

1944

Grover Thompson v. John E. Harris, Warden of the Utah State Penitentiary : Brief of Plaintiff in Behalf of Plaintiff's Petition for Rehearing

Utah Supreme Court

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Dorothea Merrill Dryer; Attorney for Plaintiff; Amicus Curiae, by appointment of the Supreme Court.

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In the Supreme Court of the State of Utah

GROVER THOMPSON,

Plaintiff,

vs.

JOHN E. HARRIS, Warden of the
Utah State Penitentiary,

Defendant.

Plaintiff's Brief In Behalf of Plaintiff's Petition for Rehearing

DOROTHEA MERRILL DRYER,

Attorney for Plaintiff,

*Amicus Curiae, by appoint-
ment of the Supreme Court.*

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In the Supreme Court of the State of Utah

GROVER THOMPSON,

Plaintiff,

vs.

JOHN E. HARRIS, Warden of the
Utah State Penitentiary,

Defendant.

Case No. 6655

Petition For Rehearing

Comes now Grover Thompson, Plaintiff in the above entitled case, and respectfully petitions this Honorable Court for a rehearing in said case upon the following grounds, to-wit:

- (1) The Court erred in holding that plaintiff was not denied his liberty without due process of law by the trial court, and erred in failing to discharge him from custody upon that ground.
- (2) Even if the plaintiff had received a fair and impartial trial in the court below, nevertheless the Court erred in failing to hold that the sentence

was void and in failing to discharge the plaintiff from custody under the sentence.

DOROTHEA MERRILL DRYER,

*Attorney for Plaintiff,
Amicus Curiae, by appointment of the Supreme Court.*

CERTIFICATE

I, the undersigned and attorney for plaintiff above named, do hereby certify that in my opinion there is good reason to believe that the judgment rendered by this Court in this action is erroneous, and that the cause should be re-examined.

DOROTHEA MERRILL DRYER,

*Attorney for Plaintiff,
Amicus Curiae, by appointment of the Supreme Court.*

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I.

IT IS SUBMITTED THAT THE COURT ERRED IN HOLDING THAT PLAINTIFF WAS NOT DENIED HIS LIBERTY WITHOUT DUE PROCESS OF LAW BY THE TRIAL COURT, AND ERRED IN FAILING TO DISCHARGE HIM FROM CUSTODY ON THAT GROUND.

Provisions safeguarding civil rights thru assertion of the right to due process of law appear both in Amend-

XIV, Section 1, of the Constitution of the United States, and in the Constitution of the State of Utah, Article 1, Section 7, as follows:

Constitution of the United States:

“* * * nor shall any state deprive any person of life, liberty, or property, without due process of law.”

Constitution of the State of Utah:

“No person shall be deprived of life, liberty or property, without due process of law.”

To ascertain the meaning of this guarantee, we must look to the case law. In the recent case of *Lisenba v. People*, 60 S. Ct. 280, 314 U. S. 219 (1941), the Supreme Court of the United States spoke authoritatively upon the application of the concept of due process of law in criminal cases. There an accused murderer claimed that confessions illegally extorted were used in evidence against him. The court, after rejecting his claim, set out the test to be followed in these words (at p. 236):

“The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence.

“As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the

trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

Does the procedure followed by the trial court meet this test? We submit that it does not. We submit that in the light of this test the proceedings below were characterized by unfairness going to their very heart, were fatally infected by unfairness in the use of evidence, and that the unfairness was of such quality and significance as necessarily to prevent a fair trial.

In support of this position, there are many cases in which proceedings such as those here below have been severely censured by learned courts, both English and American, over a long period of years. Probably the most complete and explicit opinion on this point was written by the Connecticut Supreme Court, speaking unanimously, in the case of *State v. Ferrone*, 113 A. 452, 96 Conn. 160 (1921). In that case, the defendant was convicted of having by night possession of burglar's tools or instruments of housebreaking without legal excuse. The information had further alleged that "twice before the date of the alleged crime he had been convicted, sentenced, and imprisoned in a state prison." The Connecticut Supreme Court held that the trial court had properly refused to strike out of the information the statements relating to former convictions (Connecticut evidently having no statute such as Section 105-21-27, Utah Code Annotated, 1943), but it reversed the decision and ordered a new trial because of the manifest unfairness of the proceedings below, saying:

“But in *State v. Reilly*, 94 Conn. 698, we further said, on page 705 (110 A. 550, 553) that in such an information ‘two separate issues are presented: First, was the defendant guilty of the crime charged? This relates to the crime only. Second, if guilty, had the defendant twice before been convicted, sentenced and imprisoned? This relates to the penalty only, and does not involve or state any other or different crime from that first stated. The jury must by their verdict answer each of these issues.’ This plainly indicates that the first issue should be taken up and tried by the jury first and separately; and, if the accused be found guilty on this issue, then the second issue should be tried; and, if the accused be found guilty on this issue also, then the maximum punishment prescribed by the statute must be the sentence of the court. *It cannot be believed that an accused man would ever have a fair trial, resulting in a verdict not affected by prejudice or by considerations by which the jury should not be influenced, if during the trial allegations that he had twice before been convicted of state prison crimes have been read to the jury, and evidence of his former convictions have been placed before them. It is beyond question that knowledge of such facts must necessarily prejudice the minds of his triers against the accused, and cause him more serious injury than that which he would suffer from any improper remarks of the state’s attorney.* No one would claim that in a trial for a specific crime evidence of another crime committed by the accused could be admitted for the purpose of proving his guilt of the crime alleged. The purpose of a criminal trial in this state is not more to punish the guilty than to discharge the innocent. Whatever may have been the previous offenses or the bad character of the accused, the law surrounds him with the presumption that he is innocent of the specific crime with which he is charged, and,

