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Evidence -- Confessions -- Admissibility Thereof

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by a power company renders less important the distinction often drawn in private tort cases between willfulness and negligence on the part of a defendant[15] and the effect of possible laches or acquiescence on the part of the plaintiff.[16]

The decision in the principal case is supported by the few decided cases in this field.[17]

MAX OLIVER COGBURN.

Evidence—Confessions—Admissibility Thereof

Prior to 1942, when the famous *McNabb* decision[1] was handed down, the law as to the admissibility of confessions had been that such an instrument was admissible if voluntarily made and inadmissible if not.[2]

said by way of dictum: "If this were a controversy respecting a private way I would not hesitate to deny the mandatory injunction . . . but it is manifest that, by reason of the relation which the complainant bears and its duty to the public, a judgment for damages would be totally inadequate to meet the situation."

[15] Clough v. Healy & Co., 53 Cal. App. 397, 200 Pac. 378 (1921); Bauby v. Krasow, 107 Conn. 109, 139 Atl. 508 (1927); Waterbury Trust Co. v. G. L. D. Realty Co., 124 Conn. 191, 199 Atl. 106 (1938); Tucker v. Howard, 128 Mass. 361 (1880); Walter v. Danisch, 133 N. J. Eq. 127, 29 A. 2d 897 (1943).

[16] In the following cases injunction was refused because of the plaintiff's laches or acquiesence: Waterbury Trust Co. v. G. L. D. Realty Co., *supra* note 15; Perry v. Hewitt, 314 Mass. 346, 50 N. E. 2d 48 (1943) (use of right-of-way by defendant for about 44 years); Levi v. Worcester Consol. St. Ry., 193 Mass. 116, 78 N. E. 853 (1906) (facts not clear but plaintiff appears to have "unreasonably" delayed in protecting his rights); Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770 (1892); Andrews v. Cohen, 163 App. Div. 580, 148 N. Y. Supp. 1028 (1914) (defendant told plaintiff that he intended to build passway over plaintiff's easement and plaintiff made no objection then or during construction).

[17] Collins v. Alabama Power Co., 214 Ala. 643, 108 So. 868 (1926) (five-room house built fifteen feet over on right-of-way which plaintiff had acquired for the maintenance of its power lines, ordered removed); Willingham v. Georgia Power Co., 193 Ga. 801, 20 S. E. 2d 83 (1942) (lumber packed on land over which plaintiff had easement to construct and maintain its power lines, ordered removed); Arkansas-Louisiana Gas Co. v. Cutrer, 30 So. 2d 864 (Court of Appeal of La., 1947) (frame house built over plaintiff's high pressure gas line upon plaintiff's easement, same result); Moundsville Water Co. v. Moundsville Sand Co., 124 W. Va. 118, 19 S. E. 2d 217 (1942) (sand and gravel placed upon easement which plaintiff used for maintenance of its water pipe lines, same result); Norfolk Southern Ry. Co. v. Stricklin, 264 Fed. 546 (E. D. N. C. 1920) (buildings, fences and other structures were ordered removed from plaintiff railroad's easement); *cf.* Babler v. Shell Pipe Line Corp., 34 F. Supp. 10 (E. D. Mo. 1940) (not a suit for injunction but plaintiff was held to have the right to maintain a building over the defendant's pipe lines).

[1] 318 U. S. 332 (1942).

[2] *E.g.*, Lisenba v. United States, 314 U. S. 219 (1941); Wan v. United States, 266 U. S. 1 (1924); Wilson v. United States, 162 U. S. 613 (1896); Sparf and Hansen v. United States, 156 U. S. 51 (1895); State v. Thompson, 227 N. C. 19, 40 S. E. 2d 620 (1946); State v. Patrick, 48 N. C. 443 (1856); State v. Roberts, 12 N. C. 259 (1827); Rex. v. Warickshall, 1 Leach 263, 168 Eng. Rep. 234 (1783). That this had been the test in England even before 1775 *see* Rex v. Rudd, 1 Leach 115, 118, 168 Eng. Rep. 160, 161 (1775). "The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been that such examinations and confessions have not been made use of against them on their trial."

