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RECENT CRIMINAL CASES

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MURDER — RESPONSIBILITY FOR SUICIDE.—[Indiana] Madge Oberholtzer was a resident of Indianapolis, Indiana. Appellant Stephenson, the Grand Kleagle of the Ku Klux Klan of the state, also had a home in the city. Miss Oberholzer and Stephenson were slightly acquainted. The evening of March 15, 1925, she visited him in his home. There appellant and the two men who were co-defendants with him in the original proceeding, forced liquor upon her, and intimidated her with show of weapons. The same night they took her to Hammond, Indiana, in a Pullman, Stephenson criminally assaulting her during the trip. On arriving in Hammond, about 6:30 a. m., the four went to a hotel. After breakfast Miss Oberholtzer asked Stephenson for money, left the hotel in the company of one of the co-defendants, and bought a hat and some bichloride of mercury. On her return to the hotel she took the poison. Defendants, immediately learning of her act, put her in the back of a car and drove to Indianapolis. There Miss Oberholtzer was placed in Stephenson's garage until noon of March 17, when she was taken home. She died April 14, 1925, twenty-nine days after the assault. Stephenson was held guilty of murder in the second degree. His two co-defendants were acquitted. The decision was affirmed. *Stephenson* v. *State* (Ind. 1932) 179 N. E. 633. The case had been before the Supreme Court of Indiana once previously, on a hearing for writ of habeas corpus for Stephenson. *Stephenson* v. *Daly* (1927) 200 Ind. 196, 158 N. E. 289.

Defendants were indicted on four counts: first, that Miss Oberholtzer died from wounds sustained in the attack by Stephenson, and from poison subsequently taken while she was distracted with pain and shame; second, that she died from the effects of poison taken under fear and duress; third, that she died as a result of wounds sustained in the attack; fourth, that she died as a result of defendant's failure to secure proper medical aid while deceased was under his control, suffering from the effects of poison. Stephenson was found guilty on the first count only. Reliable medical testimony eliminated the possibility of serious injury having arisen from the wounds suffered in the assault. The question remaining stands alone: Shall the defendant be held responsible for suicide committed while deceased was distracted by pain and shame?

The general doctrine covering suicide is that if the act were committed while deceased was rendered mentally irresponsible by wounds administered by defendant, then the

defendant is guilty of murder. 2 *Bishop,* "Criminal Law" (9th ed. 1923) sec. 639. The rule that one who by his acts has rendered another mentally irresponsible is liable for the subsequent acts of the deranged victim, including the taking of his own life, heretofore has been limited strictly to cases in which physical wounds inflicted by the defendant were the cause of the derangement: *People* v. *Lewis* (1899) 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783. This court extends the foregoing doctrine, previously limited in its application, to any injury, either physical or mental, which may be found to be the reasonable and probable cause of the irresponsibility.

The court depends upon three general classes of cases to support its extension of the rule. The first of these is represented by *Wilder* v. *Russell Library Co.* (1927) 107 Conn. 56, 139 Atl. 644, 56 A. L. R. 455. This is a much-criticized workmen's compensation case in which an employer was held civilly liable for the suicide of an employee deranged by overwork. It seems obvious that this case furnishes no authority for the application of the suicide doctrine to a criminal case, such as *Stephenson* v. *State, supra.* The second class of cases is that in which suicide was committed while the deceased was in fear of physical violence at the hands of the defendant. The early common law denied any criminal responsibility unless death was the direct result of physical violence: *East* "Pleas of the Crown" (1803) chap. 5, sec. 13; 1 *Hale* "Pleas of the Crown" (1778) 429. In later stages of development the doctrine has been extended to cases in which deceased committed suicide while under a well grounded fear of violence: *Rex* v. *Valade* (1915) 26 Can. Cr. C. 233; *Rex* v. *Beech* (1912) 23 Cox Cr. Cases 181. In this type of case the courts have been loath to allow any deviation from a strict interpretation of "immediate fear of violence": *Lewis* v. *Commonwealth* (1898) 19 Ky. Law Rep. 1139, 42 S. W. 1127. The third class of cases advanced by the court to support its holding is that in which deceased inflicted a mortal wound on himself while suffering from a wound inflicted by defendant, the latter not necessarily being mortal: *State* v. *Angelina* (1913) 73 W. Va. 146, 80 S. E. 141, 51 L. R. A. (N. S.) 877 and note. These cases depend almost entirely upon the derangement of the victim as the result of the first wound. In the instant case Miss Oberholtzer's acts subsequent to the attack reveal that her mental condition was sound, a condition found in none of the supporting cases quoted by the court.

