Journal of Criminal Law and Criminology

Volume 22
Issue 1 *May*

Article 6

Spring 1931

Recent Criminal Cases

RECENT CRIMINAL CASES

Compiled and Edited by the
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CRIMINAL PROCEDURE—WAIVER OF TRIAL BY JURY IN FELONY CASES.—[Illinois] The principal case arose on an original petition in the name of the people of the State of Illinois, on the relation of John A. Swanson, state's attorney of Cook County, for a writ of mandamus against Harry M. Fisher, judge of the circuit court of Cook County and ex officio judge of the criminal court of the same county. The petition alleged that an indictment was returned in the criminal court of Cook County charging one Albert Weinberg with the crime of rape; that on arraignment he pleaded not guilty and waived a jury trial, and submitted the case to the court; that the respondent heard the testimony of witnesses, found the defendant not guilty, and rendered judgment in accordance with that finding. The prayer of the petition was for a writ of mandamus commanding the respondent to expunge from the records of the criminal court all the proceedings resulting in Weinberg's discharge on the ground that on the particular indictment the respondent had neither authority to permit the waiver of the jury trial, nor jurisdiction to hear and determine the cause on such waiver, with the result that all the proceedings complained of were void. Writ denied. *Held:* Trial by jury is a right which may be waived by the defendant in a felony case, upon a plea of not guilty, provided he waives the right expressly and intelligently and receives the sanction of the court, and the court, upon such waiver, may then proceed, without the intervention of a jury, to hear and determine the case and pronounce judgment: *People* v. *Fisher* (Illinois 1930) 172 N. E. 722.

This holding is a complete reversal of the Illinois law on this point. Prior to the principal case the Supreme Court had held repeatedly that there could be no waiver of a jury trial in felony cases in which the defendant had pleaded not guilty: *Harris* v. *People* (1889)

128 Ill. 585, 21 N. E. 563; *Morgan* v. *People* (1891) 136 Ill. 161, 26 N. E. 651. However, in the princpal case, *Harris* v. *People,* supra, and *Morgan* v. *People,* supra, were specifically overruled. The reasoning in the principal case follows closely that which was used in a late case similarly decided by the Supreme Court of the United States: *Patton* v. *United States* (1930) 281 U. S. 276, 50 S. Ct. R. 253, 74 L. ed. 854. That case likewise was a reversal of previous Federal holdings. There is a distinction to be noticed between the principal case and *Patton* v. *United States,* supra, however. The Patton case required an express and intelligent waiver by the accused, but it was not to be effective unless the consent of the court and *of government counsel* were obtained. The principal case does not require the sanction of the state's attorney. This seemingly unimportant difference assumes increased importance when it is realized that one of the strongest arguments in favor of the allowance of such a waiver in felony cases is that it is to the advantage of the defendant in many cases, that he be allowed to waive a jury trial, e. g., where there is a strong public sentiment against the defendant either because of his race, color, religion, or the heinousness of the crime that was committed. Consent of the state's attorney might be very difficult, if not impossible to obtain under such circumstances.

The question of trial without jury at the option of the defendant has resulted in two lines of holdings in the various state jurisdictions. It rests, in the ultimate analysis, on whether the particular state constitution, either expressly, or impliedly, by interpretation, allows such a waiver. Where there is an express provision made for a waiver in the constitution there is no great question raised, as in the following states: *Arkansas,* Const., 1874, Art. II, sec. 7; *California,* Const., 1879, Art. I, sec. 7, Amendment of Nov. 6, 1928; *Maryland,* Const., 1867, Art. IV, sec. 8, Code, 1924, Art. 75, sec. 109; *Minnesota,* Const., 1857, Art. I, sec. 4; *North Carolina,* Const., 1876, Art. IV, sec. 13; *Oklahoma,* Const., 1907, Art. IV, sec. 20; *Wisconsin,* Const., 1848, Art. I sec. 5. Several of these state constitutions read "in all cases in the manner prescribed by law" and in these the statutes have generally limited the waiver to misdemeanors; *Arkansas,* Dig. of Statutes, 1921, sec. 3086; *California,* Pen. Code, 1925, sec. 1042; *Minnesota,* no statute found. Also certain states allow by statute waiver in all cases either with or without express permission in the constitution: *Connecticut,* Pub. Acts, 1927, ch. 107 (Amendment to sec. 6641 of Gen. Statutes, 1918); *Indiana,* Burns Stat., 1926, sec. 2299; *Maryland,* Code, 1924, Art. 75, sec. 109; *Michigan,* Pub. Acts, 1927, No. 175, ch. III, sec. 3, and ch. VIII, sec. 8; *Wisconsin,* Sess. Laws, 1925, ch. 124, p. 186; *Washington* (in all but capital cases), Rem. Comp. Stat., 1922, sec. 2144.

