Cornell Law Review

Volume 1
Issue 2 *January 1916*

Article 3

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CONFESSIONS OF THIRD PERSONS IN CRIMINAL CASES

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Why should a confession of a specific crime, which would be admissible against the confessor if he were on trial, be inadmissible in favor of a third person charged with the offense, when the confessor is not available as a witness? No doubt the average layman would declare this state of the law glaringly inconsistent in itself, and wholly incompatible with the professed attitude of criminal courts toward accused persons. And while the general sense of justice in the abstract is not always a true test of justice in the concrete, the fact that it is shocked by the denial to *A* of the benefit of *B*'s confession, however voluntary and reliable it may be, is sufficient to justify a comment upon the rule which so excludes the confession.

Of course, it is understood that the confession (as distinguished from an admission) is admitted in evidence against the confessor by virtue of that exception to the hearsay rule, which lets in declarations against the interest of the declarant. A few illustrations of this application will suffice.

"A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B.[2] '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'."[3]

"The confession is admissible on the presumption that a person will not make an untrue statement criminating himself."[4]

"The statement made by the accused was admissible as a declaration against his interest. . . . A party cannot ordinarily prove his own conduct in support of his contention because he might thus manufacture evidence in his own behalf; but there is a presumption that he will not make evidence against his interest."[5]

"Few things happen seldomer than that one in possession of his

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[2]Rex v. Warickshall, 1 Leach 263.

[3]Hopt v. State, 110 U. S. 574, 28 L. ed. Sup. Ct. Rep. 262. To the same effect is Lande's Case, 2 Leach 628.

[4]Levison v. State, 54 Ala. 525.

[5]State v. Willis, 71 Conn. 293, 41 Atl. 820.

understanding should of his own accord make a confession against himself which is not true."[6]

But there are other cosiderations which dictate the exclusion of such confessions, when sought to be introduced in favor of third persons. At a comparatively early date, while the exception to the hearsay rule, which admits declarations against interest, was still in the making, it was limited by an English court declaring that in order to render a declaration admissible under that theory, the interest affected must be pecuniary or proprietary and not penal.[7] Conformably to this it is now uniformly held that evidence of the confession of a stranger that he is the perpetrator of the offense is not admissible as a matter of substantive evidence for the purpose of exculpating the accused, where it is made neither under oath, subject to cross-examination, nor as part of what is indiscriminately denominated the *res gestae,*[8] at least unless there is direct testimony tending to connect the declarant with the crime, and the confession is sought to be used merely in confirmation of it.[9]

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[6]State v. Cowan, 7 Ired. (N. C.) 239.

[7]Sussex Peerage Case, 11 Cl. & F. 109.

[8]United States v. Miller, 4 Cranch C. C. 104, Fed. Cas. No. 15,773; United States v. McMahon, 4 Cranch C. C. 573, Fed. Cas. No. 15,699; United States v. Mulholland, 50 Fed. 415; Smith v. State, 9 Ala. 990; Snow v. State, 54 Ala. 138; Snow v. State, 58 Ala. 372; West v. State, 76 Ala. 98; Owensby v. State, 82 Ala. 63, 2 So. 764; Welsh v. State, 96 Ala. 92, 11 So. 450; Way v. State, 155 Ala. 52, 46 So. 273; McDonald v. State, 165 Ala. 85, 51 So. 629; People v. Hall, 94 Cal. 595, 30 Pac. 7; Mora v. People, 19 Colo. 255, 35 Pac. 179; Lyon v. State, 22 Ga. 399; Moughon v. State, 57 Ga. 104; Daniel v. State, 65 Ga. 199; Kelly v. State, 82 Ga. 441, 9 S. E. 171; Delk v. State, 99 Ga. 667, 26 S. E. 752; Lowry v. State, 100 Ga. 574, 28 S. E. 419; Robison v. State, 114 Ga. 445, 40 S. E. 253; Perdue v. State, 126 Ga. 112, 54 S. E. 820; Kennedy v. State, 9 Ga. App. 219, 70 S. E. 986; Bonsall v. State, 35 Ind. 460; Jones v. State, 64 Ind. 475; Siple v. State, 154 Ind. 647, 67 N. E. 544; Green v. State, 154 Ind. 655, 57 N. E. 637; State v. Smith, 35 Kan. 618, 11 Pac. 908; Davis v. Com., 95 Ky. 19, 44 Am. St. Rep. 201, 23 S. W. 585; Selby v. Com., 25 Ky. L. Rep. 2209, 80 S. W. 221; Bacigalupi v. Com., 30 Ky. L. Rep. 1320, 101 S. W. 311; State v. West, 45 La. Ann. 14, 12 So. 7, subsequent appeal in 45 La. Ann. 928, 13 So. 173; State v. Mitchell, 107 La. 618, 31 So. 993; State v. Jones, 127 La. 694, 53 So. 959; Munshower v. State, 55 Md. 11, 39 Am. Rep. 414; Com. v. Chabbock, 1 Mass. 144; State v. Evans, 55 Mo. 460; State v. Duncan, 116 Mo. 288, 22 S. W. 699; State v. Hack, 118 Mo. 92, 23 S. W. 1089; State v. Nicholson, 56 Mo. App. 412; Mays v. State, 72 Neb. 723, 101 N. W. 979; Greenfield v. People, 85 N. Y. 75, 39 Am. Rep. 636; State v. May, 15 N. C. (4 Dev. L.) 332; State v. Duncan, 28 N. C. (6 Ired. L.) 236; State v. White, 68 N. C. 158; State v. Haynes, 71 N. C. 79; State v. Bishop, 73 N. C. 44, 1 Am. Crim. Rep. 594; State v. Baxter, 82 N. C. 602; State v. Beverly, 88 N. C. 632; State v. Fletcher, 24 Or. 295, 33 Pac. 575; Rhea v. State, 10 Yerg. 258; Sible v. State, 3 Heisk. 137; Peck v. State, 86 Tenn. 259, 6 S. W. 389; Bowen v. State, 3 Tex. App. 617; Sharp v. State, 6 Tex. App. 650; Holt v. State, 9 Tex. App. 571; Horton v. State, 24 S. W. Tex. 28; Hodge v. State, 64 S. W. Tex. 242; State v. Totten, 72 Vt. 73, 47 Atl. 105; State v. Hunter, 18 Wash. 670, 52 Pac. 247.