while that presumption has no evidential force, it casts upon the state the burden of proving that the accused is guilty of that specific crime by evidence of facts material and relevant to that crime. *State v. Smith*, 65 Conn. 283, 31 A. 206. Upon such evidence only, the jury are sworn to render their verdict. A man is not to be convicted of one crime by proof that he is guilty of another. Therefore, our law sedulously guards against the introduction of evidence of any matter immaterial or irrelevant to the single issue to be determined. The purpose of these salutary laws might often be defeated if the minds of the jurors were subjected to the influence of facts or considerations having no legitimate bearing on the only question they have to decide, and their verdict be reached under the impulse of passion, sympathy, or resentment. Such a verdict is illegal and could be set aside. The rule everywhere enforced excludes not only the evidence of another crime, but also evidence tending to degrade the accused, to prejudice the jury against him, to divert their minds from the real issue which they have to determine, or to persuade them by matters which they have no legal right to consider that the accused, for reasons other than those based upon legitimate evidence, was more likely to have committed the particular crime for which he is on trial.

“As we said in *State Reilly*, *supra*, such an information as this presents two separate issues, and the issue of former convictions does not relate to the issue of the commission of the specific crime alleged, and for which only the accused is to be tried, and the fact of former convictions does not tend in any way to prove the commission of the crime charged. It follows that, until the verdict of the jury on the principal issue has been rendered, no knowledge of the alleged previous convictions should reach them, either by reading that part of the information in which they are recited

or by evidence relating to them. If the verdict on the principal issue be guilty, then the second issue may be submitted to the jury.

“In the absence of statutory regulation in this state, it is our opinion that a procedure similar to that prescribed by an English statute should be followed. 24 and 25 Vict. c. 99, Section 37; Reg. v. Martin, L. R. C. C. 214. The information should be divided into two parts. In the first the particular offense with which the accused is charged should be set forth, and this should be upon the first page of the information and signed by the prosecuting officer. In the second part former convictions should be alleged, and this should be upon the second page of the information, separable from the first page and signed by the prosecuting officer. The entire information should be read to the accused and his plea taken in the absence of the jurors. When the jury has been impaneled and sworn, the clerk should read to them only that part of the information which sets forth the crime for which the accused is to be tried. The trial should then proceed in every respect as if there were no allegations of former convictions, of which no mention should be made in the evidence, or in the remarks of counsel, or in the charge of the court. When the jury retire to consider their verdict, only the first page of the information, on which the crime charged is set out, should be given to them. If they return a verdict of guilty, the second part of the information, in which former convictions are alleged, should be read to them without reswearing them, and they should be charged to inquire on that issue. Of course, the accused may plead guilty to this part of the information, and then no further proceedings before or by the jury would be necessary. No reason appears why the accused, if he should choose, might not submit this issue to the court without the jury.

“In this way the well recognized rights of an accused person will be protected, and the principles of justice and our long established laws which have been designed to secure an impartial trial in every criminal cause will be recognized, respected and obeyed.

“There is error and a new trial is ordered.”
(Italics ours.)

It may be of interest that upon retrial of the Ferrone case, the Connecticut Supreme Court again reversed defendant's conviction, for the reason that the state's attorney persisted in attempting to introduce evidence of the prior convictions during the trial of the accused on the main charge. See 116 A. 336, 77 Conn. 258 (1922). In *State v. Delmonto*, 147 A. 825, 110 Conn. 298 (1929), the court followed *State v. Ferrone*, remarking: “We there outlined the procedure to be followed in this state in the absence of statutory regulation.”

The principles enunciated in the Ferrone case approved in the following cases: *State v. Bailey* (La.; 1928), 115 So. 613, at 616, cited in 16 C. J., § 3161, p. 1343; *People v. King* (Ill.; 1916), 114 N. E. 601; *People v. Kirkpatrick* (Wash.; 135), 43 P. (2d) 45; *Robertson v. State* (1940), 29 Al. 399, 197 So. 73, cert. den. (1940) 240 Ala. 51, 197 So. 75, 139 A. L. R. 673, at 686; *Levell v. Simpson, Warden*, 142 Kan. 892, 52 P. (2d) 372, 297 U. S. 695; *Glover v. Simpson, Warden*, 144 Kan. 153, 58 P. (2d) 73, 299 U. S. 506.