The tests used in determining "voluntariness" varied,[3] but the ultimate fact of admissibility or inadmissibility was always decided by their end result,[4] the theory being that the voluntary confession warranted the greatest credibility because it flowed "from the strongest sense of guilt,"[5] while an admission involuntarily made was rendered untrustworthy as evidence for lack of spontaneity.[6] Moreover, quite apart from the evidentiary requirement of trustworthiness, the involuntary confession was invalidated by the mandate of fair play called for by the due process provision in the federal constitution.[7]

In the *McNabb* decision, however, the United States Supreme Court took an abrupt departure from the above rule and supplemented it with a new test of its own devising. In reversing a lower federal court conviction,[8] that court found that illegal detention in violation of the prompt arraignment statutes,[9] when accompanied by long-continued questioning, was enough to render inadmissible an apparently *voluntary* confession obtained during the detention. Purposely sidestepping the constitutional

[3] In fact, different tests could sometimes be applied in the same case, depending on whether the voluntary nature of the confession was being attacked on evidential or constitutional grounds. Lisenba v. United States, 314 U. S. 219, 236 (1941). Generally, however, hope of reward or fear of physical harm instilled in the confessor by his captors were the controlling factors. Bonner v. State, 55 Ala. 245 (1876); State v. Thompson, 227 N. C. 19, 40 S. E. 2d 620 (1946); State v. Patrick, 48 N. C. 443 (1856); Rex. v. Rudd, 1 Leach 115, 168 Eng. Rep. 160 (1775). *See* Lisenba v. United States, *supra* at 240; Wilson v. United States, 162 U. S. 613, 623 (1896); State v. Andrew, 61 N. C. 205, 206 (1867). But some courts did not consider the absence of these factors conclusive proof of voluntariness. Wan v. United States, 266 U. S. 1, 14 (1924). "In the Federal courts the requisite of voluntariness is not satisfied by establishing 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."

[4] See note 2 *supra*.

[5] Rex v. Warickshall, 1 Leach 263, 168 Eng. Rep. 234, 235 (1783); State v. Biggs, 224 N. C. 23, 27, 29 S. E. 2d 121, 123 (1944).

[6] *E.g.*, 3 WIGMORE, EVIDENCE §822 (3d ed. 1940); Lisenba v. United States, 314 U. S. 219 (1941); State v. Patrick, 48 N. C. 443 (1856); Rex v. Warickshall, 1 Leach 263, 168 Eng. Rep. 234 (1783).

[7] "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. . . . If, by fraud, collusion, trickery, and subornation of perjury on the part of those representing the State, the trial of an accused person results in his conviction, he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured, and used in the trial." Lisenba v. Unted States, 314 U. S. 219, 236, 237 (1941); Chambers v. Florida, 309 U. S. 227 (1939); Brown v. Mississippi, 297 U. S. 278 (1935).

[8] McNabb v. United States, 123 F. 2d 848 (C. C. A. 6th 1941).

[9] 28 STAT. 416 (1894), 18 U. S. C. §595 (1926). "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial. . . ." [Repealed, 62 STAT. 992 (1948). See FED. R. CRIM. P., 4 and 5]; 48 STAT. 1008, 5 U. S. C. 300a (1934) ". . . the person arrested shall be immediately taken before a committing officer." [Repealed, 62 STAT. 862 (1948).] North Carolina has the same statutory requirements. N. C. GEN. STAT. §§15-24, 46 (1943).

However, none of these statutes provide penalties in case of non-compliance.

issue, it based its opinion entirely upon its broad power to prescribe rules of evidence for federal courts,[10] and left undecided the question as to whether the confession was, in fact, voluntary.

Clearly, then, a new rule to be applied by federal court judges in determining competency of confessions had been formulated, but it was not clear what that rule was.[11] The court pointed out that the "circumstances" of the case were such that a confession obtained thereunder would be inadmissible,[12] but with apparent purposefulness it limited itself to a recital of those circumstances, singling out none as the hub around which its important new decision revolved.

Most lower courts thought that the Supreme Court had placed the emphasis on the failure of the arresting officers to comply with the arraignment statute, that such failure was the controlling circumstance, and accordingly held that, under the *McNabb* case, any confession obtained prior to compliance with the statute would be inadmissible.[13]

However, this interpretative position was soon made untenable by the later case of *United States v. Mitchell.*[14] There, an early-acquired confession, obtained spontaneously and within the reasonable time awarded arresting officers before they are expected to arraign a suspect, was held admissible despite a subsequent illegal detention, the court saying, "Here there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights. . . ."[15]

Cast again upon a sea of doubt, the lower courts could now swim in but two directions. They could use the above quoted language from

[10] McNabb v. United States, 318 U. S. 332, 341 (1942).