Where there are no express provisions the interpretations vary with the wording of the constitution, because of the conflicting views as to whether trial by jury is a formal part of the governmental machinery, whether it is against public policy to allow a waiver, or whether trial by jury is such a fundamental right that it cannot be waived. As an illustration, some constitutions contain the clause "the accused shall have the right to a trial by jury"; *Illinois,* Const., 1870, Art. II, sec. 5.

One view, as illustrated by the principal case, has been to construe this "right to a trial by jury" as a personal privilege which may be waived by the defendant. Those jurisdictions which adopt this view, usually have construed the more mandatory type of provision, "trial of all crimes shall be by jury," which generally accompanies the former, to be merely directory as is illustrated by *Patton* v. *United States,* supra. But other jurisdictions have construed this right, as at common law, to be so vital to the public interest as to prevent a waiver by the accused: *Cancemi* v. *People* (1858) 18 N. Y. 128; *People ex rel Battista* v. *Christian* (1928) 249 N. Y. 314; *Hill* v. *People* (1868) 16 Mich. 351; *State* v. *Lockwood* (1877) 43 Wis. 403. (The last two cases are not the law of Michigan and Wisconsin today, but are illustrative of the views which those jurisdictions once had on this subject.) However, other decisions have been made, more satisfactorily reasoned, it is believed, which have considered this objection and have concluded even though this may have been true at common law the reasons for it no longer exist. At that time the criminal law was so strict and harsh that such protective guarantees as trial by jury, the inability to waive it, etc., were fundamentally necessary to provide a fair trial for the accused. The conditions existent during that period, which made the rule necessary, have been eliminated, hence the rule need not be retained: *Patton* v. *United States,* supra; *Hack* v. *State* (1910) 141 Wis. 346, 124 N. W. 492: (Illustrates a further development of Wisconsin law on this subject). Another argument against the doctrine expressed in *Cancemi* v. *People,* supra, is that since the accused may plead guilty, which impliedly waives a jury trial and allows the court to pass judgment, there is no good reason why a plea of not guilty and an express waiver of a jury trial should not be allowed: *State* v. *Kaufman* (1879) 51 Iowa 578, 2 N. W. 275. A further argument against the allowance of a waiver of jury trial is that a jury is part of the formal governmental machinery and the trial of a felony case without a jury leaves the court without jurisdiction because a fundamental part of the trial has been omitted: *State* v. *Ellis* (1900) 22 Wash. 129, 60 Pac. 136; *State* v. *Mansfield* (1867) 41 Mo. 471; *Michaelson* v. *Beemer* (1904) 72 Neb. 761, 101 N. W. 1007; In re *McQuown* (1907) 19 Okla. 347; *Warwick* v. *State* (1886) 47 Ark. 568, 2 S. W. 335. This argument is rebutted by the fact that on a plea of guilty, the court alone may pronounce judgment, and thus, if a jury is an integral part of the governmental machinery it is difficult to see how any judgment so given can be upheld: *State* v. *Kaufman,* supra; *Patton* v. *United States,* supra. Furthermore, the recognition of the defendant's right to waive trial by jury in misdemeanor cases is one of the most commonly accepted doctrines in the criminal procedure of all the State and Federal courts today. The absence of a jury should leave the court without jurisdiction here as well, if the reasoning mentioned is followed to its logical conclusion.