Two findings are necessary to support the unusual rule adopted by the court: first that Miss Oberholtzer was mentally irresponsible when she took her life; second, that the acts of the defendant were the proximate cause of the irresponsibility. The trial of this case was not held upon the question of irresponsibility at all; no evidence was introduced on that point. The court calmly assumed that the suicide in itself was sufficient indication of the irresponsibility of the deceased. Thus it appears that the court fails to comply with the rule which it lays down. In summary, the court decided that Madge Oberholtzer had destroyed herself while distracted by pain and shame resulting from the acts of Stephenson, and that Stephenson must atone for the results of his deed. The distraction found by the court was not proved, but assumed; the pain alleged

to have caused the distraction was insufficient to prevent Miss Oberholtzer from going out shopping, and eluding an escort-guard to buy poison. The shame which the court found to have contributed to the distraction never before has been regarded as sufficient to hold the one responsible for its existence criminally liable for acts committed while under its influence.

It seems that the explanation of this case lies outside the lawbooks. Stephenson was, at the time of the assault, the head of the Ku Klux Klan of Indiana, a secret organization which for some time had exerted a somewhat sinister influence in Indiana politics. In Miss Oberholtzer's dying declaration it was set forth that Stephenson had attempted to cow her into silence by boasts of his invulnerable political position. He had said many times, "I am the law and the power." To have ordered a new trial in this case would have seemed to the general public to be a proof of the truth of the boast. Stephenson's guilt of a heinous offense was clear. Justice could have gained nothing by a new trial; public faith in the courts would have been shaken by a reversal in such a notorious case. Unfortunately, affirmance required that violence be done to established legal theory. The exigency of the situation overbalanced judicial repugnance to the violation of long-established principles, and the case appears in the vulnerable form above set forth.

ROBERT L. GROVER.

MURDER — WITHDRAWAL OF VERDICT - FORM — LESS THAN UNANIMOUS VERDICTS.—[Illinois] On June 9, 1930, Alfred J. Lingle, a reporter for the *Chicago Tribune,* was shot and killed in a tunnel used by pedestrians in crossing under Michigan Avenue to the Randolph Street station of the Illinois Central Railroad in Chicago. The homicide was committed at 1:30 p. m. amid a crowd of people hurrying through the tunnel to trains. The murderer dashed through the east end of the tunnel, crossed Michigan Avenue through heavy traffic to the north side of Randolph street, and then escaped after a short chase. Lingle was a special "gangland" reporter and had a thorough knowledge of the underworld. The newspapers, especially the one which had employed him, gave considerable space to the crime, and as a consequence of this, as well as the audacity of the crime, the public interest was aroused. The apprehension of the criminal seemed an impossible task because of the lack of clues, but the gun which had been used was found, and though the serial number had been obliterated, it was restored with an etching fluid by the Scientific Crime Detection Laboratory of Northwestern University, and both dealer and purchaser were identified. An active man-hunt was carried on for some time by a special investigator appointed by the State's Attorney, and finally Leo V. Brothers, the defendant, was captured and charged with the crime. The trial was lengthy and attracted unusual attention. One of the jurors consistently voted not guilty, refusing to assign any reason for his vote or even to discuss it, and it was only after the other eleven jurors agreed to inflict the minimum punishment for murder, fourteen years, that he consented to vote guilty. On appeal the defendant contended that a reversible error had been committed by the trial court in withdrawing in the absence

of the defendant a verdict-form of manslaughter submitted by mistake to the jury. Other questions were raised, but need no comment. *Held,* on appeal: the case should be affirmed: *People* v. *Brothers* (1932) 347 Ill. 530, 180 N. E. 442.

The majority of the court held that only such a communication made in the absence of the accused as was prejudicial to him was a reversible error. The defendant's presence is not essential throughout the entire trial, though it may be imperative at the arraignment, the swearing of the jury, the presentation of the evidence, and the reading of the verdict. Furthermore, this was solely a case of identification, and under no theory could Brothers have been found guilty of manslaughter; he was either guilty of murder, or else he was innocent of any crime. The rule of the majority is far more flexible than that of the dissent, which was that any communication under these circumstances was a ground for reversal. The dissent seems to recognize that in this particular case the communication was not of itself reversible error, for it says: "If this single case were the only one to be affected by this judgment, it might not be a matter of serious importance, but it is of serious importance if this case becomes a precedent." (p. 453.) Apparently the dissent is too deeply impressed by the sanctity of precedent, wishing to decide each point as it arises, not only for the particular set of facts in the case, but for all cases to arise in the future. The dissent would require that any communication made in the absence of the defendant, no matter how harmless, result in the reversal of the case and a new trial. The *Brothers* case, however, was a long and expensive one and the communication did no harm. A reversal would mean that the expense of the trial would be duplicated, with the result, in all probability, the same.

