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DISCUSSION OF RECENT DECISIONS

ATTORNEY AND CLIENT—COMPENSATION AND LIEN OF ATTORNEY—WHETHER AN ATTORNEY HAS A RIGHT TO RECOVER ON CONTRACT FOR CONTINGENT FEE WHERE DEATH OF ATTORNEY INTERVENES BEFORE RECOVERY BY CLIENT—In the case of *Roe* v. *Sears, Roebuck & Co.*,[1] it appeared that Roe, in December of 1933, entered into a contract with defendant whereby he was employed as an attorney to recover federal floor and processing taxes which defendant contended had been illegally collected by the government. Roe's compensation for his services was wholly contingent upon defendant's recovery of the taxes. Roe died in June of 1934. The act imposing the floor and processing taxes was declared unconstitutional two years later.[2] As a consequence, defendant subsequently recovered a large sum of money from the government and the sellers of merchandise. Plaintiff, Roe's widow and executrix, instituted action in September of 1940 for recovery under the contract. The district court upheld defendant's motion for summary judgment, basing its decision solely upon the Illinois statute of limitations. The Circuit Court of Appeals for the Seventh Circuit reversed

1 132 F. (2d) 829 (1943).
2 United States v. Butler, 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477 (1936).

the judgment and remanded the cause, holding that a recovery could be had even though the attorney died before the services were consummated or the recovery of the client completed.

The contract in question was an Illinois contract and was governed by Illinois law. The Circuit Court of Appeals properly held that the statute of limitations did not begin to run until defendant had recovered part of the taxes involved.[3] Since recovery was later than 1936 and plaintiff instituted action in 1940, the question as to whether the five or the ten year statute was applicable thereto was, then, unimportant.

In discussing the merits of the controversy, the court indicated that the plaintiff was entitled to recover the fair value of the services rendered. Since the plaintiff based her suit squarely upon the contract and specifically denied that she was suing upon a quantum meruit basis,[4] this decision seems questionable. Not one of the cases cited in the opinion[5] holds that an attorney is entitled to recover upon the contract as if it were wholly performed, although these cases do permit a recovery, on proper pleadings, for the fair value of the services. There are apparently no Illinois cases specifically dealing with the problem. Illinois cases cited[6] do hold that where a client unlawfully discharges an attorney, the client is liable for the services rendered. The court in the instant case thought that such decisions lend some support to the view that, in the event of the death of the attorney, the same rule should apply. But the two classes of cases may be distinguished by the element of breach of contract involved in the first, but not found in the second.

The problem presented in the instant case is really one of impossibility of performance. In that regard the first question to be de-

3 Markman v. Calumet City, 297 Ill. App. 531, 18 N.E. (2d) 75 (1938); Waterman v. Kirk, 139 Ill. App. 451 (1908); Estate of Augustus Switzer v. Gertenbach, 122 Ill. App. 26 (1905).

4 See plaintiff-appellant's brief in Roe v. Sears, Roebuck & Co., on file in case No. 7947, Circuit Court of Appeals, Seventh Circuit.

5 Mulqueen v. Commissioner of Internal Revenue, 65 F. (2d) 365 (1933); Neale v. Hinchcliffe, 21 Ariz. 452, 189 P. 1116 (1920); Baylor v. Morrison, 5 Ky. (2 Bibb) 103 (1810); Succession of Payne, 155 La. 177, 99 So. 29 (1924); Creason v. Harding, 344 Mo. 452, 126 S.W. (2d) 1179 (1939); Morton v. Forsee, 249 Mo. 409, 155 S.W. 765 (1913); Johnston v. Board of Com'rs of Bernalillo County, 12 N.M. 237, 78 P. 43 (1904); Sargent v. New York Cent. & H. R. R. Co., 209 N. Y. 360, 103 N.E. 164, 52 L. R. A. (N.S.) 380 (1913); In re Lichtblau, 261 N. Y. S. 863 (1933); In re Levy's Will, 201 N. Y. S. 818 (1923); Landa v. Shook, 87 Tex. 608, 30 S.W. 536 (1895).

6 Bunge v. Downers Grove Sanitary Dist., 356 Ill. 531, 191 N.E. 73 (1934); Town of Mt. Vernon v. Patton, 94 Ill. 65 (1879); Goldberg v. Perlmutter, 308 Ill. App. 84, 31 N.E. (2d) 333 (1941); Morris v. Ekstrom, 291 Ill. App. 614, 10 N.E. (2d) 706 (1937); Caruso v. Pelling, 271 Ill. App. 318 (1933); Tulka v. Chicago City Ry. Co., 259 Ill. App. 234 (1930); and Millard v. County of Richmond, 13 Ill. App. 527 (1883).

cided is whether or not the contract is an entire one, and, if so, whether the risk of loss through impossibility should fall upon the plaintiff. In the case of *Walsh* v. *Shumway*,[7] the Illinois Supreme Court held that a contract between an attorney and client providing for a contingent fee was an entire contract and, consequently, there could be no recovery upon a quantum meruit basis. Though that case did not involve impossibility of performance, it seems likely that the Illinois courts would maintain the same view in cases like the instant one where impossibility does occur,[8] although in other jurisdictions a different rule might prevail.[9] Of course, in the absence of controlling Illinois decisions, the federal court was free to exercise an independent judgment, but it does not appear to have arrived at a view consonant with what the Illinois doctrine would seem to be.

