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Constitutional Law -- Right of Counsel

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diction of certain controversies upon its own courts or upon a particular court,[24] or which ". . . prescribes the modes of redress in [its] courts, or which regulates the distribution of [its] judicial power."[25] In accordance with these principles, the Court of Appeals, in *Popp v. Archbell*,[26] decided that the Virginia statute was a statute regulating practice and procedure in state courts and could have no effect on federal jurisdiction.

Thus, there is apparently no direct precedent for the decisions in the principal cases. Yet, on the basis of the decisions in analogous cases, it would seem that the results reached in these two cases are correct and proper, in that the jurisdiction of a court should not be restricted or eliminated by laws or rules governing procedure in the courts of other jurisdictions.

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Constitutional Law—Right of Counsel

The North Carolina Supreme Court has recently affirmed the constitutional principle that counsel need not be assigned to defend persons accused of non-capital crimes, absent special circumstances brought to the attention of the court and revealing the necessity for counsel.[1]

The English common law denied a person accused of treason or felony the benefit of counsel,[2] and did not even consider the assignment of counsel,[3] while most of the original American colonies at least nominally provided for the right to counsel.[4] The privilege, which has

[24] Barber Asphalt Pav. Co. v. Morris, Judge, 132 Fed. 945 (8th Cir. 1904) (city charter allowing claims against the city to be appealed only to a certain state court); Darby v. L. G. DeFelice & Son, Inc., 94 F. Supp. 535 (E. D. Pa. 1950) (statute providing that suits against turnpike commission could be brought only in courts of certain county); Wunderlich v. National Surety Corp., 24 F. Supp. 640 (D. Minn. 1938) (statute authorizing issue of bonds required suit on them to be brought within the state); Brown v. Return Loads Bureau, 15 F. Supp. 1073 (S. D. N. Y. 1936) (wrongful death statute providing that actions under it must be prosecuted within the state); *accord,* Slaton v. Hall, 172 Ga. 675, 158 S. E. 747 (1931) (*held* that action under same wrongful death statute could be prosecuted in competent court of another state). *Cf.* Crowley v. Goudy, 173 Minn. 603, 218 N. W. 121 (1928).

As to effect of state statutes granting exclusive jurisdiction over suits affecting probate or administration of decedents' estates to probate courts, see Annotation, 158 A. L. R. 9 (1945).

[25] Hyde v. Stone, 20 How. 170, 175 (U. S. 1858); Lappe v. Wilcox, 14 F. 2d 861 (N. D. N. Y. 1926).

[26] Note 5 *supra.*

[1] State v. Cruse, 238 N. C. 53, 76 S. E. 2d 320 (1953).

[2] Herein, the general constitutional privilege concerning counsel for defense in criminal cases is called "right of counsel," and includes: (1) "benefit of counsel," which means that a person may be represented by a lawyer whom he has employed; and (2) "assignment of counsel," which means that a person is entitled to the assignment of a lawyer to defend him.

[3] Powell v. Alabama, 287 U. S. 45, 60 (1932).

[4] *Id.* at 64.

troubled the United States Supreme Court since 1932[5] and is increasingly the subject of litigation in state courts,[6] has assumed substantial meaning in recent years[7] when the courts have attempted an adequate definition of the privilege.

In North Carolina the privilege is broadly defined in the Constitution,[8] by statutes,[9] and by an early statement of the Supreme Court,[10] but later cases applying the rule are less liberal. *State v. Hedgebeth*[11] contains the fullest statement of the present interpretation, holding the right to an assignment of counsel mandatory in capital cases, guaranteeing those accused of non-capital felonies and misdemeanors the benefit of counsel, and making the assignment of counsel in non-capital cases dependent on (1) circumstances showing "the apparent necessity of counsel for the protection of the defendant's rights," and (2) a request for counsel.[12] This case was affirmed by the United States Supreme Court,[13] although the majority[14] did not rest their decision on the merits,[15] and it is the law in North Carolina today.

