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WYOMING PROCEDURE RE ADMISSIBILITY OF CONFESSIONS†

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This presentation will deal primarily with the problem of procedure in Wyoming District Courts when an alleged confession of the accused is offered in evidence by the prosecution and objection is made by the accused on the ground, *inter alia*, that the confession is coerced and therefore inadmissible. For the purpose of this discussion, all confessions which are determined to be other than voluntary will be classified as "coerced"—for example, one induced by promise of leniency.

Professor Remington has dealt very skillfully with the effect of lack of assistance of counsel upon the admissibility of confessions, where assistance of counsel is constitutionally required, and I do not propose to touch upon that matter. Nor do I propose to trespass upon Mr. Hand's excellent treatment of the subject of unreasonable search and seizure and its effect upon the admissibility of evidence obtained thereby, although this, too, bears significantly upon the admissibility of confessions. My presentation is limited to the problem of voluntary versus coerced confessions, and the functions of the trial judge and the jury in connection therewith.

First of all, what is a confession? McKelvey[1] defines it simply as "admissions of guilt made by persons accused of crime." He makes it clear that such admissions must be express, or direct, rather than implied or circumstantial. As indicated by the definition, confessions are classified under the heading of admissions so far as the hearsay rule is concerned, and come in under the admissions exception to that rule. Because of their special character, however, courts, and to some extent legislatures, have seen fit to surround confessions with conditions and limitations above and beyond ordinary admissions, with the object of affording protection to an accused additional to the protection implicit in the terms of the admissions exception. These special conditions and limitations give rise to procedural problems when a confession is offered in evidence.

Circumstantial evidence of guilt of a crime and so-called "implied admissions" from acts and conduct are not classified as confessions, and their admissibility is not subject to the special rules pertaining to confessions.[2] Furthermore, extra-judicial statements of an accused which tend to connect him with a crime but which do not go so far as to constitute admissions of

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1. McKelvey, Evidence 221 (5th ed. 1944).
2. *Id.* at 223.

guilt are not confessions, and are to be treated as ordinary admissions. But if the admission is so serious as to be almost as persuasive of guilt as a full and complete confession would be, some courts apply the confession standards.[3] Wyoming is in this category.[4]

In the case of *Mortimore v. State*,[5] the defendant was charged with the first degree murder of his father. At the county jail, prior to the trial, the defendant admitted that he fired the shot which killed the father, but stated that he did so in order to protect a brother from imminent danger of death at the hands of the father. The prosecution offered in evidence, as a mere admission, defendant's statement that he had killed his father. The trial court admitted the statement over defendant's objection. The Wyoming Supreme Court said this:

> [W]hile a confession is generally restricted to statements acknowledging . . . guilt, and more exculpatory statements denying guilt are not confessions, a statement admitting an act essential to the crime charged and importing guilt, should not be treated as a mere admission receivable in evidence without a showing of its voluntary character . . . . To render the evidence of the statements admissible, it was necessary to show that they were freely and voluntarily made under the rules relating to confessions.[6]

The Supreme Court reached the conclusion that there was an adequate showing of the voluntary character of the statement, but reversed the conviction on other grounds.

It is obviously a question of degree, to be determined under the facts of each case, as to just how close to a confession a statement must be in order to qualify for "confession treatment" under the *Mortimore* case.

Starting from the basic rule that if the confession is voluntary it is admissible, whereas if it is coerced it is inadmissible, let us consider what happens, procedurally speaking, when the prosecution offers in evidence a statement of the accused which qualifies under the definition of confession as we have outlined it above. McCormick puts it this way:

> Under the usual practice, when the state offers a confession, a complete acknowledgment of guilt, the defendant may object on the ground that it has not been shown to have been voluntary, and if he does, the state has the duty of producing proof of voluntariness in a preliminary hearing on which the accused may offer counter-evidence. This is a time-consuming procedure, but one which is appropriate in determining the admissibility of a confession, as to which the liklihood of undue pressure is substantial.[7]

In Wyoming, the leading and probably the only case in which our procedure is described in some detail is *Clay v. State*.[8] The case has not since been cited or discussed by the Wyoming Supreme Court on this point, nor has research

