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RECENT CRIMINAL CASES

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CONSTITUTIONAL LAW — FEDERAL REVIEW OF CRIMINAL TRIALS IN STATE COURTS THROUGH DUE PROCESS.—[United States] The defendants, seven negroes, were convicted of the rape of two white girls, and were sentenced to death in a trial conducted in a community where public indignation and hostility against the defendants were so intense that it was necessary for the militia to guard all the proceedings. The convictions were affirmed by the Alabama Supreme Court: 224 Ala. 524. The defendants appealed from an order of the Alabama court denying them a new trial on the grounds that the original trial was unfair and that there was an insufficient representation of counsel. The United States Supreme Court granted a writ of certiorari and then reversed the case, holding that "the failure of the trial court to make an effective appointment of counsel was a denial of due process within the meaning of the Fourteenth Amendment": *Powell* v. *Alabama* (1932) 77 L. Ed. 78.

This decision has evoked a great deal of comment both favorable and unfavorable, the chief grounds for disagreement, aside from the facts of the case, being (1) that the decision is an unprecedented invasion of state criminal process, and a serious inroad on state sovereignty, (2) that the result will be added delay in the administration of criminal justice, and (3) that it will impose a great burden on the already overworked Supreme Court.

It is submitted that these juristic and practical objections to the conclusions reached by the majority opinion are not so formidable as they appear at first sight, and that the result reached, though considerably widening the limits of the due process clause, may be supported on precedent and principle, and will promote the best interests of American justice.

Federal interference with state criminal justice is no novelty. The two leading cases on the subject are *Frank* v. *Mangum* (1915) 237 U. S. 309 35 Sup. Ct. 582, and *Moore* v. *Dempsey* (1923) 261 U. S. 86, 43 Sup. Ct. 265. In both of these cases it was claimed that the judge and jury in the state trial court were so intimidated by mob violence that there was a denial of due process under the Federal Constitution. In the *Frank* case, after being denied a writ of error by the United States Supreme Court, the defendant petitioned the Federal District Court for a writ of habeas corpus, which was denied, and he appealed to the Supreme Court. That court conceded that due process of law is denied to a person convicted by a tribunal dominated by mob violence

without corrective process, but held that the review by the state supreme court was sufficient corrective process, and on grounds of comity, the decision of the Georgia court on the facts, while not conclusive, was entitled to great weight, and it therefore affirmed the denial of habeas corpus. In the *Moore* case, after the United States Supreme Court had denied the accused a writ of certiorari, he petitioned the Federal District Court for a writ of habeas corpus. The court sustained a demurrer to his petition and he appealed to the United States Supreme Court, which reversed the District Court and ordered an investigation into the facts, thus showing that the state supreme court's review of the facts would not prevent the federal courts from taking jurisdiction. The two cases may be easily distinguished, because the *Frank* case was an appeal on the facts, and the Georgia high court had held that the facts alleged by the defendants were untrue, whereas in the *Moore* case the appeal was on the sustaining of the demurrer, and the Arkansas court had made no ruling on the truth of the facts, but had stated that even if true, they did not show the defendants had been denied a fair trial. But it is generally believed that the *Moore* case overruled the *Frank* case: Willoughby, "The Constitutional Law of the United States" (1929) 1717.

Thus the *Moore* case establishes the principle that the Fourteenth Amendment extends the right to the accused in a state court trial to have a free, fair, and impartial trial at least so far as freedom from mob coercion is concerned, and that this right may be enforced in the federal courts. Another case in which the federal courts have interfered through the writ of habeas corpus, which involved both mob violence and insufficient representation by counsel, is *Dower* v. *Dunaway* (C. C. A. 5th, 1931) 53 F. (2d) 586.

Therefore the majority opinion, though undoubtedly stretching due process to a point hitherto unknown, may be supported doctrinally and on precedent. But in the last analysis—the limits of the due process clause being indefinable, amorphic and one of the most expedient media of judicial rationalization—lack of precedent offers little hindrance to even the widest construction. "But apart from the imminent risk of a failure to give any definition which would be comprehensive . . . there is wisdom in the ascertaining of the intent and application of such an important phase in the Federal Constitution by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require": *Davidson* v. *New Orleans* (1877) 96 U. S. 97, 104. Realistically speaking, due process means "what the judiciary interprets it to mean, if counsel can persuade accordingly": *Albertsworth*, "Constitutional Casuistry" (1932) 27 Ill. L. Rev. 264. Thus the due process cases are decided primarily on judicial statesmanship, and stare decisis, or the lack of it, is subordinated to the larger public interests. Whether the court was justified in this new encroachment into a sphere hitherto enjoyed exclusively by the states is debatable and depends on the individual's political philosophy. But evidently the court took into consideration the notoriously unfair trials given to negroes in many cases in the South involving sex crimes against white women and the tendency of even the higher

courts in some of the states to be stampeded by public clamor, into affirming doubtful trials. It is significant that even an ardent states' rights advocate like Mr. Justice Brandeis felt that justice was paramount here, and it is safe to say that Mr. Justice Holmes would have done likewise.

