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WEST JERSEY TITLE AND GUARANTEE CO. *v.* BARBER (CLERK).[1]. COURT OF CHANCERY OF NEW JERSEY.

Public Records—Right to Inspect—Remedies when Access is Denied.

A corporation duly organized under the laws of New Jersey for the purpose of the examination, insurance and guaranty of the title to lands and estates, or interests in lands, in the State, and the issuing of certificates, policies, contracts and undertakings therefor, is entitled to the same right of access to and examination of the public records of the county as an individual.

When employed to examine the title to any particular piece of property, such corporation is subrogated to the right of its employer to have such access, and the fact that it contemplates making a contract of guaranty of the title to the land in question does not detract from such right of access.

When the custodian of the records of which examination is sought refuses to permit such a corporation to enjoy the right of access to them to which it is entitled by law, and such right is clearly established, the proper remedy is by injunction to prevent the custodian from interfering with the corporation in the exercise of its right. The remedy by mandamus is, in such a case at least, entirely inadequate.

Opinion by PITNEY, V. C.

THE PROPER REMEDY FOR AN INTERFERENCE WITH THE RIGHT OF ACCESS TO PUBLIC RECORDS.

At common law there was no such right of free access to and examination of public records as now exists by statute in most of the United States. The right existed only in regard to such records as had some bearing upon a case pending (when the usual practice to obtain an examination was by motion in the cause), or where the records sought to be examined were those records of a corporation in which the corporators were supposed, in the view of the law, to have a peculiar interest. (Hereford *v.* Bridgewater, Bunb., 269; Att.-Gen. *v.* City of Coventry, Bunb., 290; Herbert *v.* Ashburner, 1 Wils., 297.) In the latter case mandamus was held to lie, even when there was an action pending. (R. *v.* Tower, 4 M. & S., 162; Harrison *v.* Williams, 4 D. & R., 820.) And in the courts of the United States, where the right re-

[1] Reported in 24 Atl. Rep., 381.

mains still subject to some of its common-law limitations, the usual practice is by petition for leave to examine. (Re McLean, 9 Cent. L. J., 425 (S. C., 8 Repr., 813); Re Chambers, 44 Fed., 786.)

But which is the proper remedy under the statutes which give the right of free access to all public records to any citizen, irrespective of any interest he may have in them? Is it mandamus to compel the custodian of the records to allow the relator the free exercise of his right, or injunction to prevent him from interfering with that right? The principal case declares that injunction is the only adequate remedy; but an examination of the cases will show that the weight of practice, if not of positive authority, is overwhelmingly in favor of the procedure by mandamus. The latter was the form of action adopted in Fleming *v.* Clerk, 30 N. J. L., 280; State *v.* Williams, 41 N. J. L., 332; Peo. *v.* Cornell, 47 Barb. (N. Y.), 329; Peo. *v.* Reilly, 38 Hun. (N. Y.), 429; Peo. *v.* Richards, 99 N. Y., 620 (S. C., 1 N. E. Rep., 258); Webber *v.* Townley, 43 Mich., 534; Diamond Match Co. *v.* Powers, 51 Mich. 145; Burton *v.* Tuite, 78 Mich., 363; Aitcheson *v*, Huebner, 51 N. W., 634; Hawes *v.* White, 66 Me., 305; Bean *v.* Peo., 7 Col., 200; Stockman *v.* Brooks (Col.), 29 Pac,, 746; Phelan *v.* State, 76 Ala., 49; Randolph *v.* State, 82 Ala., 527; State *v.* Rachac, 37 Minn., 372; State *v.* Meadows, 1 Kans. 90; Cormack *v.* Wolcott, 37 Kans. 391; Boylan *v.* Warren, 39 Kans., 301; Comm. *v.* O'Donnel, 12 W. N. C., 291. It is true that in many of these cases the decision was against the right of the relator to exercise the right of examination claimed; but in none of them, except in Diamond Match Co. *v.* Powers, was it even hinted that the complainant had made a mistake in the form of his action. Indeed, in two instances, Hawes *v.* White and Stockman *v.* Brooks, it was expressly asserted that mandamus was the proper remedy, without, however, entering into any discussion of the question, or giving any reason for that assertion. On the other hand, very few cases attempt to assert the right of examination by bill and injunction; and in but one of these is it explicitly asserted that such is the proper remedy, the others either refusing the injunction, or allowing it without any discussion on that head. Buck *v.* Collins, 51 Ga., 391; Scribner *v.* Chase, 27 Ill. App., 36; Belt *v.* Abstract Co., 20 Atl., 982; West Jersey Title & Guarantee Co., *v.* Barber (the principal case), 24 Atl., 381.