3. MCCORMICK, EVIDENCE 234 (1954).
4. Mortimer v. State, 24 Wyo. 452, 161 Pac. 766 (1916) followed in State v. Mau, 41 Wyo. 365, 285 Pac. 992, 997 (1930); *accord*, Ashcraft v. Tennessee, 327 U.S. 274 (1946).
5. 24 Wyo. 452, 161 Pac. 766 (1916).
6. *Id.* at 768.
7. MCCORMICK, *supra* note 3, at 235.
8. 15 Wyo. 42, 86 Pac. 17 (1906), *reh. denied* 15 Wyo. 73, 86 Pac. 544 (1906).

disclosed any other Wyoming authority dealing with the problem. In addition, what was said in the *Clay* opinion was dictum.

In the *Clay* case the defendant was convicted of first degree murder of one George Gerber, who was a storekeeper on Front Street in Laramie, and who was known to keep money in a cigar box in the store. Following the discovery of the dead body of Gerber, one Dicey was arrested and jailed in Laramie on suspicion of murder, and defendant Clay was arrested and jailed in Cheyenne on suspicion of the same murder, because Dicey had made a statement implicating Clay. Using a ruse, the Cheyenne sheriff induced Clay to come with him to the jail in Laramie, and there suddenly confronted him with Dicey, defendant not having known that Dicey was in custody. Defendant thereupon blurted out a confession of the murder, and this was overheard by the Laramie and Cheyenne sheriffs. At the subsequent trial of Clay, the sheriffs apparently testified to his confession. The Supreme Court held that under these circumstances the confession was voluntary, and went on to comment on the procedure employed at the trial when the confession was offered in evidence. The opinion is not clear as to the details of the preliminary hearing on the voluntariness of the confession. In particular, it is not stated whether the preliminary hearing was conducted *in* the presence of the jury or *outside* the presence of the jury. The following portion of the opinion pertains to our problem:

> The object and purpose of a preliminary examination of this kind is to determine whether the incriminating statements ought in any event to go to the jury; and if it clearly appears that they were made under a promise of immunity from punishment, duress, or by putting in fear, then they should be excluded. If, however, it appears that such statements were voluntary, or the evidence is conflicting as to whether they were in fact voluntary, then, in either event, such statements should go to the jury, together with evidence of the facts and surrounding conditions at the time they were made, with instructions to determine their character, and if, from the evidence, the jury find that they were not voluntary, then to exclude them from their consideration; otherwise, to consider them with the other evidence in the case, and give them such weight as in their judgment they are entitled to. There was no error in permitting these statements to go to the jury . . . .[9]

The court reversed the conviction because it found that two of the instructions dealing with presumptions were erroneous and materially prejudicial to the accused. It will be noted that in the excerpt quoted from the opinion there was no mention of a requirement that the trial judge make a formal finding expressing his own conclusion as to the voluntariness of the confession. Thus, two unanswered queries relative to the preliminary hearing emerge from the opinion of the Wyoming Supreme Court in *Clay v. State*: (1) Should the hearing be held outside of the presence of the jury? (2) Must the trial judge make a formal finding as to the voluntariness of the confession, and communicate this finding to the jury?

9. *Id.* at 19.

The significance of these queries is evident when one contemplates the opinion of the United States Supreme Court in the recent case of *Jackson v. Denno*.[10] Jackson held up a hotel clerk in Brooklyn about 1 o'clock in the morning of June 14, 1960. After leaving the hotel he engaged in a gun battle with a policeman. The policeman died from one of the bullet wounds. Two of the policeman's shots hit Jackson, one in the liver and the other in the lung. Jackson hailed a cab which took him to the hospital. The shooting occurred after 1 A. M., and about 2 A. M., soon after his arrival at the hospital, a detective questioned Jackson. When the detective asked him his name, he replied, "Nathan Jackson. I shot the colored cop. I got the drop on him." At the same time he admitted the robbery at the hotel. The detective later testified that at this time Jackson was in strong condition, despite his wounds. At 3:55 A. M. he was given demerol and scopolamine (truth serum). Immediately thereafter, an assistant district attorney questioned Jackson in the presence of police officers and hospital personnel, and a stenographer recorded the questions and answers. By this time he had lost a good deal of blood. He again admitted the robbery, then said, "Look, I can't go on," but in response to further questions he admitted shooting the policeman and having fired the first shot.