The other objections to the majority decision, that it furnishes new means of delay in criminal cases, and that it puts another burden on the Supreme Court, are of great weight, but if justice is to be more than a platitude, then due process should assure a fair trial, regardless of delay. Besides, the delays which reviews by the United States Supreme Court will occasion through review of state criminal trials under the due process clause are more illusory than real. No writ of error is available to the defendant where the federal question is denial of due process because of an unfair trial, and it is clear that review by certiorari will be granted only where the trial is grossly unfair or is of exceptional public interest. Similarly, the federal courts are exceedingly reluctant to interfere with state criminal process through the writ of habeas corpus. As Mr. Justice Holmes, who spoke for the majority in the *Moore* case, later said: "It must be realized that it can be done only upon definitely and narrowly limited grounds": *Ashe* v. *United States* (1926) 270 U. S. 424, 46 Sup. Ct. 334. That the federal courts rarely will interfere is shown also by the fact that every attempt since *Moore* v. *Dempsey* to claim federal protection on the ground that a conviction in a state court was secured through mob violence has proved futile: *Bard* v. *Chilton* (C. C. A. 6th, 1927) 20 F. (2d) 906, certiorari denied (1927) 275 U. S. 565; *Dunn* v. *Lyons* (C. C. A. 5th, 1927) 23 F. (2d) 14, certiorari denied (1922) 276 U. S. 622; *Ashe* v. *United States,* supra. Moreover, in the instant case the court was careful to limit its holding to a capital case with the peculiar circumstances involved here.

The added burden imposed upon the Supreme Court by this decision will not be very great, since in most cases certiorari will be denied and no opinion need be written. Indeed, it is safe to say that one of the main factors which has led the court to refuse to interfere in cases like *Frank* v. *Mangum,* supra, was the fear of being overburdened with writing opinions, since the defendant at that time had a writ of right in the writ of error. But the various statutory changes substituting review by a writ of grace, certiorari, has released the Supreme Court from this difficult administrative problem, and has enabled it to take jurisdiction in cases like the principal one, without danger of overcongestion of its calendar.

The case is a striking illustration of Judge Cardozo's theory as expounded in "The Nature of the Judicial Process" of how non-juristic factors mold judicial opinion (p. 12). Behind the surface language of the decision, the analytical student of the judicial process can discern the conflicting elements and heterogeneous viewpoints, sociological, ethical, political, and the force of crystallized public belief in the innocence of the defendants, which were the stimuli dictating the result. The influence of the aroused public opinion among liberal thinkers throughout the country that this was an outrageously unfair trial was probably the most compelling influence on the per-

sonnel of the court, and it was probably this intense interest in the case which constituted "the special and important reason" (Supreme Court Rules, Rule 38) for which certiorari was granted. What other factors motivated the decision is at best conjectural, but some of the more likely ones may be suggested. The Supreme Court originally interpreted the Fourteenth Amendment as one enacted to protect the emancipated negroes: *Slaughter House Case* (1873) 16 Wall. (U. S.) 36, 81; and it is possible that the fact that members of the race for which it was enacted were on trial, had its suggestive influence on the court in this case. It is significant that the other leading case of Federal interference under due process, the *Moore* case, also involved negroes. Also the harsh penalty, death, given the seven accused, coupled with the doubtful nature of the evidence, must have had its effect on the humanitarian impulses of the court. It is worthy of note that there was a great deal of "radical" agitation about this case and that the Washington police had a difficult time restraining a crowd from staging a demonstration in front of the Supreme Court while this opinion was being read.

But the amazing part of the decision is that the court departed from its established policy of refusing to determine new constitutional questions whenever it could decide the case on any other ground. The defendants' counsel in their brief relied greatly on *Moore* v. *Dempsey,* to which this case is strikingly similar, and the majority at the outset of the opinion quoted Chief Justice Anderson of Alabama to the effect that "the proceedings from beginning to end took place in an atmosphere of tense, hostile, and excited public sentiment." Since all the claims of the defendants were properly raised, the court easily could have settled the case on the basis of *Moore* v. *Dempsey.* Instead, as it has consistently done, it refused to re-affirm the mob violence doctrine, and chose to turn the case on the failure of the trial court to make an effective appointment of counsel. Two explanations for this most unusual procedure in which the court went out of it way to decide a new constitutional question may be offered. One is that the opinion represents a compromise between the more conservative members of the court who might have refused to follow *Moore* v. *Dempsey,* and the liberal members who did not wish to jeopardize the result they wanted by forcing the issue on the mob violence formula. This idea is suggested in International Juridical Association Bulletin, October, 1932. This surmise is strengthened by the fact that Mr. Justice Holmes, the vigorous exponent of the doctrine of *Moore* v. *Dempsey,* was no longer on the bench, and Mr. Justice Sutherland, who wrote the majority opinion in the principal case, had dissented in the *Moore* case, thereby making it doubtful that the liberal group of justices could have mustered enough votes to decide the case on the basis of the *Moore* holding. Another possibility is that the court wanted to strike a blow at the vicious practice of rushing defendants through rapid trials in which the right to counsel and other constitutional rights are mere formal gestures, and to open up a new avenue for federal regulation of unfair state trials.

