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Constitutional Law -- Double Jeopardy and the Fourteenth Amendment

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entries prior to service of a writ of garnishment in order to claim the setoff.⁸ It is sufficient that there be a valid matured debt owing to the bank.⁹ The word "matured", when applied to commercial paper means the time when the paper becomes due and demandable, and an action can be maintained thereon to enforce payment.¹⁰ While an acceleration clause creates the right to consider the note due and payable, it is not self-executing. It creates a mere option in the holder to treat the note as due.¹¹ Thus, in the absence of exceptional circumstances, a bank has the absolute right of setoff where a debt has matured prior to garnishment proceedings.

The instant case poses the following question. Did the recital providing for acceleration when the obligee deemed the debt insecure,¹² mature the debt at some instance prior to garnishment? Pursuant to the decision in *Nickell v. Bradshaw*,¹³ and parallel cases,¹⁴ an acceleration clause creates a mere option to treat the note as due. Here, although the option existed *ab initio*, it was not exercised until after garnishment. Thus, it appears that the court in the noted case erroneously rendered the decision in favor of the bank.

In defense of the court, although not stated in the opinion, it may be contended that, since the event accelerating payment¹⁵ was in the exclusive control of the bank, it is analogous to a demand note which is considered matured *ab initio*.¹⁶

Douglas C. Kaplan

CONSTITUTIONAL LAW — DOUBLE JEOPARDY AND THE FOURTEENTH AMENDMENT

Defendant was tried for commission of a felony. A mistrial resulted because a state's witness refused to testify, claiming privilege against self-incrimination. *Held*, the defendant's rights under the due process clause of the 14th Amendment¹ were not violated. Therefore, a second trial did

8. Thus, the garnishee is not limited to showing that it once had a claim which was collected by a bookkeeping entry before the writ was served. *Aarons v. Pub. Service Building & Loan Co.*, 318 Pa. 113, 178 Atl. 141 (1935).

9. *Walters v. Bank of America Nat. Trust & Sav. Ass'n*, 7 Cal.2d 28, 59 P.2d 983 (1936).

10. *Ardmore State Bank v. Lee*, 61 Okla. 169, 159 Pac. 903 (1916).

11. *Nickell v. Bradshaw*, 94 Ore. 580, 183 Pac. 12 (1919).

12. "... or should the holder of this note deem the debt insecure, the full amount evidenced hereby shall become due and payable immediately at the election of the holder of this note." *State Nat. Bank of Decatur at Oneonta v. Towns*, 62 So.2d 606, 607 (Ala. 1952).

13. See note 11 *supra*.

14. *Holt v. Guaranty & Loan Co.*, 136 Ore. 272, 296 Pac. 852 (1931); *Harrison v. Beals*, 111 Ore. 563, 222 Pac. 728 (1924).

15. Considering the debt insecure.

16. *Beilanski v. Sav. Bank*, 313 Mass. 577, 48 N.E.2d 627 (1943).

1. U. S. CONST. AMEND. XIV (nor shall any State deprive any person of life,

not place him in double jeopardy. *Brock v. North Carolina*, 73 S. Ct. 349 (1953).

At one time the trend of the decisions was to make the 14th Amendment all inclusive as to the original Bill of Rights, deeming these fundamental rights worthy of the protection from State encroachment.² Judicial construction has brought such rights as freedom of speech,³ press,⁴ religion,⁵ and benefit of counsel⁶ within the protective veil of due process. However, the federal courts have refused to extend this constitutional safeguard to include double jeopardy.⁷ The framers of the Constitution, in incorporating the plea of double jeopardy within the 5th Amendment, apparently did not intend to create a new plea, but rather to further the common law pleas of former acquittal (*autrefois acquit*) and former conviction (*autrefois convict*).⁸

North Carolina is one of five states⁹ not expressly prohibiting double jeopardy in its constitution.¹⁰ On the other hand, their Supreme Court held that to be tried twice for the same offense would be a denial of due process.¹¹ In other words, their due process clause was interpreted to include double jeopardy as one of the constitutional safeguards owed its citizens.¹²

The real question in the noted case is not the moot question of whether double jeopardy, as expressed in the 5th Amendment, is included within the 14th Amendment. It is a more fundamental issue of whether the term "double jeopardy" has any real existence separate from the 5th Amendment.¹³ The deterioration of due process has taken many forms but it reached its lowest ebb in the *Palko* case.¹⁴ In that case a defendant was convicted of a lesser degree of homicide after being indicted for murder in the first degree. The right of the state to appeal was upheld as not placing defendant in double jeopardy.

