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CRIMINAL LAW — SEARCH AND SEIZURE — CONCEALED WEAPONS.— [Illinois] The defendant, a notorious police character, was arrested by police officers without a warrant or any reasonable grounds for believing that he had committed a criminal offense. A search of his person disclosed a revolver concealed thereon. Prior to his trial upon an indictment for carrying concealed weapons, the defendant petitioned to suppress the evidence as having been obtained in the course of an unlawful arrest and search prohibited by the Illinois Constitution, Section 6— of Article 2. This petition was denied and on an appeal it was *held:* That the denial of the petition was in error and the evidence was inadmissible: *People* v. *McGurn* (1931) 341 Ill. 632; 173 N. E. 754.

Under the common law constables and watchmen were authorized to make arrest without warrants of felons and persons reasonably suspected of being felons and in cases of misdemeanors committed in the presence of officers: *North* v. *People* (1891) 139 Ill. 81; 28 N. E. 966; *Kindred* v. *Stitt* (1869) 51 Ill. 49. Policemen were unknown at the common law but they generally have been considered as having the same powers as watchmen and constables: *Shanley* v. *Wells* (1873) 71 Ill. 78.

In Illinois an arrest may be made by an officer or private person without a warrant for a criminal offense committed or attempted in his presence, and by an officer when a criminal offense has in fact been committed and he has reasonable grounds for believing that the person to be arrested has committed it: *Smith-Hurd* Ill. Statutes (1929) Chapter 38, Sect. 657, Page 1056. *People* v. *Swift* (1926) 319 Ill. 359; 150 N. E. 663. It has also been held that the police cannot arrest only for questioning: *People* v. *Scalisi* (1926) 324 Ill. 131. None of the above grounds for arrest appeared in the instant case.

The question to be determined then, is whether evidence of criminality by an act of trespass is to be rejected as incompetent for the misconduct of the trespasser. The question is not a new one. The English Courts and the majority of the State Courts in the U. S. are not in accord with the holding of the principal case, but hold that evidence illegally obtained by unlawful search and seizure, if competent otherwise, is admissible: *Bishop Atterbury's Trial* (1723-) 16 How St. Trials 495; *Phelps* v. *Prew* (1854) 3 E and B 430; *Rex* v. *Doyle*

(1886) 12 Ont. 350; *Adams* v. *New York* (1904) 192 U. S. 585; *Hartman* v. *U. S.* (1909) 168 Fed. 30; *Cornelson* v. *State* (1922) 18 Ala. App. 639; 94 So. 202; *Robertson* v. *Montgomery* (1917) 246 S. W. 860; *Venable* v. *State* (1923) 246 S. W. 860; *People* v. *LeDoux* (1909) 155 Cal. 535; 102 P. 517; *State* v. *Mangans* (1922) 97 Conn. 543; 117 A. 550; *Johnson* v. *State* (1921) 152 Ga. 271; 109 S. E. 662; *Gindrat* v. *People* (1891) 138 Ill. 103; 27 N. E. 1085; *People* v. *Paisley* (1919) 288 Ill. 310; 123 N. E. 573; *Comm.* v. *Dana* (1841) 2 Met. 329; 43 Mass. 329; *Comm.* v. *Donelly* (1923) 141 N. E. 500; *People* v. *Defore* (1926) 242 N. Y. 13; 150 N. E. 585; *People* v. *Boren* (1923) 190 N. Y. Supp. 306; *State* v. *Simons* (1922) 183 N. C. 684; 110 S. E. 591; *State* v. *Royce* (1905) 38 Wash. 111, 80 P. 268.

There is, however, a strong minority which is at variance with the above rule. This group is led by the U. S. Supreme Court with which the instant case accords. It appears that this minority is a growing group and exercises a great influence upon all the courts. Formerly the U. S. Supreme Court followed the Orthodox rule but in 1885 it changed its position in the case of *Boyd* v. *U. S.* 116 U. S. 616. Then it reverted again in the case of *Adams* v. *N. Y.* (1904) 192 U. S. 585. In 1914, however, in *Weeks* v. *U. S.*, 232 U. S. 383, the Supreme Court reversed itself and has since then been a member of the minority group. The following cases illustrate the minority rule: *Silverthorne Lumber Co.* v. *U. S.* (1919) 251 U. S. 385; *Atz.* v. *Andrews* (1922) 84 Fla. 43; 94 S. 329; *People* v. *Montgares* (1929) 336 Ill. 458; 168 N. E. 304; *People* v. *Elias* (1925) 316 Ill. 376; 147 N. E. 472; *People* v. *Reid* (1925) 315 Ill. 597; 146 N. E. 504; *People* v. *Prall* (1924) 314 Ill. 518; 145 N. E. 610; *People* v. *Castree* (1924) 311 Ill. 392; 143 N. E. 112; *People* v. *Brocamp* (1923) 307 Ill. 448; 138 N. E. 728; *Flum* v. *State* (1923) 193 Ind. 585; 141 N. E. 353; *Banks* v. *Comm.* (1924) 202 Ky. 702; *People* v. *Thompson* (1923) 221 Mich. 618; 192 N. W. 560; *Taylor* v. *State* (1922) 129 Miss. 815; 93 So. 355; *State* v. *Owens* (1924) 302 Mo. 340; *Cravens* v. *State* (1924) 148 Tenn. 517; *State* v. *Massie* (1923) 95 W. Va. 233; 120 S. E. 514; *Hoyer* v. *State* (1923) 180 Wis. 407; 193 N. W. 89; *State* v. *Jokosh* (1923) 181 Wis. 160, 193 N. W. 976.