IRWIN J. KAPLAN.

MURDER—SENTENCE — CONSIDERATION OF PRIOR RELATED ACTS.—[Illinois] The defendant, Varner Corry, age fifteen, and three other youths of about the same age broke into the John Marshall High School in Chicago on Memorial Day, 1931. A janitress discovered their presence in the swimming pool of the school and summoned police officer Edward Francis Smith. The officer, in full uniform, entered the tank room and commanded the boys to dress. The defendant reached for a revolver which he had placed with his clothing and ordered the officer to put up his hands. Smith, who was about ten feet from the defendant at the time, instead of complying, jumped behind a pillar. Shots followed, and in the exchange the officer received wounds from which he died. The defendant was apprehended later in the day. He confessed to having broken into the high school two weeks previous and stealing the fatal weapon from the athletic department. He had purchased cartridges for the revolver and had practiced on an improvised target range; he also admitted carrying the weapon with him and having reloaded it before his visit to the school on Memorial Day. The accused entered a plea of not guilty and waived trial by jury. The trial court, in sentencing him to eighteen years for murder, recounted the theft of the revolver and the purchase of cartridges. *Held:* that the trial court had improperly considered the previous acts in determining the measure of punishment; case reversed and remanded for new trial: *People* v. *Corry* (1932) 349 Ill. 122, 181 N. E. 603.

The acts of the defendant evince a definite intention to use the revolver in the consummation of an illegal act. From the apparently *bona fide* confession it seems that the defendant intended to meet opposition even at the cost of taking human life. This is a clear case of murder—and even the Supreme Court does not suggest otherwise—and the evidence concerning the theft of the revolver and the subsequent carrying of it is competent to show an unlawful intent: *People* v. *Doody* (1931) 343 Ill. 194, 175 N. E. 436; *Nash* v. *Commonwealth* (1931) 240 Ky. 691, 42 S. W. (2d) 898; *People* v. *Spaulding* (1923) 309 Ill. 292, 304, 141 N. E. 196, 201; *People* v. *Johnson* (1918) 286 Ill. 108, 121 N. E. 246. It is inconceivable that the Supreme Court of Illinois could deny that the acts of the defendant were in direct connection with the murder. The causal connections between the stealing of the gun, the practicing with it, the carrying of it concealed upon the defendant's person, the breaking into the school for a second time, armed, and finally the resistance which resulted in the homicide, are all so apparent as to harbor little doubt.

The case was heard by the trial judge without a jury, under the authority of a recent case which changed an old Illinois rule that had been in operation for over a century: *People* v. *Fisher* (1930) 340 Ill. 250, 172 N. E. 743. The purpose of the court in reversing this case seems evident: it was to instruct trial judges to be extremely careful when hearing a case under a plea of not guilty without trial by jury. The record must be entirely free from error, for as the Supreme Court says: "By waiving his right to a trial by jury, the plaintiff in error did not thereby waive any other right" (p. 605).

The Supreme Court was a bit

injudicious, however, in its choice of a case with which to discipline and instruct trial judges. The court, in probing into the mind of trial Judge Sabath, has reached the conclusion that he improperly considered the acts of the accused previous to the homicide in meting out punishment. The court states, however, that "it was proper to show that he [the defendant] obtained the revolver and bought cartridges suited to it as facts tending to establish the commission of the crime charged . . . " (p. 604). This means that Sabath, as judge, must first pass upon the legal admissibility of the evidence before submitting it to Sabath, as jury, for in this case the trial judge acted as both judge and jury. The evidence was admissible to Sabath as jury in order to show the commission of the crime as well as the intent, but it was not admissible to him in determining the amount of punishment. The metaphysical distinction between the judge as judge and the judge as jury is valuable for purposes of interpretation, but it is naive to suppose that the judge as jury can remain uninfluenced by what the judge as judge experiences. Granting that the judge acting as jury took the previous acts into consideration, it is impossible for anyone extrinsic to the ego of the judge himself to describe just how the judge acting as jury was affected. The Supreme Court appears a bit presumptive when it states that "Apparently the offenses which the court recounted were taken into consideration in determining the punishment to be imposed" (p. 605). That the previous acts were taken into account by the court acting as jury is not denied; but beyond the fact that the trial court related these offenses in reading the sentence to the defendant, there is nothing to indicate that the trial court did take these offenses into consideration in determining the punishment. In fact, there is strong evidence to the contrary. As the Supreme Court states: ". . . the punishment prescribed for that crime [murder] is not uniform in all cases but may vary within a wide range" (p. 605). The range within which the punishment varies in Illinois is from fourteen years to life imprisonment or death. As previously stated, this was a case of murder, admitted, at least tacitly, by the Supreme Court in its opinion. The only mitigating circumstance was the youthfulness of the defendant. Yet with this wide range of punishment in Illinois for murder, the trial judge sentenced the defendant to eighteen years in the penitentiary, only four years more than the minimum punishment for murder provided by statute. The Supreme Court decided, however, that the defendant had been sentenced to his prejudice—that the punishment was too severe.

