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CASE NOTES

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CONSTITUTIONAL LAW — Due Process — Intentional Admission of Perjured Testimony. — The petitioner relied on Texas statutes treating killing under influence of sudden passion arising from adequate cause as murder without malice. *Vernon's Tex. Pen. Code,* 1948, Arts. 1257a, 1257b, 1257c. A witness for the state gave testimony which the prosecutor knew was perjured and which seriously prejudiced petitioner's reliance on the statutes. The jury found petitioner guilty of murder with malice and imposed the death penalty. The court of criminal appeals affirmed. Shortly thereafter the witness made a sworn statement that he had given false testimony at the trial. Petitioner sought a writ of habeas corpus but the trial court refused and the appellate court affirmed. The United States Supreme Court granted certiorari. HELD: reversed and remanded. The petitioner was denied due process of law, for the introduction of perjured testimony tended squarely to refute his claim that he had adequate cause for sudden passion. *Alcorta v. Texas,* 355 U. S. 28 (1957).

The basic elements comprising due process of law under the fourteenth amendment are notice and hearing, *Hovey v. Elliott,* 167 U. S. 409 (1897); *Roller v. Holly,* 176 U. S. 398 (1900), and a legally competent tribunal having jurisdiction of the case. *Pennoyer v. Neff,* 95 U. S. 714 (1878); *Scott v. McNeal,* 154 U. S. 34 (1894). Despite the early reluctance of the Court to invade the province of state criminal procedure, *Hurtado v. California,* 110 U. S. 516 (1884); *Frank v. Mangum,* 237 U. S. 309 (1915), certain minimum requirements evolved to bring state criminal procedure in conformity with "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Herbert v. Louisiana,* 272 U. S. 312 (1926). By application of this rather indefinite standard, mob domination of a trial, *Moore v. Dempsey,* 261 U. S. 86 (1923); *cf., Frank v. Mangum, supra;* a partial judge with a pecuniary interest, *Tumey v. Ohio,* 273 U. S. 510 (1927); denial of counsel, *Powell v. Alabama,* 287 U. S. 45 (1932); and failure to allow for adequate preparation for trial, *Powell v. Alabama, ibid.,* were all held to be violations of due process. The prohibitions and guaranties of the fourteenth amendment are addressed to and control not only the states, but also every person, natural or judicial, who is the repository of state power. *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U. S. 278 (1913). Acts of state officers that have been

struck down include racial discrimination of jurors, *Neal v. Delaware,* 103 U. S. 70 (1881); *Rogers v. Alabama,* 192 U. S. 226 (1904); coerced confessions, *Brown v. Mississippi,* 297 U. S. 278 (1936); use of false testimony extorted by violence and torture, *Hyslon v. Florida,* 315 U. S. 411 (1932); prosecutor's fraudulent preparation of transcript of trial proceedings ultimately to be presented to highest state court, *Chessman v. Teets,* 350 U. S. 45 (1955); and a fraudulent trial and wrongful conviction by reason of a conspiracy designed to that end and carried out by state officials. *McShane v. Moldovan,* 172 F. 2d 1016 (6th Cir. 1949). Deliberate suppression by prosecutor of evidence favorable to a defendant, *U. S. v. Rutkin,* 212 F. 2d 641 (3rd Cir. 1954), or material to issues of guilt or penalty, *U. S. ex rel. Thompson v. Dye,* 221 F. 2d 763 (3rd Cir. 1955). The intentional admission of perjured testimony violates due process. *Mooney v. Holohan,* 294 U. S. 103 (1935); *Pyle v. Kansas,* 317 U. S. 213 (1942); *White v. Ragen,* 324 U. S. 760 (1945). *See* ANNOT., 2 L. Ed. 2d 1575 (1958).

