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CRIMINAL LAW AND PROCEDURE-ADMISSIBILITY OF EVIDENCE-RULE AS TO DETERMINATION OF PRELIMINARY QUESTION OF FACT

CRIMINAL LAW AND PROCEDURE — ADMISSIBILITY OF EVIDENCE — RULE AS TO DETERMINATION OF PRELIMINARY QUESTION OF FACT — Following his arrest for murder, the defendant was held thirty-six hours before being arraigned for the purpose of obtaining a confession. On trial the defendant objected to introduction of the confession on the ground that it was involuntary, having been induced by wrongful detention and beating by the police. *Held*, failure, after due request, to instruct the jury that unnecessary delay in arraignment is prohibited by law and that such delay might be considered in determining whether or not the confession was voluntary was reversible error. *People v. Alex*, (N. Y. 1934) 192 N. E. 289.

The rule that determination of a preliminary question of fact upon which depends the admissibility of a given piece of evidence is within the exclusive province of the trial judge and that his finding thereon is binding on the jury is one of the most sacrosanct of common law orthodoxies. Nevertheless this principle has come to be undermined by the heresy, of which the instant case is an illustration, that when there is a conflict of evidence, if a finding might reasonably be made in favor of the offering party, the evidence shall be admitted and the question of admissibility passed along to the jury for their final determination.[1] It is not the purpose here to trace the origin of this doctrine.[2] A few courts have altered the orthodox view by taking the position that if there is any reasonable ground for allowing the evidence, then it will be admitted as a matter of course.[3] This in effect merges the question of admissibility with that of weight.[4] The heterodox rule exists in both the mandatory and permissive forms,[5] with the

[1] 5 WIGMORE, EVIDENCE, sec. 2550 (1923), and cases cited in note.

[2] However, it should be observed that the most natural setting for the latter view is the case in which a decision on the preliminary requires the determination of the ultimate fact at issue. *Cf.* Miles v. United States, 103 U. S. 304, 26 L. ed. 481 (1880), and State v. Lee, 127 La. 1077, 54 So. 356 (1911).

[3] Sneed v. State, 143 Ark. 178, 219 S. W. 1019 (1920); Dixon v. People, 18 Mich. 84 at 91 (1869).

[4] It is always permissible under the orthodox rule, when the disputed evidence has been admitted, to set forth the same facts on which the contention of inadmissibility was made for the purpose of affecting the weight which the jury shall give to the evidence. Williams v. State, 72 Miss. 117 at 121, 16 So. 296 (1894).

[5] See Maguire and Epstein, "Preliminary Questions of Fact in Determining the Admissibility of Evidence," 40 HARV. L. REV. 392 at 420 (1927). It should be noted that the important distinction between the modified form of the orthodox rule above referred to and the heterodox rule in both of its forms is that the latter requires the jury to pass on the specific question of admissibility.

latter probably having the wider following.[6] An interesting distinction has been taken in some jurisdictions between civil and criminal cases. Massachusetts, for instance, apparently follows the orthodox rule as to civil cases while pursuing a species of the heterodox rule in criminal cases.[7] The United States Supreme Court seems to approve the Massachusetts distinction as to the admissibility of confessions,[8] but has held to the orthodox rule in criminal cases where the preliminary question was whether evidence had been obtained by unlawful search and seizure.[9] The Massachusetts court gives only the merest shred of a clue as to the reason for distinguishing between civil and criminal cases. Referring to the latter, it speaks of "the humane practice in this Commonwealth." [10] Apparently the court feels that a criminal confession is such a crucial bit of evidence that the very spirit of the common law institution of jury trial demands that the question of its admissibility be determined by twelve men rather than by one. It is of course arguable that a defendant is more likely to have "justice" at the hands of a jury than at the hand of a judge. But at the same time it should be noted that the heterodox rule really requires the jury to do what is all but psychologically impossible, e.g., expunge from its deliberations that which, having considered, it subsequently decides it had no right to consider. An answer to the query as to which is the preferable rule would seem to necessitate an evaluation of the probabilities on which these two propositions are respectively based. In the opinion of the writer the heterodox rule of evidence, while clothed in the technical terminology of a rule of exclusion, in practical effect completely destroys the principle of exclusion.[11]

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[6] Although the principal case is not explicit, New York follows the mandatory form at least in criminal cases. People v. Pantano, 239 N. Y. 416, 146 N. E. 646 (1925); People v. Doran, 246 N. Y. 409, 159 N. E. 379 (1927).

[7] Slotofski v. Boston Elevated Ry., 215 Mass. 318, 102 N. E. 417 (1913) (civil); Commonwealth v. Gangi, 243 Mass. 341, 137 N. E. 643 (1923) (criminal). The former case points out, however, that the heterodox rule only applies in criminal cases in which the trial judge has admitted the disputed evidence. If the judge in his initial consideration of the preliminary fact question excludes the evidence, that is an end of the matter.

[8] Wilson v. United States, 162 U. S. 613, 16 Sup. Ct. 895 (1895).

[9] Steele v. United States, 267 U. S. 505, 45 Sup. Ct. 417 (1925); Ford v. United States, 273 U. S. 593, 47 Sup. Ct. 531 (1927).

[10] Commonwealth v. Preece, 140 Mass. 276, 5 N. E. 494 (1885).

[11] In Maguire and Epstein, "Preliminary Questions of Fact in Determining the Admissibility of Evidence," 40 HARV. L. REV. 392 (1927), the following arguments are made in behalf of general application of the orthodox rule to all preliminary fact problems: 1. It has the advantage of simplicity. 2. The judge's decision is more predictable than that of the jury. 3. It is better to take these technical legal problems, in the solution of which it has had no opportunity for training, out of the province of the jury. 4. When a general verdict is returned it is impossible for the appellate court to determine precisely wherein the error, if any, lies. 5. Prompt vindication of privileges and competencies is given by the orthodox practice. 6. There is authority for the proposition that the judge is not bound by the ordinary rules of evidence.