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business deal; an act involving buying and selling; as the transactions on the exchange. Its synonym is negotiation.' (Webster's New International Dictionary, Second Edition)."³⁰

It would seem that the *reasoning* used by the North Carolina Court in the principal case, in view of the normally accepted understanding of the wording used in the "dead man's statute," is not in keeping with the better reasoned interpretation of the statute. However, the *holding* of the Court is a good one in view of the modern trend toward the admissibility of evidence. It would seem that this holding is in keeping with the normally accepted understanding of the wording of the statute and that the holdings in the previously cited automobile cases distorted the intent of the statute.

DONALD LEON MOORE.

Flight in General: Its Effect on Procedural Rights, Constitutional Law, and the Grand Jury

The Louisiana code provides that a challenge to the array of a grand jury must be made "before the expiration of the third judicial day of the term for which said grand jury shall have been drawn, or before entering upon the trial of the case if it be sooner. . . ."¹ In the recent case of *Poret v. Louisiana*² this statute was involved. There, one of the defendants, Poret, fled the state after the consummation of the offense and remained outside the jurisdiction until one and one half years after the termination of the term of the grand jury which indicted him. At arraignment on October 27, 1952, assisted by his own counsel, he pleaded not guilty and was granted additional time to file a motion for severance. On November 7, 1952, after denial of his motion for severance, he moved—for the first time—to quash the indictment because of systematic exclusion of Negroes from the grand jury. The trial court denied the motion, after finding that defendant was a fugitive from justice, on the ground that it was filed more than a year and a half too late. The Supreme Courts of Louisiana³ and of the United States⁴ affirmed, the latter on three grounds. First, the court considered the defendant as having forfeited his right to challenge by his own action in voluntarily fleeing. Second, even after having returned to the state he

³⁰ Rankin v. Morgan, 193 Ark. 751, 753, 102 S. W. 552, 553 (1937).

¹ Michel v. Louisiana, 350 U. S. 91, 92 (1955). The phrase "third judicial day of the term" has been interpreted by the Louisiana Supreme Court to mean "the third judicial day following the term." State v. Wilson, 204 La. 24, 14 So. 2d 873 (1943).

² 350 U. S. 91 (1955).

³ Poret v. State, 225 La. 1040, 74 So. 2d 207 (1954).

⁴ Michel v. Louisiana, 350 U. S. 91 (1955).

⁵ Agnew v. United States, 165 U. S. 36 (1896).

did not object at the first opportunity.⁵ Third, under the Due Process Clause of the Fourteenth Amendment a state may attach reasonable time limitations to the assertion of federal constitutional rights. The majority, through Justice Clark, stated:

"We do not believe that the mere fugitive status existing here excuses a failure to resort to Louisiana's established statutory procedure available to all who wish to assert claimed constitutional rights. This is not to say that the act of fleeing and becoming a fugitive deprives one of federal rights. We hold only that *due regard for the fair as well as effective administration of criminal justice gives the State a legitimate interest in requiring reasonable attacks on its inquisitorial process* and that the present case is not one in which this interest must bow to essential considerations of fairness to individual defendants."⁶ [Emphasis added.]

Justice Black, dissenting, with whom Justice Douglas and the Chief Justice concurred, declared:

"Under our system even a bad man is entitled to have his case considered at every stage by a fair tribunal."⁷

Justice Douglas, dissenting, with whom Justice Black and the Chief Justice concurred, stated:

"But it is dangerous doctrine to deprive a man of his constitutional rights in one case for his wrongful conduct in another. That is a doctrine that currently is gaining momentum. . . . I would give every accused, regardless of his record . . . the full benefit of the constitutional guarantees of due process."⁸

A similar case is *Daniels v. Allen*,⁹ considered along with a group of cases decided by the United States Supreme Court under the title of *Brown v. Allen*.¹⁰ Petitioners objected to the systematic exclusion of Negroes from the grand jury at trial. The trial court granted them 60 days in which to appeal. On the 60th day counsel called the prosecuting attorney's office to serve him, but he was out of town for the weekend. Thus service was made on Monday, the 61st day, after the prosecuting attorney had returned to his office. The state supreme court granted the prosecuting attorney's motion to dismiss the appeal on the ground

⁵ *Poret v. Louisiana*, 350 U. S. 91, 98 (1955).

⁷ *Id.* at 104.

⁸ *Id.* at 105-06.

⁹ 344 U. S. 443, 484 (1952). For the North Carolina Supreme Court's treatment of this case prior to the appeal to the United States Supreme Court see *State v. Daniels*, 231 N. C. 17, 56 S. E. 2d 2 (1949).

