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Evidence--Admission and Confession Distinguished

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Charleston v. Southeastern Constr. Co., 134 W. Va. 666, 64 S.E.2d 676 (1950); *Schippa v. West Virginia Liquor Control Comm'n. supra.* It might be noted here that when a state agency is a suitor, a counterclaim arising out of the same transaction will be entertained, providing it is not in excess of the state's claim. *State Road Comm'n v. Ball*, 138 W. Va. 349, 76 S.E.2d 55 (1953); *State, by Davis v. Ruthbell Coal Co.*, 133 W. Va. 319, 56 S.E.2d 549 (1949).

While the concept of sovereign immunity may not be desirable in modern society, so long as the present constitutional provision prevails, the courts will be called upon to decide when an action or suit has the effect of making the state defendant. It appears that the established principles are adequate for reaching such decisions, although it would seem that some of the past decisions have resulted from misapplication of these principles.

R. G. D.

EVIDENCE—ADMISSIONS AND CONFESSIONS DISTINGUISHED.—*D* was convicted of armed robbery. When *D* was taken into custody by police officers he made a statement of his activities on the evening of the alleged crime, in which statement he admitted eating food which contained garlic. At the trial a witness, who was at the scene of the robbery, testified that the odor of garlic emanated from one of the accused. The trial court admitted into evidence the statement made by *D* as a confession. *Held*, that the statement made by *D* was technically an admission and not a confession; however, since the trial court determined that the statement was voluntarily made, it was admissible as substantive evidence of the activities described therein. *State v. Buffa*, 51 N.J. Super. 218, 143 A.2d 833 (1958).

Although a distinction exists between admissions and confessions, the courts have been inclined to treat them interchangeably.

It should be noted at the outset that it is a well recognized principle that admissions and confessions are not objectionable as hearsay. *Cf. Herbert v. Lankershim*, 9 Cal. 2d 409, 71 P.2d 220 (1937); *Anthus v. Rail Joint Co.*, 231 N.Y. 557, 132 N.E. 887 (1921).

An admission differs from a confession in that the former is an acknowledgment of facts and circumstances which, if taken in connection with proof of other facts, will permit an inference of guilt, while the latter is a acknowledgment of guilt of the criminal act or a part thereof. *Gulotta v. United States*, 113 F.2d 863 (8th Cir. 1940).

Actually a confession is only one species of an admission. The peculiarity of confessions in evidence in criminal cases is that they are subject to the limitation that they must have been made without any inducement calculated to destroy their trustworthiness. 4 WIGMORE, EVIDENCE § 1050 (3d ed. 1940).

The general rule which permits an admission of an accused to be received in evidence against him is also limited by its terms to statements freely made. *Cf. Miles v. United States,* 103 U.S. 304 (1880); *People v. Cahill,* 193 N.Y. 232, 86 N.E. 39 (1909).

Among the circumstances that may be fatal to the trustworthiness of a confession or admission is the fact that it may be made under direct and palpable pressure to substitute something other than the truth. *Hyatt v. New York,* 188 U.S. 691 (1903); *Tuttle v. People,* 33 Colo. 243, 79 Pac. 1035 (1905). The statement thus presented may appear so likely to be the result of such influence that it will be rejected. We, therefore, should not expect to find the principle of inducement and coercion outside the scope of criminal prosecution. It would follow then, that in civil cases the admission of an opponent, when offered, is not to be tested or excluded by any rules of confessions or admissions applicable to the accused in a criminal case, due to the fact that either may always be explained away. 3 WIGMORE, EVIDENCE § 815 (3d ed. 1940).

It should also be noted that, for a statement to be competent as an admission, it must be one of fact, and statements relating to questions of law or conclusions of law or opinions of what the law is are not admissible. *Grand Trunk Western R. R. v. H. W. Nelson Co.,* 116 F.2d 823 (6th Cir. 1941); *Royal Ins. Co. v. Atlantic Coast Line R. R.,* 195 N.C. 693, 143 S.E. 516 (1928).

Although West Virginia draws some distinction between confessions and admissions, there appears to be no deviation as to their requirements for admissibility. In the case of *State v. Kinney,* 26 W. Va. 141 (1885), the court stated that, when one is charged with a crime, anything he says or does voluntarily, which can have any bearing toward showing his guilt, is competent to go to the jury.

In *State v. Hayes,* 136 W. Va. 199, 67 S.E.2d 9 (1951), the defendant was indicted for larceny. In a statement made to a police officer, at the time he was apprehended, the defendant admitted taking the property. The defendant at the trial contended

that he believed the property to have been abandoned. The court held that, although this statement could not be admitted as a confession of guilt, it, however, in essential details contradicted the defendant's testimony as to certain essential matters and there was no error in reading the statement to the jury. Also see, *State v. Sheppard,* 49 W. Va. 582, 39 S.E. 676 (1901), where the court distinguished between an admission and confession, but held that an extra-judicial admission voluntarily made was admissible.

In the principal case, the defendant denied having made certain statements contained in the writing. The West Virginia court dealt with this question in *State v. Kinney,* supra, where it held that, if the accused denies that he executed the written statement, then it is competent evidence for him to contradict the statement; however, the whole evidence, that is, the statement and the contradictory testimony should go to the jury.

It is therefore submitted that the label which is applied to such statement is unimportant when the introduction of the evidence has the same effect. The problem in the principal case is merely one of semantics, and the court correctly recognized that it makes no difference what the statement is called. Comment, 39 MINN. L. REV. 902 (1955).

J. E. J.

EVIDENCE—ADOPTIVE ADMISSIONS—FAILURE TO DENY INCRIMINATORY STATEMENT MADE IN PRESENCE OF ACCUSED.—*D* was convicted of murdering his wife. The prosecution's evidence included testimony of a witness received by the court on the basis of adoptive or implied admission by *D*. The witness stated that he had asked *D*'s father, who was in the room in which *D* was seated, what *D* said when he came over to the parents' home after the wife's death. Witness stated that the father replied *D* said, "I killed Jeannette," and that *D* did not make any denial of or other challenge to this statement. *D*'s motion to strike this testimony was denied by the court. *Held,* that denial of *D*'s motion to strike the statement was reversible error since the facts did not disclose that there were circumstances present which called for a denial by *D*. *Arpan v. United States,* 260 F.2d 649 (8th Cir. 1958).