It seems clear that as far as results only are concerned, it makes no practical difference which form of action is adopted; for in either case the result is the same. If the complainant proceeds by mandamus, he obtains a decree commanding the respondent to permit him to exercise his right of examination of the records; if he proceeds by bill and injunction, he obtains a decree commanding the defendant to abstain from any interference with him in the exercise of that right; thus in either case guaranteeing to him the free and undisturbed exercise of it. The deciding point, then, must be the nature of the right which is sought to be enforced; whether it is one which is more properly enforced by mandamus, or by injunction.

The essential distinction between mandamus and injunction is thus laid down in High on Extraordi-

nary Legal Remedies, 2d Ed. (1884), sec. 6, p. 10: "An injunction is essentially a preventive remedy, mandamus a remedial one. The former is usually employed to prevent future injury, the latter to redress past grievances. The functions of an injunction are to restrain motion and enforce inaction, those of a mandamus to set in motion and compel action. In this sense an injunction may be regarded as a conservative remedy, mandamus as an active one. The former preserves matters *in statu quo*, while the very object of the latter is to change the status of affairs and to substitute action for inactivity. The one is, therefore, a positive or remedial process, the other a negative or preventive one. And since mandamus is in no sense a preventive remedy, it cannot take the place of an injunction, and will not be employed to restrain or prevent an improper interference with the rights of relators." So, too, an injunction is the proper remedy where the injury is such "as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented." Hilliard on Inj., sec. 31, p. 20. In general, "it is used to prevent future injury rather than to afford redress for wrongs already committed, and it is therefore to be regarded more as a preventive than as a remedial process." High on Inj., 2d Ed., sec. 1, p. 3. The interference of the Court by injunction "rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented." Wait, Act. & Def., Vol. 3, p. 687.

In order to warrant the issuing of an injunction, then, the complainant must have a clear right which is injuriously affected by the acts of the defendant; and if the right be not clear, he will be sent to law to establish his right. The same is true of mandamus: Wait, Act. & Def., Vol. IV, p. 376; but that being a proceeding at law, is an eminently proper method of establishing a questioned right. It is worthy of note that a large majority of the cases in which mandamus was invoked to assert the right to the examination of public records were cases of first impression, or cases in which the right claimed did not exist; and it may be that this fact had some influence in determining the form of action. But where the right is clear, there are certain advantages peculiar to the process by injunction which that by mandamus does not possess.

In the first place, as quoted above, mandamus is used to redress past grievances, injunction to prevent future injury. In the class of cases under discussion, then, when the injury complained of is a single refusal to permit the complainant to examine the records at a particular time, and there is no claim that he has any desire to examine them at the present or any future time, and consequently no likelihood that the injury may be repeated, there would seem to be good reason for holding that mandamus is the proper remedy, the injury being past. In such a case the process by mandamus would permit the relator to examine the records for the purpose in his mind at the time when the examination was denied him; but would not afford him any assurance that the right would not

be denied him at any future time when he might again have occasion to examine them. In other words, it would be entirely in the power of the custodian of the records to refuse the relator access to them at each and every time when he should wish to examine them, and he would be put to the trouble of a new writ for each such invasion of his right. In point of fact, this was done in one case, that of Burton *v.* Tuite, 80 Mich., 218, and although the Court got over the difficulty by calling in the doctrine of contempt, yet there are reasons which would lead one to doubt the propriety of such an exercise of the strong arm of the Court. If the order was for a single examination, the officer would hardly be in contempt for refusing a second; and if the order was to permit any and all examinations, it is not quite clear how such an order could be made with propriety when one refusal only had been complained of. It would seem, then, far preferable to use the extraordinary powers of the Court in the first place by way of injunction, which would properly cover all instances; and contempt could then be predicated with propriety of any violation of the injunction decree.

