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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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ASSAULT AND BATTERY.

State v. *Costa,* Conn., 110 Atl. 875. *Effect of mistake as to victim.*

Defendant, who assaulted one person, mistaking him for another, with intent to maim or disfigure, or with a deadly or dangerous weapon, could be convicted under indictment charging intent to assault the person actually assaulted, despite the matter of mistake in identity.

CONSTITUTIONAL LAW.

Ex parte Hudgins, W. Va., 103 S. E. 327. *Unconstitutional definition of vagrancy.*

Section 2 of chapter 12, Acts 1917, Second Extraordinary Session (Code Supp. 1918, c. 151, Sec. 16bII (Sec. 5457b), providing that every able-bodied male resident of this state, between the ages of sixteen and sixty years, except bona fide students during school term, who shall fail or refuse to regularly and steadily engage for at least thirty-six hours per week in some lawful and recognized business, profession, occupation or employment, shall be held to be a vagrant and be guilty of a misdemeanor, and punished as therein provided, regardless of the financial ability of such person to maintain himself and his dependents without performing such labor, and regardless of his ability to obtain such employment, except as therein provided, is unconstitutional and void as imposing unnecessary and unreasonable restraint upon personal liberty, and as having no just or reasonable relation to the things generally comprehended within the police power of the state.

State v. *Reese,* Wash., 192 Pac. 934. *Legality of statute fixing venue in case of crime committed on public conveyance.*

Rem. and Bal. Code, Sec. 2293, providing that, where crime is committed on train, boat, or other public conveyance, or at any station or depot or route through which such a conveyance passes during the trip or voyage, the accused may be tried in any county through which the conveyance passes, or in which the trip or voyage begins or terminates, held unconsitutional, being in violation of Const., art. 1, sec. 22, guaranteeing to the accused a right to be tried in the county in which offense was committed.

Johnson v. *State of Maryland,* 41 Sup. Ct. Repr. 16. *May a state punish driver of a government motor truck for failure to procure a state license?*

A state cannot require the driver of a government motor truck carrying the mails over its post roads to procure a license after satisfying its officials of his competence and paying a fee therefor, though it could hold him responsible for violation of its general laws, including, perhaps, its laws of the road, since the requirement of a license is an attempt to regulate the doing of the act he was employed by the government to do, which is beyond the power of the state.

Mr. Justice Pitney and Mr. Justice McReynolds, dissenting.

CORPORATIONS.

State v. *Lehigh Valley R. Co.*, N. J., 111 Atl. 257. *Is a corporation indictable for manslaughter?*

A corporation aggregate may be indicted for involuntary manslaughter.

An indictment in the statutory form, charging a corporation aggregate with manslaughter, will not be quashed for failure to specify whether voluntary or involuntary manslaughter is meant.

Kalisch, White, Heppenheimer, and Taylor, J. J., dissenting.

Kalisch, J., dissenting, said in part: "The question here is not whether a corporation aggregate ought not to be held liable to indictment for manslaughter, but the prime question is whether or not a corporation aggregate was indictable for manslaughter at common law. If it was not so indictable at common law, then, unless there is a statute making it amenable to indictment for the offense, the indictment must be held to be nugatory. The Supreme Court, in holding the indictment to be valid, is constrained to recognize the indubitable fact that no such indictment would lie at common law, and hence it is forced to rest its determination to uphold the validity of the indictment upon the assertion that the common law has been modified. But this is an extremely dangerous step to take, and if carried out to its legitimate consequences might seriously affect the administration of the criminal jurisprudence of this state and the safety of its citizens. I can easily comprehend how the common law may be modified by statute, but am unable to pereceive by what authority a court may in a criminal case modify the common law, so as to make an artificial body amenable to indictment for crime, which was not the case before such judicial declaration. This is clearly a judicial enactment in the nature of an ex post facto law."

DISORDERLY HOUSE.

State v. *Pyles*, W. Va., 104 S. E. 100. *Whether house occupied by one woman only may be "house of ill fame."*

A house solely occupied by one woman, who there indulges in illicit sexual intercourse with numerous men, but not resorted to by any other woman for the purpose of prostitution, is not a "house of ill fame," within the meaning of a statute making it an offense to keep such a house.