[9]See in this connection, Smith v. State, 9 Ala. 990; Munshower v. State, 55 Md. 11, 39 Am. Rep. 414; State v. Fletcher, 24 Or. 295, 33 Pac. 575; Stanley State 48, Tex. Crim. Rep. 537, 89 S. W. 643.

Underlying the rule is the idea that the probability of false "confessions" for the purpose of exculpating one who is in the toils of the law renders their exclusion necessary as a matter of safety. As said in one case: "The rule excluding such confessions itself suggests the reason why they have not been more frequently resorted to in behalf of the guilty. [The word "guilty" in this connection is a most unfortunate use.] The confession in question was made out of court, was not supported by the oath of the party confessing, and the party was never subjected to cross-examination, which might very quickly have disclosed the falsity of the confession and the motive that prompted it. The law, in determining what is hearsay does not admit what a witness states some other person told him, any more than it admits what still another person may have imparted to the one next in the line of communcation. It is all hearsay; and no just exception can be made because the party confessing has put himself in a position of some hazard."[10]

But it would seem that this argument goes to the weight rather than to the admissibility of confessions. The argument, when applied to the absolute exclusion of such evidence, is an argument that might be made for excluding almost every species of evidence. We, with our rules for impeachment of witnesses, expert detection of forgeries, and the like, must face the fact that practically all kinds of admissible evidence may be the subject of falsification. Yet we admit them for what they are worth in a particular case, and leave it to the jury to say whether they can be believed in view of the circumstances.

To make an ironclad rule excluding a confession by a person other than the accused is to deprive, in many instances, an undeserving victim of circumstances or perjury, of the saving grace of a third person's true "confession." In the nature of things, by the law of chance or otherwise, some of the "confessions" must be true.

Frequently cases which expressly commend and apply the "possibility of fabrication" theory are found to rely upon the fact that the circumstances of the particular case tend to show that the confession therein involved was in fact fabricated, just as if that justified the enforcement of the theory. Those very circumstances were discredit the "confession," show pretty clearly that, save perhaps in the exceptional case, the detection of falsity is not such a difficult matter after all; and that the circumstances surrounding the confession usually give a reasonably good line on its truth. Just why

[10]Brown v. State, 37 L. R. A. (N. S.) 345, 55 So. Miss. 961.

unfavorable circumstances should be regarded as the clinching argument for the exclusion of a confession upon general grounds, when those circumstances would no less serve to discredit it in the minds of the jury, is not easy to see. Yet, as said before, some cases are found to involve substantially this position.

