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Recent Criminal Cases

RECENT CRIMINAL CASES

INSANITY DEFENSE — CRIMINAL INTENT—DUE PROCESS OF LAW.—[Mississippi] The defendant was indicted and convicted of murder but was found by the jury to have been insane at the time of the killing. The verdict undertook to conform to chapter 75 of the Mississippi Laws of 1928, which provides that insanity shall not be a defense to murder, but proof of the insanity may be offered in mitigation of the crime, and that the jury, if they find from the evidence that the defendant was insane at the time of the commission of the act shall so certify in their verdict, or if they cannot agree on whether he was insane at the time of the verdict or not they shall so state and in the latter case the judge shall sentence the defendant to imprisonment for the rest of his natural life in the penitentiary. *Held:* that the statute is unconstitutional and void, because it is in contravention of Section 14, Mississippi Constitution of 1890, which ordains that "No person shall be deprived of life, liberty, or property except by due process of law": *State* v. *Sinclair* (Miss. 1931) 132 So. 581.

In his opinion *Justice Elthridge* stated that as applied to the crime of murder it has always been necessary to entertain an intent either expressed or implied. He then quoted from *Smoot* "Insanity" p. 372, "Insanity is considered in the jurisprudence of all civilized nations to be a defense against punishment for crime. It is usually set out among the recognized defenses in the criminal codes of the several states. The reason for allowing it as such a defense is obvious. One of the essential ingredients of crime is intent. Intent involves an exercise of the reasoning powers in which the result of the criminal act can be clearly foreseen and clearly understood . . . So closely has the idea of insanity as a defense to crime been woven into the criminal

jurisprudence of English speaking countries that it has become a part of the fundamental laws thereof to the extent that a statute which attempts to deprive a defendant of the right to plead it will be declared unconstitutional and void."

In the statute in the principal case the legislature has undertaken to say that the non-existence of one of these necessary elements is immaterial and though it is absent such person shall be branded as a felon for the rest of his natural life. There could be no greater cruelty than trying, convicting and punishing a person wholly unable to understand the nature and consequence of his act. Such punishment is certainly cruel and unusual in a constitutional sense. This statute violates the "due process clause" because it does not define with certainty the nature of the prohibited act and there is not sufficient basis for its enactment to any purpose of government that will justify its passage under this clause. The mere fact that this defense has been abused is not sufficient basis. It is repugnant to the "equal protection clause" of the constitution as it is discriminatory and unequal as against a sane person as can be seen by comparing this statute with those on manslaughter where the homicide is reduced because there is no specific intent. Under the manslaughter statutes a person cannot be imprisoned for a period longer than twenty years while under this statute an insane person can be imprisoned for life which may be much more than twenty years. It also violates that part of the constitution which guarantees a man a fair and impartial trial. This section contemplates that a person shall be in a condition to be able to help in the conduct of his trial. He cannot do this if he is insane, but the statute says the judge may put him on trial.

In his concurring opinion *Justice Griffith* stated that it is not necessary to find an express inhibition in the constitution before a statute can be declared unconstitutional, but a great deal can be inferred from the wordings of the sections. The Laws of Nature are of a higher authority than any human enactment and therefore constitutional laws are inseparable therefrom. In the light of nature's laws an insane person is incapable of committing a crime. Diseases which are the work of nature cannot be punished as a crime. The legislature cannot change into guilt or punish as a crime that which under the supreme laws of nature are not guilt or punish as a crime that which nature says is not a crime. This statute is void because it is contrary to the immutable and paramount law of nature. The field of operation of the legislative power upon the diseased is amelioration and segregation and not condemnation.

In his dissenting opinion *Chief Justice Smith* adhered to the view that the only test of the validity of an act regularly passed by a state legislature is whether or not it violates the limitations imposed by the State or Federal Constitutions in express terms or by clear implication and not for any other reason. This statute does not expressly require a defendant to be tried while insane and should not be held to do so by implication. The legislature has the power to define crime and may determine its elements. The Constitution recognizes the common law as the law of the land, but it is subject to be altered or repealed at the will of the legislature. In construing the statute in its relationship to the "due

process clause" the Chief Justice said, "If men differ as to the reasonableness of whether a statute bears a substantial relationship to a proper purpose of government the legislature is entitled to its judgment and is not to be superseded by the judgment of the courts." The legislative purpose of this statute is to do away with the false plea of insanity and confine a person who has taken life while insane and may do so again. The statute does not provide for any cruel or unusual punishment. The right of the state to confine insane persons who have committed dangerous acts and are a menace to society is not doubted. The confinement provided for is neither cruel nor unusual unless made so by the place and nature of the imprisonment and continues though the insanity disappears. There can be no stigma attached as the verdict of the jury speaks of insanity and the absence of moral guilt. They do not have to find the defendant guilty of murder only, but may find him guilty of manslaughter if in their estimation they feel that he is guilty of the lesser offense as the statute does not state that he cannot be found guilty of manslaughter even though it speaks of murder. The general welfare of the people is of far greater importance than the rights of any one person.

