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Abstracts of Recent Cases

of police officers; and (3) the failure of the state to insure protection of the injured party (although the City of Chicago has, on its own, undertaken this responsibility in part). An entirely new statute, while retaining the desirable features of the old, should be enacted. The City of Chicago should become a *guarantor* of judgments secured against policemen for tortious injuries inflicted by them in the performance of their duties, rather than an indemnitor; and this liability should attach in all cases except those where the injuries result from the "willful misconduct"[33] of the officer. Other governmental agencies should be similarly responsible for the satisfaction of such judgments. Such a law would eliminate most of the objections to the present statute. And it might very easily result in lower costs to the taxpayer while guaranteeing the compensation of the victim; since the city's liability is changed from that of an indemnitor to that of a guarantor, the city will be liable only in those cases where the police officer is unable to satisfy the judgment.

Neither the present statute nor the suggested one actually operates to remove the traditional immunity of municipal corporations from liability for the acts of agents performing governmental functions.[34] The suggested statute would do what the present statute purports to do—force the governmental body to assume the responsibility for seeing that the victims of the tortious conduct of governmental agents are compensated for their injuries.

ABSTRACTS OF RECENT CASES

Legal Effect Denied to a Search and Seizure by Congressional Crime Committee—The Senate Crime Committee, while examining a witness who was an alleged gambler, obtained records and accounts and then directed the witness to lead a policeman to his home in order to obtain a record book. They neglected to inform him that he had a right to counsel and that his refusal to testify or produce records would be inadmissible in a subsequent gambling prosecution in the District of Columbia. The government claimed that such a search was not unreasonable because the defendant had assented to it. The reviewing court, however, did not agree, feeling that assent so extorted is no substitute for lawful process. *Nelson v. United States*, 22 U.S.L. Week 2014 (D.C. Cir., July 2, 1953). The court felt that the defendant's acquiescence in the search and seizure was only explainable on the basis of compulsion. They said that it is clear that if the defendant had been subjected to the same day-long pressures in a police station that his assent would not have been voluntary as a matter of law and that there is nothing to suggest that

33. The meaning of "willful and wanton" at best is perplexing. "Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others, it will justify the presumption of willfulness or wantonness. . . ." La Cerra v. Woodrich, 321 Ill. App. 107, 110, 52 N.E.2d 461, 463 (1943). Malice is a necessary element of "willfulness" (*ibid.*). See note 8 *supra*.

34. See Comment, *Tort Claims against the State of Illinois and its Subdivisions*, 47 NW. U.L. REV. 914 (1953).

a Congressional committee hearing is less awesome than a police station and should not, therefore, be viewed differently. The similarity, they claimed, has become more apparent as the investigative activities of Congress have become less distinguishable from the law enforcement activities of the executive. Thus, although a court cannot enjoin a Congressional committee from making an unconstitutional search and seizure, it can deny legal effect to it in an action before it.

Right to a Unanimous Verdict Cannot Be Waived—The defendant was tried by a jury for the commission of a felony. After retiring the jury returned in twenty-seven minutes with a report that they were unable to agree. The court inquired as to whether a majority verdict would be acceptable and the defendant agreed. The court ordered a verdict of guilty on the basis of a nine to three split in the jury. The government argued that since a defendant may waive his right to a trial by jury that he could also waive unanimity on the part of the jury. The Court of Appeals, however, held that the right to a unanimous verdict could not be waived and that the verdict was void. *Hibdon v. United States,* 204 F.2d 834 (6th Cir. 1953). The court in support of its decision pointed to the fact that unanimity was one of the peculiar and essential features of trial by jury at the common law and that it was an element of due process that had been necessary from the earliest time. They reasoned that a jury's unanimity is interwoven with the required measure of proof and that to sustain the validity of a verdict by less than all the jurors would be to destroy this test of proof, for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. Thus, it appears that a unanimous verdict is an essential of due process—a basic protection to those accused of crime—and not a mere technical requirement. Surely a prosecutor would carry a lighter burden in convincing a majority of the jury than in persuading all of them and, therefore, unjust convictions would be likely to be increased and the traditional measure of proof in criminal cases completely destroyed.

Proper Function of the Grand Jury Is to Indict But Not to Make Recommendations to the Executive or Legislative Branches of Government—A federal grand jury handed up a presentment which contained information regarding its investigation into alleged perjury violations concerning non-Communist affidavits of various union officials. It also contained recommendations to the executive and to Congress that the NLRB revoke certification of certain unions and that the Labor-Management Relations Act be amended to require waiver of the privilege against self-incrimination. The United States District Court held that the grand jury had no right to issue such a report because such was beyond its power and was in violation of the secrecy requirement. *In re United Electrical Workers,* 21 U.S.L. Week 2534 (April 13, 1953). The court pointed to the fact that the report had condemned but not indicted and that it was not within the power of a grand jury to make accusations which fall short of indictment. The action of the grand jury was also against the fundamental doctrine of separation of powers. A grand jury is an appendage of a court and as such its power cannot exceed that of a court. Thus, it follows that if a court has no power to advise the executive and legislative branches of government neither does the grand jury. The proper function of a grand jury is only to determine if there is sufficient evidence for indictment; if not, then it must remain silent.

