

Constitutionality and Mandatory Nature of the Baumes Laws

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party should permit evasion of the tax. The right rests indirectly on public favor though technically it is not a special franchise.

A dissenting opinion,¹⁴ in the instant case, by Judge Andrews emphasizes the fact that the consent of the State is indispensable to the exercise by anyone of rights concerning the use of the bridge, for its proprietary rights are involved. If not given, the use of the structure by the railroad constitutes a continuing trespass. Therefore, of necessity, a grant by the State to the railroad company may be inferred at the time the State authorized the bridge company to lease part of its structure for the operation of a railroad.

But it is rather difficult to make out a trespass here, for all that is being done has been consented to by the State, though the fact remains that no consent was granted by the State to the bridge company, which is a special franchise.¹⁵ Neither did the State confer a special franchise upon the railroad company, for it could not. By authorizing the construction of a bridge for the accommodation of pedestrians and vehicles, it could not grant a right to someone else to erect another bridge in the same place for a railroad. When it subsequently empowered the bridge company to lease part of its structure, the State merely enlarged the powers originally given. It was thereby enabled to contract for the operation of a railroad. This right it could exercise or not as it saw fit. The State could not thereafter grant to another, rights which involved the use of the bridge.

To infer that a special franchise taxable as such in this case is held by the railroad company demands a continuity of reasoning which must overlook the nature of the facts. To arrive at the desired objective, with the statute as presently constituted is too great a strain upon its logical import, at least more than is necessary, since the result may be better accomplished in another way. It is a matter which would be better solved by action upon the part of the Legislature.

Since the bridge company in such case receives a right to contract for its own profit, for the operation of a railroad, the granting of that power to contract might well be taxed. On the other hand, the tax could just as well be made upon the railroad company by expressly providing that the exercise of such a right, while strictly not a special franchise, is a privilege, emanating indirectly from the State, and subject to assessment.

H. W. P.

CONSTITUTIONALITY AND MANDATORY NATURE OF THE BAUMES LAWS.—Judicial interpretations of the Baumes Laws disclose the fact that their provisions are neither new nor unusual but, except for

¹⁴ *Supra*, note 1 at 104.

¹⁵ *Supra*, note 1.

slight changes, are simply a re-enactment of laws that have existed for many years.¹

These amendments to the Penal Law of the State of New York were passed in 1926, the purpose of their enactment being to effectively rid society of the unlawful operations of the confirmed criminal. They provide in substance that whenever it shall appear that a person who has been found guilty of a felony has been previously convicted of another felony, then his punishment shall be substantially increased.² The procedure to be followed in such event makes it incumbent upon the District Attorney to file an information accusing the person of such prior conviction. Provision is then made for a trial of the issue before a jury and, in the event that their verdict establishes the identity of the accused, the trial court is directed to sentence him in accordance with the penalties prescribed by other sections of the act.³

The practice of charging a prisoner, after conviction, with having been previously convicted of a felony and sentencing accordingly is well known to law.⁴ In England the method existed as early as the year 1835.⁵ The Massachusetts statute dealing with this matter⁶ was in force in 1817 and the West Virginia law was adopted from the code of Virginia of 1860.⁷

¹ Stat. 5 and 6 William IV, c. 111 (1835), later embodied in Stat. 24 and 25 Vict., c. 96, Sec. 116 (1861); Massachusetts Statutes, 1817, Chap. 176.

² Chapter 457, Laws 1926. "Section 1941. Punishment for second offense of felony. A person, who, after having been convicted within this state, of a felony, or an attempt to commit a felony, * * * commits any felony, within this state, is punishable upon conviction * * * as follows: If the subsequent felony is such that, upon a first conviction, the offender would be punishable by imprisonment for * * * less than * * * life, then such person must be sentenced * * * for * * * not less than the longest term * * * prescribed upon a first conviction."