There is a larger question in the case, however, and that has to do with a modification of the present requirement of a unanimous verdict. As previously stated, one juror, by holding out, forced a compromise. Disagreements are even more costly and unsatisfactory in criminal than in civil cases; the advantages throughout the trial are with the defendant (burden of proof on the state, sole right of the defendant to appeal, to mention only several), but disagreements give him an even greater advantage, for "time is the most dependable of defenses": *Green,* "Judge and Jury" (1930) 404. There is nothing in the history of the jury system to support a requirement of a unanimous verdict of twelve. Originally, disputes were referred to the neighbors of the litigants in the county, who decided the case according to their own knowledge of the facts. It was necessary to a verdict that twelve agree, and new members were added to the panel by the sheriff until twelve were found who could agree. This was not a rule requiring unanimity, but solely a rule of evidence requiring a certain degree of proof. Furthermore, although the Constitution of the United States guarantees a jury trial, it does not define it, saying nothing as to the number composing a jury nor as to a requirement of unanimity. "The requirement is based upon the court's interpretation or misinterpretation of custom": *Wilkin* "The Jury: Reformation, Not Abolition" (1930) 13 J. Am. Jud. Soc. 154, 156. In several states work has already been done along this line by allow-

ing verdicts in civil cases by nine of the twelve jurors.

That there is great possibility of disagreement when the unanimous verdict is required may be shown quite easily. There are thirteen possible ways for twelve men to vote, ranging from a unanimous vote for the defendant to a unanimous vote for the state. Only two of these votes can result in verdicts; consequently eleven of the thirteen possible votes result in disagreements. The questions which a jury is called upon to decide always have an element of doubt in them or else they would never become questions for a jury; if they were perfectly clear and unmistakable, it would be unreasonable as well as exceedingly expensive to submit them to a jury to obtain an obvious answer. Using the three-fourths rule, the possibility of a disagreement is reduced to five of thirteen, and with the rule of ten, it is seven of thirteen. The statistics with regard to the number of disagreements cannot be determined with any degree of accuracy because "most disagreements, as far as they affect the plaintiff [the state in a criminal case] and the defendant, are the disagreements which result in ridiculous compromises . . .": *Sawyer* "Jury Disagreements and the Three-Fourths Rule" (1912) 10 Ohio Law Rev. 284. Of course, the value of compromises as inflicting punishment where no punishment would otherwise be given, must be admitted.

Modification of the jury system may be justified on the grounds of reasonable doubt, if, indeed, any rationalizing be necessary. A jury might be treated as a unit for this purpose, and a court might arbitrarily (which is nothing more than good government from a practical standpoint) state that an eleven to one vote did not imply a reasonable doubt of guilt on the part of the jury as a whole, while an eight to four vote did. Thus there would be a "double doubt," one to the determined by each individual juror himself, and another, the doubt of the jury as a whole, to be determined as a matter of course from some pre-arranged scale.

To return and apply this explanation to the *Brothers* case, one sees first that there were no mitigating or extenuating circumstances, and secondly, that the case was one of identification only. If Brothers were the man who did the killing, he should have been given the maximum punishment for murder, and if he were not the man, he should have been given his freedom. The doubt that the one juror had, was something less than the reasonable doubt required before he should have voted not guilty. That this is true may be determined from the fact that he did vote guilty when the minimum punishment for murder was secured. Let us say that the doubt that the one juror possessed was one-third of what would be considered a reasonable doubt. As a result, we would have in this situation one-third of a doubt of one-twelfth of the jury, since the other eleven consistently voted guilty from the start, or one-thirty-sixth of the doubt of the jury as a whole. This one-thirty-sixth was sufficient to force a compromise. Of course, there is no way of measuring a person's convictions or doubts with any degree of precision, but this illustration does show that even one juror whose mind is not clearly made up, has the power to force eleven who are certain beyond a reasonable doubt to accept a result unsatisfactory to them.

Modification of the jury system to allow less than a unanimous vote to result in a verdict is an expedient open to those who wish to reform the administration of criminal law. To allow one juror who may be perverse, prejudiced, ignorant, or corrupt to force a delay or undesirable compromise is an evil in the present system that should be eradicated. Moreover, the fact that one man has the power to modify the decision of eleven men plays into the hand of the jury "fixer." When one juror is bribed, which is all that is necessary now, there is no one to furnish corroboration in the event of a confession, but if more than one were bribed, there would be corroborating testimony; this fact would tend to minimize jury "fixing." No reflection upon the juror in the *Brothers* case should be taken from this discussion, but the possibility of corruption under the present system should be recognized. The weakness of the present system lies in the localizing of too much power in the individual juror, elevating him to a position of power out of proportion to his intrinsic importance. The proposal to allow less than unanimous verdicts is suggested as a means of correcting the evil of corrupt juries as well as that of undesirable compromise verdicts, both of which are inherent in the present system requiring unanimous verdicts.