The decision in the *Corry* case probably will cause considerable difficulty in future prosecutions; gangsters and gunmen will demand reversals upon the authority of a reversal in the case of this fifteen year old boy.

MARSHAL WIEDEL.

CONSPIRACY TO VIOLATE MANN ACT.—[United States] Jack Gebardi alias Jack McGurn, and Louise Rolfe were indicted for conspiring to commit an offense against the United States under sec. 88, title 18, U. S. C. A. The alleged conspiracy involved the violation of the White Slave Traffic Act (Mann Act) sec. 397 *et seq.*, title 18, U. S. C. A.

which imposes a penalty upon "any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . ." The evidence tended to show that Gebardi, a married man, and Louise Rolfe, an unmarried woman, traveled by train from Chicago to Miami, Florida, and that Gebardi paid the hotel and rail expense, such trip being for an immoral purpose, namely, illicit sexual relations. Subsequent trips to Jacksonville, Florida, and Gulfport, Mississippi, also were shown. The indictment was laid under three counts, each having as its object one of the three trips for immoral purposes. Both defendants waived a jury trial. *Held:* Gebardi and Rolfe were not guilty of conspiring to violate the Mann Act because the mere acquiescence of Rolfe to make the alleged trips would not make her a conspirator, and if she was not guilty then clearly McGurn was not, since one cannot conspire with himself to commit an offense: *Gebardi* v. *United States* (1932) 286 U. S. 539, 53 S. Ct. 34.

The question involved is whether the woman by merely consenting or agreeing beforehand to make an interstate trip for the purpose of having illicit sexual relations with a male companion may be convicted of a conspiracy with the man to violate the Mann Act.

The trial court gave judgment of conviction, which was affirmed by the Court of Appeals: (C. C. A. 7th 1932) 57 F. (2d) 617. Judge Evans who wrote the majority opinion of the latter court reasons that "Credulity would be strained beyond the cracking point to accept as true the suggestion that said parties met accidentally rather than premeditately." In upholding the conviction, the court relied upon the authority of the following cases to substantiate its view: *U. S.* v. *Holte* (1915) 236 U. S. 140; *Corbett* v. *U. S.* (C. C. A. 9th 1924) 299 F. 27; *O'Leary and Sullivan* v. *U. S.* (C. C. A. 7th 1931) 53 F. (2d) 956.

Mr. Justice Stone, delivering the opinion of the Supreme Court, reasons that there was no evidence that Louise Rolfe purchased the tickets or that she was the moving spirit in conceiving or carrying out the transportation, and that the proof shows no more than that she went willingly upon the journeys for the purposes alleged. The following quotation taken from the opinion epitomizes the reasons that motivated the court in reversing the conviction: "We perceive in the failure of the Mann Act to condemn the woman's participation in those transportations, which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished."

In the *Holte* case, *supra,* the court stated that under certain circumstances it would be possible for a woman to be guilty of a violation of the Mann Act and of a conspiracy to violate it as well. In support of this statement, a hypothetical case was suggested in which a professional prostitute, as well able to look out for herself as was the man, suggested and carried out a journey within the meaning of the act, and even bought the railroad tickets herself, all in the hope of blackmailing the man. These exceptional circumstances envisaged in that case are not present here,

and the problem resolves itself into one of whether mere consent to make the alleged trips would make the woman a conspirator.

As a necessary ingredient of the commission of the substantive crime by the man, the statute contemplates the consent of the woman to make the alleged trips in many cases, but having this in mind Congress did not provide for the punishment of the woman because of her mere consent, and it is extremely doubtful whether it was intended that she should be subjected to punishment through the medium of the conspiracy device. If we are to infer that the mere acquiescence of the woman transported was intended to be condemned by the statute, the same reasoning would result in the inference that the purchaser of liquor was to be regarded as an abettor of the illegal sale, or that the consent of an unmarried person to adultery with a married person, where the latter alone is guilty of the substantive offense, would render the former an abettor or a co-conspirator. However, these inferences have not been upheld: *U. S.* v. *Farrar* (1929) 281 U. S. 624; In Re Cooper (1912) 162 Cal. 81, 121 Pac. 318.

It has been held that an agreement to commit an offense may be criminal though its purpose is to do what some of the conspirators may be free to do alone, or that anyone may plan that others shall do what he cannot do himself: *U. S.* v. *Rabinowich* (1915) 238 U. S. 78; *Tapack* v. *U. S.* (C. C. A. 3d, 1915) 220 F. 445. On the other hand, mere proof of the substantive crime, as was shown in the present case, will not alone serve to show a conspiracy to commit it: *Biemer* v. *U. S.* (C. C. A. 7th, 1932) 54 F. (2d) 1045; *U. S.* v. *Heitler* (N. D. Ill. 1921) 274 F. 401.

Congress in enacting the law did so with the express purpose in mind of doing away with the interstate traffic in women that was being conducted for purposes of prostitution, debauchery, and other immoral motives. The statute itself states that it shall be known as the "White Slave Traffic Act." To quote from Mr. Justice Lamar in his dissenting opinion in the *Holte* case, *supra;* "In giving itself such a title, the statute specifically indicates that while of right, woman is not an object of merchandise or traffic, yet for gain she has by some been wrongfully made such for purposes of prostitution . . . and that trade Congress intended to bar from interstate commerce." In view of the ultimate aim of the act, a prosecution of the woman for conspiring to violate it seems contrary to its general intendment.

