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Abstracts of Recent Cases

same for both trials before the bar would be raised, thereby adopting the more strict view of the *Spitzer* case.

The conclusion that the Illinois court may accept the view of the *Spitzer* case is supported by an examination of Illinois law before the statute was passed.[40] It must be remembered that these cases involved two prosecutions by Illinois, and were decided under the constitutional prohibition and not under a specific statute that required only the same act to raise the bar. Nevertheless (prior to passage of the statute), in single sovereignty double jeopardy cases, the Illinois courts have held that: "the fact that both crimes resulted from the same transaction and involved the same property . . . [was] of no consequence. A conviction or acquittal of burglary does not exempt the accused from prosecution and punishment for robbery."[41] Because of these views, it is likely that similar results will be reached in dual sovereignty double jeopardy cases under the new statute.

One of the best arguments against the obvious flaunting of the spirit of the double jeopardy statute, as could occur in Illinois, was stated by a New York court in *People v. Savarese*.[42] There it was pointed out that the bar against double jeopardy raised by the state constitution was a narrow bar that would be lowered by the addition of one necessary fact to the indictment, but the statutory bar should be used as the legislature intended, as a supplement to the constitutional bar, rising to protect the accused *when it becomes necessary to use one essential fact in both trials*. This interpretation, if accepted by the Illinois court, besides carrying out the presumed intent of the legislature, would allow the courts to erect a reasonably clear set of standards and aid in bringing about some degree of consistency in the law.

[40] People v. Woolsey, 399 Ill. 617, 78 N.E.2d 237 (1948). The Illinois court held burglary and robbery to be separate offenses even though the charges arose from the same act. People v. Flaherty, 396 Ill. 304, 71 N.E.2d 779 (1947); the defendant, after being acquitted in one trial of a burglary and a larceny charge, was brought to trial a second time and convicted on a charge of robbery growing out of the same facts. These cases are single sovereignty cases, but they indicate the direction of the Illinois courts' decisions in the past. See, People v. Barktus, note 21 *supra*.

[41] People v. Flaherty, note 40 *supra*, at 311.

[42] 1 Misc. 2d 305, 114 N.Y.S.2d 816 (Kings County Court 1951). This was a case involving a determination of the legislative intent with regard to the double punishment statutes of New York.

ABSTRACTS OF RECENT CASES

One Need Not Allege Possession or Ownership of Contraband To Suppress Its Use in Evidence—Petitioner was convicted of possession of narcotic drugs. The federal district court ruled that he did not have standing to move to suppress evidence seized pursuant to an allegedly unlawful search since he alleged neither ownership nor possession of the narcotics seized. The search took place in the apartment of a friend whom the petitioner was visiting. The Court of Appeals affirmed on the ground that the search and seizure were valid and thus did not pass on the question of petitioner's standing to move to suppress. On *certiorari*, the United States Supreme Court reversed, holding that petitioner had standing to contend that the entry and subsequent seizure were unlawful, despite the fact that petitioner had testified that neither the property seized nor the place of arrest were his. To rule otherwise, the Court insisted, would be to permit the government to take advantage of contradictory positions as the basis for the conviction. The conviction flowed from petitioner's possession of narcotics at the time of the search, yet fruits of the search were admitted into evidence against him on the ground that he did not have ownership or possession of narcotics at that time. Since petitioner was present in the apartment with the permission of the owner at the time the narcotics were seized, he had sufficient interest in the premises to be a "person aggrieved" by the search under Federal Rule of Criminal Procedure 41 (e). *Jones v. United States*, 28 U.S.L. WEEK 4235, (U.S. March 28, 1960).

Consolidation of Causes for Trial Denies Due Process When Attorney for Both Defendants Can Make No Decision of Consequence Without Harming One Defendant or the Other—Petitioner and a co-defendant were convicted of assault and grand larceny. The defendants were tried together and were defended by the same attorney. Petitioner maintained his innocence throughout the trial and claimed that his co-defendant stood ready to testify that he was not a party to the commission of either offense. Counsel was faced with the

dilemma of deciding whether the co-defendant should testify, thus exonerating petitioner and convicting himself or should remain silent and thereby not prejudice his own cause. He advised the co-defendant to remain silent. On appeal, the Supreme Court of Minnesota reversed, holding that the consolidation for a single trial of the informations charging distinct crimes, in face of existing conflicting interests, constituted a denial to the petitioner of due process and right to counsel. *State v. Martineau*, 101 N.W.2d 410 (Minn. 1960).