Considering the propositions raised in this case it is found that one who is so insane as to be incapable of entertaining a criminal intent, which is one of the essential ingredients of a crime, cannot be guilty of a crime or held criminally responsible for his act: *Singer* and *Krohn* "Insanity and Law" p. 283; *Parsons* v. *State* (1886) 81 Ala. 577, 2 So. 854; *Hopps* v. *People* (1863) 31 Ill. 385; *People* v. *Cummins* (1882) 47 Mich. 334, 11 N. W. 184; *State* v. *Brown* (1909) 36 Utah 46, 102 Pac. 640; *Pritz* v. *State* (1912) 178 Ind. 463, 99 N. E. 727; *Bishop* v. *State* (1911) 96 Miss. 846, 52 So. 21. Insanity is a complete defense in all cases and is not merely a mitigating circumstance: *People* v. *Kelley* (1908) 7 Cal. A. 554, 95 Pac. 45; *Sage* v. *State* (1883) 91 Ind. 141; *Commonwealth* v. *Wireback* (1899) 190 Pa. 138, 42 Atl. 542; *Commonwealth* v. *Cooper* (1914) 219 Mass. 1, 106 N. E. 545; *Witty* v. *State* (1914) 75 Tex. Cr. 440, 171 S. W. 229; *State* v. *Maioni* (1909) 78 N. J. L. 339.

Not everything which may pass under the form of statutory enactment can be considered due process of law, nor can a state make everything due process of law which by its own legislature it declares to be such: *Martin* v. *Dix* (1876) 52 Miss. 53; *State* v. *Loomis* (1893) 115 Mo. 307, 22 S. W. 350; *Burdick* v. *People* (1894) 149 Ill. 600, 36 N. E. 948, 6 R. C. L. 438.

The prohibition of the constitution in regard to cruel and unusual punishment applies to punishment which amounts to physical torture or to such as would shock the minds of persons possessed of the ordinary feelings of humanity: *Weems* v. *United States* (1909) 217 U. S. 349, 30 S. Ct. 544; *People* v. *Elliott* (1916) 272 Ill. 592, 112 N. E. 300; *Hobbs* v. *State* (1892) 133 Ind. 404, 32 N. E. 1019; *State* v. *Becker* (1892) 3 S. Dak. 29, 51 N. W. 1018; *Franklin* v. *Brown* (1914) 73 W. Va. 727, 81 S. E. 405.

In the light of the authorities one cannot help but see the justification of the viewpoint of the majority, but there is much to support the position taken in the dissent. The insanity defense has been subjected to a great deal of abuse in its ap-

plication. By this statute the legislature of Mississippi has endeavored to correct the misuse of this defense, but the majority opinion considers that it is better to allow a few to escape than to jeopardize the constitutional rights of many. The dissenting judge thinks that the legislature has made a step in the right direction and should not be thwarted by the courts. This decision has shown, however, that the statute will have to be drawn more carefully if it is to succeed in its purpose and yet not impair the constitutional rights of the defendant.

ALBERT O. HOFFMAN.

CONSECUTIVE SENTENCES IN NARCOTICS AND LIQUOR CASES.—[Federal] Government agents, suspecting the defendant of selling narcotics, sent an addict and professional informer to try to obtain evidence of his guilt. She made three different purchases of morphine from him within the same day—one of two dollars, one of eight, and one of ten. He then became suspicious and would bring her no more, whereupon he was arrested. The jury acquitted the defendant upon a count which involved the two dollar sale, but convicted him upon counts involving the other two sales as not being from an original stamped package, under 44 stat. 96 (1926); 26 U. S. C. A. 692. It also convicted him upon a count which charged a sale of morphine not in pursuance to a written order of the buyer upon a blank form issued for the purpose by the commissioner of Internal Revenue: 38 Stat. 786 (1914) 26 U. S. C. A. 696. The maximum penalty, five years imprisonment and a two thousand dollar fine, was assessed on each of these three counts. The main question on appeal was whether these sentences should run consecutively or concurrently. *Held:* the sentences should run consecutively, making a total of fifteen years imprisonment plus six thousand dollars in fines: *Blockburger* v. *U. S.* (C. C. A. Ill. 1931) 50 F. (2nd) 795; affirmed: United States Supreme Court, January 4, 1932.