The statute not having defined a house of ill fame, it is necessary to go to the common law for its definition, and, the statute being penal, the common-law offense and its definition cannot be judicially enlarged.

Lynch, J., dissenting.

FORMER JEOPARDY.

State v. *Collins*, Wash., 191 Pac. 831. *Effect of proceedings before justice of peace not conducted according to statute.*

Proceedings before a justice of the peace, in which a defendant, accused of striking certain person, pleaded guilty, under Rem. Code 1915, Sec. 1929, and was sentenced to pay a nominal fine, without injured person being summoned to appear and testify, as required by sections 1930, 1931, does not bar subsequent prosecution for assault; prior proceedings not having been conducted in accordance with mandatory requirements of statute.

Bridges, J., dissenting.

HOMICIDE.

People v. *Gilman,* Calif., 190 Pac. 205. *Resistance to arrest.*

Where accused, placed under arrest by an officer, had gone into his own house ostensibly to get his hat and coat, and, instead of asserting his freedom by refusing to return to the officer's custody, armed himself, and, returning to where the officer waited, for the purpose, as he himself declared, of ordering the officer from the premises, shot him down, without giving him a chance to leave, or waiting for any overt act in attempted furtherance of the alleged illegal arrest, accused's claim that the killing was reduced to manslaughter as having occurred in the resistance of illegal arrest could not prevail.

People v. *Northcott,* Calif., 189 Pac. 704. *Admissibility of photograph of place where body was found.*

In a prosecution for murder in the second degree, defendant being charged with performing an unlawful operation, a photograph of a secluded canyon or ravine, where the body was found, was properly admitted in evidence to explain the conditions under which the body was found; it being the theory of the state that it was necessary for the state to prove that the operation was unlawful, and not a necessary operation to preserve the life of the patient.

The presence of a small lizard upon a rock in a photograph of a ravine where the body of the deceased, the subject of an unlawful operation, was found, was not prejudicial to accused in a prosecution for second degree murder, the pitcure being taken after the body had been removed, where the state, on objection, offered to permit the clerk to mark it off.

One accused of homicide cannot be heard to complain that, because a photograph of the body as it was found in a ravine was not pleasant to look upon, he was prejudiced because of the revulsion that may have been caused by the picture, the entire record being a succession of revolting verbal picture, the ghastly facts of the case being an inseparable part.

INFANTS.

People v. *Wolff,* Calif., 190 Pac. 22. *Juvenile Court Law.*

Under the Juvenile Court Law (Deering's Gen. Laws 1915, Act 1770a, Sec. 6), providing that magistrates shall suspend proceedings against defendants under 18 years of age, and in view of sections 1, 3, and 13, the juvenile court or the superior court acting in the same may remand such a defendant to the custody of the magistrate, sections 4c, 4d, respectively, providing that if upon hearing of a petition the court shall determine that the person is not a fit subject to be dealt with according to the provisions of the act, and that no person under 18 shall be prosecuted until the matter has been submitted to the juvenile court seeming to contemplate prosecution of defendants under 18 according to general law, and hence the fact that defendant charged with murder, being under 18, was sent to the juvenile court will not prevent subsequent prosecution under the general laws.

INTOXICATING LIQUORS.

Ex parte Guerra, Vt., 110 Atl. 224. *State law not suspended by War Prohibition Act.*

The state statute (G. L. 6558), prohibiting the unlicensed traffic in intoxicating liquors, did not cease to be of force or become suspended because of the

subsequent enactment of the War Prohibition Act, approved November 21, 1918 (U. S. Comp. St. Ann. Supp., 1919, Secs. 3115 11/12f-3115 11/12h); the absence from the latter statute of express reservation to the states of the exercise of their police powers being immaterial, notwithstanding the insertion of such reservation in other war-time legislation.

MOTOR VEHICLES.

