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Constitutional Law--Due Process--Evidence Required to Sustain Criminal Convictions

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Wilson v. Girard, 354 U.S. 524 (1957). But this does not completely solve the problem, because immediately, in transferring all such cases to the United States for trial, additional problems such as cost, delay and difficulty in obtaining witnesses arise.

It thus appears that, while the Supreme Court was endeavoring to solve one problem, some other problems posing far greater difficulties have arisen. What is to be the fate of the offenders in the principal cases and like offenders in the future? Are they to be tried by the foreign countries in which the crimes were committed? Or will the government attempt to have these countries waive their jurisdiction so that the trials may be had in civilian courts in the United States? Or will the accused persons be set free without any trials?

Is it not possible that the employment and application of the principles of the principal cases may in the years ahead result in roadblocks to justice because of the running of statutes of limitation, the death or disappearance of witnesses, prohibitive costs, discouraging delays and other impediments to orderly and effective judicial administration?

A. M. P.

CONSTITUTIONAL LAW—DUE PROCESS—EVIDENCE REQUIRED TO SUSTAIN CRIMINAL CONVICTION.—P was a longtime resident of the Louisville, Kentucky, area and a frequent patron at a cafe in that city. He entered the cafe one evening to enjoy the facilities thereof while waiting for a bus. Two policemen, on a “routine check,” inquired of the cafe manager as to how long P had been there and whether he had bought anything. The manager replied that he personally had not served anything to P (P’s testimony was that one of the employees serving him a dish of macaroni and a glass of beer). The officer accosted P and “asked him what was his reason for being in there and he said he was waiting on a bus.” The officer then informed P he was under arrest and took him outside. P asked why he was being arrested (the officer testified that P was argumentative). P had a record of 54 previous arrests. The Police Court of Louisville found P guilty of two offenses—loitering and disorderly conduct—and fined him $10.00 on each charge. Upon examination of P’s petition for certiorari, the Supreme Court of the United States found that, although the fines were small, due process questions were substantial and granted certiorari. Held, complete...
absence of any evidence to support convictions for loitering and disorderly conduct renders such convictions violative of the fourteenth amendment's due process clause. *Thompson v. City of Louisville*, 80 Sup. Ct. 624 (1960).

The principal case is interesting from several viewpoints. The basic facts of the case are colorful in themselves. See *Time, The Weekly Magazine, Shufflin' Sam's Long Step*, April 4, 1960, p. 15. But when combined with the unusual routing of the case from a lowly police court directly to the highest court in the land, plus the substantiality of the constitutional questions involved, the case develops singularity with the possibility of far-reaching proportions.

The fourteenth amendment of the Constitution provides: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Due process of law has been defined as those fundamental principles which protect the citizen's private rights and guard against the arbitrary action of government. *Twining v. New Jersey*, 211 U.S. 78 (1908). The due process clause is a constitutional guarantee of respect for those basic personal immunities which are so rooted in the traditions and conscience of our people as to be ranked as fundamental or are implicit in the concept or ordered liberty. *Rochin v. California*, 342 U.S. 165 (1952). The term does not admit of precise definition. *Barnett v. Cook County*, 377 Ill. 251, 57 N.E.2d 338 (1944). It has been judicially observed that the due process clause exacts from the state, for the most lowly and outcast, all that is implicit in the concept of ordered liberty, embracing all those rights which courts must enforce because they are basic to a free society. *Wolf v. Colorado*, 338 U.S. 25 (1949).

The states are free to provide their own procedures and standards of criminal prosecution and, as long as these do not violate traditional ideas of basic justice and human rights, due process requirements will be deemed to have been complied with by the state. *Brown v. New Jersey*, 175 U.S. 175 (1899). In a criminal case due process necessarily requires the following: A law creating or defining an offense; a court of competent jurisdiction; accusation in due form; notice and opportunity to answer the charge; trial according to the settled course of judicial proceeding; and the right to be discharged if found not guilty. *Dutiel v. State*, 135 Neb. 811, 284 N.W. 321 (1939).
One of the purposes of the due process clause is to prevent arbitrary deprivation of liberty. The hearing or trial must be in fact a fair one. *Palko v. Connecticut*, 302 U.S. 319 (1937). A fair trial necessarily includes the introduction of evidence and, to conform with the requirements of due process, the evidence must be considered according to the settled usage of judicial procedure. *State v. Cooper*, 2 N.J. 540, 67 A.2d 298 (1949).

Municipal ordinances adopted by state authority constitute "state action" and are therefore within the reach of this clause. *Carlson v. California*, 310 U. S. 106 (1940). Action of state courts and state judicial officers in their official capacities is "state action." *Kenney v. Fox*, 132 F. Supp. 305 (W. D. Mich. 1955). The test as to whether requirements of due process have been met is simply whether the law operates equally on all who come within the class to be affected. *State v. Erickson*, 225 Iowa 1261, 282 N.W. 728 (1938).

