

December 1941

# Constitutional Law--Punishment for Crime-- Requirement That Penalty be Proportioned to Offence

B. D. T.

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Constitutional Law Commons](#), and the [Criminal Law Commons](#)

---

## Recommended Citation

B. D. T., *Constitutional Law--Punishment for Crime--Requirement That Penalty be Proportioned to Offence*, 48 W. Va. L. Rev. (1941).

Available at: <https://researchrepository.wvu.edu/wvlr/vol48/iss1/11>

This Recent Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

the 1937 Arkansas statute impaired no contractual agreement or obligation expressly or impliedly assumed by the state. The argument put forth was that, as there was no warranty of title by the state, the only contract entered into by it was to pass all the right, title, and interest it had and not to reassert it. Furthermore, it was said that the state was under no obligation to keep its land tax laws static. The majority answered this argument by declaring the contract involved to be much broader than that asserted by the dissent, the very purpose of the act of 1935 being to offer immunity from attack on tax titles to prospective purchasers.<sup>20</sup> The second point of the dissent was that the 1937 Arkansas statute was well within the state's general legislative powers and in no way inconsistent with the true intent and fair interpretation of the contract clause. Quoting freely from *Home Bldg. & Loan Ass'n v. Blaisdell*<sup>21</sup> the dissent said, " 'But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfillment, could not have been the intent of the constitution.' " "The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." However, the *Blaisdell* case decided that due to the existence of an emergency certain contract obligations might be impaired, or rather postponed for a limited time, that is, during the period of the emergency. This is no authority for the complete destruction of a contract. The majority opinion seems to have followed established precedent and sound reasoning in reaching its decision.

H. L. W., JR.

---

CONSTITUTIONAL LAW — PUNISHMENT FOR CRIME — REQUIREMENT THAT PENALTY BE PROPORTIONED TO OFFENSE. — The West Virginia Constitution requires that "penalties shall be proportioned to the character and degree of the offense."<sup>21</sup> In a recent case<sup>22</sup> the accused was convicted and sentenced to twenty-five years in the penitentiary for an attempt at armed robbery. Although it was not necessary to the decision, the majority of the court were of opinion that the statute<sup>3</sup> which prescribed the punishment did

---

<sup>20</sup> See 61 S. Ct. at 985.

<sup>21</sup> 290 U. S. 398, 429, 438, 54 S. Ct. 231, 78 L. Ed. 413 (1934).

<sup>1</sup> W. VA. CONST. art. III, § 5.

<sup>2</sup> *Ex parte Farmer*, 14 S. E. (2d) 910, 913 (W. Va. 1941).

<sup>3</sup> W. VA. CODE (Michie Supp. 1939) c, 61, art. 2, § 12.

not contravene this constitutional provision. The West Virginia robbery statute as amended in 1939 has made the punishment for attempts the same as for the consummated crime, and has treated it as a felony instead of a misdemeanor as formerly; hence the punishment has been increased from a one year maximum sentence to a minimum sentence of ten years, with no fixed maximum.

Statutes which prescribe no maximum penalty have been held valid,<sup>4</sup> and under them, the court may in its discretion sentence to life imprisonment.<sup>5</sup> The legislature in the exercise of its police power,<sup>6</sup> and not the courts, have the power to declare what acts shall constitute a crime and to prescribe the punishment, and the constitution is the only limitation on this power; but what these limitations are, is a matter for judicial determination.<sup>7</sup> Virtually all constitutions, both federal and state, have provisions recognizing limitations.<sup>8</sup>

The usual provision is like that contained in the Federal Constitution,<sup>9</sup> which forbids "cruel and unusual punishment". The constitutions of a minority of the states,<sup>10</sup> including West Virginia,<sup>11</sup> contain in addition a direction that the punishment shall be proportioned to the character and degree of the offense. This constitutional limitation is directed to the legislature<sup>12</sup> and there must

<sup>4</sup> *State v. Williams*, 77 Mo. 310 (1883); *State v. Fackler*, 91 Wis. 418, 64 N. W. 1029 (1895).

<sup>5</sup> *State v. Newman*, 108 W. Va. 642, 152 S. E. 195 (1930).

<sup>6</sup> *State v. Jackson*, 152 La. 656, 94 So. 150 (1922).

<sup>7</sup> *Morgan v. Devine*, 237 U. S. 632, 35 S. Ct. 712, 59 L. Ed. 1153 (1914); *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37 (U. S. 1820).

<sup>8</sup> CONSTITUTIONS OF THE STATES AND UNITED STATES (N. Y. State Constitutional Convention Committee, 1938).

<sup>9</sup> U. S. CONST. Amend. VIII, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

<sup>10</sup> ILL. CONST. art. II, § 11; IND. CONST. art. I, § 16; ME. CONST. art. I, § 9; NEB. CONST. art. I, § 15; N. H. CONST. art. XVIII; ORE. CONST. art. I, § 16; R. I. CONST. art. I, § 8. New Hampshire has the most elaborate provision ("All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest [offenses]: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.")