The most cited English case on this point, which is discussed at length and is the basis for the decision in the leading American case of *Graham v. West Virginia*, 224

U. S. 616, 32 S. Ct. 583 (1912), noted in 26 Harvard Law Review at page 84, is *Regina v. George Shuttleworth*, 3 C. and K. 375, T. and M. 626, 2 Den. C. C., 351, 5 Cox, C. C. 369, 21 L. J., M. C. 36, 15 Jur. 1066, Vol. 2, Mews Common Law Digest p. 2386, (1851). In that case, the prisoner was arraigned on an indictment charging him with larceny, and also with having been previously convicted of a felony. The reporter's account of the proceedings is as follows:

“According to the invariable practice in that Court [Sessions for the borough of Manchester], before that time, both counts were read to the prisoner, and he pleaded not guilty to the whole indictment. At the trial, the count for larceny only was read by the clerk of the peace to the jury, and the witnesses in support of that charge were heard, and the jury found the prisoner guilty. The clerk of the peace then proceeded to read to the jury the further charge, that the prisoner had been previously convicted of a felony, when the Counsel for the prisoner objected that that charge could not be gone into; and he further stated that it was his intention, however the Court might decide that question, to move in arrest of judgment generally. The court proceeded, the identity of the prisoner was proved, and the jury found prisoner had been previously convicted of a felony. Appeal was taken to the Court of Criminal Appeal, which held that the sentence, under the circumstances was legal. Lord Campbell ‘said that the matter admitted of no doubt. The prisoner, added his Lordship, is first to be arraigned on the whole indictment, including the count on the previous conviction: afterwards he is to be given in charge to the jury on the crime for which he is indicted, only, and the count charg-

ing a previous conviction is not to be stated to the jury till they have given their verdict on the subsequent felony. It is also the opinion of all the Judges, that it is unnecessary for the jury to be sworn again when trying the question of previous convictions.' Alderson, B. — That has the full concurrence of all the Judges. The practice is precisely as it was before.'” [Before 14 and 15 Vict. c. 19, Section 9; note that this was a five judge court.]

It appears from Wigmore, on “Evidence,” 9th Edition, in Section 194, cited by this court in its opinion in *Thompson v. Harris*, P. (2d) (1943), that the rule of exclusion of evidence of prior convictions was first established by the English courts, themselves, and was in use at least as early as 1684, at Hamden’s Trial. Certainly it is true that this common law rule was in force long before the adoption of the Utah Constitution and it appears that this common law rule governed English procedure long prior to the adoption of the Constitution of the United States.

Section 105-21-27, Utah Code Annotated, 1943, which forbids allegations of prior crimes in informations or indictments unless necessary to the main charge, reinforces the policy of the common law as to exclusion of evidence and goes a considerable step further in protecting the rights of the accused, in that it attempts to render impossible even the separable indictment, one part of which only could be read to the jury in advance of a verdict of guilty, namely, the part alleging the substantive crime. See *State v. Ferrone*, supra; *Regina v. Shuttleworth*, supra.

But if Section 105-21-27, Utah Code Annotated, 1943, were not our statutory law, the common law rule would forbid such procedure as was followed below, since the common law of England, so far as not repugnant to the Constitutions of the United States and of Utah, "shall be the rule of decision in all courts of this state." See Section 88-2-1, Utah Code Annotated, 1943.

The three leading American cases relating to habitual criminal laws, *Moore v. Missouri*, 159 U. S. 673 (1895), *McDonald v. Massachusetts*, 180 U. S. 311, 21 S. Ct. 389, 45 L. Ed. 542 (1901), and *Graham v. West Virginia*, 224 U. S. 616, 32 S. Ct. 583 (1912), establish generally that such laws are valid, per se, and that they do not deprive an accused of the equal protection of the laws, put him twice in jeopardy, or constitute cruel and unusual punishment. The question of due process of law here involved, i.e., the fundamental unfairness of the introduction of evidence of prior convictions, was not however, decided in these cases.

In *Moore v. Missouri*, the pleadings appear to have raised this question among others, that "the indictment in charging the former convictions attacked the defendant's character when not in issue." The opinion ruled on the questions of equal protection, double jeopardy, and cruel and unusual punishments, but did not rule on the question quoted, and it does not appear from the opinion whether the former convictions were presented to the jury before or after the verdict on the main offense. *McDonald v. Massachusetts*, which upheld a statute iden-

tical to ours, ruled on these points and in addition held that the statute was not *ex post facto*, and that no federal question was presented by the fact that the judge instructed the jury on the habitual criminal charge after verdict on the main offense. And in the leading, definitive case of *Graham v. West Virginia*, the court established the rule that a determination as to habitual criminality may be made in a subsequent or ancillary proceeding. The court relied primarily upon *Regina v. Shuttleworth*, cited *supra*, and thereby inferentially approved the rule of exclusion of allegations or proof of prior crimes before verdict on the main offense. Although these cases do not specifically pass on the aspect of due process herein presented, they are consistent with the common law rule. It is therefore permissible to infer that were the question in the instant case presented to the United State Supreme Court, it would solemnly frown upon the procedure followed below.

To sum up, the effect of the American and English cases, together with the effect of Sections 105-21-27 and 105-1-2, Utah Code Annotated, 1943, is clearly this, that the form for charging habitual criminality, set forth in Section 105-21-47, Utah Code Annotated, 1943, may be properly used *only* in one of two ways:

- (1) In a proper case, the indictment, information, or other vehicle for charging habitual criminality, reciting the fact of three convictions rather than combining a recital of two convictions with an accusation of a third crime not yet adjudicated, may be submitted to the same jury which tried the defendant upon the substantive crime, once

that jury has found the accused guilty of the substantive crime, or,

- (2) In a proper case, the vehicle for charging habitual criminality may be used in a proceeding subsequent or ancillary to the trial on the main charge.