Ex parte Hinkelman, Calif., 191 Pac. 682. *Use of untested headlight on automobile criminal, although not dangerous.*

Use of a headlight of more power than had been sanctioned by a testing agent, as provided in Motor Vehicle Act, Sec. 13, subd. (j), as amended by St. 1919, p. 210, Sec. 10, subd. (j), was a violation of such act, although such lights did not produce a dangerous glare.

Motor Vehicle Act, Sec. 13, amended by St. 1919, p. 206, Sec. 10, making it an offense to use a headlight that has not been tested and sanctioned by a testing agency, is valid.

MUNICIPAL CORPORATIONS.

Ex parte Daniels, Calif., 192 Pac. 442. *Speed ordinance conflicting with state law.*

Under the Motor Vehicle Law, as amended in 1917 and 1919 (St. 1917, p. 382, St. 1919, p. 223), declaring that the speed limit fixed shall be exclusive of all other limitations fixed by any law, and that local authorities shall have no power to maintain any ordinance or regulation in conflict, which after declaring that specified speeds were unreasonable under described circumstances and prescribing a maximum of 20 miles per hour, prohibited the operation of motor vehicles at unsafe and unreasonable speeds, and declared a violating of the act to be a crime, the question whether the operation of a motor vehicle was at unreasonable speed, there being no direct inhibition, is for the jury, and so a municipal ordinance, fixing a maximum speed of 15 miles per hour, is void because conflicting with the general law, and in attempting to constitute the judgment of the local authorities for that of the jury as to whether the speed was unreasonable.

Shaw, J., and Angellotti, C. J., dissenting.

SEDUCTION.

State v. *Storrs,* Wash., 192 Pac. 984. *Effect of offer to "marry" seduced female, who has been adjudged insane.*

In prosecution for seduction, where seduced female was confined as a criminally insane person as the result of her prosecution for murder of defendant's wife, and where defendant, during the trial, offered to marry her, and stated that proposal was made in good faith, in order to procure stay of prosecution under Rem. Code 1915, Sec. 2441, the admission in evidence of a certified copy of the information, charging seduced female with the murder of defendant's wife, and the verdict of the jury at that trial and judgment, committing her as a criminally insane person to the penitentiary, *held* proper to prove that she was not competent to accept a proposal, and that defendant's proposal was not made in good faith.

SENTENCE.

Powell v. *State,* Ga., 103 S. E. 174. *When verdict complies with requirement of "minimum and maximum term."*

Under the Indeterminate Sentence Act of 1919 (Ga. L. 1919, p. 387), the jury must prescribe a minimum and maximum term of imprisonment which is within the minimum and maximum terms prescribed by law. In the instant case the defendant was convicted of assault with intent to murder, and the punishment for that offense is fixed by the Penal Code as imprisonment and labor in the penitentiary for not less than two years nor longer than ten years. The verdict was as follows: "We, the jury, find the defendant guilty, to serve in the penitentiary for a term of not less than ten years nor over ten years." The jury, by this verdict, prescribed a "minimum and maximum term" of imprisonment which was within the minimum and maximum terms prescribed by law, as required by the statute, and the exceptions to the verdict are without merit.

TRIAL.

Long v. *State,* Okla., 192 Pac. 427. *Effect of evidence of former conviction with appeal pending.*

In a trial for a second violation of the prohibitory liquor laws, where the only evidence of the former violation charged was the conviction of the defendant, from which an appeal to this court was taken, the judgment and conviction suspended, and the appeal undetermined, the evidence is insufficient to sustain a conviction, and it is reversible error to overrule a motion for a new trial.

People v. *Ruiz,* Calif., 192 Pac. 327. *Must prosecutor elect assault on which he relies, where several shown on same day?*

In a prosecution for assault with intent to rape, where the evidence showed three separate acts by accused on the same day which would answer the charge in the indictment, it was error to refuse defendant's request to require the district attorney to elect the particular act upon which he would rely for conviction.

The failure to require the district attorney to elect the act on which he would rely for conviction was substantial error, depriving defendant of a fair trial, where the only instruction as to evidence of other offenses limited such evidence to proof of intent, and the jury were not even told that they must all agree upon one particular act before they could convict.

