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Abstracts of Recent Cases

down. Even with the protection of present state procedures, perhaps some prisoners have been executed while insane. When dealing with such slim possibilities of injustice, however, the courts should proceed with caution, lest the Fourteenth Amendment become an instrument to impede the progress and workings of judicial administration. "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results."[49]

Abstracts of Recent Cases

Right to Retain Out of State Counsel in Criminal Proceedings—In *Cooper v. Hutchinson,* 184 F. 2d 119, (2d Cir., 1950), the appellants had been tried and convicted of murder in a state court of New Jersey. Following the conviction New York lawyers were secured at the appellant's request to handle the appeal, which resulted in reversal. The trial judge, however, refused to permit the out-of-state counsel to handle the case on retrial. The appellants then sought an injunction in the federal district court to prohibit the trial judge from proceeding with the trial until he recognized the out-of-state attorneys, claiming that the trial judge's action deprived them of due process of law. The district court dismissed the complaint and appeal was made to the United States Court of Appeals of the Third Circuit. The appellant's argument was based primarily on the case of *U. S. v. Bergamo,* 154 F. 2d 31, where the Third Circuit Court held that the right to counsel in a federal criminal proceeding included the right to out-of-state counsel. The appellants contended that since the *Bergamo* case held this right to be an element of due process under the Fifth Amendment, it must also be protected under the Fourteenth Amendment. The question confronting the court, then, was not merely whether a man charged with a crime has the right to counsel, but whether he has the constitutional right to choose his counsel. If such a right did exist, it would admittedly serve to limit the control of the states over the persons licensed to practice before its courts. The court, however, declined to face this problem, deciding the case on the grounds that once an out-of-state attorney has been admitted to try a capital case it is for the entire "cause," and he can not be arbitrarily removed without depriving his client of his constitutional rights. "Assuming that these accused persons could not have claimed representation by out-of-state lawyers as a constitutional right, the representation was granted and may not, without cause, be taken away."

Refusal of Witness to Testify on Grounds of Self-Incrimination Can Not Be Used to Prejudice Defendant—In *Billeci v. United States,* 184 F. 2d 394 (D.C., 1950), the defendants were convicted of carrying on a lottery. Their appeal was based on the trial court's failure to give proper instructions in sixteen different instances. One of the instructions requested by the defendant was to the effect that the failure of certain witnesses to testify on the grounds of self-incrimination could not be considered as prejudicial to the defendant. The court not only denied the instruction, but permitted the prosecutor in his summation to ask the jury to infer that the testimony of these witnesses, if given, "would be . . . damaging to the defendant's case." This was found to be erroneous, the Circuit Court noting that the right of a witness to refuse

49. Snyder v. Massachusetts, 291 U.S. 97, 116 (1934).

to testify on the grounds of self incrimination is one "personal to himself," and its exercise should not result in harm to someone else. "His answer, if given, might conceivably be that he but not the defendant was guilty of the offense, or it might be that both he and the defendant were guilty; or it might relate entirely to some other offense."

A Judge's Right in Federal Cases to Comment on the Evidence—One of the instructions given by the court in the foregoing *Billeci* case, which was objected to by defendant's counsel, contained a quotation from the remarks of the court in *District of Columbia v. Horning*, 47 App. D.C. 413, which had been approved by the United States Supreme Court in *Horning v. District of Columbia*, 254 U. S. 135 (1920). This quotation read as follows: "In a criminal case the court cannot peremptorily instruct the jury to find the defendant guilty. If the law permitted it, I would do so in this case. It is your duty under your oaths as jurors to accept as correct and be governed by the exposition of the law which I give you. In conclusion I will say to you that a failure by you to bring in a verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors." The court in the *Billeci* case found this instruction to be error, distinguishing the *Horning* case on the grounds that there the facts were not in dispute, since the defendant testified to the same facts as did the government witnesses, whereas in the present case there was a vigorous disagreement as to the facts. Thus the latitude given the trial court the *Horning* case would seem to be restricted to those situations where "the testimony of both sides is in agreement and the only question actually open is one of law."

Another grounds for reversal alleged by the defendants was the charge that the trial judge in his instructions to the jury "by intonations and gestures, emphasized principles beneficial to the prosecution and de-emphasized those things which he said of benefit to the defendants." The court stated that such actions might well be grounds for reversal, but to be so the defense counsel must be careful to record fully and accurately what has occurred, making certain that it is entered in the record at the time of the occurrence. It is not enough that a general objection be made for the record with the intention of developing it more fully on appeal. By getting a complete and accurate statement of the objection in the record the trial court will have an ample opportunity to fully comprehend the objection and perhaps rectify any error by a proper instruction to the jury.

Proceedings Under Sexual Psychopath Statute Held Not to Violate Due Process—Missouri has been one of a small group of states to enact sexual psychopath legislation in an effort to solve the problem presented by the chronic sex offender. Other states with similar statutes include Illinois, California, Massachusetts, Nebraska, Ohio, Indiana, Michigan, and Minnesota. As was the case with the Michigan statute, the Missouri statute was attacked on the grounds that proceedings under it violated the due process provisions of the state constitution. The Supreme Court of Missouri, like that of Michigan, found no merit in the defendant's contention. *State v. Green*, 232 S.W. 2d 897 (Mo. 1950).

The Missouri statute provides that when it appears that a person charged with a sex crime is a sexual psychopath the prosecuting attorney shall file a petition requesting that the court hold a hearing on the matter. The defendant is then examined by two physicians, and "if prima facie proof be made