

1893

Jan. 21;

Feb. 4;

April 29.

[CROWN CASE RESERVED.]

THE QUEEN v. THOMPSON.

Criminal Law—Evidence—Confession—Evidence of Confession, when admissible.

In order that evidence of a confession by a prisoner may be admissible, it must be affirmatively proved that such confession was free and voluntary, that is, was not preceded by any inducement to the prisoner to make a statement held out by a person in authority, or that it was not made until after such inducement had clearly been removed.

The prisoner was tried for embezzling the money of a company. It was proved at the trial that, on being taxed with the crime by the chairman of the company, he said, "Yes, I took the money," and afterwards made out a list of the sums which he had embezzled, and with the assistance of his brother paid to the company a part of such sums. The chairman stated that at the time of the confession no threat was used and no promise made as regards the prosecution of the prisoner, but admitted that, before receiving it, he had said to the prisoner's brother, "It will be the right thing for your brother to make a statement," and the Court drew the inference that the prisoner, when he made the confession, knew that the chairman had spoken these words to his brother :—

Held, that the confession of the prisoner had not been satisfactorily proved to have been free and voluntary, and that therefore evidence of the confession ought not to have been received.

CASE stated by the acting chairman of quarter sessions for the county of Westmoreland.

At the Westmoreland Quarter Sessions, held at Kendal on October 21, 1892, Marcellus Thompson was tried for embezzling certain moneys belonging to the Kendal Union Gas and Water Company, his masters.

Mr. Crewdson, the chairman of the company, at whose instance the warrant for the prisoner's apprehension had been issued, was called as a witness by the prosecution to prove among other things a confession by the prisoner.

As soon as this confession was sought to be put in evidence, objection was taken to its admissibility, and we therefore, before receiving further proof, allowed the witness to be cross-examined by the prisoner's counsel. In answer to the latter's questions, the witness stated that, prior to the confession being made,

the prisoner's brother and brother-in-law had come to see him, and that at this interview he said to the prisoner's brother, "It will be the right thing for Marcellus to make a clean breast of it." The witness added, "I won't swear I did not say 'It will be better for him to make a clean breast of it.' I may have done so. I don't think I did. I expected what I said would be communicated to the prisoner. I won't swear I did not intend it should be conveyed to the prisoner. I should expect it would. I made no threat or promise to induce the prisoner to make a confession. I held out no hope that criminal proceedings would not be taken." No evidence was produced to the Court tending to prove that the details of the interview had been communicated to the prisoner, or to rebut the evidence of Mr. Crewdson as to what took place at the interview.

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It was then contended by the prisoner's counsel that the above statements to the prisoner's brother were inducements to the prisoner to confess, held out by a person in authority, and that evidence of the confession was therefore inadmissible.

We found that Mr. Crewdson was a person in authority, and we found, as a fact, that the statements made by him were calculated to elicit the truth, and that the confession was voluntary, and we accordingly admitted the evidence.

The witness then proved that after the interview he charged the prisoner with embezzling the company's money, and one of the directors told the prisoner that he was in a very embarrassing position. The prisoner replied, "I know that; I will give the company all the assistance I can." He said, in answer to witness's charge, "Yes, I took it; but I do not think it is more than 1000%. It might be a few pounds more." No statement was made to the prisoner that the confession would save him from prosecution; there was no threat or promise.

Subsequently the prisoner made out a list of moneys which he admitted had not been accounted for by him. This list we also admitted in evidence.

The prisoner was convicted and sentenced to three years' penal servitude.

The question for the opinion of the Court is whether the evidence of the confession was properly admitted.

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The case having been sent down for amendment, the following statement was added :—

At a meeting of the directors a question was asked by one of the directors as to the value of the stock on a farm occupied by the prisoner's brother, and it was suggested that a bill of sale over the stock should be given. The prisoner stated that the worth of the stock was over 1000*l.*, but that he could not accept the suggestion about the security without telling his brother. At the same meeting the prisoner said, "My brothers have got it" (meaning the money); "it has gone to pay interest on mortgages." Mr. Crewdson said, "I never agreed not to prosecute, if a bill of sale were given."

After the charge was made, 340*l.* was received from the prisoner, together with some money and an I.O.U. for 25*l.*, which were found in the cash-box. Of the sum of 340*l.*, 90*l.* was paid into the bank by the prisoner, and 250*l.* by his brother. Mr. Crewdson stated that no arrangement was made as to the discrepancy being treated as a debt, and that the sum paid was simply by way of restitution.