Entrapment was not mentioned as a defense in the opinion, although Alshuler, J., dissenting in the Circuit Court of Appeals, deplored the fact that the government made its detecting process an installment affair, and that the penalties for each installment were made to run consecutively. There was, however, no entrapment, strictly speaking, in this case. The defense of entrapment is one that usually excuses the defendant of all criminal liability for his wrongful acts: *Weiderman* v. *U. S.* (C. C. A. Okla. 1926) 10 F. (2nd) 745. To catch a suspect by a trap or by deceit does not alone constitute entrapment: *U. S.* v. *Wray* (D. C. Ga. 1925) 8 F. (2nd) 429. This defense is usually open to an otherwise innocent person who has been induced to commit a crime with a view to having him prosecuted. Thus one who had no intention of committing a crime, but was lured into crime by officers of the law cannot be convicted: *Weiderman* v. *U. S.*, supra. But if the intent and purpose to violate the law were present, the mere fact that public officers furnished the opportunity is no defense: *Ritter* v. *U. S.* (C. C. A. Nev. 1924) 2 F. (2nd) 598. Thus the mere fact that officers offer to buy liquor, either in person or through agents does not constitute entrapment where they have reasonable cause to believe that the

defendant is violating the law: *St. Clair* v. *U. S.* (C. C. A. Neb. 1927) 17 F. (2nd) 886; *Jordan* v. *U. S.* (C. C. A. Ga. 1924) 2 F. (2nd) 598; *Kendjerski* v. *U. S.* (C. C. A. Ohio 1926) 9 F. (2nd) 909; *De Long* v. *U. S.* (C. C. A. Neb. 1925) 4 F. (2nd) 244; *Farley* v. *U. S.* (C. C. A. Wash. 1921) 269 F. 721; *Ramsey* v. *U. S.* (C. C. A. Tenn. 1920) 268 F. 825; *Sancedo* v. *U. S.* (C. C. A. Texas 1920) 268 F. 830.

There is something more to this case, however, than the mere solicitation to commit a crime. Here the defendant was induced to commit not one but three acts. Of course, the fact that a single sale of morphine can be an offense under two different statutes is none of the officer's doing, but the fact that each time he or his agent makes a purchase from the defendant may add five years and two thousand dollars to the defendant's penalty gives him a tremendous power. Suppose that the defendant in the present case had not become suspicious, and that the government did not arrest him until after it had made twenty purchases, would the penalty have been one hundred years plus a fine of forty thousand dollars? Such a decision is possible. Under the federal law the offenses which may be joined in the same action are not limited to the consolidation of counts which might have been joined at common law, but the trial court is vested with discretion to refuse to permit joinder if it would prevent a fair trial or be unjust to the defendant: 10 Stat. 162 (18 U. S. C. A. 557) *Dolan* v. *U. S.* (C. C. A. Mo. 1904) 133 F. 440; *Kidwell* v. *U. S.* (1912) 38 App. D. C. 566.

Indictments usually contain many counts, but courts do not often sentence the offender on each count of which he is found guilty. What formula guides the courts in exercising this discretionary power? "If there be several counts, but they appear to charge the same offense, variously stated to prevent variance from the evidence, there will be but one sentence; but if the counts really charge separate offenses, though connected together, and therefore capable of joinder under this section, sentence may be imposed for both, for such was the legislative intent in creating separate offenses": *Ex Parte Farlow* (D. C. Ga. 1921) 272 F. 910; and see *Ex Parte Hibbs* (D. C. Ore. 1886) 26 F. 421. These words, as can readily be seen, are to be used more often in *expressing* judgment than in *determining* it. For instance, in the present case, the court could just as easily have held that the two counts for the two sales charged the same continuing offense stated in two different counts in order to prevent variance from the evidence.

It is to be noted that this case is in line with the present trend of stiff penalties handed down in narcotics cases: Cf. *Parmagini* v. *United States* (C. C. A. Cal. 1930) 42 F. (2nd) 721, where the defendant amassed five consecutive sentences aggregating seventeen years in the penitentiary plus $17,000 in fines by reason of his violation of five different statutes by a single sale of narcotics; accord *Robinson* v. *United States* (C. C. A. Cal. 1923) 288 F. 450 (Purchase, sale, and distribution of narcotics held distinct offenses); *Proffitt* v. *United States* (C. C. A. Cal. 1920) 264 F. 299 (indictment containing separate counts for receiving and concealing opium held sufficient); *Iponmatsu Ukichi* v. *United States* (C. C. A. Hawaii 1922) 281 F.

525 (conspiracy to sell and conceal narcotic drug held separate offense, punishable as such). But see *Braden* v. *United States* (C. C. A. Minn. 1920) 270 F. 441, where it was held in the eighth circuit that possession of five separate narcotics constituted but one offense. Decisions following the *Parmagini* case are held not to impose double jeopardy since it is competent for legislation to make out of one transaction any number of separate crimes: see 1 *Bishop* "Criminal Law" (9th Ed. 1925) sec. 1060; *Carter* v. *McClaughry* (1901) 183 U. S. 365, 22 Sup. Ct. Rep. 181; *Morgan* v. *Devine* (1915) 237 U. S. 632, 35 Sup. Ct. Rep. 712.