¹⁰ 344 U. S. 443, 484 (1952). See Note, 26 N. C. L. REV. 185 (1946) and N. C. GEN. STAT. § 9-1 (1953).

that the notice was one day late, and the court refused to consider the appeal on its merits. The United States Supreme Court affirmed on the ground that the state furnished an adequate and easily complied-with method of appeal, and that habeas corpus should not be a substitute for appeal. Justice Black, dissenting, stated:

"Although admittedly the [North Carolina] court had discretionary authority to hear the appeal, it dismissed the case. Petitioners were thereby prevented from arguing the point of racial discrimination and consequently it has never been passed on by an appellate court. This denial of state appellate review plus the obvious racial discrimination thus left uncorrected should be enough to make one of those 'extraordinary situations' which the Court says authorizes federal courts to protect the constitutional rights of state prisoners."¹¹

The United States Supreme Court indicated in *Frisbie v. Collins*¹² that "special circumstances" may justify federal entry in a case where prompt federal intervention is required. Obviously, the Supreme Court did not think that "special circumstances" were present in the *Poret* and *Brown* cases, although in both cases systematic exclusion of Negroes from the grand jury was apparent. Also, several defendants were facing execution.

Justice Black, dissenting, in the *Brown* case declared:

"The court thinks that to review this question and grant petitioners the protections guaranteed by the Constitution would 'subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.' I cannot agree. State systems are not so feeble."¹³

Thus it seems that a dominant consideration of the majority in both cases is the idea of maintaining a balance between state and federal power. Also, the majority, for a test, looked only at the reasonableness of the state regulation, and not at the way the regulation affected the respective petitioners.¹⁴

Illustrative of the ability of the court to reach an opposite conclusion with the "reasonableness test" is *Reece v. Georgia*,¹⁵ decided

¹¹ *Brown v. Allen*, 344 U. S. 443, 553 (1952).

¹² 342 U. S. 519, 521 (1951).

¹³ *Brown v. Allen*, 344 U. S. 443, 553 (1952).

¹⁴ *Michel v. Louisiana*, 350 U. S. 91, 93 (1955): "We do not find that this requirement on its face raises an insuperable barrier to one making claim to federal rights. The test is whether the defendant had 'reasonable opportunity to have the issue as to the claimed right heard and determined' by the State Court." See also *Paterno v. Lyons*, 334 U. S. 314 (1947) and *Parker v. Illinois*, 333 U. S. 571 (1948).

¹⁵ 350 U. S. 85 (1955).

the same day as the *Poret* case. There the state regulation provided that challenge to the composition of the grand jury must be made before indictment. The defendant was arrested three days before, and attorneys were not appointed to defend him until one day after, his indictment. Five days after appointment counsel moved to quash the indictment on the ground that Negroes had been systematically excluded from the grand jury. The motion was overruled, and the state supreme court affirmed.¹⁶ The United States Supreme Court reversed, holding the regulation unconstitutional, saying through Justice Clark:

"But it is utterly unrealistic to say that he had such opportunity when counsel was not provided for him until the day after he was indicted. . . . Georgia should have considered Reece's motion to quash on its merits."¹⁷

Compare that statement with the statement of Justice Douglas in his dissent in the *Poret* case:

"The opportunity to raise the constitutional objection, therefore, was foreclosed before he was arraigned and, as far as the record shows, before he had any knowledge that the indictment was pending against him. It is as if the grand jury had been impaneled before the commission of the offense, and the time for raising objections to it expired with the impaneling, as was the case of *Carter v. State of Texas*, 177 U. S. 442, 20 S. Ct. 687, 689, 55 L. Ed. 839. Under these circumstances Poret had no real opportunity to challenge the constitutionality of the composition of the grand jury."¹⁸

Justice Clark in the *Reece* case cited and relied upon the *Carter* case as authority, saying:

"In the present case as in *Carter*, the right to object to a grand jury presupposes an opportunity to exercise that right."¹⁹

It should be noted that both the majority and minority in the *Poret* case relied on many of the same cases, and Justice Clark in the *Reece* case relied on some of the same cases as the minority in the *Poret* case. One great difficulty in ascertaining what the law is on this subject is made manifest by the fact that the same cases can be relied on as authority for opposite conclusions.

In the *Reece* case nothing was said about counsel's failure to raise the federal question at the first opportunity. It should be emphasized

¹⁶ *Reece v. State*, 211 Ga. 339, 85 S. E. 2d 773 (1955).

¹⁷ *Reece v. Georgia*, 350 U. S. 85, 89 (1955).