Shee, Q.C., and *Cavanagh*, for the prisoner. Evidence of the confession was not admissible. In the absence of proof by the prosecution that it was voluntary, evidence of a confession cannot be received : *Reg. v. Baldry* (1); *Reg. v. Warringham*. (2) Here no such proof was given. It has been repeatedly held that proof of the use of such an expression as "it is better to tell the truth" by a person in authority excludes evidence of a confession : *Reg. v. Gillis* (3); *Reg. v. Garner* (4); *Reg. v. Bate and Others* (5); *Reg. v. Doherty* (6); *Reg. v. Fennell*. (7) The finding that the words were "calculated to elicit the truth" shews that they operated as an inducement, by conveying to the accused that he would find it advantageous to admit his guilt. A confession shewn to have been brought about by such an inducement cannot be proved (3 Russell on Crimes, pp. 441, 442, 5th ed.).

Segar (with him, *C. M. Wilson*), for the prosecution. Evidence

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| (1) 2 Den. C. C. 430. | (4) 1 Den. C. C. 329. |
| (2) 2 Den. C. C. 447, n. | (5) 11 Cox C. C. 686. |
| (3) 11 Cox C. C. 69. | (6) 13 Cox C. C. 23. |
| (7) 7 Q. B. D. 147. | |

of the confession was admissible. It is not shewn that what passed between the prisoner's brother and the prosecutor was communicated to the prisoner. The words used were also advice on moral grounds. Confessions preceded by exhortations of this kind were held admissible in *Reg. v. Jarvis* (1), and *Reg. v. Reeve*. (2) The justices have found that the confession was voluntary, and it was for them to decide what words were used, and whether they were repeated to the prisoner in such a manner as to convey a promise or threat. Evidence of a confession is *prima facie* admissible, and can only be excluded upon proof by the prisoner that the confession was not voluntary.

[They also cited *Rex v. Court* (3); *Reg. v. Moore* (4); and *Rex v. Clewes*. (5)]

Shee, in reply.

Cur. adv. vult.

April 29. The following judgment was read by

CAVE, J. The question in this case is whether a particular admission made by the prisoner was admissible in evidence against him. This is a question which must necessarily arise for decision in a number of cases both at petty and quarter sessions; and to my mind it is very unsatisfactory that the principle which must guide the decision of magistrates in these cases should be loosely or confusedly interpreted.

Many reasons may be urged in favour of the admissibility of all confessions, subject of course to their being tested by the cross-examination of those who heard and testify of them; and Bentham seems to have been of this opinion (*Rationale of Judicial Evidence*, Bk. v., ch. vi., s. 3). But this is not the law of England. By that law, to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible. On this point the authorities are unanimous. As Mr. Taylor says in his *Law of Evidence* (8th ed. Part 2, ch. 15, s. 872), "Before any confession can be received in

(1) Law Rep. 1 C. C. R. 96.

(3) 7 C. & P. 486.

(2) Law Rep. 1 C. C. R. 362.

(4) 2 Den. C. C. 522.

(5) 4 C. & P. 221.

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evidence in a criminal case, it must be shewn to have been voluntarily made; for, to adopt the somewhat inflated language of Eyre, C.B., '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:' *Warickshall's Case*. (1) The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the judge, who will require the prosecutor to shew *affirmatively*, to his satisfaction, that the statement was *not* made under the influence of an improper inducement, and who, *in the event of any doubt subsisting on this head*, will reject the confession."

The case cited in support of this proposition is *Reg. v. War- ringham* (2), where Parke, B., says to the counsel for the prosecution: "You are bound to satisfy me that the confession which you seek to use against the prisoner was *not* obtained from him by improper means. I am not satisfied of that; for it is impossible to collect from the answers of this witness whether such was the case or not." Parke, B., adds, "I reject the evidence of admission, not being satisfied that it was voluntary." In *Reg. v. Baldry* (3) it is said by Pollock, C.B., that the true ground of the exclusion is not that there is any presumption of law that a confession not free and voluntary is false, but that "it would not be safe to receive a statement made under any influence or fear." He also explains that the objection to telling the prisoner that it would be better to speak the truth is that the words import that it would be better for him to say *something*. With this view the statutory caution agrees, which commences with the words: "You are not obliged to say anything unless you desire to do so." (4)

These principles are restated and affirmed by the present Lord Chief Justice in *Reg. v. Fennell* (5), in the following words:

(1) 1 Leach. C. C. R. 263, 4th ed. Spring Assizes in 1851.

(2) 2 Den. C. C. 447, n. The (3) 2 Den. C. C. 430, at p. 442.

report is from the MS. note taken by (4) See the Indictable Offences Act, Parke, B., at the trial at the Surrey 1848 (11 & 12 Vict. c. 42), s. 18.