It is believed that the holding in the principal case is a sound one, for many reasons. One writer, after an analysis of the various types of state constitutions, has come to the conclusion that most of the prevailing constitutional provisions pertaining to the jury are subject to the interpretation that trial by jury

is a privilege which the accused has the power to surrender at his option in all criminal cases: Oppenheim, "Waiver of Trial by Jury in Criminal Cases" (1927) 25 Michigan Law Rev. 695. The construction that it is a privilege represents the tendency in the decisions: *Ibid.* The reason behind the rule of the common law that such a waiver is against the public interest began to disappear when Sir Samuel Romilly began his reforms which made the criminal law less harsh and rigid. Construing the right to a trial by jury as a privilege which may be waived does not decrease the rights of an accused, but, on the contrary, increases them. Under the holding in the principal case an accused cannot be forced to accept a jury trial in a community where the public is prejudiced against him, thus avoiding a serious risk of conviction from a jury, which is more apt to be swayed by prejudice than is a judge. The following statistics (taken from *Bundick,* "Trial Without Jury" (1930) 36 Case and Comment 26) were issued by the state's attorney of Baltimore City, which has allowed waiver of trial by jury for many years:

"Years	*Jury Trial*	*Cases Handled Directly by Court*
1924	180	4,326
1925	205	4,347
1926	271	3,774
1927	229	4,588
1928	115	4,531
1929	237	4,374."

This shows that the great majority of accused persons prefer to be tried by the presiding judge instead of by a jury. And not only does the allowance of a waiver of jury trial aid accused persons, but it facilitates the handling of criminal cases generally, which are slow at best, by eliminating the slow, tedious process of selecting a jury, and by eliminating technicalities in the admission of evidence.

ORRIN C. KNUDSEN.

RAPE—MENTAL CAPACITY TO CONSENT.—[California] Defendant was charged with the rape of a woman twenty-two years old, the information alleging that the prosecutrix was "incapable of giving legal consent to said act of sexual intercourse by reason of her being of unsound mind." An appeal was taken from a conviction and an order denying a new trial, defendant urging that the evidence was insufficient to show that the prosecutrix was incapable of giving legal consent. The mother of the prosecutrix was insane and had been committed to a state hospital. All of the witnesses agreed that the prosecutrix was of subnormal mentality. However, she had kept house for her father and brother for several years, and at the time of the acts in question was attending high school, though making slow progress. The Court in reviewing the evidence concluded that the prosecutrix seemed to know what constituted the physical act and that pregnancy might result therefrom, but that she apparently had little conception of other serious consequences which would follow. The reason prosecutrix gave for submitting to the act was that "If I didn't let him do it he would just stand there all day and not let me get anything done for I was busy—." *Held* on appeal, that the evidence was not insufficient to show that the prosecutrix was incapable of giving legal con-

sent: *People* v. *Boggs* (Cal. 1930) 290 P. 618.

In the words of the court, "Whether the woman possessed mental capacity sufficient to give legal consent must, saving in exceptional cases, remain a question of fact for the jury. It need but be said that legal consent presupposes an intelligence capable of understanding the act, its nature, and possible consequence. The understanding referred to must, of course, be an intelligent understanding and the consequences include more than the mere physical consequences."

In this discussion, only the consent element in rape will be considered. A woman may be so mentally deficient as to be incapable of giving what is called "legal consent" to the act of intercourse even though she give actual consent. We are here concerned chiefly with the extent of the unsoundness of mind on the part of the woman necessary to render her "legally" incapable of consenting to the act, and the tests given the jury to aid them in determining the capacity to consent.

In the first place, the question of capacity to consent is one for the jury to decide with the aid of instructions from the Court. The judge can offer no mechanical measuring device, no practical standard of the necessary mental capacity to consent; actually the judge offers little help other than through instructions framed with phrases so general as to be almost of no assistance. In general, a woman is said to be capable of legal consent when she is capable of "understanding and appreciating the act committed, its immoral character, and the probable or natural consequences which may attend it": *Note* L. R. A. 1916 F742, 744.

A woman with less intellect than is required to make a contract may so consent to a carnal connection that it will not be rape: *Bishop* "Criminal Law" (9th ed. 1923) sec. 1121-1; and the mere fact that a woman is weak-minded does not disable or debar her from consenting to the act: *McQuirk* v. *State* (1887) 84 Ala. 435, 4 So. 775. Even though of unsound mind, if the woman yields to the act from animal passion, many courts hold that the act is not against the will or without consent: *State* v. *Tarr* (1869) 28 Iowa 397; Ann. Cas. 1912 B 1049.