That similar sentences are possible in liquor cases is shown by *People* v. *Franklin* (1930) 341 Ill. 499, 173 N. E. 607. There, in spite of the general lack of esteem in which the Eighteenth Amendment is held in most parts of Illinois, the court decided that eleven different sales to several stool-pigeons justified eleven different consecutive sentences of sixty days each plus eleven fines of $150 each. In spite of the seemingly severe penalty imposed in this case, there is still a great difference between its less than two years penalty and the fifteen years provided by the instant case. Moreover, *People* v. *Franklin* is conspicuous for its severity in contrast with the general leniency of decisions under the prohibition laws. On the other side of the fence is *Orsatti* v. *United States* (C. C. A. Cal. 1924) 3 F. (2nd) 778; *certiorari* denied 268 U. S. 694, 45 S. Ct. 513. There the defendant was found guilty under twenty-one counts for twenty-one payments of graft to a prohibition officer, but only one sentence was imposed. Where the defendant was convicted on two counts, (1) transporting 144 bottles of whiskey, and (2) possession of the same whiskey, and he was sentenced to a $350 fine on each count, the alternative sentences of forty days on each count were made to run concurrently when the defendant was unable to pay his fine: *State* v. *Mclerine* (1925) 188 La. 511, 104 So. 308. In a similar case, (1) possession and (2) selling of the same pint of whiskey did not constitute separate offenses: *Muncy* v. *U. S.* (C. C. A. W. Va. 1923) 289 F. 780. It was also held erroneous to impose sentence both on a count for possession and on one for transportation of liquor: *Schroeder* v. *U. S.* (C. C. A., N. Y. 1925) 7 F. (2nd) 60.

Sentences given to violators of the liquor laws in St. Louis, as revealed by the Missouri Crime Survey, are interesting. "From that study it appears that in 1925 but 6.44 per cent of the liquor misdemeanor cases ended in carrying out of a sentence and but 3.88 per cent in carrying out of the sentence unmodified; and that in 1926 the percentage of sentences carried out was but 4.47. In the latter year, of 670 prosecutions, in which 476 defendants pleaded guilty and ten were convicted on trial, but 30 sentences were carried out. In 93 per cent of the cases in which a fine was imposed the fine was 'stayed,' and in 2.67 per cent it was reduced. Thus in substantially 96 per cent of the cases of convictions resulting in a fine there was no penalty or no substantial penalty. In any event an insignificant total of four out of 487 who pleaded guilty or were convicted on trial were imprisoned, and no term exceeded 60 days. The prohibition survey shows that in 1929 conditions were no better": House Document No. 722,

71st Congress, 3rd session, p. 42 (1931), "Wickersham Report."

"When the enforcement of the National Prohibition Act is compared with the enforcement of the laws as to narcotics . . . there is an enormous margin of profit in breaking the latter. The means of detecting transportation are more easily evaded than in the case of liquor. Yet there are no difficulties in the case of narcotics beyond those involved in the nature of the traffic because the laws against them are supported everywhere by a general and determined public sentiment": "Wickersham Report," op. cit. p. 80.

What are the factors motivating the dissimilar judgments in these two types of cases? Is it the general attitude of judges that the narcotic laws do not punish with appropriate severity the reprehensible business of "bootlegging dope"? At any rate, many of the judges would seem to share the opinion of many of the laymen that the narcotic laws were more rightly conceived than the prohibition laws. Because of the overwhelming amount of liquor litigation, much of the laxity in the enforcement of the prohibition laws can also be attributed to the administrative factor. The personalities of different judges as shown by the divergence of their reactions to similar situations is an interesting factor. A survey was made of the disposition of thousands of minor criminal cases by several judges of the City Magistrate Court in New York during the years 1914 to 1916 with the purpose of finding to what extent the personal equation entered into the administration of justice. They differed to an amazing degree in their treatment of similar classes of cases. Thus of 546 persons charged with intoxication brought before one judge, he found about 97 per cent guilty, whereas of the 673 arraigned before another judge, 531, or 79 per cent were found not guilty: *Everson*, "The Human Element in Justice," 10 JOUR. OF CRIM. LAW AND CRIMINOLOGY 90 (1920).

It would be very difficult, if not impossible, to avoid the exercise of the judge's discretion to determine what counts should be joined and whether the sentences upon a joinder of counts should run concurrently or consecutively. Criminal law involves the most insistent and the most fundamental of social interests. It is true that "No legislative omniscience can predict and appoint consequences for the infinite variety of detailed facts which human conduct continually presents": *Roscoe Pound*, "Criminal Justice in America" (1930) 36. Just as it is a scientific truth that no two peas in a pod were ever exactly alike, so is it true that no two human beings are ever exactly alike, nor will the impartial application of a law have the same effect on everyone. The judicial discretion, if wisely used, can be a greater equalizing agency in justice than any law. It is submitted that aside from the impossibility of avoiding the exercise of the judicial discretion, there is no desirability of doing so.

