UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 23 | Number 4 Article 4

6-1-1945

Notes and Comments

North Carolina Law Review

The
North Carolina Law Review

VOLUME 23 JUNE, 1945 NUMBER 4

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Criminal Law—Confessions*

Three youths, who were sought for murder and attempted robbery in North Carolina, were located in a Virginia jail by North Carolina county officers and representatives of the State Bureau of Investigation. The boys were questioned several times; and twelve days after they had been found, they confessed in the presence of a dozen officers and witnesses from North Carolina, including the solicitor of the twelfth judicial district. At the *voir dire* the youths testified that they were induced to confess by the statements of the solicitor that ". . . he was going to put this bill of indictment for second degree murder which carried a penalty of 25-30 years in our home state and at most, in all probability, we

* Supplementing Coates, *Limitations on Investigating Officers* (1937) 15 N. C. L. REV. 229 at 233-236.

would be out in five years. . . ."[1] The officers denied having made any offers or inducements, and the solicitor stated that he went to Virginia purposely to insure that no unfair methods were employed in gaining information. A State Bureau of Investigation agent testified that part of his "scheme" was to tell the boys that under the law of Virginia they were liable to the death penalty; and in reply to queries from the youths about the first and second degree murder charges, he answered that a first degree charge would be drawn and what would happen to them would be left to the jury and the court. It was further testified that another State Bureau of Investigation agent told the boys ". . . I can't understand why an intelligent young man like you, can't see the difference in twenty-five to thirty years in your home state and life imprisonment at the best in another state than your own."[2] The trial judge asked the prosecuting counsel if they could explain why these young men, after continually stating that they had nothing to say, should suddenly say ". . . I want to make a statement that will hang me,"[3] but no explanation was offered. The trial court, nevertheless, ruled that the confession was voluntary, and the boys were convicted of first degree murder. On appeal to the Supreme Court, in a four to three decision, it was held that the confessions were involuntarily gained and were improperly admitted in evidence.

In this discussion the role of confessions in the law of evidence will be developed in the following manner: (1) The value of confessions; (2) voluntary confessions; (3) involuntary confessions; (4) second confessions; (5) confessions of third parties; (6) evidence uncovered by involuntary confessions and (7) procedural problems.

The Value of Confessions

In 1797 the Supreme Court refused to uphold a conviction for the capital crime of horse stealing based upon a voluntary confession which was the sole evidence, and it was stated that: "A confession, from the very nature of the thing, is a very doubtful species of evidence, and to be received with great caution. It is hardly to be supposed that a man perfectly possessed of himself, would make a confession to take away his own life."[4] However, voluntary confessions were accepted as corroborative evidence, and in 1847 the court in *State* v. *Cowan*[5] shifted to the view that a prisoner could be convicted of a capital crime upon his own unbiased and voluntary confession without any other evidence.

Voluntary Confessions

Throughout all the cases the idea has been reiterated that a free

[1] State v. Biggs, 224 N. C. 23, 29 S. E. (2d) 121, 122 (1944).
[2] *Id.* at 26, 29 S. E. (2d) at 122.
[3] *Ibid.*
[4] State v. Long, 2 N. C. 456 (1797).
[5] 29 N. C. 239 (1847); *accord,* State v. Hardee, 83 N. C. 619 (1880).

and voluntary statement deserved the highest credit because it was presumed to flow from a strong sense of guilt, but that any statement wrung from the mind by the flattery of hope or torture of fear or promise of reward would merit no consideration since it was the least reliable statement of all.

In determining whether a confession has been given voluntarily there have been several well-established principles laid down. The mere fact that the accused is under arrest,[6] in the custody of officers,[7] or in jail[8] at the time of the alleged confession has been held not to invalidate the confession. Nor do officers have to take the caution to advise the accused of his right not to speak, as required by the statute when accused is examined by a magistrate,[9] as a condition precedent to the acceptance as voluntary any statement made by an accused; that statute being applicable only to preliminary examinations before magistrates.[10] Furthermore, the fact that the officers were armed when the confession was made has been held not to invalidate it,[11] and the case is even stronger where the accused made fun of the arms by calling them "pop guns."[12] Although the prisoner had been wounded by the officers who had him in custody and to whom he made the confession, it was held voluntary upon the showing that on the journey to jail the officers treated him kindly and he had no subsequent fear of them.[13] In *State* v. *Bridges*[14] the accused was arrested, handcuffed, and being driven to jail in an automobile when an officer suddenly turned around, turned a flashlight into the prisoner's face and asked why he had committed the murder. The reply was held to be a voluntary confession. Two other

[6] State v. Smoak, 213 N. C. 79, 195 S. E. 72 (1937); State v. Jones, 203 N. C. 374, 166 S. E. 163 (1932); State v. Bowden, 175 N. C. 794, 95 S. E. 145 (1918); State v. Christy, 170 N. C. 772, 72 S. E. 499 (1915); State v. Cooper, 170 N. C. 719, 87 S. E. 50 (1915); State v. Lance, 166 N. C. 411, 81 S. E. 1092 (1914); State v. Drakeford, 162 N. C. 667, 78 S. E. 308 (1913); State v. Wright and Harriston, 61 N. C. 486 (1868); State v. Gregory, 50 N. C. 315 (1858); State v. Scates, 50 N. C. 420 (1858); State v. Jefferson, 28 N. C. 305 (1846).

[7] State v. Tate, 210 N. C. 613, 188 S. E. 91 (1936); State v. Stefanoff, 206 N. C. 443, 174 S. E. 411 (1934); State v. Grier, 203 N. C. 586, 166 S. E. 387 (1932); State v. Gray, 192 N. C. 594, 135 S. E. 535 (1926).

[8] State v. Wagstaff, 219 N. C. 15, 12 S. E. (2d) 657 (1940); State v. Jones, 145 N. C. 466, 59 S. E. 353 (1907); State v. Bohanon, 142 N. C. 695, 55 S. E. 797 (1906); State v. Exum, 138 N. C. 600, 50 S. E. 283 (1905); State v. Flemming, 130 N. C. 688, 41 S. E. 549 (1902).

[9] N. C. GEN. STAT. (1943) §15-89: "The magistrate shall then proceed to examine the prisoner in relation to the offense charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed by the magistrate of the charge made against him, and that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings."

[10] State v. Gross, 223 N. C. 31, 25 S. E. (2d) 193 (1943).

[11] State v. Caldwell, 212 N. C. 484, 193 S. E. 716 (1937).

[12] State v. De Graff, 113 N. C. 688, 18 S. E. 507 (1893).

[13] State v. Horner, 139 N. C. 603, 52 S. E. 136 (1905).

[14] 178 N. C. 733, 101 S. E. 29 (1919); *cf.* State v. Exum, 213 N. C. 16, 195 S. E. 7 (1937).

interesting variations are found in *State* v. *Conly*[15] where the defendant was found hiding under his bed, and when told by a police officer that a certain man was dead, voluntarily stated that he "aimed" to kill him; and *State* v. *Jones*[16] where the defendant, while running down the street carrying a gun, was chased by a policeman who asked him why he had shot his wife. The confession made under those circumstances was held to be voluntary.

The addition of handcuffs[17] or tying of hands, if tying is not painful,[18] to the fact of arrest does not make the confession involuntary. In *State* v. *Rodgers*[19] the accused was tied during his appearance before a magistrate, and it was held that this was not sufficient to cause the confession to be involuntary, although the court censured this practice before a magistrate.