A practical consideration that suggests itself is that in many cases in order to convict those guilty of a violation of the act itself, the testimony of the woman transported is the most potent evidence in possession of the prosecution. If it be held that the acquiescence of the woman to make the trip would make her a conspirator, she would then be in a position to claim her privilege and refuse to testify on the ground that she might thereby subject herself to a prosecution for conspiracy.

Conceding that Louise Rolfe was not guilty of conspiracy to violate the Mann Act, it follows that McGurn also was not guilty, because one cannot conspire with himself to violate an act, there being no evidence that he conspired with anybody else: *Williams* v. *U. S.* (C. C. A. 4th, 1922) 282 F. 481.

It is settled that commercialism is not an essential to a violation of the "White Slave Traffic Act": *Caminetti* v. *U. S.* (1916) 242 U. S. 470. In non-commercial cases, although they are technically within the prohibitions of the statute, the various district attorneys have prosecuted such as in their own discretion demand attention. As a guide to the exercise of this discretion, cases involving previous chaste, or very young women or girls, or (when state laws are inadequate) involving married women (with young children) then living with their husbands, properly have received consideration. The present prosecution is a digression from the previous policy in non-commercial cases, since none of the above factors were involved, but the explanation can be found in the facts leading to the indictment. When McGurn was being questioned as to his alleged participation in the "St. Valentine's Day Massacre" in Chicago, his alibi was to the effect that he was out of the state at the time with Rolfe. Attempted prosecutions by state authorities were unsuccessful. The Federal authorities then instigated this prosecution using the Mann Act violation as a means of sending McGurn, a notorious character, to the penitentiary.

The question arises as to why a prosecution under a conspiracy indictment was had rather than one against Gebardi himself for the direct violation of the act, there being no particular reason why the woman should be convicted. Two possible motivating factors suggest themselves as an explanation. In the first place, the evidence on the part of the government was largely circumstantial and the chances of proving a conspiracy charge possibly seemed greater, since more evidence might be introduced under conspiracy counts than under those charging the substantive crime itself. This inference may be supported on the grounds that a conspiracy makes each conspirator liable for the acts of every other conspirator done in pursuance of the conspiracy. Consequently, the admissions and acts of a co-conspirator may be used to affect the proof against the other. Therefore, any acts or admissions made by Louise Rolfe might be admissible against McGurn: 2 *Wigmore* "Evidence" (2d ed., 1923) sec. 1079; *Logan* v. *U. S.* (1893) 144 U. S. 263, 12 S. Ct. 617; *Brown* v. *U. S.* (1895) 150 U. S. 93, 14 S. Ct. 37. Another possible advantage of a conspiracy indictment involving both McGurn and Rolfe, the latter having become his wife, is the bargaining possibilities it contains. More specifically, the government could offer to *nolle prosequi* the conspiracy indictment, thus letting his wife go free if McGurn would plead guilty to an indictment that had been returned for the substantive offense.

At the present time, an indictment is still pending against McGurn for the direct violation of the act which calls for some comment as to whether he committed the substantive crime. The interstate transportation denounced by the act must have for its object, or be a means of effecting, or at least facilitating the illicit sexual relations of the parties; but the mere fact that a journey from one state to another is followed by such intercourse unrelated to the journey itself, cannot be regarded as a violation of the statute—if it is only incidental to the primary purpose of the trip: the *Caminetti* case, *supra; Van Pelt*

v. *United States* (C. C. A. 4th, 1917) 240 Fed. 346. Taking into consideration these interpretations of the act that have been given, there was evidence offered which would tend to show that the trips were made to facilitate illicit sexual relations between the defendants, thereby causing McGurn to be guilty of a direct violation of the act. However, it is not very likely that the government will subject itself to the expense and trouble of another prosecution, especially in view of the fact that the defendants are now married—which would make it unlikely that a jury would convict.

HAROLD KOVEN.

COURTS—POWER TO ADOPT AND ENFORCE RULES.—[Illinois] A petition for a writ of mandamus was filed by the Chicago Bar Association as relator, praying that the respondent be commanded to expunge from the records of the Criminal Court of Cook County certain orders which he had assumed to enter as a judge of the Criminal Court of said county. Judge Feinberg, the respondent, while in the chancery branch of the Circuit Court of Cook County, summoned and impanelled a special grand jury after a petition had been presented to the judges of the Circuit Court asking that a political investigation be made. Chief Justice Fisher of the Criminal Court refused to recognize this special grand jury because the respondent at that time had not been assigned to the Criminal Court, and had no authority to impanel a special grand jury and appoint a special state's attorney to make such an investigation. Chief Justice Fisher directed the Clerk of the Criminal Court not to fulfill the duties imposed upon him by Judge Feinberg. On a hearing of the petition, the court refused to issue the mandamus. *Held:* that Judge Feinberg, who had not been assigned to the Criminal Court and who had made void orders respecting the grand jury, was without jurisdiction to expunge the orders entered in the Criminal Court, and he could not be compelled by mandamus to expunge them: *People* ex rel. *Chicago Bar Association* v. *Feinberg* (1932) 348 Ill. 549, 181 N. E. 437.