State v. *Diedlman,* Mont., 190 Pac. 117. *Effect of court's remark that challenge to juror would be sustained.*

In a criminal prosecution, where the trial court, on examination of a venireman, interposed with the remark that, if the county attorney would challenge, he would sustain the challenge, and it did not appear that there was any ground for sustaining a challenge for cause, such action of the court was erroneous, amounting to the exercise of peremptory challenge, which right the trial court does not possess, particularly as the right to challenge can be waived by failure to exercise.

In a prosecution for sedition, the action of the trial court in announcing on voir dire examination that he would sustain a challenge to a venireman, amounting to the exercise by the court of peremptory challenge, held most prejudicial, because indicating to the remaining jurors that the court entertained prejudice against any of the veniremen who manifested a friendly disposition toward defendant.

State v. *Ungar,* N. Y., 111 Atl. 37. *Effect of unauthorized care and custody of jury by detective in employ of prosecutor.*

An accused person, defending himself against a criminal charge, suffers the manifest wrong and injury described in the statute, when a detective, attached to the office of the prosecutor of the pleas, without authority of law, assumes, in part at least, the care and custody of a jury impaneled to determine his guilt or innocence on an indictment prosecuted by the prosecutor of the pleas, and in pursuance of that assumption mingles with the jury, converses and takes his meals with them, as freely as a properly appointed officer sworn to perform that duty.

Ex parte Lyde, Okla., 191 Pac. 606. *Effect of absence of defendant during trial.*

In felony cases the defendant's presence in open court when judgment is rendered is an essential prerequisite, and indispensable to the jurisdiction of the court to render a valid judgment. He cannot waive this right and his counsel cannot do so for him.

Where, after rendering judgment in open court, in the absence of the defendant, the judge left the courtroom and proceeded to the county jail, where the defendant was confined, and there, in the absence of the court clerk and the defendant's counsel, again pronounced judgment and sentence, held, that the court was not in session at the county jail, and the judgment and sentence there pronounced is a nullity. Held, further, that all the proceedings of rendering judgment and passing sentence were coram non judice and void.

The holding in this case that the proceedings in rendering judgment and passing sentence were void only affects the judgment and sentence, and leaves the verdict and all precedent proceedings in full force and effect. The petitioner is, therefore, remanded to the custody of respondent pending the rendition of judgment in conformity with law and in accordance with the verdict of conviction.

Commonwealth v. *Insano,* Pa., 110 Atl. 248. *Admissibility of signed confession procured through interpreter.*

A confession taken through an interpreter, though accused could speak some English, where the interpreter and other witnesses testified that the questions and answers were properly interpreted and written by the stenographer, and that thereafter the confession was read to accused by the interpreter, and also by the prosecuting attorney in English and signed by him, is admissible without testimony by the stenographer that the questions and answers as interpreted were correctly transcribed.

Commonwealth v. *Davis,* Pa., 110 Atl. 85. *Discharge of juror for illness.*

The discharge of the jury was justified and did not constitute an acquittal or entitle defendant to plead former jeopardy, where one of the jurors was suffering from influenza and there was danger of its communication to others, and he was also suffering from a mild form of epilepsy causing momentary lapses of consciousness without any visible evidence of such condition.

Procedure in the U. S. Court for China.—[The opinion in *U. S.* v. *Ollerdessen* affords an illustration of the possibilities of improving our procedure,

where, as in this jurisdiction, we are not hampered with a jury.—Charles S. Lobingier, J., U. S. Court for China, Shanghai.]

United States v. *Albert F. Ollerdessen*
(Cause No. 1089; filed October 9, 1920.)

SYLLABUS

(By the Court)

1. CRIMES: Plea of Guilty admits only those elements of the offense which are specifically charged.

2. Id.: Involuntary manslaughter; Sentence. Where there was an entire absence of criminal intent, the negligence charged was at most slight, and the prosecution joined in urging exemption from imprisonment, a moderate fine was imposed on condition that the accused indemnify the victim's family.