<sup>11</sup> W. VA. CONST. art. III, § 5 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offense").

<sup>12</sup> *People v. Allen*, 352 Ill. 262, 185 N. E. 205 (1933); *People v. Elliott*, 272 Ill. 592, 112 N. E. 300 (1916).

be a clear violation of the provision to hold a statute invalid.<sup>13</sup> The provision of the Federal Constitution is addressed solely to the courts of the United States exercising criminal jurisdiction and has no application to the states, which are governed by their own constitutional provisions.<sup>14</sup> In jurisdictions which have only the provision against "cruel and unusual punishment", there is a conflict as to whether this applies to the *quantum* of punishment. The majority of courts hold it to be simply a restriction on the mode of punishment in view of its historical development,<sup>15</sup> its sole office being to eliminate punishments of a barbarous character such as drawing and quartering, burning at the stake and disemboweling.<sup>16</sup> A minority,<sup>17</sup> including the United States Supreme Court,<sup>18</sup> have held that the length of the sentence may be such in proportion to the offense as to constitute "cruel and unusual punishment". Courts adopting this latter view have in effect arrived at the same position as is expressed in our state constitution and those like it.

Very rarely has a statute been held invalid solely because of the duration of the punishment under either a "cruel and unusual punishment" clause or "disproportionate" clause.<sup>19</sup> It has been said to be a precept of justice that punishment for crime should be graduated and proportioned to the offense.<sup>20</sup> The chief difficulty is in formulating a test whereby it may be determined whether the prescribed punishment is proportional. The test generally stated is that the penalty should not be so proportioned to the offense as to shock the moral sense of all reasonable men as

---

<sup>13</sup> *Ibid.* A presumption will be indulged by the appellate court, absent a contrary showing that the penalty imposed by trial judge is not disproportioned to the offense, *State v. Boloff*, 138 Ore. 568, 4 P. (2d) 326 (1931).

<sup>14</sup> *Collins v. Johnston*, 237 U. S. 502, 35 S. Ct. 649, 59 L. Ed. 1071 (1915); *Ex parte Watkins*, 7 Pet. 573, 8 L. Ed. 786 (U. S. 1884); *State v. O'Brien*, 106 Vt. 97, 170 Atl. 98 (1934); *Southern Express Co. v. Commonwealth*, 92 Va. 67, 22 S. E. 309 (1895).

<sup>15</sup> *People v. Merris*, 80 Mich. 634, 638, 45 N. W. 591 (1890); *Garcia v. Territory*, 1 N. M. 415, 418 (1869); *Aldridge v. Commonwealth*, 2 Va. Cas. 447 (1823); but see *Hart v. Commonwealth*, 131 Va. 726, 109 S. E. 532 (1921) (in which the court stated it remained an open question in Virginia as to whether the cruel and unusual punishment clause applied to duration of sentence.)

<sup>16</sup> *In re Kemmler*, 136 U. S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1889); *In re O'Shea*, 11 Cal. App. 568, 105 Pac. 776 (1909).

<sup>17</sup> *State v. Moilen*, 140 Minn. 112, 167 N. W. 345 (1918); *Fisher v. McDaniel*, 9 Wyo. 557, 64 Pac. 1056 (1901).

<sup>18</sup> *Weems v. United States*, 217 U. S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1909).

<sup>19</sup> For the instances involving this issue see the cases collected in (1897) 36 L. R. A. 564; Notes (1911) 19 Ann. Cas. 728; L. R. A. 1915C 558.

<sup>20</sup> *Weems v. United States*, 217 U. S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1909).

to what is right and proper under the circumstances,<sup>21</sup> or, as Judge Brannon expressed it, "imprisonment so long as to shock our feeling of humanity, conscience, justice and mercy."<sup>22</sup> The best guide, however, is the adjudicated cases showing penalties which have been sustained and a few which have been condemned.<sup>23</sup> The Illinois courts, at least, look to the minimum penalty, stating that it is only when the minimum penalty is flagrantly and plainly oppressive that the courts will consider the punishment disproportionate,<sup>24</sup> and that when several offenses are joined in one indictment the test is to be applied to the penalty for each single offense and not to the aggregate punishment.<sup>25</sup>

Heretofore in West Virginia, attempts have been governed by a general statute prescribing the punishment,<sup>26</sup> but the amended robbery statute<sup>27</sup> has removed attempted robbery from the operation of this general statute. Minnesota enacted a similar statute with respect to bank robbery,<sup>28</sup> which has been sustained in two decisions,<sup>29</sup> the Minnesota court reasoning that so far as purpose

<sup>21</sup> *Sustar v. County Court of Marion County*, 101 Ore. 657, 201 Pac. 445 (1921). Another test is that courts will not declare statutory punishment cruel or unusual or disproportioned to the offense unless it is cruel or degrading, not known to the common law, or obsolete or wholly disproportioned to the offense, *People v. Callicott*, 322 Ill. 390, 153 N. E. 688 (1926).

<sup>22</sup> *State v. Woodward*, 68 W. Va. 66, 73, 69 S. E. 385 (1910).