The Supreme Court of Illinois in giving this decision upheld the theory that rules of court, such as had been adopted by the Circuit and Superior Courts of Cook County, are binding on each of the judges, unless in a particular case for good cause, they may be disregarded: *People* v. *Smith* (1916) 275 Ill. 210, 113 N. E. 891. These rules must be consistent with the law, and not violate or contravene the constitution or statutes. The court declared that no judge of the Circuit Court, unless so assigned, had the right to hold a term in the Criminal Court: *United States Life Ins. Co.* v. *Shattuck* (1895) 159 Ill. 610, 43 N. E. 389. The case just cited is directly *contra* to the principal one relied upon by the respondent, which held that the jurisdiction of the Criminal Court of Cook County, in criminal and quasi-criminal cases, is concurrent with the Circuit Court and not exclusive: *Berkowitz* v. *Lester* (1887) 121 Ill. 99, 11 N. E. 860. The court disposed of the *Berkowitz* decision on the grounds that it was a question of constitutional interpretation, and that the cases following the *Berkowitz* rule failed to give a true exposition of the constitutional clauses involved. The Supreme

Court declared that the *Berkowitz* case was out of harmony with *United States Life Ins. Co.* v. *Shattuck, supra,* and the opinion was overruled.

Aside from the local importance attached to this decision, it is peculiarly significant as bearing upon the power of courts to adopt and to enforce their own rules and regulations. The extent to which courts may go in exercising this power is a moot question, and the limit to which they may proceed has not met with universal approbation.

In 1853 the old Recorder's Court of the City of Chicago was established by the state legislature: Laws of Illinois, 1853, 147. For Recorder's Courts see: 3 *Holdsworth* "History of English Law" (1924) 144; *Sidney* and *Beatrice Webb* "English Local Government" (1924) 321-358. When the Illinois Constitution was revised in 1870, the Recorder's Court was continued, but called the Criminal Court of Cook County: Illinois Constitution, 1870, Art. 6, sec. 26. By the Act of 1874, the Criminal Court had conferred upon it exclusive original jurisdiction of all criminal cases in the County of Cook, except as was conferred upon justices of the peace: Ill. Rev. Stat. (Smith-Hurd, 1931) ch. 38, sec. 701. The judges who were to preside in this court were required to be selected from the judges of the Circuit or Superior Court, as nearly as might be in alternation, by the choice of the whole number of judges of the respective courts or as might be provided by law. Said judges were to be *ex officio* judges of the court: Illinois Constitution, 1870, Art. 6, sec. 26.

The general doctrine that courts have the power to adopt rules for their own procedure has been upheld in many cases. A court has, even in the absence of any statutory provision or regulation in reference thereto, inherent power to make rules for the regulation of their practice and conduct of their business: *Fullerton* v. *U. S. Bank* (1828) 1 Pet. (U. S.) 604; *Mahr* v. *Union Pac. R. R. Co.* (1906) 140 Fed. 921; Ex parte *Birmingham* (1902) 134 Ala. 609, 33 So. 13; *Hinckley* v. *Dean* (1882) 104 Ill. 630; *Gardner* v. *Butler* (1906) 193 Mass. 96, 78 N. E. 885; *Rigney* v. *Rigney* (1891) 127 N. Y. 408, 28 N. E. 405; *Hilffrich* v. *Greenberg* (1903) 206 Pa. 516, 56 Atl. 45. Such rules, however, must not be contrary to the constitution and laws of the state: *Rooker* v. *Bruce* (1908) 171 Ind. 86, 85 N. E. 357; *Gardner* v. *Butler, supra;* In re *Evans* (1913) 42 Utah 282, 130 Pac. 317; *People* v. *Nichols* (1880) 79 N. Y. 582; *Van Ingen* v. *Berger* (1910) 82 Ohio St. 255, 92 N. E. 433; note, 19 Ann. Cas. 799; *Stevenson* v. *Milwaukee County* (1909) 140 Wis. 14, 121 N. W. 654; *State* v. *Gideon* (1893) 119 Mo. 94, 23 S. W. 748; *Goodwin* v. *Bickford* (1901) 20 Okla. 91, 93 Pac. 548; *Zeuske* v. *Zeuske* (1910) 55 Or. 65, 103 Pac. 648; *Equipment Corp. of America* v. *Primos Vanadium Co.* (1926) 285 Pa. 432, 132 Atl. 360.

