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CORROBORATION OF A CONFESSION [FEDERAL]

It has long been the boast of certain members of the legal profession that most law-suits can be won on procedural questions, without recourse to the substantive law of the case. The attitude, too often, has been, hew to the rules, let the facts fall where they may. Of course, all lawyers do not intentionally adhere to this practise, but for several years before the passage of the new rules of civil procedure for Federal courts, 49.8 per cent of all cases were disputes over procedure. Solicitor General (now Attorney General) Robert Jackson then expressed the hope that the new rules would permit lawyers to cease devoting half their time "not to what the decision should be, but to how a decision should be reached." [1]

Few will contend that our courts have habitually endeavored to avoid a decision of a case on its merits; but the fact, too often, has been that rules of procedure become so firmly entrenched in the judicial mind, that the court is inexorably led to its conclusion—that the substance must bow to the procedure. Sometimes, it may be that the necessity for the rule is long past, and its retention is a stumbling-block in the path of justice. The late Mr. Justice Holmes made this pertinent observation: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." [2]

In the recent decision, *Gulotta v. United States*,[3] the defendant was tried for falsely representing himself to be a citizen of the United States for a fraudulent purpose;[4] the indictment charged that he subscribed to an oath that he was a citizen of the United States, for the purpose of having his name enrolled upon the register of qualified voters, when in reality he was not a citizen. At the trial in the District Court, the government introduced the Affidavit of Registration filed by defendant on February 3, 1938, in which he declared that he was born in the state of Louisiana in 1896. To prove the defendant was not a citizen, the government introduced an extrajudicial confession,[5] which was a written statement signed by defendant before a naturalization examiner on December 1, 1938. In it he declared that he was born in Campobello, Italy, in 1896, of Italian parents; that he had told the election commissioners that he was born in Louisiana; that he knew he was born in Italy; and that he fraudulently represented himself to be a citizen of the United States for the purpose of voting. To corroborate this confession, the government introduced

[1] Address by Solicitor General Robert H. Jackson broadcast on the National Radio Forum, November 21, 1938.

[2] Hyde v. United States, 225 U. S. 347, 391 (1912).

[3] Gulotta v. United States, 113 F. (2d) 683 (C. C. A. 8th, 1940).

[4] Criminal Code, §79; 18 USCA §141 (1927), 35 Stat. 1103 (1909).

[5] Certain elemental distinctions must be kept in mind. We are here dealing with extrajudicial confessions and admissions—those given outside of court, before trial, either orally or in writing. Judicial confessions are in effect a plea of guilty and entirely another matter.

A distinction between confessions and admissions is recognized. A confession is a declaration made by the accused admitting his guilt in the crime. An admission is a statement, either direct or implied, of facts tending to show guilt of defendant; he does not admit his guilt, but he admits facts and circumstances which, if taken in connection with other facts, may permit an inference of guilt. 2 Words and Phrases (Perm. Ed. 1940) 463.

(1) a signed declaration of intention to become a citizen stating that the defendant was born in Campobello, Italy, filed in the office of the clerk of the District Court of Kansas City in November, 1918; (2) a second declaration of intention filed by defendant after his registration as a qualified voter; and (3) a passport delivered to the naturalization officer at the time of the second declaration, purporting to have been issued to defendant by the King of Italy in 1903, stating that he was born in Campobello, Italy.

Defendant was convicted in the District Court, appealed, and the Circuit Court reversed. Both the Circuit Court and the District Court followed the rule that extra-judicial confessions, or admissions, are not sufficient to authorize a conviction of crime unless corroborated by independent evidence of the corpus delicti.[6] This rule owes its conception to a growing humanitarianism among criminal law judges of the 1700s. In that day, when the accused in a criminal case was without benefit of counsel, could not testify at his own trial, and appeal was not allowed, it was small wonder that fair-minded judges seized upon any pretext to prevent apparent miscarriages of justice.[7] One such pretext, which grew to have the stature of a rule, was that a confession was the weakest form of evidence and should not be admitted. At the same time, however, other legal scholars asserted it was the highest form of evidence. In the words of Mr. Wigmore, "This seems to be the simple explanation of the apparently contradictory views; if we *distinguish the confession as evidence from the evidence of the confession,* we find that few have ever really doubted that the first is in itself of the highest value, while the second is always suspected."[8]

Out of a desire for justice, coupled with a misunderstanding of this fundamental distinction, the rule developed and fastened itself on the law—that there must be corroboration of a confession.[9] Who can say that at the time it was formulated, it did not serve a salutory purpose or at least supply a formula by which could be turned aside the ends of manifest injustice? The modern criminal case, however, is a far cry from that by-gone era; today, if a confession is involuntary—that is, obtained by threats or promises, or actual force—it is a matter for counsel to bring before the court, and for the judge, either to reject the doubtful "confession," or to instruct the jury as to its evidentiary value.[10] When the judge has done the latter it would seem the jury could fairly decide whether all the evidence establishes the guilt of the accused beyond a reasonable doubt. Under such a system where a confession must be proved voluntary, there can be no need for a rule that requires independent evidence of the corpus delicti.[11] Nevertheless, the rule was carried

[6] For citation to state cases, Wigmore, Evidence (3rd ed. 1940), §2071, ns. 3 and 4; Massachusetts alone is definitely contra; Commonwealth v. DiStasio, 294 Mass. 297, 1 N. E. (2d) 189 (1936).

