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THE ADMISSIBILITY OF EXTRA-JUDICIAL CONFESSIONS:
A COMPARATIVE STUDY

by

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ABSTRACT OF THESIS

Undoubtedly, one of the most contentious areas of law in England, Canada and the United States is, and has been for almost two hundred years, the rule of law relating to the admissibility of extra-judicial confessions and statements. It is generally accepted that confessions and incriminating statements must be voluntary in order to be admissible in evidence. However, debate arises as to the meaning, scope and effectiveness of voluntariness as the test of admissibility.

The purpose of this thesis is to compare, by analysing separately and in depth the rules relating to the admissibility of incriminating statements and confessions in England, Canada and the United States as expressed by the United States Supreme Court. It is intended to isolate the internal factors of the respective rules, and by so doing, to indicate their problem areas, similarities and differences, as well as to demonstrate the judicial attitude in each country as regards the rights of an accused person in police custody, in relation to police investigative practices.

It is also intended to explore historical sources regarding criminal confessions, and to follow the historical sequence of events leading to the modern voluntary rule, thus exposing the role played by the confession of an accused in the administration of criminal justice throughout history, as well as revealing the historical basis of the rule itself.

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TABLE OF CONTENTS

A. ENGLAND

CHAPTER		PAGE
I	HISTORICAL PERSPECTIVE: THE BASIS OF THE RULE	1
II	THE PROPER TEST OF ADMISSIBILITY	34
III	THE CONCEPT OF PERSON IN AUTHORITY	46
IV	INDUCEMENT WITHIN THE RULE	62
V	THE VOIR DIRE	87
	1. Historical Introduction	87
	ii. Burden of Proof on the Voir Dire	91
	iii. Standard of Proof	100
	iv. Practice	104
	v. Duty of the Trial Judge on the Voir Dire	106
	vi. Function of the Jury	112
VI	CONTINUOUS CONFESSIONS	115
VII	THE DOCTRINE OF CONFIRMATION BY SUBSEQUENT FACTS	126
VIII	THE DUTIES OF THE POLICE: THE JUDGES' RULES	144
	1. The Caution	145
	ii. Questioning the Accused: Related Duties	152
	iii. The Judges' Rules	156

B. CANADA

I	THE CONFESSIO AL RULE IN CANADA	171
	1. Evolution of the Rule	171
	11. Scope of Voluntariness as the Test of Admissibility	179
	111. Police Questioning and Practices: The Judges' Rules	184
	(a) Cross-Examination of an Accused in Custody	185
	(b) Other Police Practices	187
	(c) The Judges' Rules	190
	(d) The Caution: Form and Effect	192
II	THE CONCEPT OF PERSON IN AUTHORITY	197
III	THE INDUCEMENT	209
IV	CONTINUOUS CONFESSIONS	231
V	THE VOIR DIRE, OR TRIAL WITHIN A TRIAL	241
	1. The Burden of Proof	243
	11. Extent of Burden: Content	249
	111. Functions of Judge and Jury	261
	iv. Alcohol as a Factor Affecting Admissibility	271
VI	THE DOCTRINE OF CONFIRMATION BY SUBSEQUENT FACTS	277

C. UNITED STATES

I	THE EMERGENCE OF THE CONFSSIONAL RULE IN THE UNITED STATES' SUPREME COURT	287
	1. Evolution of the Concept of Voluntariness	287
	11. The Test of Voluntariness	298
II	THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND CONFESSIONS	312
	1. The Evolution of Due Process and Jurisdictional Factors	312
	11. Due Process: The Test of Voluntariness in a Constitutional Environment	325
III	THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND CONFESSIONS	341
	1. Due Process: The Test of Voluntariness and Continuous Confessions	341
	11. Due Process: Factors Considered by the Supreme Court as Affecting Voluntariness	347
IV	DELAY IN ARRAIGNMENT: A PROCEDURAL RULE AFFECTING CONFESSIONS IN FEDERAL COURTS	356
V	MODERN CHANGES IN THE LAW RELATING TO CONFSSIONAL EVIDENCE	371
	1. The Right to Counsel and Custodial Interrogation	371
	11. The Doctrine of "Fruit of the Poisonous Tree"	389
VI	DUE PROCESS AND THE DETERMINATION OF THE ISSUE OF VOLUNTARINESS	397

D. CONCLUSION

CONCLUSION	411

TABLE OF CASES

A. ENGLAND

<u>Abrahams, Qui Tam v. Bunn</u> (1768), 4 Burr. 2251, 98 E.R. 173 (K.B.)	88
<u>Attorney-General v. Mico</u> (1657), Hardres 139, 145 E.R. 419 (Ex.)	23
<u>Bartlett v. Smith</u> (1843), 11 M. & W. 483, 152 E.R. 895 (Ex.)	89,106
<u>Botham, Assignee v. Swingler</u> (1794), Peake 285, 170 E.R. 158 (Lord Kenyon)	88
<u>Boyle v. Wiseman</u> (1855), 11 Ex. 260	107
<u>Burrowes et al. v. Court of High Commission</u> (1605), 3 Bulst. 49, 81 E.R. 42	23
<u>Chan Wei Keung v. R.</u> (1966), 51 Cr. App. R. 106,113,114 257 (P.C.)	
<u>Cleave v. Jones</u> (1852), 7 Ex. 421	107
<u>Commissioners of Customs & Excise v.</u> 54,59,62,70 <u>Harz et al.</u> (1967), 51 Cr. App. R. 123 (H.L.) 79,85,136	
<u>Craig et al. v. Richard, Earl of Anglesea</u> (1743), 17 How. St. Tr. 1140	88
<u>Deokinanan v. R.</u> (1968), 52 Cr. App. R. 45,47,49,53,56,97 241 (P.C.)	
<u>Doe v. Davies</u> (1847), 10 Q.B. 315	107
<u>Ibrahim v. R.</u> [1914/ A.C. 559 (P.C.)	33,37,45,61,62 83,111,155
<u>Jacobs v. Layborn</u> (1843), 11 M. & W. 88,89 685, 152 E.R. 980 (Ex.)	
<u>Kuruma v. R.</u> [1955/ A.C. 197 (P.C.)	111,126
<u>Lewis. v. Harris</u> (1913), 24 Cox C.C.66 (K.B.)	151,153,155
<u>Minter v. Priest</u> [1930/ A.C. 558 (H.L.)	107
<u>Needham v. Smith</u> (1704), 2 Vernon 463, 23 E.R. 897 (Ch.)	89
<u>Noor Mohammed v. R.</u> [1949/ A.C. 182 (P.C.)	111
<u>R. v. Ackroyd et al.</u> (1824), 1 Lew. 49, 168 E.R. 954 (Holroyd, J.)	76
<u>R. v. Adams</u> (1923), 17 Cr. App. R. 77	163

<u>R. v. Ali & Hussain</u> (1965), 49 Cr. App. R.	230
<u>R. v. Allen et al.</u> (1834), Cent. Cr. Ct. C. 32 (Littledale, J.)	126,143
<u>R. v. Arnold</u> (1838), 8 C. & P. 621, 173 E.R. 645 (Denman, L.C.J.)	81,147,148
<u>R. v. Attwood</u> (1851), 5 Cox C.C. 322 (Erle, J.)	151
<u>R. v. Baldry</u> (1852), 2 Den. 430, 169 E.R. 568 (C.C.R.)	36,44,62,69 71,77,95,96,146,148,151
<u>R. v. Baldwin</u> (1931), 23 Cr. App. R. 62	107,151
<u>R. v. Barker</u> (1941), 28 Cr. App. R. 52	76,135
<u>R. v. Bass</u> [1953] 1 Q.B. 680	113,161
<u>R. v. Bate et al.</u> (1871), 11 Cox C.C. 686 (Montague Smith, J.)	59,121
<u>R. v. Bateman</u> (1845), 1 Cox C.C. 186 (Patteson, J.; Erle, J.)	
<u>R. v. Berriman</u> (1854), 6 Cox C.C. 388 (Erle, J.)	90,141 152,159
<u>R. v. Best</u> (1909), 22 Cox C.C. 97 (C.C.A.)	155
<u>R. v. Blackburn</u> (1853), 6 Cox C.C. 333 (Talfourd, J.)	52,60,76
<u>R. v. Bodkin</u> (1863), 9 Cox C.C. 403 (Ir.)	151
<u>R. v. Booker</u> (1924), 18 Cr. App. R. 47	159,163,164
<u>R. v. Booth et al.</u> (1910), 5 Cr. App. R. 177	90,106,153 155,160,161
<u>R. v. Boswell et al.</u> (1842), C. & M. 584, 174 E.R. 645 (Cresswell, J.)	60,76
<u>R. v. Brackenbury</u> (1893), 17 Cox C.C. 628 (Day, J.)	155
<u>R. v. Bromhead</u> (1906), 71 J.P. 103 (C.C.R.)	163
<u>R. v. Broughton</u> (1910), 6 Cr. App. R. 8	57,59,76
<u>R. v. Brown & Bruce</u> (1931), 23 Cr. App. R. 56	164
<u>R. v. Brown</u> (1845), 9 J.P. 314	59,77
<u>R. v. Buchan</u> [1964] 1 All E.R. 502 (C.C.A.)	80,81,83,164
<u>R. v. Burgess</u> (1968), 52 Cr. App. R. 258	114
<u>R. v. Butcher</u> (1798), 1 Lea. 264, 168 E.R. 235 fn. (a)	138,140,143
<u>R. v. Butterwasser</u> [1948] 1 K.B. 4	87,88
<u>R. v. Cain</u> (1839), 1 Craw. & Dix. 36 (Ir.)	141

<u>R. v. Cart</u> (1838), MS. (Denman, L.C.J.), cited Taylor, <u>Evid.</u> , p. 595	145
<u>R. v. Cass</u> (1783), 1 Lea. 291, 168 E.R. 249, fn. (a) (Gould, J.)	32, 34, 74
<u>R. v. Cave</u> /1963/ Cr. L. Rev. 371 (C.C.A.)	113
<u>R. v. Chadwick</u> (1934), 24 Cr. App. R. 138	90, 97, 106
<u>R. v. Chambers</u> (1848), 3 Cox C.C. 92 (Rolfe, B.)	151
<u>R. v. Cheverton</u> (1862), 2 F. & F. 833, 175 E.R. 1308 (Erie, J.)	59, 72, 121, 151
<u>R. v. Cleary</u> (1963), 48 Cr. App. R. 116	60, 75
<u>R. v. Clewes</u> (1830), 4 C. & P. 220, 172 E.R. 678 (Littledale, J.)	92, 112
<u>R. v. Coleman</u> (1749), Wills, <u>Circ. Evid.</u> , 6 ed., p. 128	30
<u>R. v. Coley</u> (1868), 10 Cox C.C. 536 (Mellor, J.)	59, 73
<u>R. v. Collier et al.</u> (1848), 3 Cox C.C. 57 (Williams, J.)	59, 60 73, 120
<u>R. v. Collier</u> /1965/ 3 All E.R. 136 (C.C.A.)	169
<u>R. v. Colpus et al.</u> (1917), 12 Cr. App. R. 193	45
<u>R. v. Cook</u> /1959/ 2 Q.B. 340	111
<u>R. v. Cook</u> (1918), 34 T.L.R. 515 (C.C.A.)	156
<u>R. v. Cooper et al.</u> (1833), 5 C. & P. 535, 172 E.R. 1087 (Parke, J.)	59, 121
<u>R. v. Court</u> (1836), 7 C. & P. 487, 173 E.R. 216 (Littledale, J.)	40, 77
<u>R. v. Cowell</u> (1940), 31 Cox C.C. 415 (C.C.A.)	91, 106, 107, 151
<u>R. v. Crowe & Myerscough</u> (1917), 81 J.P. 288	159
<u>R. v. Croydon et al.</u> (1846), 2 Cox C.C. 67 (Rogers, J.)	59, 75
<u>R. v. Day</u> (1847), 2 Cox C.C. 209 (Cresswell, J.)	42, 59, 67
<u>R. v. Derrington et al.</u> (1826), 2 C. & P. 418, 172 E.R. 189 (Garrow, B.)	82
<u>R. v. Dickenson</u> (1844), 81 J.P. 329 (Patteson, J.)	149

<u>R. v. Dingley et al.</u> (1841), 1 C. & K. 637, 174 E.R. 970 (Pollock, C.B.)	76
<u>R. v. Doherty</u> (1874), 13 Cox C.C. 23 (Ir.)	73, 121, 151
<u>R. v. Dousett</u> (1835), 2 Cent. Cr. Ct. C180 (Littledale, J.)	74
<u>R. v. Downing</u> (1840), M.S. (Lord Abinger) cited Taylor, <u>Evid.</u> , p. 589	123
<u>R. v. Drew</u> (1837), 8 C. & P. 175, 173 E.R. 433 (Coleridge, J.)	44, 51, 59, 146, 150
<u>R. v. Dunn</u> (1831), 4 C. & P. 543, 172 E.R. 817 (Bosanquet, J.)	49, 71, 74
<u>R. v. Dwyer</u> (1932), 23 Cr. App. R. 156	151
<u>R. v. Edwards</u> (1869), 33 J.P. 119 (Cleasby, J.)	66
<u>R. v. Enoch & Pulley</u> (1833) 5 C. & P. 539, 172 E.R. 1089 (Parke, J.)	44, 49, 53, 59, 72
<u>R. v. Fennell</u> (1881), 7 Q.B.D. 147 (Coleridge, L.C.J.)	45, 62, 73, 83
<u>R. v. Firth</u> (1913), 8 Cr. App. R. 162	163
<u>R. v. Francis et al.</u> (1959), 43 Cr. App. R. 174	106, 111
<u>R. v. Fudge</u> [1965] Cr. L. Rev. 52 (C.C.A.)	113
<u>R. v. Furley</u> (1844), 1 Cox C.C. 76 (Maule, J.)	59, 150
<u>R. v. Garbett</u> (1847), 1 Den. 236, 169 E.R. 227 (C.C.R.)	40, 138
<u>R. v. Gardner & Hancox</u> (1915), 11 Cr. App. R. 265	153, 154, 155, 163
<u>R. v. Garner</u> (1848), 1 Den. 331, 169 E.R. 267 (Erle, J.)	42, 61, 73, 90, 94, 97
<u>R. v. Gavin et al.</u> (1885), 15 Cox C.C. 656 (A.L. Smith J.)	153, 155
<u>R. v. Gibbons</u> (1823), 1 C. & P. 96, 171 E.R. 1117 (Park, J.)	49, 52, 53, 58, 61, 72
<u>R. v. Gibney</u> (1822), <u>Jebb C.C.</u> 15 (Ir.)	59, 63
<u>R. v. Gilham</u> (1828), 1 Mood. 186, 168 E.R. 1235 (C.C.R.)	37, 39, 63, 145
<u>R. v. Gillis</u> (1866), 11 Cox C.C. 69 (Ir.)	37, 76
<u>R. v. Godhino</u> (1911), 7 Cr. App. R. 12	68
<u>R. v. Gould</u> (1840), 9 C. & P. 364, 173 E.R. 870 (Tindal, C.J.)	140, 141, 142, 143

<u>R. v. Graham</u> (1839), 1 <u>Craw. & Dix</u> 99 (Ir.)	75
<u>R. v. Grayson</u> (1921), 16 <u>Cr. App. R.</u> 7	163
<u>R. v. Green et al.</u> (1832), 5 <u>C. & P.</u> 312, 172 E.R. 990 (Gurney, B.)	145,146
<u>R. v. Griffin</u> (1809), <u>Russ. & Ry.</u> 151, 168 E.R. 732 (C.C.R.)	59,72,90,130,139,140
<u>R. v. Hall</u> (1790), 2 <u>Lea.</u> 559, 168 E.R. 382, fn. (a) (C.C.R.)	32,34,76
<u>R. v. Hall</u> (1834), 1 <u>Cent. Cr. Ct. C.</u> 234 (Tindal, C.J.)	74
<u>R. v. Hammond</u> (1941), 28 <u>Cr. App. R.</u> 84	98
<u>R. v. Hardwick</u> (1811), 1 <u>C. & P.</u> 98, 171 E.R. 1118 fn. (b) (Wood, B.)	47,48
<u>R. v. Harris</u> (1844), 1 <u>Cox C.C.</u> 106 (Maule, J.)	59,148
<u>R. v. Harris et al.</u> (1932), 1 <u>Mood.</u> 338, 168 E.R. 1295 (C.C.R.)	126,145
<u>R. v. Harris-Rivett</u> [1956] 1 <u>Q.B.</u> 220	158
<u>R. v. Harvey</u> , (1800), 2 <u>East P.C.</u> 658 (Lord Eldon)	128,137
<u>R. v. Hassett</u> (1861), 8 <u>Cox C.C.</u> 511 (Ir.)	151
<u>R. v. Heal</u> (1905), 69 <u>J.P.</u> 224 (Grantham, J.)	82
<u>R. v. Hearn</u> (1841), <u>C. & M.</u> 107, 174 E.R. 431 (Coltman, J.)	60,75
<u>R. v. Hearne et al.</u> (1830), 4 <u>C. & P.</u> 215, 172 E.R. 676 (Littledale, J.)	112
<u>R. v. Hersey</u> (1908), 1 <u>Cr. App. R.</u> 260	114
<u>R. v. Hewett</u> (1842), <u>C. & M.</u> 534, 174 E.R. 623 (Patteson, J.)	60,76,121
<u>R. v. Hirst</u> (1896), 18 <u>Cox C.C.</u> 374 (Manch. Ass.)	154
<u>R. v. Histed</u> (1898), 19 <u>Cox C.C.</u> 16 (Hawkins, J.)	111,151,153,155
<u>R. v. Holmes</u> (1843), 1 <u>C. & K.</u> 248, 174 E.R. 796 (Rolfe, B.)	40,147
<u>R. v. Hornbrook, sub nom., R. v. Morton</u> (1843), 1 <u>Cox C.C.</u> 54 (Coleridge, J.)	41,59,150
<u>R. v. Horner et al.</u> (1846), 1 <u>Cox C.C.</u> 364 (Tindal, C.J.)	148
<u>R. v. Howes</u> (1834), 6 <u>C. & P.</u> 404, 172 E.R. 1296 (Denman, L.C.J.)	76,93,118,121,145

<u>R. v. Jacobs et al.</u> (1850), 4 Cox C.C. 54 (Erle, J.)	68
<u>R. v. James</u> (1909), 2 Cr. App. R. 319	39,151
<u>R. v. James et al.</u> (1834), 1 Cent. Cr. Ct. C. 241 (Littledale, J.)	34
<u>R. v. Jarvis</u> (1867), 10 Cox C.C. 574 (C.C.R.)	36,66,77
<u>R. v. Jenkins</u> (1822), Russ. & Ry 492, 168 E.R. 914 (C.C.R.)	132,136,138
<u>R. v. John</u> , MS. (Buller, J.) 2 East P.C. c.5	106
<u>R. v. Johnston</u> (1864), Ir. C.L.R. 60	80
<u>R. v. Jones</u> (1872), 12 Cox C.C. 241 (C.C.A.)	77
<u>R. v. Jones</u> (1809), Russ. & Ry. 152, 168 E.R. 733 (C.C.R.)	59,72,90,130,135
<u>R. v. Joyce</u> (1958), 42 Cr. App. R. 19 (Slade, J.)	54,59,70
<u>R. v. Judge</u> [1965/ Cr. L. Rev. 52 (C.C.A.)	113
<u>R. v. Kerr</u> (1837), 8 C. & P. 176, 173 E.R. 449 (Park, J.)	149
<u>R. v. Kingston</u> (1830), 4 C. & P. 387, 172 E.R. 752 (Parke, J.)	49,61,72
<u>R. v. Knight & Thayer</u> (1905), 20 Cox C.C. 711 (Channell, J.)	44,111,153,155,161
<u>R. v. Lambe</u> (1791), 2 Lea. 553, 168 E.R. 379 (C.C.R.)	32,34,47
<u>R. v. Laughner</u> (1847), 2 Cox C.C. 134 (Pollock, L.C.B.)	60,61,75
<u>R. v. Leatham</u> (1861), 8 Cox C.C. 498 (Q.B.)	126
<u>R. v. Lewis</u> (1833), 6 C. & P. 161, 172 E.R. 1190 (Gurney, B.)	80
<u>R. v. Lingate</u> (1815), 172 E.R. 1296, fn. b (Bayley, J.)	121,145
<u>R. v. Little; R. v. Wilson</u> [1954/ Cr.L.Rev. (C.M.A.C.)	158
<u>R. v. Lloyd et al.</u> (1834), 6 C. & P. 393, 172 E.R. 1291 (Patteson, J.)	44,75
<u>R. v. Lock</u> (1845), 10 J.P. 204 (Erle, J.)	82
<u>R. v. Lockhart</u> (1785), 1 Lea. 386, 168 E.R. 295 (Buller, J.)	128,137
<u>R. v. Luckhurst</u> (1853), 6 Cox C.C. 243 (Parke, B.)	53,59,60,76

<u>R. v. Male et al.</u> (1893), 17 Cox C.C. 689 (Cave, J.)	153,154,159
<u>R. v. Mansfield</u> (1881), 14 Cox C.C. 639 (Williams, J.)	37,60,76
<u>R. v. Massey</u> /1964/ Cr. L. Rev. 43 (C.C.A.)	161
<u>R. v. Matthews</u> (1919), 14 Cr. App. R. 23	164
<u>R. v. May</u> (1952), 36 Cr. App. R. 91	158,163
<u>R. v. McGregor</u> (1967), 51 Cr. App. R. 338	112
<u>R. v. McLintock</u> /1962/ Cr. L. Rev. 549 (C.C.A.)	61,106
<u>R. v. Meynell</u> (1834), 2 Lew. 120, 168 E.R. 1100 (Taunton, J.)	59,72,119
<u>R. v. Millen et al.</u> (1849), 3 Cox C.C. 507 (Wightman, J.)	60,73
<u>R. v. Miller</u> (1895), 18 Cox C.C. 54 (Hawkins, J.)	44,153
<u>R. v. Mills</u> (1833), 6 C. & P. 146, 172 E.R. 1183 (Gurney, B.)	59
<u>R. v. Mills & Lemon</u> /1947/ K.B. 297	158,163
<u>R. v. Moore</u> (1834), 1 Gent. Cr. Ct. C. 7 (Denman, L.J.)	34,74,126,143
<u>R. v. Moore</u> (1852), 2 Den. 525, 169 E.R. 608 (C.C.R.)	42,43,53 54,57,58,59,60,69
<u>R. v. Morgan</u> (1895), 59 J.P. 827 (Cave, J.)	73,138,143 154
<u>R. v. Morton</u> (1843), 2 M. & Rob. 514, 174 E.R. 367 (See, <u>R. v. Hornbrook</u>)	
<u>R. v. Mosey</u> (1784), 1 Lea. 264, 168 E.R. 235, fn. (a) ² (Buller, J.)	128,132,137
<u>R. v. Murray</u> (1950), 34 Cr. App. R. 203	106,112, 113
<u>R. v. Muscot</u> (1712), 10 Mod. 192, 88 E.R. 689 (Parker, C.J.)	87
<u>R. v. Nichols</u> /1967/ Cr. L. Rev. 296 (C.C.A.)	167
<u>R. v. Northam</u> (1968), 52 Cr. App. R. 97	68,76,78,84
<u>R. v. Nowell</u> /1948/ 1 All E.R. 794 (C.A.)	61
<u>R. v. Nute</u> , cited Burns, <u>Just.</u> , (Chitt. ed.,) tit. "Evid." (C.C.R.)	107,116
<u>R. v. Ovenell</u> (1968), 52 Cr. App. R. 167	111,114
<u>R. v. Owen et al.</u> (1839), 9 C. & P. 238, 173 E.R. 818 (Gurney, B)	80
<u>R. v. Parker</u> (1861), 8 Cox C.C. 465 (C.C.A.)	52,54,60,70,73

<u>R. v. Parkinson</u> [1964/ Cr. L. Rev. 398 (C.C.A.)	113
<u>R. v. Parratt</u> (1831), 4 C. & P. 570, 172 E.R. 829 (Alderson, J.)	60,75
<u>R. v. Partridge</u> (1836), 7 C. & P. 551, 173 E.R. 243 (Patteson, J.)	59,75
<u>R. v. Pattison</u> (1929), 21 Cr. App. R. 139	151
<u>R. v. Pettit</u> (1850), 4 Cox C.C. 164 (Wilke, C.J.)	59
<u>R. v. Pilley</u> (1922), 16 Cr. App. R. 138	163
<u>R. v. Pountney et al.</u> (1836), 7 C. & P. 302, 173 E.R. 134 (Alderson, B.)	60
<u>R. v. Powell-Mantle</u> [1959/ Cr. L. Rev. 445 (Qu. Sess.)	161,164
<u>R. v. Priest</u> (1847), 2 Cox C.C. 378 (Patteson, J.)	149
<u>R. v. Radford</u> (1823), 1 Mood. 197, 168 E.R. 1239 (Best, C.J.)	63
<u>R. v. Reason</u> (1872), 12 Cox C.C. 228 (Keating, J.)	36,77,153
<u>R. v. Reeve et al.</u> (1871), 12 Cox C.C. 179 (C.C.A.)	66
<u>R. v. Rice et al.</u> (1962), 47 Cr. App. R. 79	111
<u>R. v. Richards</u> (1832), 5 C. & P. 318, 172 E.R. 993 (Bosanquet, J.)	59,60,74,117
<u>R. v. Richards</u> [1967/ 51 Cr. App. R. 266	59,73,79,84
<u>R. v. Risborough</u> (1847), 11 J.P. 280	64
<u>R. v. Roberts</u> [1953/ 2 All E.R. 340 (Devlin, J.)	108
<u>R. v. Robinson</u> [1917/ 2 K.B.D. 108	82
<u>R. v. Rose</u> (1898), 67 L.J.Q.B. 289	73,77
<u>R. v. Row</u> (1809), Russ. & Ry. 153, 168 E.R. 733 (C.C.R.)	47,48,53,54,58
<u>R. v. Rudd</u> (1775), 1 Lea. 116, 168 E.R. 160 (C.C.R.)	30,32
<u>R. v. Rue</u> (1876), 13 Cox C.C. 209 (Denman, J.)	60,123
<u>R. v. Rule</u> (1844), 8 J.P. 599 (Lord Abinger)	60,73,137,141
<u>R. v. Sargent</u> [1963/ Cr. L. Rev. 848 (C.C.A.)	160
<u>R. v. Sartori et al.</u> [1961/ Cr. L. Rev. 397 (Edmund Davies, J.)	102
<u>R. v. Scott</u> (1856), D. & B. 4169 E.R. 909 (Campbell, L.C.J.)	36,43

<u>R. v. Sealey</u> (1844), 8 J.P. 328 (Wightman, J.)	59
<u>R. v. Shaw</u> (1834), 6 C. & P. 372, 172 E.R. 1282 (Patteson J.)	50,77
<u>R. v. Shepherd</u> (1836), 7 C. & P. 579, 173 E.R. 255 (Gaselee, J.)	59,72
<u>R. v. Sherrington</u> (1838), 2 Lew. 123, 168 E.R. 1101 (Patteson, J.)	52,59,72,119
<u>R. v. Shuter</u> /1966/ Cr. L. Rev. 104 (Fenton Atkinson, J.)	70
<u>R. v. Simpson</u> (1834), 1 Mood. 410, 168 E.R. 1323 (Patteson, J.)	50,76
<u>R. v. Sippett</u> (1839), MS. (Tindal, C.J.) cited Taylor, <u>Evid.</u> , p. 593, fn. (j)	51
<u>R. v. Skuce</u> (1835), 2 Cent. Cr. Ct. C. 111 (Littledale, J.)	74
<u>R. v. Slaughter</u> (1831), 4 C. & P. 543, 172 E.R. 818, fn. (b)	49,72
<u>R. v. Sleeman</u> (1853), 6 Cox C.C. 245 (C.C.A.)	54,60,65
<u>R. v. Smith</u> (1959), 43 Cr. App. R. 121 (C.M.A.C.)	61,83 106,118,123
<u>R. v. Smith</u> (1897), 18 Cox C.C. 470 (Hawkins, J.)	163
<u>R. v. Smith</u> (1961), 46 Cr. App. R. 51	163
<u>R. v. Spencer et al.</u> (1837), 7 C. & P. 776, 173 E.R. 338 (Parke, B.)	50,72
<u>R. v. Spilsbury et al.</u> (1835), 7 C. & P. 187, 173 E.R. 82 (Coleridge, J.)	37
<u>R. v. Stanton</u> (1911), 6 Cr. App. R. 198	60,66
<u>R. v. Stebbing</u> /1962/ Cr. L. Rev. 472 (C.C.A.)	161
<u>R. v. Stenning</u> (See, <u>R. v. Collier</u>)	
<u>R. v. Straffen</u> /1952/ 2 All E.R. 657 (C.C.A.)	161
<u>R. v. Sutherland et al.</u> /1959/ Cr. L. Rev. 440 (C.C.A.)	73,112,113
<u>R. v. Swatkins et al.</u> (1831), 4 C. & P. 547, 172 E.R. 819 (Patteson, J.)	44,59,93,149
<u>R. v. Sykes</u> (1913), 8 Cr. App. R. 233	114
<u>R. v. Taylor</u> (1923), 17 Cr. App. R. 109	159
<u>R. v. Taylor</u> (1839), 8 C. & P. 733, 173 E.R. 694 (Patteson, J.)	51,60,72

<u>R. v. Thomas</u> (1836), 7 C. & P. 345, 173 E.R. 154 (Coleridge, J.)	39
<u>R. v. Thomas et al.</u> (1834), 6 C. & P. 353, 172 E.R. 1273 (Patteson, J.)	50,57,72
<u>R. v. Thompson</u> (1783), 1 Lea. 291, 168 E.R. 248 (Hotham, B.)	32,34,45,76,91
<u>R. v. Thompson</u> (1893), 17 Cox C.C. 641 (C.C.R.)	37,45,61 62,101,103
<u>R. v. Thompson</u> (1910), 22 Cox C.C. 299 (C.C.A.)	163
<u>R. v. Thornton</u> (1824), 1 Lew. 50, 168 E.R. 955 (C.C.R.)	34,35,85,152
<u>R. v. Toole</u> (1856), 7 Cox C.C. 244 (Ir.)	37,101,151
<u>R. v. Treacy</u> (1944), 30 Cr. App. R. 93	97,107,111
<u>R. v. Turner</u> (1832), 1 Mood. 347, 168 E.R. 1298 (C.C.R.)	112
<u>R. v. Tyler et al.</u> (1823), 1 C. & P. 128 171 E.R. 1132 (Hullock, B.)	49,52
<u>R. v. Unsworth</u> (1910), 4 Cr. App. R. 1.	37
<u>R. v. Upchurch</u> (1836), 1 Mood. 465, 168 E.R. 1346 (Parke, B.)	53,59,60,74
<u>R. v. Vernon</u> (1872), 12 Cox C.C. 153 (Cleasby, B.)	37,77
<u>R. v. Voisin</u> (1918), 13 Cr. App. R. 89	151,158,159,168
<u>R. v. Walkley et al.</u> (1833), 6 C. & P. 175, 172 E.R. 1196 (Gurney, B.)	44,72
<u>R. v. Walsh</u> (1943), Ir. Cir. R. 866	75
<u>R. v. Warickshall</u> (1783), 1 Lea. 263, 168 — E.R. 234 (C.C.R.)	31,37,127,137
<u>R. v. Warren</u> (1848), 12 J.P. 571	77
<u>R. v. Warringham</u> (1851), 2 Den. 447, 169 E.R. 575 (Parke, B.)	44,90,95,96,101
<u>R. v. Wattam</u> (1957), 36 Cr. App. R. 72	161
<u>R. v. Watts et al.</u> (1844), 1 Cox C.C. 75 (Gurney, B.)	149
<u>R. v. Welbourne</u> (1792), Linc. Sum. Ass., cited 2 East P.C., c.5	106
<u>R. v. Wheeler</u> (1838), 2 Lew. 157, 168 E.R. 1113 (Coleridge J.)	80
<u>R. v. Wheeley</u> (1838), 8 C. & P. 250, 173 — E.R. 482 (Alderson, B.)	80

<u>R. v. Whitehead</u> (1866), L.R. 1 C.C.R. 33	89
<u>R. v. Wild</u> (1835), 1 Mood. 453, 168 E.R. 1341 (C.C.R.)	64
<u>R. v. Williamson</u> /1964/ Cr. L. Rev. 126 (C.C.A.)	161,163
<u>R. v. Wilson</u> (See, <u>R. v. Little</u>)	
<u>R. v. Wilson et al.</u> (1967), 51 Cr. App. R. 194	55,56,57,59 97,101,113
<u>R. v. Winkel et al.</u> (1912), 76 J.P. 191 (Avory, J.)	164
<u>R. v. Winsor</u> (1864), 4 F. & F. 360 176 E.R. 599 (Channell, B.)	59,75
<u>R. v. Wong Chiu Kwai</u> (1908), 3 Hong Kong L.R. 89 (S.C.)	83
<u>R. v. Zeigert</u> (1867), 10 Cox C.C. 555 (Willes, J.)	77
<u>Rogers v. Hawken</u> (1898), 19 Cox C.C. 122 (Russell, L.C.J.)	155
<u>Sparks v. R.</u> /1964/ 1 All E.R. 727 (P.C.)	44,62,97,101 106,108,113
<u>Trial of Audley</u> (1631), 3 How. St. Tr. 401	24
<u>Trial of Crook</u> (1662), 6 How. St. Tr. 202	
<u>Trial of the Essex Witches</u> (1645), 4 How. St. Tr. 817	24
<u>Trial of Fawkes et al.</u> (1606), 2 How St. Tr. 159	22,27
<u>Trial of Felton</u> (1628), 3 How. St. Tr. 367	15,25
<u>Trial of Fitz-Patrick et al.</u> (1631), 3 How. St. Tr. 419	24
<u>Trial of Lady Frances, Countess of Somerset</u> (1616), 2 How. St. Tr. 951	24,27
<u>Trial of Francis</u> (1717), 15 How. St. Tr. 898	27
<u>Trial of Garnet</u> (1606), 2 How. St. Tr. 218	22
<u>Trial of Gerhard et al.</u> (1654), 5 How. St. Tr. 518	25
<u>Trial of James</u> (1661), 6 How. St. Tr. 67	27
<u>Trial of Lovat</u> (1746), 18 How. St. Tr. 596	89,106
<u>Trial of Mitchell</u> (1677), 6 How. St. Tr. 1208	27
<u>Trial of Peacham</u> (1615), 2 How. St. Tr. 869	17,25

<u>Trial of Penn etal.</u> (1670), 6 How. St. Tr. 951	24
<u>Trial of Raleigh</u> (1603), 2 How. St. Tr. 1	22,23,25,27
<u>Trial of Smith</u> (1616), 2 How. St. Tr. 1050	24
<u>Trial of the Suffolk Witches</u> (1682), 6 How. St. Tr. 648	24
<u>Trial of Tonge</u> (1662), 6 How. St. Tr. 225	25
<u>Trial of Twyn etal.</u> (1663), 6 How. St. Tr. 513	27
<u>Trial of White</u> (1741), 17 How. St. Tr. 1079	27,92
<u>Trial of Willis</u> (1710), 15 How. St. Tr. 614	29
<u>Trial of Woodburne etal.</u> (1722), 16 How. St. Tr. 54	27,29
<u>Turner etal. v. Pearte</u> (1787), 1 T.R. 718, 99 E.R. 1339	88,89

B. CANADA

<u>Attorney-General of Quebec v. Begin</u> /1935/ S.C.R. 535	176
<u>Attorney-General v. Stewart</u> (1817), 2 Mer. 143, 35 E.R. 895 (Ch.)	171
<u>Beatty v. R.</u> /1944/ S.C.R. 73	230, 265
<u>Bigaouette v. R.</u> (1926), 46 C.C.C. 311 (Que.C.A.)	193
<u>Boudreau v. R.</u> (1949), 7 C.R. 427, (S.C.C.)	176, 178, 179, 182 183, 195, 196, 210, 223, 243
<u>Calvin's Case</u> (1609), 7 Co. Rep. 1, 77 E.R. 377	171
<u>Chapdelaine v. R.</u> (1933), 62 C.C.C. 209 (Que. C.A.)	176, 213, 227
<u>Chase v. R.</u> /1948/ 2 D.L.R. 608 (N.S.C.A.)	245, 262
<u>Colpitts v. R.</u> (1966), 47 C.R. 175 (S.C.C.)	270
<u>Comeau v. R.</u> (1961), 131 C.C.C. 139 (N.S.C.A.)	219, 282, 283
<u>Cooper v. Stewart</u> (1889), 14 A.C. 286 (P.C.)	171
<u>Cortcel's Case</u> (1749), MS., Pub. Arch. N.S.	172
<u>Costain v. R.</u> (1960), 129 C.C.C. 348 (P.E.I.S.C.)	272
<u>Demenoff v. R.</u> /1964/ S.C.R. 79	237
<u>Donnelly et al. v. R.</u> /1948/ 3 D.L.R. 301 (N.B.C.A.)	247
<u>Dubuc v. R.</u> (1954), 18 C.R. 337 (Que. C.A.)	268
<u>Dupuis v. R.</u> /1952/ 2 S.C.R. 516	196, 237
<u>Ford v. R.</u> (1953), 17 C.R. 26 (Que. C.A.)	268
<u>Gach v. R.</u> /1943/ S.C.R. 250	195, 216, 230
<u>Goad's Case</u> (1673), Rec. Ct. Asst's. Mass. Bay, p.3	173
<u>Gravel v. R.</u> (1918), 32 C.C.C. 268 (Que. C.A.)	241
<u>Hebert v. R.</u> (1954), 113 C.C.C. 97 (S.C.C.)	181, 247
<u>Kelsey v. R.</u> /1953/ S.C.R. 220	270
<u>Marcotte v. R.</u> (1949), 97 C.C.C. 310 (Que. C.A.)	179
<u>Markadonis v. R.</u> /1935/ S.C.R. 657	187, 195, 244
<u>McKenna v. R.</u> /1961/ S.C.R. 661	273, 276
<u>Meisner v. Fanning</u> (1842), 3 N.S.R. 97 (S.C.)	172
<u>Metenko v. R.</u> (1951), 12 C.R. 228 (C.A.)	262
<u>Patrick's Case</u> , N.S.P.C., East. T., 1765-1783, 33 (Pub. Arch., N.S.)	173

<u>Pearson v. R.</u> /1959/ S.C.R. 369	237
<u>Prosko v. R.</u> (1922), 63 S.C.R. 226	175,208,211,243
<u>R. v. Adams et al.</u> (1957), 25 C.R. 80 (N.S.C.A.)	248
<u>R. v. Albrecht</u> (1966), 49 C.R. 314, (N.B.C.A.)	181,203,211,237 250,262,266
<u>R. v. Allen</u> (1954), 108 C.C.C. 102 (Sask. C.A.)	179,185,196
<u>R. v. Anderson</u> (1942), 77 C.C.C. 295 (B.C.C.A.)	181,264
<u>R. v. Angelucci</u> (1946), 88 C.C.C. 111 (B.C.C.A.)	178
<u>R. v. Bannerman</u> (1966), 48 C.R. 111 (Man.C.A.), affm'd (1967), 50 C.R. 77 (S.C.C.)	268,275
<u>R. v. Barrs</u> (1946), 86 C.C.C. 9 (Alta.C.A.)	189,199,207
<u>R. v. Baschuk</u> (1931), 56 C.C.C. 208 (Man.C.A.)	242,243
<u>R. v. Beaulieu</u> /1968/ 1 C.C.C. 143 (Alta. C.A.)	196,264
<u>R. v. Beddoes</u> (1952), 103 C.C.C. 131 (Sask. C.A.)	196
<u>R. v. Bela Singh</u> (1914), 24 C.C.C. 142 (B.C.S.C.)	193
<u>R. v. Bellos</u> /1927/ S.C.R. 258	185,243
<u>R. v. Benjamin</u> (1917), 32 C.C.C. 191 (Que. K.B.)	178,179,207 216,244
<u>R. v. Bird</u> /1967/ 1 C.C.C. 33 (Sask. Q.B.)	196,219,283
<u>R. v. Black & Mackie</u> /1966/ 3 C.C.C. 187 (Ont. C.A.), affm'd /1966/ S.C.R. v, ix.	178,229 247,254,268
<u>R. v. Bogh Singh</u> (1913), 12 D.L.R. 626 (B.C.C.A.)	244
<u>R. v. Bohun</u> /1933/ 3 W.W.R. 609	190
<u>R. v. Boisjoly</u> (1956), 22 C.R. 19 (Que. C.A.)	267
<u>R. v. Booker</u> (1928), 50 C.C.C. 271 (Alta. S.C.)	272
<u>R. v. Brennan</u> /1963/ 3 C.C.C. 30 (P.E.I.S.C.)	185,230
<u>R. v. Briden</u> (1960), 128 C.C.C. 159 (Ont. C.A.)	176,178,285
<u>R. v. Brown</u> /1931/ O.R. 154 (C.A.)	215,218
<u>R. v. Bruce</u> (1907), 12 C.C.C. 275 (B.C.S.C.)	192,207 217,244

<u>R. v. Byers</u> /1942/	2 D.L.R. 104 (B.C.C.A.)	247
<u>R. v. Cansdale</u> (1951),	12 C.R. 245 (Alta. S.C.)	176
<u>R. v. Chambers</u> /1948/	1 D.L.R. 399 (Ont. C.A.)	196, 270
<u>R. v. Choney</u> (1908),	12 C.C.C. 289 (Man.C.A.)	221, 264
<u>R. v. Cooke</u> (1914),	22 C.C.C. 241 (N.S.S.C.)	192, 211
<u>R. v. Cummings</u> (1912),	5 D.L.R. 86 (Que. K.B.)	175
<u>R. v. Daley</u> (1909),	16 C.C.C. 168 (N.B.S.C.)	207, 217, 271
<u>R. v. Davidoff</u> (2) (1951),	101 C.C.C. 238 (B.C.C.A.)	178
<u>R. v. Day</u> (1890),	20 O.R. 209 (Q.B.D.)	184, 185
<u>R. v. Deagle</u> (1947),	88 C.C.C. 247 (Alta. C.A.)	190, 196
<u>R. v. DeClerg^e</u> /1966/	2 C.C.C. 190 (Ont. C.A.), affm'd sub.nom DeClerg ^e (1968), (2d) 530 (S.C.C.)	257, 258, 259
<u>R. v. ^{D^e}Mesquito</u> (1915),	24 C.C.C. 407 (B.C.C.A.)	175, 207 208, 215, 241
<u>R. v. Dick</u> (1947),	2 C.R. 417 (Ont. C.A.)	196, 238, 252
<u>R. v. Downey</u> (1955),	20 C.R. 213 (B.C.C.A.)	230, 238, 283
<u>R. v. Doyle</u> (1886),	120 O.R. 347	280
<u>R. v. Dreher</u> (1952),	14 C.R. 339 (Alta.C.A.)	181, 243, 262
<u>R. v. Drewicki</u> (1964),	41 C.R. 265	271
<u>R. v. Eaton</u> (1957),	25 C.R. 320 (B.C.C.A.)	189, 237
<u>R. v. Elliott</u> (1900),	31 O.R. 14 (Div. Ct.)	185, 207, 243 262, 264
<u>R. v. Emele</u> (1940),	74 C.C.C. 76 (Sask.C.A.)	179, 189, 201 229, 242, 248
<u>R. v. Essery</u> /1945/	4 D.L.R. 509 (P.E.I.S.C.)	193, 207 216, 247
<u>R. v. Farduto</u> (1912),	21 C.C.C. 144 (Que. C.A.)	189, 207, 220 221, 241, 268
<u>R. v. Field</u> (1865),	16 U.C.C.P. 98	174
<u>R. v. Finkle</u> (1865),	15 U.C.C.P. 453	174, 192, 194 231, 233, 239, 268
<u>R. v. Fitton</u> /1956/	S.C.R. 958	182, 184, 185, 188, 190 196, 210, 223, 225, 237 243, 266
<u>R. v. Gillis</u> /1966/	2 C.C.C. 219 (B.C.C.A.)	264

<u>R. v. Girvin</u> (1916), 10 Alta.R. 324 (C.A.)	248,268
<u>R. v. Godwin</u> /1924/ 2 D.L.R. 362 (N.B.K.B.)	179,190,224
<u>R. v. Graf</u> (1909), 19 O.L.R. 238 (S.C.)	226,272 270
<u>R. v. Gutschmidt</u> /1939/ 3 D.L.R. 688 (Sask. (C.A.))	212,242,266
<u>R. v. Haase</u> /1965/ 2 C.C.C. 56 (B.C.C.A.)	
aff'm'd /1965/ 2 C.C.C. 123 (S.C.C.)	284
<u>R. v. Hambleton</u> (1956), 23 C.R. 124 (B.C.S.C.)	268
<u>R. v. Hanlon</u> (1958), 122 C.C.C. 384 (Nfld.S.C.)	196,217
<u>R. v. Hanna</u> (1940), 14 M.P.R. 365 (N.S.S.C.)	208,217
<u>R. v. Harnish</u> (1961), 130 C.C.C. 305 (N.S.C.A.)	183
<u>R. v. Harris</u> (1946), 88 C.C.C. 79 (Que. C.A.)	189,190 217,268,270
<u>R. v. Hartridge</u> /1967/ 1 C.C.C. 346 (Sask. C.A.)	248,274
<u>R. v. Heroux</u> (1943), 80 C.C.C. 345 (Que. K.B.)	247
<u>R. v. Hilson</u> (1958), 28 C.R. 262 (Ont. C.A.)	275
<u>R. v. Hnedish</u> (1959), 29 C.R. 347 (Sask. Q.B.)	256
<u>R. v. Hoo Sam</u> (1912), 5 Sask.L.R. 180 (C.A.)	175,193 244
<u>R. v. Howlett</u> (1950), 9 C.R. 196 (Ont.C.A.)	185,187,196 227,253
<u>R. v. Hughes</u> (1920), 55 D.L.R. 697 (Alta.C.A.)	175
<u>R. v. Hughes et al.</u> /1942/ S.C.R. 517	270
<u>R. v. Hurd</u> (1913), 21 C.C.C. 98 (Alta. S.C.)	178
<u>R. v. Iwanchuk</u> (1928), 50 C.C.C. 465 (Alta.C.A.)	244
<u>R. v. Jackson</u> (1898), 2 C.C.C. 149 (N.S.S.C.)	207,208 213,215,243
<u>R. v. Jacques</u> (1958), 29 C.R. 249 (Que. Welf. Ct.)	272
<u>R. v. James</u> (1912), 17 B.C.R. 165 (Hunter, C.J.)	175
<u>R. v. Johnston</u> (1948), 91 C.C.C. 59 (Ont.C.A.)	195
<u>R. v. Jones</u> (1944), 84 C.C.C. 299 (P.E.I.S.C.)	185,265
<u>R. v. Jones</u> (1921), 17 Alta. R. 86 (C.A.)	244
<u>R. v. Kay</u> (1904), 9 C.C.C. 403 (B.C.S.C.)	192,196,211
<u>R. v. Kestenberg et al.</u> (1959), 126 C.C.C. 387 (Ont. C.A.)	178

<u>R. v. Kong</u> (1914), 24 C.C.C. 142 (B.C.S.C.)	194,235
<u>R. v. Kooten</u> /1926/ 4 D.L.R. 771 (Man.K.B.)	175,179 184,193
<u>R. v. Kozak</u> (1947), 88 C.C.C. 350 (B.C.C.A.)	178
<u>R. v. Lai Ping</u> (1904), 8 C.C.C. 467 (B.C.S.C.)	207,215 237,238,251
<u>R. v. Lantin</u> (1943), 80 C.C.C. 375 (Que.K.B.)	190,194
<u>R. v. La Plante</u> /1958/ O.W.N. 80 (C.A.)	256,257
<u>R. v. Lazure</u> (1959), 126 C.C.C. 331 (Ont. C.A.)	207,216,247
<u>R. v. LeBrun</u> (1954), 110 C.C.C. 262 (B.C.S.C.)	248
<u>R. v. Lee</u> (1952), 104 C.C.C. 402 (Ont.C.A.)	250,261,264
<u>R. v. Lewis</u> (1964), 43 C.R. 201 (Y.T.C.A.)	217,236,237
<u>R. v. Loisel</u> (1955), 21 C.R. 210 (Que.C.A.)	203,204,208 266
<u>R. v. Mandzuk</u> /1946/ 1 D.L.R. 521 (B.C.C.A.)	178,242
<u>R. v. Markadonis</u> (1935), 8 M.F.R. 407 (N.S.S.C.)	178
<u>R. v. Martin</u> (1905), 90 O.L.R. 218 (C.A.)	178,248,268
<u>R. v. Matchette</u> (1946), 19 M.P.R. 132 (N.B.C.A.)	178,207, 242
<u>R. v. Mazerall</u> /1946/ O.R. 762 (C.A.)	175
<u>R. v. M'Craw</u> (1906), 12 C.C.C. 253 (Que.C.A.)	178,220,262
<u>R. v. MacNeill</u> (1945), 18 M.P.R. 175 (P.E.I.S.C.)	207,219
<u>R. v. McAloon</u> (1959), 124 C.C.C. 182 (Ont.C.A.)	179,269
<u>R. v. McAskill</u> (1930), 3 M.P.R. 469 (N.S.C.A.)	179,243
<u>R. v. McCafferty</u> (1886), N.B.R. 396 (C.C.R.)	216,277,278 280,283,286
<u>R. v. McDonald</u> (1948), 5 C.R. 375 (Alta.C.A.)	235
<u>R. v. McGourty</u> (1950), 27 M.P.R. 275 (N.B.C.A.)	254,262
<u>R. v. McKenzie</u> /1965/ 3 C.C.C. 6 (Alta.C.A.)	205
<u>R. v. McKillop</u> (1948), 5 C.R. 375 (Ont. C.A.)	268
<u>R. v. McLaren</u> /1949/ 2 D.L.R. 682 (Alta. C.A.)	269
<u>R. v. McLean & McKinley</u> (1957), 126 C.C.C. 395 (B.C.S.C.)	188,224
<u>R. v. Medley</u> (1966), unreported, N.S.S.C.) (Bissett, J.)	219

<u>R. v. Meeker</u> (1965), 44 C.R. 108, aff'm'd (1965), 44 C.R. 112 (S.C.C.)	228,254
<u>R. v. Minogue</u> /1935/ 4 D.L.R. 504 (B.C.S.C.)	219
<u>R. v. Moke</u> (1917), 12 Alta.R. 18 (C.A.)	175
<u>R. v. Muirhead</u> (1951), 29 M.P.R. 317 (N.S.Co.Ct.)	272
<u>R. v. Mulligan</u> (1955), 111 C.C.C. 173 (Ont. C. A.)	190,250,265 266,269,270
<u>R. v. Murakami</u> (1951), 12 C.R. 245 (S.C.C.)	181,182,213, 237
<u>R. v. Myles</u> (1923), 40 C.C.C. 84 (B.S.C.A.)	175,176,179 180,199,204,216 234,235,249,214,251,253,266
<u>R. v. Nahirniak</u> (1931), 56 C.C.C. 225 (Man. C.A.)	242
<u>R. v. Newes</u> /1934/ 3 D.L.R. 237 (Alta.C.A.)	199,203,207
<u>R. v. Nye</u> (1958), 122 C.C.C. 1 (Ont.C.A.)	223,226,227
<u>R. v. O'Donnell</u> (1936), 65 C.C.C. 299 (Ont.C.A.)	179
<u>R. v. Ogrodowski</u> (1943), unreported, (Ont.C.A.)	195
<u>R. v. O'Hara</u> (1946), 88 C.C.C. 75 (B.C.C.A.)	243,253
<u>R. v. Oleschuk</u> (1942), 77 C.C.C. 164 (B.C.C.A.)	247
<u>R. v. O'Neill</u> (1916), 9 Alta. R. 365 (C.A.)	179,193,244
<u>R. v. Ostroglov</u> (1956), 22 C.R. 375 (B.C.C.A.)	181,216, 247
<u>R. v. Ouellette</u> (1951), 99 C.C.C. 230 (B.C.C.A.)	270
<u>R. v. Pais</u> (1941), 75 C.C.C. 318 (B.C.C.A.)	242,243,247 280
<u>R. v. Pedersen</u> /1956/ O.W.N. 212 (H.C.)	275
<u>R. v. Picariello et al.</u> (1923), 39 C.C.C. 1 (Alta. C.A.)	254
<u>R. v. Plowman</u> (1958), 123 C.C.C. 76 (Nfld.S.C.)	183,196,243
<u>R. v. Price</u> (1931), 55 C.C.C. 206 (N.B.C.A.)	176,180,181 187,194,208
<u>R. v. Rasmussen</u> (1934), 9 M.P.R. 41 (N.B.C.A.)	175,181,190 201,214,242
<u>R. v. Read</u> (1921), 17 Alta. R. 68 (C.A.)	244
<u>R. v. Regnier</u> (1955), 21 C.R. 374 (C.A.)	261
<u>R. v. Riopel</u> (1922), 39 C.C.C. 148 (Que. C.A.)	207

<u>R. v. Roadhouse</u> (1933), 61 C.C.C. 191 (B.C.C.A.)	201,208 217
<u>R. v. Robichaud</u> (1938), 70 C.C.C. 365 (N.B.C.A.)	181,186 262
<u>R. v. Rodney</u> (1918), 420 L.R. 645 (C.A.)	175,179,193 201,262
<u>R. v. Romp</u> (1888), 17 O.R. 567 (Ch.D.)	216
<u>R. v. Rossi</u> (1910), 17 C.C.C. 182 (N.B., Landry, J.)	196
<u>R. v. Royds</u> (1904), 8 C.C.C. 209 (B.C.C. Ct.)	208
<u>R. v. Rubletz</u> /1941/ 1 D.L.R. 333 (Sask. C.A.)	270
<u>R. v. Ryan</u> (1905), 9 O.L.R. 137 (C.A.)	175,188,199,201 208,213,220,226 241
<u>R. v. Sampson</u> (1934), 8 M.P.R. 237 (N.S.C.A.)	229,244
<u>R. v. Sampson</u> (2) (1934), 8 M.P.R. 328 (N.S.C.A.)	268
<u>R. v. Scory</u> (1945), 83 C.C.C. 306 (Sask.C.A.)	176,195,246
<u>R. v. Seabrooke</u> /1932/ O.R. 575 (C.A.)	187,226,228,230 254,262
<u>R. v. Shaw</u> /1965/ 1 C.C.C. 130 (B.C.C.A.)	269
<u>R. v. Sigmund et al.</u> /1968/ 1 C.C.C. 92 (B.C.C.A.)	243
<u>R. v. Sileski</u> (1922), 63 D.L.R. 146 (Que.C.A.)	193,207,268
<u>R. v. Sim</u> (1954), 108 C.C.C. 380 (Alta. S.C.)	188,211,223
<u>R. v. Simmons et al.</u> (1955), 110 C.C.C. 309 (Ont. C.A.)	268
<u>R. v. Simpson</u> (1950), 9 C.R. 369 (Ont. C.A.)	228,254
<u>R. v. Simpson et al.</u> /1943/ 3 D.L.R. 355 (B.C.C.A.)	280
<u>R. v. Simpson</u> (1954), 34 M.P.R. 311 (N.S.C.A.)	268
<u>R. v. Spain</u> (1917), 28 C.C.C. 113 (Man. C.A.)	175,194
<u>R. v. Stain</u> (1960), 128 C.C.C. 212 (Man. Co. Ct.)	186
<u>R. v. Starr</u> (1960), 33 C.R. 277 (Man. C. Ct.)	185
<u>R. v. Steffof</u> (1909), 15 C.C.C. 366 (Ont. C.A.)	251
<u>R. v. St. Lawrence</u> (1949), 93 C.C.C. 376 (Ont. H.C.)	278,281 282,283,286
<u>R. v. Sykes</u> (1951), 13 C.R. 153 (B.C.C.A.)	216
<u>R. v. Terry</u> (1955), 20 C.R. 37 (B.C.S.C.)	189
<u>R. v. Thauvette</u> /1938/ 2 D.L.R. 755 (Ont. S.C.)	272

<u>R. v. Theriault</u> (1953), 17 C.R. 269 (Que. Q.B.)	196
<u>R. v. Todd</u> (1901), 4 C.C.C. 514 (Man. K.B.)	176,197 211,213
<u>R. v. Tutty</u> (1905), 9 C.C.C. 544 (N.S.C.A.)	207,250,252
<u>R. v. Umlah</u> (1922), 38 C.C.C. 302 (N.S.C.A.)	176,188,207 215,221,262
<u>R. v. VanHorst</u> (1914), 24 C.C.C. 157 (B.C.S.C.)	196
<u>R. v. Viau</u> (1898), Q.O.R. 7 Q.B. 362 (C.A.)	184,241
<u>R. v. Wallace</u> (1914), 24 C.C.C. 158 (B.C.S.C.)	185
<u>R. v. Ward</u> (1924), 41 C.C.C. 418 (Alta. C.A.)	175,244
<u>R. v. Washer</u> /1948/ O.W.N. 393	271,272,273
<u>R. v. Weighill</u> /1945/ 2 D.L.R. 471 (B.C.C.A.)	211,255,256 257
<u>R. v. White</u> (1909), 180 O.L.R. 640 (C.A.)	188,220,264, 280
<u>R. v. Willis et al.</u> (1913), 21 C.C.C. 64 (Man.K.B.)	241
<u>R. v. Wilmot</u> /1940/ 3 D.L.R. 358 aff'm'd /1941/ 1 D.L.R. 689 (S.C.C.)	246
<u>R. v. Wishart</u> (1955), 20 C.R. 163 (B.C.C.A.)	187,226,230 239,244,250,268
<u>R. v. Wolbaum</u> /1965/ 3 C.C.C. 191 (Sask. C.A.)	179,183
<u>R. v. Wyatt</u> (1968), 70 D.L.R. (2d) 677 (N.S.C.A.)	248
<u>R. v. Yensen</u> (1961), 130 C.C.C. 353 (Ont. H.C.)	190,196,272
<u>R. v. Zachariuk</u> (1948), 92 C.C.C. 359 (Alta.C.A.)	
<u>R. v. Young</u> (1905), 38 N.S.R. 427 (C.A.)	176,178,185 207,215,221 232,248,251,253,264
<u>Re Day</u> (1961), 130 C.C.C. 41 (B.C.S.C.)	196
<u>Re Eftoda</u> (1963), 39 C.R. 324 (Sask. C.A.)	203,208
<u>Re Lewis</u> (1904), 9 C.C.C. 233 (N.W.T.S.C.)	253
<u>R. ex rel. Wickert v. Keen</u> (1967), 50 C.R. 228 (B.C.S.C.)	274
<u>Richard v. R.</u> (1957), 43 M.P.R. 229 (N.B.C.A.)	181,183,226 228,229,230 238,240,252
<u>Ruflange v. R.</u> (1965), 46 C.R. 332 (Que. C.A.)	227
<u>Rustad v. R.</u> /1965/ S.C.R. 555	275

<u>Sankey v. R.</u> /1927/ S.C.R. 436	185,187,193,228 229,243,252,254
<u>Schmidt v. R.</u> /1945/ S.C.R. 438	268
<u>Sim's & Hoskin's Case</u> (1749), MS., Pub. Arch. N.S.	172
<u>Thiffault v. R.</u> /1933/ S.C.R. 509	193,228,230,243 252,254,265
<u>Trepanier v. R.</u> (1911), 19 C.C.C. 290 (Que. C.A.)	184,194,235 244,271,280
<u>Uniacke v. Dickson</u> (1848), 2 N.S.R. 287 (Ch.)	172
<u>White's Case</u> (1749), MS., Pub. Arch. N.S.	172
<u>Wilband v. R.</u> /1967/ 2 C.C.C. 6 (S.C.C.)	206,208

(Australian Cases Referred to)

<u>Attorney-General of New South Wales v. Martin</u> (1909) 9 C.L.R. 713 (H.C.)	177
<u>Basto v. The Queen</u> (1954), 91 C.L.R. 628 (H.C.)	269
<u>Gouldham v. Sharrett</u> /1966/ W.A.R. 129 (S.C.)	221
<u>Cornelius v. The King</u> (1936), 55 C.L.R. 235 (H.C.)	177,241
<u>Hough v. Ah Sam</u> (1912), 15 C.L.R. 452	242
<u>McDermott v. The King</u> (1948), 76 C.L.R. 501 (Aust. H.C.)	182,186 191,211
<u>R. v. AH On</u> (1875), 12 N.S.W. S.C. 193	241
<u>R. v. Amad</u> /1962/ V.R. 545 (Smith, J.)	193,220,238
<u>R. v. Burnett</u> /1944/ V.L.R. 115 (S.C.)	182
<u>R. v. Deathe</u> /1962/ V.R. 650 (S.C.)	269
<u>R. v. Horrocks</u> (1892), 4 Q.L.J. 218 (Harding, J.)	221
<u>R. v. Jeffries</u> (1946), 47 S.R. (N.S.W.) 284	191
<u>R. v. Lee</u> /1950/ V.L.R. 413, aff'm'd, (1950), 83 C.L.R. 133 (Aust. H.C.)	191,221,243
<u>R. v. Mangin</u> (1894), 6 Q.L.J. 63 (C.C.R.)	221
<u>R. v. Many Many et al.</u> (1895), 6 Q.L.J. 224 (Harding, J.)	184
<u>R. v. Rogerson</u> (1870), 9 N.S.W.S.C. 234	184,186,220
<u>R. v. Rosenkl et al.</u> (1863), 2 N.S.W.S.C. 27	221
<u>R. v. Smith</u> /1964/ V.R. 95 (Gowans, J.)	221
<u>R. v. Starecki</u> /1959/ V.R. 141 (S.C.)	272

C. UNITED STATES

<u>Agoston v. Pennsylvania</u> (1950), 340 U.S. 844	333
<u>Alderman v. United States</u> (1947), 165F. 2d 622 (D.C.Cir.)	363
<u>Allen v. United States</u> (1952), 202F 2d 329 (D.C.Cir.)	367
<u>Anderson v. United States</u> (1943), 318 U.S. 350	359
<u>Ashcraft v. Tennessee</u> (1944), 322 U.S. 143	323,349,352,353
<u>Ashcraft v. Tennessee</u> (1946), 372 U.S. 274	330
<u>Ashdown v. Utah</u> (1958), 375 U.S. 426	352,377
<u>Bank of Columbia v. Okely</u> (1819), 4 Wheat. S.C. 235	312,316,317
<u>Blackburn v. Alabama</u> (1960), 361 U.S. 199	334,335,335,337 338,349,352,354
<u>Blood v. Hunter</u> (1945), 150F 2d 640 (10th Cir.)	363
<u>Boles v. Stevenson</u> (1964), 379 U.S. 43	410
<u>Boone v. United States</u> (1947), 164F 2d 102 (D.C.Cir.)	364,367
<u>Bowerhan's Case</u> (1822), 4 City Hall Rec. 136 (N.Y. Sess.)	294
<u>Bram v. United States</u> (1897), 168 U.S. 532	298,303,305,306 308,310,319,321, 326,328,335,336, 347,348,354,356 371,372,373
<u>Brinegar v. United States</u> (1947), 165F 2d 512 (10th Cir.)	363
<u>Brown v. Allen</u> (1953), 344 U.S. 443	336,348,349,354
<u>Brown v. Commonwealth</u> (1838), 33 Am.Dec. 263 (Va.S.C.)	297
<u>Brown v. Mississippi</u> (1936), 297 U.S. 278	319,321,325,335 348,349,351,373
<u>Brown v. New Jersey</u> (1899), 175 U.S. 172	315
<u>Brown v. Walker</u> (1896), 161 U.S. 591	307
<u>Buchalter v. New York</u> (1943), 319 U.S. 427	318
<u>Canty v. Alabama</u> (1940), 309 U.S. 629	327
<u>Chambers v. Florida</u> (1940), 309 U.S. 227	323,327,328,335 338,350,351,352

<u>Cicenia v. La Gay</u> (1958), 357 U.S. 504	352,375,377,383
<u>Clewis v. Texas</u> (1967), 386 U.S. 707	335,346,349,351 352,353,354,355
<u>Clifton v. United States</u> (1965), 341F 2d 649 (5th Cir.)	385
<u>Cohen v. United States</u> (1944), 144F 2d 984 (9th Cir.)	359
<u>Collins v. Beto</u> (1965), 348F 2d 823 (5th Cir.)	384
<u>Commonwealth v. Antaya</u> (1903), 184 Mass. R. 326 (S.C.)	401
<u>Commonwealth v. Bond</u> (1897), 170 Mass R. 41 (S.C.)	401
<u>Commonwealth v. Bush</u> (1933), 188 N.E. 613 (S.C.)	402
<u>Commonwealth v. Chabbock</u> (1804), 1 Mass. R. 144 (S.C.)	292
<u>Commonwealth v. Corcoran</u> (1903), 182 Mass. R. 465 (S.C.)	402
<u>Commonwealth v. Crocker</u> (1871), 108 Mass. R. 464 (S.C.)	293
<u>Commonwealth v. Cuffee</u> (1871), 108 Mass. R. 285 (S.C.)	293,401
<u>Commonwealth v. Cullen</u> (1873), 111 Mass. R. 435 (S.C.)	293,401
<u>Commonwealth v. Culver</u> (1879), 126 Mass. R. 464 (S.C.)	293,401
<u>Commonwealth v. Curtis</u> (1867), 97 Mass. R. 574 (S.C.)	293
<u>Commonwealth v. Dillon</u> (1792), 4 U.S. 116	288
<u>Commonwealth v. Drake</u> (1818), 15 Mass. R. 161 (S.C.)	292
<u>Commonwealth v. Holt</u> (1876), 121 Mass. R. 61 (S.C.)	293
<u>Commonwealth v. Howe</u> (1857), 9 Gray 110 (Mass.S.C.)	293 401
<u>Commonwealth v. Hudson</u> (1904), 185 Mass. R. 402 (S.C.)	402
<u>Commonwealth v. James</u> (1868), 99 Mass. R. 438 (S.C.)	293
<u>Commonwealth v. Knapp</u> (1830), 9 Pick. 495 (Mass.S.C.)	292,293
<u>Commonwealth v. Mitchell</u> (1875), 117 Mass.R. 431 (S.C.)	293

<u>Commonwealth v. Morey</u> (1854), 1 Gray 461 (Mass.S.C.)	292,293
<u>Commonwealth v. Piper</u> (1876), 120 Mass.R. 185 (S.C.)	401
<u>Commonwealth v. Preece</u> (1885), 140 Mass.R. 276 (S.C.)	401
<u>Commonwealth v. Russ</u> (1919), 122 N.E. 176 (S.C.)	401
<u>Commonwealth v. Sego</u> (1878), 125 Mass.R. 210 (S.C.)	293
<u>Commonwealth v. Smith</u> (1876), 119 Mass.R. 305 (S.C.)	293,401
<u>Commonwealth v. Taylor</u> (1850), 5 Cush. 605 (Mass. S.C.)	293
<u>Commonwealth v. Tuckerman</u> (1857), 10 Gray 173 (Mass.S.C.)	293
<u>Commonwealth v. Whittemore</u> (1858), 11 Gray 201 (Mass.S.C.)	293
<u>Coppola v. United States</u> (1961), 365 U.S. 762	359
<u>Crooker v. California</u> (1958), 357 U.S. 433	334,351,352,375
<u>Culombe v. Connecticut</u> (1961), 367 U.S. 568	321,338,340,341 349,352,354,355 377
<u>Dailey v. United States</u> (1958), 261F 2d 870 (5th Cir.)	368
<u>Darwin v. Connecticut</u> (1968), 391 U.S. 346	345,346
<u>Davidson v. New Orleans</u> (1878), 96 U.S. 97	314
<u>Davidson v. United States</u> (1965), 349F 2d 530 (10th Cir.)	385
<u>Davis v. North Carolina</u> (1966), 384 U.S. 737	353,355
<u>Den ex dem Murray v. Hoboken Land & Improvement Co.</u> (1856), 18 How.S.C. 272	313
<u>Duffy v. People</u> (1863), 26 N.Y. 558 (C.A.)	296,399
<u>Duncan v. United States</u> (1952), 197F 2d 935 (5th Cir.)	368
<u>Escobedo v. Illinois</u> (1964), 378 U.S. 478	355,375, 380,383 384,385
<u>Fahy v. Connecticut</u> (1963), 375 U.S. 85	392
<u>Fikes v. Alabama</u> (1957), 352 U.S. 191	322,334,335,349 351,352,353
<u>Findley v. State</u> (1841), 36 Am.Dec. 557 (Ind.S.C.)	297

<u>Finlay v. State</u> (1943), 14 So. 2d 844 (Fla.)	370
<u>Gallegos v. Colorado</u> (1962), 370 U.S. 49	350
<u>Gallegos v. Nebraska</u> (1951), 342 U.S. 55	321,335,336 354,370
<u>Garner v. United States</u> (1949), 174F 2d 499	368
<u>Garrity v. New Jersey</u> (1967), 385 U.S. 493	338
<u>Gibbs v. Burke</u> (1949), 337 U.S. 773	318
<u>Gideon v. Wainwright</u> (1963), 372 U.S. 335	316,377 378,381
<u>Goldsmith v. United States</u> (1960), 277F 2d 335 (D.C.Cir.)	368
<u>Greenwald v. Wisconsin</u> (1968), 390 U.S. 519	335,340,351 352,353,354,355
<u>Greenwell v. United States</u> (1964), 336F 2d 962	385
<u>Gros v. United States</u> (1943), 136F 2d 878 (9th Cir.)	360
<u>Grosjean v. American Press Co.</u> (1936), 297 U.S. 233	315
<u>Haines v. United States</u> (1951), 188F 2d 546 (9th Cir.)	368
<u>Haley v. Ohio</u> (1948), 332 U.S. 596	323,331,350,355
<u>Hallinger v. Davis</u> (1892), 146 U.S. 314	313
<u>Hamilton v. Alabama</u> (1961), 368 U.S. 52	377,379,382
<u>Hardy v. United States</u> (1902), 186 U.S. 224	310,326,348
<u>Harris v. South Carolina</u> (1949), 338 U.S. 68	330,332,333 349,352,353,355
<u>Harrison v. United States</u> (1968), 392 U.S. 219	393,394 395
<u>Hayes v. United States</u> (1965), 347F 2d 668 (8th Cir.)	385
<u>Haynes v. Washington</u> (1963), 373 U.S. 503	335,340,348 352,408
<u>Hector v. State</u> (1829), 22 Am.Dec. 454	297
<u>Hendrickson v. People</u> (1854), 10 N.Y. 13 (C.A.)	296
<u>Herbert v. Louisiana</u> (1926), 272 U.S. 312	318
<u>Holden v. Hardy</u> (1898), 169 U.S. 366	313
<u>Hopt v. Utah</u> (1884), 110 U.S. 574	298,301,303 336,348,355

<u>Hurtado v. California</u> (1884), 110 U.S. 516	313,316
<u>In the Matter of the Application of Paul L. Gault et al.</u> (1967), 387 U.S. 1	350
<u>Jackson's Case</u> (1819), 1 City Hall. Rec. 28 (N.Y. Sess.)	295
<u>Jackson v. Denno</u> (1964), 378 U.S. 368	352,354,397,400,409
<u>Jackson v. United States</u> (1964), 337F 2d 136 (D.C. Cir.)	385
<u>Johnson v. New Jersey</u> (1966), 384 U.S. 719	388
<u>Johnson v. Pennsylvania</u> (1950), 340 U.S. 881	333
<u>Kent v. United States</u> (1966), 383 U.S. 541	350
<u>Lee v. Mississippi</u> (1948), 332 U.S. 742	332
<u>Lee v. Mississippi</u> (1952), 343 U.S. 747	348,366
<u>Leyra v. Denno</u> (1954), 347 U.S. 556	323,338,345, 352407
<u>Lisenba v. California</u> (1941), 314 U.S. 219	318,323,327,334347,348,349,351352,353,354
<u>Lomax v. Texas</u> (1941), 313 U.S. 533	327
<u>Lynum v. Illinois</u> (1963), 372 U.S. 528	338,351,352
<u>Lyons v. Oklahoma</u> (1944), 322 U.S. 596	323,334,343,345
<u>Malinski v. New York</u> (1945), 324 U.S. 401	314,316,317,318322,323,331,347351,352,353
<u>Mallory v. United States</u> (1957), 354 U.S. 449	350,366,368
<u>Malloy v. Hogan</u> (1964), 387 U.S.1	340,348
<u>Manley v. Georgia</u> (1929), 279 U.S.1	316
<u>Massiah v. United States</u> (1964), 377 U.S. 201	352,378,380
<u>McGee v. State</u> (1952), 104 N.E. 2d 726 (Ind.)	298
<u>McLeod v. Ohio</u> (1965), 381 U.S. 356	380
<u>McNabb v. United States</u> (1943), 318 U.S. 332	319,322,348349,350,351,354356,359,360,361362,364,365,363366
<u>Milligan & Welchmans Case</u> (1821), 6 City Hall Rec. 10 (N.Y. Sess.)	295,399

<u>Miranda v. Arizona</u> (1966), 384 U.S. 436	355,370,375,385 386,387,388,389
<u>Mitchell v. United States</u> (1944), 138F 2d 426 (D.C.Cir.)	360
<u>Moore v. Dempsey</u> (1923), 261 U.S. 86	318
<u>Nardone v. United States</u> (1939), 308 U.S. 338	389,390,393
<u>Paddy v. United States</u> (1945), 143F 2d 847 (9th Cir.)	363
<u>Palko v. Connecticut</u> (1937), 302 U.S. 319	317
<u>Payne v. Arkansas</u> (1958), 356 U.S. 560	323,332,335,349 350,351,352,354 355
<u>People v. Barbato</u> (1930), 172 N.E. 458 (N.Y.C.A.)	400
<u>People v. Brasch</u> (1908), 85 N.E. 809 (N.Y.C.A.)	399,400
<u>People v. Bretagna etal.</u> (1949), 83 N.E. 2d 537 (S.C., App. Div.)	400
<u>People v. Cassidy</u> (1892), 30 N.E. 1003 (N.Y.C.A.)	400
<u>People v. Catalfano</u> (1954), 132 N.Y.S. 3d 217 (S.C., App. Div.)	400
<u>People v. Dorado</u> (1964), 398 P. 2d 361 (Cal.)	384,385
<u>People v. Doran</u> (1927), 159 N.E. 379 (N.Y.C.A.)	400
<u>People v. Fanning</u> (1892), 30 N.E. 569 (N.Y.C.A.)	400
<u>People v. Farrell</u> (1956), 153 N.Y.S. 2d 284 (S.C., App. Div.)	400
<u>People v. Fox</u> (1890), 121 N.Y. 449	400
<u>People v. Guido</u> (1926), 152 N.E. 149 (Ill.)	397
<u>People v. Hartgraves</u> (1964), 202 N.E. 2d 33 (N.Y.)	384,385
<u>People v. Huntley</u> (1965), 255 N.Y.S. 2d 38 (S.C., App. Div.)	400,409
<u>People v. Kinney</u> (1911), 95 N.E. 756 (N.Y.C.A.)	400
<u>People v. Maxwell</u> /1823/ Cr. Rec. 163 (N.Y., Oyer & Tenor.)	295
<u>People v. McGloin</u> (1883), 91 N.Y. 241 (C.A.)	296
<u>People v. McMahon</u> (1857), 15 N.Y. 384 (C.A.)	296
<u>People v. Meyer</u> (1900), 56 N.E. 758 (N.Y.C.A.)	399,400
<u>People v. Pantano</u> (1925), N.E. 646 (N.Y.C.A.)	399