Crowds assembled about the place where the prisoner is being detained. If it has been shown that the prisoner heard none of the threats being made,[20] or if the officer in charge placed himself between the crowd and the prisoner and the confession was not made until a subsequent day,[21] is held not to be a fact which would invalidate the confession. In *State* v. *Daniels*[22] a crowd was assembled at the train from which the prisoner stepped. When the prisoner showed great fear and asked the sheriff not to let the crowd hurt him, the sheriff verbally reassured his safety and asked the circumstances of the crime; whereupon, the prisoner confessed. The ruling that this confession was voluntary appears to have entirely overlooked both the state's and defendant's testimony.

Statements made to an officer in response to his exhortation for the prisoner to ". . . tell the truth,"[23] or ". . . if you want to go ahead—tell me the truth, I will appreciate it"[24] or ". . . this is a very serious matter, and I presume you know what it is about. It is about this man that has been hit at the warehouse"[25] have been held voluntary. Interesting cases involving exhortatory statements which produced confessions are *State* v. *Hudson*,[26] where a witness told the defendant to keep his mouth shut and pray, and to the contrary, the defendant confessed,

[15] 130 N. C. 683, 41 S. E. 534 (1902).
[16] 145 N. C. 466, 59 S. E. 353 (1907).
[17] State v. Whitfield, 109 N. C. 876, 13 S. E. 726 (1891); State v. Bishop, 98 N. C. 773, 4 S. E. 357 (1887).
[18] State v. Cruse, 74 N. C. 491 (1876).
[19] 112 N. C. 874, 17 S. E. 297 (1893).
[20] State v. Efler, 85 N. C. 585 (1881).
[21] State v. Vann, 82 N. C. 631 (1880).
[22] 134 N. C. 641, 46 S. E. 743 (1904).
[23] State v. Myers, 202 N. C. 351, 353, 162 S. E. 764, 765 (1932).
[24] State v. Thompson, 224 N. C. 661, 664, —— S. E. (2d) —— (1944).
[25] State v. Murray, 216 N. C. 681, 683, 6 S. E. (2d) 513, 514 (1939).
[26] 218 N. C. 218, 10 S. E. (2d) 730 (1940).

and *State* v. *Patrick*.[27] In the latter case a slave was forced by a witness to fit his shoe into a track, and then the witness said, ". . . you might as well tell all about it . . . for I am satisfied . . . if you belonged to me, I would make you tell." A short time later the slave called the witness aside and confessed; and the court, in holding the confession voluntary, *strangely* enough said that the statement of the witness, "if you belonged to me I would make you tell," carried with it the *assurance* that the witness would inflict no suffering upon the defendant. An unusual interpretation is to be found in *State* v. *Hawkins*[28] where the sheriff told a prisoner that he was on the spot and that the only way out was to plead insanity, to which the prisoner replied that he would never do it. The court here said that if the statement made by the sheriff were an accusation, then the words replied by the prisoner were not an admission; and that if the answer could be interpreted as a confession, it was voluntary and therefore admissible in evidence.

The fact that prior to the confession the prisoner was shown clothing which the accuser had said her attacker wore, and that subsequent to such showing the defendant confessed has been held not to invalidate a confession.[29] In *State* v. *Saunders*,[30] a former slave, while tied, was carried to the accuser's house. There, in the presence of five white men, he was confronted with the clothing he had supposedly stolen and was asked where he got them. The court upheld the decision of the trial court that this was a voluntary confession; but, under the facts as stated, it is difficult to understand on what basis this decision was made.

Mistaken belief was not sufficient reason to cause confession to be involuntary where a prisoner confessed to rape without knowing that the penalty for the crime to which he had confessed was hanging;[31] or where the confession was gained by talk made to a cell-mate who promised not to tell and who assured the defendant that one criminal could not testify against another.[32] However, this type of holding appears unjust in the case where an aged and sick woman was induced to confess, to the procurement of an agent to murder her husband, by the words of a private detective that he was a right good old "monger doctor" who could "work roots" and "gummer folks," and he would give her something so that she wouldn't get caught if she would tell him about it.[33] The court's reasoning that the promise to protect by witchery, although it was an artifice resorted to in order to ascertain the truth, offered no temptation in the contemplation of law, to an innocent

[27] 48 N. C. 443, 448 (1856).
[28] 214 N. C. 326, 199 S. E. 284 (1938).
[29] State v. Smith, 213 N. C. 299, 195 S. E. 819 (1938).
[30] 84 N. C. 729 (1881).
[31] State v. Jefferson, 28 N. C. 305 (1846).
[32] State v. Mitchell, 61 N. C. 447 (1868).
[33] State v. Harrison, 115 N. C. 706, 20 S. E. 175 (1894).

person to pretend that he was guilty, might be legalistically sound; but at the same time it leaves the impression that the confession would never have been gained without this underhanded method of inducement. Equally difficult to understand is the decision that a confession, induced by the promise of a girl to marry the accused if he confessed to the arson, was voluntary because the promise did not have any reference to the prisoner's escape from the criminal charge but was merely a collateral boon. Furthermore, it was shown that the promise was made by the girl in order to receive $50 offered to her if she could obtain the defendant's confession.[34]

Voluntary confessions may be obtained against the maker under circumstances when he was not aware of the possible consequences of his statements. In *State* v. *Chisenhall*[35] a statement made before a solicitor by a witness, against whom no charge was pending, in reference to an offense committed by another, was received in evidence against the maker when subsequently indicted for the same offense. Testimony given by an accuser in swearing out a warrant for assault and battery was later accepted as evidence against him in a trial for adultery instigated by the person whom he had accused of the assault and battery.[36]

Involuntary Confessions

On the other hand there are a number of instances where confessions have been held to be involuntary. In *State* v. *Davis*[37] an officer, after arresting the defendant, told him that he had worked up the case and that the defendant might as well tell all about it. Here it was ruled that the statements were calculated to agitate the mind of the defendant, an ignorant man, and that an officer discharged his duty by simply making an arrest, it being no part of his duties to provoke a prisoner into making any statements. A clear illustration of the circumstances which have caused a confession to be involuntary is where armed captors kept the accused in the woods twelve miles from town and subjected him to persistent questioning instead of taking him to jail.[38]

Although mere handcuffing or tying has not been a fact rendering a confession involuntary, where the bound defendant is lashed until he confesses;[39] or where one defendant who is bound, sees another lashed, and he confesses to forestall equal treatment,[40] the confessions have been held involuntary.

The simple fact that crowds surrounded the accused has not justified

[34] State v. Hardee, 83 N. C. 619 (1880).
[35] 106 N. C. 676, 11 S. E. 518 (1890).
[36] State v. Simpson, 133 N. C. 676, 45 S. E. 567 (1903).
[37] 125 N. C. 612, 34 S. E. 198 (1899).
[38] State v. Dildy, 72 N. C. 325 (1875).
[39] State v. Fisher, 51 N. C. 478 (1859).
[40] State v. Lawson, 61 N. C. 47 (1866).

the holding of a confession to be involuntary; but the addition of the facts, that one defendant saw another struck and threatened; and he was told to confess or be hanged,[41] did justify holding a confession involuntary. The same result was reached where the crowds uttered threats of violence which the defendant heard;[42] and where crowds surged around an unprotected defendant and told him that if he would get out of the state, they would not mob him.[43]

Exhortatory statements that have produced involuntary confession are clearly illustrated in *State* v. *Whitfield*.[44] Where a colored man was confronted by his white boss and several other white men, the boss saying ". . . I believe you are guilty; if you are, you had better say so; . . . if you are not, you had better say that. . . ." The threats here were also accompanied by menacing gestures. Other examples are where the accused was promised that he would "get off lighter" if he confessed,[45] and where the defendant's statements were made under the influence of liquor after he had been falsely told that others had confessed.[46]

An extraordinary situation is to be found in *State* v. *Brittain*.[47] A husband forced his wife to confess to incest with her father on the threat of leaving her. This is perhaps one of the most unusual cases of fear causing an involuntary confession, and it is somewhat *contra* to the views of *State* v. *Harrison*[48] and *State* v. *Hardee*[49]—that the influence exerted must bear some relation to the criminal charge.

