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Abstracts of Recent Cases

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and conspiracy in Illinois, for example,³⁹ may hold public office, under statutory law, though a conviction for these offenses would be clearly inconsistent with the standards of decency and respect for the law which the public is entitled to expect from their elected officials. Conversely, a felony conviction which vacates a public office may work an injustice upon an officeholder who, perhaps in his youth many years before his election, had been convicted of involuntary manslaughter or other crime which in no way relates to his qualification for public office. And if extraterritorial convictions are to be given strict effect, a man may be removed from office for conviction of a felony in one state when that act is only a misdemeanor or even no crime at all in the state of disqualification.

The practice of singling out certain crimes for the label of infamy is similarly not without fault. It was precisely because Colorado had adopted this practice that a person convicted of evading federal income taxes was able to retain his office,

³⁹ See ILL. REV. STAT., c. 38, §§80, 138, 139, 162, 492 (1957).

for income tax evasion was not one of the crimes listed as infamous.⁴⁰

It is submitted that the adoption of a dual test of infamy may answer the problem presented. The "punishment" test, which deems all felonies infamous, is well suited to those instances where constitutional provisions demand the protection of an indictment by the grand jury. As far as the office disqualification cases are concerned, today, more than ever before in the history of our country, the need is great for competency in public office. That competency, as regards the issue with which we are here concerned, should be determined by the nature of the offense rather than by the severity of the penalty attached to certain crimes. In this way inequities to the individual whose offense has no relation to his ability to perform the functions of the office will be avoided and the public interest will be better served by correlating the quality of the man himself to the requirements and obligations of his office.

⁴⁰ See note 13 *supra*.

ABSTRACTS OF RECENT CASES

Francis A. Heroux

Judge's Comments On Defendant's Guilt Prejudicial Error—The defendant was charged with selling narcotics in violation of 21 U.S.C. §§ 173, 174. At his trial, the defendant conceded that he had sold a package to a federal agent which supposedly contained narcotics; however, the defendant claimed that the package only contained plaster of paris which he palmed off on the agent to cheat him. A necessary corollary of this defense was that the defendant had been "framed" by the agents and that the agents had either fooled the United States Attorney or else the United States Attorney was a party to the "frame-up".

During the course of the trial, the district judge took an active part in questioning the witnesses. When the defendant took the stand to testify in his own behalf, the judge developed several lines of inquiry about the alleged "frame-up". During this questioning, the judge stopped to comment, "that he had once been an Assistant United States Attorney and that it was easy enough to tell when an agent is trying to frame somebody". Thereafter,

at the close of the trial, the judge in his instructions, while admonishing the jury that they were the sole trier of facts, told the jury that he personally believed the defendant guilty of the crime as charged.

The jury returned a verdict of guilty and the defendant appealed. The United States Court of Appeals for the Second Circuit reversed and remanded, holding that it was outside the area of permissible judicial comment for the judge to interject his own personal testimony into the case and also reversible error for the judge to tell the jury that he personally believed the defendant guilty of the crime charged. *United States v. Woods*, 252 F. 2d 334 (2 Cir. 1958).

Discussing the trial judge's part in the questioning of the witnesses, the court reiterated the premise that during the course of a trial a federal judge is more than a moderator and it is his duty to develop the facts and to make the proceedings orderly and comprehensible to the jury. However, when the judge stated from his own knowledge that

the jury could not give credit to the defense without imputing to the prosecutor conscious participation in the frame-up, he assumed the role of an expert witness and this exceeded the bounds of judicial comment. Furthermore, the judge's comment in his instructions that he personally believed the defendant to be guilty of the crime as charged was also improper. The government argued that the comment only related to the issue of credibility as between the federal agent and the defendant and thus the instant case would not come under the rule of *United States v. Murdock*, 290 U.S. 389 (1933) which prohibits judicial opinions of guilt if the vital facts are in issue. The government's theory was based on the fact that the only issue in the case was one of credibility, and if the judge could comment on credibility, he could also comment on guilt. The court, even assuming *arguendo* that the judge could comment on credibility, rejected the government's argument. The court noted a significant difference between expressions as to "guilt" and expressions as to "credibility," especially in view of the impact of the burden of proof. That is, the trial judge in effect said that he thought the federal agent's testimony was not only true, but also constituted evidence of guilt beyond a reasonable doubt.

Threat Of Mob Violence Held To Be Mental Coercion—Petitioner, a nineteen year old Negro, was suspected of the robbery-murder of an elderly merchant. He was arrested by the police at 11:00 a.m. on October 5 and held incommunicado without any charge being placed against him until the afternoon of October 7. During this time, he was questioned continuously about the crime, but he did not make a confession. Thereupon, the chief of police stated to the petitioner that there was a mob of people waiting outside to "get" him, but that if he would make a full confession the chief agreed to protect him. In this setting the petitioner immediately consented to make a statement about the crime.

At the beginning of the trial the petitioner's counsel moved to suppress the confession, but the trial court overruled this motion. This ruling was appealed and the United States Supreme Court held that the confession was coerced and its use at the trial over the petitioner's objection deprived him of due process of law. *Payne v. Arkansas*, 78 S.Ct. 844 (1958).

The state argued that the confession was not

coerced because there was no physical torture involved. The Court rejected this argument, reiterating its stand in *Watts v. Indiana*, 338 U.S. 49, 52, 53 (1949) where it said, "there is torture of mind as well as body; the will is as much affected by fear as by force. . . . A confession by which life becomes forfeit must be the expression of free choice." The Court then went on to point out that the threat of mob violence used by the police chief created such fear in the petitioner that the subsequent confession he made was not an "expression of free choice" and thus the confession was coerced. The Court concluded that the use of this confession deprived the petitioner of that fundamental fairness essential to the very concept of justice, and, hence, denied him the due process of law guaranteed by the fourteenth amendment.

Evidence That Defendant Drank From Same Bottle As Negroes Prejudicial—The defendant was brought to trial for bribing a police officer to let him maintain a disorderly house. He was convicted and he appealed. One of the grounds urged for reversal was that evidence had been introduced at the trial that the defendant had been seen drinking liquor from the same bottle as Negroes. The Court Of Appeals of Georgia reversed the conviction, holding that mention of this fact at the trial was prejudicial error. *Ingram v. State*, 103 S.E.2d 666 (Ga. 1958).

The court noted that evidence that drinking was going on at a disorderly house would be admissible, but that it was not relevant to show that mixed drinking had occurred. The court took notice of the fact that Georgia is one of a minority of states which holds that mixing of the races is undesirable and that "the issue of racial integration is fraught with great emotional tension in the face of Brown v. Board of Education. . . ." As long as the federal courts, and this court, held that mention of racial differences in trials where Negroes were defendants was prejudicial to a fair trial, the court would equally protect a white defendant.

Defendant Entitled To New Trial When Court Reporter Loses Notes—The petitioner was convicted of armed robbery in 1948. He immediately filed a notice of appeal and received several time extensions during which he tried to obtain a transcript of the trial for use in a bill of exceptions. Shortly after the trial the court reporter became seriously ill and his shorthand notes were lost.