STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE, 62D CONGRESS, 3D SESSION, SENATE, DOCUMENT NO. 974

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649164585

State indemnity for errors of criminal justice, 62d congress, 3d session, senate, document No. 974 by Edwin M. Borchard & John H. Wigmore

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

www.triestepublishing.com

EDWIN M. BORCHARD & JOHN H. WIGMORE

STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE, 62D CONGRESS, 3D SESSION, SENATE, DOCUMENT NO. 974

Trieste

62D CONGRESS } SENATE { DOCUMENT
3d Session } { No. 974

STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE

By
EDWIN M. BORCHARD
Law Librarian of Congress

WITH AN EDITORIAL PREFACE

By
JOHN H. WIGMORE
Dean, Northwestern University School of Law

REPRINTED FROM
JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY
JANUARY, 1913

TO ACCOMPANY THE BILL (S. 7676) TO GRANT RELIEF TO PERSONS ERRONEOUSLY CONVICTED IN COURTS OF THE UNITED STATES

PRESENTED BY MR. SUTHERLAND
DECEMBER 10, 1912.—Referred to the Committee on the Judiciary and ordered to be printed

WASHINGTON
GOVERNMENT PRINTING OFFICE
1913

EDITORIAL

By

JOHN H. WIGMORE,

Dean, Northwestern University School of Law.

WITH REFERENCE TO

A BILL To grant relief to persons erroneously convicted in courts of the United States.

The State is apt to be indifferent and heartless when its own wrongdoings and blunders are to be redressed. The reason lies partly in the difficulties of providing proper machinery and partly in the principle that individual sacrifices must often be borne for the public good. Nevertheless, one glaring instance of such heartlessness, not excusable on any grounds, is the State's failure to make compensation to those who have been erroneously condemned for crime.

There is plenty of analogy for such a measure. The Federal Court of Claims is a standing example of the general maxim that the State should fulfill its obligations and redress its wrongs by judicial inquiry and award. And a particular analogy here is found in the constitutional principle that compensation should be made for property taken for public purposes. To deprive a man of liberty, put him to heavy expense in defending himself, and to cut off his power to earn a living, perhaps also to exact a money fine—these are sacrifices which the State imposes on him for the public purpose of punishing crime. And when it is found that he incurred these sacrifices through no demerit of his own, that he was innocent, then should not the State at least compensate him, so far as money can do so?

Why has the principle never been here applied? Because we have persisted in the self-deceiving assumption that only guilty persons are convicted. We have been ashamed to put into our code of justice any law which *per se* admits that our justice may err. But let us be realists. Let us confess that of course it may and does err occasionally. And when the occasion is plainly seen, let us complete our justice by awarding compensation. This measure must appeal to all our instincts of manhood as the only honorable course, the least that we can do. To ignore such a claim is to make shameful an error which before was pardonable.

To disentangle the subject of prejudices, let us distinguish three different kinds of cases: (1) Cases where officer of justice is legally liable; (2) cases where the innocent man's sacrifice extends only up to his acquittal; (3) cases where it extends to and beyond his conviction.

(1) *Wrongs by officers* are now taken care of by the law. If the officer is insolvent there is practically no redress, and the State might therefore be asked to compensate. We leave aside this question; it is for the far future.

(2) *Wrongs done by the State preceding an acquittal* include the loss of personal liberty, the loss of income, the loss of reputation and the expense incurred by one who is later acquitted. Here it is clear that the State must arrest and try *all* duly accused persons, though it is certain that a large proportion will be found innocent. The innocent man has here made a sacrifice for the public good. There is no redress against the officers; they have faithfully kept to their duty under the law. The public good has gained quite as much as it would have done when commerce was served by a railroad placed on land taken by force from that same man. Why should not the sacrifice be compensated? In a civil case at least costs are given against the unsuccessful litigant. Why should not the State allow costs against itself? Perhaps the amount of the expense bill would look too great. This may be a practical deterrent. But let us at least admit the principle and go on to the third class of cases.