Note that it is at the trial for the main offense, only, where all the facts requisite to that crime are in issue, that the jury's judgment regarding these facts is prejudiced by knowledge of prior convictions. Where the verdict of guilty of the main crime has been rendered, only the question of whether or not the defendant was in truth previously convicted would be in issue. Note, also, that as practical matter, the use of the subsequent or ancillary proceeding would normally be restricted to the situation in which the previous crimes were unknown to the prosecutor at the time of the trial of the main charge. But this is not always so. For example, see the case of *State v. Smith*, 273 P. 323, 128 Ore. 515 (1929), which describes the practice under the Oregon statute providing for a special supplementary proceeding.

We should now examine the specific ways in which a procedure such as that followed below affects the right of an accused to a fair and impartial trial. In this connection, reference should be made to the information which is set out verbatim on page 2 of the first brief in this case. It is not a separable information, as required by the *Ferrone* case, and *Regina v. Shuttleworth*. It accuses relator "of the Crime of ROBBERY AND BEING AN HABITUAL CRIMINAL" and alleges the commissions and convictions

of two prior crimes, describing them at length, contrary to the specific statutory prohibition of Section 105-21-27, Utah Code Annotated, 1943. That this entire information was read to the jury at the commencement of the proceedings in the trial court goes without saying.

Such a procedure has certain obvious effects, which bear study:

FIRST. The jury is apprised of the previous crimes as soon as it has been impaneled. This occurs although it is well established that the state cannot, in a criminal proceeding, introduce evidence attacking the character of the accused, unless the accused first puts his good character in issue by introducing evidence to sustain his good character or reputation or has become a witness in his own behalf. This is true because the character of a person accused of crime is not a fact in issue on a prosecution for such crime. See 20 Am. Jur. S. 325; Wigmore, *supra*, SS. 57, 58.

In the case of *State v. Devlin*, 258 P. 826, 145 Wash. 44 (1927), this matter is dealt with explicitly. The court there quotes from the opinion in the second Ferrone case:

“ ‘Evidence tending to show the commission of other crimes of the part of the accused, or facts disclosing his bad character or repute, are not material or relevant to the charge against the accused and should never be permitted to be introduced, for the purpose can be none other than to prejudice the jury against the accused, and hence to deny him the fair trial which the law guarantees him of being proved guilty of the crime with which he stands charged by evidence which the law ac-

cepts. None of the conversations between Higgins and the accused was admissible. It was obviously intended for the purpose of picturing the accused as a notorious criminal.' ”

The opinion continues:

“The question involved is that of a fair trial, a right vouchsafed by the direct written law of the people of the state. It partakes of the character of fair play, which pervades all the activities of the American people whether in their sports, business, society, religion, or the law. In the maintenance of government to the extent that it is committed to the courts and lawyers in the administration of the criminal law it is just as essential that one accused of crime shall have a fair trial as it is that he be tried at all, whether he be guilty or not, has his picture in the rogues' gallery or not.”

The court then quotes from *Hurd v. People*, 25 Mich. 405 (1872):

“Unfair means may happen to result in doing justice to the prisoner in the particular cases, yet, justice so attained is unjust and dangerous to the whole community.”

In the main, there are two lines of cases which contravene or appear to contravene the established rule of fairness in the exclusion of evidence immaterial to the cause and prejudicial to the accused. The first type is illustrated by *People v. Sickles*, 156 N. Y. 541, 51 N. E. 288 (1898), noted in 24 L. R. A. N. S. at p. 432, in which a strong and well reasoned dissenting opinion was written, and *Rains v. State*, 142 Neb. 284, 5 N. W. (2d) 887

(1942), which is the only case of which we are aware explicitly holding that a procedure such as that of the trial court in the case at bar is not violative of due process of law. With the exception of the Rains case, none of these cases presents a ruling on the question of due process of law here in issue, and the Rains case has several peculiarities. The court in that case cites as its authority the Nebraska cases of *Kuwitzky v. O'Grady*, 135 Neb. 466, 282 N. W. 396, at 399, and *Taylor v. State*, 114 Neb. 257, 207 N. W. 207, at 209. The Taylor case merely states that if the prosecution desired to punish under the habitual criminal act, prior convictions could be set out in the same count of the indictment. This indicates that the state has rejected the English rule and lacks any statute corresponding to Section 105-21-27, Utah Code Annotated, 1943. The Kuwitzky case holds that since the habitual criminal act occurs in the chapter on "Criminal Procedure" in the Nebraska code, the trial court was without power to render a distinct and separate judgment and sentence upon the habitual criminal count of the information. The court cites *McDonald v. Massachusetts*, supra, in support of this proposition, neglecting altogether the leading case of *Graham v. West Virginia*, supra, which flatly holds that a determination as to habitual criminality may be made in separate or ancillary proceedings.