At his later trial for first degree murder in a New York state court, the prosecution offered in evidence as confessions the statements made by Jackson at both 2 A. M. and at 3:55 A. M. Although defense counsel did not formally object to their admission, the United States Supreme Court, for various reasons, treated the situation as if a formal objection had been made on the grounds that the confessions were not voluntary. Jackson took the stand and gave an account of the robbery and the shooting that differed in important respects from his confessions. He testified that when questioned in the hospital he was in pain and gasping for breath, and that he was refused water and was told that the police would not let him alone until he gave them the answers they wanted, all of which the officers denied. He testified that he remembered the interrogation, but said he could remember neither the questions nor the answers. The defense attorney also argued that Jackson's responses at 3:55 A. M. were affected by the demerol and scopolamine, which the prosecution denied. Obviously, the facts presented an issue as to the voluntary character of the confessions.

The trial court submitted the issue of the voluntariness of the confession, or confessions, to the jury, along with the other issues in the case. The jury was instructed that if it found the confession involuntary, it was to disregard it entirely, and determine guilt or innocence solely from the other evidence in the case; alternatively, if it found the confession voluntary, it was to determine its truth or reliability and afford it weight accordingly. This was a typical application of what is called the "New York rule," or procedure, when an issue is raised as to the voluntariness of a confession offered in evidence by the prosecution.

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10. 378 U. S. 368 (1964).

The New York state court jury found Jackson guilty of first degree murder, and he was sentenced to death. The conviction was affirmed by the New York Court of Appeals,[11] with that court certifying that it had necessarily passed upon the voluntariness of the confessions, and had found that Jackson's constitutional rights had not been violated. The United States Supreme Court denied certiorari.[12] Jackson then filed a habeas corpus in the federal district court, claiming that the New York court procedure for determining the voluntariness of a confession was unconstitutional, and that in any event his confession was coerced. The federal district court examined the state court record and heard argument, but did not hold an evidentiary hearing, found that the confessions were voluntary, and that the New York procedure was constitutional.[13] The federal court of appeals affirmed.[14] The United States Supreme Court granted certiorari to consider the constitutionality of the New York procedure governing the admissibility of a confession alleged to be involuntary, and reversed, with Justices Clark, Harlan and Stewart dissenting, and with Justice Black dissenting in part. The majority held that the New York procedure violated the due process clause of the 14th Amendment.[15]

Exactly what was the New York procedure, or as it is usually called, "the New York rule?" We should observe, at the outset, that the New York rule is only one of several rules, each somewhat different from the others, whereby the admissibility of confessions is determined. Professor Bernard Meltzer, of the University of Chicago Law School, some years ago wrote an article[16] in which he identified and described four different views, or rules, followed in the various jurisdictions. The Court in the *Jackson* opinion seemed to place great reliance on the Meltzer article. According to the New York rule, as explained by the Court and Meltzer, when a confession is offered and objected to as being coerced, the judge holds a preliminary hearing on the voluntariness of the confession. He is not required to exclude the jury, "and perhaps is not allowed to do so."[17] At this hearing, testimony and other evidence bearing on voluntariness is taken. When it is over, if the judge deems the confession coerced *as a matter of law,* he excludes it, and presumably he instructs the jury to disregard it in arriving at a verdict.

> But if the evidence presents a fair question as to its voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from undisputed facts, the judge 'must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness.' (Footnote omitted). *Stein v. New York,* 346 U.S. 156, 172. If an issue of coercion is pre-

11. 219 N.Y.S.2d 621 (1961).
12. 368 U.S. 949 (1961).
13. 206 F.Supp. 759(S.D.N.Y. 1962).
14. 309 F.2d 573 (2d Cir. 1962).
15. 378 U.S. 368 (1964).
16. Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury,* 21 U. CHI. L. REV. 317 (1954).
17. *Jackson, supra* note 10, at 377 n.7.

> sented, the judge may not resolve conflicting evidence or arrive at his independent appraisal of the voluntariness of the confession, one way or the other. These matters he must leave to the jury.[18]

The Court emphasized, in *Jackson v. Denno*, that the New York jury returns only a general verdict upon the ultimate question of guilt or innocence, and that it is therefore impossible to ascertain whether the jury found the confession voluntary and relied upon it, or found it involuntary and supposedly ignored it. Furthermore, it is impossible to discover how the New York jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue.