A confession can be affected by acts as well as words. When five men accosted the defendant and urged her to tell the truth about what she had done with her child, her act of leading them to the river was held to be an involuntary confession.[50]

There are conflicting decisions on whether a denial may be introduced in evidence. In *State* v. *McDowell*[51] the defendant, while lying in bed, was confronted by four armed officers who accused him of murder, which accusation the defendant denied. The defendant objected to this statement being introduced in the trial court, and on appeal it was held that this was not a confession at all; and that, although the statement might have been induced by fear, it was admissible in evidence. But where the defendant was forced to listen to the reading of the affidavits of other defendants which incriminated him, and he remained

[41] State v. George, 50 N. C. 233 (1858).
[42] State v. Lowry, 170 N. C. 730, 87 S. E. 62 (1915).
[43] State v. Parish, 78 N. C. 492 (1878).
[44] 70 N. C. 356, 357 (1874).
[45] State v. Drake, 113 N. C. 624, 18 S. E. 166 (1893).
[46] State v. Anderson, 208 N. C. 771, 182 S. E. 643 (1935).
[47] 117 N. C. 783, 23 S. E. 433 (1895).
[48] 115 N. C. 706, 20 S. E. 175 (1894).
[49] 83 N. C. 619 (1880).
[50] State v. Crowson, 98 N. C. 595, 4 S. E. 143 (1887).
[51] 129 N. C. 523, 39 S. E. 840 (1901).

silent, the court refused to allow the introduction of his silence during the reading as evidence on the basis that if this silence could be construed as a confession it was involuntarily made.[52]

In the light of the discussion of the cases involving voluntary and involuntary confessions it is difficult to understand the views of the dissent in the principal case. The majority decision was founded on the testimony of both the state's and the defense's witnesses that a lighter penalty would be exacted in North Carolina; that one of the cross-examiners made his statements as part of a "scheme"; and that youthful defendants would not know enough about criminal procedure to ask the type of questions he asked unless he had been influenced by previous statements of the examiners. The dissent apparently based its opinion on the conflicting testimony of some of the state's witnesses in regard to *some* of the statements that were credited to them and thought that there was sufficient evidence to support the trial judge's opinion that the confession was voluntary.

Second Confessions

Another phase of this problem is second confessions. Subsequent confessions involving the same crime are presumed to flow from the same inducement that caused the first involuntary confession. Unless there has been a sufficient showing of facts to rebut the inference that the second confession was dominated by the same influence, the second confession will fail equally with the first.[53] The question of when sufficient evidence has been introduced to rebut that presumption has produced interesting situations. An outstanding example of the refutation of the previously dominating influence is found in *State* v. *Fisher*.[54] The first confession was gained by the cruel beating of the defendant while he was chained; but the second confession, given while the defendant was in jail, was made in order to extenuate the defendant's offense in the estimation of his friend. Equally strong is the case where the first confession was obtained through fear of a Georgia lynching gang, and the second confession was made in North Carolina to a fortune teller and a fellow prisoner several days later.[55] *State* v. *Moore*[56] presents a decision that apparently was not justified by the facts. Here the first confession was prompted by the sheriff's promise to "let the defendant off lighter." Subsequently the defendant told a psychiatrist the same story without any inducement on the part of the doctor; but the defendant, according to testimony, labored under the idea that the sheriff had sent the psychiatrist and that he must tell coinciding stories in order

[52] State v. Dill, 208 N. C. 313, 180 S. E. 571 (1935).
[53] State v. Fox, 197 N. C. 478, 149 S. E. 735 (1929).
[54] 51 N. C. 478 (1859).
[55] State v. Lowry, 170 N. C. 730, 87 S. E. 62 (1915).
[56] 210 N. C. 686, 188 S. E. 421 (1936).

to gain the sheriff's aid. Yet this second confession was held to be voluntary. A confusing situation is revealed in *State* v. *Grier*.[57] In the trial court the first confession was discarded because the statements had been made by the defendant while in jail before officers, none of whom had cautioned him as required by statute.[58] The second confession, made to the same officers was accepted by the trial court; and the defendant appealed, contending that the second confession was induced by the same influence as the first. The Supreme Court upheld the trial court's decision in regard to the second confession; while at the same time it trounced the decision by pointing out that the first confession was equally sufficient, since the only basis on which it had been ruled out was the lack of the statutory caution which is required before magistrates and *not* officers. Another unusual fact situation is found in *State* v. *Gregory*[59] where the defendant was induced by an examining magistrate to confess on promise of a pardon. The magistrate then approached the defendant and told him that he had acted improperly and that the confession was illegal; furthermore, he warned the defendant that any subsequent statement would be used against him, after which the defendant confessed to another witness. This second confession was held voluntary. In *State* v. *Godwin*[60] the trial court ruled out the first confession as involuntary, but accepted a second confession. The defendant appealed contending that the confession which had been admitted was the first one that he had made and not the second, and that both were involuntary; but the Supreme Court ruled that the finding of the trial court if supported by evidence was conclusive.

Similarly, there are cases where the second confession has been rejected as being dominated by the same influence as the first. Where the defendant has been promised a lighter sentence,[61] and where he was promised no prosecution at all if he would tell the truth,[62] the second confessions were rejected equally with the first when there had been no evidence that the inducements had been withdrawn. It is to be noted that in the latter of these examples the second confession was made before a person other than the one to whom the first had been made; yet in absence of evidence showing that the prior inducement no longer existed, the court held that the second confession was inadmissible. A strong example of the second confession being dominated by the prior influence is shown in the case where a colored man was pursued by several officers who shot at him a number of times while attempting arrest.

[57] 203 N. C. 586, 166 S. E. 595 (1932).
[58] See note 9 *supra*.
[59] 50 N. C. 315 (1858); *cf.* State v. Needham, 78 N. C. 474 (1878).
[60] 216 N. C. 49, 3 S. E. (2d) 347 (1939).
[61] State v. Gibson, 216 N. C. 535, 5 S. E. (2d) 717 (1939); State v. Drake, 113 N. C. 625, 18 S. E. 166 (1893); State v. Roberts, 12 N. C. 259 (1827).
[62] State v. Lowhorne, 66 N. C. 638 (1872).