In 1915 a set of rules was adopted by the Circuit and Superior Courts of Cook County, regulating their procedure, the method of assignment of judges to the criminal court, and other matters relating to their judicial activities. Judges who were to sit in the Criminal Court were to be designated by the executive committee of each court, from among the judges of the law division of their respective courts, as nearly as may be in rotation:

Rules of Circuit and Superior Court of Cook County, Rule 6. So far as we know the judges elected to these courts were aware of these rules and abided by them; but whether or not these rules were known to them, the established practice of these courts, of which they were cognizant, had the same effect as a rule of court: *The Semaramis* (E. D. N. Y., 1931) 50 F. (2d) 623. Consequently, Judge Feinberg, in summoning the special grand jury at a time when he was not assigned to the criminal branch of the County Court, was usurping a power which he did not possess. The accepted theory is that rules of court have the effect of laws, both upon the judge and litigants: *North Ave. Bldg. Ass'n.* v. *Huber* (1918) 286 Ill. 375, 121 N. E. 721; *Axtell* v. *Pulsifer* (1895) 155 Ill. 141, 39 N. E. 615; *Weil* v. *Neary* (1929) 278 U. S. 160, 40 Sup. Ct. 144. Furthermore, the rules adopted by a court have the effect of law as to proceedings in such court: *People* v. *Andrus* (1921) 299 Ill. 50, 132 N. E. 225; *Golden* v. *McKim* (1922) 45 Nev. 350, 204 Pac. 602; *Renfrow* v. *Ittleson* (1925) 110 Okla. 109, 236 Pac. 585; *Clawans* v. *Whiteford* (1931) 60 App. D. C. 412, 55 F. (2d) 1037; *U. S.* v. *Barber Lumber Co.* (C. C. A. 9th, 1908) 169 Fed. 184. These rules cannot be disregarded or set aside except in the manner provided by the rules themselves: *Owens* v. *Ranstead* (1859) 22 Ill. 161.

The respondent, in the heat and turmoil of a political campaign in which he was vitally interested, impanelled his special grand jury, thereby setting aside the court rule pertaining to the assignment of judges to the criminal court. A court has no discretion to dispense at pleasure with rules established by it: *Bratt* v. *State Industrial Accidental Commission* (1925) 114 Or. 644, 236 Pac. 478. In another jurisdiction it has been held that a court ought not to depart from established practice suddenly and without notice: *City of Detroit* v. *Judge of Recorder's Court* (1931) 255 Mich. 44, 237 N. W. 40. A course of action, such as that indulged in by the respondent in suspending fixed rules of the court of which he was a member, may be criticized on the theory that a rule of a court cannot be dispensed with to suit the circumstances of any particular case: *Clawans* v. *Whiteford, supra; Rio Grande Irrigation Co.* v. *Gildersleeve* (1899) 174 U. S. 608, 198 Sup. Ct. 761. Without the adoption of rules by general agreement, each judge would have his own rules, and uncertainty and confusion would result in practice: *Gage* v. *Eddy* (1892) 167 Ill. 102, 47 N. E. 200.

The general trend of decisions bearing upon the question of the rule making power of courts is in harmony with the views voiced by many legal authorities in this field. Each successive year the opinions of these men carry a reverberating note, advocating more freedom to be given to the courts to prescribe rules under which they shall operate. At the beginning of federal statehood, it was the generally recognized policy of the state that the legislature should formulate the procedure and practice for the courts. The fact remains, however, that the making of such laws for procedure and practice is in itself an exclusive judicial function. There is excellent authority, from an historical as well as a legal standpoint, that the making of these rules is not at all a legislative but purely a judicial function: *Hay-*

burn's Case (1792) 2 Dall. (U. S.) 411. Chief Justice Marshall in 1825 stated that the line has not been drawn exactly which separates those important subjects, which must be regulated entirely by the legislature itself, and those in which a provision is made for the ones who work under rules to fill in the details themselves: *Wayman* v. *Southward* (1825) 10 Wheat. 1, 23 U. S. 1. Over a hundred years later Professor Wigmore said that the legislature exceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary's duties: *Wigmore* "All Legislative Rules for Judiciary Procedure are Void Constitutionally" (1928) 23 Ill. L. Rev. 276, 277. Dean Pound has declared that the power to govern procedure by general rules has been regarded universally as part of the judicial function, and hence, as an inherent power of courts of justice: *Pound* "Regulation of Judicial Procedure by Rules of Court" (1915) 10 Ill. L. Rev. 172.

The consensus of opinion appears to be that matters of court procedure should be placed in the hands of those who are to work under these rules. The judges are certainly better qualified by training and experience, than any legislative body, to formulate rules of procedure. In order to obtain a more effective and uniform system, the court should have the power to adopt and enforce such rules as may be best suited to that end: *Hinton* "Court Rules for the Regulation of Procedure in Federal Courts" (1927) 13 A. B. A. Jour., Part 2, 8. The strong effort which is being made by the legal profession of the United States to place the regulation of legal procedure under the control of the courts has the double purpose of saving the public from the burden of an utterly inadequate administration of justice, and of rescuing the profession from the undeserved charge of responsibility for that inadequacy: *Sunderland* "Expert Control of Legal Procedure Through Rules of Court" (1927) 13 A. B. A. Jour., Part 2, 2.

The proponents of court-made rules advance the following advantages in support of their plan:

1. Control of details of Court procedure calls for the exercise of expert knowledge, and best results can be derived by utilizing the ability, knowledge, experience and study of judges and lawyers.
2. It would be possible to make changes in rules at any time by appealing to the court which has the power to change them.
3. Judges would be responsive to the necessary changes in practice.
4. Court rules would discourage reliance on technical questions of procedure to defeat substantive rights.
5. It would tend to enlarge the general respect for administration of justice and elevate both bench and bar in the estimation of the public.

