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Constitutional Law--State's Right to Criminal Appeal

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constitutionality of a statute which authorized the suspension of an operator's license if the operator had been involved in an accident resulting in death, injury, or serious property damage. This statute was held unconstitutional as authorizing a taking of property without due process of law, two justices dissenting on the ground that the operation of an automobile was not a right but a privilege.

There is no decision of the United States Supreme Court in regard to the constitutionality of these financial responsibility statutes; nor has that court expressly declared itself upon the question of whether the operation of a motor vehicle is merely a privilege or a liberty or property right, though certain cases are sometimes cited for that proposition.

It therefore seems probable that in a case where the exercise by a state of its police power is deemed unreasonable in its highway regulations, the license to operate a motor vehicle may be given the protection of the due process clause of the Federal Constitution.

J. H. H.

CONSTITUTIONAL LAW — STATE'S RIGHT TO CRIMINAL APPEAL.

— Palko was tried for first degree murder, and found guilty of second degree murder. Thereafter the state of Connecticut appealed, with the permission of the trial judge under a state statute and the case was reversed. On the second trial the defendant Palko was found guilty of first degree murder and sentenced to death. He objected to the second trial on the ground that it placed him twice in jeopardy for the same offense, thus violating the Fourteenth Amendment of the Constitution of the United States, and appealed to the Supreme Court on the same ground. Held, that the execution of the sentence would not deprive Palko of life with-

\[\text{footnote}{14 \text{ State v. Kouni, 76 P. (2d) 917 (Idaho 1938).}}\]
\[\text{footnote}{15 \text{ Chicago v. Banker, 112 Ill. App. 94 (1904).}}\]
\[\text{footnote}{1 \text{ CONN. GEN. STAT. (1930) § 6494. See also Snyder v. Massachusetts, 297 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 575 (1936), on the state's right to regulate criminal procedure.}}\]
\[\text{footnote}{2 \text{ State v. Palko, 121 Conn. 660, 186 Atl. 657 (1936); Palko v. State, 122 Conn. 529, 191 Atl. 320 (1937).}}\]
out the due process of law guaranteed by the Fourteenth Amendment. *Palko v. Connecticut.*

This amendment does not necessarily give protection against the same things as the first eight, although a violation of one of the first eight amendments, which are of course restricted in their application to the federal courts, may be also, in the state courts, a denial of due process of law, violating the Fourteenth Amendment. Whether it does so in any particular case, however, must be decided by interpretation and precedent, and not by analogy to the Bill of Rights. Denial of trial by jury, compulsory self-incrimination, criminal prosecution without a grand jury proceeding, are not denials of due process, while state laws abridging freedom of speech, the right of peaceable assembly, or the right of criminal defendants to the benefit of counsel, are. The discrepancies between the protections afforded by the Bill of Rights and those arising from the Fourteenth Amendment are not due to gaps in either guaranty, but rather to the fact that they set up different planes of moral and philosophical values on which to decide cases arising under them. Therefore, since the right of the state to appeal in criminal cases, bestowed by statute, does not offend the sense of values established by the due process clause, the conviction of Palko was not in derogation of his rights as a United States citizen.

The decision of the case turns on the point of due process, and may be criticized on that basis. One phase of due process only must be considered here, being directly involved in the case. There seems to be no logical reason why the Fourteenth Amendment should not be construed to cover this case as well as that of freedom of speech: certainly the average American thinks no more highly of the right of peaceable assembly than of the right to trial by jury; yet they are distinguished.4 It is difficult to conceive of a single judicial mind producing a definition of due process which would decide all these cases as they have been decided; evidently the distinctions are the result of different minds working on different problems. In this light it is impossible to criticize the

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3 58 S. Ct. 149, 82 L. Ed. 220 (1937).
principal case. It can be said that it is supported by the existing
authority on the subject, in so far as it has been decided, and that
the conclusion reached appears to be reasonable. It remains for a
more ambitious treatise to correlate the case with other such cases,
and thereby to paint a picture of the field of due process in state
criminal proceedings. It will be found in examining the opinion
in this case and comparing it with others in the field that several
hazy ideas, present in the earlier decisions, have here coalesced into
a definite rule for this type of case. The chief value of the case
then lies in the enlightening discussion it contains of the field of
due process in civil rights cases, and in the crystallization of the
rules on the subject.  

