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The War on Crime

Alice Friedman

involving real property) to have a limitation of actions thereon exceeding six years. In spite of the fiction that full justice is awarded by the courts and that the allowance of costs to the successful plaintiff is payment in full for the trouble and expense to which he has been put in prosecuting his suit, there should be some method of settling a liquidated claim or demand by payment of less than the full amount due.[46] Perhaps, so long as the seal retains any of its other significations, the authority of an agent to affix it should be equally solemn and formal.

But means to accomplish these and any other desirable ends should be attained by some method appropriate thereto. The fact that a long Statute of Limitations is appropriate in one transaction is no justification for adding fourteen years thereto in another merely because the letters "L.S." happen to be printed on the paper on which it is recorded. That accords neither with common sense, the intention of the parties nor the purpose of the Statute of Limitations. The United States Supreme Court said over half a century ago that a sealed instrument "binds the parties by force of the natural presumption that an instrument executed with so much deliberation and solemnity is founded upon some sufficient cause." [47] Today no one will honestly believe or seriously contend that there exists any such "natural presumption."

It is submitted that, rather than continuing to pursue the course followed for the last one hundred years and more, of now and then essaying some infringement on the domain of the seal, and then a few years later amending and changing the degree of the infringement, the better and only proper course would be to do away entirely with this now decrepit remnant of ancient law; and in those cases where it is still serving some useful purpose, to provide a more logical and modern means of accomplishing the same end.

WESLEY DAVIS.

THE WAR ON CRIME.—In recent years, the problem of dealing with crime and criminals has become a major one, and it has become increasingly evident that the old laws and methods were ineffective to battle the new type of criminals. Prior to the repeal of the Prohibition laws, the leaders in the movement for repeal declared that those laws were responsible for the increase in and prevalence of crime, and held forth the hope that with the repeal, crime would cease. However, there was no instantaneous change—in fact, there

[46] The present amendment has done away with the use of the sealed receipt or release as a means of settling out of court many claims, without substituting anything in place thereof. This will work a hardship on attorneys and clients alike. Means may be devised, such as giving a worthless chattel or the promise of a third person, as a part of the consideration. Whether or not the courts will countenance a too bare-faced subterfuge remains to be seen.

[47] Storm v. United States, 94 U. S. 76, 24 L. ed. 42 (1876).

was no sign that there was even a lessening, and the need for further action was apparent.

Perhaps the most important of the measures enacted by the New York State Legislature in 1935 is the so-called "Public Enemy" Law.[1] This is an amendment to subdivision 11 of Section 722 of the Penal Law, which declares that any person of evil reputation or engaged in an illegal occupation who is found consorting with other persons of like reputation, with an illegal purpose, shall be deemed to have committed the offense of disorderly conduct, the new amendment adding "In any prosecution under this section, the fact the defendant is engaged in an illegal occupation or bears an evil reputation and is found consorting with persons of like evil reputation, thieves or criminals shall be prima facie evidence that such consorting was for an unlawful purpose." This amendment is to remain in force for one year.

This is by far the most drastic step yet to be taken in an effort to control the activities of the habitual criminal. It is of course a complete reversal of the attitude heretofore taken in the prosecution of criminals, in that the prosecution is enabled to start out with the presumption that the persons found consorting, provided that they are both of evil reputation or have criminal records, were doing so for an unlawful purpose, and the defense now has the onus of rebutting that presumption. There is always a general distrust of the new, especially where it makes so radical a change in an old-established order.

The immediate objection to be raised is that such a provision is a violation of the rights of the defendant to be presumed innocent unless proven guilty beyond a reasonable doubt. The constitutionality of this new amendment has already been passed upon by inferior courts in several cases[2] where the defendants raised that objection. In both cases, the defendants were charged with consorting for an unlawful purpose, evidence introduced to show that they were of an evil reputation, and then the duty was put upon the defendants to show that their consorting was not for an illegal purpose. This they were unable to do, and they were therefore convicted.

Although the constitutionality of this amendment to the Penal Law has been passed upon, this is not conclusive since it was by inferior courts. Before its passage, the Law Revision Commission expressed the opinion[3] that this proposed amendment, if passed,

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[1] N. Y. Laws of 1935, c. 921. This provision originally enacted in 1931, c. 793, amended Laws of 1932, c. 58, omitting the last sentence creating the presumption, and police officials found it difficult, and in most cases impossible, to prove the illegal purpose. Therefore the legislature amended the law as above set forth to give the people the benefit of the presumption.

[2] People v. Arcidiaco and Spitale, 156 Misc. 461 (App. T. Ct. of Spec. Sess. 1935); People v. Berman *et al.*, 156 Misc. 463 (App. T. Ct. of Spec. Sess. 1935).