Cases sustaining this rule in the Federal courts, are: Isaacs v. United States, 159 U. S. 487 (1895); Flower v. United States, 116 Fed. 241 (C. C. A. 5th, 1902); Naftzger v. United States, 200 Fed. 494 (C. C. A. 8th, 1912); Goff v. United States, 257 Fed. 294 (C. C. A. 8th, 1919); Martin v. United States, 264 Fed. 950 (C. C. A. 8th, 1920); Forlini v. United States, 12 F. (2d) 631 (C. C. A. 2nd, 1926); Tingle v. United States, 38 F. (2d) 573 (C. C. A. 8th, 1930); Pon Wing Quong v. United States, 111 F. (2d) 751 (C. C. A. 9th, 1940).

[7] For a refreshing discussion of the rise, and present place of this rule in our courts, see Wigmore, Evidence (3rd Ed. 1940), §§865-867.

[8] Wigmore, Evidence, §866, p. 369 (italics added).

[9] Federal courts have not been unanimous in their decisions as to whether the rule of corroboration might apply only to the confession, or must be corroboration of the corpus delicti. It is immaterial to this discussion, inasmuch as we accept the stricter form of the rule for the sake of argument—that there must be independent evidence of the corpus delicti. The following cases hold corroboration of the confession alone sufficient: United States v. Williams et al., 1 Cliff 5, 28 Fed. Cas. No. 16,707 (1858); Pearlman v. United States, 10 F. (2d) 460 (C. C. A. 9th, 1926); Wynkoop v. United States, 22 F. (2d) 799 (C. C. A. 9th, 1927).

[10] Wharton, Criminal Evidence (11th Ed. 1935), §597, p. 990.

[11] "The policy of any rule of the sort is questionable. No one doubts that the warning it conveys is a proper one, but it is a warning which can be given with equal efficacy by counsel or * * * by the judge in his charge on the facts. Common intelligence and caution, in the juror's minds, will sufficiently appreciate it, without laying on of the road [rod] in the shape of a rule of law. Moreover, the danger which it is supposed to guard against is greatly exagger-

over, the "idea became encysted in a phrase," and is now applied indiscriminately to every confession—whether it be proven voluntary or not.

The rule is, however, apparently too well established in the courts of the Federal Circuit to be easily overthrown, and, in the words of Mr. Justice Learned Hand, "* * * we should not feel at liberty to disregard a principle so commonly accepted, merely because it seems to us that such evils as it corrects could be more flexibly treated by the judge at trial * * *."[12] In the case in which he made that statement, he did not overthrow the rule, but he found the defendant guilty by fitting the case within the rule. It is our contention that the court in the *Gulotta* case not only should have done the same thing, but could have done so, without a painful stretching of the rule.

The court in the Gulotta case is apparently guilty of a serious confusion of terminology which leads it to erroneous thought-processes. It states that the defendant relied "upon the long-established rule that 'extrajudicial confessions *or* admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the corpus delicti.' "[13] What the courts have meant, of course, is that extrajudicial confessions are not sufficient corroboration, and that extrajudicial admissions are not sufficient, either standing alone. The manner in which the court uses the word "or" makes the rule sound as though it were, "extrajudicial confessions *and* admissions are not sufficient corroboration of the corpus delicti." This contention is borne out by the fact that later in the opinion, the court says, "The rule that to warrant conviction of a crime both confessions and admissions must be corroborated by some independent evidence * * *," and still later, "In the absence of such showing admissions and confessions are received with the caution and under the necessity of some independent proof of the corpus delicti * * *."[14]

Not one of the cases cited by the court sustains the rule, when it is stated "confessions and admissions." Each case deals with either a confession alone, or admissions alone, and in each of those cases, the particular court did, or did not, find sufficient corroboration of the corpus delicti, outside the admission or confession. In the Gulotta case, the court conditioned itself to thinking "confessions and admissions together must be corroborated" and it was an easy misstep for it to fall into the narrow holding of the case, that admissions cannot be sufficient corroboration of the corpus delicti.

Conceding, *arguendo,* that admissions of the usual type could not be sufficient, it seems to us that those appearing in the principal case are of a different nature, and should be given greater weight as evidence. One of the admissions relied upon by the prosecution to corroborate the corpus delicti (the false representation of citizenship), was a declaration of intention to become a citizen, signed, and filed with a court by Gulotta, twenty years before this action took place. Such an admission is substantially stronger than an admission made at or subsequent to the commission of the crime.[15] This was recognized in *Gordnier v. United States*[16] when the court made this comment: "The affidavits [in which defendant declared his age, long prior to the action] which were introduced in evidence against plaintiff in error were not confessions, and they can hardly be said to be admissions, not having been against interest at the time when they were made. * * * They would undoubtedly have been admissible in evi-

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ated in common thought. That danger lies wholly in a false confession of guilt. Such confessions, however, so far as handed down to us in the annals of our courts, have been exceedingly rare * * * . Such a rule might ordinarily, if not really needed, at least be merely superfluous. But this rule, and all such rules, are today constantly resorted to by unscrupulous counsel as mere verbal formulas with which to entrap the trial judge into an error of words in his charge to the jury. These capabilities of abuse make it often a positive obstruction to the course of justice." Wigmore, Evidence, §2070.

[12] Daeche v. United States, 250 Fed. 566, 571 (C. C. A. 2nd, 1918).

[13] Gulotta v. United States, 113 F. (2d) 683, 685 (C. C. A. 8th, 1940) (italics added).