(3) *Wrongs done by the State through erroneous conviction* are so much rarer than the preceding class that the expense of doing justice need here not be deterrent, and this wrong, when it does happen, is so much more grievous that it stands by itself in its appeal to our sense of justice. Moreover, the moral effect of such an unredressed wrong is so bad that we can afford to make special effort to prevent it. A few cases of this kind stand in our annals as perpetual blood marks and do more to weaken the cause of law and order than a thousand unjust acquittals. The case of Lesurques, in France, just before the Revolution—a victim of mistaken identity—is chronicled in every book on circumstantial evidence. The case of Adolph Beck, in England only a few years ago, has done much to undermine the profound faith of the English people in their courts and their police. How much better if the law provided frankly beforehand for redress in such contingencies. Would not this at least restore our faith that justice would ultimately be done? In both those notable cases the Government made a donation by way of expiation—in Beck's case the sum of £5,000. But to leave such expiation to the whims or the sympathy of a busy political officer and to the chances of persistent intrigues, by the friends of the victim, is unworthy of an enlightened community. And in our own country it was left to the beneficence of a private citizen (Andrew Carnegie) to do something for Toth, the latest victim of justice's errors, who lay for 20 years in a Pennsylvania prison, convicted of a crime which he never committed.

Why should we not provide for such grievous errors of justice? Almost every continental nation has done something substantial during the last hundred years to correct this defect in the law. Shall we lag behind any longer?

It is nobody's interest, apparently, to move for such a law. You and I have never suffered in that way; no large business interest is threatened; no class of persons directly feel a loss in their pockets; and so nobody exerts himself. Only the casual victims feel the wrong and to expect them to unite in a demand for legislation is absurd.

Mr. Borchard's article reprinted below ought to appeal to every citizen of the land and particularly to every legislator. He sets forth what has been done on the Continent and points out the entire feasibility of the measure. We ask for its earnest consideration.

Mr. Borchard has drafted a bill, which is printed in this document at page 31 and is now pending in Congress. By this bill the Court of Claims is given jurisdiction of such cases arising under Federal jurisdiction. The bill can be easily adopted for the same purpose in State courts for State cases. We trust that the movement for this amendment of our law will spread, and that it will be taken up by the Institute of Criminal Law and Criminology.

J. H. WIGMORE.

EUROPEAN SYSTEMS OF STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE.

EDWIN M. BORCHARD, Law Librarian of Congress.

In an age when social justice is the watchword of legislative reform, it is strange that society, at least in this country, utterly disregards the plight of the innocent victim of unjust conviction or detention in criminal cases. No attempt whatever seems to have been made in the United States to indemnify these unfortunate victims of mistakes in the administration of the criminal law, although cases of shocking injustice are of not infrequent occurrence. The case of Andrew Toth, who was convicted of murder in Pennsylvania, sentenced to life imprisonment, and after having served 20 years was found to have been absolutely innocent, is still fresh in the public mind. There was no provision of law for relieving his terrible condition, the State legislature declined to make compensation, and only through the generosity of Andrew Carnegie, who pensioned him at $40 a month, was the man able to return to Hungary, his native land.[1] In England, the flagrant injustice meted out to Adolf Beck, who through the most lax administration of the criminal law was convicted for the crime of another man and was imprisoned for seven years, resulted at least in the establishment of the Court of Criminal Appeal (7 Edw. VII, c. 23) though it left the unfortunate Beck without the slightest legal redress.[2]

Up to the present moment Anglo-American public law is wholly opposed to granting an indemnity to such victims of the errors of criminal justice. The safeguarding of society by the prosecution of crimes against it is, to be sure, an attribute inherent in all governments, one of the *jura majestatis*. For mistakes in exercising this sovereign right, says our law, there can be no liability of the State. We go even further. Whether the injury to the individual is accidental or intentional on the part of the State or on the part of the *judge* (except one of most inferior jurisdiction), the injured person is left without redress.

Yet, within certain spheres of governmental action involving similarly a public interference with private rights, we admit freely that the State owes compensation to those individuals upon whom special

[1] Virginia Law Register, v. 17, p. 406.