EMERSON WHITNEY.

EXPRESSION OF OPINION BY PROSECUTING ATTORNEY AS TO GUILT OF ACCUSED.—[Pennsylvania] The defendant was indicted for murder. Three witnesses gave testimony to the effect that the killing was committed by the accused in self-defense. The prosecuting attorney, in his argument to the jury, repeatedly stated that in his belief the de-

fense was "cooked up." The defendant's counsel objected to this language, asking for the withdrawal of a juror and continuance of the case. These requests were denied. The court also refused to instruct the jury upon the request of the defense that the prosecuting attorney's statements should be disregarded. On appeal it was held that there was "no error": *Commonwealth* v. *Massarelli* (Pa. 1931) 156 Atl. 101.

The majority of the court held that a prosecuting attorney may express his opinion on the evidence but should avoid stating his personal belief. A different view was taken by the dissenting judge who argued there was error in that no evidence was submitted by the prosecutor to show that the defense was "cooked up"; that the judge's refusal to give instructions to disregard the district attorney's statements gave judicial sanction to the remarks; and that in essence the expression of the attorney's belief that the defense was a fabrication was equivalent to expressing his belief in the guilt of the accused.

The principle has become established that a prosecuting attorney may declare that in his opinion the accused is guilty where he states, or it is apparent, that such opinion is founded on the evidence: *Fertig* v. *State* (1898) 100 Wis. 301, 75 N. W. 960; *State* v. *Armstrong* (1905) 37 Wash. 51, 79 Pac. 490; *People* v. *Hess* (1891) 85 Mich. 128, 48 N. W. 181; *Crenshaw* v. *State* (1908) 153 Ala. 5, 45 So. 631; *Valentine* v. *State* (1913) 108 Ark. 594, 159 S. W. 26; *People* v. *Rogers* (1912) 163 Cal. 476, 126 Pac. 143; *Riggins* v. *State* (1915) 125 Md. 165, 93 Atl. 437; *Reed* v. *State* (1902) 66 Neb. 184, 92 N. W. 321; *People* v. *Pargone* (1927) 327 Ill. 463, 158 N. E. 716; *State* v. *Horton* (1922) 151 La. 683, 92 So. 298; *People* v. *Dykes* (Cal. App. 1930) 290 Pac. 102. On the other hand, it has been held that a prosecuting attorney should not in his argument to the jury declare his individual opinion or belief that the accused is guilty, where the jury may get the impression that the opinion or belief is based on something other than the evidence submitted: *Broznack* v. *State* (1899) 109 Ga. 514, 35 S. E. 123; *Jackson* v. *State* (1889) 116 Ind. 464, 19 N. E. 330; *Howard* v. *Commonwealth* (1901) 110 Ky. 356, 61 S. W. 756; *State* v. *Iverson* (1915) 136 La. 982, 68 So. 98; *People* v. *Dane* (1886) 59 Mich. 550, 26 N. W. 781; *State* v. *Clark* (1911) 114 Minn. 342, 131 N. W. 369; *People* v. *King* (1916) 276 Ill. 138, 114 N. E. 601; *State* v. *Hance* (Mo. App. 1923) 256 S. W. 534. Various reasons have been given as a basis for this rule, one view being that such a statement makes the prosecuting attorney a witness without the opportunity of being cross-examined: *People* v. *King*, supra. Another view is that such a declaration is a breach of professional propriety and professional ethics: *State* v. *Gunderson* (1913) 26 N. D. 294, 144 N. W. 659. It has been reasoned also that an attorney has no authority to substitute himself for the jury and pronounce guilt upon the accused: *Cline* v. *State* (1925) 20 Ala. App. 578, 104 So. 347. Whether or not, however, the appellate court will reverse and remand a case because of this improper conduct depends mainly upon the closeness of the evidence. In a case where the guilt was clearly established by two eye-witnesses and convincing corroborating evidence, it was said "there is no serious contention that

plaintiff in error did not commit the assault that resulted in the death, and so we hold that the misconduct of the prosecuting attorney was not reversible error": *People* v. *Pilewski* (1920) 295 Ill. 58, 128 N. E. 801. But where the evidence is about equally balanced, such conduct on the part of the prosecutor may be reversible error. In *State* v. *Gunderson, supra,* a conviction for rape was reversed and remanded, the judge saying "in a close case such as this, the slightest error may be fraught with the most injurious of consequences, and we believe that justice requires that a new trial be had." Some courts have held that an instruction given to disregard counsel's statements would take away the effect of prejudice which may have been caused by such remarks: *State* v. *Harper* (1918) 143 La. 534, 78 So. 845; *State* v. *Egan* (1923) 47 S. D. 1, 195 N. W. 642; *Johnson* v. *State* (1920) 150 Ga. 67, 102 S. E. 439; *State* v. *Smith* (Mo. 1926) 281 S. W. 35. However, it is apparent that where the evidence is close, such an instruction may have no effect.

