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Constitutional Law--Due Process--Evidence of Prior Conviction

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should persist until the jury are convinced that facts are shown from which reasonable minds could find against the existence of the presumed facts. If the assumed fact is rebutted then it should, just as in the case of an "inference", disappear. The "presumption" should function only as a procedural device of going forward with the evidence which would dictate a decision only where there is an entire lack of competent evidence to contradict it, but the moment substantial, countervailing evidence appears from any source, the presumption should cease to have any function. The presumption should merely shift the burden of going forward with the evidence but should not shift the burden of persuasion.

3. The court should in every case avoid the use of the term "conclusive presumption". If the end accomplished is no more than to declare a rule of substantive law, which is beyond the province of the trier, then it should not be reached through the fiction of presumption, but rather by way of a positive statement by the court declaring or preserving a substantive common law rule.

J. L. R.

CASE COMMENTS

CONSTITUTIONAL LAW—DUE PROCESS—EVIDENCE OF PRIOR CONVICTION.—*D* was convicted of first degree murder in the state court and sentenced to death. Under Pennsylvania law, the jury has the duty of determining the penalty when they find a defendant guilty of first degree murder. The court allowed the admission of evidence of a prior conviction, instructing the jury that such evidence was to be used solely for the purpose of assessing the penalty. This evidence was allowed before the jury determined the guilt or innocence of *D*. *D* contends that the introduction of such evidence before the verdict on the theory that the jury will disregard this knowledge in determining his guilt, and yet use it later in determining his penalty is a denial of due process under the fourteenth amendment. *Held*, that the fourteenth amendment guarantees no particular form of procedure in state criminal trials, and the states should have the widest latitude in administering their own systems of justice; consequently, Pennsylvania procedure, permitting the introduction of prior convictions for the sole purpose of enabling the jury to assess the proper penalty, did not deprive *D* of due process of law. *United States ex rel. Thompson v. Price*, 258 F.2d 918 (3d Cir. 1958).

The basis of this decision is to be found in PA. STAT. ANN. tit. 18, § 4701 (1950), which places the duty of assessing the penalty on the jury where the defendant is found guilty of first degree murder. In *Commonwealth v. Parker*, 294 Pa. 144, 143 Atl. 904 (1928), the Pennsylvania court interpreted the statute to permit the admission of evidence of prior convictions solely for the purpose of enabling the jury, after it had found the accused guilty, to assess the penalty.

The overwhelming weight of authority throughout the country, follows the doctrine that, in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged. *Smith v. State*, 195 Wis. 555, 218 N.W. 822 (1928); *People v. Seaman*, 107 Mich. 348, 65 N.W. 203 (1895); *State v. Garney*, 45 Idaho 768, 265 Pac. 668 (1928). There are certain exceptions to the doctrine: (1) when such evidence tends directly to establish the particular crime, *Pittman v. State*, 51 Fla. 94, 41 So. 385 (1906); (2) to prove the motive, the intent, or the absence of mistake or accident, *People v. Northcott*, 209 Cal. 639, 289 Pac. 634 (1930); (3) as proof of the identity of the accused, *Mitchell v. State*, 140 Ala. 118, 37 So. 76 (1904).

The West Virginia law on this problem was decided early in *Watts v. State*, 5 W. Va. 532 (1872), where the court held that "evidence of a distinct, substantive offense cannot be admitted in support of another offense." This doctrine has been modified somewhat since that early date. Thus in *State v. Moubray*, 139 W. Va. 535, 81 S.E.2d 117 (1954), the court recognized the *Watts* doctrine, but stated one exception, allowing admission of evidence of a prior offense to show motive or intent if such other offense is similar and near in time to, has some logical connection with, and tends to establish the commission of the specific offense charged, and indicates that the specific offense is part of a system of criminal action. Such evidence is also admissible to show the bad character of the defendant where he has sought to establish his own good character. *State v. Miller*, 75 W. Va. 591, 84 S.E. 383 (1915). Prior to 1943, the use of evidence of prior convictions was likewise permissible as a basis for additional penalty, but it was an absolute necessity that it

be properly charged in the indictment so as to acquaint the accused of the charge he must be prepared to defend. If admitted when not properly charged in the indictment, there was a strong presumption that such evidence was prejudicial. *State v. Royal,* 94 W. Va. 617, 119 S.E. 801 (1923). The undesirable result of this case was changed in 1943. W. VA. CODE ch. 61, art. 11, § § 18, 19 (Michie 1955), provides for admission of prior convictions for determining additional penalty after conviction of the particular offense charged. It is submitted that this procedure is most desirable in that the verdict of the jury is in no way swayed by the past conduct of the defendant.