Where a recovery is allowed for services rendered pursuant to an entire contract full performance of which has become impossible, it is generally requisite that the part of the services rendered shall have been beneficial to the defendant.[10] Apparently, in the instant case, the services rendered in no way contributed to the ultimate recovery by the defendant. This issue was not discussed to any great extent in the opinion, and it is possible that, upon a trial of the instant case, the issue of benefit to the defendant of the services rendered will assume greater importance than was indicated therein. If none in fact was conferred, it would appear that on either theory the court should have denied recovery. The view which permits a recovery for at least the fair value of services rendered pursuant to an entire contingent fee contract is to be preferred,[11] but it would seem that the court should not be justified in allowing such a recovery unless the plaintiff is willing to try the case on that theory.

The Illinois courts may adopt a rule refusing recovery in cases such as the instant one, but this decision may serve to have some influence in favor of an opposite holding, hence its existence is worthy of notice.

P. M. HICKMAN

7 65 Ill. 471 (1872).

8 People ex rel. Palmer v. Peoria Life Ins. Co., 376 Ill. 517, 34 N.E. (2d) 829 (1941); Huyett & Smith Mfg. Co. v. Chicago Edison Co., 167 Ill. 233, 47 N.E. 384 (1897); Siegel v. Eaton & Prince Co., 165 Ill. 550, 46 N.E. 449 (1897); City of Chicago v. Sexton, 115 Ill. 230, 2 N.E. 263 (1885); Bassett v. Child, 11 Ill. 569 (1850); O'Hern v. De Long, 298 Ill. App. 375, 19 N.E. (2d) 214 (1939); In re Estate of Cook, 282 Ill. App. 412 (1935); Estate of Preston v. Smith, 67 Ill. App. 613 (1896).

9 See, for example, Dryer v. Lewis, 57 Ala. 551 (1877); Ryan v. Dayton, 25 Conn. 188 (1856); Coe v. Smith, 4 Ind. 79 (1853); Clark v. Gilbert, 26 N. Y. 279 (1863); Wolfe v. Howes, 20 N. Y. 197 (1859); Parker v. Macomber, 17 R. I. 674, 24 A. 464 (1892); McClellan v. Harris, 7 S. D. 447, 64 N.W. 522 (1895); Landa v. Shook, 87 Tex. 608, 30 S.W. 536 (1895); Fenton v. Clark, 11 Vt. 557 (1839); and Jennings v. Lyons, 39 Wis. 553 (1876).

10 See cases cited in note 9, ante.

11 Restatement, Restitution, Ch. 2, § 40.

CRIMINAL LAW—EVIDENCE—EFFECT OF DETENTION IN POLICE CUSTODY FOR LENGTHY PERIOD PRIOR TO PRELIMINARY EXAMINATION UPON ADMISSIBILITY OF CONFESSION OTHERWISE VOLUNTARILY GIVEN—In two decisions simultaneously rendered, those of *McNabb* v. *United States*[1] and *Anderson* v. *United States*[2] the United States Supreme Court recently reversed federal criminal convictions on the ground that confessions obtained from certain of the accused had been improperly secured and admitted, even though no evidence of coercion or "third degree" method was involved beyond the fact of an intermittent questioning of the persons concerned covering several days between the time of arrest and preliminary examination. Despite the fact that in each case the trial court had, by way of preliminary determination of admissibility, found no such evidence of coercion as to render the confessions involuntary, and despite the fact that the jury in each case found likewise though directed to disregard the confessions if they believed them to be involuntary, the majority of the court were of the opinion that the failure to surrender the arrested persons to the examining magistrate immediately after seizure[3] constituted such an invasion of the rights of the accused as to necessarily make their statements involuntary *per se*. In so deciding on their own motion, the majority indicated that they did not deem it necessary to invoke constitutional guarantees, but were content to rest the decision on applicable federal statutes[4] and on the court's own power to supervise the administration of criminal justice in the federal courts.