[3] LEGISLATIVE DOCUMENT, 1935, No. 60K.

would be unconstitutional because it violated the "due process" clauses [4] and because it was too indefinite.

The legislature may pass a statute providing that proof of one fact shall constitute *prima facie* evidence of the existence of another fact essential to the guilt of the accused, without violating any constitutional rights,[5] but there are limitations [6] to the creation of such presumptions. There must be some natural and fair connection between the fact proved and the main fact in question. It cannot be a purely arbitrary presumption.[7] This test, however, is met by the statute in question. When dealing with habitual criminals and they are apprehended consorting together at various times and places, the inference that they are doing so for an unlawful purpose is not unnatural or unfair.

The legislature, of course, has the power [8] to enact laws shifting the duty of going forward with the evidence.[9] This does not take away the burden of proving that the accused is guilty beyond a reasonable doubt.[10] Before the presumption that the consorting was for an unlawful purpose arises, the prosecution must prove that the defendants are of evil reputation or that they are engaged in an illegal occupation. The defendants are then given an opportunity to show, if they can, that their purpose was not unlawful. The production of satisfactory evidence sufficient to rebut the statutory presumption is, however, a difficult and sometimes impossible task. Similar statutes in other states have been held unconstitutional and void because they violated the constitutional requirement of "due process" and because they were considered too indefinte.[11]

A necessary part of the proof required in order to establish the

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[4] U. S. CONST. 5TH and 14TH AMENDMENTS.

[5] People v. Adams, 176 N. Y. 351, 68 N. E. 636 (1903), *aff'd*, Adams v. N. Y., 192 U. S. 585, 24 Sup. Ct. 416 (1904); People v. Cannon, 139 N. Y. 32, 34 N. E. 759 (1893).

[6] *Ibid.*

[7] State v. Griffin, 154 N. C. 611, 614, 70 S. E. 292 (1911) (A statute establishing such presumption where there is no rational connection, and the presumption is purely arbitrary is unreasonable and void).

[8] Bank of Chenango v. Brown, 26 N. Y. 467 (1863) (The legislative power in this state is absolute and unlimited, except by restrictions of the Constitution).

[9] The Board of Commissioners of Excise of the City of Auburn v. Merchant, 103 N. Y. 143, 8 N. E. 484 (1886) (A statute prescribing rules of evidence in either civil or criminal cases which leaves a party a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them upon evidence legitimately bearing upon them cannot be assailed on constitutional grounds).

[10] People v. Cannon, 139 N. Y. 32, 34 N. E. 759 (1893) (A provision of this kind does not change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt); Casey v. United States, 276 U. S. 413, 48 Sup. Ct. 373 (1928).

[11] People v. Belcastro, 356 Ill. 144, 190 N. E. 301 (1934); People v. Alterie, 356 Ill. 307, 190 N. E. 305 (1934); People v. Licavolie, 264 Mich. 643, 250 N. W. 520 (1933). *Contra:* State v. Bulot, 175 La. 21, 142 So. 787 (1932) (An act forbidding persons to "unlawfully assemble for any unlawful purpose" was not too indefinite, although it was held unconstitutional for another reason).

presumption is that the defendants are of evil reputation. Reputation may be created by malicious gossip, unfounded rumors exaggerated in repetition and the like, and to allow such evidence is manifestly unfair.[12] Also, in the interpretation of the statute, the word "criminal" must be construed. Undoubtedly, the intention was to designate one whose conduct is habitually criminal. However, in order to secure the conviction, it might be construed in its strictly technical sense to mean one who has been convicted of a felony or one convicted of any crime. If taken in the latter sense, then a person convicted of a traffic violation, for instance, would be considered a criminal.

If this provision is applied to carry out the intention for which it was passed, namely, to prevent future crime, it should be allowed to stand, because it would prove an aid in an attempt to abort criminal activities. However, the danger is that there may be attempted a use of this law in order to punish individuals who, while they are not guilty under this law, are suspected of guilt in other connections, which suspicions cannot be proved.

Another aid to the state in the prosecution of criminals is the new Section 295–1 to the Code of Criminal Procedure[13] which requires that, on demand, a defendant indicted by a grand jury must furnish, if he intends to offer an alibi as a defense, a bill of particulars stating the place or places he claims to have been and also the names and addresses of his witnesses. In the event that such a bill of particulars is not served and filed, all testimony in reference to an alibi may be excluded, in the discretion of the court. If allowed, the prosecuting officer may obtain an adjournment of three days. This takes away no substantive right of the accused, but does protect the prosecution from a surprise alibi and enables it to prepare therefor.