When we compare Wyoming procedure as outlined in the *Clay* case with New York procedure as outlined in the *Jackson* case we are at once struck with the similarity of the two. As pointed out *supra*, what the Wyoming Supreme Court said in *Clay* leaves two unanswered questions of much importance in the light of *Jackson*: first, is the preliminary hearing to be held outside the presence of the Wyoming jury, and second, does the Wyoming trial judge make a formal finding as to the voluntariness of a confession which he allows to go to the jury, communicating this finding to the jury? It is interesting to note that Mr. Justice Black, who dissented in part and concurred in part, classified Wyoming as following the New York rule, on the basis of the *Clay* case.[19] The majority, consisting of Justices White (who wrote the opinion), Brennan, Douglas, Goldberg, and Chief Justice Warren, on the basis of *Clay v. State* classified Wyoming as being among "Those jurisdictions where it appears unclear from appellate court opinions whether the Massachusetts or New York procedure is used in the trial court. . . ."[20]

In addition to the New York rule there are two other main rules or procedures for determining the voluntariness of a confession—the "orthodox rule" and the "Massachusetts rule."[21] As briefly explained by Mr. Justice White,[22] under the former the judge himself solely and finally determines the voluntariness of the confession. Under the Massachusetts rule,

> the judge hears the confession evidence, himself resolves evidentiary conflicts and gives his own answer to the coercion issue, rejecting confessions he deems involuntary and admitting only those he believes voluntary. It is only the latter confessions that are heard by the jury, which may then, under this procedure, disagree with the judge, find the confession involuntary and ignore it.[23]

It seems evident that under the Massachusetts rule the preliminary hearing is conducted outside the presence of the jury.

In *Jackson v. Denno* the Court held that the New York rule violated the

18. *Id.* at 377.
19. *Id.* at 417.
20. *Id.* at 379 n. 8.
21. Professor Meltzer identified four rules rather than three, but his fourth rule is one in which the trial court is given discretion to follow the orthodox rule or the Massachusetts rule; see Meltzer, *supra* note 16, at 320. He pointed out a number of other variations which have existed in both state and federal courts.
22. *Jackson, supra* note 10, at 378.
23. *Ibid.*

due process clause of the Fourteenth Amendment. It approved the Massachusetts rule by way of dictum in a footnote,[24] and expressed no opinion concerning the constitutionality of the orthodox rule. Since Wyoming *may* follow the New York rule, a summary of the infirmities of the New York rule as enumerated in the majority opinion is in order:

(1) It provides no definite and separate decision of the coercion issue. After a verdict of guilty, the accused cannot know whether the jury found the confession voluntary, and took it into consideration in reaching the guilty verdict, or whether the jury found it coerced, presumably ignored it, and found sufficient evidence outside the confession to justify a guilty verdict. Thus, on appeal or in subsequent proceedings, the accused does not and cannot know what he is attacking.

(2) Possibly the confession serves as a make-weight in a compromise verdict—some jurors accepting the confession, others rejecting it but finding sufficient other evidence, and some jurors never reaching a separate conclusion as to the confession, but returning an unanalytical verdict based on all they heard.

(3) The jury gets all the evidence at once, including evidence which tends to prove the *truth* of the confession. The jury is inevitably influenced by evidence tending to establish the truth of the confession. Of course, the mere fact that a coerced confession is *true* does not qualify it for admission into evidence. Thus, evidence of the truth of the confession inevitably distorts the judgment of the jury on resolving conflicting evidence as to coercion. In this regard the Court quoted Professor Morgan's statement that "regardless of the pious fiction indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it."[25] The Court in the *Jackson* opinion regarded this third fault as being the most serious of all.

