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Constitutional Law - Due Process - Jury Determination of Voluntariness of Confession

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prove to be very significant in the field of criminal law. The question is: If it is a violation of due process to deny a witness the privilege against self-incrimination, to force him to testify if his testimony can be used by another jurisdiction, and to allow another jurisdiction to use the testimony once it has been forced under an immunity statute, is it not equally a violation of due process to allow one jurisdiction to prosecute a defendant for a criminal act for which he has already been acquitted or convicted in another jurisdiction? The reason given for allowing both state and federal governments to prosecute the same defendant for the same criminal act is that the governments are separate sovereignties, and therefore there has been a crime committed against both.[23] It should be patently obvious that this is a mere fiction derived from a legal concept that has ceased to be significant in American constitutional law.[24] If the Court has abolished the dual sovereignty fiction in the area of self-incrimination should it not also abolish it in the area of double jeopardy? The dual crime argument might have logical force in the case of a continuing crime between two states, but it has, by the *Murphy* case, lost what strength it once had with reference to acts which violate both state and federal law.[25]

The *Murphy* case represents the Court's increased willingness to expand on the concept of due process of law. Considering this tendency it is not highly speculative to predict that in the near future the law will see many new developments in this area. Because of the many problems arising with each new opinion, one cannot help but ask if perhaps the Court is not moving too fast. This is not to say that the decisions themselves have been wrong but it is to suggest that society needs time to adjust to new constitutional standards just as it needs time to adjust to new legislation. In the last analysis the results of both are the same.

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CONSTITUTIONAL LAW—DUE PROCESS—JURY DETERMINATION OF VOLUNTARINESS OF CONFESSION—Convicted of first degree murder, the defendant petitioned for habeas corpus in federal court asserting that his conviction in New York was invalid as founded upon a confession improperly determined voluntary. During trial

23. United States v. Lanza, 260 U.S. 377 (1922); *accord*, Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959).

24. The concept of federalism espoused by Mr. Justice Harlan in his dissenting opinions in Roth v. United States, 354 U.S. 476, 496 (1957); Mapp v. Ohio, 367 U.S. 643, 672 (1961); and more recently in Malloy v. Hogan, 84 Sup. Ct. 1489, 1497 (1964), has been consistently rejected by the Court.

25. See Bartkus v. Illinois, *supra* note 23, at 150 (Black J., dissenting); Abbate v. United States, *supra* note 23, at 201 (Black J., dissenting).

there was conflicting testimony as to the voluntariness of the confession. In accordance with New York law, this question was submitted to the jury along with the other issues for a single verdict, with the instruction to disregard the confession if voluntary and to determine the issue of guilt from other evidence, or, if it found the confession voluntary, to determine its reliability and afford it weight accordingly. The United States Supreme Court *held*, because a jury cannot without confusion determine both issues of guilt and voluntariness, and because its decision as to voluntariness is not discernible by an appellate court, this procedure did not afford a reliable determination of coercion and thereby violated the due process clause. The four dissenting Justices reasoned that a jury determination is a safeguard of a defendant's liberty and that the majority decision was grounded in conjecture. *Jackson v. Denno*, 84 Sup. Ct. 1774 (1964).

The differing jurisdictions have developed three methods of determining a confession's voluntariness. First is the orthodox view under which the judge hears evidence and alone rules on voluntarines for the purpose of admissibility; the jury only determines voluntariness as affecting the confession's credibility.[1] Second is the approach of Massachusetts wherein the judge at a preliminary inquiry is permitted to weigh the evidence and exclude a confession if he finds it involuntary, or, if he finds it voluntary, to submit it to the jury with the instruction that they must find it voluntary before considering it.[2] Third is the New York view,[3] which was involved in the principal case.

The difference in these views is that under the orthodox rule the judge's determination of coercion is final,[4] while under the latter two rules the judge's determination is not, unless he finds the confession involuntary. The Massachusetts rule gives the judge greater discretion than the New York formula in that he may exclude a confession even if there is a fair question of fact.

The issues of competency and credibility are related. The orthodox method follows the traditional division of responsibility between judge and jury:[5] that the determination of the question of voluntariness is one of competency for the judge, while the jury's duty is to weigh the credibility of evidence.[6] Under the heterodox[7] methods a judge's finding of competency is not conclusive, as it

1. Phillips v. State, 258 Ala. 510, 28 So. 2d 542 (1947); State v. English, 85 N.W.2d 427 (N.D. 1957). This rule is followed in twenty states and three federal circuit courts.
2. State v. Pulliam, 87 Ariz. 216, 349 P.2d 781 (1960); Commonwealth v. Sheppard, 313 Mass. 590, 48 N.E.2d 630 (1943). This rule is followed in fourteen states and two federal circuit courts.
3. State v. Jones, 253 Iowa 829, 113 N.W.2d 303 (1962). This view is followed in sixteen states and six federal circuit courts.
4. Jackson v. Commonwealth, 193 Va. 664, 70 S.E.2d 322 (1952).
5. 9 WIGMORE, EVIDENCE § 2550 (3d ed. 1940).
6. Burton v. State, 107 Ala. 108, 18 So. 284 (1895).
7. 9 WIGMORE, EVIDENCE § 2550 (3d ed. 1940). This was a term used by Wigmore to characterize the Massachusetts and New York rules.

may also be for the jury to decide whether the confession was freely made,[8] thus giving the jury the duty of resolving both competency and credibility. In rejecting a coerced statement, the jury uses the same judicial standard as the judge.[9]

The advocates of the orthodox rule attack the heterodox rules on two main grounds: first, it is claimed that a jury is unable to differentiate between the issue of voluntariness and the ultimate issue of guilt, and that even if the jury found the confession involuntary it could not disregard it;[10] second, it is argued that if the judge's role is not made final he may shirk his responsibility and surrender in favor of a jury decision,[11] resulting in a diminution of the protection afforded the defendant.