A further attempt to limit the use of firearms by private individuals is made in another law[14] passed this year. This is an amendment to Section 1897, subdivision 9a, of the Penal Law, and applies only to New York City. It states that no license to carry a revolver shall be valid in the city of New York, unless such license has been issued by the Police Commissioner of that city or a special permit has been issued by him giving a license such validity. The New York City Police Department has long complained[15] that many

[12] Hammond v. State of Ohio, 78 Ohio State 15, 84 N. E. 416 (1908).
[13] N. Y. Laws of 1935, c. 506.
[14] N. Y. Laws of 1935, c. 508.
[15] "No longer will a prisoner charged with violation of the Sullivan Law be able to offer an up-state license as a defense. Our records are full of instances wherein gangsters legally carried guns because under false names they managed to obtain licenses outside of New York City. Salvador Spitale, Frankie Yale, Jake (Legs) Diamond, Arthur (Dutch Schultz) Flegenheimer, Harry Kirschenbaum—such men as these have been picked up on the streets carrying weapons and have flaunted pistol licenses in the face of the examining magistrate or of the arresting officer." *Interview with Police Commissioner Valentine*, N. Y. Times, May 5, 1935, §4, at 1.

individuals apprehended have been carrying licenses issued in some small town up-state, obtained under a false name. A measure of this sort can meet with no objection and should be of benefit to the administration of law and order in the city.

However, in order to balance the benefits, there has been passed a law [16] creating a bureau of investigation in the division of state police. It gives to rural communities which have no detective force or other facilities for the detection and prevention of crime the aid of experts, scientists, technicians and other qualified persons.

Another problem which has long been under consideration is that of the present bail system. Prisoners could be admitted to bail in any number of places where there was no way of checking into their criminal record, and the result was that one criminal might be admitted to bail many times, during a short period of time, with many charges pending against him. In many instances, the criminal found that it paid him to forfeit his bail and continue his criminal activities in other jurisdictions.

In order to combat this, the Code of Criminal Procedure was amended in 1926, by Section 552a, intended primarily for New York City, which provided that "no person charged with a felony or with any of the misdemeanors or offenses specified in the preceding section shall be admitted to bail until his finger prints shall be taken to ascertain whether he has previously been convicted of crime." This section was made effective on April 16th, and only ten days later was declared unconstitutional,[17] although by an inferior court, on the ground that it violated the due process of law. Although there was no express provision that a prisoner could be compelled to be finger-printed, this would be implied, and such finger-printing would be an encroachment against the liberty of person. Also, the provision regarding excessive bail [18] would be violated, since this includes denial of bail or "its hedging in with conditions which are impractical, unreasonable or onerous of performance." [19] With the recent campaign for compulsory finger-printing of the entire population as a means of crime detection and prevention,[20] it is a question whether this law would meet a like fate if enacted at the present time.

In 1928, the Penal Law was amended [21] providing that one admitted to bail in connection with a charge of felony and who fails to appear as required, thereby forfeiting his bail, is also guilty of a felony if he fails to appear within thirty days. This year, this provision was further amended [22] making a person admitted to bail

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[16] N. Y. Laws of 1935, c. 697.

[17] People v. Hevern, 127 Misc. 141, 215 N. Y. Supp. 412 (1926).

[18] U. S. CONST. 8TH AMENDMENT; N. Y. CONST. art. I, §5.

[19] People v. Hevern, 127 Misc. 141, 215 N. Y. Supp. 412 (1926).

[20] Conference on Crime, sponsored by Gov. Lehman, held at Albany, N. Y., Oct. 1 to 4, 1935.

[21] N. Y. PENAL LAW §1694A.

[22] N. Y. Laws of 1935, c. 275.

in connection with various offenses [23] under the Penal Law and the Code of Criminal Procedure, directed at known habitual criminals, prostitutes and vagrants, guilty of a misdemeanor if he fails to appear within fifteen days, thereby forfeiting his bail.

Regarding bail after conviction, pending appeal, here we find that the tendency has always been to be stricter and there are more considerations to limit the judicial discretion.[24] If there is a reasonable doubt as to whether the judgment of conviction will be affirmed on appeal, the appellant is entitled to be admitted to bail pending the decision of the appellate court.[25] The rule has been laid down that "The court in exercising its discretion to admit accused to bail pending appeal should consider probabilities of reversal of conviction, personal circumstances of accused and his personal attitude toward society as organized in government." [26] However, where there is reason to believe that an appeal is being taken merely in order to delay the punishment of the defendant, bail after conviction should be refused.[27] In an address to the American Law Institute,[28] Chief Justice Hughes said, "While there should be a proper opportunity for appeal where substantial questions are presented, there is no reason why review of convictions should not be prompt. The spectacle of persons convicted of crime at large on bail pending unnecessary delays on appeal brings the processes of the courts into public contempt."

