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Recent Criminal Cases

RECENT CRIMINAL CASES

CRIMINAL LAW — HYPNOSIS AS FORCE IN ROBBERY. — [Alabama] Prosecutrix, chief witness for the state, met defendant and soon afterward, according to her testimony, he hypnotized her, or put her under a spell. At defendant's request prosecutrix obtained her bank books from her home two miles away, went to the banks unaccompanied, and drew out $290. She then returned to where the defendant was waiting and handed the money to him. Prosecutrix was not frightened when she drew out her money, and there was no contention that violence was committed upon her. Defendant was convicted of robbery, and appeals on the ground that the evidence does not sustain the charge. *Held:* Judgment reversed. The element of "fear," essential to robbery, is lacking, although defendant may be guilty of some other crime. *Louis* v. *State* (Court of Appeals of Alabama 1930) 130 So. 904.

The question as to just what acts constitute force or fear in robbery is one involving much judicial construction. Possibility of robbery by hypnosis presents that question in its most bizarre form.

There are very few cases involving hypnosis in crime to be found in the reports: Cf. *Sloan* "Hypnotism as a Defense to Crime." (1924) 42 Medico-Legal Journal 37; Note (1897) 40 L. R. A. 269. In the cases most frequently cited as authority on the subject of hypnosis, *People* v. *Worthington* (1894) 105 Cal. 166, 38 Pac. 689, and *People* v. *Ebanks* (1897) 117 Cal. 665, 49 Pac. 1049, it is obvious that no genuine question of hypnosis arose. Hypnosis was used as a desperate defense to a criminal charge in each case, and so the above mentioned cases can by no means be considered a judicial refusal to recognize hypnosis as a natural phenomenon. See *Sloan*, op. cit., supra, at p. 48.

In the instant case the court adopted the accepted common law definition of robbery as "the feloni-

ous taking of money, or goods of value, from the person of another, or in his presence, by violence to his person, or by putting him in fear." The court next accepted the modern definition of hypnosis from Webster's New International Dictionary as: "a name applied to a condition, artificially produced, in which the person hypnotized, apparently asleep, acts in obedience to the will of the operator." If the above premises are adhered to, it is clear that logically hypnosis is not the equivalent of the essential element of force or fear in the crime of robbery.

It is generally held that the use of some force in the taking of property or the putting of the injured party in fear is essential to constitute robbery: *Monaghan* v. *State* (1913) 10 Okla, Crim. 89, 134 Pac. 77, 46 L. R. A. (N. S.) 1149; *Jones* v. *Commonwealth* (1902) 112 Ky. 689, 66 S. W. 633, 57 L. R. A. 432; *State* v. *Parsons* (1906) 44 Wash. 299, 87 Pac. 349, 7 L. R. A. (N. S.) 566. However, force and fear often become little more than mental domination of the victim by the accused. Thus where defendant put a gun against a bank messenger's back and commanded him to drop the bag he was carrying, a conviction for robbery was sustained: *State* v. *Redmond* (1922) 122 Wash. 392, 210 Pac. 772. It may be questioned whether "fear" or merely a potent type of "suggestion" caused the bank messenger to drop the bag. See also *Sutton* v. *State* (1924) 162 Ark. 438, 258 S. W. 632. But filching money from a drunken victim's pocket while helping him home is not robbery: *People* v. *Jones* (1919) 290 Ill. 603, 125 N. E. 256; *Hall* v. *People* (1898) 171 Ill. 540, 49 N. E. 495. Likewise taking money from a victim by slipping a hand in his pocket while a confederate engages him in conversation has been held not to be robbery: *State* v. *Parker* (1914) 262 Mo. 169, 170 S. W. 1121, L. R. A. 1915C 121. Contra: *Snyder* v. *Commonwealth* (1900) 21 Ky. Law Rep. 1538, 55 S. W. 679 (Jostling by confederate).