The protection prescribed by the Fifth Amendment, that a person shall not be compelled to be a witness against himself in a criminal case, is not limited to the courtroom but extends to the jail as well.[5] For that reason confessions obtained out of court are not presumed to be true,[6] especially when made by one in custody, and they may even be presumed to be involuntary.[7] The prosecution, therefore, is usually required to introduce some evidence that a confession was

1 —U. S.—, 63 S. Ct. 608, 87 L. Ed. (adv.) 579 (1943), reversing 123 F. (2d) 848 (1941). Mr. Justice Reed wrote a dissenting opinion. The decision therein was criticized, but followed, in Haupt v. United States, — F. (2d) —(1943), by the Circuit Court of Appeals, Seventh Circuit, in its opinion filed in case No. 8165, not yet reported.

2 —U. S.—, 63 S. Ct. 599, 87 L. Ed. (adv.) 589 (1943), reversing 124 F. (2d) 58 (1941). Dissent noted by Mr. Justice Reed.

3 5 U.S.C.A. § 300 a, authorizing officers of the Federal Bureau of Investigation to make arrests, requires that "the person arrested shall be immediately taken before a committing officer."

4 18 U.S.C.A. § 595; 5 U.S.C.A. § 300 a; 18 U.S.C.A. § 593.

5 United States v. Kallas, 272 F. 742 (1921).

6 Diaz v. People, 109 Colo. 482, 126 P. (2d) 498 (1942).

7 Stewart v. State, 231 Ala. 594, 165 So. 840 (1936). Some courts however will hold confessions to be prima facie voluntary: Cooper v. State,—Miss.—, 11 So. (2d) 207 (1942). This attitude forces defendant to prove that it was not voluntary and requires great caution on his part if he wishes to testify to involuntariness without waiving completely his privilege to remain silent.

in fact voluntarily made, though the decisions on this point have been far from uniform.[8]

As the voluntary nature of the confession is regarded as the mark of its truthfulness, it has been universally admitted since very remote times that physical violence applied to extort a confession will render either a written confession or an oral statement inadmissible. Modern society has progressed far enough with the improvement of crime-fighting methods, agencies and devices to look down upon physical coercion as barbaric. Thus a man who confessed to a murder after having been suspended twice so that the marks of the rope on his neck were still plainly visible to spectators at his trial, and who had also been repeatedly lacerated by whippings until he confessed, was entitled to have the conviction reversed.[9] Likewise, in the case of a man kept in custody, without warrant or charge, without friend or counsel, for six or seven days and taken to the woods at night and there whipped, though the confession was taken formally thereafter by the proper officials, he too was entitled to have such confession excluded.[10] These are extreme examples, but at times such illegally obtained confessions have been used in evidence, and convictions gone unreversed, because no damage was deemed done to the defendant thereby.[11] It should also be remembered that when the alleged violence in obtaining the confession has not been proved, a conviction based thereon may be affirmed,[12] and the involuntary nature of a confession will sometimes be found

[8] Some decisions hold that the only test of admissibility of a confession is its trustworthiness, and it will be admissible if true regardless of coercion. This has been held by federal courts: Murphy v. United States, 285 F. 801 (1923); Wagner v. United States, 110 F. (2d) 595 (1940), and at least once in Illinois, two judges dissenting: People v. Fox, 319 Ill. 606, 150 N.E. 347 (1926). The desire to establish admissibility upon the basis of truth has led to the strange instance of a court going to the trouble of checking up the confession so as to determine whether the defendant's name as therein stated, his address, his age, his wife's name, and even her age were true. The confession also recited that defendant had one child, a girl, indicating her age. All these details being true, the court deemed the rest of the confession must have also been true and therefore it was regarded as properly admitted although it followed beatings suffered at the hands of the prosecutrix's father and brother: West v. State, 141 Tex. Cr. App. 233, 147 S.W. (2d) 791 (1941).

[9] Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936).

[10] White v. Texas, 310 U. S. 530, 60 S. Ct. 1032, 84 L. Ed. 1342 (1940).

[11] People v. Clinton, 78 Cal. App. 451, 248 P. 929 (1926); Smith v. State, 129 Fla. 388, 176 So. 506 (1937); Blanchard v. State, 184 Miss. 369, 184 So. 66 (1938); O'Neil v. State, 38 Okla. Cr. 391, 262 P. 218 (1927); Devroy v. State, 239 Wis. 466, 1 N.W. (2d) 875 (1942).