This raises the question whether ignorance on the part of the defendant of the mental deficiency of the woman is an excuse. In *People* v. *Griffin* (1897) 117 Cal. 583, 49 P. 711, it was held that such ignorance is no defense, but the weight of authority seems otherwise: *Missouri* v. *Helderle* (Mo. 1916) 186 S. W. 696; *Ress* v. *Shepherd* (1909) 84 Neb. 268, 120 N. W. 1132; *Beaven* v. *Commonwealth* (1895) 17 Ky. L. Rep. 246, 30 S. W. 968; *Wharton* "Criminal Law" (11 ed. 1912) sec. 703; *Brill* "Cyclopedia Criminal Law" (1923) sec. 889. In some states, as in Minnesota, where the statute declares that it is rape to have intercourse with a female incapable, through unsoundness of mind, of giving consent, the question of knowledge on the part of the defendant of such mental condition is held to be dispensed with by the statute: *State* v. *Dombroski* (1920) 145 Minn. 278, 176 N. W. 985.

A review of the cases involving mental capacity to consent would disclose no workable standard to aid in the decision of other cases. But in no one of the cases in which the woman was found incapable of consent do we find an intellect so near normal as in the instant case. Gen-

erally, the women concerned were idiots or imbeciles incapable of coherent speech, unable to care for themselves or to understand or respond to questions.

The following are typical of the tests of mental capacity generally applied by the courts. "The test of mental capacity of a woman to consent to sexual intercourse . . . is whether she was capable or incapable of exercising judgment in the matter": *Wharton* and *Stille* "Medical Jurisprudence" (5th ed. 1905) sec. 203; *Clevenger* "Medical Jurisprudence of Insanity" (1893) vol. 10, 201; *Reg.* v. *Barratt* (1873) 12 Cox C. C. 498. "This mental incapacity must reach the point where the woman is incapable of expressing any intelligent assent or dissent": *Morrow* v. *State* (1913) 13 Ga. App. 189. Another test is the incapability of "'understanding the moral nature of the act, or of giving assent thereto": *State* v. *Warren* (1910) 232 Mo. 185, 200, 134 S. W. 522. "Though you find her of weak mind, yet if she was capable of exercising her will sufficiently to control her personal actions, and if she acquiesced in the connection, the defendant would not be guilty": *State* v. *Tarr,* supra. "All females who, by reason of mental unsoundness, are so far deprived of the power to form or entertain an intelligent opinion on the subject, of realizing the nature and moral wrong of the act, and the possible consequences thereof to them": *State* v. *Dombroski,* supra. "Those who, by reason of mental inferiority are incapable of knowing or realizing the moral quality of the act, and are therefore also incapable of giving rational consent" is a test applied to a statute in respect to females "of imbecility of mind": *State* v. *Haner* (1919) 186 Iowa 1259, 1262, 173 N. W. 225. In *Lee* v. *State* (1901) 43 Texas Cr. 285, 286, 64 S. W. 1047, where the words in the statute were: "a woman being so mentally diseased at the time as to have no will to oppose the act," the test given was: "the intellect must be so broken down or destroyed by disease as not to know the right or wrong of the particular act, or knowing the right and wrong thereof, on account of mental disease not able to oppose the will to the act of carnal intercourse."

The determination of the existence or non-existence of mental capacity to consent to intercourse is a difficult one: *Puttkammer* "Consent in Rape" (1925) 19 Ill. Law Rev. 410. For that reason it seems unjust to criticize a court for refusing to disturb the verdict of a jury on that question, but it is submitted that in the instant case of *People* v. *Boggs,* the court affirmed a conviction for the rape of a woman who in most of the courts in the United States and England would have been found to be mentally capable of legal consent. We have a woman who, though of subnormal intelligence, was attending high school and was taking care of a house, a woman who knew the nature of the act and that pregnancy might result therefrom. Here, by reason of having "little conception of other serious consequences which would follow," the woman was held mentally incapable of consent, with the result that the defendant, though having actual consent, was held guilty of rape, one of the most serious offenses known to the law, and one carrying with it a punishment correspondingly severe.

ABRAHAM FISHMAN.

CRIMINAL LAW — FORGERY — INDORSING A CHECK UNDER AN ASSUMED NAME FOR PURPOSES OF FRAUD.—[Illinois] The defendant, a margin clerk in the main office of a brokerage firm, opened an account in a branch office of that company under the name of a personal friend, H. L. Oppenheimer, who neither knew of nor authorized such a transaction. Although, by the brokerage company's rules, no accounts were to be taken under false names and without proper marginal deposits, various buying and selling orders in the account were placed by the defendant and subsequently approved by him as margin clerk with no collateral deposited to cover the margins. By such manipulations the Oppenheimer account had been built up to a balance of about $1,850, when the defendant caused the cashier to issue to him a company check for that account payable to Oppenheimer. The check was then indorsed "Oppenheimer" by the defendant and the money appropriated by him. On an idictment for forging the indorsement and uttering the check, the defendant was convicted of forgery. *Held,* on appeal, that the judgment be affirmed, the facts of the offense charged sufficiently stating a case of forgery: *People* v. *Dwyer* (Ill. 1930) 173 N. E. 765.