MARSHAL WIEDEL.

ARREST—FORCE AN OFFICER MAY USE TO EFFECT ARREST.—[Federal] The defendant, a federal prohibition officer, was convicted of involuntary manslaughter. He and two other officers were attempting to arrest deceased and another whom they found operating a still. The testimony was conflicting, the defense claiming that the deceased threatened one of the officers with a pistol and that the defendant shot him upon his refusal to drop the weapon. Defendant testified that he shot at deceased's legs and did not intend to kill him. The prosecution introduced testimony that the deceased ran when the officers arrived, that they ordered him to stop, and began shooting when he continued running. The trial court instructed the jury that they should acquit the defendant if they found that, when he shot deceased, the deceased was pointing his pistol at one of the officers, but should convict him if he fired while deceased was running away and no longer threatening the other officer. *Held:* reversed and a new trial granted because of this erroneous instruction. The rule applicable here was not that of self-defense, but that as to the force which an officer may use to effect the arrest of a felon, when such felony is committed in the officer's presence. The rule enunciated by the appellate court is that the officer was justified in using such force as under the circumstances appeared reasonably necessary to effect the arrest or prevent the escape of a felon, and if the reasonable use of such force resulted in the death of the felon, the officer was not to be held criminally accountable therefor: *Stinnet* v. *Commonwealth* (C. C. A. 1932) 55 Fed. (2d) 644.

An officer of the law, like any private person, always has the right of self-defense. This, however, is not sufficient, because his duty to effect arrests requires him to act affirmatively. An officer whose duty it is to make an arrest has a right to use such reasonable force as is

necessary to overcome the resistance offered, and to make the arrest even to the extent of taking life: *People* v. *Brooks* (1901) 131 Cal. 311, 63 Pac. 464. He may never use unnecessary force or dangerous means if the arrest can be effected otherwise. The amount of force and the means are left to the sound discretion of the officer, within reasonable limits, but upon trial the reasonableness of the force is a question for the jury: *State* v. *Bland* (1887) 97 N. C. 438, 2 S. E. 460. The standard by which such reasonableness is measured is that of the ordinarily prudent man under the circumstances: *Scibor* v. *Oregon-Washington R. Co.* (1914) 70 Or. 116, 140 Pac. 629.

Where no active resistance is offered and the person whom the officer is trying to arrest merely flees, the amount of force which the officer may use is dependent upon whether he is arresting for a felony or a misdemeanor.

The usual rule is that an officer may take the life of one charged with felony if necessary to effect arrest or prevent escape: *State* v. *Smith* (1905) 127 Ia. 534, 103 N. W. 944, 70 L. R. A. 246. Since this can be done only as a last resort, the officer must be certain that the person he is attempting to arrest is aware that an officer is trying to arrest him for a felony; unless this is done the officer is not considered as having exhausted all other means.

The decisions have not been uniform where the officer is arresting upon mere suspicion of felony. Some hold that if the officer has reasonable grounds to believe a felony has been committed he may use the same means to arrest as if in fact a felony had been committed: *Coldeen* v. *Reid* (1919) 107 Wash. 508, 182 Pac. 599; *People* v. *Kilvington* (1894) 104 Cal. 86, 37 Pac. 799. The more general rule is that mere suspicion of the commission of a felony will not justify killing to prevent the escape of a suspected person; and that in so doing the officer acts at his peril, thereby subjecting himself to prosecution and liability if it develops that in fact no felony has been committed: *Wiley* v. *State* (1918) 19 Ariz. 346, 170 Pac. 869, L. R. A. 1918D 373.

Upon trial an officer is never the final arbiter of the necessity to kill, this being a question for the jury under all the evidence: *State* v. *Montgomery* (1910) 230 Mo. 660, 132 S. W. 232. While most decisions require as justification only that the killing be necessary to the arrest, some require that it be an absolute necessity: *Conraddy* v. *People* (1862) 5 Park. Cr. (N. Y.) 234, while others require only apparent necessity: *Lindle* v. *Commonwealth* (1901) 111 Ky. 866, 64 S. W. 986, or probable necessity: *Jackson* v. *State* (1888) 66 Miss. 89, 5 So. 690, 14 Am. St. Rep. 542.

When arresting for a misdemeanor the usual rule is that an officer may never kill merely to effect an arrest, even though the person he is attempting to arrest escapes: *Commonwealth* v. *Loughhead* (1907) 218 Pa. 429, 67 Atl. 747, 120 Am. St. Rep. 896. Of course, the officer still has the right of self-defense and the duty to overcome all forcible resistance: *Fugate* v. *Commonwealth* (1920) 187 Ky. 564, 219 S. W. 1069. There are a few decisions purporting to hold, perhaps in dicta alone, that an officer may kill if necessary to effect an arrest for a misdemeanor: *State* v. *Dierberger* (1888) 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380;

see 28 Mich. L. Rev. 957.