[5] The first significant federal case, preceding the decisions cited herein, was Powell v. Alabama, 287 U. S. 45 (1932).

[6] See list of cases cited in 16 C. J. S., *Const. Law* § 591 (Supp. 1953).

[7] Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N. Y. U. L. Q. REV. 1, 7, 9 (1944).

[8] N. C. CONST. Art. I, § 11: "In all criminal prosecutions, every person charged with crime has the right . . . to have counsel for defense. . . ."

[9] N. C. GEN. STAT. § 15-4 (1953), enacted in 1777, provides: "Every person, accused of any crime whatsoever shall be entitled to counsel in all matters which may be necessary for his defense." See N. C. GEN. STAT. §§ 15-4.1, 5 (1953).

[10] State v. Collins, 70 N. C. 241, 244 (1874): "In this country every one has a constitutional right in all criminal prosecutions to have counsel for his defense; and if he be too poor to employ counsel, it is the duty of the court to assign some one to defend him; and it is the duty of the counsel thus assigned to give to the accused the benefit of his best exertions. It is gratifying to be able to state that the bench and bar in North Carolina have always dealt mercifully and generously with those who have had the double misfortune to be stricken with poverty and accused of crime."

[11] 228 N. C. 259, 45 S. E. 2d 563 (1947).

[12] *Id.* at 266, 45 S. E. 2d at 567.

The importance of a request for the assignment of counsel in noncapital cases is not clear. The general statement in the *Hedgebeth* case, *ibid.*, places this factor on an equal plane with "special circumstances," but *In Re* Taylor, 229 N. C. 297, 301 49 S. E. 2d 749 (1948), citing the *Hedgebeth* case, provides that "the appointment of counsel . . . is discretionary with the trial court." Probably a request for counsel in another circumstance which the court considers in determining whether there was an improper failure to assign counsel, although the broad rule of the *Hedgebeth* case is so indefinite that later cases may enlarge or diminish the importance of a request.

[13] Hedgebeth v. North Carolina, 334 U. S. 806 (1947).

[14] Justices Rutledge and Douglas dissented.

[15] Hedgebeth v. North Carolina, 334 U. S. 806, 807 (1947): "If petitioner's allegations, with supporting affidavits, in the *habeas corpus* proceedings controlled the issue before us, they would established circumstances that make the right to assistance of counsel an ingredient of the Due Process clause. * * * Since the North Carolina Supreme Court went on the ground that it did not have the full record before it, we are constrained to dismiss the writ because the judgment below can rest on a non-federal ground."

Several cases have raised the question of what circumstances will warrant the assignment of counsel in non-capital cases, but the court has not given a general rule in answer. Where a person indicted for violation of a criminal penalty provision of the election law[16] rejected the trial court's attempt to assign counsel, no error was found, although the court seemed to assume that he might have the privilege of assignment of counsel.[17] In the *Hedgebeth* case,[18] a tenant farmer was indicted for "highway robbery." He was twenty-four years old with a third grade education, without money, unfamiliar with business and legal affairs, and although not questioned as to his desire for counsel, the court held the failure to assign counsel for him was not a denial of the constitutional privilege. The court's attitude seemed different where a nineteen year old Negro soldier was charged with assault with intent to kill. By dictum it indicated that the judge should have assigned counsel for the defendant, and reversed his conviction on this and other grounds.[19]

In the principal case[20] an indigent defendant, thirty-nine years of age, had attended school through the sixth grade, had formerly been convicted of serious crimes and had served time in prison. Charged with conspiracy to assault and rob, assault with a deadly weapon with the intent to kill, and robbery, he did not ask for counsel and after attempting to try his own case was convicted on all counts and given sentences running consecutively. The court held that there was no error in the failure of the trial court to assign counsel for him. A general rule based on these cases can be no clearer than the overworked maxim that "each case must stand on its own facts."

