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James Albert House Jr.

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relationship, his failure to resort to legal process to protect his title is sufficient to indicate his acquiescence in the adverse possession. The fact that he gives the tenant a lease when unaware of any other tenancy relationship, rather than resort to legal process, should not operate to deprive him of his legal title. To allow this result would seem to give an unfair supremacy to the relationship of landlord and tenant to the detriment of the holder of the legal title and would seem to be contrary to the purpose and reason for statutes allowing the acquisition of title to property by adverse possession.

NAOMI E. MORRIS

Constitutional Law—Due Process—Admissibility of Confessions

The decision in the "Reader's Digest Murder Case,"[1] recently handed down by the United States Supreme Court, presents quite a dilemma to state courts in their determination of the admissibility of confessions. In a line of decisions beginning at least as early as 1936,[2] the Supreme Court has set aside as violative of the Due Process Clause of the Fourteenth Amendment convictions in which "third degree" methods were used to extract confessions from the accused.[3]

The common law principle of exclusion of involuntary confessions rested on the theory that they were untrustworthy testimony; that the accused may have given an untrue confession to avoid or end present pain and coercion.[4] A new test of what constitutes an involuntary confession has evolved in the last decade and, until the decision in the principal case, appeared to be becoming an established principle of constitutional law. While this test is not enunciated in any case as a uniform

[1] Stein v. New York, 73 Sup. Ct. 1077 (1953). The case rose to the Supreme Court on writ of *certiorari* after the Court of Appeals of New York affirmed conviction. 303 N. Y. 856, 104 N. E. 2d 917 (1952).

[2] Brown v. Mississippi, 297 U. S. 278 (1936). Involuntary confessions were excluded by federal courts on the ground that they were in violation of the Fifth Amendment privilege against self-incrimination as far back as the leading case of Bram v. United States, 168 U. S. 532 (1897). Judicial thinking tended then to consider involuntary confessions only in the light of the self-incrimination clause of the Fifth Amendment which, of course, was inapplicable to the states. But as Chief Justice Hughes said in Brown v. Mississippi: "Compulsion by torture to extort a confession is a different matter. The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, 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. . . . The freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law." 297 U. S. 278, 285 (1936).

[3] Chambers v. Florida, 309 U. S. 227 (1940); White v. Texas, 310 U. S. 530 (1940); Ashcraft v. Tennessee, 322 U. S. 143 (1944); Malinski v. New York, 324 U. S. 401 (1945); Haley v. Ohio, 332 U. S. 596 (1948); Watts v. Indiana, 338 U. S. 49 (1949); Turner v. Pennsylvania, 338 U. S. 62 (1949); Harris v. South Carolina, 338 U. S. 68 (1949); Johnson v. Pennsylvania, 340 U. S. 881 (1951) (per curiam).

[4] 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

standard, formulated as is a "prescription in pharmacopoeia,"[5] the principle relied upon is that the Due Process Clause of the Fourteenth Amendment proscribes the use against an accused of a confession which was extorted from him by inflicting physical[6] or mental[7] pain, regardless of the reliability of the confession.[8] But as pointed out in a note in this *Law Review,*[9] the test rests upon but a handful of opinions, and in all of the cases having full opinions there were strong dissents. Four of the cases were five-four decisions,[10] while two others were six-three decisions.[11] The permanence of the test became uncertain when, in the summer of 1949, death took two justices who had consistently sided with the majority, Justices Murphy and Rutledge. While three other cases[12] have considered the problem of involuntry confessions and the Due Process Clause of the Fourteenth Amendment since the *Watts, Turner,* and *Harris* decisions were handed down in June of 1949, it was not until *Stein* v. *New York* that the tenuous constitutional rule was questioned by the majority of the court.

In the principal case, petitioners Stein, Cooper, and Wissner were convicted and sentenced to death for the felony murder[13] of the companion of the driver of a *Reader's Digest* delivery truck, which petitioners robbed. Police had arrested petitioners after two months of investigation and had carried them separately and at different times to police barracks, where they were illegally held incommunicado and interrogated for periods of two to four days. Stein and Cooper made confessions, which they contended were extorted from them by force, but Wissner remained

[5] Malinski v. New York, 324 U. S. 401, 417 (1945) (concurring opinion of Frankfurter, J.).

[6] Brown v. Mississippi, 297 U. S. 278 (1936).

[7] Watts v. Indiana, 338 U. S. 49 (1949).

[8] Lisenba v. California, 314 U. S. 219 (1941).