In the instant case, the evidence was not clear whether the deceased or the accused commenced the firing. From the circumstances it was more than likely that the deceased was the aggressor since the defendant, by paying his attentions to the other's wife, had caused a disruption of the marriage, there being at the time of the killing a bill pending for divorce. Thus there was a possibility that defendant shot in self-defense, but the prosecutor's statements undoubtedly lessened the weight of the testimony of the defendant's witnesses who testified that they saw the deceased fire first. The test is: Were the remarks made as deductions from the evidence already introduced in the case? The answer in this instance must be in the negative. The case being one where the jury could decide one way or the other, it seems that the lower court should have allowed the withdrawal of the juror and continuance of the case. It could have lessened the effect of the improper statements, if they were erroneous, by giving an instruction to disregard them, but the trial court also refused to do that. These denials probably were prejudicial to the defendant and seem to be sufficient ground for granting a new trial.

EDWARD S. ALTERSOHN.

HOMICIDE—PRESUMPTION OF MALICE FROM PROOF OF THE KILLING—BURDEN OF PROOF IN REBUTTAL.—[New Jersey] The defendant was indicted and convicted for the second degree murder of his wife. His testimony disclosed that he had taken his wife's revolver after she threatened to shoot him but in the struggle it was discharged, the bullet entering her head, which resulted in her death, as he discovered on his return from market. Excepting the conditions under which the struggle occurred, his story was contradicted in all its material particulars by witnesses for the prosecution. For reversal, the defendant urged that the jury's verdict was against the weight of the evidence, as he claimed that the revolver was discharged accidentally and wholly unintentionally, although he did not deny firing the shot. *Held:* on writ of error, that the judgment should be affirmed, since no reversible error appeared on the record. "Where the fact of killing is first proved, the law presumes it to have been founded on malice until the contrary appears and all circumstances

alleged by way of justification, excuse, or alleviation must be proved by the prisoner, unless they arise out of the evidence produced against him": *State* v. *Mangino* (New Jersey 1931) 156 Atl. 430.

The usual presumption in homicide cases is that the accused is innocent until proved to be guilty beyond a reasonable doubt by the prosecution, thus placing the burden on the state to prove all the elements of the crime, malice being one of these elements. If malice is to be presumed, the prosecution is relieved to a considerable extent of the necessity of producing evidence. Most jurisdictions support the holding in the principal case: *Commonwealth* v. *Troup* (1931) 302 Pa. 246, 153 Atl. 337; *Patty* v. *State* (1921) 126 Miss. 94, 88 So. 498; *Commonwealth* v. *Bedrosian* (1924) 247 Mass. 573, 142 N. E. 778; *State* v. *Duncan* (1918) 101 Wash. 542, 172 Pac. 915; *People* v. *Schryver* (1870) 42 N. Y. 1; *State* v. *Holland* (1927) 193 N. C. 713, 138 S. E. 8; *Patton* v. *Commonwealth* (1930) 235 Ky. 845, 32 S. W. (2d) 405. The decisions in New Jersey have uniformly upheld the doctrine: *State* v. *Zellers* (1824) 7 N. J. L. 220; *Brown* v. *State* (1899) 62 N. J. L. 666, 42 Atl. 811; *State* v. *Ehlers* (1922) 98 N. J. L. 236, 119 Atl. 15. This principle only requires that the defendant introduce sufficient evidence of the defense as to raise a reasonable doubt in the minds of the jury on the question of malice; thereupon, the prosecution once more has the burden of proving express malice beyond a reasonable doubt: Comment (1931) 21 JOUR. CRIM. LAW & CRIMINOLOGY 609, 610. The burden of thus going forward with the evidence is not imposed on the defendant when the mitigating circumstances appear from the proof of the prosecution: *State* v. *Patterson* (1873) 45 Vt. 308; *People* v. *Russell* (1926) 322 Ill. 295, 153 N. E. 389; *Wagner* v. *State* (Ark. 1931) 37 S. W. (2d) 86.

In Illinois, section 155 of the Criminal Code provides that when the killing is proved, the burden of proving circumstances of mitigation, justification or excuse devolves on the accused unless the proof of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter or that the accused was justified or excused in committing the homicide: Ill. Rev. Stat. (Cahill 1931) chap. 38, sec. 352. An instruction in the words of this section has been approved: *Duncan* v. *People* (1890) 134 Ill. 110, 24 N. E. 765. The principle was recognized in *People* v. *Hubert* (1911) 251 Ill. 514, 96 N. E. 294, and *People* v. *Dare* (1919) 288 Ill. 182, 123 N. E. 321.