In *Reneau* v. *State* (1879) 2 Lea (70 Tenn.) 720, the court, after holding that an officer may as a last resort kill a felon to effect an arrest, said: ". . . it may be a question worthy of consideration whether the law ought not to be modified in respect to the lower grade of felonies, especially in view of the large number of crimes of this character created by comparatively recent legislation, whether as to these even escape would not be better than to take life."

At common law all felonies were punishable by death and so it was not considered a great loss if the arresting officer killed the felon, as the felon's life was forfeit. The word felony no longer means a crime punishable by death, yet the old common law is still in effect.

At the last meeting of the American Law Institute a proposed uniform act on this subject was discussed: Proceedings, Vol. IX, p. 179 *et seq.* The act made it necessary, to excuse a killing or wounding by a police officer, that the arrest be a lawful one, that the officer reasonably believe that the arrest cannot be otherwise effected, that he reasonably believe that the suspected person knows of the officer's attempt to arrest him, that the offense for which the officer is trying to arrest is either treason, murder, voluntary manslaughter, mayhem, arson, robbery, common law rape, kidnapping, burglary or assault with intent to murder, rape or rob, and that the person killed or wounded is the one named in the warrant or if there is no warrant the officer reasonably believes the offense was committed by the person killed or wounded. It was argued, however, that the rule should be more liberal so as to put the burden upon the lawbreaker, rather than upon the officer to decide points of law at his peril. It was suggested that the common law did not deal with the modern armed bandit, that we should not weaken the police officer who protects us from the war being levied by organized crime, and that there are few bloodthirsty officers who would abuse their privileges under a more liberal act. Those who supported the act disclaimed any quarrel with the officer who met force by force, but pointed out that the proposed act meant to deal only with cases where there was no active resistance, but merely a fleeing on the part of the person the officer was trying to arrest. The Institute took no final action, but voted to return the proposed uniform act to a committee for further consideration and report at the next meeting.

The law always has held human life to be very valuable. It would seem that society loses more through the death of those who have committed minor felonies, which today need not be very serious offenses, than it gains through the arrest of all such persons, who are only potentially dangerous. Should not the law on this point be changed so as to have greater regard for human life?

WESLEY F. HANNER.

CONFESSIONS — EVIDENCE WHETHER VOLUNTARY OR NOT.— [New York] Plaintiff in error was convicted by a jury upon his own repudiated confession which was made under the following circumstances: Before he was arraigned in court, he was illegally detained for thirty-six hours, during which period he was questioned by five police officers. Promising to tell the truth if given food, the con-

dition was performed, and he made a detailed confession which he repeated in all its particulars to an assistant district attorney several hours later. *Held:* reversed and a new trial ordered. This court is left with doubts and fears that the confessions were obtained by brutality and threats: *People* v. *Mummiani* (1932) 258 N. Y. 394, 180 N. E. 94 (O'Brien, Kellogg, and Hubbs, JJ. dissenting).

The history of the doctrine of confessions divides itself into four stages:

(1) *Confessions in the 1500's and 1600's.* In this stage exclusionary rules are conspicuous by their absence. All confessions were admitted into evidence without question as to their proceeding from hope of promises or from fear of threats. Technically a confession was the equivalent of a plea of guilty, and in the words of Serjeant Hawkins, "the highest conviction that can be made": *Hawkins* (1716) Pleas of the Crown, b. II, c. 31; 2 *Wigmore* "Evidence" (2d ed. 1923) sec. 817. See also: *Staunford* (1607) Pleas of the Crown, b. 2, c. 51; *Hale* (1680) Pleas of the Crown (Emlyn's ed.) 225.

(2) *Confessions in the Second Half of the 1700's.* In this period exclusionary rules were first given articulation by Lord Mansfield in *Rudd's Case* (1775) 1 Leach Cr. C. 135, where the accused applied for release in consequence of having confessed under an assurance of pardon, to be received as an accomplice testifying for the Crown. The following statement was made: "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." This was followed by *Warickshall's Case* (1783) 1 Leach Cr. C. 298, wherein the modern rule was given clear statement in the declaration that confessions obtained by threats and promises are inadmissible in evidence.