When he was caught, he confessed. The second confession was made before the same officers on the next day while the accused was handcuffed and in jail. This second confession was also held involuntary.[63] In *State* v. *Stevenson*[64] the first confession was made to an officer who had told the accused that: ". . . there is no use you beginning to lie to me this morning. I have already too much evidence to convict you. We are going to take you down there." After the confession, the accused was taken to a doctor to have his arm wound treated, whereupon he confessed again. The defendant testified that he had been afraid of lynching, and the court held that the fear instigated by the officer's remarks influenced the second as well as the first confession. This same result was reached in the case where a woman had been forced into confessing to incest by the threat of her husband to leave her where the second confession was made to her family in the presence of her husband who had not withdrawn his threat.[65]

Third Party Confessions

A perplexing problem is presented by the introduction of the confessions of third parties to vindicate the defendant. The original case in that line is *State* v. *May*.[66] The defendant offered evidence of the confession of a third party that he alone was guilty of the crime of which the defendant was accused, but this evidence was rejected as hearsay. This harsh rule has been consistently followed,[67] and the court in *State* v. *English*[68] adequately expressed the criticism of this line of authority by saying: "Almost every judge who has had to lay down the law in cases like this does not like it. . . . It may seem absurd to one not accustomed to compare proofs, and estimate the weight of testimony according to the test of veracity that an unbiased confession of one man that he is guilty of an offense with which another is charged, should not establish the guilt of him who confesses it, and by consequence, the innocence of the other, but the law must proceed on general principles."

Evidence Uncovered by Involuntary Confessions

This discussion is not complete without mention of evidence gained through involuntary confessions. Although the confession itself is involuntary, evidence revealed by such confession has always been admissible.[69] Examples of this are wnere an accused murderer revealed the

[63] State v. Drake, 82 N. C. 592 (1880).
[64] 212 N. C. 648, 649, 194 S. E. 81 (1937).
[65] State v. Brittain, 117 N. C. 783, 23 S. E. 433 (1895).
[66] 15 N. C. 328 (1833).
[67] State v. Church, 192 N. C. 658, 135 S. E. 769 (1926).
[68] 201 N. C. 295, 299, 159 S. E. 318, 319 (1931); Note (1931) 10 N. C. L. Rev. 84.
[69] State v. Thompson, 161 N. C. 242, 76 S. E. 243 (1912); State v. Mallet, 125 N. C. 718, 34 S. E. 651 (1899); State v. Winston, 116 N. C. 992, 21 S. E. 106 (1895).

hiding place of the bloody murder club to officers;[70] where accused thieves revealed the hiding places of stolen property in a garden[71] and in the woods;[72] and where a person suspected of larcency, revealed where the stolen money, saddle bags and clothing were concealed.[73]

PROCEDURAL PROBLEMS

When a confession is accepted in evidence, the entire confession must be brought in.[74] The part favorable to the defendant as well as the part unfavorable must be admitted. In *State* v. *Worthington*[75] evidence was offered of part of a conversation between the alleged thief and the owner of the stolen goods, and the defendant objected to the omission of the rest of the conversation. His appeal was successful, and the court stated that this admission of the confession in its totality was not the situation where the defendant might be held to be manufacturing evidence for himself. Likewise, where a confession revealed that the defendant was drunk at the time he committed the crime, and the trial judge charged the jury that the evidence offered by the defendant in his own behalf must be taken "with a grain of salt," the court on appeal ruled that the charge was error. Since the defendant was entitled to have the whole confession offered, the evidence of drunkenness was for the jury to consider on the question of the deliberation and premeditation in the murder indictment.[76]

All confessions are presumed to be voluntary until or unless they are controverted by the defendant,[77] and the voluntariness is for the trial court to determine at the *voir dire*.[78] Confessions may be either express or implied. An express confession is where the defendant pleads guilty and thus in the face of the court admits the truth of the accusation. This plea of guilty equals a conviction, and the court then has nothing to do but decree judgment in this formal confession. But a full and voluntary confession made before a magistrate or any other person is merely evidence of guilt.[79] In the preliminary hearing before the trial court, the *voir dire,* the defendant has the right to ask that the jury be withdrawn, to cross-examine the state's witnesses, and to present his own evidence as to the incompetency of the confession.[80] In the presentation of the defendant's evidence it has been held error for the trial judge to refuse to allow the defendant to testify as to his ver-

[70] State v. Lowry, 170 N. C. 730, 87 S. E. 62 (1915).
[71] State v. Winston, 116 N. C. 992, 21 S. E. 106 (1895).
[72] State v. Lindsey, 78 N. C. 499 (1878).
[73] State v. Moore, 2 N. C. 482 (1797).
[74] State v. Kelly, 216 N. C. 627, 6 S. E. (2d) 533 (1939).
[75] 64 N. C. 594 (1870).
[76] State v. Edwards, 211 N. C. 555, 191 S. E. 1 (1937).
[77] State v. Richardson, 216 N. C. 304, 4 S. E. (2d) 852 (1939).
[78] State v. Rodgers, 216 N. C. 731, 6 S. E. (2d) 499 (1939).
[79] State v. Branner, 149 N. C. 559, 63 S. E. 169 (1908).
[80] State v. Smith, 213 N. C. 299, 195 S. E. 819 (1938).

sion of the confession.[81] Since the defendant has a right to offer evidence that the confession was not voluntary, and since by statute[82] a defendant has the right to testify in his own behalf at his request, he is competent to testify in regard to the voluntariness of his own confession; and the judge should then pass on the credibility of his testimony. If the defendant fails to offer any evidence at the *voir dire* to show that the confession is involuntary, he waives this right; and his testimony given at trial tending to show that the confession is involuntary comes too late to be considered.[83] However, if the defendant waives his right to controvert the voluntariness of the confession and on trial it is subsequently revealed from the evidence of the *state's witnesses* that the confession is not voluntary, it is admissible at that point.[84]

What facts amount to such threats or promises as to exclude confessions as not voluntary are questions of law.[85] Whether there is any evidence tending to show that the confession is not voluntary is a question of law which is reviewable.[86] But whether the evidence, if true, proves the facts, or whether the witnesses giving testimony in regard to facts are credible or not, or in the case of conflict of testimony, which witness should be believed, are questions of fact which cannot be reviewed[87] *unless* there is not sufficient evidence to support the jury's finding.[88]

Instructions can be given to the jury by the judge that even voluntary confessions are to be received with caution, but this is not required.[89] It is not error to refuse to charge that confessions are to be received with caution, and still less so, when the court is not asked to give the instructions.[90] The jury alone has the right to judge the sufficiency of the confession as proving the fact confessed,[91] and they may believe the confession in part, *in toto,* or not at all.[92] In *State* v. *Hardison,*[93] a charge that it was for the jury, having regard to all the evidence, to say what portions of the defendant's statements they would receive and what they would reject in their sound discretion, was upheld.

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[81] State v. Whitner, 191 N. C. 659, 132 S. E. 603 (1926).
[82] N. C. GEN. STAT. (1943) §8-54.
[83] State v. Alston, 215 N. C. 713, 3 S. E. (2d) 11 (1939).
[84] State v. Gibson, 216 N. C. 535, 5 S. E. (2d) 717 (1939); State v. Anderson, 208 N. C. 771, 182 S. E 643 (1935)
[85] State v Andrews, 61 N. C. 205 (1867).
[86] State v. Page, 127 N. C. 512, 37 S. E. 66 (1900).
[87] State v. Manning, 221 N. C. 70, 18 S. E. (2d) 821 (1942); State v. Fain, 216 N. C. 157, 4 S. E. (2d) 319 (1939); State v. Burgwyn, 87 N. C. 572 (1882).
[88] State v. Hairston, 222 N. C. 455, 22 S. E. (2d) 885 (1942); State v. Harris, 222 N. C. 157, 22 S. E. (2d) 229 (1942); State v. Perry, 212 N. C. 533, 193 S. E. 727 (1937); State v. Gosnell, 208 N. C. 401, 181 S. E. 323 (1935).
[89] State v. Hardee, 83 N. C. 619 (1880); State v. Graham, 68 N. C. 247 (1873).
[90] State v. Patrick, 48 N. C. 443 (1856).
[91] State v. Graham, 68 N. C. 247 (1873).
[92] State v. Davis, 63 N. C. 578 (1869).
[93] 75 N. C. 200 (1876).
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Res Ipsa Loquitur—Application to Electric Eye Doors

The recent North Carolina case of *Watkins* v. *Taylor Furnishing Co., Inc.*,[1] held that the doctrine of *res ipsa loquitur* did not apply where a customer was injured by a "magic eye" door in defendant's store. Plaintiff entered through the left side of the double door opening, the door, being partially open, suddenly closed catching the plaintiff between it and the door frame. The applicability of *res ipsa loquitur* to injuries sustained by customers in stores is raised by this case and the following discussion will be limited to such problem.

