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Constitutional Law--Due Process-The Known Use of Perjured Testimony by the Prosecution Not an Orderly Course of Procedure

Constitutional Law—Due Process—The Known Use of Perjured Testimony by the Prosecution Not an Orderly Course of Procedure. Petitioner seeks an original writ of habeas corpus. He states that he is unlawfully restrained of his liberty under a commitment pursuant to a conviction, in February, 1917, of murder in the first degree and sentence of death, later commuted to life imprisonment. Petitioner charges that the state holds him in confinement without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. The grounds of his charge are that the sole basis of his conviction was perjured testimony which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him. He alleges that he could not by the exercise of reasonable diligence have discovered, prior to the denial of his motion for a new trial and his appeal to the state Supreme Court, the evidence which was subsequently developed and which proved the testimony against him to have been perjured. Held, the known use of perjured testimony and suppression of testimony which would refute the perjured testimony, by the prosecuting authorities of a state in a criminal trial, violates the constitutional guaranty that no person shall be deprived of his life, liberty or property without due process

17 Butler v. Perry (1916), 240 U. S. 328, 60 L. ed. 672.

18 Slaughter House Cases (1872), 16 Wall. 36; Plessy v. Ferguson (1896), 163 U. S. 537.

19 State v. Richcreek (1906), 167 Ind. 217, 77 N. E. 1085.

20 State v. Jacobson (1916), 80 Or. 648, 157 Pac. 1108; Fougera v. N. Y. (1917), 166 N. Y. S. 248, 178 App. Div. 824; Haller Sign Works v. Physical Culture Training School (1911), 249 Ill. 436, 94 N. E. 920.

of law, but the petitioner must first seek a writ of habeas corpus in the state Supreme Court.[1]

Due process of law is guaranteed by the Constitution of the United States, but it is not thereby defined.[2] Upon the Supreme Court of the United States devolves the power to define "due process of law," but that body has thus far refused to attempt any definition.[3] However, while the doctrine of due process of law has not yet been limited by a definition, and hence can be extended at the discretion of the Supreme Court, its meaning is discernible from the various decisions in which it has been applied.

The guaranty of due process as a matter of procedure means that no part of a person's personal liberty, including ownership, shall be taken away from him except by the observance of certain formalities.[4] The essential requirements are that the fundamental principles of justice be preserved, that the established and regular course of procedure be followed, and that the rights of the party be determined and protected by a tribunal appointed by law.[5] The purpose of the guaranty of due process is to protect a person against being deprived of his personal liberty by any person or authority unless certain established procedural formalities are observed.[6] Thus due process as a matter of procedure requires certain inherent elements of justice in the determination of questions rather than the form by which the decision was reached and does not have the effect of imposing upon the states any particular form or mode of procedure.[7]

Due process of law as a matter of procedure is composed of four essential elements, namely (1) notice, (2) opportunity to be heard, (3) an impartial tribunal, and (4) an orderly course of procedure, to all of which the person whose rights are being determined is entitled.[8] The first of these elements, notice, in order to be sufficient, must constitute a notification to the person of the time and place, including the tribunal before whom a claim is to be made, apprise him of the nature of the cause against him, must come to a person of reasonable intelligence and afford him sufficient opportunity to prepare and make his answer. For an action in rem, notice by publication is sufficient, but for an action not in rem, constructive notice is due process only when personal service cannot be obtained even as to property within the jurisdiction of the court.[9] The second element means that the person, before he may be deprived of his liberty legally, must be given an opportunity to be heard in his own defense. He must be given the opportunity to appear and defend his rights; that is, he must be given the opportunity to testify, to

[1] Mooney v. Holohan (1935), 79 L. ed. 347.

[2] U. S. Const. Amend. XIV, sec. 1.

[3] Willis, Due Process of Law Under the United States Constitution (1926), 74 U. of Pa. L. R. 331.

[4] Willis, Manuscript for Constitutional Law Textbook as yet unpublished (1935).

[5] 12 C. J. 1188; Leeper v. Texas (1891), 139 U. S. 462 (Tex.); Kilbourn v. Thompson (1880), 103 U. S. 168 (D. C.); Turpin v. Lemon (1902), 187 U. S. 51 (W. Va.).