[9] Note, 28 N. C. L. Rev. 393 (1950).

[10] Harris v. South Carolina, 338 U. S. 68 (1949); Turner v. Pennsylvania, 338 U. S. 62 (1949); Haley v. Ohio, 322 U. S. 596 (1948); Malinski v. New York, 324 U. S. 401 (1945).

[11] Watts v. Indiana, 338 U. S. 49 (1949); Ashcraft v. Tennessee, 322 U. S. 143 (1944).

[12] Stroble v. California, 343 U. S. 181 (1952) (conviction affirmed; record showed no evidence of coercion; in fact, it appeared that defendant was anxious to confess, although he claimed he was slapped once by arresting officer); Gallegos v. Nebraska, 342 U. S. 55 (1951) (conviction affirmed; no evidence to show coercion, although the confessions were obtained during a period of 25 days of illegal detention by federal and state officers before accused was brought before a magistrate and before counsel was appointed. While McNabb v. United States, 318 U. S. 332 [1942] proscribes the use in federal courts of evidence obtained by federal officers during illegal detention, the *McNabb* rule is not a limitation imposed by the Due Process Clause on the state courts. Lyons v. Oklahoma, 322 U. S. 596 [1944]); Johnson v. Pennsylvania, 340 U. S. 881 (1951) (per curiam; reversed on the basis of Turner v. Pennsylvania).

[13] A homicide committed by a person engaged in the commission of a felony. It is first-degree murder and carries a mandatory death sentence unless the jury recommends life imprisonment. N. Y. Penal Law §§ 1044(2), 1045, 1045-a (McKinney, 1944).

silent. After this period of custody, they were examined by the prison doctor who later testified that the petitioners had various bruises and abrasions about the body.[14] The examining physician also testified that the injuries "could have been" sustained prior to arrest.[15]

When the confessions were offered in evidence at the trial, the defendants objected to their introduction on the grounds that they had been obtained through coercion. The trial court heard evidence in the presence of the jury as to the issue of coercion and left determination of the issue to the jury. While this New York practice[16] of letting the confession go to the jury to determine its voluntariness is contrary to the general rule that admissibility of a confession is a question of law for the court,[17] the Fourteenth Amendment does not forbid jury trial of the issue.[18] Petitioners did not take the stand,[19] and the issue of coercion rested on charges of their counsel and the circumstantial evidence of multiple bruises and injuries on petitioners' bodies the day after arraignment. The jury was instructed to consider the confessions only if it found them to have been voluntarily made. A general verdict of guilty was rendered by the jury.

As the Supreme Court points out, "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 other evidence."[20] The court therefore held that the jury could properly have found the confessions not to have been obtained by physical force or threats or psychological

[14] "Testimony by the prison doctor who examined them predicated mainly on the notes he made at the time was that Wissner had a broken rib and various bruises and abrasions on the side, legs, stomach and buttocks; Cooper had bruises on the chest, stomach, right arm, and both buttocks; Stein had a bruise on his right arm." Stein v. New York, 73 Sup. Ct. 1077, 1083 (1953).

[15] *Id.* at 1085, note 11. The doctor testified that it was difficult to state exactly how long the bruises had been there; that the bruises on Cooper's body could have been there as long as six days (he had been in custody three days); and that Stein's bruises could have been sustained prior to arrest. *Ibid.*

[16] The trial judge must exclude the confession if he is convinced that it was not freely made, or that the verdict that it was freely made would be against the weight of evidence, but if the issue of voluntariness presents a fair question of fact, he must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and truthfulness. N. Y. CODE CRIM. PROC. § 395 (McKinney, 1945).

[17] 3 WIGMORE, EVIDENCE § 861 (3d ed. 1940). This rule is well recognized by the majority of jurisdictions, including the federal courts and 30 states, all of which are surveyed by Dean Wigmore. North Carolina is in accord with the majority rule. State v. Manning, 221 N. C. 70, 18 S. E. 2d 821 (1942).

[18] Lisenba v. California, 314 U. S. 219 (1941).

[19] Under New York law, if defendants had taken the witness stand to support the charges that the police had obtained the confession by coercion, they could have been subjected to general cross-examination. See People v. Trybus, 219 N. Y. 18, 113 N. E. 538 (1916). As the court points out, if they had testified, undoubtedly their previous criminal records would have been put in evidence, and by refusing to testify those records were not brought to the attention of the jury.