[12] In People v. Doran, 246 N. Y. 409, 159 N.E. 379 (1927), it seems that a police officer wore a boxing glove during the questioning and Justice Cardozo dissented for that reason. In McCleary v. State, 122 Md. 394, 89 A. 1100 (1914), the jail physician found some bruises on defendant's body and had to administer some morphine prior to confession. There is no indication whatever in the opinion that the morphine itself might have induced the confession. In both cases, convictions were sustained.

present, despite the use of violence, because of some special purpose on the part of the defendant making it.[13]

Physical duress has also been found present, though no violence has been applied. Courts have recognized that physical suffering resulting from defendant's own illness, aggravated by the refusal of medical aid until confession was made, is sufficient to make a confession involuntary.[14] Lack of sleep extending from Monday to Friday has been deemed a species of coercion.[15] Denial of food may also vitiate a confession.[16] Plying with questions, or repeating the same question over and over again, especially if the questioning extends for a whole week and ends after an all-night session, may well destroy the effectiveness of a confession thus secured.[17] Such repetitious questioning tends to annoy, and a person who cannot escape custody is induced to try new answers until he hits upon the ones desired.[18] The federal courts have held confessions obtained under such circumstances void, even when there has been no arrest at all,[19] but not infrequently the jury is allowed to decide as to whether the same was voluntary or not.[20] The element of physical suffering becomes less apparent if the defendant is simply taken at night to the morgue and questioned for less than an hour in the presence of the murdered man's body.[21] In such a case, perhaps, the coercion might be said to result from the implied promise to relieve the defendant from the uncomfortable environment.[22]

13 State v. Hawkins, — Mo. —, 165 S.W. (2d) 644 (1942), it seems that there was not really a confession, but merely statements used as such, being rather in the nature of admissions. In State v. Hoskins, 327 Mo. 313, 36 S.W. (2d) 909 (1931), the defendant's purpose had been to exonerate an accomplice. In People v. Hubbell, — Cal. App. —, 128 P. (2d) 579 (1942), defendant's purpose was to save former pupils from being implicated in immoral practice charges. The majority opinion in Elmore v. State, 223 Ala. 490, 137 So. 185 (1931), held that admitting ownership of whiskey to save one's mother from being also taken to jail was motivated by defendant's own purpose, therefore voluntary and admissible, although the dissenting opinion points out that there was an inducement held out to defendant in the nature of a promise to let his mother go free.

14 Ziang Sung Wan v. United States, 266 U. S. 1, 45 S. Ct. 1, 69 L. Ed. 131 (1924).

15 Rounds v. State, 171 Tenn. 511, 106 S.W. (2d) 212 (1937).

16 People v. Sweeney, 304 Ill. 502, 136 N.E. 687 (1922); People v. Mummiani, 258 N. Y. 394, 180 N.E. 94 (1932). There may still be coercion by threats if, to the knowledge of defendant, an accomplice has confessed under physical duress and defendant fears the same treatment: People v. Flores, 15 Cal. App. (2d) 385, 59 P. (2d) 517 (1936).

17 Deiterle v. State, 98 Fla. 739, 124 So. 47 (1929).

18 Cf. the testimony of the federal agent in the McNabb case: "It took me three and one-half hours to get a story that was satisfactory . . . ."—U. S.—, 63 S. Ct. 608 at 612, 87 L. Ed. (adv.) 579 at 583.

19 United States v. Bell, 81 F. 830 (1897).

20 Cobb v. Commonwealth, 267 Ky. 176, 101 S.W. (2d) 418 (1937).

21 Davis v. United States, 32 F. (2d) 860 (1929).

22 To avoid possible duress, such as follows where a recalcitrant is kept in a small cell, blanketed so as to exclude light and air, as in People v. Brockett,

It requires only one more step to say that inducements and promises may be such as to prevent a confession from being the voluntary act of the defendant and may, therefore, serve to make it untrustworthy. Whether such untrustworthiness follows from the possibility that a confession so obtained will probably reflect the prosecutor's own ideas, or from the fact that the defendant was made to talk against his wish when he had a right to remain silent, is not important since the result is the same. It is, therefore, usually required that, before a confession made by a person in custody be admissible against him, such person be warned of his constitutional rights to counsel and to remain silent, and warned that any statement made might be used in court against him. As a consequence, it has been held that promises which induce one to diverge from the truth will vitiate a confession. For example, a promise of a slight punishment,[23] or to facilitate the posting of a bond,[24] or to transfer him to another prison where he will find his old friends,[25] or not to prosecute his wife if he confesses,[26] have been found sufficient to warrant reversal.

In some cases the promise may be said to arise from conduct alone, serving as an inducement tending to cause the defendant to speak against himself, perhaps without regard to the truth. Thus, exhibiting the members of one's family handcuffed together, though they were in no position to observe the defendant, was regarded as an improper suggestion that they would be freed if defendant confessed.[27] Allowing a seventeen-year old boy to see his sixteen-year old fiance in jail, though not permitting them to talk, was regarded as an inducement offering to liberate her if he would talk as the prosecution desired.[28]

Holding a person in custody unlawfully, without warrant or without reporting to the committing magistrate, while by no means equal to the "third degree" methods above referred to, is likely to coerce the accused into making a false confession in order to be at least released to the proper custodial authorities. Such an inducement, though not

195 Mich. 169, 161 N. W. 991 (1917), some states have passed statutes providing for definite safeguards for persons in custody. See, for example: Ga. Gen. Code 1942, Art. 12468; Carroll's Ky. Stat., 1936, §§ 1649b1 to 1649b4; Vernon's Tex. Code Crim. Proc., Arts. 727 and 727a. The terms of such statutes must be followed strictly. In North Carolina however the statute has been held applicable only to capital cases, hence did not aid the defendant in State v. Exum, 213 N. C. 16, 195 S. E. 7 (1938), even though he was arrested without warrant and his counsel denied access to his client until after confession had been secured.