<u>People v. Phillips</u> (1870), 42 N.Y. 200 (C.A.)	296
<u>People v. Randazzio</u> (1909), 87 N.E. 112 (N.Y.C.A.)	399
<u>People v. Rankin</u> (1807), Rep. Crim. L. Cas. 467 (N.Y., Oyer & Term.)	294
<u>People v. Robertson etal.</u> /1822/ Cr. Rec. 66 (N.Y., Oyer & Term.)	296
<u>People v. Rogers</u> (1858), 18 N.Y. 9 (C.A.)	296
<u>People v. Valletutti</u> (1948), 78 N.E. 2d 485 (N.Y.C.A.)	400
<u>People v. Wentz</u> (1867), 37 N.Y. 303 (C.A.)	296
<u>People v. White</u> (1903), 68 N.E. 630 (N.Y.C.A.)	400
<u>Perovich v. United States</u> (1907), 205 U.S. 86	309,347
<u>Perry v. United States</u> (1957), 253F 2d 337 (D.C. Cir.)	368
<u>Pierce v. United States</u> (1952), 197F 2d 189 (D.C. Cir.)	367
<u>Pierce v. United States</u> (1896), 160 U.S. 355	302,336,347 353
<u>Powell v. Alabama</u> (1932), 287 U.S. 45	313,317
<u>Powers v. United States</u> (1912), 223 U.S. 203	309,336,355
<u>Pixley v. United States</u> (1955), 220F 2d 912 (10th Cir.)	366
<u>Reck v. Pate</u> (1961), 367 U.S. 433	335,338,343 349,350,351,352
<u>Reeves v. Alabama</u> (1954), 348 U.S. 891	327
<u>Respublica v. M'Carty</u> (1781), 2 U.S. 86	288
<u>Respublica v. Roberts</u> (1778), 1 U.S. 39	288
<u>Rettig v. United States</u> (1956), 239F 2d 916 (D.C. Cir.)	367
<u>Rochin v. California</u> (1952), 342 U.S. 165	317
<u>Rogers v. Richmond</u> (1961), 356 U.S. 534	337,408
<u>Ruhl v. United States</u> (1945), 148F 2d 173 (10th Cir.)	363
<u>Shotwell Mfg. Co. etal. v. United States</u> (1963), 371 U.S. 341	319
<u>Silverthorne Lumber Co. v. United States</u> (1920), 251 U.S. 385	389,391,393
<u>Sims v. Georgia</u> (1967), 385 U.S. 538	410

<u>Snyder v. Massachusetts</u> (1934), 291 U.S. 97	317
<u>Spano v. New York</u> (1959), 360 U.S. 315	321,336,338,348 352,377,379,407
<u>Sparf v. United States</u> (1895), 156 U.S. 51	300,301,336,347 355
<u>Stage's Case</u> (1821), 6 City Hall Rec. 177 (N.Y. Sess.)	294,399
<u>State v. Aaron</u> (1818), 7 Am. Dec. 592 (N.J.S.C.)	297
<u>State v. Browning</u> (1944), 178 S.W. 2d 71 (Ark.)	370
<u>State v. Bunk</u> (1950), 73 A 2d 249 (N.J.)	370
<u>State v. Folkes</u> (1944), 15 P 2d 17 (Ore.)	370
<u>State v. Guild</u> (1828), 18 Am. Dec. 404 (N.J.S.C.)	297
<u>State v. Phelps</u> (1839), 34 Am. Dec. 672 (Vt.S.C.)	297
<u>State v. Rogers</u> (1951), 64 S.E. 2d 572 (N.C.)	298
<u>State v. Soper et al.</u> (1839), 33 Am. Dec. 665 (Me.S.C.)	297
<u>Steel's Case</u> (1821), 6 City Hall Rec. 5 (N.Y. Sess.)	294
<u>Stein v. New York</u> (1952), 346 U.S. 156	323,334,335,348 351,352,353,354 404,406,407,408 409
<u>Stroble v. California</u> (1952), 343 U.S. 181	323,335,336,341 342,354
<u>Symons v. United States</u> (1949), 178F 2d 615 (9th Cir.)	368
<u>Tarkington v. United States</u> (1952), 194 F 2d 63 (4th Cir.)	367
<u>Taylor v. Alabama</u> (1948), 335 U.S. 252	323,332
<u>Thomas v. Arizona</u> (1958), 356 U.S. 390	323,334,336,341 342
<u>Tillotson v. United States</u> (1956), 231F 2d 736 (D.C.Cir.)	367
<u>Townsend v. Sain</u> (1963), 372 U.S. 293	335,337,338,348 349,351,352,353 354
<u>Tucker's Case</u> (1820), 5 City Hall Rec. 164 (N.Y. Sess.)	259,399
<u>Turner v. Pennsylvania</u> (1948), 338 U.S. 62	330,331,333,351 352,354
<u>Twining v. New Jersey</u> (1908), 211 U.S. 78	316,317

<u>United States v. Bascadore</u> (1811), 24 Fed.Cas. 1028 (D.C.Cir.)	290
<u>United States v. Bayer</u> (1947), 331 U.S. 532	345,346
<u>United States v. Carignan</u> (1951), 342 U.S. 36	354,366
<u>United States v. Chapman</u> (1851), 25 Fed. Cas. 404 (Dist. Ct., Penn.)	288,291
<u>United States v. Childress</u> (1965), 347 F 2d 448 (7th Cir.)	384
<u>United States v. Cooper</u> (1857), 25 Fed. Cas. 629 (W.D., Va.)	290,291
<u>United States v. Corn</u> (1944), 54 F. Supp. 307 (E.D., Wis.)	360
<u>United States v. Duffy etal.</u> (1804), 25 Fed. Cas. 922 (D.C. Cir.)	290
<u>United States v. Ebeling</u> (1944), 146 F 2d 254 (2nd Cir.)	360
<u>United States v. Grote</u> (1944), 140 F 2d 413 (2nd Cir.)	359
<u>United States v. Haupt</u> (1943), 136 F 2d 661 (7th Cir.)	359,360
<u>United States v. Hoffman</u> (1943), 137 F 2d 416 (2nd Cir.)	360
<u>United States v. Hunter</u> (1806), 26 Fed. Cas. 436 (D.C. Cir.)	289
<u>United States v. Keegan</u> (1944), 141 F 2d 248 (2nd Cir.)	360,363
<u>United States v. Keitner</u> (1945), 149 F 2d 105 (2nd Cir.)	363
<u>United States v. Klee</u> (1943), 50 F. Supp. 679 (E.D., Wash.)	360
<u>United States v. Kountis</u> (1965), 350 F 2d 869 (7th Cir.)	384
<u>United States v. Leviton</u> (1951), 193 F 2d 848 (2nd Cir.)	367
<u>United States v. Matthews etal.</u> (1843), 26 Fed. Cas. 1205 (Dist. Ct., N.Y.)	289
<u>United States v. Mitchell</u> (1795), 1 U.S. 348	288
<u>United States v. Mitchell</u> (1944), 322 U.S. 65	321,360,361 363,365,392

<u>United States v. Nott</u> (1839), 27 Fed. Cas. 189 (Ohio, Cir.)	290
<u>United States v. Pocklington</u> (1822), 27 Fed. Cas. 580 (D.C. Cir.)	289
<u>United States v. Prior</u> (1837), 27 Fed. Cas. 624 (Cranch, C.J.)	291
<u>United States v. Pumphreys</u> (1802), 27 Fed. Cas. 631 (D.C. Cir.)	289
<u>United States v. Richard</u> (1823), 27 Fed. Cas. 798 (D.C. Cir.)	289, 291
<u>United States v. Sheetters</u> (1954), 122 F. Supp. 52 (S.D., Cal.)	367
<u>United States v. Smith</u> (1806), 27 Fed. Cas. 1233 (N.Y. Cir.)	291
<u>United States v. Walker</u> (1951), 190 F 2d 481 (2nd Cir.)	368
<u>United States v. Williams</u> (1951), 341 U.S. 70	327
<u>United States v. Williams et al.</u> (1858), 28 Fed. Cas. 636 (Me. Cir.)	290
<u>United States ex rel. Bilokumsky v. Tod</u> (1923), 263 U.S. 149	309
<u>United States ex rel. Jennings v. Ragen</u> (1959),	
<u>Upshaw v. United States</u> (1947), 168 F 2d 167 (D.C. Cir.)	365
<u>Upshaw v. United States</u> (1948), 335 U.S. 410	348, 351, 353 364, 366, 369
<u>Vernon v. Alabama</u> (1941), 313 U.S. 547	327
<u>Ward v. Texas</u> (1942), 316 U.S. 547	323, 328, 348, 349 351, 352, 354
<u>Watson v. United STATES</u> (1956), 234F 2d 42 (D.C. Cir.)	367
<u>Watts v. Indiana</u> (1949), 338 U.S. 49	322, 324, 332, 333 334, 338, 347, 348 352, 353, 354
<u>West v. Louisiana</u> (1904), 194 U.S. 258	315, 320
<u>Wheeler v. United States</u> (1947), 165 F 2d 225 (D.C. Cir.)	363, 364
<u>White v. Maryland</u> (1963), 373 U.S. 59	377, 379, 382
<u>White v. Texas</u> (1940), 309 U.S. 631,	327

<u>William's Case</u> (1819), 1 City Hall Rec. 149 (N.Y. Sess.)	294
<u>Williams v. United States</u> (1951), 341 U.S. 97	327,348
<u>Wilson v. Louisiana</u> (1951), 341 U.S. 901	336
<u>Wilson v. United States</u> (1896), 162 U.S. 613	302,303,309 340,347,355 356, 372
<u>Wong Sun v. United States</u> (1963), 371 U.S. 471	390,391,393
<u>Woodford v. People</u> (1875), 62 N.Y. 117 (C.A.)	296,400
<u>Ziang Sun Wan v. United States</u> (1923), 53 App. D.C. 250	311
<u>Ziang Sun Wan v. United States</u> (1924), 266 U.S. 1	310,321 326,347,351 352,353,354

A. ENGLAND

CHAPTER I

Historical Perspective The Basis of the Rule

Any rule resembling the modern concept of confessions in criminal evidence was unknown in the rudimentary legal procedures of the early Saxons.¹ Laws, such as they were, were either local laws, or dooms as they were called, or laws issued in written ordinance by the king.² The local laws were declared by the leader of a group of townships, the "hundred", and were only

- 1 There are, however, indications of a rule concerning confessions previous to this period. In Roman Law, the confession of an accused was acceptable as a method of proof. If the accused confessed voluntarily in the presence of the injured party, or if the confession was re-iterated publicly at different times in his absence, the confession was then received as plenary proof. See, H. Liverland Council xix 8, lxxxv 5, cxxxv 11, c. lxxv 12, 5, and c. lxxxv 2, 3, 11, Mascard De Prob., vol. 1, at p. 34, 349, Van Leeuwen's Comm. B. 5, c. 21, 187. 4, 5, as cited by J. F. Taylor, A Treatise on the Law of Evidence (1890), at p. 363. Careful consideration was given as to whether the confession was uttered under the influence of wine, drugs, or duress. See, Inst. In v. Crat. lib. 5, c. 7. According to Prof. Holdland, the Saxon law remained uninfluenced by Roman doctrines. The Constitutional History of England (1931), at p. 5. Nothing has been found by the writer to indicate otherwise.
- 2 The only reference to the word 'confession' in the laws of the early Saxon kings has been in the religious context. For e.g., in the laws of Canute, it is thus ordained

"But let us very zealously turn from sins, and let us all readily confess our misdeeds to our confessors, and altogether cease [from evil] and zealously make amends."

applicable to that hundred, their sole purpose being the better management of local affairs. The written law or the king's law, which formed only a small part of the total law, was primarily concerned with the keeping of the peace. If violence were committed in another man's house, then he who committed the violence must atone to the head of that house, and atonement in this regard was monetary compensation.³ Reprisal by the injured party was discouraged,⁴ and if the offender refused to pay the amount, or because

See, A.D. Robertson, The Laws of the Kings of England From Edmund to Henry I (1925), at p. 169, and also at pp. 7, 91, 99.

3 Compensation was a fixed amount by law. The monetary value placed on a man's life, i.e. his wer, which varied in a descending scale according to his rank, was also the measure of fines payable by him for his own offences. See, William Stubbs, Select Charters (1921, 9th ed.) at p. 72. W. J. V. Windeyer, Lectures on Legal History (1938), at p. 16, et seq. William Stubbs, The Constitutional History of England (1880), vol. 1, at p. 209. et seq. Maitland, op. cit., fn. 1, at p. 4.

4 Maitland, ibid, A further purpose of the king's law was to organize the local inhabitants to take up, and give the hue and cry. In effect, this meant pursuing an offender from township to township until his apprehension. See, Bacon, Abridgement of the Law (1832, 7th ed.), vol. IV, at p. 236. Anyone who neglected this all important police duty did so under threat of fine. See, William Stubbs, Select Charters, op. cit., at p. 81.

of the seriousness of the breach of the peace the fine was not adequate, the local courts,⁵ rather than the injured party, demanded satisfaction.

At the trial of the offender, any question of fact that did arise was simply determined by putting the accused offender to the ordeal⁶, an appeal to the supernatural which was considered an effective measure of justice. The accused, however, could demand that he be allowed to bring into court eleven men of the hundred who would swear with himself that his account of the case were true.⁷

Within this framework of neighbourhood justice, the confession or the acknowledgement of a law-breaker that he committed a breach of the king's law was of little import. Detection of crime, and apprehension of

5 The courts, i.e. the hundred moot and shire moot, held only local jurisdiction. See, William Stubbs, The Constitutional History of England, supra fn.1, at p.118, et seq., Maitland, op. cit. fn.1.

6 The usual ordeals were by water and by hot iron. In the ordeal by hot iron, once the accused solemnly swore his innocence, the hot iron was applied. If the scars healed at the end of three days, the accused was innocent. See, generally, L O. Pike, A History of Crime in England (1873), at pp. 53, 54.

7 This method of trial was referred to as compurgation. Apparently, the witnesses called by an accused were really character witnesses. However, it is probable that if there were actual eye-witnesses, these persons would be included in the eleven called. See, Pike, op. cit., ibid, at p.55.

criminals were, for the most part, left in private hands. Suspicion, alone, was enough to raise the hue and cry, and the ensuing arrest and detention of the suspected had the same result in trial by ordeal, whether the suspected criminal confessed the misdeed, or whether he was entirely innocent. Once on trial, it was then a question of his "common fame", i.e. his reputation within the hundred, or whether he was able to endure the ordeal. The Saxon law did not allow for inquiry as to whether the act committed was a voluntary act on the part of the accused, and similarly, there was no consideration given to mens rea. Breaches of the king's law did not have a mental element as an ingredient, and the intentions of an accused were thus of little or no consequence.

After the Norman conquest, the local courts were left standing, but the king gave to his Council, or Curia, original and criminal jurisdiction over all matters. No longer did a suitor have to depend on the prejudices of the neighbourhood in the local courts, and more often than not, avoided this local influence by going directly to the Council. The ordeal⁸ and compurgation still existed as modes of trial⁹, but personal compensatory aspects of crime disappeared. Any act of violence

⁸ Supra, fn.6. See, for e.g., Fleas of the Crown (1200-1225) (Selden Soc.) vol.1, pp. 3,4,5,10,18,43.

⁹ In this period, combat was instituted as another mode of trial. See, Pike, Cp.Cit. fn.6, at p. 124.

committed within the kingdom was now considered an offence against the Crown, and anyone being convicted thereof was liable to be put to death, outlawed, or fined, depending on the gravity of the offence. Mutilation itself was considered a worthy expedient in trivial offences.¹⁰

By the latter half of the twelfth century, all legal administration became centralized, it being placed on a constitutional foundation. By the Assize of Clarendon in 1166,¹¹ reissued with amendments at Northampton in 1176, the rule of law had been initiated. A system of itinerant judges was established, i.e. Justices in Eyre, and were authorized to inquire

"... through the several counties and through the several hundreds, by twelve of the most legal men of the hundred and by four of the most legal men of each vill, upon their oath that they will tell the truth, whether there is in their hundred or in their vill, any man who has been accused or publicly suspected of himself being a robber, or murderer, or thief, or of being a receiver of robbers, or murderers, or thieves..."¹²

The ordeals, as methods of trial, thus began to yield to the oath of this body of witnesses. The purpose of the inquest, however, was not to solely determine guilt

10 As to the rise of the exemption of benefit of clergy, see Rike, Op.Cit., at p. 105.

11 See, Adams & Stephens, Select Documents of English Constitutional History (1920), at p. 14.

12 supra, fn.11, pp. 14, 15.

or innocence. A finding that a person was accused or publicly suspected was enough to merit arrest. Moreover, the confession of an offender was now generally accepted to be final answer, depriving the confessor of any defense by law. As the Assize stated

"And if any one shall have acknowledged robbery or murder or theft or the reception of them in the presence of legal men or of the hundreds, and afterwards shall wish to deny it, he should not have law."¹³

Although detection and arrest still depended on the hue and cry, those having custody of the offender were now encouraged by law to obtain his confession.¹⁴

By the early twelve hundreds, law was being purveyed throughout the country by the justices in Eyre, who were free to declare their own remedies.¹⁵ Pleas before these King's justices were now Pleas of the Crown, and the gravest of these was felony. They were no longer the result of an accusation by an aggrieved person. Rather, they could now be initiated by indictment

13 supra, fn. 11, p. 16

14 By the Inquest of Sheriffs, 1170, the sheriff was to be given custody of thieves. ibid., p.22

15 It is probable that during this period, English law may have been influenced by Roman law. If the justices did not have a precedent of their own, they were able to draw on the body of Roman law for help in reaching their decisions. As far as confessions are concerned, there is no historical evidence of influence.

procedure, and all men came to be protected from arbitrary arrest and imprisonment.¹⁶ But criminal investigation was still mainly a private matter, and what little there was began and ended on the obtaining of the confession of guilt from the mouth of the felon. If the accused confessed, he could expect little mercy, and the usual result was for him to be summarily hanged.¹⁷ Acceptance by the courts of the felon's confession was unconditional. There was no requirement that it be given voluntarily, or that it be made in court. Any confession made at the time of arrest, or otherwise, would be received, as long as it could be proved that it was in fact made.

16 Magna Charta, 1225 c.29, which stated

"Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae." At first, it applied only to "liber homo", i.e. free men. See generally, Windeyer, Op. Cit. fn. 3, c.vi at p.64, Proceedings on the Habeas Corpus (1627), 3 How. St. Tr. 1, at p. 18, et seq.

17 For e.g., supra, fn. 8, at pp. 7, 92.

As early as 1212, the following entry appears

"Hyngce of Spofforth and Gamel Fremantle, suspected persons, are to be hanged, for the sheriff's sergeants and the free men and the four neighbouring townships testified that they confessed a robbery of thirty-three pence done to one of the sheriff's men."¹⁸

Later, in 1225, the king's bailiff of the hundred testifies that the accused felon confessed to him when arrested the morning after the crime was committed -

"And because the king's bailiff produces suit to prove the confession made before him..."

- the accused was sentenced to be hanged.¹⁹

On the establishment of the office of coroner, it became an important function of that office to hear and record confessions. See, R.F. Hunnisett, The Medieval Coroner (1961), at p. 68, Select Coroners Rolls (1265-1313) (Selden Soc.) vol. 9, at pp. xiv, xxiv, 37, 38, Eyre of Kent 1313-4 (Selden Soc., Y.E. ser.) vol. v, at pp. liii, et seq., Fleta-Volume II (Selden Soc.) vol. 72, c.25, at p. 64, The Mirror of Justices (Selden Soc.) vol. 7, c. xlii, at p. 29. There is evidence, however, that it was not the exclusive function of a coroner. See, infra, fns. 18, 19 Select Pleas of the Crown, supra, fn. 8, at pp. 34, 66, 118, Pleas before the Justices of the King's Bench in Henry Third's Reign (Selden Soc.), at p. 128.

¹⁸ supra, fn. 8, pl. 111, at p.66

¹⁹ ibid, pl. 184, at p. 118, and see also pl. 49, at pp. 23, 24. It is important to note that the confession in this case was extra-judicial, i.e. out of court. Although the accused defended, and denied the making of it, the court accepted it, on proof that it was in fact made.

The legal philosophy of the time was solely directed to the elimination of felony, which was now being committed wholesale. The confession, whether judicial or extra-judicial, to a coroner or otherwise, was considered the means to this end. It is not, therefore, surprising to find that whether a confession was voluntary or extorted did not merit judicial consideration. The condemnation of an accused by an accused was encouraged, and the end justified the means in obtaining it, to the extent that torture began to manifest itself as an investigatory procedure. As the preamble to a later remedial statute stated ²⁰

20 Ordinances of 1311, 5 Edw.II, c.34, 1 Stats. Realm 165. As to the mode of torture, Fleta states, supra, fn. 17, c.26, at p. 66

"... may be that a man has been hung by his feet, or his nails have been torn off or he has been loaded with irons, or such-like tortures."

"For as much as many prisoners do become Approvers for the saving of their lives, and by means of diverse oppressions and pains which Sheriffs and Gaolers in whose custody they are, and set them on to approve the most sick persons of the country, and those of good fame, whom they caused to be attached, and to put into vile and hard imprisonment, and take grievous ransom of them. ..."²¹

If a suspected felon managed to endure the severe hardship of imprisonment while awaiting trial, his predicament did not end on his appearance before the king's justices. It was incumbent upon him to plead either guilty or not guilty. If he remained mute, he was immediately returned to prison until he chose to speak.²² In later years, by means fort et dure, this "choice" was eliminated, and force was applied until the accused did speak.²³ If he

21 Since many were arrested on suspicion, and endured a period of imprisonment before trial, it is difficult not to conclude that torture was employed on them, first to confess themselves regardless of their guilt or innocence, and to then turn approver to satisfy the monetary whim of the sheriff or gaoler. See, Helen M. Cam, Studies in the Hundred Rolls Some Aspects of Thirteenth Century Administration (1921), 6 Ox. Stud. Soc. & Leg. Hist., at p. 24, et seq. See also, (1293), Y.B. 21 & 22 Edw. II 184, for an example where force was applied without cause. The greatest complaint of this period was arbitrary treatment by local officials as well as the Crown. Extortion by officials was rampant, and by the Statute of Westminster (First) (1275), 1 Edw. I, some attempt was made to eliminate it. See, c.c. IX(-), XIII, XXXI, XXXII, XXXV, Also, (1326-7), 1 Edw. III, c. 3, 5, 7, (1340), 14 Edw. III, St.1, c. 9, s. 10, (1362), 36 Edw. I, c. III, s. 2.

22 ibid, c. XII

23 See, for example, (1302) Y.B. 30 & 31 Edw. I, at p. 498, 502.

pleaded not guilty, there was little chance for him to rebut the evidence against him. If he did plead guilty, and confess the contents of the charge against him, he could only look forward to immediate execution, or to being forced to abjure the realm.²⁴

The dawn of the fourteenth century ushered in the emergence of a body of Common Law,²⁵ and with it came a shift in emphasis as to what constituted felony. The strict liability of the Saxon period,²⁶ which had begun to yield in

24 See, Select Coroners Rolls, supra, fn. 17, at pp. xxiv, 38, "The only case found by the writer, where a confession was not acted upon, was in 1214, where the entry states

"The king is to be consulted about an insane man who is in prison because in his madness he confesses himself a thief, while really he is not guilty."
See, Pleas of the Crown, Op. Cit. fn. 8, pl. 113, at pp. 66, 67. It is to be noted that even in this case, although the confessor was known to be innocent, he was still confined to prison because of his confession. As to abjuration of the realm generally, see William Rastell, Entries (1596), Folio 1, & 2. Note that confession was a condition precedent, and that the confession should be voluntary, i.e. "... fatebatur voluntarie cognovit "

25 Maitland, Op. Cit. fn. 1, at p. 19.

26 Supra, p. 3.

the latter half of the thirteenth century,²⁷ had now finally yielded. Whereas previously there was little consideration given as to whether the party's action was voluntary or whether he intended to do the act, it now became necessary that in order for legal consequences to attach, the act must not be the product of duress or compulsion.²⁸ For some years, it was recognised that malice was the sole cause of many appeals²⁹ in the courts, and by 1338, the question arose whether an averment touching motives in a civil action need be answered on the analogy of malice in a criminal case.³⁰

As early as 1302, confessions are seen to be the result of duress, and if objected to at trial, it appears

27 For e.g., (1267), 52 Hen. III c.25, the Statute of Marlborough, it is stated

"Murder from henceforth shall not be judged before our justices, where it is found Misfortune only: But it shall take place in such as are slain by Felony, and not otherwise."

And see, Statute of Westminster (Second) 1285), 13 Edw.1, st.1, c. xxxiv;

28 See, (1340), Y.B. 14 Edw. III at pp. 112, fn.1, 556, 557, Y.B. 11 Ric. II 1387-1388, (The Ames Foundation), at pp. 9, 12, 169. See also, Y.B. 13 Ric. II 1389-1390 (The Ames Foundation), at p. 60.

29 Statute of Westminster, supra fn. 27, preamble; See, also, infra, fn.31

30 (1338 -9) Y.B. 12 & 13 Edw. III 80; See also, p.82, By 1403, the mental element, i.e. mens rea was referred to in statute as "malice prepensed." See (1402-4) 5 Hen. IV, C.V. By the 17th century, it could be stated that "... a crime is not a crime unless the desire to harm is present... Intention and purpose distinguish crimes." See, Fleta, supra, fn.17, c.31, at p.80

that inquiry was held into the alleged extortion.³¹

Similarly, in the case where felony was committed by a wife, under coercion by her husband, and the same was complained of by her at her trial, the justices enquired into her allegation. As the entry states:³²

"Un feme fuit arraine de $\bar{c}$ $\bar{q}$ el aver felon emble ijs de pain, $\bar{q}$ dis $\bar{q}$ l le fist per comandēnt mes pristeront l'enquest, per $\bar{q}$ fuit trove que el' le fist per cohercion de son baron maugre le soē, per que el' ala quite, & dit fuit $\bar{q}$ (?) command de baron son auter cohercion, ne ferra nus manner de felone, & C."

In both cases, however, it is to be noted that the accused had first to object, and even then it was a matter of judicial discretion whether inquiry was made into the circumstances of the alleged coercion. At this time, there was still no rule of law requiring confessions to be voluntary, but if an accused felon did voluntarily confess, he was allowed to abjure the realm.³³

31 (1302) Y.B. 30 & 31 Edw I., Appendix II, at p. 543. The entry states in part: "Qui quidem Ricardus in curia comparens cognovit confessionem suam, sed dixit quod eam fecit rigore et dirricione quam sustinuit in prisiona, ut sic relevari posset ab augustia." It is to be noted that the confession was said to have been made to escape the atrocities practised in prison. See, supra, fn. 21, also, Statute of Westminster, supra, fn. 21, C. XIII. See, infra, fn. 52.

32 Y.B. (1354) Edw. III, Pt. 5, (Lib. Ass.) pl. 40, at p. 137, sometimes briefly cited as 27 Ass. 40.

33 See, supra, fn. 24.

During this period, there was no organised police force, and the highways were still laden with robbers, with theft, murder and rape being common occurrences. By (1327) 1 Edw. III, stat. 2, c. 16, good and lawful men were assigned as keepers of the king's peace, and nine years later³⁴

"... because of the great mischiefs that have happened in the Realm, through Thieves, Felons and other evil persons ... there shall be assigned in every county good men and true, and having authority to inquire, hear, and determine..."

the causes thereof, as well as power to arrest and imprison the felons, or suspected felons. The powers of these justices of the peace were statutorily expanded,³⁵ and an accused felon, rather than receiving protection from the law, found himself being arrested, imprisoned, and interrogated by the person who was also to prosecute, judge, and inevitably finally punish him.

The institution created was a move away from inherited feudal jurisdictions. The justices of the peace were local people, but representatives of the king,³⁶

34 (1336), 10 Edw. III, stat. 2, c.3.

35 (1344), 10 Edw. III, stat. 2, c.5, (1360), 34 Edw. III, c.18, (1414), 2 Hen. V., stat. 1, c.4, 2 Hen. V. stat. 2, c.5, (1423), 2 Hen. VI, c. 18, (1441-2), 20 Hen. VI., c.8, (1444-5), 23 Hen. VI, c.4.

36 See, (1344), ibid, where they are referred to as "Keepers of the Peace by the King's Commission." Since the king claimed the sole right to exact the oath, it was by this agency that the justices of the peace had power to do the same, although in some cases, it was spelled out in the statute, as in (1414) 2 Hen. V, stat. 1, c.4.

and although it seemed to be against the trend of royal centralization it was in effect a shrewd utilisation of local gentry with local connections by the king for his own purposes. In effect, the king's agents were everywhere, and these agents were the justices of the peace. They were not authorised to use torture within the common law or by their originating statutes,³⁷ but armed as they were by royal prerogative,³⁸ there was little they could not do to attain their object of confession and conviction. The rights of the Crown took precedence over the rights of the individual, and although the rule of law as then understood was not obliterated, it was relegated to a secondary position on conflict with royal prerogative.

The justices of the peace had as their example the King's Council itself, which by virtue of this prerogative, examined accused parties as well as witnesses, on oath with the sole purpose to extort a

37 In some cases, the oath was authorized. See, supra fn.36

38 The king early claimed the right to torture. In Pipe Roll, 34 Hen. II, North.10, the entry states,

"Petrus Filius Ade reddit quandam mulierem
et eam tormentavit sine licentia Regis" (My italics)

See, Felton's Case (1628) 3 How. St. Tr. 367, at p. 371, where the question for the judges, regarding torture by the rack was:

"... the question therefore is, whether by the law he might not be racked, and whether there were any law against it, (for said the king) if it might be done by law, he would not use his prerogative in this point." (My italics)

confession.³⁹ Confession was the only assurance of condemnation, and if there were several to be examined, they were examined singly in private, the testimony of one being played against that of the other to reveal names of accomplices as well as to resolve any discrepancy.⁴⁰

By the close of the fifteenth century, the Court of Star Chamber had been established, its purpose being to quell the continuous rise of felony, as well as the persistence of extortion and bribery among officials.⁴¹ Acting as it did on the slightest suspicion, and armed as it was with the rack, press, thumb screw and other instruments of torture to aid its interrogation of prisoners,⁴² a person could find himself summoned, without warning or reasons given, before the Court to be examined

39 See, generally, (Selden Soc., vol.35) Select Cases Before the King's Council (1243-1482), Introduction, and at pp. 70, 72. The examination procedure appears early in the reign of Edw.II. See, Cal. Cl. Rolls 2 Edw. II, 132, 6 Edw. II, 559, and J.F. Baldwin, The King's Council in England During the Middle Ages (1913) at p. 296, et.seq.

40 For e.g., Esturmy v. Courtenay (1392), Select Cases, ibid, p. 77, at p. 79. Written confessions were preferred, and obtained where possible.

41 (1487), 3 Hen. VII, c.1 Note preamble.

42 According to Professor Maitland, the first historical evidence of torture was in 1468. Op. Cit. fn. 1, at p. 221. But see, supra, fn. 38.

upon oath to answer the charge against him. In a felony examination, there was no presumption of innocence in favour of an accused, and presumed guilty as he was, the sole purpose of his interrogation was to obtain his full confession.

Whether the accused at first confessed was of little import. If he did not, the same was obtained by use of the rack. If he did, he was still tortured to provide material details to satisfy the charge, or names of his accomplices.⁴³ Nor was there any advantage to one summoned, not to appear. Its spies were everywhere, and orders were issued to justices of the peace to act as its agent, torture usually resulting whether it was authorised by the orders or not.⁴⁴

43 See, Trial of Edmund Peacham (1615), 2 How St. Tr. 869, where at p. 871, it is stated that he "... was examined before torture, in torture, between torture and after torture..."

44 As to the court generally, see J.S. Holdsworth, A History of English Law, vol. 5, at p.184, A.T. Carter, A History of English Legal Institutions (1910), c.XIV, Select Cases in the Star Chamber (1477-1509) (Selden Soc., vol.16), Introduction, and at pp.72; Select Cases in the Star Chamber (1509-1544) Selden Soc., vol. 10 Introduction, and Baldwin, Op. cit., fn.39. Although the measures employed by the Court of Star Chamber are repugnant to any modern conception of law, undoubtedly the Court was a champion in its own era, in the cause of eliminating the widespread lawlessness - rape, robbery, murder - which plagued the country, by demanding and obtaining respect for the law when disrespect was the order of the day. If one considers the Court from this standpoint, it might well be argued that the end justified the means.

The powers of the judges were further expanded in 1554⁴⁵ and 1555,⁴⁶ and the rights of an accused were even further subjugated to the whim of an overpowerful Crown. On arrest of a suspected felon, it was ordered that the justices

"... shall take the examination of such prisoner, and information of those that bring him, of the fact and circumstance or as much thereof as shall be material to prove the Felony...⁴⁷,

and the judges interpreted their powers widely in their search for evidence against the accused. Any exonerating evidence that did appear was strictly by accident, and the last consideration was the fairness of the examination to the accused. They considered it their duty to get enough evidence to condemn the accused, and there was little concern for the manner in which it was obtained.⁴⁸ At the trial, the result of such examination was received as best evidence and without question. The accused stood little chance of a fair hearing, and usually he was unaware of what the charge was or who his accusers were. Without

45 (1554), 1 & 2 Phil. & M., c. 13.

46 (1555), 2 & 3 Phil. & M., c. 10.

47 ibid.

48 See, Maitland, Op. cit. fn. 1, at p. 233, Holdsworth, Op. cit. fn. 44, at p. 191, et seq. At the common law, the justices were prohibited in the use of this procedure, hence the need for the statutes. See, infra, fn. 56.

counsel to defend him, and unable to lead evidence, he was forced to defend himself and accept the inevitable, or to hope against hope that the judges would have the uncommon decency to return him to the confines of prison.

By this time, however, the early common law doctrine as regards confessions, which had been in existence since the fourteenth century⁴⁹ and which was often avoided or ignored, was now given new vitality. As early as 1547, it was incorporated into statutes concerning treason, when it was provided:

"... That no person... shall be indicted, arraigned, condemned or convicted for any offence of treason... unless the same ... be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same."⁵⁰

Staundforde, writing in the latter half of the sixteenth

49 supra, fn. 32. fn. 31,

50 ^{see,} (1547), 1 Edw. VI, c. 12, S. 22, (1551), 5 & 6 Edw. VI, c. 11, S. 12, (1554), 1 & 2 Phil. & M., c. 10, S. 11, (1559), 1 Eliz, c. 5, S. 10.

stated the doctrine in the following manner ⁵¹

- 51 (1583), Les Plées del Coron at p. 142, See also, 1607 edn., b.2, at p. 142 where the following translation is given

"If one is indicted or appealed of felony and on his arraignment he confesses it, this is the best and surest answer that can be in our law for quieting the conscience of the judge and for making it a good and firm condemnation, provided however, that the said confession did not proceed from fear, menace, or duress, which if it was the case, and the judge has become aware of it, he ought not to receive or record this confession, but cause him to plead not guilty and take an inquest to try the matter."

In Cowel's Interpreter (1701), under "Confession of Offence", it states in part

"... so that it proceeds freely of his own accord, without any threats, force, or extremity used For if the Confession arise from any of these Causes, it ought not to be recorded..."

See also Jacob's Law Dictionary (1729) to the effect, Robert Brooke, La Graunde Abridgement (1586), at p. 108, Anthony Fitzherbert, La Graunde Abridgement (1577), at p. 199. At first blush, this would appear to be a different doctrine than that exposed in the treason statutes. However, see (1547), 1 Edw. VI, c.12, s.10 referring to "confession of offence".

"Si un foit indite, ou appelle de felony & sur son arraignment il ceo confessa, cest le plus mieux sure respons, que puit estre in nostre ley, a quieter la conscience de l iudge, & a faire bon firm condemnation, si issint foit que le dit confession ne proceda das c' pauour, manace, ou dures, quel sil sait & le iudge le percevra, il ne doit prendre ou recorder cel confession, eins causer luy pleder de rien cupable, & prendre un enquest a ceo trier, come fuist fait an."

This doctrine as regards the confession of an offence made no reference to extra-judicial confessions, and seemed only to apply to the plea of guilty. But it was early realized that, although the confession of the indictment was judicial, it usually depended on a pre-trial examination of the prisoner, out of court, and it was to this out-of-court interrogation of the prisoner that the rule was directed. If such confession was the result of menaces or duress, or other physical compulsion, it was considered to be of little reliability. But if, on the other hand, physical compulsion was entirely absent, the confession of the indictment as to matter and form was treated as best evidence. The rule presumed that all confessions were willingly given, and if they were not, it was upon the accused to

object.⁵²

Nor was this the only change in the law that favoured the accused in this period. Liberty now demanded that the law, which for centuries was a good deal overridden by prerogative of the Crown, be biased in favour of the accused. By 1590, this public demand manifested itself as a rule of law,⁵³ and in Leigh's Case

52 Extra-judicial confessions were accepted early in the thirteenth century. See, supra fn. 18, and especially, supra, fn. 19, and see, supra, fn. 31, 32. See, Trial of Guy Fawkes, et al. (1606), 2 How. St. Tr. 159, at p. 185, concerning confessions, on apprehension. See, also Trial of Henry Garnet (1606), 2 How. St. Tr. 218, at p. 233, where Coke alleges the accused "denieth those things which before he had freely and voluntarily confessed." In the Trial of Sir Walter Raleigh (1603), 2 How. St. Tr. 1, the accused produced a letter from Lord Cobham, his accuser, which letter now exonerated him. As to what took place in the courtroom, the Reporter states.

"Here was much ado Mr. Attorney alledged, that his last letter was politicly and cunningly urged from the Lord Cobham, and that the first was simply the truth, and that lest it should seem doubtful that the first letter was drawn from my Lord Cobham by promise of mercy, or hope of favour, the Id. Ch. J. willed that the jury might herein be satisfied. Whereupon the earl of Devonshire delivered that the same was mere voluntary, and not extracted from the Lord Cobham upon any hopes or promise of pardon."

53 Udal v. Walton (1590), 14 M. & W. 256.

quoted by Coke, C.J., in Burrowes v. Court of High Commission⁵⁴, the principle was affirmed that nemo tenetur prodere seipsum - no man should be compelled to accuse himself. As Hardres argued, pro defendente, after referring to the above principle, in The Attorney-General v. Mico⁵⁵

"Upon this ground though the parties own confession of a crime be the clearest proof in the law, yet if such confession proceed from dread, or be extorted by any compulsion, it ought not to be received against him."

and compulsion included use of the oath.⁵⁶

54 (1605), 51 L.R. 43

55 Hardres 139, (1657), 145 E.R. 419.

56 There is authority which suggests that the rule existed much earlier. Lambard, in his Epitome (1619), states at p. 213, referring to the statutes of

"For at the Common Law, Nemo tenebatur prodere seipsum, and then his fault was not to be wrung out of himself but rather to be discovered by other means and men." (See, also, 1577 & 1599 edns.)

This suggests two points. First, if Lambard is correct, no examination procedure was allowed by the common law, prior to 1554. Second, that the rule contained in the maxim, at least in this period, included confessions, and was broad enough to include any form of compulsion. Hardres apparently agreed with this suggestion. supra, fn. 55,

It is difficult not to accede in this opinion. There is, however, authority indicating that it referred to compulsion by oath only, i.e. privilege against self incrimination. As early as 1603, Popham, L.C.J. stated "God forbid any man should accuse himself upon his oath" See, Trial of Sir Walter Raleigh, supra, fn. 52, at p. 19. No reference was made to the maxim itself. See, however, for reference to maxim, Trial of John Crook, (1662), 6 How. St. Tr. 202, at p. 205.

Although the use of torture persisted throughout the first half of the seventeenth century,⁵⁷ after 1640, instances of it to extort confessions were a thing of

See also, Trial of the Lady Frances Countess of Somerset (1616), 2 How. St. Tr. 951, at p.986, Trial of Audley (1631), 3 How. St. Tr. 401, at p.413, In the Trial of Lawrence Fitz-Patrick et al. (1631), 3 How. St. Tr. 419. Hyde, L.C.J., states "... the law did n t oblige any man to be his own accuser." As to the use of the maxim, see Penn & Meads Trial (1670), 6 How. St. Tr. 951, at p. 957-958. In some cases, justices of the peace were given authority to use the oath in the early 15th century. Quaere, whether Lambard's observation would apply as early as this. See, Sollom Emlyn, Preface (1730) 1 How. St. Tr XXII, at p. XXV. n.C. Conset, The Practice of the Spiritual or Ecclesiastical Court (1708), at p. 384.

57 Torture was also employed in this period in suspected cases of witchcraft. In the case of the Lancashire Witches, in 1612, before Altham and Bromley, J.J., women "were successively apprehended... and were all of them by some means induced, some to make a more liberal, and others a more restricted confession of their misdeeds in witchcraft..." Trial of Mary Smith (1616), 2 How. St. Tr. 1050, Essex Witches (1645), 4 How. St. Tr. 517, Suffolk Witches (1682), 6 How. St. Tr. 648. See, Remarkable Trials and Notorious Characters, Anon. 1871, at pp. 12, et seq. See, also, Pike Op. Cit. fn. 6 vol. 2. at p. 132, et seq. p. 235, (), 33 Hen. VIII, c.8, () 5 Eliz. c. 16, as to statutes dealing therewith.

the past.⁵⁸ The abolition of torture, and the emergence of a rule relating to confessions,⁵⁹ based as they were on the general premise that no man should be compelled to accuse himself, were the culmination of a lengthy protest against the inquisitorial and manifestly unfair methods adopted centuries before by the Star Chamber and the justices of the peace. But it was more than this. It was a manifestation of a changing legal philosophy, an awakening of the conscience to the belief that the end no longer justified the means. It was a demand for liberty

As to torture in Star Chamber, see Trial of Edmund Leacham, supra, fn. 43, Trial of Sir Walter Raleigh, supra, fn. 52, at p. 22, In Feltons Case, supra, fn. 38, the judges decided that torture by the rack was unknown to English law. However, other methods of torture persisted beyond this date. See, for e.g., Proceedings in the Star Chamber against Dr. Alexander Leighton (1630), 3 How. St. Tr. 383, at p. 386.

58 The Court of Star Chamber was abolished by (1640), 16 Car 1, c.10. But see, Tonge's Case (1662), 6 How. St. Tr. 225, which suggests at least the threat of torture was still possible. leine forte et dure, although not strictly torture, was abolished by 12 Geo. III, c.20. See Pike, Co. Cit. fn.6., vol.2, at pp. 283-284; See, also, supra, fn. 22 & 23,

59 See, The Trial of John Gerhard et. al. (1654), 5 How. St. Tr. 518, where a witness against accused, denies allegations made by him in an earlier examination before the justice of the peace, on the grounds, that the examination was extorted. Note that the justice of the peace had to be sworn to give testimony that the examination was voluntary.

and protection for the individual against the improper exercise of arbitrary power, and as such, marked the beginning of what is considered the modern conception of the rule of law.

Within the framework of the law of nature, it was recognized that man was naturally endowed with two faculties - understanding and liberty of the will.⁶⁰ The absence of both demanded that where there was no will to commit an offense, there must then be no penalty within the law. The strict liability of the Saxon period, which began to give way on the rise of common law, early in the fourteenth century, was now but a memory to a society which demanded that penalty should only be the result of voluntary conduct. As Lord Hale stated

"And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions."⁶¹

Although the rule that confessions, in order to be accepted, must be voluntary was in evidence for more than a century, it was not until the first half of the eighteenth

60 Sir Matthew Hale, Historia Placitorum Coronae (1736), p. 14. Lord Hale died Dec. 25, 1676. The printing of this work was commissioned on June 29, 1680, and printed in 1736. See, also, p. 304.

61 ibid., at p.15.

century that the overriding powers of the justices of the peace under the examination statutes⁶² began to wilt under objection.⁶³ The justices had considered that those statutes gave them authority to ignore the well-established common law doctrine, but by the early seventeen hundreds, the demise of this assumed authority was well in progress. In 1741, in the Trial of Charles White⁶⁴ for murder, the

62 supra, fn. 45, 46.

63 Promises of favours and mercy as a means of inducing a confession were in existence at the same time as torture. See, Trial of Sir Walter Raleigh, supra fn. 52, at p. 29. Trial of the Lady Frances Countess of Somerset supra, fn. 56 at p. 989, Trial of Guy Fawkes et al. (1606), 2 How. St. Tr. 159, at p. 203, The Trial of John James (1661), 6 How. St. Tr. 67, Objections were few, mainly because an accused was usually not represented by counsel, and unable to lead witnesses. If there was an objection, it was usually the word of accused against that of justice of peace. See, Trial of Francis Francia (1717), 15 How. St. Tr. 898 at pp. 920, 921, But it was still necessary for the justice of the peace to give testimony to refute accused's allegation, See, also, Trial of James Mitchell (1677), 6 How. St. Tr. 1208, at p. 1209, as to an attempt to extort a confession by promises of pardon. It was generally assumed that examination resulted in confession. Trial of John Twyn, et al. (1663) 6 How. St. Tr. 513, at p. 530, per Hyde, L.C.J. See, also Trial of John Woodburne et al. (1722), 16 How. St. Tr. 54, at pp. 62, 63, as to confession to a constable.

64 (1741), 17 How. St. Tr. 1079, at p. 1085.

stain had been removed. In that case, counsel for the prisoner asked

"... Was the confession voluntarily made or not? for if it was not voluntarily [made], it ought not to be read."

The Recorder replied thus

"... That is an improper question, unless the prisoner had insisted and made it part of his case, that his confession was extorted by threats, or drawn from him by promises, in that case, indeed, it would have been proper for us to enquire by what means the confession was procured but as the prisoner alleges nothing of that kind, I will not suffer a question to be asked the clerk, which carries in it a reflection on the magistrate before whom the Examination was taken. Let it be read."

It was now clear that the court would inquire into the examination held by the justice of the peace to see if the resulting confession was in fact a product of the free will of the accused. But it would not do so proprio motu. It was necessary, as it had been at the inception of the rule, that the accused objected,⁶⁵ and only on this objection would inquiry be made into the circumstances of the examination. The court presumed that all confessions were voluntary, and since the abolition of torture⁶⁶ this

65 See, Staundforde, Op.Cit. fn.51, where the pertinent wording is, "... quel sil sait & le iudge le percevra", i.e. if it comes to the attention of the judge. See, also, supra, fn. 32, fn. 32, and fn.19, for e.g.

66 supra, fn. 58, For reference as to "voluntary without torture", see Hale, Op. cit. fn.60, at p.304, For reference, "voluntary without compulsion", see Gilbert, The Law of Evidence (1754), at p. 139.

presumption took the form of absence of threats and promises. The rule was not that all confessions, in order to be admissible, must be voluntary. Rather, it was that all confessions are admissible as being voluntary, subject to the objection of the accused and inquiry by the court.⁶⁷

By the latter half of the century, the new attention given to the confession rule was easily justified. The new philosophy as regards criminal law generally, argued that, because a man would not lightly speak out against his interest, his voluntarily speaking out against his interest must therefore be entitled to great weight. The necessary corollary to this proposition was that, if an accused person did speak out against himself as a result of compulsion and not by voluntary choice, it was entitled to little weight, not because it was considered to be untrue, but because of the possibility of its untruth. As Beccaria argued in his Essay on Crimes and Punishment

67 In Trial of John Woodburne & Arundel Coke *supra*, fn. 63 at p. 62, 63, a confession to a constable and gaoler was accepted. There was no objection in this case because that confession was undoubtedly voluntary. See, Woodburne's evidence, at p. 68, 69. In Willis' Trial (1710), 15 How. St. Tr. 614, at p. 623, the confession was objected to, not because it was the result of duress and therefore involuntary, but because it did not alone satisfy the charge of treason within the statute.

"... it is confounding all relations, to expect that a man should be both the accuser and accused, and that pain should be the test of truth, as if truth resided in the muscles and fibres of a wretch in torture. By this method, the robust will escape, and the feeble be condemned... Torture will suggest to a robust villain an obstinate silence, that he may exchange a greater punishment for a less, and to a feeble man confession, to relieve him from the present pain, which affects him more than the apprehension for the future."⁶⁸

It was recognized that an accused must be able to choose freely whether to speak or remain silent, and cases began to appear in justification, that where this free choice was impaired by external stimuli, false confessions resulted.⁶⁹

In 1775, Mansfield, C.J., on the return of a writ of habeas corpus to the Court of King's Bench, was able to state, obiter ⁷⁰

"The instance has frequently happened, of persons having made confessions under threats or promises the consequence as frequently has been, that such examination and confessions have not been made use of against them at their trial."

⁶⁸ (1807), at p. 52.

⁶⁹ For e.g., In the case of Richard Coleman, tried in 1749, at the Kingston Spring Assizes, the confession of the accused given while intoxicated was received in evidence, only to find after execution of the accused, that the confession was false. See, Wills, Circumstantial Evidence (6th edn.), at p. 128.

⁷⁰ R. v. Rudd (1775), 1 Lea. 116 168 E.R. 160, at p.161. Here, the justices of the peace promised her, on her examination before them, that if she spoke the truth, she would be safe from prosecution.

Eight years later, the basis of the rule was authoritatively stated in the case of R. v. Warickshall,⁷¹ where an accessory to grand larceny confessed as a result of promises of favour. In rendering judgment, the court comprised of Eyre, B., and Wares, J., stated ⁷²

"Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. 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, but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected."

Before the close of the eighteenth century, the rule relating to confessions had undergone a notable change. Previously, the rule was simply that voluntary confessions were admissible. Now, however, because of the rise in incidence of objections to extra-judicial confessions at trial, the judges took upon themselves a discretion to

71 (1783), 1 Lea. 263, 168 E.R. 234, In this case, the promise was held out by the prosecution, who would appear to be the owner of the stolen goods.

72 ibid, p. 234-235. It is to be noted that the court does not lay down the rule that confessions must be proven to be voluntary, before they are admissible. This case, as well as supra, fn. 70, depended on the objections of counsel that the confessions were the result of promises. Otherwise, the point would not have been considered, as there was no onus on the Crown, before objection, to prove voluntariness. But see, infra, fn. 73.

refuse those confessions tendered, that did not appear to be voluntary, thereby imposing a burden on the Crown. As Hotham, B., stated, in The King v. Thompson

"I must acknowledge, that I do not like to admit confessions, unless they appear to have been made voluntarily, and without any inducement. Too great a chastity cannot be preserved on this subject."⁷³

All methods employed in obtaining confessions from the accused came under strict scrutiny of the court, and even the slightest hope of mercy was sufficient to invalidate a subsequent confession.⁷⁴ The courts were not concerned whether the hope or threat, or other inducement could reasonably lead to the confession or whether in fact it resulted therefrom. The capacity of the inducer as to whether or not he could effect the threat or promise was not in question. On the other hand, if it were voluntary, it was acceptable, regardless of whether it was given at the moment of apprehension, or while accused was in custody.⁷⁵

In the early nineteenth century, however, this stringent exclusionary policy was to dissolve under a barrage of imposed conditions. The wide scope of inducement was narrowed, and only those confessions as a

⁷³ (1783), 1 Lea. 291, 168 E.R. 248, at p. 249.

⁷⁴ Cass' Case, ibid, fn. (a), Hall's Case (1790), 2 Lea. 559, 168 E.R. 382 fn. (a).

⁷⁵ The King v. Lambe (1791), 2 Lea. 553, 168 E.R. 379.

result of inducement held out by persons in authority⁷⁶ were excluded, and the problem was one of reconciliation of the rights of an accused with law enforcement, and the duties of the rising number of police.⁷⁷ It was not until 1914 that the modern rule relating to confessions was authoritatively stated by Lord Sumner, in the leading case of Abraham v. The King,⁷⁸ where he observed

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecutor to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

76 infra, c.3.

77 infra, c.8

78 [1914] A.C. 599, 24 Cox C.C. 174 (1.C.), at pp. 180, 181

CHAPTER TWO

THE PROPER TEST OF ADMISSIBILITY

By the turn of the nineteenth century, the evidential rule that a confession, in order to be admissible must be voluntary, had become entrenched in English law.⁷⁹ But, although there was no judicial challenge as to the existence of the rule authoritatively expounded in R. v. Warickshall,⁸⁰ the seed of judicial uncertainty as to the meaning of "voluntary" within the rule, had been planted early. This seed, throughout the century had germinated, matured and blossomed into a series of inconsistencies, leading only confusion to the law relating thereto, and seriously restricting the operation of the rule itself.

Since most, if not all, cases which came on for determination involved something being said to the accused in custody, the test of admissibility early adopted by the judges was whether or not the words spoken amounted to a promise or a threat.⁸¹ If they were so held to

79 infra, fn. 80. R. v. Rudd, supra, fn. 70, R. v. Thompson, supra, fn. 73, Cass' Case, supra, fn. 74, Hall's Case, supra, fn. 74, R. v. Lambe, supra, fn. 75.

80 supra, fn. 71

81 It was the well-established custom of the police to state in evidence at a trial that they neither threatened nor made promises to the accused. See, R. v. James et al. (1834), 1 Cent. Cr. Ct. C. 241 (Littledale, J.), at p. 242, R. v. Moore (1834), 1 Cent. Cr. Ct. C. 7 (Denman, L.J.), at p. 8. See also, R. v. Thornton (1824), 1 Lew. 50, 168 E.R. 955, (C.C.R.) R. v. Rudd, supra fn. 70

constitute a threat or promise, the confession was not received, and in the latter half of the eighteenth century, this tended towards an accurate definition of voluntary, as long as the sole circumstance in each case was something being said to the accused. However, in the early eighteenth century, with the growth of a professional body of police, an accused in custody found himself being induced to speak, not only by what was being said to him, but also by what was being done to him. Yet, the judges adhered to the threat-promise test of admissibility, ignoring as it did the added forms of inducement, and limiting the operation of "voluntary" within the rule.

In the case of R. v. Thornton,⁸² a fourteen year old boy was illegally arrested, and although the magistrates were sitting, he was not immediately arraigned. While in confinement he was deprived of food until after he confessed. Bayley, J., thought it worthy of consideration whether a confession extracted within these circumstances, and where the conduct of the police was calculated to intimidate, was admissible, and reserved the point for the opinion of the judges. On rendering the reserved judgment, a majority of the judges, comprised of Abbott, C.J., Alexander, C.B., Graham, B., Park, J., Burrough, J., Garrow, B., and Hullock, B., held that the confession was admissible, solely because no threat or promise had been held out.

⁸² supra, fn.81

It is clear from this case that whether a confession was voluntary was limited to the negative answer of whether a threat or promise was held out to the accused. It was an objective test and compulsive circumstances which probably did operate upon the mind of the accused to confess, were not to be considered. Even if the trial judge was satisfied that it was not in fact voluntary,⁸³ it was still admissible, unless a promise or threat was evident and regardless of whether the police calculated to intimidate the accused in order to extort a confession. What was "voluntary" was narrowly defined as being without threat or promise, to the exclusion of all other heads of inducement.⁸⁴

83 Apparently, as was Bayley, J., the learned Best, C.J., and Holroyd, J., who together formed the dissenting minority in the reserved judgment. supra, fn. 82

84 See, R. v. Scott (1856), D. & B. 47, 169 E.R. 909, per Campbell, L.C.J., at p. 914, for a categorical statement to this effect. Compare to his previous decision in R. v. Baldry (1852), 2 Den. 430, 169 E.R. 568 (C.C.R.). See also, R. v. Reason (1872) 12 Cox C.C. 228. If the sole circumstance was a question of what was spoken to the accused, the test is approved as being a satisfactory meaning of voluntary within the rule. See, R. v. Jarvis (1867), 10 Cox C.C. 574, per Kelly, C.B. at p. 576, R. v. Baldry, supra, per Pollock, L.C.B., at p. 573, and Erle, J., at p. 574,

A second test of admissibility, adopted by Coleridge, J., in R. v. Spilsbury,⁸⁵ was that

"... to render a confession inadmissible, it must either be obtained by hope or fear."

Although this was apparently similar to the threat-promise test, there were, however, inherent differences. Whereas the previous inquiry was based on objective criteria, this test was subjective, in the sense that "hope" and "fear" were states of mind of the accused, and unless the confession of the accused could be said to be actually caused by "hope" or "fear", it would be admitted in evidence. As Williams J., observed in R. v. Mansfield ⁸⁶

85 (1875), 7 C. & L. 187, 173 E.R. 82, see, also, R. v. Vernon (1872), 12 Cox C.C. 153, per Cleasby, B., R. v. Gilham, *infra*, fn. 162, R. v. Arickshall *supra*, fn. 71, where "the flattery of hope" and "the torture of fear" were intended as broad examples of inducement, R. v. Thompson (1893), 17 Cox C.C. 641 (C.C.R.), per Cave, J. at p. 645, approved in Ibrahim v. R., *supra*, fn. 78.

86 (1881), 14 Cox C.C. 639, at p. 640, See, also, R. v. Gillis (1865) 11 Cox C.C. 69 (Ir) R. v. Unsworth (1910), 4 Cr. App. R. 1, Compare to R. v. Toole (1856), 7 Cox C.C. 244, per Pigot, C.B., and R. v. Thompson, *ibid*, per Cave, J.

'The true principle which renders the confession of a prisoner not receivable in evidence seems to be that if the confession is made either under fear caused by a threat, or in hope of ultimate forgiveness or gain held out by a person in authority, that then it is not admissible."

Whereas Coleridge, J. limited the meaning of voluntary within the rule to the categories of hope and fear, Williams, J., not only limited these categories to threat and promise, but also added the further restriction that the confession must actually result from either the threat or promise, the result of which was to limit the operation of "voluntary" even more than the previous test had done.

These judicial considerations, although leading to a series of confused and irreconcilable decisions, did not strike at the basis of the rule. In both cases, they were simply efforts on the part of individual judges to either arrive at a satisfactory meaning of voluntary on the particular set of facts before them, or to limit what they considered its meaning to be, to a clearly defined scope of operation.

However, an heretical doctrine had arisen, which, in the form of a further test of admissibility, had sought to undermine the voluntary rule itself. Eighteenth century legal philosophy.⁸⁷ argued that no-one could be

87 See, supra, fn. 68, 72.
Op. Cit. at p. 139

(1754), Gilbert,

compelled to incriminate himself and therefore only voluntary confessions were admissible. Induced confessions were inadmissible primarily because they were induced, i.e. not voluntary, as being the product of compulsion. The object of the rule was to eliminate compulsion, and facts obtained thereby, regardless of their relevancy, or truth, were unacceptable as proof against an accused.

In the nineteenth century, however, this philosophical basis of the rule was misconstrued. In R. v. Gilham,⁸⁸ it was stated

"The true principle of exclusion and that on which all the authorities quoted rest, is that confessions obtained by hopes of pardon and fears of punishment are made under the influence of a class of motives that may lead to falsehood."

Eight years later, this was translated into a test of admissibility, and a categorical denial of the proper test of whether the confession is voluntary, in the sense of being without compulsion or inducement, when Coleridge, J., deposed⁸⁹

⁸⁸ supra, fn. 85

⁸⁹ R. v. Thomas (1836), 7 C. & P. 345, 173 E.R. 154, approved in R. v. James (1909), 2 Cr. App. R. 319, per Darling, J.

"The only proper question is whether the inducement held out to the prisoner was calculated to make his confession an untrue one?"

This flew in the face of the rule that a confession, to be admissible, must be voluntary, and as a test of admissibility, had several defects. It emphasized the mind of the inducer, as manifested by the inducement used. No regard was had to the accused. Involuntary confessions, if they were not in fact calculated to result in falsehood, would be admissible regardless of whether they were true or false. Voluntary confessions would be inadmissible, if the inducements were calculated to lead to an untruth, even if the resultant confession was in fact true.

The same rule was adopted by Littledale, J., when he observed, in rendering judgment in the case of R. v. Court 90

"The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself guilty of an offence which he really never committed."

Mr. Justice Coleridge, apparently recognizing the obvious defects, attempted a restatement of his

90 (1836), 7 C. & P. 487, 173 E.R. 216, approved by Rolfe, B., in R. v. Holmes (1843), 1 C. & K. 248, 174 E.R. 796, and see, R. v. Garbett (1847), 1 Den. 236, 169 E.R. 227 (C.C.R.).

position in R. v. Hornbrook,⁹¹ when he explained

"A prisoner is not to be entrapped into a confession, and before any such evidence is received it must be seen that his mind is entirely free from every false hope or fear that would be likely to operate upon his mind, and induce to say that which is not true. That is the principle upon which all these cases are decided. Has anything been said to the party to induce him to state that which is not true, under a hope that he shall thereby benefit himself."⁹²

By relating this test to the previous hope - fear doctrine,⁹³ the learned justice restated the emphasis to be on what operated on the mind of the accused, rather than on what was "calculated"⁹⁴ by the inducer. But by qualifying the categories of hope and fear with "false", and limiting the test to what was said to the accused, further defects were added. Anything other than a false hope or fear held out to an accused, would not be grounds for rejection, regardless if it were likely to result in an untrue confession. Similarly, if nothing was said to induce a confession, it would be receivable, regardless if it were not voluntary as

91 (1843), 1 Cox C.C. 54, sub nom. R. v. Morton (1843), 2 Mood. & Rob. 514, 174 E.R. 367.

92 supra, fn. 13, at p. 55

93 supra, fn. 7

94 supra, fn. 11

being extorted by physical, or forms of psychological compulsion. Furthermore, if the false hope or fear held out to an accused was to benefit not himself, but, for example, a member of his family, the resulting confession would apparently be received, regardless of whether it was likely to lead him to say that which was not true, or whether it was not voluntary.

Although the test was refused by Erle, J. in R. v. Garner⁹⁵ and repudiated as being too narrow by Cresswell, J., in R. v. Day,⁹⁶ it continued to exist. In 1852, the learned Parke, B., after consulting Coleridge, J., held that confessions ought to be excluded unless voluntary, but that the meaning of "voluntary" was that circumstances must give rise to a presumption that the inducement held out would be likely to cause an accused to tell an untruth.⁹⁷

In R. v. Baldry,⁹⁸ a case involving words being directed to an accused in the form of a caution, Campbell, L.C.J., adopted a similar position. Rather than

95 (1848), 1 Den. 331, 169 E.R. 267, at p. 268, also R. v. Baldry, supra, fn. 84. at p. 574

96 (1847), 2 Cox C.C. 209.

97 R. v. Moore (1852), 2 Den. 525, 169 E.R. 608, at p. 610.

98 supra, fn. 84

hold that the caution did not amount to an inducement and that the confession was therefore, voluntary, the learned Lord Chief Justice seemed to commit himself to the heresy by holding that since there could be no likelihood that the accused was induced to say anything untrue, the confession must be considered voluntary.⁹⁹

But this case is far from satisfactory. Baron Parke, in giving his decision on the point reserved, states

"In that I entirely concur, and I think that the reasons given by the Lord Chief Justice are satisfactory. By the law of England, in order to render a confession admissible in evidence it must be perfectly voluntary, and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession."¹⁰⁰

By comparison of this opinion to the previous decision of the learned Baron in R. v. Moore,¹⁰¹ both read in relation to the judgment of Campbell, L.C.J.¹⁰² an ambiguity arises. While lip service is being paid to the threat-promise test, support is given to the falsity doctrine, as well as suggesting that the proper test of

⁹⁹ See the later decision of Campbell, L.J.J., in R. v. Scott, supra, fn. 84

¹⁰⁰ supra, fn. 84

¹⁰¹ supra, fn. 97

¹⁰² supra, fn. 84

admissibility to be whether a confession is voluntary, in the sense of no inducement being held out to the accused,¹⁰³ and in the sense that there was no likelihood of the accused confessing an untruth.

The falsity doctrine was finally repudiated by Lord Morris, in Sparks v. R.¹⁰⁴ when he noted

"Though the learned judge considered that some inducements had been held out, he considered that they were not calculated or likely to make the appellants confession an untrue one what has to be considered, however, is whether there were inducements or other circumstances which showed that the statement was not a voluntary one..."¹⁰⁵

The meaning of "voluntary" with the rule, i.e. whether any inducements or other circumstances existed, or were held out by a person in authority, ran a parallel course throughout the nineteenth century with the previous tests of admissibility,¹⁰⁶ and was

103 See R. v. Enoch & Pulley (1833), 5 C. & F. 539, 172 E.R. 1089, per Parke, J. (as he then was) R. v. Warringham (1851), 2 Den. 447, 169 E.R. 575 (Parke, B.)

104 [1964] 1 All E.R. 727 (i.C.)

105 ibid, at p. 739. See, Archbold, Criminal Pleading, Evidence and Practice (35th edn.), pgh. 1112, at p. 462.

106 Suggested in R. v. Swatkins et al. (1831), 4 C. & F. 547, 172 E.R. 819 (Patteson, J.) R. v. Walkley et al. (1833), 6 C. & F. 175, 172 E.R. 1196 (Gurney, B.); R. v. Enoch & Pulley supra, fn.103, R. v. Lloyd et al. (1834), 6 C. & F. 393, 172 E.R. 129, (Patteson, J.) R. v. Drew (1837), 6 C. & F. 175, 173 E.R. 433 (Coleridge, J.), R. v. Warringham, supra, fn.103; R. v. Baldry, supra, fn. 84, per Parke, B. R. v. Miller (1895), 18 Cox C.C. 54 (Hawkins, J.) R. v. Knight & Hayre (1905), 20 Cox C.C. 711 (Channell, J.).

stated as early as 1783 by Hotham, B.¹⁰⁷ By the latter half of the nineteenth century, it was accepted by Lord Coleridge, C.J.¹⁰⁸ that a confession to be voluntary, had to be given without threats, promises, evidence, or improper influence, thus assuring the rule of a broad scope of operation. The proper test of admissibility was authoritatively stated by Cave, J., in the leading case of R. v. Thompson¹⁰⁹

"If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, is it proved affirmatively that the confession was free and voluntary, that is, was it preceded by any inducement held out by a person in authority to make a statement? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

107 R. v. Thompson, supra, fn. 73

108 R. v. Fennell (1881), 7 Q.B.D. 147

109 supra, fn. 85, approved in Ibrahim v. R., supra, fn. 78 and Deakinanan v. R (1968), 52 Cr. App. R. 241 (P.C.) and R. v. Colpus et al. (1917), 12 Cr. App. R. 193.

CHAPTER THREE

THE CONCEPT OF "PERSON IN AUTHORITY"

The concept of "person in authority" within the modern common law rule, relating to the admissibility of extra-judicial confessions, was a comparatively recent adoption in the early nineteenth century and formed no part in the earlier exposition of the rule itself. As late as the early seventeenth century, the rule was simply that competency of an accused to condemn himself was conditional on the condemnation or confession being voluntarily given, which in this period was considered to be without torture, or actual duress or compulsion.

In the eighteenth century, the lack of judicial concern as to the status of the person effecting the compulsion, (which now included threats and promises), remained. As Gilbert, C.B., observed ¹¹⁰

"Confessions of guilt made by a prisoner to any person at any moment of time, and at any place, subsequent to the perpetration of the crime and previous to his examination before the magistrate, are at common law admissible in evidence..." (*My italics*)

By the close of the century, it was recognized that these confessions were usually made by the accused while

¹¹⁰ Law of Evidence (1726), at p. 137

in custody, and presumably made to those who so held him, or to other persons who were concerned with the disposition of the case. As Grose, J., stated, in delivering the opinion of the judges in R. v. Lambe ¹¹¹

"The general rule respecting this species of testimony is, that a free and voluntary confession made by a person accused of an offence is receivable in evidence against him, whether such confession be made at the moment he is apprehended, or while those who have him in custody are conducting him to the magistrates, or even after he has entered the house of the magistrate for the purpose of undergoing his examination."

The relationship suggested by the judges in this case, as regards custody and accused's confession, was not soon to be incorporated in the general rule of admissibility. The weakness in the "rule" as stated in Lambe was that it allowed for the possibility of someone, without any colour of authority, to interfere and induce the accused to speak, while the accused was in actual police custody. It was this situation that arose in R. v. Row, ¹¹² where the question again was reserved for

¹¹¹ supra, fn. 75

¹¹² (1809) Russ. & Ry. 153, 168 E.R.733 (C.C.R.), Approved, Deokinanan v. R., supra, fn.109, at p.247. It would appear that the definition of a person in authority as being someone who was concerned with the apprehension, prosecution, or examination of the accused, as stated in the headnote and statement of facts, was that of the reporter, and not the judges. This view is supported by R. v. Hardwick, infra. fn.4., where Wood, B., one of the judges in Row, adopted a much less restricted definition.

the opinion of the judges. In that case, a constable had apprehended a person on a charge of stealing a quantity of muslins. While the constable was conducting the accused to the magistrates, some neighbours urged the accused to tell the truth and to consider his family. The judges agreed that the confession was properly admitted, because

"... the advice to confess was not given or sanctioned by any person who had any concern."

Here previously an inducement alone was enough to taint a subsequent confession, it seemed now necessary that, for rejection to ensue, the inducement leading to the confession had to be held out by a person "concerned" in the particular case. Two years later, in the case of R. v. Hardwick, Baron Wood, one of the judges in Row, translated the previous opinion in terms of the modern rule, in holding that a constable's wife was not a person in authority, or having influence.¹¹³

However, neither of these cases was taken to have laid down a general rule, and judicial doubt persisted both as to the existence of the concept, as well as its scope if it did exist. If it was clear that any inducement held out by a person in authority

113 (1811), C. & F. 98, 171 E.R. 1118, fn. (b)

would result in rejection of an ensuing confession, what if the inducement was not held out by a person in authority but by some other person, yet the prisoner subsequently confessed to a person in authority? This question, although apparently decided in R. v. Row¹¹⁴ arose again in the cases of R. v. Tyler et al.¹¹⁵ and R. v. Gibbons,¹¹⁶ where it was held that a confession in these circumstances would be received.

A similar question arose as to the status of a confession made as a result of an inducement by a person having no authority, and made to this same person. In R. v. Dunn,¹¹⁷ the accused was indicted for larceny of a

114 supra, fn. 112

115 (1823), 1 C. & F. 128, 171 E.R. 1132 (Hullock, B.)

116 (1823), 1 C. & F. 96, 171 E.R. 1117, (Parke, J.), Approved, Deokinanan v. R., supra, fn. 109

117 (1831), 4 C. & F. 543, 172 E.R. 817, and see, R. v. Slaughter (1831), 4 C. & F. 543, 172 E.R. 818, fn. (b) a case of arson, where Bosanquet, J., had also refused to receive a confession made by a prisoner to one of his fellow workmen, who had told him it would be better for him to confess. In R. v. Kingston (1830), 4 C. & F. 387, 172 E.R. 752, Parke, J., after consulting Littledale, J., apparently accepted this principle, in not receiving a confession made to a surgeon, after an inducement by the surgeon. But see, R. v. Inoch et al. supra, fn. 103, where Parke J., after conferring with Taunton, J., applied different principles to a different situation, in holding a confession inadmissible as being the result of an inducement held out by a person who had accused in custody.

hymn book. At his trial, before Bosanquet, J., the prosecution tendered a confession made by the accused to the person to whom he had proposed to sell the stolen book, and who induced the accused to speak. Over the contention of the prosecution that this person was not a person in authority, the learned judge held that any person's telling a prisoner that it will be better for him to confess, will exclude a confession made to that person, although that person is not a person in authority.

While some judges were ascertaining who in a given situation were persons in authority within the rule, Patteson, J., was denying the existence of the concept. According to this learned judge, if the confession was the result of an inducement, it was inadmissible, regardless who held out the inducement,¹¹⁸ and in R. v. Simpson¹¹⁹ he rejected a confession induced by a neighbour and mother of the prosecutor's wife. As late as 1837, there was a divergence of judicial opinion as to the existence of the concept, for as Parke, B., (later Lord Wensleydale) observed, in R. v. Spencer et al.¹²⁰

118 For e.g. R. v. Thomas et al. (1834), 6 C. & P. 353, 172 E.R. 1273, as explained in R. v. Shaw (1834), 6 C. & P. 372, 122 E.R. 1282.

119 (1834) 1 Mood. 410, 168 E.R. 1323.

120 (1837), 7 C. & P. 776, 173 E.R. 338.

"... there is a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable. Some of the judges think it is receivable, and others think it is not so."¹²¹

By 1839, however, the problem was resolved, and Patteson, J., was able to state:

"It is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority..."¹²²

After this date, the concept first suggested in R. v. Row was universally accepted, and, although "person in authority" within the rule, was not defined in scope, two certainties did emerge.

In the first place, if a confession was induced by a person in authority, it was inadmissible, regardless whether the confession was actually made to a person in

^{fn. 120,}
121 supra, at p. 339

122 R. v. Taylor (1839), 8 C. & P. 733, 173 E.R. 694; And see, R. v. Drew, supra, fn. 106.

123 supra, fn. 112, But see, R. v. Sippett (1839), Maid. Ass. MS., cited J.P. Taylor, Op. Cit. 593, fn. (j), where a confession made by the prisoner while talking in his sleep was tendered in evidence, but Tindal, C.J., doubting its admissibility, it was withdrawn.

authority, or some other person. Conversely,¹²⁴ if a confession was induced by a person not in authority, evidence of it was admissible regardless to whom the confession was actually made, whether a person in authority or not.

It would appear that, by this converse proposition a confession which was not voluntary, would be admissible, if the confession was induced by a person not in authority. Furthermore, if the confession were the result of actual physical compulsion applied by a person not in authority, the result would seem to be the same, even though the confessor in these circumstances would be deprived of his right to speak or remain silent, and forced to accuse himself, with the subsequent confession being not voluntary. The learned Parke, B., apparently recognizing this defect, was willing to state the rule of admissibility of extra-judicial confessions as two rules, when he said, in

124 See, R. v. Gibbons, supra, fn. 116, R. v. Tyler et al. supra, fn. 115, R. v. Sherrington (1838), 2 Lew. 123, 168 E.R. 1101 (Patteson, J.): R. v. Blackburn (1853), 6 Cox C.C. 533 (Talfourd, J.); R. v. Parker (1861), 8 Cox C.C. 465 (C.C.A.)

R. v. Moore¹²⁵

"It is admitted that confessions ought to be excluded unless voluntary... But a rule has been laid down in different precedents, by which we are bound, and that is, that if the threat or inducement is held out actually or constructively by a person in authority, it cannot be received, however slight the threat or inducement."

As to who was a person in authority, was still a matter to be decided on the facts of each case, objectively with little regard being had as to how the person holding out the inducement was looked upon by the accused. It was at least clear that if the person holding out the inducement had any concern in the business,¹²⁶ or held an office of authority,¹²⁷ or held the accused in custody,¹²⁸ or if the offence was against him,¹²⁹ and he was a person likely to prosecute,¹³⁰ or if he held control over accused by reason of his

125 supra, fn. 97, at p. 610; approved, Deokinanan v. R. supra, fn. 109, at p. 250, per Viscount Dilhorne.

126 R. v. Raw, supra, fn. 112, R. v. Upchurch (1836) 1 Mood. 465, 168 E.R. 1346 (Parke, B.)

127 R. v. Gibbons, supra, fn. 116.

128 R. v. Enoch et al., supra, fn. 103

129 R. v. Moore, supra fn. 97

130 R v. Luckhurst (1853) 6 Cox C.C. 243, (Parke, B.).

relationship with accused,¹³¹ he would be considered a person in authority with the rule, and the confession would be rejected as being not voluntary.

About the middle of the nineteenth century, an attempt was made by textwriters to limit the scope of the concept to persons who were concerned with the apprehension, prosecution or examination of accused,¹³² or to persons who had some opportunity of influencing the course of the prosecution,¹³³ but as general propositions, they obtained little if any judicial support.¹³⁴

131 R. v. Sleeman (1853) 6 Cox C.C. 245 (C.C.A.).

132 See, the inaccurate headnotes in R. v. Row, supra, fn. 112. R. v. Moore, supra fn. 97; Also, 2 Russ. Cr. 839; Archbold, Criminal Pleading, Evidence and Practice (1966), at p. 409.

133 Kenny, Outlines of Criminal Law (15th ed.) at p. 470.

134 In R. v. Moore, supra fn. 97, although Parke, B., refers to 2 Russ. Cr. 839, at p. 610, he does not incorporate it as part of his judgment. Rather, he accepts the wider scope of the concept when he states at p. 558.

"... all those who were engaged about the prosecution or apprehension of a person charged might be regarded certainly as persons in authority: and amongst others, the master or mistress of a servant might be a person in such authority... (My italics)

Compare to the jury direction in R. v. Parker, supra fn. 124. In R. v. Joyce (1958) 42 Cr. App. R. 19, Slade, J. accepts Kenny without question, but this case was disapproved in Comms. of Customs & Excise v. Harz & Power, a decision of the House of Lords, infra, fn. 149.