In the instant case, through the application of the doctrine of constructive force there lies a logical pathway for the interpretation of hypnosis as force, sufficient to bring the case within the category of robbery, had the court so desired. Thus in a case in which the defendant drugged the bartender of a saloon, and while the latter was unconscious, took money from the cash register, the court affirmed a conviction for robbery on the ground that such taking involved constructive force, reasoning entirely by analogy from rape cases in which the female was drugged, or was otherwise made unable to resist: *State* v. *Snyder* (1919) 41 Nev. 453, 172 Pac. 364, L. R. A. 1918E 933. In a prosecution for seduction in which there was hypnosis of the female by the defendant, the court sustained a conviction on the ground that hypnosis of the victim was a destruction of the woman's power of resistance: *State* v. *Donavan* (1905) 128 Iowa 45, 102 N. W. 791. If hypnosis is considered as destroying a woman's power of resistance, and overcoming the power of resistance in such manner is constructive force, it would follow that hypnosis of a robbery victim is a form of constructive force. However, in the instant case, the court approached the question directly, and did not deem hypnosis a force element sufficient to constitute the crime of robbery.

E. W. OHRENSTEIN.

CRIMINAL LAW — TESTIMONY OF AN ACCOMPLICE.—[Illinois] Under an indictment for burglary, the evidence against defendants consisted entirely of the testimony of one Kleiner who had been promised by the State that his release on probation would be recommended. The trial court instructed the jury that "under the laws of the State of Illinois a defendant may be convicted upon the uncorroborated testimony of an accomplice; and if the jury believe from the evidence in this case, beyond a reasonable doubt, that the testimony given by the witness Kleiner is true, then they can act upon the same as true. The testimony of an accomplice, like all other evidence in the case, is for the jury to pass upon. The jury is further instructed that the witness Kleiner is an accomplice in this case." *Held:* on appeal, that the judgment be reversed on the ground that whether Kleiner was or was not an accomplice of the defendant was a question of fact for the jury; and that the jury should have been instructed that the testimony of an accomplice is subject to grave suspicion and should be considered in the light of all other evidence in the case and the influence under which the testimony is given. *People* v. *Smith* (Ill. 1931) 174 N. E. 828.

Where there is any conflict in the testimony as to whether a witness is or is not an accomplice, the issue must be submitted to the jury: *Elizando* v. *State* (1892) 31 Tex. Cr. 237, 20 S. W. 560; *Commonwealth* v. *Bisch* (1896) 165 Mass. 188, 42 N. E. 560; *Hargrove* v. *State* (1906) 125 Ga. 270, 54 S. E. 164; *People* v. *Swersky* (1916) 216 N. Y. 471, 111 N. E. 212. But where the facts are all admitted and no issue thereon is raised by the evidence, it then becomes a question of law for the court: *Territory* v. *West* (1908) 14 N. M. 546, 99 P. 343; *People* v. *Sternberg* (1896) 111 Cal. 11, 43 P. 201; *Cudjoe* v. *State* (1916 Okl.) 154 P. 500. Where there was no conflict as to the evidence it was held reversible error for the Court to submit such question to the jury: *State* v. *Carr* (1895) 28 Or. 389, 42 P. 215. There is nothing in the record of the principal case indicating that there was a conflict of evidence as to whether Kleiner was an accomplice, but it was held that the Court by deciding the case "expressed an opinion" on the most important question in the case: *People* v. *Smith,* supra at 830.

At common law one could be convicted upon the uncorroborated testimony of an accomplice: *King* v. *Attwood* (1788) 1 Leach 464. But it was competent for the court to caution the jury and point out the danger of such uncorroborated testimony: *Gray* v. *People* (1861) 26 Ill. 344; see *Rex* v. *Jones* (1809) 2 Camp. 131, 132. Such advice to the jury was merely a "counsel of caution" not a rule of evidence: 4 *Wigmore* "Evidence" (2d ed. 1923) sec. 2056; *State* v. *Potter* (1869) 42 Vt. 495; see *Cross* v. *People* (1868) 47 Ill. 152, 160; *Collins* v. *People* (1881) 98 Ill. 584, 589; *State* v. *Stebbins* (1860) 29 Conn. 462, 473. It was a matter of discretion with the trial judge and failure to caution the jury on such matter was not ground for a new trial: *Porath* v. *State* (1895) 90 Wis. 535, 63 N. W. 1061; see *Commonwealth* v. *Price* (1858 Mass.) 10 Gray 472, 71 Am. Dec. 668; *Cheatham* v. *State* (1889) 67 Miss. 335, 343, 7 So. 204; *State* v. *Hier* (1905) 78 Vt. 488, 492, 63 A. 877. Some states have by statute turned