The advocates of the heterodox methods answer these allegations by claiming that a jury would not retire confused if properly instructed,[12] and that the prospect is equally great of finding a shirker on the bench under either rule.[13] Finally, the defendant is protected by placing the burden of proving voluntariness on the prosecution.[14]

The principal case overrules the Court's recent determination of the procedure employed to resolve the questions of fact relating to the voluntariness issue,[15] and impliedly accepts the Massachusetts view, which gives the defendant the added protection of a second chance to have his confession excluded,[16] thereby forcing twenty two jurisdictions to seek a different rule.[17]

It appears that the decision is desirable insofar as it is a move for uniformity, but it is arguable that the Court's reasoning was imperfect. Since there is no demonstrable proof that separating the issue of voluntariness of a confession from the issue of the accused's guilt is so difficult as to be impossible for a jury to deal with fairly (a point relied on by the dissenters), the Court's basis for its decision —that the jury is incapable of giving a reliable and clear cut decision of coercion and guilt—is not persuasive. Also, to strengthen its position, the Court should have made clear why the Massachusetts rule would not offend due process, since its effect is, in many cases, the same as that of the New York method. This could have been accom-

8. State v. Johnson, 69 Ariz. 203, 211 P.2d 469 (1949).
9. 3 WIGMORE, EVIDENCE § 861 (3d ed. 1940).
10. This is the argument used by the majority in the principal case.
11. Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 329 (1954).
12. See State v. Smith, 32 N.J. 501, 161 A.2d 520 (1960). An example of such instructions appear in State v. Hood, 69 Ariz. 294, 213 P.2d 368, 371-72 (1950): "The law absolutely forbids you to consider a confession in determining the innocence or guilt of a defendant unless the confession was voluntarily made, and although the Court has admitted evidence tending to show that defendant made a confession, you must disregard the asserted confession entirely unless you yourselves, by your own weighing of all the evidence, your own judging of the credibility of the witnesses and your own reasonable deductions, conclude that the alleged confession was not only made but was voluntary."
13. State v. Smith, *supra* note 12, at 551-52.
14. State v. Pulliam, 87 Ariz. 216, 349 P.2d 781 (1960).
15. Stein v. New York, 346 U.S. 156 (1953), which held that the fourteenth amendment does not forbid jury trial of the issue, was specifically overruled.
16. Commonwealth v. Preece, 140 Mass. 276, 5 N.E. 494 (1885).
17. See State v. Jones, 253 Iowa 829, 113 N.W.2d 303 (1962).

plished by reference to the traditional competency-credibility dicotomy, since that is the focal point of the problem.

The author concludes that in order to justify the existence of the Massachusetts view over the New York procedure, more reasoning is necessary than an attack on the jury determination of a factual issue.

JEROME JAYNES

OFFICERS—ELIGIBILITY AND QUALIFICATION—LEGISLATOR CREATING OFFICE OR INCREASING EMOLUMENTS—In an original proceeding to determine the right of three candidates to run for the offices of governor and secretary of state, where each candidate had been a member of the previous legislature, which had passed a small across-the-board salary increase for all state offices, the Utah Supreme Court *held,* one judge dissenting, that the Utah constitutional provision[1] forbidding any legislator during his term of office to seek any civil office which had been created, or for which the emoluments had been increased during his term of office, was not violated by the legislature's general "cost-of-living" salary increase,[2] and that the legislators were eligible to hold such state offices. The chief justice dissented on the grounds that the constitutional provision was clear and unambiguous, and that the majority, by judicial fiat, had expanded the intent of the constitution. *Shields v. Toronto,* 395 P.2d 829 (Utah 1964).

More than half the states,[3] following the example of the federal constitution,[4] have enacted constitutional provisions similar to the Utah provision interpreted above. These jurisdictions have generally construed such provisions strictly and have barred legislators from running for offices created during their term of office, such as special legal counsel,[5] justice of the peace,[6] industrial commission,[7] war emergency council,[8] levee commissioner,[9] city police judge,[10] and circuit judge.[11] Courts have also barred legislators when the emoluments were increased for such offices as county

1. UTAH CONST. art. VI, § 7.
2. The salary of the secretary of state was raised from $10,500 to $11,000, and the governor's was raised from $13,200 to $15,000.
3. *E.g.,* FLA. CONST. art. 3, § 5; MINN. CONST. art. 4, § 9; N.D. CONST. art. 2, § 39; S.D. CONST. art. 3, § 12; UTAH CONST. art. 6, § 7.
4. U.S. CONST. art. 1, § 6, cl. 2.
5. Palmer v. State, 11 S.D. 78, 75 N.W. 818 (1898); *but cf.* State *ex. rel.* Landis v. Futch, 122 Fla. 837, 165 So. 907 (1936).
6. Kimble v. Bender, 173 Md. 608, 196 Atl. 409 (1938).
7. State *ex. rel.* Jugler v. Grover, 102 Utah 41, 125 P.2d 807 (1942); *but cf.* Shields v. Toronto, 395 P.2d 829 (Utah 1964).
8. Opinion of the Justices, 244 Ala. 386, 13 So. 2d 674 (1943).
9. Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169 (1858).
10. Montgomery v. State *ex rel.* Enslen, 107 Ala. 372, 18 So. 157 (1895).
11. State v. Porter, 1 Ala. 688 (1840).