It is the contention of the minority rule that the admission of such evidence is a violation of the 4th amendment to the U. S. Constitution and various provisions of similar character found in every state Constitution and particularly present in the pending case under discussion.

Historically, however, the 4th amendment does not contain the double immunity contended for it. It makes unlawful search and seizure without warrant, but it does not contain a provision that evidence so obtained in the course of an illegal act shall not be admissible. See 19 Ill. Law Review 303 (1924); American Bar Association Journal, Aug. 1922, page 479.

The difference of holdings presents a problem in legal philosophy. It has been stated in the following manner, "The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On one side is the social need that crime be repressed; on the other, the social need that law shall not be flouted by insolency of office: Cardozo, J., *People* v. *Defore* (1926)

242 N. Y. 13; at page 24. It appears that the Court in the principal case was influenced by the Federal rulings based on the expression that "the end does not justify the means" and that there is more to be feared from official illegality than from private violations of the law.

It is submitted, however, that the very nature of the offense of carrying concealed weapons was such that it could not be perceived. Hence the situation was one demanding arrest on suspicion alone, and the notorious character of the defendant might be sufficient foundation for the suspicion.

HYMAN B. LEVIN.

SENTENCE — POWER OF COURT TO SHORTEN AFTER COMMITMENT.— [Federal] In a criminal prosecution by the United States the defendant and others were sentenced to the county jail for the period of one year. But after defendants had served three months, probation was to be granted "on condition that they abide by the laws." Having served three months and after the expiration of the term of court in which sentence was imposed, each defendant petitioned to show cause why writ of habeas corpus should not issue. *Held:* "The remedy of defendants is by parole or pardon. Writs denied": *United States* v. *Praxulis* (Wash. N. D. 1931) 49 Fed. (2) 774.

In the absence of statute a court cannot set aside or alter its judgment after the expiration of the term: *Ex Parte Friday* (N. D. N. Y. 1890) 43 Fed 916; *Com.* v. *Foster* (1877) 122 Mass. 317, 23 Am. Rep. 326, 2 Am. Crim. Rep. 499; *Woodcock* v. *Richey* (1928) 225 Ky. 318, 8 S. W. (2) 389 (court has no power in subsequent term to suspend further execution of the sentence because of defendant's ill health). A trial court at the same term has no power to set aside a sentence after defendant has been committed and impose a different sentence increasing the punishment: *Ex Parte Lange* (1874) 18 Wall. 163, 21 L. Ed. 872; *Re Johnson* (C. C. Mass. 1891) 46 Fed. 477; *Hickman* v. *Fenton* (1930) 120 Neb. 66, 231 N. W. 510, 70 A. L. R. 819; *Wharton* "Criminal Procedure" (10th ed. 1918) sec. 1853. But cf. *State* v. *Ludderth* (1922) 184 N. C. 753, 114 S. E. 828 (trial court increased punishment because defendant appealed); *State* v. *Dougherty* (1886) 70 Ia. 439, 30 N. W. 685 (increased fine prior to satisfaction of judgment); *Regina* v. *Fitzgerald* (1795) 1 Salk. 401. However, in the same term, the court may reduce the punishment after commitment: *Re Graves* (D. C. 1902) 117 Fed. 798 (relied upon in *United States* v. *Benz,* post); *State* v. *O'Connor* (1922) 154 Minn. 45, 191 N. W. 50. Contra: *Emerson* v. *Boyles* (1926) 170 Ark. 621, 280 S. W. 1005, 44 A. L. R. 1193.