Such an instruction was disapproved in *People* v. *Willy* (1922) 301 Ill. 307, 133 N. E. 859. Here, the prosecution's proof tended to show that the act had been done in self-defense so that the burden was still on the prosecution to show beyond a reasonable doubt that the act was criminal. Relying on this case, it has been said that the burden of proof never shifts to the defendant, no matter what his defense may be and that section 155 of the Criminal Code should not be given as an instruction in any homicide case: *People* v. *Durand* (1923) 307 Ill. 611, 139 N. E. 78; accord: *People* v. *Sterankovitch* (1924) 313 Ill. 556, 145 N. E. 172; *Bishop* "Criminal Procedure" (2d ed. 1913) vol. II, secs. 1049, 1050; *Taylor* v. *State* (1929) 201 Ind. 241, 167 N. E. 133; *Landreth* v. *State* (1930) 201 Ind. 691, 171 N.

E. 192; *Lee* v. *State* (Ala. App. 1931) 132 Sou. 61; *State* v. *Twine* (Ia. 1931) 233 N. W. 476 (self-defense). Yet, we find two later Illinois cases approving the principle represented in the statute although the question of the correctness of such an instruction was not involved: *People* v. *Russell* (1926) 322 Ill. 295, 153 N. E. 389; *People* v. *Meyer* (1928) 331 Ill. 608, 163 N. E. 453.

Where the defense is insanity, some jurisdictions hold that the state has the burden of proving the defendant sane beyond a reasonable doubt: *Davis* v. *U. S.* (1895) 160 U. S. 469, 16 Sup. Ct. 353; *Walker* v. *People* (1882) 88 N. Y. 81; *People* v. *Cochran* (1924) 313 Ill. 508, 145 N. E. 207. Others put the burden on the defendant to prove insanity by a preponderance of the evidence: *Graves* v. *State* (1883) 45 N. J. L. 347; *Keener* v. *State* (1895) 97 Ga. 388, 24 S. E. 28; Comment (1926) 4 Tex. Law Rev. 533.

Allowing a presumption of malice to arise after proof of the killing has been established would appear to put too great a risk of non-persuasion on the defendant. In addition, it may be said that a presumption of malice gives the appearance of conflicting with the presumption of innocence which requires the prosecution to assume the burden of proof by showing guilt beyond a reasonable doubt. However, it is believed that the principle affords a convenient method for punishing those persons whom the court might believe to be guilty, leaving a loop-hole on the question of the burden of proof through which the court can escape when the guilt is not so clear. This may account for the inconsistency of the Illinois decisions where apparently no valid reason is furnished why an instruction in the words of the statute should not be given. In this situation, it would not be wise to make use of the advice which has been offered that when stock instructions are not available, the words of the statute should be followed: *Swanson* "Instructions to Juries," p. 2.

J. F. WATERMAN.

POLICE POWER—FREEDOM OF THE PRESS.—[United States] The appellant was permanently enjoined under a statute which provided that any person who shall be engaged in the "business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away a malicious, scandalous and defamatory newspaper, magazine or other periodical" is guilty of a nuisance and may be enjoined; Laws of Minnesota, 1925, ch. 285; Minnesota Statutes (Mason, 1927) sec. 10123-1 et seq. In an intermediate appeal [*State Ex Rel Olson* v. *Guilford* (1928) 174 Minn. 457, 219 N. W. 770, 58 A. L. R. 607] and an appeal from the judgment of the District Court [*State Ex Rel Olson* v. *Guilford* (1929) 179 Minn. 40, 227 N. W. 326], the Supreme Court of Minnesota held the law constitutional as against the objection that it violated both the State and Federal Constitutions: *Held:* On appeal (four Justices dissenting) judgment reversed; that the statute infringed the liberty of the press guaranteed by the Fourteenth Amendment: *Near* v. *State of Minnesota* (1931) 51 S. Ct. 625.

The First Amendment to the Federal Constitution expressly protects the freedom of the press from infringement by the Federal Government and similar provisions of State

Constitutions protect from infringement by State governments. The Fourteenth Amendment to the Federal Constitution has been construed to include freedom of the press in the liberties protected by the due process clause: *Gitlow* v. *New York* (1925) 268 U. S. 357, 45 S. Ct. 625; *Whitney* v. *California* (1927) 274 U. S. 357, 47 S. Ct. 641: *Stromberg* v. *California* (1931) 283 U. S. 359, 51 S. Ct. 532.

The majority opinion held that the statute by a deprivation of liberty violated the Fourteenth Amendment by imposing a previous restraint on publication (any suppression of or interference with the publication or circulation of a newspaper, magazine, etc.) and that the statute was beyond the police powers of the state. The dissent maintained that there was no previous restraint on publication, because the statute did not provide for administrative restraint but for a remedy, *i. e.,* a suit in equity. They also maintained that the appellant abused his right to freedom of the press and that it was within the police power of the state to denounce the things done as a nuisance since he was threatening the morals, peace, and good order of the state.

