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Comment on Recent Decisions

CONSTITUTIONAL LAW—EFFECT OF THE TWENTY-FIRST AMENDMENT ON PROSECUTIONS BEGUN UNDER THE EIGHTEENTH AMENDMENT.—The defendants were indicted in the federal District Court in North Carolina for conspiring to violate the National Prohibition Act and for possessing and transporting intoxicating liquor. The district Judge dismissed the indictment on the ground that since it had been filed the Eighteenth Amendment of the federal Constitution had been repealed by the Twenty-First. (5 F. Supp. 153.) Appeal was taken by the United States. *Held*: Such prosecutions became immediately void upon the ratification of the repeal amendment. *United States v. Chambers et al.* (1934) 54 S. Ct. 434.

The result in the principal case is attainable by either of two processes of reasoning. If common law principles are applied it is clear that the prosecution must abate. After the repeal of a penal statute there can be no prosecution for a violation which occurred before the repeal. *People v. Hiller* (1897) 113 Mich. 209, 71 N. W. 630; 16 C. J. 70. Cf. *Draper v. State* (1909) 6 Ga. App. 12; 64 S. E. 117. Prosecutions which have already been instituted are also stopped unless the repealing statute contains a saving clause. *United States v. Passmore* (1804) 4 Dall. 372; *United States v. Tynen* (1871) 78 U. S. 88. This is true even when a plea of guilty has been entered. *Whitehurst v. State* (1873) 43 Ind. 473. A failure of the defendant to except at the trial will not validate a conviction. *Lunning v. State* (1857) 9 Ind. 309. Since the Constitution is written in the language of the common law resort can obviously be had to that body of principles in its interpretation. *Schick v. United States* (1904) 195 U. S. 65; *South Carolina v. United States* (1905) 199 U. S. 437; *Ex Parte Grossman* (1925) 267 U. S. 87.

This common law principle meets the obstacle of the Congressional enactment that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute. . . ." 1 U. S. C. A. 29. It is apparent that this cannot apply to the situation in the principal case since the saving statute refers only to acts of Congress and cannot apply to amendments to the Constitution.

The second method, that largely relied upon by the Court, is a purely constitutional one. The general government is one of granted or delegated authority. *McCulloch v. Maryland* (1819) 4 Wheat. 316; *Kansas v. Colorado* (1907) 206 U. S. 46. The moment of the consummation of ratification is when an amendment becomes operative part of the Constitution. *Dillon v. Gloss* (1921) 256 U. S. 368. If prosecutions were allowed to continue the Twenty-First Amendment would be denied immediate effect and there would be exercised a power which was not contained in the grant to the national government. The National Prohibition Act thus became unconstitutional without the usual requirement of a judicial decree. This position is supported not only by reason but by authority as well. *Hollingsworth v. Virginia* (1798) 3 Dall. 378.

The result of the principal case was practically a foregone conclusion. It is entirely in accord with good principles of legislative interpretation that the repeal of a penal enactment stops all proceedings thereunder. A more

debatable question, one not presented in the instant case, is the effect of the Twenty-First Amendment upon national liquor legislation enacted before the ratification of the Eighteenth Amendment. W. M., '36.

EVIDENCE—HEARSAY—ADMISSIBILITY OF HOSPITAL RECORD.—In a personal injuries suit it was attempted to introduce as evidence the plaintiff's hospital record, consisting of entries made by doctors, internes and nurses. Admitting the abstract admissibility of such evidence on the analogy of entries made in the regular course of business, the court excluded the instant record because it was not shown to have been made under the supervision of a physician qualified to give expert testimony. *Paxos v. Jarka Corporation* (Pa. 1934) 171 Atl. 468.

Considerations of logic and expedience would seem to demand that hospital and insane asylum records be peculiarly favored exceptions to the hearsay rule; they are "entries in the regular course of business"; the dual requirements of necessity and trustworthiness are conspicuously present: such records are commonly a composite of the observations of persons too numerous to be called from their hospital duties to testify as to easily forgotten matters of daily routine; they represent scientific data, far more impartial than many more favored forms of evidence. 3 Wigmore (2d ed., 1923) par. 1707. A few jurisdictions favor this view. *Ribas v. Revere Rubber Co.* (1914) 37 R. I. 189, 91 Atl. 58; *Boss v. Illinois Central Ry. Co.* (1921) 221 Ill. App. 504. Most courts, however, have been extremely chary in admitting such records. Some avowedly reject. *In re Hock's Will* (1911) 129 N. Y. S. 196 *Harkness v. Borough of Swissvale* (1913) 238 Pa. 544, 86 Atl. 478; *Jordan v. Apter* (1919) 93 Conn. 302, 105 Atl. 620. Others, as in the instant case, honor the rule by way of dictum but manage to find technical excuses to relieve them from applying it. Lack of necessity is frequently invoked. *Osborne v. Grand Trunk Ry. Co.* (1913) 87 Vt. 104, 88 Atl. 512. Where the superintendent of a hospital made regular case entries based on doctors' reports, and vouched for their authenticity, the entries were rejected because not made by an actual observer of the patient. *Price v. Standard Life & Acc. Inc. Co.* (1903) 90 Minn. 264, 95 N. W. 1118. It was elsewhere intimated that such second-hand reports would be admissible in cases of necessity, but, significantly, the court did not find such necessity present. *De-laney v. Framingham Gas Fuel Co.* (1909) 202 Mass. 359, 88 N. E. 773. This latter dictum seems correct in light of the frequency with which hospital records are compiled from a series of first-hand reports, by one who has not observed the actual case. Properly upholding their admission see *Ribas v. Revere Rubber Co.*, *supra*. The holding of the instant case is not altogether blameless of sophistry; it would seem that case data regularly made by a hospital staff should fulfill the requirements of expert testimony whether or not the actual supervision of a physician is shown. For this general subject see 1 Wigmore (2d ed., 1923) par. 569.

The findings of official boards of health present similar problems; here the same narrow policy is pursued. A laboratory analysis of sputum made by a state board of health was rejected in *Fondi v. Boston Mutual Life Ins. Co.* (1916) 224 Mass. 6, 112 N. E. 612. The finding of a board of draft examiners during the World War has been ingeniously excluded as an *ex parte* proceeding. *Laird v. Boston & M. Ry. Co.* (N. H. 1921) 114 Atl. 275. Contra see *Casey v. Kennedy* (1920) 52 D. L. R. 326.