In the second place, the cause of action in such cases is rather for interference with a right, than for the establishment or enforcement of a right; and in such a case the proper remedy is by injunction to prevent such interference.

In the third place, the remedy by mandamus is wholly inadequate to redress a continuing grievance, for the simple reason, as has been seen above, that the writ only applies to past grievances, and for every successive invasion of the complainant's rights he is obliged to sue out a new writ; provided, of course, that the respondent is contumacious. And while there is authority for the view that redress can be had by process for contempt, yet it may be very plausibly argued that the exigency of the writ is answered by permission for a single examination, and that it is then exhausted. This, too, would seem to be the correct inference from the nature of the writ. But in the case of injunction no such argument could be urged; for then the command of the writ would be to abstain from all interference with the complainant in the exercise of his right of examination, and its exigency would not be exhausted during life, or the continuance of the defendant in office.

Finally, the Court will not grant a mandamus unless convinced that it will be practically effective to secure the object aimed at: Shortt, Inf. Mand. & Quo. War., p. 246. And there are strong reasons for believing that mandamus would not be an efficient, or perhaps too efficient, remedy in many cases. When the right claimed is one that would require the use of the office of the custodian for many days, so as to be likely to interfere with the duties of the office, or with the rights of others of the public, mandamus would simply command the officer to permit the relator to exercise his right, without regard to the rights of others, or the paramount claims of the public business, and the courts would have no power, in adjudicating the bald question of right, to annex to that right the necessary restrictions. This very argument was one of the reasons for refusing the writ in several of the cases; and while it

cannot avail to defeat the right when it exists, supposing that mandamus is the proper remedy, it should nevertheless be one of the potent factors in settling the question whether or not it *is* the proper remedy. In granting an injunction, however, the Court can annex to it all proper and necessary qualifications of the exercise of the right interfered with, and *uno flatu* settle all the conflicting interests and rights of the officer, the public and the complainant.

These reasons are very fully and clearly stated in the two cases which have condescended to discuss the question, where it would seem that the courts arrived at their conclusions independently of each other. At all events, the earlier case is not referred to in the latter. The former case, however, Diamond Match Co. *v.* Powers, 51 Mich., 145, went off on other grounds, but the discussion of the present question is very interesting and instructive. "It seems evident that in any case where the claim is for a continuous use of the record office and its public contents from day to day and week to week, and not merely for a single occasion, with all its material facts defined, there must be great, if not insuperable difficulty in enforcing the claim by mandamus. The register has rights and duties which must be respected; so the general public have rights as well as the claimant; and the conditions are not steadily the same. They are subject to variation. On every occasion each must act reasonably, and with proper regard for the rights and duties of the others. As the circumstances vary the conduct must vary, so as to secure conformance to the rule of reasonable action by which the right is to be regulated. When the case presents a single occasion, and calls for an act which is presently determinate, it is entirely practicable to direct the act by mandamus. But where the case contemplates something continuous, yet variable in its conditions and aptitudes, the remedy by that process seems an unfit one. It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt. It is, therefore, necessary to point out the very thing to be done; and a command to act according to circumstances would be futile."

The advantages of the procedure by injunction are even more forcibly pointed out in the opinion of the Vice-chancellor in West Jersey Title & Guarantee Co. *v.* Barber, 24 Atl., 381 (the principal case): "With regard to the remedy by *mandamus* it seems to me that the slightest consideration will show that it is entirely inadequate. If the complainant has the right which it claims to have access to the books and records in defendant's office, it is one which, from the nature of the business, is a continuing one, and may arise every day, and one which, to be of any value, must be exercised at once. To delay its exercise until it could be determined by a court of law would be simply to deny it, because, before the judgment could be obtained, the value of its exercise in the particular instance complained of would be lost. If, indeed, the right of the complainant here in question is not so clearly established at law as to warrant the interference of this Court by the strong arm of an injunction, that alone is a sufficient answer to the complainant's case, and the

complainant will be, as a matter of course, turned over to a court of law, to establish there its right by a test case; but when that is once established, it would be a denial of justice to say that, in every instance that it is desired to exercise the right already clearly established, it must resort to its legal remedy, and can have no help from this Court. If, then, the complainant's right is clear at law and not open to question, it seems to me that it is entitled to the aid of this Court to enjoin the defendant from preventing its exercise."

