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Criminal Law - Sentence - Method of Execution

A. C.

the evidence in this case, is not, in fact, a dangerous weapon."[10] Other decisions in point[11] are also at variance with our Louisiana Supreme Court's decision in the *Johnston* case.

When the Wisconsin Supreme Court held that an unloaded gun did not constitute a "dangerous weapon,"[12] the legislative body of that state enacted a statute[13] which expressly stated that an assault with a firearm, *whether loaded or unloaded,* would constitute an aggravated assault. If it is socially desirable, because of the serious disturbance of the peace which may result,[14] that the person who threatens another with an unloaded firearm be held for an aggravated assault, then it is submitted that the remedy should be by direct legislative action, rather than by a judicial interpretation which involves an abandonment of the general rule that criminal statutes are to be strictly construed in favor of the accused.

J. M. S.

CRIMINAL LAW—SENTENCE—METHOD OF EXECUTION—The defendant was tried and convicted of murder. On August 8, 1940, the judge sentenced him to death "by hanging by the neck until dead." When the transcript of the proceedings was sent to the Governor to have the date of execution fixed, the defendant, alleging that he could not be hanged because Article 569 of the Code of Criminal Procedure had been repealed by Act 14 of 1940,[1] and that the latter statute would be ex post facto if applied

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10. Id. at 952.

11. Territory of Arizona v. Gomes, 14 Ariz. 139, 125 Pac. 702 (1912); People v. Sylva, 143 Cal. 62, 76 Pac. 814 (1904); People v. Montgomery, 15 Cal. App. 315, 114 Pac. 792 (1911); State v. Godfrey, 17 Ore. 300, 20 Pac. 625 (1889). In State v. Napper, 6 Nev. 113 (1870), a threat with an unloaded firearm was held not to constitute an assault under a statute defining an assault to be "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another."

12. Luitze v. State, 204 Wis. 78, 234 N.W. 382 (1931). In this case the assailant pointed an unloaded revolver at another. The question of law to be decided was whether this constituted an assault with a dangerous weapon. The court held that this was not an assault with a dangerous weapon, *no matter how much the person at whom it was pointed may have been put in fear.*

13. Wis. Stats. (1935) § 340.40.

14. In view of the strain which was placed upon the context of the controlling articles in the principal case, it may be safely inferred that the court is of the opinion that serious disturbance of the peace is very likely to result from such an assault. The writer concurs in this opinion. It is a not too uncertain likelihood that a victim may suffer serious mental pain and injury. And in cases where the victim has a weak heart, his life may be endangered or his condition aggravated.

1. Dart's Code of Crim. Law and Proc. (1943) Arts. 569-570.

to his crime, made application for a writ of injunction to restrain the Governor from ordering his execution. *Held*, the act is not ex post facto when applied retrospectively, because it only changes the method of execution and does not affect any substantial personal right. *State ex rel. Pierre v. Jones*, 200 La. 808, 9 So. (2d) 42 (1942).

In the infliction of the death penalty we may consider three elements: the time, the place and the method of execution. The time and the place are by law no part of the judgment,[2] nor are they essential elements of the sentence. Where the place was changed after the sentence had been imposed, the Louisiana Supreme Court held that the act changing it did not operate as a legislative pardon, even in the absence of a saving clause, and it left the correction of the sentence to be made by the trial court.[3]

Summarizing ex post facto laws within the intendment of the Constitution, in *Calder v. Bull*,[4] Mr. Justice Chase said: "ex post facto law is every law that changes the punishment, *and* inflicts a greater punishment than the law annexed to the crime when committed."[5] If Justice Chase had used the disjunctive *or*, it could easily be argued that a law is ex post facto when it either ameliorates or increases the punishment of a crime committed before the law was passed; but, by using the conjunctive *and*, he makes it clear that the law must increase the punishment in order that it fall within the constitutional inhibition.[6]

We know, then, that punishment may be lessened, but it cannot be increased, constitutionally, by a statute enacted after the commission of the offense;[7] and when the increasing statute does not contain a saving clause, the defendant will be discharged on the theory that he has been legislatively pardoned.[8]

The question then arises whether the changing of the method of inflicting the death penalty from hanging to electrocution is an increase or mitigation of punishment. Some courts may hesitate

2. Blackstone, Commentaries (Croley's ed. 1529) 404; McDowell v. Couch, 6 La. Ann. 365 (1851); State v. Oscar, 13 La. Ann. 297 (1858).

3. State v. Johnson, 144 La. 735, 81 So. 293 (1919).

4. 3 U.S. 386, 1 L.Ed. 648 (1798).

5. Accord: State v. Read, 52 La. Ann. 271, 26 So. 826 (1899).

6. McGuire v. State, 76 Miss. 504, 25 So. 495 (1898); Liebowitz v. Warden of New York County Penitentiary, 174 N.Y. Supp. 823, 186 App. Div. 730 (1919).

7. Hicks v. State, 150 Ind. 293, 50 N.E. 27 (1897); Commonwealth v. Wyman, 66 Mass. 237 (1853); Commonwealth v. Mott, 38 Mass. 492 (1859); McGuire v. State, 76 Miss. 504, 25 So. 495 (1898).