¹⁸ *Poret v. Louisiana*, 350 U. S. 91, 105 (1955).

¹⁹ *Reece v. Georgia*, 350 U. S. 85, 89 (1955).

that counsel did not raise the point until five days after appointment, the exact number of days that the court held too late, as not made at the first opportunity, in *Agnew v. United States*.²⁰ The court nevertheless thought that the federal right should be protected, so the state regulation was declared unreasonable, and therefore unconstitutional. In *Michel v. Louisiana*,²¹ considered along with the *Poret* case, there was a misunderstanding between the trial court and counsel as to exactly when counsel was appointed, whether when the trial court orally appointed counsel in open court or when he received formal notice of appointment some three days later. The trial court considered him appointed as of the time of the oral appointment, and a motion to quash the indictment because of systematic exclusion of Negroes from the grand jury was denied because it was four days too late, it being made seven days after oral appointment and four days after formal appointment. Despite the misunderstanding, the United States Supreme Court affirmed, accepting the trial court's theory that counsel was appointed as of the time of oral appointment in open court and stating that a motion to quash is a short, simple document, easily prepared in a single afternoon. It is true that a motion to quash could easily be prepared in a single afternoon, but to investigate and collect evidence concerning systematic exclusion of Negroes from the grand jury, so as to warrant preparation of such a motion, might take a considerable amount of time. No matter at which time one considers counsel to have been appointed in the *Michel* case, the motion was made not later than two days after the motion in the *Reece* case. If one takes the view that counsel was not empowered to act until his formal appointment, the motion was made one day sooner than the motion in the *Reece* case.

The distinction does not seem clear. Apparently, the court thought that the Louisiana regulation did not raise "an insuperable barrier to one making claim to federal rights,"²² whereas it thought that the regulation in the *Reece* case did. Counsel in the *Poret* case did not file his motion to quash until twelve days after he was employed by *Poret*, and the court held this too late, either with or without regard to the Louisiana statute.

Aside from the position taken by the majority in the *Poret* case that the Louisiana statute was objectively reasonable, the decision seems to be based upon the voluntary flight of *Poret*. What, then, are the rights generally of one who evades the law by fleeing?

Generally, the law is rather harsh to persons who evade it, as is illustrated by the *Poret* case. A fleeing felon in North Carolina may be declared an outlaw, and any person can arrest him, or slay him if

²⁰ 165 U. S. 36 (1896).

²¹ 350 U. S. 91 (1955).

²² See note 14 *supra*.

necessary.²³ If he flees the state he may lose his state citizenship and his right to personal property exemptions.²⁴ If before trial, he simply flees, within or without the state, he loses his right to a speedy trial;²⁵ he may be denied a continuance for the purpose of obtaining witnesses, the rationale being that he did not use proper diligence;²⁶ and the statute of limitations is suspended.²⁷ If defendant flees after trial his appeal will be dismissed or his case left off the docket,²⁸ unless he is in actual²⁹ or constructive³⁰ custody at the time of the consideration of the appeal. It would seem that an austere stand may be justified where the defendant has already been tried and found guilty and then flees. But it seems that the court is not justified in saying that he has lost some substantial right where he flees prior to trial. As was pointed out in *Hickory v. United States*:

“A person however conscious of innocence might not have courage to stand trial, but might, although innocent, think it necessary to consult his safety by flight.”³¹

Where the defendant has fled, upon being tried he may find that

²³ N. C. GEN. STAT. § 15-48 (1953). See *State v. Stancill*, 128 N. C. 606, 611-12, 38 S. E. 926, 928 (1901) for vindictive language by Justice Cook: “So careful is the law to protect those who have not been tried and convicted that the ‘outlaws’ are entitled to be ‘called upon and warned to surrender’ before they are allowed to be slain.”

²⁴ *Cromer v. Self*, 149 N. C. 164, 62 S. E. 885 (1908). See N. C. GEN. STAT. §§ 15-55 to -84 (1953) and Notes, 10 N. C. L. REV. 292 (1931), 11 N. C. L. REV. 163 (1932), 15 N. C. L. REV. 343, 344 (1936), 41 HARV. L. REV. 74 (1927) and 31 MINN. L. REV. 699 (1947) on extradition.

²⁵ *Chelf v. State*, 223 Ind. 70, 58 N. E. 2d 353 (1945); *McGuire v. Wallace*, 109 Ind. 284, 10 N. E. 111 (1887).