The second line of cases which appear to contravene the established rule of fairness is illustrated by the case of *Massey v. United States*, 281 F. 293 (1922), which holds that under the National Prohibition Act, providing

more severe punishments for subsequent offenses than for a first offense, and requiring a previous conviction to be pleaded in the indictment, it was not error to permit the prosecuting attorney to read to the jury an indictment containing an allegation that the accused had been previously convicted of a similar crime. This holding corresponds to holdings in the state liquor cases and Federal Narcotics Law cases. Almost all of these cases go off on the theory that the former conviction is a necessary ingredient of the second or subsequent offense, i.e., a previous misdemeanor conviction may be a necessary ingredient in a felony charge. This is not the theory of habitual criminal laws. Moreover, it is extremely important to note that even here the only kind of previous conviction which may be brought to the attention of the jury by means of indictment or information is a conviction of a similar crime. Such evidence might be deemed to be of some probative value, in that a person who persistently violated the liquor law might properly be thought to be more likely to have committed a liquor law violation than one whose record in that regard was wholly clean. But allegations of former convictions of any other sort of crime than one intimately connected with the crime at issue would be bad even here. As was said in *People v. Meisner, et al.*, (Ill. 1924), 142 N. E. 483:

“A man cannot be convicted of a crime because he is a bad man generally or has committed other crimes for which he has not been punished, tho evidence which tends to prove the offense charged is not objectionable because it discloses other offenses; the test of admissibility being the

connection of the facts proved with the offense charged."

Aggravated offenses cases, are, of course, to be entirely distinguished from the lines of cases discussed above. Under aggravated offenses statutes, a subsequent act to that for which the accused is being tried may be shown to demonstrate wilful intent to do harm at the time of the first act. Illustrations of this principle appear in criminal libel cases, where libels subsequent to that for which the accused is being tried may be put in evidence to negative the possibility of mistake, or unintentional error.

SECOND. In a fair trial, the accused has the power to elect whether he will refuse to testify on the ground of the privilege against self-incrimination or whether he will take the stand in his own defense and subject himself to the normal rules of cross examination. If the defendant elects to pursue the former course, no evidence may be introduced with regard to prior convictions, since the rule is firmly and universally established that the prosecution cannot initially attach the defendant's character. Whigmore, cited *supra*, S. 57; 20 Am. Jur. § 325.

If the defendant elects to take the stand in his own defense, and affirmatively attempts to show his good character, the prosecution may in rebuttal offer evidence as to his bad character, the reason being that the prosecution is at liberty to refute the claim of good character as it could refute any other claim made by the opposing

side. This is not a relaxation of the primary principle. Whigmore, cited *supra*, S. 58.

But if the defendant merely takes the stand in his own defense, without affirmatively putting his good character in issue, he is treated as any other witness, and is subject, on cross examination, to proper questions tending to shake his credibility. Section 104-49-20, R. S. Utah, 1933, requires this, that:

“* * * a witness must answer as to the fact of his previous convictions for a felony.”

And the case of *State v. Hougensen*, 91 U. 359, 64 P. (2d) 229 (1936), has laid down the rules which shall govern in the event that a witness is required to answer a question as to whether he has ever been convicted of a felony, at p. 239 of the opinion:

“The inquiry must end with the cross examination, altho not necessarily with the witness' answer to the particular question put.”

Should the witness answer in the affirmative, cumulative evidence of the truth of the answer would be ruled out, as adding nothing to the truth already established. Inflammatory matter, prejudicial to the accused in the eyes of the jury, such as rogues' gallery portraits, fingerprint cards, and certified records, would then be excluded. Should the witness deny that he had formerly been convicted of any felony, the prosecution could then proceed with proper proof in refutation of the witness' claim.

Contrast the procedure actually followed below, wherein allegations of previous convictions were read to the jury at the commencement of the trial and were considered as being part of the prosecution's case, to be proved before the defense could proceed with its evidence. Once these allegations and evidence in support of them reached the jury, of what value was the privilege against self-incrimination to the accused? Could he have anything left to lose by exposing himself to attack thru taking the stand as a witness in his own defense? We submit a sneak attack had already been made. Did he have any opportunity whatsoever to decide whether he would go further, and put his good character in issue? Clearly he did not. By force of circumstances, he found himself in a far worse situation than as if he had merely become a witness in his own defense, or had gone further and put in affirmative evidence of good character. It goes without saying that he found himself infinitely worse off than as if he had refused to take the stand as a witness in his own defense, and had he voluntarily assumed the risk that the prosecution would interrogate him concerning prior convictions, he would have been assured that such evidence of prior convictions, unless he denied them, would be limited to a full and frank admission on his part. Compare the relatively favorable impression such an admission would make upon a jury with the impression to be made by the prosecution's introduction of rogue's gallery portraits, fingerprint cards, and certified copies of court records, which could properly be admitted only if a witness denied he had ever been con-

victed of a felony, and perhaps not even then. Would not the accused here, by means of the introduction of documents and photographs highly inflammatory in character, in fact be placed in the position of having to carry the burden of proof of his own good character, under almost hopeless conditions, this in addition to the necessity of proving he did not commit the crime for which he was being tried? We submit that such was the effect of the procedure in the trial court.

In the instant case, the accused suffered the final indignity in being subjected to such a procedure when, under the holding of the Walsh case, *supra*, he could not properly have been deemed an habitual criminal at all, in that it appears upon the face of the record that the prior convictions alleged and proved as part of the prosecution's case did not meet the "not less than three years" requirement of the habitual criminal act itself! In other words, had Section 105-21-27 not been part of the statutory law, and if the American and English rules with regard to fairness in the use of evidence did not exist, still the allegation of prior crimes and evidence thereon could not have been presented to the jury because the crimes alleged did not fulfill the requirements of the habitual criminal act as a matter of law.