As recently as 1967, Parker, L.C.J., stated in R. v. Wilson et al;¹³⁵

"The first question that arises is whether Captain Birkbeck was a person in authority. There is no authority so far as this court knows which clearly defines who does and who does not come within that category... Mr. Hawser in the course of argument sought to put forward the principle that a person in authority is anyone who can reasonably be considered to be concerned or connected with the prosecution, whether as initiator, conductor or witness. The court finds it unnecessary to accept or reject the definition, save to say that they think that the extension to a witness is going very much too far."¹³⁶

The main criticism of these suggested definitions was that they severely restricted the scope of the concept, limiting it, as they did, to the sole objective consideration as to whether the inducer was in any way concerned with the prosecution. If the inducer did not come within this limitation, the confession was admissible, regardless of whether the inducer did in fact, hold authority over the accused, and by his inducement rendered the confession not voluntary. The heretical definitions did not allow for inquiry as to whether the accused regarded the inducer as a person in authority, and whether his so regarding him was reasonable

¹³⁵ (1967) 51 Cr. App. R. 194

¹³⁶ ibid, at p. 201

in the circumstances.¹³⁷

The question was finally settled in the very recent case of Deokinanan v. R.,¹³⁸ a decision of the Privy Council. In that case one B., at the request of accused via accused's brother, went to see the accused in prison, at which time B. promised to help accused, by recovering certain monies for him. B. then informed the police, and on their instructions, (which were not revealed at the trial), returned to prison, lying to the accused that he was imprisoned on a warrant for a fine. The accused confessed to B., and on his trial for the confessed murder and robbery, B. was a prosecution witness. On appeal to the Privy Council from a decision of the Guyana Court of Appeal, it was held that the confession was free and voluntary, and that the mere fact that a person may be a witness for the prosecution, does not make that person a person in

137 In R. v. Wilson, ibid, Parker, L.C.J., apparently used the test as to how the owner of the stolen goods was looked upon in relation to those who stole the goods, i.e. could the accused reasonably consider him to be a person in authority. It is submitted that this is the proper test to determine which persons are persons in authority within the rule.

138 supra, fn. 109

authority within the rule.¹³⁹

In rendering the judgment of the Court, Viscount Dilhorne quoted with approval¹⁴⁰ the definition of person in authority by Bain, J., in the Canadian case of R. v. Todd,¹⁴¹ where he observed

"A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason that it is a rule of law that confessions made as a result of inducements held out by persons in authority that the accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe...." (My italics)

In other words, the concept of person in authority receives its vitality, not from the mechanics of the administration of justice such as being concerned with the prosecution, but from the relationship of the person with the accused.¹⁴² Could the accused

¹³⁹ Approving R. v. Wilson, ^{et al.} supra, fn. 135: But see, R. v. Broughton (1910), 6 Cr. App. R. 8, at p.11, per Alverstone, L.C.J., and R. v. Thomas, supra, fn. 118.

¹⁴⁰ supra, fn. 138, at p. 250

¹⁴¹ (1901), Man. L.R. 364.

¹⁴² See, supra, fn. 137, and R. v. Moore, supra fn. 97 where counsel for the prisoner urged this test upon the court, Also, supra, fn. 138, at p. 248, Cummings, J.A., Guyana.

reasonably regard the person as a person in authority?
It is submitted that this test suggested by Bain, J.,
was adopted by the learned Lord, when he stated at
p. 247:

"Further, even if a promise by B. had induced the confession, B. was not and could not in their Lordships' opinion have been regarded by the appellant as a person in authority. It has long been established that a confession must be induced by a person in authority to be admissible."143 (My italics)

The essence of this test as to who, or who is not, a person in authority within the rule of admissibility, it is submitted, is the relationship of the person to the accused. Were the accused and the person holding forth the inducement in such a relationship at the time of the holding out of the inducement, that the accused could reasonably regard that person as a person in authority? Every case must depend on its own circumstances, and a person held to be a person in authority in one set of circumstances, may not be so considered in another.

It is within this framework that the vast majority of decided cases can be reconciled as regards the concept of persons in authority. Within the relationship of officers concerned with the administration of justice qua

143 Approving R. v. Row, supra, fn. 112, R. v. Gibbons, supra, fn. 116, R. v. Moore, supra, fn. 97.

accused, judges have considered magistrates,¹⁴⁴
constables,¹⁴⁵ gaolers,¹⁴⁶ searchers at gaol,¹⁴⁷ prosecutors,¹⁴⁸

- 144 R. v. Cooper et al. (1833), 5 C. & P. 535, 172 E.R. 1087 (Parke, J.) R. v. Drew, *supra*, fn. 106 R. v. Morton (1843), 2 M. & Rob. 514, 174 E.R. 367 (Coleridge, J.) R. v. Harris (1844), 1 Cox C.C. 106 (Maule J.) R. v. Furley (1844), 1 Cox C.C. 76 (Maule, J.) R. v. Pettit (1850), 4 Cox C.C. 164 (Wilde, C.J.).
- 145 R. v. Gibney (1822), Jebb C.C. 15 (Ir. C.C.R.). R. v. Swatkins et al. *supra*, fn. 106 R. v. Mills (1833), 6 C. & P. 146, 172 E.R. 1183 (Gurney, B.) R. v. Meynell (1834), 2 Lew. 120, 168 E.R. 1100 (Taunton, J.). R. v. Shepherd (1836), 7 C. & P. 579, 173 E.R. 255 (Gaselee, J.) R. v. Enoch & Pulley, *supra*, fn. 103, R. v. Sherrington, *supra*, fn. 124 R. v. Day, *supra*, fn. 96. R. v. Collier et al. (1848), 3 Cox C.C. 57 (Williams J.) R. v. Cheverton (1862), 2 F. & F. 833, 175 E.R. 1308 (Erle, C.J.) R. v. Coley (1868), 10 Cox C.C. 536 (Mellor, J.); R. v. Bates (1871), 11 Cox C.C. 686 (Montague Smith, J.), R. v. Joyce *supra*, fn. 134, R. v. Richards [1967] 51 Cr. App. R. 266.
- 146 R. v. Sealey (1844), 8 J.P. 328 (Wightman, J.)
- 147 R. v. Winsor (1864) 4 F. & F. 360, 176 E.R. 599 (Channell, B.)
- 148 R. v. Croydon et al. (1846), 2 Cox C.C. 67 (Rogers, J.) R. v. Wilson, *supra*, fn. 135. In the sense of those wronged by the offence, or those likely to prosecute as informants or complainants, see. R. v. Collier et al. *supra*, fn. 145, R. v. Luckhurst, *supra*, fn. 130, R. v. Moore, *supra*, fn. 97, R. v. Partridge (1836), 7 C. & P. 551, 173 E.R. 243 (Patteson, J.), R. v. Richards (1832), 5 C. & P. 318, 172 E.R. 993 (Bosanquet J.); R. v. Upchurch *supra*, fn. 126, R. v. Griffin (1809), Russ. & Ry. 151, 168 E.R. 732 (C.C.R.); R. v. Jones (1809), Russ. & Ry. 152, 168 E.R. 733 (C.C.R.), R. v. Brown (1845), 9 J.P. 314; R. v. Broughton, *supra*, fn. 139.

customs officers,¹⁴⁹ and, indeed, the government itself,¹⁵⁰ to be within the concept. Similarly, any confession obtained by any individual inducing the accused will be rejected, if the inducement was held out in the presence or hearing of a police officer, and the officer accepted the inducement as his own by not taking steps to remove it.¹⁵¹

Other relationships placing accused in the servient position have been judicially considered, such as master-servant,¹⁵² captain-crew member,¹⁵³ army

149 Commissioners of Customs & Excise v. Harz et al. [1967] 51 Cr. App. R. 123.

150 R. v. Boswell et al. (1842), C. & M. 584, 174 E.R. 645 (Cresswell, J.), R. v. Blackburn supra, fn. 124.

151 R. v. Laughner (1847), 2 Cox C.C. 134 (Pollock, L.C.B.) R. v. Miller et al. (1849), 3 Cox C.C. 507 (Wightman, J.), And see, R. v. Pountney et al. (1836), 7 C. & P. 302, 173 E.R. 134 (Alderson B.), R. v. Collier et al., supra, fn. 145; R. v. Luckhurst, supra, fn. 130; R. v. Cleary (1963), 48 Cr. App. R. 116; R. v. Parker, supra, fn. 124.

152 R. v. Taylor, supra, fn. 122, R. v. Richards, supra, fn. 148; R. v. Upchurch, supra, fn. 126, R. v. Hearn (1841), C. & M. 107, 174 E.R. 431 (Coltman, J.); R. v. Hewett (1842), C. & M. 534, 174 E.R. 623 (Patteson, J.) R. v. Rule (1844), 8 J.P. 599 (Lord Abinger), R. v. Moore, supra, fn. 97; R. v. Rue (1876), 13 Cox C.C. 209 (Denman, J.), R. v. Mansfield, supra, fn. 86, R. v. Stanton (1911), 6 Cr. App. R. 198, But see, R. v. Sleeman, supra, fn. 131, where a daughter of master, qua servant-accused was not considered a person in authority.

153 R. v. Parratt (1831), 4 C. & P. 570, 127 E.R. 829 (Alderson J.)

officer-private,¹⁵⁴ teacher-student,¹⁵⁵ employer-employee,¹⁵⁶ and the person occupying the dominant position has been held to be a person in authority.¹⁵⁷

154 Ibrahim v. R., supra, fn. 78, R. v. Smith (1959), 46 Cr. App. R. 121 (C.M.A.C.).

155 R. v. McLintock [1962] Cr. L. Rev. 549 (C.C.A.).

156 R. v. Thompson, supra, fn. 85

157 The relationship of doctor-patient, which normally may not be an authority relationship, will so be considered if the doctor assumes authority over his accused patient. See, R. v. Nowell [1948], 1 All E.R. 794 (C.A.), R. v. Kingston, supra, fn. 117 R. v. Gibbons, supra, fn. 116, R. v. Garner, supra fn. 95. In R. v. Downing, Chelmsford Sp. Ass. 1840 MS., and cited Taylor, Evidence (1848), at p. 589, fn (m), before Lord Abinger, a nurse as well as a surgeon were considered to be in authority. As to the husband-wife relationship, see R. v. Laughher supra, fn. 151, where Pollock, L.C.B. stated at p. 135;

"... we should be careful not to admit anything that might have been said in consequence of that connection between the husband and wife, for which the law implies coercion."

CHAPTER FOUR

INDUCEMENT WITHIN THE RULE

Extra-judicial confessions, or statements by the accused, proving or tending to prove his guilt to be admissible in evidence, must be voluntary,¹⁵⁸ in the sense that they must not be preceded by any inducement held out by a person in authority¹⁵⁹ to the accused.¹⁶⁰

158 In R. v. Baldry, supra, fn. 84, Larke, B., stated

"There is no doubt as to the general rule of law. Every confession, to be admissible in evidence must be voluntary, and any inducement held out, either by promise of favour, or threat of harm, the gain of an indefinite nature, will exclude it."

159 See, generally, supra, c.3

160 R. v. Thompson, supra, fn. 85, R. v. Fennell, supra, fn. 108. In Ibrahim v. R., supra, fn. 78 Lord Sumner stated

"It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecutor to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

See, also Sparks v. R., supra, fn. 104, Commissioners of Customs & Excise v. Harz et al., supra, fn. 149.

As early as 1822, in the Irish case of R. v. Gibney,¹⁶¹ the judges unanimously held that the "inducement" within the rule must be temporal in nature, if exclusion of the tendered confession was to result. Similarly, ~~six~~ years later, in what is now considered the leading case of R. v. Gilham,¹⁶² the accused was gaoled for murder, after a coroner's inquest. While in gaol, he spoke to the gaoler, saying. "Well, they will hang me for this I know but I thank God I am innocent of this murder," to which the gaoler replied, "Don't add lies to the crime." The gaoler then sent for a chaplain who told the accused it would be better for him to confess his sins before God, and at a second interview, also urged the accused that if he knew himself guilty, to reconcile himself with God. The accused then confessed, first to the gaoler, and then to the Mayor, who cautioned him before taking his statement, to which accused had no objection of signing.

In the course of judgment on the point reserved, Lord Tenterden stated ¹⁶³

161 supra, fn. 145

162 (1828), 1 Mood. 186, 168 E.R. 1235 (C.C.R.)

163 supra, fn. 162 at p. 1242 See, also, R. v. Radford (1823), 1 Mood. 197, 168 E.R. 1239 which was apparently decided on privilege.

"The whole argument, therefore, on the other side, as to the religious impressions is founded on a fallacy: because the motives are not of a class that can justify a fair and reasonable suspicion that the confessions given under such motives are untrue. And with regard to any temporal hopes, none such existed, or if they did exist, the effect of them is entirely got rid of by the cautions given the prisoner before the confessions were made."

It was clear that spiritual stimulus, such as the fear of God, was not an inducement within the rule, regardless if it did operate on the mind of an accused. Nor did it matter to whom the confession was made. If the hope, fear, or influence held out was not temporal, the subsequent confession was received. In R. v. Wild,¹⁶⁴ a thirteen year old boy was charged with murder. While in custody, he was approached by a person associated with his custodian, and told: "Now kneel down. I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty." All the judges agreed that the boy's confession was properly admitted, and in R. v. Risborough,¹⁶⁵ where a clergyman urged an accused ten year old to "speak the truth in the face of God", a similar result obtained, although the boy

164 (1835), 1 Mood. 453, 168 E.R. 1341

165 (1847), 11 J.P. 280.

confessed to a constable, and not to the clergyman.¹⁶⁶

Similarly, mere moral exhortations are not considered as inducements within the rule and sufficient to exclude confessions. In R. v. Sleeman,¹⁶⁷ a maid-servant under a charge of setting fire to one of her master's farm buildings, was given into temporary custody of the master's daughter. The daughter neither lived in her father's house, nor had any control over the servant. When alone together, the daughter told the accused servant: "I am sorry for you, you ought to have known better. tell the truth, whether you did it or not." When the accused replied her innocence, the daughter added. "don't run your soul into more sin, but tell the truth." Parke, B., speaking for the Court of Criminal Appeal, held the resulting confession to be properly admissible as what was spoken to the accused did not amount

166 It is to be noted that the accused in each case was a person of tender years. It would seem to the writer that the fear of God would be a much more real inducement than temporal fear or hope for such a young person to speak. But even more so, it would be a much more real inducement for the young person to speak the truth, and this would appear to be the overriding consideration of the courts. As such, it is consistent with the test as to the competency of very young persons to give evidence on oath.

167 supra, fn. 131

to a threat or inducement within the rule. In R. v. Reeve et al.,¹⁶⁸ two boys, one eight years old, the other a little older, were in custody on suspicion of obstructing a train. While in custody one of the boys' mothers said "You had better, as good boys, tell the truth," whereupon both boys confessed. The confessions were held to have been rightly received in evidence.

In every case, the question to be asked is whether any inducement was exercised or held out to the accused,

168 (1871), 12 Cox C.C. 179 (C.C.A.), and see per Kelly, C.B. at p. 180. In R. v. Jarvis, supra, fn. 84, a young accused was told by his master. "Jarvis I think it is right I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police, and I should advise you that, to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue." A letter was then produced, which Jarvis denied writing, to which his master (the prosecutor) replied "Take care, Jarvis, we know more than you think we know." It was held by Kelly, C.B., Bramwell, B., Willes, Byles, and Lush J.J., concurring, that these words did not import an inducement within the rule. See also, with reference to "good girls", R. v. Stanton, supra, fn. 152. In R. v. Edwards (1869), 33 J.P. 119, the words used by a mistress qua her servant were "you may as well tell the truth, it is sure to be found out. It was held, per Cleasby, J., that this was only an exhortation to tell the truth, and not an inducement within the rule.

and any motivation other than a temporal inducement will not be sufficient answer to exclude the tendered confession from being admitted. However, if there is a temporal inducement together with any sort of moral or religious stimulus, the confession will not be received. Regardless of what other motivation there is, if there is a threat, promise, or other temporal inducement, however slight, the resulting confession will not be received in evidence as being voluntary. In R. v. Day,¹⁶⁹ a policeman asked an eight year old questions with reference to the Lord's prayer, where he would go if he told a lie, and whether God knew everything. The boy not replying, the policeman then asked whether he thought God knew who had set fire to the haystack. The boy, who did not reply, began to cry. The policeman persisted, telling the boy he would apprehend him on a charge of arson. The boy confessed, which confession was rejected by Cresswell, J. at the trial.

It is also clear that not only does the inducement in order to deprive the confession of its voluntariness have to be temporal, but it must also be external as regards the accused. That is, it must be held out to the accused. Internal stimuli, such as a product of the imagination of the accused, whether temporal in nature or not, will not be

169 supra, fn. 96

inducements within the rule. In R. v. Godhino,¹⁷⁰
Hamilton, J., observed:¹⁷¹

"where a definite hope of pardon has been held out, but by a person not in authority, the confession has constantly been held to be receivable. A hope of pardon held out by appellant to himself can be in no better position."

Similarly, the inducement must be held out to the accused, and any inducement offered to one person cannot affect the admissibility of a confession made by another person, although the other person happened to be present when the inducement was offered.¹⁷² Nor does the inducement have to be an inducement held out to the accused by a person in authority, to confess. The purpose of the rule from its inception has been to prevent the accused from

170 (1911), 7 Cr. App. R. 12.

171 ibid, at p. 14. However, a mis-interpretation by accused of an external stimulus, for e.g., words being spoken to him, will not result in a subsequent confession being received, if the external stimulus on its face possibly admitted of the interpretation placed on it by the accused. See, R. v. Northam (1968), 52 Cr. App. R. 97, at pp. 104, 105, per Winn, L.J.

172 R. v. Jacobs et al. (1850), 4 Cox C.C. 54. It is submitted, however, that if the circumstances admitted of the possible belief by accused that the inducement applied to him, or if an ambiguity arose, the confession will be rejected. See, supra, fn. 171.

being compelled to speak. According to Pollock, L.C.B.¹⁷³

"The real question is, whether the language used can be understood as conveying some intimidation, or offering some reward which might induce the person addressed to speak at all, the objection does not consist in the inducement to acknowledge guilt, but the inducement to speak at all," ¹⁷⁴

If the accused is induced to speak, and in speaking, acknowledges the crime with which he is charged, either wholly, or in part, the inducement will be sufficient to deprive the acknowledgment of voluntariness within the rule, and therefore, will not be admissible in evidence. The prerequisite of admissibility is that the acknowledgment or confession must be a product of the free operation of the will of the accused. Any inducement, temporal in nature, and held out to the accused by a person in authority, directly or indirectly, will deprive the confession of the necessary voluntary character.

In the first half of the nineteenth century, it was

173 R. v. Baldry, supra, fn. 84, at p. 529.

174 It is inherent that the inducement must be communicated to the accused, and if so, the confession of the accused will be rejected, whether the inducement was actually i.e. directly communicated, or constructively, i.e. indirectly communicated. See R. v. Moore, supra, fn. 97, at p. 610, per Parke, B.

propounded by some text-writers that the inducement, in order to negative voluntariness, must relate to the charge or contemplated charge against the accused.¹⁷⁵

This heretical limitation, however, unsupported as it was by judicial authority,¹⁷⁶ was recently laid to rest by Lord Reid, in Commissioners of Customs and Excise v. Harz et al.¹⁷⁷, a decision of the House of Lords, when he stated:¹⁷⁸

"It is said that if the threat or promise which induced the statement related to the charge or contemplated charge against the accused, the statement is not admissible, but that if it related to something else, the statement is admissible.

175 It would seem to have first appeared in Joy, Confessions and Challenges (1842), at p. 12, which states "But the threat or inducement held out must have reference to the prisoners escape from the charge..." In 1848, Taylor, Op.Cit. supra, fn.1, at p. 592, it was similarly stated "We come now to the nature of the inducement. and here it may be laid down as a general rule that in order to exclude a confession, the inducement whether it be in the shape of a promise, a threat, or mere advice must have reference to the prisoner's escape from the criminal charge against him."

176 But see, R. v. Parker, supra, fn. 124. In R. v. Joyce, supra, fn. 134, Slade, J., accepted Kenny, Outlines of Criminal Law, which in turn copied the heresy. See, also, R. v. Shuter [1966] Cr.L.Rev.104, (Fenton Atkinson, J.).

177 supra, fn. 149

178 ibid, at p. 158

That the alleged rule or formula is illogical and unreasonable I have no doubt. Suppose that a daughter is accused of shoplifting and later her mother is detected in a similar offence, perhaps at a different branch, where the mother is brought before the manager of the shop. He might induce her to confess by telling her that she must tell him the truth and it will be worse for her if she does not or the inducement might be that, if she will tell the truth, he will drop proceedings against the daughter. Obviously the latter would in most cases be far the more powerful inducement and far the more likely to lead to an untrue confession. But if this rule were right, the former inducement would make the confession inadmissible, but the latter would not. The law of England cannot be so ridiculous as that."

Thus, it is emphasized that "inducement" within the rule is used in a completely unrestricted sense as to kind. During the eighteenth and nineteenth centuries, the question arising in the vast majority of cases was whether certain words spoken to the accused amounted to an inducement, and threats and promises were emphasized as heads of inducement, almost to the exclusion of all other forms. The words "It is better" or "it will be better or worse" were given a technical meaning, and usually resulted in exclusion of a subsequent confessions.¹⁷⁹ For example, confessions

179 In (1803), 2 East P.C. 659, the learned author states: "... saying to the prisoner that it would be worse for him if he did not confess, or that it would be better for him if he did, is sufficient to exclude the confessions according to constant experience." See, also, R. v. Dunn, supra, fn. 117, R. v. Baldry, supra, fn. 84 at p. 530, su ra, fn. 178.

have been excluded where the phraseology used was "... it will be better for you if you confess",¹⁸⁰ "You are under suspicion of this, and you had better tell all you know",¹⁸¹ "you had better tell the truth, or it will lie upon you and the man will go free."¹⁸² "You had better split, and not suffer for all of them",¹⁸³ "It would have been better if you had told at first",¹⁸⁴ "she had better tell all",¹⁸⁵ "you had better not add a lie to the crime of theft"¹⁸⁶ "you had better tell you did it",¹⁸⁷ "you had better tell all about it it will save trouble",¹⁸⁸

180 R. v. Griffin, supra, fn. 148, R. v. Jones, supra, fn. 148, R. v. Spencer, supra, fn. 120, R. v. Sherrington supra fn. 124, R. v. Slaughter, supra, fn. 117

181 R. v. Kingston, supra, fn. 117

182 R. v. Enoch et al., supra, fn. 103

183 R. v. Thomas et al. supra, fn. 118

184 R. v. Walkley et al. supra, fn. 106

185 R. v. Gibbons, supra, fn. 116, R. v. Meynell, supra, fn. 145.

186 R. v. Shepherd, supra, fn. 145

187 R. v. Taylor, supra, fn. 122

188 R. v. Cheverton, supra, fn. 145.

it would be better for his own and his wife's sake if he made a statement;¹⁸⁹ "tell the truth, it will be better for you to do so",¹⁹⁰ "you had better tell the truth it may be better for you",¹⁹¹ "you had better tell me all about the corn that is gone",¹⁹² "it will be better for you to tell the truth, as it will save the shame of a search warrant in your house",¹⁹³ "if she did not tell she might get herself into more trouble and it would be worse for her",¹⁹⁴ "it is better for him to tell the truth and not to put people to the extremities he was doing",¹⁹⁵ and "you had better tell where you got

189 R. v. Sutherland et al. [1959] Cr. L. Rev. 440 (C.C.A.), See, R. v. Richards, supra, fn. 145

190 R. v. Rule, supra, fn. 152

191 R. v. Garner, supra, fn. 95, R. v. Fennell, supra, fn. 108. But not "you had better speak the truth" R. v. Millen et al., supra, fn. 151. R. v. Moore supra, fn. 97, Or, "you had better tell the truth" R. v. Parker, supra, fn. 124. See, also, supra, fn. 168.

192 R. v. Rose (1898), 67 L.J.Q.B. 289 (C.C.R.)

193 R. v. Collier et al. supra, fn. 145.

194 R. v. Coley, supra, fn. 145

195 R. v. Doherty (1874), 13 Cox C.C. 23

the property."¹⁹⁶

Other phrases suggesting benefit or harm as threats or promises were equally held to taint confessions obtained from the accused, as in the case of the following. "I am in great distress about my irons if you will tell me where they are, I will be favourable to you,"¹⁹⁷ "Mary, my girl, if you are guilty do confess, it will perhaps save your neck;"¹⁹⁸ if she did not tell all about it that night, a constable would be sent for in the morning to take her before a magistrate,¹⁹⁹ "... if you do not tell me who your partner was, I will commit you to prison as soon as we get to

196 R. v. Dunn, supra, fn. 117. In the early nineteenth century, it was the practice of police witnesses to state in their testimony that they did not say "it would be better", or other similar phrases. For e.g., in R. v. Moore supra, fn. 81 it was stated: "I did not threaten him or promise him it should be better if he said anything." Similarly, in R. v. Skuce (1835), 2 Cent. Cr. Ct. R. 111 (Littledale, J.) "I did not tell him it would be better to confess or worse if he did not." See, also, R. v. Dousett (1835), 2 Cent. Cr. Ct. R. 180 (Littledale, J.) at p. 181, R. v. Hall (1834), 1 Cent. Cr. Ct. R. 234 (Tindal, L.C.J.).

197 R. v. Cass, supra, fn. 74

198 R. v. Upchurch, supra, fn. 126

199 R. v. Richards, supra, fn. 148

Newcastle;"²⁰⁰ "If you will tell where the property is, you shall see your wife",²⁰¹ "... you will not be hung";²⁰² "I shall be obliged to you if you would tell us what you know about it, if you will not, we of course can do nothing;"²⁰³ if she did not tell the truth about the things found in the pump, he would send for the constable to take her,"²⁰⁴ "I dare say you had a hand in it, you may as well tell me all about it";²⁰⁵ tell the truth if she knew anything about it;²⁰⁶ "Put your cards on the table. Tell them the lot. If you did hit him, they cannot hang you";²⁰⁷ "I have enough against you",²⁰⁸ "Unless you give me a more satisfactory account,

200 R. v. Parratt, supra, fn. 153

201 R. v. Lloyd et al., supra, fn. 106

202 R. v. Winsor, supra, fn. 147

203 R. v. Partridge, supra, fn. 148

204 R. v. Hearn, supra, fn. 152, See, also, R. v. Walsh (1843), Ir. Cir. R. 866

205 R. v. Croydon et al., supra, fn. 148

206 R. v. Laughher, supra, fn. 151

207 R. v. Cleary, supra, fn. 151

208 R. v. Graham (1839), 1 Craw. & Dix. 99

I will take you before a magistrate,"²⁰⁹ "Tell me where the things are and I will be favourable to you."²¹⁰
"If you tell me about this matter, you can have bail "²¹¹

A confession, in order to be admissible in evidence must be voluntary, and any words spoken to accused by a person in authority, either directly or indirectly, which could possibly amount to a threat²¹² or promise,²¹³ however slight, will negative this requisite

209 R. v. Thompson, supra, fn. 73. See, R. v. Broughton, supra, fn. 139

210 ibid

211 R. v. Northam, supra, fn. 171, at p. 100, per Winn, L.J. See also, R. v. Howes (1834), 6 C. & P. 404, 172 E.R. 1296 (Denman, L.C.J.), where accused was told that if he told all, he would be acquitted.

212 For e.g., R. v. Luckhurst, supra, fn. 130, R. v. Simpson, supra, fn. 119;

213 As to promises, see R. v. Ackroyd et al. (1824), 1 Lew. 49, 168 E.R. 954 (Holroyd, J.) (promise of liberty or of receiving reward); R. v. Hall, supra, fn. 74; R. v. Gillis, supra, fn. 86 (turning King's evidence); R. v. Hewett, supra, fn. 152 R. v. Mansfield, supra, fn. 86 (promise of forgiveness). R. v. Boswell et al., supra, fn. 150; R. v. Dingley et al. (1841), 1 C. & K. 637, 174 E.R. 971 (Pollock, C.B.); R. v. Blackburn, supra, fn. 124; R. v. Barker (1941), 28 Cr. App. R. 52 (promises of pardon); However, it is submitted that nothing is gained by treating threats and promises separately. Words amounting to an inducement in most cases suggest both a threat and a promise. For example, "If you confess, I will free you" suggests a promise to do so if accused confesses, and a threat not to do so if accused does not confess. Even in the case where a confession is extorted by actual violence, the accused confesses, not because of the violence in fact applied, but because of the imminent fear of it continuing and the hope of it stopping.

voluntariness resulting in rejection of the confession.²¹⁴
The question in every case is whether there was an inducement, and if words spoken to the accused is the sole circumstance to be considered by the trial judge, the words themselves must be looked at to see if they contain an inducement,²¹⁵ i.e. whether the language used could be understood by the accused as offering him any benefit, or suggesting any threat, however slight.²¹⁶

214 As examples of words which did not amount to an inducement, see R. v. Vernon, supra, fn. 85 ("How came you to do it"). R. v. Reason, supra, fn. 84 ("I must know more about it."), R. v. Jones (1872), 12 Cox C.C. 241 (C.C.A.) ("Now is the time for you to take it [the stolen purse] back to her."). R. v. Shaw, supra, fn. 118. ("I wish you would tell me how you murdered the boy - pray split."). See, also, R. v. Court, supra, fn. 90. R. v. Brown, supra, fn. 148, R. v. Warren, (1848), 12 J.P. 571, R. v. Zeigert (1867), 10 Cox C.C. 555 (Willes, J.).

215 R. v. Rose, supra, fn. 192

216 R. v. Baldry, supra, fn. 84, per Pollock, L.C.B. R. v. Jarvis, supra, fn. 84, per Kelly, C.B., at p. 576, where he stated "The question is, do the words used by the prosecutor, when substantially, fairly, and reasonably considered, import a threat or promise to the accused, according as he should answer"?

In the recent case of R. v. Northam,²¹⁷ the accused suggested to a police officer that, if he admitted complicity in one offence of housebreaking, he should be allowed to have it taken into consideration at his forthcoming trial on similar offences, rather than have a separate trial. At the time, accused's wife was pregnant and not in good health. The police officer agreed to this and accused confessed. The accused, however, was tried separately and his confession was admitted in evidence. On appeal, holding that the confession was improperly admitted as it was the result of an inducement by a person in authority, Winn, L.J., observed, in quashing the conviction:

"It is not the magnitude, it is not the cogency to the reasonable man or to persons with such knowledge as is possessed by lawyers and others which is the proper criterion. It is what the average, normal, probably quite unreasonable person in the position of the appellant at the time might have thought was

217 supra, fn. 171

likely to result to his advantage from the suggestion agreed to by the police officer."218

The rule is that confessions must be voluntary, and it is to be remembered that anything spoken to accused is only one form of possible inducement sufficient

218 ibid, at p. 104. The learned justice continued: "The Court realises that this is imposing yet one more clog upon the efficient performance by the police of their duties." It is respectfully submitted by the writer that the doctrine so ably expounded by Winn, L.J., unwarranted and unenforced by case authority as it is, tends only to further confusion of this facet of the rule relating to confessions. For a further conflicting doctrine by the same learned judge, see R. v. Richards, supra fn. 145, at p. 268. From the inception of the rule, words amounting to a threat or a promise, however slight, served to exclude confessions as a result thereof. The question is how the accused could have understood the words, without regard as to what a reasonable man or average man in the position of the accused may have thought. It is submitted that it was this to which Lord Reid alluded in Commissioners of Customs & Excise v. Harz et al. supra, fn. 149, at p. 158; thus emphasizing that the facts in each case must be considered in relation to the particular accused. If Winn, L.J.'s theory were correct, a below-average accused of sub-normal intelligence would be prejudiced by the average-normal objective standard.

to negative voluntariness. The unrestricted scope of inducement within the rule was emphasized in the learned judgment of Hays, J., in the Irish case of R. v.

Johnston,²¹⁹ when he observed:

"All that the Common law requires is that the confession in pais be voluntary. But that word is to be understood in a wide sense, as requiring not only that the prisoner should have free will and power to speak, or refrain from speaking, as he may think right, but also that his will should not be warped by any unfair, dishonest, or fraudulent practices, to induce a confession...

Upon this principle, it is that, in the tenderness of modern times, judges have uniformly refused to receive in evidence a confession that has been either certainly or probably procured by a promise of good or a threat of evil, by exciting a hope of reward or a fear of temporal punishment other than that which the law has prescribed for the offence charged. So also a confession will be rejected if it appears to have been extracted by the presumed pressure and obligation of an [illegal] oath,²²⁰ or by pestering interrogatories, or if it appears to have been made by the party to rid himself of importunity, or if, by subtle and answering questions, as those which are framed so as to conceal then drift and object, ⁷ he has been taken at a disadvantage and thus entrapped into a statement which, if left to himself, and in the full freedom of volition,

219 (1864), Ir. C.L.R. 60, at p. 83, And see R. v. Buchan [1964] 1 All E.R. 502 (C.C.A.), per Parker L.C.J., at p. 503.

220 As to oath negating voluntariness, see R. v. Lewis (1833), 6 C. & P. 161 (Gurney, B.), 172 E.R. 1190, R. v. Wheeley (1838), 8 C. & P. 250, 173 E.R. 482 (Alderson, B.); R. v. Owen et al. (1839), 9 C. & P. 238 173 E.R. 818 (Gurney, B.), But see contra, R. v. Wheater (1838), 2 Lew. 157, 168 E.R. 1113 (Coleridge J.): and generally, cases cited in 168 E.R. 1114, fn.

he would not have made. These are cited merely as instances of the several ways in which a confession may be unfairly and improperly procured, so as to deprive it of the character of being voluntary..."

Any sort of improper influence employed by a person in authority to make or encourage accused to speak will exclude a confession by the accused, provided the influence or inducement is temporal in nature and it is communicated to the accused. The door as to what constitutes an inducement, on the facts of each case is never closed, and in a given case, although one circumstance may not amount to an inducement within the rule, the whole pattern of circumstances taken together may be sufficient to negative voluntariness. It is submitted that even a trick may in certain circumstances amount to an inducement,²²¹ although if standing alone, it would

221 R. v. Buchan, supra, fn. 219, R. v. Arnold (1838), 8 C. & P. 621 173 E.R. 645 (Denman, L.C.J.).

not usually be so treated.²²²

Similarly, the existence of any violence or actual physical compulsion on the part of a person in authority to extort a confession, will, without more,

fn. 221,
222 supra,/ In R. v. Derrington et al. (1826), 2 C. & P. 418, 172 E.R. 189 (Garrow, B.), a confession was admitted, although the letter containing it was obtained by a promise of the gaoler to mail letter to accused's father, which instead he turned over to the police. In R. v. Robinson [1917] 2 K.B.D. 108, a prison-censored letter confessing crime was admitted. Similarly, in R. v. Lock (1845), 10 J.P. 204 (Erle, J.), a letter obtained in deceptive circumstances would have been admitted, if it had been proven that accused wrote it. See, also, R. v. Heal (1905), 69 J.P. 224 (Grantham, J.); It would appear that in each case, supra, the deception did not induce the writing of the letter. In other words, the accused in each case voluntarily wrote the letter, and in no case was there any inducement to confess before the letter was written. It would, therefore, appear that each confession was admitted as being voluntary, no inducement being held out by a person in authority. No case has been found by the writer laying down the proposition that a confession obtained by deception, or a trick is admissible. It is submitted that the use of a trick is but one circumstance to be considered by the trial judge, in deciding whether a confession is voluntary, in the sense that no inducement has been held out by a person in authority, to the accused to speak.

serve to exclude the confession. In R. v. Fennell.²²³ on a trial for larceny, accused's confession was admitted in evidence. Although the confession was made to the prosecutor in the presence of a police inspector, immediately after the prosecutor had said to the prisoner, "The inspector tells me you are making house-breaking implements, if that is so, you had better tell the truth, it may be better for you.", the learned chairman received the confession on the ground that the words used did not import a threat or promise. On appeal the conviction was quashed, Coleridge, L.C.J., stating:

"... a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight nor by the exertion of any improper influence."²²⁴

223 supra, fn. 108, and see, R. v. Hatts (1883), 48 J.F. 248 (C.C.R.)

224 ibid, at p. 151, In R. v. Smith, supra, fn. 154, Parker, L.C.J., observed at p. 39: "In deciding whether an admission is voluntary the court has been at pains to hold that even the most gentle, if I may put it that way, threats or slight inducements will taint a confession." See, also, R. v. Buchan supra, fn. 219. Since the abolition of torture, no case has been found by the writer where violence was used to extort a confession in England. But violence is undoubtedly within the scope of inducement in the modern rule. In R. v. Wong Chiu Kwai (1908), 3 Hong. Kong L.R. 89 (S.C.), approved in Ibrahim v. R. [1914] A.C. 599, at p. 613, it was held, inter alia, that a confession is not deemed to be free and voluntary if it has been obtained by violence.

It is, however, necessary to consider a recent suggestion by Winn, L.J., where he stated in R. v. Northam,²²⁵ obiter.

"In giving judgment in Richards, 51 Cr. App. R. 266 at p. 268 ..., I myself said that there was a distinction, as it seemed to the court in that case, to be kept in mind always between inducement by persons not in authority, with regard to which the proper test the court then said must be whether a confession was in fact induced, whether there had been a persuasion of the will of the individual to make such a confession, whereas in the case of inducements by persons in authority, in particular police authority, the question was, was any offer or promise made which was capable of constituting an inducement, as distinct from one which in fact induced."

It is respectfully submitted that the "distinction" of which the learned justice appears to be the sole proponent, has no place in the modern rule relating to the admissibility of extra-judicial confessions, and serves only to confuse the law relating thereto. In the first place, it is submitted that any inducement held out to accused by a person not in authority, will not exclude a subsequent confession.²²⁶ Even in the case

225 supra, fn. 171 at p. 103.

226 supra, c.3.

where a private person applies actual physical compulsion to accused to speak, this person, by his assumption of authority over the accused, will be considered a person in authority within the rule. If, however, the inducement is by word, the confession is not admitted, because the person was not in authority qua the accused.

Secondly, if the inducement was by a person in authority, the learned justice limits the category of inducement to "offer or promise". By this test, if a police officer extorted a confession from an accused by a bribe, threat, or even actual violence, the subsequent confession would be admissible. This is clearly not the law of England, which holds that any inducement, however gentle, will exclude.²²⁷

Thirdly, the question in all cases, it is submitted, is whether any inducement has been held out to the accused by a person in authority. If the facts of the particular case admit of violence, or if all circumstances taken together admit of a compulsive atmosphere as regards the accused,²²⁸ the confession

227 supra, fn. 224.

228 See, R. v. Thornton, supra, fn. 81, and Commissioners of Customs & Excise v. Harz et al. supra, fn. 149, at p. 157, where Lord Reid states "Then there is cited Thornton (1832), 1 Moo. C.C. 27, a decision which would certainly not be followed today."

will be excluded, as these inducements speak for themselves. If, however, the sole circumstance in a given case is the fact of certain words being spoken to the accused, the confession will be excluded only if the accused could understand the words as a promise of favour or a threat of harm. In no case is regard to be had to whether the confession was in fact induced, or whether the accused was in fact induced to speak.

CHAPTER FIVE

LE VOIR DIRE

1. Historical Introduction

Although the origin of the phrase voir dire is historically uncertain,²²⁹ it is clear that by the seventeenth century, the procedure of "oath upon a voir dire" was firmly established in English common law, both in criminal trials as well as civil, as a procedure by which the competency of witnesses was decided.

According to Jacobs

"A person who is to be a witness in a cause may have two oaths given him, one to speak the truth to such things as the court shall ask him concerning himself, or other things which are not evidence in the cause, the other to give testimony in the cause in which he is produced as a witness the former is

229 It was at least in use during the period of the Court of Star Chamber. See, R. v. Lutterwasser [1948] 1 K.B. 4, at p. 5, where Lord Goddard, J.C. states "... one of the great complaints in the Stuart times made against the Star Chamber by the common lawyers was that the Star Chamber, unlike the courts of common law, always claimed to examine the witnesses on the voir dire." It is probable that the procedure of "oath upon a voir dire" originated earlier as an inquiry to determine the competency of jurors. See, R. v. Inscot (1712), 10 Mod. 192, 68 E.R. 689, at p. 690, per Parker, C.J. The term "voir dire, voire dire, or voyer dire" is derived from the Latin, Veritatem dicere. See, Giles Jacobs, Law Dictionary (10th ed., 1782), under title "Voir Dire".

called the oath upon a voyer dire."²³⁰

In R. v. Muscot,²³¹ where the question was whether a person produced as evidence for the prosecution might not be examined upon the voir dire, as was the common practice in civil actions, Parker, C.J. observed.

"It is a principle of the common law, that every man shall be tried by a fair jury, and that evidence shall be given by persons disinterested. The law gives the party tried his election to prove a person offered as evidence interested two ways, viz., either by bringing other evidence to prove it, or else by swearing the person himself upon a voir dire, but though he may do either, he cannot have recourse to both. It was never objected before that a person should not be sworn upon a voir dire, nor will it, I hope, ever hereafter."

The special form of the oath was that the person shall truthfully answer all such questions the

230 Law Dictionary, supra, fn. 1, under title "Oath". It would appear that the term voir dire refers to the separate examination, rather than the oath itself. See, Jacobs v. Layborn, infra, fn. 232 per Rolfe, B., at p. 982. As to examples of use of the procedure, see Craig et al. v. Richard, Earl of Anglesea (1743), 17 How. St. Tr. 1140, at p. 1262; Botham, Assignee v. Swingler (1794), Peake 285, 170 E.R. 158 (Lord Kenyon) Turner et al v. Pearte (1787), 1 T.R. 718, 99 E.R. 1339. Abrahams, Qui Tam v. Bunn (1768), 4 Burr. 2251, 98 E.R. 173.

231 supra, fn. 229.

court shall demand of him,²³² and although it was clear that the procedure was an inquiry to "satisfy the conscience of the judge, the jury having nothing to do with it",²³³ it appears that the examination may have been conducted in the presence of the jury,²³⁴ and at any time during the trial.²³⁵

As regards confessions, the use of the voir dire as a preliminary hearing by the judge to determine voluntariness is of very recent origin. During the

232 See, Jacobs v. Layborn (1843), 11 M. & W. 685, 152 E.R. 980, at p. 982, per Rolfe, B., R. v. Butterwasser, supra, fn. 229, See, especially, Lovat's Case (1746), 18 How. St. Tr. 596, per Lord Abinger at p. 983.

233 Lovat's case, ibid, See, also, Bartlett v. Smith (1843), 11 M. & W. 483, 152 E.R. 895, per Lord Abinger at p. 896.

234 No authority has been found by the writer to the effect that examination on the voir dire had to be conducted in the absence of the jury. Rather, the suggestion of the cases seems to be the reverse. See, Needham v. Smith (1704), 2 Vernon 463; Lovat's Case, supra, fn. 232, per Lord Hardwicke; Jacobs v. Layborn, supra, fn. 232

235 See, Turner v. Pearte supra, fn. 230, per Buller, J. at p. 1340, Lovat's Case supra, fn. 232. Even if a witness has been examined on the voir dire and found to be competent, his evidence will be excluded if it appears by his examination in-chief that he is incompetent. See, R. v. Whitehead (1866), L.R. 1 C.C.R. 33.

nineteenth century, no judicial reference to the term voir dire is to be found in cases involving confessions, and it would appear that all evidence concerning the admissibility of confessions was received in the presence of the jury.²³⁶ However, by the first quarter of the century it was necessary that the judge hear the evidence relating to the issue of voluntariness in the absence of the jury.²³⁷ In R. v. Chadwick,²³⁸ when it appeared that a police witness was going to give evidence of a confession by accused, accused's counsel objected. The Recorder then permitted the witness to continue, and after overruling the objection without any separate hearing as to voluntariness, admitted the confession. At a later stage in the trial, evidence was heard in the presence of the jury regarding

236 For example, see R. v. Garner, *supra*, fn. 95; R. v. Warringham, *supra*, fn. 103, R. v. Jones *supra*, fn. 148 R. v. Griffin, *supra*, fn. 148. R. v. Berriman (1854), 6 Cox C.C. 388 (Erle, J.). A browse through the volumes of the Cent. Cr. Ct. R. is particularly instructive on this point. Even in R. v. Thompson, *supra*, fn. 85, the leading case on burden of proof, there is no reference to the necessity of evidence being taken in the absence of the jury.

237 R. v. Booth & Jones (1910), 5 Cr. App. R. 177, per Darling, J., at p. 180.

238 (1934), 24 Cr. App. R. 138.

whether the alleged threats by the police to the accused had or had not been made. On appeal, it was held that the proper course to be followed when objection is taken to the admission of a confession, is for the trial judge to hear evidence in the absence of the jury relating to the issue of voluntariness, and upon that evidence, rule whether the confession is or is not admissible.²³⁹

11. Burden of Proof on the Voir Dire.

The rule was that a confession of an accused, in order to be admissible in evidence, must be voluntary. As late as the nineteenth century, as far as the courts were concerned, this simply meant "appearing"²⁴⁰ to have been voluntarily made, without threat, promise or otherwise induced. As regards the prosecution, this was interpreted to mean that the

239 By 1940, this was considered to be the usual practice. See, R. v. Cowell (1940), 31 Cox C.C. 415 (C.C.A.), at p. 416. However, even as late as this, the "trial within a trial" was not commonly referred to as the voir dire, eo nomine, and it has only been in the last two decades that voir dire and "trial within a trial" became synonymous.

240 R. v. Thompson, supra, fn. 73

person who had taken the confession, gave testimony to prove the confession, usually stating that no inducement had been held out by him to the accused.²⁴¹ There was no burden on the prosecution to negative possible inducements, and if the accused alleged extortion, it was for him to make it part of his case.²⁴² In R. v. Clewes,²⁴³ a prisoner charged with murder made a confession before a coroner. It appeared that, before he made this confession, he had been interviewed by a magistrate. On the suggestion of the prisoner's counsel that, since the magistrate may have induced his client to confess, the prosecution was bound to call the magistrate as a witness, Littledale, J., stated.

"As something might have passed between the prisoner and [the magistrate] respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do. However, if they will not call him, the prisoner may do so if he chooses."²⁴⁴

On the refusal of the prosecution to call the witness, the witness was called on behalf of the

241 In Hale, P.C., at p. 284, it is stated that "it must be testified that he [confessed] freely without any menace or undue terror imposed on him."

242 See, R. v. White, supra, fn. 64

243 (1830), 4 C. & P. 220, 172 E.R. 678

244 ibid, See, also, R. v. White, supra, fn. 64.

prisoner, and it was proved that inducements had been held out.

In R. v. Swatkins et al.,²⁴⁵ while the accused was in the custody of one constable, a second constable entered the room. The first constable then left, and the accused immediately confessed to the second constable, without first being cautioned by him. It was again argued on behalf of the accused that the first constable must be called by the prosecution to prove that he held out no inducements to the accused, before the confession to the second constable was receivable. It was contended by the prosecution that it only had to prove that no inducement was held out by the person to whom the confession was made, and that if it was suggested that any other person induced the accused, it was incumbent on the accused to prove it. It was held by Patteson, J., not deciding the issue on whom the burden of proof lay, that the first constable should be called by the prosecution as it would lead to a "collusion of constables."²⁴⁶

²⁴⁵ supra, fn. 106

²⁴⁶ ibid, at p. 820. Compare to R. v. Howes, supra, fn. 211, where two constables were not bound over as witnesses.

But if any doubt was entertained by the learned Patteson, J., as regards the issue he successfully avoided in the former case, it was resolved seventeen years later in R. v. Garner,²⁴⁷ a case involving an indictment against a thirteen year old girl for administering poison to her mistress with intent to murder her. At the trial, the learned judge received the confession of the accused, tendered by the prosecution to prove intent, after the person to whom the confession was made swore in evidence that he held out no inducement. It was later proved that he may have held out an inducement to the accused, and Patteson, J., after consulting Denman, L.C.J., refused to strike the confession out of his notes. The accused was convicted, and on the request for the opinion of the judges,²⁴⁸ all agreed that the conviction could not be sustained, Patteson, J. stating:²⁴⁹

"I have no doubt that the affirmative lies upon the prisoner, who is bound to prove that the inducement was held out; but here that was affirmatively proved after the confession had been received."

No case had explicitly decided that the burden was on the prosecution to prove the tendered confession voluntary, in the sense of negating possible inducements.

247 supra, fn. 95

248 Before Pollock, C.B., Patteson, Maule, Cresswell, and Erle, J.J.

249 supra, fn. 95 at p. 177

Rather, it was clear that the prosecution merely had to produce the person who took the statement, and if any doubt arose as regards the possibility of other persons inducing the accused, it was clearly for the accused to prove the inducement. If, however, the doubt was confined to the person who took the confession, in the sense that it did not appear that the confession was voluntary after the testimony of this person, the burden was on the prosecution to remove that doubt. In R. v. Warringham,²⁵⁰ where it was contended by the prosecution that there was no such burden upon it, Parke, B., stated, rejecting this contention:

"You are bound to satisfy me that the confession which you seek to use in evidence against the prisoner, was not obtained from him by improper means." 251

Although the learned Baron Parke had not intended to lay down a rule applicable to all cases,²⁵² and although the actual ruling did not conflict with previous decisions,²⁵³ the case was interpreted as laying down the general principle

250 supra, fn. 103

251 ibid, at p. 576

252 In R.v. Baldry supra, fn. 84, Parke, B., stated at p. 526. "The object of the report /R. v. Warringham/ was not to show what words amounted to an inducement, but that where words of inducement were used, and it is doubtful whether they were used before or after a statement, that the prosecution must clear up the doubt, and show that they did not precede the statement."

253 supra, fns. 247, 249

that the burden of proof was on the prosecution to prove the tendered confession voluntary. As Taylor stated:²⁵⁴

"... The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the judge, who will require the prosecution to show affirmatively, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession."

This suggested, contrary to Patteson, J.'s ruling in R. v. Garner,²⁵⁵ that there was no burden whatever on the accused as regards proof of voluntariness. In the leading case of R. v. Thompson,²⁵⁶ the contention that a confession can only be excluded upon proof by the accused that the confession was not voluntary was rejected for the last time. Approving the "general rule" of R. v. Warringham,²⁵⁷ as proposed by Taylor,²⁵⁸ it was held that it was incumbent on the prosecution to prove affirmatively that the confession was free and voluntary, in the sense of negating possible inducements.

254 Law of Evidence (8th ed.), c.15, s.872: Compare Taylor's statement with the headnote of R. v. Warringham, supra, fn. 103, and with the actual ruling of the case as stated in R. v. Baldry, supra, fn. 252

255 supra, fn. 95

256 supra, fn. 85, approved in Ibrahim v. R. supra, fn. 78

257 supra, fn. 103

258 supra, fn. 254

As Cave, J., observed, in rendering judgment:²⁵⁹

"... it was incumbent on the prosecution to prove whether any, and if so, what communication was actually made to the prisoner, before the magistrates could properly be satisfied that the confession was free and voluntary."

It cannot now be doubted that the burden of proof on the voir dire is on the prosecution to prove that the confessional statement it wishes to be admitted in evidence is free and voluntary, in the sense of producing evidence to negative any possible inducement.²⁶⁰ If any form of influence or inducement does appear, the confession will be rejected from evidence, unless the prosecution can clearly prove, to the satisfaction of the trial judge, that the effect of the influence on inducement was removed before the confession was made.²⁶¹ On the voir dire, there is no burden whatever on the accused as regards proof of the issue of voluntariness, although he is entitled to lead evidence relating to the issue if he so chooses.

However, if the accused decides to give testimony on the voir dire, he is then open to be cross-examined by the

259 supra, fn. 85, at p. 17. Coleridge, L.C.J., Hawkins, Day, Wills, J.J., concurring.

260 The statement of Patteson J., in R. v. Garner, supra, fn. 95, although it does not appear to have been considered, as well as other suggestions to the contrary, must now be taken as being overruled. See, as to the burden on prosecution, R. v. Chadwick, supra, fn. 238, R. v. Treacy (1944), 30 Cr.App.R. 93, Sparks v. R. supra, fn. 104; R. v. Wilson et al., supra fn. 135, Deokinanan v. R., supra, fn. 109, per Viscount Dilhorne, at p. 246.

261 supra, fn. 256

prosecutor, and it would appear that it is proper for the prosecutor to ask whether the confession is true.

In R. v. Hammond,²⁶² where the point arose on appeal, Humphreys, J., stated at p. 87:

"It was a perfectly natural question to put, and was relevant to the issue whether the story which the appellant was then telling of being attacked and ill used by the police was true or false. It was put by the Lord Chief Justice in the early part of the argument of counsel for the appellant, that it surely must be admissible because it went to the credit of the person who was giving evidence. If a man says, "I was forced to tell the story, I was made to say this, that and the other", it must be relevant to know whether he was made to tell the truth or whether he was made to say a number of things which were untrue. In other words, in our view, the contents of the statement which he admittedly made and signed were relevant to the question of how he came to make and sign that statement, and therefore, the questions which were put were properly put."

It would seem that what the learned judge cites as one ground, would in reality appear to be three grounds, all of which, it is submitted, are of questionable validity as bases for allowing the question. In the first place, the learned judge reasons that the question is allowable on the ground that it is relevant to the "issue" of whether the testimony of the accused is true or false. It is respectfully submitted that when an accused gives testimony on the voir dire, it must be assumed that it is the truth, until proven otherwise by the

262 (1941), 28 Cr. App. R. 84 (Caldecote, L.C.J., Humphreys and Lewis J.J.).

prosecution.²⁶³ If it were a valid ground, one would expect the logical conclusion, that by answering in the affirmative, the accused would be believed. Instead, his evidence was discounted, and his confession held voluntary.

Secondly, the learned judge holds the question permissible on the grounds that it is relevant to credit. It is true that once the accused takes the witness stand on the voir dire, the prosecution is entitled to cross-examine him to credit. In other words, the purpose of the prosecutor by his cross-questions, is to suggest that the witness is not the type of person whose evidence can be regarded as being trustworthy. Therefore, by asking the question, "Is it true?", the prosecutor expects a negative answer, as he did in this case. One would expect, therefore, when the question was answered "Yes", that the prosecutor established the credit of the witness, rather than destroy it, and it was then open to the learned trial judge as a logical conclusion, to fully accept the evidence of the accused and reject the confession as not being voluntary. Instead, the learned trial judge did not accept the evidence of the accused, and by so doing, verified the transparency of relevancy to credit as a basis for permitting the question.

267 Similarly, if the judge means relevant to whether the confession is voluntary, it cannot be, because the confession is assumed to be not voluntary until proven to be so by the prosecution.

Thirdly, the learned Humphreys, J., held the question permissible because in his words, " .. it must be relevant to know whether he was made to tell the truth. ..." Aside from the obvious criticism that the confession rule is directed to the forcing of the accused to speak, and in no way can the truth or falsity of what was said justify the force used, it is respectfully submitted that the only issue on the voir dire is whether the confession is voluntary and in no way can the question "Is it true?" be regarded as relevant to that issue. The truth of the confession is of no concern of the trial judge, whose duty on the voir dire is as regards the admissibility of evidence, not the value and weight to be attached to that evidence.

Finally, it is submitted that the trial judge has a wide discretionary control over all cross-examinations, and even if the writer is wrong as to the foregoing and there is a slight relevancy in the question, it is respectfully submitted that the possibility of prejudice in the question is so great that the trial judge, in his discretion, should not permit its being asked.

111 Standard Of Proof

On the voir dire, the burden of proof on the prosecution is to prove the tendered confession voluntary, to

the satisfaction of the trial judge.²⁶⁴ In all cases, whether a confession is admissible or not, depends on the opinion the judge himself forms, after a consideration of all the circumstances.²⁶⁵ As the slightest inducement will serve to exclude the confession, any doubt existing in the mind of the judge as to the voluntariness of the confession will result in rejection of that confession. It is therefore submitted that it is necessary that the evidence adduced by the prosecution on the voir dire must give rise to no other inference, or admit of no other conclusion than that the confession was in fact voluntarily given by the accused. Any doubt arising from a portion of the evidence relating to the issue of voluntariness, will taint the whole of the evidence, unless that doubt is removed by the prosecution. It is not a question of probability, nor the preponderance of evidence.

"It must be ascertained with certainly that such confession was neither obtained by threats nor promises, but was perfectly free and voluntary, without any menace or undue terror imposed upon the prisoner." 266 (*My italics*)

264 R. v. Thompson, supra fn. 85, R. v. Warrington, supra fn. 103, Sparks v. R., supra, fn. 104, per Lord Morris of Borth-y-Gest, at p. 732, R. v. Wilson et al., supra fn. 135, per Parker, L.C.J., at p. 198, R. v. Toole supra, fn. 86

265 R. v. Doherty (2) (1874), 13 Cox C.C. 24 (Fitzgerald, B., Tr.); R. v. Thompson, supra, fn. 85

266 2 Hale, P.C. 284, 2 East, P.C. 657.

Although the extent of proof required of the prosecution on the voir dire to prove voluntariness has not been doubted for over a century, by R. v. Sartori et al.,²⁶⁷ a recent decision of a single judge, certain confusion has been added to the law relating to the standard of proof. In that case, it was decided, apparently without reference to any previous authority, that the burden of proof on the prosecution to satisfy the judge as to voluntariness of confessions and statements was the same as the burden on the prosecution to satisfy the jury of the guilt of the defendants, i.e. proof beyond a reasonable doubt. If by that decision, the learned judge meant that to satisfy the trial judge on the voir dire was equivalent to the doctrine of reasonable doubt in the sense of being the highest possible burden imposed in criminal law, the decision was unnecessary, and tends only to the confusion of the respective functions of judge and jury. If, however, the learned judge intended to extend to the confession rule the doctrine of reasonable doubt in the sense that it is possible for the judge on the voir dire to entertain some doubt, and still admit the confession as being voluntary, then it is respectfully submitted that such an intention is against all leading authority on the subject, and being devoid of authority

267 /1961/ Cr.L.Rev. 397 (Edmund Davies, J.). See, also, R.S. O'Regan, Admissibility of Confessions - the Standard of Proof /1964/ Crim. L. Rev. 287

itself, should not be followed.²⁶⁸

A jury, on the evidence before it, might have some doubt as to a certain piece of evidence, but still be satisfied beyond a reasonable doubt that the accused is guilty of the criminal act with which he is charged.²⁶⁹ However, on the voir dire, the judge can be convinced that the accused did the act and that the confession is true, but if he has any doubt as to whether the confession is voluntary, then it is incumbent upon him to reject the confession.²⁷⁰

268 It is submitted that it was no accident, or mere oversight that "to satisfy the trial judge" was not equated with the doctrine of reasonable doubt in R. v. Thompson, supra, fn. 85.

269 Indeed, the introduction of the majority verdict has even lessened this standard.

270 Note, however, R. v. H. [1961] Cr. L. Rev. 324, R. v. McLintock, supra, fn. 155, a case involving continuous confessions, where the test adopted was whether the prosecution had proved beyond a reasonable doubt that the inducement was not operating, apparently without reference to the satisfaction of the trial judge. Compare to R. v. Smith, supra, fn. 154, per Parker, L.C.J., Even if the judge finds the confession voluntary, according to Parker, L.C.J., in R. v. Francis et al. (1959), 43 Cr. App. R. 174, at p. 176 "... there may well be cases where the judge might not think it right to allow the confession to be put before the jury at all."

iv. Practice

In meeting the burden of affirmative proof, it is submitted that there is an ethical duty on the prosecutor not to deliberately withhold, or refrain from leading, evidence or testimony which might aid the trial judge in reaching his conclusion on the voir dire or trial within a trial. His duty is to fairly present all the evidence, the absence of which may lead to the court or trial judge being misled, or to undue prejudice of the accused. It is inherent that the prosecutor refrain from posing questions to the accused, if the accused gives evidence on the voir dire, which questions have as their sole purpose to unduly prejudice the position of the accused, or any other purpose not consonant with the trial reaching the proper conclusion on the limited issue of voluntariness.

Although there is no burden of producing evidence on the defence at the trial within a trial, if defence counsel does decide to lead evidence, he is ethically bound not to lead evidence which he knows to be false, or otherwise mislead the court. This duty, it is submitted, is in no way relegated to a secondary position behind that of defence counsel's duty to his client. On the voir dire, it is the duty of defence counsel to fairly present the case of his client concerning the confession or statement. Within this duty, and

considering that it is permissible for the prosecution to inquire, if the accused does testify, whether the confession is true, it would appear that only in special circumstances should it be suggested to the accused that he give evidence in his own behalf, as the prejudice of his answer may outweigh all other considerations.

Although it is necessary for the counsel representing the accused to timely object at the trial to the tendering of the confession or statement in evidence, it would appear, nevertheless, to be improper practice on the part of the prosecution to "push" the confession or statement in evidence, without recourse to the necessary preliminary procedure of a trial within a trial. In the vast majority of cases, and especially where the trial is before judge and jury, it would appear to be better practice for both counsel to notify the trial judge, immediately before the trial, that in their opinion a voir dire or trial within a trial is going to be necessary. If there is any doubt in the minds of counsel as to whether a voir dire is or is not required, it is submitted that proper practice demands that this doubt be resolved in favour of the holding of a voir dire, at which time argument can be made in the absence of the jury.

On the voir dire, since most cases involve the testimony of two police officers, it would seem to be a wise consideration on the part of the defence to ask for the exclusion of witnesses. Even the slightest chance of collusion of witnesses, however remote, must be probed on behalf of the accused. Similarly, whether a confession or

statement is held to be involuntary often depends on the cross-examination of the police witnesses. In this regard, if the statement was taken by the question and answer method, it is incumbent upon the counsel for the accused to inquire as to the exact phraseology of the questions asked, as the questions themselves may contain an inducement, as for example, the question "Don't you realize it will definitely be to your advantage to confess?" Because of the importance of the cross-examination, it would seem to be wise practice, on the part of counsel for the accused, to frame his cross-questions, as much as he is able, before trial.

v. Duty Of The Trial Judge On The Voir Dire

It is clear that whether a confession is voluntary is a preliminary question, the answer on which the admissibility of the confession depends, and as such must be answered by the judge on the voir dire, without any reference to, and in the absence of,²⁷¹ the jury.²⁷²

271 R. v. Booth & Jones, supra, fn. 237, R. v. Chadwick, supra, fn. 235, R. v. Coveil, supra, fn. 239, R. v. Murray (1950), 34 Cr. App. R. 203, per Goddard, L.C.J., at p. 207, R. v. Francis et al., supra, fn. 270, Sparks v. R. supra, fn. 104 at p. 733, Chamber Keung v. R. 51 Cr. App. R. 257 (1957).

272 Partlett v. Smith, supra, fn. 233, per Lord Abinger at p. 396. In Thomas John's Case (1790), cited in East, p. 3 c. 5, from H. B. Buller, J. as to a dying declaration, all the judges agreed that it should not be left to the jury to say whether the deceased thought she was dying or not. Rather, the judge must decide it before he receives the evidence. Similarly, Henry Melbourne's Case (1792), Lincoln Sups Ass., there cited, See, also Novat's Case, supra, fn. 232.

In Doe v. Davies,²⁷³ Lord Denman, C.J. observed:

"There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus an oath, or its equivalent, and competency, are conditions precedent to admitting viva voce evidence, and the apprehension of immediate death to admitting evidence of dying declarations; and search to secondary evidence of lost writings, and stamp to certain instruments; and so is consanguinity or affinity in the declarant to declarations of deceased relatives. The judge alone has to decide whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter-evidence is offered, he must receive it before he decides, and he has no right to ask the opinion of the jury on the fact as a condition precedent."

According to Lord Atkin,²⁷⁴

"The question is one of admissibility of evidence, and on all such questions it is for the judge to decide after hearing, if necessary, evidence on both sides bearing on any contested question of fact relevant to the question. Thus the question whether a confession is voluntary is to be determined by the judge and not the jury."

The sole issue on the voir dire is whether the confession proposed to be exhibited in evidence is voluntary, and it is the duty of the trial judge not only to hear evidence²⁷⁵

273 (1847), 10 Q.B. 315; See also, Cleave v. Jones (1852), 7 Ex. 421, Boyle v. Wiseman (1855), 11 Ex. 360, per Parke, B., at p. 363.

274 Minter v. Priest /1930/ A.C. 558 (H.L.), at p. 581-582, Compare R. v. Nute, infra, fn. 290

275 It is not enough for the judge to decide on depositions from a lower court. See R. v. Treacy, supra, fn. 260

relevant to this issue, but also to rule at the conclusion of argument on the evidence whether or not the confession is, or is not voluntary, and therefore, whether the confession is admissible, or non-admissible. As stated by Lord Morris of Borth-y-Cest in Sparks v. R.²⁷⁶

"The procedure to be followed when a question arises whether to admit a statement is well settled. ... If objection is made to admissibility, it is for the judge to hear evidence in the absence of the jury and then to rule whether an alleged confession should or should not be admitted. He ought not to admit it if, on the view which he forms of the circumstances of the making of a confession, he does not consider that it was a voluntary one." 277

276 supra, fn. 104, at p. 736.

277 On the voir dire the accused is entitled to testify himself. See, R. v. Cowell, supra, fn. 239, disapproving the contrary suggestion in R. v. Baldwin (1931), 23 Cr.App.R. 62. The judge must first decide whether the statement was that of the accused. As Devlin, J., noted in R. v. Roberts [1953] 2 All E.R. 340, at p. 344:

"I shall inquire into the two questions whether the statements which are alleged to have been made by the defendant were in fact, his statements, and, if so, whether they were made voluntarily and in accordance with the Judges' Rules, and I shall reach that conclusion of fact on the latter question in the ordinary way. On the former question, it seems to me, subject to anything which counsel for the defence may say, that it would be right that, if I think there is some evidence fit to go to the jury that they were his statements, I shall admit the statements and let them go to the jury. If I do not think that there is any evidence fit to go to the jury that they are his statements, I shall rule them out."

Remembering that the burden of proof on the voir dire is solely on the prosecution to prove voluntariness to his satisfaction, the trial judge must first inquire whether the statement or confession sought to be introduced into evidence, was in fact the confession of the accused. If there is any doubt arising as to this point, and the prosecution cannot resolve that doubt, the confession will be rejected. If, however, the judge is satisfied that it was made by the accused, he must then inquire whether there was any inducement arising from the circumstances of the case. At this point, the test employed by the trial judge, it is submitted, is not an objective test. Rather, it is subjective, in the sense that the trial judge must ask whether the accused could reasonably be induced to speak by the circumstances obtaining at the time, and previous to the time of making the statement or confession. The test, it is submitted, is not whether an average man, or reasonable man, or even the trial judge, in place of the accused would have been induced to speak. Rather, it is the accused himself, regardless of whether he is above or below average, reasonable or unreasonable, rational or irrational. The law must take each accused as it finds him, and what may reasonably induce one accused, may not reasonably induce another.

If the trial judge is satisfied, on a consideration of the whole of the circumstances, that there was no inducement, he will then admit the confession. If, however, the trial

judge entertains any doubt as to the existence of an inducement, or if the facts of the case give rise to the inference or conclusion that there was an inducement present, and the prosecution has not, by clear and convincing evidence, removed that doubt by proving that the existing inducement had dissipated by the time of the making of the confession, the trial judge will further inquire whether or not the inducement was held out to the accused by a person in authority.²⁷⁸ The test as to "person in authority" ^{it is submitted,} is whether the accused could reasonably believe the person to be in authority over him. Again, it is a subjective test, and the criterion is not what some other person in the position of the accused may have thought.

If the judge has any doubt in his mind as to whether the person is a person in authority, and the prosecution is unable to clearly prove that the person was not in authority over the accused, the confession will not be admitted, unless the prosecution can prove by positive evidence that the inducement held out was not held out to the accused, or that the inducement, being held out to the accused, was not communicated to the accused, either directly or indirectly.

278 If actual violence is used to compel the accused to speak, it is submitted that it will be presumed that the person applying the violence is a person in authority over the accused. This point of the inquiry is usually limited to, and follows a finding that certain words used may amount to or contain an inducement.

However, even if the prosecution has proven to the satisfaction of the trial judge that the confession is voluntary, the trial judge has a discretion to exclude the confession,²⁷⁹ which will be exercised if the methods used to obtain the confession were manifestly unfair, or in breach of the Judges' Rules.²⁸⁰

If the confession is excluded by the trial judge on the voir dire, it is excluded for all purposes, and the prosecution cannot use it for cross-examination.²⁸¹ If the

279 It would appear that judges have always had this discretion. See, fn. 51, See, also, Kuruma v. R. [1955] A.C. 197, at p. 204, Noor Mohammed v. R. [1949] A.C. 182, at p. 192, R. v. Cook [1959] 2 Q.B. 340; R. v. Husted (1898), 19 Cox C.C. 16, (Hawkins, J.); R. v. Knight & Thayer, supra, fn. 106; Ibrahim v. R., supra, fn. 78 at p. 184, R. v. Francis et al., supra, fn. 270, R. v. Owenell (1968), 52 Cr. App. R. 167, at p. 175. And see J.A. Andrews, Involuntary Confessions and Illegally Obtained Evidence in Criminal Cases [1963] Cr.L.Rev. 15, 77.

280 See, infra, c. vii, s.111.

281 R. v. Treacy, supra, fn. 260. This rule also obtains in favour of any co-defendant of the maker of the inadmissible confession or statement. See, P. v. Rice et al. (1962), 47 Cr. App. R. 79.

confession is admitted as being voluntary, all of the confession must go in evidence, those parts favourable to the accused as well as those unfavourable,²⁸² and the confession thus admitted, is only evidence against the person confessing.²⁸³

vi. Function of the Jury

Once the confession is held admissible by the judge on the voir dire, counsel are again entitled to present the same evidence to the jury. As Goddard, L.C.J., stated in R. v. Murray.²⁸⁴

"This point, if there is any doubt about it, had better be settled once and for all. It has always, as far as this court is aware, been the right of counsel for the defendant to cross-examine again the witnesses who have already given evidence in

282 R. v. Clewes, supra, fn. 243, R. v. Hearne et al. (1830), 4 C. & P. 215, 172 E.R. 676 (Littledale J.), R. v. McGregor (1967), 51 Cr. App. R. 338.

283 ibid; R. v. Turner (1832), 1 Mood. 347, 168 E.R. 1298 (C.C.R.), R. v. Sutherland et al, supra, fn. 189

284 supra, fn. 271, at p. 207; If, however, the trial judge is sitting without a jury, there would appear to be no reason for delving into the evidence heard on the voir dire, or trial within a trial, a second time.

the absence of the jury, because if he can induce the jury to think that the confession has been obtained by some threat or promise or some means of that sort, then of course the value of the confession is enormously weakened. The weight of the evidence and the value of the evidence are always for the jury." 285

- 285 This case, however, was misinterpreted three years later, in R. v. Bass [1953/ 1 Q.B. 680 (C.C.A.)], where it was held that the trial judge, on admitting the confession, must direct the jury to find whether or not the confession was voluntary, and that if they were not satisfied of its voluntariness they should reject it in toto. This misinterpretation was regarded as being the law. See, F. v. Sutherland et al. supra, fn. 189. R. v. Burgess [1964/ Cr. L. Rev. 469 (C.C.A.)], and it was held that, the finding of the trial judge as to voluntariness not being conclusive, it was necessary for the jury first to decide whether or not it was voluntary, before they could consider whether the confession was true. See, R. v. Parkinson [1964/ Cr. L. Rev. 398 (C.C.A.)], Sparks v. R., supra, fn. 104, R. v. Judge [1965/ Cr. L. Rev. 52 (C.C.A.)]; R. v. Cave [1963/ Cr. L. Rev. 371 (C.C.A.)]; R. v. Wilson et al., supra, fn. 135 at p. 198. This doctrine however, was exploded by Chan Wei Keung v. R., supra, fn. 271, which held, approving R. v. Murray, supra, fn. 284, that whether a confession was voluntary was solely a matter for the trial judge on the voir dire, with the jury considering what weight to attach to it, once admitted.

It cannot now be doubted that the sole question for the jury is whether the confession, once admitted, is true and what weight to attach to it. Once the trial judge admits the confession as being voluntary, that finding as to voluntariness is conclusive.²⁸⁶ As Parker, L.C.J., observed in R. v. Burgess:²⁸⁷

"The position now is that the admissibility is a matter for the judge, that it is thereafter unnecessary to leave the same matters to the jury, but that the jury should be told that what weight they attach to the confession depends upon all the circumstances in which it was taken, and that it is then right to give such weight as they think fit."

The jury is entitled to accept the confession of the accused without further evidence. The corroboration is necessary, although in practice there is invariably some corroboration.²⁸⁸

286 Chan Wei Keung v. R., supra, fn. 271

287 (1968), 52 Cr. App. R. 258; See, also, R. v. Ovenell, supra, fn. 279.

288 R. v. Mersey (1908), 1 Cr. App. R. 260, R. v. Sykes (1913), 8 Cr. App. R. 233.

CHAPTER SIX

CONTINUOUS CONFESSIONS

By the turn of the nineteenth century, although the usual case arising before the courts involved inquiry as to whether a single confession of an accused was admissible at his trial, factual situations involving more than one extra-judicial confession by the accused had also demanded and received judicial attention. Where the accused confessed the particular charge more than once, or gave more than one incriminating statement, no problem arose if the first of the confessions or statements was voluntary, in the sense of being given without any form of inducement. In this situation, inquiry as regards subsequent confessions or statements would be unaffected by the first.

Where, however, the first acknowledgment of guilt in whole or in part was the result of a threat, promise, or some other improper influence, and therefore inadmissible as being not voluntary, the question then arose as to what effect the previous inducement, or the previous inadmissible confession or statement had on those statements subsequently given by the accused. In other words, if a subsequent confession was to be held inadmissible, was the reason to be because it was induced by the first confession itself, and since the first confession was

rejected as being not voluntary, the subsequent confession must also be similarly rejected? Or was it to be because the inducement which caused the accused to confess in the first instance, continued to operate, thereby inducing the subsequent confession? If the latter were the case, then regardless of whether the accused subsequently confessed because he felt it did not matter since he had already done so, the subsequent confession would be admissible, provided the inducement instigating the first confession was clearly shown to have dissipated.

It would appear that early law favoured the former alternative, and as early as 1800,²⁸⁹ if a confession had been obtained from a prisoner by undue means, any statement afterwards made by him under the influence of that confession would not be received in evidence. In R. v. Nute,²⁹⁰ a servant girl was charged with setting fire to an outbuilding. Her mistress told her that if she would repent God would forgive her, but the mistress concealed from her that she would not forgive her herself. The accused servant girl confessed, and the next day, another person in her mistress' sight, though not of hearing, told her that her mistress had said she had confessed, and drew from her a second confession. Lord Eldon allowed the confessions to be given in evidence, and the prisoner was convicted. Although the twelve judges held that Lord Eldon

289 R. v. White (1800), 172 E.R. 1308, fn.(a), Phillips, Evidence, vol. 1, p.104.

290 Burn's Just., Chitt. edn., tit. Evidence.

erroneously left it to the jury to say whether the first confession was made under a hope of favour, and whether the second confession was made under the influence of the first, rather than deciding the issue himself, they did not disagree with the formulation of the questions to be answered by the learned judge.

It was clear, however, that by the close of the first half of the century this view was not to prevail. Rather, judicial emphasis began to be directed to the inducement giving rise to the first confession, and if it appeared or was shown that this inducement was at an end, subsequent confessions were received in evidence. In R. v. Richards²⁹¹ a fifteen year old girl accused of poisoning was told by her mistress that if she did not tell all about it that night, a constable would be sent for in the morning to take her before a magistrate. The girl confessed, which confession was rejected from evidence. Next day, a constable was sent for, and as he was taking her to the magistrate, she made a statement to him, he having held out no inducement for her to do so. It being argued for the accused that the inducement must be taken to have continued, the learned judge observed, as to the second statement:

"I think that this statement is receivable. The inducement was, that if she confessed that night, the constable would not be sent for, and she would not be taken before the magistrates. Now, she must

291 supra, fn. 148

have known, when she made this statement, that the constable was then taking her to the magistrates. The inducement, therefore, was at an end." 292

No consideration was given to the probability that the accused confessed a second time because she believed her first confession was valid, and under the influence of the first confession itself, felt she had nothing to lose by making a second one. In R. v. Howes,²⁹³ where the accused confessed to two arresting constables after being induced to speak, and later to a magistrate after being cautioned, counsel for the accused argued that since the law presumes that the inducement of the first confession continued, the magistrate should have told the accused that the former confession would have no effect. The learned Denman, L.C.J., disagreed, and held that it was not necessary for the magistrate to inform the accused that the first confession was of no effect, and, since he could not say that the second confession resulted from the earlier inducement, he admitted the second confession.