²⁶ *Hubbard v. State*, 65 Neb. 805, 91 N. W. 869 (1902); see *Stevens v. State*, 49 S. W. 105 (Tex. Cr. App. 1899) where a continuance for the co-defendant of the fugitive was not granted because it was doubtful if the attendance of the fugitive could be procured.

²⁷ *State v. Miller*, 188 Mo. 370, 87 S. W. 484 (1905); *In re Bruce*, 132 Fed. 390 (C. C. Md. 1904) (1904), *aff'd* in *Bruce v. Bryan*, 136 Fed. 1022 (C. C. Md. 1905); *State v. Pelley*, 221 N. C. 487, 20 S. E. 2d 860 (1942); *Streep v. United States*, 160 U. S. 128 (1895).

²⁸ *Eisler v. United States*, 338 U. S. 189 (1949); *Wood v. State*, 61 S. W. 308 (Tex. Cr. App. 1901); *Harris v. Commonwealth*, 311 Ky. 429, 224 S. W. 2d 427 (1950); *cf.* *Commonwealth v. Andrews*, 97 Mass. 543 (1867) *held*, that the fugitive loses his right to be heard by counsel on appeal where he flees after trial.

²⁹ *Knight v. State*, 190 Tenn. 326, 229 S. W. 2d 501 (1950). But see *Savage v. State*, 174 P. 2d 272 (Okla. Cr. Rep. 1947) which *held*, that it is within the discretion of the Appellate Court to review where the prisoner voluntarily left the state, and *Bland v. State*, 224 S. W. 2d 479 (Tex. Cr. App. 1950) which *held*, that the appeal would be dismissed unless the prisoner could show good cause why it should be reinstated even where the prisoner was then in actual custody.

The rationale of the rule seems to be that the court will not consider an appeal of the defendant unless he can be made to respond to any judgment or order the court may enter in the case. *Kuyendall v. State*, 168 P. 2d 142 (Okla. Cr. App. 1946). In *State v. Cody*, 119 N. C. 908, 26 S. E. 252, 56 Am. St. Rep. 692 (1896) the convict had escaped and had been at large for two years, and still was at the time of the consideration of the appeal.

³⁰ *People v. Cossey*, 217 P. 2d 133 (Cal. App. 1950).

³¹ 160 U. S. 408, 418 (1895). This case has an excellent discussion on flight.

his flight has created certain natural and non-legal presumptions against him.³² Flight is usually easy to establish, and it is almost universally present in crimes of violence. Flight in any direction,³³ and for any amount of time or any distance³⁴ will warrant an instruction by the court as to flight. Though flight alone is not sufficient to establish guilt,³⁵ it is a legitimate ground for the inference of guilt,³⁶ add to this his departure immediately after the consummation of the offense, and his traveling under aliases to avoid detection, and such is in itself evidence of guilt.³⁷ As a matter of course, it is for the jury to determine the weight that is to be given the evidence.³⁸ Where the state makes no contention that defendant fled he cannot introduce evidence of voluntary surrender.³⁹ Although the offense be admitted,⁴⁰ or the defendant voluntarily surrendered,⁴¹ evidence of flight may nevertheless be admitted. Thus, it seems that the state can always take advantage of flight, but that the defendant cannot take advantage of voluntary surrender or a refusal to flee⁴² unless the state first enters evidence of flight, or the defendant voluntarily surrenders prior to an indictment being filed against him.⁴³

Once evidence of flight is offered by the state, the defendant has the right to explain away the flight by using any evidence consistent with his innocence.⁴⁴ Evidence of a willingness to surrender voluntarily⁴⁵ is admissible where a flight instruction is given, and, in such a case, the

³² "He who flees from trial confesses his guilt." PUBLILI SYRI, SENTENTIAE 30 (1870). "The wicked flee when no man pursueth: but the righteous are bold as a lion." PROVERBS 28:1.

³³ *People v. Sanchez*, 35 Cal. App. 2d 231, 95 P. 2d 169 (1939). Defendant's flight was from the presence of threatening police and not from the premises which he was charged with looting.

³⁴ *Hamby v. State*, 71 Ga. App. 817, 32 S. E. 2d 546 (1945). After the shooting the defendant ran and was apprehended at home an hour later, not having fled the community. *Muse v. State*, 29 Ala. App. 271, 196 So. 148, *cert. denied* 239 Ala. 557, 196 So. 151 (1940). Defendant "whirled and run" after taking the pocket book and was apprehended the next day, not having left the city.

³⁵ *Howard v. State*, 182 Miss. 27, 181 So. 525 (1938).

³⁶ *United States v. Heitner*, 149 F. 2d 105, *cert. denied* 326 U. S. 727, *rehearing denied* 326 U. S. 809 (1945); *Bird v. United States*, 187 U. S. 118 (1902); *Allen v. United States*, 164 U. S. 492 (1896).