[23] Williams v. State, 65 Okla. Cr. 336, 86 P. (2d) 1015 (1939); Sorenson v. United States, 143 F. 820 (1906).

[24] People v. Campbell, 359 Ill. 286, 194 N.E. 533 (1935).

[25] State v. Williamson, 339 Mo. 1038, 99 S.W. (2d) 76 (1936).

[26] Brown v. State, 198 Ark. 920, 132 S.W. (2d) 15 (1939). On the new trial, a conviction was had without using the confession, and it was affirmed in 203 Ark. 109, 155 S.W. (2d) 722 (1941).

[27] State v. Butts, 349 Mo. 213, 159 S.W. (2d) 790 (1942).

[28] Perrygo v. United States, 2 F. (2d) 181 (1924).

recognized as amounting to coercion, will at times be held to vitiate a confession, at least where such detention is further aggravated by denial of counsel and friends,[29] by removal from place to place to avoid service of habeas corpus,[30] or to practice continuous and insistent questioning.[31] A combination of unlawful detention, delay in commitment, denial of counsel and friends, and persistent questioning seems to have gained recognition in the decided cases as tending decidedly to make a confession inadmissible. Just one of these elements alone, however, will be insufficient.[32] In several cases dealing with such combination of factors, continuous and insistent questioning appears to have been the deciding factor, no other physical coercion being present,[33] and such has been the holding of the Illinois Supreme Court.[34]

By the decision rendered in the instant cases, still another category appears to have been developed. Though akin to that group of cases last mentioned, the present cases involved only intermittent rather than persistent questioning. No physical discomfort, hunger, or lack of sleep seems to have harassed the accused persons,[35] and though the questioning was extensive it was broken up into fairly short periods.[36] The prisoners were adequately warned of their right to remain silent, no threat of violence was offered, and no promise or inducement was made. In these respects, therefore, the instant cases in no way fit into established categories. They therefore point to the view that mere undue delay between arrest and presentment before a committing magistrate will be fatal to the admissibility of confessions, otherwise voluntarily made, in federal criminal cases. Denied opportunity to question before commitment, and with little chance of success in obtaining a confession there-

29 People v. Day, 125 Cal. App. 106, 13 P. (2d) 855 (1932); People v. Dye, 119 Cal. App. 262, 6 P. (2d) 313 (1932).

30 Hergesheimer v. State, 139 Tex. Cr. 427, 141 S.W. (2d) 598 (1940).

31 Ward v. Texas, 316 U. S. 547, 62 S. Ct. 1139, 86 L. Ed. 1663 (1942), noted in 31 Ill. B. J. 330 (1943).

32 Mere failure to arraign promptly, Cates v. State, 118 Tex. Cr. 35, 37 S.W. (2d) 1031 (1930); denial of counsel, Pinckard v. State, 62 Tex. Cr. 602, 138 S.W. 601 (1911), and State v. Neubauer, 145 Iowa 337, 124 N.W. 312 (1910).

33 Bullock v. United States, 122 F. (2d) 213 (1941); Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 427, 84 L. Ed. 716 (1940); Purpura v. United States, 262 F. 473 (1919).

34 People v. Vinci, 295 Ill. 419, 129 N.E. 193 (1920). Illinois seems committed to a liberal policy tending to protect the accused, and it has been expressly stated that the duty of the State's attorney runs to the accused as well as to the public: People v. Cochran, 313 Ill. 508, 145 N.E. 207 (1924), and that the same methods are to be employed to try guilty persons as to try innocent persons: People v. Bimbo, 314 Ill. 449, 145 N.E. 651 (1924). Both these cases are cited further in People v. Sweetin, 325 Ill. 245, 156 N.E. 354 (1927). However, it has also been held at least once that truth alone matters. See note 8, ante.

35 On the first day of detention in the McNabb case, it is true, the prisoners were confined for some fourteen hours in a room barren of furniture, but thereafter they were provided with the usual accommodations found in public jails.

36 The longest questioning session seems to have been for five or six hours.

after,[37] the federal agents will verily need to use "brains as an instrument of crime detection."[38]

It is probably fortunate, from the standpoint of state police officials, that the decision was confined to statutory rather than constitutional grounds. Had the court seen fit to say that the conduct involved violated the Fifth Amendment it might, on the principle that the Fourteenth Amendment incorporates some of the earlier guarantees in the words "due process," have become a precedent binding on the states. For the present, at least,[39] they may continue to interrogate prisoners, avoiding all semblance of violence, until a confession is obtained or a release is secured by use of habeas corpus.