The principal defense contention, as argued upon appeal, was that the foregoing facts did not establish a case of forgery, and that the offense was rather that of obtaining money under false pretences. The statutory definition of forgery is: "Every person who shall falsely make, alter, forge, or counterfeit any . . . check, draft, bill of exchange . . . or shall utter, publish, pass, or attempt to pass as true and genuine . . . knowing the same to be false, altered, forged, or counterfeited with intent to prejudice, damage, or defraud any person, body politic or corporate . . . shall be deemed guilty of forgery . . ." Ill. Rev. Stat. (Smith Hurd 1929) ch. 38, sec. 277. Under this statute, three essential elements must be present to constitute a forgery, namely, (a) a false writing or alteration of an instrument, (b) the instrument as made must be apparently capable of defrauding and (c) there must be an intent to defraud: *Goodman* v. *People* (1907) 228 Ill. 154, 81 N. E. 830. That the instrument is apparently capable of defrauding implies that it contains "an absolute, unconditional promise or obligation to pay a sum of money or personal property": *Shirk* v. *People* (1887) 121 Ill. 61, 11 N. E. 888, or again, that it has apparent legal efficacy: *White* v. *Wagar* (1900) 185 Ill. 195, 57 N. E. 26. The intent to defraud must be found by the jury from the facts, but the incident of the falsely made instrument being uttered usually indicates such an intent: *Fox* v. *People* (1880) 95 Ill. 71. These latter two elements of forgery are, as the court found, undoubtedly present in the principal case. The check, if genuine, imports an absolute obligation in the maker; the intent to defraud is found in the defendant's violation of the company's rules in dealing under a false account and without margin deposit, and in the improper procuring and uttering of the check payable to Oppenheimer.

The case of *People* v. *Pfeiffer* (1910) 243 Ill. 200, 90 N. E. 680 is instructive as to what the statute contemplates as a "false writing." There, a trustee falsely represented to the makers of notes that the notes had been lost. As a result, duplicates were issued which were sold

by the trustee and the money received thereon converted. The trustee did not indorse or alter these notes and the court found the transaction was not a forgery. The distinction must be made between an instrument which is fraudulently signed (forgery) and a genuine instrument which the maker is induced to execute through the fraud and misrepresentation of another (false pretences): ibid., 205. Ill. Rev. Stat. (Smith Hurd 1929) ch. 38, sec. 277 is substantially the common-law definition of forgery: *People* v. *Adams* (1921) 300 Ill. 20, 132 N. E. 765. And under the common-law and in those states adopting the common-law statement, the instrument or signature alleged to be forged must purport to be the act of another than the party signing: *Goucher* v. *State* (1925) 113 Neb. 352, 204 N. W. 967, note 41 A. L. R. 229, 231; *Commonwealth* v. *Costello* (1876) 120 Mass. 358; *Commonwealth* v. *Foster* (1873) 114 Mass. 311; contra *Luttrell* v. *State* (1886) 85 Tenn. 232, 1 S. W. 886. In the absence of any restrictive statute, it is the common-law right of a person to change his name: *Loser* v. *Plainfield Savings Bank* (1910) 149 Ia. 672, 128 N. W. 1101. The mere assumption of a name without intent to deceive as to the identity of the signer is not forgery: *Commonwealth* v. *Costello,* supra at 371. This distinction was pointed out by Lord Mansfield in an early case—"if a person gave a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit being given wholly to himself, without any regard to the name." But where the instrument gains a "superior credit" as that of another, then forgery is committed: *Rex* v. *Dunn* (1765) 1 Leach, C. L. 57.