The use of perjured testimony is equally as revolting to the traditional concept of justice as mob domination of a trial, denial of counsel, coerced confessions, or any of the other repudiated violations and is tantamount to a conviction based on no evidence. No circumstances should require one to prejudice the right of a defendant to a fair trial in eagerness to secure a conviction. Even though a defendant is guilty he is still entitled to due process. *Rochin v. California,* 342 U. S. 165 (1952). Although the law is well settled with reference to the intentional use of perjured testimony, the recurrence of the problem merits an inquiry into the duties of the office of prosecuting attorney. Does the prosecutor have a duty to disclose all evidence favorable to a defendant even though prosecutor personally doubts the truth of such evidence? The constitutional duty of the prosecutor pervades the whole issue. QUERY, is non-feasance of a prosecutor as constitutionally invalid as malfeasance? An affirmative answer would seem to be in accord with the evolution of decisions giving vitality to the due process clause as a bulwark of life and liberty against local injustice.

CHARLES RICE.

CONSTITUTIONAL LAW — Separation of Powers — No Provision for Review by Court of Findings of Fact by Administrative Agency. — In 1957 the legislature of New Mexico passed a compulsory workmen's compensation act which encompassed all employers hiring four or more workers in extra hazardous occupations and all employees whose employers had voluntarily submitted to the provisions of the legislation. The act replaced the courts as prescribed in the existing statute and provided for the establishment of a commission to hear compensation cases, decide questions of fact and make conclusions of law which would have the force and effect of judgments when filed, if supported by substantial evidence. Appeal to the District Courts for review of findings of law was to be available, but no provision was made for a review of findings of fact. Subsequent to the passage of this act, on the relation of a concrete manufacturing company and two insurance companies, the State obtained a writ of mandamus to compel the governor to appoint a commission in compliance with the act, the governor not having done so because he doubted its validity. HELD 3-2: The act is unconstitutional. The failure to provide for a review of findings of fact constitutes a usurpation of powers inherent in the judiciary and hence is banned by the doctrine of the separation of powers under the state constitution. *State v. Mechem,* 63 N. M. 250, 316 P. 2d 1069 (1957).

The uniform view held in this country at the present time is that the legislature does not inherently possess any judicial power, *Kilbourn v. Thompson,* 103 U. S. 168 (1881); *Guy v. Hermance,* 5 Cal. 73, 63 Am. Dec. 85 (1855), or any mixed jurisdiction which is partly legislative and partly judicial. *Ervine's Appeal,* 16 Pa. 256, 55 Am. Dec. 499 (1851). The doctrine as to the separation of powers of the government into three distinct departments is considered sufficient to prevent the legislature from exercising any judicial function whatsoever, except such as may be allowed to it by the constitution itself. *Preveslin v. Derby & A. Developing Co.,* 112 Conn. 129, 151 Atl. 518 (1930); *State ex rel. Williams v. Whitman,* 116 Fla. 196, 150 So. 705 (1934). It is, however, the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society. *Providence Journal Co. v. McCoy,* 94 F. Supp. 186, 195 (D. R. I. 1950), aff'd 190 F. 2d 760 (1st Cir. 1951), cert. den. 342 U. S. 894 (1951); *State v. Sears,* 4 Wash. 2d 200, 103 P. 2d 337 (1940). Thus while any act by which the legislature attempts to exercise authority or usurp functions properly within the scope of the judicial power is unconstitutional and void, *State ex rel. French v. Stone,* 224 Ala. 234, 139 So.