The sole question, therefore, was whether or not the second statement was a result of the continuing effect of the inducement leading to the first confession. In h. v.

292 supra, fn. 291. Compare to R. v. Smith, irira, fn. 302

293 supra, fn. 211

Reynell,²⁹⁴ the accused was indicted for stealing two hams. A constable, under a search warrant, found the hams in the house of the accused, and thereupon, in the presence of one of the prosecutors, said to the accused. "You had better tell all about it." The accused then confessed, which confession was acknowledged to be inadmissible by the prosecution. In the afternoon of the same day, another of the prosecutors went to the accused's house, and the accused repeated the same confession made earlier to the constable, but no inducement had been held out. Taunton, J., refused to receive the second confession, finding it impossible to say that it was not induced by the earlier promise held out to the accused.

Four years later, in R. v. Sherrington,²⁹⁵ where a second confession followed an induced first confession by fifteen minutes, Patteson, J. observed:

"There ought to be strong evidence to shew that the impression under which the first confession was made, was afterwards removed, before the second confession can be received. I am of opinion, in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first: the interval of time being too short to allow the supposition that it was the result of reflection and voluntary determination." 296

294 supra, fn. 145, See, also, R. v. Hewitt, supra, fn. 152

295 supra, fn. 124

296 ibid

By 1848, it was necessary that it be proved to the satisfaction of the trial judge that any confession tendered in evidence was voluntary, and where the confession tendered by the prosecution was one subsequently made to an induced confession of the same charge, it was necessary that the trial judge be satisfied beyond doubt that the previous inducement had been dispelled. In n. v. Collier et al.²⁹⁷, the prosecutor in the presence of the constable, induced the accused to confess, which confession was rejected from evidence. The constable then took the accused into a loft, and in the absence of the prosecutor, the accused again made a statement. This second statement was also rejected. Half an hour later, and again in the absence of the prosecutor, the constable took the accused to gaol, after which he made a statement for the third time. Williams, J., not being satisfied that the influence leading to the first two statements was removed, rejected the third statement, even though the accused was

297 supra, fn. 145.

cautioned by the constable not to say anything.²⁹⁸

Similarly, in the Irish case of R. v. Doherty,²⁹⁹ where an accused had been told by a constable at ten o'clock in the morning that it would be better for him to tell the truth, and not to put people to the extremities he was doing, an incriminating admission by the accused to another constable after six o'clock in the evening of the same day,

298 See, R. v. Howes, supra, fn. 293. In R. v. Lingate (1815), Phillips, Evidence, vol. 1, p. 115, 172 E.R. 1296, fn. b, a second confession was held admissible after a caution by a magistrate. Similarly in R. v. Bate et al. (1871), 11 Cox C.C. 686 (Montague Smith, J.), a third statement to a magistrate was received in evidence, after a caution by the magistrate, the previous two being rejected. In R. v. Cooper et al. supra, fn. 144, where a second confession was made to a turnkey at the gaol without inducement, after an earlier confession was induced by a magistrate and rejected, the second confession was also rejected, especially because the turnkey did not caution the prisoner. See, also, R. v. Doherty, supra, fn. 195, R. v. Cheverton, supra, fn. 145, per Erle, J., at p. 1309.

299 supra, fn. 298: Compare to R. v. Hewett, supra fn. 294.

was not allowed to be given in evidence, although the second constable had previously cautioned the prisoner. It was contended by the prosecution that, from the length of time intervening coupled with the caution by the second constable, the previous inducement must have been removed. Whiteside, C.J., in rendering judgment, stated:

"The Judges have held that it must be shown that the prisoner thoroughly understood that he could expect no gain from a confession. The subsequent caution must be shown to have had the effect of removing all such expectation from the prisoner's mind..."

Although it was clear that length of time between the first and subsequent confessions, and whether the accused was cautioned before making the subsequent confessions,³⁰⁰ were factors to be considered by the trial judge in deciding the voluntariness of the subsequent confessions, they were not necessarily decisiveⁱⁿ themselves. It was necessary that the trial judge be satisfied, that all the circumstances of the case gave rise to no inference other than that all inducement had been dispelled, i.e. that the subsequent confessions were voluntary. If any subsequent confession was inextricably involved with any previously induced confession, the

300 See, supra, fn. 298.

subsequent confession would be rejected as not being voluntary.³⁰¹

The modern law was recently stated by Parker, L.C.J. in R. v. Smith,³⁰² a court martial appeal. In that case, three soldiers were stabbed while in barracks. The Regimental Sergeant Major paraded the soldiers and threatened to keep them on parade until the culprit stepped forward. The accused confessed, and later, in the early morning, confessed again to a police sergeant after being cautioned by him. The first confession was rejected from evidence, and the learned Lord Chief Justice, in holding the subsequent confession admissible because the original threat had dissipated,³⁰³ stated:

"The court thinks that the principle to be deduced from the cases is really this: that if the threat or promise under which the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement." ³⁰⁴

301 R. v. Rue, supra, fn. 152. R. v. Downing (1840), Taylor, Op.Cit. fn. 16, at p. 589 fn.(n), m.s. Lord Aringer

302 supra, fn. 154

303 Compare to R. v. Richards, supra, fn. 291

304 Note the similarity with this statement of the law, and that in J.P. Taylor, A Treatise on the Law of Evidence (1848), at p. 591.

Although this proposition cannot now be doubted, the question arises - what if the first confession had been induced by violence, rather than a threat or promise? It is respectfully submitted that, any confession obtained from an accused after the application of physical coercion or violence to his person, regardless of the time limit between confessions, or whether he was or was not cautioned, would be inadmissible in evidence as not being voluntary.

The burden of proving voluntariness of any confession tendered in evidence, is at all times on the prosecution. Once it appears that the first confession was obtained in this manner, it is submitted that an irrebuttable presumption arises that any subsequent confession was the result of the continuing effect of the violence. Even if this were not the case, it is difficult to see how, in such circumstances, the prosecution could meet the burden of proving voluntariness on the voir dire, to the satisfaction of the trial judge.

Since any confession is open to scrutiny by the court only on its being tendered in evidence by the prosecution, it may be suggested that, where there are successive confessions by the accused, the prosecution can withhold the first, induced confession, and tender only the apparently uninduced subsequent confession. It is submitted that such a suggestion is specious at best. Aside from the fact that to do so may be a breach of the prosecutor's duty to the court, it is respectfully submitted that it is incumbent on the prosecution to tender

the first confession. If this were not the case, it would then be open to the police to obtain by any means, a long line of confessions from an unwilling accused, until they finally obtained one which would "appear" to be voluntary.

CHAPTER SEVEN

THE DOCTRINE OF CONFIRMATION BY SUBSEQUENT FACTS

It is clear that any fact relevant to the issue in a given case is prima facie admissible in evidence. If the fact arises from the voluntary confession of an accused, as for example the accused confessing where he hid the stolen goods, the fact of the finding of the stolen goods is admissible, not because the confession is voluntary, but solely because the fact is relevant to the issue in the case.³⁰⁵ In other words, the relevancy of a particular fact and therefore its admissibility, is independent of how the fact was obtained.³⁰⁶ It is true that the fact may be excluded from evidence in the discretion of the trial judge, as on the ground of its probative value being outweighed by its prejudicial effect to the accused. Prima facie, however, all facts relevant to the issue are admissible in evidence.

It would, therefore, appear to follow that if the fact is discovered in consequence of a confession which is held to be not voluntary by the trial judge, as being induced by a promise,

305 See, R. v. Harris et al. (1832), 1 Mood 338, 168 E.R. 1295 (C.C.R.). See, also, R. v. Allen et al. (1834), 1 Cent.Cr. Ct.R. 32, at p. 37, R. v. Moore, supra, fn. 81. As to illegally obtained evidence, see J.A. Andrews, supra, fn. 279; Glarville Williams, Evidence Obtained by Illegal Means /1955/ Cr.L. Rev. 339

306 Kuruma v. R., supra, fn. 279. See also, R. v. Leatham (1861), 8 Cox C.C. 498 (Q.B.), per Crompton, J., at p. 501.

threat, actual physical compulsion, or other improper inducement, whether or not the fact is admissible would be independent of this finding of non-admissibility as regards the confession. In R. v. Warickshall,³⁰⁷ the earliest reported case on the subject, the accused, an accessory after the fact of grand larceny, was induced to confess by a promise of favour. As a result of the confession, the stolen property was found in her lodgings, concealed between the sackings of her bed. It was contended by counsel for the accused that because of the fact of the finding of the property in her custody had been obtained as a result of an inadmissible confession, the proof of that fact ought also to be rejected.

The Court, rejecting this contention, observed

"This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source, for a fact, if it exists at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived, and the impossibility of admitting any part of the confession as a proof of the fact, clearly shews that the fact may be admitted on other evidence, ... The rules of evidence with respect to the admission of facts, and those which prevail with respect to the rejection of parol declarations or confessions, are

307 supra, fn. 71

distinct and independent of each other."³⁰⁸

Whether the relevant fact is admissible is dependent upon proof as to its existence, and if the fact is discovered in consequence of an inadmissible confession, reference cannot be made to the confession in order to prove the fact. This is so, not because the confession is extorted from the accused, but because the confession is not admissible and therefore, not legal evidence. Thus, if the confession were received in evidence, it is submitted that any fact discovered in consequence thereof could be proved by the confession itself.

In R. v. Lockhart,³⁰⁹ the accused was indicted for theft of a number of diamonds and pearls. As a result of the confession of the accused, which was induced by promises of favour and subsequently held inadmissible, it was discovered that some of the stolen goods had been disposed of to another person. On the prosecution calling this other person to prove

³⁰⁸ supra, fn. 307, at p. 235: Similarly, in R. v. Rosey (1784), 1 Lea. 264, 168 L.R. 235 fn. (a)², where, on a charge of shoplifting, the goods were found as a result of an induced confession, Buller, J., stated: "Whatever acts are done, are evidence, but if those acts are not sufficient to make out the charge against the prisoner, the conversation or confession of the prisoner cannot be received, so as to couple it with those acts, in order to make out the subject matter of proof..." See, also R. v. Lockhart, infra, fn. 309 R. v. Harvey, infra, fn. 321.

³⁰⁹ (1785), 1 Lea. 386, 168 L.R. 295 (Buller, J.).

that he had received the stolen goods from the accused, it was contended on behalf of the accused that since the discovery of the witness was the result of the inadmissible confession, the witness was not competent. It was held, however, to be clearly law that, although an improperly obtained confession is inadmissible in evidence, it can never go to the rejection of other witnesses which are discovered in consequence of such confession.

If the fact discovered is real evidence, such as the stolen property in a charge of theft, or the corpse in a charge of murder, or a witness, no problem arises as to its admissibility, provided the inadmissible confession is not relied on as proof of the fact. No reported case holds otherwise, and although the inadmissible confession leads to the discovery of the fact, the fact does not depend upon the confession for its existence. For example, where, in the case of a stolen goat, the accused does not confess where he has hidden it, it is no less a goat if discovered by a police constable without the aid of accused's confession.

A problem does arise, however, where the fact wished to be proved by the prosecution is not animate, but rather, depends solely upon the accused for its existence, as in the case where the prosecution wishes to lead the fact that the accused, after inducement, showed where the stolen goods were hidden, i.e. the actions of the accused.

In R. v. Jones,³¹⁰ the prosecutor asked the accused for the money which he had taken from his, the prosecutor's pack. Before the money was produced, the prosecutor further stated that "he only wanted his money, and if the accused gave him that, he might go to the devil if he pleased." The accused then gave the prosecutor some money, saying that was all he had left of it. On the whole of this evidence being left to the consideration of the jury by the trial judge, the accused was convicted. On the question being reserved for the opinion of the judges, it was held by a majority of the judges that the confessor was wrongly admitted, and the conviction wrong.³¹¹

Rather than attempting to extricate what facts were admissible, it is submitted that the majority of the court quite properly regarded the whole of the circumstances - the statements of the prosecutor, the action of producing the money by the accused, the oral statement of the accused - as an induced confession, and therefore, inadmissible in evidence. Although the money did exist as a fact regardless of the other circumstances,

310 supra, fn. 148, followed in R. v. Clarke (1828), per Vaughan, B., cited in Joy, Op.Cit., at p. 87. Compare to R. v. Griffin infra, fn. 323.

311 The majority was composed of Macdonald, C.B., Chambre, J., Heath, J., Lawrence, J., and Le Blanc, J., with Wood B., Grose, J., and Mansfield, C.J., dissenting, and Lord Ellenborough dubitante.

it is clear that its relevancy and therefore its admissibility was solely dependent on these other circumstances.

However, even if the fact is capable of proof without reference to the accused, or the accused's confession, this will not prevent the court from treating the fact as being equivalent to a confession, if there is an inducement present, which is solely directed to the accused for the purpose of discovering the fact. In R. v. Barker,³¹² the accused produced business books and records under a promise that he would not be prosecuted. At his trial for conspiracy, and the delivering of false statements of account with intent to defraud, the Crown sought to introduce the documents, contending that they were not brought into existence by the promise or threat. The documents were admitted and the accused was convicted. On appeal, the conviction was quashed, and Tucker, J., speaking for the court comprised of himself, Viscount Caldecote, C.J., and Asquith, J., stated:³¹³

"But in the present case the promise or inducement which was implied in this extract from Hansard expressly related to the production of business books and records... those documents stand on precisely the same footing as an oral or a written confession which is brought into existence as the result of such a promise, inducement, or threat."

312 supra, fn. 213.

313 supra, fn. 312 at p. 384. It is to be noted that the court is not deciding that facts discovered in consequence of an inadmissible confession are themselves inadmissible.

Where the acts of the accused are clearly separate from an induced confession, it would appear that the acts are admissible.³¹⁴ If, in the case of theft, or other crime, the action of the accused in pointing out the place of the stolen property, or corpse, or murder weapon, is not confirmed by the finding of the same in the place directed by the accused, the action or conduct of the accused is not admissible in evidence. In R. v. Jenkins,³¹⁵ the accused was induced by a promise to confess to stealing. After confessing, the accused carried the police officer to a particular house, as the house where he had disposed of the stolen property, and pointed out the person to whom he delivered it. That person denied knowing anything about it, and the property was never found. This evidence was admitted and the accused was convicted, the question then being reserved for the opinion of the judges. Holding that the evidence was improperly received, the court reportedly stated:³¹⁶

314 R. v. Mosey, supra, fn. 308. But see, infra, pp. 96,97.

315 (1822), Russ. & Ry. 492, 168 E.R. 914.

316 supra, fn. 315.

"The confession was excluded, because being made under the influence of a promise it could not be relied upon, and the acts of the prisoner, under the same influence, not being confirmed by the finding of the property, were open to the same objection. The influence which might produce a groundless confession, might also produce groundless conduct."

It is clear by this decision that any incriminating evidence brought into existence by the accused, by word or act, will be prima facie inadmissible, if the accused is induced to speak or to act. The operative and negating factor is the inducement directed to the accused, in consequence of which the accused's statement or action will be excluded as being not voluntary, and possibly unreliable. It is also clear that any induced acts on the part of the accused will be admissible in evidence, if those acts are confirmed by the finding of the property, and it is this proposition, although apparently the law, that tends to confuse the existing body of law on the subject.

That this proposition is illogical cannot be doubted. The court quite properly equated induced conduct with an induced confession. But by suggesting that accused's conduct, if confirmed by the finding of the property, is admissible, it would appear to follow that, if accused's confession were confirmed as being reliable, it also would be received in evidence. It is respectfully submitted that this is an erroneous view of the law. Confessions are excluded from evidence because they are not voluntary, regardless of whether or not they are true, or confirmed as being true.

The object of the confession rule is to exclude from evidence that which is not the product of the voluntary operation

of the will of the accused. A confessional statement of an accused, in order to be admissible, must be voluntary, in the sense that it cannot proceed from a threat, promise, or other improper inducement held out to the accused. A voluntary statement is considered to be most reliable evidence against the maker of the statement, and thus it is submitted, is the only part played by reliability within the rule, i.e. something akin to an observation after the fact.

Similarly, in the case of induced incriminating conduct, it is difficult to see why the fact that it was induced, and therefore not voluntary, should be relegated to a minor position, if the conduct was confirmed by the finding of the property; especially, since in a given case, induced incriminating conduct may be tantamount to an induced confession. Take, for example, the following set of facts where an accused is interrogated by a police officer regarding a theft, and the police officer says to the accused: "Show us where you have hidden the property that you have stolen, and you will not be prosecuted." The accused does not speak, but walks into the kitchen, followed by the police officer, and points to the cookie cannister. The police officer then searches the cookie cannister and finds the stolen property.

It is submitted that at the trial of the accused, there can be no doubt that the above facts would be regarded as a confession, and would be excluded as being not voluntary.³¹⁷ What, then, if the police officer had said to the accused: "Confess and you will not be prosecuted", and in consequence of this promise, the accused does not speak but points to a certain place where after a brief search, the police officer finds a written confession of the theft, complete in every detail? Could it be argued that the written document, because it was brought into existence before the inducement, was not a confession within the rule excluding non-voluntary extrajudicial confessions? It is submitted that such an argument would be specious at best, and that the document as well as the conduct of the accused pointing to its discovery, would be treated as the confession of the accused and, being not voluntary, would be excluded from evidence at the trial of the accused. Although the document did exist before the inducement, it became police

317 R. v. Jones, supra, fn. 310. R. v. Barker, supra, fn. 312. It would, however, probably depend on the timely objection of counsel for the accused, and in his getting all of the facts before the court. If it were not held inadmissible, police officers, by a shrewd wording of the inducement, or by actual physical compulsion itself, would be able to force the accused into incriminating conduct at will.

knowledge solely by reason of the inducement.

At the time of the decision in R. v. Jenkins,³¹⁸ it is probable that the confession rule was strictly limited to statements by the accused acknowledging the offence, without more. Today, however, a confession within the rule includes admissions by the accused which, although not an acknowledgment of the offence, tends to prove that the accused committed the offence.³¹⁹ It is respectfully submitted that the modern definition is broad enough to include incriminating conduct on the part of the accused, and, if it is the result of an inducement held out to the accused by a person in authority, it should not be received in evidence, regardless of whether the conduct is confirmed as being reliable by the finding of the property. It is true that the purpose of a trial is to arrive at the truth in the matter before it. But this cannot be allowed to be interpreted as meaning to the sacrifice of basic principles governing the protection of the accused, inherent in the common law, such as the concept of voluntariness regarding confessional evidence.

Where a question arises as to the admissibility of a fact discovered in consequence of an inadmissible confession, it would appear by the great weight of authority that the fact, if a fact of real evidence such as the stolen property, would

318 supra, fn. 315

319 Commissioners of Customs and Excise v. Harzetal., supra fn. 149.

be admissible provided it could be proved without the aid of the confession itself.³²⁰ As the eminent Lord Eldon stated in R. v. Harvey³²¹

"where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved, would have been sufficient to warrant a conviction without any confession leading to it."

It would follow from this, that since the fact cannot be proved by the confession, the inadmissible confession cannot be received in evidence if confirmed to be true, in whole or in part, by the discovery of the fact. Once the confession is found to be inadmissible as being not voluntary, it is inadmissible once and for all, regardless of whether it is true or confirmed to be true. However, other theories did emerge

320 R. v. Warickshall, supra, fn. 307. See, also R. v. Lockhart, supra, fn. 309, infra fn. 321

321 Bodwin Summer Ass. (1800), 2 West, P.C. 658. See, also R. v. Mosey supra, fn. 308. In the Irish case of R. v. John (1839), 1 Crave. 411, 20, the accused was indicted for concealing the birth of a child. As a result of a threat, she told the witness that the child's body was hidden in the bedstead. The witness then discovered it there. Torrens, J., excluded the confession, but allowed evidence relating to the search for, and discovery of the body of the child. It would appear that the learned judge would not permit the discovery of the body to be connected with the fact that there was a confession. See, also, R. v. Rule, supra, fn. 152.

in the nineteenth century and denied the validity of this proposition. These theories, arising as they did from a mistaken belief as to the proper basis of the exclusionary rule regarding confessions, tended only to the confusion of the subject.

The first theory⁵²² argued that the underlying reason for rejecting a confession extorted from an accused was that the confession so obtained may have been false, with emphasis being placed on the falsity of the confession, rather than on the methods used to obtain it. It was then argued, assuming this to be the proper basis, that so much of the confession as relates strictly to the fact discovered by it, should be allowed in evidence because the discovered fact confirms that this part of the confession was not false. Whether or not the confession was voluntary was not considered a subject of proper inquiry. If the confession was confirmed in part, then that part so confirmed was admissible in evidence.

522 R. v. Butcher (1798), 1 Lea. 264, 168 E.R. 235 fn. (a)²
It could then be argued that a confession confirmed in part is thereby confirmed in toto. See, Wigmore, Evidence (1940), s. 858, et seq.. See, also, R. v. Garbett supra, fn. 90, p. 203, where Lord Denman, C.J., agrees with the prosecution that in cases of theft, the confession is received if the stolen property be found in consequence - "because it leads to the inference that the party was not accusing himself falsely." But see R. v. Moore, supra, fn. 305.
Note the suggestion in R. v. Jenkins, supra, fn. 315.

At first blush, the case of R. v. Griffin³²³ would appear to support this theory. In that case, the accused was charged with theft of a guinea and two promissory notes. On being induced by the prosecutor that it would be better for him to confess, the accused brought to the prosecutor a guinea and a £5 note, telling the prosecutor it was one of the notes stolen from him. The trial judge, Chambre, J., told the jury that, notwithstanding the previous inducement to confess, they might receive the accused's declaration regarding the note, accompanying the act of delivering it up, as evidence that it was the stolen note. The accused was convicted, and on the point being reserved, a majority of the judges composed of Lord Ellenborough, Mansfield, C.J., Macdonald, C.B., Wood, B., and Heath, Grose, and Chambre, J.J., held the evidence to have been properly admitted and the conviction right.

It is difficult, however, to see how this decision can be cited to support the above-noted theory. It would seem that the ratio of the case was solely that the circumstances involved did not amount to a confession by the accused.³²⁴ It is true that a strong inference does arise that

323 supra, fn. 148

324 Le Blanc and Lawrence, J.J., dissenting, were of the opinion that the production of the money by the accused was alone admissible, and not the declaration that the £5 note was one of the stolen notes.

the accused committed the theft especially from his declaration that the note produced was the stolen note. But at the time this decision was rendered, if the accused did not clearly acknowledge the offence, the courts were slow to consider inferences, however strong, as being tantamount to a confession³²⁵

The theory does appear to gain support from R. v. Gould,³²⁶

325 Compare to R. v. Jones, supra, fn. 310 decided the same day by the same court. It is submitted that R. v. Griffin would not be so decided today.

326 (1840), 9 C.& 364, 173 E.R.870 Phipson, Evidence, 8th ed. p. 255, referring to R. v. Butcher, supra, fn. 322, R. v. Griffin, supra, fn. 323, and R. v. Gould states:

"Facts and documents disclosed in consequences of inadmissible confessions are received if relevant. And where property has been discovered or delivered up in this way, so much of the confession as strictly relates thereto will be admissible, for these portions at least cannot be untrue; but independent statements not qualifying or explaining the fact, though made at the same time will be rejected. The earlier rule admitted the facts, but excluded the accompanying statements."

In Taylor, Evidence, 12th ed., para. 902, the rule is stated thus:

"When in consequence of information unduly obtained from the prisoner, the property stolen or the instrument of the crime, or the body of the person murdered, or any other material fact, has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement about his knowledge of the place where the property or other article was to be found being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. ... So much of the confession as relates distinctly to the fact discovered by it may be given in evidence as this part at least if the statement cannot have been false."

Compare to Archbold, Criminal Pleading, Evidence & Practice, 31 ed., pp. 375-6.

See, generally, A. Gottlieb, Confirmation by Subsequent Facts (1956), 72 L.Q.R. 209, for an excellent discussion of the subject.

a case involving the charge of burglary. A statement was made to a police officer under circumstances which prevented its being offered in evidence. In the statement, some allusion was made to a lantern, and the police witness was asked whether, in consequence of something which the prisoner had said, he made search for the lantern. Tindal, C.J., and Parke, B., were both of the opinion that the words used by the accused, with reference to the thing found ought to be given in evidence. The policeman accordingly stated that the prisoner told him he had thrown a lantern into a pond in Pocock's Fields.

If one assumes that the statement not offered in evidence would have been inadmissible as a confession, then this case stands for the proposition that evidence may be given that in consequence of what the accused said, certain property was found, in other words, because what the accused said in his confession was confirmed by the finding of the property, that part of the confession is admissible in evidence.

Fourteen years later, although R. v. Gould³²⁷ was not expressly considered, the confirmation theory was emphatically refuted. In R. v. Berriman,³²⁸ where, on an indictment for

327 supra, fn. 326

328 supra, fn. 236. See also, R. v. Cain, R. v. Rule, supra, fn. 321.

concealing of a child, counsel for the prosecution proposed to put to the witness a question, whether in consequence of the answer the accused had given the magistrate, he had made a search in a particular spot and found a certain thing, the learned Erle, J., stated:

"No!! Not in consequence of what she said
You may ask him what search was made, and what
things were found, but under the circumstances
I cannot allow that proceeding to be connected
with the prisoner." 329

Although the Gould proposition is often cited by legal writers as being the law,³³⁰ it cannot be doubted that the rejection of this proposition would be more in accord with principles of logic and justice, as well as in conformity with the historical principle on which the confession rule is based. Confessions are admitted in evidence only if they are voluntary. If, after a voir dire, they are found to be not voluntary, they are excluded from evidence, in whole and in part. It is hoped, when an occasion presents itself, the heretical "Doctrine of Confirmation by Subsequent Fact" will

329 ibid, at p. 389

330 For e.g. Phipson, Evidence (1952) at p. 273, Cockle, Cases and Statutes on Evidence (1952), at p. 197:

See, infra, fn. 326

(1963) 208

finally be laid to rest.³³¹

331 A further theory, stated as being more common than the R. v. Butcher heresy was that the most that was proper to leave to the jury was "... the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly; but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case." See, (1803), 2 East P.C. 658, citing the unreported cases of R. v. Hodge (1790), and R. v. Grant et al. in support. See, also, R. v. Moore, *supra*, fn. 305. In R. v. Allen et al., *supra*, fn. 305, police witness was allowed to state: "I found the articles on a rabbit hutch, in the back yard, by his (the accused's) direction." Compared to the Gould theory, this is by far the lesser of the two evils.

CHAPTER EIGHT

THE DUTIES OF THE POLICE THE JUDGES' RULES.

By the early eighteen hundreds, the investigative function of the justices of the peace, which they had possessed in the Elizabethan period, had been assumed by a growing body of organised police. The judiciary, noting the increase in numbers as well as power of the police, and observing the imbalance in the respective positions of an arresting policeman and an arrested accused, deemed it necessary to impose restrictions on this police power in order to safeguard the rights of an accused.

That the police were prone to adopt extra-judicial measures to obtain confessions from those in their custody was of little doubt. But just as certain was the fact that these measures so adopted were to be judicially scrutinized in order to assure their conformity with basic principles of fair play inherent in the common law. For the most part in the law regarding crimes, these principles were encompassed by the concept of voluntariness. Sanction was solely directed against voluntary criminal action, and thus confessions, if induced by methods of over-zealous police activity, were excluded from evidence at the trial of the accused as not being voluntary. As Lord Denman instructed a police witness

in R. v. Cart.³³²

"The distinction is very clear you are not to suppress the truth, but you are not to take any measures of your own to endeavour to extort it."

It was this judicial awareness concerning what the duties of the police should be that gave rise to the practice of warning or cautioning the accused before interrogation, culminating as it did in the formulation of the Judges' Rules in the early twentieth century.

1. The Caution.

In the early nineteenth century, it was clearly an accepted duty of magistrates or their clerks to caution an accused on his examination before them that he need not say anything unless he pleased.³³³ The purpose of the caution was not to dissuade the accused from saying anything, but was, rather, to inform him of his rights relative to the position in which he found himself. In R. v. Green et al.³³⁴

332 (1838), Maidstone Summ. Ass., n.b., cited by Taylor, op.cit., at p. 595

333 See, for e.g. R. v. Lingate, supra, fn. 298 (Payley, J.): R. v. Gilham, supra, fn. 85: R. v. Harris, et al. supra, fn. 305: R. v. Howes, supra, fn. 211

334 (1832), 5 C. & P. 312, 172 L.R. 990.

where the accused were not only told that they must not expect any favour from speaking, but also that they were encouraged not to confess, Gurney, B., stated:³³⁵

"That was wrong. A prisoner ought to be told that his confessing will not operate at all in his favour, and that he must not expect any favour because he makes a confession, and that, if anyone has told him that it will be better for him to confess, or worse for him if he does not, he must pay no attention to it; and that anything he says to criminate himself will be used as evidence against him on his trial."³³⁶ After that admonition, it ought to be left entirely to himself whether he will make any statement or not. but he ought not to be dissuaded from making a perfectly voluntary confession, because that is shutting up one of the sources of justice."

But the form of the caution prescribed by the learned judge was not to be readily accepted by other members of the judiciary. Five years later, in the case of R. v. Drew,³³⁷ on the examination of an accused for felony, the magistrates' clerk told the accused not to say anything to prejudice himself as what he said would be taken down " and used for or against him at his trial."³³⁸ Coleridge, J., refused to accept the

³³⁵ ibid, at p. 991

³³⁶ *in italics*. Compare to infra, fns. 338, 339

³³⁷ supra, fn. 106. See, R. v. Baldry, infra, fn. 351.

³³⁸ Compare to supra, fn. 336, infra fn. 340.

accused's statement, holding that the wording used by the clerk amounted to an inducement.

The following year, Lord Chief Justice Denman attempted a reconciliation of the conflict with what he considered to be the proper course for magistrates to follow, when he observed:³³⁹

"The frequent warnings given to prisoners, not to say anything that may criminate themselves, renders it necessary for me to set right a prevalent error on this subject, and to state what I conceive to be the proper course of proceeding. A prisoner is not to be entrapped into making any statement, but when a prisoner is willing to make a statement, it is the duty of magistrates to receive it, but magistrates before they do so ought entirely to get rid of any impression that may have before been on the prisoner's mind, that the statement may be used for his own benefit, and the prisoner ought also to be told what he thinks fit to say will be taken down, and may be used against him on his trial." ³⁴⁰

But even this clear statement of the law did not achieve the desired consistency in the form of the caution to be used by magistrates, and the question of whether the wording used by a magistrate was an inducement continued to arise. In R. v. Holmes,³⁴¹ the magistrates caution. "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence at your trial", was held not to constitute an inducement for the accused to

³³⁹ R. v. Arnold, *supra*, fn. 221

³⁴⁰ By italics, see, supra, fns., 338, 336

³⁴¹ supra, fn. 90.

speak or confess.³⁴² Yet, in R. v. Harris³⁴³ the caution of a justice's clerk, that whatever the accused said would be taken down and used against him was held to be sufficient inducement to reject the subsequent statement. It was not until the enacting of the Indictible Offences Act in 1848 that inconsistency relating to the form of caution to be used by magistrates was finally dissipated, and it was thereafter incumbent upon magistrates to follow the form set out in the act.³⁴⁴

342 It would appear that R. v. Arnold, *supra*, fn.339, did lend a good deal of consistency to the subject. In R. v. Hule *supra*, fn. 152, a statement was made to a magistrate after the "usual caution". See, also, R. v. Horner et al. (1846) 1 Cox C.C. 364 (Tindal, C.J.), where the form of caution used by the magistrate was, "anything they said would be taken down and might be used against them."

343 *supra*, fn. 144, See R. v. Baldry, *infra*, fn. 351.

344 (1848), 11 & 12 Vict. c.42, s.18, later repealed by the Criminal Justice Act (1925), 15 & 16 Geo. 5, c.96, s.49 (4), sch.3, stated in part: "... the Justice ... shall ... read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial.'... provided always, that the said Justice or Justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but whatever he shall then say, may be given in evidence against him upon his trial, notwithstanding such promise or threat: ..." For Irish equivalent, see 14 & 15 Vict. c.93, s.14

There can be no doubt that the growth of the practice of cautioning an accused by the police was in no small way accelerated by, if not attributed to, the use of the caution by magistrates. As early as 1837, in a trial where a constable testified that he did not caution a female accused that her answer to his questions would be given in evidence, Parke, J., observed:³⁴⁵

"But I must say that, in this particular case, there does not appear to have been anything improper in the conduct of the policeman, though treating it as a general question I think it is better that it should not be done. I should not myself if placed in such a situation, put a question to a prisoner without cautioning her."

The position of the police as regards an accused was readily equated to that of the magistrate, and other judges held it was not the duty of the police to caution the accused not to speak or confess. In R. v. Watts et al.,³⁴⁶ a trial on an indictment for rape, where counsel for the accused

345 R. v. Kerr (1837), 8 C. & P. 176, 173 E.R. 449, at p. 451. See, also, R. v. Swatkins et al. *supra*, fn. 106 where Patteson, J., held the caution by a police officer a necessity, and because of its absence, unsafe to receive the evidence.

346 (1844), 1 Cox C.C. 75. In R. v. Priest (1847), 2 Cox C.C. 378, Patteson, J., observed: "It has been said sometimes, that a constable ought to say to a prisoner, 'Hold your tongue - say nothing.' That is very foolish. A prisoner is not to be prohibited from saying anything if he chooses. A constable is not to lead a prisoner to say anything, but if a prisoner chooses to say anything, it is the duty of the constable to hear what he has to say." Compare this opinion to R. v. Swatkins et al., *supra*, fn. 345 and R. v. Dickenson (1844), 8 J.P. 329. (Patteson, J.)

inquired of a police witness whether the accused had been previously cautioned, Gurney, B., stated:

"I think it right to say it is not the business of police officers to caution persons in their custody, and who are about to make statements, not to do so. Their duty is to abstain from inducing them to make them. It is indeed a most miserable affectation of candour to say - "Pray Sir, do not make any observations, as they may possibly be used hereafter against you!" It is a very absurd thing, and has the effect of interfering seriously with justice, and preventing the detection of criminals. Some of the most learned judges on the bench are, I know, of the same opinion."

But as in the experience of the magistrates caution, the form to be used by the police was not clarified, and in some cases, was considered tantamount to an inducement. In R. v. Hornbrook,³⁴⁷ a constable cautioned an accused in his custody: "you are apprehended on a serious charge, take care that you don't say anything to injure yourself, but if you can say anything in your defence, we are willing to hear it, and to send to any person to assist you." Coleridge, J., approving his own decision in R. v. Drew³⁴⁸ held that the word "defence" necessarily conveyed to the prisoner's mind that what he said would be to his benefit, and that the subsequent statement must therefore be rejected.³⁴⁹ This opinion was

347 supra, fn. 91, sub nom. R. v. Morton (1843), 2 Mood. & Rob. 514, 174 E.R. 367.

348 supra, fn. 337

349 Similarly, in R. v. Furley, supra, fn. 144, it was held by Maule, J., following R. v. Drew, supra, fn. 337, that a constable's caution to an accused in custody, that what she says will be used against her on the trial, will prevent the reception of any statement made in consequence.

considered overruled five years later by the learned Baron Rolfe,³⁵⁰ and was finally laid to rest in *R. v. Baldry*,³⁵¹ where it was held that the caution "You need not say anything to criminate yourself. What you do say will be taken down and used in evidence against you" did not constitute an inducement so as to exclude a subsequent statement.

By the turn of the century, judicial opinion was uniform in holding that a policeman, if he has taken the accused in custody, or has made up his mind to charge the accused, he should immediately caution the accused especially if he was to be questioned by him.³⁵² In 1912, these instructions were directed to the police in the form of the Judges' Rules.³⁵³ Although it was clear that admissibility of a statement by an accused did not solely depend on whether or not a caution was given,³⁵⁴ it was a circumstance to be considered by the trial judge, and in some cases, the absence of the caution may result in exclusion of the statement.³⁵⁵

350 *R. v. Chambers* (1843), 3 Cox C.C. 92 (Rolfe, B.) See, also, *R. v. Atwood* (1851), 5 Cox C.C. 322 (Erle, J.)

351 *supra*, fn. 84

352 *R. v. Cheverton*, *supra*, fn. 145 (Erle, C.J.), *R. v. Listed*, *supra*, fn. 279, *R. v. James*, *supra*, fn. 89, *Lewis v. Harris* (1913), 24 Cox C.C. 66 (K.B.) See, however, the Irish Cases *R. v. Poole*, *supra*, fn. 36 (Aigot, C.B., Richards, B.), *R. v. Halett* (1861), 8 Cox C.C. 511 (Christian, J.), *R. v. Bodkin* (1863), 9 Cox C.C. 403 (Aigot, L.C.B.), and *R. v. Doherty*, *supra*, fn. 195, which apparently did not follow the English example.

353 See *infra*,

354 Absence of the caution did not necessarily mean exclusion. See, *Lewis v. Harris*, *ibid*, per Darling, J., at p. 70 *R. v. Voisin* (1918), 13 Cr.App.R. 89, *R. v. Paterson* (1929), 21 Cr.App.R. 139. Compare *R. v. Baldwin*, *supra* fn. 277.

355 *R. v. Dwyer* (1932), 23 Cr.App.R. 156 See, *R. v. Baldwin*, *ibid*, *R. v. Cowell* *supra*, fn. 239.

11. Questioning the Accused: Related Duties

It is trite to state that, at the close of the nineteenth century, judicial direction to the police was not solely limited to the use of the caution. Rather, the whole scope of police procedure in criminal investigation came under judicial scrutiny, its object being the determination of what the duties of the police should be as regards the interrogation or questioning of an accused.

It had long been recognized that questioning by the police was an integral part in the investigation of crime, and such questioning proceeded without regulation.³⁵⁶ Provided no promise or threat had been held out to an accused to speak, a statement made in consequence of such questioning was usually received in evidence. However, by the latter half of the nineteenth century, the limits began to be judicially defined. As Erle, J., observed in R. v. Perriman.³⁵⁷ 1874

"... no police officer has any right, until there is clear proof of a crime having been committed, to put searching questions to a person for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence a police officer is justified, after a proper caution, in putting to a suspected person interrogatories with a view to ascertaining whether or not there are fair and reasonable grounds for apprehending him. Even this course should be very sparingly resorted to."

At the dawn of the twentieth century, a relatively clear body of rules for the police to follow, had been

356 For e.g., see R. v. Thornton, supra, fn. 81

357 supra, fn. 236.

formulated by decided cases. The right of a police officer to question or interrogate any person was solely dependent on clear proof of a crime having been committed. Once there was proof of the commission of a crime, a police officer could inquire regarding that crime, provided he cautioned suspected persons before questioning them.³⁵⁸ But once he had made up his mind to take the person into custody,³⁵⁹ or actually had done so,³⁶⁰ he had no right to question the person.

358 supra, fn. 357. See. also h. v. Hale, et al., infra. fn. 361.

359 In R. v. Reason, supra, fn. 84, Keating J., stated at p. 229: "It is the duty of the police constable to hear what the prisoner has voluntarily to say, but after the prisoner is taken into custody it is not the duty of the police constable to ask questions. So, when the police constable has reason to suppose that the person will be taken into custody, it is his duty to be very careful and cautious in asking questions." See, also, R. v. Knight & Thayer, supra, fn. 106, per Channell, J., at p. 713; Lewis v. Harris supra, fn. 352, per Darling, J., at p. 71. h. v. Booth & Jones, supra, fn. 237, per Darling, J., at p. 180

360 See, R. v. Reason, ibid, h. v. Knight & Thayer, ibid, R. v. Booth & Jones, ibid., R. v. Gavin et al. (1885) 15 Cox C.C. 656, per A.L. Smith, J., at p. 657; R. v. Gardner & Mancox (1915), 11 Cr. App. R. 265, per Avory, J., at p. 269. Compare to R. v. Histed, supra, fn. 279: h. v. Miller supra, fn. 106 (Hawkins, J.).

On being taken into custody, the person was first to be cautioned and then charged.³⁶¹ If, however, the police officer did obtain an incriminating statement by questioning an accused person in custody, there was no rule of law to exclude

361 R. v. Male et al. (1893), 17 Cox C.C. 689, where Cave, J., observed in his summation to the jury at p. 690:

"It is quite right for a police constable or any other police officer, when he takes a person into custody to charge him and let him know what it is he is taken up for, but the prisoner should be previously cautioned, because the very fact of charging induces a prisoner to make a statement, and he should have been informed that such statement may be used against him. The law does not allow the judge or the jury to put questions in open court to prisoners, and it would be monstrous if the law permitted a police officer, without anyone being present to see how the matter was conducted, and put a prisoner through an examination, and then produce the effects of that examination against him. Under these circumstances, a policeman should keep his mouth shut and his ears open."

See also, R. v. Gardner & Mancox., *ibid.*
See, also, R. v. Morgan (1895), 59 J.P. 827, where Cave, J., held that answers to questions by the police could not be given in evidence. Compare to R. v. Grist (1896), 18 Cox C.C. 374, per Dingdale, C.C., Special Commissioner at Manchester Assizes, after conferring with Cave, J.

the statement for that reason alone.³⁶² Confessional or incriminating statements were only excluded if found to be the result of an inducement held out to the accused by a person in authority.³⁶³ It was, rather, a circumstance to be considered by the trial judge, and one which endowed him with a judicial discretion to exclude the statement.³⁶⁴

362 In R. v. Gavin et al, supra, fn. 360, where an accused was indicted for stealing two barrels of oysters. A.L. Smith, J., stated: "When a prisoner is in custody the police have no right to ask him questions. Reading a statement over, and then saying to him, 'what have you to say?' is cross-examining the prisoner, and therefore I shut it out." This case was interpreted as laying down the rule excluding admissions made by a prisoner in answer to questions put by a policeman. Eight year later, in R. v. Brackenbury (1893), 17 Cox C.C. 626, Day, J., expressly dissented from this decision, and held there was no such rule of law. In R. v. Best (1909), 22 Cox C.C. 97, the Court of Criminal Appeal disapproved of R. v. Gavin, supra, as being too wide a statement of the law. But see, Ibrahim v. R., supra, fn. 78 at p. 183: See, also, R. v. Histed, supra, fn. 360, Reporter's note p. 17. It is clear, however, that there is no rule of law. See, R. v. Knight & Thayre, supra, fn. 359, Rogers v. Hawken (1898) 19 Cox C.C. 122 (Russell, L.C.J., Mathew, J.): R. v. Booth & Jones, supra, fn. 359. Lewis v. Harris, supra, fn. 359. Ibrahim v. R. supra, fn. 78 at pp 183, 184.

363 Rogers v. Hawken, ibid.

364 R. v. Histed, ibid; R. v. Knight & Thayre, supra, fn. 359. R. v. Booth & Jones, supra, fn. 359. R. v. Gardner & Hancox, supra, fn. 360. In Lewis v. Harris, supra, fn. 359 Darling J., stated: "... it has been frequently held that if that rule is infringed then the judge in his discretion may reject the evidence, and it is tolerably certain that if there is any sign that the evidence was unfairly obtained he would reject it." See, especially: Ibrahim v. R., supra, fn. 78. Similarly, the reading over of a co-accused's statement to the accused by the police, is a form of cross-examination which may invoke judicial discretion to exclude. See, R. v. Gavin et al., supra fn. 360, R. v. Histed, ibid. R. v. Booth & Jones, supra fn. 359. R. v. Gardner & Hancox, supra, fn. 360. It is to be noted that there is no judicial discretion to admit the statement. Rather, it is solely to exclude.

iii. The Judges' Rules.

There was, however, a serious objection to the judicial regulation of police investigation by way of the decided case. The "rules", suggested by individual judges as to what was the proper course for the police to follow in their interrogation of an accused and investigation of crime, were not communicated to the police, and indeed, when they were, judicial conflict itself tended to negative any hope of uniformity.³⁶⁵ As a result of a desire on the part of the police for clarity on the subject, all the judges of the King's Bench Division, at the request of the Home Secretary, drew up a body of rules for the assistance of the police, which were as follows:³⁶⁶

1. When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.
2. Whenever a police officer has made up his mind to charge a person with a crime he should first caution such person before asking any question or any further questions as the case may be.
3. Persons in custody should not be questioned without the usual caution being first administered.

365 See, The Judges' Rules and Administrative Directions to the Police, Home Office Circular No. 31, 1964, [1964/ Cr. L. Rev. 165, at p. 166 fn. 1.

366 ibid. See, also, Stone, Justices' Manual (1952), at p. 365. First four rules were drafted in 1912. See, R. v. Cook (1918), 34 T.L.R. 515: R. v. Voisin, supra, Tn. 354. The remainder were drafted in 1918.

4. If the prisoner wishes to volunteer any statement the usual caution should be administered. It is desirable that the last two words ("against you") of such caution should be omitted, and that the caution should end with the words "be given in evidence."
5. The caution to be administered to a prisoner, when he is formally charged, should be in the following words: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence."
6. A statement by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.
7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.
8. When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements, and nothing should be done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it either it has been read to him and he has been invited to make any correction he may wish.

As in the previous judicial dicta affecting the duties of the police, the underlying purpose of the Judges' Rules was not so much a desire to keep in balance the need for adequate police procedures in the investigation of crime and the need for guarantee of the individual liberty of a person who found himself being questioned in the custody of the police. It was, rather, a desire to maintain the necessary imbalance, with the scales of justice always favouring protection of and fairness to, the person being questioned. By a code of practice designating standards of propriety for the guidance and the assistance of the police, the judges intended to ensure that statements or extra-judicial confessions obtained by police interrogation were voluntary, and not obtained by any improper means.³⁶⁷

But the Judges' Rules were not accepted without criticism, and it was doubtful from the outset whether they

367 The Judges' Rules were not rules of law. See h. v. Voison, supra, fn. 354. R. v. Mills & Lemon [1947] K.L. 297, R. v. May (1952), 36 Cr.App.R. 91, R. v. Little, R. v. Wilson [1954] Cr.L.Rev. 56 (C.L.A.C.), R. v. Harris-Rivett [1956] 1 Q.B. 220 at pp. 228, 229, per Coddard L.C.J. See generally Ian Brownlie, Police Questioning, Custody and Caution [1960] Cr.L.Rev. 298 Glanville Williams, Questioning by the Police: Some Practical Considerations [1960] Cr.L.Rev. 325; J.C. Smith, Questioning by the Police: Some Further Points [1960] Cr.L.Rev. 347. Ian Brownlie, Questioning - A General View [1967] Cr.L.Rev. 76

would realize the intentions leading to their inception. Rather than clearly disspeiling any doubt on the part of the police as to what was judicially expected of them, the draughting of the rules seemed to compound the uncertainty. Where previously the police were directed to caution a suspected person before asking any questions of that person,³⁶⁸ Rule 1 seemed to countermand this direction, implying that the caution was not necessary in these circumstances.³⁶⁹ But the rules did not supersede the earlier judicial direction, which was later affirmed as being the proper course for the police to follow.³⁷⁰ Similarly, where previous to the Rules it was generally considered that the police should not interrogate a person they had taken in custody, or had made up their minds to take in custody,³⁷¹ Rule 3 appeared to permit interrogation in custody after a caution was administered. If the police had made up their minds to take a person into custody, they apparently could question this person freely and without caution. But in 1923, the learned Avory, J., observed that it had been laid down as a rule that the police must not examine accused persons once they are in custody³⁷² and in 1930, as a result of a Royal Commission on Police Powers and

368 R. v. Berriman, supra, fn. 236. And see, R. v. Male et al. supra, fn. 361.

369 See, R. v. Dooker (1924), 18 Cr. App. R. 47.

370 R. v. Crowe & Myerscough (1917), 81 J.L. 288.

371 supra, fn. 359.

372 R. v. Taylor (1923), 17 Cr. App. R. 109, at p. 110.
Compare to R. v. Voisin, supra, fn. 366

Procedure two years earlier, it was thought necessary to further direct the police that:³⁷³

"Rule (3) was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned, on the subject of the crime for which he is in custody, and long before the rule was formulated and since, it has been the practice for the Judge not to allow any answer to a question so improperly put to be given in evidence ..."

Furthermore, "in custody" was not defined by the Rules. Although it was clear that physical custody of the person was not necessary,³⁷⁴ was a person "in custody" if the police had made up their minds to take physical custody of that person? Or, if a suspect was informed that he might be charged of an offence, was that person to be then considered

373 Circular 536053/23, issued by the Home Secretary, June 24. In R. v. Sargent [1963] Cr. L. Rev. 848 (C.C.A.), where the facts were, inter alia, that the accused was arrested and cautioned at 9 a.m. on a charge of receiving stolen property. At 11.45 a.m. he was questioned without being cautioned, and as a result thereof, made an incriminating remark which was admitted at his trial. On appeal, the Court composed of Parker, L.C.J., Ashworth and Litchcliffe, J.J., held the real point was not whether the accused should have been cautioned a second time but whether the accused should have been questioned at all, he being in custody, and under Rule 3 as explained by the 1930 Circular, his answers were inadmissible.

374 R. v. Booth & Jones *supra*, fn. 237, per Darling, J., at p. 180.

in custody?

According to the circular of 1930.³⁷⁵

"Prima facie the expression 'persons in custody' in Rule (3) applies to persons arrested before they are confined in a police station or prison but the Rule equally applies to prisoners in the custody of a gaoler. The terms 'persons in custody' and 'prisoners' are therefore synonymous for the purpose of this Rule."

But this had seemed to suggest that "in custody" was synonymous with "arrest", and therefore, tended to confuse matters even more. Nor was there many attempts judicially to define the term. In R. v. Straffen,³⁷⁶ it was stated to mean "in custody of the police" which was of little help, while in R. v. Patten,³⁷⁷ the court stated that the fact that

375 supra, fn. 373

376 [1952] 2 All L.R. 657 (C.C.A.).

377 (1957), 36 Cr.App.R. 72, at p. 77. See, also, where Rule 3 was held to be breached, R. v. Lass, supra, fn. 285 R. v. Williamson [1964] Cr. L. Rev. 126 (C.C.A.). R. v. Massey [1964] Cr. L. Rev. 43 (C.C.A.) R. v. Powell-Mantle [1959] Cr. L. Rev. 445 (Qu. Sess.): Compare R. v. Stebbing [1962] Cr. L. Rev. 472. Previous to the Judges' Rules, it would appear that once the police officer made up his mind to charge a person, that person was considered to be "in custody", See, R. v. Booth & Jones, supra, fn. 374. R. v. Knight & Thayer, supra, fn. 106.

the police officers might have arrested the appellant if he refused to answer their questions did not put him in custody.

It was also extremely doubtful whether the person being questioned by the police was effectively protected under the Judges' Rules. By being given a wide discretion in several of the Rules, the police were encouraged to fly in the face of the spirit, if not the letter, of the Rules themselves. Under Rule 2, a person was to be cautioned only when a police officer made up his mind to charge that person. Without considering that this time to caution may differ with different police officers on the same facts, or that some police officers, if not all, would deliberately "not make up their minds" until all information was extracted from the person interrogated, at what stage of the proceeding could it be said that the police officer did in fact make up his mind to lay a charge? was it the same stage of the proceeding that he should have made up his mind to charge? It soon became evident that the answer to these inquiries was to be left to the trial judge, to be decided on the individual set of facts before him.³⁷⁸

Rule 8 presented a further opportunity for the police to avoid the spirit of the rules. Under this rule, the police

378 Similarly, it was left to the trial judge to decide whether, under Rule 6, the police deliberately withheld the caution to elicit a statement from the accused, or under Rule 7, asked further questions under the sham of removing ambiguity.

were directed not to read a co-accused's statement³⁷⁹ over to an accused or to invite a reply from the accused. But this direction was interpreted strictly by the police, and rather than read the statement to the accused, a police officer would tell the accused what his accomplice had said. This practice was judicially considered to be not in accord with principles of English justice, and a breach of the rule.³⁸⁰ Other procedures adopted by the police to encourage an accused to speak were to confront one accused with another,³⁸¹ to confront an accused with exhibit evidence³⁸²

379 As to a statement being admitted to show what the accused did or omitted to do when he was made aware of it, i.e. to show accused's demeanor, see: R. v. Thompson (1910), 22 Cox C.C. 299 (C.C.A.), approving R. v. Bromhead (1906), 71 J.F. 103, disapproving R. v. Smith (1897), 18 Cox C.C. 470 (Hawkins, J.). R. v. Firth (1913), 8 Cr.App.R. 162. R. v. Adams (1923), 17 Cr.App.R. 77.

380 R. v. Grayson (1921), 16 Cr.App.R. 7; R. v. Mills & Lemon, supra, fn. 367. In R. v. Williamson, supra, fn. 377 where the accused was questioned on the contents of a statement of an accomplice, Rule 8 was held not to apply as the accused had not yet been charged. See, also, R. v. Pilley (1922), 16 Cr. App. R. 138

381 R. v. Pilley, ibid, approving R. v. Gardner & Hancox supra, fn. 360.

382 R. v. Booker, supra, fn. 369 R. v. May, supra, fn. 367 followed in R. v. Smith (1961), 46 Cr. App. R. 51, where the accused was shown clothing belonging to him and the stolen property, which had been discovered at the house of a co-accused.

to tell an accused what a witness has said³⁸³ or to suggest to an accused that they had evidence of his guilt,³⁸⁴ or even to arrest a person on a minor charge and holding the person in custody while investigation into a major charge is being completed, freely questioning the person as to the major charge.³⁸⁵

It was clear that the Judges' Rules of 1912 and 1918 had not satisfied initial intentions, both from the view of the police as well as the person being questioned. In 1961, it was judicially accepted that a review of the rules was necessary,³⁸⁶ and in 1964 the following rules were drafted, superceding the earlier rules.

1. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

383 R. v. Matthews (1919), 14 Cr. App. R. 23

384 In R. v. Brown & Bruce (1931), 23 Cr. App. R. 56, approving R. v. Winkel et al. (1912), 76 J.P. 191, it was held that the police have no right to suggest by questions to a person detained in custody that they have evidence of his guilt, and answers to such a suggestion are not admissible in evidence.

385 R. v. Booker, supra, fn. 369; R. v. Powell-Mantle, supra, fn. 377, as limited by R. v. Puchan, supra, fn. 219

386 See, [1961] Cr. L. Rev. 284.

2. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person ~~or~~ cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms.

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

3. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

"Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

- (b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:-

"I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence."

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interviewing officer.

- (c) When such a person is being questioned or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.
4. All written statements made after caution shall be taken in the following manner. (a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say, if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to the following:
- "I, ..., wish to make a statement. I want someone to write down that I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."
- (b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.
- (c) The person making the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following:
- "I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."
- (d) Whenever a police officer writes the statement he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him.
- (e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished

reading it he shall be asked to write and sign or make his mark on the following certificate at the end of the statement.

"I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will."

- (1) If the person who has made a statement refuses to read it or to write the above mentioned certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.
5. If at any time after a person has been charged with, or has been informed that he may be prosecuted for, an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something, he shall at once be cautioned or further cautioned as prescribed by rule 3(a)
6. Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these rules.³⁸⁷

Most of the problems arising under the old rules tended to be resolved by the new rules. Where previously there was

³⁸⁷ See, R. v. Nichols [1967] Cr L. Rev. 296 (C.C.A.)

some doubt existing as to whether a person in custody should be questioned at all,³⁸⁸ it was now clear under the new Rule 1 that a police officer was free to question any person in custody and without caution. If, however, the person became a suspect, or was charged or informed that he may be prosecuted, the person then had to be cautioned.³⁸⁹ After caution, a suspect could continue to be questioned, but if the person was charged or informed that he may be prosecuted, further questions were permitted only in exceptional circumstances.³⁹⁰ In effect, the new rules³⁹¹ clearly distinguished between the stages of suspicion and of accusation, anticipating four interrogations by the police namely:

(1) before the person questioned is suspected.

(2) after the person is suspected, but is not arrested nor informed that he may be prosecuted.

388 supra, fns. 371, 372, 373. But see, R. v. Voisin supra, fn. 354.

389 Rules 2, 3(a). As regards cautioning of a suspect, see supra, fns. 4, 6. It is to be noted that the old rules did not refer to a person who has been informed that he may be prosecuted for an offence.

390 Rule 3 (b)

391 As to the new Rules, see generally Practice Note /1964/ 1 All E.R. 237; /1964/ Cr. L. Rev. 165. J.C. Smith, The New Judges' Rules - a Lawyer's View /1964/ Cr. L. Rev. 176. T. E. St. Johnston, The Judges' Rules and Police Interrogation in England Today (1966), 57 Jo. Cr. L. Crim., & P.S. 85. Ian Brownlie, Questioning. A General View /1967/ Cr.L.Rev. 75

- (3) after the person is suspected, but is not arrested and is informed that he may be prosecuted
- (4) after the person is suspected, arrested and formally charged.³⁹²

Some measure of effective protection of the person being questioned was also restored by the new Rules. Where, under the old second, sixth and seventh rules the police were endowed with a broad discretion relating to the cautioning and questioning of a person, the new rules either eliminated or strictly controlled this discretion.³⁹³ Furthermore, where the old rules were silent on the subject, the new rules provided for the recording by the police of the time and place of the interrogation, as well as the persons present.³⁹⁴ Similarly, questions and answers were to be recorded,³⁹⁵ and the person giving the statement was always to be asked whether he desired to write it himself,³⁹⁶ with a procedure set up for the police to follow if the person cannot or refuses to write or sign the

392 Compare R. v. Brackenbury *supra*, fn. 362. R. v. Collier, R. v. Stenning [1965] 3 All E.R. 136 (C.C.A.)

393 Compare the old seventh rule to Rule 3 b, and 3 c of the new rules.

394 Rule 2, 3 c

395 Rule 3 b

396 Rule 4

statement.³⁹⁷ Although the new rules did not provide for every contingency, it was clear that they, as compared to the old rules, they did come closer to assuring that statements given to the police were as a result of the free will of the person questioned.³⁹⁹

But the new rules, like the old, are without sanction and are not rules of law.⁴⁰⁰ Under the rules, the trial judge has a discretion to exclude the statement if the rules are bresched, and it is only by the exercise of this discretion that the accused receives any real protection.

397 Rule 3 b, Rule 4 a, Rule 4 f.

398 For e.g., the new rules contain no direction to the police to explain the caution, nor do they assure that questioning will follow immediately after the caution has been administered.

399 For e.g., see Rule 4 e.

400 supra, fn. 3.

B. CANADA

CHAPTER ONE

THE CONSTITUTIONAL ROLE IN CANADA

I. Evolution of the rule

It is perhaps trite to state that any history of law in Canada must necessarily begin with a consideration of the results of colonization by England in the eighteenth century. Under English law, the first colonial settlers in North America were deemed to bring with them such of the laws of England as were reasonably applicable to the conditions of the new settled colonies.⁴⁰¹ The law of the colonies was therefore the law of England⁴⁰² existing at the time of

401 See, Calvin's Case (1609), 7 Co. Rep. 1, 77 E.R. 377, Attorney-General v. Stewart (1817), 2 Mer. 143, 35 E.R. 895 (Ch.); Cooper v. Stewart (1889), 14 A.C. 286 (P.C.), at pp. 291-2.

402 On the founding of Halifax, Nova Scotia in 1749, His Majesty's Instructions Relating to the Courts of Justice, Pub. Arch., Art. 82, directed the English commander-in-chief: "You are to take care that no man's life, member, freehold or goods be taken away or harmed in our said Province under your government otherwise than by established and known laws, not repugnant to but as near as may be agreeable to the Law of this Kingdom...."

settlement, and the administration of criminal justice was no exception.⁴⁰³

If a person was arrested for a crime, he was usually examined previous to his trial.⁴⁰⁴ On his trial, which was sometimes referred to as "The inquisition",⁴⁰⁵ the accused person could either plead guilty, or not guilty and place himself on God and his country.⁴⁰⁶ If a finding of guilt was

403 This was so, unless the law was inapplicable, or abrogated by local statutes or Imperial statutes extending to the colony. For e.g., as to the Province of Nova Scotia, Uniacke v. Dickson (1848), 2 N.S.R. 287 (On.) states in headnote. "The whole of the English common law will be recognized as in force here excepting such parts as are obviously inconsistent with the circumstances of the country; while, on the other hand, none of the statute law will be received except such parts as are obviously applicable and necessary." See, also Meisner v. Fanning (1842), 3 N.S.R. 97 (O.C.)

As to instructions to appoint sheriffs and Justices of the Peace, see, supra, fn. 402, Art. 66. Similarly, in the colony of Massachusetts Bay, Justices of the Peace were appointed: "... in all things to have like power that Justices of peace hath in England for reformation of abuses and punishings of offenders..." (1630), Records of the Court of Assistants of the Colony of the Massachusetts Bay (1904), ed. John Noble), at p. 3.

404 See, for e.g., Examination of Jean Baptiste Peter et al., N.S., Pub. Arch. N.S. 342, Entry 6.

405 See, for e.g., Sims & Hoskins Case (1749), Record of Criminal Proceedings from 1749 to 1766 (N.S., Pub. Arch. N.S.), at p. 5.

406 See, for e.g., Cortcel's Case, ibid, at p.1, White's Case ibid, at p. 2.

to ensue, it was necessary that the accused be proved to have voluntarily committed the criminal act with criminal intent or "forethought malice".⁴⁰⁷ If the accused had confessed extrajudicially on his arrest and examination, this confession weighed heavily against him. As was stated by a jury in rendering a special verdict in a case involving an indictment of bestiality.⁴⁰⁸

"[I]f the prisoner's confession against himself upon his first apprehension and examination before his trial together with one evidence be sufficient to a legal conviction, then we find him Guilty according to indictment...."

If the accused was fortunate, or perhaps wealthy, he could obtain "His Majesty's pardon,"⁴⁰⁹ but this was the exception rather than the rule. The claim of benefit of clergy was always open to the accused, which even if allowed by the court, usually resulted, in the vast majority of cases, in some form of punishment being meted out.⁴¹⁰

Although it is probable that the confession of an accused was considered best evidence at his trial, there is

407 supra, fn. 406

408 Goad's Case (1673), Mass. supra fn. 3, at p. 10. See also, Examination of John Peterquin (1754), supra, fn. 4, Entry 15, where, on a charge of inciting a riot, the accused contended he confessed to escape further torture.

409 See, for e.g., N.S.P.C. East. T., 1765-1785 (M.S. Pub. Arch. N.S. 143), Entries 29, 57, 79, 100, 211.

410 See, for e.g., ibid, Entries 6, 54, 47, 48, 53, 197, 232, 255. In Patrick's Case, Entry 33, benefit of clergy was allowed, with the order that the accused's left hand be branded, as well as for him to be whipped five lashes at each of six of the most public streets in the Town of Halifax.

very little reference to confessions among the early pleas of the Crown in the colonies. Whether there were any claims by the accused that his confession was the result of some form of inducement, one is left to surmise, and indeed, whether admissibility of the confession was contingent upon it appearing to be voluntary, does not appear to have been the subject of judicial pronouncement.⁴¹¹ By the late nineteenth century, however, it was clear that any extra-judicial confession induced by promises of favour or undue influence was not admissible in evidence at the trial of the person confessing.⁴¹² At the turn of the century, this negative approach was

411 In Nova Scotia, the court record of the evidence does not appear in the pleas of the Crown. See, for e.g., supra, fn. 409.

412 R. v. Finkle (1865), 15 U.C.C.P. 453, approved in R. v. Field (1865), 16 U.C.C.P. 98. See, also, S.R. Clarke, Criminal Law of Canada (1872), at p. 471, Similarly, in Australia, the law relating to confessions began to clarify itself, although differently. See, for e.g., as to New South Wales, (1858), 22 Vict. 7, s.11; as to Queensland, The Evidence and Discovery Act of 1867, s.64, as to Victoria, the Evidence Act (1857), 21 Vict. 3, s. 141; See, also, as to Western Australia, the Native Administration Act (1905-1947), s.60(1). As to Australia generally, T. P. Fry, Admissibility of Statements Made by Accused Persons (1938), 11 Aust. L.J. 425. R.W. Baker, Confessions and Improperly Obtained Evidence (1956), 30 Aust. L.J. 59, R. R. Kidston, Confessions to Police (1960), 33 Aust. L.J. 369.

translated into terms of voluntariness,⁴¹³ and in 1905, in the case of R. v. Ryan,⁴¹⁴ a decision of the Ontario Court of Appeal, Osler, J.A., observed

"Among the legion of 'varying voices' on this subject, one clear and satisfactory rule is laid down - perhaps I should say affirmed - by a court of considerable authority, in the recent case of Reg v. Thompson /1893/ 2 Q.B. 12, ..., namely, that in order that the confession of a prisoner may be admissible, it must be proved affirmatively to the satisfaction of the trial judge that it was made freely and voluntarily, and not in response to any threat or to any suggestion of advantage to be inferred either directly or indirectly from the language used by a person in a position of authority...'

It was an accepted proposition that voluntary confessions were received in evidence because no person would freely make a statement against his interest unless it was true.⁴¹⁵ Confessions resulting from some form of inducement were generally rejected because it was recognized that innocent

413 See, for e.g., R. v. James (1912), 17 B.C.R. 165 (Hunter, C.J.), R. v. Hoo Sam (1912), 5 Sask. L.R. 180 (C.A.); R. v. De Mesquita (1915), 24 C.C.C. 407 (B.C.C.A.), R. v. Moke (1917), 12 Alta. R. 18 (C.A.), R. v. Spain (1917), 28 C.C.C. 113 (Man. C.A.), R. v. Cummings (1912), 5 D.L.R. 86 (Que. K.B.), R. v. Rodney (1918), 42 O.L.R. 645 (C.A.), R. v. Hughes (1920), 55 D.L.R. 697 (Alta. S.C.), R. v. Myles (1922), 40 C.C.C. 84 (N.S.C.A.), Proskov. R. (1922), 63 S.C.R. 226, R. v. Ward (1924), 41 C.C.C. 418 (Alta. C.A.); R. v. Kooten /1926/ 4 D.L.R. 771 (Man. K.B.), R. v. Rasmussen (1934), 9 M.P.R. 41 (B.C.A.).

414 (1905), 9 O.L.R. 137, (C.A.) at p. 142.

415 See, for e.g., R. v. Mazerall /1946/ O.R. 762 (C.A.).

persons may be induced to commit themselves,⁴¹⁶ thus leading to false⁴¹⁷ or untrustworthy⁴¹⁸ confessions, and therefore, unreliable as evidence.⁴¹⁹ In the leading case of Boudreau v. R.,⁴²⁰ the learned Rand, J., referring to the common

416 See, for e.g., Chapdelaine v. R. (1933), 62 C.C.C. 209 (Que. C.A.), per Walsh, J., at p. 214.

417 See, Boudreau v. R. (1949), 7 C.R. 427 (S.C.C.), per Rand, J. at p. 435.

418 See, R. v. Young (1905), 38 M.S.R. 427, per Graham, C.J. at p. 444; R. v. Unlah (1922), 38 C.C.C. 302 (F.S.S.C.), per Harris, C.J., R. v. Myles, *supra*, in. 413, per Rogers, J., at p. 102, R. v. Briden (1960), 128 C.C. 159 (Ont. C.A.), per Porter, C.J.O., at p. 159.

419 There were, however, other important reasons accepted as giving rise to the rule, as for e.g., protection of the individual from inducement and abuses of authority. See, R. v. Todd (1901), 4 C.C.C. 514, (Man. K.L.) per Bain, J., at p. 526, R. v. Cansdale (1951), 12 C.R. 245 (Alta. S.C.), per Egbert, J., at p. 246, and evidence of involuntary confessions was also rejected as a "rule of policy" (R. v. Price (1931), 55 C.C.C. 206 (N.B.C.A.), per Byrne, J. at p. 208), and in violation of the historical common law principle embodied in the maxim nemo tenetur seipsum accusare. R. v. Scory (1945), 83 C.C.C. 306, (Sask. C.A.) per Mackenzie, J.A., at p. 315. But see, A-6. Que. v. Begin /1935/ S.C.R. 593, contra.

420 supra, fn. 17.

law rule,⁴²¹ stated at p. 435

421 Although the criminal law in Canada is codified (s.5, Crim. Code An Act respecting the Criminal Law 1953-54, C.51) in force as of Apr. 1, 1955, (S.C.R. 54-471 88 Can. Gaz. Pt. II, 1345), there is only one reference to extra-judicial confessions. S. 155 states "Nothing in this act prevents a prosecutor giving in evidence at a preliminary inquiry any admission, confession or statement made at any time by the accused that by law is admissible against him." Compare to the English Indictable Offences Act (18-19 11 & 12 Vict. C. 42, S.16, and see, (1869), 32 & 33 Vict., C.30, S. 33, (1866), R.S.C. C.174, S.72. In Australia the initial treatment of criminal confessions was an attempt at a statutory solution. See, supra, fn. 412. For e.g., in New South Wales, (1858), 22 Vict. 7, s.11 stated

"No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any untrue representation, or by any threat or promise whatever, and every confession made after any such representation, or threat or promise, shall be deemed to be induced thereby, unless the contrary be shown."

Compare to Victoria, the Evidence Act (1857), 21 Vict. 8, s.16, s.141, now the Evidence Act of 1928, s.141, which states, in part

"No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made."

As to a modern statement of the law relating to New South Wales, see the Crimes Act of 1900, s. 410, which added the qualification that the threat or promise must be held out by "the prosecutor or some person in authority." These statutory provisions have been held in the High Court not to exclude the application of the common law. See, Attorney-General, New South Wales v. Martin (1909), 9 C.L.R. 713 Cornelius v. The King (1936), 55 C.L.R. 235.

"... the rule is directed against the danger of improperly instigated or induced or coerced admissions.⁴²² It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule. ... The underlying and controlling question then remains is the statement freely and voluntarily made?"

- 422 As Moss, C.J.C. stated in R. v. Martin (1905), 9 C.L.R. 218 (C.A.), at p. 223: "And in order to the admissibility of a statement made by an accused person, it need not appear that it is a full acknowledgment of guilt so as to be a confession in the strictest sense of the term. If it connects or tends to connect the accused, either directly or indirectly, with the commission of the crime charged, it cannot be excluded on the ground that it is not a plenary confession." In order for the rule to apply, the statement must inculcate or incriminate the accused, by stating or tending to prove by inference that he committed the crime or participated in its commission. See R. v. Young, *supra*, fn. 416, at p. 451 R. v. McCraw (1906), 12 C.C.C. 253 (Que. A.), per Tremblay, J., at p. 261 R. v. Mord (1913) 21 C.C.C. 98 (Alta. C.), R. v. Hood, *supra*, fn. 413 R. v. Benjamin (1917), 32 C.C.C. 191 (Que. K.L.). R. v. Markadonis (1935), 41 C.L.R. 407 (A.S.C.), per Chisholm, J., at p. 410, *supra*, fn. R. v. Hatcher (1946), 19 C.L.R. 132 (C.L.C.A.). R. v. Landzuk [1946] 1 C.L.R. 521 (C.C.C.A.) per O'Halloran, J.A. at p. 524. R. v. Angelucci (1946), 88 C.C.C. 111 (C.C.C.A.) R. v. Kozak (1947), 88 C.C.C. 350 (C.C.C.A.): Loudreau v. R. *supra*, fn. 417, at p. 431 R. v. Davidoff (No. 2) (1951), 101 C.C.C. 238 (B.C.C.A.), R. v. Briden, *supra*, fn. 418; R. v. Kestenberg et al. (1959), 126 C.C.C. 387 (Ont. C.A.); R. v. Black & Mackie [1966] 3 C.C.C. 157 (Ont. C.A.) [Appeal dismissed, [1966] S.C.R. 1, 1X.

II. Scope of Voluntariness as the Test of Admissibility.

In the adoption of the English rule, the test of whether an extra-judicial statement or confession was voluntary⁴²³ was accepted almost without question⁴²⁴ as the proper test of admissibility. The special meaning given to the term "voluntary" in Ibrahim v. R.,⁴²⁵ i.e. not obtained by any fear of prejudice or hope of advantage exercised or held out by a person in authority, was judicially approved in Canada,⁴²⁶ although the interpretation placed on the scope of this definition lacked standardization. Was it to be treated as being unlimited in scope, or was it to be restricted in its operation?

As early as 1923, the broad view was effected in Nova Scotia, when the learned Rogers, J., stated in R. v. Myles:⁴²⁷

423 See, supra, fn. 413, 420, also, R. v. Lueke (1940), 74 C.C.C. 76 (Sask. C.A.), R. v. Allen (1954), 108 C.C.C. 102 (Sask. C.A.), R. v. Wolbaum [1965] 3 C.C.C. 191 (Sask. C.A.).

424 But see, Chapdelaine v. R., supra, fn. 416, at p. 212.

425 supra, fn. 78

426 See, for e.g. R. v. O'Neil (1916), 9 Alta. R. 365 (C.A.). R. v. Rodney, supra, fn. 413 R. v. Godwin [1924] 2 D.L.R. 362 (N.B.K.L.): R. v. McAskill (1930), 3 M.P.R. 469 (N.S.C.A.): R. v. O'Donnell (1936), 65 C.C.C. 299 (Ont. C.A.): R. v. McAloon (1959), 124 C.C.C. 182 (Ont. C.A.) Boudreau v. R., supra, fn. 417. R. v. Kooten, supra, fn. 413.

427 supra, fn. 413, (1923), 56 N.S.R. 18, at p. 37. Similarly, in Quebec, Hackett, J., observed: "A confession in order to be admissible must not be extracted by any sort of threat or promise or forcing, nor can it be extracted by any fear or any direct or implied promise, however slight, or by the exercise of improper influence, but it must be entirely free and voluntary, and the onus is upon the prosecution to establish that it is entirely free and voluntary." R. v. Benjamin, supra, fn. 422. See, also, Marcotte v. R. (1949), 97 C.C.C. 310 (Que. C.A.).

"... if a statement is made to or in the presence of a person in authority induced by any promise or threat, or by suggestion likely to excite hope or produce fear, or if the person in authority resorts to any other mode of influence, however slight, which does not leave the mind of the accused perfectly free, then the statements so induced are the subject of distrust and are rejected as being evidentially of no value."

According to this view, it is acknowledged that an inducement may exist outside the sphere of the subjective states of mind of hope and fear, and that the rule was intended to cover all inducements held out to the accused to speak, by a person in authority, and depriving the accused of the choice of speaking or remaining silent.

Byrne, J., in the New Brunswick case of R. v. Price,⁴²⁸ agreed with this unrestricted view where, as trial judge, he explained

"It is true I did find that the statement was not obtained from the accused by any fear of prejudice or hope of advantage exercised or held out by a person in authority, but I did not say nor find that it was a voluntary statement in that sense. That is to say, the accused did not engage in the affair of his own will or choice, but that it was obtained from him by improper questioning and without warning."

However, in the Court of Appeal, with the trial decision clearly before him, Hazen, C.J., refused to accept the learned trial

428 supra, fn. 419 at p. 211

judge's decision on this point, stating ⁴²⁹

"In the case before us, the learned trial judge has held clearly and positively that statements made by /accused/ were not induced by hope or fear. In other words, that it was a voluntary statement...."

This narrow interpretation of the scope of voluntariness within the rule excluding non-voluntary confessions persisted in argument, and as late as 1942 was refuted by Sloan, J.A., as he then was, in the British Columbia Court of Appeal.⁴³⁰

"To say because the statement of the accused is proved to have been made without fear of prejudice or hope of advantage, it is therefore admissible against him /is/ in complete disregard of all other factors which a wise "rule of policy" might under certain circumstances, consider as having exercised an improper influence or inducement upon the free mind of the confessor...."