(5) 7 Q. B. D. 147, at p. 150.

"The rule laid down in Russell on Crimes is that a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. It is well known that the chapter in Russell on Crimes containing that passage, was written by Sir E. V. Williams, a great authority upon these matters."

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If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, Is it proved affirmatively that the confession was free and voluntary—that is, Was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible.

In the present case the magistrates appear to have intended to state the evidence which was before them, and to ask our opinion whether on that evidence they did right in admitting the confession. Now there was obviously some ground for suspecting that the confession might not have been free and voluntary; and the question is whether the evidence was such as ought to have satisfied their minds that it was free and voluntary. Unfortunately, in my judgment, the magistrates do not seem to have understood what the precise point to be determined was, or what evidence was necessary to elicit it. The new evidence now before us throws a strong light on what was the object of the interview between Mr. Crewdson and the prisoner's brother and brother-in-law, why he made any communication to them, and why he expected that what he said would be communicated to the prisoner. There is, indeed, no evidence that any communication was made to the prisoner at all; but it seems to me that after Mr. Crewdson's statement, that he had spoken to the prisoner's brother and brother-in-law about the desirability of the prisoner making a clean breast of it, with the expectation that what he had said would be communicated to the prisoner, it was incumbent on the prosecution to prove whether

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any, and if so, what communication was actually made to the prisoner, before the magistrates could properly be satisfied that the confession was free and voluntary.

The magistrates go on to say that they inferred that the details of the interview would be, by which I suppose they intend to say that they inferred they were, communicated to the prisoner, which seems to have been the right inference to draw under the circumstances. They add that they found, as a fact, that the statements made by Crewdson were calculated to elicit the truth, and that the confession was voluntary. The first of these findings, if the ruling of Pollock, C.B., in *Reg. v. Baldry* (1) is, as I take it to be, correct, is entirely immaterial. The second finding, if it is a corollary from the first, does not follow from it, and, if it is an independent finding, is not warranted by the evidence; and, as the question for us is whether this finding was warranted by the evidence, I feel compelled to say that in my judgment it was not. Taking the words of Mr. Crewdson to have been, "It will be the right thing for Marcellus to make a statement," and that those words were communicated to the prisoner, I should say that that communication was calculated, in the language of Pollock, C.B., to lead the prisoner to believe that it would be better for him to say *something*. All this, however, is matter of conjecture; and I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation.

I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession;—a desire which vanishes as soon as he appears in a court of justice. In this

(1) 2 Den. C. C. 430, at p. 442.

particular case there is no reason to suppose that Mr. Crewdson's evidence was not perfectly true and accurate ; but, on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary, I think it ought not to have been received. In my judgment no other principle can be safely worked by magistrates.

LORD COLERIDGE, C.J., HAWKINS, DAY, and WILLS, JJ., concurred.

Conviction quashed.

Solicitors for the prosecution : *G. E. Cartmel, Kendal.*

Solicitors for the prisoner : *R. F. Thompson, Kendal.*

H. D. W.

[IN THE COURT OF APPEAL.]

HAIGH AND ANOTHER v. WEST.

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April 24.

Inclosure—Highway—Pasturage—Prescription—User—Presumption of Lawful Origin—Claim of Inhabitants of Parish to Land—Presumption of Grant to Trustees—Presumption of Enrolment—Presumption of Grant for purpose not requiring Enrolment—Charitable Uses Act (9 Geo. 2, c. 36)—Vesting of Property of Parish in Churchwardens and Overseers—59 Geo. 3, c. 12, s. 17—Statute of Limitations.

By an award made under an Inclosure Act passed in the year 1774 certain lands were allotted and certain roads set out as public highways. From a short time after the passing of the Act the pasturage of one of the roads set out was let annually by the inhabitants of the parish in vestry assembled. The money received from the tenants was devoted to different parochial purposes, and there had been no interference or claim by the lords of the manor until the present action, in which the plaintiff, as lord of the manor, claimed damages from the defendant, who was tenant to the vestry, for trespass in pasturing his sheep in the road. There was no evidence in whom the soil of the road was vested before the passing of the Inclosure Act. No grant of the road was produced, and there was no evidence of the enrolment of any such grant :—

Held (affirming the judgment of Charles, J.), that a lawful origin must be presumed from the long usage, and that the presumption was that the road was vested in some person or persons as trustees for the parishioners :

Held, further, that a presumption might be made either that the grant of the road had been enrolled, or that the grant had been made for some purpose which had since been lost sight of, but which did not require that the deed should be enrolled :—

Held, further, that the churchwardens and overseers, as trustees under