The exercise of this power in its more simple forms is clear but difficulties arise when the power assumes executive color. Although the separation of powers doctrine is a recognized governmental theory the independence of these powers is qualified: *Ex Parte Grossman* (1925) 267 U. S. 87, 45 S. Ct. 332. In a later opinion Chief Justice Taft said, "The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it": *United States* v. *Murray* (1928) 275 U. S. 347 at 358, 48 S. Ct. 146 (denying the power to federal courts of first instance to grant probation

under the Probation Act after defendant has served any part of his sentence). During the last term of the Supreme Court Mr. Justice Sutherland speaking for an unanimous court was forced to interpret the quoted statement of Chief Justice Taft: *United States* v. *Benz* (1931) 282 U. S. 304, 51 S. Ct. 113, 75 L. Ed. 192; Comment (1931) 19 Geo. L. J. 365. Benz, while serving a ten months sentence and before the expiration of the term, petitioned the federal District Court to modify the sentence. The court reduced the term of imprisonment from ten to six months. To explain its affirmance the Supreme Court pointed out that the words in *United States* v. *Murray* were only illustrative of congressional intent and further the case involved the construction of the Probation Act of 1925 (18 U. S. C. A. secs. 724-727), and not the general powers of the court: *United States* v. *Benz* 51 S. Ct. at 115, 75 L. Ed. at. 194. Ten days after the *Benz Case* the Circuit Court of Appeals, Second Circuit, relying on the Benz Case affirmed the power of the District Court to sentence a defendant to a year and a day after "serving" four months of a two year probation: *United States* v. *Grossberg* (C. C. A. 2nd 1931) 47 Fed. (2) 597; cf. *Reeves* v. *United States* (C. C. A. 8th 1929) 35 Fed. (2) 323 (defendant sentenced to jail at expiration of probation term and after court term though he had not violated probation orders).

The principal case would seem to indicate certain limitations upon the court's general power over judgments. (1) The court's power is definitely limited to the term, and judgments in the term may not so be designed as to have future effect when that power does not exist. (2) The scope of the Parole Act (1910 and 1913) (18 U. S. C. A. secs. 714-723), the Probation Act, *supra,* the court's general powers, and the pardoning power are delimited. If the behavior of the defendant warrants he may be paroled after one-third of the sentence is served: 18 U. S. C. A. sec. 714. This is in the province of the Parole Boards and not of the courts. The Probation Act may be invoked after conviction: 18 U. S. C. A. sec. 724. The court may revoke or modify any probation within five years: *United States* v. *Murray,* supra. But after conviction the court under the Probation Act is limited to suspending "imposition or execution of sentence": 18 U. S. C. A. sec. 724. The judgment in the instant case directed execution of sentence to be later arrested with the granting of probation. This was beyond the province of the Probation Act and was not within the court's general powers as defined by *United States* v. *Benz.* The Parole Boards (18 U. S. C. A. secs. 715-716) or the Chief Executive alone have power to grant such relief: Article 2, sec. 2, cl. 1, Constitution. A judgment with like effect but different form has been found to be void: *White* v. *Burke* (C. C. A. 10th 1930) 43 Fed. (2) 329 (district court without power to impose probation with condition that defendant serve some portion of a sentence of imprisonment). The purpose of this decision was likewise to avoid overlapping of the Parole Act and clashes between the orders of District Courts and of Parole Boards. The Probation Act gave no power to the trial court to vacate its judgment after the expiration of the term and prior to execution of sentence by remission of the fine: *United States* v. *Felder* (S. D. N. Y. 1926) 13 Fed. (2) 527. Prior to *Ex Parte United*

States [(1916) 242 U. S. 27, 37 S. Ct. 1] the District Courts exercised their various forms of probation but that case denied the power and demanded Congressional authority. These six years under the Probation Act (1925) have necessitated much construction.

The principal case is of additional interest since the power of a court to sentence for a definite period of imprisonment with the provision that after a partial service probation be granted was earlier denied upon the ground that any interference by a judge with a closed sentence after the prisoner had entered the penitentiary should not be attempted since it was not unlike the exercise of the pardoning power: *Archer* v. *Snook* (N. D. Ga. 1926) 10 Fed. (2) 567. But *United States* v. *Benz* definitely disapproved any such reasoning: 51 S. Ct. at 115, 75 L. Ed. at 194. See *Hynes* v. *United States* (C. C. A. 7th 1929) 35 Fed. (2) 734 and *Cisson* v. *United States* (C. C. A. 4th 1930) 37 Fed. (2) 330 (which are not mentioned by the court but are in Government's brief, and so inferentially overruled). In the *Benz Case* the petition for the reduction of the sentence was made during the term of court so that the judge in the principal case could approve the theory of that case yet reach the same conclusion as in *Archer* v. *Snook* by pointing out that a court couldn't do by reservation what it later would have no power to do.

The trial courts in the same term may either before or after commitment reduce the punishment of initial judgments. But, even though the courts have exclusive power to grant probation their judgments must not have the effect of usurping the jurisdiction of the Parole Boards by sentencing to both the penitentiary and subsequent probation. It is vital to know the boundaries of the courts' power in the administration of criminal justice.

HARVEY WIENKE.