R. S. Haskell, Esq., Special Assistant U. S. Attorney, for the prosecution.
Stirling Fessenden, Esq., for the defense.

LOBINGIER, J.:

Defendant pleads guilty to an information charging that he—

"on the fourth day of August, in the year of our Lord one thousand nine hundred and twenty, on Bubbling Well Road, in the City of Shanghai, in the Republic of China, and within the jurisdiction of this Court, did unlawfully and feloniously kill a human being, involuntarily and without malice, in that the said Albert Francis Ollerdessen at the time and place above mentioned was operating a motor car carrying Shanghai license No. 3419 at about 1:45 a. m. and while so operating said motor car, without due caution and circumspection, did run into and collide with a canvas shed under which shed one Loh Ah Wo ( ) a Citizen of the Republic of China, was engaged in a lawful occupation, that when said car operated by the said Albert Francis Ollerdessen ran into and collided with said canvas shed the said Loh Ah Wo ( ) received such mortal injuries, from which he languished and died."

It will be seen that there is no charge of excessive speed. Defendant testified, when heard in relation to the penalty, that he was running at a rate of not more than fifteen miles per hour, and while the Sikh and Chinese policemen say that he was going "very fast" they do not claim to have tested the speed by watch, and defendant's estimate seems reliable in view of the fact that he had gone but a short distance and had just changed to third speed when the collision occurred. At any rate, he could not be convicted of excessive speeding without a specific charge thereof.

The "canvas shed" mentioned in the information had been erected in the center of Bubbling Well Road between the south side and the "traffic island," by the Shanghai Mutual Telephone Company of which the deceased was an employee. He was concealed in the shed and the space between it and either side was narrow. It is undisputed that the collision occurred while defendant's attention was momentarily diverted from the wheel by a bouquet of flowers which he had just purchased and placed on the seat, but which was jarred therefrom by the car's motion. Such deflection could well have been involuntary as the information charges and defendant states that it lasted no longer than three seconds.

There is, consequently, no question here of criminal intent and hardly one of negligence. Nevertheless, involuntary manslaughter may consist of "the commission of a lawful act which might produce death . . . without due caution

and circumspection."[1] And the penalty for such offense is imprisonment for not more than three years or a fine of not more than one thousand dollars or both.[2] There is no minimum and the court is thus vested with a wide discretion.

The deceased was forty-two at the time of his death and, according to the tables of mortality furnished by a local insurance company, his expectancy of life was about nineteen years. His widow was called as a witness and her testimony discloses the most serious phase of the unfortunate affair. She testifies that she is left with five children, the youngest a babe in arms, that her late husband was earning Mex. $19.00 per month at the time of his death, and that practically the whole sum is needed to support the family. She adds naively

"What good will it do me to have this man (defendant) sent to prison? That will not feed me and my children."

There is, unquestionably, much justification for this view. Our law is lame in that it makes no provision for indemnifying the injured party in the criminal proceeding. The civil law is more effective in this particular for it requires a judgment in favor of such party as a feature of the sentence.[3] This obviates the necessity of two trials—one to enforce the criminal liability and the other for the civil. In a case like this where there was a clear absence of criminal intent and where the negligence was at most slight, the civil liability becomes the principal feature and if we can dispose of it in this proceeding it will be to the obvious advantage of all concerned.

The prosecution joins the defense in urging that no sentence of imprisonment be imposed. If we follow that recommendation we are limited to a fine which, as we have seen, cannot exceed one thousand dollars. But if, instead of such a fine, we can require the defendant to indemnify the victim's family in a large and substantial amount we shall have accomplished more toward actual reparation of the wrong than by either imprisonment or fine; and defendant offers to provide such indemnity in lieu of a prison sentence. He offers, in other words, to pay the widow a sum which placed at interest will yield her $20.00 per month, or slightly more than the deceased was earning. We are of the opinion that this affords the best solution of the difficulty and that with such indemnification the ends of justice will be subserved by the imposition of a moderate fine.

It is therefore ordered that upon the deposit with, and assignment to, the clerk of this court as trustee, of securities yielding, in addition to the amount already paid, the sum of twenty dollars Mexican per month, which sum is hereby directed to be paid the widow of the deceased, the further payment of a fine of one hundred dollars United States currency and the costs of this prosecution, the defendant shall be absolved from further liability herein and that, at the end of nineteen years, the said securities shall be reassigned and returned to defendant.