These arguments are certainly entitled to careful consideration; and a close examination will find but little that can be urged against them. It may be safely concluded, then, that whenever the right of examination claimed is not for a single instance, but for a continuous period of time, whether long or short, the proper remedy is by injunction; and that the remedy by mandamus in cases of this nature is confined to those instances in which a single exercise only of the right is claimed; or, to give this discussion a concrete value, that the proper remedy for any interference with the right of examination by a private individual, searching the records for his own private purposes or curiosity, would be by mandamus; but the remedy for an interference with the right of examination by an abstractor of titles or a title insurance company, whose business naturally calls for constant and even daily investigation of the records, would, on account of its continuous nature, be by injunction.

ARDEMUS STEWART.

EARLY *v.* COMMONWEALTH.[1] SUPREME COURT OF APPEALS OF VIRGINIA.

Confessions—When Deemed to be Voluntary.

On the trial of an indictment for arson, evidence was offered by the prosecution to prove certain confessions made by the accused to a private detective, employed to work up the case, who arrested him. The accused testified that the detective said "that if he would tell him all about it he would make it easier for him." *Held:* affirming the Court below, that the evidence was admissible, as, taking the accused's testimony as true, the inducement was not offered by a person in authority.

LEWIS, P.

ABSTRACT FROM THE OPINION OF THE COURT.

The objection is to the action of the Court in admitting evidence to prove certain confessions by the prisoner. The evidence was objected to on the ground that the confession was not voluntary. The confession was made to the wit-

[1] 11 S. E. Rep., 795.

ness, Hale, who testified that it was made, so far as he knew, without any inducement having been offered by any one. The witness also testified that he was informed by Wren, a detective, who had been employed by the corporation of Rocky Mount to ferret out evidence of the burning, that the prisoner desired to make a confession to him (the witness); that, accompanied by Wren, he went to the prisoner and had a conversation with him; that in the course of that conversation Wren stated to the prisoner that, if he made any statement at all, it must be with the understanding that it was freely and voluntarily made, without the influence of hope or fear, and that thereupon the confession was made. The prisoner, however, upon this point, testified that before the conversation just alluded to Wren said to him that if he would "tell him all about it he would make the Commonwealth make it easier" on him, and that in consequence of this assurance he made the confession in question. On the other hand, one Edwards, another detective, testified that before Wren spoke to Hale on the subject of the proposed confession, he heard a conversation between Wren and the prisoner, in which Wren remarked to the prisoner that, if he wanted to make any statement to him, he could not offer him anything, but that his statement must be voluntary. This, he says, he heard, although he did not hear all that passed between them. Wren, it appears, was discharged as a witness by the attorney for the Commonwealth before the trial, and did not testify. We are of opinion that, under these circumstances, the confession was admissible in evidence. There is no doubt but that, before a confession can be rightly admitted, the Court must be satisfied that it was voluntary—that is, that it was made without the influence of hope or fear exerted by a person in authority, or with the apparent sanction of such person; and the burden of showing that it was voluntary is upon the Commonwealth. But here, taking the prisoner's own statement to be true, no inducement was offered by any one in authority.

The Admissibility of Confessions as Evidence.