(3) *Confessions in the 1800's.* In this stage an abnormal situation predominated. Exclusion became the rule, admission the exception. Thus a statement to the accused by a person in authority that he "had better tell the truth" prevented the confession made in response thereto from being introduced in evidence: *Hardin* v. *State* (1898) 66 Ark. 53, 48 S. W. 904; *Bram* v. *United States* (1897) 168 U. S. 532, 42 L. Ed. 568; *Biscoe* v. *State* (1889) 67 Md. 6; *Rizzolo* v. *Commonwealth* (1889) 126 Pa. 54; *Hudson* v. *Commonwealth* (1866) 2 Duv. (Ky.) 531. Also, the statement "what you say will be held for or against you," made the subsequent confession bad for the reason that the accused might think it an inducement to admit guilt: *Pryor* v. *State* (1899) 40 Tex. Cr. 643, 51 S. W. 375; *Unsell* v. *State* (1898) 39 Tex. Cr. 330, 45 S. W. 1022; *Gunn* v. *State* (1898) 39 Tex. Cr. 257, 45 S. W. 694. An admonition to the defendant that he "had better confess" was viewed with little favor by the majority of courts: *State* v. *Davis* (1899) 125 N. C. 612, 34 S. E. 198; *Banks* v. *State* (1887) 84 Ala. 430, 4 So. 382; *Commonwealth* v. *Nott* (1883) 135 Mass. 269; *People* v. *Ward* (1836) 15 Wend. (N. Y.) 231. And it was held that a question directed at

the accused involving the assumption of his guilt, excluded the resulting confession: *State* v. *Clarissa* (1847) 11 Ala. 57. The application of this principle resulted in much confusion but the courts clung to it nevertheless. It was thus laid down in the federal courts until recently: *Hansen* v. *United States* (1895) 156 U. S. 51; *Hopt* v. *Utah* (1884) 110 U. S. 574, 4 Sup. Ct. 202. This open and shut viewpoint has been modified by the federal courts since the case of *Wan* v. *United States* (1924) 266 U. S. 1, 69 L. Ed. 131.

(4) *Confessions in the 1900's.* These years represent a reaction to the previous period, with attempts at arriving upon a middle ground by a scrutiny of all the circumstances in which the confession was made: *2 Wigmore, supra,* sec. 817. Thus a suggestion that the accused had better go on and tell the truth had no element of an unlawful inducement: *State* v. *McGuire* (Mo. 1931) 39 S. W. (2d) 523; *State* v. *Myers* (1931) 202 N. C. 351, 162 S. E. 764. Also, where accused made a confession a few days after inducements were offered it was held, that the inducements without more were insufficient to invalidate the confession, and that it must clearly appear from all the circumstances that the inducements operated at the time the confession was made in order that it be inadmissible: *People* v. *Dye* (Cal. 1931) 6 P. (2d) 313. That the defendant was intoxicated by a drug while making his confession goes only to its weight as evidence among other circumstances but does not render it inadmissible: *People* v. *Samenigo* (Cal. 1931) 5 P. (2d) 653.

The doctrine of confessions is a mixed one, including both law and fact. It is the duty of the judge to determine whether or not the confession proceeded from threats or promises in passing upon its *admissibility.* It is the duty of the jury, after the confesion is once admitted, to pass upon its *credibility.* This sharp distinction in the function of the judge and of the jury is recognized in the majority of American jurisdictions: *People* v. *Fox* (1926) 319 Ill. 606, 150 N. E. 347; *People* v. *Guido* (1926) 321 Ill. 397, 152 N. E. 149; *Bates* v. *Smith* (1920) 78 Fla. 672, 84 So. 373; *Commonwealth* v. *Russ* (1919) 232 Mass. 58, 122 N. E. 176; *2 Wigmore, supra,* sec. 861. However, there are many courts which hold that, after the judge has applied the legal tests and admitted the confession, the jury are to apply them again and by that token reject the confession. This is the minority rule: *Gin Bock Sing* v. *U. S.* (1926) 8 Fed. (2d) 976; *People* v. *Randazzio* (1909) 194 N. Y. 147, 87 N. E. 112; *Commonwealth* v. *Bond* (1906) 170 Mass. 41, 48 N. E. 756; *2 Wigmore, supra,* sec. 817. This view is criticized principally on the ground that the question of admissibility is one of law which is guided by the application of legal tests unfamiliar to a jury: *2 Wigmore, supra,* sec. 817.

It is not without some importance to note that the state of New York falls within the minority rule: *People* v. *Lytton* (1931) 257 N. Y. 310, 178 N. E. 290; *People* v. *Barbato* (1930) 254 N. Y. 170, 172 N. E. 458; *People* v. *Doran* (1927) 246 N. Y. 409, 159 N. E. 379; *People* v. *Randazzio, supra; People* v. *Rogers* (1908) 192 N. Y. 331, 85 N. E. 135; *People* v. *Brash* (1908) 193

N. Y. 46, 85 N. E. 809. But in a recent case New York has modified its adherence to this rule by limiting the function of the jury to cases where there is a conflict in the evidence on the question of voluntariness: *People* v. *Weiner* (1928) 248 N. Y. 118, 161 N. E. 441. In other words, where no conflict is present, no question of fact is present, and just as the judge is bound to admit or reject the confession without hesitation because of the absence of adverse evidence, so it is presumed the jury would accept or reject the confession for the same reason. Suffice it to say that there was a conflict of evidence in the principal case.