328 (1932); *Drillon v. Industrial Accident Commission,* 17 Cal. 2d 346, 110 P. 2d 64 (1941), it is within the constitutional powers of the legislature to exercise powers judicial in their nature, where the exercise of such powers is incident and essential to the discharge of legislative functions. *Bushnell v. Leland,* 164 U. S. 684 (1897); *Erie R. R. v. Board,* 89 N. J. L. 57, 98 Atl. 13 (1916). And in the exercise of this power the legislature may confer quasi-judicial power on administrative boards to effect a purpose for the public in general and can provide that the orders of such boards are not to be overruled if supported by substantial evidence. *City of Socorro v. Cook,* 24 N. M. 202, 173 Pac. 682 (1918); *Floyd v. Department of Labor and Industries,* 44 Wash. 2d 560, 269 P. 2d 563 (1954). By the great weight of authority, workmen's compensation acts are regarded as falling within, and as a legitimate exercise of, the police powers of the state, *Mountain Timber Co. v. Washington,* 243 U. S. 188 (1917); *New York Cent. Ry. v. White,* 243 U. S. 188 (1917), even in the absence of express constitutional authority, *Atkinson, Kier Bros., Spicer Co. v. Industrial Commission,* 35 Ariz. 48, 274 Pac. 634, 635 (1929), it being held that they diminish the likelihood that injured workmen or their dependents will become public charges. *Board v. Abbott,* 212 Ky. 123, 278 S. W. 533 (1925); *Cunningham v. Northwestern Impr. Co.,* 44 Mont. 180, 119 Pac. 554 (1911). And such a contention would seem to be supported by the earlier holding of the Supreme Court of New Mexico which says all that is required to bring a questioned law within the proper sphere for an exercise of the police power is that it bear a valid relationship to some permissible object for the exercise of that power. *State v. Cleveland,* 47 N. M. 230, 141 P. 2d 192 (1943); *see also Mitchell v. City of Rosewall,* 45 N. M. 92, 111 P. 2d 41 (1941). The great weight of authority also supports the view that the creation by compensation laws of boards or commissions having authority to find facts and make awards does not constitute an unwarranted exercise of judicial powers or an unwarranted creation of a judicial tribunal or court. *Crowell v. Benson,* 285 U. S. 22 (1932); *State v. Mountain Timber Co.,* 75 Wash. 581, 135 Pac. 645 (1917); *Borgnis v. Falk Co.,* 147 Wis. 327, 133 N. W. 209 (1911). And provisions making the decisions of the industrial board or commission in effect final as to all questions of fact do not deprive the parties of property without due process of law. *Nega v. Chicago Rys.,* 317 Ill. 482, 148 N. E. 250 (1925); *Helfrick v. Dahlstrom Mettallic Door Co.,* 256 N. Y. 199, 176 N. E. 141 (1931); *Hawkins v. Bleakly,* 243 U. S. 210 (1917).

The decision of the New Mexico Court is difficult to reconcile even with other New Mexico decisions. It is only within the public interest that the police power of a state may be exercised, and a valid exercise of this power prevents the assertion of rights otherwise protected by constitutional guarantees. Thus due process guarantees are not violated by a tax on employers to support a state operated compensation fund. *Cf. Mountain Timber Co. v. Washington, supra.* Nor are they violated by a tax on the sale of tobacco devoted entirely to the support of the aged. *Cf. State v. Cleveland, supra.* The majority opinion concedes that the police power permits fact finding by administrative agencies which directly control and regulate the activities of carriers, public utilities, liquor dealers, barbers and many others, upholding such actions as "quasi-judicial". Notwithstanding, they categorically deny this power in the field of workmen's compensation. Are we then to say that the constitutional guarantee of due process is less sacred than the right of individuals to have private disputes settled entirely by the judiciary? The consequences of an affirmative answer to this question are disasterous, for one of the principal reasons for the creation of such a commission is to secure the benefit of special knowledge acquired through continuous experience in this difficult and complicated field. And if the review of the administrative determinations is to be very broad, with the reviewing court deciding the case de novo upon its own independent judgment, the commission is turned into little more than a media for the transmission of evidence to the court and the values of adjudication of fact by experts or specialists in the field are destroyed.

This decision is a striking example of what Justice Cardozo referred to as the dangers of "conceptualistic jurisprudence". Perhaps these words of Justice Frankfurter best illustrate the proper approach to the doctrine of the separation of powers: The "practical demands of government preclude its doctrinaire application" for "we are dealing with what Madison called a 'political maxim' and not a technical rule of law".

G. DANA SINKLER.

EVIDENCE — Use of Wiretap Evidence in State Courts. — The defendant was indicted for bookmaking upon evidence produced by recordings made pursuant to wiretap orders issued under New York Code of Criminal Procedure. HELD: *Benanti v. United States,* 355 U. S. 96 (1957), requires the dismissal of a bookmaking indict-

ment based on evidence obtained by wire tapping. *People v. Dinan,* 172 N. Y. S. 2d 496 (1958).

Under common law, the fact that evidence was illegally obtained is not grounds for excluding it. 20 AM. JUR., *Evidence* §§ 393-402; 8 WIGMORE, EVIDENCE §§ 2183-2184b (3d ed. 1940). Illegally obtained evidence is not admissible in a federal court where such evidence was obtained by unlawful search and seizure. *Weeks v. United States,* 232 U. S. 383 (1914). As the rule is generally stated, federal courts will not accept evidence illegally obtained by federal officers, the rule being one of extrinsic policy designed to prevent federal officers from violating Fourth Amendment rights. *See e. g.,* 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940). Evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the federal constitution is admissible in a state court. *Wolf v. Colorado,* 338 U. S. 25 (1949).