Hudson "Why Confer Rule Making Power on Courts?" U. of Mo. Law Bul. Series 13, quoted in 7 Jour. of Am. Jud. Sov. (1924) 161.

ROGER R. CLOUSE.

PHOTOGRAPHS — ADMISSIBILITY.— [Rhode Island] The defendant was indicted and convicted of murder in the second degree for a killing committed during a prison riot. On appeal, exceptions were taken to the

admission of photographs showing not only the bullet wounds on the body of the deceased, but also the entire body. It was argued that the photographs would cause a feeling of repulsion and would prejudice the minds of the jury against the defendant. Whether they were correct or genuine was not questioned. *Held:* affirmed, on the ground that photographs were competent to prove the nature of the wounds, the identity of the deceased, and cause of the death: *State* v. *Miller* (R. I. 1932) 161 Atl. 222.

Photographs, like maps, diagrams, and plats generally are admissible on the ground that they are a witness's pictured expression of the data observed by him. Thus they take the place of words. Where it is shown that they have been taken accurately and represent the subject correctly, they are admissible if they illuminate the matter in controversy: *Simmons* v. *State* (1931) 184 Ark. 373, 42 S. W. (2d) 549; comment (1930) 18 Ky. L. Jour. 301. The competency of photographs in evidence may be attacked on three grounds: there may be an objection, not to the photographic testimony as such, but to the relevancy of the fact testified to; there may be an objection to the reproduction of a corporeal injury or other object calculated unduly to excite sympathy for one party; there may be an objection that the photographs substantially misrepresent the object: 2 *Wigmore* "Evidence" (2d ed., 1923) sec. 792. With the advent of new improvements in photography, photographs have been used in innumerable instances. They have been received for the purpose of describing and identifying premises which were the scene of a crime: *State* v. *Ramos* (1930) 159 Wash. 599, 294 Pac. 223; *Elmendorf* v. *Commonwealth* (1916) 171 Ky. 410, 188 S. W. 483. They have been admitted to show scenes taken several months after the crime was committed where the condition of the premises had not changed materially in the meantime: *Hassell* v. *State* (1916) 80 Tex. Cr. R. 93, 188 S. W. 991. They have been allowed as primary evidence of the identity of persons alive or dead: *Underhill* "Criminal Evidence" (3d. ed., 1923) sec. 103. The principles underlying the admissibility of photographs have been applied to kindred inventions, such as enlarged photographs, photostats, X-Ray radiographs, skiagraphs, moving pictures, and talking motion pictures: *United States* v. *Ortiz* (1899) 176 U. S. 422, 44 L. Ed. 529 (magnified signature); *Kurzrok* v. *United States* (1924) 1 F. (2d) 209 (photostats of false revenue records); *Chicago El. Co.* v. *Spence* (1904) 213 Ill. 220, 42 N. E. 796 (skiagraph of body); *Miller* v. *Minturn* (1904) 73 Ark. 183, 83 S. W. 918 (radiograph of injured ankle); *Commonwealth* v. *Roller* (1930) 100 Pa. Super. Ct. 125 (talking motion pictures); *Wigmore* "Moving Pictures in Evidence" (1921) 15 Ill. L. Rev. 123.

As a general rule, photographs of decedents are not admissible in evidence where primarily they serve no other purpose than to prejudice the jury: *State* v. *Miller* (1903) 43 Ore. 325, 74 Pac. 658; 2 *Wigmore* "Evidence" (2d ed., 1923) sec. 792. But they are admissible in evidence to aid the jury in understanding the nature of mortal wounds and the identity of the deceased, though they may cause a reaction against the accused beyond the strict limits for which they were admissible: *Commonwealth* v. *Retkovitz* (1915) 222 Mass. 245, 110 N.

E. 293; *Commonwealth* v. *Winter* (1927) 289 Pa. 284; 137 Atl. 261 (deceased children); *Commonwealth* v. *Sydlosky* (1931) 305 Pa. 406, 158 Atl. 155 (murdered baby with hands and feet cut off); *State* v. *Eggleston* (1931) 161 Wash. 486, 297 Pac. 162 (wounds of deceased). Apparently, therefore, the decision in the instant case allowing photographs of the wounds and of the entire body of the deceased was in accord with the authorities. It seems that the defendant clearly was guilty of murder in the second degree and that the court believed the defendant received the minimum sentence. As a consequence, the court in affirming the conviction used the rule that photographs introduced to identify the deceased and his wounds are admissible even though they are prejudicial incidentally. Were the factual situation a border-line case between murder and manslaughter, the court could say with equal ease that there was no question of the identity of the deceased or his wounds and that the only purpose an introduction of photographs of a mangled corpse could serve was to prejudice the jury against the accused. Fundamentally, the operation of these rules appears to be another exemplification of the idea that prejudicial error is largely dependent upon the closeness of the case. See *Baker*, "Reversible Error in Homicide Cases" (1932) 23 Jour. Crim. Law 28.

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