There seem to be no cases which uphold the dissent in their view that the statute was not a previous restraint on publication. On the other hand courts in practically every jurisdiction have denounced similar practices as the imposing of previous restraints, *Dearborn Publishing Company* v. *Fitzgerald* (1921) 271 Fed. 479 (D. C. N. D. Ohio, E. D.) (attempt to prevent sale of newspapers on city streets on ground that they calculated to excite scandal and had the tendency to create breaches of the peace); *New Yorker Staats-zeitung* v. *Nolan* (1918) 89 N. J. Eq. 387, 105 Atl. 72 (attempt to suppress newspaper printed in German as likely to create public disturbances). Apparently in only one other instance has there been an attempt to suppress a newspaper as a nuisance. A city ordinance declaring a newspaper a nuisance and prohibiting its circulation within the city was held void as curtailing the liberty of the press, *Ex Parte Neill* (1893) 32 Tex. Cr. 275, 22 S. W. 923, 40 A. S. R. 776.

The real question involved is this —Can publication of a newspaper be prevented by any procedure without violating the freedom of the press? All the cases seem to point in one direction, that is, that a newspaper may publish what it pleases without previous restraint of any kind. In *Ex Parte Neill, supra,* the court said, "The power to prohibit the publication of newspapers is not within the compass of legislative action in this state, and any law enacted for that purpose would clearly be in derogation of the bill of rights." Other cases which have held that previous restraints may not be imposed are: *German Herold Pub. Co. of New York City, Inc.* v. *Brush* (1918) 170 N. Y. S. 993; *Ulster Square Dealer* v. *Fowler* (1908) 58 Misc. 325, 111 N. Y. S. 16; *Commonwealth* v. *Blanding* (1825) 3 Pick. (Mass.) 304, 15 Am. Dec. 214; *State* v. *Butterworth* (1928) 104 N. J. L. 579, 142 Atl. 57.

In deciding whether the statute was an unconstitutional exercise of the police power or not, the dissent used the rule that the court is required to assume that a situation exists warranting the legislation unless the contrary is shown to be true. While cases were cited up-

holding this contention it seems that a much broader rule prevails, that is, that the constitution is supreme and the court in looking for a violation will go behind the declared intention of a statute to establish its real nature and effect: *Freund,* "Police Power," pp. 60, 61; *Lochner* v. *New York,* 198 U. S. 45, 25 S. Ct. 539, *Coppage* v. *Kansas,* 236 U. S. 1, 35 S. Ct. 240.

The statute in the instant case seems to have been an unreasonable exercise of the police power. Though a lawful business may sometimes be regulated under the police power it cannot be suppressed: *Freund,* "Police Power," pp. 531, 537; *State* v. *Houghton* (1916) 134 Minn. 226, 158 N. W. 1017; *Pacific States Supply Co.* v. *San Francisco,* 171 Fed. 727 (C. C. N. D. Cal. 1909); *Chicago* v. *Chicago & O. P. Elev. R. R. Co.* (1911) 250 Ill. 486, 95 N. E. 456 Justice Butler, who wrote the dissent in the instant case, in *Burns Baking Co* v. *Ryan* (1924) 264 U. S. 504, said: "A state may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions on them." See also *Frost* v. *Railroad Commission* (1926) 271 U. S. 583; *Terrance* v. *Thompson* (1923) 263 U. S. 197; *Baker* v. *Daly* (D. C. Oregon 1926) 15 F. (2d) 881. A legislature may not impose unusual restrictions on lawful occupations by invoking the doctrine of nuisance: *Lawton* v. *Steele* (1894) 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385; *Williams* v. *Evans* (1917) 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L. R. A. 1918F, 542; *Freund* "Police Power," p. 160. The Minnesota statute declared publishing defamatory matter a nuisance but defamation and nuisance are clearly distinguishable: *Hall et. ux.* v. *Calloway et. al.* (1913) 76 Wash. 42, 135 Pac. 478. A mere declaration that a thing is a nuisance does not make it so unless in fact it had that character: *Yates* v. *Milwaukee* (1870) 10 Wall. (77 U. S.) 497.

When the vast history of freedom of the press is considered and when one realizes the protections with which it has been hedged it is readily seen why the court in this case declared the statute void. There are other remedies available for abuse of freedom of the press (criminal libel and private remedies for slander and defamation) and there is therefore little reason for enjoining publication of a newspaper for defamation. To permit it under any guise might be a dangerous precedent which would serve as a weapon by which a political party in power could stifle criticism of itself and of its conduct of government.

JAMES A. HARRINGTON.