United States v. *Sin Wan Pao Company*
(Cause No. 993; filed May 15, 1920)

SYLLABUS

1. CRIMES: *Corporations.* While it seems to have been originally doubtful whether a private corporation was subject to criminal liability the later developmen of the law has removed such doubt.

[1]Federal Penal Code, sec. 274.
[2]Id. 275.
[3]E. g., Spanish Penal Code, title IV.

2. —:—: Evolution of corporate criminal liability traced.

3. —:—: *Penalty.* Since a corporation cannot be imprisoned and is subject only to a fine, the latter, where both are prescribed, should be a substantial one.

4. —:—: The special duty of corporations enjoying the extraterritorial privilege, to avoid all violations of law, commented on.

Chauncey P. Holcomb, Esq., U. S. District Attorney, for the prosecution.
Fleming, Davies & Bryan, by Mr. Fleming, for the defense.

LOBINGIER, J.:

The defendant is a corporation organized under the laws of Delaware and registered at the American Consulate General in Shanghai, where it maintains and publishes, in the Chinese language, a daily newspaper of large circulation. The information before us charges it with having "published a notice stating where certain obscene, lewd and indecent books may be obtained," and the District Attorney asks for a conviction under the statute penalizing.

"Who (m) ever sells, or offers to sell, or give away . . . any obscene, lewd, or indecent book, pamphlet, drawing, engraving, picture, photograph, instrument, or article of indecent or immoral use, or *advertises the same for sale.*"[1]

The language further set out in the information fully sustains the averment —for the mere titles of these books, as there translated, are unfit to be reproduced here. The defendant, by its duly authorized attorney, enters a plea of guilty, but at the same time explains that the advertisement of the books was accepted for publication and inserted in the paper by a Chinese employee without the knowledge of the directors, who are, it is but fair to state, gentlemen of excellent reputation.

But, notwithstanding the plea of guilty, we must, before imposing sentence, determine whether the offense is one which the corporation as such could commit or the individuals composing it are alone subject to prosecution. For the capacity of a corporation to commit crime is not the same as that of a natural person. Indeed, there was a time in the history of our law when it was at least doubtful whether such a prosecution as this would lie at all; and its evolution from that stage forms an instructive chapter in legal development.[2]

It is little more than two centuries now since Lord Holt uttered, as reported,[3] his famous dictum that "a corporation is not indictable but the particular members of it are." So Blackstone,[4] writing two generations later, declares that "a corporation cannot commit treason, or felony *or other crime* in its corporate capacity."

It was, indeed, recognized early that *quasi* corporations like towns and

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[1]Act of Congress of March 3, 1901, 31, U. S. Stats. at Large, Ch. 854, Sec. 872.

[2]"The doctrine of holding corporations responsible for violation of penal laws is one developed by gradual evolution; but it is none the less the law, and is of healthful necessity and utility." *Southern Express Co.*, v. *State*, 1 Ga. App., 700, 58 S. E. 67. *Compare Com.* v. *Pulaski Co.*, Agr., Ass'n., 92 Ky. 197, 17 S. W. 442.

[3]Anonymous, 12 Mod. 559 (1701).

[4]Commentaries, I, 476.

counties, were subject to prosecution for neglect of duties imposed by law.[5] But so late as 1823 the highest court of Virginia, in considering an information charging a Turnpike Company

"in their corporate character, with a nuisance in obstructing a common public highway and road, by digging it up, and placing therein large quantities of stone and dirt, whereby the ctizens of the Commonwealth were hindered from passing and travelling on the same; to their great damage and common nuisance,"[6]
was

"unanimously of opinion, that a Corporation, such as the President, Directors and Company of the Swift Run Gap Turnpike Company, cannot be impleaded by its artificial name for the criminal offense stated in the information."[7]

In 1841 the Supreme Court of Maine sustained exceptions to the conviction of a corporate defendant for maintaining a nuisance, saying

"We have been referred to no precedent where an indictment has been sustained against a corporation, upon such a charge; and in our opinion, the individuals concerned and not the corporation, must be held criminally answerable for what has been done."[8]