Although there is feeling that assignment of counsel is ordered more frequently now than in the past,[21] and some decisions do support this theory,[22] the North Carolina rule is not in conflict with that of Florida,[23] Massachusetts,[24] Pennsylvania[25] and some of the other states.[26]

There are provisions in the United States Constitution[27] which

[16] Now N. C. GEN. STAT. § 163-196(10) (1952).
[17] State v. Pritchard, 227 N. C. 168, 41 S. E. 2d 287 (1947).
[18] 228 N. C. 259, 45 S. E. 2d 563 (1947).
[19] State v. Wagstaff, 235 N. C. 69, 68 S. E. 2d 858 (1951).
[20] State v. Cruse, 238 N. C. 53, 76 S. E. 2d 320 (1953).
[21] Notes, 30 B. U. L. REV. 139, 141 (1940), 42 COL. L. REV. 271, 282 (1942), 28 TEXAS L. REV. 236, 240 (1950).
[22] Johnson v. Zerbst, 304 U. S. 458 (1938); People v. Avilez, 86 Cal. App. 289, 194 P. 2d 829 (1948); Todd v. State, 226 Ind. 496, 81 N. E. 2d 530 (1948); Cogdell v. State, 193 Tenn. 261, 246 S. W. 2d 5 (1951); Thorne v. Callahan, 39 Wash. 2d 43, 234 P. 2d 517 (1951).
[23] Sneed v. Mayo, —— Fla. ——, 66 So. 2d 865 (1953).
[24] McDonald v. Commonwealth, 173 Mass. 322, 53 N. E. 874 (1899), followed in Allen v. Commonwealth, 324 Mass. 558, 87 N. E. 2d 192 (1949).
[25] Popovich v. Claudy, 187 Pa. Super. 482, 87 A. 2d 489 (1952).
[26] See, Betts v. Brady, 316 U. S. 455, 477 (1942) (appendix). The classification set out there does not adequately present the North Carolina rule, however.
[27] U. S. CONST. AMENDS. V, VI, XIV, § 1.

affect the state rule concerning the right to counsel, but the application of these provisions seems to be a policy question on which the members of the United States Supreme Court have consistently divided, revealing wide differences of opinion. A majority has expressed the idea that the "due process" clause is the only limit on state interpretation of this privilege, defining the test of denial of due process to be whether the facts of the particular case are "shocking to the universal sense of justice."[28] Another theory in support of this view is that the matter of criminal justice is properly left in state hands,[29] and it has led a majority to erect technical barriers to the consideration of this privilege.[30] The contrary view states that the assignment of counsel is a fundamental right, and is guaranteed to defendants in all state criminal cases by the Fourteenth Amendment.[31]

Recently the court has recognized this division,[32] and following the death of two justices usually voting with the minority,[33] a rule has begun to evolve which is a hybrid of the two conflicting views. The basic theory remains that of the majority,[34] but in response to a minority appeal for a formulated principle, *Powell v. Alabama*[35] is now cited as holding that the assignment of counsel in capital cases is required.[36] In non-capital cases, the rule remains fluid and the right to assignment of counsel is said to depend upon the facts of the particular case.[37]

The tendency of the federal Supreme Court is to declare the right to an assignment of counsel in an increasing number of non-capital cases,[38] and a dissenting opinion presents the test as the "need" for counsel, measured by the "nature of the charge and the ability of the

[28] Betts v. Brady, 316 U. S. 455, 461 (1942).

[29] In Uveges v. Pennsylvania, 335 U. S. 437, 449 (1948), Mr. Justice Frankfurter said in dissenting: ". . . intervention by this Court in the criminal processes of States is delicate business. It should not be indulged in unless no reasonable doubt is left that a State denies, or has refused to exercise, means of correcting a claimed infraction of the United States Constitution."

[30] In Carter v. Illinois, 329 U. S. 173, 176 (1946), the court, in reaching its decision that there had been no denial of due process, said ". . . the very narrow question now before us is whether this common law record establishes that the defendant's sentence is void . . . ," and repeatedly used the phrase "upon the record before us" to introduce any statement of law.