8. State v. Hickman, 127 La. 442, 53 So. 680 (1910); State v. Guillory, 127 La. 951, 54 So. 297 (1911); State v. Jones, 127 La. 768, 53 So. 985 (1911); State v. Hagen, 136 La. 868, 67 So. 949 (1915); State v. Thomas, 149 La. 654, 89 So. 887 (1921).

to elaborate on this,[9] but the Governor of New York, impressed with the serious objections to executions by hanging and hopeful that means might be found for taking life in a less barbarous manner, brought the subject to the attention of the legislature in 1885. A commission appointed to that end reported in favor of electrocution as the most humane and practical method. This method was adopted by statute in 1888.[10] As a result of this well grounded belief that electrocution is less painful and more humane than hanging,[11] the states of Louisiana,[12] Alabama,[13] Florida,[14] Georgia,[15] Illinois,[16] Indiana,[17] Kentucky,[18] Nebraska,[19] Ohio,[20] Tennessee[21] and Texas[22] have adopted legislation similar to that of New York. The statutes under consideration do not change the penalty—death—but only the mode of inflicting it. The punishment is not increased and some of the odious features incident to the old methods are abated.

In view of the foregoing, the question above presented may be answered by saying that a change from hanging to electrocution is a mitigation of the punishment; therefore even if the statute effecting the change is passed after the commission of the crime it would not come under the constitutional prohibition. Furthermore, "the inhibition of the Constitution was intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alterations in conditions deemed necessary for the orderly infliction of human punishment;"[23] and statutes of the nature of Act 14 of 1940[24] are procedural—not substantive[25]—and are not derogatory of any right an accused had prior to the enactment.

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9. Hartung v. People, 22 N.Y. 95 (Ct. App. 1860).
10. In re Kemmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890).
11. Storti v. Commonwealth, 178 Mass. 549, 60 N.E. 210 (1901); State v. Tomassi, 75 N.J. Law 739, 69 Atl. 214 (1907).
12. La. Act 14 of 1940 [Dart's Code of Crim. Law and Proc. (1943) Arts. 569, 570].
13. Ala. Code (1940) tit. 15, § 343.
14. Fla. Comp. Gen. Laws (Skillman, 1927) § 8429.
15. Ga. Code (1935) § 27-2512.
16. Ill. Rev. Stat. (1941) c. 38, § 749.
17. Ind. Stat. Ann. (Burns, 1933) § 9-2236.
18. Ky. Rev. Stat. (1942) § 431.220.
19. Neb. Comp. Stat. (1929) § 29-2504.
20. Ohio Gen. Code Ann. (Page, 1937) § 13456-2.
21. Tenn. Code Ann. (Williams, 1934) § 11790.
22. Tex. Crim. Stat. (Vernon, 1936) § 798.
23. Malloy v. South Carolina, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905 (1915).
24. Dart's Code of Crim. Law and Proc. (1943) Arts. 569, 570.
25. State v. Brown, 342 Mo. 53, 112 S.W. (2d) 568 (1938).

In jurisdictions other than Louisiana, courts have reached the same conclusion with reference to statutory change from hanging to either electrocution[26] or lethal gas.[27]

In the *Pierre* case[28] and the subsequent case of *State v. Burks*[29] the judge sentenced the defendant to death by hanging and the trial court amended the sentence to make it comply with the provisions of Act 14 of 1940. In *Henry v. Reid*[30] the sentence was to die "in the manner provided by law" so that the executive head of the government could order the execution according to the statute then in force. This form of the sentence was also held valid in a later case.[31]

We come to the conclusion that the method of carrying out the death penalty is as unessential an element as are the time and the place, and that it may be changed by the legislature even after the accused has been found guilty or has been sentenced, and its change at such a time does not deprive the defendant of any of his substantial rights. Actually it works to his advantage because thus the state is free to adopt the most modern and humane method of inflicting capital punishment.

A. C.

NEGLIGENCE — DANGEROUS PREMISES — LICENSEE AND INVITEE DISTINGUISHED—Plaintiff, a sixteen year old boy, entered the shop office of defendant railroad company in search of the superintendent. His purpose was to solicit defendant's advertising for a local newspaper. While waiting outside the shop, he was injured when one of several metal car wheels, which were negligently stacked, fell upon him. *Held,* plaintiff was an invitee and as such was owed the duty of reasonable care with respect to the condition of the premises. The court, having found that the plaintiff was entitled to protection against negligence, allowed recovery under

26. Woo Dak San v. State, 36 N.M. 53, 7 P. (2d) 940 (1931); Shipp v. State, 130 Tenn. 491, 127 S.W. 317 (1914).

27. Hernandez v. State, 43 Ariz. 424, 32 P. (2d) 18 (1934); Shaugnessy v. State, 43 Ariz. 445, 32 P.(2d) 337 (1937); State v.Brown, 342 Mo. 53, 112 S.W. (2d) 568 (1938).

28. 200 La. 808, 9 So. (2d) 42 (1942), commented on in (1943) 5 LOUISIANA LAW REVIEW 259.

29. 202 La. 167, 11 So. (2d) 518 (1942), commented on in (1943) 5 LOUISIANA LAW REVIEW 578.

30. 201 La. 857, 10 So.(2d) 681 (1942), commented on in (1943) 5 LOUISIANA LAW REVIEW 578.

31. Iles v. Flournoy, 202 La. 29, 11 So.(2d) 16 (1942).