A storekeeper owes an affirmative duty to exercise ordinary and reasonable care to maintain the premises in a safe condition for the protection of business visitors.[2] In the absence of the proprietor's actual knowledge of the alleged defect, it must appear that he was constructively notified of its presence, *i.e.*, that it existed for such a time before the accident as to have become apparent if reasonable care had been exercised in inspecting the premises.[3] Such a failure to inspect, or a failure to repair discoverable defects, constitutes negligence. On the other hand, the defendant storekeeper is not the insurer of the safety of those who enter his store for the purpose of making purchases.[4]

As prerequisite to the invocation of the doctrine of *res ipsa loquitur* the courts have established the following rules: (1) The instrumentality producing harm must be such that in the ordinary course of events no injury would result unless from a negligent construction or user.[5] (2) The apparatus must have been in the control and/or management of the party charged with neglect at the time of the injury.[6] It has been held that this refers to the right of control, rather than actual control, at the time of the negligence complained of.[7] Thus the mere

[1] 224 N. C. 674, 31 S. E. (2d) 917 (1944).

[2] Todd v. S. S. Kresge Co., 303 Ill. App. 89, 24 N. E. (2d) 899 (1940); Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936).

[3] Rankin v. Brandies & Sons, 135 Neb. 86, 280 N. W. 260 (1938); Pratt v. Great Atl. & Pac. Tea Co., 218 N. C. 732, 12 S. E. (2d) 242 (1940).

[4] Hulett v. Great Atl. & Pac. Tea Co., 299 Mich. 59, 299 N. W. 807 (1941); Pratt v. Great Atl. & Pac. Tea Co., 218 N. C. 732, 12 S. E. (2d) 242 (1940); Fox v. Great Atl. & Pac. Tea Co., 209 N. C. 115, 182 S. E. 662 (1935); Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936).

[5] John v. McGinnis Co., 37 Cal. App. 176, 99 P. (2d) 323 (1940); Wiedanz v. May Dept. Store Co., —— Mo. App. ——, 156 S. W. (2d) 44 (1941); Springs v. Doll, 197 N. C. 240, 148 S. E. 251 (1929); Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936); Kilgore v. Shepard Co., 52 R. I. 151, 158 Atl. 720 (1932).

[6] Olson v. Swan, 203 Cal. 206, 263 Pac. 518, 58 A. L. R. 129 (1928); Home Public Market v. Newrock, 111 Colo. 428, 142 P. (2d) 272 (1943); Todd v. S. S. Kresge Co., 303 Ill. App. 89, 24 N. E. (2d) 899 (1940); Nichols v. Korbritz, 139 Me. 256, 29 A. (2d) 161 (1942); Wiedanz v. May Dept. Store Co., —— Mo. App. ——, 156 S. W. (2d) 44 (1941); Springs v. Doll, 197 N. C. 240, 148 S. E. 251 (1929); Benjamin v. Sears, Roebuck Co., 62 Ohio App. 83, 23 N. E. (2d) 447 (1939); Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936).

[7] Hart v. Emery, Bird, Thayer Dry Goods Co., 233 Mo. App. 312, 118 S. W. (2d) 509 (1938).

possibility that some third person might have been responsible for the negligent condition does not prevent the rule from applying, because the doctrine is founded on probabilities, not mere possibilities.[8] In most of the cases both of these requisites are present, but courts apply the doctrine when only one is found to exist. In combination with one or both of these conditions is found a third explanation for the application of *res ipsa loquitur:* That the defendant possesses superior knowledge or means of information as to the cause of the occurrence than does the plaintiff.[9]

The doctrine is not a substantive rule of law; rather, it is a rule of evidence, permitting the jury, in most jurisdictions, to draw an inference of negligence, which the defendant is always entitled to negative, and if he fails to do so takes the risk of an adverse verdict.[10] If two reasonable inferences are deducible from the same facts, one of which points to the negligence of the defendant and another to a different cause, the doctrine is inapplicable, else, it is said, "a jury is called upon to enter the field of speculation."[11]

The courts agree that the mere fact of an invitee falling on the floor of a store does not of itself raise the inference of negligence on the part of the storekeeper.[12*] To recover in such instance the injured party must prove by competent evidence some actionable negligence of

[8] *Ibid.*

[9] Takashi Kataoka *et al.* v. May Dept. Store Co., *et al.*, —— Cal. App. ——, 139 P. (2d) 25 (1943); Wiedanz v. May Dept. Store Co., —— Mo. App. ——, 156 S. W. (2d) 44 (1941).

[10] Galbraith v. Smith, 120 N. J. L. 515, 1 A. (2d) 34 (1938); Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936).

[11] Farina v. First Nat. Bk., 72 Ohio App. 109, 51 N. E. (2d) 36 (1943) (The doctrine only applies when the facts admit of a single inference—that the accident would not have happened unless the defendant had been negligent).

[12*] F. W. Woolworth Co. v. Ney, 239 Ala. 233, 194 So. 667 (1940) (Plaintiff slipped on banana peel in aisle of store. Held: The Plaintiff is under the primary duty to show that the injury was proximately caused by the negligence of the storekeeper, or one of its servants or employees.); Dalton v. Steiden Stores, Inc., 277 Ky. 179, 126 S. W. (2d) 155 (1939) (Plaintiff stumbled over weather stripping and fell. Held: Must show that defect could have been discovered by reasonable inspection.); Hulett v. Great Atl. & Pac. Tea Co., 299 Mich. 59, 299 N. W. 807 (1941) (Plaintiff slipped on oily floor. Held: To establish liability there must be evidence that the floor was improperly oiled.); Rankin v. Brandies & Sons, 135 Neb. 70, 280 N. W. 260 (1938) (Plaintiff slipped on soapy substance on floor. Held: This raises no presumption of negligence, but what constitutes due care of the storekeeper should be determined from the surrounding circumstances.); Pratt v. Great Atl. & Pac. Tea Co., 218 N. C. 732, 12 S. E. (2d) 242 (1940) (Plaintiff slipped on greasy floor. Held: Defendant was not insurer of safety of those who entered the store and the doctrine of *res ipsa loquitur* is not applicable.); Fox v. Great Atl. & Pac. Tea Co., 209 N. C. 115, 182 S. E. 662 (1935) (Plaintiff slipped when she stepped on beet lying on the floor. Held: Must establish actionable negligence of the defendant.); Parker v. Great Atl. & Pac. Tea Co., 201 N. C. 691, 161 S. E. 209 (1931) (oily floor); Bowden v. S. H. Kress & Co., 198 N. C. 559, 152 S. E. 625 (1930) (oily floor); Reay v. Montgomery Ward & Co., Inc., 154 Pa. Super. 119, 35 A. (2d) 558 (1944) (oily floor); Martin v. Miller Bros. Co., 26 Tenn. App. 110, 168 S. W. (2d) 187 (1942). For further collection of authorities on this point see Notes (1919) 5 A. L. R. 282, (1924) 33 A. L. R. 181, 197.

the defendant.[13] Nor was the rule allowed to be extended to cover a case where the plaintiff stumbled over a plainly visible scale platform as she was leaving defendant's store,[14] or where plaintiff, busily engrossed in conversation with another lady, stumbled over a stool in the store's aisle,[15*] or where plaintiff was run into by a small boy on a tricycle, the store having tricycles for sale.[16*] Also refusing to allow the doctrine to be availed of where defendant's control is lacking, the California court in *Bartholomai* v. *Owl Drug Co. et al.* said: "The mere fact that the fire occurred is insufficient to raise an inference of negligence on the part of defendants."[17] In that case defendant was having some welding done by a contractor and fire broke out causing plaintiff's injuries.