[20] Stein v. New York, 73 Sup. Ct. 1077, 1085 (1953).

coercion, and that if the jury so resolved that the confessions were admissible, it would not have been constitutional error.[21] If the jury had rejected the confession as involuntary, however, the court held that the jury could constitutionally have based a conviction upon other sufficient evidence. The court thus resolved its own dilemma by finding that it was neither error if the jury admitted and relied on the confession, nor was it error if they rejected it and convicted on other evidence.[22]

To this holding, Justices Black, Frankfurter, and Douglas filed vigorous dissents. Justice Black declared, "beginning at least as early as *Chambers* v. *Florida* [1940], this court has set aside state convictions as violative of due process when based on confessions extracted by state police while suspects were held incommunicado. That line of cases is greatly weakened if not repudiated by today's sanction of the arbitrary seizure and secret questioning of the defendants here. State police wishing to seize and hold people incommunicado are now given a green light."[23] Justice Frankfurter in his dissent said "the court goes beyond a mere evaluation of the facts of this record. It makes a needlessly broad ruling of law which overturns what I had assumed was a settled principle of constitutional law."[24] He adds that "it is painful to be compelled to say that the court is taking a retrogressive step in the administration of criminal justice. I can only hope that it is a temporary, perhaps an *ad hoc*, deviation from a long course of decisions."[25] Justice Douglas echoes the alarm of the other dissenters and cites a body of opinion[26] against the decision of the majority.[27] While the court had

[21] The court was impressed by the evidence that Stein and Cooper confessed after "only" 12 hours of intermittent questioning stretched over a 32-hour period, and that Cooper spent much of that time "driving a bargain" with police and parole officers that if he confessed, his brother would not be prosecuted for parole violation. *Id.* at 1093.

[22] The court also held that even if the confessions of Stein and Cooper were considered to have been involuntary, their use would not have violated any federal right of Wissner, who did not confess but was implicated by those who did. As for Wissner's contention that his rights were infringed because he was unable to cross-examine accusing witnesses (the confessors, who did not take the stand), the court held that there is no right of confrontation under the Fourteenth Amendment, citing as authority West v. Louisiana, 194 U. S. 258 (1904), in which it was decided that the Federal Constitution did not preclude Louisiana from using affidavits on a criminal trial. As Justice Black points out in his dissent however, a later case, *In re* Oliver, 333 U. S. 257 (1948), reversed a conviction, *inter alia*, because the defendant was denied reasonable notice of the charge against him and the right to confront witnesses against him. Stein v. New York, 73 Sup. Ct. 1077, 1099 (1953).

[23] Stein v. New York, 73 Sup. Ct. 1077, 1099 (1953).

[24] *Id.* at 1100.

[25] *Ibid.*

[26] Stroble v. California, 343 U. S. 181 (1952); Gallegos v. Nebraska, 342 U. S. 55 (1951); Haley v. Ohio, 332 U. S. 596 (1948); Malinski v. New York, 324 U. S. 401 (1945); Lyons v. Oklahoma, 322 U. S. 596 (1944).

[27] Douglas also contends in his dissent that in all of the cases in which the court has dealt with the practice of discrimination against Negroes in the selection of juries as violative of due process under the Fourteenth Amendment, from Neal v. Delaware, 103 U. S. 370 (1880) down to Avery v. Georgia, 73 Sup. Ct. 891 (1953), the determinative question was whether a constitutional right had been violated,

characterized these rulings as dicta, Douglas points out that *Malinski* v. *New York* was a square holding that if the admitted confession were found to be coerced a subsequent conviction would be set aside, even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict,[28] and that the conviction in *Malinski* was reversed, even though other evidence might have supported the verdict.[29] The holding in the *Malinski* case followed language in other cases[30] similar to that used by Justice Roberts in *Lisenba* v. *California:* "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."[31]

The ruling in *Stein* v. *New York* that the jury could reject the confessions as involuntary and still base a conviction on other sufficient evidence, appears then to be a retreat from the precedent of the Supreme Court itself. It is interesting to note that Justices Douglas, Frankfurter, and Black, now dissenters, were with the majority in the *Ashcraft, Malinski, Haley, Watts, Harris,* and *Turner* decisions; while Justice Jackson, who here writes the majority opinion, was dissenting along with Justices Reed and Burton and Chief Justice Vinson in those cases. The new Justices, Clark and Minton, take the majority view in the instant case. As Douglas states, "from the undisputed facts it seems clear that these confessions would be condemned if the constitutional school of thought when *Haley* v. *Ohio,*[32] *Watts* v. *Indiana,*[33] *Turner* v.

and not if there were other sufficient evidence to convict. In the *Avery* case, the court said if the jury commissioners failed in their duty to use a non-discriminatory method of selecting a jury, the conviction must be reversed, "no matter how strong the evidence of guilt." Stein v. New York, 73 Sup. Ct. 1077, 1103 (1953) (dissenting opinion of Douglas, J.).