[14] Id. at 686.

[15] United States v. Gulotta, 29 F. Supp. 947, 950 (W.D. Mo. 1939).

[16] Gordnier v. United States, 261 Fed. 910 (C. C. A. 9th, 1920).

dence * * *."[17] There was no full confession of the crime in that case, so that the court might have said, in following the recognized restriction upon the rule: "Evidence aliunde, however, as to the corpus delicti, need not be such as to alone establish the facts beyond a reasonable doubt. It is sufficient if, when considered in connection with the confession, it satisfies the jury beyond a reasonable doubt that the offense was in fact committed, and the plaintiff in error committed it."[18]

In the principal case we have a full confession, and the fact that Gulotta went to the authorities as an alien, to take out citizenship papers. In addition there was the passport about which the court was forced to concede, "It was tendered by appellant to a naturalization official, however, with the apparent intent that the facts therein stated should be accepted as true. It was within the discretion of the trial court to receive it in evidence as an admission by the appellant that he was born in Italy. * * * As such, it was cumulative only."[19] The court held, on the passport, that it "* * * was in no way authenticated nor identified. It is not competent evidence, therefore, to prove the facts stated therein." It did not need to prove the facts stated. Since the trial court could "receive it in evidence," it would seem to fall squarely within the rule of the Forte case—"We do not rule that such corroborating evidence must, independent of the confession, establish the corpus delicti beyond a reasonable doubt."[20]

It will be worthwhile to note a case decided by the same court that decided the Gulotta case, at the same term of court, the opinion written by the same learned justice. In the case of *Gregg v. United States*,[21] defendant was convicted of attempting to transport intoxicating liquor into the state of Kansas, though when arrested he was 150 miles from the state line. He confessed fully, and the court, in sustaining the conviction, had this to say: "In this instance the independent evidence introduced by the government corroborated the appellant's confession in every essential detail. Apart from the confession the evidence was sufficient to permit a legitimate inference that the appellant's destination was the state of Kansas. The appellant's home was in Kansas. He was traveling in the direction, but a few hours distant from the Kansas line. Considered with his confession and with the other circumstances shown by the government the evidence warranted the jury in finding beyond a reasonable doubt that appellant intended to transport the liquor into the state of Kansas."[22]

Comparing the two cases, we find: in the *Gregg* case, the fact that Gregg carried a load of liquor, lived in Kansas, and was traveling in the general direction (though 150 miles away), corroborates the corpus delicti (attempting to transport intoxicating liquor into the state). In the *Gulotta* case, the fact that Gulotta presented himself as an alien to declare his intention to become a citizen, showing a passport to the authorities to convince them of the truth of his words, *does not* corroborate the corpus delicti (the false representation of oneself as a citizen).

It is, at best, a discouraging task to find the rational and fundamental reason behind the variant holdings. It can be readily done with the glib formula, "One was circumstantial evidence, the other, admissions." It must be kept in mind that admissions, as evidence in the *Gulotta* case,

[17] Id. at 912.

[18] Mangum v. United States, 289 Fed. 213, 216 (C. C. A. 9th 1923). See also Forte v. United States, 94 F. (2d) 236, 240, 69 App. D. C. 111, (App. D. C. 1937); Oldstein v. United States, 99 F. (2d) 305, 306 (C. C. A. 10th, 1938); Jordan v. United States, 60 F. (2d) 4 (C. C. A. 4th, 1932), cert. den. 287 U. S. 633; Wiggins v. United States, 64 F. (2d) 950 (C. C. A. 9th, 1933), cert. den. 54 S. Ct. 72.

[19] Gulotta v. United States, 113 F. (2d) 683, 685 (C. C. A. 8th, 1940).

[20] Forte v. United States, 94 F. (2d) 236, 240 (App. D. C. 1937); cf. Litkofsky et al. v. United States, 9 F. (2d) 877, 880 (C. C. A. 2d, 1925); Duncan v. United States, 68 F. (2d) 136 (C. C. A. 9th, 1933).

[21] Gregg v. United States, 113 F. (2d) 687 (C. C. A. 8th, 1940).

[22] Id at 690.

and the circumstances, as evidence in the *Gregg* case, prove nothing conclusively in themselves, but only as they point to the actual wrong confessed to by the parties. The idea "encysted in a phrase" has again reared its serpentine head, and paralyzed the judicial process with a glance.[23]

J. F. RYDSTROM

SILENCE BY ONE IN CUSTODY IN THE FACE OF ACCUSATION [ALABAMA]

The defendant, in the recent case of *Muse* v. *State*,[1] was tried for robbery. At the trial the prosecuting witness was permitted to testify, over the objection of the defendant, that he had identified the defendant in a police station line-up and that, when pointed out as the man who had taken $4.10 from him, the defendant had made no denial of the charge but had remained silent. Several officers were also permitted to state what was said and done at the time of this identification. The defendant was convicted and sentenced to imprisonment for twenty years.[2] He appealed to the Alabama Court of Appeals and that court sustained the trial court's ruling allowing the testimony into evidence and affirmed the conviction. Both a motion for rehearing and a writ of certiorari to the Alabama Supreme Court were denied.