[6] Willis, Manuscript for Constitutional Law Textbook as yet unpublished (1935); R. G. Ludy, Inc. v. City of Chicago (1934), 356 Ill. 230, 190 N. E. 273; People v. Belcastro (1934), 356 Ill. 144, 190 N. E. 301.

[7] Willis, Manuscript for Constitutional Law Textbook as yet unpublished (1935); Frank v. Mangum (1915), 237 U. S. 309 (Ga.); Iowa C. R. Co. v. Iowa (1896), 160 U. S. 389 (Iowa); Hooker v. Los Angeles (1903), 188 U. S. 314 (Cal.); Holmes v. Conway (1916), 241 U. S. 624 (Kan.).

[8] Reif v. Barrett (1933), 355 Ill. 104, 188 N. E. 889; Prescott v. State (1934), 37 P (2d.) 830 (Okla.); Louie Yung v. Coleman (1934), 5 Fed. Supp. 702 (Idaho); Frank v. Mangum (1915), 237 U. S. 309 (Ga.); Ong Chang Wing v. United States (1910), 218 U. S. 272 (P. I.); Willis, Manuscript for Constitutional Law Textbook as yet unpublished (1935).

[9] Prescott v. State (1934), 37 P (2d.) 830 (Okla.); Willis, Manuscript for Constitutional Law Textbook as yet unpublished (1935).

produce witnesses in his behalf, and to produce relevant documents. Furthermore, the opportunity given must be reasonable and fair to the accused.[10] By an impartial tribunal is meant an unbiased and unprejudiced trier of fact and administrator of law. There may be a judge and jury, or a judge alone,[11] or there may be some other body set up by law, such as a commission.[12] The fourth element, an orderly course of procedure, is the phase of due process which is primarily involved in the principal case.

The court in the principal case says that the requirement of due process "in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions," and that "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." It goes on to say that "Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."[13] These brief statements of the Supreme Court suggest the essence of an orderly course of procedure; the observance of those rules and principles which have been established by our system of jurisprudence for the protection and enforcement of private rights,[14] in a proceeding conducted according to the orderly processes of law.[15] The requirement of an orderly course of procedure does not require any particular form of procedure. Procedure sanctioned by settled usage will satisfy the requirements,[16] but an orderly course of procedure is not limited to procedure which has been sanctioned by settled usage. New forms of procedure are as much due process as old forms, provided they give a person a fair opportunity to present his case.[17]

An orderly course of procedure requires the presence of witnesses when the opportunity to defend oneself is involved,[18] and it is due process to compel attendance of witnesses.[19] An orderly course of procedure requires a public trial.[20] There is not an orderly course of procedure when the same person is inquisitor, interpreter, prosecutor, and judge,[21] or when access to court is denied or hindered.[22] Mob domination of the court and proceedings

10 Molnar v. State (1931), 202 Ind. 669, 177 N. E. 452; Frank v. Mangum (1915), 237 U. S. 309 (Ga.); Willis, Manuscript for Constitutional Law Textbook as yet unpublished (1935).

11 Prescott v. State (1934), 37 P (2d.) 830 (Okla.).

12 Willis, Manuscript for Constitutional Law Textbook as yet unpublished (1935); Kilbourn v. Thompson (1880), 103 U. S. 168 (D. C.).

13 Mooney v. Holohan (1935), 79 L. ed. 348, 349 (Cal.).

14 Kennard v. Louisiana ex rel. Morgan (1875), 92 U. S. 480, (La.); Endicott-Johnson Corp. v. Encyclopedia Press (1924), 266 U. S. 285 (N. Y.); Turpin v. Lemon (1902), 187 U. S. 51 (W. Va.); Reif v. Barrett (1933), 355 Ill. 104, 188 N. E. 889.

15 Ong. Chang Wing v. United States (1910), 218 U. S. 272 (P. I.); Prescott v. State (1934), 37 P. (2d.) 830 (Okla.); Reif v. Barrett (1933), 355 Ill. 104, 188 N. E. 889.

16 Murray v. Hoboken (1855), 18 How. 272 (N. Y.).

17 Hurtado v. California (1884), 110 U. S. 516 (Cal.); State of Missouri v. North (1926), 271 U. S. 40 (Mo.); Funk v. United States (1933), 290 U. S. 371 (N. C.).