I. *The Test of Admissibility.*— The admissibility of confessions as evidence in criminal prosecutions depends upon the credibility given them by the circumstances under which they were made. They have value as evidence only when freely and voluntarily made, when they are presumed to flow from a conscience overburdened with a sense of guilt, and are therefore admitted as a proof of the crime to which they refer. It is to be presumed that a man will not of his free will impute to himself a crime of which he is innocent, but the law recognizes the susceptibility of human nature to the violent influences of pain or danger, or the hope of escape therefrom, and, ever seeking the truth, guards jealously against the causes which may produce a false confession. 4 Bl. Com., 357; Foster's Crown Law, 243; Joy on Confessions, *12; Simon's Case, 6 C. & P., 541; In the People *v.* McMahon, 15 N. Y., 384; Selden, J., states clearly a principle which should be noted. "The first distinction which the law makes is between a statement or declaration made before, and one after the accused was conscious of being charged or suspected with the crime. If before, it is admissible in all cases, whether made under oath or without oath, upon a judicial proceeding, or otherwise; but if made *afterward*, the law becomes at once cautious and hesitating. The inquiry then is, is it voluntary,—does it proceed from the spontaneous suggestions of the party's own mind, free from the influence of any extraneous disturbing cause?"

II. *The Presumption as to the Admissibility of a Confession.*— The determination of the question of admissibility is of course the province of the judge. The rule as to the presumption which obtains when the confession is first offered in evidence, in England, uniformly is that the confession was involuntary, and the burden of proving the contrary is upon the prosecution. Thus, in R. *v.* Warringham, 2 Den. C. C., 447, Parke, B., said, "You are bound to satisfy *me* that the confession which you seek to use against the prisoner was not obtained by improper means." In the United States, the rule varies. Young *v.* State, 68 Ala., 569; Nicholson *v.* State, 38 Md., 140; People *v.* State, 49 Cal., 69; Barnes *v.* State, 36 Tex., 356; Thompson *v.* Comm., 20 Gratt. (Va.), 724; and People *v.* Swetland, 77 Mich., 61, follow the English rule. In other cases, the confession is presumed to be voluntary, but the defendant is protected by his privilege of objection to its introduction. Comm. *v.* Culver, 126 Mass., 464; Comm. *v.* Sego, 125 Mass., 210; Reefer *v.* State, 25 Ohio St., 464; State *v.* Davis, 34 La. An., 351; O'Mahoney *v.* Belmont *et al.*, 62 N. Y., 117.

The rules laid down by Sir James Stephen in his Digest of the Law of Evidence for determining the admissibility, or voluntary nature of confessions are as follows:

"No confession is deemed to be voluntary,

(*a*) if it appears to the judge to have been caused by any inducement, threat or promise, proceeding from a person in authority, and having reference to the charge against the accused person, whether

addressed to him directly or brought to his knowledge indirectly;

(*b*) if (in the opinion of the judge), such inducement, threat or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him.

(*c*) A confession is not involuntary, only because it appears to have been caused by the exhortations of a person in authority to make it a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority."

II. *Inducements which Render a Confession Involuntary and Inadmissible.*—Leaving for future consideration the question of who is a person in authority within the meaning of the rule, we will consider what inducements are regarded as sufficient to render a confession given in consequence thereof inadmissible. The decisions are not uniform, and the same lack of unanimity characterizes the decisions on every branch of the subject. In 3 Russell on Crimes, 368, it is laid down that a confession, in order to be admissible must be "free and voluntary," that is, it must not be extracted by "*any sort* of threat or violence, nor obtained by *any* direct or implied promises, however slight, nor by the exertion of any improper influence." "The law cannot measure the force of the influence used, or decide its effect upon the mind of the prisoner, and, therefore, excludes the declaration if *any* degree of influence has been exerted." EYRE, C. J., in Warickshall's Case, 1 Leach C. C., 263, gives the reason for the rule, saying, "a confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and, therefore, it is rejected. In a note to this case, a case illustrative of the reason is given. One of three men, tried and convicted of the murder of one H., confessed himself guilty, under a promise of pardon. The confession, therefore, was not given in evidence against him, and a few years afterward it appeared that H. was alive. In the earlier cases the Courts appear to have been astute to seize upon anything that by any possibility could be considered to have influenced the defendant to confess.