³ "Section 1943. Procedure relating to resentencing. If * * * after sentence * * * it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth either in section nineteen hundred and forty-one or nineteen hundred and forty-two, it shall be the duty of the district attorney * * * to file an information * * *. Whereupon, the court * * * shall cause the said person * * * to be brought before it and shall inform him of the allegations * * * and of his right to be tried as to the truth thereof * * *. If the jury finds that he is the same person or if he acknowledges or confesses in open court, after being duly cautioned as to his rights * * * the court shall sentence him to the punishment prescribed in said sections * * * and shall vacate the previous sentence * * *. Whenever it shall become known to any warden * * * that any person charged with or convicted of a felony has been previously convicted within the meaning of said sections * * * it shall become his duty forthwith to report the facts to the district attorney of the county."

⁴ *Supra*, note 1.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Code of W. Va. Chap. 152, Sections 23 and 24 derived from Code of Va. 1860, Chap. 199.

The constitutionality of these statutes, including the amendment to the New York law, has been tried in the respective jurisdictions where they are in force and sustained without exception.⁸

In *Graham v. West Virginia*,⁹ the State Court's decision was appealed to the United States Supreme Court. It was there held that no reason existed why a proceeding should not be prosecuted upon an information by a competent public officer.¹⁰ "There is no occasion for an indictment—the inquiry is not into the commission of an offense" which is the province of the indictment, but is confined to the question whether the party before the court had been convicted of a crime.¹¹ There is nothing harsh or unfair to the prisoner in such a practice. On the contrary it is a distinct advantage because it gives him the benefit of a trial freed from the possibility of prejudice which might exist in the minds of the jurors if they had knowledge of his former offense. Formerly, in order to convict a person as a second offender and give him increased punishment, it was necessary to allege his previous convictions in the indictment and prove them on the trial.¹² Although the old method may still be used, the indictment is usually limited to a charge of the new offense and until that is proved, testimony as to the old is inadmissible.¹³

In the *Ross* case,¹⁴ it was contended by counsel for the prisoner that the statute was *ex post facto*, since its effect was to punish the prisoner for his first offense.¹⁵ But Chief Judge Parker points out that the punishment is not for the first offense, but for the second. "The punishment is enhanced from the character of the culprit. * * * It is rendered more severe in consequence of the situation into which the party had previously brought himself."¹⁶

In *People v. Gowasky*,¹⁷ Judge Crane reviews the authorities of the several states where such statutes are in force and cites with approval the West Virginia case. "No one," he says, "ever doubted the wisdom or justice of punishing a second or third offender more severely than a first offender."¹⁸ * * * "The punishment for the second offense is increased because of his apparent persistence in the perpetration of crime and his indifference to the laws which keep society together; he needs to be restrained by severer penalties than if it were his first offense."¹⁹

⁸ *Regina v. Shrimpton* (3 Car. & Kir. Rep. 373, 1851); *Graham v. W. Va.*, 224 U. S. 616, 32 Sup. Ct. 583 (1912); *Ross Case*, 2 Pick (Mass.) 165 (1824); *People v. Gowasky*, 244 N. Y. 451, 155 N. E. 737 (1927).

⁹ *Supra*, note 8, 224 U. S. 616, 627.

¹⁰ *Ibid.*, 626.

¹¹ *Ibid.*, 627.

¹² *People v. Rosen*, 208 N. Y. 169, 101 N. E. 855 (1913).

¹³ *Supra*, note 8, 244 N. Y. 451 at 460, 155 N. E. 737 at 740.

¹⁴ *Supra*, note 8.

¹⁵ *Supra*, note 8, 2 Pick (Mass.) 165 at 169.

¹⁶ *Ibid.*, 170.

¹⁷ *Supra*, note 8, 244 N. Y. 451.

¹⁸ *Ibid.*, 457.

¹⁹ *Supra*, note 13.

Our most recent case, *Dodd v. Martin*,²⁰ considers the law from a different angle, namely, the amount of discretion permitted or allowed thereunder to the trial court.

The prisoner in that case was indicted for burglary in the third degree and attempted grand larceny in the second degree as a second offense. He pleaded guilty to the first charge, and was convicted therefor. After he had commenced serving his sentence he was remanded to court to answer an information filed against him by the District Attorney. The County Judge, notwithstanding the fact that the accused had informed the court on the trial that he had already been convicted of a felony, ordered the original plea of guilty set aside and accepted a plea of guilty to the crime of petit larceny, thus permitting the prisoner to avoid the heavier penalty, since the latter crime is only a misdemeanor.