The inquiry then is whether, in the principal case, the defendant's taking of the assumed name was with the intent to deceive as to his identity and so was of the essence of the fraud. His position was such that, had he opened the account in his own name, upon discovery of a falsification in the company's books with respect to that account, suspicion would have been immediately directly toward him. The assumption of a false name was the most expeditious method of avoiding detection in the event that the shortage should be found. The fact that the opening of a false account was contrary to the company's rules, is additional evidence of the defendant's deceptive intent. Forgery has been found where the party's sole intent in indorsing under an assumed name was to prevent the owner from tracing his property: *Rex* v. *Taft* (1777) 1 Leach, C. L. 172. In the leading case of *Oregon* v. *Wheeler* (1890) 20 Ore. 192, 25 Pac. 394, an imposter drove up a team of horses and desired to make a chattel mortgage on them in return for a loan. The real party, whose name the imposter has assumed, was unknown to the maker of the loan, but the court, in finding forgery in the indorsement of the note, thought the name had been assumed for purposes of deception.

Oregon v. *Wheeler,* supra, has been criticized on the basis that the presence of the horses and not the name of the owner was the motivating factor in leading to the loan: *Brown* "The Forgery of Fictitious Names" (1896) 30 Am. L. Rev. 500, 511. The author of this article prefers to determine the presence or absence of forgery by the intention of the defrauded party rather than the intention of the alleged forger, though he cites no criminal

cases resembling the principal case where such a test has been applied. On general principles, it would seem manifestly unfair to the defendant to measure his criminality by the intent of another person. It is true that, in determining civil liability where a check is given to an impostor, the courts may find an intention of the drawer to give the check to the impostor, thus protecting the drawee at the expense of the drawer: *Land Title & T. Co.* v. *Northwestern Nat. Bank* (1900) 196 Pa. 230, 46 Atl. 420; *Robertson* v. *Coleman* (1886) 141 Mass. 231, 4 N. E. 619. But, perhaps illogically, the majority of such cases refer to the indorsement by the impostor to whom the check was "intentionally" given as forgery: see cases cited Note 22 A. L. R. (1923) 1228; Note 52 A. L. R. (1928) 1326. In effect then, it has seemed to make no difference with respect to the criminal offense found to be present whether the intention of the defrauded party or the forger be used as a criterion and there can be no objection to the court's following precedent in the principal case in finding the gist of the forgery to be in the assumption and signing of a false name which purports to be that of another.

JACK G. BOYLE.

CRIMINAL LAW — SENTENCE — BANISHMENT—PROBATION.—[Michigan] The defendant was convicted of violating the Michigan liquor law, a felony, and the court's sentence imposed a fine and declared that the defendant "must leave the State of Michigan within thirty days and not return for the period of probation" fixed at five years. *Held*, on appeal, that the portion of the sentence providing for banishment from the State should be reversed since there was no statutory authority for such a sentence and the penalty of banishment would be impliedly prohibited by public policy as tending to incite dissension, provoke retaliation, and disturb the fundamental equality of political rights among the states: *People* v. *Baum* (1930) 251 Mich. 187, 231 N. W. 95.

Cited in the opinion, and apparently the only other case of direct banishment to be found, is *State* v. *Baker* (1900) 58 S. C. 111, 36 S. E. 501. In that case the defendant was sentenced to seven years imprisonment of which he was to serve five years and, thereupon, be released upon condition that he should serve the remaining two years if he ever re-entered the state. In reversing the banishment terms of this sentence, the appellate court said it recognized no right in the trial judge to sentence a criminal to perpetual banishment.

The practical equivalent of banishment has been accomplished by means other than direct sentence. In *State* v. *Hatley et al.* (1892) 110 N. C. 522, 14 S. E. 751, the trial court after imposing sentence, declared the capias, by which the convicted persons were to be taken into custody to serve their sentence, would not issue if they left the state within thirty days. Defendants departed from the state but later returned and were imprisoned. Upon the issue raised on writ of certiorari, the court declared that "the judgment . . . cannot be fairly construed as a judgment of banishment, if so, it would be void," and denied the writ. Cf. In re *Hinson* (1911) 156 N. C. 250, 72 S. E. 310. Moreover, the same result as banishment has been obtained in cases of pardons granted and ac-

cepted on condition that the criminal depart from and remain outside the state: *State ex rel. O'Connor* v. *Wolfer* (1893) 53 Minn. 135, 54 N. W. 1065; Ex parte *Hawkins* (1895) 61 Ark. 321, 33 S. W. 106; *State* v. *Barnes* (1890) 32 S. C. 14, 10 S. E. 611, 17 Am. St. Rep. 832. For further annotations, see: (1892) 14 L. R. A. 286, 287, 288; (1907) 7 Ann. Cas. 92, 93; (1884) 59 Am. Dec. 576; (1907) 111 Am. St. Rep. 111.