<sup>32</sup> *State v. Newman*, 108 W. Va. 642, 152 S. E. 195 (1930) (twenty-five years for armed robbery); *State v. Knosky*, 87 W. Va. 558, 106 S. E. 642 (1921) (fine of \$300 and two years in penitentiary for possession and operation of a moonshine still); *State v. Miller*, 85 W. Va. 326, 102 S. E. 303 (1919) (fine of \$200 and imprisonment for sixty days for assault and battery); *Franklin v. Brown*, 73 W. Va. 727, 81 S. E. 405 (1914) (imprisonment for life for unarmed robbery); *State v. Woodward*, 68 W. Va. 66, 69 S. E. 385 (1910) (fine of \$50 and six months in jail for violation of statute governing saloons); *State v. McKain*, 56 W. Va. 128, 49 S. E. 20 (1904) (fine of \$50.00 and sixty days in jail for assault and battery); *People v. Brooks*, 65 Cal. 295, 4 Pac. 7 (1884) (thirty-five years for assault with intent to commit robbery); *State v. Stubblefield*, 157 Mo. 360, 58 S. W. 337 (1900) (capital punishment for train robbery); *Robards v. State*, 37 Okla. Cr. 371, 259 Pac. 166 (1927) (death or not less than twenty-five years for armed robbery). Penalties held excessive: *State v. Ross*, 55 Ore. 450, 104 Pac. 596 (1909) (sentence of 800 years with fine of one-half million dollars); *State v. Walton*, 50 Ore. 142, 91 Pac. 490 (1907) (boy of eighteen sentenced to twenty-five years for robbery and five years for assault); see *State v. Woodward*, 68 W. Va. 66, 73, 69 S. E. 385 (1910) (statement by Judge Brannon that sentence for years to the penitentiary for assault and battery attended with no serious results or long imprisonment in jail for profane swearing would be disproportionate to the offense).

<sup>24</sup> *People v. Elliott*, 272 Ill. 592, 112 N. E. 300 (1916); *People v. Butler*, 268 Ill. 635, 109 N. E. 677 (1915).

<sup>25</sup> *People v. Elliott*, 272 Ill. 592, 112 N. E. 300 (1916).

<sup>26</sup> W. VA. CODE (Michie, 1937) c. 61, art. 11, § 8.

<sup>27</sup> W. VA. CODE (Michie Supp. 1939) c. 61, art. 2, § 12.

<sup>28</sup> MINN. CODE (Mason, 1927) § 10106.

<sup>29</sup> *State v. Easton*, 171 Minn. 158, 213 N. W. 735 (1927); *State v. Colcord*, 170 Minn. 504, 212 N. W. 735 (1927).

is concerned, the unsuccessful attempt is as vicious as complete success. It would appear that it is only in an exceptional case that a penalty will be held to be disproportionate to the offense, and that courts tend to give effect to the legislative policy respecting the duration of punishment for crime, making little use of the constitutional limitation.

B. D. T.

CONTRACTS — SUFFICIENCY OF NOTICE TO REQUIRE EXERCISE OF OPTION. — *P* was a tenant under a lease giving it an option to purchase the leased premises within seven days after notice of an offer from a third party at a satisfactory price. On July 31st notice was given to *P* of an offer to purchase, but the name of the offeror was not contained therein. *P* received assurance on August 3rd from the offeror's attorney that the offer was *bona fide* and that the offeror was bound under the terms of the purchase contract. *P* accepted under the terms of the option on August 9th. *D*, however, refused to comply with the option on the basis that *P* had not accepted within the time set by the option, and conveyed the premises to *X*, the undisclosed offeror. Among the terms of the undisclosed offeror's contract to purchase was a provision that the offeror was to pay five hundred dollars from a fund held in escrow if "by reason of their inability to effect suitable and proper financial arrangements" they should fail to purchase the premises. *P* sought to have the deed to *X* set aside and to obtain specific performance of the option. Judgment for *P*. *Held*, one judge dissenting, that *P*'s acceptance on August 9th was in accordance with the terms of the option, the notice of July 31st being insufficient because (1) the contract to purchase was conditional, and (2) the notice failed to give *P* a basis of inquiry into the *bona fides* of the offer. *Peerless Dept. Stores v. George M. Snook Co.*<sup>1</sup>

The court was of the opinion that the offer which *X* made to *D* for the purchase of the property was not the type of offer contemplated by the option in that it contained a provision for stipulated damages.<sup>2</sup> The inference to be gathered from the reasoning of the court is that the provision made the contract one in the alternative. So to hold would be tantamount to placing contracts with stipulations for liquidated damages in the same category with alternative contracts. The two types are closely interwoven<sup>3</sup> but may be dis-

<sup>1</sup> 15 S. E. (2d) 169 (W. Va. 1941), Rose, J., dissenting.

<sup>2</sup> Majority opinion, Fox, J., concurring specially.

<sup>3</sup> Note (1929) 35 W. VA. L. Q. 367, 368.