And so late as 1864 the Supreme Court of Indiana[9] upheld the dismissal of a prosecution against a railway company for obstructing a highway. Meanwhile, however, it was held in England that a private railway corporation was indictable

[5]*"Regina* v. *The County of Wilts,* 1 Salk. 359; *The Queen* v. *The Inhabitants of Cluworth,* 6 Mod. 163, S. C.; 1 Salk. 359, and in the *Queen* v. *Saintiff,* 6 Mod. 255, Lord Holt himself held, that if a common footway be in decay, an indictment must of necessity lie for it, because an action will not lie without a special damage. It seems to be true, moreover, as was stated by Talfourd, Sergeant, *Arguendo,* in the *Queen* v. *Railway Co.,* 3 Queen's Bench, 267, that although there was at that time no direct authority in England for the position that a corporation aggregate is indicated in the corporate name, yet the course of precedents has been uniform for centuries, and the doctrine has frequently been taken for granted, both in arguments and by the judges. The case of *Langforth Bridge Cro. Car.* 565 (1635); *Regina* v. *The Inhabitants of the County of Wilts,* 1 Salk. 359 (1705); *The King* v. *Inhabitants of the West Riding of Yorkshire,* 2 Blac. Rep. 685 (1770); *Rex* v. *The Inhabitants of Great Boughton,* 5 Burr. 2700 (1771); *The King* v. *The Inhabitants of Clifton,* 5 D. & E. 499 (1784); *Rex* v. *The Corporation of Liverpool,* 3 East 86 (1803); *Rex* v. *Mayor of Stratford-upon-Avon,* 14 East 348 (1811); *Rex* v. *The City of Gloucester,* Dougherty's Crown Circ. Ass. 359." Chief Justice Green in *State* v. *R. Co.,* 23 N. J. L. 364, 365 (1852).

[6]*Com.* v. *Turnpike Co.,* 2 Va. Cas. 362.

[7]Id.

[8]*State* v. *Great Works Co.,* 20 Me. 41, where it was further observed: "A corporation is created by law for certain beneficial purposes. They can neither commit a crime or misdemeanor, by any positive or affirmative act, or incite others to do so, as a corporation. While assembled at a corporate meeting, a majority may, by a vote entered upon their records, require an agent to commit a battery; but if he does so, it cannot be regarded as a corporate act, for which the corporation can be indicted. It would be stepping aside altogether from their corporate powers. If indictable as a corporation for an offense, thus incited by them, the innocent dissenting minority become equally amenable to punishment with the guilty majority." This decision was expressly overruled in *State* v. *Portland,* 74 Me. 268, 43 Am. Rep., 586, which, however, was against a municipal corporation.

[9]*State* v. *Ohio & Miss. R. Co.,* 23 Ind. 363.

for an act of nonfeasance in disregarding a statute[10] and shortly afterward an indictment of such a corporation for obstructing a highway, was upheld.[11] These English decisions have been generally followed in the United States.[12]

There was once a tendency to exclude crimes which "involve a criminal or immoral intent."[13] But the latest decisions have passed beyond that limit.[14] Thus a private corporation has been held subject to prosecution for criminal libel,[15] keeping a disorderly house,[16] permitting gambling,[17] violating the liquor laws,[18] and depositing obscene matter in the mails.[19]

In all of these acts (which are but a few of those included) there would seem to have been as much or more exercise of criminal intent as is required in order to commit the offense here charged and we see no escape for defendant in that direction.

II

The remaining question involves the penalty. The statute[20] prescribes a maximum term of imprisonment for one year or a fine of $500.00, with a

[10]*Reg.* v. *Birmingham & Gloucester Ry. Co.*, 32 B. 223, 11 J. M. C. 134.

[11]*Reg.* v. *Great North of England Ry. Co.* 9 Q. B. 315, 2 Cox C. C. 70, 7 Eng. R. C. 466 (1846).