One may liken the situation to that in which a drop of poison is let fall into a glass of water — it may or may not be sufficiently virulent to fatally affect a person drinking it, but the water is no longer *aqua pura*, it has become poisoned-water, in which two elements have been

inextricably mixed. Should a person drinking this poisoned-water die immediately thereafter, one could not determine whether he died as a result of drinking the water or the poison or merely died coincidentally. But in the absence of scientific tests establishing the contrary, a reasonable man would think it more likely than not that death resulted from the element of poison introduced into the water. So, in the case of fundamental unfairness in the use of evidence, one can never be certain that the ineradicable element of unfairness has resulted in a miscarriage of justice, but where the unfairness goes to the heart of the proceeding, a reasonable man would think it more likely than not that a verdict reached after the potentially fatal element of unfairness has been introduced into the proceeding resulted in a verdict which otherwise would not have been reached. Where such a likelihood exists, due process is absent, and the proceeding is a nullity in the eyes of the law.

POINT II.

IT IS SUBMITTED THAT EVEN IF THE PLAINTIFF HAD RECEIVED A FAIR AND IMPARTIAL TRIAL IN THE COURT BELOW, NEVERTHELESS THE COURT ERRED IN FAILING TO HOLD THAT THE SENTENCE WAS VOID AND IN FAILING TO DISCHARGE THE PLAINTIFF FROM CUSTODY UNDER THE SENTENCE.

In the proceedings below, relator was found guilty of "robbery and being an habitual criminal," and upon this verdict the following judgment and sentence were rendered:

“The judgment and sentence of this Court is that you, Grover Thompson, be confined and imprisoned in the State Prison for a term of not less than fifteen years.”

The jury's verdict of “robbery and being an habitual criminal” represents: (1) a determination of fact with respect to the allegations of robbery contained in the information, and (2) a determination of fact as to the identity of the accused with the person who had been twice previously convicted, sentenced, and committed as alleged in the information.

Since the judgment and sentence of the court are appropriate under the habitual criminal act, Section 103-1-18, Rev. Stat. Utah, 1933, but are not appropriate for the crime of robbery, they depend upon a determination as a matter of law that the prior convictions alleged in the information satisfy the requirements of the habitual criminal act. But since the prior convictions, sentences, and commitments were not of “not less than three years each,” as required by the act (*State v. Walsh*, [1943]), the court was without power to impose such a sentence. Nor, obviously, did the court have power to impose such a sentence for robbery. This want of power appears on the face of the record.

It is a settled rule that to render a judgment immune from attack, the court must have had not only jurisdiction of the subject matter and of the person of the defendant, but must also have had authority to render the particular judgment in question, and if either of these elements is wanting the judgment is fatally defective and

open to collateral attack. This is true because jurisdiction to render the sentence imposed is deemed as essential to its validity as jurisdiction of the person or subject matter. However, mere errors, omissions, or mistakes in judgment or sentence render the sentence merely voidable, and are correctable only by appeal or by writ of error.

The question to be answered, then, is whether the judgment and sentence imposed below are void or merely voidable. Cases on this point appear in an exhaustive annotation on "Illegal or Erroneous Sentence as a Ground for Habeas Corpus," 76 A. L. R. 468-514, following the leading case of *Lee Lim v. Davis*, 75 U. 245, 284 P. 323, 76 A. L. R. 461 (1929). This annotation relates solely to the question of whether a prisoner may be discharged on habeas corpus for errors, defects, or irregularities appearing on the face of the sentence, the court having jurisdiction of the person and subject matter, and a valid conviction having been rendered. The cases present fact situations which require careful analysis, and there is some apparent conflict, altho not a great deal.

We submit that the cases require a determination that in the case at bar the court was without power to impose the sentence it did, that the sentence is therefore void, at least in part, not merely voidable, and that relator is entitled to relief from this void sentence. Whether relator should be released entirely or whether a correct

sentence should be imposed, is not so clear, as will be pointed out *infra*. See 29 C. J. p. 175.

Let us turn to the cases in which the sentences have been held void as absolutely unauthorized or of an entirely different character from those authorized by law, as, for example, where, on a verdict for a misdemeanor, a sentence would be imposed as for a felony, (*Ex parte Burden*, [1907] 92 Miss. 14, 131 Am. St. Rep. 511, 45 So. 1) or where, upon a conviction for burglary, the court would sentence the prisoner to be hanged, (*In re Fanton*, [1898] 55 Neb. 703, 70 Am. St. Rep. 418, 76 N. W. 447). In all of these cases, the sentence was held void *ab initio*, altho in some instances steps were taken to impose a sentence appropriate to the facts found and in others the prisoner obtained complete discharge.

A. Cases in which the prisoner was remanded for proper sentence are:

1. *In re Hughes* (1917) 54 Mont. 153, 167 P. 650. There the relator was sentenced to the state prison for not less than seventeen nor more than twenty years, altho the indeterminate sentence act provided that the minimum term should not exceed one half of the maximum term. The court there released the prisoner from the sentence, but held that he should be remanded for a proper sentence.
2. *Littlejohn v. Stells* (1905) 123 Ga. 427, 51 S. E. 390. There the only authorized punishment for the offense of the relator was a fine or imprisonment, but he was sentenced to work on the chain gang. It was held that absolute discharge should not be given, but that he should be remanded for a proper sentence.