Generally, silence in the face of the direct accusation of a crime is admissible as a circumstance to be considered by a jury as tending to show guilt.[3] Where the accusation is made while the defendant is in custody, however, the courts are divided.[4] In such a situation some courts hold that such restraint destroys the basis for an inference of acquiescence or failure to controvert. "These courts maintain that it is the common knowledge and belief of men in general that silence while under arrest is the proper procedure to protect their interest, whether they be guilty or innocent."[5] Other tribunals hold that the mere fact of arrest is not sufficient to render the testimony inadmissible, although it is a circumstance to be considered by

[23] Justice Otis who heard the case without a jury in the District Court, had this comment to make: "This is really a controversy between highly technical requirements of law and the substance of truth. If the case * * * had been submitted to a jury, no one can doubt that a verdict of 'guilty' would have been returned almost instanter. Such a verdict might have offended the letter of the law, it would not have offended justice in the larger sense. The sole reliance of the defendant was not on consciousness of innocence, but on obstacles obtruded in the prosecutor's path by rules of evidence." United States v. Gulotta, 29 F. Supp. 947, 948 (W. D. Mo. 1939).

[1] 196 S. 148 (Ala. Ct. of App., March, 1940.)

[2] "Any person who is convicted of robbery must be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years," Alabama Code (1928) c. 227, §5460.

[3] Naturally, the accused must have heard the statement and understood that he was being charged with a crime, before inference of acquiescence in the accusation may be drawn. However, it will be inferred or presumed that he heard the statement if it is made in his presence. It also follows that when the accused is restrained from denying, no inference can be drawn and the evidence will be held inadmissible. See Wharton, Evidence in Criminal Cases (11th ed. 1935) §§661, 662. In Bob v. State, 32 Ala. 560 (1858), evidence of silence of a negro slave accused of assault was not admitted because contradiction of the accusation would have been "improper" and "insolent."

"It ought not to be necessary to note that the party's denial of the third person's statement destroys entirely the ground for using it." Wigmore, Evidence (3rd. ed. 1940) §§ 1071, 1072.

The court in the principal case, citing Doby v. State, 15 Ala. App. 591, 74 S. 724 (1917), remarks that "Silence in the face of pertinent and direct accusation of a crime, *partakes of the nature of a confession*, (italics added) and is admissible as a circumstance to be considered by the jury as tending to show guilt . . ." Although courts often speak of silence in such circumstances as being an *admission* or *confession*, *e.g.*, People v. Tielke, 259 Ill. 88, 102 N. E. 229 (1913) and Davis v. State, 131 Ala. 10, 31 S. 569 (1902), it is never given the weight of a confession. See Note (1920) 34 Harv. Law Rev. 205; People v. Nitti, 312 Ill. 73, 92, 143 N. E. 448, 454 (1924).

[4] See, generally, Wharton, Criminal Evidence, §§121, 656, 661, 665; Wigmore, Evidence, §§272, 1129, 1130, 1071. Annotations, 25 L. R. A. (N. S.) 542, 558; 42 L. R. A. (N. S.) 890, 892; 80 A. L. R. 1235, 1259; 115 A. L. R. 1510, 1517.

[5] Wharton, Criminal Evidence, §66. See cases there cited. Wigmore states that the better rule is to allow some flexibility according to the circumstances, §1072 and cases there cited.

the jury.[6] Alabama by a long line of decisions is committed to this latter view.[7]

An accusation "would, of itself, be objectionable as hearsay testimony, being a statement made at some time other than at a present trial offered to prove the truth of the matter therein asserted, and based entirely on the credibility of a declarer not then before the court. However, as in the case of admissions generally, the statements . . .are not offered as evidence of the truth merely because they were uttered; they are secondary in nature and are accepted in evidence as untainted by the hearsay stigma because they are a necessary predicate to the showing of the substantive evidence the reaction of the accused."[8] "Silence in the face of accusation is the evidentiary fact, and not the accusation."[9]

However, if everything the accusor (in the principal case, the prosecuting witness) said and did is to become part of the accusation, much extraneous and highly prejudicial testimony would be unfairly admitted.[10] Where the line is to be drawn, what statements should be admitted as showing an accusation and what ones rejected may indeed become a problem. For example, in the principal case a policeman witnessing the identification was asked to state " 'what Mr. Glenn did or said when he went in the door where those eight or ten darkies were.' And the policeman answered, 'he identified him and he made mention of his teeth and hair, and eyes, and face and everything, and got a good look at him in the face and he said positively it was him.' "[11] Such testimony serves more to show how *sure* the accusor was that the defendant was the guilty party than it does to indicate an accusation calling for a denial.[12] In addition it must be remembered that coming from a third party such testimony is apt to be tempered with impression and misstatement.[13] It is no wonder that such evidence has been called "dangerous," to be received with "great caution."[14]

Furthermore, it is difficult to find any psychological basis for the courts' general conclusion that if one does not deny an accusation he thereby tacitly admits his guilt. The rule is seemingly the result of an attempt by the courts to catagorize human behavior into straight-jacket classifications; and since reactions to an accusation do not follow any standardized pattern, the use of the rule must often result in grossly unfair inferences. If, for example, a man having just enough legal knowledge to be "sure" of the proper course of action while under arrest, stood on his fancied legal rights in not denying, he would soon find, in some states, that his rights had been moved out from under him. On the other hand, a timid bewildered Mr. Milquetoast overwhelmed by

[6] The states that follow this rule include: California, Florida, Illinois, Kentucky, Michigan, Mississippi, New Jersey, Pennsylvania, South Dakota, Tennessee and Wisconsin. Among those that exclude the testimony when the accused is in custody are: Connecticut, Georgia, Idaho, Louisiana, Missouri, New Hampshire, New York, Ohio, Oklahoma, Rhode Island, and South Carolina.