In Order To Constitute Second Offense, Both Crimes Must Be Against Same Soverign—Petitioner was convicted of murder in the second degree and sentenced to life imprisonment in Pennsylvania. A previous conviction of a similar offense in New York was considered in determining that the increased penalty for second or subsequent offenses was appropriate. On a writ of habeas corpus, petitioner challenged the legality of the application of the increased sentence based on the out-of-state conviction. The Supreme Court of Pennsylvania granted the writ and remanded the cause for imposition of a proper and legal sentence. The court held that there was no suggestion in the Pennsylvania enabling statute which would allow convictions in other states to be considered in the computation of sentence for crimes committed within the Commonwealth. *Swingle v. Banmiller*, 156 A.2d 520 (Pa. 1959).

Bail Pending Appeal Must Ordinarily Be Granted in Federal Criminal Prosecutions—Petitioner was convicted of knowingly making false statements to a federal savings and loan association in order to obtain a loan to which he was not entitled. He was denied bail by the district court, pending appeal. Petitioner contended that he was entitled to bail as a matter of right under Rule 46 (a) of the Federal Rules of Criminal Procedure. The United States Court of Appeals for the Fourth Circuit granted his application for bail, holding that none of the grounds for denying bail were present. It noted that bail can be denied only (1) where the appeal is insubstantial or frivolous, (2) where there is a real danger of the defendant fleeing, (3) where defendant has committed prior offenses, or (4) where there is a reasonable likelihood that the defendant will commit additional offenses if released on bail. *Rhodes v. United States*, 275 F.2d 78 (4th Cir. 1960).

Communication to Jury of Trial Judge's Opinion on Question of Guilt Constitutes Prejudicial Error—Petitioner was charged with armed robbery. The jury found it difficult to reach a verdict and requested the judge to redefine the term "armed robbery." In response the trial judge stated: "Now, again, I am not telling you what I believe in this matter; the evidence indicates that the two other men were armed but strongly indicates that he (the defendant) was not armed . . .the only evidence I recollect is that he may have at some time or other made some request to get the gun from the other men who had it. That is all there is so while he was armed in the sense of being armed, he was not personally armed and if you came out with a verdict otherwise, why I would change it because I would have to." The defense promptly objected to these remarks as prejudicial. The defendant was convicted and the California District Court of Appeal, Second District, reversed the conviction. It held that the remarks of the trial judge indicated a personal belief in the guilt of the defendant and suggested that he might find a way to extend leniency to the defendant if he were found guilty. *People v. Muza*, 3 Cal. Rep. 395 (Cal. 2d Dist. 1960).

Character of a Defendant Is Put in Issue Only When He Calls Witnesses To Attest to His Reputation—Petitioner was convicted of dispensing and distributing four capsules of heroin. In response to a question by the prosecution, he testified that he had not obtained narcotic drugs for his co-defendants on any occasion other than that specified in the indictment. The testimony of one of the co-defendants regarding other alleged narcotic transactions was admitted in evidence over petitioner's objection. The Court of Appeals for the Second Circuit reversed the conviction, holding that it was prejudicial error for the court to admit this rebuttal testimony since it went far beyond the permissible bounds of attacking a witness's credibility. The court stated: "When a witness is cross-examined for the purpose of destroying his credibility by proof of specific acts of misconduct not the subject of a conviction, the examiner must be content with the answer. The examiner may not, over objection, produce independent proof to show the falsity of such answer." Since the defendant had not put his character in issue, no independent evidence could be admitted in rebuttal on this issue. *United States v. Masino*, 275 F.2d 129 (2d Cir. 1960).

Court of Appeals Has No Power to Revise a