[28] "If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict." Malinski v. New York, 324 U. S. 401, 404 (1945).

[29] The court recognizes that it cannot characterize the *Malinski* case as dictum, and expressly says that "except for the *Malinski* case the question raised here could not have been raised or decided." Stein v. New York, 73 Sup. Ct. 1077, 1095 (1953). Without overruling or distinguishing the *Malinski* decision, the court states that against the factual background of its other decisions which it had called dicta, "we do not think our cases establish that to submit a confession to a state jury for judgment of the coercion issue automatically disqualifies it from finding a conviction on other sufficient evidence, if it rejects the confession." *Id.* at 1095.

[30] "If the confession which petitioner made in the District Attorney's office was in fact involuntary, the conviction cannot stand, even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict." Stroble v. California, 343 U. S. 181, 190 (1952). "The use of any confession obtained in violation of due process requires the reversal of a conviction even though unchallenged evidence, adequate to convict remains." Gallegos v. Nebraska, 342 U. S. 55, 63 (1951). "A coerced confession is inadmissible under the Due Process Clause even though statements in it may independently be established as true." Watts v. Indiana, 338 U. S. 49, 50, note 2 (1949).

[31] 314 U. S. 219, 236 (1941).

[32] 332 U. S. 596 (1948).

[33] 338 U. S. 49 (1949).

Pennsylvania,[34] and *Harris* v. *South Carolina*[35] were decided still was the dominant one."[36] Those cases indicated that the Supreme Court had directed a "mandate" to the state courts[37] that confessions be admitted only when free from any physical or psychological coercion. This was hailed by many as a salutary development in constitutional law and criminal procedure,[38] and a trend in the direction of the English law, which is particularly sensitive to police abuses of the rights of the accused.[39] Certainly, it demonstrated that much had been accomplished since 1931, when the Wickersham Commission reported that the extortion of confessions by the police by mental or physical pressure was widespread in this country,[40] but that such methods still exist is shown by the cases which continue to appear. A survey of the methods that have been used to extort confessions tends to indicate that it has gradually taken a reduced showing of coercion to result in a finding by the Supreme Court of a violation of due process.[41]

[34] 338 U. S. 62 (1949).

[35] 338 U. S. 68 (1949).

[36] Stein v. New York, 73 Sup. Ct. 1077, 1104 (1953).

[37] "It is sufficient to here say that we have reached the conclusion that the instant confession was obtained under circumstances such as to constitute its use in evidence a denial of due process, under the decisions of the Supreme Court of the United States. Having so concluded, it is our duty to follow what we understand to be the mandate of that court. Prince v. Texas, 155 Tex. Cr. R. 108, 111, 231 S. W. 2d 419, 421 (1950).

[38] Note, 28 N. C. L. REV. 390 (1950).

[39] "Questioning of persons in custody; xlvii: a rigid instruction should be issued to the police that no questioning of a prisoner, or a person in custody, about any crime with which he is, or may be charged, should be permitted. (1) If a prisoner expresses a wish to make a voluntary statement, he should be cautioned, offered writing materials and left to write without being overlooked, questioned or prompted." Only obvious ambiguities in prisoner's statements may be cleared up by questions, which prisoner shall be free to answer or refuse to answer without any coaxing or pressure by the police. Royal Commission on Police Powers and Procedure, Cmd. no. 3297, at 144, as quoted in 3 WIGMORE, EVIDENCE § 847 (3rd ed. 1940).

[40] Reported in National Commission on Law Observance and Enforcement, Report No. 11, *Lawlessness in Law Enforcement* 153 (1931).