B. Cases in which prisoner was granted a complete discharge are :

1. State v. District Ct. (1907) 35 Mont. 321, 89 P. 63. Prisoner was convicted of a misdemeanor but sentenced to the penitentiary for fourteen years as for a felony. It was held that the trial court exceeded its jurisdiction in rendering an entirely different punishment from that prescribed by statute.
2. State v. Gray (1875), 37 N. J. L. 368, 1 Am. Crim. Rep. 554. Relator was sentenced to imprisonment at hard labor for six months upon a conviction of adultery, whereas the statute permitted imprisonment only. The judgment was held illegal and relator discharged since a new judgment could not be passed either in that court or in the court below.
3. Biddle v. Thiele (1926; C.C.A. 8th) 11 F. (2d) 235. Where relator was charged with a second offense under the National Prohibition Act but sentenced as for a third offense, the sentence was held excessive and totally void because the excessive portion thereof could not be separated from the legal portion. Note, tho, that the discharge was without prejudice to the government to take steps toward resentence.

Attention is invited at this point also to those cases in which the sentence was unauthorized because of indefiniteness and therefor held void and the plaintiff given his discharge on habeas corpus. See *Rasmussen v. Zundel* (1926), 67 Utah 456, 248 P. 135, and *Lee Lim v. Davis*, cited supra. In the *Lee Lim* case, the petitioner was discharged without prejudice to the rights of the state to initiate further appropriate proceedings.

In another group of cases, altho the sentence was not held void ab initio, or totally void, the plaintiff was uniformly given relief from the illegal part of such sentence. Since this relief was given on collateral attack, the sentence was in fact considered partially void and given effect only in so far as the power of the court extended. In some of these cases, relief was not then granted, on the ground that the valid portion had not yet been served and plaintiff could not therefor complain. However, the courts almost uniformly granted plaintiff his discharge when the valid portion had already been served, and furthermore, often granted relief in the form of a corrected sentence even where the valid portion of the sentence had not yet been served. Typical of these cases are the following, in all of which the attack was by habeas corpus:

A. Prisoner discharged after the proper sentences was served:

1. *Munson v. McClaughry* (1912), 42 L.R.A. (N. E.) 302, 117 C.C.A. 180, 198 F. 72. A prisoner who had served a sentence for burglary with intent to commit larceny was discharged from a sentence for larceny which, it was held, the court had no power to impose.
2. *In Re Stewart* (1884), 16 Neb. 193, 20 N. W. 255. *People ex rel Carlstrom v. Eller* (1926), 323 Ill. 28, 153 N. E. 597, 49 A.L.R. 490. Prisoners in these cases were wrongfully sentenced to both fine and imprisonment. They were discharged upon payment of the fines.
3. *In re Bolden* (1910), 159 Mich. 629, 124 N. W. 548. Prisoner was sentenced to prison for a term of

from two and one half to eight years, altho the legal imprisonment for his crime was imprisonment in the county jail for not more than one year. Since the prisoner had already served about four years, he was given an absolute release.

B. Discharge refused until the legal sentence be served:

1. *Reese v. Olsen* (1914), 44 U. 318, 139 P. 941. The court there had power to impose a fine and imprisonment, but went further and also imposed a sentence of imprisonment until the fine be paid. It was held that since the legal and illegal terms of imprisonment were separable, the prisoner would not be released on habeas corpus until the legal term was served.
2. *State v. Hooker* (1922), 183 N. C. 763, 111 S. E. 351. Relator was jailed for thirty days and given a \$200 fine for contempt. It was held he must serve the legal part of the sentence: thirty days in jail and payment of a \$50 fine.

C. Prisoner remanded for proper sentence:

1. *Ex Parte Simmons* (1878), 62 Ala. 416. Relator was convicted of burglary and sentenced to three years at hard labor. Where such hard labor could not properly exceed two years, prisoner was remanded for proper sentence.
2. *Com. v. Curry* (1926), 285 Pa. 289, 132 A. 370. Convicted of attempted burglary, the petitioner was improperly sentenced as an habitual offender to imprisonment of not less than seven years and six months and not more than thirty years. The statute applicable to the offense provided for imprisonment not to exceed ten years. The sentence was held illegal and the record remanded for a proper resentencing.

D. Sentence corrected or modified and affirmed:

1. *Ex parte Harlan* (1909; C. C.), 180 F. 119 (decree affirmed in (1910) 218 U. S. 442, 54 L. Ed. 1101, 31 S. Ct. 44, 21 Ann. Cas. 849). There the prisoner was convicted of an offense with a statutory punishment of a "penalty" and imprisonment for not more than two years. The sentence conformed to the statute as to the penalty and length of imprisonment, but imposed imprisonment at "hard labor." It was held that to the extent of the court's excess of jurisdiction the sentence was annulity, and the sentence was amended *nunc pro tunc* by expunging the part imposing "hard labor."

E. Proper sentence imposed, and prisoner remanded:

1. *Halderman's Petition* (1923), 276 Pa. 1, 119 A. 735. In that case, the court's failure to make the sentences on two counts run concurrently caused them to run cumulatively, thereby making the punishment in excess of the ten year penalty authorized by statute. It was held that since the minimum sentence rendered was within the ten year limit, it was voidable only. The sentence was corrected to conform to the statute.