The United States Supreme Court had previously upheld the constitutionality of the New York Rule in *Stein v. New York*,[26] and much of the opinion in the *Jackson* case was devoted to a critical analysis of the *Stein* rationale. *Stein* was expressly overruled by *Jackson*.[27] The Court reversed the *Jackson* case and remanded it to the federal district court to allow New York a reasonable time to afford the accused either a proper hearing on the issue of coercion, or a new trial, with the observation that:

> Of course, if the state court, at an evidentiary hearing, redetermines the facts and decides that Jackson's confession was involuntary, there must be a new trial on guilt or innocence without the confession being admitted in evidence.[28]

The State apparently decided to give Jackson a new trial. Under date of April 4, 1965, the Associated Press reported that Jackson at a new trial

24. *Id.* at 378 n. 8.
25. *Id.* at 382 n. 10.
26. 346 U.S. 156 (1953).
27. *Jackson, supra* note 10, at 391.
28. *Id.* at 394.

had again been convicted of first degree murder; but the dispatch did not state whether or not the confessions were admitted in evidence at the second trial.

If Wyoming trial judges have been following the New York rule, it is obvious that this procedure can continue no longer. There appear to be three possible alternatives: the orthodox rule, the Massachusetts rule, or a procedure under which the trial judge has discretion to follow either the orthodox rule or the Massachusetts rule.[29] As to the first, although the Court in *Jackson v. Denno* did not pass upon its constitutionality, it should be satisfactory to the Court inasmuch as it meets all the objections to the New York rule voiced in *Jackson v. Denno.* If the orthodox rule should be adopted, then, in the event the trial judge determines that the confession was voluntary, the evidence surrounding the making of a confession ought to be presented to the jury; not on the issue of the voluntariness of the confession but on the issue of its credibility and weight. No matter which rule is applied, two requirements must be observed: (1) The preliminary hearing must take place outside the presence of the jury, and (2) The trial judge must make an express finding on the issue of voluntariness before this issue can be submitted to the jury. In approving the Massachusetts procedure the Court made the following observations:

> Given the integrity of the preliminary proceedings before the judge, the Massachusetts procedure does not, in our opinion, pose hazards to the rights of a defendant. While no more will be known about the views of the jury than under the New York rule, the jury does not hear all confessions where there is a fair question of voluntariness, but only those which a judge actually and independently determines to be voluntary, based upon all of the evidence. The judge's consideration of voluntariness is carried out separate and aside from issues of the reliability of the confession and the guilt or innocence of the accused, and without regard to the fact (that) the issue may again be raised before the jury if decided against the defendant. The record will show the judge's conclusions in this regard and his findings upon the underlying facts may be express or ascertainable from the record. Once the confession is properly found to be voluntary by the judge, reconsideration of this issue by the jury does not, of course, improperly affect the jury's determination of the credibility or probativeness of the confession, or its ultimate determination of guilt or innocence.[30]

Under the Massachusetts rule, if the judge finds the confession voluntary the confession testimony would then be repeated before the jury. The jury may thereafter disagree with the judge and find the confession coerced. This rule appears, then, to be a sort of compromise between the orthodox and the New York rule.

The United States Supreme Court's approval of the Massachusetts rule seems to me surprising in view of the criticisms which the Court voiced about the New York rule. As the Court itself admits, it cannot be determined under the Massachusetts rule, any more than it can be determined under the New York

29. As to the latter possibility see *supra* note 21.
30. *Jackson, supra* note 24.

rule, whether the jury agreed with the judge the confession was voluntary, and took it into account in arriving at a verdict, or whether the jury found it to be coerced, and presumably ignored it, but believed that there was sufficient evidence outside the confession to justify a verdict of guilty. When he attacks the verdict, the accused does not know what he is attacking under the Massachusetts rule any more than he knows what he is attacking under the New York rule. It seems to me also that the other two criticisms of the New York apply with equal force to the Massachusetts rule; that confession may serve as a make-weight in a compromise verdict, and that since the jury gets all the evidence at once, it will inevitably be influenced by evidence tending to establish the *truth* of the confession.

For Wyoming the *easy* way out (assuming no state constitutional obstacle) would be to go over to the orthodox rule; let the judge himself solely and finally determine the voluntariness of the confession. Wigmore favors this procedure,[31] and states that it "is well recognized in the majority of jurisdictions."[32] He cites, in support, cases from England, the 2nd and 7th federal circuits, and from 28 states. He adds, however, that " . . . in comparatively recent times the heresy of leaving the question to the jury has made rapid strides,"[33] and cites an almost equal number of jurisdictions, including many federal cases, in support of the latter statement. Some of the states are duplicated in both lists. His citations are suspect also because he cites *Clay v. State* as holding that the admissibility of a confession is a question solely for the judge![34] Wigmore does not identify the Massachusetts rule as separate and distinct from the New York rule. Meltzer, writing in 1954, cites only Rhode Island and Colorado as supporting the Massachusetts rule,[35] but indicates that his citations are not intended to be exhaustive.