CRIMINAL LAW — UNREASONABLE SEARCHES AND SEIZURES—PROBABLE CAUSE.—[Illinois] The defendant was seated in a passenger train in Cook County when officers charged with the enforcement of the game laws boarded the train in search of persons whom they had been told were guilty of violating those laws. These officers saw some feathers sticking out of the defendant's pocket, searched his person for evidence of guilt, and found four hen pheasants in his coat pockets. The officers had no search warrant or warrant for arrest. They removed the defendant's coat forcibly, and, according to his testimony, against his will. One officer alone, Schultz, testified that the defendant did not protest. The officers arrested him and proceeded to have him prosecuted for the unlawful possession of hen pheasants at a time when the killing or possession of a hen pheasant was a criminal offense under the provisions of the Game Code of the State of Illinois. The defendant was convicted in a justice court. An appeal to the Criminal Court was decided against the defendant. A petition to the same tribunal asking the suppression of the evidence as illegally obtained was similarly disposed of. The defendant appealed. *Held:* on appeal, reversed. The search of the defendant, without a warrant and before arrest, by officers merely having anonymous telephonic information that there had been a violation of the game laws and that the violator was on a certain train, those officers merely

observing feathers in the defendant's pocket, was unlawful, because such circumstances are not probable cause for arrest and because the search was made before arrest. Admissions made and evidence discovered at the time of such unlawful search should be suppressed: *People* v. *De Luca* (April, 1931) 175 N. E. 370.

The issues raised in this case, as shown by the briefs of counsel, were three in number: (1) Whether the mere possession of a hen pheasant was an offense included in the Game Code; (2) whether there was probable cause for making the arrest before the search, assuming that there was an arrest, which was denied; (3) whether the search was illegal as being before arrest and without a search warrant, the resultant evidence being illegally obtained.

The court in its opinion apparently assumed that the first issue was not worthy of comment for, with no discussion whatsoever, it said that the defendant "was convicted of the offense of unlawfully possessing a hen pheasant at a time when the killing or possession of a hen pheasant was a criminal offense of the game laws of Illinois," p. 370-1. Such treatment of this issue cannot be commended. The court, in the interest of clarity, if nothing else, should have decided finally and decisively upon the point raised.

The court decided that there was no probable cause before the search for an arrest and hence, in effect, decided that the arrest, if it occurred before search, was illegal, and the evidence thereby obtained should be suppressed. The court also decided that the search occurred before the arrest, thus rendering the evidence obtained objectionable in either alternative.

It is believed that the court's conclusion is a sound one. But the opinion is misleading to anyone having no knowledge of the contents of the briefs of counsel, for the decision on one issue was assumed and the language of the decisions on the other two issues was such as to make it practically impossible to discover the true holding. It would be difficult to cite the case with any degree of certainty for any one point with the assurance that it would be accepted as an authority for that point. It would be better, it is believed, to decide such a case on one point alone—specifically leaving the other to be decided later.

The decision in the principal case has aroused much controversy because of two prevailing views as to the function of the law. Here again, loose constructionists and strict constructionists differ radically in their interpretations. These are: (1) A belief that the corpus of the law is merely a means to an end and if the "means" defeats the purpose for which it was created it should be disregarded. The particular application here is that if the suppressed evidence clearly showed the defendant to be guilty he should have been held, regardless of the technicality of search before arrest. (2) Those holding the second view believe, in general, that even though occasionally a guilty defendant might be set free in the process, the integrity of our laws should be maintained until they are changed in a proper manner. In particular, they believe that this defendant should have been set free if no other evidence than that which was suppressed could be advanced, for the reason that the law, in this case, was obviously violated to secure the defendant's conviction.

Undoubtedly, the loose construc-

tionist's view has much to be said for it. The body of the law, and its procedure, in general, should not be deified and set up as a fetish to be worshipped to the extent that the guilty escape punishment for their offenses or to the extent that officers of the law are hindered in their work. Without a doubt the law is only a means to an end. It is believed, however, that when a certain procedure has developed because of some essential need to combat the very human tendency toward oppression, such procedure should not be casually disregarded when it is shown that an accused person actually is guilty though not declared so legally. An accused person is not legally guilty until declared so by a court of law and until then he is entitled to all the safeguards due to an innocent man.

