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Change in Venue in Criminal Case--Constitutional Law

RECENT CASE NOTES

CHANGE OF VENUE FROM JUDGE IN CRIMINAL CASE—CONSTITUTIONAL LAW.—The defendants were charged by affidavit with the crime of robbery. On December 23, 1930, the cause was set to be tried on January 2, 1931. On December 31, 1930, the defendants filed a motion and affidavit for a change of venue because of bias and prejudice of the judge. This motion was overruled by the court and the defendants appeal, alleging that there was error in so ruling. *Affirmed.*[1]

An Indiana statute[2] provides that the defendant in a criminal prosecution may have a change of venue from the judge on account of bias and prejudice, but that an affidavit must be filed at least ten days before the date for which the trial is set, or if it is set for a day less than ten days away, it must be filed within two days. It will be noted that the defendants' trial was set for a full ten days ahead, but that their affidavit was not filed until two days before the day named. The defendants alleged, however, that they had just discovered the bias and prejudice of the judge. The court, in upholding the action of the judge in refusing the affidavit and motion, held that "in the absence of a statute giving a defendant in a criminal action the right to a change of venue from the judge on account of bias and prejudice, no right to such a change exists. * * * Appellants' right, or rather privilege, to a change from the judge on account of bias and prejudice being statutory, the legislature may withhold it entirely or grant it on such conditions as may seem just and proper." The court then pointed out that the appellants had not complied with the statute and therefore had no grounds for complaint.

Assuming, for a moment, that a defendant does not have a privilege to a change of venue in the absence of a statute, was the court correct in holding that if the legislature chose to grant such a privilege, it could do so upon whatever conditions it saw fit to impose? While there are cases the other way,[3] there is a considerable amount of authority to the effect that the mere power to withhold a privilege is not the power to grant it upon any condition, but that the condition must be constitutional.[4] By this the courts seem to mean that the condition must not be the surrender of a legal privilege guaranteed by the Constitution. Thus, it has been held that the power to exclude foreign corporations is not the power to admit them upon the condition that they give up the privilege of suing in the federal courts;[5] and that the power to prohibit the use of the public highways is not the power to allow private carriers to use them upon the condition that they become common carriers.[6] While this doctrine—that the

[1] *Detrich v, The State,* Supreme Court of Indiana, Oct. 26, 1932, 182 N. E. 706.

[2] Sec. 2235 Burns', Rev. of 1926, as amended by Sec. 2235 Burns' Supp. of 1929.

[3] *Paul v. Virginia* (1868), 8 Wall. 168; *Waters—Pierce Oil Co. v. Texas* (1889), 177 U. S. 28, 20 Sup. Ct. 518; *State v. Sterrin* (1916), 78 N. H. 220, 98 Atl. 482.

[4] *Barron v. Burnside* (1887), 121 U. S. 186, 7 Sup. Ct. 931; *So. Pac. R. R. v. Denton* (1892), 146 U. S. 202, 13 Sup. Ct. 44; *Baltic Min. Co. v. Mass.* (1913), 231 U. S. 68, 34 Sup. Ct. 15; *Frost v. R. R. Comm.* (1926), 271 U. S. 583, 46 Sup. Ct. 605.

[5] *Barron v. Burnside* (1887), 121 U. S. 186, 7 Sup. Ct. 931.

[6] *Frost v. R. R. Comm.* (1926), 271 U. S. 583, 46 Sup. Ct. 605.

condition must be constitutional—has not been universally applied,[7] and has been severely criticized,[8] it must be admitted that it has considerable merit. The legislature should not have the indirect power to deprive persons of their constitutional guaranties by coercion. However, the result reached by the court upon this point was correct, even though its language was too broad. The condition involved in this particular case would not amount to the surrender of a constitutional privilege unless the privilege to which it is attached is itself guaranteed by the Constitution.

But, was the court correct in holding that this privilege does not exist in the absence of a statute? It cannot be denied that the great weight of authority supports this position.[9] But, it is submitted that if the United States Supreme Court followed one of its recent decisions to its logical conclusion, a different and more desirable result might be reached. In that case,[10] it was held that a system whereby an inferior judge is paid only when there is a conviction, is unconstitutional as a violation of the due process clause. This result could only have been reached upon the theory that due process of law, as a matter of procedure, requires a fair and impartial tribunal. It is true that there was a dictum in the case to the effect that "all questions of judicial qualification may not involve constitutional validity. * * * Matters of personal bias would seem to generally be matters only of judicial discretion." But, if due process has been extended to include the requirement that there be a fair and impartial tribunal, this dictum would seem very hard to support. It could hardly be argued that one has a fair and impartial tribunal when the judge is biased and prejudiced. In the principal case the court pointed out that the decisions of the judge on questions of law can be corrected upon appeal. But, this hardly guarantees a fair trial, for as was pointed out in *In re Davis Estate*[11] "there are presumptions in favor of his (the judge's) rulings which cannot be ignored, and he can make orders which cannot be disturbed unless there has been a gross abuse of discretion."[12]

If we assume that the United States Constitution does guarantee the privilege of a change of venue from the judge for bias and prejudice, is the condition imposed upon its exercise by the Indiana statute constitutional, as it is applied in this case? It is submitted that it is not. Of course, the police power would allow the legislature to impose restrictions upon the exercise of such a privilege. But, restrictions would only be within the scope of the police power if the social interests in their favor were stronger than those in favor of the privilege protected. A social interest in favor of expediting justice might be found behind the condition. Opposed to this are the social interests in the individual life, and in a fair administration of justice. Does the former social interest outweigh the latter ones so that it would be constitutional to deprive a defendant of the privilege because he had failed to comply with the statute, in a case where,

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[7] See note 3 (*Supra*).

[8] Merrill, Unconstitutional Conditions (1929), 77 U. of Pa. L. Rev. 879.

[9] *Long v. State* (1920), 25 Ga. App. 22, 102 S. E. 359; *Hennon v. State* (1925), 33 Ga. App. 600, 127 S. E. 473; *Tucker v. State* (1926), 35 Wyo. 430, 251 Pa. 460; *Berry v. State* (1918), 83 Tex. Cr. R. 210, 203 S. W. 901.

[10] *Tumey v. Ohio* (1927), 273 U. S. 510, 47 Sup. Ct. 437.

[11] *In re Davis Estate* (1891), 11 Mont. 1, 27 Pac. 342.

[12] Approved in *Day v. Day* (1906), 12 Idaho 556, 86 Pac. 531.

through no fault of his, compliance was impossible? The restriction would surely be valid in a case where the defendant could have complied, for it would naturally prevent abuses of the privilege and expedite justice without substantial injury to an innocent defendant. It might be argued that to make the rule effective it would be necessary to apply it in all cases, and that the social interest behind the condition would therefore be strong enough to justify its application even where compliance would be impossible. However, while the question is undeniably close, it is submitted that in such a case the social interests in favor of the privilege are stronger, and that the condition so applied is unconstitutional, assuming that the privilege to which it is attached is guaranteed by the Constitution.

It is submitted, then, that the language of the court was too broad when it said that since this was a privilege which could not be entirely withheld, it could be granted upon any condition; that the result reached was correct unless there was error in holding that there is no non-statutory privilege to a change from the judge for bias and prejudice; that this latter position is supported by the great weight of authority, but that the other result logically ought to be reached; and that if it were reached, the condition attached to its exercise by the Indiana statute, as applied in this case, would be unconstitutional. W. H. H.