[7] People v. Lehne, 359 Ill. 631, 195 N. E. 468 (1935); People v. Kelly, 203 Cal. 128, 263 Pac. 226 (1928); Doby v. State, 15 Ala. App. 591, 74 S. 724 (1917); Simmons v. State, 7 Ala. App. 107, 61 S. 466 (1913); Raymond v. State, 154 Ala. 1, 45 S. 895 (1908); Ray v. State, 50 Ala. 104 (1873).

[8] Wharton, Criminal Evidence, §656.

[9] Rowlan v. State, 14 Ala. App. 17, 70 S. 953, 955 (1916). See also Raymond v. State, 154 Ala. 1, 45 S. 895 (1908), dissent.

[10] In Merriweather v. Commonwealth, 118 Ky. 870, 878, 82 S. W. 592, 595 (1904), the court says, "If silence [in the face of an accusation] . . . is evidence of guilt, then one charged with crime must, under penalty of himself creating most damaging evidence against himself in support of the charge, enter into a controversy with every idle straggler who may choose to accuse him to his face. He must parry every cross examination attempted by every self-appointed questioner. He must, though not addressed, continue to shout denial of every fugitive statement tending to implicate him that may reach his ears. He must hazard answering accurately every statement so made, or have his silence construed as evidence of his having admitted not only what the witness then said, but possibly now says was then said."

[11] This testimony is set out in the Brief and argument on rehearing for the defendant.

[12] The testimony, at any rate, is far less certain in indicating an accusation calling for denial than the statement of another witness who testified that Glenn pointed out the defendant and said, "that's the man that robbed me." From the opinion of the Court of Appeals it is difficult to tell just what opportunity the defendant had to deny the charge made at the time of the line-up.

[13] See the latter part of the quotation from Merriweather v. Commonwealth, supra n. 10.

[14] Wharton, Criminal Evidence, §665.

the gravity of his predicament, might remain mute. In either case, both would have been much better off if, in the manner of the hardened criminal personified by the movie villain, they had denied the accusation with a curt, "Brother, ya got da wrong guy"! As Justice Redfield commented in *Mattock* v. *Lyman*, "With some men, perhaps, silence would be some grounds of inferring assent, and with others none at all. The testimony then would depend upon the character and habits of the party, which would lead to the direct trial of the parties, instead of the case."[15]

In *Commonwealth* v. *Kenney* the court remarked that if the defendant is "restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence, then no inference of assent can be drawn from that silence. Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance, to decide ultimately upon them."[16]

Manifestly, men under arrest may react differently to an accusation. Lack of any psychological measuring-stick to determine when silence under such circumstances is or is not an admission of guilt, makes the admission or exclusion of such evidence an arbitrary matter. At best, when admitted, testimony of this nature is dangerous, and is to be received with great caution. Lest such dangerous testimony be used to convict one who innocently stands mute, is it not better than this evidence be arbitrarily excluded?

MARVIN KOENIGSBERG.

COMMENTS BY THE PROSECUTING ATTORNEY ON OTHER INDICTMENTS PENDING AGAINST THE ACCUSED [ALABAMA]

The appellant in the case of *Gallman* v. *State*,[1] was charged with receiving and concealing stolen property. Trial was had on this single issue, the defendant was found guilty, and the case then came before the court of appeals. One of the exceptions to the action of the trial court, involved a remark by the states attorney that other indictments were pending against the accused. The trial judge sustained an objection but refused to exclude this statement from the record, and overruled accused's motion that a mistrial be declared; the court merely stating that it did not think reference to the other indictments was fair. The court of appeals in the instant case, reversed the trial court's action in not excluding the improper statement from the consideration of the jury. The appellate court's argument was: that the solicitor did not say for what offenses the indictments were, nor for what reason they were mentioned; and therefore the solicitor had deliberately introduced this statement, in an effort to create in the minds of the jury an ineradicable impression as to the type of man the accused represented—which was highly improper, and reversible error.

Remarks of this type by the prosecuting attorney have been declared error,[2] with two exceptions to the rule.[3] These have

[15] 16 Vt. 113, 119 (1844).

[16] 53 Mass. 235, 237 (1847). But, as a practical matter, every accused person faced with such testimony would plead that he thought it to be to his interest to remain silent, claiming that if he had not thought so he would have denied explicitly. The limitation, therefore, begs the question; it offers no criterion to use, without trying the parties rather than the case.

[1] (Ala. App.) 195 So. 768 (Feb. 13, 1940).

[2] Decennial, Criminal Law, 722½, 730 (13); Century Digest, Criminal Law, §§1668, 1669, 1670, 1675; Corpus Juris, Criminal Law, §2253; Hall v. U. S., 150 U. S. 76 (1893); Ashby v. State, 25 Ala. App. 207, 143 So. 242 (1932); People v. Helm, 152 Cal. 532, 93 P. 99 (1907); Bennett v. State, 62 Ark. 516, 36 S. W. 947 (1896); Sasse v. State, 68 Wis. 530, 32 N. W. 849 (1887); Whitfill v. State, 75 Tex. Cr. 169, 169 S. W. 681 (1914) (court did not hear the improper remark of counsel, and counsel for the accused did not thereafter make his objection before the court; although if he had, the court would have ruled in his favor); Meadows v. Commonwealth (Ky.), 104 S. W. 954 (1907) (indictment read as to a similar crime committed by the accused. Held to be error. Very analogous to the principle case, note 1 supra); People v. Becker, 75 Ohio St. 407, 79 N. E. 929 (1907).