[2] For a full report of this remarkable case of mistaken identity see Parliamentary Papers, 1905, v. 62, Cd. 2315, Committee of Inquiry into the case of Mr. Adolf Beck. Report from the Committee, London, 1904; Sims, George. The martyrdom of Adolf Beck. London, Daily Mail Office, 1904; Lowell, Government of England, New York, 1908, v. 2, p. 463. Parliament to some extent subsequently vindicated English justice by granting Beck a gratuity of £5,000. The Epps case, reported in the Chicago Tribune of Sept. 23, 1912, and the Hartzell case in Chicago, reported in the press Oct. 25, 1912, are typical of such injustice.

damage is inflicted. When property is taken from individuals for the public use our fundamental law prescribes that just compensation must be paid. Publicists as far back as Grotius, Puffendorf and Bynkershoek recognize that compensation is a necessary incident to the exercise of the right of eminent domain.[1] On the other hand, when in the administration of the criminal law, an equally sovereign right, society takes from the individual his personal liberty, a private right at least equally as sacred as the right of property, it dismisses him from consideration regardless of the gross injustice inflicted upon an innocent man without even an apology, much less compensation for the injury. Jurists who uphold the right of the State to prosecute and convict innocent persons without making compensation have been driven to draw fine distinctions between the taking of property and the taking of liberty for the public use. We shall discuss these distinctions below.

The ultimate end and object of government is to protect those rights which, as Blackstone denominates them, are the absolute rights of all mankind—the right to personal security, to liberty and to property. The unquestioned manner with which in Anglo-American law the liberty of innocent persons is sometimes taken is all the more startling in view of the history of individual rights since *Magna Charta*.[2]

The object of this article is to show the methods by which the legislatures of Europe have solved the problem of indemnifying those innocent individuals who, in the exercise of a sovereign right beneficial to society and to the State in its function as the preserver of the public peace, have been unjustly arrested, detained, or convicted and punished. First of all it may be well briefly to review the law in this country and on the Continent in order to show the wide difference in the civil remedies granted to persons who are wrongfully or erroneously arrested or convicted.

In the United States we, of course, recognize the right of an individual wrongfully prosecuted on private information or complaint to sue the complaining witness for false imprisonment or malicious prosecution without probable cause. Likewise if his unfortunate predicament is due to the malfeasance, misfeasance, or nonfeasance of an officer exercising ministerial powers, or even of certain judicial officers of inferior jurisdiction, the law gives redress to the injured person by an action for damages against the officer.[3] Where, however, the unjust detention or conviction results from the error, or even from the malice, fraud or corruption of a judge of general jurisdiction or where it results from an unfortunate concurrence of circumstances, the individual is without a civil remedy.[4] The rule in this country may be expressed as follows:

> No action lies in any case for misconduct or delinquency, however gross, in the performance of judicial duties. * * * If corrupt he [the judge] may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may be done.[5]

---

[1] Citations in article of Henry Wade Rogers, "Compensation as an incident of the right of eminent domain," Southern Law Review, v. 5, N. S., 1879-80, p. 5.

[2] An act of Massachusetts of June 22, 1911, authorizes compensation for lost income to acquitted persons confined in excess of six months while awaiting trial.

[3] Throop, Public Officers, New York, 1892, sec. 724.

[4] Excess of jurisdiction must be distinguished from entire absence of jurisdiction. For wrongful acts in cases where he has no jurisdiction at all the judge is civilly liable. See Mechem, Public Offices and Officers, sec. 628 and sec. 629; Bradley *v.* Fisher, 13 Wall., 335, 351; Hughes *v.* McCoy, 11 Colo., 591.

[5] Throop, Public Officers, New York, 1892, sec. 713.