[11] Waite, *Police Regulation by Rules of Evidence,* 42 MICH. L. REV. 679 (1944); *see* Mr. Justice Reed, dissenting in Upshaw v. United States, 69 S. Ct. 170, 174 (1948).

[12] McNabb v. United States, 318 U. S. 332 (1942).

". . . we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded." At p. 341.

"The circumstances in which the statements . . . were secured reveal a plain disregard of the duty enjoined by Congress upon Federal law officers." At p. 344.

". . . the circumstances under which evidence was secured are not irrelevant in ascertaining its admissibility." At p. 346.

"We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here." At p. 347.

[13] Mitchell v. United States, 138 F. 2d 426 (App. D. C. 1943) *rev'd,* 322 U. S. 65 (1943); Runnels v. United States, 138 F. 2d 346 (C. C. A. 9th 1943); United States v. Hoffman, 137 F. 2d 416 (C. C. A. 2d 1943); United States v. Haupt, 136 F. 2d 661 (C. C. A. 7th 1943); *see* United States v. Grote, 140 F. 2d 413 (C. C. A. 2d 1944); *cf.* Gros v. United States, 136 F. 2d 878 (C. C. A. 9th 1943); United States v. Keegan, 141 F. 2d 248 (C. C. A. 2d 1944). *Contra:* United States v. Klee, 50 F. Supp. 679, 685 (E. D. Wash. 1943), "I have reached the conclusion that the Supreme Court in the *McNabb* case added to the various tests to be taken into consideration by the trial judge a new one, that of whether or not a man was promptly taken before the United States Commissioner."; *see* Tooisgah v. United States, 137 F. 2d 713, 715 (C. C. A. 10th 1943).

[14] 322 U. S. 65 (1943).

[15] *Id.* at 70.

the *Mitchell* case as a guide post and hold that there had to be shown in addition to illegal custody a "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";[16] or, by reading the *Mitchell* case as a mere modification of the *McNabb* rule as they had previously conceived it, they could arrive at the alternative conclusion that a voluntary confession is admissible if obtained prior to the time detention becomes illegal, but inadmissible, regardless of attendant circumstances, if elicited after the period of permissive custody has expired.

While the former interpretation won almost unanimous support from the lower federal courts,[17] the recent decision of *Upshaw v. United States*[18] clearly indicates that a majority of the supreme tribunal take the contrary view. Defendant, in that case, was arrested on suspicion of theft and, without being taken before a committing magistrate, was detained and questioned intermittently for thirty hours, at the end of which time he confessed. The question periods never lasted for more than a half hour and there was never more than one officer present.

The District Court thought the confession was admissible because the "detention of petitioner 'was not unreasonable under the circumstances as a matter of law,'"[19] and Upshaw was convicted on the strength of it. This conviction was sustained by the Court of Appeals[20] on the theory that while the detention may have been unreasonable, "there was no disclosure induced by illegal detention"[21]—*i.e.*, there was no "successful extraction of . . . inculpatory statements by *continuous*

[16] *Id.* at 67. Obviously, this interpretation of the *McNabb* case, as explained by the *Mitchell* decision, was very similar to the unique pre-*Mitchell* interpretation by Judge Schwellenbach in United States v. Klee (see note 13, *supra*). It was a swing back toward the notion that voluntariness is the only test of admissibility and amounted to a holding that the *McNabb* case merely added illegal detention for the purpose of securing a confession by psychological pressure as a *consideration* in determining the fact of voluntariness or involuntariness. Upshaw v. United States, 168 F. 2d 167, 168 (App. D. C. 1948).

[17] *E.g.*, Upshaw v. United States, 168 F. 2d 167 (App. D. C. 1948), *rev'd*, 69 S. Ct. 170 (1948); Alderman v. United States, 165 F. 2d 622 (App. D. C. 1947); Boone v. United States, 164 F. 2d 102 (App. D. C. 1947); Brinegar v. United States, 165 F. 2d 512 (C. C. A. 10th 1947); Hasson v. United States, 158 F. 2d 330 (App. D. C. 1946); Akowskey v. United States, 158 F. 2d 649 (App. D. C. 1946); Blood v. Hunter, 150 F. 2d 640 (C. C. A. 10th 1945); Ruhl v. United States, 148 F. 2d 173 (C. C. A. 10th 1945); Paddy v. United States, 143 F. 2d 847 (C. C. A. 9th 1944); *accord*, Wright v. United States, 159 F. 2d 8 (C. C. A. 8th 1947). But before the *Mitchell* case was decided, one court, with some prescience, had chosen the other alternative as being the true *McNabb* rule. United States v. Keegan, 141 F. 2d 248 (C. C. A. 2d 1944).