Search warrants appear to have been unknown to the early common law. The practice of using them grew imperceptibly and they were at first confined to searches for stolen goods: see *State* v. *Justice's Court* (1912) 45 Mont. 375, 382, 123 Pac. 405. But their usefulness soon forced their recognition as well as led to their abuse, for a practice gradually crept into the administration of the English government for the secretary of state to issue general warrants for searching private houses to discover and seize books and papers that might be used to convict their owners of charges of libel. Their use was extended until the person, property, and premises of the individual were subject, practically without limit, to search and seizure, which became so oppressive and intolerable that the courts and Parliament were finally forced to restrict and control their use: *Entick* v. *Carrington* (1765) 19 How. St. Tr. 1029. Consequently, in 1766 the House of Commons passed resolutions condemning general warrants for the seizure of persons or their books and papers: *Parliamentary History* (1766) Vol. XVI, p. 209; *Constitutional History of England,* T. E. May (Am. ed., 1864), Vol. 2, Ch. XI, pp. 245-252. When the people of this country founded the various states and the nation, sooner or later they provided in the constitutions thereof that the people should be secure in their persons, houses, papers, and effects against unreasonable search and seizure: *Boyd* v. *United States* (1885) 116 U. S. 616, 625; *Buckley* v. *Beaulieu* (1908) 104 Me. 56, 71 Atl. 70; *State* v. *Anderson* (1917) 270 Mo. 533, 194 S. W. 268; *Ex parte Gould* (1910) 60 Tex. Crim. 442, 447, 132 S. W. 364. The security intended to be guaranteed by the provisions against wrongful search and seizure is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law and to give a remedy against such usurpations when attempted: *Adams* v. *New York* (1904) 192 U. S. 585, 24 S. Ct. 372; *State* v. *Mausert* (1915) 88 N. J. L. 286, 95 Atl. 991. Federal and state constitutions provide against unreasonable searches and seizures. In addition, statutes of the State of Illinois provide that in offenses against the game laws a search warrant is necessary to search the person of an accused: *Cahill's Ill. R. St.,* 1931, Ch. 61, secs. 55-58.

The court in the principal case held that there was no probable cause for an arrest under the existing circumstances. It is believed that this finding is correct. The fact that the defendant really was guilty has no bearing whatsoever in de-

termining this point. It is a question of fact, and it is conceded that reasonable men may disagree on such a finding. But here the question was decided favorably to the defendant. It may be argued by the loose constructionists that the fact that the prisoner was guilty should have swayed the court to decide that there was probable cause for the arrest, but to urge such a thing would be to undermine that judicial impartiality that we have been at such pains to cultivate and which we have been so distressed to find wanting in certain cases. It would be a peculiar paradox to allow officers of the law to violate the law in order to enforce it. The general public would have no security at all as a result of such tactics. Overzealousness to enforce the law plus an over-tolerant attitude toward their violations of the law in so doing soon would lead officers to rashness and carelessness in their methods of enforcement.

ORRIN C. KNUDSEN.

CRIMINAL LAW—INSTRUCTIONS—ARGUMENT OF COUNSEL.—[Federal] Albert Fall, Secretary of the Interior, was being prosecuted for bribery. Seventy years of age at the time of the trial, and in dangerously poor health, he was brought into court in a wheel chair, heavily wrapped in blankets. This, coupled with an ostensibly illustrious public career, was brought to the attention of the jury in a forcefully dramatic fashion. Counsel for the defense, in closing, assured the jury that Fall needed the "lung-healing sunshine of New Mexico," and asserted that if he were sent to prison as a result of this "political persecution" he would die. In conclusion, the jury were told that no one could hold them to account for any verdict they might return. In his charge, the trial judge instructed the jury that it had nothing to do with the "lung-healing sunshine of New Mexico"; that they were to decide the case upon the evidence and nothing else. In touching upon the last remarks of the defense, the court warned the jury that the lawful way for it to express sympathy for the defendant was not by an unjustifiable verdict, but by recommending clemency. The jury, in doing this, were to bear in mind, however, that such a recommendation became no part of the verdict, nor was it binding upon the court, although it would become a part of the record. The defendant reserved exceptions to the above given portions of the charge. *Held:* that there was no error in the charge, because the summation arguments of counsel were so extraneous to the evidence and so obviously an appeal to prejudice and sympathy that a cautionary instruction such as the one involved was proper: *Fall* v. *United States* (C. C. A. D. C., 1931) 49 Fed. (2d) 506.

There were two contentions to be disposed of by the court. The first, briefly discussed, involved that portion of the charge which discussed clemency. An instruction that intimates a probability of clemency, if the jury recommends it, has been held to be prejudicially erroneous: see *Crawford* v. *State* (1821) 2 Yerg. 60, 24 Am. Dec. 467; *Osius* v. *State* (1928) 96 Fla. 318, 117 So. 859. An intimation that the court would be lenient if evidence upon the question of motive, taken after the verdict, warranted it, constituted reversible error: *Miller* v. *United States* (1911) 27 App. D. C. 138. The same result is reached, and the same reasoning employed, when the jury itself inquires about the re-

sult of a recommendation of clemency after it has retired: *McBean* v. *State* (1892) 83 Wis. 206, 53 N. W. 497; *State* v. *Keefer* (1902) 16 S. D. 180, 91 N. W. 1117; *Territory* v. *Griego* (1895) 8 N. M. 133, 42 P. 81. But *cf. Rehfeld* v. *State* (1921) 102 Ohio St. 6131, 131 N. E. 712. This discussion assumes, of course, that there are no statutory provisions for mandatory recommendations of clemency and for instructions to that effect: See Note, 17 A. L. R. 1117.