Certificate of Innocence Is Not an Absolute Right After Acquittal of Murder—The defendant was found guilty of murder and assault. The Court of Appeals reversed and remanded the cause. At the second trial the jury found the defendant not guilty. The defendant then made a claim for damages in the Court of Claims pursuant to 28 U.S.C. §1495. In order to proceed in this action he requested the district court judge who presided at the second trial to sign a "certificate of innocence." (See 28 U.S.C. §2513.) This request was refused and from that order the defendant appealed. The Court of Appeals held that whether such a certificate shall issue is a matter committed to the discretion of the presiding judge and it is not mandatory that such a certificate shall issue. The statute which requires the "certificate of innocence" as a prerequisite to the civil suit for damages not only demands that the defendant show that he was acquitted, but that the trial judge thought he did not commit the acts charged or that, if he did, his acts were justifiable and, therefore, not criminal. Thus, the effect of the legislation is to require the concurrence in the not guilty verdict of a thirteenth juror—namely, the trial judge. *Rigsbee v. United States,* 204 F.2d 70 (D.C. Cir. 1953).

Order Committing the Defendant to the Custody of the Attorney General Until Mentally Competent to Stand Trial Is Not a Deprivation of Constitutional Rights and Is a Final Order from Which There Can Be an Appeal—The accused was indicted for sending libelous and defamatory materials through the United States mails in violation of 18 U.S.C.A. §1718. The district court ordered a hearing to determine the mental competency of the accused, pursuant to 18 U.S.C.A. §4244, 4246. The court determined that the defendant was an insane person and unable to make a defense to the charges in the indictment. Commitment was made to the Attorney General "for the purpose of observation and treatment until such time as said defendant shall become mentally competent or until further order of the court." The appeal in *Higgins v. United States,* 205 F.2d 650 (9th Cir. 1953), raises two important questions. First, is the aforementioned commitment based upon a final order subject to appeal? The Court of Appeals answered this in the affirmative by saying that when the mental disturbance of the accused might be of a long time, perhaps forever, then such an order of commitment is not of an interlocutory nature, but is a final order which may be appealed from. Second, are the aforementioned statutes, pursuant to which the defendant was committed, Constitutional? The court answers this by stating that, although the federal government has neither the constitutional nor inherent power to enter the general field of lunacy, Congress has the power to provide for the proper care and treatment of persons temporarily insane while in the custody of the United States awaiting trial upon a criminal offense. The order of the lower court is actually less than a judgment of insanity. It is merely a restraint upon the defendant until he is mentally competent for trial.

Pennsylvania Grand Jury Denied the Right to Investigate Conditions Leading to Prison Riots—Subsequent to a prison riot in the Western State Penitentiary in Pittsburgh, Pennsylvania, the District Attorney petitioned the court to submit the problem to the grand jury for investigation. The petition was granted but the Attorney General requested that the order be modified by limiting grand jury activity to criminal acts committed within the county. The Superior Court agreed with the plea of the Attorney General and ruled

that the lower court had no power to order a grand jury investigation into the conduct and management of the state penitentiary or to allow the grand jury to look into any matters which would not lead to criminal prosecution. The court based its opinion upon the fact that the institution was an arm of the executive branch. *In re Grand Jury Investigation of Conditions at Western State Penitentiary,* 96 A.2d 189 (Pa. 1953).

Recent Illinois Statute Permits Pre-Trial Suppression of an Illegally Obtained Confession—Illinois has recently amended its criminal code so that a defendant will be permitted to suppress an illegally obtained confession by filing a motion in advance of trial. If the judge finds that the alleged confession is incompetent he shall so rule and shall suppress it at that time. Thereafter, this confession may not be offered or received in evidence on the trial of the case. If, however, the ruling is adverse to the defendant this shall not prejudice his right to show that the alleged confession is incompetent at the time it is offered in evidence at the trial. Ill. Rev. Stat. c. 38, §736.1 (1953).

Where Defendant Fails to Produce Witness that It Was to His Interest to Produce, with No Explanation, Jury Could Draw an Inference that the Testimony Would Be Unfavorable to the Defendant—Defendant alleged that a third party had caused his accident with the plaintiff and that, therefore, he was not responsible. Defendant did not, however, produce this third party as a witness and offered no satisfactory explanation for his failure to do so. The plaintiffs insisted that they had no knowledge of any such person. The Supreme Court of Pennsylvania reversed the trial court's instruction that the jury should consider that this third party was equally available to both plaintiffs and defendants as a witness. It was the feeling of the court that this was prejudicial to the plaintiffs. They stated the ruling consideration as being that where evidence is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him. Here producing the third party was to the interest of the defendant and within his control. When he offered no satisfactory explanation for his failure to produce this witness the proper inference by the jury would be that this testimony would be unfavorable to the defendant. *Haas v. Kasnot,* 92 A.2d 171 (1952).

The *Haas* case also holds that the police accident report compiled by officers who had arrived on the scene, but who had not witnessed the accident, was hearsay. The report is not given the standing of a public record and, therefore, is not admissible as the U.S. Weather Reports are.

Arrest for Drunken Driving on Private Property—In *State v. Harold,* 246 P. 2d 178 (Ariz. 1952), the defendant was convicted with a second offense of operating a motor vehicle while under the influence of intoxicating liquor and reckless driving. The arrest was made on private property. One of the defendant's contentions was that the state has no power to regulate automobiles on private property. On appeal, the court held that the legislature has both the right and the duty to prevent incompetent automobile drivers from operating vehicles on highways or elsewhere within the borders of the state to protect the public welfare, and enforcement of such legislation is within the police power of the state. The court further stated that even upon private property an intoxicated or reckless driver of an automobile is just as much a menace to himself or to anyone who may be lawfully thereon as he would be to those on a public highway.