[31] Betts v. Brady, 316 U. S. 455, 475 (1942) (dissenting opinion).

[32] Uveges v. Pennsylvania, 335 U. S. 437, 440 (1948).

[33] Justices Frank Murphy and Wiley B. Rutledge.

[34] Uveges v. Pennsylvania, 335 U. S. 437, 441 (1948): "The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trial."

[35] 288 U. S. 45 (1932).

[36] Williams v. Kaiser, 323 U. S. 471, 476 (1944); Bute v. Illinois, 333 U. S. 640, 680 (1948) (dissenting opinion).

[37] Palmer v. Ashe, 342 U. S. 134 (1951).

[38] Palmer v. Ashe, 342 U. S. 134 (1951); Gibbs v. Burke, 337 U. S. 773 (1949); Uveges v. Pennsylvania, 335 U. S. 437 (1948); Townsend v. Burke, 334 U. S. 736 (1948); Wade v. Mayo, 334 U. S. 672 (1948).

average man to face it alone. . . ."[39] The court has held the failure to assign counsel to be a denial of due process where the defendant was incapable of defending himself on trial by reason of his age, race, or mentality;[40] where the trial court or its officers acted unfairly;[41] and where the defendant was unable to conduct adequate defense because of a complex charge or fact situation.[42]

The rule of the United States Supreme Court affecting the states is thus similar to the North Carolina rule, but the "special circumstances" which require the assignment of counsel in non-capital cases have been more thoroughly explored, and it is likely that the United States rule is more liberal than the North Carolina rule. It appears that a person accused of a non-capital crime in North Carolina today has no assurance of an assignment of counsel.

The writer suggests that the United States Supreme Court has maintained a strong and liberal policy on civil rights, including the right to counsel in criminal cases, expressing a desire to leave the application of this privilege in the hands of the several states. Thus, the function of the states is to delineate a policy which will insure defendants in non-capital cases a substantial constitutional right.

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Corporations—Dissolution—Deadlock

The problem of corporate stockholder and/or director deadlock is a familiar one to the practicing corporation lawyer.[1] This deadlock situation is, of course, only one of many problems which arise under the general subject of dissolution of a corporation, for any cause, at the instance of minority stockholders. The broader topic above referred to has already been treated in this *Law Review*[2] and therefore, the

[39] Bute v. Illinois, 333 U. S. 640, 682 (1948).

[40] Palmer v. Ashe, 342 U. S. 134 (1951) ("young irresponsible boy" of low mentality); Wade v. Mayo, 334 U. S. 672 (1948) (eighteen year old "youth unfamiliar with court procedure"); De Meerleer v. Michigan, 329 U. S. 663 (1947) (seventeen year old boy); Rice v. Olson, 324 U. S. 786 (1945) (Indian).

[41] Uveges v. Pennsylvania, 335 U. S. 437 (1948) (defendant threatened by state's attorney); Townsend v. Burke, 334 U. S. 736 (1948) (court questioned defendant about former criminal charges, of which he had been exonerated); Smith v. O'Grady, 312 U. S. 329 (1941) (false promises by officers of the court).

[42] Palmer v. Ashe, 342 U. S. 134 (1951) (defendant, convicted of robbery, meant to plead guilty to breaking and entering); Gibbs v. Burke, 337 U. S. 773 (1949) (court said counsel could have prevented admission of incriminating testimony); Rice v. Olson, 324 U. S. 786 (1945) (venue problem of trial court's jurisdiction over an Indian on reservation).

[1] For an excellent discussion of the problem in general, see Israels, *Deadlock and Dissolution*, 19 CHI. L. REV. 778 (1952).

[2] Note, 28 N. C. L. REV. 313 (1950).

"Deadlock, which appears by the decided cases to have occurred only in corporations having a few stockholders, implies dissension due to equal division, and therefore does not involve problems of protection for the minority." Horstein, *A Remedy for Corporate Abuse*, 40 COL. L. REV. 220, 231 (1940).