In all the cases, the criterion used by the courts to reach a decision was the factor of "inducement." This was clearly demonstrated in the federal case cited: *Miller* v. *United States, supra.* The central idea is that there must be no verdict that is induced by matters extraneous to the evidence (such as an intimation of probable clemency). With this criterion in mind, it becomes apparent that the decision in the principal case on this portion of the charge is correct. There could have been no inducement in a charge warning the jury that its recommendation would have no binding effect upon the court. The charge merely cautioned the jury as to its power and duty, and impressed upon it the wrongfulness of transforming a desire for clemency into an unjustifiable and unreasonable verdict.

The second problem to be disposed of by the court involved the matter of cautionary instructions in general, and the nature of this particular instruction. The authorities establish the uncontroverted rule that it is part of the defendant's right to counsel that he have the benefit of his proper summation argument, and that any instruction to disregard such argument is reversible error: *Bishop* "New Criminal Procedure" (2d ed., 1913) sec. 975a; *People* v. *Ambach* (1910) 247 Ill. 451, 93 N. E. 310; *Commonwealth* v. *Maddocks* (1910) 207 Mass. 152, 93 N. E. 25; *State* v. *Silverman* (1924) 100 N. J. Law 249, 126 A. 618. Cf. *U. S.* v. *Flowery* (D. C. D. Mass., 1845) 25 Fed. 1124, 1 Spr. 109, Fed. Cas. 15122; *State* v. *Rugero* (1906) 117 La. 1040, 42 So. 495; *People* v. *De Camp* (1906) 146 Mich. 533, 109 N. W. 1047. "It is both the right and duty of counsel to maintain their cause"; and their statements of the facts need not be in soft terms: *State* v. *Price* (1916) 135 Minn. 159, 160 N. W. 677; *Bishop, supra.*

When the summation is based upon the evidence, the court cannot prevent illogical or unsound conclusions from being drawn, if counsel stay within the proper limits of debate; and this is so even of the argument be most forceful and contain invective: *Bishop, supra;* Comment (1926) 4 N. C. L. Rev. 132; *United States* v. *Flowery, supra; Patterson* v. *State* (1905) 122 Ga. 587, 50 S. E. 489; *State* v. *Rugero, supra; People* v. *DeCamp, supra.*

The right to counsel and to the argument of counsel in summation, however, does not justify an unrestrained forensic meandering. The summation, whether it be that of the prosecution or of the defense (there is apparently no difference in the handling of cases wherein the prosecution is at fault and those wherein the defense is at fault), must follow the evidence and constitute a reasonable deduction therefrom: *Burton* v. *Commonwealth* (1913) 151 Ky. 587, 152 S. W. 545; *State* v. *Guerringer* (1915) 265 Mo. 408, 178 S. W. 65; *State* v. *Neadeau* (1921) 137 Wash. 297, 242 P. 36; *Washington* v. *State* (1920) 25 Ga. Apps. 422, 103 S. E. 854; *State* v. *Silverman, supra.* Cf. *People* v.

Dana (1886) 59 Mich. 550, 26 N. W. 780, 781.

Charges similar to the one in the principal case are usually found in cases in which the summation argument of counsel, instead of merely misinterpreting facts or attempting to get in new evidence, simply appeals to the passion, prejudice, or sympathy of the jury; charges against such argument are uniformly upheld: *People* v. *Dana, supra; State* v. *Fogleman* (1913) 161 N. C. 458, 79 S. E. 879; *People* v. *Duzan* (1916) 272 Ill. 478, 112 N. E. 854; *State* v. *Silverman, supra; State* v. *Harsted* (1911) 66 Wash. 158, 119 P. 24; *State* v. *Stockton* (1925) 119 Kan. 868, 241 P. 688; *State* v. *Severin* (1929) 58 N. D. 792, 228 N. W. 199. Cf. *State* v. *Butts* (1899) 107 Ia. 65, 78 N. W. 687; *State* v. *Guerringer, supra; Commonwealth* v. *Nye* (1913) 340 Pa. 354, 87 A. 585; *State* v. *Hamilton* (1916) 80 Or. 562, 157 P. 796; *State* v. *Farrell* (1928) 320 Mo. 319, 6 S. W. (2d) 875; *Wolfe* v. *State* (1928) 200 Ind. 557, 159 N. E. 545; *Commonwealth* v. *Crow* (1931) 303 Pa. 91, 154 A. 283.