18 Snyder v. Massachusetts (1934), 291 U. S. 97 (Mass.).

19 Lilienthal, The Power of Governmental Agencies to Compel Testimony (1926), 39 Harv. L. Rev. 720.

20 Gaines v. Washington (1928), 277 U. S. 81 (Wash.); Frank v. Mangum (1915), 237 U. S. 309 (Ga.).

21 Jones, Interest and Duty in Relation to Qualified Privileges (1924), 22 Mich. L. Rev. 444.

22 Chicago, etc., Ry. v. Minnesota (1890), 134 U. S. 458 (Minn.); Ex Parte Young (1908), 209 U. S. 123 (Minn., Original Juris.).

is not an orderly course of procedure.[23] However, an orderly course of procedure does not require a jury trial,[24] nor an appeal.[25] An orderly course of procedure does not require a court to weigh the evidence, but it does require it to examine the entire record, to ascertain the issues, to discover whether there are facts not reported, and to see whether or not the law has been correctly applied to the facts.[26]

The holding of the principal case, that the known use of perjured testimony by the prosecution is a violation of due process, is an extension of the requirements of an orderly course of procedure. The Fourteenth Amendment does not mention such, nor have previous decisions so held. Yet it is now law that the known use of perjured testimony is prohibited by the doctrine of due process of law. It is undeniable that the object of the due process clause, the protection of every citizen in his personal and property rights against the arbitrary action of any person or authority[27] would be violated by such action on the part of the prosecuting authorities of a state, but that does not make it law. The answer to the question, Why is it law?, lies in the United States Supreme Court. That body determines the law of the United States; therein lies the real origin of the doctrine of due process of law. The Supreme Court, with respect to the known use of perjured testimony and the doctrine of due process, did not find the law; it made and is still making it by its interpretation of the Constitution.[28] H. P. C.

Constitutional Law — Equal Protection of the Law — Garnishee Act. Appellant was a judgment debtor and sought to enjoin appellees, a justice of the peace and a constable, from issuing and levying an execution upon 10 per cent of the wages due appellant from his employer. Appellees would have been acting pursuant to the terms of Chapter 61, Acts 1925, commonly known as the Indiana Garnishee Law of 1925. Thus the issues raised the validity of this act. Held, the Garnishee Law violates Section 23, Article 1 of the Bill of Rights of the Indiana Constitution, as well as the equal protection clause of the Fourteenth Amendment of the Federal Constitution.[1]

Declaring unconstitutional a garnishment statute is rather novel in view of the fact that there were garnishee laws even as far back as colonial days,[2] and that today such proceedings are generally authorized throughout the states.[3] Thus, to better understand the action of the court here, it is well to bear in mind the constitutional and statutory provisions relevant to this question as they were admirably set out in the principal case.

[23] Frank v. Mangum (1915), 237 U. S. 309 (Ga.); Waterman and Overton, Federal Habeas Corpus Statutes and Moore v. Dempsey (1933), 1 U. Chi. L. Q. 307.

[24] Jordan v. Massachusetts (1912), 225 Mass. 167, 114 N. E. 291; Crane v. Hahlo (1922), 258 U. S. 147 (N. Y.).

[25] State of Ohio v. Akron Metropolitan Park Dist. (1930), 281 U. S. 74 (Ohio).

[26] International Shoe Co. v. Federal Trade Commission (1930), 280 U. S. 291 (C. C. A).

[27] R. G. Lydy, Inc. v. City of Chicago (1934), 356 Ill. 230, 190 N. E. 273; People v. Belcastro (1934), 356 Ill. 144, 190 N. E. 301; Wulzen v. San Francisco (1894), 101 Cal. 15, 20, 35 P. 353; McKinster v. Sager (1904), 163 Ind. 671, 72 N. E. 854; Hovey v. Elliott (1897), 167 U. S. 409 (N. Y.).

[28] Willis, Due Process of Law Under the United States Constitution (1926), 74 U. of Pa. L. Rev. 339.

[1] Martin v. Loula (1935), 194 N. E. 178 (Ind.).

[2] Treadway v. Andrews (1850), 20 Conn. 384, 392, referring to statute of 1784; Ancient Charters and Laws, Mass. Bay, c. 267.

[3] 28 C. J. 17.