[3] Corpus Juris, Criminal Law, §2253.

been recognized in cases (a) where there is evidence on the record from which the crime may be inferred;[4] and (b) if the remarks are confined to the purposes for which the proof has been admitted.[5] Keeping in mind that the cornerstone of justice is that of a fair and impartial trial, and using this as a criterion, those prosecuting attorneys who willfully overstep this boundary, should be decisively stopped by the judge of the trial court, so as to give to the accused the type of trial to which he is, by law, entitled.[6]

The foregoing considerations suggest the final problem—having objected and the case not falling within the two exceptions to the rule, is such an error reversible or not?

Many times we find the courts holding such a statement by the state solicitor error but not reversible, because it had been removed from the jury's consideration by the trial judge's action in excluding the remark from the record and decisively admonishing the jury to disregard it.[7] In contrast to this, there are cases which hold that the error is reversible, no matter how strong the judge's remarks to the jury have been as to disregarding the prosecuting attorney's insinuations.[8] The courts here say that the words are ineradicable, and the effects cannot be removed from the jurors' minds merely by words; and hold a mistrial has resulted. A third catagory is in the situation where the trial court refuses to admonish the jury to disregard, but tacitly or expressly approves of the illegal insinuations by the prosecuting attorney.[9] In these cases the appellate courts will usually, in the strongest language, disaffirm the action of the lower court, and remand for a new trial. A fourth category is one in which there is a clear preponderance of guilt (in the mind of the court), and while there may have been error; still the preponderance is so strong, that the error is not regarded as predjudicial and not of sufficient importance to remand.[10]

The trend of these cases shows that the remarks must be very unfair before the appellate court will reverse the trial court, where the latter has admonished the jury to disregard. The appellate courts will largely leave the determination, as to the impropriety of a solicitor's remark, to the trial court's discretion.[11] They will also presume, in the case of a trial court's

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4 Johnson v. State, 134 Ala. 54, 32 S. 724 (1901) (remark "oft repeated criminal" justified by prior crimes on the record); People v. Cucchiette, 24 Cal. App. 495, 141 P. 933 (1914); Spahn v. People, 137 Ill. 538, 27 N. E. 688 (1891).

5 Decennial, Criminal Law, 719; Century Digest, Criminal Law, §1669; Bradburn v. U. S., 3 Indian Ter. 604, 64 S. W. 550 (1901); Taylor v. State, 50 Tex. Cr. 560, 100 S. W. 393 (1907) (evidence entered for the purpose of showing credibility and no other use can be made of it); State v. Kakarikos, 45 Utah 470, 146 P. 750 (1915) (testimony to identify gun, then used to show an arrest of defendant for another offence. This is error); People v. Campbell, 173 Mich. 381, 139 N. W. 24 (1912).

6 The problem as to the admissibility of other crimes is not covered in this note as it is a separate problem of evidence. For reference see: Annotations, 62 L. R. A. 193.

7 Burkett v. State, 215 Ala. 453, 111 So. 34 (1927) (prompt instructions to disregard); Mynett v. State, 179 Ark. 1199, 18 S. W. (2d) 335 (1929); State v. Tucker, 190 N. C. 708, 130 S. E. 720 (1925) (indiscretion must be corrected at trial and if gross, the judge, must interfere at once); Commonwealth v. Touri, 295 Pa. 50, 144 Atl. 761 (1929).

8 Decennial, Criminal Law, §730; Century Digest, Criminal Law, §1693; People v. Pantages, 212 Cal. 237, 297 P. 890 (1931); People v. Kolowich, 262 Mich. 137, 247 N. W. 133 (1933); Arcos v. State, 120 Tex. Cr. 315, 29 S. W. (2d) 395 (1930) (no hard and fast rule as to when remarks are ineradicable, but must take into consideration the facts and circumstances of each particular situation); Gaston v. State, 95 Ark. 233, 128 S. W. 1033 (1910) (facts and circumstances control as to when there is reversible error); People v. Manganaro, 218 N. Y. 9, 112 N. E. 436 (1916); State v. Nyhus, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.) 487, (1909) (words of general caution are not enough).

10 State v. McBrien, 265 Mo. 594, 178 S. W. 489 (1914) (counsel told to go ahead with the argument. Appellate court held this to be highly improper); State v. Netherton, 128 Kas. 564, 279 P. 19 (1929) (failure to admonish the jury is highly improper); Fleming v. Commonwealth, 224 Ky. 160, 5 S. W. (2d) 899 (1928).

10 People v. Peeples, 70 Cal. App. 518, 162 P. 653 (1916) (evidence clearly supported conviction and the court assumes that the jury followed the instructions to disregard); People v. Duncan, 261 Ill. 339, 103 N. E. 1043 (1913) (preponderance as to guilt).