the caution into a rule of law: 4 *Wigmore* "Evidence," supra; Ala. Code 1923, sec. 5635; Calif. P. C. (1872) 1111, C. C. P., sec. 2061, par. 4; Minn. Gen. St. 1923 C92, sec. 9903. Illinois has no statute but refusal of the Court, in giving such an instruction, to include a caution is reversible error: *Hoyt* v. *People* (1892) 149 Ill. 588, 30 N. E. 315. An instruction exactly the same as that in the principal case was held not to be erroneous because another instruction gave sufficient caution: *People* v. *Frankenburg* (1908) 236 Ill. 408, 86 N. E. 128. It is error to instruct the jury that the credibility of an accomplice is to be passed upon "as any other witness" although following this they are warned that the testimony of an accomplice must be received with great caution: *People* v. *Rongetti* (1930) 338 Ill. 56, 170 N. E. 14. Contra: *People* v. *Rees* (1915) 268 Ill. 585, 109 N. E. 473. Where the credibility of an accomplice was attacked it was held that the court was under a duty to take the case away from the jury: *United States* v. *Murphy* (1918 N. D. of N. Y.) 253 Fed. 404. It has been held that the jury should consider the elements of benefits or malice affecting the credibility of an accomplice: *People* v. *Harvey* (1926) 321 Ill. 361, 367, 152 N. E. 147, 149; *People* v. *Elmore* (1925) 318 Ill. 276, 290, 149 N. E. 286, 291.

Although conviction may be sustained upon the uncorroborated testimony of an accomplice such testimony is open to the gravest suspicion and the Court upon review will look at all the evidence and set aside the verdict if satisfied that there is a reasonable doubt of the defendant's guilt: *People* v. *Gammuto* (1918) 280 Ill. 225, 117 N. E. 454; *People* v. *Aiello* (1922) 302 Ill. 518, 135 N. E. 62; *People* v. *Pattin* (1919) 290 Ill. 542, 125 N. E. 248; *Cochran* v. *People* (1918) 175 Ill. 28, 51 N. E. 845.

ESTHER NEWTON.

GAMING — SLOT MACHINE AS A GAMBLING DEVICE—AMUSEMENT AS A THING OF VALUE.—[Iowa] This was an action to condemn as a gambling device, a slot-vending machine which, upon the deposit of a nickel, uniformly released one package of mints. In addition to the mints there were released, at times and in quantities determined only by chance, brass discs or tokens, stamped on one side, "no cash value," and on the other side, "good for amusement only". These tokens remained the property of the vendor and could be used only to replay the machine for the customer's sole amusement. Nothing of value was ever vended with the token, its only function and use being, upon deposit in the slot, to spin a set of reels on which were printed certain phrases, and which, when they stopped spinning, formed sentences purporting to give humorous advice to the player. *Held,* that this machine was a gambling device subject to condemnation under the statute: Iowa Code 1927, ch. 593, secs. 3198-13215 (prohibiting any "game of chance", "gambling scheme or device", or "gift enterprise" without definition of these terms): *State ex rel. Manchester* v. *Marvin* (Iowa 1930) 233 N. W. 486.

The court, holding that the fortune telling feature made the vending machine a gambling device, said, "The use of the discs had a manifest purpose. Such purpose was to stimulate the expectation of the buying patron that he

might receive something more than a package of mints. . . . Among the patrons of the machine, some, if not many of them, might prefer the feature of amusement rather than the package of mints. If these discs were made 'good' for admission to a movie or other place of amusement, their character as a gambling device would be easily recognized. Something akin thereto was their actual function as used." This comment will be concerned chiefly with the question whether a vending machine, by reason of having attached to it an amusement feature such as described above, thereby becomes a gambling device.