If public policy is the ground for objection to the sentence of banishment in the principal case, it would seem to apply with equal efficacy to cases of withholding a capias for taking the sentenced criminal into custody and to cases of pardons granted on condition that the criminal remain outside the state. The true reason for reversal appears to be absence of statutory authority for such a sentence. For decisions declaring that a sentence of a different character from that authorized by law is void if it exceed the maximum permitted, see: Ex parte *Clarke* (Okla. Cr. Ct. App. 1925) 236 Pac. 66; *State* v. *McMahon* (Iowa 1926) 211 N. W. 409; *United States* v. *Holtz* (E. D. N. Y. 1923) 288 Fed. 81, affirmed sub nomine *Holtz* v. *United States* (C. C. A. 2nd 1923) 293 Fed. 1019 (memorandum decision). Based on this ground the principal case seems to be correctly decided.

A state statute authorizing banishment apparently would not be particularly objectionable. A possible reason discountenancing banishment, that such punishment would be cruel and unusual, has been removed. See *United States* v. *Ju Toy* (1905) 198 U. S. 253, 269, 270; *Fong Yue Ting* v. *United States* (1893) 149 U. S. 698, 708, 709; *Legarda* v. *Valdez* (1902) 1 Philippines 146, 149. Such a state statute, however, might be held to conflict with certain rights of citizenship accruing under the Federal Constitution. In conclusion, certain arguments to combat a banishment statute might be suggested, namely, rights of Federal citizenship as distinguished from State citizenship include the right of free passage throughout the Union, the right to travel in interstate commerce or use navigable waters.

D. V. LANSDEN.

PARDON — CONVICTION AS SECOND OFFENDER WHEN PARDONED FOR FIRST OFFENSE.—[Louisiana] Defendant was granted an absolute pardon after serving sentence for the crime of embezzlement in Texas. Subsequently in Louisiana he was convicted of forgery and sentenced as a second offender, from which sentence defendant appealed. Held: that the judgment be set aside and the case remanded for sentence as a first offender; that a full pardon restored the appellant to the status, so far as the law is concerned, which he occupied prior to conviction: *State* v. *Lee* (1931) 171 La. ..., 132 So. 219.

Although a pardon does not have the retroactive effect of giving the convict an action against the state, nevertheless it has been held to remove the disabilities of conviction and restore civil rights: *Commonwealth* v. *Quaranta* (1928) 295 Pa. 264, 154 A. 89 (witness); *State* v. *Lewis* (1904) 111 La. 693, 35 So. 816 (voter); *Puryear* v. *Commonwealth* (1887) 83 Va. 51, 1 S. E. 512 (juror). Contra: In re *Spencer* (1878) 5 Sawy. 195 (pardoned convict unable to secure naturalization); *State* v. *Carson* (1872) 27 Ark. 469 and *State* v. *Parks* (1909)

122 Tenn. 230, 122 S. W. 977 (though pardoned, fact of conviction prevented judge from holding office). A pardon does not entitle one to recover fines paid: *Byrum* v. *Turner* (1916) 171 N. C. 86, 87 S. E. 975. Contra: *Cole* v. *State* (1907) 84 Ark. 473, 106 S. W. 673; *Holliday* v. *People* (1848) 10 Ill. 214 (discharged from paying fine but not costs). By legislative authority the governor may have power to certify the restoraton of cvil rights: *People* v. *City of Chicago* (1921) 222 Ill. A. 100. Contra: *Foreman* v. *Baldwin* (1860) 24 Ill. 298 (civil rights restored only by petitioning legislature).