In Rex *v.* Drew, 8 Car. & P., 140, the prisoner was told "not to say anything against himself, as what he said would be taken down and used for or against him at his trial," and in Reg. *v.* Farley, 1 Cox, 76, the prisoner was told by a policeman, that whatever she told him would be used against her on her trial. This last case was decided on the authority of Rex *v.* Drew, holding that to assure the prisoner that whatever she said would be used at her trial, was holding out to her an advantage which rendered her statement inadmissible. Regina *v.* Harris, 1 Cox, 166, was decided similarly.

In Reg. *v.* Jones, MAULE, J., said: "To tell a prisoner what he says *will* be given in evidence against him is an inducement, for if he is told that it is to be used at all, it may induce him to say something that he may suppose may make for him." These cases were cited and overruled in Reg. *v.*

Baltry, 2 D. C. C., 430 (1852), where the policeman, having the defendant in custody, told him the nature of the charge against him, and said: "You need not say anything to criminate yourself, but what you do say will be taken down and used in evidence against you." POLLOCK, C. B., deciding in favor of the admission of the statement, said: "The words employed by the constable amount neither to a promise or a threat. They are to be taken in their obvious meaning, and when a confession is well proved, it is the best evidence that can be produced; unless it is clear that there was a threat or a promise to induce the confession, it should be admitted." This case marked the aversion, which had long been growing, with which the judges had come to regard the exclusion of valuable evidence for reasons of little weight. In Comm. *v.* Whittemore, 11 Gray, 202; Comm. *v.* Sego, 125 Mass., 210; Rex *v.* Jarvis, L. R., 1 C. C. R., 96. However, where it was said that it "would be better" to confess, this was held to be a promise of worldly advantage, which would exclude the confession. Rex *v.* Kington, 4 C. & P., 387; Rex *v.* Dunn, 4 C. & P., 543; Rex *v.* Slaughter, 4 C. & P., 353; Rex *v.* Walkely, 6 C. & P., 175; Rex *v.* Thomas, 6 C. & P., 353; Comm. *v.* Kennedy, 135 Mass., 543; Kelley *v.* State, 72 Ala., 244; State *v.* Wintzingrode, 9 Or., 153; State *v.* Alphonse, 34 La. Ann., 9; Vaughan *v.* Comm., 17 Gratt. Va., 576; People *v.* Thompson, 84 Cal., 598; Comm. *v.* Hannan, 4 Pa. St., 269; State *v.* York, 37 N. H., 175. On the other hand, it has been held that such words would not render confessions inadmissible. Reg. *v.* Parker, Leigh & Cave, 42; Fonts *v.* State, 8 Ohio, N. S., 98; Aaron *v.* State, 37 Ala., 106; Young *v.* Comm., 8 Bush, 366; State *v.* Freeman, 12 Ind., 100; State *v.* Whitfield, 70 N. C, 356.

Mere admonitious to tell the truth have been held sufficient to exclude, R. *v.* Holmes, 1 C & K., 248; R. *v.* Upchuck, 1 Mos. C. C., 465; State *v.* Hagan, 54 Mo., 192, 70 N. C., 356; R. *v.* Fennell, 72 B. D., 147; R. *v.* Mansfield, 14 Cox C. C., 639. But the sounder docrine undoubtedly is that a mere adjuration to speak the truth will not exclude where there were no threats or promises. Whart. Cr. Ev., Sec. 647, 652, 654; Aaron *v.* State, 37 Ala., 106; King *v.* State, 40 Ala., 314; Kelly *v.* State, 72 Ala., 244. And in R. *v.* Jarvis, L. R., 1 C. C. R., 96; R. *v.* Sleeman, 1 Dears. C. C., 249; R. *v.* Reeve, L. R., 1 C. C., 362, it is held that where the words used only import advice on moral grounds, the statement made in consequence were admissible, and that the cases to the contrary have gone too far.

Promises of favor or assistance will exclude, Cass's Case, 1 Leach, 293; or a hope of pardon, Comm. *v.* Knapp, 9 Pick., 497; a release "if he would tell." Mountain *v.* State, 40 Ala., 344; or in hope of being admitted as a witness for the prosecution. Spears *v.* State, 2 O. St., 583; State *v.* Johnson, 30 La. An., P. II, 881.