G. Maschinot

Criminal Law—Evidence—Whether or Not Persons Whose Names and Places of Residence Are Learned by Illegal Search and Seizure of Records May Testify as to Matters Contained in Such Records—In the case of *People* v. *Martin*[1] the facts disclosed that the police obtained information that an abortion had been performed, and, upon talking to the victim, learned that the crime had been committed at a particular location, to-wit: one of the offices of the defendants. Police officers thereupon went to such address, arrested the defendants, and while there, without search warrant, removed certain records and left them with the State's Attorney. Later they entered another office of the defendants, also without a search warrant, and seized additional property and records. A subsequent search of the home of one of the defendants, again without a search warrant, produced other papers and effects particularly the names, addresses, and data concerning certain other persons who had been treated by defendants. Armed with this information, the State's Attorney called a number of these persons to testify before the grand jury and secured an indictment charging the defendants with conspiracy to commit abortion. At the trial thereon, defendants objected to such persons testifying at all, but the state contended that, even though the search and seizure was illegal, the information learned from such witnesses should be regarded as obtained through means independent of the illegal search, hence was properly admissible. The trial court permitted such witnesses to testify

[37] Few criminals will do as the defendant did in People v. Gingell, 211 Cal. 532, 296 P. 70 (1931), who deliberately sought out a police officer in order to make a confession.

[38] —U. S.—at—, 63 S. Ct. 608 at 615, 87 L. Ed. (adv.) 579 at 586.

[39] The court intimated, however, that the existence in almost every state in the union of statutes similar to that relied upon in the instant case, see footnote 7 to McNabb v. United States, —U. S.—at—, 63 S. Ct. 608 at 614, 87 L. Ed. (adv.) 579 at 585, might well have some bearing on the question whether or not a conviction in a state court under similar circumstances involved a violation of fundamental principles of liberty and justice.

[1] 382 Ill. 192, 46 N.E. (2d) 997 (1943).

and defendants were convicted. On appeal therefrom, it was held such ruling was erroneous.

In that connection the court said: "It is only necessary for us to determine whether it has been shown the testimony of the witnesses was received from independent sources, and upon that question we find there is nothing in the record to substantiate the claims of the prosecution, but upon the other hand it is almost conclusive that the information to be given by all of the material witnesses in the case was obtained from the matters illegally seized. . . . "[2] From such statement it would appear that the court felt that the oral testimony of such witnesses amounted to no less than an introduction of evidence illegally seized, particularly since the testimony disclosed substantially nothing more than was contained in the records thus wrongfully taken.

Unless there is a constitutional or statutory restriction, the common-law rule on this issue was that evidence otherwise relevant and material was not objectionable because the manner of its acquisition was unfair, because it was acquired by means of an illegal search and seizure, or because some constitutional provision had not been complied with in acquiring it. If evidence was once before the court, according to such view, a collateral issue would not be permitted to determine the propriety of its source.[3] This was the prevailing rule until the decision of *Boyd* v. *United States*,[4] in which case the United States Supreme Court construed the Fourth Amendment to the United States Constitution so as to prohibit the use of evidence obtained by means of an illegal search and seizure. That body re-examined the doctrine at the time of the decision in *Adams* v. *New York*,[5] at least as applied to a state prosecution, but reverted to the original view of the Boyd case in the decision in *Weeks* v. *United States*,[6] handed down almost thirty years later, and has followed the doctrine consistently since.[7]

There is a split of authority among the states at the present time on the question of the admissibility of illegally obtained evidence,[8] but Illinois is definitely committed to the minority view that where evidence is obtained by the illegal conduct of state officers in making an illegal search, the evidence will not be admitted in a subsequent trial of the accused,[9] provided that a proper motion is duly made to suppress

[2] 382 Ill. 192 at 202, 46 N.E. (2d) 997 at 1002.

[3] Greenleaf on Evidence (15th Ed.), Vol. 1, § 254a; Jones, Commentaries on the Law of Evidence (2d Ed.), Vol. 5, § 2076.

[4] 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

[5] 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1904).

[6] 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

[7] See Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925); Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931).

[8] Wigmore, Evidence (2d Ed.), Vol. 4, § 2184, Note 1.