[18] 69 S. Ct. 170 (1948).

[19] *Id.* at 171.

[20] Upshaw v. United States, 168 F. 2d 167 (App. D. C. 1948).

[21] *Id.* at 169.

questioning for *many* hours under *psychological pressure.*"[22] The Supreme Court granted certiorari[23] and reversed.

Stressing the mandates of the prompt commitment statute, the court said, ". . . a confession is inadmissible if made during illegal detention . . . whether or not the 'confession is the result of torture, physical or psychological.' "[24] Thus the second alternative rule outlined above was expressly adopted and the effect of the *McNabb* decision on the law of confessions was made certain: A confession may be voluntary and yet be inadmissible—it is inadmissible if secured while the confessor is being illegally detained, though illegal detention subsequent to a confession has no effect upon it.

The *McNabb* rule has now passed through three interpretative stages.[25] It has been much maligned all along the way,[26] and its desirability is, indeed, open to serious question. Though obviously intended to encourage federal law enforcement officers to comply with the commitment statutes by depriving them of any "fruits of their wrongdoing,"[27] it may well be doubted that it will have the desired effect. As a practical matter, confessions, however illegally obtained, and however inadmissible in court, often aid greatly in procuring evidence otherwise undiscoverable. This evidence, despite the incompetency of its source, has always been competent itself.[28] Therefore, if the Supreme Court is not prepared to go the further step and declare such evidence likewise inadmissible, it probably has not substantially destroyed the incentive to violate the statutes.

Moreover, even if the judicially imposed sanction for violation of the sanctionless legislative mandate is effective, the cure may be much worse than the malady. The salutary effect of a remedy which will partially paralyze the protective arm of law enforcement is questionable,[29] even though that remedy may be a sure cure for the sniffles

[22] United States v. Mitchell, 322 U. S. 65, 67 (1943). Italics supplied.
[23] 334 U. S. 842 (1948).
[24] 69 S. Ct. 170, 172 (1948).
[25] See notes 13, 17 and 18, and cases there cited.
[26] United States v. Haupt, 136 F. 2d 661 (C. C. A. 7th 1943); Waite, *Police Regulation by Rules of Evidence,* 42 MICH. L. REV. 679 (1944); 56 HARV. L. REV. 1008 (1943); 40 ILL. L. REV. 273 (1945); *see* Mr. Justice Reed, dissenting in McNabb v. United States, 318 U. S. 332, 347-349 (1942) and in Upshaw v. United States, 69 S. Ct. 170, 172-183 (1948).
[27] Upshaw v. United States, 69 S. Ct. 170, 172 (1948).
[28] *E.g.,* United States v. Richard, 27 Fed. Cas. 798, No. 16, 154 (C. C. D. C. 1823); United States v. Hunter, 26 Fed. Cas. 436, No. 15,424 (C. C. D. C. 1806); State v. Riddle, 205 N. C. 591, 172 S. E. 400 (1934); State v. Herring, 200 N. C. 306, 156 S. E. 537 (1931); *see* Note, 53 L. R. A. 403 (1901).
[29] Waite, *Police Regulation by Rules of Evidence,* 42 MICH. L. REV. 679, 690 (1944), quoting Mr. J. Edgar Hoover, "Modern criminals seldom operate alone and this is particularly true with regard to the more serious violations. . . . Immediate arraignment of the first member of a criminal gang who is arrested, with the resultant public record and publicity, would frustrate plans of enforce-

of statutory non-compliance. All in all, it is difficult to see why direct legislative action making violators of the statutes amenable to the criminal law would not be preferable to the indirect method of encouraging compliance now being employed by the federal judiciary. It would seem to be no answer to say that the effectiveness of such a legislative sanction depends on the willingness of government attorneys to prosecute and of juries to convict. To advance this argument is to admit that prosecutors willfully violate their solemn oaths of office—a crime in itself; that juries do not honestly perform their functions as triers of fact; and that the people, speaking through their elected representatives, are helpless to prescribe an enforceable standard of conduct for their servants. If this be so, we should look to the very foundation of our system of law enforcement and not undermine the structure still further by turning avowed criminals loose to prey again upon society.