Perhaps the most interesting point in the case is one not neces-
sary to the decision, (if it be decided that double jeopardy in a
state court does not violate the due process clause) and not definite-
ly passed on by the court, i.e., does the right of appeal by the state
constitute double jeopardy? The leading Connecticut case under
which the court administers the statute in question, goes on the
assumption that a prisoner is not put in double jeopardy merely
by virtue of two trials in the same case, even at the instance of
the prosecution, rather than on appeal by the defense. The dis-
sent in the leading Supreme Court case of Kepner v. United States,
by Holmes, White and McKenna, and a separate dissent by
Brown, agree that there can be but one jeopardy in one case. A
second trial is regarded by these authorities as but a continuation
of the jeopardy which began with the first hearing. This view,
while it is not sustained by the majority decisions as to appeal by
the state, might if put into practice result in a better administra-
tion of criminal justice than we enjoy at present. The obvious
effect would be to eliminate many of the attempts of defense coun-

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5 Serra v. Mortiga, 204 U. S. 470, 27 S. Ct. 343, 51 L. Ed. 571 (1907),
illustrates admirably the state of the authorities prior to the principal case.
Cases involving federal guaranties, habeas corpus cases arising during the Civil
War period, and criminal appeals from the Philippine Islands during the first
decade of this century. In the former class of cases, the court under Chief
Justice Taney tended to construe the Bill of Rights liberally, while in the
latter group the court tends to refuse the appeal if reasonably possible, thus
narrowing the scope of rights protected by these eight amendments. Cases
arising from state courts are few, and stand for scattered points of law, which
have not previously been articulated into so definite a principle as Justice
Cardozo has laid down here.


7 Kepner v. United States, 195 U. S. 100, 24 S. Ct. 797, 49 L. Ed. 114, 1 Ann.
Cas. 655 (1904).
sel to create error for reversal, since under this rule both sides would have an equal right to a trial free of substantial error.

The point is not important for West Virginia lawyers, since a statute such as the one involved here would necessitate an amendment to our state constitution. There are two existing provisions which bear on the problem, one forbidding double jeopardy, and the other forbidding the retrial of any point decided by a jury otherwise than by the rules of the common law, which would exclude any such procedure as this. “Double jeopardy” has been construed by our court to mean empaneling more than one jury in a single case, in accord with the majority rule. Under these provisions there could be no West Virginia statute permitting the state to appeal in criminal cases.

C. A. P. Jr.

TORTS — ASSUMPTION OF RISK — WORKMEN’S COMPENSATION — NONSUBSCRIBERS. — A, an employee in the wholesale house of D, was present when D instructed X to open a trap door in the floor, the two by four foot opening being located in the hall which was ten feet wide directly opposite the door to D’s office in which A worked, directly in front of the door of the candy storeroom, and just inside the building’s main door which was at one end of the hall. X removed the trap door and placed boxes containing groceries around the opening as a protection. Later the same day, A, on her way to the candy room to get a piece of candy, an act which D had expressly forbidden his employees to do, fell into the hole and was killed. D though eligible was not a subscriber to the workmen’s compensation fund, and was thus deprived of his common law defenses of contributory negligence and assumption of risk. In action for negligence brought by P, administrator of A, against D, verdict and judgment were given for P. D brings error. Held, that the question of negligence is one for the jury, and the court will not disturb its verdict. Judgment affirmed. Thorn v. Addison Bros. & Smith. 4

The holding in the Thorn case is a striking example of the extent to which the courts of West Virginia may go in imposing a

4 W. Va. Const. art. III, § 5: “... nor shall any person ... be twice put in jeopardy of life or liberty for the same offense.” Id. at art. III, § 13: “No fact tried by a jury shall be otherwise re-examined than according to the rules of the common law.”

4 Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915F 1093 (1915).

194 S. E. 771 (W. Va. 1937).