Ordinarily a trial court's ruling on admissibility will not be disturbed on review unless the trial court has clearly abused its discretion: *State* v. *Green* (1929) 128 Ore. 49, 273 Pac. 381; *State* v. *Brady* (1927) 104 W. Va. 523, 140 S. E. 546; *Davis* v. *State* (1925) 178 Wis. 114, 189 N. W. 558, 24 A. L. R. 490; *Greenwood* v. *State* (1913) 107 Ark. 568, 158 S. W. 427. It is submitted that New York presents a singular view on this point, unless yielding to the jury a question which they had a right by law to decide, can be considered a clear abuse of discretion; it is further submitted that the timidity displayed by this decision is a "mental reversion" to the attitude of courts of the nineteenth century toward confessions.

ALVIN R. KATZ.

INJUNCTIONS IN FAMILY RELATIONS — GOVERNMENT AND MORALS. —[Illinois] As part of a proceeding for separate maintenance, an injunction issued "which stepped between a man and his alleged mistress after the latter had refused to end a clandestine relationship which had broken up a home." By the terms of the injunction, the erring husband and his paramour were "enjoined to desist, and refrain from seeing, communicating, talking, associating, and having sexual relations with each other." Injunction issued in *Dunham* v. *Dunham*, March, 1932, from Superior Court of Cook County.

To the student of criminal law, this unusual injunction brings to mind a trend in the law which is typically American, and in sharp contrast with the situation in the only other English speaking nation. In England adultery is no longer a punishable legal offense. In fact, it has been suggested that "it would hardly be possible to restore it as an offense under [English] law": Note (1930) 74 Sol. J. 717. In our own country adultery is a penal offense in practically every state. In England there is no criminal statute punishing the voluntary, private "sexual expression" of adults. In the United States, about thirty-five states make cohabitation between unmarried persons criminal. And in about twenty states it is a criminal offense for two unmarried adults, acting voluntarily and in private, to engage in a single act of sexual connection. (Statistics taken from *May*, "Legal Control of Sex Expression" (1929) 39 Yale L. J. 219.) The same writer also indicates how in this country there is not only a continuing demand for new substantive laws for the regulation of sexual conduct, but also many newly proposed administrative measures for the enforcement of moral laws. These facts are significant. The growing tendency to enlarge the jurisdiction of government over the most intimate human

relations renders it imperative that we study closely each new attempt of government in this direction. The injunction issued in the instant case is perhaps such an attempt, in perfect keeping with developments in the criminal law, and calling for careful consideration.

The first question prompted by the decision is the propriety of the injunction from the standpoint of technique or theory. The obvious difficulty lies, of course, in the traditional maxim that equity acts only on property rights. That the ancient maxim still lives was illustrated as recently as one year ago by a noted writer on equity jurisprudence, whose work as revised announces it to be still the rule that "a party is not entitled to a writ of injunction for a matter affecting his person . . . Where the gist of the injury is purely personal the fact that it may be injurious to property does not give the court jurisdiction": *Bispham,* "Principles of Equity" (11th ed. 1931) sec. 436. This doctrine has been subjected to considerable criticism both in the cases and by law writers, expressed in an avowed tendency to depart from such limitation on the jurisdiction of equity courts: Note (1921) 14 A. L. R. 295, and 1 L. R. A. (N. S.) 1147; *Chaffee,* "Cases on Equitable Relief" (1930). To some writers it has appeared that the traditional rule, taken literally, makes the system of equity suitable only to a "semi-savage society which has much respect for property but little for human life": Note (1897) 37 L. R. A. 783; note (1920) 5 Cornell Law Quar. 177. A few courts, in extending their equitable protection over what they believed to be valuable personal rights, have refused to recognize the validity of the venerable maxim: *Stark* v. *Hamilton* (1919) 149 Ga. 227, 99 S. E. 40 (where the court, upon the petition of a father, restrained the defendant from further debauching complainant's infant daughter). This hostile attitude towards limiting equity jurisdiction is growing in all fields of law, but Texas has been especially prominent in asserting an enlarged jurisdiction of equity over a suit whose object is to preserve the marital relation and to conserve and rehabilitate the wavering affections of the accused spouse: *Ex Parte Warfield* (1899) 40 Tex. Cr. Rep. 413, 50 S. W. 933; *Witte* v. *Bauderer* (Tex. Civ. App. 1923) 255 S. W. 1016; *Smith* v. *Womack* (Tex. Civ. App. 1925) 271 S. W. 209. Other courts, however, apparently more respectful to tradition, have worked out theories by which presumably desirable ends are reached within the technical range of the property right limitation. In the class of cases under discussion, where a stranger threatens to destroy the family relation, there is no great distortion of legal theory in finding a property interest in the right of consortium, or in the right of the husband, if he is the aggrieved party, to the services of his wife. To some, this method of finding a property right involved so as to evade the rule of equity has seemed an unbecoming subterfuge; as Mr. Pound expresses it, "something is found which gives the camel's nose legitimate standing in the Chancellor's tent, and the whole beast follows in order to dispose of the case completely. Such devices never obtain except when we are dealing with a moribund rule": *Pound* "Equitable Relief Against Injuries" (1916) 29 Harv. Law Rev. 640.