[12]Cyc. X, 1326 (14), 1227 (19). "Experience showed the necessity of modifying the old rules; and the decided tendency of modern decision has been to extend the application of all legal remedies, both civil and criminal, to corporations, and subject them thereto as in the case of individuals, so far as is possible." *Com.* v. *Pulaski Co.*, Agr. Assn., 92 Ky. 197, 17 S. W. 443. *Compare So. Express Co.* v. *State*, 1 Ga. App. 700, 52 S. E. 67.

[13]X, 1231, *England*—"Nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation which, as such, has no such duties, cannot be guilty in these cases." Lord Denman, C. J., in *Reg.* v. *Great North of England Ry. Co.*, 9 Q. B. 315, 2 Cox, C. C. 70, 7 Eng. Rul. Cas. 466. *United States—U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, where the court says: "Authority is still producible, however, for the dogma that corporations cannot be indicted for offenses which derive their criminality from evil intention (*Commonwealth* v. *Proprietors of New Bedford Bridge*, 2 Gray (Mass.) 339), nor for any crime of which a corrupt intent or malus animus is an essential ingredient (*State* v. *Morris & Essex Ry.*, 23 N. J. Law, 360)."

[14]*Federal*—"I think this is but the remanant of a theory always fanciful and in process of abandonment." Hough, J., in *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 835. *Massachusetts*—"We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil." *Telegram Newspaper Co.* v. *Com.*, 172 Mass. 293, 52 N. E. 445, 44 L. R. A., 159, 70 Am. St. Rep. 280.

[15]*Massachusetts—Telegram Newspaper Co.* v. *Com.*, 178 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280. *New York—People* v. *Star Co.*, 135 App. Div. 517, 120 N. Y. 498. *Tennessee—State* v. *Atchison*, 71 Tenn. 729; *Banner Pub. Co.* v. *State*, 16 Lea 176, 57 Am. Rep. 214.

[16]*State* v. *Passaic Co.*, Agr. Soc., 54 N. J. L., 260, 23 Atl. 680.

[17]*Com.* v. *Pulaski Co.*, Agr. Asso., 92 Ky. 197, 17 S. W. 442.

[18]*Federal—Joplin Mercantile Co.* v. *U. S.* 213 Fed. 926. *Georgia—So. Express Co.* v. *State*, 1 Ga. App. 700, 58 S. E. 67.

[19]*U. S.* v. *N. Y. Herald Co.*, 159 Fed. 296, quoting *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 835.

[20]Act of Congress of March 3, 1901, 31 U. S. Stats. at Large, Ch. 854, sec. 872.

minimum of $50.00. Were defendant a natural person some imprisonment would seem to be necessary. For the published matter, while not extensive, is demoralizing in the extreme and whoever is actually responsible for it made use of the protection afforded him by American registry. It will not do to permit that to become a means of evading adequate punishment. The number of American corporations in China has greatly increased of late, nearly forty having been organized under the Act of Congress of March 2, 1903. If all, or even a part, of these were to escape the proper consequences of the violation of law on the ground that the same were actually committed by Chinese employees the result would be serious indeed. If the increase of American corporations in China is to continue, and is to receive official encouragement, it is only upon the condition that they conform to our best national standards. And especially in a matter like this, where the morals of the Chinese public are so gravely affected, the standards can be none too high and the care exercised none too sedulous.

Nor is it a legal excuse that the directors of the defendant corporation did not personally know of the objectionable publication. In legal contemplation they were bound to know. As was said by Federal Judge Hough, of the southern district of New York, in a somewhat similar case:

"To fasten this species of knowledge upon a corporation requires no other or different kind of legal inference than has long been used to justify punitive damages in cases of tort against an incorporated defendant. If a corporation can corporately know that an engineer is an habitual drunkard,[21] it can even more surely know the ordinary contents of a newspaper, the publication of which is its sole reason for existence.[22]

The defendant cannot be imprisoned and the more serious portion of the penalty is, therefore, excluded from consideration. In view of this we agree with the District Attorney that the fine should be a substantial one, and we fix it at $250.00 U. S. currency, which sum, together with the costs of this prosecution, defendant is accordingly sentenced to pay.

[21] *Cleghorn* v. *N. Y. Central, etc., R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375.
[22] *U. S.* v. *New York Herald* Co., 159 Fed. 296.