[9] People v. Bain, 359 Ill. 455, 195 N.E. 42 (1935); People v. DeLuca, 343 Ill. 269, 175 N.E. 370 (1931); People v. Sovetsky, 343 Ill. 583, 175 N.E. 844 (1931).

the evidence.[10] The failure to make a proper motion, used by the United States Supreme Court as one basis for the distinction between the Adams case and the Weeks case, results in the proposition that the court will not consider such a collateral issue unless a motion has been duly made before the trial to suppress the evidence, and, if none is made, it will not inquire into the source of the evidence.[11] The rule has been confined in Illinois, however, to operate only on its own officers, and does not take cognizance of the illegal conduct of the federal or other governments, nor of the unlawful conduct of third persons.[12] For that matter, it does not concern the rights of any one other than the accused.[13]

The case of *Silverthorn Lumber Company* v. *United States*,[14] cited by the court in the instant case, added a refinement to the doctrine of the Weeks case when the United States Supreme Court there held that evidence obtained by illegal search and seizure could not only not be used as evidence, but that it could not be used at all for any purpose. The Illinois Supreme Court applied that rule, in principle, in the case of *People* v. *Rooney*,[15] wherein they rejected as inadmissible photostatic copies of a pawnshop ticket after the original had been obtained through an illegal search and seizure. In *People* v. *Stokes*,[16] a still further application of this principle was made when the court held that information obtained through an illegal search could not be introduced by way of oral testimony. The decision in the instant case, is, therefore, but a logical extension of established doctrines, for without the illegal search, the prosecuting authorities would never have known of the existence of the witnesses it later called.

The underlying philosophy of the rule has, however, been characterized as an instance of "misplaced sentimentality"[17] resulting in the punishment of the trespasser by refusing to punish the guilty accused. Such extreme applications of the rule of inadmissibility tend to hamper the efficient administration of justice, but the tenor of the decisions in Illinois makes it clear that this state is definitely committed to that policy,[18] and no change appears likely to occur.

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10 People v. Brooks, 340 Ill. 74, 172 N.E. 29 (1930); People v. Prall, 314 Ill. 518, 145 N.E. 610 (1924).

11 People v. Brooks, 340 Ill. 74, 172 N.E. 29 (1930).

12 Gindrat v. People, 138 Ill. 103, 27 N.E. 1085 (1891).

13 People v. Touhy, 361 Ill. 332, 197 N.E. 849 (1935); People v. Bain, 359 Ill. 455, 195 N.E. 42 (1935).

14 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920).

15 355 Ill. 613, 190 N.E. 85 (1934).

16 334 Ill. 200, 165 N.E. 611 (1929).

17 Wigmore, Evidence (2d Ed.), Vol. 4, § 2184.

18 In addition to the instant case, see also People v. Bain, 359 Ill. 455, 195 N.E. 42 (1935); People v. DeLuca, 343 Ill. 269, 175 N.E. 370 (1931); People v. Brocamp, 307 Ill. 448, 138 N.E. 728 (1923).

DISMISSAL AND NONSUIT—APPLICATION FOR NONSUIT AND PROCEEDINGS THEREON—WHETHER PLAINTIFF IN ILLINOIS MAY PREVENT JUDGMENT ON MERITS AND COMPEL NONSUIT BY DELIBERATELY ABSENTING HIMSELF FROM TRIAL—The plaintiff, in the case of *Flassig v. Newman*,[1] instituted an action in forcible entry and detainer. Despite defendant's contention that as title was involved the action should have been in ejectment, plaintiff proceeded to trial thereon. Experiencing difficulty in making proof, plaintiff asked for and received permission to discontinue the trial and file an amended complaint. Such amended complaint, while containing a count in ejectment, reiterated the claim in forcible entry and detainer. When the court indicated that, as to the latter count, he had already determined that question on the prior hearing, plaintiff presented a petition for change of venue on the ground of prejudice on the part of the judge, but the same was denied.[2] The case then being set for trial, plaintiff and his counsel deliberately absented themselves from the hearing but defendants offered evidence to substantiate the defense relied upon. Judgment was, accordingly, given in favor of the defendants on the merits. Plaintiff subsequently moved to vacate such judgment contending that the trial judge should have dismissed the action for want of prosecution. On appeal from an order denying such motion, it was held that plaintiff's failure to comply with the provisions of Section 52 of the Illinois Civil Practice Act[3] justified the decision of the case on the merits.

The common-law rule had been that plaintiff maintained control of the litigation up until judgment had been actually pronounced, hence he could take a voluntary nonsuit as a matter of right,[4] or, by deliberately absenting himself from the hearing, could prevent the court from passing on the merits of the case.[5] Such conduct often made the administration of justice a mere travesty. It was, therefore, provided fairly early in this state that the right to move for a nonsuit should be exercised "before the jury retire from the bar,"[6] though the practice in cases where plaintiff failed to appear was still confined to a mere dismissal of the suit.[7]

1 317 Ill. App. 635, 47 N.E. (2d) 527 (1943).

2 While a petition on such ground must ordinarily be granted if in proper form, People v. Rosenbaum, 299 Ill. 93, 132 N.E. 433 (1921), the denial thereof in the instant case was upheld on the ground the petition was filed too late. See In re Wheeling Drainage Dist. No. 1, 282 Ill. App. 565 (1935).