In 1951, an attempt was made by Rand, J., in the Supreme Court of Canada,⁴³¹ to dispel doubts existing as to the meaning of the test of admissibility when he briefly observed:

429 supra, fn. 419, at p. 216. For a similar "misinterpretation" by Hazen, C.J., of a trial decision, see his judgment in R. v. Rasmussen, supra, fn. 413, (1934), 62 C.C.C. 217, at p. 223, Compare to trial decision at p. 221, and see R. v. Robichaud (1938), 70 C.C.C. 365 (1 B.C.A.), per Baxter, C.J. at p. 372. Richard v. R. (1957), 43 F.P.R. 229 (N.B.C.A.), R. v. Albrecht (1966), 49 C.R. 314 (N.B.C.A.).

430 R. v. Anderson (1942), 77 C.C.C. 295, at p. 298, approved in R. v. Ostroglaw (1956), 22 C.R. 375 (B.C.A.). And see, R. v. Dreher (1952), 14 C.R. 309 (Alta.C.A.), per MacDonald, J.A., at p. 352.

431 R. v. Murakami (1951), 12 C.R. 245 (S.C.C.), at p. 251: See, also, Hebert v. R. (1954), 113 C.C. 97 (S.C.C.), per Rand, J., at p. 104.

"The case of Boudreau v. The King, [1949/ S.C.R. 262, has laid down the rule to be applied in the case of confessions was the statement freely and voluntarily made. That means, I think, was it made by one whose mind and will were disposed to the making of it free from any real influence exerted upon them by any direct or indirect inducement of hope or fear held out by a person in authority."

But this did little to clarify the law. Rather than affirming the broad view, it tended to confirm the narrow interpretation by seeming to limit the categories of inducement to hope and fear, thereby failing to resolve the dilemma in application of the test.

Five years later, however, presented with a further opportunity to pass on the subject and perhaps realizing the shortcomings of his previous explanation in R. v. Murakami,⁴³² the learned Justice had left no doubt that the test within the exclusionary rule was to have an unrestricted operation in Canada. As he authoritatively stated in R. v. Fitton.⁴³³

432 supra, fn. 431

433 [1956/ S.C.R. 958; 24 C.R. 371, at p.374. In McDermott v. The King (1948), 76 C.L.R. 501 (Aust.H.C.), the learned Dixon, J., later C.J., explained at p. 511: "At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made." See, also, R. v. Burnett [1944/ V.L.R. 115, per O'Brien, J., at p. 116.]

"The rule on the admission of confessions which, following the English authorities, was restated in Boudreau v. The King, supra, at times presents difficulty of application because its terms tend to conceal underlying considerations material to a determination. The cases of torture, actual or threatened, or of unabashed promises are clear, perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of a conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them."

Rather than re-define voluntariness in terms other than the hope - fear duality, the learned justice re-defined this duality to include all forms of inducement arising from the circumstances of a particular case. The test - is it voluntary? - was still to be explained in terms of fear of prejudice or hope of advantage held out to the accused by a person in authority. But the practical application of this test simply became. as any inducement held out to the accused by a person in authority?⁴³⁴

434 See, Richard v. R. supra, fn. 429. I. v. Plowman (1958), 123 C.C.C. 76 (f.d.s.c.) R. v. Harnish (1961) 130 C.C.C. 305 (N.S.C.A.). I. v. Wolbaum, supra, fn. 423.

III. Police Questioning and Practices The Judges' Rules

From the early development of the rule excluding involuntary extra-judicial confessions or statements in Canada, it was clearly an accepted judicial proposition that police interrogation per se did not render inadmissible a confessional statement obtained as a result thereof.⁴³⁵ It was recognized that questioning was a necessary investigative procedure, whether it was the questioning of suspects,⁴³⁶ of those in custody,⁴³⁷ under arrest and charged,⁴³⁸ or were preliminary inquiry by the police of no person in particular.

435 See, R. v. Day (1890), 20 O.R. 209 (Q.B.D.). The facts were that the accused was questioned in custody by detectives. Because of the English decision in R. v. Cavin, supra, fn. 360, the case was reserved, and Arnour, C.J., later stated at p. 211. "We think, although we reprehend the practice of questioning prisoners that we cannot come to the conclusion that evidence obtained by such questioning is inadmissible..." Similarly, as to Australia, see, R. v. Rogerson (1870), 9 N.S.W.S.C. 234; R. v. Many Many et al. (1895), 6 Q.L.J. 224 (Harding, J.). R. v. Walker et al. (1887), 138 L.R. 469 (S.C.).

436 See, for e.g. R. v. Pitton, supra, fn. 435, per Nolan, J. at p. 972.

437 See, for e.g. R. v. Day, supra, fn. 435. R. v. Vien (1898), 7 O.R. 362 (C.A.).

438 See, R. v. Kooten, supra, fn. 413. Trepanier v. R. (1911), 19 C.C.C. 290 (Que.C.A.).

But there was a proviso. As Boyd, C., observed in the case of R. v. Elliott,⁴³⁹ approving the earlier decision in R. v. Day.

"The general principle is that admissions made to the officer in charge, even in response to questions, may be received if the presiding judge is satisfied that they were not unduly or improperly obtained which depends upon the circumstances of each case."⁴⁴⁰

(a) Cross-Examination of Accused in Custody

If the confession tendered in evidence was obtained by police questioning, the character of the questioning will be a circumstance relevant to its admissibility.⁴⁴¹ If the interrogation of the accused in custody was, in effect, cross-examination, it would appear that the tendered confession would be excluded as not being voluntary. As Russell, J., emphasized in R. v. Young.⁴⁴²

439 (1900), 31 O.R. 14 (Div. Ct.), at p. 17. And see, R. v. Wallace (1914), 24 C.C.C. 158 (S.C.C.).

440 It was necessary that the interrogation be shown to be properly conducted in order to prove that the resulting confession was voluntary. See, Sankey v. R. [1927/ S.C.R. 436. R. v. Zellos [1927/ S.C.R. 258. R. v. Allen supra, fn. 423. R. v. Fitton, supra, fn. 433.

441 See, supra, fn. 440. And see, R. v. Starr (1960), 33 C.R. 277 (Man. C. Ct.).

442 supra, fn. 418, (1905), 10 C.C.C. 466, at p. 511: Similarly, in R. v. Howlett (1950), 9 C.R. 196 (Ont. C.A.), a three hour period of cross-examination in the form of repeated accusations that the accused had committed murder resulted in rejection of accused's confession. See, also R. v. Starr, id., R. v. Jones (1944), 84 C.C.C. 299, (1944) 1 S.C. per Campbell, J. at p. 301: R. v. Blennan [1963/ 3 C.C.C. 30 (P.L.I.S.C.), per Campbell C.J., at p. 35.

"A police officer after he has arrested a prisoner charged with a crime, must not cross-examine him or put questions to him on the subject matter of the offence, and if he do so the statements of the accused are not receivable in evidence."

It is necessary that the questions be without "intimidating or suggestive overtones",⁴⁴³ and not "for the purpose of trapping the suspected person into making admissions",⁴⁴⁴ or "designed" or calculated to bring about a confession.⁴⁴⁵ Every case must depend on the whole of the circumstances⁴⁴⁶ and similar considerations will apply if the interrogator is some one other than a police officer,

443 R. v. Hutton, supra, fn. 433, per Rand, J., at p. 963; R. v. Robichaud, supra, fn. 429 per Baxter, C.J. p 375

444 See, supra, fn. 436: As to Australia, see. R. v. Roelison, supra, fn. 435, per Stephen, C.J., at pp. 235-236, where the learned judge stated in part: "... I do not say that such questioning may not be carried to an improper length, but it does not affect the admissibility of the prisoner's answers, provided nothing has been done to entrap or mislead him." And see, McDermott v. The King, supra, fn. 433.

445 See, R. v. Stain (1960), 128 C.C.C. 212 (Man. Co. Ct.)

446 See, supra, fns. 436, 443.

acting under police authority, or in the presence of the police.⁴⁴⁷

(b) Other Police Practices.

Other measures adopted by the police in their investigation of crime and questioning of suspects are varied, and in many cases, give rise to an implication of coercion, resulting in a court's excluding from evidence those confessional statements resulting therefrom. Long periods of uninterrupted questioning,⁴⁴⁸ or several periods of questioning⁴⁴⁹ imply, on the part of the accused, an unwillingness to make a statement, and on the part of the police, a determined bid to bring pressure to bear on the accused to confess.⁴⁵⁰ In both cases, it is difficult to

447 See, R. v. Price, supra, fn. 419, at p. 216, per Hazen, C.J.).

448 See, for e.g., R. v. Howlett, supra, fn. 442.

449 See, for e.g., Lankey v. R., supra, fn. 440.

450 Where several policemen are present at an interrogation of an accused, a similar result would obtain. In R. v. Seabrooke [1952] C.R. 575 (C.A.), where five detectives and another were present, Bullock, C.J.C. observed at p. 580. "Their presence was, I think, calculated to bring pre-sure to bear upon the accused and therefore to deprive his statements of a voluntary character." See, also, Markedonis v. R. [1935] S.C.R. 657, decision appealed from, supra, fn. 422 R.v. Wishart (1955), 20 C.R. 165 (B.C.C.A.).

conceive of any other result than a finding by the court that such police action would deprive statements or confessions so obtained of their necessary voluntary character.⁴⁵¹

Similarly, the confronting of the accused by the police with exhibits, or the disclosing to the accused evidence in their possession, negatives the requisite voluntariness of a confession so obtained. In R. v.

451 A further practice of the police is the making of false statements to an accused in custody. In R. v. White (1909), 1800 L.R. 640 (C.A.), where accused was falsely informed that another had incriminated him, the confession was held admissible. However, recognizing that in some circumstances the confession may be regarded as involuntary, Osler, J.A., stated.

"I will add speaking for myself, that the practice of police officers of any grade examining prisoners is to be disapproved, and that the obtaining of confessions or statements from them by trick or deception is to be strongly reprobated, the latter in particular tends only to obstruct the course of justice by discrediting an officer whose testimony might otherwise be useful."

See, also, F. v. Ryan, supra, fn. 414, per Moss, C.J.O., at p. 140. R. v. Gulah, supra, fn. 418, per Rogers, J.. However, in R. v. Sim (1954), 108 C.C.C. 380 (Alta.S.C.), McBride, J., observed at p. 389.

"Police officers are forbidden from inducing a confession by deliberately lying or inventing situations to an accused which have no shadow of truth."

In R. v. McLean & McKinley (1957), 126 C.C.C. 395 (E.C.A.C.), the learned McInnes, J., disapproving the result in R. v. White, supra, held that the weight of authority was against the admissibility of statements obtained in such circumstances. This would now appear to be the better opinion. See, R. v. Eitton, supra, fn. 443.

⁴⁵²
Terry, an accused, while in custody without being charged, and without warning, was shown photographs and notes taken from the place the crime had been committed, as well as signed statements of his daughter and sons relating to the crime. On a trial for murder, it was held that such disclosure of evidence had placed the accused in a position where he felt compelled to speak, and that the statement was therefore rejected as being induced.⁴⁵³

452 (1955), 20 C.R. 37 (L.C.S.C.). See, also, R. v. Eaton (1957), 25 C.I. 320 (F.C.C.A.).

453 However, if the accused is shown the statement of an accomplice, without comment, and without the invitation of a reply, rejection of a subsequent confession would not result. See, R. v. Harris (1946), 88 C.C.C. 79 (Que. C.A.) R. v. Mills & Lemon, supra, fn. 367 R. v. May, supra, fn. 367. It would also appear that procuring a fellow prisoner to obtain a confession from an accused by the police is not, of itself, enough to negative voluntariness of the confession so obtained. R. v. Farduto (1912), 21 C.C.C. 144 (Que. C.A.) R. v. Barrs (1946), 86 C.C.C. 9 (Alta. C.A.). Compare to supra, fn. 451. See also, as to refusing accused's request for a solicitor, R. v. Enele, supra, fn. 423.

(c) The Judges' Rules.

It is clear that the Judges' Rules⁴⁵⁴ as expounded in England are not binding in Canada, although their presence is recognized.⁴⁵⁵ As Rand, J., observed in the Supreme Court of Canada:⁴⁵⁶

"In this country they have no other force than what their innate good sense may suggest in individual determinations, as considerations to be kept in mind in weighing the total circumstances."

It would appear therefore, that Canadian judges are free to consider the Rules as a guide to what is proper police behaviour within the framework of the administration of justice, the deviation from which by the police being but one circumstance in the assessment of all circumstances in any particular case. Although it is difficult to correctly gauge the extent of the adoption of the English

454 supra, England, c.8.

455 R. v. Odwin, supra, fn. 426 R. v. Bonin (1955) 3 W.T.R. 609, at p. 613. R. v. Asmusen, supra, fn. 413 per Barry, C.J.C., at p. 229. R. v. Lantin (1943), 30 C.C.C. 375 (Que. L.), R. v. Harris, supra, fn. 453, R. v. Deale (1947), 38 C.C.C. 247 (Alta. C.A.), O'Connor, J.A., dissenting, at p. 254 R. v. Sullivan (1955), 111 C.C.C. 175 (Ont. C.A.), per MacKay, J.A. at p. 176.

456 R. v. Patton, supra, fn. 455, at p. 964. See, also, R. v. Yensen (1961), 130 C.C.C. 555 (Ont. C.A.), per O'Connor, J.A., at p. 550.

rules of police forces in Canada, it is probable that, considering the judicial attention given the rules as recognized standards of propriety in police conduct, the extent of adoption could be pronounced.⁴⁵⁷

457 See, generally, J.L. Anthony (Arthur Ross, The Status of Confessions in our Modern Legal System. The Point of View of the Policeman. (1955-61), Alta. L. Rev. 145.

in Australia

In R. v. Lee [1950] 3.L. 413, O'Bryan, J., observed at p. 421

"In Victoria, we have no rules approved by the judges, but very similar rules have been laid down by the Chief Commissioner of Police for the guidance of police officers in taking statements from suspected person or persons who are in custody, or who have been charged. The object of these rules is, on the one hand, to ensure that the questioning of persons suspected or in custody shall not proceed beyond limits of fairness and, on the other hand, that the police shall not be hampered in their very difficult task of investigating crime so that, as a result, criminals will escape justice. The mere fact that one or more of these rules has been broken does not necessarily mean that the accused person has been treated with undue fairness or harshness. On the other hand, rules such as these are made to be obeyed, and their breach immediately gives rise to the question whether such unfairness has not been done to the accused as to warrant the exclusion of the evidence of statements obtained as a result thereof."

See, also, the affirmation of this case, (1950), 83 C.L.R. 133 (Aust. L.C.), at pp. 142, 143. R. v. Jeffries (1946), 47 S.R. (N.S.W.) 284, McDermott v. The King, supra, fn. 433, at p. 513.

(d) The Caution. Form and Effect

The use of the caution by a police officer previous to questioning an accused in custody was judicially considered as a wise, and in most cases, a necessary police practice. Using decided English cases as their example, it was an accepted philosophy that an accused in custody ought to be made aware of the consequences of his making a statement, by being made to understand that the police interrogation had as its sole purpose the obtaining of incriminating admissions from the accused.⁴⁵⁸ At the trial of the accused, the onus was on the prosecution to prove that any

⁴⁵⁸ See, R. v. Hinkle, supra, fn. 412. In R. v. Kay (1904), 9 C.C.C. 403 (B.C.S.C.), followed in R. v. Cook (1914), 22 C.C.C. 241 (P.S.S.C.), Burf, J., observed at p. 404.

"The accused ought therefore, before speaking, to have been warned of the consequences of speech, and made to understand that he was being questioned with the object of extracting admissions to be used against him. In the absence of affirmative proof by the prosecution that these conditions were fulfilled, the statements of the accused made in such circumstances cannot be heard in support of the charge against him."

In R. v. Bruce (1907), 12 C.C.C. 275 (B.C.S.C.) the full court stated, per curiam.

"The rule as to cautioning is that before the Crown introduces statements by prisoners, the onus is on the Crown to show that there has been no inducements given to make those statements."

statement or admission so obtained was voluntary. Although there was no rule of law to the effect that if the accused were not cautioned the incriminating statement or admission was inadmissible, the presence or absence of the caution was an important circumstance to be considered by the trial judge.⁴⁵⁹ If a caution was used by the police officer taking the statement,⁴⁶⁰ it was then for the trial judge to decide on its sufficiency. As Hazen, C.J. observed in the New Brunswick Court of

459 See, for e.g., R. v. 100 Sam, supra, fn. 413, R. v. O'Neil, supra, fn. 426, R. v. Rodney, supra, fn. 413, R. v. Kooten, supra, fn. 413, Cautioning of the accused in itself, did not satisfy the burden of voluntariness. See, R. v. Sileski (1922), 63 D.L.R. 146 (Que. C.A.) Bigaouette v. R. (1926), 46 C.C.C. 311 (Que. C.A.) Sankey v. R., supra, fn. 440, Thiffault v. R. [1933] S.C.R. 509, R. v. Essery [1945] 4 D.L.R. 509 (P.E.I.S.C.). And see, R. v. Alad, infra, fn. 536, per Smith, J., at p. 547.

460 See, R. v. Bela Singh (1914), 24 C.C.C. 142 (P.C.S.C.).

Appeal:⁴⁶¹

"but unless it is proved that prior to such questioning the prisoner was warned that he was under no obligation to answer questions put to him and would suffer no prejudice by not answering, and that anything he said could be given in evidence by the prosecution at his trial, it would rarely happen that the trial judge could be satisfied that the statements thus made by the prisoner were free and voluntary. Therefore, we think it is in all cases expedient, and in most cases essential, that before the prisoner is asked any question he be given such warning."

The law relating to cautioning of prisoners, which was considered well settled, was again hurled into confusion

461 R. v. Price, supra, fn. 419, at p. 218. In 1913, it was held in the Sask. S.C. that the warning. "anything you say may be taken down in writing and used as evidence at your trial" - was insufficient. See, Anthony & Moss, supra, fn. 457, at p. 148. In Trepanier v. R., supra, fn. 435, the wording "for or against" in a warning was held to be an inducement to the accused to speak. See, R. v. Winkle, supra fn. 412, where a caution to an accused that anything he said might be used against him and not to say anything, unless he wished, was referred to as the "ordinary caution". Compare to the form used in R. v. Kong (1914), 24 C.C.C. 142 (B.C. S.C.). However, in R. v. Lantin, supra, fn. 455, Langlais, J., held that the use of "against him" in the caution was invalid as having the effect of preventing the accused from making an exculpatory statement. See, generally, Anthony & Moss, supra, fn. 457. The accepted form for the use by police officers would appear to be: "You need not say anything. You have nothing to hope from any promise or favour and nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence at your trial." Note the contention in R. v. Spain, supra, fn. 413.

by the decision in Gach v. R.,⁴⁶² decided in the Supreme Court of Canada in 1943. In that case, Taschereau, J., approving the judgment of Mr. Justice Darling in the English case of R. v. Booth and Jones,⁴⁶³ held that before being interrogated by police officers, the appellant should have been warned. Two years later in the Saskatchewan Court of Appeal,⁴⁶⁴ this decision was interpreted as laying down, as a rule of law, that where an accused was questioned in police custody, a caution must be given. In the Ontario Court of Appeal, relying on an earlier unreported decision of its own⁴⁶⁵ and distinguishing the Gach decision, it was held that the absence of a warning or caution does not necessarily result in the exclusion of a statement or confession obtained by police questioning. In Boudreau v. R.,⁴⁶⁶ the Gach decision was followed, and on appeal from the Quebec Court of Appeal to the Supreme Court of Canada, the Gach-Scory interpretation was refuted when Kerwin, J., authoritatively stated the current law on

462 /1943/ S.C.R. 250 And see, Markadonis v. R., supra fn. 450, per Davis, J., at p. 664.

463 ubi supra, fn. 237

464 R. v. Scory, supra, fn. 419.

465 R. v. Johnston (1948), 91 C.C.C. 59: R. v. Orodowski Jun. 16, 1943.

466 (1948), 93 C.C.C. 55.

the subject 467

"The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and in many cases, an important one.⁴⁶⁸

467 Boudreau v. I. supra, fn. 417, at p. 433 And see, R. v. Howlett, supra, fn. 442. R. v. Geddoes (1952), 103 C.C.C. 131 (Sask. C.A.) Dupuis v. R. /1952/ 2 C.C.R. 516 R. v. Theriault (1953), 17 C.R. 269 (Que. C.A.). R. v. Allen, supra, fn. 423 R. v. Pitton, supra, fn. 433. R. v. Manlor (1958), 122 C.C.C. 384 (Mfld. S.C.), R. v. Plowman, supra, fn. 434.

468 As to cautioning a minor, see, R. v. Jensen, supra, fn. 456. Compare to Re Day (1961), 130 C.C.C. 41 (B.C. C.). In any case, it is open to the trial judge to reject the statement if he is not satisfied that the accused understood the implications of making it. See, R. v. Beaulieu /1968/ 1 C.C.C. 143 (Alta. C.A.) As to where accused is questioned as regards one offence, and charged with another, see, R. v. Kay, supra, fn. 458, R. v. Rossi (1910), 17 C.C.C. 182 (P.E., Landry, J.), R. v. Van Horst (1914), 24 C.C.C. 157 (B.C. C.), R. v. Dick (1947), 2 C.R. 417 (Ont. C.A.), Also, 89 C.C.C. 312, R. v. Chambers /1948/ 1 D.L.R. 399 (Ont. C.A.), R. v. Deagle, supra, fn. 455, R. v. Bird /1967/ 1 C.C.C. 33 (Sask. C.A.). It would appear that if the accused was cautioned in relation to the first charge only, the caution would be evidence of voluntariness of a statement on a trial on this charge alone, unless the charges were virtually the same or the second charge was a lesser charge.

CHAPTER TWO

THE COERCION OF PERSONS IN AUTHORITY

Within the rule excluding extra-judicial confessions, any inducement held out to the accused by a person in authority will serve to exclude the subsequent confession of the accused, regardless of whether the accused makes the confession to the person in authority, or to any other person. In this instance, the operative factor is the inducing by a person in authority, and it is this alone that negatives voluntariness. It would therefore follow that, if the accused was induced to confess or make an incriminating statement by a person not in authority, the statement would be admissible in evidence, regardless of whether the accused made the statement to the person so inducing, or to any other person. Who then are "persons in authority" within the confessional rule in Canada, and how, in any given case, is this status determined?

In n v. Todd,⁴⁶⁹ two persons, neither of whom were peace officers, were hired by the chief of police as detectives for the purpose of obtaining evidence which would connect the prisoner with a murder. Holding as

469 supra, fn. 419.

gangsters to the prisoner, they told him that they would make him a member of the gang if he satisfied them that he had committed a serious crime. The prisoner accused, believing them to be what they pretended to be, confessed the murder. Bain J., holding that the accused was not induced by persons in authority, observed after a careful consideration of pertinent English authorities:⁴⁷⁰

"A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason that it is a rule of law that confessions made as the result of inducements held out by persons in authority are inadmissible is clearly this, that the authority that the accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe, and so in some degree to overcome the powers of his mind..."

It was clear to the learned Bain J., that in order to determine whether the persons alleged to have induced the accused were persons in authority, it was necessary to look at the relationship of the accused and the persons from the point of view of the accused. In other words, did the accused reasonably believe the persons to be in control

470 ibid, at p. 526 (by italics)

or in authority over him?⁴⁷¹ If the accused knew or believed this, although the relationship itself, i.e. dominant-servient, in authority - under authority, might not be sufficient to lead to an inference of coercion,⁴⁷² the accused would be more likely to be influenced by anything said or done to him by these persons. The same view as to the concept of person in authority within the rule was differently stated by the learned Harvey, C.J.A., in the case of R. v. Newes,⁴⁷³ a decision of the Alberta Court of Appeal:

471 See, R. v. Ayles, supra, fn. 413, per Chisholm, J., at p. 91 "... the prisoner believed him to be a person in authority." In R. v. Barrs, supra, fn. 453, a confession made by an accused to a person who appears to him to be a fellow prisoner is not inadmissible as made to a person in authority.

472 See, R. v. Ryan, supra, fn. 414, where it was held, inter alia, there having been no inducement, the relationship between postal superintendant and letter carrier was not in itself sufficient to justify coercion.

473 [1934] 3 D.L.R. 237.

"Apparently a person in authority within the meaning of the rule is some person whose promise or threat would be likely to influence the accused and induce him to make a statement against his interest from fear or hope."

Both judicial statements recognized that an accused would not be induced by someone whom he did not believe to be in authority or control over him. If he did not believe the person to be in authority over him, he would not feel himself deprived of the choice of speaking or remaining silent, and would be less likely to incriminate himself falsely, or at all. According to this view, there is no rule that once a person in authority, always a person in authority. It does not allow for fixed categories of persons who are persons in authority within the rule. Rather, it emphasizes the flexibility of the concept, by leaving it to the trial judge in each individual case on the particular circumstances before him, to decide whether the accused was induced by a person in authority or not. Where in one case a person in relation to the accused is considered to be a person in authority, he might not be so considered in another. Where one accused might reasonably believe a person to be in authority over him, another accused might not reasonably hold a similar belief. In every case, it is the particular accused which gives the concept vitality and meaning.

Although the advantages of the above-noted opinion cannot be understated nor its existence as a test of person in authority within the rule denied, there is, however, a restricting definition of the concept in Canada. In 1904, Osler, J.A., in the Ontario Court of Appeal, while approving the English case of R. v. Thompson⁴⁷⁴ but apparently quoting from its erroneous headnote, defined "person in authority" as a "... person in a position of authority in connection with the prosecution of the person by whom the confession was made."⁴⁷⁵

Twenty years later, in R. v. Rasmussen,⁴⁷⁶ a decision

474 ubi supra fn. 85

475 R. v. Ryan, supra, fn. 414.

476 supra, fn. 413. In R. v. Hoadhouse (1933), 61 C.C.C. 191 (F.C.C.A.), Macdonald, J.A., speaking for the Court, stated at p. 192.

"Dr. S. stood in the same position as the wife of an arresting officer if the accused has been taken to his home for first aid treatment at her hands administered under the circumstances disclosed in this case. The doctor was not deputized by the police to act on their behalf nor was he performing any function in connection with the administration of justice. Nor can any significance be attached to the place where the treatment was given nor to the professional character or otherwise by the ministrant."

See, also, R. v. Elele, supra, fn. 423, where a person was held not to be a person in authority *as* "She had nothing to do with the investigation which the police were carrying on...". In R. v. Rodney, supra, fn. 476, Latchford, J., at p.267, states. "Before admitting evidence of statements so made, the magistrate or judge should be satisfied that no inducement whatever has been held out to the accused by any person having authority over him or concerned in the subject matter of the charge." (My italics)

of the New Brunswick Court of Appeal, Barry, C.J.K.B., stated.

"To exclude a confession the inducement must have been held out by a person in authority, i.e., some one engaged in the arrest, detention, examination or prosecution of the accused or by some one acting in the presence and without the dissent of such person..."

By so defining the concept of person in authority, the operation of the concept within the rule excluding induced or involuntary confessions is severely restricted. Involving as it does a shift in emphasis away from the accused, the concept is limited to certain categories of persons. In a given case, if the person alleged to have induced the accused is not engaged in the arrest, detention, examination or prosecution of the accused, or not acting with the assent of such person, the person would not be considered to be a person in authority within the rule, regardless of whether the accused believed on reasonable grounds that the person was in authority or control over him. Similarly, the inquiry of the trial judge is limited by the rigid categories, and the definition designates as irrelevant any circumstance which does not pertain to any of the categories, i.e. arrest, detention, examination, and prosecution of the accused.

No difficulty arises where the trial judge can dually conclude that the person in question was reasonably believed by the accused to be in authority of him, as well as being

concerned with the prosecution. In R. v. Loiselee,⁴⁷⁷ the accused was suspected of arson. An insurance adjuster visited the accused with the intention of obtaining from the accused a repayment of claim monies after the interview with the adjuster, the accused returned the monies. Citing Kenny⁴⁷⁸ to the effect that a person in authority means one who had some opportunity of influencing the course of the prosecution, and approving the statement of Harvey, C.J.A.,⁴⁷⁹ the court held that an insurance adjuster charged with the investigation of a loss suspected to be fraudulent was a person in authority within the rule.

However, that a great deal of confusion exists because of the presence of two tests for "person in authority" cannot be doubted. In R. v. Albrecht,⁴⁸⁰ the magistrate ruled that one R. the personnel manager and security officer of a department store in which the accused had tendered a counterfeit bank note, was a person in authority in relation to the accused, although the accused was not charged with regard to that note. On the acquittal of the accused on a charge of possession of counterfeit money, the crown

477 (1955), 21 C.R. 210 (Que. C.A.). Compare Re Lftoda (1963), 39 C.R. 524 (Sask. C.A.).

478 Outlines of Criminal Law, 15 ed., at p. 470

479 R. v. Newes, supra, in. 473.

480 supra, in. 429

appealed, alleging misdirection in law on the part of the magistrate. It was held by the New Brunswick Court of Appeal, inter alia, that ⁴ was not a person in authority.

In rendering judgment, Bridges, C.J., stated:⁴⁸¹

"Person in authority has been interpreted to include anyone concerned or engaged in the examination, arrest or prosecution of the accused. However, the principle has been extended to include a person whom the accused had reasonable grounds to believe to be a person in authority."

By attempting to resolve the dilemma by a merger of the two tests into one, the learned Chief Justice led at least one of his brethren into serious error. As Limerick, J., observed.⁴⁸²

"We, however, do not know if the respondent believed Prime to be a person in authority or not. The Crown is not in position to enlighten the Court on this point. It is a matter in the exclusive and particular knowledge of the respondent and he has not seen fit to enlighten the Court nor has he chosen to testify as to any inducement held out to him or call evidence rebutting that given by the Crown."

It would appear that the learned judge erred by treating the latter part of the "principle" stated by Bridges, C.J.,
exact
to be an/subjective test for the concept of person in authority within the exclusionary rule. The test, it is submitted, is not - did the accused actually believe him

fn. 480,
481 supra, at p. 519, et seq., citing R. v. Loiselette,
supra, fn. 477, R. v. Hyles, supra, fn. 413

482 ibid, at p. 320

to be a person in authority? Rather, the trial judge must ask himself, on the circumstances of the case, could the accused have reasonably believed the person to be a person in authority? It is not an objective test, in the sense of placing the reasonable man, or average man in the place of the accused. It is whether the accused, however unreasonable or below average he may be, reasonably believed the person to be in authority over him.⁴⁸³

483 If the statement of the learned Lamerick, J., are correct, not only would it have the effect of compelling the accused to testify or lead evidence, but it would also seem to suggest that there is a burden on the accused to prove an inducement. Compare to a further statement of the learned judge, supra, fn. 98 at p. 321. As to burden, see, infra 25. It is respectfully submitted that where the issue arises, the burden of proving voluntariness is on the Crown, an integral part of which is to prove that no inducement was held out by a person in authority.

If there is any doubt whether the inducer is a person in authority, and that doubt is not resolved by the prosecution on which lays the sole burden of proof, it is submitted that the inducer must be considered to be in authority over the accused. See, R. v. L. (1965) 5 C.C.C. 241 (Alta. C.A.), where Johnson and Cullen, J.J., held that a psychiatrist, nominated by the Attorney-General to examine a person for the purpose of giving evidence as to whether such person is a dangerous sexual offender, would be considered a person in authority if the psychiatrist caused the person to believe that he had power to control the proceedings or was acting as the agent of the police to obtain admissions.

as recently as 1967, an opportunity presented itself in the Supreme Court of Canada to clarify the law relating to the concept of person in authority. But Lauteux, J., speaking for the Court in Wilband v. R.,⁴³⁴ a case involving the status of a Crown-appointed psychiatrist in dangerous sexual offender proceedings under S.661 of the Criminal Code, contented himself to state

"Indeed, the nature of their position in relation to the proceedings under S. 661, Criminal Code, does not enable them to control or influence the course of such proceedings in the sense and the manner in which the course of proceedings may be controlled or influenced by persons who have a concern with the apprehension, prosecution or examination of prisoners conducted to collect evidence leading to the conviction of an offence."

At first blush, this judgment would appear to be authority for defining the concept of person in authority to those persons concerned with the apprehension, prosecution or examination of prisoners. However, no attempt was made by the learned justice to lay down a rule, and his judgment must merely be read as stating the truism that persons so concerned are to be considered persons in authority. It is respectfully submitted that the proper test to be employed by a trial judge to discern which persons are persons in authority, is to ask Could the accused, on the

434 [1967] 2 C.C.C. 6 (S.C.C.), at p. 10.

circumstances of the case, reasonably believe the person to be such? Any person concerned, by virtue of their office within the administration of justice would be considered as persons in authority within this test.

Such persons would include magistrates,⁴⁸⁵ justices of the peace,⁴⁸⁶ police officers of any grade,⁴⁸⁷ or anybody acting as an agent for, or with the assent of, or in the presence of the police,⁴⁸⁸ jurors,⁴⁸⁹ and prosecutors, including informants or complainants.⁴⁹⁰ Similarly, fire

485 R. v. Sileski, supra, fn. 459

486 R. v. Benjamin, supra, fn. 422

487 See, for e.g., R. v. Tutty (1905), 9 C.C.C. 544 (P.S.S.C.), Chief of police, R. v. Young, supra, fn. 418, Detective employed by the Crown, R. v. Umlah, supra, fn. 418, police inspector, R. v. MacNeill (1945), 18 M.P.N. 175 (I.L.L.S.C.), R. v. Lazure (1959), 126 C.C.C. 331 (Ont. C.A.), R. v. Nyles, supra, fn. 413, R. v. Bruce, supra, fn. 458, R. v. Daley (1909), 16 C.C.C. 168 (M.B.S.C.) police officer or constable, R. v. Elliott, supra, fn. 439, reeve, as to fellow prisoner, see R. v. Barrs, supra, fn. 453, R. v. Farduto, supra, fn. 453

488 See, for e.g., R. v. Essery, supra, fn. 459, person having custody of the accused, R. v. Jackson (1898), 2 C.C.C. 149 (I.S.S.C.), brother of prosecutor, P. v. Lai Ping (1904), 8 C.C.C. 467 (E.C.S.C.), interpreter as regards Chinese prisoner, R. v. Latchette, supra, fn. 422, R. v. De Pesquito supra, fn. 413.

489 See, for e.g., R. v. Riopel (1922), 39 C.C.C. 148 (Que. C.A.).

490 See, for e.g., R. v. Jackson, supra, fn. 488; R. v. Newes, supra, fn. 470.

investigators⁴⁹¹ and immigration officers⁴⁹² may be considered persons in authority, and the trial judge will regard any relationship between the inducer and the accused as an especially relevant circumstance to be considered by him, as in the case of employer-employee,⁴⁹³ master - servant,⁴⁹⁴ insurance adjuster - claimant,⁴⁹⁵ a church rector as regards his choir boys,⁴⁹⁶ and doctor - patient.⁴⁹⁷

491 See, for e.g., R. v. Rice, supra, fn. 419, R. v. Hanna (1940), 14 D.P.R. 365 (F.S.C.)

492 Trosko v. R., supra, fn. 413

493 R. v. Jackson, supra, fn. 480, R. v. Ryan, supra, fn. 414

494 R. v. De losquito, supra, fn. 413

495 Loiselle v. R., supra, fn. 477. Compare, Re Eftoda, supra, fn. 477.

496 R. v. Royds (1904), 8 C.C.C. 209 (B.C.C.Ct)

497 R. v. Roadhouse, supra, fn. 476, and see Wilband v. R. supra, fn. 484.

CHAPTER THREE

THE PRINCIPLE

An assessment of the reasons underlying the existence of the evidential rule excluding involuntary extrajudicial confessions of accused persons demands as a first consideration, an enquiry into the concept of voluntariness as a basis of criminal law itself. From the inception of the Common Law, the legal philosophy regarding crime accepted without question as its major premise, that conduct, in order to be open to sanction as criminal conduct, had to be voluntary, i.e. a conclusion reached by the free will of the accused. If the conduct could not be said to be voluntary, but rather, was the result of an overborne will, a product of external compulsion, then the conduct was not to be considered as criminal conduct. Fairness demanded that sanction obtain only to voluntary conduct.

From this broad principle, it was recognized that if an accused person, by unrestricted operation of his own will, freely confessed to having committed a crime, such confession was to be regarded as evidence. There was no reason to reject such a confession. It was considered as the best evidence, as an accused person would not freely declare against his own interest unless such declaration

were true. The operative factor was that the confession was voluntary. If, however, the confession of the accused was given, not freely, but as the result of some form of inducement or compulsion operating upon his mind and held out to him by some person in authority over him, it was unacceptable as evidence because it was not voluntary.

Confessions which were not voluntary, as being the result of inducement, were not reliable and possibly false. But even if their reliability, their truth, could be proven, they were still not accepted as evidence because they were not voluntary. Primarily, exclusion resulted, not because of the possible harm to the accused if they were used, but because of the harm done to the accused in obtaining them.

The confession rule, as authoritatively stated in Ibrahim v. R.⁴⁹⁸ and followed in Canada in the leading case of Boudreau v. R.⁴⁹⁹ and subsequent cases, directed that any confession or statement of the accused, obtained as a result of fear of prejudice or hope of advantage held out to the accused by a person in authority, would be excluded from evidence as not being voluntary. The rule contemplates an unlimited category of inducements, with the components fear and hope being limited to that exercised or engendered by

498 ubi supra, fn. 78

499 supra, fn. 417, as explained by R. v. Litton, supra, fn. 453.

a person in authority.⁵⁰⁰ Within the test of whether there was any inducement held out to the accused by a person in authority, it is necessary that the inducement, in order to exclude the resulting confession or statement, must be of a temporal nature.⁵⁰¹ Any inducement of a spiritual character

500 In Prosser v. R. supra, fn. 413, Edington, J., stated at p. 234

"It is the inducement exercised by the officers in charge that is to be guarded against and not the accidental circumstances of an arrest and the bearing thereof on the mind of one accused that has to be guarded against."

Compare to R. v. Kay, supra, fn. 458, followed in R. v. Cook, supra, fn. 458 where Duff, J., stated at p. 404.

"The arrest and charge are in themselves a challenge to the accused to speak, an inducement within the rule."

In R. v. Sim, supra, fn. 451, McBride, J., observed at p. 389

"Furthermore, contrary to defence submission on the point, the fear contemplated by the rule in the Ibrahim case... is not, in my opinion, fear which may be engendered by arrest, being charged with a crime and perhaps, in addition, having a guilty conscience ... but must be fear of prejudice engendered by a person in authority."

See, also R. v. Albrecht, supra, fn. 429, per Limerick, J.A., at p. 321.

In the Australian case of McDermott v. R., supra, fn. 433, the learned Dixon, J., as he then was, observed, obiter, at p. 512 "It is perhaps doubtful whether, particularly in this country, a sufficiently wide operation has been given to the basal principle that to be admissible a confession must be voluntary, a principle the application of which is flexible and is not limited by any category of inducements that may prevail over a man's will."

501 R. v. Todd, supra, fn. 419, R. v. Gibney ubi supra, fn. 161, R. v. Gilham, ubi supra, fn. 162, R. v. Wild ubi supra, fn. 164, R. v. Risborough, ubi supra, fn. 165.

will not suffice to exclude a confession, regardless of whether it was held out or exercised by a person in authority, or whether the accused confessed or gave a statement because of it.

The inducement, in order to negative voluntariness of *AN* extra-judicial incriminating statement, must be an external stimulus, i.e. originating outside the mind of the accused, and must be held out to the accused.

If the inducement is not held out to the accused, any statement of the accused will not be excluded because of the inducement. Similarly, internal stimuli, i.e.

inducements arising from the operation of the mind of the accused or imagined by him, are not inducements within

the rule.⁵⁰² If it is an external stimulus, temporal in nature and held out to the accused by a person in authority, it still must be communicated to the accused, either directly or indirectly, in order to negative voluntariness

502 See, for e.g., n. v. Codrino, supra, fn. 170. As to a confession induced wholly by the belief of the accused, see n. v. Gutschmidt /1939/ 3 D.L.R. 683 (Sask. C.A.). As to a confession induced by accused's desire to shield another, see, n. v. Weighill /1945/ 2 D.L.R. 471 (3 C.C.A.).

of the subsequent confession.⁵⁰³ For example, if a police officer told accused that he would not be imprisoned if he confessed, and the accused confessed, although he did not hear the words of the officer, or, if a police officer tells another to inform the accused that he will not be imprisoned if he confesses, and the accused confesses although he was not so informed - in both cases, voluntariness of the confessions would not be negatived.

By the middle of the nineteenth century in England, text writers began to expound the theory that an inducement, in order to result in exclusion of a confession or statement obtained as a result thereof, had to relate to the charge or contemplated charge against the accused.⁵⁰⁴ As early as 1901, this theory was adopted in Canada, although it was recognized as being unsupported by case authority.⁵⁰⁵ In 1934, Barry, C.J.K.B. observed in the New Brunswick Court of Appeal:

503 In R. v. Jackson, supra, fn. 488, the accused was handed a writing which contained the inducement "you had better confess. It will be better for you as we know all." See, R. v. Murakami, supra, fn. 431

504 ubi supra, fn. 175

505 R. v. Todd, supra, fn. 419. And see, R. v. Ryan, supra, fn. 414, Chapdelaine v. h., supra, fn. 416

"A promise or threat in order to exclude a confession must relate to the charge, i.e. must reasonably imply that the prisoner's position with reference thereto will be rendered better or worse, according as he does or does not confess." 506

The theory, however, did not obtain in all the provincial jurisdictions. In the Nova Scotia case of R. v. Nyles,⁵⁰⁷ police officers told the accused that if he thought anything of the murdered girl and did not want her name to be mixed up in it, he had better make a clear statement. Although such inducement clearly did not relate to his position being better or worse as regards the charge, it was held an inducement sufficient to exclude the incriminating admission of the accused. In England, the theory was recently disposed of by Commissioners of Customs Excise v. Herz et al,⁵⁰⁸ a decision of the House of Lords. Although this case is not legally binding in Canada, it is hoped that its great persuasive authority would move the Supreme Court of Canada to similarly deny the existence of such an illogical theory as part of the exclusionary rule in Canada.

Any spiritual inducement or mere moral exhortation held out by a person in authority, and communicated to the accused

506 R. v. Dussean, supra, fn. 413, at p. 55

507 supra, fn. 413

508 ubi supra, fn. 149

will not exclude the confession of the accused. Any inducement, however, temporal in character, held out to the accused by a person in authority, and communicated to the accused, will operate to exclude the confession or statement of the accused, regardless of whether it related to the charge or contemplated charge. It is within this meaning of inducement that the following words used by persons in authority have held to constitute threats or promises, thereby negating voluntariness.

"If you don't, I'll go for an officer,"⁵⁰⁹ You had better confess. It will be better for you as we know all;⁵¹⁰ A man always gets on better by telling the truth;⁵¹¹ if you could give me any information about it, it will probably serve you as well as other ends;⁵¹² You will be arrested if you do not say where the stolen goods are;⁵¹³ they have laid a trap for you and you have walked into it;⁵¹⁴ it

509 R. v. Jackson, supra, fn. 488

510 ibid

511 R. v. Lai P. ng, supra, fn. 488

512 P. v. Young, supra, fn. 418

513 R. v. Levesque, supra, fn. 415

514 A. v. Ulah, supra, fn. 418

would be better for you to return the stolen ration books;⁵¹⁵ where a policeman told the accused that he thought S. would not prosecute if he got his goods back,⁵¹⁶ where police officers told the accused that if he thought anything of the girl and did not want her name to be mixed up in it, he had better make a clean statement,⁵¹⁷ the truth will go better than a lie. If anyone prompted you to do it you had better tell about it.⁵¹⁸

It would be better to tell the truth,⁵¹⁹ it would be better for him to admit the shirt was his, it would be easier for him,⁵²⁰ he would do anything to help him out;⁵²¹ it might go easier with her to co-operate,⁵²² it would be better for him if he told the truth and quit lying,⁵²³ it would be better for him to tell the truth

515 Gach v. L., supra, fn. 462

516 R. v. McCafferty (1886), N.P.P. 596 (C.C.R.)

517 R. v. Pyles, supra, fn. 413

518 R. v. Romp (1888), 17 C.R. 567 (C.D.)

519 See, R. v. Brown [1931] C.R. 154 (C.A.), L. v. Sykes (1951), 13 C.R. 153 (D.C.C.A.)

520 See, R. v. Benjamin, supra, fn. 422

521 See, R. v. Messery, supra, fn. 459

522 See, R. v. Ostroglau, supra, fn. 430

523 See, R. v. Lazure, supra, fn. 437

about the matter;⁵²⁴ it would be best if he got it off his chest and eased his mind,⁵²⁵

Other wording has been held not to constitute an inducement within the rule. The fact that a prisoner, committed for trial for assault causing bodily harm, was told by a constable removing him to gaol that the assaulted party would die, is not evidence of an inducement to the prisoner so as to make his subsequent question "what do you think I will get - about fifteen years?" inadmissible against him.⁵²⁶ Similarly the comment by a police officer "this looks bad" at the time of arrest and search of the accused, after finding stolen money on the accused person was not sufficient to exclude.⁵²⁷ Where a police officer, in answer to a query of the accused, remarked "I can tell you that you will not be mistreated", it was held not to be a promise of advantage, since the accused himself said "I may as well tell you the truth and take my pill for what I have done."⁵²⁸

524 See, R. v. Manlon, supra, fn. 467

525 See, R. v. Lewis (1964), 43 C.R. 201 (Y.T.C.A.)

526 See, R. v. Bruce, supra, fn. 458

527 See, R. v. Daley, supra, fn. 417

528 See, R. v. Harris, supra, fn. 453. In R. v. Hanna, supra, fn. 491, the statement of a fire marshall, "but if you do, you do it with your eyes wide open, you are in some danger" was held not to constitute an inducement. Similarly, see R. v. Roadhouse, supra, fn. 470

It is clear that any phraseology directed to the accused and containing the expression "it would be better" will result in exclusion of accused's statement. As Grant, J.A., speaking for the majority in the Ontario Court of Appeal, observed 529

"The law therefore appears to be well settled that any statement or alleged confession or admission, made by the accused after the use to him of the expression 'it would be better'... would not be admissible in evidence."

If the words could be interpreted by the accused as suggesting benefit or harm, or as being promises or threats, then the statement of the accused given as a result of such promises or threats is not receivable in evidence as being an involuntary statement. Any suggestion of harm or fear will suffice, and if the words spoken to the accused by the person in authority could be interpreted by the accused as being a command, the trend of authority in Canada is to exclude statements that appear to result therefrom.

529 R. v. Brown, supra, fn. 519, at p. 156. As to England, see, ubi supra, fn. 179

In Comeau v. R.,⁵³⁰ a police officer, while questioning accused in the course of a murder investigation, told him that because of certain suspicious facts it was "necessary" for the latter to give him an explanation. Shortly thereafter, the accused gave a statement. On appeal from a conviction of murder, it was held that any statement made following the use of the word "necessary" will result in that statement being inadmissible.

Where a confession of an accused is obtained by the use of a trick or some form of artifice, the trend of modern authority is to exclude such confession from evidence. From the early nineteen hundreds, although the general attitude within the provincial jurisdictions was against the use of such methods to obtain confessions or statements, the judges appeared not to be willing to exercise their discretion to exclude the confessions so

530 (1961), 131 C.C.C. 139 (N.S.C.A.), See also, R. v. Minogue [1935] 4 D.L.R. 504 (I.C.S.C.), In R. v. Medley N.S.S.C., Fall, 1966 unreported, before the learned Bissette, J., a statement following the expression "should" was excluded as being the result of a command. In R. v. MacNeill, *supra*, fn. 487, the expression "she would have to tell us" was held, *dubitante*, not to exclude a subsequent statement. It is respectfully submitted that this case was improperly decided. Any doubt should and must be resolved in favour of exclusion. In R. v. Bird, *supra*, fn. 468, Disberry, J., stated at p. 42 "I am quite satisfied that the accused was asked and not commanded or ordered to show the location of the fire."

obtained. In R. v. Ryan,⁵³¹ where a false statement was made to the accused, who was later charged with theft of money and a post letter, it was held that the untrue statement would not render accused's subsequent statement inadmissible. Four years later, in a decision of the same court, the Ontario Court of Appeal,⁵³² Osler, J A., observed, referring to the English case of R. v. Husted.⁵³³

"Generally speaking, it may be said that it is no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made... I have no doubt that in some circumstances it may appear that a confession so obtained ought to be regarded as not having been freely and voluntarily made..." (my italics)

According to the learned Lemieux, J., in the Quebec Court of Appeal.⁵³⁴

"And this rule governs more particularly when the person in authority is a police officer, who ... resorts to subterfuges and tricks and lays a trap for the prisoner in order to obtain from him declarations which might inculcate."

Even as early as this it was clear that, although judges were unwilling to exclude confessions solely because they were obtained by a trick, the fact that they were obtained

531 supra, fn 414

532 R. v. White, supra, fn. 451

533 ubi supra, fn. 279

534 R. v. McCraw, supra, fn. 422. Compare, R. v. Farduto, supra, fn. 453

by a trick was an important circumstance to be considered by the trial judge. In Nova Scotia, while some judges strongly reprobated⁵³⁵ the practice of using deception as an investigatory procedure, other judges held it to be necessary for the prosecution to prove that a statement was not the result of unfair means. As Townshend, J., stated, while dissenting and upholding the admissibility of the confession in R. v. Young.⁵³⁶

"The only obligation on the part of the Crown was before such a statement could be admitted to satisfy the Judge that it had not been obtained by any unfair means, or by taking any unjust advantage of the accused, that it was voluntarily made without the inducement of any promise and without threat or compulsion of any kind."

In the Manitoba case of R. v. Choney,⁵³⁷ the accused's statement was obtained by a person falsely assuming the

535 R. v. Umlah, supra, fn. 418, per Rogers J.

536 supra, fn. 418, at p. 478. Compare Australia, as to false representations, R. v. Rogers, supra, fn. 435. As to confessions being excluded because of "untrue" representations, see, R. v. Rosenkranz et al. (1863), 2 N.S.W. 27, R. v. Horrocks (1892), 4 Q.L.J. 218 (Harding, J.), R. v. Mangin (1894), 6 Q.L.J. 63 (O.C.R.), As to trick, see, Gouldham v. Barrett [1966] W.A.R. 129 (S.C.). As to judge's discretion to exclude confessions if obtained by unfair means, see, The King v. Lee et al (1950), 83 C.L.R. 133 (Aust. H.C.), McDermott v. The King, supra, fn. 433, L. v. Alad [1962] V.R. 545 (Smith, J.), R. v. Smith [1964] V.R. 95 (Gowans, J.). see, supra, fn. 451.

537 (1900), 12 C.C.C. 209 (Man. C.A.) but see, L. v. Arduto, supra, fn. 453.

character of an interpreter sent by the accused's solicitor to the accused to obtain his statement of the case. The police had asked the interpreter to get the accused prisoner to talk about the case, and they had concealed witnesses near the prisoner's cell to overhear the conversation. The Court of Appeal held that the statement to the "interpreter" was a privileged statement and not admissible, and similarly, that the concealed listeners were to be treated as having fraudulently adopted the character of the solicitor's representatives, and their evidence was to be rejected on the ground of privilege. Although Diphen, J.A.,⁵³⁸ refused to express any opinion as regards the admissibility of confessional evidence obtained by a trick, Berdue, J.A., stated at p. 291.

"I think the confession was not obtained in a proper manner. It was obtained by a trick and by means of the position the witness had occupied in reference to counsel who was acting for the accused."

It was generally recognized that the use of deception by the police to obtain incriminating statements from accused persons in their custody was not only inherently unfair to the accused, but was also improper police practice. However, it was clear that a confession induced

538 ibid, at p. 206

by a trick could not be said to be induced by hope or advantage or fear of prejudice as then understood, and the doubt existing as to the scope of judicial discretion within the confession rule, led to a judicial reticence to invoke it. It was not until after Oudizian v. I.⁵³⁹ was decided in the Supreme Court of Canada, emphasizing the broad unrestricted meaning of the test of voluntariness within the rule, that decided cases, concerning trick, deception or artifice employed by the police, began to speak with one voice. In I. v. I.,⁵⁴⁰ Lamer, J., emphatically stated that.

"Police officers are forbidden from inducing a confession by deliberately lying or inventing situations to or accused which have no shadow of truth."

In I. v. I.,⁵⁴¹ in the Supreme Court of Canada,

539 supra, fn. 417

540 supra, fn. 451, at p. 55

541 supra, fn. 430, at p. 572. In I. v. I. (1975), 12 L.T.R. 2d 1 (Ct. App. Ont. 1975), 4, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Holan, J., observed

"The questioning must not, of course, be for the purpose of trapping the inspected person into making admissions and every case must be decided according to the whole facts."

Finally, in R. v. McLean ⁵⁴² McCarthy, the learned Jinnes, J. in the Supreme Court of British Columbia, was able to hold that the weight of authority is against the admissibility of statements obtained in such circumstances.

There is, however, no rule of law stating that confessions induced by a trick, trap or other form of deception are inadmissible. The only rule of law regarding confessions of accused persons is that these confessions, in order to be admissible in evidence, must be voluntary, in the sense of not being induced by any form of suggestion or benefit or fear of prejudice. If, on the whole of the circumstances, the confession tendered by the prosecution is not proven to be voluntary in this sense, then the confession is excluded from evidence. The question in each case is: Was there any inducement held out to the accused by a person in authority? Whether or not certain words spoken to the accused amount to an inducement must be determined in relation to the mental attitude of the accused at the time he made the statement. ⁵⁴³

⁵⁴² supra, fn. 451

⁵⁴³ See, for e.g., R. v. Godwin supra, fn. 426, per McGee, J., at p. 371

As the learned Jand, J, explained in the Supreme Court of Canada:⁵⁴⁴

"... the phrase 'free in volition from the compulsion or inducements of authority means free from the compulsion or apprehension of prejudice and the inducement of hope for advantage, if an admission is or is not made. That fear or hope could be instigated, induced or coerced, all these terms referring to the element in the mind of the confessor which actuated or drew out the admission. It might be called the induced motive of the statement." (in italics)

reasonably

Could the accused/understand the words as offering any benefit or hope? The test, it is submitted, is not the average man, or the reasonable man in the position of an accused. It is, rather, a subjective test with specific reference to the particular accused. Words which may induce one accused to speak, may not so induce another. If the words spoken to the accused could be understood, considered, or interpreted by him as offering benefit or hope, then the words spoken are an inducement within the rule, resulting in the exclusion of his statement as not being voluntary.

The overriding question is whether any inducement has been held out to the accused to speak. If nothing has been said to the accused, whether the tendered statement was not induced and voluntary, depends upon the external circumstances surrounding the taking of the statement from the accused. It may be that the trial judge will consider the whole circumstances to amount to an atmosphere of compulsion,

⁵⁴⁴ R. v. Itton, supra, in. 450, at p. 965

thereby depriving the tendered statement of the necessary voluntariness. Or, one isolated act of violence toward the accused will be sufficient to exclude the resulting statement. In all cases, judicial enquiry is directed to an assessment of the circumstances leading up to the giving of the statement by the accused, which confession may be rejected in the discretion of the trial judge because of one circumstance, such as a trick, or on the whole of the circumstances. In all cases, if it can be said that the circumstances were calculated to bring pressure to bear on the mind of the accused and to deprive the accused of his choice of speaking or remaining silent, then confessions obtained in such circumstances will be rejected as being not voluntary.⁵⁴⁵

A major consideration is the character of the interrogation, and if it can be said that the interrogation of the accused in custody was unduly long, this in itself may suffice to exclude a statement as a result thereof, as being induced and not voluntary. As Loffe, J.A., observed in

545 See, for e.g., R. v. Seabrooke, supra, fn. 450, per Bullock, C.J.C., at p. 580. R. v. Ryan, supra, fn. 414, per Macdaren, J.A., Richard v. R., supra, fn. 429, per Blair, J.C., at p. 245, R. v. Wisnart, supra, fn. 450, R. v. Mye, supra, fn. 541

R. v. Howlett,⁵⁴⁶ where the accused was interrogated for over three hours.

"In view of the character of the interrogation of the accused, I think that the answers made by the accused that he had not receive any threat or promise, do not establish that the statement was a voluntary one and do not evince that the methods used did not so influence the mind of the accused as to induce him to make the statement in question."

Similarly, the character of the questions used in the interrogation will be considered by the trial judge, and if it can be said that they amount to cross-questions, the resulting statement will be excluded.⁵⁴⁷ If the accused is interrogated during a period of unwarranted or illegal detention, this in itself may serve to exclude any statement as not being voluntary, with the court paying particular attention to the detention itself.⁵⁴⁸ The place where the accused is detained and interrogated may give rise to the inference that it was calculated by fear to obtain his statement. In Rufange v. R.,⁵⁴⁹

546 supra, fn. 442, at p. 205, and see, R. v. Nye, supra, fn. 541

547 See, supra, fns. 442-447, incl.

548 See, Chapdelaine v. R., supra, fn. 416. And see, R. v. Nye, supra, fn. 541

549 (1965), 46 C.R. 332 (Que. C.A.).

solitary confinement of the accused, deprivation of sleep, and interrogation during the night resulted in exclusion of accused's statement. A similar result obtained in Richard v. R.,⁵⁵⁰ where the accused was held in a room 6' x 11', shut off from the world over a week-end, and under constant guard.

Where the statement was obtained after several periods of questioning and in the presence of several officers, a court will be slow to admit a statement arising from such circumstances as being voluntary. As Anglin, C.J., observed in Darby v. R.,⁵⁵¹ an important judgment in the Supreme Court of Canada:

"We feel, however, that we should not part from this case without expressing our view that the proof of the voluntary character of the accused's statement to the police which was put in evidence against him, is not satisfactory. That statement put in writing by the police officer, was obtained only upon a fourth questioning to which the accused was subject on the day following his arrest. Three previous attempts to lead him to "talk" had apparently proved abortive - why, we are left to

550 supra, fn 429

551 supra, fn. 440, at pp. 440-1, approved in Thiffault v. R., supra, fn. 459, per Duff, C.J. at p. 515. See, also, R. v. Seabrooke, supra, fn. 450, R. v. Meeker (1965), 44 C.R. 108 (T.C.C.A.), affirmed, (1965), 44 C.R. 112 (S.C.C.) v. Simpson (1950), 9 C.P. 369 (Ont. C.A.).

surmise. The accused, a young Indian, could neither read nor write. No particulars are vouchsafed as to what transpired at any of the three previous "interviews", and but meagre details are given of the process by which the written statement ultimately signed by the appellant was obtained. We think that the police officer who obtained that statement should have fully disclosed all that took place on each of the occasions when he "interviewed" the prisoner, and, if another policeman was present, as the defendant swore at the trial, his evidence should have been adduced before the statement was received in evidence. With all the facts before him, the learned judge should form his own opinion that the tendered statement was indeed free and voluntary as the basis for its admission, rather than accept the mere opinion of the police officer who had obtained it, that it was made "voluntarily and freely."

Although there is no duty on police to inform persons in their custody that they are entitled to counsel,⁵⁵² the refusal of the police of a prisoner's request to see his solicitor is an important circumstance, although not necessarily the deciding circumstance.⁵⁵³ It is necessary that police questioning be conducted with due regard to the rights of the subject,⁵⁵⁴ and voluntariness of a statement so obtained is to be determined by whether there was a violation of any of the essentials of justice

552 See, R. v. Black & Mackie, supra, fn. 552

553 See, R. v. Emele, supra, fn. 553. As to illiteracy as a factor, see Sankey v. R., supra, fn. 440, R. v. Saupsch (1934), 8 T.F.R. 237 (F.S.C.A.)

554 See, Richard v. R., supra, fn. 429, per Ritchie, J.A., at pp. 250, 251.

appraised in the particular circumstances of the whole case.⁵⁵⁵ If it can be said that any circumstance was calculated to prejudice the accused,⁵⁵⁶ the confession or statement of the accused will not be received in evidence against him. If it can be said that the whole of the circumstances amounted to an atmosphere of compulsion⁵⁵⁷ or a compulsive climate,⁵⁵⁸ any incriminating statement so induced will be excluded from evidence as not being voluntary.⁵⁵⁹

555 See, R. v. Wishart, supra, fn. 450

556 R. v. Seabrooke, supra, fn. 450, Richard v. R., supra fn. 429, R. v. Wishart, ibid. Beatty v. R. [1944] S.C.R. 73, approving Tuffault v. R., supra, fn. 459.

557 In Cach v. R., supra, fn. 462, Laschereau, J., as he then was, observed at p. 254: "Moreover, the presence of these officers with a search warrant, in the house of the appellant, his transfer to the barracks to be questioned ..., the suggestion that it would be 'better for him to talk and give the coupons back' created an atmosphere prejudicial to the appellant." See, also, R. v. Wishart, supra, fn. 450
R. v. Brennan, supra, fn. 442

558 R. v. Wishart, supra, fn. 450, R. v. Downey, supra fn. 694

559 See, generally, Norman Borins, Confessions (1950-59), 1 Cr. L. Q. 140, at p. 145, et seq. C.C. Savage, Admissions in Criminal Cases (1962-63), 5 Cr. L. Q. 49.

CHAPTER FOUR
CONTINUOUS CONFESSIONS

From the latter half of the nineteenth century in Canada, the judicial direction, as regards consideration of cases admitting of further confessions of an accused after a previously induced confession, became readily apparent. It was accepted that an extra-judicial confession or statement, in order to be admissible in evidence, must be proven by the prosecution to have been made voluntarily, without any inducement. But the question arose, given several confessions or statements by an accused with the first being clearly induced, what effect would this prior inducement have on the admissibility of the later confessions, and especially, on the burden resting upon the prosecution?

In R. v. Pinkle,⁵⁶⁰ where on a charge of arson, the accused had confessed before a coroner after being cautioned by him and after previously confessing to a constable, Richards, J.J., stated

"I think, however, the more reasonable rule to act on is, that notwithstanding the caution of the magistrate, it is necessary to go further in the case of a second confession, and to inform the party that the first statement cannot be used to his prejudice, not merely to caution him not to say anything to injure himself. If, after the prisoner has been cautioned and his mind impressed

560 supra, pp. 412

with the idea that his prior statement cannot be used against him, he still thinks fit to confess again, the latter declaration is receivable."

There was no doubt on the mind of the learned Chief Justice that the operative factor was for the accused to be made aware that his first confession could not be used against him, and it was on the presence of this factor that the voluntariness, and hence admissibility, of the second or subsequent confessions depended.

At the turn of the century, an opportunity presented itself to affirm this "rule" in the case of R. v. Young,⁵⁶¹ a decision of the Supreme Court of Nova Scotia. In that case, the accused was convicted of murder. A detective employed by the Crown visited her at the pool, and told her that if she could give him any information regarding the crime, it would probably serve her as well as other ends. The accused was not cautioned, and after making incriminating statements to the detective, she confessed to another officer about an hour later. At the trial, the trial judge, relying in part on the lapse of time between statements, found she was free from any influence of the detective's inducement.

However, on appeal, it was held that in the absence of evidence to rebut the presumption that the second statement

561 supra, fn. 418

was made under the operation of the same influence as the former one, the trial judge had erred. As Graham, C.J., observed⁵⁶²

"What opportunity was there for reflection for having the hopes or fears imparted by the detective to her mind dispelled? The burden is upon the Crown to show that they were dispelled, not that they might have been dispelled."

Although the court did not employ the wording used in R. v. Linkle,⁵⁶³ there was little difference in meaning. Even if the prosecution could have shown a time lapse of several hours between the statements, it is clear that this would not have affected the decision of Graham, C.J. A time lapse, leading to the inference that the accused possibly, or even probably confessed voluntarily the second time, was insufficient to satisfy the burden on the prosecution, which was to prove that the effect of the previous inducement was, in fact, spent.

If, however, there was any doubt existing in the Nova Scotia Supreme Court as to the validity of the "rule" as stated in R. v. Linkle,⁵⁶⁴ such doubt was resolved in the

562 supra, fn. 561

563 supra, fn. 560

564 supra, fn. 560

case of J. v. "yles",⁵⁶⁵ decided in 1922. The accused therein was in hospital as a result of a self-inflicted bullet wound, when he was examined by a police officer concerning murder. The police officer, without cautioning him, told him that if he thought anything of the murdered girl, and did not want her name to be mixed up in it, he had better make a clean statement of it. The accused then made an incriminating statement, and later, made a second statement to the same effect as the first after being warned.

It was contended on behalf of the accused that the warning given at the second interview was of no avail as the prisoner was not then told that the first statement could not be used in evidence against him. The guilty verdict being set aside, and a new trial ordered, Chisholm, J., stated⁵⁶⁶

"I agree that the warning given at the second interview was of no avail, seeing that the first statement was made in consequence of an

565 supra, fn. 413

566 ibid, at p. 92

inducement."⁵⁶⁷

Similarly, in R. v. McDonald,⁵⁶⁸ a decision of the Alberta Court of Appeal, two police officers read a statement of an accomplice, who said he participated in an act of gross indecency with the accused, over to the accused, who confessed the statement to be partly true. The accused was arrested, and at the police station, another statement was taken after cautioning him. It was held, approving R. v. Jyles,⁵⁶⁹ that the subsequent caution was not shown to have had the effect of removing probable consequences of the former inducement. As Larlee, J.A., observed in judgment.⁵⁷⁰

567 In Trepanier v. R., supra, fn. 438, Trenholme, J., stated at p. 297 "Then as regards the confessions made to the newspaper men ... these confessions are not admissible because the same confessions had been got by the detectives by means which we cannot say are legal." In R. v. Kong, supra, fn. 461, the headnote reads. "Where a person in custody as a material witness is interrogated by the police without being cautioned and thereupon makes admissions implicating himself in the crime, his repetition of the same statement before the same officers on another occasion, after being cautioned that he is not obliged to answer but that if he does so, his statement may be used against him, will not be admitted if he was not further cautioned that his previous statements could not be used and that he need not repeat them or say anything further unless he so desired."

568 (1948), 5 O.R. 375

569 supra, fn. 565

570 supra, fn. 568, at p. 385

"I would think that the admitted confession flowed as a natural and almost inevitable consequence from the admission already made by the accused. It was not shown by clear and positive evidence that the influence on the mind of the accused from having made the first admissions had been removed. In other words, the admitted confession was not voluntary."

In R v. Lewis,⁵⁷¹ decided in the Yukon Territories Court of Appeal in 1964, the accused, who was being interviewed by the Royal Canadian Mounted Police concerning a murder, was told by one of the constables that if he was involved or in any way responsible, it would be best if he got it off his chest and eased his mind. The accused thereupon confessed, and subsequently, he made a written confession. In holding the later statement inadmissible, the trial judge observed:

"... it seems to me that justice requires that in the circumstances of a case such as the present no subsequent statement of the accused could be regarded as voluntary unless it had been explained to the accused that his earlier admission that he had caused the girl's death could not be used against him."

The appeal court refused to disturb this ruling, holding that an appeal by the Crown did not lie under S. 584(1)(a) of the Criminal Code, since this was a question of fact

571 supra, fn. 525

and not the requisite question of law alone.⁵⁷²

It would thus appear that the "rule" first detailed in R. v. Finkle is firmly established in Canadian jurisprudence. Where there are two or more confessions of an accused with the first confession being the result of an inducement, a presumption arises that the second or subsequent confessions are also the result of the same inducement. In other words, the inducement which tainted the first confession is taken to have continued in effect, thereby tainting subsequent confessions. The onus is on the prosecution to prove the voluntariness of any confession tendered by it. In this instance it would appear that voluntariness of any subsequent confession would be considered to be clearly established by

572 S. 584(1)(a) of the Criminal Code gives the Attorney-General the right to appeal "... against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone." See, also, SS. 597, 598. If a trial judge misdirects himself as to the law, an appeal will lie. R. v. Murakami, *supra*, fn. 431, Dupuis v. R., *supra*, fn. 467, R. v. Albrecht, *supra*, 429. In R. v. Lewis, *supra*, fn. 571, it would seem that the Court of Appeal did not consider that the trial judge misdirected himself as to the law. As to appeal by the Crown generally, see also, R. v. Lai Ping, *supra*, fn. 488, per Duff, J., at p. 473, Demenoff v. R. [1964] S.C.R. 79, Pearson v. R. [1959] S.C.R. 369 R. v. Fitton, *supra*, fn. 433.

the prosecution only when the accused had been cautioned that his previous confession or statement could not be used against him. It is only by the accused being so cautioned that the presumed continuing effect of the inducement resulting in the first confession can be said to have dissipated.⁵⁷³

If, however, the confessions of an accused can be said to be inseparable as being the result of an "atmosphere of compulsion" rather than an isolated inducement, it is clear that the courts will exclude these confessions for this reason. In R. v. Wishart,⁵⁷⁴ the accused was charged with buggery for causing his wife, the complainant, to have connection with a dog, under s. 202 of the Criminal Code. During the course of the investigation, the accused was interrogated at the police station with at least three

573 Compare, R. v. Lal Singh, supra, fn. 572

574 supra, fn. 450. See, also, R. v. Baton, supra, fn. 452, Richard v. R., supra, fn. 429. Compare to R. v. Dick, supra, fn. 468, where seven statements were taken from a female accused while she was in custody for murder. See, also, R. v. Downey, infra, fn. 684. Compare the Australian case of R. v. Amad, supra, fn. 536, per Smith, J., at p. 549.

officers present. Two of the officers left the interrogation room, and while away, the other officer had conversation with the accused. The two officers then returned, and cautioned the accused. At the trial, the trial judge held that the statement taken with the three officers present was obtained by compulsion, but he admitted that made to the single officer. In allowing the accused's appeal, the Court of Appeal of British Columbia held that there was an atmosphere of compulsion, and the answer to the single officer was subject to all the affirmities in the three-officer examination of which it was plainly an inseparable part.

Whereas the Finkle rule directs itself to the case where the inducement tainting the first confession is isolated, in the sense that the total circumstances would not admit of being an atmosphere of compulsion, the Wishart approach is directed to those instances where, on an assessment of the whole circumstances, it can be said that the confessions or statements of the accused were the result of such an atmosphere of compulsion. One complements the other, and both have as their underlying purpose, the correction of improper police practices and the protection of the individual rights of the accused.

As Ritchie, J.A. observed in Richard v. P. 575

"... he had been subjected to a confession - conditioning process of some nature savouring of 'brain-washing' methods we view with abhorrence when employed in other nations ... I am satisfied there was a police abuse of the rights of the accused. .. "

575 supra, in. 429, at p. 262

CHAPTER FIVE

THE VOIR DIRE, OR TRIAL WITHIN A TRIAL

By the turn of the century, it was clearly established that whether or not a confession was voluntary, was an issue to be decided by the trial judge on a so-called voir dire,⁵⁷⁶ i.e. trial within a trial, in the absence of the jury.⁵⁷⁷ As Galt, J., observed on an application before him for postponement of trial:⁵⁷⁸

576 As to English origins of the term, see supra, Eng., c. 5. As to Canada, see R. v. Vieu supra, in. 437, R. v. De Mesquita, supra in. 413, Cravel v. R. (1918), 32 O.C.C. 368 (Que. C.A.).

577 Ibid, R. v. Ryan, supra, in. 414, Compare to R. v. Lorduto, supra, in. 453, where Cross, J., stated at p. 150 "The evidence was brought out just as any statement by a prisoner or suspected person to another private person would be proven by making the latter a witness at the trial." Similarly, as to Australia, see R. v. Ah Cu (1875), 12 N.S.W.L.R. 13, where all evidence appeared to be presented before the jury. However, see, Cornelius v. The King (1930), 55 C.L.R. 235 (Aust. H.C.).

578 R. v. Willis et al. (1913), 21 C.C.C. 64 (Man. K.B.), at p. 67. Compare, R. v. Cornelius /1936/ V.L.R. 189 (S.C.), per Mann, C.J., at p. 191, affirmed, Cornelius v. The King, ibid.

"... the admissibility of a confession is hedged about with many difficulties, for it has been found in practice that confessions have been extracted from prisoners which were subsequently found to have been erroneous in many particulars, and in some cases, absolutely without foundation in fact. ... This is so well understood by lawyers that counsel for the Crown, even when relying upon a confession which he feels sure of having admitted in evidence, is not allowed, in opening his case to the jury, to disclose that the confession is 'until after it has been decided to be admissible in evidence by the judge.'"

The question of admissibility is one of law for the trial judge, and the proper practice for the determination of that question is for the trial judge to hear viva voce evidence on that point in the absence of the jury, and to then rule whether the confession should be admitted or not.²⁷⁵ The sole issue on the voir dire of trial within a trial is whether the proffered confession or statement is voluntary, and on that issue, it is competent for the accused to lead evidence or to testify himself. If the accused does testify on that issue, he is entitled to have

²⁷⁵ See R. v. Escombe (1890), 20 Q.B. 348 (Q.B.),
R. v. Warburton (1891), 20 Q.B. 348 (Q.B.),
R. v. Escombe, supra, at 348; R. v. Escombe, supra,
supra, in 302; R. v. Escombe, supra, at 342; R. v.
Escombe (1891), 75 Q.B. 348 (Q.B.), R. v. Escombe,
supra, in 422; R. v. Escombe, supra, in 422.
Similarly, as to Australia, see, Clairmont v. The King
(1947), 70 C.L.J. 216 (Just. Ct.), per Menzies, J.,
at p. 325.

the cross-examination restricted to the issue itself.⁵²⁰

1. The Burden of Proof

Every confession or statement, in order to be admissible, must be proven to have been made voluntarily, without fear or prejudice or suggestion of advantage held out to the accused by a person in authority, and the burden is upon the prosecution to so prove.⁵²¹ As Macdonald, J.A., observed in the Alberta Court of Appeal:⁵²²

"The trial judge had to determine as a fact whether or not the statement was free and voluntary. The burden was on the Crown to show affirmatively that it was a free and voluntary statement. Where the prosecution fails to do so the burden cast upon it, or where the latter is left in doubt, the statement should be rejected. It cannot be said that because no threat was made or no hope or advantage was held out the statement of an accused becomes admissible evidence regardless of other circumstances which may have exercised an improper influence on her mind."

520 R. v. O'Hara, supra in. 604. R. v. Paschuk, supra, fn. 579, R. v. Pais, supra, in. 579, approving R. v. Covell, ubi supra, fn. 238.

521 See, for e.g., Prosko v. R., supra, fn. 413, R. v. Bellos, supra, fn. 440, Sankey v. R., supra, in. 440, Thiffault v. R., supra, in. 459, Boudreau v. R. supra, in. 417, R. v. Patten supra, fn. 433, R. v. Plowman, supra, in. 434, R. v. McSkell (1950), 5 C.T.R. 469 (I.C.C.A.) R. v. Sigurd et al. (1968) 1 C.C.C. 92 (I.C.C.A.), R. v. Jackson, supra, fn. 428, R. v. Elliott, supra, in. 439.

Similarly, see the Australian cases, Hough v. A'Hea (1912), 15 C.L.R. 452 (Aust. H.C.), The King v. Lee et al. (1950), 93 C.L.R. 175 (Aust. H.C.).

522 R. v. Dreher, supra, in. 430 at p. 352

It is necessary that the prosecution affirmatively prove that the tendered confession was entirely voluntary, not being the result of any inducement.⁵⁸³ Unless the prosecution meets this burden, on a voir dire or trial within a trial, the confession is not admissible. Before the confession is admissible in evidence at all, the trial judge must, after a trial within a trial, rule it to be voluntary. As the learned Davis, J., stated.⁵⁸⁴

"Evidence was given at the trial that in the middle of the night (a day after the murder) the accused was removed from his cell and, escorted by three police officers, was taken out to the Morien Road in search of his revolver. The accused was cross-examined at length on the incidents of that trip and his answers were made the basis for rebuttal evidence. The whole course of conduct and conversation of the accused on that trip was clearly inadmissible in the absence of any proof that the statements made were voluntary and upon proper warning."