The Massachusetts rule would have the merit, for Wyoming, of not constituting a radical departure from what we have done historically, and of retaining the jury as a component part of the procedure. In *People v. Huntley*,[36] a case subsequent to the *Jackson* case, the New York Court of Appeals expressly adopted the Massachusetts rule for New York. The *Huntley* opinion is a significant one since it recognizes the retroactivity of *Jackson v. Denno*, discusses the applicability of various post-conviction procedures, and lays down guidelines for trial courts. Limitations of time prevent a detailed discussion of the *Huntley* case in this presentation, but the opinion should be studied by all who are interested in this problem of procedure *re* the admissibility of confessions.

One other state which had followed the New York rule prior to *Jackson v. Denno* has, in the light of that decision, gone over to the Massachusetts

31. 3 WIGMORE, EVIDENCE §861 (3d ed. 1940).
32. *Ibid.*
33. *Ibid*
34. *Ibid.*
35. Meltzer, *supra* note 21, at 323.
36. People v. Huntley, 16 N.Y.2d 72, 204 N.E.2d 179 (1965).

rule.[37] On the other hand, two former "New York rule states" have recently selected the orthodox rule.[38] At the moment of this writing, then, the score stands at 2-2.

If Wyoming does adopt the Massachusetts rule, could we institute the practice of submitting to the jury a special interrogatory inquiring whether the jury accepted or whether it repudiated the trial judge's finding that the confession was voluntary? If this were done, then one of the greatest objections to both the New York and Massachusetts rules would be removed, namely, that we do not know, under either one, whether the jury found the confession voluntary and considered it in arriving at a guilty verdict, or whether it found the confession coerced and ostensibly ruled it out of consideration in arriving at the verdict. Dean Mason Ladd, a recognized authority on evidence, has observed that: "Conceivably a special interrogatory to the jury might solve the problem of the *Stein* case in determining whether the confession was voluntary. . . . This practice of using interrogatories has not been followed."[39] Rule 49(b) of the Wyoming Rules of Civil Procedure authorizes special interrogatories, and a Wyoming statute provides that: "The proceedings provided by law in civil cases as to . . . the manner of returning the verdict shall be had upon all trials on indictments, so far as the proceedings may be applicable, and when it is not otherwise provided."[40]

But at this point we encounter what seems to be an ambiguity in the *Jackson* opinion. In its dictum approval of the Massachusetts rule the Court definitely contemplates that the same jury which passes on the issue of voluntariness will be the jury which determines the ultimate guilt or innocence of the accused. Yet in a footnote at a later stage of the opinion this statement is made: "Whether the trial judge, another judge, or another jury, *but not the convicting jury* (emphasis supplied) fully resolves the issue of voluntariness is not a matter of concern here."[41] If this language is to be taken at face value, then the Massachusetts rule as it has heretofore existed would have to be modified by the requirement that if juries are to be used at all there must be two of them: one to pass upon the issue of voluntariness, and the other to pass upon the ultimate issue, either with or without the confession, depending upon the action of Jury No. 1; certainly a cumbersome, expensive and time-consuming procedure. It is to be hoped that the Supreme Court will clarify its position on this point.

It is likely that before long the Supreme Court of Wyoming will be called upon to solve, for our state, the orthodox-Massachusetts-New York rule dilemma. The legal profession will await the answer with great interest.

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37. State v. Brewton, 238 Ore. 590, 395 P.2d 874 (1964).
38. People v. Walker, 374 Mich. 331, 132 N.W.2d (1965); State v. Burke, ____Wis.____ 133 N.W.2d 953 (1965).
39. LADD, CASES AND MATERIALS ON EVIDENCE 504 (2d ed. 1955).
40. WYO. STAT. §7-237 (1957).
41. *Jackson, supra* note 10, at 391 n. 19.