

Comment on Recent Decisions

CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT—PROVINCE OF LEGISLATURE.—Defendant, who was convicted of the unlawful transportation of "moonshine," was given the maximum sentence by the jury. On appeal he contended that the punishment was excessive. *Held*, that since fixing the punishment for crime is a legislative and not a judicial function, appellate courts can not adjudge as excessive a punishment which is within the range prescribed by statute. *State v. Wheeler*, 2 S. W. (2d) 777 (Mo., 1928).

The eighth amendment to the Federal Constitution provides against cruel and unusual punishment. This provision has reference only to federal statutes and does not apply to state statutes establishing punishment for crimes. *Commonwealth v. Murphy*, 165 Mass. 66, 42 N. E. 504; *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101. Most states have in their bill of rights clauses similar to the federal amendment. Article 2, Section 25 of the Missouri Constitution is such a provision, and is the one sought to be invoked in the principal case in an effort to have the punishment adjudicated excessive, on the ground that it was cruel and unusual. But such a prohibition has reference only to the statutes fixing the punishment and not to the punishment assessed by the jury or court within the limits of the statute. If the statute is not in violation of the constitution then any punishment assessed within the limits of such statute can not be adjudged excessive. *State v. Alexander*, 315 Mo. 199, 285 S. W. 984; *State v. Van Wye*, 136 Mo. 227, 37 S. W. 938; *Miller v. State*, 149 Ind. 607, 49 N. E. 894; *Commonwealth v. Murphy*, *supra*; *State v. Davis*, 88 S. C. 229, 70 S. E. 811. The term cruel and unusual punishment means that the mode of punishment is of a barbarous character and unknown to the common law. *State v. Williams*, 77 Mo. 310; *State v. McCauley*, 15 Cal. 429. "It devolves upon the legislature to fix the punishment for crime and in the exercise of their judgment great latitude must be allowed and courts may reasonably interfere only when the punishment is so unreasonable or so cruel as to meet the disapproval and condemnation of the conscience and reason of men generally." *State v. Becker*, 3 S. D. 29, 51 N. W. 1018.

In the principal case the constitutionality of the statute under which the defendant was convicted was not questioned. Therefore, in the light of the authorities above cited, the Missouri Supreme Court properly refused to go into the question of excessive punishment so long as such punishment was within that prescribed by the limits of the statute. R. B. S., '30.

CONSTITUTIONAL LAW—STATUTE REGULATING ADMISSION TO BAR.—Appellant, a member of the Philadelphia Bar, and a resident of Delaware County, applied to the board of law examiners of that county for the purpose of becoming enrolled as a member of the Delaware County Bar. The Court rule provided that "an applicant for admission to the bar of Delaware County shall make a formal declaration in writing that he intends permanently to practice in that county, and within three months to open his principal office there. . ." Olmstead did not state his intention to open his principal office in Delaware County and his application was refused. *Held*, that the rule of the court was binding upon all applicants, notwithstanding that a statute literally construed, apparently provided to the contrary. *In re Olmstead*, 292 Pa. 96, 140 Atl. 634 (1928).

The judicial departments of the respective states have sagaciously sustained the constitutionality of statutes providing reasonable requirements for admission to the bar. Such action has been based upon the sensible attitude of the courts to avoid friction with the legislative department, and a recognition of the police

power of the legislature. *Ex parte Garland*, 4 Wall. 333, 379, 18 L. Ed. 366; *In re Mock*, 146 Cal. 378, 80 Pac. 64. Also 10 L. R. A. (N. S.) 288. However, all courts have not recognized the power of the legislature to formulate qualifications for admission to the bar. Some courts, zealously guarding the constitutional provisions creating the courts, have denied the existence of any power in the legislature to prescribe prerequisites for the admission to the bar and have held any attempt to do so an encroachment upon the judicial department and void. *In re Goodell*, 39 Wis. 232; *In re Mosness*, 39 Wis. 509. In the latter case the court passed on a statute which provided for the admission of attorneys of another state, holding that if the intention was to admit attorneys of another state to practice, "it was clearly without the power of the legislature." The case of *Re Applicants*, 143 N. C. 1, 55 S. E. 635, is an extreme case, in which it is apparent that the court has divested itself of what other courts have termed their "inherent" power to prescribe rules and conditions for admission to the bar. In that case the applicant's admission to the bar was opposed on the ground that the applicant was not of good character, and the court held that insofar as the legislature had prescribed the requirements for admission to the bar it could not inquire into the character of the applicant since he had complied with the requirements. The statute was held not to violate the constitutional or inherent powers of the courts. No other case is so forceful in upholding the police power of the legislature in regulating the admission to the bar.

The case of *Splane's Petition*, 123 Pa. 527, 16 Atl. 481, considered a statute which provided that one admitted to the bar in one county should on motion be admitted to all other courts of the state. It was held to be an encroachment upon the judicial department and void. But the principal case regarded the decision of this point as mere *obiter dictum* and hence not binding.

In the principal case, the specific issue was whether a person, having been admitted to practice in one county, should on motion be admitted to the bar of another county without first complying with the rules of the court. The *dictum* in the case is stronger than the decision, but it is quite apparent that the spirit of this case is inconsistent with that of *Re Applicants*, *supra*. The court said that there are "certain functions of the lower courts, with which the legislature cannot interfere, one of them being the power to adopt rules to facilitate the proper dispatch of the business of such tribunals, instancing regulations relating to the service of notices and papers. When one who does not intend to establish an office in a county to whose courts he would be admitted, applies for such admission, he is not to expect practitioners having established offices within the county to be subjected to annoyance and inconvenience in the service of papers upon him."

The court further states, "the adoption of a rule to minimize such annoyance and inconvenience was within the power of the court, even if the rule in question affected the right to be admitted to the bar of such court," and the court reached this conclusion this notwithstanding a statute which, apparently provided to the contrary. M. L. M., '29.

CRIMINAL LAW—ENTRAPMENT.—While the defendant was engaged in making a book on the horse races a police officer in plain clothes placed a bet with him. Following the receipt of the money defendant was arrested for the statutory offense of being custodian and depository of a bet placed on a contest of speed of horses. *Held*, defendant may not avail himself of the defense of entrapment where he was engaged in making a book on the races and the officers had not incited him thereto. *State v. Stolberg*, 2 S. W. (2d) 618 (Mo., 1928).

Entrapment has been pithily defined as the "seduction or improper inducement to commit a crime, and not the testing by trap, trickiness, or deceit of one suspected." Undoubtedly the rule is as stated in the principal case, that where an officer incites a person to commit a crime and lures him on to its consummation