In R. v. Sampson,⁵⁸⁵ where the jury was informed that

583 See, for e.g., R. v. Bruce, supra, fn. 458, R. v. O'Neill, supra, fn. 420, R. v. Bogan Singh (1913), 12 D.L.R. 826 (1 C.C.A.), R. v. McCann, supra, fn. 413, R. v. Jones (1921), 17 Alta. R. 46 (C.A.), R. v. Read (1921), 17 Alta. R. 68 (C.A.), R. v. Benjamin supra, fn. 422, R. v. Ward, supra, fn. 413, R. v. Tranchuk (1928), 50 O.C.C. 405 (Alta. C.A.), R. v. Wishart, supra, fn. 450.

584 Merkadonis v. ..., supra, fn. 450, at p. 664

585 supra, fn. 553, see, supra, fn. 578, contra, Tiepanier v. R., supra, fn. 538

the accused had made a written confession, which was not tendered in evidence, Helliish, J , speaking for the court, stated.

"The mere description of the written statement made by the accused as a 'confession' is comprehensive and cogent evidence of its contents, which I think should not have been put before the jury without proof of the document itself."

Similarly in Chase v. R.,⁵⁸⁶ a decision of the Nova Scotia Court of Appeal, the accused was cross-examined on a statement which the prosecution did not prove voluntary and did not introduce as part of its case. It was held that the prosecution is not entitled to cross-examine an accused, even for the purpose of testing his credibility, on a statement made by him to persons in authority, if such statement has not been declared to be admissible by the court. The learned Archibald, J., emphatically stated.⁵⁸⁷

"The burden was on the Crown to show that the statement was admissible. The procedure to be followed by the prosecution when seeking to introduce such a statement in evidence is well-known and long established. Not having attempted to comply with that procedure, the statement should not have been brought to the attention of the Court at all."

If the prosecution endeavours to put the statement in evidence, and it is declared inadmissible as not being voluntary, a similar result obtains. Once declared

586 /1948/ 2 D.L.R. 608

587 ibid, at p. 611

inadmissible, the confession or statement is inadmissible for all purposes. In R. v. Wilmut,⁵⁸⁸ Ford, J.A., stated in rendering judgment

"As to the third ground of appeal, I am of the opinion that the ruling of the learned trial judge was right in refusing to permit the Crown to prove the alleged statements made to the police surgeon, because the accused had, on being cross-examined, not admitted that he made them. It is conceded that the statements, if made at all, were made to a person in authority and that the Crown could not prove their voluntary character so as to make them admissible. This being so, in my opinion, not only should the Crown be not permitted to prove them in rebuttal any more than in chief, but that it is improper to permit cross-examination as to them. Indeed they should, in my opinion, be treated for all purpose as non-existent or as having no probative value of any kind, either as going to the credit of the accused as a witness or otherwise."

In R. v. Cory,⁵⁸⁹ it was held that a statement declared to be not voluntary is not admissible in rebuttal to contradict the evidence in chief of the accused, and that the failure of accused's counsel to object to the cross-examination of the accused on the statement, does not entitle the Crown to contradict the answers given in cross-examination by proving in rebuttal what the accused had told the police. This case, together with the English case of R. v. Treacy,⁵⁹⁰ was approved in the Supreme Court of Canada

588 [1940] 3 D.L.R. 358, at p. 374, affirmed [1941] 1 D.L.R. 689 (S.C.C.)

589 [1945] 2 D.L.R. 248 (Sask. C.A.)

590 infra, fn. 596

in Hebert v. R.⁵⁹¹ and it would appear that once a confession or statement is ruled inadmissible on the voir dire or trial within a trial, it is inadmissible for all purposes.⁵⁹² As the learned judge, J. noted.⁵⁹³

"For purposes of evidence they are tainted with untrustworthiness and the reasons that exclude them from direct introduction prevent their being slipped in the back way by cross-examination."

On the voir dire, or the trial within a trial, there is no burden whatever on the accused. The burden is on the prosecution to prove that the confession tendered by it is entirely voluntary, to the satisfaction of the trial judge. Admissibility of the confession is dependent on proof of voluntariness, and counsel for the accused cannot consent to admissibility, or waive this requisite proof.

591 supra, in. 451

592 See, also, R. v. Pais, supra, in. 579, R. v. Byers /1942/ 2 C.L.R. 104 (P.C.C.A.), R. v. Oleschuk (1942), 77 C.C.C. 164 (L.C.C.A.), R. v. Heroux (1943), 80 C.C.C. 545 (Que. K.L.); Donnelly et al. v. U. /1948/ 3 D.L.R. 501 (N.B.C.A.), R. v. Ostroglau, supra, in. 430, R. v. Lazure, supra, in. 487 (Ont. J.A.)

593 R. v. Black & Mackie, supra, in. 422, contra, R. v. Messery, supra, in. 459, Hebert v. R., supra, in. 591, at p. 104.

In R. v. Young,⁵⁹⁴ Graham, C.J., observed after a consideration of English authority.

"Mr. N. could not assent to or waive anything to her prejudice. That in criminal law he was not an agent, although in her presence, for whose conduct she would be held responsible."

In I. v. LePrun,⁵⁹⁵ the full judgment of Mansor, J., reads:

"Counsel for the accused is prepared to admit that a statement made by the accused to the police is a voluntary statement. In my view the Court cannot accept such an admission. Only facts may be admitted under s. 978 of the Criminal Code. As to whether the statement was a voluntary one or not is a question of law to be determined only after hearing all the evidence as to the circumstances under which the alleged statement was made. The Crown must lead that evidence before I can rule on the question of admissibility of the statement."⁵⁹⁶

594 supra, fn. 418. See, also, R. v. Buehle, supra, fn. 423.

595 (1954), 110 C.C.C. 262 (F.C.S.C.) See, R. v. Lateman (1845), 1 Cox C.C. 186, per Erle, J.

596 A statement or confession is only evidence when tendered by the Crown. There is no right in the accused, if the statement is exculpatory or partly exculpatory, to tender it, or to require it to be tendered by the Crown. See, R. v. Adams et al. (1957), 25 C.R. 80 (N.S.C.A.), R. v. Partridge [1967], 1 C.C.C. 546 (Sask. C.A.). Similarly, if it is tendered by the prosecution, it must be tendered as made. R. v. Girvin (1916), 10 Alta. R. 324 (C.A.) R. v. Martin, supra, fn. 422. Although there is no obligation on the prosecution to put a statement, which has been ruled admissible, in evidence, once evidence which has been heard in the absence of the jury has been again gone into before the jury, the prosecution is bound to put the statement or confession in evidence. See, R. v. Wyatt (1968), 70 D.L.R. (2d) 677 (N.S.C.A.), approving R. v. Treacy [1944] 2 All E.R. 229, at p. 256, per Humphreys, J.

ii Extent of Burden. Content

The burden on the prosecution is to prove that the extra-judicial confession of the accused was entirely voluntary, in the sense that it was made, not as a result of any fear or prejudice or suggestion of advantage, but as a result of the free operation of the mind of the accused. To meet this burden, it is necessary that the prosecution negative all possible inducements by leading evidence of all the circumstances surrounding the making of the confession, which must clearly give rise to no other inference than that the confession or statement was voluntary. In L. v. Giles,⁵⁹⁷ Rogers, J., clearly stated what is demanded of the prosecution on the voir dire, when he explained.

"When all the facts are before the trial judge and the testimony satisfies him that the statement of evidence of which is about to be tendered was entirely voluntary in the sense described, a court of review will seldom interfere with the decision of the trial tribunal. It is however, for the Crown to satisfy the Court upon a full presentation of all the known facts, and if it should appear that there is uncertainty as to the complete absence of the taint of inducement the Crown should not press the evidence. The prisoner must have the benefit of the reasonable doubt whether it be of law or of fact, and he cannot be deprived of that benefit unless the voluntary nature of the incriminating evidence is established upon consideration of all the relevant testimony."

Although the content of the burden on the prosecution is stated to be that it must prove voluntariness beyond

597 supra, fn. 413.

a reasonable doubt,⁵⁹⁸ it is clear that this means beyond any doubt. The burden on the prosecution is to prove affirmatively to the satisfaction of the trial judge, that the statement or confession was voluntary. The only sense in which a question of doubt arises, it is submitted, is whether the voluntariness has been proved to the satisfaction of the judge, because if he entertains any doubt, it has not been so proved.⁵⁹⁹

An inducement, however slight, leads to the inference that the confession of the accused is not voluntary. It is, therefore, incumbent upon the prosecution to negative all inducements, both possible and actual. In R. v. Tutty,⁶⁰⁰ Russell, J., observed:

"The onus was upon the prosecution to establish that the statement of the prisoner was entirely free and voluntary, and I think it was not sufficient for this purpose that the officer should swear to this. He should have proved it by negating the possible inducements by way of hope or fear that could have made the statement of the prisoner inadmissible."

Similarly, if there was an inducement present, it is necessary that the prosecution prove that its effect was clearly removed before the confession was made. In R. v.

⁵⁹⁸ See, R. v. Almeida, supra, 10. 425, R. v. Wishart, supra, fn. 450

⁵⁹⁹ R. v. Lee (1952), 104 C.C.C. 402 (Ont. C.A.), approved in R. v. Mulligan, supra, fn. 455

⁶⁰⁰ supra, fn. 487

Lai Ping,⁶⁰¹ a Chinese prisoner was suffering from the effect of opium, and was in a depressed condition by reason of the withdrawal of the drug. While in this condition, he was told by a Chinese interpreter that a man always gets on better by telling the truth. Two days later the accused confessed. At his trial, the proving by the prosecution that the accused was cautioned by a magistrate before his confession was received, was held to remove the effect of the previous inducement.

Where the circumstances admit of more than one statement made by an accused, with the statement earliest in time being clearly induced, a presumption arises that the later confessions or statements were the result of the same inducement as the former. In these circumstances, the voluntariness of the later statements or confessions can only be proven, by the prosecution negating the presumed continuing effect of the earlier inducement. The burden is satisfied only when it is proven that the earlier inducement was in fact dispelled, and not that it might have been dispelled.⁶⁰²

601 supra, fn. 485.

602 See, R. v. Steirfoiff (1900), 15 O.C.C. 366 (Ont. C.A.), per Jos, O.J.C., at p. 370, R. v. Young, supra, fn. 413, R. v. Lyles, supra, fn. 415, And see, "Continuous Confessions", supra, c.4

In all cases, it is necessary that the prosecution satisfy the trial judge that the confession was not the result of any inducement held out to the accused by a person in authority. In cases of verbal inducement, it is conceivable that, although the inducement cannot be negatived by the prosecution, the confession may still be admitted as being voluntary, if the prosecution can show that the person holding out the inducement was not a person in authority within the rule.

Although the quantum of evidence would vary with each case, it is clear that the sole testimony of the person or police officer taking the statements, that it was voluntary and not the result of threats and promises, is not sufficient to satisfy the burden.⁶⁰³ Similarly, it has been held that the statements of an accused that no inducements had been held out, or that the statement was voluntary, does not prove

"... an inducement had not been made to her or destroy the fact that one was made, much less

603 R. v. Dick(2)(1947), 89 C.C.C. 312 (Ont. C.A.); R. v. Tully, supra, fn. 487, Richard v. R., supra, fn. 429. See, Bonkey v. R., supra, fn. 440, per Anglin, C.J., at p. 441. Thurault v. R., supra, fn. 459.

tend to remove the influence of it."⁶⁰⁴

It would appear that the minimum evidential requirement for the prosecution to meet the burden upon it on the voir dire, or trial within a trial, is for it to lead evidence of all the circumstances surrounding the taking of the confession from the accused. In other words, there must be a full presentation of known facts by the prosecution before a finding of voluntariness by the trial judge will ensue.⁶⁰⁵ The burden on the prosecution is a

⁶⁰⁴ R. v. Young, supra, fn. 416, per Graham, C.J. at p. 502, R. v. Lovlett, supra, fn. 442.
⁶⁰⁵ Compare, R. v. Davis (1904), 9 C.C. 235 (1 W.L.R.), where it was held that it was not necessary to ask the witness proving the confession whether any threat or inducement has been held out, if a complete account of the interview is given and no suspicion is aroused. In R. v. O'Hara (1946), 88 C.C. 75 (D.C. A.) the headnote states in part "where at the trial within a trial as to the admissibility of a confession, the only evidence adduced is that the accused, taken in custody was given the customary warning, and no evidence was given by the police officers that the statement was made freely and voluntarily, or as to the circumstances under which the confession was made, and the accused was not told of his right to testify as to the admissibility of the confession, there has not been a sufficient inquiry to warrant the admission of the confession." As to the caution or warning generally, see, supra, p. 192, et seq.

⁶⁰⁶ See, for e.g., R. v. Myles, supra, fn. 597, per Rogers, J.

burden of producing all evidence relevant to the making of the confession by the accused, and an integral factor in this burden is that the prosecution produce as witnesses, all persons in whose presence the confession was made.

In R. v. Seabrooke,⁶⁰⁶ where the trial judge concluded that certain statements made by the accused in the presence of five detectives and a clerk were voluntary, on the evidence of one of the five detectives without questioning the others as to the voluntary nature of the statements, a new trial was ordered. As the learned J.J., C.J., observed in Touffault v. R.,⁶⁰⁷ a decision of the Supreme Court of Canada-

606 supra, fn. 450

607 [1935] S.C.R. 509, at p. 515 approving Sankey v. R., supra, fn. 440, and applied in Lecker v. R., supra, fn. 551. Although the absence of the persons as witnesses may, in certain circumstances, be adequately explained, it is difficult to see how, in these circumstances, the trial judge could come to any other conclusion than that the confession was not proven voluntary. It is open to the accused to call all persons who were present, even if it comes out by cross-examination that there were others. R. v. Picariello et al. (1925), 39 O.C.C. 1 (Alta. C.A.)
It is submitted that the prosecution must also call, if circumstances admit, any and all persons who had custody of the accused immediately preceding the making of the confession, whether they were present at the making of the confession or not. However, see, R. v. McGourty (1950), 27 M.T.R. 275 (M.T.C.A.), to the effect that, if defence counsel wishes to question a police officer who was not present, he must suggest so at the trial. See, also, R. v. Simpson, supra, fn. 501, following Touffault v. R., supra, and R. v. Black and Achle, supra, fn. 52.

"Where such a statement is elicited in the presence of several officers, the statement ought, as a rule, not to be admitted unless (in the absence of some adequate explanation of their absence) those who were present are produced by the Crown as witnesses, at least for cross-examination on behalf of the accused, and, where the statement professes to give the substance of a report of oral answers given by the accused to interrogatories, without reproducing the questions, then the written report ought not to be admitted in evidence unless the person who is responsible for its compilation is (here again in the absence of some adequate explanation of his absence) called as a witness."

After several years of doubt, it would now appear to be settled in Canada that if the accused testifies on the trial within a trial as to the admissibility of a confession made by him, it is open to the prosecution in cross-examination to ask him if the confession is true. The question first arose in the English case of H. v. Cammrod,⁶⁰⁸ where Humphreys, J., decided that the question was permissible as being

1. " - relevant to the issue whether the story which the appellant was then telling of being attacked and ill used by the police was true or false."
2. " - relevant to know whether he was made to tell the truth or whether he was made to say a number of things which were untrue."
3. " - relevant to the question of how he came to make and sign that statement "

Four years later, this decision was doubted in the case of H. v. Weirhill,⁶⁰⁹ where in the British Columbia Court

608 supra, in. 262

609 supra, in. 502 at p. 474

of 'appeal, the learned O'Halloran, J.A., observed,
Robertson, Sidney Smith, J.A., agreeing

"In this last aspect, W. v. Lord (1941), 2^o
Cr. App. n. 84 was touched on indirectly. If
that decision reflects the final judicial view
held in England, the point will no doubt arise
in the future whether it marks a significant
divergence from the jurisprudence upon the
admissibility of confessions and 'trials within
trials' which has been built up in Canada for the
most part within the last twenty-five years. As
I understood the trend of decision in Canada a
confession is not evidence until the trial judge
decides that it is voluntary and admits it as
evidence, and also that the object of a 'trial
within a trial' is to discover not whether the
confession is true (which is to the jury alone)
but whether it is voluntary and hence admissible
in evidence."

The dicta of W. v. Lord, W. v. Hammond (10

as, however, incorporated into Canadian law in the W. v. Lord
case of W. v. Lord, all decided in 1950. The following
year, W. v. Lord⁶¹² expressly disagreed with the W. v. Lord
W. v. Lord decision, and all, W. v. Lord, in approving W. v. Lord.
(13)
W. v. Lord, observed.

"I do not see how under the guise of 'credibility'
the court can transmute what is initially an
objection as to the 'admissibility' of the confession
into an objection of an accused. That could be

610 supra, fn. 608

611 [1950] C. 80 (C.A.)

612 (1950), 29 C.L. 547 (Sask. C.F.), at p. 550

613 supra, fn. 609

inherent to our accepted standards and principles of justice, it will invite and encourage brutality in the handling of persons suspected of having committed offences ... Only the jury can pass upon the truth or weight of the confession when only on evidence is fully before it."

Here Mallory J.A., in Reichall concerned himself to argue that the "truth" of a confession was not an issue on the voir dire or trial either a trial, or relevant to the sole issue of whether the confession is voluntary, the learned Hall, J., while approving this, also implied that to allow such a question could result in compelling the accused to incriminate himself.⁶¹⁴

The question again arose in R. v. Le Clerq⁶¹⁵ In that case, an accused appealed from his conviction, by a judge sitting without a jury, for indecently assaulting an eleven year old girl. One of the grounds of appeal was that on the voir dire, the trial judge had asked whether a statement made by the accused was true. The majority of the Ontario Court of Appeal held that they were bound by R. v. La Plante,⁶¹⁶ but, Laskin, J.A., dissenting, observed.⁶¹⁷

614 See, Austin L. Cooper, Admissibility of Confessions. The Impact of the Rule in R. v. Hanford (1958), 1 Cr. L. Q. 46, T. D. Norton, Do we need a Code of Evidence? (1960), 36 Can. L. Rev. 35, at p. 37 et seq.

615 [1966] 2 O.3 C. 190 (Ont. C.A.)

616 supra, fn. 611

617 supra, fn. 615, at p. 195

"The trial within a trial has a limited object to enable the trial judge to decide whether an inculpatory statement made to persons in authority is admissible by examining the circumstances surrounding its making. To use such an occasion to obtain verification from the accused of the truth of his statement is to depart from the purpose for which the voir dire is held, and is to prejudice the accused unfairly in the very question of admissibility. Putting the matter another way, the question whether a confession is true even if relevant to the issue of its voluntariness (and hence admissibility) involves resort to a line of inquiry that goes so much beyond the issue for which it is invoked as to make it improper either to initiate it or pursue it " 618

On further appeal to the Supreme Court of Canada,⁶¹⁹ Hall, Spence and Pigeon, J.J., dissenting, it was held that the appeal should be dismissed Martland, J., writing an opinion concurred in by McIntyre, Abbott, Judson and Ritchie, J.J., stated at p. 557 of the report.

"I am in agreement with the conclusions stated in the Hammond case. While it is settled law that an inculpatory statement by an accused is not admissible against him unless it is voluntary, and while the inquiry on a voir dire is directed to that issue, and not to the truth of the statement, it does not follow that the truth or falsity of the statement must be irrelevant to such an inquiry."

Cartwright, C.J., in a separate majority opinion, wrote, while agreeing that the question - Is it true? - was technically admissible as being relevant to the credibility of the evidence:⁶²⁰

618 See, England, ubi supra, c v(11)

619 De Clerq v. R. (1968), 70 D.L.R. (2d) 530

620 supra, in. 619, at p. 535

"However, while it cannot be said that the question was legally inadmissible, in my respectful opinion, this was eminently a case in which the trial judge should, in the exercise of his discretion, have refrained from putting the question. ..." 621

But the learned justice held that such a mistaken exercise of discretion was not sufficient to endow the Court with jurisdiction, which is limited to dealing with errors in law.

Hall, J., dissenting, held that asking the accused - Is the statement true? - was tantamount to asking him if he was guilty of the offence. Spence and Pigeon, J.J., in separate dissenting opinions, agreed with Hall, J., adding that the question should not be allowed because of the prejudice to the accused. Pigeon, J., stated in his judgment.

"Because the rule against compulsory self-incrimination is the root of the objection, I cannot agree that this is a matter of judicial discretion respecting the extent

621 Approving Loor Uncharmed v. R. /1949/ A.C. 182, at p. 192, where Lord Du Parq stated: "... cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge." Compare to Laskin, J., supra in. 617.

of cross-examination or credibility. In considering the cogency of the reasoning in R. v. Diamond ... we should bear in mind that, in the United Kingdom, Judges are allowed to comment on the omission of the accused to testify. In this perspective it is much less obnoxious to permit incriminating questions on the voir dire than under a system where such comments are strictly prohibited." 622

Although the law must now be taken as permitting the question - Is it true? - to be asked the accused on the trial within a trial, the soundness of the reasons for so allowing it, i.e. under the guise of credibility, must still be open to question. Similarly, another important question - the extent of the discretion of a trial judge to refuse admissibility on the grounds of prejudice to the accused - appears to have been thoughtlessly discarded by some of the learned members in the Supreme Court. If it is not still open for trial judges in their discretion to disallow the question being asked, then it must, indeed, be a very special case where defence counsel should allow the accused to give testimony on the voir dire.

622 See, supra, fn. 614.

111 Functions of Judge and Jury

The question of admissibility of an extra-judicial statement or confession is a preliminary issue to be decided by the trial judge in the absence of the jury.⁶²³ Whether a statement or confession is admissible is solely dependent on whether it is voluntary, and the burden of proving voluntariness affirmatively and to the satisfaction of the trial judge is on the prosecution.⁶²⁴ As Pickup, C.J., stated in the Ontario Court of Appeal:⁶²⁵

"The correct principle ... is that the burden upon the Crown is to prove affirmatively to the satisfaction of the trial judge that the statement sought to be admitted in evidence was a voluntary statement. The only sense in which the question of doubt properly comes into it ... is that the voluntary character of the statement must be proved to the satisfaction of the trial judge, and if the trial judge is in doubt about it, it has not been proved to his satisfaction."

623 See, supra, fn. 576

624 See, supra, fn. 581; R. v. Regnier (1955), 21 C.R. 374 (C.A.)

625 R. v. Lee, supra, fn. 599, at p. 418. As to reasonable doubt, see, supra, fn. 598

When the prosecution offers evidence of an alleged confession by the accused, it is the duty of the trial judge to enquire into all the circumstances surrounding the making of the confession or statement by the accused.⁶²⁶ If the trial judge is not completely satisfied, or entertains some doubt, as to the voluntary nature of the confession or statement, it will be rejected. If the judge has any doubt,⁶²⁷ he has no discretion to admit the confession or statement. There is, however, in a few cases, some contrary suggestion, to the effect that the judge has a discretion to admit as well as exclude. In R. v. Robichaud,⁶²⁸ decided in the New Brunswick

626 See, for e.g., R. v. McCraw, supra, fn. 422, R. v. Elliott, supra, fn. 439, R. v. Seabrooke, supra, fn. 450, R. v. Chase, supra, fn. 586

627 See, for e.g., R. v. Breher, supra, fn. 430, Metenko v. R. (1951), 12 C.R. 225 (C.A.).

628 R. v. Robichaud, supra, fn. 429 at p. 372. See, also, R. v. McCourt, supra, fn. 607, In R. v. Urlah, supra, fn. 418 where the magistrate "very doubtfully" admitted the evidence, Rogers, J., stated at p. 306 "... we were called upon to say whether he, in his discretion rightly exercised, should have received it." In R. v. Rodney (1913), 30 C.C.C. 252 (Ont. C.A.), Latchford, J., stated at p. 267. "Before admitting evidence of statements so made, the magistrate or judge should be satisfied that no inducement whatever has been held out to the accused by any person having authority over him ... But, if satisfied that the statement has been obtained by fear or prejudice or hope or advantage held out by a person in authority, he should in my opinion, declare the evidence admissible. The matter is largely, if not entirely, one of discretion ..." And see, R. v. Albrecht, supra, fn. 429.

Court of Appeal, Baxter, C.J., observed in rendering the judgment of the court.

"Whether it was voluntary or not was a question of fact for him and for him alone. He had under review all the circumstances from the time of the prisoners arrest to the making of the confession and it was for him to exercise a legal discretion as to whether it was voluntary or induced, affected by fear or compulsion or entirely free." (my italics)

But, as the learned Duff, C.J., noted in the Supreme Court of Canada.⁶²⁹

628 R. v. Fouchard, supra, in. 429, at p. 372. See also, R. v. McCourt, supra, in. 607. In R. v. Umlah, supra, in. 418, where the magistrate "very doubtfully" admitted the evidence, Rogers, J., stated at p. 306. "... we were called upon to say whether he, in his discretion rightly exercised, should have received it." In R. v. Rodney (1918), 30 O.R. 259 (Ont. C.A.), Latchford, J., stated at p. 267

"Before admitting evidence or statements so made, the magistrate or judge should be satisfied that no inducement whatever has been held out to the accused by any person having authority over him.... If, in satisfied that the statement has been obtained by fear or prejudice or hope of advantage held out by a person in authority, he should in my opinion, declare the evidence inadmissible. The matter is rarely, if not entirely, one of discretion..." and see, R. v. Albrecht supra, in. 429.

629 Thiessault v. R. supra, in. 459, at p. 515

"... the determination of any question raised as to the voluntary character of a statement by the accused elicited by interrogatories administered by the police is not a mere matter of discretion for the trial judge, as the court below appears to have thought."

If the trial judge on the trial within a trial is not satisfied, beyond any doubt, it is submitted that he must exclude the inculpatory statement.⁶³⁰ In exercise of discretion is involved. If, on the other hand, the statement or confession is proved to be voluntary, the trial judge may, in the exercise of his discretion, exclude the statement or confession if he deems the manner in which the confession was obtained to be unfair to the accused,⁶³¹ or if he was not satisfied that the accused understood all the implications of making a statement or confession.⁶³² It is only the exclusion of the statement or confession that is left to the discretion of the trial judge, which is to be decided upon the diverse and particular circumstances of each case.⁶³³

630 See, R. v. Lee, supra, in 529

631 See, for e.g., R. v. Jones, per Lord Hailsham, J., supra fn. 418, R. v. Choney, supra, in. 537 R. v. Hite, supra, in 451, R. v. Elliott, supra, in. 439

632 See, R. v. Peaulieu, supra, in. 468

633 See, R. v. Anderson, supra, in. 430, per Lord Hailsham, J.A., at p. 200. R. v. Gillis [1966] 2 C.C.C. 219 (C.C.C.B.)

In deciding whether the statement is voluntary, the trial judge must first be satisfied that the statement tendered in evidence was a correct statement of what the accused had said, or intended to say. If he was not satisfied that it was the statement of the accused, or if he has any doubt on the point, he will reject the statement.⁶³⁴ If the statement was taken by question and answer method, it is necessary for the trial judge to enquire as to the questions asked.⁶³⁵ If the tendered statement is oral, it is very pertinent for him to satisfy himself that there are no inconsistencies in police evidence, especially where

634 In Batty v. H., supra, in. 556, Duff C.J., stated "In Thiffault v. R. /supra, in. 459/ the decision of this Court was that the evidence pointed to the conclusion that the statement tendered in evidence was not a correct statement of what accused had intended to say.. " See, also, R. v. Sullivan (1955), 20 C.R. 269 (Ont. C.A.), approving the English case of R. v. Roberts, supra, in. 271, per Devlin, J., R. v. Jones (1944), 18 C.P.R. 164 (Campbell, C.J.), where a question arose as to whether certain words used were those of the accused or the interrogating police officer.

635 See, Thiffault v. R., supra, in. 459

no notes were taken by the interrogating officers.⁶³⁶

If the trial judge is satisfied that the statement is that of the accused, he must then inquire as to whether there was any inducement held out to the accused. If the circumstances beg the question of whether certain words amounted to an inducement, he must ask whether the accused could have considered, believed or interpreted the words as offering fear or prejudice or hope of advantage.⁶³⁷ If the trial judge concludes that they could so be interpreted by the accused, he then must assure himself that the words were in fact communicated to the accused⁶³⁸ and held out⁶³⁹ to him by a person in authority. Whether or not a person is to be considered to be a person in authority depends on whether the accused could have reasonably believed the person to be in authority over him.⁶⁴⁰ If the trial judge concludes that the inducement

636 See, R. v. Sullivan, supra, fn. 634

637 See, for e.g., R. v. Odwin, supra, fn. 426, R. v. Pitson, supra, fn. 455, and generally supra, c.

638 For e.g. R. v. Gutschmidt, supra, fn. 592

639 See, for e.g., supra, fn. 119

640 R. v. Boisselle; R. v. Lyles; R. v. Albrecht, supra, fn. 97. See, for e.g., R. v. Boisselle, supra, fn. 477, R. v. Albrecht, supra, fn. 429, R. v. Lyles, supra, fn. 412

was held out to the accused by a person in authority, and communicated to the accused, he must reject the statement as not being voluntary, unless the prosecution can prove that the effect of the inducement had dissipated by the time the accused made the statement.

If the issue does not involve words spoken to the accused, the trial judge will enquire into the total circumstances to see if the statement of the accused was voluntary. Relevant circumstances include the age and mentality of the accused and his physical well-being at the time of making the statement, time of arrest, time and length of questioning by the police, type of detention, i.e. solitary or guarded, place of interrogation, number of interrogations, number of officers present, number of officers coming and going from the place of interrogation, whether accused was standing or sitting while interrogated, whether accused was deprived of food, drink, or other amenities, whether the accused was cautioned, and his statement read over to him.⁶⁴¹

After an enquiry into all the circumstances, if the trial judge is satisfied that the statement was not

(41) For a list of factors considered by one judge, see, R. v. Boisjoly (1956), 22 C.R. 19 (Que. C.A.)

improperly obtained, or the result of a compulsive atmosphere,⁶⁴² he will rule the statement to be voluntary,⁶⁴³ and admissible in evidence. When the statement is tendered in evidence, the whole confession or statement must go in,⁶⁴⁴ including exculpatory parts, as well as inculpatory, and it is evidence only against the maker.⁶⁴⁵

642 See, for e.g., R. v. Wishart, supra, fn. 450

643 See, for e.g., R. v. Finkle, supra, fn. 412, R. v. Garduto, supra, fn. 453, R. v. Girvin, supra, fn. 596, R. v. Sileski, supra, fn. 459, R. v. Simpson (2) (1934), 2 P.P.R. 328 (N.S.C.A.), R. v. Harris (1946), 1 C.R. 509 (Ont. C.A.), R. v. McKillop (1948), 5 C.R. 375 (Ont. C.A.), R. v. Simpson (1954), 34 P.P.R. 311 (N.S.C.A.), R. v. Hambleton (1956), 25 J.R. 124 (B.C.S.C.), R. v. Simmons et al. (1955), 110 C.C.C. 309 (Ont. C.A.), R. v. Black & Mackie, supra, fn. 422

644 See, R. v. Martin, supra, fn. 422, Schmidt v. R. [1945] 1 C.R. 438

645 If repudiated by the accused, the statement is still left to the jury to decide on its truth or falsity. See, Ford v. R. (1953), 17 C.L. 26 (Que. C.A.), Dubuc v. R. (1954), 18 C.R. 337 (Que. C.A.)
Where a trial judge is sitting without a jury, all evidence concerning the voluntary nature of the confession is not necessary to be gone into again. See, R. v. Bannerman (1965), 48 C.R. 111 (Man. C.A.), Aff'm'd, (1967), 50 C.R. 77 (S.C.C.)

Once the confession or statement is ruled admissible by the trial judge, the circumstances surrounding the making of the confession are again gone into before the jury, whose function is to decide on the truth of the statement, and what weight to attach to it. As Harvey, C.F.A. stated in R. v. McLaren,⁶⁴⁶ in rendering the

646 /1949/ 2 P.L.R. 682 (Alta. C.A.), at p. 698, in R. v. MacAloon (1959), 30 C.R. 305 (Ont. C.A.), supra, in. 426, disapproving of R. v. Bass, ubi supra, in. 235, MacKay, J.A., stated at p. 308. "... the question that the jury must decide is whether the statement is true, not whether it was a voluntary statement. But in coming to a conclusion as to whether they are convinced beyond a reasonable doubt that the statement is true, they may, and should consider all the circumstances leading up to and surrounding the making of the statement." See, R. v. Shaw /1965/ 1 C.C.C. 130 (B.C.C.A.), which does not decide the conflict between R. v. MacAloon and R. v. Bass, supra. See, R. v. Mulligan, supra, in. 455, which approved R. v. Murray /1951/ 1 K.B. 392, per Goddard, L.J., ubi supra, in. 284. The Bass doctrine was exploded in Chan Wei Leung v. R. ubi supra, in. 271, a decision of the Privy Council. As to England, with which R. v. MacAloon is consistent, see ubi supra, in. 235. In the Australian case of Pasto v. The Queen (1954), 91 C.L.J. 628 (H.C.), approving Sinclair v. The King, supra, in. 579, which was in accord with R. v. Murray, the Court observed:

"The jury is not concerned with the admissibility of the evidence; that is for the judge, whose ruling is conclusive upon the jury and who for the purpose of making it must decide both the facts and the law for himself independently of the jury. Once the evidence is admitted the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. For that purpose it must sometimes be necessary to go over before the jury the same testimony and material as the judge has heard or considered on the voir dire for the purpose of deciding the admissibility of the accused's confessional statements as voluntarily made..." See, also R. v. Deathe /1962/ V.R. 650 (C.C.)

judgment of the Alberta Court of Appeal.

"Unless a confession is voluntary when made to one in authority it is not admissible in evidence, and for the purpose of deciding its admissibility the trial judge must find the fact that it is voluntary and such finding by the trial judge has a legal aspect, but once it has been admitted its weight is entirely for the consideration of the jury and in deciding what weight should be attached to it, it is the right and duty of the jury to consider the manner in which it was obtained and all the circumstances connected with it being given. In doing so the jury properly will consider not only whether it was in their opinion given voluntarily and without undue influence to that extent that they see fit."

It is admitted, it is well known that the weight of a confession is for as any other piece of evidence. It is open to the jury to say which part it shall believe, or disbelieve.⁶⁴⁷

It is clearly settled in Canadian law that the jury may convict on the confession alone if believed by it.⁶⁴⁸

⁶⁴⁷ See, e.g., R. v. Hughes et al. [1942] 3 O.R. 517, R. v. Harris, 50 B.R. 111, 61 B.T.R. 111, R. v. Mulligan, Harris, 45 B.T.R. 111, R. v. Gullett [1941] 1 T.R. 33 (Can. J.A.), R. v. Zachariuk (1942), 92 C.C.C. 239 (Alta. C.A.), R. v. Ouellette (1951), 50 C.C.C. 270 (S.C.C.). The mechanics of taking a confession and introducing it in court are matters going to the weight of the evidence, and not to matters relating to admissibility. See, Solomon v. R. (1906), 47 C.P. 175 (N.S.C.) where a tape recording of a confession established as an exhibit in production was held acceptable.

⁶⁴⁸ See, for e.g., R. v. Gault (1909), 19 O.R. 232 (C.A.) R. v. Gullett, R. v. Chambers (1947), 50 C.C.C. 232 (Ont. C.A.), R. v. Kelson, R. v. Kelson [1953] S.C.R. 220, per Macdonald, J., at p. 227.

iv. Alcohol as a Factor Affecting Admissibility

It was early considered in Canada that the extent of intoxication of an accused at the time he made an incriminating statement, was both a factor relevant to the issue of voluntariness of the statement on the voir dire,⁶⁴⁹ as well as a factor necessarily to be valued by the jury in assessing what weight to attach to the statement, i.e. whether the statement was true or false.⁶⁵⁰

On the voir dire, if it appears that the accused was in some degree under the influence of alcohol at the time he made an incriminating admission or statement, the burden is on the prosecution to show that the accused knew what he was saying. In R. v. Washer,⁶⁵¹ McRuer,

649 See, Trepanier v. R., supra, fn. 438 per Trenholme, J., at p. 294

650 In R. v. Daley, supra, fn. 487, while the accused was in prison on a charge of theft, he was searched by a police officer who found money on him. The officer said "this looks bad, J.", to which the accused, who was under the influence of liquor at the time, replied with an incriminating admission. It was alleged by the Crown that drunkenness went only to the weight and not the admissibility of the evidence. White, J., for the court and without a discussion of reasons, held that the evidence was properly admitted.

651 /1948/ O.W.N. 393, at p. 394. See, also, R. v. Drewicki (1964), 41 C.R. 265.

C J .C., as he then was, clearly stated

"I think that I could require much more proof than I have here to satisfy me that the accused was at the time that statement was taken, possessed of all his faculties to such an extent that he could fully appreciate the consequences of the statement. I am not laying it down as a rule of law that the Crown must show this in normal cases before a statement becomes admissible - far from it, but I am saying that in this case, where the evidence shows that the accused was at the very time in some state of intoxication, and to such an extent that it apparently affected his brain in such a way that he could not walk steadily, I think I could be exercising my discretion very unwisely if I held that the onus that rests upon the Crown had been discharged." 652

Thirteen years later, in R. v. Jensen,⁶⁵³ the learned

652 In R. v. Muirhead (1951), 29 C.R. 317 (1 S.C.C.), it was held, approving R. v. Lasher, that a statement made by a person while intoxicated, to a police officer that he was the driver of a certain car, was inadmissible. See, also, Cottin v. R. (1960), 129 C.C.C. 348 (1 S.C.C.), approving that intoxication is unquestionably a factor to be considered in arriving at a decision as to whether a statement is, or is not, voluntary.

653 (1961), 136 C.C.C. 353 (Ont. H.C.). In this case, at a trial of a mentally retarded juvenile for murder, it was held that where the police take a statement from a minor, different considerations apply, than those applicable to adults. The police officer administering the caution must demonstrate to the Court that the child did in fact understand the caution as a result of careful explanation and after pointing out to him the consequences that may flow from making a statement. See, also as to minors, R. v. Jacques (1958), 29 C.R. 249 (Que. Superior Ct.). "It is clear that evidence concerning the mental condition of the accused at the time he made the statement, is admissible on the voir dire as being relevant to the issue whether the statement was voluntarily made. R. v. Thauvette /1938/ 2 D.T.R. 755 (Ont. C.). See, also R. v. Godwin, *supra*, fn. 426 R. v. Locker, (1928), 50 C.C.C. 271 (Alta. S.C.). Compare Sinclair v. The King, *supra*, fn. 579 R. v. Starecki /1959/ V.R. 141 (S.C.).

Chief Justice explained in referring to his judgment in R. v. Washer.⁶⁸⁴

I want to make it perfectly clear that I had no intention, in what I said in that case, of laying down as a rule of law that because a man was in some degree under the influence of liquor he could not make a voluntary statement. ... But that was a circumstance to take into consideration..."

In the important case of McLennan v. H.,⁶⁵⁵ the accused gave statements to the police that he had parked his car on railway tracks. He was indicted on two counts that he willfully obstructed the lawful use of property and that he drove a motor vehicle while intoxicated. At the trial, the accused was described by a witness as being drunk. In the Supreme Court of Canada, Kerwin, C.J. observed, in dismissing the appeal.⁶⁵⁶

"In the present case it is apparent that the learned trial judge carefully considered all of the evidence and notwithstanding the evidence of intoxication, concluded that the appellant knew what he was saying. It is also apparent that he properly directed himself in law as to the effect to be given to the evidence of intoxication." (*in italics*)

It is necessary on the voir dire that the trial judge be satisfied that the statement about to be tendered in evidence, and made by the accused while he was in some state of intoxication, could be said to amount to his

⁶⁵⁵ [1961] 3 C.R. 661

⁶⁵⁶ ibid., at p. 663

statement in the sense that, at the time of making it, the accused knew what he was saying and appreciated the consequences of what he did say. If it is not proved by the prosecution to the satisfaction of the trial judge that the statement amounted to the statement of the accused in this sense, then the statement will be rejected from evidence as not being voluntary.

In the recent case of R. v. Hartridge,⁶⁵⁷ a decision of the Saskatchewan Court of Appeal, the accused-appellant, while detained at his house, made incriminating statements. From the evidence on the voir dire, it appeared that he was staggering, and breathalyser evidence led by the defence indicated that he was in a high degree of intoxication at the time the statements were made. The accused did not recall making the statements, and one doctor testified to the effect that he was experiencing an organic amnesia. In allowing the appeal, and ordering a new trial, it was held by Gulliton, C.J., speaking for the court, that such a condition of intoxication must be taken into consideration in deciding whether the accused possessed all of his faculties to the extent that he could appreciate the consequences of his statement.⁶⁵⁸

If the trial judge concludes that the alleged statement

657 (1966), 57 D.L.R. (2d) 332

658 See, also R. ex rel. Wickert v. K en (1967), 50 C.L.R. 228 (P.C.S.C.)

or confession is voluntary, whether given by the accused in a state of intoxication or not, it is then for the jury (or trial judge sitting alone) to consider whether the statement or confession is true or false, and what weight to attach to it.⁶⁵⁹ In R. v. Wilson,⁶⁶⁰ an appeal from a conviction of murder, it was argued that at the time of making his confession, the accused was in such a state of intoxication as to render his statement involuntary. In rendering judgment in the Ontario Court of Appeal, Porter, C.J.O., observed.⁶⁶¹

"The trial judge may properly direct the attention of the jury to the evidence as to drunkenness as it relates to the weight and value of the statement in evidence and he may even express his opinion as to the effect of the drunkenness on the weight and value of the evidence, provided he makes it perfectly clear that the question is always for the jury to decide in the exercise of their function notwithstanding any opinion expressed by the judge."⁶⁶²

However, in Rustad v. R.⁶⁶³ where the trial judge did

659 See, supra, ins. 645, 646

660 (1958), 28 C.R. 262

661 Ibid, at p. 264

662 Compare Rustad v. R. (1965) D.O.B. 555, as to jury charge. In R. v. Federsee (1956) C.W. 212, Gale, J. as he then was, stated at p. 370:

"I should like to say that in my opinion unless the co-sumption of alcohol renders a man susceptible to the influences which normally cause a statement to be admissible that which is said by a person in that condition is admissible in evidence, although perhaps of little weight."

See, also, R. v. Bannerman, supra, ins. 645, per Miller, C.J., dissenting at p. 115. Case affirmed in Supreme Court of Canada without reference to this point (1967), 50 C.R. 77

663 supra, ins. 662

not instruct the jury as to the effect of intoxication on the confession of the accused, the learned Ritchie, J. observed in the Supreme Court of Canada, allowing the appeal.⁶⁶⁴

"... but there are more serious omissions which require consideration ... he at no time gave them any instructions as to the effect of her having been intoxicated on the truth or falsity of what the appellant was alleged to have said. ... In my opinion in the present case the evidence of the appellant's intoxication was such as to make it desirable for the trial judge to tell the jury that it was a factor to be taken into consideration in assessing the value of the confession ..."

664 ibid, at p. 661. See, also, Clenna v. R., supra fn. 655.

CHAPTER SIX

THE DOCTRINE OF CONFIRMATION BY SUBSEQUENT FACTS

The question arises, where as a result of an inadmissible confession, if certain articles or material facts of the crime in question are found, is any part of the inadmissible confession thereby rendered admissible, it being confirmed as being true by the finding of the articles or material facts? At first blush, considering that confessions or statements are excluded from evidence because they are in fact induced whether they are true or not, one would logically expect a negative answer. But the Canadian rule, being an adoption of the English experience, has inherited the same degree of difficulty and confusion inherent in that experience, which does not permit logical or simple analysis.⁶⁶⁵ There are two main avenues of thought on the subject in Canada. In the first place, as exposed by R. v. McCafferty,⁶⁶⁶ facts subsequently discovered are admissible, but they cannot be connected with the inadmissible confession leading to their finding

665 See, generally, England, ubi supra, c. 7

666 (1886), N.B.R. 396 (C.C.R.)

or discovery in any way. Secondly, under R. v. St. Laurence,⁶⁶⁷ facts subsequently discovered are admissible, and evidence can be given that they were discovered as a result of a statement made by the accused.

In R. v. McCafferty,⁶⁶⁸ the accused was convicted of stealing goods. While in custody he was told by a police officer that the owner of the stolen articles was a good-hearted man, and he, the police officer, thought that if the goods were returned, the accused would not be prosecuted. The accused then told the police officer that if he went to a particular place he would find the goods. The goods were afterwards found in the place described by the prisoner. It was contended by counsel for the prosecution that it did not matter if the statement of the accused was induced, because the finding of the goods confirmed the truth of the statement. The court held, by a 4 - 2 majority, that the statement was improperly received, Palmer, J., stating.⁶⁶⁹

667 (1949), 93 C.C.C. 376 (Ont. H.C.)

668 supra, fn. 666

669 It is to be noted that there was no direct acknowledgment by the accused that he committed the crime. Compare to R. v. Jones, ubi supra, fn. 310. The majority refused to follow R. v. Gould, ubi supra, fn. 326. The minority contended that a different rule was acted on in R. v. Harvey 2 East T.C. 658, ubi supra, fn. 321, and would have held that the statement was properly received on the authority of R. v. Waricksnall, ubi supra, fn. 307, R. v. Rose, ubi supra, fn. 308, and R. v. Lockhart, ubi supra, fn. 309.

"The fact of finding the goods in the place in which they were found and their condition, was clearly admissible, even though they were found in consequence of the information which the prisoner gave - although improper inducements had been held out, ... I think the rule here is that laid down by Lord Eldon in Harvey's Case (2 East P.C. 658), that where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession from being given in evidence, he would direct an acquittal unless the fact proved would itself have been sufficient to warrant a conviction without any confession leading to it. The rule thus applied would give full force to the evidence of any fact that could be proved by independent evidence. ...

If it were allowed to prove by such confession, that he had the goods or that he took them - and this is necessary to convict - it is apparent that he would be convicted on a confession or statement of a fact he was improperly induced to make."

It is clear in this case that the majority rejected the statement of the accused because it was the result of an inducement, and no weight was given to the truth of the statement being confirmed by the finding of the goods in accord with the statement. Although the fact was admissible, it could not be connected in any way with the statement of the accused leading to the discovery of it.

Although this case was logically consistent with the true basis of the exclusionary rule relating to confessions or statements, and as such tended to a fair

administration of justice, it was not followed.⁶⁷⁰ In Ontario, a different rule arose,⁶⁷¹ and in R. v. White,⁶⁷² the learned Osler, J.A., citing the English texts of Archbold and Ehipson, stated ⁶⁷³

"The statement made to the officer J., after the interview with the chief of police, as to where the key of [the victim's] house would be found, confirmed as it was by the finding of the key in the place described, was plainly admissible, for, even if accompanying language amounting to a confession was inadmissible as possibly untrue, this fact at least was not."

This case was approved in the Quebec Court of Appeal,⁶⁷⁴ and in R. v. Simpson et al.,⁶⁷⁵ a case dealing

670 But see R. v. Fais, supra, fn. 579, where, in a case involving the charge of unlawfully retaining stolen goods, and the accused directs the police to where the goods are, McDonald, J.A., stated, Sloan, J.A., agreeing

"Having regard to what was said in the Court of Appeal in New Brunswick in R. v. McCafferty ..., where the older cases are fully discussed, I am doubtful that even so much of the appellant's statement ought to be admitted. ... As I say, I am very doubtful about this, but in any event, my view is that even on this evidence the accused could not be properly convicted.

671 See, R. v. Doyle (1836), 12 O.R. 347

672 supra, fn. 451

673 ibid., at p. 34

674 Trepanier v. R., supra, fn. 438

675 [1943] 3 D.L.R. 355 (E.C.C.A.)

dealing with the compulsory production of documents under a statute, McDonald, C.J., emphatically stated, citing with approval the English cases of R. v. Griffin⁶⁷⁶ and R. v. Gould⁶⁷⁷

"But it is said that, apart from the statute altogether, these books and documents are protected at common law. Nothing could be further from fact. It is trite law that where anything is found in consequence of a statement made by a prisoner under circumstances which preclude its being given generally in evidence, nevertheless such part of it as relates to the thing found in consequence is receivable, and ought to be proved."

Six years later, the issue squarely arose before the learned McRuer, C.J., of the Ontario High Court, in the case of R. v. St. Lawrence.⁶⁷⁸ In that case, the accused, while in custody, was questioned under circumstances which would render his statements inadmissible in evidence. As a result of certain admissions he was taken to a point near the scene of the crime, at which time he pointed out where he had thrown a "twitch", and the dead man's wallet. On searching the place, both the articles were found. The learned judge observed⁶⁷⁹

676 ubi supra, fn. 323

677 ubi supra, fn. 326

678 supra, fn. 667

679 ibid., at p. 322

"The matter involved in considering the admissibility of the evidence tendered by the Crown is one of great difficulty, and one on which there is no unanimity of opinion among judges or text-book writers."

After an exhaustive review of English authority, and being greatly persuaded by the statement of law in Taylor, 12 ed., para. 902,⁶⁸⁰ the learned judge concluded that his decision had to rest on the "fundamental principle" to the effect that where the discovery of the fact confirms the confession, then that part of the confession so confirmed is alone admissible. As he stated ⁶⁸¹

"It is therefore permissible to prove in this case the facts discovered as a result of the inadmissible confession, but not any accompanying statements which the discovery of the facts does not confirm. Anything done by the accused which indicates that he knew where the articles in question were is admissible to prove the fact that he knew the articles were there when that fact is confirmed by the finding of the articles, that is, the knowledge of the accused is a fact, the place where the articles were found is a fact. If he does or says something that indicates his knowledge of where the articles are located, and that is confirmed by the finding of the articles, then the fact of his knowledge is established. On the other hand, it is not admissible to show that the accused said he put

680 See, ubi supra, fn. 326

681 supra, fn. 667, at p. 391, in Comeau v. R. supra, fn. 530 Illsley, C.J., in the trial judgment accepted the St. Lawrence doctrine when he noted, after excluding the confession of the accused "From that of course I except the parts of the statement which are connected with the finding of the objects."

the articles where they were found, as the finding of them does not confirm this statement. The finding of them is equally consistent with the accused's knowledge that some other person may have put them in the place where they were found."

For the most part, the doctrine expounded in R. v. St. Lawrence⁶⁸² was approved over that in R. v. McCafferty.⁶⁸³ But, at least in the British Columbia Court of Appeal, if justice in a given case demanded the exclusion of the statements of the accused leading to the recovery of stolen articles, then the statements were excluded by the Court, without feeling itself persuaded to do otherwise by the St. Lawrence case. In R. v. Downey,⁶⁸⁴ after oral and written statements were held inadmissible as not being voluntary, the

682 supra, fn. 667. In R. v. Bird, supra, fn. 468, Disbery, J., stated, following the St. Lawrence doctrine, at p. 41

"I am, therefore, of the opinion that the evidence of the finding of the clothing, as a result of the information given by the accused in his inadmissible confession, is admissible in this case." See, also Comeau v. R., supra, fn. 681

683 supra, fn. 666

684 (1957), 20 C.R. 213 (B.C.C.A.) The headnote states: "An involuntary statement made by an accused to the police which led to the discovery of articles relating to the crime is not confirmed and made admissible by the fact that the finding of the articles is consistent with the truth of the statement if the result of the search be also consistent with a reasonable possibility that the statement is untrue."

prosecution tendered a statement of the accused leading to the finding of the stolen articles. Although lip service was paid to the St. Lawrence case, the learned Judge, J.A., observed ⁶⁸⁵

"In any event, it is clear that they were so inextricably bound up with what had gone before that they were likewise inadmissible."

Similarly, in R. v. Hesse,⁶⁸⁶ where the accused had given information as to the whereabouts of two bodies, the British Columbia Court of Appeal held, stating that it was inappropriate to examine the rationale of the rule, that only the information relating to one body was admissible. As to those parts of the statement of the accused relating to his knowledge of the whereabouts of the other body, the court held them inadmissible, as the other body had already been discovered by the police, without the assistance of his information.

If, however, the accused makes a statement admitting a material fact, and which admission does not amount to a confession, or is not part of a confession, the admission of the accused is admissible, if proved to be, or confirmed as being, true by other admissible evidence.

⁶⁸⁵ ibid, at p. 213

⁶⁸⁶ [1965] 2 C.C.C. 56 (B.C.C.A.), affirmed [1965] 2 C.C.C. 123 (S.C.C.)

In R. v. Briden,⁶⁸⁷ the accused was charged with breaking and entering. On cross-examination, he was asked whether after his arrest, he had told the police where the break-in had taken place. The accused denied making such a statement, and the prosecution, in rebuttal, led evidence of a police officer to the effect that it was as a result of conversation with the accused that the information was obtained. No statement or confession of the accused was placed before the court, and no evidence was given as to what was actually said.

Porter, C.J.C., observed, with MacKay, J.A.
concurring ⁶⁸⁸

"The only purpose of evidence of the kind in question is to show that the accused had knowledge of some fact material to the issue. In this case the material fact was the place of the break-in. The accused's admission of such knowledge, standing alone, would not necessarily amount to a confession of guilt. It would be evidence consistent with guilt, and might, along with other proven circumstances raise an inference of guilt. Its admissibility depends upon confirmation. The truth of the information, given by the accused must be proven by other admissible evidence. When, the statement of the accused, not being a confession, is admissible even though improperly obtained from him by threats or inducements. ... Unless a confession were involved,

687 (1964), 127 C.C.C. 154 (Ont. C.A.)

688 ibid, at pp. 158, 159

and inseparable from such a statement, I do not think that a voir dire would be necessary to determine admissibility."

The learned Chief Justice cited R. v. McCafferty⁶⁸⁹ and the English case of R. v. Gould⁶⁹⁰ in support. When one realizes, however, that in McCafferty, the court expressly refused to follow Gould, the confusion as to the confirmation doctrine readily appears, compounded only by the fact that, while Gould was cited with approval in R. v. Simpson et al.,⁶⁹¹ that case was regarded in R. v. St. Lawrence⁶⁹² as adding confusion to the matter and unable to be rationalized by decision. The rule in Canada undoubtedly needs clarification, and it is hoped, when the opportunity presents itself in the Supreme Court of Canada, the confusion attaching thereto will be resolved.

689 supra, fn. 666

690 ubi supra, fn. 326

691 supra, fn. 675

692 supra, fn. 667

C. UNITED STATES OF AMERICA

as expressed by the United
States Supreme Court.

CHAPTER ONE

THE EMERGENCE OF THE CONFESSIONAL RULE IN THE UNITED STATES' SUPREME COURT

I Evolution of the Concept of Voluntariness

By the seventeenth century, the concept of voluntariness which was fundamental to English common law, had permeated the legal structure in the American colonies. Confessions of an accused were not to be extorted because, it was argued, that an innocent accused may falsely confess from fear, and the confession of a guilty person so obtained would be contrary to the common law maxim of nemo tenetur prodere seipsum, i.e. a person cannot be compelled to be his own accuser.⁶⁹³ In 1642, one Richard Billingham who had been charged with the revision of the laws of the colony in Massachusetts, posed the following question to the governor of the colony:⁶⁹⁴

693 Bradford, History of Plymouth Plantation, Mass. Hist. Soc. Coll., ser. 4, vol. 3, at p. 390, et seq. Liberty 45 of the Body of Liberties, 1641, states: "No man shall be forced by torture to confess any crime against himself..."

694 Bradford, ibid, at p. 777

"How far a magistrate may extracte a confession from a delinquent, to accuse himselfe of a capitall crime, seeing nemo tenetur prodere seipsum..."

One of Governor Bradford's ministers replied in part ⁶⁹⁵

"A magistrere is bound - to sifte ye accused and by force of argument to draw him to an acknowledgme of ye truth, but he may not extracte a confession - by any violent means - by any punishmente inflicted or threatened to be inflicted, for so he may draw forth an acknowledgme of a crime from a fearfull innocente, if guilty he shall be compelled to be his owne accuser, when no other can, which is against ye rule of justice."

In the latter half of the eighteenth century, after separation of the colonies from England, it was clearly accepted that confessions in order to be admissible, had to be voluntary. In The Commonwealth v. Dillon,⁶⁹⁶ a twelve year old boy, while under arrest for arson, was visited by several persons including inspectors of the prison, who told him, inter alia, that his confession would probably result in his pardon,

695 ibid. As to the states which adopted the English examination statutes of 1 & 2 Phil. & M., 2 & 3 Phil. & M., see, Simon Greenleaf, A Treatise on the Law of Evidence (2d edn., 1844), C. XII, at p. 271, fn. 1. As to federal courts, see, for e.g., cases infra, fn. 699, and U.S. v. Chapman, infra, fn. 701.

696 (1792), 4 U.S. 116. As to a confession in cases of treason, see the earlier cases of Respublica v. Roberts (1778), 1 U.S. 39 (Oyer & Terminer, Phil.), and Respublica v. M'Carty (1781), 2 U.S. 86 (Oyer & Terminer, Phil.). As to comparison to English treason statutes, see, United States v. Mitchell (1795), 1 U.S. 348.

and that he would be confined in the Dungeon, without food, unless he made full disclosure. The boy later confessed to the Mayor formally, which confession he repeated at subsequent periods.

At the trial, it was contended by counsel for the accused that the confession was obtained under such duress, threats and promises that its legal credit and validity were destroyed. The court held the confession before the mayor to be voluntary, and admitted it, but charged the jury that if they had any doubt, to acquit, which the jury did.

By the first half of the nineteenth century, the rule excluding involuntary extra-judicial confessions had evolved, both in the federal as well as the state courts. In the federal courts, it was early recognized that confessions extorted by threat of punishment or obtained by hope or promises of reward were not to be received in evidence.⁶⁹⁷ It was necessary that confessions had to be voluntary, and any threat or promise or inducement would exclude a confession given subsequent thereto.⁶⁹⁸

697 See, United States v. Pumphreys (1802), 27 Fed. Cas. 631 (D.C. Cir.)

698 See, for e.g., United States v. Hunter (1806), 26 Fed. Cas. 436 (D.C. Cir.) United States v. Focklington (1822), 27 Fed. Cas. 580 (D.C. Cir) (hope of mitigation of punishment) United States v. Richard (1823), 27 Fed. Cas. 798 (D.C. Cir.) (Promise of no prosecution) United States v. Matthews et al. (1843), 26 Fed. Cas. 1205 (Dist. Ct., S.D.N.Y.)

Confessions made under oath were, similarly not received.⁶⁹⁹

As Brockenbrough, J., noted in a Virginia District Court 700

"Among the rules most carefully elaborated, and strictly enforced is this that if the confession has been made to a person in authority in the premises, and has been induced by anything said or done by such person, calculated to excite either hope or fear in the prisoner's mind, then the confession is inadmissible."

If an accused person made a second, or subsequent confession, after being induced to make an earlier one, the later confession was not received, unless it could be

699 See, United States v. Bascadore (1811), 24 Fed. Cas. 1028 (D.C. Cir.), United States v. Duffy et al. (1804), 25 Fed. Cas. 922 (D.C. Cir.), United States v. Williams et al. (1858) 28 Fed. Cas. 636 (Me. Cir.)

700 United States v. Cooper (1857), 25 Fed. Cas. 629 (W.D. Va.), at p. 630. In United States v. Tott (1839), 27 Fed. Cas. 189 (Cir. Ct., D. Ohio), it was stated at p. 190

"To make a confession, therefore, evidence, it must be made, so far as can be ascertained, in the absence of any excitement which creates a hope to obtain favor, or to avoid a threatened punishment. But the court in such cases must judge of the motives which induce the confession, from the confession itself, and the circumstances under which it was made.... It is difficult to lay down any precise form of words which, if addressed to the prisoner, should exclude his confession. Every case must be governed by its own circumstances."

shown by clear and satisfactory proof that the influence or inducement leading to the first confession had dissipated. The earlier induced confession gave rise to a presumption of law that later confessions were obtained under the same influence.⁷⁰¹ If, however, a fact was discovered as a result of an involuntary confession, although the confession was excluded, the fact itself was admitted in evidence.⁷⁰² If a confession was tendered in evidence, it had to be tendered as a whole,⁷⁰³ and it was open to the jury to believe all of it, or any part of it, or to reject it from their consideration completely.⁷⁰⁴

In the state courts, a similar pattern obtained at common law. It was argued, with reliance on English precedent, that involuntary confessions were excluded because the inducement used to obtain them might result

701 In United States v. Chapman (1851), 25 Fed. Cas. 404 (Dist. Ct., Penn.), a second confession was held inadmissible, although made 42 hours after the first, and although previously cautioned by the magistrate. See, United States v. Cooper, ibid.

702 In United States v. Richard, supra, fn. 698, the fact of the prisoner's going to the place where the property was secreted, and identifying it, was held admissible.

703 See, for e.g., United States v. Smith (1806), 27 Fed. Cas. 1233 (N.Y. Cir.)

704 See, for e.g., United States v. Prior (1837), 27 Fed. Cas. 624 (Cranch, C.J.).

in their being untrue.⁷⁰⁵ In Massachusetts, confessions obtained by promises were rejected as early as 1804,⁷⁰⁶ and any form of temporal benefit offered to the accused resulted in the subsequent confession of the accused being held to be not good evidence.⁷⁰⁷ In Commonwealth v. Ince,⁷⁰⁸ where a hope of pardon was held out to the

705 See, supra, fn. 694, 695. Commonwealth v. Knap, infra, fn. 708

706 See, Commonwealth v. Chabcock (1804), 1 Mass. R. 144 (S.C.)

707 See, Commonwealth v. Drake (1813), 15 Mass R. 161 (S.C.), Commonwealth v. Lorey (1854), 1 Gray 461 (Mass. S.C.). The inducement or influence, in order to negative voluntariness, had to be an external stimulus, and not arising from the mere operation of the mind of the accused. See, Commonwealth v. Knap, infra, fn. 708

708 (1830), 9 Pick. 495 (Mass S.C.)

accused if he would confess, Morton, J., observed 709

709 ibid, at p. 502. See, also Commonwealth v. Taylor (1850), 5 Cush. 605 (Mass. S.C.), per Dewey, J., at p. 610, Commonwealth v. Morey, supra, fn. 707 per Snaw, C.J. As to continuous confessions, ibid, J., noted in Commonwealth v. Knapp, supra, fn. 708, at pp. 498, 499

"The rule is that when a confession has been improperly obtained, all subsequent confessions are inadmissible, although they may have been made at different times, and to different persons, for the presumption is, that they were made under the same influence, or in consequence of the former confession.

In Commonwealth v. Tuckerman (1857), 10 Gray 173 (Mass. S.C.), which recognized that voluntariness was to be decided on a consideration of all the circumstances, Merrick, J., stated the rule at p. 190

"It is certainly a clear as well as familiar principle of law, that every free and voluntary confession is admissible in evidence against a party accused of any criminal offence, but that all those which are obtained from him by threats of harm, or promises of favour and worldly advantage, held out by a person in authority, or standing in any relation from which the law will presume that his communication would be likely to exercise an influence over the mind of the accused, are to be excluded from the hearing of judicial tribunals."

As to other cases formative of the rule in Massachusetts in the nineteenth century, see, Commonwealth v. Howe (1857), 9 Gray 110 (Mass. S.C.), where it was decided that whether a party making confessions was so much under the influence of intoxicating liquor, as not to understand what he was confessing, is a question for the jury. Also, Commonwealth v. Whittemore (1858), 11 Gray 201 (Mass. S.C.), Commonwealth v. Curtis (1867), 97 Mass. R. 574 (S.C.), Commonwealth v. James (1868), 99 Mass. R. 438 (S.C.), Commonwealth v. Cuffee (1871), 107 Mass. R. 285 (S.C.). The question usually was whether certain words amounted to an inducement to the accused to confess. See cases, supra, and Commonwealth v. Crocker (1871), 108 Mass. R. 464 (S.C.), Commonwealth v. Cullen (1873), 111 Mass. R. 435 (S.C.), Commonwealth v. Mitchell (1875), 117 Mass. R. 431 (S.C.); Commonwealth v. Smith (1876), 119 Mass. R. 305, Commonwealth v. Holt (1876), 121 Mass. R. 61 (S.C.), Commonwealth v. Segg (1878), 125 Mass. R. 210 (S.C.), Commonwealth v. Culver (1879), 126 Mass. R. 464 (S.C.).

"Where they are entirely voluntary, they are to be received, but where they are drawn out by any expectation of favor or by menaces, they are to be rejected. The question is ... whether the confessions were voluntary or not."

In New York, in the case of People v. Rankin,⁷¹⁰ a marshall induced the female accused to confess by telling her, "if you do not tell all you know about the business, you will be put in the dark room and hanged." In excluding the confession, the court stated⁷¹¹

"The confession of a prisoner must be free and voluntary, or it cannot be given in evidence upon his trial. ... A confession upon an official examination, or to other persons, if obtained under the impression of hope or fear, cannot be admitted in evidence, however slight those impressions may be."

Any threat or promise would vaint the confession, and, if it were a question of competency of a subsequent confession, it was left to the jury to decide whether the earlier promises continued their influence,⁷¹² or whether the earlier confession influenced the latter.⁷¹³ Confessions taken by the police were presumed to be voluntary,⁷¹⁴ and if facts were discovered by reason of an induced confession, these facts were received in

⁷¹⁰ Rep Cr. L Cas (1807) 467 (Oyer & Term.)

⁷¹¹ Ibid., at . 469

⁷¹² See, Bowdhan's Case (1822), 4 City Hall Rec. 136 (N.Y. Sess.), Steel's Case (1821), 6 City Hall Rec. 5 (N.Y. Sess.)

⁷¹³ See, Stake's Case (1821), 6 City Hall Rec. 177 (N.Y. Sess.)

⁷¹⁴ See, for e.g., William's Case (1819), 1 City Hall Rec. 149 (N.Y. Sess.)

evidence,⁷¹⁵ especially so if they were sufficient to establish the guilt of the prisoner.⁷¹⁶ Nor was there any duty on the person taking the confession to warn the accused, either that he was not bound to confess, that his confession should be free and voluntary or that it would be read in evidence against him.⁷¹⁷ Voluntary confessions were

715 See, for e.g. Tucker's Case (1820), 5 City Hall Rec. 164 (N.Y. Sess.), Milligan and Welchman's Case (1821), 6 City Hall Rec., 10 (N.Y. Sess.)

716 See, Jackson's Case (1819), 1 City Hall Rec. 28 (N.Y. Sess.)

717 See, People v. Maxwell [1823] Cr. Rec. 163 (Oyer & Terminer, N.Y.)

accepted as best evidence.⁷¹⁸ Induced confessions were

718 In People v. Robertson et al. [1822] Cr. Rec. 66 (Cyer & Terminer, N.Y.), a case of grand larceny where the examining magistrate told the wife of the accused that "if what she told him was true, it was better for her husband to confess", the court stated at pp. 68, 69

"It is necessary to make the examination of a prisoner's evidence upon his trial, that it should be made without any menace or terror held out to him, or any species of undue influence used, it must be free and voluntary. It must not be induced by the flattery of hope, or the fear of torture..."

As to other cases formative of the rule in New York in the nineteenth century, see Hendrickson v. People (1854), 10 N.Y. 13 (C.A.), where Selden, J., dissenting, stated at p. 33 "If by voluntary is meant uninfluenced by the disturbing fear of punishment, or by flattering hopes of favor, the expression may be accurate. But it is liable to mislead because it suggests the idea that the rejection of what are termed involuntary confessions flows from that principle of common law which is supposed mercifully to exempt persons from all obligations to criminate themselves, and which is expressed by the maxim nemo tenetur prodere seipsum ... Nothing can be clearer, indeed, than that the rule of exclusion rests, not upon the compulsory manner of obtaining the confessions but upon the dangerous and unreliable nature of the evidence", People v. McMahon (1857), 15 N.Y. 384 (C.A.), People v. Rogers (1858), 18 N.Y. 9 (C.A.), People v. Wentz (1867), 37 N.Y. 303 (C.A.), Duffy v. People (1863), 26 N.Y. 558 (C.A.), People v. Phillips (1870), 42 N.Y. 200 (C.A.), Woodford v. People (1875), 62 N.Y. 117, After September, 1881, confessions were governed by s. 395, N.Y. Cd. Crim. Proc., which stated

"A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he should not be prosecuted therefor, but it is not sufficient to warrant his conviction without additional proof that the crime charged has been committed." See, for e.g., People v. McElroy (1883), 21 N.Y. 241 (J.A.)

rejected as being unreliable and possibly false.

As early as 1818⁷¹⁹ the rule regarding extra-judicial confessions was considered in New Jersey, and ten years later,⁷²⁰ it was accepted that the true criterion was the actual state of mind of the accused at the time of making the confession, and whether at that time he was under any influence of hope or fear. Similarly, by 1829,⁷²¹ the concept of voluntariness as a basis for admissibility, was firmly imbedded in the jurisprudence of the state of Missouri, and by 1850, a similar claim could be made by all state jurisdictions.⁷²² Although there

719 See, State v. Aaron (1818), 7 Am. Dec. 592 (N.J.S.C.)

720 State v. Guild (1828), 18 Am. Dec. 404 (N.J.S.C.)

721 Lector v. State (1829), 22 Am. Dec. 454 (Mo. S.C.), For a review of the law in Missouri, see William M. Howard, Admissibility of Confessions of Guilt in Missouri (1958), 23 Mo. L. Rev. 331

722 For e.g., see State v. Soper et al. (1839), 33 Am. Dec. 665 (Me. S.C.), Brown v. Commonwealth (1838), 33 Am. Dec. 263 (Va. S.C.), State v. Phelps (1839), 34 Am. Dec. 672 (Vt. S.C.), Findley v. State (1841), 36 Am. Dec. 557 (Ind. S.C.), See, generally, 3 Wigmore, Evidence, (3rd. ed.), tit. "Confessions", Bates Booth, Confessions and Methods Employed in Procuring Them (1930), 4 So. Cal. L. Rev. 83, Notes Elements in the Admissibility of Confessions (1932), 18 Iowa L. Rev. 73, Confession Induced by Promise of Benefit (1925), 25 Mich. L. Rev. 308, George A. Baldwin, James A. Patterson, Admissions, Confessions and Declarations in Pennsylvania (1936), 2 U. of Pitts. L. Rev. 180, James T. Landye, Confessions (1934), 13 Ore. L. Rev. 249, Henry Christopherson, Confessions [1945] Wis. L. Rev. 257, Edward Brandt Latimer, The Admissibility of Confessions in Evidence in Criminal Courts [1952-53] S.C.L.Q. 268, 14 Am. Dig. 1833.

were differences within the rule as adopted by the various states,⁷²³ Professor Greenleaf, writing on evidence at the time, was able to state that the rule of law, applicable to all cases, demanded that a confession shall have been made voluntarily, without the appliances of hope or fear.⁷²⁴

11. The Test of Voluntariness and Bram v. United States

The first case to reach the Supreme Court of the United States was that of Hopt v. Utah,⁷²⁵ and if one considered the position of importance previously bestowed on English precedent by both state and federal courts in the evolution of their respective rules regarding confessions, there could be little doubt as to what approach would be taken by the Supreme Court. In that case, the accused was arrested by a detective for murder and then given into the custody of a policeman. A few

723 For e.g., some states have held that the burden is on the accused to negative a presumption of voluntariness. See, McGee v. State (1952), 104 N.E. 2d 726 (Ind.) State v. Rogers (1951), 64 S.W. 2d 572 (T.C.). Similarly, some states and courts have not accepted the concept of person in authority. See, Bram v. United States (1897), 168 U.S. 532, at p. 557

724 Greenleaf, Op. Cit., supra, fn. 3, at p. 264

725 (1884), 110 U.S. 574

minutes later, the detective, who had remained out of the hearing of the policeman and the accused, joined them, at which time the accused immediately confessed. At the trial, the policeman was not called to give evidence, and it was now contended on behalf of the convicted accused that the policeman may have induced the accused to confess.

It was held by the Court,⁷²⁶ speaking through Hallan, J., that since there was no suggestion on behalf of the accused that voluntariness of the confession would have been negatived if the policeman had testified, and since nothing appeared from the circumstances suggesting collusion between the detective and the policeman, there was no reason for the lower court to exclude the confession from evidence.

726 The court relied on the English cases of R. v. Cleves, supra, fn. 243, R. v. Williams, 3 Russ. Cr. (Snars. ed.) 431, and R. v. Warner 3 Russ. Cr. (Snars. ed.) 432. In R. v. Williams, on similar facts, it was contended that the constables ought to be called to prove that nothing had been said or done to induce the accused to confess. But Taunton, J., after consulting with Litchdale, J., stated "We do not think, according to the usual practice, that we ought to exclude the evidence because a constable may have induced the prisoner to make the statement, otherwise he must in all cases call the magistrates or constables before whom or in whose custody the prisoner has been." Here, counsel for the accused, by citing R. v. Harrington, supra, fn. 103, was in effect contending that unless the policeman was called, the confession was not affirmatively shown to have been voluntary.

The Court, approving the leading English case of R. v. Warickshall,⁷²⁷ accepted the voluntary - trustworthy approach to confessions, and Harlan, J., stated for the Court ⁷²⁸

"But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made, either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprive him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law."

Eleven years later, the subject of extra-judicial confessions again arose for the consideration of the Court in Spartan v. United States,⁷²⁹ posing the question of whether certain words amounted to an inducement for the first time, as well as whether custody or confinement is in itself sufficient to justify exclusion of a confession or statement as not being voluntary. The accused, with others, being suspected of killing their second mate, were placed in irons, and remained so until their ship reached port, more than one thousand miles later. The

727 ubi supra, fn. 71

728 supra, fn. 725, at p. 534

729 (1895), 156 U.S. 51

captain of the ship told one of the others confined with the accused to keep his statement until the right time came and then "tell the truth". Harlan, J., again speaking for the Court, observed ⁷³⁰

"It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the confession was voluntarily made or was extorted by threats or violence or made under the influence of fear. But confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises."

As to whether the words amounted to an inducement, the Court held they did not, on the authority of the English cases of R. v. Court⁷³¹ and R. v. Reeve,⁷³² and after referring to their earlier decision in Loft v. Utah,⁷³³ reasoned that

"Nothing said ... was at all calculated to put him in fear or to excite any hope of his escaping punishment by telling what he knew or witnessed or did in reference to the killing."⁷³⁴

⁷³⁰ ibid, at p. 55

⁷³¹ ibi supra, fn. 90

⁷³² ubi supra, fn. 168

⁷³³ supra, fn. 725, which had earlier approved R. v. Warickshall, ubi supra, fn. 71 and R. v. Baldry, ubi supra, fn. 84

⁷³⁴ supra, fn. 729, per Harlan, J., at p.56. The Court also decided that, generally speaking, confessions were only evidence against those who made them. There, however, two persons were jointly tried, the confession of one is admissible against the other, if made in his presence, and under circumstances which would lead to the inference that he accepted it as being true.

It was clear that the Court was determined not only to adopt the English approach to the confessions, but also, the English rule itself. By so doing, it became seized with the difficulties attending the English jurisprudence on the subject. As, for example, it had accepted without question the heresy that an inducement, in order to exclude a confession, must relate to the charge, or refer to the escape from punishment under the charge,⁷³⁵ although there was no decided case as authority for this contention.

The following year, in Pierce v. United States,⁷³⁶ where the accused, while under arrest and in handcuffs for murder, had made a statement, it was held by the Court, citing its earlier decisions, that custody per se will not render a statement inadmissible, nor would the mere presence of police officers be an inducement within the rule and sufficient to negative the requisite voluntariness. Similarly, in Wilson v. United States,⁷³⁷ where an accused, in order to avert suspicion from himself in a murder inquiry, answered the question of a commissioner, it was held that his answers were not rendered inadmissible because the commissioner did not inform him that he could have the aid of counsel, nor caution him that he

735 ibid, supra, fn. 728. See, England, ubi supra, c.4

736 (1895), 160 U.S. 355

737 (1895), 162 U.S. 613

need not answer, or that his statements might be used against him.⁷³⁸ Fuller, C.J., speaking for the Court, and again approving the voluntary-trustworthy approach as stated in Hopt v. Utah,⁷³⁹ observed ⁷⁴⁰

"In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort."