A promise of a collateral benefit is not an inducement sufficient to render a confession inadmissible. 1 Greenl. Ev., Sec. 229. Thus, in Rex. *v.* Lloyd, 6 C. & P., 353, where the constable told the prisoner that if he would tell he could see his wife, who was confined in a separate room, the statement following was admissible.

State *v.* Tatso, 50 Vt., 48; Rutherford *v.* Comm., 2 Metc. Ky., 387; State *v.* Wentworth, 37 N. H., 196. In Rex *v.* Sexton, 3 Russ. C. & M., 368, a confession made after the prisoner's request for a glass of gin had been granted, was held inadmissible. The correctness of this discision has been seriously doubted. The inducement offered must be of a strictly temporal advantage. Thus, exhortations by the chaplain of the jail, appealing to the prisoner to ease his soul by a confession, will not render such confession inadmissible. R. *v.* Gilham, 1 Mo. C. C., 186. So, the remark, "an honest confession is good for the soul." 9 Lea. Tenn., 128.

For the purposes of this note a further discussion of inducements and their effect is unnecessary. They are fully treated of in Wharton's Crim. Law; Greenl. Ev., and Am. and Eng. Encyl. of Law.

IV. *Who is a person in authority?*

The rule as given by Stephen indicates that an inducement must be offered by a person in authority in order to vitiate the confession, and that an inducement offered by one not in authority will have no effect. This is accepted both in England and the United States; but it may be profitable to seek to ascertain what is requisite to constitute a person in authority within the meaning of the rule.

As in the question of inducements, the courts were more liberal in the earlier cases in construing the effect of the status of the person offering the inducement upon the mind of the accused. In more than one case it was seriously doubted whether anything beyond the terms and effect of the inducement, *per se*, should be considered, and in Rex *v.* Dunn, 4 C. & P., 543, BOSANQUET, J., said, "Any person telling a prisoner that it will be better for him to confess, will always exclude any confession made to that person." This, while it was a departure from established principle as laid down in the cases of Rex *v.* Hardwick, Rex *v.* Gibbons, 1 C. & P., 97, and Rex *v.* Tyler, 1 C. & P., 129, was followed in Rex *v.* Slaughter, 4 C. & P., 544, note; and in other cases, at least rendered the admissibility of the evidence a dubious question. Thus, while a prisoner was in custody, he was told by a person without authority that it would be better for him to confess, and he thereupon made a statement. PARKE, B., said: "There is a difference of opinion among the judges whether a confession made to a person who has no authority, after an inducement is held out by that person, is receivable in evidence: Rex *v.* Spencer, 7 C. & P., 302; Rex *v.* Pountney, 7 C. & P., 302. But in Taylor's case, 8 C. & P., 733, it was held that a confession must have been induced by a person in authority in order to repel the presumption of its truth: Rex *v.* Hardwick, Rex *v.* Gibbons, and Rex *v.* Tyler, *supra*. And in Reg. *v.* Moore, 2 Den. C. C., 527, it was declared that a confession is admissible though obtained by threats and inducements, provided such threats and inducements were held out by a person not in authority. Also, where the inducement is held out in the *presence* of one in authority, it is presumed to have been with his sanction, and, therefore, inadmissible. Thus, where the inducement was held out by the magistrate's clerk, in the presence of the magistrate: Drew's case, 8

C. & P., 140; Moody's case, 2 Crawf. & Dix C. C.; Rex *v.* Laugher, 2 C. & K., 225; Rex *v.* Kingston, 4 C. & P., 387; Cohen *v.* Kennedy, 135 Mass., 543; U. S. *v.* Chapman, 4 Am. L. J. (N. S.), 440.

In Jones *v.* State, 58 Miss., 349, the sheriff went with W., a stranger to the prosecution, to the jail, and while there was told by the cell-mate of the defendant that he, the defendant, wished to make a confession, as his father told him it would be better for him to tell the truth. The sheriff, with W., saw the man, and told him that his confession could not benefit him. W. then said that it "would be better to tell the truth," and the man made a statement. *Held*, that the sheriff could not be presumed to have sanctioned the inducement offered by W., as he had just before told the prisoner that his confession could not benefit him.