[41] Brown v. Mississippi, 297 U. S. 278 (1936) (confession obtained after accused was taken by a deputy and a mob to the woods, severely beaten and a noose placed around his neck; conviction reversed); Chambers v. Florida, 309 U. S. 277 (1940) (defendants jailed in atmosphere of mob violence, subjected to five days and nights of interrogation before they "broke" and confessed; conviction reversed); Ashcraft v. Tennessee, 322 U. S. 143 (1944) (accused subjected to 36 hours of continuous questioning, during which time he was denied food and sleep; conviction reversed); Lyons v. Oklahoma, 322 U. S. 596 (1944) (accused was subjected to 16 days of intermittent questioning and had a pan of human bones placed before him in order to obtain a confession; conviction affirmed, as a later confession was determined voluntary); Malinski v. New York, 324 U. S. 401 (1945) (defendant was arrested, stripped, and held incommunicado in order to coerce a confession; conviction reversed); Haley v. Ohio, 332 U. S. 596 (1948) (a fifteen-year-old Negro boy was interrogated from midnight until 5 a.m. and not permitted to see friends or counsel and a confession was obtained; conviction reversed); Watts v. Indiana, 338 U. S. 49 (1949) (accused was interrogated intermittently for six days, during which time he was not given adequate opportunities for sleep or a decent allowance of food; conviction reversed); Turner v. Pennsylvania, 338 U. S. 62 (1949) (accused was interrogated by relays of officers from four to six

But throughout these decisions there have been strong dissents, a major theme being that the Supreme Court was interfering with the states in their administration of criminal justice.[42] The alarm that Jackson once expressed in his dissents over this "encroaching federal power" over state courts is now embodied in the majority opinion of the principal case.[43] The court feels that the state courts may be abdicating their primary responsibilty of determining the admissibility of confessions under their own rules, and that the conscience of the local administration of justice may become subordinated to a federal Supreme Court exercizing its conscience over the details of state police procedure.[44]

Thus the court, rather than deciding whether the confessions by petitioners in the instant case were voluntary, holds that the jury could have determined the issue either way and their verdict would be given

hours a day for five days; conviction reversed); Harris v. South Carolina, 338 U. S. 68 (1949) (defendant was questioned intermittently for three days; conviction reversed).

[42] The typical dissent was that expressed by Justice Jackson in Ashcraft v. Tennessee, 322 U. S. 143, 174 (1944): "The use of the Due Process Clause to disable the states in protection of society from crime is quite as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation."

The majority view of this line of cases is well stated by Justice Frankfurter in Watts v. Indiana, 338 U. S. 49, 50, 53-55 (1949): "Although the Constitution puts protection against crime predominantly in the keeping of the states, the Fourteenth Amendment severely restricted the states in their administration of criminal justice. . . . On review here of state convictions, all those matters which are usually termed issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this court. . . . But issue of fact is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happening, when that conclusion incorporated standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. . . . If force has been applied [to secure a confession], this court does not leave to local determination whether or not the confession was voluntary. There is torture of mind as well as body; the will is as much affected by fear as force. . . . A confession by which life becomes forfeit must be the expression of free choice. . . . If it is the product of sustained pressure by the police it does not issue from a free choice. . . . Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. . . . In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a confession based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken. We are deeply mindful of the anguishing problems which the incidence of crime presents to the states. But the history of criminal law proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating, whatever may be their effect in a particular case."

[43] "Petitioner's argument here is essentially that the conclusion of the New York judges and jurors are mistaken and that by reweighing the same evidence, we, as a superjury, should find the confessions were coerced. This misapprehends our function and scope of review, a misconception which must be shared by some state courts with the result that they feel a diminished sense of responsibility for protecting defendants in confession cases." Stein v. New York, 73 Sup. Ct. 1077, 1090 (1953).

[44] Note, 28 N. C. L. REV. 390 (1950).

"decisive respect."[45] But the court does not expressly overrule its previous holdings, for it further declares:

> Of course, this court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court.[46]

This language has more of a familiar ring; it is found in previous cases which declare that the securing of a confession through the "denial of due process is the failure to observe that fundamental fairness essential to the principles of liberty and justice,"[47] and that the absence of such fairness "fatally infected the trial."[48] Perhaps this indicates that the court is not abandoning but just contracting the radius of the protection of due process to cover only those instances in which extreme abuses by the police are employed to obtain confessions, or where the Supreme Court thinks there is insufficient evidence to convict without the use of the confession. Despite the concern of the dissent,[49] there are no indications that the decision is a return to the old trustworthiness test, long since buried by newer constitutional principles.[50] How retrogressive a step this case represents will be shown only by future decisions of the court. But until a more definitive opinion is handed down, state courts will face the problem of whether they can permit a conviction on the basis of other sufficient evidence when the question of the voluntariness of the confession goes to the jury.[51]