In determining the issue of due process the Supreme Court will generally accept the determination of the trier of the facts unless that determination so lacks support in evidence that to give it effect would work a fundamental unfairness amounting to denial of due process. *Lisenba v. California*, 314 U.S. 219 (1941). Apparently, the requirement of some evidence to support a criminal prosecution is so basic to any criminal proceeding that the question of complete lack of evidence has rarely arisen. It hardly needs elaboration that a conviction without any evidence at all would amount to purely arbitrary decision. That such arbitrary action on the part of a state agency amounts to denial of due process under the fourteenth amendment necessarily follows.

In the principal case the only question before the Supreme Court was whether the charges against the petitioner were so utterly devoid of evidentiary support that to base a conviction thereon would be an unconstitutional denial of due process. As to the charge of loitering there was not a suggestion of evidence of P's guilt. The second charge of disorderly conduct was sought to be substantiated by the police officer's testimony to the effect that P was argumentative. There was no evidence that P in any way disturbed the peace of Louisville, and, furthermore, Kentucky law seems to hold that, if a man wrongfully arrested fails to object to the arresting officer, he waives any right to complain later that the arrest was unlawful. *Nickell v. Commonwealth*, 285 S.W.2d 495, 496 (Ky. 1955). A conviction on such dearth of evidence, apparently
based upon purely arbitrary judgment by the police court, is indeed shocking to traditional concepts of ordered liberty.

The far-reaching possibilities of this case are suggested by the direct routing from the police court of the City of Louisville to the Supreme Court of the United States. Under the Kentucky statutes police court fines of less than $20.00 on a single charge are not appealable or otherwise reviewable in any other Kentucky court. *Thompson v. City of Louisville*, *supra* at 4194. The Supreme Court granted certiorari because of the substantial questions of due process. *Thompson v. Louisville*, 360 U.S. 916 (1959). Does this open the door to a multitude of similar petitions to the Supreme Court involving petty fines? Probably not. Instances of complete lack of evidence are probably rare. It is doubtful that the Supreme Court would accept a similar case where there is some evidence to substantiate the judgment. The effect of this decision may have some influence in producing more cautious observation of due process procedures and requirements by lesser tribunals.

The right of appeal is not of itself a requirement of due process. *Reetz v. Michigan*, 188 U.S. 508 (1903). But the right to a fair trial is part of due process, and the demands of due process have been met as long as one ample hearing is provided. *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74 (1930). Failure of Kentucky to provide for review of police court fines under $20.00 does not in itself amount to denial of due process. In the instant case there is no question of the adequacy of P's right to review since a state has the power to provide its own modes of procedure for judicial administration, and there is no claim that Kentucky fails to provide adequate review facilities. P was provided the same judicial machinery available to others in a similar situation. The only denial of due process is that a conviction was rendered without evidence in support thereof. Although the state's failure to provide review is not denial of due process, the state may be placing an unnecessary burden on the Supreme Court by not providing review of police court fines when constitutional questions are involved.

That the principal case ever reached the Supreme Court is a tribute to the high calibre of justice achieved by our society. But that such a case of necessity must be determined by the highest court of the land because of the inadequacy of a state's review procedure shows a weakness in our system. How Kentucky and
other states will react to this spotlight on the gap in review procedure when there is no fair hearing below remains to be seen.

J. McK.

CRIMINAL LAW—ATTEMPT TO RECEIVE STOLEN PROPERTY—FACT THAT PROPERTY WAS NO LONGER STOLEN HELD IMMATERIAL.—Six automobile tires were stolen but were recovered by the police. Upon being advised by one of the thieves that he was in the process of taking the tires to sell to a certain service station operator, the arresting officer suggested that he proceed with his plan and complete the sale. This was done and the service station operator was charged with an attempt to receive stolen property. In seeking a writ of prohibition, D, the service station operator, argued that the property was no longer stolen, since it had been recovered from the thieves, and therefore an essential element of the crime was missing. Held, even assuming that the character of the property had been changed from “stolen” to “recovered” (and that therefore prosecution for receiving stolen property would not lie), defendant had attempted to receive stolen property when he purchased the tires believing them to have been stolen and with an intent to keep them from the true owner. Faustina v. Superior Court, 345 P.2d 542 (Calif. 1959).

The problem of impossibility in the principal case is one small facet of the field of criminal attempts. An analysis of this facet, out of context, would be impractical—indeed, to take such an approach would be to succumb to the procedure which will be criticized in this comment. Rather, the analysis will cover the entire area of criminal attempts.

The courts have failed to recognize, and they have become victims of, the elusive irony of the law of attempts. They have divorced the attempt to commit a crime from the crime attempted and have joined all the myriad forms of attempt into a single body of substantive law, disregarding the dissimilarities among the individual attempts. Any law that deals with intent and the workings of the human mind without physical consummation is intrinsically subjective. In reducing all attempts to a unified body of law the courts have thus striven to catalogue elements of mental and moral manifestations that defy codification by our limited human methods. It follows that the most patently insignificant misdemeanors constitute the least comprehended and least satisfactorily resolved field of criminal law.