There has been, however, some difference of opinion in applying the doctrine to those cases where a chair in which the customer is sitting suddenly collapses. In *Kilgore* v. *Shepard Co.*[18] it appeared that a leg of the chair in which plaintiff sat was out of its socket and suddenly collapsed. The Rhode Island court ruled that *res ipsa loquitur* did not apply, saying that the control over the chair had been assumed by the plaintiff.[19*] But the Missouri[20] and Texas[21] courts have repudiated the doctrine of the *Kilgore* case. Thus where a chair in which plaintiff sat collapsed, having been procured for her by a clerk of defendant, it was held that the customer had a *prima facie* case against the store.[22*] Likewise in the case of *Clark-Daniels, Inc.* v. *Deathe et al.*[23*] it was held that *res ipsa loquitur* was in order where a chair in which plaintiff was sitting collapsed because of the absence of a vital screw. It is sub-

[13] *Ibid.*

[14] Burckhalter *et al.* v. F. W. Woolworth Co., 340 Pa. 300, 16 A. (2d) 716 (1941).

[15*] Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936) (The court was of opinion that this stool was not within the exclusive control of defendant, and that it could have been placed in this position by some of the customers as easily as by an employee of defendant.).

[16*] Barnes v. J. C. Penny Co., 190 Wash. 633, 70 P. (2d) 311 (1937) (It is necessary for the injured party to prove that the instrumentality causing the injury was, at the time thereof, in the exclusive control of defendant.).

[17] 42 Cal. App. (2d) 38, 108 P. (2d) 36, 39 (1940).

[18] 52 R. I. 151, 158 Atl. 720 (1932).

[19*] *Accord,* Mineo v. Rand's Food Shops, Inc., —— Misc. ——, 32 N. Y. S. (2d) 23 (1941) (Court conceded that defendant was constructively in control of the chair, but said that there should be exclusive control. There was also the feeling on the part of the court that defendant had only limited opportunity for inspection.).

[20] Herries v. Bond Stores, 231 Mo. App. 1053, 84 S. W. (2d) 153 (1935).

[21] Clark-Daniels, Inc. v. Deathe *et al.,* 131 S. W. (2d) 1091 (Tex. Civ. App. 1939).

[22*] *Supra* note 19 (The court distinguishes between this and the *Kilgore* case, which was stated to be in a minority, in that the clerk in the former case *offered* the chair to plaintiff, while in the latter case there was no clerk present and the plaintiff moved the chair six inches and sat down.).

[23*] *Supra* note 20 (The court attempts to distinguish this from the *Kilgore* case by stating that in the former there was a defect not apparent to the casual observer, while in the latter such was not the case.).

mitted that the proposition expounded in the latter decisions is more reasonable, for the storekeeper has an "overall" control of chairs provided for his customers and he could have discovered any defects by reasonable inspection; whereas the injured customer was not in a position to inspect for hidden defects.

The application of the doctrine would seem to be clear in those cases involving injuries sustained by falling objects. It is usually held that *res ipsa loquitur* is available when the object is within the control of defendant and would likely not have fallen had there been due care exercised by the latter. Thus in *Benjamin* v. *Sears, Roebuck & Co.*[24] plaintiff was permitted to invoke the doctrine where he was injured by a falling advertising sign which had been resting on a narrow ledge over a stairway.[25*] Closely allied to this situation and presenting a striking analogy is the case of *Nichols* v. *Korbritz.*[26] There plaintiff, while standing in the center of the store, was struck in the eye by a meat hook which, for some unexplained reason, had traveled from an open refrigerator along a track on the ceiling extending into the center of the store. The court said that, since this instrumentality was within the control of the defendant and the injury would not likely have happened had the latter exercised due care, *res ipsa loquitur* applied.[27] Likewise where a customer falls through a defective trap door, not having been apprised of its presence,[28] or an unguarded cellar stairway,[29] the doctrine has found favor with the courts.

The principal case seems to be one of first impression, but upon analogy and comparison with the prerequisites for the application of the doctrine and with those cases which immediately follow dealing with swinging doors, it is apparent that the North Carolina court reached the logical result. In a recent Illinois case[30] the plaintiff's intestate was about to enter defendant's store through a swinging door which was partially open. When she came within one foot of the entrance the door swung towards her, and in an effort to ward off a certain collision therewith, she lost her balance and fell. The evidence tended to show that several other persons had preceded intestate and had gone through this same door, accounting for its being partially open at this time. It was held that *res ipsa loquitur* did not apply. This case is representative of those where the injured party or some third person in fact

[24] 62 Ohio App. 83, 23 N. E. (2d) 447 (1939).

[25*] *Accord,* Perry v. Stein *et al.,* —— Mo. App. ——, 63 S. W. (2d) 296 (1933) (Where a shelf in a store collapsed throwing canned goods on plaintiff.); Gailbraith v. Smith, 120 N. J. L. 515, 1 A. (2d) 34 (1938) (Chandelier fell on plaintiff.).

[26] 139 Me. 256, 29 A. (2d) 161 (1942).

[27] *Ibid.*

[28] John v. McGinnis Co., 37 Cal. App. (2d) 176, 99 P. (2d) 323 (1940).

[29] Lynch *et al.* v. Gatteguo, —— Misc. ——, 17 N. Y. S. (2d) 337 (1939).

[30] Todd v. S. S. Kresge Co., 303 Ill. App. 89, 24 N. E. (2d) 899 (1940).

had control of the agency, and the accident might have resulted from one of several causes, for some of which the defendant would not be liable.[31*] When a customer places himself within range of a swinging door, he subjects himself to the probability of being hit by it if someone has just passed through it. It would be unreasonable to conclude that the storekeeper was in exclusive control of such an instrumentality. The reasoning of these cases applies to the facts of the recent North Carolina case.[32] Could it be fairly said that the storekeeper in the instant case was in exclusive control of the opening and closing of the "magic eye" door, when such door is known to remain motionless until the light beam between the electric eyes (which cause the door to operate) is broken by an incoming or outgoing patron? The proposition expressed in the swinging door cases above, *i.e.*, that third persons are in control of the door rather than defendant, would seem to apply to cases of doors operated by the magic eye.

In the instant case a railing separated ingoing and outgoing customers. The right hand door was marked "IN" and there was a rope on the outside of the left hand door to indicate that it was not the entrance. The plaintiff's carelessness in not keeping to the right and using the door marked entrance presents an inference of negligence which would also preclude the application of the doctrine. It is submitted that the Supreme Court reached the correct result.

JAMES G. HUDSON, JR.