But compare the following cases:

- A. *Harrison v. Moyer* (1915; D. C.), 224 F. 224. Prisoner was convicted of conspiracy, for which the statute provided imprisonment for not over two years, but was sentenced to five years under a statute which the trial judge deemed applicable. It was held that the error should have been corrected by a writ of error and that habeas corpus did not lie.
- B. *McElhaney v. Fenton* (1927), 115 Neb. 299, 212 N. W. 612. The prisoner was sentenced to from

three to twenty years altho the statute provided for a punishment of from one to ten years. It was held that the fixing of the sentence was erroneous but that it could have been corrected by proper proceedings in error.

Let us contrast with the foregoing, the cases in which the court rejected the claim of total or partial invalidity. These cases involve merely a failure to conform to technical statutory requirements. It is the common and outstanding characteristic of these cases that the prisoner cannot really claim that he has been harmed, and he is therefor not discharged. Typical of this situation are the following cases:

- A. *Connella v. Haskell* (1907), 87 C. C. A. 111, 158 F. 285. There petitioner was sentenced to five years imprisonment for each of two offenses, the terms to run concurrently. The statute provided that such sentences shall be cumulative. Such irregularity was held not to render the sentence void.
- B. *Carter v. Snook* (1928; C. C. A. 5th), 28 F. (2d) 609. The total of the erroneous sentence did not exceed the sum of the sentences which could properly have been imposed.
- C. *Ex Parte Tanner* (1929), 219 Ala. 7, 121 So. 423; *In re Casey* (1902), 27 Wash. 686, 68 P. 185. In these cases, the judges fixed proper sentences where the juries failed in their required duty of imposing sentence.
- D. *O'Neill v. Jordan* (1914), 5 Alaska 81; *Re Barton* (1889), 6 Utah 264, 21 P. 998. In these cases, the prisoners were sentenced without their consent within six hours after the verdict, contrary to statute in this respect.

- E. *Re Hemstreet* (1912), 18 Cal. App. 639, 123 P. 984. There the justice failed to pronounce judgment of sentence within the time fixed by statute.
- F. *Ex Parte Beeler* (1899), 41 Tex. Crim. Redp. 240, 53 S. W. 857. There the clerk inserted a wrong name in entering the final judgment of sentence in the minutes of the court.
- G. *Re Burger* (1878), 39 Mich. 203. Mere misnaming of prisoner where he was sufficiently designated to preclude a mistake.
- H. *Re Winslow* (1915), 91 Ohio St. 328, 110 N. E. 539. There a burglar was sentenced to remain in prison "until discharged by due process of law" when the only statute applicable required a sentence of from one to fifteen years.

But compare the following case:

- A. *Ex parte Lyde* (1920), 17 Okla. Crim. Rep. 618, 191 P. 606. Here the sentence was imposed on the defendant in his absence, contrary to statute, and the court held the sentence illegal and void, entitling relator to his discharge on habeas corpus, subject to remand for sentence in accordance with his conviction.

In the case at bar, a sentence was imposed appropriate to the status of habitual criminality. Such a sentence is wholly unauthorized for the crime of robbery nor was it authorized upon the pleadings in this case for the status of habitual criminality. The irregularity complained of is not merely technical but seriously damages the plaintiff and goes to the jurisdiction or power of the

court to impose the particular sentence in question. See 12 R. C. L., pp. 1197, 1209.

It follows, then, that one of four results should be reached by this court:

- A. The prisoner should be completely discharged;
- B. The prisoner should be discharged from the particular sentence without prejudice to further proceedings to enforce the conviction of robbery;
- C. The prisoner should be remanded for the imposition of a valid sentence; or,
- D. The sentence should be modified or corrected by this court.

It is submitted that inasmuch as the prisoner may be recommitted for robbery by legal order or process (Section 104-65-22, Rev. Stat. Utah, 1933), justice would be done both the prisoner and the state by the adoption of the second course of action. See also *Lee Lim v. Davis*, cited *supra*. However, since habeas corpus proceedings contemplate disposition of the prisoner according to justice and the law, we submit that this court has plenary power to enter the sentence appropriate to the conviction, *nunc pro tunc*, expunging from the record the void sentence imposed by the court below. If the court be inclined toward the complete discharge of the relator, it has respectable case authority for taking such a position.

CONCLUSION

In the light of the foregoing argument and authorities, we submit that two questions require a rehearing in this case:

First: Can it be said that relator has enjoyed due process of law? We submit that he has not, for these reasons:

A fair and impartial trial is guaranteed every defendant in a criminal proceeding by both state and federal constitutions. The procedure followed below, permitting the introduction of matters extraneous to the case and highly prejudicial in character, rendered the relator repugnant to the jury, prevented him from obtaining a fair trial, and deprived him of due process of law. A denial of due process results in the complete invalidity of the unfair proceedings. Void proceedings are subject to attack on habeas corpus and require the discharge of relator, subject to retrial on the question of robbery.

Second: Can it be said that the court below had jurisdiction to impose the particular sentence it did upon the relator? We submit that it did not, for these reasons:

A judgment and sentence, in order to be immune from collateral attack, must be within the power of the court to impose. The sentence imposed below was appropriate to the status of habitual criminality, but utterly unauthorized for the crime of robbery, the only issue presented by the allegations of the pleadings. Such a

void sentence is reachable by habeas corpus, and requires the discharge of relator, subject to proper steps being taken to impose a valid sentence.

The plaintiff submits that the writ of habeas corpus should be granted.

Respectfully submitted,

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