Section 555 of the Code of Criminal Procedure which governs who shall be allowed bail after conviction and where there has been a stay of proceedings pending appeal, has this year been amended [29] to deny bail to a defendant convicted of a charge under Section 552 of the Code and who is circumstanced as therein described. This provision will only affect a defendant who has been convicted of a felony or who has been convicted twice of any of the misdemeanors or offenses mentioned therein,[30] and then only after he has already been convicted.

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[23] N. Y. PENAL LAW §722, subds. 6 or 11; N. Y. CODE OF CRIM. PROC. §887, subds. 4 or 10; §898a.

[24] People v. Van Horne, 8 Barb. 158 (1850) (At common law, all offenses including treason, murder and other felonies were bailable before indictment found, although bail in the case of capital offenses was a matter within the discretion of the court. However, this discretion is purely a judicial discretion and the court should be guided in its exercise by the circumstances of the case and the rules of law applicable to such circumstances).

[25] N. Y. CODE OF CRIM. PROC. §527; People v. Kaplan, 147 Misc. 752, 264 N. Y. Supp. 542 (1933).

[26] Circuit Court of Appeals Rule 15 for the Third Circuit.

[27] See United States v. Motlow, 10 F. (2d) 657 (C. C. A. 7th, 1926).

[28] AMERICAN BAR ASSOCIATION JOURNAL, June, 1934.

[29] N. Y. Laws of 1935, c. 507.

[30] Illegally using, carrying or possessing a pistol or other dangerous weapon; making or possessing burglars' instruments; buying or receiving stolen property; unlawful entry of a building; aiding escape from prison; that kind of disorderly conduct defined in subd. 6 of §722, N. Y. PENAL LAW (interferes with any person in any place by jostling against such person or unnecessarily

In the past, in dealing with criminals, the tendency has always been to give the accused the benefit of every doubt, in order that an innocent person may not be unjustly convicted. However, the primary purpose is after all to safeguard the general public welfare, and, to do so, it is becoming increasingly necessary to tighten the net around the criminal, shifting the emphasis from protection of the accused to protection of the public. The public has gradually come to a realization of the necessity for a remodeling of our crime laws in order to cope with the situation, and the changes mentioned above are probably only the beginning of a program of such changes.

ALICE FRIEDMAN.

COMMENTS ON LEGISLATION CONCERNING THE UNLAWFUL PRACTICE OF THE LAW.—For the first time in the history of our state jurisprudence, the Appellate Division in seeking to exercise its supervisory powers over the legal profession, ordered a general investigation of the conduct of its members in regard to a particular line of professional work—to wit, the Negligence Practice.[1] This investigation placed the entire profession on the block of public contempt, and although the stems of this illicit practice were cut by disbarment, the roots of the evil remained intact. These evil roots were the acts of unscrupulous individuals who solicited the cases. If the attorneys retaining cases from these so-called solicitors, better known as "ambulance chasers," were apprehended by justice, under our penal laws then existent,[2] the counselors-at-law were disbarred[3] while the real wrongdoer was permitted to continue his paltry business. According to certain reports[4] written after the investigation, the general opin-

crowding him, or by placing a hand in the proximity of such person's pocket, pocketbook or handbag); and unlawfully possessing or distributing habit-forming narcotic drugs. N. Y. CODE OF CRIM. PROC. §552, subd. 3b.

[1] *Ambulance Chasing*, N. Y. L. J., Oct. 8, 1928.

[2] N. Y. PENAL LAW §274, before amended by N. Y. Laws of 1935, cc. 577, 578.

[3] Matter of Marlow, 225 App. Div. 252, 232 N. Y. Supp. 578 (2d Dept. 1929); Matter of Littack, 225 App. Div. 247, 232 N. Y. Supp. 571 (2d Dept. 1929). (Here the respondent was accused of splitting the fees on a number of negligence cases brought by one Fabricant. The respondent's contention was that the money given to Fabricant was for his fidelity in working with the respondent. But the damaging evidence against the respondent was the testimony given by a law-school graduate, who stated that in answer to an advertisement for a clerk's position, the respondent told him that there would be no salary, but if he brought in cases the fee would be split with the applicant. The court was not unanimous in its decision, for Rich, J., held that the respondent was not guilty of the offense of "splitting fees" with Fabricant, but that Fabricant received a salary.) Matter of Katzka, 225 App. Div. 250, 232 N. Y. Supp. 575 (2d Dept. 1929).

[4] *Nationwide War on "Ambulance Chasers"* (1929) 15 A. B. A. J. 325-6; *Investigations of "Ambulance Chasers," The Source of the Evil* (1928) 32 LAW NOTES 101.