Wire tapping is not an illegal search and seizure. *Olmstead v. United States,* 277 U. S. 438 (1928). In 1934, Congress enacted the Communications Act which provides, ". . . no person not being authorized by sender shall intercept any communications and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." 47 U. S. C. § 605. In construing this statute the U. S. Supreme Court has held the statute applicable to federal officers and has excluded wiretap evidence obtained by such officers. *Nardone v. United States,* 302 U. S. 379 (1937). Intrastate as well as interstate communications are protected from disclosure in federal courts where interception is made under direction of federal officers. *Weiss v. United States,* 308 U. S. 321 (1939).The Communications Act does not require the exclusion of wiretap evidence in state courts. *Schwartz v. Texas,* 344 U. S. 199 (1952).

Evidence illegally obtained by unlawful search and seizure is admissible in New York state courts. *People v. Defore,* 242 N. Y. 13, 150 N. E. 585 (1926). Wire tapping is illegal in New York. Ex parte orders can be issued by judges to allow wire tapping to obtain evidence of a crime. CONSTITUTION OF NEW YORK, ART. 1 § 12; NEW YORK CODE OF CRIMINAL PROCEDURE, § 813a. The United States Supreme Court has affirmed a case in which the New York Court of Appeals held evidence obtained under the New York wiretap statute admissible in a state court. *People v. Stemmer,* 298 N. Y. 728, 83 N. E. 2d 141, *aff'd,* 336 U. S. 963 (1949). Subsequently the United States Supreme Court has held that evidence obtained by state law enforcement officers through wire tapping authorized by state statute

is inadmissible in federal court where such evidence is in violation of the Federal Communications Act. Included in the opinion was *dicta* which held state statutes allowing wire tapping, which is in violation of 47 U. S. C. § 605, invalid. *Benanti v. United States,* 355 U. S. 96 (1957). Following the *Benanti* decision in a memorandum issued by the Supreme Court, Special Term, New York County, Justice Hofstadter held, ". . . all wiretaps, whether 'authorized' or not are illegal; and hence, any application for order 'authorizing' interception of telephone messages within New York must be denied, notwithstanding Criminal Procedure Code section providing therefor." *Matter of Interception of Telephone Communications,* 170 N. Y. S. 2d 84 (1958). The court in the instant case goes beyond this and holds evidence so obtained inadmissible in the state court.

Query: What was the intent of Congress in passing § 605 of the Communications Act? Before the *Benanti* decision it appeared to be a federal rule of evidence. Except for a brief period during 1940, every Attorney General since the Communications Act was enacted has favored and adhered to the position of authorized wire tapping by federal officers in certain cases. Brownell, *The Public Security and Wire Tapping,* 39 CORN. L. REV. 195 (1954). The court in the *Benanti* decision held that 47 U. S. C. § 605 is not a mere rule of evidence and construed the statute to prevent states from legislating to violate the specific wording of the Act. Since *Gibbons v. Ogden,* 9 Wheat. 1 (U. S. 1824), it has been firmly established that when Congress acts within its delegated powers, such acts become the supreme law of the land.

Clearly the *Benanti* case holds the New York wiretap statute invalid and any such orders issued would be in violation of 47 U. S. C. § 605. But, does the *Benanti* decision hold that such evidence so obtained would be inadmissible in a state court? If so, it would be overruling *Schwartz v. Texas, supra.* No indication of such holding is apparent in reading the *Benanti* decision. The question yet to be answered by the courts of New York is whether illegally obtained wiretap evidence will be admissible in New York state courts under the rule of *People v. Defore, supra.* This question will not have to be answered if Congress will pass legislation showing the intent of 47 U. S. C. § 605. Legislation was introduced in the United States Senate in the 85th Congress (S. 3013) to amend 47 U. S. C. § 605 to authorize wire tapping in compliance with state laws such as the New York wiretap statute.

E. W. LANEY.