³⁷ *People v. Peak*, 66 Cal. App. 2d 894, 153 P. 2d 464 (1944); *People v. Waller*, 14 Cal. 2d 693, 96 P. 2d 344 (1939).

³⁸ *State v. Torphy*, 217 Ind. 383, 28 N. E. 2d 70 (1940).

³⁹ *Moyers v. State*, 61 Ga. App. 324, 6 S. E. 2d 438 (1940); *Starke v. State*, 31 Ala. App. 322, 16 So. 2d 426 (1944); *Slappey v. State*, 64 Ga. App. 713, 13 S. E. 2d 873 (1941).

⁴⁰ *State v. Hargraves*, 62 Idaho 8, 107 P. 2d 854 (1941).

⁴¹ *People v. Reese*, 65 Cal. App. 2d 329, 150 P. 2d 571 (1944).

⁴² *Moyers v. State*, 61 Ga. App. 324, 6 S. E. 2d 438 (1940).

⁴³ *People v. Martin*, 380 Ill. 328, 44 N. E. 2d 49 (1942).

⁴⁴ *Cavney v. State*, 210 Ind. 455, 4 N. E. 2d 137 (1936); *McAllister v. State*, 30 Ala. App. 366, 6 So. 2d 32 (1942).

⁴⁵ *People v. Zammora*, 66 Cal. App. 2d 166, 152 P. 2d 819 (1942); *Compton v. State*, 74 Okla. Cr. Rep. 48, 122 P. 2d 819 (1942); *cf. Moyers v. State*, 61 Ga. App. 324, 6 S. E. 2d 438 (1940), which *held*, that it was not error to exclude evidence that defendant did not flee after the robbery.

court should instruct the jury as to the defendant's right to explain his flight or absence.⁴⁶ If voluntary surrender is made before an indictment is filed against the defendant, this overcomes any presumption of guilt arising from the flight.⁴⁷

Because there is usually movement by the offender away from the scene of the crime, it seems that the state could introduce evidence of flight in most cases, from which the jury could, and it seems invariably would, draw an inference of guilt. To overcome this inference, the defendant must come forward with an explanation or suffer the risk of "non-persuasion." A maxim of the law is that a person is presumed innocent until proved guilty. For practical purposes, this maxim is rendered nugatory when evidence is admitted that the defendant "suddenly left town," for this places upon him the heavy burden of explanation.

The *Poret* case is another decision which treated the fleeing felon with harshness, but unlike the state and federal cases just referred to, it considered the defendant's flight in conjunction with a denial of federal constitutional rights in a state criminal prosecution. Though there may be strong reasons for an unsympathetic attitude toward the fleeing felon, this does not justify being extremely technical or vindictive when there are serious showings that he was denied some substantial or constitutional right at his day in court. Justice Black asked: "Could a state statute of limitations like this one declare that anyone under indictment who flees the State has thereby waived his right to counsel or his right to be tried by an unbiased judge?"⁴⁸ Unquestionably, we would all respond negatively. The great danger lies in the affirmative answer of this next question posed by Justice Black: "If *Poret* can be denied this constitutional right, why not others?"⁴⁹ Involved here are not only the rights of the fugitive from justice, but also those of all men accused of crime. The court should not seek to punish a defendant who is guilty of having fled either before or after trial by denying him a hearing on a constitutional question.⁵⁰ It is submitted that the minority opinion in the *Poret* case is the preferable view.

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⁴⁶ *Compton v. State*, 74 Okla. Cr. Rep. 48, 122 P. 2d 819 (1942); *McAllister v. State*, 30 Ala. App. 366, 6 So. 2d 32 (1942).

⁴⁷ *People v. Martin*, 380 Ill. 328, 44 N. E. 2d 49 (1942). This decision may be explained by the fact that the defendant was highly nervous and that the prosecutrix was only six years of age.

⁴⁸ *Poret v. Louisiana*, 350 U. S. 91, 103 (1955); cf. *In re Murchison*, 349 U. S. 133 (1955).

⁴⁹ *Poret v. Louisiana*, 350 U. S. 91, 103 (1955).

⁵⁰ *Id.* at 103: "Poret could have been charged with a federal crime under 62 STAT. 755, 18 U. S. C. § 1073, 18 U. S. C. A. § 1073, for fleeing from one State to another to avoid prosecution. But he could not have been convicted until after adequate notice and a fair trial on an indictment returned by a fair grand jury selected without regard to race or color."