[45] Stein v. New York, 73 Sup. Ct. 1077, 1090 (1953).
[46] *Id.* at 1091.
[47] Brown v. Mississippi, 297 U. S. 278 (1936).
[48] Lisenba v. California, 314 U. S. 219 (1941).
[49] Stein v. New York, 73 Sup. Ct. 1077, 1104 (1953) (dissenting opinion of Douglas, J.).
[50] Brown v. Mississippi, 297 U. S. 278 (1936).
[51] The language used by the court indicates that it will reverse in the future only when extreme abuses are found in the securing of the confession or when there is not other sufficient evidence to convict, regardless of whether the confession is determined voluntary by the jury or the judge. The court states, "of course, where the judge makes a final determination that a confession is admissible and sends it to the jury as a part of the evidence to be considered on the issue of guilt and the ruling admitting the confession is found on review to be erroneous, the conviction, at least normally, should fall with the confession." Stein v. New York, 73 Sup. Ct. 1077, 1096 (1953). Despite this statement, the whole tenor of the decision is that it will take a showing of extreme coercion before the Supreme Court will reverse a state court finding of guilt, irrespective of *who* determines the voluntariness of the confession. Not only are those jurisdictions in which the question is one of fact for the jury facing a dilemma in resolving the problem of admissibility of confes-

Due process as secured by the Fourteenth Amendment is very flexible, and can be enlarged or contracted according to the policy of the Supreme Court at a given time. Confessions cannot always be tested to fit a Procrustean bed, but must be measured in the light of a flexible due process requirement that state courts observe that fundamental fairness essential to the protection of the accused by refusing to use a confession obtained by physical or psychological coercion. It is to be hoped that we are not entering upon "a new regime of constitutional law,"[52] in which the rights of the accused are valued less highly than is the efficient functioning of the machinery for the administration of justice, but rather that a resilient Due Process Clause will reassert in succeeding cases the principles that nearly a generation of decisions has evolved.

JAMES ALBERT HOUSE, JR.

Constitutional Law—Racial Restrictive Covenants—Recovery of Damages for Breach

Since 1948 when the Supreme Court held that racial restrictive covenants could not be specifically enforced by injunction in state or federal courts,[1] legal writers have speculated[2] and the courts have disagreed[3] on the recovery of damages. Now the Supreme Court in *Barrows* v. *Jackson*[4] has settled the issue by holding the award of damages by a state court for the breach of racial restrictive covenants to be state

sions under the Due Process Clause, but also facing the same problem are those jurisdictions in which the voluntariness of the confession is a question of law for the court. The latter must decide whether a conviction now must be reversed when the trial judge admits a confession which may have been involuntary, but there is, however, other sufficient evidence on which the jury could have found the accused guilty. And just how much coercion the Supreme Court is now likely to say is of "such gravity and magnitude" to require a reversal is an unknown measure and a problem facing *all* jurisdictions.

[52] Stein v. New York, 73 Sup. Ct. 1077, 1102 (1953) (dissenting opinion of Douglas, J.).

[1] Shelley v. Kraemer, 334 U. S. 1 (1948) (state courts); Hurd v. Hodge, 334 U. S. 24 (1948) (federal courts) (discussed in Notes, 27 N. C. L. REV. 224 (1949), 28 N. C. L. REV. 442 [1950]).

[2] Barnett, *Race Restrictive Covenants Restricted,* 28 ORE. L. REV. 1 (1948); Crooks, *The Racial Covenant Cases,* 37 GEO. L. J. 514 (1949); Groves, *Judicial Interpretation of the Holdings of the United States Supreme Court in the Restrictive Covenant Cases,* 45 ILL. L. REV. 614 (1950); Heard, *Race and Residence: The Current Status of Racial Restrictive Covenants,* 1 BAYLOR L. REV. 20 (1948); Howell, *Recent Developments in the Law of Racial Restrictions on Real Property,* 1 INTRA L. REV. OF ST. LOUIS 222 (1951); Kiang, *Judicial Enforcement of Restrictive Covenants in the United States,* 24 WASH. L. REV. 1 (1949); Lowe, *Racial Restrictive Covenants,* 1 ALA. L. REV. 15 (1948); Ming, *Racial Restrictions and the Fourteenth Amendment: the Restrictive Covenant Cases,* 16 U. OF CHI. L. REV. 203 (1949); Scanlan, *Race Restrictions in Real Estate-Property Values v. Human Values,* 24 NOTRE DAME LAW. 157 (1948).

[3] See notes 10 and 11 *infra.*

[4] 73 Sup. Ct. 1031, 97 L. Ed. (Adv. p. 961) (1953).