The District Attorney obtained a writ of mandamus compelling the trial judge to reinstate the former plea and to proceed to resentence the prisoner in accordance with Section 1943 of the Penal Law. The Court of Appeals in sustaining the writ has found, three judges dissenting, that the county court exceeded its authority in allowing the change of plea and set aside the sentence as illegal.

The judicial discretion lodged in the trial court is greatly curtailed by the recent amendment. "Neither the court nor district attorney have any discretion" under the section in question regarding the amount of punishment to be given.²¹ This is fixed by statute, not by the court. It is the duty of the District Attorney to file an information accusing the defendant of his previous conviction and of the judge to pass sentence as prescribed. The terms of the statute are unquestionably mandatory. "The Legislature has enacted what shall be done and the courts and juries must comply with it" regardless of their personal convictions. The efficacy of "opinions regarding the wisdom or severity of its enactments are matters for the Legislature, not the courts."²²

The need for careful attention to the other requirements of the statute cannot be too strongly emphasized. A rigid observance of all formalities is necessary to an impartial and just administration of the law. There is grave danger in accepting a plea of guilty to a lesser degree of crime. Its acceptance does not grant immunity to the defendant and he should be warned that the effect of his conviction will be just the same if he has been previously convicted.²³ He should be instructed as to his rights to have the truth of the charge as to his identity tried by a jury. The provision for added punishment fairly imports action based upon an accusation and hearing

²⁰ 248 N. Y. 395 (1928).

²¹ *Supra*, note 17 at 465.

²² *Ibid.*, 463.

²³ *Supra*, note 21.

whereby rights of the accused are amply protected. If any misunderstanding occurs then there is a discretion vested in the trial judge, and he may permit a plea to be changed or retracted.²⁴ Otherwise, the Baumes Laws have withdrawn all discretion from the court in such actions. "The Legislature has provided a mechanistic rule to take the place of the discretionary powers of the judge in passing sentence on second offenders."²⁵

R. A. B.

CHATTEL MORTGAGES ON AFTER-ACQUIRED PROPERTY—VALIDITY AS TO CREDITORS.—At common law, a grant of chattels not in being or not in the possession of the grantor at the time of the execution of the instrument, passed no interest to the grantee even though the grantor subsequently acquired the subject of the grant. To relieve the obvious hardship worked on the grantee, who had in the meantime conferred some benefit on the grantor, relying on the promised future security, courts of equity, without putting themselves in conflict with the principle that there can be no present transfer of that which is not in being, construe the agreement as a present contract to give a lien, which as between the parties takes effect and attaches to the subject of the agreement as soon as it is acquired by the mortgagor.¹ The validity of such an agreement between the contracting parties is unquestioned where the rights of third parties do not intervene.² Upon settled principles of equity, such an agreement should be equally valid and enforceable against all subsequent transferees of the mortgaged property except *bona fide* purchasers, since the lien of the mortgage attaches simultaneously with the possession of the mortgagor and there is no lapse of time during which the rights of third parties may attach to the same property.

Our law on this point is unexplainably inconsistent. In *Kribbs v. Alford*³ we have a logical and intelligible disposition of the question. A mortgage covering chattels to be brought on the premises in the future was properly filed as required by the Recording Act. Subsequently, the property was sold to purchasers who had no actual knowledge of the existence of this mortgage, but it was held that they were not *bona fide* purchasers as the recording of the mortgage

²⁴ *Ibid.*

²⁵ *Supra*, note 20 at 399.

¹ *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811 (1890); *McCaffrey v. Woodin*, 65 N. Y. 459 (1875); *Coats v. Donnell*, 94 N. Y. 168 (1893); *In re Roseboom*, 253 Fed. 136 (N. D. N. Y., 1918).

² *Deeley v. Dwight*, 132 N. Y. 59, 30 N. E. 258 (1892); *Coats v. Donnell*, 94 N. Y. 168 (1893).

³ *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811 (1890).