Wills—Acts Constituting Election

In the recent case of *Perkins* v. *Isley*[1] testatrix devised all her property to defendant and appointed plaintiff as executor. Plaintiff was declared mentally incompetent, and defendant requested the clerk of court to appoint an administrator *c. t. a.* The administrator was ap-

[31*] Olson v. Swan, 203 Cal. 206, 263 Pac. 518, 58 A. L. R. 129 (1928) (The doctrine of *res ipsa loquitur* was not applicable in case of injury to a patron of a store by the rebound of a swinging door when she was holding its companion open for another customer to pass through, where the equipment is standard and includes checking devices.); Home Public Market v. Newrock, 111 Colo. 428, 142 P. (2d) 272 (1943) (Plaintiff was injured by the breaking of a glass panel in swinging door under pressure of his hand.); Wiedanz v. May Dept. Store Co., —— Mo. App. ——, 156 S. W. (2d) 44 (1941) (Where plaintiff, attempting to enter defendant's store through revolving door, was knocked down by a woman hit by the door which was pushed by a man, it was held that there was no proximate cause as to the defendant.); Farina v. First Nat. Bk., 72 Ohio App. 109, 51 N. E. (2d) 36 (1943) (Patron departing from bank was injured by collapse of revolving door. It was held that *res ipsa loquitur* did not apply.). *But cf.* Crump v. Montgomery Ward & Co., Inc., 313 Ill. App. 151, 39 N. E. (2d) 411 (1942) (The store's door was equipped with a plunger door check, and plaintiff was struck by the metal bar of the door which had been held open by the door stop but suddenly closed as customer entered the store. It was held that *res ipsa loquitur* was applicable.).

[32] *Supra* note 1.

[1] 224 N. C. 793, 32 S. E. (2d) 588 (1945).

pointed and entered into the duties of office. Three months later defendant filed a petition renouncing her rights under the will and alleging that she wished to take by intestate succession along with the plaintiff, her brother. In an action for partition instituted by plaintiff's guardian, the defendant contends that her renunciation amounted to a conveyance made without the written assent of her husband. The jury found the plaintiff and defendant to be tenants in common. On appeal the court sustained this holding, saying that defendant was under no obligation to make an election and her request to appoint an administrator *c. t. a.* did not estop her from renouncing her rights under the will. But defendant did make a valid renunciation of her rights under the will by filing the petition with the Clerk of Court. Such a right is a natural one and needs no statutory authorization.

An election under a will consists of the exercise of a choice offered the devisee of accepting the devise and surrendering some right of his which the will undertakes to dispose of, or of retaining such right and rejecting the devise. The choice is compulsory between two inconsistent rights or claims where there is a clear intention of the testator that the beneficiary shall not enjoy both;[2] but it must appear that the testator intended an election to be made before the acts of the devisee will constitute an election.[2a] As applied to a will, the doctrine simply means that one who takes under such will must conform to all its legal provisions.[3]

There may be an election either (1) by express declaration showing the intention of electing, or (2) by implication. If the election is by express declaration, little difficulty is experienced in determining whether an election has been made. It is where the election is impliedly made that the difficulty lies. Since election is based on the intention of the parties, testator and devisee, it is difficult to lay down set rules as to what constitutes an election; rather the facts of each particular case control.

In the first place, a devisee is entitled to know the condition of an estate before making an election.[4] Therefore, an agreement to abide by a will made without sufficient knowledge on which to base an intelligent judgment as to the best course to pursue will not estop a widow from making a later dissent.[5] Furthermore, a devisee must know an election is necessary in order to be bound by acts which ordinarily would constitute an election.[6] Especially is this true where the other parties

[2] Wright v. Wright, 198 N. C. 753, 153 S. E. 321 (1930); Note (1937) 110 A. L. R. 1317; EATON ON EQUITY (2nd ed. 1923) §65; 28 R. C. L., WILLS, §361.

[2a] *In re* O'Rourke's Estate, 106 Vt. 327, 175 Atl. 24 (1934).

[3] McGehee v. McGehee, 189 N. C. 558, 127 S. E. 684 (1925).

[4] *See* Richardson v. Truby, 250 Ill. 577, 580, 95 N. E. 971, 973 (1911).

[5] Richardson v. Justice, 125 N. C. 409, 34 S. E. 441 (1899).

[6] Johnson v. Ellis, 172 Ga. 435, 158 S. E. 39 (1931); Wible v. Ashcraft, 116 W. Va. 54, 178 S. E. 516 (1935).

affected by such election can be placed substantially in the same position as if there had been no election.[7]* But once a valid election is made, there can be no dissent.[8]

Under the older cases dower was a favorite of the law, and the courts were quick to overlook acts which would usually constitute an election under ordinary circumstances in an effort to provide for the widow.[9]* Too, at common law there was a presumption of the acceptance of the most beneficial estate.[10]

An implied election to take under a will can be shown in many ways. Foremost is a failure to dissent from the will. In those states having statutes controlling election, usually a limited time is allowed for the widow to dissent;[11] and a failure to dissent within the time prescribed estops the widow from electing to take dower.[12]* Election in such fashion operates in the nature of estoppel or on the basis of laches.[13] Too, an election made by a failure to dissent from a will is a personal one,

[7]* Ludlum v. Roth, 126 N. J. Eq. 556, 10 A. (2d) 648 (1940); Waggoner v. Waggoner *et al.*, 111 Va. 325, 68 S. E. 990 (1910) (Widow held property belonging to her husband's estate in ignorance of the fact that if she took under the will she would relinquish her rights to other property. *Held,* to be no election.).

[8] Pirtle v. Pirtle, 84 Kan. 782, 115 Pac. 543 (1911).

[9]* Ramsour v. Ramsour, 63 N. C. 231 (1869) (Widow had conveyed land in payment of her personal debts.). *But see* Shuette v. Bowers, Com'r of Int. Rev., 32 F. (2d) 817 (1929) (Where a husband willed his entire property to his wife and she sold part of the realty without an admeasurement of dower, such act constituted an election. It is to be noted that this is a tax case which raised the question of a deduction allowed for the widow's dower rights under the estate tax.).

[10] Merrill v. Emery, 27 Mass. (10 Pick.) 507 (1830); Yawger's Ex'r v. Yawger *et al.*, 37 N. J. Eq. 216 (1883).

[11] ALA. CODE (1940) tit. 61, §§18-21; COLO. STAT. ANN. (Michie, 1935) c. 176, §37; FLA. STAT. ANN. (1944) tit. 41, §731.33; GA. CODE ANN. (Park, Skillman, Strozier, 1936) §37-502 through §37-504 (legatee), §113-819 (widow); ILL. REV. STAT. ANN. (Smith-Hurd, 1935) c. 41, §§10-13; IND. STAT. ANN. (Burns, 1933) §6-2332 through §6-2336; IOWA CODE (1939) §12007-12011; KAN. GEN. STAT. ANN. (Corrick, 1935) §§22-245 to 22-248; KY. REV. STAT. ANN. (Cullen, 1942) §392.080; ME. REV. STAT. (1930) c. 89, §13, §14; MD. ANN. CODE (Flack, 1939) art. 93, §314; MASS. ANN. LAWS (1933) c. 191, §15; MICH. STAT. ANN. (Henderson, 1938) §§26.234-26.235; MINN. STAT. (Henderson, Kennedy & Scott, 1941) §525.191; MO. REV. STAT. ANN. (1942) §325-330; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §§5819-5820; NEB. COMP. STAT. (1929) §30-107, §30-108; N. H. REV. LAWS (1942) c. 359, §§10-14; DECEDENT ESTATE LAW (N. Y.) §18(7); N. C. GEN. STAT. (1943) §30-1 to §30-3, §31-42; OHIO GEN. CODE ANN. (Page, 1937) §10504-56 to §10504-58; OREGON COMP. LAWS ANN. (1940) §17-113, §17-114; PENN. STAT. (Purdon, 1930) tit. 20, §264, §265; R. I. GEN. LAWS (1938) c. 556, §21; TENN. CODE ANN. (Williams, 1934) §§8358-8364; UTAH CODE (1943) §101-1-4; VT. PUB. LAWS (1933) §2965; VA. CODE (1942) §5246; WISCONSIN STAT. (1941) §233.13.