Another mode of approach from the point of view of technique is the consideration of the interest involved as one consisting essentially in one's relation with third persons. Perhaps we are dealing here with an interest which is more closely analagous to one's professional and trade relations than to the interest of one's personality as that term is commonly understood in the law: *Green* "Judge and Jury" (1931) p. 5. The same writer points out that the use of the injunction is one of the favorite modes employed by courts in protecting this interest which one has in his relations with other persons: *Ibid.* p. 15. There is some judicial recognition of this attitude towards disturbance of the domestic tranquility as an injury to one's relation with others, a relation here rising out of the marriage contract, and constituting an interest as valuable as that arising out of an employment contract: dissent in *Snedaker* v. *King* (1924) 111 Ohio St. 225, 145 N. E. 15 (where the court reversed the decision of the trial court granting an injunction very similar to the one granted in the instant case).

The working out of an escape mechanism, to evade the result of the property requirement in this type of case, is less important than the consideration of whether it is desirable in this way further to extend the interference of government in the more intimate phases of life. At best it involves the judiciary in an extremely unpleasant task of administering to maladjustments far too delicate for the average court to tamper with at all. From a realistic standpoint, whatever may be the *legal* relation of the parties, there is a palpable difference between enjoining A. from interfering with B.'s employment contract with C., and an order to a wayward spouse to love his or her mate, who, as attested to in the bill, has been ever loving, and faithful beyond reproach. The picture is significant from whatever angle the problem of social expediency is considered, whether it be moral, administrative, or preventive. From the aspect of morality there is much to be said against "vesting in the discretion of a judge the power to prevent the intercourse of responsible persons who have committed no crime": Note (1899) 3 Law Notes 166. The same writer significantly indicates that the whole proceeding neglects "the fact that a wife is a distinct personality, having other rights and duties in life besides the duty of yielding service and affection to the husband." Clearly there are subtler phases of human relations which, for moral purposes, are better left to the dictates of conscience than to the supervision of civil jurisdiction. From the aspect of administration, the difficulties are also manifest. One court has pointed out that proof of the violation of the court's order, enforceable only through contempt proceedings, must necessarily come through the testimony of two or three persons standing in such a relation to each other as to make most arduous the task of the arbiter: *Snedaker* v. *King,* supra. Frankness also dictates the suggestion that more often than not the entire proceeding will have been commenced under the urge of jealousy and rage that another is proving more successful as a lover. And from the aspect of the use of the injunction in such cases as a preventive measure, one writer has pertinently indicated how "the failure of the law to secure obedience has been historically

shown in at least four fields of human life . . . (1) In the field of personal morals. This has always been a favorite interest of the law, but its failures in this field are proverbial": *Cohen* "Limits of Idealism in the Law" (1927) 27 Col. Law Rev. 3.

Perhaps there is something even in the suggestion that "'an order that forbids a man and woman to see each other merely adds fuel to the flame. If the wife is to be assisted in her fight for a rehabilitated home, action should not be taken which will almost inevitably make wrongdoing more alluring": *Snedaker* v. *King,* supra. True, there are many instances, as has been pointed out previously, of attempted governmental interference in such relations. But at best, as Mr. Cohen says, they are unpleasant and unedifying things to bring into court, and our problem, and the problem of the courts, is to determine whether we wish to *extend* this type of civil jurisdiction further than it has gone.

The bringing of marital grievances into court is obviously not solely a question of judicial power as limited by the maxim that equity acts only in cases involving property interests. Excessive insistence on the moribund nature of the maxim has resulted in beclouding the real issue. It is perhaps true, as the opponents of the rule say, that the test of the validity of a legal maxim is public policy. But that does not answer the question; it is merely a more significant way of asking the question, which is the social advisability of extending the range of governmental interference beyond the point where experience teaches that human laws should stop, and good taste dictates that conscience be permitted to control.

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