As a general rule no person is liable civilly for what he may do as judge while acting within the limits of his jurisdiction, nor is he liable for neglect or refusal to act. The rule is especially true where the judge is one having general jurisdiction, and in such case there is no liability even though he exceeds his authority. The overwhelming weight of authority is to the effect that where a judge has full jurisdiction of the subject matter and of the parties, whether his jurisdiction be a general or limited one, he is not civilly liable where he acts erroneously, illegally, or irregularly. * * * Nor is he liable for a failure to exercise due and ordinary care or where he acts from malicious or corrupt motives.[1]

The reason for the rule is thus stated by Mechem:

Courts are created on public grounds. They are to do justice as between suitors, to the end that peace and order may prevail in the political society and that rights may be protected and preserved. The duty is public and the end to be accomplished is public. The individual advantage or loss results from the proper and thorough or improper and imperfect performance of a duty for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice as between individuals, he may be called to account by the State in such form and before such tribunal as the law may have provided. But as the duty neglected is not a duty to the individual, civil redress, as for an individual injury, is not admissible.[2]

The general rule of the immunity from civil suit of a judge having jurisdiction for injuries resulting to private individuals from his acts, however malicious or corrupt, is, therefore, well established in our law. In the absence of statute any liability of the State is, of course, absolutely excluded, and up to the present time no such statutory liability has been assumed either in England or in the United States.

In most of the European countries, on the other hand, the innocent individual unjustly arrested, prosecuted, or convicted has the civil remedies recognized by us—*first*, a right of action against the complaining witness or other person who has wrongfully accused him or otherwise aided in his prosecution,[3] and, *secondly*, a right of action against the officer through whose act he has been injured, where there has been an excess or abuse of the officer's legal powers.

But at this point the similarity ceases. The extensive immunities of a judge from private suit in this country are only recognized by the civil law within the narrowest limits. On principle the continental judge is liable for his tortious acts in excess or abuse of his authority like any other officer, the only qualification being that in matters within his judicial discretion he is allowed considerable leeway. But corrupt or malicious exercise of judicial powers in all cases involves the personal liability of the judge.[4] Besides the right of action

[1] 23 Cyc., pp. 568–569 and authorities there cited.
[2] Mechem, Public Offices and Officers, Chicago, 1890, sec. 619, citing Cooley.
[3] See, for example, art. 373 of the French Penal Code.
[4] See, for example, Austria, art. 9 of the organic law of Dec. 21, 1867, and the law of July 12, 1872, on the judicial power and the right of action for torts by judicial officers in the exercise of their functions. Also, Spain, Ley de Enjuiciamiento Civil, 1881, art. 903, et seq. Sec. 866 of the French code of civil procedure provides that judges are liable to civil suit in the following cases: First, if there has been malice or deceit (*dol*), fraud (*fraude*), or extortion committed either in the proceedings or in the judgment; * * * Fourthly, for a denial of justice. In France, the procedural difficulties of bringing an action against a public officer are somewhat greater than in Germany, although the substantive rights against a wrongdoing officer are now practically the same in both countries. Up to the last decade, the French officer enjoyed greater immunity for his official acts than the German. The German civil code, sec. 839, par. 1, provides: "If an officer willfully or negligently commits a breach of official duty incumbent upon him as toward a third party, he shall compensate the third party for any damage arising therefrom." Paragraph 2 provides that "if an officer commits a breach of his official duty in giving judgment in an action, he is not responsible for any damage arising therefrom, unless the breach of duty is punished with a public penalty to be enforced by criminal proceedings." This last clause applies to cases of willful perversion of justice under sec. 336 of the penal code and includes malicious or corrupt exercise of the judicial power. The commentaries of Planck and Staudinger explain the narrow limitations of par. 2 just quoted. It applies first to a *final judgment only* and does not excuse gross negligence, malice, or corruption. For all intermediate and interlocutory orders and decrees—as in negligently ordering an arrest or attachment, declining to receive evidence, failure to call a witness demanded by a defendant, a disregard of undisputed testimony—the judge is civilly liable and is not protected by the immunity granted in par. 2 of sec. 839. See Nöldeke, Die civilrechtliche Haftung des Richters nach dem B. G. B., in Gruchot's Beiträge zur Erläuterung des deutschen Rechts, vol. 42, 1898, p. 795, at pp. 804, 821–822; Dolles, Haftpflicht der Beamten, Berlin, Guttentag, 1899, pp. 206 et seq.