The pardoning power is an executive function and no legislative act can limit the effect of an unconditional pardon which relieves the offender from all resulting legal consequences: *Ex parte Garland* (1867) 4 Wall. 333, 32 How. Prac. 241; *Easterwood* v. *State* (1895) 34 Tex. Crim. 400, 31 S. W. 294; *Osborne* v. *United States* (1875) 91 U. S. 474 (rights of property restored); *Carlisle* v. *United States* (1872) 16 Wall. 147 (alien disloyalty); *Fite* v. *State* (1905) 114 Tenn. 646, 88 S. W. 941; *Bishop*, "Criminal Law" (9th ed. 1923) sec. 898. To this point most courts agree, but there is a marked division of opinion as to whether enhanced punishment for a subsequent offense is a legal consequence of a prior pardoned conviction. To aid the definitive powers a distinction has been used as between legal consequences and civil rights: *Scrivnor* v. *State* (Tex. Crim. 1928) 20 S. W. (2) 416 (distinguishing the status of the witness); Comment (1930) 3 S. Cal. L. R. 438. A pardon has been held, as in the principal case, not to be limited in effect to a mere restoration of citizenship, to the right to testify and to the rights of suffrage, but as a legal consequence to prohibit in a subsequent trial plea and proof of the conviction as a means of bringing about a heavier penalty: *State* v. *Martin* (1898) 59 Ohio St. 212, 52 N. E. 188, 43 L. R. A. 94; *Edwards* v. *Commonwealth* (1883) 78 Va. 39 ('a remission of guilt—held erroneous by *Williston*, "Does a Pardon Blot Out Guilt?" (1915) 28 Harv. L. R. 647, 655); *Scrivnor* v. *State*, supra. A convict under a suspended sentence from a felony conviction may not be committed to the penitentiary on the record of a subsequent pardoned conviction: *Sanders* v. *State* (1928) 108 Tex. Crim. 467, 1 S. W. (2) 901, 57 A. L. R. 440; Comment (1928) 41 Harv. L. R. 918. An Oklahoma court has gone so far as to hold that in legal contemplation the offense itself is obliterated: *Ex parte Collins* (1925) 32 Okla. Crim. App. 6, 239 Pac. 693.

Another group of decisions reason that any consideration of a prior pardoned conviction in determining the penalty for a subsequent offense is not a legal consequence of the former offense since the fact of conviction is used as an indication of criminal depravity: *Mount* v. *Commonwealth* (1865) 63 Ky. 93; *State* v. *Edelstein* (1927) 146 Wash. 221, 262 Pac. 622; *People* v. *Kaiser* (1929) 135 Misc. 67, 236 N. Y. S. 619; *Carlesi* v. *New York* (1914) 233 U. S. 51; 34 Sup. Ct. 576 (affirming 208 N. Y. 541, 101 N. E. 1114). A pardon is no defense to disbarment proceedings based on the pardoned offense: *Nelson* v. *Commonwealth* (1908) 128 Ky. 779, 109 S. W. 337, 16 L. R. A. (N. S.) 272; *In re Egan* (1928) 52 S. D. 394, 218 N. W. 1. Contra: *Scott* v. *State* (1894) 6

Tex. Civ. App. 343, 25 S. W. 337. That a pardon should be no defense to a trial and sentence as a second offender for a subsequent offense finds support in analagous decisions. The greater criminality attaching to one who repeats an offense justifies increased punishment for second offenders: *People* v. *Craig* (1909) 195 N. Y. 190, 88 N. E. 38. Legislative discretion may treat a former conviction in another state as having the same effect as a domestic conviction as applied to habitual criminals: *McDonald* v. *Commonwealth of Massachusetts* (1901) 180 U. S. 311, 21 Sup. Ct. 389; *Cross* v. *State* (1928) 96 Fla. 768, 119 So, 380. If a statute imposing increased punishment is enacted between the commission of the first and second offenses, the later one may be punished as a second offense and the increased punishment is not regarded as a part of the penal consequence of the first offense but applies only to the last as aggravated by repetition: *Cross* v. *State,* supra; *Jones* v. *State* (1913) 9 Okla. Crim. 646, 133 Pac. 249, 48 L. R. A. (N. S.) 204; "Cooley's Constitutional Limitations" (7th ed. 1903) 383. The guilt of the accused would seem to be affirmed by the pardon and in the act of accepting the pardon the accused admits it: *Burdick* v. *United States* (1915) 236 U. S. 79, 35 Sup. Ct. 267; *Manlove* v. *State* (1899) 153 Ind. 80, 53 N. E. 385.

In the principal case the fact that the defendant was pardoned after serving his sentence may have been a factor in the court's decision. The nucleus of the problem is found in the moralistic concept of 'guilt' and it has been suggested that the power of pardon be made expressly broad enough to completely remove all taint of guilt: Note (1913) 26 Harv. L. R. 644. Such a fiction could hardly veil the actual reality of guilt: *Williston,* "Does A Pardon Blot Out Guilt?" (1925) 28 Harv. L. R. 647. Society's protection against the habitual criminal should never be diminished by the use of the pardon.

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