The original concept of double jeopardy has been so abridged, misconstrued and distinguished by the learned justices that today the terms mean

liberty, or property without due process of law).

2. *Kepner v. United States*, 195 U.S. 100 (1904); *Lisen v. California*, 314 U.S. 219 (1941).

3. *DeJonge v. Oregon*, 299 U.S. 353 (1937).

4. *Near v. Minnesota*, 283 U.S. 697 (1932); *Gitlow v. New York*, 268 U.S. 652 (1925).

5. *Hamilton v. Regents of University of California*, 293 U.S. 245 (1934).

6. *Powell v. Alabama*, 287 U.S. 45 (1932).

7. *Palko v. Connecticut*, 302 U.S. 319 (1937).

8. PERKINS, *CASES AND MATERIAL ON CRIMINAL LAW*, p. 650.

9. Conn., Md., Mass., N.C. and Vt.

10. N.C. CONST., Art. I, § 17. "No person ought to be taken, imprisoned or dis-seized of his freehold, liberties or privileges, or outlawed or exiled or in any manner deprived of his life, liberty or popety but by the law of the land."

11. *State v. Collins*, 169 N.C. 323, 84 S.E. 1049 (1915).

12. *State v. Mansfield*, 207 N.C. 233, 176 S.E. 761 (1934).

13. *Ex parte Ulrich*, 42 Fed. 587 (W.D. Mo. 1890) (defendant was tried and acquitted and brought to trial again on same offense).

14. See note 7 *supra*.

little or nothing,¹⁵ at least as to the 14th Amendment. Therefore, it is submitted that but one conclusion can be drawn — that double jeopardy is no longer a distinguishable element in this area of our federal rights. Rather, it is a vague concept to be considered in determining whether the defendant has been given a “fair trial” as that concept has been developed in the 14th Amendment.

F. Stewart Elliott

CONSTITUTIONAL LAW—LOYALTY OATHS—DUE PROCESS

An Oklahoma statute required that state officers and employees take a loyalty oath swearing they are not now, and for five years prior to the taking of the oath have not been members of, or affiliated with, organizations listed by the United States Attorney General as Communist front or subversive.¹ Plaintiff seeks to enjoin payment of compensation to school teachers who refused to subscribe. *Held*, that the statute is an arbitrary assertion of power and offends due process because it fails to distinguish between innocent membership and knowing activity in a subversive organization. *Wieman v. Updegraff*, 73 S. Ct. 215 (1952).

A great majority of the attacks upon state and federal statutes prescribing loyalty oaths have been unsuccessful.² The courts have held that these statutes do not infringe upon the freedom guaranteed by the First, Fifth and Fourteenth Amendments.³ Although the right to free speech carries with it the corresponding right to be silent,⁴ either right may be denied if its exercise would present a “clear and present danger” that it

15. *Meador v. Williams*, 117 Mo. 564, 92 S.W. 151 (1906) (four state's witnesses had been examined but material witness was absent); *Pizano v. State*, 20 Tex. 139, 54 Am. Rep. 511 (1894) (State's Att'y had not subpoenaed his witness). *Contra*: *State v. Dove*, 222 N.C. 162, 22 S.E.2d 231 (1942) (court ordered mistrial since evidence desired by state was not presently available).

16. *In re Kemmler*, 136 U.S. 436 (1890); *United States v. Cruikshank*, 92 U.S. 542 (1875); *State v. Lec*, 65 Conn. 265, 30 Atl. 1110 (1894); *Article*, 35 YALE L.J. 674 (1926).

1. OKLA. STAT. tit. 51, §§ 37.1-37.8 (1951). “I..... do solemnly swear . . . that I am not affiliated directly or indirectly with the Communist Party, the Third Communist International, with any foreign agency, party, organization, association or group whatever which has been officially determined by the United States Attorney General or other authorized agency to be a communist front or subversive organization . . . that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, the Third Communist International, or of any agency, party, organization, association”

2. E.g., *Garner v. Board of Public Works*, 341 U.S. 716 (1950); *American Communications Association v. Douds*, 339 U.S. 382 (1950); *Dworken v. Cleveland Board of Education*, 94 N.E.2d 18 (Ohio 1950).

3. E.g., *Garner v. Board of Public Works*, 341 U.S. 716 (1950); *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1949); *National Maritime Union v. Herzog*, 78 F. Supp. 146 (D.D.C. 1948).

4. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).