But whether desirable or undesirable, unless the *McNabb* rule finds its way into the constitutional guarantee of due process, it does not appear likely that the North Carolina Supreme Court will feel constrained to adopt it. This conclusion is supported not only by the fact that since the *McNabb* case was decided our court has three times[30] reaffirmed its previous stand that the sole test of admissibility is whether the confession is voluntary and made without inducement, threat or hope of reward, but also by a study of the closely analogous problem of illegal search and seizure.

The federal rule has long been that evidence procured through illegal search and seizure is inadmissible because obtained in violation of the constitutional prohibitions of the fourth amendment.[31] However, North Carolina has steadfastly refused to allow the fact of illegality in method of procurement to have any effect on the competency of evidence.[32] In fact, our court,[33] in the interest of preserving admissibility, has gone a step further and laid a very strict construction upon a statute[34] which is almost a codification of the federal rule.

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ment officers to apprehend the other individuals and conspirators involved. . . . Expediency rather than immediacy should be a determining factor in deciding how soon in the public interest an individual taken into custody should be arraigned." *See* Upshaw v. United States, 69 S. Ct. 170, 182 (dissenting opinion), "Officers charged with enforcement of the criminal law have objected for the reason that fear of the application of its drastic penalties deterred officers from questioning during reasonable delays in commitment."

[30] State v. Thompson, 227 N. C. 19, 40 S. E. 2d 620 (1946); State v. Biggs, 224 N. C. 23, 29 S. E. 2d 121 (1944); State v. Harris, 222 N. C. 157, 22 S. E. 2d 229 (1942).

[31] Weeks v. United States, 232 U. S. 383 (1914).

[32] State v. Shermer, 216 N. C. 719, 6 S. E. 2d 529 (1940); State v. McGee, 214 N. C. 184, 198 S. E. 616 (1938).

[33] State v. McGee, 214 N. C. 184, 198 S. E. 616 (1938).

[34] N. C. GEN. STAT. §15-27 (1943).

It is to be hoped that these indications are true ones and that the North Carolina Supreme Court will, in fact, persist in its refusal to follow the federal example.

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Federal Jurisdiction—Diversity of Citizenship—Realignment of Parties in Corporate Derivative Suits

A New York stockholder in a New York corporation brought a derivative suit against a citizen of Kentucky. The corporation was joined as a defendant in accordance with the practice in derivative suits. The complaint alleged that the officers in control of the New York Corporation had wrongfully transferred shares to the Kentucky defendant in exchange for some worthless property. The Kentucky defendant sought dismissal for lack of diversity of citizenship between the plaintiff stockholder, a citizen of New York, and his New York corporation. The plaintiff conceded the apparent absence of diversity but contended that the court should sustain diversity jurisdiction by realigning the New York corporation as a complainant, since the action was on behalf of that corporation.

The court refused to realign on the ground that the complaint showed that managing powers of the New York corporation had fradulently conspired with the other defendant, therefore the corporation was a rightful and necessary party defendant and could not be regarded otherwise.[1]

The problem of realignment is of particular significance in corporate derivative suits, in view of the facts that jurisdiction in such cases is usually based on diversity of citizenship,[2] the right sought to be enforced is a corporate right,[3] and the corporation is an indispensable party.[4] Logically, it would seem that the corporation should be aligned

[1] Smallen v. Louisville Fire & Marine Ins. Co., 80 F. Supp. 279 (W. D. Ky. 1948).

[2] *See* Koster v. (American) Lumbermens Mutual Casualty Co., 330 U. S. 518, 522 (1947) ("With possible rare exceptions, these actions involve only issues of state law and . . . can get into federal courts only by reason of diversity of citizenship of the parties.").

[3] Koster v. (American) Lumbermens Mutual Casualty Co., *supra* note 2 at 522 ("The cause of action which such a plaintiff brings before the court is not his own but the corporations's."); Greenberg v. Giannini, 140 F. 2d 550, 554 (C. C. A. 2d 1944); STEVENS, CORPORATIONS §163 (1936) ("the mere fact that the shareholder appears as plaintiff . . . does not change the substantial nature of the right to be enforced or the judgment to be collected. Both the right and the judgment belong to the . . . corporation.").

[4] Davenport v. Dows, 18 Wall. 626 (U. S. 1873); Hobbs v. Mitchell, 80 F. 2d 172 (C. C. A. 10th 1935) (held that it was collusive to leave out the corporation). *See* Koster v. (American) Lumbermens Mutual Casualty Co., 330 U. S. 518, 522 (1947).