Since gambling was no crime at common law: *Bishop,* "Statutory Crimes" (3rd ed. 1901), sec. 846, the terms "gambling" and "gambling devices" have no settled and definite meaning and often statutes fail to define them: *State* v. *Mann* (1867) 2 Ore. 238. "To gamble is to play or engage in a game for money or other stake, and gambling, in its broadest and most generic sense, comprehends every species of game or device of chance": *Brill,* "Cyclopedia Criminal Law" (1922) sec. 1075. "A gambling device is any contrivance by the operation of which chances are determined whereby money or property is lost or won": *Brill,* supra, sec. 1091. A slot machine is a gambling device where the return to the player is dependent upon an element of chance: Case Note (1908) 20 L. R. A. (N. S.) 239. Even though the player in any event receives something, and even though that something is worth the money spent, so that the player cannot lose, yet the machine is a gambling device if the player stands a chance to win "something" in addition: Case Note (1925) 38 A. L. R. 73.

On most slot machines the customer stakes money, and the keeper or operator stakes money, candy, cigars, other merchandise, or trade checks. In the instant case, the stake was amusement—the operation of the fortune telling device. The customer was certain to receive his money's worth of mints. But the principal case held that the chance of winning this amusement made the mint-vending machine a gambling device.

Generally, the value of the thing at stake is immaterial; the statutes do not discriminate between large and small wagers. It was held to be gambling to play for "money or other thing of value" in *McBride* v. *State* (1897) 39 Fla. 442, 22 So. 711; "money or other thing" in *Allen* v. *Commonwealth* (1917) 178 Ky. 250; 198 S. W. 896. The term "property" is said to include "everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value . . .": *Wapsie Power Co.* v. *City of Tipton* (1923) 197 Ia. 996, 193 N. W. 643, 645.

The right of the player to operate a machine so as to cause it to display a card containing a funny saying or a prophecy is clearly a "thing" which apparently has an "exchangeable value". Therefore, a machine of chance upon which it may be won is technically a "gambling device": *Green* v. *Hart* (1930) 41 Fed. (2d) 855 (on the ground that the combination of the element of chance with the inducement of receiving "something" for nothing results in gambling and that such a saying or prophecy is "something"); *Rankin* v. *Mills Novelty Co.* (Ark. 1930) 32 S. W. (2d) 161

(a device with which the customer could play a symbolic game of base ball was held to be a thing of value as contributing to the amusement of the public).

The only possible ground for reaching a contrary result would be to regard the amusement vended as having so small a value that the law will not consider it—that is, "de minimis non curat lex". That position was apparently taken in *Overby* v. *Oklahoma* (Okla. 1930) 287 Pac. 796, where it was held that a slot machine similar to the one condemned in the instant case was not a gambling device, the tokens being regarded as having no value. In *Ross* v. *Goodwin* (1930) 40 F. (2d) 535, such a machine was condemned because of the peculiar statute, but the court intimated that the amusement feature was not a thing of value.

In spite of this judicial opinion to the contrary, the principal case is supported by the reasoning behind the statutes. The machine is an incitement to the gambling impulse, and in persons of little or immature intelligence the operation may have that effect. The argument that no serious injury to the morals of the community will result from such a machine is an argument for a legislature, not for a court. In theory such a device is no less an evil than a roulette wheel. The difference is one of degree, not of principle.

ABRAHAM FISHMAN.

CRIMINAL LAW — SEARCH OF AUTOMOBILE WITHOUT WARRANT — PROBABLE CAUSE — DISCLOSURE OF INFORMANT.—[Federal] On an indictment for a violation of the National Prohibition Act, the defendant, before trial, filed a motion to suppress the use of certain liquor as evidence on the ground that such evidence had been acquired by an illegal search and seizure. Two Federal prohibition agents, acting on information that the defendant would transport liquor in his automobile along a certain highway at a certain time, intercepted the defendant and, on his denial of transportation, searched his car and found a quantity of liquor, which was later sought to be introduced in evidence. The officers did not have a warrant and acted solely on the information received, taken together with the fact, known to one officer, that the defendant had previously been convicted of violating a liquor ordinance in a near-by city.