[12]* Collins v. Carman's Ex'r, 5 Md. 503 (1854) (Statute required renunciation within six months, and widow lived on the land for four years.); Moore v. Gordon, 85 N. J. Eq. 150, 95 Atl. 983 (1915); *see* Lee v. Giles, 161 N. C. 541, 77 S. E. 852 (1913).

[13] Cox v. McBroom, 155 Kan. 2, 122 P. (2d) 185 (1942); Williams v. Campbell, 85 Kan. 631, 118 Pac. 1074 (1911); Collins v. Carmen's Ex'r, 5 Md. 503 (1854); Hoggard v. Jordan, 140 N. C. 610, 53 S. E. 220 (1906); *In re* Wilson's Estate, 297 Pa. 348, 147 Atl. 70 (1929); Appeal of Jackson, 126 Pa. 105, 17 Atl. 535 (1889).

and the executor or administrator of a deceased widow cannot dissent therefrom.[14]

But what affirmative acts constitute an election? Clearly, mere consent to the probate of a will does not amount to an election to take under it.[15] In North Carolina, at least, the qualification as executor or executrix does not amount to an election;[16] but once the will is offered for probate by the executor with full knowledge of his rights thereunder, there can be no later dissent.[17]* Still, if such acts are made without knowledge of the condition of the estate, if a dissent is made immediately upon discovery, the North Carolina court has held it to be valid.[18]*

Where election is provided for by statute,[19] it has been held that a strict compliance with the statute is essential;[20]* and acts which would otherwise constitute an election have no bearing on the case.[21]*

Such acts as constitute an election must be clear and unequivocal, and must clearly evince an intention to take under the will.[22] Hence, the acceptance by a widow of a "family allowance" provided for by statute and granted by the court "until further order" is merely a temporary provision for the widow's support, pending administration of the estate, and does not constitute an election.[23] Bare statements by a widow that certain legatees would take something under a will alone will not constitute an election.[24] Neither does the fact that a widow signed her husband's will, consenting to its terms, estop her from dissenting later.[25] Furthermore, mere occupancy of the family residence, which the widow is entitled to do until her allotment of dower—in and of itself—does not constitute an election.[26] This is especially true where there has been no occasion which calls for her assertion of it.[27]

[14] Note 13, *supra*.

[15] McGrath v. Quinn, 218 Mass. 27, 105 N. E. 555 (1914).

[16] *In re* Shuford's Will, 164 N. C. 133, 80 S. E. 420 (1913).

[17]* Treadway v. Payne, 127 N. C. 436, 37 S. E. 460 (1900) (Here the devisee assumed the duties as executor and offered the will for probate. The court held him estopped to elect later and accept the same property under a deed executed by the testator subsequent to making the will.); Mendenhall v. Mendenhall, 53 N. C. 287 (1860).

[18]* Simonton v. Howton, 78 N. C. 408 (1878) (Widow had served as executor for sixteen months.).

[19] Note 11, *supra*.

[20]* Williams v. Williams, 114 Fla. 733, 154 So. 835 (1934) (Statute required widow to dissent from will within one year after its probate. Therefore, the fraudulent act of her attorney in failing to file her dissent did not prevent the operation of the statute.).

[21]* Bullock v. Smith, 201 Iowa 247, 207 N. W. 241 (1926) (Statute required written notice of consent to will. Where a widow occupied the premises during her lifetime and gave no written notice, she made no election.).

[22] Merchant's Nat. Bank v. Hubbard, 222 Ala. 518, 133 So. 723 (1931).

[23] Dick v. Glenn, 218 Ind. 282, 31 N. E. (2d) 1009 (1941).

[24] Note 22, *supra*.

[25] Tavel v. Guerin, 119 Fla. 624, 160 So. 665 (1935).

[26] Note 22, *supra*.

[27] Archer v. Barnes, 149 Iowa 658, 128 N. W. 969 (1910).

The filing of a suit by a widow and the heirs of a testator to set aside a testamentary trust as invalid does not constitute a dissent from the provisions of the will within the statutory period.[28] On the other hand, the Virginia court has held that a widow who acted as executrix of her husband's will, was not estopped to dissent therefrom merely because she unsuccessfully contested a claim of deed of trust indebtedness on her husband's estate.[29] Neither would a widow's request to withdraw administration of her deceased husband's estate be construed as a renunciation to take under his will where she actually possessed the property.[30] But where the action at law results in an absolute assertion of title under the will, there is indicated an intention to make an election.[31] Furthermore, an election against interest conferred by the will may result in the same decision.[32*]

As indicated above, few singular acts on the part of the devisee or legatee will result in an election; but add together two or more of the above or similar acts, and usually the courts hold a valid election to have been made.[33*]

In the principal case the court held that there was no obligation on the part of the defendant to make an election, and the mere fact that she requested the appointment of an administrator *c. t. a.* was insufficient to estop her from renouncing her rights under the will. But she did make a valid renunciation of her rights under the will by the filing of the petition with the Clerk of Court, which clearly and unequivocally set out her intention. It is submitted that the decision of the court is correct.

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[28] Story v. First Nat. Bank & Trust Co. in Orlando, 115 Fla. 436, 156 So. 101 (1934).

[29] Liverman v. Lloyd, 159 Va. 565, 166 S. E. 475 (1932).

[30] Peter v. Peter, 343 Ill. 493, 175 N. E. 846 (1931).

[31] Davis v. Badlam, 165 Mass. 248, 43 N. E. 91 (1896).

[32*] Smith v. Furnish, 70 Cal. 424, 12 Pac. 392 (1886) (Suit for services rendered to a testator is an election not to claim a legacy in payment of said services.).

[33*] McWorther v. Green, 111 Ark. 1, 162 S. W. 1100 (1914) (Wife held an estate by the entirety with her husband. He devised the whole property to his son in consideration that his son support his mother for life. The mother lived with the son until her death without claiming any interest in the land and with the knowledge that the son claimed it under the will. These acts precluded the heir of the mother from asserting any title in the property.); Appeal of Baker's Estate, 170 Okla. 595, 41 P. (2d) 640 (1935) (Widow's acts in offering her husband's will for probate, consenting to act as executrix, giving notice to creditors, filing inventory, paying bequests, seeking credit therefor in her account, filing and having the court approve her final accounts, and exonerate her bond—all without dissatisfaction with the will, constituted an election to take under the will.); *In re* Melot's Estate, 231 Pa. 520, 80 Atl. 1051 (1911) (Husband as executor of his wife's will filed an account in which he claimed credit for money paid for his wife's funeral expenses as provided by will; he also asked the court to distribute in exact accordance with provisions of the will, which excluded a legacy to himself. The court held this to be an election.); Borden v. Ward *et al.*, 103 N. C. 173, 9 S. E. 300 (1899) (Use of property and conveyance thereof constituted an election.).