STEPHEN says that "the prosecutor, officers of justice having the prisoner in custody, magistrates and other persons in similar positions are persons in authority. The master of the prisoner is not such a person in authority if the crime of which the person making the confession is accused was not committed against him." This is also the general rule in the United States: People *v.* Ward, 15 Wend., 231; Wolf *v.* Comm. 30 Gratt., 833; State *v.* Brockmann, 46 Mo., 566; Rector *v.* Comm. 80 Ky., 468; U. S. *v.* Pocklington, 2 Cr. C. C., 293; State *v.* Staley, 14 Minn., 105. In Russ on Crimes, it is said that all engaged in the apprehension, prosecution or examination of the prisoner are persons in authority within the meaning of the rule: Smith *v.* Comm. 10 Gratt., 734; Wolf *v.* Comm. *supra*.

In some of the States a much broader rule has been laid down. Thus in Murphy *v.* State, 63 Ala. 1 (1879), the Court said: "A confession induced by hope or fear, excited in the mind by the representations of any one connected with the prosecution, or connected with the accused, who may, considering his relations and condition, *be fairly supposed by him to have power* to secure him whatever of benefit is promised, or to influence the threatened injury, cannot be regarded as voluntary and ought not to be received as evidence. This view was approved in People *v.* Walcott, 51 Mich., 612 (1883), where three persons, none of whom were in a position of authority, gained admission to the cell of the accused in the dead of night and secured a confession by representing that it would be "better to tell the truth." In sharp contrast to the decision of the Michigan court is the decision in Comm. *v.* Cuffee, 108 Mass., 285 (1871), where the confession of a boy of thirteen, arrested without a warrant and upon suspicion, elicited from him by two police officers who questioned him for two hours, after searching him and stripping him, and without warning him of his right not to answer, or giving him an opportunity to consult counsel, was held admissible on his trial for the crime. In this case the reason the Court gave was that there were no threats or promises made by the officers which would induce the prisoner to confess. Commonwealth *v.* Nott, 135 Mass., 269, is more orthodox, where an inducement held out in the presence of a superior officer renders the ensuing statement inadmissible. But the Massachusetts courts seem in a number of cases

to have disregarded the rule of exclusion whenever its technicalities were not met by the case in hand: Comm. *v.* Tuckerman, 10 Gray, 173; Comm. *v.* Smith, 119 Mass., 305; Comm. *v.* Cuffee, *supra*. The cases in the Federal courts, while adhering to the letter of the rule, do not go beyond it or disregard it to such an extent as the courts of Massachusetts.

The true note was sounded in the case of Murphy *v.* State (63 Ala., 1, 1879), where the Court defines a person in authority to be "any one connected with the prosecution, or connected with the accused, who may, considering his relations and condition, be *fairly supposed by him* to have power to secure him whatever benefit is promised, or to influence the threatened injury."

In the principal case, the case of U. S. *v.* Stone is relied upon as deciding that a detective, who is employed by the owners of stolen goods to find them and to institute civil or criminal proceedings regarding the same, is not a person in authority whose inducements will prevent a confession inadmissible in evidence. There is a slight distinction, however, between the facts of Stone's case and the subject of annotation. In the first, at the time the inducements (which were slight) were made, no process had issued against the defendant, nor had any criminal proceedings been instituted. In the principal case, according to the hypothesis of the judge, "if what the defendant says is true," the inducements were held out *after* the defendant was under arrest, when all confessions are regarded suspiciously. How far we can go before we are beyond the pale of those who are "engaged in the prosecution or apprehension of a prisoner" it is difficult to say, but the impression of the detective upon the prisoner's mind must have been that of a person clothed with authority, and the inducements held out were more than sufficient. Rules cannot be formulated which can meet the necessities of every case. Age, condition, situation, character and attending circumstances must always enter into the problem. Certainly, from the trend of decisions, it appears that the old fear, that the rule of exclusion has been carried too far, and "in its application justice and common sense have too frequently been sacrificed at the shrine of mercy," still exists in the breasts of the judiciary.

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