Up to this time, the Supreme Court of the United States, relying exclusively on decisions in English courts, accepted without question the rule that confessions in order to be acceptable as evidence against an accused, had to be voluntary. The question in each case,

738 The Supreme Court of the United States adopted a broad definition as to what statements came within the ambit of confessions. Clearly, acknowledgements of guilt, and those admissions tending to prove guilt were required to be voluntarily given. Hopt v. Utah, supra, fn. 725, Bram v. United States, supra, fn. 723, In Wilson v. United States, ibid, the statement was, in effect a denial of guilt. However, because it contained answers to questions which were made the basis of contradiction at the trial, the Court considered it within the rule. As Fuller, C.J., stated at p. 622 "Although his answers to the questions did not constitute a confession of guilt, yet he thereby made disclosures which furnished the basis of attack, and whose admissibility may be properly passed on in the light of the rules applicable to confessions."⁴¹

739 supra, fn. 725

740 supra, fn. 737, at p. 623

involving a conviction based wholly or in part on a statement or confession of an accused, was whether the confession or statement was in fact voluntary as being free from any sort of compulsion or inducement operating on the mind of the accused at the time the statement or confession was made. If, on a perusal of the record of the lower court, it could be said that what was spoken to the accused amounted, under English precedent, to an inducement, the conviction would be rendered nugatory. But to 1856, the Court had not been forced by any trial record to so conclude. Its sole effort, on the few cases rising for its consideration, was directed to the affirmation of circumstances which did not exclude the statement or confession.

There was no independent reasoning by the Court, nor was there any attempt to justify the rule excluding extrajudicial confessions within the framework of American jurisprudence. Relying heavily on such English authorities as Russell, it had accepted that voluntary confessions were admissible as the highest creditable proof, because an accused would not lightly condemn himself unless it were true. Similarly, it rejected confessions which were not voluntary because there arose the possibility of the confessions being untrue and, therefore, unreliable as evidence. To all intents and purposes, the Court although American in nature, was English in practice.

The expected reaction was soon manifested in the case of Bram v. United States.⁷⁴¹ It was a reaction by the Court to its earlier reliance on English precedent, coupled with an awareness of it to the need to justify the confession rule as regards American law. The circumstances revealed by the trial record presented a new situation to the Court. The accused, who was a ship's first officer was convicted of murdering his captain. While at sea, the bodies of the captain, his wife and the second mate were discovered on the ship, and although it was clear that they were murdered, nothing directed suspicion to anyone. One of the seamen had ^{then} told other members of the crew that he had seen the accused kill the captain. On this information, the accused, although declaring his innocence, was placed in irons by the crew, together with another seaman to whom some suspicion had pointed ^{now}. On arrival of the ship in the Canadian port of Halifax, custody of the prisoners was taken by the local chief of police. While in custody, the accused was stripped of his clothing and examined by a detective, and although he denied knowing anything about it, he did make some statements made use of against him at his subsequent trial.

At the trial, the detective testified that he had made no threats or inducements of any sort, and that the statements made by the accused was entirely voluntary. He did say that he told the accused "Now, look here,

⁷⁴¹ suora, fn. 723

Eram, I am satisfied that you killed the captain. But some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders."

The Court, giving especial consideration to the fact that the accused was stricken while questioned by the detective, held that the circumstances amounted to an exertion of influence, rendering the statement of the accused not voluntary, and ordered a new trial. But the Court did not adhere to its earlier approach by deciding solely on the basis of English precedent. Rather, it justified the voluntary rule in regard to the Constitution of the United States, and where previously a confession in like circumstances would have been excluded simply because a perusal of the trial record indicated it was not voluntary, now became excluded because the confession, being not voluntary, was in violation of the Fifth Amendment to the Constitution, which demanded that "no person shall be compelled in any criminal case to be a witness against himself."

White, J., rendering the majority opinion of the Court,⁷⁴² and holding that the ". . . generic language of

⁷⁴² Brewer, J., dissenting, with Fuller, C.J., and Brown, J., concurring in the dissent, maintained that the statement was voluntary, and that even if an inducement could be said to be present, the statement was not a "confession" within the rule.

the amendment was but a crystallization of the doctrine as to confessions ...",⁷⁴³ approved an earlier statement of Brown, J., in Brown v. Walker,⁷⁴⁴ a case not involving confessions, where he observed, obiter⁷⁴⁵

"The maxim Nemo tenetur seipsum accusare had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1633, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions ... made the system so odious as to give rise to a demand for its total abolition. ... So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment."

743 supra, fn. 723, at p. 543

744 (1896), 161 U.S. 591

745 ibid, at . 593

After an extensive review of authorities, cited as support by the Court for its assertion of a constitutional basis for the rule regarding confessions,⁷⁴⁶ and an attempt by the Court to reconcile its present reasoning with earlier cases decided by it,⁷⁴⁷ the Court concluded:⁷⁴⁸

"To communicate to a person suspected of the commission of crime the fact that his cosuspect has stated that he has seen him commit the offence, to make this statement to him under circumstances which call imperatively for an admission or denial and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought, and then to use the denial made by the person so situated as a confession. is not only to compel the reply but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of."

746 The Court, it would appear, was persuaded by Gilbert, Evidence (2d. ed.), at p. 139, in its holding that the privilege against self-incrimination (of the fifth amendment) was, in effect, the confession rule. As to England, see, England, supra, c.1); it would appear that early consideration of confessions in the American colonies was inextricably tied up with the maxim nemo tenetur prodere seipsum. See, supra, fn. 693.

747 supra, fn. 723, at p. 542; At p. 548 it was stated: "And the accuracy with which the doctrine as to confessions as now formulated embodies the rule existing at common law and imbedded in the Fifth Amendment was noticed by this Court in Wilson v. United States,/supra, fn. 737/"

748 supra, fn. 723, at p. 564

The test, however, as to the validity of a conviction in a federal court remained the same. Could it be said on the totality of circumstances as exposed by the trial record that the confession, on which the conviction was based, was perfectly voluntary?⁷⁴⁹ If so, the conviction would stand, and the Court affirmed its earlier decisions that confinement,⁷⁵⁰ or lack of warning,⁷⁵¹ in themselves were not enough to taint the confession and subsequent conviction. If, as regards the accused, it

749 In Ferovich v. United States (1907), 205 U.S. 85, it was held that a deputy marshall may testify as to conversations between himself and the accused, which were not induced by duress, intimidation, or other improper influences, but were perfectly voluntary.

750 See, U.S. ex rel. Bilokumsky v. Tod (1923), 263 U.S. 149.

751 In Powers v. United States (1912), 223 U.S. 203, it was held inter alia, following Wilson v. United States, supra, fn. 737, that the admission in evidence at the trial of the testimony of the accused, voluntarily and understandingly given at the preliminary hearing, does not violate his privilege against self-incrimination under the Fifth Amendment of the Constitution, although he was not warned at the time that what he said might be used against him.

"Affirmatively and fully ... appears that all that he said in the matter was said voluntarily, without any inducement or influence of any kind being brought to bear upon him", 752

then the conviction will be affirmed. The scope of inducement was unrestricted by the Court, as to category, and there, from the undisputed facts of the trial court record it appeared, that the time of interrogation was calculated to entrap the accused into a confession of guilt, the Court would not hesitate in reversal of the lower court judgment.

In Zhang Sun Jan v. United States,⁷⁵³ the accused was convicted of murder, which conviction was affirmed by the Court of Appeals of the District of Columbia. The undisputed facts of the record pertaining to the confession of the accused were that the accused was ill at the time of interrogation, that the interrogation was persistent and lengthy, and that the accused was taken to examine and re-examine the scene of the murder, and every exhibit connected with it. Brandeis, J., speaking for the Court, in reversing the judgment of the lower court, stated, citing Bran v. United States⁷⁵⁴

"In the Federal courts the requisite of voluntariness is not satisfied by establishing

752 Gardner v. United States (1902), 186 U.S. 224, per Brewer, J., for the court, at p. 230

753 (1924), 260 U.S. 1

754 Id., at p. 11

merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was in fact, voluntarily made. ... a confession obtained by compulsion must be excluded, whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise."

This statement of the law was more than a recognition of the rule as previously stated in the earlier case. It was, rather, an emphatic denial by the Court as to the existence of any other test for the competency of confessional statements in lower federal courts,⁷⁵⁵ or any limitation on the proper criterion of voluntariness.

755 In the judgment reversed, Ziang Sun Wan v. United States 53 App. D. C. 250, it had been suggested by the Court, at p. 289, that "The crucial test to be applied in determining whether or not a confession is voluntarily or involuntarily made depends upon its truth or falsity."

CHAPTER TWO

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND CONFESSIONS

1. The Evolution of Due Process and Jurisdictional Factors.

The Fourteenth Amendment to the Constitution of the United States, which had been primarily adopted for the protection of members of the coloured race,⁷⁵⁶ was proclaimed in force on July 28, 1868, and demanded that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Previous to the coming into force of this amendment, the phrase "due process of law", also existing in the federal Fifth Amendment, had arisen for interpretation. As early as 1819, the phrase, or clause, was held to be "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."⁷⁵⁷ In 1856, in Den ex dem. Murray v. Hoboken

756 See, Charles Warren, The Supreme Court in United States History (1947), c. xxxiii, at p. 600; See, also, Bernard Schwartz, The Supreme Court: Constitutional Revolution in Retrospect (1957), at p. 162, et seq.

757 See, Bank of Columbia v. Okely (1819), 4 Wheat S.C. 235.

Land & Improvement Co.,⁷⁵⁸ the learned Curtis, J., delivering the opinion of the Court, stated,⁷⁵⁹ after tracing the origin of "due process" to be equivalent to per legem terre, i.e. the law of the land, in Magna Charta :⁷⁶⁰

"To what principles, the, are we to resort to ascertain whether this process exacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."⁷⁶¹

But the Supreme Court, holding that the phrase had the same meaning in the Fourteenth Amendment, as it did in the Fifth, refused to strictly define it. In Davidson v.

758 (1856), 18 How. S.C. 272

759 ibid, at p. 276

760 See, England, supra, fn. 16; See, as to use of the phrase "due process" in early English statutes, 28 div. 111, c.3; 37 Edw. 111 c. 18; 42 Edw. 111, c.3; See, also, Coke, 2 Inst. 50.

In 26 Edw. 111, Rot Parl., n.20, it was stated that no man ought to be imprisoned by special command without indictment or other due process to be made by the law.

761 Approved in Hallinger v. Davis (1892), 146 U.S. 314; Holden v. Hardy (1898), 169 U.S. 366; Hurtado v. California (1884), 110 U.S. 516; Compare, Powell v. Alabama (1932), 287 U.S. 45

New Orleans,⁷⁶² Miller, J., speaking for the Court
observed:⁷⁶³

"But, apart from the imminent risk of failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." ⁷⁶⁴

The effect of the Fourteenth Amendment due process was not to withdraw the administration of justice from the states.⁷⁶⁵ It was, rather, to qualify the

762 (1878), 96 U.S. 97

763 ibid, at p. 104

764 In Malinski v. New York (1945), 324 U.S. 401, the learned Frankfurter, J., noted at pp. 413, 414;

"Experience has confirmed the wisdom of our predecessors in refusing to give a rigid scope to this phrase. It expresses a demand for civilized standards of law. It is thus not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society."

765 Under Art. I, s.10, U.S. Const., criminal justice was left to the States, without restriction whatever.

previously carte blanche situation of the states in their attitudes toward criminal justice, by imposing on them the constitutional duty that their criminal procedures must not result in a denial of fundamental rights.⁷⁶⁶ In Hurtado v. California,⁷⁶⁷ it was contended that the due process clause of the Fourteenth Amendment was violated, where the procedure of indictment was not employed by the state in its prosecutions. Matthews, J., in refusing this contention, and holding that the procedure of prosecution by information, after examination and commitment by a magistrate did not violate due process, observed, in a landmark judgment:⁷⁶⁸

766 Peckham, J., in West v. Louisiana (1904), 194 U.S. 258, at p. 263, approving Brown v. New Jersey (1899), 175 U.S. 172, observed:

"The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." Fundamental rights, safeguarded against federal action by the first eight amendments to the Constitution, were also safeguarded against state action by the due process clause of the Fourteenth Amendment. See, Grosjean v. American Press Co. (1936), 297 U.S. 233, at pp. 243, 244.

767 supra, fn. 761

768 ibid, at p. 535

"Due process of law /in the Fifth Amendment/ refers to that law of the land, which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."

Rather than being a shorthand repetition of the original Federal Bill of Rights,⁷⁶⁹ which was, in effect, a formulation of protection from clear-cut, historical grievances previous to 1776 and separation, the Fourteenth Amendment's due process clause functioned independently as a directive to the States to conform in their present and future conduct, to non-arbitrary standards.⁷⁷⁰ When the claim arose before the Supreme Court that a right had been denied under the Fourteenth Amendment, the question to be answered in all cases was whether the claimant was deprived, by the criminal proceedings resulting in his

769 See, Hurtado v. California, *supra*, fn. 761; Twining v. New Jersey, *infra*, fn. 773; Malinski v. New York, *supra*, fn. 764; Gideon v. Wainwright (1963) 372 U.S. 335, per Douglas, J.

770 See, Bank of Columbia v. Okely, *supra*, fn. 757; Twining v. New Jersey, *ibid*; Manley v. Georgia (1929) 279 U.S. 1; Francis J. Swayze, Judicial Construction of the Fourteenth Amendment (1912), 26 Harv. L. Rev. 466.

conviction, of his constitutional guarantee of due process of law.⁷⁷¹

Although its maximum effectiveness depended on its being unrestricted as to definition, the due process clause has been referred to by various judges, in explanation of that for which it stands.⁷⁷² In Twining v. New Jersey, Moody, J., queried:⁷⁷³

"Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law."

In Snyder v. Massachusetts, the learned Cardozo, J., holding that due process was not violated where the motion of the accused to be present at a view by the jury is denied, noted:⁷⁷⁴

771 See, Malinski v. New York, supra, fn. 764, at p. 416:
See, also Powell v. Alabama, supra, fn. 761

772 See, Bank of Columbia v. Okely, supra, fn. 757

773 (1908), 211 U.S. 78, at p. 106

774 (1934), 291 U.S. 97, at p. 105. In Palko v. Connecticut (1937), 302 U.S. 319, the same learned judge observed:

"... immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, became valid as against the states."

See, also, Rochin v. California (1952), 342 U.S. 165

"The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Similarly, in Malinski v. New York,⁷⁷⁵ the learned Frankfurter, J., referred to the clause as being collective of:

"... those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses."

Indeed, it may be fairly stated that the Court, in assessing whether the due process clause has been violated, bases its conclusion on the answer to the question whether the accused was deprived of a fair trial by state action.⁷⁷⁶

775 supra, fn. 764, at p. 417. In Herbert v. Louisiana (1926), 272 U.S. 312, at p. 316 Van De Vanter, J., stated due process to include:

"... fundamental principles of liberty and justice which lie at the bases of all our civil and political institutions." See, also, Buchalter v. New York (1943), 319 U.S. 427

776 For e.g., see, Moore v. Dempsey (1923), 261 U.S. 86; Gibbs v. Burke (1949), 337 U.S. 773. As to due process generally, see, Samuel Bader, Coerced Confessions and The Due Process Clause (1949), 15 Brooklyn L. Rev. 51. In Lisenba v. California (1941) 314 U.S. 219, Roberts, J., speaking for the majority, observed: "As applied to a criminal trial denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt."

If there was any doubt as to whether the broadening scope of due process would attach to the admissibility of confessions in state as well as federal courts,⁷⁷⁷ such doubt was clearly resolved in Brown v. Mississippi,⁷⁷⁸ a decision of the Supreme Court in 1936. Although it may be said that this case, by imposing a constitutional basis to the admissibility of confessions, had undoubtedly changed the law, it was clearly a logical extension of constitutional principle earlier propounded by the Court and first attaching to confessions in lower federal courts in Bram v. United States.⁷⁷⁹

777 The Supreme Court, when reviewing judgments of federal courts, has a broad supervisory authority, which is not solely limited to the inquiry as to whether the judgment is constitutionally valid. Its authority extends to the supervision over procedure and practice of federal courts, and the Court is free to declare a confession inadmissible in a federal criminal trial whenever this is considered necessary in the interests of justice. In other words, the supervisory authority extends to the maintenance of civilized standards of procedure and evidence, in the formulation of which the court is not restricted. See, McNabb v. United States (1943), 318 U.S. 332

778 (1936), 297 U.S. 278

779 supra, fn. 723. It would appear that the Bram doctrine would be invoked in very few cases. See, supra, fn. 777. See, also, Shotwell Mfg. Co. et al. v. United States (1963), 371 U.S. 341, especially the dissenting opinion of Black, J., with Warren, C.J., and Douglas, J., concurring.

Qualification had already been imposed on state criminal procedure in that any procedure adopted by the states had to have, as its lowest common denominator, the assurance that the accused would not be deprived of his "fundamental rights" by its operation.²⁸⁰ From this, little advocacy was necessary to persuade the Court to conclude that where a state had made use of an involuntary or extorted confession to secure the conviction of an accused, the accused was thereby deprived of his fundamental right to a fair trial, i.e. the due process clause of the Fourteenth Amendment was thereby violated.

In order for an accused not to be deprived of liberty without due process of law, the imposed condition was that the confession had to be voluntary, in the sense of being a product of the free will of the accused, unencumbered by any form of compulsion or coercion. If the confession or incriminating statement or admission of the accused was obtained by extortion or compulsion, thereby depriving the accused of the choice of speaking or remaining silent, the confession could not be said to be voluntary, and the use of such confession at the trial of the accused was violative of constitutional due process.

780 See, for e.g., West v. Louisiana, supra, fn. 766

The test of voluntariness, which had earlier been an evidential standard and by Bram v. United States⁷⁸¹ had been given scope in a constitutional environment with reference to federal courts, was now, by Brown v. Mississippi,⁷⁸² to similarly take effect with regard to review of state court conviction.⁷⁸³

It is clear that the Court would reverse the conviction either from a state or federal court, if it is satisfied that it was based on a coerced or involuntary confession. But the reviewing power of the Court is not as broad as far as a state conviction was concerned. It

781 supra, fn. 779

782 supra, fn. 778

783 As to review of federal courts, see supra, fn. 777; United States v. Mitchell (1944), 322 U.S. 65; Gallegos v. Nebraska (1951), 342 U.S. 55. It may be said that by due process, the Supreme Court was also compelling police officers to conform to a high standard of investigative conduct which demanded civilized standards of interrogation practices, the impropriety of which the Court was first made aware of in Ziang Sun Wan v. United States, supra, fn. 753. See, infra, Spano v. New York, fn. 818, per Warren, C.J., and Culombe v. Connecticut, fn. 824, per Frankfurter, J., where both learned judges accepted without question that the nice problem presented to the Court within the test of voluntariness was the reconciling of police investigative measures with the constitutional rights of the accused. See, also, infra, fn. 805.

is, rather, limited to the inquiry whether the due process clause of the Fourteenth Amendment has been violated.⁷⁸⁴

As the learned Frankfurter, J., observed in McNabb v. United States:⁷⁸⁵

"... while the power of this court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice' ... which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the Federal Courts is not confined to ascertainment of constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law'..."

In determining whether the use of the confession was a denial of due process, the Supreme Court is not precluded by a verdict of the lower state court, which may have found that the circumstances under which the confession was made did not amount to duress. Rather, it is the considered duty of the Court to make an independent examination of the trial court record, and although questions

784 See, supra, fn. 91; Malinski v. New York, supra, fn. 764; Watts v. Indiana (1949), 338 U.S. 49, per separate opinion of Frankfurter, Murphy & Rutledge, J.J., Fikes v. Alabama (1957), 352 U.S. 191, per Harlan, J., dissenting.

785 supra, fn. 777 at p.

of fact are solely determined within the sphere of the trial court, if the undisputed facts of the record are indicative of coercion, the Supreme Court will not hesitate in holding that such conviction based in whole or in part on the coerced or involuntary confession violates the due process clause of the Fourteenth Amendment.⁷⁸⁶ In Lyons v. Oklahoma,⁷⁸⁷ Reed, J., delivering the opinion of the Court, stated in approval of Lisenba v. California:⁷⁸⁸

"When conceded facts exist which are irreconcilable with such mental freedom, /i.e. voluntariness/ regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually

786 See, for e.g., Chambers v. Florida (1940), 309 U.S. 227; Lisenba v. California, *supra*, fn. 776; Malinski v. New York, *supra*, fn. 764; Ashcraft v. Tennessee (1944), 322 U.S. 143; Ward v. Texas (1942), 316 U.S. 547; Stroble v. California (1952), 343 U.S. 181; Stein v. New York (1952), 346 U.S. 156; Haley v. Ohio (1948), 332 U.S. 596; Thomas v. Arizona (1958) 356 U.S. 390; Payne v. Arkansas (1958), 356 U.S. 560. Some judges contend that use of a coerced confession in securing a conviction violates the Fifth Amendment's veto against compulsory self-incrimination, made applicable to the States by the Fourteenth Amendment. See, Leyra v. Denno (1954), 347 U.S. 556; Taylor v. Alabama (1948), 335 U.S. 252, per Murphy, J., dissenting; Lyons v. Oklahoma, *infra*, fn. 787, per Murphy, J., dissenting.

787 (1944), 322 U.S. 596, at p. 602

788 *supra*, fn. 786

occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision."

Similarly, in Watts v. Indiana,⁷⁸⁹ Frankfurter, J., noted, with Murphy and Rutledge, J.J., concurring:

"... any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. But if force has been applied, this Court does not leave to local determination whether or not the confession was voluntary."

789 supra, fn. 784, at p.

11. Due Process: The Test of Voluntariness in a Constitutional Environment

790

Brown v. Mississippi was the first case decided by the Supreme Court in which the question arose, whether state convictions which rest solely upon confessions shown to have been extorted by officers of a state by coercive practices were consistent with the due process clause of the Fourteenth Amendment. In that case, the accused, who were ignorant negroes, were convicted solely upon their confessions, which were made only after their being whipped, and being put through other atrocities which had moved the learned Griffiths J., in the highest court of the state, dissenting, to observe:⁷⁹¹

"Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government."

On a review of the admitted facts of torture, as evidenced in the record of the trial proceedings, the Court had stated that there was enough before the lower court to prove beyond doubt that the confessions were not voluntary, and that

790 supra, fn. 778

791 161 So. 465, at p. 471.

"It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis of conviction and sentence was a clear denial of due process."⁷⁹²

Voluntariness as the test of due process was thus established, and that the question to be answered when a claim was made that due process had been violated, was whether on the undisputed facts of the record it could be said that the confession on which the conviction was based, was freely and voluntarily made. Although the case was concerned with torture, there was no indication by the Court that the scope of voluntariness was to be restricted. Rather, there was every indication that the test, as the standard of due process itself, was to be completely unrestricted in scope, and, in effect, to be treated as it had been previously treated by the Court at common law⁷⁹³ and with regard to violation of the Fifth Amendment.⁷⁹⁴

792 supra, fn. 790, at p. 286

793 See, Ziang Sun Wan v. United States, supra, fn. 753; Hardy v. United States, supra, fn. 752; Bram v. United States, supra, fn. 723.

794 See, Bram v. United States, ibid

In Chambers v. Florida,⁷⁹⁵ the accused, with others, while in custody for robbery and murder, without being formally charged, confessed, after five days of incessant interrogation by state officers and other persons. Black, J., delivering the opinion of the Court in reversal of the conviction, observed:⁷⁹⁶

"... the due process provision of the Fourteenth Amendment - just as that in the Fifth - has led few to doubt that it was intended to guarantee procedural standards, adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority."

The following year,⁷⁹⁷ the Court contrasted due process with the evidential rule regarding confessions at common law, and although the respective purposes of each were held to vary,⁷⁹⁸ there was no suggestion by the Court that

795 supra, fn. 786; See, case comment, (1940), 38 Mich. L. Rev. 858. See, also, the reversals, per curiam: Canty v. Alabama (1940), 309 U.S. 629; White v. Texas (1940), 309 U.S. 631; Lomex v. Texas (1941), 313 U.S. 544; Also, Vernon v. Alabama (1941), 313 U.S. 547; Reeves v. Alabama (1954), 348 U.S. 891; Compare, United States v. Williams (1951), 341 U.S. 70 and Williams v. United States (1951), 341 U.S. 97

796 ibid, at p. 245

797 Lisenba v. California, supra, fn. 776

798 ibid, at p. 236, per Roberts, J., "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."

the test of voluntariness in each case was not to be similarly treated.⁷⁹⁹ The inquiry by the Court was an inquiry into the totality of circumstances as manifested by the undisputed facts of record. If the totality of circumstances indicated any form of oppression or coercion, the requisite voluntariness of the confession was negatived, thereby resulting in a deprivation of the accused of liberty without due process of law.⁸⁰⁰ As Jackson, J., was later to state in a strong dissenting judgement, joined in by Roberts, J., and the learned Frankfurter, J.:⁸⁰¹

"Always heretofore the ultimate question has been whether the confessor was in possession of his own will and self-control at the time of confession. For its bearing on this question the Court always has considered the confessor's strength or weakness, whether he was educated or illiterate, intelligent or moronic, well or ill, Negro or white."

799 See, Black, J., at p. 238, where the learned judge dissented, arguing that the conviction should have been reversed. Note the reference to Chambers v. Florida, supra, fn. 786 and Bram v. United States, supra, fn. 723.

800 See, Ward v. Texas, supra, fn. 786, where reversal ensued of a conviction based on a confession obtained from an accused, under illegal arrest, after a delay in arraignment, during which time the accused was moved from county to county, while being continuously questioned and told of threats of mob violence. See, also, infra, fn. 814

801 infra, fn. 802, at p. 162 ; see, also, infra, fn. 814.

However, some confusion was added to the law in Ashcraft v. Tennessee.⁸⁰² In that case, the accused, who had been arrested on suspicion, confessed to murder, after thirty-six hours of practically continuous interrogation under powerful electric lights by relays of officers, investigators and lawyers. The Court held, in a majority opinion delivered by Black, J., that because of the inherently coercive effect of the interrogation, the confession was not voluntary but compelled. Although it appeared clear that the learned judge had simply intended to state that such manner of questioning of an accused was, in itself, sufficient to render a subsequent confession involuntary, his reference to "inherently coercive" was attacked in a strong dissenting opinion which forcefully noted:⁸⁰³

"A confession made by one in custody heretofore has been admissible in evidence unless it was proved and found that it was obtained by pressures so strong that it was in fact involuntarily made, that the individual will of the particular confessor had been overcome by torture, mob violence, fraud, trickery, threats or promises...

As we read the present decision the Court in effect declines to apply these well established principles. Instead, it (1) substitutes for determination on conflicting evidence the question whether this confession was actually produced by coercion, a presumption that it was, on a new

802 supra, fn. 786; For case comments, see (1944), 28 Marq. L. Rev. 125; (1944), 57 Harv. L. Rev. 919

803 ibid, at p. 157

doctrine that examination in custody of this duration is 'inherently coercive'; ..."

It was not a criticism as to the result. It was, rather, a criticism that the majority should have found as a fact that the accused's freedom of will was overborne or impaired, instead of delving into hitherto unknown criteria such as "inherent coerciveness". However, if the dispute in the case can fairly be attributed to a mistake in choice of wording by the learned Black, J.,⁸⁰⁴ it is otherwise clear that the learned judge made no mistake as to the intended effect of his judgment. It was clearly fulfilling the need of disciplining police forces which the learned judge had earlier considered to be a main purpose of due process itself.⁸⁰⁵ It was, in effect, a guarantee that the Court would essentially see police practices to conform to civilized standards, in regard to those in custody or under arrest.

804 It is submitted that it can. No attempt was made by the learned judge to disturb his previous judgments. See, for e.g., supra, fn. 799. Similarly, when the opportunity arose again, in Ashcraft v. Tennessee (1946), 327 U.S. 274, the learned judge merely stated: "Our reversal of Ashcroft's first conviction was on the ground that his conviction resulted from a trial so conducted as to deprive Ashcraft of due process of law in violation of the Fourteenth Amendment." See, also, Harris v. South Carolina (1949), 338 U.S. 68; Turner v. Pennsylvania (1948), 338 U.S. 62

805 See, supra, fns. 796, 783; infra, fn.s 818, 819, 824.

Where, therefore, the police had delayed the arraignment of an arrested accused, and held him incommunicado for three days during which he was prevented from seeing a lawyer and continuously questioned, and at the same time stripped naked to humiliate him and lead him to believe that he was going to "get a shellacking", a subsequent conviction was reversed by the Court as being based on a confession, which was not voluntary.⁸⁰⁶ Similarly, where a fifteen year-old negro lad was questioned for several hours after arrest, without any friend or legal counsel present or at hand, a majority of the Court held that the subsequent conviction was based on a confession which was obtained by methods at variance with fundamental concepts of fairness and justice, i.e. due process.⁸⁰⁷ The question in each case was simply

806 See, Malinski v. New York, supra, fn. 764

807 See, Haley v. Ohio, supra, fn. 786. Frankfurter, J., observed at p. 603
"But whether a confession of a lad of fifteen is 'voluntary' and as such admissible, or 'coerced' and thus wanting in due process, is not a matter of mathematical determination. Essentially it invites psychological judgment - a psychological judgment that reflects deep, even if inarticulate, feelings of our society. Judges must divine that feeling as best they can from all the relevant evidence and light which they can bring to bear for a confident judgment of such an issue, and with every endeavour to detach themselves from their merely private views."
See, also, Turner v. Pennsylvania, supra, fn. 804.

whether or not the confession was voluntary. If the methods employed by the police to obtain the confession were coercive, or oppressive, the confession was not voluntary, and therefore, any conviction based on such a confession was violative of due process of law.⁸⁰⁸

In Watts v. Indiana,⁸⁰⁹ the accused, suspected of murder, was solitarily confined by the police for two days. He was then questioned day and night, hours at a time, being deprived of sleep and a decent allowance of food. In violation of state law, he was not given a hearing before a magistrate, and was without friendly or professional advice, or advice as to his constitutional rights. In the Supreme Court, the confession was held, in these circumstances, not to be voluntary, and Frankfurter,

808 And this, even if testified at the trial by the accused that the confession never in fact was made. See, Lee v. Mississippi (1948), 332 U.S. 742; Or if the confession was true or not Taylor v. Alabama, per Murphy, J., supra, fn. 786, per Murphy, J., dissenting. In Payne v. Arkansas, supra, fn. 786, where the accused was arrested without warrant, denied a hearing before a magistrate as well as food for long periods, was held incommunicado and not advised of his right to counsel and to remain silent, and was threatened with mob violence by the chief of police, a majority of the Supreme Court held that the course of conduct of the law-enforcement officers resulted in a coerced confession, and the conviction was reversed. See, also, infra, fn. 810.

809 supra, fn. 784; See, also Harris v. South Carolina, supra, fn. 804

J., speaking for Murphy and Rutledge, J.J., observed:⁸¹⁰

"A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary."

In order for the confession or statement made by an accused to be competent evidence against him, it must, as previously under the common law rule, be an expression of the voluntary operation of the accused's mind. It is a product of the voluntary operation of the accused's mind only when the accused is accorded the complete freedom

fn. 809,
810 supra, at p. 53. The learned Douglas, J., concurring in a separate opinion, indicated his willingness to hold that delay in arraignment, per se, was sufficient to render a subsequent confession involuntary, when he stated: "The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country." In Harris v. South Carolina, supra, fn. 804 the accused confessed after protracted police interrogation, and after a threat by the sheriff to arrest his mother. He was not cautioned of his rights, nor given a preliminary hearing, and was denied the benefit of consultation with family and friends. As in Watts v. Indiana, supra, fn. 784, his subsequent conviction was reversed by the Supreme Court. See, also, Turner v. Pennsylvania, supra, fn. 804, and the reversal, per curiam, Johnson v. Pennsylvania (1950), 340 U.S. 881; Also, Agoston v. Pennsylvania (1950), 340 U.S. 844.

of choosing whether to speak or remain silent.⁸¹¹ If the accused is induced to speak or confess by actual physical violence, threats, or promises, he is deprived of this necessary freedom and his confession or statement is, therefore, not voluntary. Similarly, any form of psychological or physical strain deliberately imposed on the mind or person of the accused by interrogating officers, or other officers not concerned with the interrogation, and calculated to obtain the confession or statement of the accused, will result in that confession or statement being involuntary, as not being a product of the free operation of the will of the accused.⁸¹² To be admissible, it is necessary that the confession or statement

811 See, for e.g., Lyons v. Oklahoma, supra, fn. 787; Lisenba v. California, supra, fn. 776; Watts v. Indiana, supra, fn. 784

812 See, Watts v. Indiana, supra, fn. 784. The Supreme Court, in its inquiry, weighs the circumstances of police pressure against the particular accused. That which may break down the powers of resistance of one accused, may not do so to another. See, Fikes v. Alabama, infra, fn. 784; Stein v. New York, supra, fn. 786; Thomas v. Arizona, supra, fn. 786; See, also, Crooker v. California (1958), 357 U.S. 433. Blackburn v. Alabama, infra, fn. 819; supra, fn. 109.

be entirely voluntary, and it would appear that, as at common law,⁸¹³ negating factors are unrestricted as to kind, and what is or what is not voluntary, depends upon an assessment of the circumstances as exposed by the record of a particular case,⁸¹⁴ i.e. the totality of circumstances.

If the Court, in making its independent determination on the undisputed facts of the trial record, concludes that the confession or statement was not made freely and voluntary, the conviction will be reversed as being in violation of the due process clause of the Fourteenth Amendment.⁸¹⁵

813 See, Bram v. United States, supra, fn. 723

814 See, for e.g., Gallegos v. Nebraska, supra, fn. 783; Stroble v. California, supra, fn. 786; Stein v. New York, supra, fn. 786; Fikes v. Alabama, supra, fn. 784; Payne v. Arkansas, supra, fn. 786; Blackburn v. Alabama, infra, fn. 819; Reck v. Pate (1961), 367 U.S. 433; Townsend v. Sain, infra, fn. 819; Haynes v. Washington (1963), 373 U.S. 503; Clewis v. Texas (1967), 386 U.S. 707; Greenwald v. Wisconsin (1968), 390 U.S. 519

815 See, for e.g., Brown v. Mississippi, supra, fn. 778; Chambers v. Florida, supra, fn. 786; United States v. exrel. Jennings v. Ragen (1959), 358 U.S. 276.

Similarly, where a confession is shown to be involuntary at any stage during the trial, the accused is deprived of due process of law, unless the confession is excluded. See, Blackburn v. Alabama, infra, fn. 819

Custody, delay in arraignment and prolonged detention are but individual circumstances in the Courts determination of voluntariness,⁸¹⁶ and if, on the undisputed facts it is not clearly proven that the due process clause was in fact violated in the use by the lower court of a coerced or involuntary confession, the Supreme Court of the United States will affirm the conviction.⁸¹⁷

In Spano v. New York,⁸¹⁸ where the police had deceived the accused into confessing by threats to him of the loss of his job and its subsequent effect on his family, the learned Warren, C.J., did not accept a limited basis as to why involuntary confessions were excluded from evidence. There he observed:

"The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent trustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

816 See, Hopt v. Utah, *supra*, fn. 725; Sparf v. United States, *supra*, fn. 729; Pierce v. United States, *supra*, fn. 736; Bram v. United States, *supra*, fn. 723; Powers v. United States, *supra*, fn. 751; Gallegos v. Nebraska, *supra*, fn. 783; Stroble v. California, *supra*, fn. 786; Wilson v. Louisiana (1951) 341, U.S. 901, *per curiam*, Brown v. Allen (1953) 344, U.S. 443.

817 See, for e.g., Gallegos v. Nebraska, *ibid*; Stroble v. California, *ibid*; Thomas v. Arizona, *supra*, fn. 786

818 (1959), 360 U.S. 315, at p.

And again, in Blackburn v. Alabama⁸¹⁹ where an accused, who appeared to be suffering from some form of insanity, without friends, counsel or relatives present, was interrogated continuously for about nine hours until he confessed, which confession was in fact composed by a law officer, the learned Chief Justice stated:

"Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion. And when the other pertinent circumstances are considered - ... the chances of the confessions having been a product of a rational intellect and a free will become even more remote and the denial of due process even more egregious."

The overriding consideration in all cases was, consistently whether or not the confession, on which the conviction was based, was voluntary. Whether the confession was true or not was of little moment,⁸²⁰ and due process

819 (1960), 361 U.S. 199, at p. Compare, supra, fn. 797, and Townsend v. Sain (1963), 372 U.S. 293

820 In Rogers v. Richmond (1961), 356 U.S. 534, it was held, per Frankfurter, J., writing for the majority, that the state courts, by taking into account the circumstance of probable truth or falsity of a confession in determining its voluntariness, applied a standard not permissible under the due process clause of the Fourteenth Amendment.

demanding the answer that, on the undisputed facts of the trial record or inferences reasonably arising therefrom,⁸²¹ the confession be the product of a rational intellect and a free will,⁸²² and not as a result of importunity or a will overborne at the time the confession was made.⁸²³

In Culombe v. Connecticut,⁸²⁴ the accused, an

821 For e.g., Rogers v. Richmond, ibid.

822 Watts v. Indiana, supra, fn. 784; Blackburn v. Alabama, supra, fn. 819; Reck v. Pate, supra, fn. 814; Spano v. New York, supra, fn. 818

823 For e.g., Watts v. Indiana, supra, fn. 784; Chambers v. Florida, supra, fn. 786; Leyra v. Denno, supra, fn. 786; In Reck v. Pate, ibid, the Supreme Court considered the will of a youth of subnormal intelligence overborne, when he was held incommunicado for four days, without adequate food, counsel or friends, was in pain and a physically weakened state, and was submitted to six or seven hour stretches of relentless interrogation. See, also, Lynum v. Illinois (1963), 372 U.S. 528, where a mother confessed only after being told that state financial aid of her children would be cut off and her children taken from her unless she co-operated.

824 (1961), 367 U.S. 568; Compare, Townsend v. Sain, supra, fn. 819, Lynum v. Illinois, supra, fn. 823; Reck v. Pate, supra, fn. 814; As to threat of removal from public office, see, Garrity v. New Jersey (1967), 385 U.S. 493.

easily led mental defective, was interrogated while in police custody, for a period of four days. He was not informed of his rights, and his request for counsel was frustrated by the police. The police, in order to gain more time to obtain his confession of murder, had him charged with a minor crime. In the Supreme Court, where the murder conviction was reversed, Frankfurter, J., joined by Stewart, J., noted:

"The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. ... The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or

or helps to propel the confession."⁸²⁵

825 In Culombe v. Connecticut, ibid, the learned judge suggested the following analysis of the Court's inquiry:

"The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external 'phenomenological' occurrences and events surrounding the confession. Second, because the concept of 'voluntariness' is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal 'psychological' fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances."

As to equating the common law test of voluntariness in Wilson v. United States, supra, fn. 737 with voluntariness as the test of due process, see, Haynes v. Washington, supra, fn. 814. Similarly, in Malloy v. Hogan (1964), 378 U.S. 1, it was held that in determining whether the due process clause of the Fourteenth Amendment is violated by the admission of the accused's confession in a state court criminal trial, the test is not whether the conduct of the state officers in obtaining the confession was shocking, but whether the confession was free and voluntary, i.e. was not extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

For the most recent treatment of "free and rational choice", see, Greenwald v. Wisconsin, supra, fn. 814

CHAPTER THREE

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND CONFESSIONS

1. Due Process: The Test of Voluntariness and Continuous Confessions

It is clear that a conviction based upon an involuntary confession will be reversed by the United States Supreme Court as being in violation of the due process clause of the Fourteenth Amendment, regardless of whether the evidence apart from the involuntary confession might have been sufficient to sustain the verdict in the lower court. This rule holds true even where such evidence consists of voluntary confessions.⁸²⁶ Where, therefore, a series of confessions made by the accused has been admitted at his trial, the conviction will be reversed as being violative of due process if, from the undisputed facts of the record or inferences reasonably arising therefrom, it appears that the first confession in time was not voluntary, in the sense of being a product of the free intellect and choice of the accused.⁸²⁷

826 Stroble v. California, supra, fn. 786; Culombe v. Connecticut, supra, fn. 824. Similarly, the finding of a trial court that subsequent confessions were involuntary cannot control the separate constitutional inquiry posed by the character of the first confession. See, Thomas v. Arizona, supra, fn. 786

827 ibid

Where the first confession (or only confession) was made a period of time after an inducement, the Court's inquiry as to whether the confession is voluntary mainly concerns a scrutiny of the time interval between the inducement or coercion and the subsequent confession to see whether there were any further instances of coercion, or any factors tending to prove that the subsequent confession was in fact voluntary. In Stroble v. California,⁸²⁸ where the accused was maltreated on his arrest by the arresting police officer, the Supreme Court considered the fact that the arresting officer did not demand that the accused confess or implicate himself, and the fact that the confession was made an hour later in circumstances indicating that the accused was willing to confess to anybody who would listen, as being indicative of the voluntary nature of the confession. In Thomas v. Arizona,⁸²⁹ the accused negro was roped in the presence of police officers on two occasions in connection with his arrest. Twenty hours after the ropings, the accused first confessed orally to a justice of the peace, and later gave detailed written confessions after being cautioned that he did not have to confess. The Court, in concluding that the oral confession was not made as a result of fear engendered by the ropings,

828 supra, fn. 786

829 supra, fn. 786

was persuaded by the undisputed facts showing the time interval devoid of all coercive influence, and the fact that the activity of the accused during the interval indicated that he had confessed voluntarily.⁸³⁰

If, however, the accused makes a series of confessions, the first of which is rejected in the trial court as not being voluntary or not tendered by the state for the same reason, the question for the Supreme Court, in a consideration of a claim of due process violation, is whether the subsequent confessions are voluntary. The answer to this question is dependent on the inferences as to the continuing effect of the inducement or coercive practices resulting in the first confession, which may fairly be drawn from the surrounding circumstances.⁸³¹ In Lyons v. Oklahoma,⁸³² the accused was jailed for eleven days on suspicion of murder, after which he was

830 In Reck v. Pate, supra, fn. 814, the accused, almost mentally retarded, was arrested on a charge of murder. While being held incommunicado, without food or the aid of counsel, family or friends, he confessed after physical abuse being applied and being confronted with confessions of his companions during his continuous interrogation which lasted the better part of three days. The following day he signed another confession, and both were admitted at his trial. In reversing the conviction, the Supreme Court held that there were no facts suggesting that the second confession was an independent act of the first, and that the coercive practices which led to the first confession, had also caused the second.

831 infra, fn. 832

832 (1944), 322 U.S. 596.

interrogated at night for approximately nine hours. A pan of the victim's bones was placed in the lap of the accused. The accused then confessed, which confession was not offered in evidence. A second confession was obtained later the same day, and a third oral confession was admitted at the trial without objection. A majority of the Court held that because of the twelve hour interval between the first and second confession, together with the fact that the accused was warned that he should not make a statement unless he voluntarily wanted to and that what he might say would be used against him, the effect of the previous coercive practices surrounding the first confession had dissipated. In rendering the opinion of the Court, Reed, J. observed:⁸³³

"The admissibility of the later confession depends upon the same test - is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted

833 supra, fn. 832, at p. 603; Murphy, J., dissenting in an opinion with which Black, J., concurred, maintained that it was "inconceivable" under the circumstances for the second confession to be free from the "coercive atmosphere" surrounding the first, and that it was one continuous transaction.

as voluntary, cannot be a denial of due process."⁸³⁴

Where there is no appreciable time interval between the induced or coerced confession and subsequent confessions, the Court will not hesitate in concluding that the coercive character of the first confession controlled the character of the subsequent confessions, all being part of one continuous process.⁸³⁵

In order for the Court to otherwise conclude that the second or subsequent confession was not a direct result of the compulsive atmosphere surrounding the previous involuntary confession or confessions, it is necessary that there appear a break in the stream of events leading from the involuntary confession or confessions to those subsequently made, sufficient to "insulate" the later

834 In United States v. Bayer (1947), 331 U.S. 532, where there was an interval of six months between the first and second confession, the Court had stated that it has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the accused from making a competent one after those circumstances have been removed, and that the "poisonous fruit" doctrine does not apply. See, also, Lyons v. Oklahoma, *supra*, fn. 832, at p. 604, the Court's treatment of the contention of the accused that a presumption that earlier abuses render subsequent confessions involuntary unless there is clear and definite evidence to overcome the presumption. But, see, *infra*, c.v(11)

835 See, Leyra v. Denno (1954), 347 U.S. 556. Compare Black, J.'s majority opinion here, with his dissenting concurrence in Lyons v. Oklahoma, *supra*, fn. 833; See, Darwin v. Connecticut (1968), 391 U.S. 346.

confession from the previous compulsive circumstances.⁸³⁶
In other words, the undisputed facts of the trial court record must not give rise to the inference that the later confession was a result of the continuing effect of the previous compulsive or coercive practices, i.e. an inference of the later confession being not voluntary.

836 See, Clewis v. Texas (1967), 386 U.S. 707; United States v. Bayer, supra, fn. 834. Note the totality of circumstances in Clewis v. Texas, which included a thirty-eight hour delay in presentment before a magistrate, the fact that interrogation was not merely to secure information but to elicit a signed statement of the police view of the truth, the fact that the poorly educated negro accused was not warned of his rights, and that his faculties were impaired by sickness, inadequate food and sleep and prolonged interrogation in custody. As to the Court's assessment of circumstances generally, see, supra, fn. 814. See, also, Darwin v. Connecticut, ibid.

ii Due Process: Factors Considered by the Supreme Court
as Affecting Voluntariness

The concern of the Supreme Court, in making its determination as to the presence or denial of due process, is primarily an inquiry into whether or not the confession, on which the conviction of the accused in the trial court was based, can be said to have been made voluntarily.⁸³⁷ If, in assessing the circumstances,⁸³⁸ the Court concludes that the confession was not voluntary in the sense of being a product of the free choice of the accused, the conviction will be reversed.

It is clear that reversal will result if the accused confessed because of hope of benefit or some fear of prejudice operating on his mind.⁸³⁹ Similarly, circumstances which amount to any form of temporal inducement,⁸⁴⁰ duress

837 See, for e.g., Ziang Sun Wan v. United States, supra, fn. 753; Bram v. United States, supra, fn. 723; Watts v. Indiana, supra, fn. 784

838 See, supra, fn. 814

839 See, for e.g., Pierce v. United States, supra, fn. 736; Wilson v. United States, supra, fn. 737; Bram v. United States, supra, fn. 723; Sparf v. United States, supra, fn. 729; Perovich v. United States, supra, fn. 749; Malinski v. New York, supra, fn. 764; Lisenba v. California, supra, fn. 776

or intimidation,⁸⁴¹ terrorism,⁸⁴² physical violence,⁸⁴³ or any other form of improper influence⁸⁴⁴ or compulsion⁸⁴⁵ will be considered by the Court to negative the requisite voluntariness.

It is necessary that the confession be voluntarily made by the accused, and it is considered not to be so made if brought about by promises⁸⁴⁶ or threats⁸⁴⁷ held

841 See, for e.g., Townsend v. Sain, supra, fn. 819

842 See, for e.g., McNabb v. United States, supra, fn. 777

843 See, for e.g., Bram v. United States, supra, fn. 723; Lisenba v. California, supra, fn. 776; Ward v. Texas, supra, fn. 786; Lee v. Mississippi (1952), 343 U.S. 747; Upshaw v. United States (1948), 335 U.S. 410; Watts v. Indiana, supra, fn. 784; Stein v. New York, supra, fn. 786; Brown v. Mississippi, supra, fn. 778; Williams v. United States, supra, fn. 795; United States ex rel Jennings v. Ragen, supra, fn. 815; Malloy v. Hogan, supra, fn. 825.

844 See, Bram v. United States, supra, fn. 723; Malloy v. Hogan, supra, fn. 825.

845 See, for e.g., Hopt v. Utah, supra, fn. 725; Hardy v. United States, supra, fn. 752; Haynes v. Washington, supra, fn. 814

846 See, for e.g. Bram v. United States, supra, fn. 723; Hopt v. Utah, supra, fn. 725; Hardy v. United States, supra, fn. 752; McNabb v. United States, supra, fn. 777, per Reed, J., dissenting; Brown v. Allen, supra, fn. 816; Malloy v. Hogan, supra, fn. 825.

847 See, for e.g., Hopt v. Utah, supra, fn. 725; Bram v. United States, supra, fn. 733; Hardy v. United States, supra, fn. 752; McNabb v. United States, supra, fn. 777, per Reed, J., dissenting; Spano v. New York, supra, fn. 818; United States ex rel Jennings v. Ragen, supra, fn. 815.

out to the accused to induce him to speak, or any form of trickery⁸⁴⁸ calculated to deprive the accused of his choice to speak or remain silent.

The Supreme Court, in assessing the circumstances presented by the trial court record, will weigh those circumstances in relation to the accused. Thus, the mental capacity⁸⁴⁹ of the accused is an important consideration, for what may be of little pressure or inducement to a person of normal ability and intelligence, may be of great pressure to an accused of subnormal intelligence,⁸⁵⁰ or one considered mentally defective,⁸⁵¹ or even insane.⁸⁵² Similarly, education or illiteracy⁸⁵³

848 See, for e.g., Lisenba v. California, supra, fn. 776; McNabb v. United States, supra, fn. 777, per Reed, J., dissenting

849 See, for e.g., Brown v. Mississippi, supra, fn. 778; Lisenba v. California, supra, fn. 776; Ward v. Texas, supra, fn. 786; Fikes v. Alabama, supra, fn. 784; Ashcraft v. Tennessee, supra, fn. 786

850 See, Reck v. Pate, supra, fn. 814

851 See, Townsend v. Sain, supra, fn. 819; Culombe v. Connecticut, supra, fn. 824

852 See, Blackburn v. Alabama, supra, fn. 819

853 See, for e.g., Ward v. Texas, supra, fn. 786; Harris v. South Carolina, supra, fn. 804; Fikes v. Alabama, supra, fn. 784; Brown v. Allen, supra, fn. 816; McNabb v. United States, supra, fn. 777; Ashcraft v. Tennessee, supra, fn. 804; Payne v. Arkansas, supra, fn. 786; Clewis v. Texas, supra, fn. 814.

of the accused is a factor relevant to the voluntariness of his confession, as well as the age⁸⁵⁴ of the accused, especially if he happens to be a minor.⁸⁵⁵ The Court will also consider the character and reputation⁸⁵⁶ of the accused, whether he has had previous experience with the

854 See, for e.g., Chambers v. Florida, *supra*, fn. 786; McNabb v. United States, *supra*, fn. 777; Mallory v. United States, *infra*, fn. 913; Payne v. Arkansas, *supra*, fn. 786; Reck v. Pate, *supra*, fn. 814

855 See, for e.g., Haley v. Ohio, *supra*, fn. 786; especially per Frankfurter, J., *supra*, fn. 807. In Gallegos v. Colorado (1962), 370 U.S. 49, a fourteen year old orally confessed on his arrest for murder. He was not immediately brought before the juvenile court, and after being detained five days, without having the advice or contact with his parents, (his mother's request to see him was denied), a lawyer, or friendly adult, he signed a formal confession. In holding that due process had been violated and reversing his conviction, the Supreme Court stated in part that "He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admission." For case comments, see, (1962-3), 25 Ga. B. J. 127; (1962-3), 15 Ala. L. Rev. 234; (1962), 50 Cal. L. Rev. 902; (1962-3), 48 Io. L. Rev. 518; Donald B. King, Developing a Future Constitutional Standard For Confessions (1961-2), 8 Wayne L. Rev. 481. See, also, Kent v. United States (1966), 383 U.S. 541, where it was held, *inter alia*, that confessions elicited through many hours of police interrogation of a minor who is subject to the jurisdiction of the juvenile court are not admissible in subsequent criminal prosecutions against him. And see, In the Matter of the Application of Paul L. Gault, et al.

856 See, for e.g., Harris v. South Carolina, *supra*, fn. 804; Ashcraft v. Tennessee, *supra*, fn. 786.

criminal law or holds a criminal record,⁸⁵⁷ and particularly his physical condition at the time of his custody and confession, such as whether he was ill⁸⁵⁸ or stripped of his clothing.⁸⁵⁹

Since the vast majority of confessions are made while the accused is in police custody or confinement, the Supreme Court will carefully scrutinize the circumstances leading from arrest to confession, and any circumstances which tends to deprive the accused of the free operation of his mind, or of his fundamental rights is relevant to the question of whether the due process clause of the Fourteenth Amendment has been violated.

In this regard, the Court will consider whether the accused was arrested without a warrant,⁸⁶⁰ whether he

857 See, for e.g., Townsend v. Sain, supra, fn. 819; Crooker v. California, supra, fn. 812; Stein v. New York, supra, fn. 786; Fikes v. Alabama, supra, fn. 784; Lynnum v. Illinois, supra, fn. 823.

858 See, for e.g., Zhang Sun Wan v. United States, supra, fn. 753; Reck v. Pate, supra, fn. 814; Clewis v. Texas, supra, fn. 814; Greenwald v. Wisconsin, supra, fn. 814.

859 See, for e.g., Bram v. United States, supra, fn. 723; Brown v. Mississippi, supra, fn. 778; Malinski v. New York, supra, fn. 764; McNabb v. United States, supra, fn. 777; Upshaw v. United States, supra, fn. 843, per Reed, J., at p. 424

860 See, for e.g., Chambers v. Florida, supra, fn. 786; Ward v. Texas, supra, fn. 786; Lisenba v. California, supra, fn. 776; Payne v. Arkansas, supra, fn. 786; Turner v. Pennsylvania, supra, fn. 804

was held incommunicado,⁸⁶¹ to the exclusion of counsel, relatives or friends,⁸⁶² and whether he was subjected to prolonged interrogation⁸⁶³ with inadequate food,⁸⁶⁴

861 See, for e.g., Chambers v. Florida, *supra*, fn. 786; Ward v. Texas, *supra*, fn. 786; Lisenba v. California, *supra*, fn. 776; Malinski v. New York, *supra*, fn. 764; Payne v. Arkansas, *supra*, fn. 786; Fikes v. Alabama, *supra*, fn. 784; Culombe v. Connecticut, *supra*, fn. 824; Reck v. Pate, *supra*, fn. 814; Haynes v. Washington, *supra*, fn. 814; As to holding an accused minor incommunicado, see, *supra*, fn. 855.

862 See, for e.g., Chambers v. Florida, *supra*, fn. 786; Turner v. Pennsylvania, *supra*, fn. 804; Watts v. Indiana, *supra*, fn. 784; Fikes v. Alabama, *supra*, fn. 784; (father and lawyer barred from seeing accused) Blackburn v. Alabama, *supra*, fn. 819; Reck v. Pate, *supra*, fn. 814; Townsend v. Sain, *supra*, fn. 819; Lynumn v. Illinois, *supra*, fn. 823; Jackson v. Denno, *infra*, fn. 985; As to mother and lawyer being refused to see minor accused, see, *supra*, fn. 855; As to denial of right to counsel, see, Ashdown v. Utah, *infra*, fn. 938; Crooker v. California, *supra*, fn. 812; Cicenia v. LaGay, *infra*, fn. 935; Spano v. New York, *supra*, fn. 818; Haynes v. Washington, *supra*, fn. 814; and for culmination of denial of the right to counsel being equivalent to a denial of due process, see, Massiah v. United States, *infra*, fn. 941.

863 See, for e.g., Chambers v. Florida, *supra*, fn. 786; Ziang Sun Wan v. United States, *supra*, fn. 753; Ward v. Texas, *supra*, fn. 786; Ashcraft v. Tennessee, *supra*, fn. 786; Watts v. Indiana, *supra*, fn. 784; Turner v. Pennsylvania, *supra*, fn. 804; Haynes v. Washington, *supra*, fn. 814; Stein v. New York, *supra*, fn. 786; Leyra v. Denno, *supra*, fn. 786; Fikes v. Alabama, *supra*, fn. 784; Lisenba v. California, *supra*, fn. 776; Harris v. South Carolina, *supra*, fn. 804; Spano v. New York, *supra*, fn. 818; Blackburn v. Alabama, *supra*, fn. 819; Reck v. Pate, *supra*, fn. 814; Clewis v. Texas, *supra*, fn. 814

864 See, for e.g., Watts v. Indiana, *supra*, fn. 784; Payne v. Arkansas, *supra*, fn. 786; Reck v. Pate, *supra*, fn. 814; Clewis v. Texas, *supra*, fn. 814; Greenwald v. Wisconsin, *supra*, fn.

or sleep.⁸⁶⁵ The type of interrogation will be considered, such as whether it was an imposition of psychological pressure by the police,⁸⁶⁶ the number of officers involved,⁸⁶⁷ whether it was effected by relays of officers,⁸⁶⁸ or by many periods of questioning, and whether it was done at night.⁸⁶⁹

Any police practice which may reasonably give rise to the inference of police intention to extract a confession, will be given great weight by the Supreme Court in its

865 See, for e.g., Lisenba v. California, supra, fn. 776; Watts v. Indiana, supra, fn. 784; Clewis v. Texas, supra, fn. 814; Greenwald v. Wisconsin, supra, fn. 814

866 As to psychological pressure generally, see for e.g., Watts v. Indiana, supra, fn. 784; Stein v. New York, supra, fn. 786; Fikes v. Alabama, supra, fn. 784; Upshaw v. United States, supra, fn. 843; Malinski v. New York, supra, fn. 764; Townsend v. Sain, supra, fn. 819

867 See, for e.g., Pierce v. United States, supra, fn. 736; infra, fn. 868; Greenwald v. Wisconsin, supra, fn. 814

868 See, for e.g., Ashcraft v. Tennessee, supra, fn. 786; Harris v. South Carolina, supra, fn. 804

869 See, for e.g. Davis v. North Carolina (1966), 384 U.S. 737; Ziang Sun Wan v. United States, supra, fn. 753.

determination of voluntariness of the confession before it. Such practices include delay in presenting the accused before a committing magistrate,⁸⁷⁰ the laying of a minor charge in order to gain more time to interrogate on the more serious crime,⁸⁷¹ the use of drugs in interrogation,⁸⁷² or polygraph tests,⁸⁷³ showing the accused exhibits of the crime,⁸⁷⁴ or telling the accused that his accomplice had implicated him.⁸⁷⁵

870 See, for e.g., Gallegos v. Nebraska, supra, fn. 783; Stroble v. California, supra, fn. 786; Brown v. Allen, supra, fn. 816; Stein v. New York, supra, fn. 786; Ward v. Texas, supra, fn. 786; Turner v. Pennsylvania, supra, fn. 804; Watts v. Indiana, supra, fn. 784; Payne v. Arkansas, supra, fn. 786; Culombe v. Connecticut, supra, fn. 824; As to delay in arraignment affecting lower federal courts, see, infra, c. IV

871 See, for e.g., Culombe v. Connecticut, supra, fn. 824; And see, United States v. Carignan (1951), 342 U.S. 36, Douglas, J., joined by Black and Frankfurter, J.J., dissenting.

872 See, for e.g., Townsend v. Sain, supra, fn. 819; Jackson v. Denno, infra, fn. 985;

873 See, for e.g., Clewis v. Texas, supra, fn. 814

874 See, for e.g., Ziang Sun Wan v. United States, supra, fn. 753

875 See, for e.g., Bram v. United States, supra, fn. 723; Lisenba v. California, supra, fn. 776; Turner v. Pennsylvania, supra, fn. 804; As to the placing of accused by the police in solitary confinement, or a barren or small detention room, see, Watts v. Indiana, supra, fn. 784; McNabb v. United States, supra, fn. 777; Greenwald v. Wisconsin, supra, fn. 814; Blackburn v. Alabama, supra, fn. 819; As to the police composing the confession, see, Blackburn v. Alabama, supra, fn. 819

Similarly, the consistent failure of the police to caution⁸⁷⁶ an accused in their custody,⁸⁷⁷ or to advise the accused of his right to counsel, and to remain silent,⁸⁷⁸ has led the Supreme Court to declare minimum standards of custodial interrogation for the police to follow, in the case of Miranda v. Arizona.⁸⁷⁹

876 Lack of warning, per se, was not sufficient to render a confession involuntary. See, for e.g., Wilson v. United States, supra, fn. 737; Powers v. United States, supra, fn. 751; Harris v. South Carolina, supra, fn. 804; McNabb v. United States, supra, fn. 777; Haley v. Ohio, supra, fn. 786

877 Custody, itself, was one circumstance to be considered. See, for e.g., Hopt v. Utah, supra, fn. 725; Sparf v. United States, supra, fn. 729

878 See, for e.g., Payne v. Arkansas, supra, fn. 786; Culombe v. Connecticut, supra, fn. 824; Davis v. North Carolina, supra, fn. 869; Clewis v. Texas, supra, fn. 814. Compare, supra, fn. 862; Greenwald v. Wisconsin, supra, fn. 814

879 (1966), 384 U.S. 436. And see, Escobedo v. Illinois (1964), 378 U.S. 478

CHAPTER FOUR

DELAY IN ARRAIGNMENT: A PROCEDURAL RULE AFFECTING CONFESSIONS IN FEDERAL COURTS

Previous to 1943, the rule relating to confessions in federal courts was constitutional in nature and governed by the due process clause of the Fifth Amendment.⁸⁸⁰ Due process demanded the exclusion of confessions if they were found to be involuntary,⁸⁸¹ and whether or not a confession was voluntary, and therefore in accord with due process, depended upon an assessment of the circumstances in which the confession was made. However, in McNabb v. United States,⁸⁸² the Supreme Court under its broad authority to make rules of evidence and generally supervise the procedure of lower federal courts,⁸⁸³ imposed a further exclusionary rule relating to confessions which was not based on constitutional grounds.

In that case, the several accused, who had been engaged in the illicit traffic of whisky, were arrested for the murder of a federal officer. Rather than being presented before a United States Commissioner or a committing judge on their arrest, the accused were detained for

880 See, Bram v. United States, supra, fn. 723

881 See, for e.g., Wilson v. United States, supra, fn. 737

882 (1943), 318 U.S. 332

883 See, supra, fn. 777; ibid; infra, fn. 887

questioning. They were not permitted to see relatives or friends, and did not have the aid of a lawyer. After two days of incessant interrogation, confessions were obtained, which provided the basis of their subsequent conviction.

The Supreme Court, in an opinion delivered by the learned Frankfurter, J., noted that the accused had been subjected to the pressures of an illegal procedure. After citing several statutes of Congress⁸⁸⁴ and state legislation⁸⁸⁵ requiring that a person arrested shall be immediately taken before a committing officer, the opinion reasoned:⁸⁸⁶

"The purpose of this impressively pervasive requirement of criminal procedure is plain ... Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard - not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. Its aims to avoid all the evil implications of secret interrogation of persons accused of crime."

884 For e.g., 18 U.S.C.A., s. 595; Act of June 18, 1934, c. 595; Act of March 1, 1879, c. 125

885 See, supra, fn. 882, at p. 343, fn. 7

886 supra, fn. 882, at pp. 343, 344

The Court concluded, with Reed, J., registering a strong dissenting opinion, that to do otherwise than reverse the conviction which had been "secured through such a flagrant disregard of procedure" or by "such violation of legal rights", would not only frustrate congressional policy, but would also implicate the courts in a wilful disobedience of the law.

The Court left no doubt as to the rule it was laying down, as evidenced by the dissenting opinion of Reed, J.,⁸⁸⁷ as well as by another case decided by the

887 The learned Reed, J., stated, supra, fn. 882, at p. 348:

"While the connotation of voluntary is indefinite, it affords an understandable label under which can be readily classified the various acts of terrorism, promises, trickery and threats which have led this and other courts to refuse admission as evidence to confessions. Now the Court leaves undecided whether the present confessions are voluntary or involuntary and declares that the confessions must be excluded because in addition to questioning the petitioners, the arresting officers failed promptly to take them before a committing magistrate. The Court finds a basis for the declaration of this new rule of evidence in its supervisory authority over the administration of criminal justice."

Court at approximately the same time:⁸⁸⁸ where arresting officers fail promptly to take an accused before a committing magistrate, the confessions of the accused must be excluded. But the Court in the McNabb decision, by its reference to other factors such as youth and education of the accused, as well as the pressure of the interrogation itself, had planted a seed of confusion in the lower federal courts.

Some courts had treated McNabb as laying down a coercion test,⁸⁸⁹ and simply stating that illegal detention was one factor to be considered in an assessment of

888 Anderson v. United States (1943), 318 U.S. 350. In this case, eight accused were arrested, and not taken before a magistrate as required by state law. They were questioned intermittently over a period of six days, by federal officers, during which time they saw neither friends, relatives, nor counsel, and six had given incriminating statements. Affirming the McNabb rule, the Supreme Court reversed the conviction, holding that where evidence is secured by collaboration, i.e. by a working arrangement, between federal and state officers, during an illegal delay in arraignment, the McNabb rule is operative. Compare, Coppola v. United States (1961), 365 U.S. 762

889 For e.g., compare, Cohen v. United States (1944), 144 F. 2d. 984 (9th Cir.); United States v. Grote (1944), 140 F. 2d 413 (2nd. Cir.); United States v. Haupt (1943), 136 F. 2d 661 (7th Cir.)

voluntariness of a confession.⁸⁹⁰ Other courts interpreted promptness or "immediately" to mean with all convenient speed,⁸⁹¹ while others considered the case as a policy judgment against improper police practices.⁸⁹² Moreover, while some lower courts properly interpreted McNabb to exclude confessions where there was a delay in arraignment,⁸⁹³ others treated it as laying down a strict rule of evidence demanding that all confessions obtained before arraignment were to be excluded.⁸⁹⁴

The Supreme Court was presented with an opportunity to clarify McNabb in the case of United States v. Mitchell.⁸⁹⁵ But rather than provide clear guidance to the lower federal courts, the decision in Mitchell tended to confuse the McNabb doctrine even more than it previously had been. In Mitchell, although clearly holding that delay in arraignment does not render inadmissible oral confessions

890 United States v. Klee (1943), 50 F. Supp. 679 (E.D., Wash.)

891 For e.g., compare, United States v. Keegan (1944), 141 F. 2d 248 (2nd Cir.); United States v. Ebeling (1944), 146 F. 2d 254 (2nd Cir.)

892 For e.g., see, United States v. Corn (1944), 54 F. Supp. 307 (E.D., Wash)

893 For e.g., Gros v. United States (1943), 136 F. 2d 878 (9th Cir.)

894 For e.g., United States v. Hoffman (1943), 137 F. 2d 416 (2nd Cir.), Compare, United States v. Haupt, supra, fn. 889, and Mitchell v. United States (1944), 138 F. 2d 426 (D.C. Cir.)

895 (1944), 322 U.S. 65.

previously made to the delay and shortly after the accused was taken in custody, the Court did not avail itself of the opportunity to categorically state the rule in McNabb. Rather, in an opinion of Frankfurter, J., it attempted to explain McNabb, which explanation provided several misleading statements.

In the first place, in reference to its previous decision, the Court referred to illegal detention "under aggravating circumstances",⁸⁹⁶ which seemed to suggest that illegal detention or delay in arraignment was not the sole consideration. Similarly, the opinion continued:⁸⁹⁷

"Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the McNabb Case which led us to rule that a conviction on such could not stand."

This seemed to suggest that it not only must appear that the illegal detention was for the purpose of obtaining a confession, but that the confession must be obtained by the illegal detention, and questioning, as factors of psychological pressure over a long period, the operative consideration being psychological pressure. In other words, was the confession induced by psychological pressure? However, the opinion later shows that this interpretation

896 supra, fn. 895, at p. 67

897 supra, fn. 895, at p. 68

was not intended by the Court, when it stated:⁸⁹⁸

"Here there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights."

Although this statement appears to negative "psychological pressure" as a consideration, it clearly suggests an alternative, just as confusing when read in conjunction with the ⁸⁹⁹ McNabb decision, that the confession, in order to be excluded, must be induced by the illegal detention. The Court seemed to provide a further test: Could it be said that the confession was the "fruit" of the illegality in detaining the accused?⁹⁰⁰

The inconsistency in the Court's opinion was aptly pointed up by Reed, J., again tabling a dissenting opinion, when he observed:⁹⁰¹

"As I understand McNabb ... as explained by the Court's opinion of today, the McNabb rule is that where there has been illegal detention of a prisoner, joined with other circumstances which are deemed by this Court to be contrary to proper conduct of Federal prosecution, the confession

899 supra, fn. 895, at p. 70

900 As the opinion stated supra, fn. 895, at p. 70:

"But in any event, the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers."

901 supra, fn. 895, at p.

will not be admitted. Further, this refusal of admission is required even though the detention plus the conduct do not together amount to duress or coercion."

It is not, therefore, surprising that the Supreme Court's decision in United States v. Mitchell⁹⁰² was not considered by some lower courts as establishing, once and for all, the rule of evidence first stated in McNabb v. United States.⁹⁰³ Interpretation was not consistent, and the apparent weaknesses of the Courts' opinion in Mitchell, became the bases of decision in lower federal courts.

Some courts maintained that in order for exclusion to result, it was necessary that the confession be shown to have been "induced" by the illegal detention,⁹⁰⁴ or that "psychological pressure" be shown to have been present.⁹⁰⁵ In several cases, the rule was strongly criticized,⁹⁰⁶ and illegal detention was not considered

902 supra, fn. 895

903 supra, fn. 882

904 See, for e.g., United States v. Keegan, supra, fn. 891; Compare, Paddy v. United States (1945), 143 F. 2d 847 (9th Cir.) Wheeler v. United States (1947), 165 F 2d 225 (D.C. Cir.), Alderman v. United States (1947), 165 F 2d 622 (D.C. Cir.)

905 See, for e.g., Blood v. Hunter (1945), 150 F. 2d 640 (10th Cir.)

906 See, for e.g., Ruhl v. United States (1945), 148 F 2d 173 (10th Cir.); Blood v. Hunter, ibid; Paddy v. United States, supra, fn. 904; United States v. Keitner (1945), 149 F 2d 105 (2nd Cir.), Brinegar v. United States (1947), 165F 2d 512 (10th Cir.)

sufficient per se, but, rather, had to be coupled with other facts probative of psychological pressure in order for exclusion to result.⁹⁰⁷ When the duality of illegal detention and psychological pressure did not exist, so that it could not be said that the confession was the "fruit" of the delay, convictions resulted although there had been long delays in arraignment.⁹⁰⁸

What was demanded by the situation was a clear, unambiguous statement by the Supreme Court of the McNabb principle. But even if this had been provided, it was doubtful whether all inconsistent decisions would have been eliminated. Some courts did not agree with McNabb and rather than treat McNabb as establishing a rule of evidence, they analyzed the reasoning of the Court in it and subsequent cases, in search of some statement on which they could base an alternate conclusion.

The problem again arose before the Supreme Court in Upshaw v. United States,⁹⁰⁹ where the accused had been detained for a period of thirty hours, without having been

907 See, for e.g., Ruhl v. United States, ibid.

908 See, for e.g., Upshaw v. United States, infra, fn. 910; Wheeler v. United States, supra, fn. 904; Compare, Boone v. United States (1947), 164 F 2d 102

909 (1948), 335 U.S. 410

taken before a committing magistrate. The court below⁹¹⁰ had treated McNabb v. United States,⁹¹¹ as explained in United States v. Mitchell,⁹¹² as doing nothing more than to extend the meaning of involuntary confessions to include those induced by psychological pressure. Since psychological pressure had not been present, the lower court concluded that the confessions were not the "fruit" of the illegal detention."

The Supreme Court, in reversing the conviction, reiterated the McNabb ruling, as being the failure of federal law officers promptly to take the accused before a judicial officer, i.e. illegal detention, and reconciled Mitchell by saying, in that case, the confessions were found to have been made before any illegal detention had occurred. Upshaw was the first case to reach the Supreme Court after the new Federal Rules of Criminal Procedure had become operative, and Rule 5(a) had demanded:

"An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

910 (1947), 168 F 2d 167 (D.C.Cir.)

911 supra, fn. 882

912 supra, fn. 895

Now, by its decision in Upshaw, as Frankfurter, J., was later to observe,⁹¹³ the Supreme Court had clearly indicated that the wording, "without unnecessary delay" had implied no relaxation of the McNabb ruling.

Three years later, the Court,⁹¹⁴ by a 5 - 4 majority, refused to extend the McNabb doctrine to a confession of murder obtained by repeated questioning of the police, while the accused was legally detained on another charge, and the following year, in Lee v. Mississippi,⁹¹⁵ the Court clearly defined the elements of the doctrine, when Jackson, J., delivering the opinion of the Court, observed:⁹¹⁶

"In McNabb, however, we held that, where defendants had been unlawfully detained in violation of the federal statute requiring prompt arraignment before a commissioner, a confession made during the detention would be excluded as evidence in federal courts even though not inadmissible on the ground of any otherwise involuntary character."

Although the original rationale of the rule seemed to be clearly established, lower federal courts continued to lack consistency in their decisions. The approach that the confession must be induced by the illegal detention

913 Mallory v. United States (1957), 354 U.S. 449, at p.

914 United States v. Carignan (1951), 342 U.S. 36

915 (1952), 343 U.S. 747

916 ibid, at p. 754

persisted,⁹¹⁷ although some courts indicated a willingness to compromise by effecting a presumption, that where there was illegal detention, the confession will be presumed to be induced by it.⁹¹⁸ Similarly, some courts continued to inquire into elements of "psychological pressure."⁹¹⁹

But a new bone of contention arose in lower court decision, perhaps more because of the new procedural Rule 5(a), than because the doctrine as exposed by the Supreme Court in McNabb through Upshaw. The lower courts began to consider the wording "without unnecessary delay", and the effect of the lack of an available committing magistrate or officer. Some cases admitted confessions obtained after a

917 For e.g., see, Watson v. United States (1956), 234F 2d 42 (D.C.Cir.); See, Boone v. United States, supra, fn. 908, and see, supra, fn. 904

918 For e.g., see, Allen v. United States (1952), 202F 2d 329 (D.C.Cir.); Compare, United States v. Leviton (1951), 193F 2d 848 (2nd Cir.); United States v. Sheeters (1954), 122 F Supp. 52 (S.D., Cal.)

919 Tillotson v. United States (1956), 231 F 2d 736 (D.C.Cir.). See, supra, fns. 907, 908. See, also Pierce v. United States (1952), 197F 2d 189 (D.C.Cir.) and compare, Rettig v. United States (1956), 239F 2d 916 (D.C. Cir.) as to confusion generally. In Tarkington v. United States (1952), 194F 2d 63 (4th Cir.), the court refused to apply the McNabb rule to a plea of guilty made after a two week delay in arraignment.

week end delay,⁹²⁰ and in others, a similar result obtained where a magistrate was not available.⁹²¹

If any doubt did persist, the Supreme Court's decision in Mallory v. United States⁹²² must be taken to have resolved that doubt. Perhaps for the first time, the Court had clearly established the McNabb rule, in holding that any confession secured during "unnecessary delay" is inadmissible in evidence. The Court clearly indicated that that sole consideration was the delay itself, to the exclusion of all other factors which may or may not be present in a given case. The purpose of the prompt arraignment rule was solely not the disciplining of federal

920 For e.g., see, United States v. Walker (1951), 190F 2d 481 (2nd Cir.); Pixley v. United States (1955), 220F 2d 912 (10th Cir.); And see, Haines v. United States (1951), 188F 2d 546 (9th Cir.); Symons v. United States (1949), 179F 2d 615 (9th Cir.); infra, fn. 921

921 For e.g., see, Duncan v. United States (1952), 197F 2d 935 (5th Cir.); Garner v. United States (1949), 174F 2d 499; ibid.

922 (1957), 354 U.S. 449; Compare, Goldsmith v. United States (1960), 277F 2d 335 (D.C.Cir.); Perry v. United States (1957) 253 F 2d 337 (D.C. Cir.); Dailey v. United States (1958), 261F 2d 870 (5th Cir.).

officers,⁹²³ but rather, to ensure that the rights of an arrested person would be protected, as expressed in Rule 5(b) of the Federal Rules of Criminal Procedure, which provides:

"The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him..."