11 State v. Nichols, 327 Mo. 1237, 39 S. W. (2d) 777 (1931).

admonition to the jury to disregard an illegal insinuation, that the jury followed the court's instructions.[12]

In a review of the cases, one becomes keenly aware of the prevalent use of illegal insinuations by the prosecution, and the consequent need for as strong measures as possible to correct this abuse. Courts should restrict remarks by the prosecuting attorney, to the legal evidence, and declare *any* off-side comments referring to past crimes, in an effort to predjudice the jury, as error amounting to a mistrial. This might work a hardship in the first few cases, where the state solicitor was surprised by the strictness of the rule, but it would serve as a check on further attempts to give the jury an illegal and unfair impression of the defendant. It must be always kept in mind that the jury, with the layman's approach to law, cannot help but be materially affected by these uncurbed statements, on the part of the State —statements which render nugatory and meaningless the defendant's supposed right to a fair and impartial trial. Only by this rigid prohibition, can irrational diatribes by the prosecution, as to former crimes by the accused, be obviated; and the accused be given the right to have his case decided by the laws of evidence and reason, rather than by those of predjudice and emotion.

Edward H. Hatton.

THE DEGREE OF REASONABLENESS REQUIRED IN ARREST WITHOUT A WARRANT [ILLINOIS]*

A holdup of a filling station was committed by two persons, one a short man, and the other, an unidentified driver of a black car. Twenty-four hours later three police officers having this information saw a person answering the description of a short man in the hold-up get out of the defendant's car two miles from the point where the robbery had occurred. The officers drove up to this car, and as they did so, the defendant, who had been driving, got out. He refused to stop when commanded to do so by the officers and was thereupon arrested without a warrant in the tavern into which he had run. A thirty-two caliber pistol was found on his person, and a pistol, blackjack, rubber gloves, and adhesive tape were found in the glove compartment of his car.

The officers did not at that time know that the person arrested was George Henneman, a known "gun-toter"[1] and it was only in their belief that he was an accomplice in a robbery that they arrested him. Henneman was tried and convicted of the crime of carrying concealed weapons. The Supreme Court of Illinois reversed the conviction because the arrest was without sufficient cause, and therefore it was error for the lower court to admit evidence obtained by the illegal search. The police officers "had no evidence, information or basis for suspicion that the plaintiff in error had committed a crime or was in any way implicated in a crime, beyond the fact that a second man appeared in the robbery with the man who semed to answer the description of the robber."[2]

Under the common law a constable did not have the authority to arrest without a warrant for misdemeanors committed outside of their presence. But he could arrest where either a felony had been committed, or he had a reasonable belief that one had been committed and where he had a reasonable belief that the person arrested had committed it.[3]

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[12] People v. Peeples, 70 Cal. App. 518, 162 P. 653 (1916).

* People v. Henneman, 373 Ill. 603, 27 N. E. (2d) 448 (1940).

[1] The defendant in this case had previously been arrested and searched merely because there was a report that suspicious looking characters were in the neighborhood. Upon the information gained from this search he was convicted of the crime of carrying concealed weapons. The Supreme Court reversed saying mere suspicion is an insufficient ground for arrest and search without a warrant. 367 Ill. 151, 10 N. E. (2d) 649 (1932).

[2] People v. Henneman, 373 Ill. 603, 605, 27 N. E. (2d) 448, 449 (1940), Wilson, C. J. and Shaw, J. dissented without opinion.

[3] IV Chesire, Stephens Commentaries on Laws of England (19th ed. 1928), 187-189; Harris and Wilshire, Criminal Law (15th ed. 1933) 345-348;

In Illinois by statute "an arrest may be made by an officer or by a private person without a warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed and he has reasonable grounds for believing that the person to be arrested has committed it."[4] "Criminal offense" as used in the statute has been construed to include misdemeanors as well as felonies.[5] Whether there are reasonable grounds to warrant an arrest is a mixed question of law and fact.[6] "No general rule applicable to every case has been, or probably can be announced as to what facts will constitute a justification in law for an arrest without a warrant, other than that such grounds of suspicion exist as should influence the conduct of a prudent and cautious man under the circumstances."[7] An arrest made on mere suspicion or for questioning is not enough to meet this test,[8] and a discovery of weapons after the arrest cannot relate back and operate as a justification for the arrest.[9]

It would seem that the police officers would have reasonable grounds to suspect a person sufficient to arrest him if an offense had in fact been committed and there were *any* facts known to the officers that tended to associate him with that offense as a possible perpetrator. The Illinois courts have seemingly gone this far in other cases; in *People v. Brown*[10] the arresting officer had no description other than the make of the cars upon which to base their arrest and search, yet it was upheld although the criminals arrested were not those sought; in *People v. Euctice*[11] the police stopped and searched all cars on a certain route over which they expected a fleeing criminal to pass, yet the arrest of one of those searched was upheld and there was a conviction for carrying concealed weapons. Seemingly the only argument against taking this position is that arrests and searches based on slight suspicion would inconvenience the innocent persons affected but it would seem that this would be greatly outweighed by the public benefit resulting from increased efficiency in the capture of criminals by peace officers.

The search and seizure which follows a lawful arrest whether with or without a warrant is not unreasonable or an invasion of the Constitutional provision against

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Wilgus, Arrest without a Warrant (1924) 22 Mich. L. Rev. 541, 673; Hall, Legal and Social Aspects of Arrest without a Warrant (1935) 49 Har. L. Rev. 566; Although police were unknown at Common Law, they are generally considered as having the same powers as watchmen and constables. Shanley v. Wells, 71 Ill. 78 (1873).

[4] Smith-Hurd, Ill. Stat. (Perm. ed.) C. 38, §657 (1935).

[5] Coughlin v. Whitmore, 132 Ill. App. 574 (1907); People v. Scalisi, 324 Ill. 131, 154 N. E. 715 (1926); People v. McGurn, 341 Ill. 632, 173 N. E. 754 (1930); People v. Roberta, 352 Ill. 189, 185 N. E. 253 (1933); People v. Davies, 354 Ill. 168, 188 N. E. 337 (1933); People v. Ford, 356 Ill. 572, 191 N. E. 315 (1934).