3 Ill. Rev. Stat. 1941, Ch. 110, § 176.

4 Daube v. Kuppenheimer, 272 Ill. 350, 112 N.E. 61 (1916).

5 Extract in Bellewe 251, 72 Eng. Rep. 109 (1585); Penny v. Harvey, 3 T. R. 123, 100 Eng. Rep. 489 (1789).

6 Laws 1819, p. 142. This section, with additions to cover cases where the trial is before the court without a jury, was last reenacted as § 70 of the Practice Act of 1907, and may be found in Cahill Ill. Rev. Stat. 1931, Ch. 110, § 70. As to chancery proceedings see ibid., Ch. 22, § 36. It seems to have first received application in Berry v. Savage, 3 Ill. (2 Scam.) 261 (1840).

7 Holmes v. C. & A. R. R. Co., 94 Ill. 439 (1880). If plaintiff or his attorney participated in the trial, he was required to comply with the statute or face judgment on the merits: Delano v. Bennett, 61 Ill. 83 (1871).

Section 52 of the Illinois Civil Practice Act, designed to equalize the rights of the plaintiff and the defendant in this regard,[8] placed still further restrictions on the voluntary dismissal of an action without prejudice to the right to institute a new suit. That section has been construed several times prior to the present case, but in all such instances the plaintiff was present in court and moved to dismiss the action. Thus in *Chicago Title & Trust Company* v. *County of Cook*[9] the trial court was reversed for granting plaintiff's motion for nonsuit when the trial had proceeded for several days and no attempt had been made to comply with the requirements of the statute. A decree on the merits was upheld, in *Kosmerl* v. *Sevin*,[10] because the motion was not made until the court was prepared to pronounce the decree. A similar motion, after completion of the hearings before a master in chancery and his report thereon, was held properly denied in *Menard* v. *Bowman Dairy Company*[11] since plaintiff therein presented neither the stipulation nor the affidavit required by the statute, and in *Gunderson* v. *First National Bank of Chicago*[12] a mere oral motion made by counsel during the trial was held insufficient. Though dicta in two other cases might tend to indicate that the statute in question has made no change in the earlier rule,[13] the only actual qualification imposed on the same is to be found in *Galeener* v. *Hessel*[14] where the court held the statute inapplicable if the motion for nonsuit be made prior to appearance by the defendant.

Though such statute does not purport to abolish the court's power to enter an involuntary nonsuit as occurs in cases where the plaintiff fails to appear and prosecute his demand,[15] and merely seems to regulate the plaintiff's conduct when applying for a voluntary dismissal without prejudice, the decision in the instant case discloses that the court feels the practice should be identical whether the plaintiff is

[8] See note to Section 52 of the Civil Practice Act in Illinois Civil Practice Act Annotated (Chicago, 1933) 129.

[9] 279 Ill. App. 462 (1935).

[10] 295 Ill. App. 345, 15 N.E. (2d) 20 (1938).

[11] 296 Ill. App. 323, 15 N.E. (2d) 1014 (1938).

[12] 296 Ill. App. 111, 16 N.E. (2d) 306 (1938).

[13] See Hitchcock v. Hitchcock, 373 Ill. 352, 26 N.E. (2d) 108 (1940), and Korngabiel v. Fish, 313 Ill. App. 286, 40 N.E. (2d) 314 (1942).

[14] 292 Ill. App. 523, 11 N.E. (2d) 997 (1938).

[15] The annotator, in Illinois Civil Practice Act Annotated (Chicago, 1933) 131, states: "Nothing herein said should convey the impression that all judgments in the absence of plaintiffs must necessarily be judgments on the merits. Judgments of nonsuit are not abolished, and, when rendered, always give the privilege of another suit. In the absence of both parties from the trial, unless there be admissions in the pleadings, no judgment other than one of nonsuit would be proper . . . The new section gives a defendant a right to proceed to a judgment on the merits only in the event he produces sufficient evidence to warrant such a judgment." Where nonsuit is entered, plaintiff may institute a new action within one year, even though the statute of limitations may have run in the meantime, under Ill. Rev. Stat. 1941, Ch. 83, § 24a.

present in court asking for such relief or deliberately stays away so as not to be compelled to seek the same. While a difference in principle might be found to exist between the statute and a situation in which plaintiff was unavoidably absent, the same cannot be said of the circumstance disclosed in the instant case. The apparent intention of the legislature in thus limiting plaintiff's control over pending litigation, may well support a construction that the common-law rules as to nonsuit have been to this extent, abrogated. A plaintiff hereafter, then, must stand advised that once litigation has been instituted it must be prosecuted to final judgment on the merits unless he complies with the applicable statute or can show sufficient reason for vacating any judgment rendered therein.

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