It has been suggested that where the actions of the counsel and the spectators in the court room are such as to create passion, prejudice, or sympathy, cautionary instructions not only are permissible, but are necessary, and should be given: *Brewer* v. *State* (1909) 160 Ala. 66, 49 So. 336. Cf. *Cobb* v. *Covenant Mutual Benefit Assn.* (1891) 153 Mass. 176, 26 N. E. 230; *State* v. *Hamilton, supra; State* v. *Barton* (1911) 70 Or. 470, 142 P. 248.

The authorities support the conclusion of the court in the principal case as to the portions of the charge which have been discussed. The support can be claimed both by an analogy of fact situations, and by an application of the reasoning of the cases cited. There is no doubt that a forceful dramatization of the past record, the dangerous physical condition, and the fine personal appearance of Fall was made by the defense in the address to the jury. Such a direct appeal to sympathy and prejudice justified, according to the weight of authority, a cautionary instruction. Portraying the government, particularly the Federal government, as a tyrant is an old trick, and if successful would seriously hamper law enforcement. In a typical case, the Federal government was represented by counsel, in summation, as a bully who took the poor citizen out of his protecting state court, and put him into the hands of an official eager for a victim. The court's charges tending to disabuse the minds of the jurors, and assuring them that the Federal court was a people's court, and that what they were witnessing was prosecution, not persecution, was held valid: *Kennedy* v. *United States* (C. C. A. S. C., 1921) 275 Fed. 182. Here we have a strikingly similar situation in the attempt to portray Fall as a victim of the Senate's political persecution.

The same reasoning determined the rule as to cautionary instructions as determined the rule as to charges containing intimations of probable clemency. The one effort seems to be to preserve the purpose and spirit of trial by jury. A check is provided in the one case upon the trial judge, and in the other upon counsel, with the same objective in view. The desire in both cases is that "solely upon the weight or credibility of the evidence . . . should the jury decide": *Bishop, supra.* The verdict should conform to the evidence, not to any preconceived notions of justice: *People* v. *Duzan, supra.* In the Miller case,

there was error in the charge solely because it introduced extraneous matter that prevented a verdict from being reached on the evidence alone: *Miller* v. *United States, supra.* An excellent expression of the fact that the criterion in these cases is the injection of this "new element" is presented by a case in which a charge intimating a probability of clemency was held to be prejudicial error, notwithstanding the fact that clemency actually was exercised: *Commonwealth* v. *Switzer* (1890) 134 Pa. 383, 19 A. 181.

The facts of the principal case in no way put it into the type of situation against which the system of trial by jury is being protected. The instructions merely served to bring the issue out of the clouds and into the light; no extraneous matter was introduced; the portion of the charge discussing clemency was purely cautionary, and was carefully worded; the sole object was to bring the minds of the jury to the issue to be tried, rather than to take their minds away from it. When a charge does this, it meets with a very authoritative standard. See *Reynolds* v. *United States* (1878) 98 U. S. 145, 168.

JEROME L. FELS.

CRIMINAL LAW — NEW TRIAL — RECANTATION BY STATE'S WITNESS AS GROUND FOR NEW TRIAL.—[Illinois] The defendant, found guilty of murder, was sentenced to twenty-five years in the penitentiary. His motion for a new trial was based mainly on an affidavit of one of the State's witnesses in which she repudiated her testimony given at the trial. According to the court's statement of fact, when the defendant and his son were alone in a room after a quarrel between them, the son was fatally injured by a revolver shot. The defendant claimed that the deceased attacked him, and that the defendant's revolver was accidentally discharged in the struggle. The defendant's daughter had testified that after the shooting she asked him why he had done it, and he replied, "I told you I would do that some day, and I am going to kill another one before I die." After the trial she made an affidavit that this testimony was false, that she had neither asked such a question, nor received such an answer; that at the time she was fourteen years old, was unmarried, but pregnant, and as a result of her condition and fear of its consequences, she was terror-stricken to the point of not knowing what was going on, and that only since the trial had she begun to remember things clearly. The court, after weighing her recantation and other evidence pointing strongly to the defendant's guilt: *Held,* that the judgment be affirmed on the ground that a recantation by a witness of testimony on trial does not necessarily entitle the defendant to a new trial, and that the affidavit of this recanting witness is not entitled to such weight as to justify a conclusion that the testimony on trial was corrupt and wilfully false: *People* v. *Marquis* (Ill., 1931) 176 N. E. 314.