[6] People v. Scalisi, 324 Ill. 131, 154 N. E. 715 (1926); People v. Roberta, 352 Ill. 189, 185 N. E. 253 (1933).

[7] People v. Doody, 343 Ill. 194, 205, 175 N. E. 436, 442 (1931). See People v. Euctice, 371 Ill. 159, 20 N. E. (2d) 83 (1939); People v. Brown, 354 Ill. 480, 188 N. E. 529 (1934); People v. Roberta, 352 Ill. 189, 185 N. E. 253 (1933) (where officers were told by the girl inmates of a house of ill-fame, that they were practicing prostitution and directed and pointed out to the officers two men as "sluggers" the arrest and search was upheld); People v. Kissane, 347 Ill. 385, 179 N. E. 850 (1932).

[8] People v. McGurn, 341 Ill. 632, 173 N. E. 754 (1930), noted 22 J. Crim. Law 589 (orders by a superior officer to arrest where the arresting officer has not any belief that the accused is guilty of a criminal offense is insufficient); People v. Humphreys, 353 Ill. 340, 187 N. E. 446 (1933) (An anonymous letter not naming the accused who is arrested three months later on the direction of a superior officer to bring him in was held insufficient); People v. Ford, 356 Ill. 572, 191 N. E. 315 (1933) (a reputed member of a gang suspected of kidnaping cannot be arrested where the arresting officers did not suspect him of participation); People v. Poncher, 358 Ill. 73, 192 N. E. 732 (1933) (The fact that the police saw a stolen car go into a repair shop and drive away without some of its parts did not justify an arrest and search for receiving stolen goods).

[9] People v. Macklin, 353 Ill. 64, 186 N. E. 531 (1933); People v. Ford, 356 Ill. 572, 191 N. E. 315 (1934).

[10] 354 Ill. 480, 188 N. E. 529 (1933). "The fact that this was a Ford sedan, to which they might have changed from a Ford with a rumble seat, and that the Buick was the wrong Buick, did not keep the officers from having reasonable grounds . . ." 345 Ill. 480, 485, 188 N. E. 529, 530 (1933).

[11] 371 Ill. 159, 20 N. E. (2nd) 83 (1939).

illegal search and seizure,[12] but where the evidence is taken as the result of an illegal arrest and search there is a diversity of opinion as to the admissibility of the evidence so taken. The Federal and a growing minority of State courts including Illinois will not allow evidence obtained from an illegal search and seizure to be admitted in the trial of the case. They argue that a suit for trespass is inadequate protection against unlawful search and seizure and to allow illegally obtained goods into evidence would render the right practically worthless.[13] A majority of the state jurisdictions, however, allow evidence illegally obtained to be admitted in the trial of the case if pertinent to the issue.[14] The reasons given for this rule are: *first*, to avoid collateral issues in the trial of the case[15]; *second*, that the suit for trespass, though not now strictly enforced, can be sufficient to enforce the right against unlawful search, especially since that is the only method to enforce the right against search by other private citizens[16]; and *third*, that if the evidence were excluded criminals, undoubtedly guilty, would be allowed to go free simply because an officer unwittingly or over zealously made a wrongful arrest and search.[17]

The states, following the minority doctrine and refusing to admit evidence illegally obtained (even though pertinent) should certainly apply the rule, as to the reasonableness required in arrest without a warrant, liberally and so make it less difficult for law enforcing bodies to protect society against criminals. However, they should go further and re-examine the rule rejecting the evidence. "The question is whether protection for the individuals would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice."[18] Yet the choice must be made, and it would certainly seem that it should be made in favor of the admission of the evidence, for surely the constitutional and statutory provisions against unlawful search were never meant to be a shield behind which those guilty of criminal offenses could safely hide.

JOHN C. VOGEL

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[12] North v. People, 139 Ill. 81, 28 N. E. 966 (1891).

[13] Weeks v. U. S., 232 U. S. 383 (1914); Chafee, The Progress of the Law (1922) 35 Harv. L. Rev. 673, 694; Atkinson, Unreasonable Searches and Seizures (1925) 25 Col. L. Rev. 11; Neblach, Underhills Criminal Evidence (4th ed. 1935) § 137; Wharton's Criminal Evidence (11th ed. 1932) §§373, 771. However, according to the minority rule timely application to suppress the evidence must be made before trial, People v. Brocamp, 307 Ill. 448, 138 N. E. 728 (1923); People v. Castree, 311 Ill. 392, 143 N. E. 112 (1924).

[14] Wigmore on Evidence (3rd ed.) §§ 2183, 2184; Harno, Evidence Obtained by Illegal Search and Seizure (1925), 19 Ill. L. Rev. 303; Knox, Self Incrimination (1925), 74 Penn. L. Rev. 139; Fraenkel, Concerning Searches and Seizures (1921), 34 Harv. L. Rev. 361.

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

[16] Commonwealth v. Tibbetts, 157 Mass. 519, 32 N. E. 910 (1893); People v. DeFore, 242 N. Y. 13, 150 N. E. 585 (1926).

[17] State v. Reynolds, 101 Conn. 224, 125 A. 636 (1924); People v. DeFore, 242 N. Y. 13, 150 N. E. 585 (1926).

[18] People v. DeFore, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926).