Considering the constitutional question, in *Anderson v. State,* 8 Okla. Crim. 90, 91, 126 Pac. 840 (1912), the court made the following observations: "In criminal cases in a state court, due process of law means a trial in a court of competent jurisdiction, before an impartial judge and jury, or judge without a jury, upon an accusation, either by indictment or information, as the state may provide, charging the accused with the violation of some state law, of which accusation the accused must have notice in time to enable him to prepare for trial. This trial must proceed according to the established procedure or rules of practice in such state applicable to all such cases. In other words, the defendant must have his day in court. The admission of evidence for or against the accused must be according to the established rules in such state in all such cases, and the punishment inflicted must be authorized by law."

In the principal case, the admission of evidence of prior convictions is based on state procedure which was established over thirty years prior to the decision, although contrary to the common law doctrine that such evidence is inadmissible. It is submitted that an established rule founded on unsound reason and logic should be given no greater consideration in questions of due process of law than one recently promulgated. In *Brown v. Board of Education,* 347 U.S. 483 (1954), the Supreme Court of the United States recognized that a man may be deprived of his constitutional guarantees by a so called "established practice." It would appear that the admission of evidence of a prior conviction would certainly lead a reasonably prudent man to look with disfavor on the accused, thus the impartial jury guaranteed by the fourteenth amendment is dispensed with, despite instructions that the evidence is to be used for the sole purpose of determining the penalty. In *United States*

ex rel. Thompson v. Price, 79 Sup. Ct. 295 (1958), the defendant in the principal case was denied certiorari, but no reasons for the denial were given. Therefore, it is not known if the Pennsylvania practice has been sanctioned or condemned.

J. F. W., Jr.

CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—TESTIMONY PRIVILEGE OF JOURNALIST.—*P* brought action against broadcasting company for allegedly false and defamatory statements made about her by a "network executive" and published by defendant newspaper columnist. The district court held defendant in criminal contempt for refusing to testify to the identity of the "network executive" who was indicated to be the source of the allegedly defamatory statement in her column. Defendant, claiming this to be a confidential communication, appealed. *Held,* that the first amendment, guaranteeing freedom of the press, does not confer an evidentiary privilege on a journalist to refuse to identify the source of an allegedly defamatory statement. *Garland v. Torre,* 259 F.2d 545 (2d Cir. 1958).

The claim of the defendant in this case of a privilege from testifying as to the source of her publication presents a twofold problem. The two legal theories on which the defendant claimed such a privilege in the principal case are those most frequently proposed in cases of this nature. They are: (1) the guarantee of freedom of the press contained in the first amendment; and (2) a privilege from testifying as a rule of evidence.

The contention with which the court was most concerned in the resolution of the principal case was the constitutional guarantee of freedom of the press. On this ground, there seems little doubt that the court accurately and soundly applied the law. The guarantees of the constitution are liberally applied, and broad scope is given to them. *Martin v. City of Struthers,* 319 U.S. 141 (1943); *Williamson v. United States,* 184 F.2d 280 (2d Cir. 1950). Authors and publishers are entitled to a high degree of protection from accountability for their publications. *Baure v. Secretary of Commonwealth,* 320 Mass. 230, 69 N.E.2d 115 (1946). But it has long been recognized that freedom of the press is not an absolute freedom. *Schneider v. New Jersey,* 308 U.S. 147 (1939). It is primarily a freedom from prior restraint. *Near v. Minnesota,* 283 U.S. 697 (1931).