The rule that recantation by a witness does not necessarily entitle the defendant to a new trial, finds no dissent in any of the cases examined. It appears that the question is a matter for the trial court's discretion. *First,* it must be determined what weight is to be attached to the recantation, and whether it be true or false. In the words of Chief Justice Cardozo, "the trial judge has to choose between recantors as conscience - stricken penitents, or

criminal conspirators to defeat the ends of justice": *People* v. *Shilitano* (1916) 218 N. Y. 161, 112 N. E. 733, 739, L. R. A. 1916F 1044. In evaluating a repudiation, the court usually will go into the motives behind it: *People* v. *Giordano* (1919) 106 Misc. Rep. 235, 175 N. Y. S. 715; *People* v. *Farini* (1925) 125 Misc. Rep. 300, 209 N. Y. S. 532. An extensive latitude is permitted the trial judge in this matter. Where he finds that it was induced by threats and fear of the defendant's friends, as in the *Shilitano case, supra;* or that the affidavit was not voluntarily made: *Martin* v. *U. S.* (1927) 17 F. (2d) 973; or that the witness appeared to be under the personal influence of the defendant; *Little* v. *State* (1923) 161 Ark. 245, 255 S. W. 892; or the witness made a vague, self-contradictory impression upon cross-examination after the repudiation: *People* v. *Van Den Dreissche* (1925) 233 Mich. 38, 206 N. W. 339, the appellate court will sustain the denial of a new trial, even though the evidence repudiated was vital to the State's case.

In the *second* place, as with the probable effect test for newly-discovered evidence, the trial court exercises its discretion, subject to review by the Supreme Court for abuse, in deciding what probable effect the recantation would have at the trial, and what influence it would have had on the jury. Where there was other evidence to support a conviction, a court has refused a new trial even though the defendant presented the affidavit of six jurors that they would have rendered a different verdict had they known of the recanting witness' perjury: *State* v. *Doyle* (1915) 138 La. 350, 70 So. 322; see also *U. S.* v. *Biena* (1895) 8 N. M. 99, 42 P. 70. At variance with these opinions, which put the determination of what the jury would have done under these new circumstances up to the judge, there is the dissenting opinion in the unusually difficult *Shilitano* case, *supra,* where it was said, "what court can speculate upon what basis the jurors formed a judgment, upon whose testimony they based their decision?", and where the minority thought it would have been more proper for the trial judge to have sought the aid of a jury.

In the exercise of this phase of its discretion, the court determines whether the evidence other than the recanted testimony would be sufficient to warrant a conviction. Whenever a new trial has been denied, there was either other conclusive evidence, or there were counter-affidavits reaffirming the original testimony, or the recantation was held unworthy of belief. New trials have not been granted where the retraction has served merely to impeach a witness, or to repudiate purely cumulative testimony. A denial of a new trial has been sustained even when the recanting witness confessed to the crime: *People* v. *Shea* (1896) 38 N. Y. 821, 16 Misc. Rep. 111, 11 N. Y. C. R. 307. In a rape case where conviction was based almost entirely on the testimony of the prosecuting witness, the defendant was unsuccessful in his motion, the court deeming the repudiation to have been induced by the close family relationship between the parties: *People* v. *Van Den Dreissche, supra.* In Georgia the decisions are governed by the Civil Code provision that the verdict cannot be set aside for recantation, unless the witness shall have been convicted of perjury as a result of his testimony, and the

verdict could not have been obtained without his evidence.

Where the defendant's motion has been successful, it has been because the disavowal was believed by the court, and the testimony repudiated was essential to a finding of guilty: *Chappell* v. *State* (1911) 6 Ok. Cr. 398, 119 P. 139; *Carter* v. *State* (1914) 75 Tex. Cr. R. 110, 170 S. W. 739; *People* v. *Busch* (1923) 228 Ill. App. 11; *People* v. *Cohen* (1921) 117 Misc. Rep. 158, 191 N. Y. S. 831 (a statute prohibited a conviction on an accomplice's uncorroborated testimony, and the corroborating witness recanted). Where there is strong unretracted evidence on which to base a conviction, there may be granted a new trial based on other material, though otherwise insufficient, errors if in addition there is a recantation: *Myers* v. *State* (1914) 111 Ark. 399, 163 S. W. 1177; *Clark* v. *State* (1891) 29 Tex. App. 437, 16 S. W. 171.

Behind the courts' refusals to grant these motions except under unusual conditions is a realization of the ease with which improper influences can be brought to bear after the trial on the witnesses in criminal cases. There may be only too much pressure exerted upon them by the associates of powerful defendants before and during the trial, and unless the courts are stern, it would be in rare cases that some important witness, so often of a questionable character himself, could not be frightened or bribed into insisting that he had perjured himself, to say nothing of prearranging a situation dependent upon an easily swayed court. If granting the new trial were relatively automatic, the situation would be one where "the power to grant a convicted defendant a new trial rests not with the court, but with the witnesses who testified against him at the trial": *People* v. *Shilitano, supra.* This result is prevented by making the success of the defendant's motion depend upon a stringent inspection by the court of the circumstances of the case and of the recantation. Only in an unusual case, where the basis of conviction is destroyed by a repudiation accepted as truthful, should a new trial be granted, and only in an unusual one would justice seem to require one.

C. D. HARVEY.