An example of this may be seen by reading the last quotation above in connection with the language which immediately follows it in the opinion of the court: "Many motives, apart from the love of truth and justice, induce men to assume the gravest risks. Among the strongest of these is family affection, and it is observable that in this case the property against which the trespass was directed was that of Henry Brown, and not his brother, the accused, and that in the confession proposed to be proved, Henry Brown, while claiming to be the culprit, stated that his brother 'had suffered long enough about the matter,' . . . It is worthy of note in this case, that although Henry Brown had been present at the previous trial of his brother, he remained wholly silent as to his authorship of the crime, and that his confession was not made until the state had disclosed all of its evidence and the trial resulted in a verdict of manslaughter, on which his brother was sentenced to imprisonment for the short term of two years. The hazard he assumed, was not, therefore, one of very great gravity, especially as his running away on being released goes strongly to show that, apart from facing a jury in his brother's behalf, he did not intend to incur any decided risk, and was ready to recant his confession as soon as it had served its purpose, or exposed him to any great peril. This much is said in answer to the suggestion that only an imperative sense of guilt could have moved him to brave the great dangers that attended his confession and as going to show that the supposed harshness of the rule may afford no reason for not adhering to it and excluding hearsay evidence as inadmissible."[11]

From what has been said, especially with respect to the fact that the hearsay rule is founded upon the desire to prevent perjury with impunity, it follows that the limitation which excludes all admissions which are against "penal" interest is tantamount to a declaration that, while a man who makes an admission against his pecuniary

[11]Brown v. State, *supra*. These are excellent reasons why the defendant in this particular case was not entitled to the benefit of the confession as an entirely truthful and reliable one. But it does not justify the exclusion of a confession where there is neither direct testimony nor any circumstance which tends to establish its untruth. To admit the confession even in the former instance would be merely to leave it to the jury to ignore it in view of the strong circumstances against it, and thus accord to the jury the right to exercise its peculiar function of determining the weight and credibility of evidence.

or proprietary interest will be presumed to tell the truth, he will be presumed a liar when his statement is against his penal interest. It is going far to say that, whereas man holds property in such high regard that any of his statements to the detriment of his title and interest therein will be taken as true, the average individual takes such little thought of liberty, life and soul, that he will falsely condemn them for the purpose of exonerating another who, by the same token, has no greater solicitude for his own liberty, life or soul; and this is especially unjustifiable in the light of the common knowledge that the individual, instead of having a higher regard for property than for life and liberty, will, when accused of crime, exhaust his entire material wealth to secure liberty, life and vindication.

And it may be added that a confession is admitted against the declarant himself when he is on trial for the offense, not, of course, upon the theory that, if he was indiscreet enough to make the statement, he would suffer the consequences, but upon the ground that having been made to his own detriment, it is presumed to be the truth. But the query occurs, why should the presumption as to its truth diminish when the declaration is sought to be admitted in favor of another?[12]

With respect to this limitation of the exception to the hearsay rule, Professor Wigmore has this to say in his great work on Evidence:[13] "The rulings already in our books cannot be thought to involve a settled and universal acceptance of this limitation. In the first place, in most all of the rulings the declarant was not shown to be deceased or otherwise unavailable as a witness, and therefore, the declaration would have been inadmissible in any view of the present exception. Secondly, in some of the rulings the independent doctrine was applicable that, in order to prove the accused's non-commission of the offense by showing commission by another person, not merely one casual piece of evidence suffices but a prima facie case resting on several concurring pieces of evidence must be made out. Finally, most of the early rulings had in view, not the present exception to the hearsay rule, but the doctrine of admissions that the admissions of one who is not a co-conspirator cannot effect others jointly charged. It is therefore not too late to retrace our steps and to discard this barbarous doctrine which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the

[12]Some of the above language is taken from an earlier discussion of this question by the present writer, in a note in 37 L. R. A. N. S. 345.
[13]§ 1477.

true culprit now beyond the reach of justice. Those who watched with self-righteous indignation the course of proceedings in Captain Dreyfus' trial should remember that, if that trial had occurred in our own courts the spectacle would have been no less shameful if we, following our own supposed precedents, had refused to admit what the French Court never for a moment hesitated to admit,—the authenticated confession of the escaped Major Esterhazy, avowing himself the guilty author of the treason there charged."

Now and then we hear of a convicted person being pardoned upon another's confession, sometimes after years of imprisonment. In such a case there appears little disposition to disbelieve the confession. For instance, the reader may remember the case of the Pittsburgh man who, a few years ago, was thus pardoned after serving many years of a sentence for homicide. The truth of the confession, and the innocence of the unfortunate prisoner, seem to have been unquestioned, and were the basis of the pardon; yet the fact remains that if the confession had been made before the trial of the prisoner, it would not,—at least unless taken under a commission or other legal sanction, have been admissible in behalf of the accused. The rule which excludes such evidence has been called "wholesome." Professor Wigmore says it is "barbarous." In the majority of instances it is applied without discussion beyond reference to supposed precedent. It reduces to mere verbiage the motto, "Better that ninety-nine guilty should escape, than that one innocent person should suffer." Whether or not that motto, as some contend, goes too far, it certainly leans in the right direction. The rule as to confessions of third persons does not.