The McNabb - Mallory doctrine, although binding as a rule of evidence on all federal courts, is not applicable

923 Compare the dissenting opinion of Reed, J., in Upshaw v. United States, *supra*, fn. 909. As to the rule generally, see, Confessions (1966) 79 Harv. L. Rev. 935; Illegal Detention and The Admissibility of Confessions (1944), 53 Yale L.J. 758; James E. Hogan & Joseph M. Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue (1958), 47 Geo. L.J. 1. As to case comments, see, /1956/ U.Ill.L.F. 505; (1956), 9 U.Fla.L.Rev. 354; (1957), 35 Tex. L. Rev. 728; (1957), 57 Col. L. Rev. 735; (1958), 46 Geo. L. J. 185; (1958), 23 Mo. L. Rev. 25; (1957-8), 20 Ya. B. J. 127; The McNabb Rule: Upshaw Through Mallory (1957), 43 Va. L. Rev. 915; (1960-61), 70 Yale L. J. 298; (1960-61), 49 Geo. L. J. 618; (1961), 7 N.Y.L.F. 108; (1961), 74 Harv. L. Rev. 1222; Ramifications of the McNabb Rule /1958-59/ 8 De Paul L. Rev. 410; (1961-62), 24 Ya. B. J. 120; (1962-63), 61 Mich. L. Rev. 1364; (1962-63), 41 N.C.L. Rev. 858; (1963-64), 39 Notre Dame Law. 214

to the states,⁹²⁴ and the vast majority, if not all, of the states have refused to follow its example.⁹²⁵ With the increasing number of state trial court records evidencing delay in arraignment, as an undisputed fact, being employed by the police in violation of state legislation to obtain confessions, the Supreme Court, rather than impose the federal rule on the states, adopted a compromise solution in Miranda v. Arizona.⁹²⁶

924 And so stated by the Supreme Court. See, for e.g., Gallegos v. Nebraska, supra, fn. 783.

925 For e.g., see, Finlay, v. State (1943), 14 So. 2d 844 (Fla.); State v. Folkes (1944), 15 P. 2d 17 (Ore.); State v. Bunk (1950), 73 A 2d 249 (N.J.) State v. Browning (1944), 178 S.W. 2d 77 (Ark.); See, especially, (1959), 5 Prac. Law. 53, at p. 56

926 infra, fn. 879

CHAPTER FIVE

MODERN CHANGES IN THE LAW RELATING TO CONFESSIONAL EVIDENCE

1. The Right to Counsel and Custodial Interrogation

From its earliest consideration of the subject of confessions or statements of an accused, and especially since its "Americanizing" of the English common law rule relating thereto, the United States Supreme Court had been acutely aware of the need to protect the interests of the individual accused in the confession-making environment. Recognition of the historical inequality of the position of the accused qua that of the police interrogators, at the time of the making of the confession or incriminating statement, had led the Supreme Court to desert the common law basis of the rule requiring that involuntary confessions be excluded from evidence, in favour of a constitutional basis under the Fifth Amendment's ban on self-incrimination.⁹²⁷

The shift in basis had not, immediately at least, resulted in any visible, or practical change in the law relating to confessions. Indeed, the continued acceptability of the broad test of voluntariness had assured this result. The shift was, however, a theoretical change indicative of the philosophy of the Supreme Court

927 See, Bram v. United States, supra, fn. 723; See, also, supra, fns. 694, 695, 746.

itself. This change in philosophy, or more accurately, an adoption by the Court of a philosophical pattern for the first time in reaction to English precedent, manifested itself as a new direction in emphasis. At common law, the rule relating to confessions was a rule of evidence, which emphasized factors which might causally negate voluntariness directly, i.e. threat, promise, etc. By being clothed as a constitutional safeguard, the rule now emphasized indirect factors⁹²⁸ or circumstances, such as absence of counsel, delay in arraignment of the accused, or lack of warning. At common law, in a consideration of the totality of circumstances of a given case, police action was emphasized, i.e. what had been done to the accused. Now, the Court was concerned as a prior consideration, with what the police had failed to do. Equality of position of accused qua his police interrogators demanded that he be appraised of his fundamental rights, although this had yet to receive the force of law.

928 This is not to say that the Court, at common law, did not consider such circumstances as absence of counsel or lack of warning to the accused. See, Wilson v. United States, supra, fn. 737. However, no English case has been found by the writer where absence of counsel was considered as a circumstance. As to Canada, see, R. v. Mack & Blackie, supra, fn. 422. It would appear that Wilson v. United States, ibid, prepared the way for the change in Bram v. United States, ibid.

By the time the first state case involving the subject of confessions had appeared for review,⁹²⁹ constitutionality had become the overriding emphasis of the Supreme Court. Consistent with its philosophy as exposed in Bram, state court convictions were held to be violative of the due process clause of the Fourteenth Amendment, if based in whole or in part on a coerced or involuntary confession. In subsequent cases, this inquiry into due process was controlling. In the vast majority of state cases to come before it, the Court had recognized the common factor of the recurring coercion equation to be incommunicado detention of the accused, leading to the absence of counsel and failure to warn or caution the accused as to his fundamental rights.⁹³⁰ But the Court had contented itself with giving these factors pride of place in its assessment of voluntariness of the confession, the standard prerequisite to due process, or constitutionality, and as one could expect, more often than not resulting in its reversal of the state conviction.

The primary concern of the Court was the protection of the accused, on the premise that he should not be compelled to incriminate himself. But it would appear to have been clearly accepted that if the accused

929 Brown v. Mississippi, supra, fn. 778

930 For e.g., supra, fns. 870, 878

could be effectively protected by eliminating incommunicado, or illegal detention, the erring police interrogators would be disciplined at the same time. Disciplining the police, however, was a secondary consideration, and would follow only as an acceptable result to the protection of the accused.

As far as federal cases were concerned, the Court by virtue of its broad supervisory authority over lower federal courts, eliminated illegal detention, theoretically at least, on non-constitutional grounds. The Court reasoned that by insisting on the prompt presentment or arraignment of the accused before a committing magistrate, he would thus be apprised of his constitutional rights under the Federal Rules of Criminal Procedure.⁹³¹ But as regards the states, a dilemma had presented itself. The federal rule was not applicable to the states, and rather than adopt it by example, the states chose to merely consider delay in arraignment as one circumstance in assessing voluntariness of a confession.⁹³²

931 See, supra, c.3

932 Since the McNabb-Mallory rule was not applicable to the states, when a state conviction was under review, delay in arraignment was similarly regarded as one circumstance by the Supreme Court. See, supra, fn. 870

The ultimate concern of the Supreme Court was to effectively ensure the accused of his fundamental rights while he was being interrogated in police custody. In a series of recent decisions, positive action was taken by the Court in holding as requirements that the accused be informed of his right to the assistance of counsel,⁹³³ and cautioned that he need not say anything, but that if he does, what he says may be used against him.⁹³⁴

In 1958, the Supreme Court had recognized that the right to counsel extends to pre-trial proceedings as well as to the trial itself.⁹³⁵ But the members of the Court differed as to whether the rule affecting pre-trial proceedings was to be an automatic exclusionary rule, or whether it was to be a discretionary rule, depending on the circumstances of the individual case. In Crooker v. California,⁹³⁶ a majority of the Court rejected the adoption of a rule automatically excluding statement or confessional evidence obtained during police interrogation of an accused before trial or indictment, where counsel was denied the accused. Recognizing that due process could be

933 Escobedo v. Illinois (1964), 378 U.S. 478; Miranda v. Arizona (1966), 384 U.S. 436

934 ibid

935 Crooker v. California (1958), 375 U.S. 433; And see, Cicenia v. LeGay (1958), 357 U.S. 504

936 ibid

violated when an accused is deprived of counsel for any part of pre-trial proceedings, the majority insisted that violation was dependent on whether the deprivation prejudiced the accused to the extent that his subsequent trial could not be said to be "fair".

The Court held that the test was whether, on a consideration of all the circumstances of the case, the accused was so prejudiced by the denial of access to counsel that his subsequent trial was tainted by a lack of fundamental fairness. On the circumstances before it, being especially persuaded by the fact that the accused had one year of law school education, the Court held there was no violation of due process requiring reversal of the conviction.

In the strong dissenting opinion of Douglas, J., with which Warren C.J., and Black and Brennan, J.J., had joined, argument was in favour of an exclusionary rule, irrespective of circumstances, and solely dependent on whether there was in fact a denial. Where there was a denial by the police of the accused's repeated demand for counsel prior to making the confession or statement, there was, according to the dissenting opinion, a denial of due process of law as guaranteed by the Fourteenth Amendment. The strength of the dissenting opinion was clearly based on a silent awareness that custodial interrogation was a critical stage, as far as the accused was concerned.

By giving an incriminating statement at this stage, more often than not it could only act to his prejudice at his trial. In other words, if the accused were to be protected by counsel, this could only be done at the time he needed counsel most - i.e. at pre-trial interrogation. It could not be denied that the majority were as well aware of accused's pre-trial need for counsel. The difference, however, lay in the fact that the majority, even recognizing possible prejudice, were willing to accept it as permissible, and not being fundamentally unfair.⁹³⁷

Where the opportunity presented itself, the dissenters continued to maintain their position,⁹³⁸ and in Gideon v. Wainwright,⁹³⁹ although not involving right to counsel during police interrogation, the indication was that its earlier position in Crooker v. California⁹⁴⁰ was due to be

937 For e.g., in Cicenia v. LaGay, supra, fn. 935, the Court did not in fact inquire whether fundamental unfairness had been shown.

938 See, Ashdown v. Utah (1958), 357 U.S. 426; Cicenia v. LaGay, supra, fn. 935; Spano v. New York (1959), 360 U.S. 315 (concurring); Culombe v. Connecticut (1961), 367 U.S. 508

939 (1963), 372 U.S. 335; And see, Hamilton v. Alabama (1961), 368 U.S. 52; White v. Maryland (1963), 373 U.S. 59

940 supra, fn. 936

remodelled by the Court. In Gideon, it was held by the Court that the Sixth Amendment's provision that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defence, was made obligatory upon the states by the Fourteenth Amendment. Appointment of counsel at a trial, the Court concluded, did not depend on the fact that a capital offence was under consideration, nor on a showing of "special circumstances".

The following year, in Massiah v. United States,⁹⁴¹ the Court held that under the Sixth Amendment's guarantee of the accused's right to the assistance of counsel, the accused's incriminating statements, elicited by government agents after he had been indicted and in the absence of counsel, were not admissible. The accused, who had been indicted for a violation of the federal narcotics law, retained a lawyer, pleaded not guilty, and was released on bail. While the accused was released, federal agents with the co-operation of a co-accused, installed a radio transmitter in his car, without the accused's knowledge. It was over this radio transmitter, or microphone that the agents obtained the statements in question, at a time when the accused and co-accused were conversing. The Court, in holding that the statements so

obtained could not be used against the accused, and referring to its earlier decisions in White v. Maryland⁹⁴² and Hamilton v. Alabama,⁹⁴³ reasoned that the accused was entitled to the assistance of counsel "at the only stage when legal aid and advice would help him."⁹⁴⁴

With this emphasis by the Court on the great need for the assistance of counsel during police interrogation, there could be little doubt as to the future direction of the Court with reference to interrogation and the right to counsel. Indeed, White, J., writing a dissenting opinion based on the tenet that society must maintain its investigative capacity qua the accused,⁹⁴⁵ prophesied:⁹⁴⁶

942 supra, fn. 939

943 ibid

944 The Court at p. 206, was persuaded by Spano v. New York, supra, fn. 938, where it stated. "Four concurring justices pointed out that the Constitution required reversal of the conviction upon the sole and specific ground that the confession had been deliberately elicited by police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help."

945 The balancing of the rights of the accused and the interests of society always appears as the basis to division among the judges in the confession cases. See, for e.g., the dissenting opinion of White, J., infra, fn. 946

946 supra, fn. 941 at p. 208

"The reason given for the result here - the admissions were obtained in the absence of counsel - would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not; to admissions made prior to arraignment, at least where the defendant has counsel or asks for it; to the fruits of admissions improperly obtained under the new rule; to criminal proceedings in state courts; and to defendants long since convicted upon evidence including such admissions."

The rule respecting the absence of counsel was made applicable to the states in McLeod v. Ohio,⁹⁴⁷ and in Escobedo v. Illinois,⁹⁴⁸ decided in 1964, the Court went a long way in fulfilling the dissenter's prophecy in Massiah.⁹⁴⁹ Escobedo was arrested without warrant, and later released under a writ of habeas corpus. Eleven days after his release, the police were told by another, later to be indicted with the accused, that he had fired the fatal shots. The police then took Escobedo into custody, and interrogated him. During the interrogation, the police had indicated to the accused that they had sufficient evidence, so he may as well admit the crime. The accused repeatedly requested the presence of his counsel, which request was refused by the police, and he was not advised of his constitutional rights. His lawyer had also made repeated efforts to him, which were also

947 (1965), 381 U.S. 356, per curiam

948 supra, fn. 933

949 supra, fn. 941

frustrated by the police. At the trial, it was suggested that the accused made the incriminating statement because of assurances of immunity by a police officer.

In the Supreme Court of Illinois, after a rehearing, the conviction was affirmed, the court holding that the statement was voluntary. As a second ground, the court held, on the authority of Crooker v. California,⁹⁵⁰ that even though obtained after a denial of request for counsel, the statement was admissible.

The Supreme Court, rather than consider the question of voluntariness, chose to base its decision on the issue, whether under the circumstances the police denial of the accused's request for his lawyer constituted a denial of the Sixth Amendment's guarantee of the Assistance of Counsel, made applicable to the states in Gideon v. Wainwright.⁹⁵¹ The Court stated that the fact that Escobedo had not yet been indicted at the time he made the statement, was insufficient to distinguish the Massiah decision.⁹⁵² Because suspicion had focused on Escobedo, and the police were making every effort to obtain a confession, an adversary situation had been created, and

950 supra, fn. 935

951 supra, fn. 939

952 The Court referred to the Judges Rules in England in recognizing that no special significance should attach to the formal indictment.

the need of the accused for the aid or assistance of counsel in such a situation was crucial. The interrogation situation, the Court declared in referring to its earlier decisions in White v. Maryland⁹⁵³ and Hamilton v. Alabama,⁹⁵⁴ was a "critical" stage as far as the accused was concerned. If he confesses or makes an incriminating statement, his "conviction" obtains as a result, and therefore, the Court reasoned, he should be entitled to the assistance of counsel at this "most critical" stage. In rendering its judgment, the Court stated:⁹⁵⁵

"We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment as 'made obligatory upon the States

953 supra, fn. 939

954 ibid

955 supra, fn. 948, at pp. 490, 491; The Court also condemned the calculated exploitation by the police of the accused's ignorance of his constitutional rights, especially with the knowledge that if counsel had been made available to the accused their purpose of obtaining a confession regardless, may have been frustrated. According to the Court, an accused being interrogated by the police is constitutionally entitled to be advised by his counsel of his privilege against self-incrimination.

by the Fourteenth Amendment'... and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."⁹⁵⁶

The Court attempted to distinguish Crooker v. California⁹⁵⁷ on the grounds of the accused's law school education in that case, as well as the fact that there, the accused had been warned. But the Court stated that both Crooker and Cicenia v. LaGay⁹⁵⁸ were overruled, in so far as they were inconsistent with the present decision in Escobedo.

Although the vast majority of lower courts recognized that the Supreme Court, by its decision in Escobedo, was effecting a new constitutional doctrine, doubt existed as to the scope of that doctrine.⁹⁵⁹ Various questions appeared to be left unanswered by the decision. For example, at what point of time does police investigation "focus" on a person? When the investigation does in fact "focus" on a person, is it then necessary for the state or prosecution to affirmatively advise that person of his choice of speaking

956 White, J., joined by Clark, Stewart, J.J. dissented

957 supra, fn. 935

958 supra, fn. 935

959 See, Confessions (1965-66), 79 Harv. L. Rev. 935, at p. 1000, et seq.; Also, Massiah, Escobedo And Rationales For the Exclusion of Confessions (1965), 56 J. Cr. L. Crim. & P.S. 412

or remaining silent? Similarly, when investigation is focussed on a particular person, thus giving rise to an adversary situation, is it necessary for that accused person to be advised of his right to "the Assistance of Counsel" or must he specifically ask for a lawyer? Similarly, as several factors were given in the "holding" in Escobedo, the question arises as to which of the factors are to be taken as controlling? Furthermore, if Escobedo is taken as laying down a firm right to counsel not dependent on accused requesting a lawyer, it must be assumed, as pointed up in the dissenting opinion of White, J., that this right can be waived by the accused. If, therefore, an accused confesses after being cautioned as to his rights, is this to be taken as establishing an effective waiver?

A variety in interpretation of the Escobedo decision appeared in the lower courts, and both state and federal courts arrived at different conclusions.⁹⁶⁰

Some insisted that the accused must request counsel in order for the rule to operate,⁹⁶¹ while others, in

960 For e.g., compare, Collins v. Beto (1965), 348 F 2d 823 (5th Cir.), and United States v. Childress (1965), 347F 2d 448 (7th Cir.); People v. Dorado (1964), 398P 2d 361 (Cal.); People v. Hartgraves (1964), 202 N.E. 2d 33 (N.Y.)

961 See, for e.g., United States v. Kountis (1965), 350F 2d 869 (7th Cir.)

opposition to a narrow view⁹⁶² of the holding,
interpreted the decision broadly.⁹⁶³ Courts in the
same jurisdiction differed,⁹⁶⁴ while others suggested a
strict adherence to the "voluntariness" test.⁹⁶⁵
Perhaps the most forceful implication arising from
Escobedo was that the Supreme Court, in its effort to
protect the accused in a custodial environment, was
tending to an elimination of pre-trial confessions or
statements from evidence. This in no small measure,
it may be fairly said, contributed to the confusion in
the lower courts and to a narrow interpretation of
Escobedo.

The Supreme Court clarified its intentions in
Miranda v. Arizona.⁹⁶⁶ In that case, the accused, a
"seriously disturbed individual with pronounced sexual
fantasies", was arrested on charges of kidnapping and

962 See, for e.g., People v. Hartgraves, ibid;
Davidson v. United States (1965), 349F 2d 530
(10th Cir.)

963 See, for e.g., People v. Dorado, supra, fn. 960;
Clifton v. United States (1965), 341F 2d 649
(5th Cir.)

964 Compare, Jackson v. United States (1964), 337F 2d
136 (D.C.Cir.); Greenwell v. United States (1964)
336F 2d 962

965 Hayes v. United States (1965), 347F 2d 668 (8th Cir.)

966 (1966), 384 U.S. 436, a common decision for the
cases Vignera v. New York, Westover v. United
States and California v. Stewart as well,

rape. On his arrest, he was taken to an interrogation room where he signed a confession containing a typed paragraph stating that the confession was made voluntarily with full knowledge of his legal rights, and with the understanding that any statement made by him might be used against him. It was held by the Supreme Court, reversing his conviction, that the confession was inadmissible because the accused was not in any way apprised of his right to counsel, nor was his privilege against self-incrimination effectively protected in any other manner.

In an opinion by Warren, C.J., for five members of the Court, the Court held:⁹⁶⁷

"the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

967 ibid, at p. 444

The Court recognized the confusion over its Escobedo decision, and stated that an investigation focuses on an accused when that accused is being questioned in custody or significantly restricted in freedom of action, which would appear to be broad enough to include any form of constructive custody, not solely confined to the police station itself, nor limited to questioning by de facto police officers. The Court makes it clear that if the accused at any time during interrogation desires to remain silent, all questioning must cease, even if a valid waiver was previously obtained. Where at any time the accused submits to questioning without counsel being present, the onus is placed squarely on the prosecution by the Court, of proving that the requisite warnings were given to the accused and that he knowledgably waived his rights at the outset of the questioning process. This burden on the prosecution with reference to waiver, the Court indicated, was to be a heavy burden, presumably decreasing proportionally to the increase in the education and intelligence of the accused.

The policy underlying the majority opinion was a striking out by the Court at the evils of incommunicado detention and the third degree, which are at odds with the basic privilege against self-incrimination, and the

Court recognized that

"Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 968

According to the majority opinion, the one "protective device" which would ensure that the dictates of the privilege against self-incrimination would be met by police interrogation procedures was the presence of counsel, which would in itself, prevent the police from seeking confessions, even when other evidence could have been found by the police to convict.⁹⁶⁹

In Johnson v. New Jersey,⁹⁷⁰ it was established that⁹⁷¹ Miranda was non-retroactive in effect, and although

968 supra, fn. 966, at p. 457

969 The policy underlying the dissenting opinions was that the majority rule of custodial interrogation, represents poor constitutional law, and being harmful to the country at large, will result in criminals going free. See, supra, fn. 945.

970 (1966), 384 U.S. 719

971 supra, fn. 966. As to case comments and relevant legal articles, see, for e.g., George Edwards, Interrogation of Criminal Defendants - Some Views on Miranda v. Arizona (1966-67), 35 Ford. L. Rev. 169; Karl P. Warden, Miranda - Some History, Some Observations and Some Questions (1966-67), 20 Vand. L. Rev. 39; Sheldon H. Elsen, Arthur Rosett, Protection For the Suspect Under Miranda v. Arizona (1967), 67 Col. L. Rev. 645; (1965-66), 19 Vand. L. Rev. 1379; (1967), 31 Albany L. Rev. 137; (1966-67), 71 Dick. L. Rev. 116; (1966-67); 28 U. Pitts. L. Rev. 77

Miranda must be taken as theoretically heralding a decrease in confessions, it remains to be seen whether the decision will have this practical effect. By its decision in Miranda, the Court not only established equality of position in the police custodial environment, i.e. the accused in relation to his interrogators - which in practice means that the scales of fairness must be tilted in favour of the accused - but also, for the first time, expounded positive duties for law enforcement officers, duties which can only tend to a more civilized administration of criminal justice.

11. The Doctrine of "Fruit of the Poisonous Tree"

The phrase, "fruits of the poisonous tree" was first used by the learned Frankfurter, J., in Nardone v. United States,⁹⁷² and finds its applicability as a doctrine in the exclusion of evidence which was obtained as an indirect result of official misconduct. For e.g., where evidence was obtained as a result of an illegal search and seizure infringing the Fourth Amendment's guarantee against such action, the evidence so obtained would be excluded as "fruits" of the illegal search.⁹⁷³ Or, where evidence was obtained by illegal wiretapping,

⁹⁷² (1939), 308 U.S. 338, at p. 341

⁹⁷³ See, for e.g., Silverthorne Lumber Co. v. United States (1920), 251 U.S. 385

such evidence would be similarly excluded.⁹⁷⁴ The policy underlying the exclusion of the evidence is not altogether clear, and the Supreme Court has not made its considerations known. It would appear, however, to be a two-pronged policy. In the first instance, as in the case of unconstitutional searches, the deterrent effect of exclusion would seem to be prominent. In negating admissibility of the evidence so obtained, the purpose of obtaining it would be removed, thus resulting in a reduction of the incidence of illegal action. Secondly, considerations of causation would seem to underly the exclusionary rule, with reasoning that the evidence would not have been brought but for the preceding illegal action. However, although the policy may be uncertain, the question arises as to the relevancy of the rule to the subject of confessions.

In Wong Sun v. United States,⁹⁷⁵ on the information of a person arrested in possession of narcotics and previously unknown to the police as an informer, the ^{had gone} police/to the laundry of one Toy, entered it, and without a warrant, arrested Toy, who gave information leading to the arrest of Wong Sun. While released on their own

974 Nardone v. United States, supra, fn. 972

975 (1963), 371 U.S. 471

recognizance, both were interrogated, and unsigned incriminating statements were obtained by the police. It was held inter alia, by a five-four majority, that Wong Sun's statement was admissible because it was not the fruit of the illegal arrest.

In an opinion of Brennan, J., the Court reasoned that evidence seized during an unlawful search could not constitute proof against the victim of the search. Referring to Silverthorne,⁹⁷⁶ the Court declared that the rule extended to direct as well as indirect "fruits" of the illegal action, and that because the "knowledge" was gained by the government's own wrongdoing, it could not be used. This suggests that the "wrongdoing" itself negatives the competency of the evidence, per se. But the Court was not consistent. As it stated:⁹⁷⁷

"Under such circumstances it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion"

and again, as regards Wong Sun, it declared that the connection between the illegal arrest and the statement had "become so attenuated as to dissipate the taint."⁹⁷⁸

976 supra, fn. 973

977 supra, fn. 975 at p. 390

978 supra, fn. 975, at p. 390 ; applying Nardone v. United States, supra, fn. 972

Both statements of the Court would seem to suggest that the test is whether or not the illegal action "induced" the evidence,⁹⁷⁹ as opposed to a "voluntary" production of the evidence by the accused. In accord with this suggestion, the Court emphasizes the causal "connection" between the illegal action and the giving of the statement by the accused, indicating that, depending on the intervening time, it may in some cases reasonably infer voluntariness or find that the inducement had dissipated.

This "induced" or "but for" theory was again supported by the Court in circumstances where an accused's confession was obtained after the accused had been confronted with objects of real evidence, unconstitutionally obtained. In Fahy v. Connecticut,⁹⁸⁰ the accused was charged with having painted swastikas on a synagogue.

979 Support for this contention is also found in the Court's early treatment of the McNabb-Mallory theory. In United States v. Mitchell, *supra*. fn. 895, the learned Frankfurter, J., stated, at p. 70 "But in any event, the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers" and again, *supra*, fn. 895, at p. 70 "Here there was no disclosure induced by illegal detention..."

980 (1963), 375 U.S. 85

Without an arrest or search warrant, a can of black paint and a paint brush were seized by the police, and admitted in evidence at the trial. On review of the subsequent conviction, the Supreme Court, in an opinion by the learned Warren C.J., for five members, held, inter alia, that a confession induced by illegally seized evidence was not admissible in a criminal trial. The Court, in making reference to its previous decisions in Silverthorne, Nardone and Wong Sun, stated that its policy was not only to prevent the admissibility of such illegally obtained evidence, but to prevent the use of such evidence in any manner whatsoever. Although the elapsed time between confrontation and confession was undoubtedly of major importance to the Court, it would seem that such factors as the experience of the accused as well as the extent of his implication by the evidence were of equal relevance to the Court's inquiry.

In the recent case of Harrison v. United States,⁹⁸¹ the Supreme Court clearly indicated its intention to maintain the doctrine of "fruits of the poisonous tree" as an unrestricted catch-all to exclude any form of evidence stemming from official illegality. In that case, at the trial of the accused, his three confessions were illegally admitted. After the confessions were

admitted in evidence against him, the accused took the witness stand to testify to his own version of events leading to the victim's death. At his second trial, the confessions were not tendered, but the testimony of the accused was.

In the Supreme Court, a majority of the Court held that the accused was forced to testify because of the admission of the three illegally-obtained confessions. The opinion, through Stewart, J., declared that the testimony was tainted "by the same illegality that rendered the confessions themselves inadmissible." The Court, for the first time clearly imposing the burden of negating the operation of the doctrine on the prosecution, held that the extent of the burden was for the prosecution to show that its "illegal action" did not "induce", the testimony of the accused, and this it did not do. The opinion stated:⁹⁸²

"Here, however, the petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby - the fruit of the poisonous tree, to invoke a time worn metaphor."

In other words, the Court clearly accepted as the policy behind the doctrine, the non-voluntariness with which the evidence or testimony was brought into

982 ibid, at p. 222

being. That is, the evidence or testimony was "induced" by the illegal action, and would not have been brought into being or would not have happened "but for" the illegal action. Because of this causal connection, the illegality of the official action attaches to the evidence or testimony resulting therefrom.

There remains, however, several unanswered questions with respect to the doctrine, not only to its underlying policy but also to its application in the field of confessions. If the doctrine applies to exclude testimony made under oath and in open court, with all the attendant protections such as the advice of counsel, as it seems to in Harrison, is this not an unreasonable extension of the doctrine, admitted by the learned White, J., to be already "complex and elusive?"⁹⁸³ Similarly, is the "induced" theory the only basis for the exclusion, or is a deterreny factor involved, a factor which the Court seems to have ignored in Harrison, but considered in its previous cases?

The doctrine does not appear to apply to the situation where the accused confesses a second or subsequent time after having previously confessed

983 supra, fn. 981, dissenting. See, also, the dissenting opinions of Harlan, and Black, J.J.

involuntarily, i.e. the continuous confession situation.⁹⁸⁴
If the principle excluding evidence obtained by illegal action is solely causal in nature, could it not be said that the second or subsequent confession was a "fruit" of the "poisonous" first? Similarly, does the doctrine apply where the accused is not confronted with real evidence illegally obtained, but knows that it is in the position of the police, and confesses because of this knowledge? Again, where the real evidence is discovered as a result of an induced and illegal confession, at common law this evidence is not excluded. However, would not a logical application of the "fruits" doctrine clearly exclude the evidence so discovered?

Worse can

It is hoped that the Supreme Court by future decision eliminates the doubt inherent in the doctrine by giving clear direction as to its relation with the subject of confessions, as well as to the scope and application of the doctrine generally.

984 See, supra, c.III(1)

CHAPTER SIX

DUE PROCESS AND THE DETERMINATION OF THE ISSUE OF VOLUNTARINESS

Previous to the decision of the Supreme Court in Jackson v. Denno,⁹⁸⁵ method as to the determination of the voluntariness of a confession was generally considered to be a local matter of procedure, and as such, was left to the discretion of the individual criminal jurisdiction itself. In most instances, the method adopted has been categorized as the "orthodox" approach, or either of the "New York procedure" or that of the "Massachusetts procedure," although in some jurisdictions the method adopted does not meet this neat classification.⁹⁸⁶

In the orthodox procedure,⁹⁸⁷ as, for example, that practiced in both England and Canada, the issue of voluntariness is determined by the presiding judge alone. Evidence relevant to this issue, to the exclusion of all

985 (1964), 378 U.S. 368

986 See, ibid, fn. 9, at p. 379, and Appendix at p. 396

987 See, for e.g., People v. Guido (1926), 152 N.E. 149 (Ill.), and as to other states, see (1937), 85 A.L.R. 870. As to the subject generally, see, J. H. Maguire, C.S.S. Epstein, (1927), 40 Harv. L. Rev. 392, Preliminary Questions of Fact in Determining The Admissibility of Evidence, Edmund H. Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact (1929), 43 Harv. L. Rev. 165, Wigmore, Evidence (3rd ed., 1940), tit. "Confessions"

other evidence, is heard by the trial judge on a voir dire, or trial within a trial, in the absence of the jury. During this hearing, all the circumstances surrounding the making of the confession are inquired into by the judge, and presented by the prosecution on whom lies the burden of proving that the confession was entirely voluntary to the satisfaction of the judge. At this time, the accused is entitled to testify, as well as to lead other evidence. At the conclusion of the evidence, the trial judge is bound to rule whether the confession is voluntary or not voluntary. If the judge rules that the confession was not voluntary, it is excluded from evidence for all purposes. If he rules that the confession was voluntary and hence, admissible, the jury is then recalled and the evidence gone into again before it. In this procedure, the function of the jury is to determine what is true. It may reject all of it, or reject it in part and believe it in part, but in all cases, it must be considered by it. As regards the voluntariness of the confession, the finding of the trial judge is conclusive, and clearly evidence from the trial court record.

The New York procedure derives from the practice in the state of New York. By the early nineteenth century in that state, the question of voluntariness of a confession

was to be decided by the jury.⁹⁸⁸ Under this procedure, all evidence was, therefore, presented in the presence of the jury.⁹⁸⁹ If the evidence was so clear as to preclude any doubt that the confession was not made voluntarily, the trial judge rejected the confession. Similarly, where there was absolutely no doubt as to the admissibility of the confession, the trial judge had a duty to admit it. As Werner, J., noted in People v. Meyer⁹⁹⁰

"The right and duty of the court to exclude such evidence when it is the product of fear, duress, or threats presupposes the same right and duty to admit such evidence when it clearly appears that it was purely voluntary, and entirely free from the vices which furnish the ground for exclusion."

In other words, where there was no conflict as to the evidence, the question of voluntariness was solely a question for the court and not the jury. Where, however,

988 See, for e.g., Hilligan & Welchman's Case, supra, fn. 715, Tucker's Case, supra, fn. 715, Stage's Case, supra, fn. 713, Compare, Duffy v. People, supra, fn. 718.

989 ibid., In People v. Brasch (1908), 85 N.E. 809 (N.Y.C.A.), the request of accused's counsel for the preliminary examination in the absence of the jury was denied, the Court holding that there was no rule requiring the exclusion of the jury. In People v. Randazzio (1909), 87 N.E. 112 (N.Y.C.A.), where the lower court granted accused's application for the absence of the jury, it was held on appeal that the evidence relating to the question of voluntariness should be taken in the presence of the jury, because it was part of the evidence in the case.

990 (1900), 56 N.E. 758 (N.Y.C.A.), at p. 761, see, also, People v. Fantano (1925), N.E. 646 (N.Y.)

a conflict did arise from the evidence and a fair question of fact was thus presented, it was for the jury to resolve the conflict, under proper instructions.⁹⁹¹ At the trial, if the accused objected to the admissibility of the confession and offered to prove to the court that it was not voluntary, it was error for the court to receive the confession "without first hearing proof offered and deciding upon the competency of the confession as evidence against the party making it."⁹⁹² As in the orthodox procedure, the burden of establishing the voluntariness of the confession is on the prosecution.⁹⁹³ But it was for the jury to decide whether voluntariness, as well as the truth of the confession had been established beyond a reasonable doubt.⁹⁹⁴

991 For e.g., see People v. Cassidy (1892), 30 N.E. 1003 (N.Y.C.A.), People v. Fanelli (1892), 30 N.E. 569 (N.Y.C.A.), People v. Meyer, ibid, People v. White (1903), 68 N.E. 630, People v. Brasch, ibid, People v. Doran (1927), 159 N.E. 379 (N.Y.C.A.) People v. Barbato (1930), 172 N.E. 458 (N.Y.C.A.)

992 People v. Fox (1890), 121 N.Y. 449, per O'Brien, J., at p. 45, Compare, Goodford v. People (1875), 62 N.Y. 117 (C.A.), People v. Linney (1911), 95 N.E. 756 (N.Y.C.A.)

993 For e.g., see, People v. Valletutti (1948), 78 N.E. 2d 485 (N.Y.C.A.), People v. Catalfano (1954), 132 N.Y.S. 2d 217 (S.C., App. Div.), People v. Farrell (1956), 153 N.E. 2d 284 (S.C., App. Div.)

994 For e.g., see People v. Valletutti, ibid, People v. Bretagne et al. (1949), 83 N.E. 2d 537 (S.C., App. Div.) As to the New York procedure after Jackson v. Denno, supra, fn. 985, see, People v. Huntley (1965), 255 N.Y.S. 2d 838 (S.C., App. Div.)

The Massachusetts procedure differed from both the orthodox as well as the procedure instituted in New York, but, in effect, it was a compromise between the two. In Commonwealth v. Fier,⁹⁹⁵ Horton, J., as he then was, clearly defined the formula applicable to the resolution of the preliminary question of voluntariness, when he stated⁹⁹⁶

995 (1876), 120 Mass. R. 185 (S.C.)

996 ibid., at p. 185, In Commonwealth v. Love (1857), 9 Gray 110 (Mass. S.C.), it would appear that, previous to this time, the question of voluntariness was solely determined to the judge as in the orthodox procedure. In that case, however, Thomas, J., noted at p. 113

"If the judge was to hear the evidence, and determine the mental condition of the defendant when the confessions were alleged to have been made, he should hear all the competent evidence. The more correct course would have been to submit the confessions with the whole evidence to the jury."

By 1871, it was clearly the practice to leave the issue to the jury as well. In Commonwealth v. Cuffee (1871), 108 Mass. R. 285 (S.C.), Chapman, J., noted, at p. 288

"And though the evidence given at that stage of the trial showed that no threats or promises were made, yet, after all the evidence was in, the court still further guarded the rights of the prisoner by instructing the jury that if, upon the whole evidence in the case, it appeared to them that these statements had been induced by threats and promises, they should not be allowed any weight or effect against the prisoner." See, also, Commonwealth v. Cullen (1873), 111 Mass. R. 435 (S.C.), Commonwealth v. Smith (1876), 119 Mass. R. 305, at pp. 309, 310, Commonwealth v. Culver (1879), 126 Mass. R. 464, per Lord, J., at pp. 465, 466, Commonwealth v. Freece (1885), 140 Mass. R. 276, per Morton, C.J., at p. 277 Commonwealth v. Bond (1897), 170 Mass. R. 41, per Holmes, J., at p. 43, Commonwealth v. Antaya (1905) 187 Mass. R. 326, per Hammond, J., at p. 327.

"When a confession is offered in a criminal case, and the defendant objects that he was induced to make it by threats or promises, it necessarily devolves upon the court to determine the preliminary question whether such inducements are shown. ... If the presiding judge is satisfied that there were such inducements, the confession is to be rejected, if he is not satisfied, the evidence is admitted. But if there is any conflict of testimony or room for doubt, the court will submit this question to the jury with instructions that if they are satisfied that there were such inducements they shall disregard and reject the confession."

Rather than leave the voluntariness issue to the sole province of the trial judge as in the orthodox procedure or to the province of the jury as demanded by the New York approach, the method or procedure adopted in Massachusetts required that both the judge and jury determine the issue, if there was conflict or doubt as to whether the confession was voluntary. In the first instance, the judge, on a preliminary examination of the circumstances surrounding the making of the confession in the absence of the jury,⁹⁹⁷ determined whether the accused had met the burden upon him in rebutting the presumption of voluntariness.⁹⁹⁸ If the judge is not satisfied that the confession was voluntary, it is excluded from evidence. If, however, the judge decides that it is voluntary,

⁹⁹⁷ For e.g., see, Commonwealth v. Corcoran (1903) 182 Mass. R. 465 (S.C.), Commonwealth v. Hudson (1904), 185 Mass. R. 402 (S.C.), Commonwealth v. Russ (1919), 122 N.E. 176 (S.C.), per Rugz, C.J., at p. 180.

⁹⁹⁸ For e.g., see, Commonwealth v. Lush (1937), 138 N.E. 613 (S.C.)

the confession is admissible. But this finding of the trial judge is not a conclusive determination as regards the issue, and does not preclude the jury from determining for itself whether the confession was voluntary. Even after the trial judge determines that the confession was voluntary, it is binding upon the jury, to exclude the confession if, on a consideration of the circumstances they are not equally satisfied that the confession was the voluntary act of the accused.

The pertinent difference between the orthodox and the Massachusetts procedure on the one hand, and that of New York, was clearly that in the latter the trial judge was not bound to conclude as to the issue. While in both the orthodox and Massachusetts procedures the accused was entitled to insist on a ruling from the trial judge at the conclusion of the voir dire or preliminary examination, the New York approach avoided this by leaving the issue to the jury to resolve the conflict in evidence relating to voluntariness. In both the orthodox and Massachusetts procedures, it was clear from the trial court record as to what had been the decision or finding of the trial judge as regards the issue. However, it was not certain in the New York approach whether the jury actually found a confession in a given case not voluntary and ignored it, or whether it was found voluntary and formed part of the jury's conclusion of

guilt. The jury rendered only a general verdict. Since in this approach the inquiry into the confessional circumstances was necessarily made in the presence of the jury, even if the jury was not satisfied as to the voluntariness and believed the confession, it could not fail to be impressed with the knowledge that the accused in fact admitted the crime.

The New York procedure was considered by the United States Supreme Court for the first time in the case of Stein v. New York.⁹⁹⁹ In that case, without any objection on the part of the several accused, the trial court heard evidence in the presence of the jury as to the issue of the voluntariness of the confessions. Five of the accused testified at the trial, and in the Supreme Court, attacked the fairness of the New York procedure on the basis that they were prevented from testifying because to do so would have subjected them to an unrestricted cross-examination, a cross-examination that could not have been limited to the coercion or voluntariness issue itself.

In an opinion by Jackson, J., the Supreme Court recognized the uncertainty deriving from the state procedure, when it noted ¹⁰⁰⁰

⁹⁹⁹ (1952), 246 U.S. 156

¹⁰⁰⁰ ibid., at p. 170

"Under these circumstances, we cannot be sure whether the jury found the defendants guilty by accepting and relying, at least in part, upon the confessions or whether it rejected the confessions and found them guilty on the other evidence. Indeed, except as we rely upon a presumption that the jurors followed instructions, we cannot know that some jurors may not have acted upon one basis, while some convicted on the other."

But the opinion proceeded on the assumption that the jury had acted in either one of two ways as regards the issue of the voluntariness of the confessions of the accused. It had either determined the conflict of the evidence against the accused, therefore finding the confessions voluntary, and relied upon it or, it had found that the confession had been coerced, presumably rejecting it according to the instructions of the trial judge, and reached its verdict of guilt solely on other evidence. Regardless of which manner of proceeding had been taken by the jury, it was acceptable to the Court.

As to the accused's attack on the fairness of the procedure, the opinion recognized that cross-examination "could be employed so as to work a denial of due process", but, noting that the accused had not indicated a willingness to testify at the trial nor did they request a ruling as to the scope of the cross-examination from the trial judge, the opinion stated 1001

"We think, on any realistic view of this case, they stayed off the stand not because the State would subject them to any improper cross-examination but because their records made them vulnerable to any proper one."

The Court concluded that, since the states are free to "allocate functions between judge and jury as they see fit", the due process clause of the Fourteenth Amendment does not "forbid" jury trial of the issue of voluntariness or coercion. But the underlying reason for the decision was clearly pointed up when the opinion, recognizing the high incidence of states following the New York example,¹⁰⁰² declared ¹⁰⁰³

"Despite the difficult problems raised by such jury trial, we will not strike down as unconstitutional procedures so long established and widely approved by state judiciaries regardless of our personal opinion as to their wisdom."

The Court seemed to imply that regardless^{of} whether a state procedure posed "difficult problems", or was in fact unconstitutional, the Court would not hold it to be such, because the states were free to choose any procedure they wished. This implication did more than emphasize the Court's unwillingness to infringe state procedural authority. It was, in effect, a positive limitation on the scope of due process.

But it was a limitation to which the Court was soon to refuse to adhere. Two years after Stein was decided,

1002 For e.g., see, 148 A.L.R. 546

1003 supra, fn. 999, at p. 179

three of the learned judges of the Stein majority opinion had deemed necessary to again speak out in defence of the New York procedure. In the case of Leyra v. Denno,¹⁰⁰⁴ where the Court reversed a New York conviction, Hinton, J., with Reed and Burton, J.J., concurring, dissented, stating that,¹⁰⁰⁵

"To let the jury pass upon this question is not so unfair to petitioner as to violate the fundamental principles of justice."

According to Hinton, J., the action of the majority in reversing the conviction, was to hold in effect that the New York procedure violated due process. As he observed,¹⁰⁰⁶

"New York must be mystified in its efforts to enforce its law against homicide to have us say it may not submit a disputed question of fact to a jury. The Court holds that to do so denies due process."

Although the Leyra opinion did not hold as Hinton, J. interpreted it to have done, it was clear from the dissenting opinion that reaction against the New York procedure, and thus against Stein was becoming pronounced. In Spano v. New York,¹⁰⁰⁷ the learned

1004 (1954), 347 U.S. 556

1005 ibid, at p. 588

1006 ibid, at p. 589

1007 (1959), 360 U.S. 315, at p. 324

Warren, C.J., noted that "Stein held only that when a confession is not found by this Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied upon it."

In Rogers v. Richmond,¹⁰⁰⁸ the Court held that a confession may go to the jury only if it is "subjected to screening in accordance with correct constitutional standards", and Frankfurter observed, speaking for seven members of the Court¹⁰⁰⁹

"Determination of the admissibility of confessions is, of course, a matter of local procedure. But whether the question of admissibility is left to the jury or is determinable by the trial judge, it must be determined according to constitutional standards satisfying the Due Process Clause of the Fourteenth Amendment. If the question of admissibility is left to the jury, they must not be misdirected by wrong constitutional standards, if the question is decided by the trial judge, he must not misdirect himself."

In effect, the Court now held that state procedures for determining the issue of voluntariness must conform to the standard of constitutional due process, and where the issue was left to the conclusive determination of the jury, the Court was not precluded by a general verdict of guilty from ensuring that a proper constitutional standard was applied or in resolving the issue.¹⁰¹⁰

1008 (1961), 365 U.S. 534

1009 ibid, at p. 545, fn. 3

1010 See, Haynes v. Washington (1963), 373 U.S. 503

The stage had now been set for a holding by the Court that the New York procedure was unconstitutional, and the opportunity presented itself in Jackson v. Denno.¹⁰¹¹ In an opinion by White, J., the Court held that the New York procedure was violative of due process.¹⁰¹² After a review of the different state treatments of determining the issue of voluntariness, the opinion declared that an accused is "entitled to a fair hearing in which both the underlying factual issues and the voluntariness are actually and reliably determined", and this the New York did not provide.¹⁰¹³

In referring to Stein v. New York,¹⁰¹⁴ the opinion recognized that in that case the Court operated on the basis of "alternative assumptions", and "failed to take proper account of the dangers to an accused's rights under either of the ~~Alternative~~ assumptions." In overruling the Stein decision, the opinion reasoned that under the New York procedure all evidence was given at the same time before the jury, whether it related to voluntariness of the confession, truth of the confession, or that the accused had committed the crime. If the

1011 supra, fn. 985

1012 As to New York adopting the Massachusetts procedure after this finding of the Supreme Court, see, People v. Funtley, supra, fn. 994

1013 supra, fn. 1011, at p. 381

1014 supra, fn. 999

jury believed that the accused had committed the crime or that the confession was true this belief would generate "natural and potent pressure" to find the confession voluntary, and would therefore "seriously distort" its judgment and assessment of the evidence relating to the making of the confession by the accused. Furthermore, when an accused because of the fear of cross-examination as in Stein refuses to testify, "the determination of voluntariness is made upon less than all of the relevant evidence."¹⁰¹⁵ Even if the jury does find that the confession was involuntary, it is still seized with the knowledge that the accused in fact confessed.

In holding the New York procedure unconstitutional, the Court approved both the orthodox and Massachusetts procedures, both having "the integrity of the preliminary proceedings before the judge", in the absence of the jury, the underlying consideration being that the accused's rights would be adequately protected, especially to ensure that if a conviction resulted, it could not be based on a coerced confession. In other words, both procedures ensure a "fair and effective" determination of the voluntariness issue at a trial,¹⁰¹⁶ i.e. due process of law.¹⁰¹⁷

¹⁰¹⁵ supra, fn. 1011, at p. 389, fn. 16

¹⁰¹⁶ See, Boles v. Stevenson (1964), 379 U.S. 43

¹⁰¹⁷ See, Sims v. Georgia (1967), 385 U.S. 538

D. CONCLUSION

B CONCLUSION

1. Historical Basis of the Voluntary Rule

Although the history surrounding the subject of extra-judicial confessions in criminal law is indeed obscure, it is respectfully submitted that the limited historical material available relating thereto does expose a relatively clear sequence leading to the modern rule.

Previous to the fourteenth century, legal philosophy was specifically directed to the prejudice of an accused. How a confession was obtained was of no concern to the courts, and once a confession was made by an accused, under the Assize of Clarendon he could not be heard to deny it. As the Assize directed¹⁰¹⁸

"And if any one shall have acknowledged robbery or murder or theft or the reception of them in the presence of legal men or of the hundreds, and afterwards shall wish to deny it, he should not have law."

Suspicion alone was enough to merit arrest, and the confession alone was the deciding factor as to the guilt of an accused. Thus, in 1212, two suspected persons were hanged on the basis of their extra-judicial confessions,¹⁰¹⁹

¹⁰¹⁸ See, ubi supra, fn. 13

¹⁰¹⁹ See, ubi supra, fns. 11, 18

and in 1225, where an accused had confessed at the time of his arrest, he was sentenced to a similar fate because, as the entry states, "... the king's bailiff produces writ to prove the confession made before him."¹⁰²⁰

During this period, there was no inquiry by the court as to whether a confession was voluntarily made. As regards the extra-judicial confession of an accused, all that was necessary was that the confession be proven to have been in fact made.

This harsh philosophy as regards the criminal accused began to give way with the rise of the body of common law in the early fourteenth century. As early as 1302, historical evidence as to the growth of a concept of fairness to and an accused began to appear, when, on the contention of the accused that he had confessed in prison to escape physical abuse, a judicial inquiry was held. The entry states in part ¹⁰²¹

"Qui quidem Ricardus in curia comparens cognovit confessionem suam, sed dixit quod eam fecit rigore et dirrigione quam sustinuit in prisoa, ut sic relevari posset ab angustia."

Although it is probable that such an inquiry was held primarily to discover whether the prison officials

1020 ubi supra, fn. 19

1021 ubi supra, fn. 31

did in fact exceed their authority,¹⁰²² this primary intention was undoubtedly inextricably tied up with the growing belief that an accused should not be made to suffer because of involuntary action, especially if it resulted from an official abuse of authority. It was, in effect, a recognition by the common law of a concept of voluntariness, a doctrine of fairness towards an accused.

By the middle of the century, the existence of such a concept at common law was beyond doubt. In 1354, where a woman complained, at her trial for felony, that she had been forced to commit the felony by her husband, the court considered her allegation favourably. As the entry states ¹⁰²³

"Un feme fuit arraine de c̄ q̄ el aver felon
emble ijs de pain, q̄ dis q̄l le fist per
commandement mes pristeront l'enquest, per
q̄ fuit trove que el' le fist per cohercion de
son baron naugre le soē, per que el' ala
quite, c̄ dit fuit q̄ (?) command de baron
son auter cohercion, ne ferra nus manner
de felone, c̄ c "

The concept of voluntariness, as an acceptable standard of fairness, permeated the structure of the criminal law. For the first time, it attached itself

1022 as to arbitrary treatment by officials, see ubi supra, fn. 21. Prison officials were authorized to use force by the common law, only in the case of peine forte et dure. See, for e.g., ubi supra, fn. 23. Peine forte et dure was, in effect, punishment ordered by the court on the accused refusal to be judged by the law of the land.

1023 ubi supra, fn. 31

to confessions, but only to a limited extent. If an accused confessed voluntarily, i.e., "facte bator voluntarie cognovit", he was allowed to abjure the realm.¹⁰²⁴ Although uncertainty surrounded the concept and its relation to confessions, two things were evident. In the first place, the common law recognized the divisibility of the general category of confessions into voluntary and involuntary, and by permitting abjuration of the realm, encouraged voluntary confessions. Secondly, the law indicated a willingness to inquire into the circumstances surrounding the making of the confession, if it was objected to as being made under duress.

By the sixteenth century, this attitude of the common law blossomed into a doctrine relating to confession of felony. As Stoundforde states¹⁰²⁵

"If one is indicted or appealed of felony, and on his arraignment he confesses it, this is the best and surest answer that can be in our law for quieting the conscience of the judge and for making it a good and firm condemnation, provided however, that the said confession did not proceed from fear, menace, or duress, which if it was the case, and the judge has become aware of it, he ought not to receive or record this confession, but cause him to plead not guilty and take an oath to try the matter."

Although this statement of the law, which was applied statutorily to treason,¹⁰²⁶ appears to have been

1024 See, ubi supra, fn. 24, 33

1025 ubi supra, fn. 51, and see, fn. 52.

1026 See, ubi supra, fn. 50

limited to the plea of guilty, it is submitted that it was not so restricted. Although no reference was made to extra-judicial confession, it was clear that, even though the confession of an indictment was judicial, the law was directed against the extra-judicial use of violence, duress, fear or threats to obtain it. Inevitably, an accused so induced would confess long before he reached the court and the practice was to read such confession at his trial.¹⁰²⁷

The change in the direction of legal philosophy relating to confessions in the fourteenth century had now grown up to a clear recognition that a confession made without violence was the best form of evidence. But the doctrine enounced by Staundforde did not state as a rule that confessions in order to be admissible must be proven to be voluntary. It was, rather, a manifestation of the broader principle accepted at common law, i.e. a person cannot be compelled to accuse himself, a principle deriving from the concept of voluntariness itself. As the learned Barbauld tells us in his

¹⁰²⁷ For e.g., in the Trial of John Crook (1652), 6 How. St. Tr. 202, the accused is heard to say at p. 218

".. this kind of practice, to take men by force and imprison them, and then ask them questions, the answer of which makes them guilty, is not only unrighteous in itself, but against law..."

Eirenarcha 1028

"For at the Common Law, Nemo tenebatur prodere seipsum, and then his fault was not to be run out of himselfe but rather to be discovered by other means and men."

As in the fourteenth century, if the accused objected to his confession as being given under duress, the trial judge would inquire into the matter. The law demanded that confessions had to be voluntary, but generally speaking the requisite voluntariness was presumed, and unless objected to by the accused, they were accepted as the highest form of evidence or proof of being made. As early as 1603, one is able to recognize in terms what was later to become the modern rule excluding involuntary confessions. In the Trial of Sir Walter Raleigh, when the accused tendered a letter from

1028 ubi supra, fn. 56. And see, fns. 54, 55. If one accepts the maxim as the basis of the modern privilege against self-incrimination, it is respectfully submitted that one cannot then ignore the historical relationship between the privilege rule, and the rule excluding involuntary confessions. It would appear that both rules are species of the same genus, and that the genus is the concept of voluntariness. But see, contra, Wigmore, Evidence (3rd ed., 1940), ss. 823-827, John H. Wigmore, Nemo tenetur Seipsum Prodere (1891), 5 Harv. L. Rev. 71, E. M. Morgan, The Privilege Against Self-Incrimination (1949), 34 Minn. L. Rev. 7, Compare, C.T. McCormick, The Scope of Privilege in the Law of Evidence (1938), 16 Tex. L. Rev. 417.

his accuser which exonerated him, the report stated ¹⁰²⁹

"Here was much ado Mr. Attorney alleged that his last letter was politically and cunningly urged from the Lord Cobham, and that the first was simply the truth, and that lest it should seem doubtful that the first letter was drawn from my lord Cobham by promise of mercy or hope of favour, the Lord Ch. J. willed that the jury might herein be satisfied. Whereupon the earl of Devonshire delivered that the same was mere voluntary, and not extracted from the Lord Cobham upon any hopes or promise of pardon." (My Italics)

By the first half of the eighteenth century, the philosophy behind the concept of voluntariness in relation to confessions had been clarified. As Baron Gilbert then observed ¹⁰³⁰

"... the voluntary confession of the party in interest is reckoned the best evidence, for if a man's swearing for his interest can give no credit, he must certainly give most credit when he swears against it, but then this confession must be voluntary and without compulsion, for our law in this differs from the civil law, that it will not force any man to accuse himself, and in this we do certainly follow the law of nature, which commands every man to endeavour his own preservation, and therefore Pain and Force may compel man to confess what is not truth of facts, and consequently such extorted confessions are not to be depended upon."

¹⁰²⁹ ubi supra, fn. 52, and see, fn. 63. It is to be noted that the issue here was whether the accuser was induced to accuse Raleigh, or whether he did so voluntarily. It would appear that the judge had a discretion to inquire into any form of evidence, if it appeared not to be voluntary. However, as to the use of torture, see, ubi supra, fn. 43, 67

¹⁰³⁰ Law of Evidence (1754), at p. 139

By 1775,¹⁰³¹ the learned Mansfield, C.J. was able to conserve the frequent exclusion from evidence of confessions which were obtained by threats or promises, and in R. v. Warickshall¹⁰³² the Gilbert philosophy was authoritatively stated in modern terms. The presumed voluntariness rule, which had its roots in the fourteenth century, had now become an exclusionary rule of evidence. Confessions obtained by threats, promises or any inducement would be excluded from evidence. As Baron Hotham noted in R. v. Thompson¹⁰³³

"I must acknowledge, that I do not like to admit confessions, unless they appear to have been made voluntarily, and without any inducement. Too great a chestity cannot be preserved on this subject.

The modern rule - which became in the nineteenth and present centuries an inquiry into whether the prosecution in a given case had discharged the burden upon it of proving to the satisfaction of the trial judge, that no inducement had been held out to the accused by a person in authority¹⁰³⁴ - had thus been initiated.

1031 R. v. Rudd, ubi supra, fn. 70

1032 ubi supra, fn. 71

1033 ubi supra, fn. 73

1034 For e.g., Ibrahim v. R., ubi supra, fn. 78

11 The Rule England and Canada

Although the evidential rule relating to confessions in England and Canada is positively stated as being that a confession in order to be admissible at the trial of its maker must be voluntary, the practical application of the rule, and thus the test of admissibility, takes the form - was any inducement held out to the accused by a person in authority?¹⁰³⁵ In both countries, admissibility of a confession is dependent on a prior analysis by the trial judge, in the absence of the jury, of the total circumstances surrounding the making of the confession.¹⁰³⁶ In this analysis, two important considerations arise - Which persons are persons in authority? Which factor or factors amount to an inducement?

(a) Person in Authority

As regards who are persons in authority within the rule, some confusion does arise. In England, a definition propounded by text-writers stated that any person concerned with the apprehension, arrest, examination and prosecution of an accused was a person in

1035 See, supra, England, c.2, Canada, c.1

1036 See, supra, England, c.5, Canada, c.5

authority, to the exclusion of all other persons.¹⁰³⁷

As recently as 1967, the learned Parker, L.J., refused to either approve or reject this definition.¹⁰³⁸

Even more recently, the learned Viscount Dilhorne in 1968 decided, obiter, that a person was not a person in authority because he could not have been regarded as such by the accused.¹⁰³⁹

Similarly, in Canada, both definitions are in existence. As early as 1922,¹⁰⁴⁰ the learned Chisholm, J., in the Nova Scotia Supreme Court held the criterion to be belief by the accused that the person was a person in authority, while twelve years later, in the New Brunswick Court of Appeal, the English text-writers definition was considered to be the proper test of person in authority within the rule.¹⁰⁴¹

It is respectfully submitted that the test suggested by the learned Viscount Dilhorne in England, and that first referred to in Canada by Chisholm, J., is the proper test by which persons are to be considered persons in authority. A trial judge has only to ask - Could the accused reasonably believe the person to be in authority over him?

1037 See, supra, fn. 132

1038 See, R. v. Wilson et al., supra, fn. 135

1039 Deakinanan v. R., supra, fn. 143

1040 R. v. Miles, supra, fn. 471

1041 See, R. v. Rasmussen, supra, fn. 476

(o) The Inducement

It is clear that the inducement within the Anglo-Canadian rule, in order to negative voluntariness, must be temporal in character.¹⁰⁴² A spiritual inducement, or moral exhortation, or a product of the imagination of the accused will not suffice to exclude confessions resulting therefrom.¹⁰⁴³ In order for exclusion to result, the inducement must be held out and communicated to the accused, either directly or indirectly.¹⁰⁴⁴ Although it is now certain in English law that the inducement does not have to relate to the charge or contemplated charge against the accused,¹⁰⁴⁵ there is a difference of opinion existing in Canada on this point.¹⁰⁴⁶ It is respectfully submitted that when an occasion presents itself in the Supreme Court of Canada, this difference of opinion will be resolved in favour of the English rule, and the reasoning of Lord Reid

1042 See, for e.g., R. v. Gidney, supra, fn. 151, R. v. Gilham, supra, fn. 162, R. v. Todd, supra, fn. 419, See, generally, England, c.4, Canada, c.3,

1043 See, for e.g., R. v. Sleeman, supra, fn. 167, R. v. Goddard, supra, fn. 170, R. v. Gutschmidt, supra, fn. 502, R. v. Veighill, supra, fn. 502

1044 See, for e.g., R. v. Jacobs et al., supra, fn. 172, See, also, supra, fn. 503.

1045 See, Commissioners of Customs & Excise v. Harz et al., supra, fn. 178.

1046 See, for e.g., R. v. Rasmussen, supra, fn. 413, Compare, R. v. Miles, supra, fn. 413.

in the Commissioners of Customs and Excise v. Harz et al.¹⁰⁴⁷

It is similarly clear that inducement within the rule is completely unrestricted as to kind, provided only that it is temporal in character. Where the question arises as to whether certain language used by a person in authority amounted to an inducement, it is respectfully submitted that the test to be employed by the trial judge is whether the language used could be reasonably understood by the accused as offering him any benefit or suggesting any threat.¹⁰⁴⁸ If the answer to this query is affirmative, then it is submitted, the language amounts to an inducement within the rule.

(c) Confirmation by Subsequent Facts

Undoubtedly, the most confusing facet of the Anglo-Canadian rule is that which is commonly referred to as the doctrine of confirmation by subsequent facts.¹⁰⁴⁹ In English law, it would seem that any fact discovered by means of an inadmissible confession is admissible

¹⁰⁴⁷ supra, fn.178

¹⁰⁴⁸ As to England, see, R. v. Rose, supra, fn. 214, per Lord Russell, C.J., at p. 202, Commissioners of Customs - Excise v. Harz et al., supra, fn. 178, per Lord Reid at p. 158, Compare R. v. Northam, supra, fn. 213, per Vinn, L.J. As to Canada, see, R. v. Godwin, supra, fn. 543, R. v. Fittol, supra, fn. 544

¹⁰⁴⁹ See, generally, England c. 7, Canada, c. 6.

itself, provided it can be proved without reference to the confession,¹⁰⁵⁰ and further provided that the inducement did not expressly relate to the production or discovery of the fact.¹⁰⁵¹ From that, it would appear to follow that since the fact cannot be proved by the confession, the inadmissible confession cannot be made admissible by the fact "proving" or confirming the confession to be true. In other words, as the Court stated in R. v. Parickshell ¹⁰⁵²

"The rules of evidence which respect the admission of facts, and those which prevail with respect to the rejection of parol declarations or confessions, are distinct and independent of each other."

There is, however, authority which states, in effect, that so much of the confession as relates strictly to the fact discovered by it, should be allowed in evidence because the discovered fact confirms that it is part of the confession was true.¹⁰⁵³ Similarly, in Canada, there is also two lines of authority, one refusing the confirmation doctrine,¹⁰⁵⁴ the other admitting that part of the confession confirmed by the discovery of the

1050 See, R. v. Parickshell, supra, fn. 307

1051 See, supra, R. v. Barker, supra, fn. 312, 316

1052 supra, fn. 307, See, also, R. v. Lockhart, supra, fn. 309, R. v. Harvey, supra, fn. 321, R. v. Berriman, supra, fn. 328

1053 See, supra, fn. 322, R. v. Gould, supra, fn. 326, Compare, supra, fn. 331

1054 See, R. v. McCafferty, supra, fn. 668, R. v. Fais, supra, fn. 670

fact.¹⁰⁵⁵

It is respectfully submitted that rejection of the doctrine of confirmation by subsequent facts would be more in accord with logic, as well as in conformity with the historical principle on which the confession rule is based. Confessions or statements if inadmissible as not being voluntary, should, it is submitted, be inadmissible for all purposes, regardless whether they are true, or confirmed as being true in whole or in part. It is hoped, when an opportunity does arise, in both England and Canada, that this area of law will be so clarified.

(d) Other Facets of the Rule

There are, however, differences between the law of England and that of Canada in several aspects of the rule relating to confessions or incriminating statements. In the area of continuous or successive confessions,¹⁰⁵⁶ i.e. where the facts of a given case admit of more than one confession, judicial treatment of the facts tends to differ in the two countries. Where an accused makes one or more statements after previously having been induced to make an earlier one, the question arises whether the later statements were induced by the continuing effect of the inducement of his earlier confession or statement. In England, the law was clearly stated by Parker, L.C.J., in

1055 See, R. v. St. Lawrence, supra, fn. 657, R. v. Prince, supra, fn. 673

1056 See, supra, England, c.6, Canada, c.4

R. v. Smith 1057

"Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement."

In Canada, on the other hand, although the inquiry takes the same form as in England, i.e. has the effect of the earlier inducement dissipated, the weight of case authority appears to demand that subsequent confessions are not admissible unless the accused has been cautioned that his earlier confession cannot be used against him.¹⁰⁵⁸ There is, furthermore, a tendency in Canada to treat, where the facts of a given case permit, more than one confession as being inseparable, and referring to the whole circumstances as being an "atmosphere of compulsion." In other words, the later confessions or statements are regarded as being tainted with the unfairities of the prior induced confession.¹⁰⁵⁹

Although the burden on the prosecution to prove voluntariness on the trial within a trial is, it is submitted, the same in England and Canada,¹⁰⁶⁰ i.e.

1057 supra, fn. 302

1058 See, for e.g., R. v. Finkle, supra, fn. 560
R. v. Kon, supra, fn. 567

1059 See, R. v. Wisnart, supra, fn. 574, R. v. Downey, supra, fn. 558

1060 See, generally, England, supra, c.5, Canada, c.5.

beyond reasonable doubt and to the satisfaction of the trial judge, it would appear that in this area of continuous confessions the quantum of evidence to meet the burden is greater in Canada. Similarly, in Canada, whether an accused was under the influence of alcohol at the time he confessed is treated as a factor affecting voluntariness and hence, admissibility. It is necessary at the time of making the confession that the accused knew and appreciated the consequences of what he was saying.¹⁰⁶¹

(c) The Judges' Rules

Although it may be fairly concluded that the philosophy behind the evidential rule is basically the same in England and Canada, there is a difference in attitude towards criminal investigation itself, and this difference is pointed up by the existence of the English Judges' Rules, which were not judicially duplicated in Canada.¹⁰⁶²

The purpose of the English Rules, which were first formulated in 1912, and 1918, and which were restated in 1964, was two-fold to ensure voluntary confessions, and to provide standards of propriety¹⁶ which the police were expected to conform in their investigation of crime.

¹⁰⁶¹ See, supra, Canada, c.5, s.IV

¹⁰⁶² See, generally, supra, England, c.8, s.111, Canada, c.1, s.111(c)

Although the Rules are not rules of law, they do provide the trial judge with a discretion to exclude a statement or confession from evidence if they were not admeled to by the police. The formulation of the Rules clearly indicated an intention on the part of the judiciary to control police conduct.

On the other hand, although lip service has been paid to the Rules by Canadian judges, the judiciary in Canada appears to be reticent in imposing restrictions by way of a body of rules on police investigation, the result being that police forces in Canada are less restricted in their investigation of crime than police in England. Moreover, it would seem to be indicated that, by not adopting the English Judges' Rules, the judicial attitude in Canada is that accused persons are sufficiently protected, and no need exists to further ensure that confessions made by accused persons in custody are voluntary. Nothing has been found by the writer to suggest that this judicial view is not well-founded, and there does not appear to be, at least in the reported cases, a higher incidence of police-induced confessions in Canada than in England.

There can be no doubt that the Judges' Rules do restrict the police in England in their investigation of crime. The question which must be answered in future, considering the great increase in crime, is whether they

are not restricted unduly. What is needed in the area of confessions is a balance between two competing interests - the interests of society as a whole and those of the individual. It is respectfully submitted that this has been, and is being provided in England and Canada by the standard of voluntariness in the rule relating to confessional evidence.

111 The Rule United States Supreme Court

Although the English evidential rule relating to the admissibility of criminal statements and confessions was approved in the United States Supreme Court, it became, with the fertilisation of the due process clause of the United States Constitution, a constitutional safeguard rather than a rule of evidence. But the test of due process relating to confessions, and thus the standard of constitutional validity, is the same unrestricted test as in Anglo-Canadian law as the confession voluntary, or a consideration of the totality of circumstances in a given case.¹⁰⁶⁴

Any state conviction which was based on an involuntary confession was reversed by the Supreme Court as being violative of the due process clause of the Fourteenth Amendment of the Constitution, and in this regard, it is submitted, the Court has remained remarkably consistent.¹⁰⁶⁵ Within the constitutional rule, as in the Anglo-Canadian rule, the test of voluntariness functions as it had been intended historically. Dictating fairness towards an accused, it protects him from being induced to incriminate himself. In effect, it ensures fundamental fairness in the obtaining, and the use of confessional evidence.

¹⁰⁶⁴ See, generally, supra, U.S.S.C., c.2

¹⁰⁶⁵ See, ibid, s.11

Unlike Canada, and to a greater degree than in England, it would appear that the United States Supreme Court is determined to regulate police investigative practices, by imposing judicial controls as it has done in Miranda v. Arizona.¹⁰⁶⁶ Decided in 1966, the major holding in that case was, that before a statement of an accused is admissible as being constitutionally valid, the accused must have been cautioned, prior to being questioned, that he has a right to remain silent, that any statement he does make may be used in evidence against him, and that he has a right to the presence of a lawyer.

Undoubtedly, the Miranda doctrine is an effective protection to the accused. But it would seem to have been achieved to the sacrifice of efficient police investigation. It is clear that as a result of Miranda, there will be fewer confessions as evidence in criminal trials. Indeed, it would seem to have been a purpose of the Court's decision in Miranda to encourage the police to seek their evidence other than from the mouth of the accused. But what is not so clear is whether or not it was the intention of the Supreme Court to eliminate from evidence the use of confessions or statements altogether. In an attempt to balance the competing interests of the individual and the interests of society, it remains to be seen whether the United States Supreme Court, by Miranda, has erred in

favour of the individual.

iv. The Standard of Voluntariness A Problem in Application - A Suggested Solution

The universal judicial attitude to the reception of confessional evidence was clearly exposed as early as 1823, when in the State v. Fields, the court observed ¹⁰⁶⁷

"... how easy it is for the hearer to take one word for another, or to take a word in a sense not affixed to it by the speaker. And for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible is it to make third persons understand the exact state of mind and meaning of the one who made the confession. For these reasons, evidence of confession, though admissible is yet received with great distrust, and under the superintendence of very solicitous apprehensions for the wrong it may do."

Today, the trial judge in determining the issue of voluntariness, is faced with further difficult problems. If the accused does not give testimony on the issue, the trial judge is deprived of being able to assess the personal characteristics of the accused - whether he is intelligent or slow, easily suggestible or otherwise, nervous or not - all factors which are relevant to a determination of the issue. Moreover, when only prosecution evidence is presented, the court is usually asked to accept as accurate, testimony depending on the

¹⁰⁶⁷ (1823), 10 Fenn. 10

witnesses' memory, or notes, which may be faulty or sketchy. If the accused does testify, his testimony is almost always in direct conflict with police evidence, giving rise to a difficult issue of credibility.

Similarly, in the vast majority of cases, the questions which led to the confession are not before the court, questions which in themselves may have contained an inducement to the accused to speak.

It is respectfully submitted that many of the problems in applying the test of voluntariness could be eliminated, if all confessions or statements taken by the police from an accused in custody were required to be mechanically recorded. By then having the tape recording available on the voir dire or trial within a trial, it is submitted that the trial judge would be better apprised of the exact circumstances surrounding the making of the confession or statement. As recently as 1965, in the case of R. v. Allamussain,¹⁰⁶⁸ the first authoritative judicial pronouncement on the subject,¹⁰⁶⁹

¹⁰⁶⁸ (1965), 49 Cr. App. R. 230

¹⁰⁶⁹ In R. v. Mills & Rose (1962), 46 Cr. App. R. 336, Ginn, J., noted at p. 339

"As the law of this country stands at present, there is really no direct authority upon the question whether or not a record of sounds taken by a tape recording machine is, as such, admissible in evidence or not."

in England it has been held that a tape recording is admissible in evidence, provided the accuracy of the recording can be proved,¹⁰⁷⁰ and the voices recorded properly identified.

Furthermore, it would seem that such a procedure would neither restrict the investigative function of the police nor detract from protection afforded an accused in custody. Although one disadvantage would be the possibility of the tape being edited, changed or "doctored" after the confession was made,¹⁰⁷¹ it is submitted that this possibility however remote would be outweighed by the advantages of this form of evidence in excluding factors surrounding the making of the confession or statement, and therefore, factors relevant to the issue of voluntariness.

107 Supra, fn. 1065, at p. 238, per Marshall, J. As to Canada, see, Colnatts v. R., supra, fn. 647

107. See, F. J. Radley, Recording as Testimony to Truth [1954] Cr. L. Rev. 96, and see, generally, D. J. Elliott, Mechanical Aids to Evidence [1952] Cr. L. Rev. 5, R. E. Auld, The Admissibility of Tape Recordings in Criminal Proceedings: A Comparative Note [1961] Cr. L. Rev. 508

INDEX

Abjuration	11, 13
Appeal	237
Approver	10
Assize of Clarendon	5, 6
Burden of proof	91-97, 243-248, 252, 261
Caution	118, 121, 122, 123, 145- 154, 156, 157, 159, 162 165, 168, 192-196, 231, 232, 234, 235, 238, 239 251, 272, 291, 295, 302 355, 372, 373, 386-386
Compulsive atmosphere	85, 230
Confirmation by subsequent facts	126-143, 277-286, 291
Confrontation of accused with evidence	163, 164, 188, 189, 310, 354
Continuous confessions	115-125, 231-240, 251, 291, 293, 294, 395
Counsel, right to	229, 372, 376-384
Coroner	8
Cross-examination	155, 160, 185, 186, 187, 245, 246
Custodial interrogation, rules of	156-170, 190, 191, 386
Delay in arraignment	35, 328, 331, 336, 354, 356-370, 372
Deprivation of food	352
Deprivation of sleep	228, 332, 353
Detention, illegal	85, 227, 328, 332, 351, 374
Drugs	251, 354
Due process, what is	312-318
Due process, and confession	319-341
Extortion by officials	10
Factors relevant to admissibility	267, 347-355

False statements	164, 177, 188, 220
History, in England -	
Eleventh century	1-4
Twelfth century	5
Thirteenth century	6-9
Fourteenth century	11-14
Fifteenth century	15, 16
Sixteenth century	16-22
Seventeenth century	22-27
Eighteenth century	26-32
History, in Canada	171, 172, 173, 177
History, in U.S.A.	287, 288
Hue and cry	2, 4, 6
Illiteracy	229, 349
Indictment, procedure of	6, 7
Inducement, nature of	62-67, 70, 80, 81, 211-215, 292
Inducement, words amounting to	71-76, 215-219, 290, 293, 294, 301
Inducement, test of	77, 78, 224, 225, 267
Insanity	11, 272, 274, 337, 349
Interrogation, character of	155, 160, 185-187
Interrogation, length of	226, 187, 310, 327, 329, 331, 332, 333, 337, 352
Interrogation, periods of	187, 228, 353
Judge, duty of on voir dire	106-111, 261-268
Judges' Rules	156-170, 190, 191, 386
Jury, function of on voir dire	112, 113, 114, 269, 270, 291
Justices of the Peace	5, 6, 14, 15, 17, 18, 25, 27, 28, 144
King's Council	15
Magna Charta	7, 313
Mental capacity	349
Mens rea	4, 12
Minority	196, 272, 288, 350
Misrepresentation	177, 188
Nemo tenetur prodere seipsum	23, 176, 287, 288, 296, 307, 308

Oath	14, 15, 17, 80, 290
Peine forte et dure	10
Person in authority, concept of	47-51, 197, 293
Person in authority, who is	53, 59, 60, 61, 207, 208
Person in authority, test of	53, 54, 55, 56, 57, 58, 198-207, 266
Poisonous tree, fruits of	389-396
Police, duties of	145, 153, 154, 155, 196
Privilege against self-incrimination	309, 323, 371, 386, 388
Promises (See, Threats)	
Proof, standard of	100-102, 249-261
Psychological pressure	353
Proof, burden of (See, Burden of proof)	
Rebuttal, confession tendered in	246
Roman law	1, 6
Rule, object of	39, 40, 42, 43, 44, 210
Rule, statement of	33, 45, 83, 175, 210, 298
Rules, Judges' (See, Judges' Rules)	
Sleep, deprivation of	228, 332, 353
Solitary confinement	228, 332, 354
Star Chamber, Court of	16, 17, 25
Subsequent facts (See, Confirmation by)	
Threats	27-31, 34-36, 38, 43, 45, 46, 62, 70, 86, 91, 101, 113, 179, 214, 252, 289, 293 300, 311, 348
Torture	9, 15, 16, 17, 24, 25, 28 37, 83, 325, 326, 329
Trial within a trial (See, Voir Dire)	
Trick	81, 82, 219-224, 226, 329 349, 364

Violence	83, 85, 226, 325, 329
Voir dire, history of	87, 88, 89, 90, 107
Voir dire, absence of jury on	90, 241, 242, 261, 397
Voir dire, issue on	107, 108, 241, 255, 256, 257 258, 259, 260
Voluntariness and admissibility	32-45, 179-183, 298
Voluntariness, not admitted as fact	248
Voluntariness and due process	321-341
Voluntariness, determination of	87-112, 241-271, 397-410
Voluntary conduct	4, 12, 26
Warning (See, Caution)	