On trial, the officers were asked the name of their informant but refused to disclose it, following the policy of the Department forbidding such disclosures. *Held:* that the evidence was insufficient to establish probable cause for a search without a warrant; that the motion to suppress the evidence be sustained and order entered accordingly, reserving to the plaintiff the proper exceptions. In its opinion, the court pointed out that the testimony of the informant is not always necessary to establish probable cause, but that when officers search an automobile without a warrant, they may be required to disclose every element on which they relied to establish probable cause, and such a rule may reasonably include the source of any information received: *United States* v. *Blich* (D. C., D. Wyo., 1930) 45 F. (2d) 627.

The question in this case, whether a prohibition agent who searches an automobile for liquor, without a warrant, but on information which he believes to be credible, may be

required to disclose the name of his informant, is but a refinement of the broader questions as to the general right to search an automobile or other vehicle for transporting liquor, without a warrant, but on probable cause, and as to the elements going to establish probable cause. The proposition that an automobile suspected of being used in the transportation of intoxicating liquor may be searched by officers without a warrant, but on probable cause, is so well settled today that it is necessary to cite only the leading case: *Carroll* v. *United States* (1925) 267 U. S. 132, 45 Sup. Ct. 280. In this and in other cases, it has been pointed out that the search of an automobile or other vehicle is an exception to the general rule on search and seizure for the obvious reason that the mobile character of such a vehicle makes an immediate search imperative, before the object of search may be moved out of the jurisdiction: *Carroll* v. *United States,* supra; *Moore* v. *State* (1925) 138 Miss. 116, 103 So. 483; *Peru* v. *United States* (C. C. A., 8th, 1925) 4 F. (2d) 881. However, even where there is sufficient time to procure a warrant, a failure to do so does not invalidate the search: *Woodson* v. *State* (1929) 111 Tex. Cr. App. 348, 13 S. W. (2d) 102.

Various definitions have been given as to what constitutes probable cause for such a search; it has been held that probable cause is not restricted to information or knowledge gained by the officer in the exercise of his senses, but that cause may be based, in whole or in part, on information furnished to the officer from external sources; thus officers acted on probable cause when "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched": *Carroll* v. *United States,* supra. Belief based on the information furnished by a credible person has been held sufficient to constitute probable cause: *Moore* v. *State,* supra. Where the facts and circumstances lead the officer to a reasonable belief that the law is being violated, a search of an automobile, without a warrant, is justified: *Ash* v. *United States* (C. C. A., 4th, 1924) 299 F. 277. Some courts adopt a more exacting test and require that such information be received "from sources apparently so reliable that a prudent and careful person, having due regard for the rights of others, would act thereon": *People* v. *Kamhout* (1924) 227 Mich. 172, 198 N. W. 831. Still more stringent is the statutory requirement that where an officer searches without a warrant, he must have absolute personal knowledge that the law is being violated: *State* v. *Simmons* (1926) 192 N. C. 692, 135 S. E. 866 (P. L. 1923, c. 1, sec. 6). The determination of the presence or absence of probable cause has been held to be a judicial question: *Story* v. *City of Greenwood* (1929) 158 Miss. 755, 121 So. 481; *Hamilton* v. *State* (1928) 149 Miss. 251, 115 So. 427; *Moore* v. *State,* supra. Probable cause must exist before the search is begun, and no information acquired in the course of search is admissible to establish the existence of such cause: *Sellers* v. *Lofton* (1929) 149 Miss. 849, 116 So. 104; *Ford* v. *City of Jackson* (1929) 153 Miss. 616, 121 So. 278. The burden of proof that the search in

question is unreasonable and unlawful has been held to be on him who contends for the contrary: *United States* v. *Vatune* (D. C., 1923) 292 F. 497. In some States, a presumption exists by statute that the officer performed his official duty in a regular manner: *State* v. *District Court of Fourth Judicial District* (1925) 72 Mont., 213, 232 Pac. 201 (Rev. Codes 1921, Par. 10606).

Obviously, the most satisfactory ground for probable cause is the information gained by the officer through the exercise of his senses, and the courts have so held. Thus where the officer sees or smells the liquor, or sees the defendant acting in a suspicious manner, many courts have declared that such knowledge is sufficient to establish probable cause for a search without a warrant: *Smith* v. *State* (Tex. Cr. App., 1930) 31 S. W. (2d) 826 (officer saw liquor in automobile); *State* v. *Knudsen* (Wash. 1929) 280 Pac. 922 (same); *People* v. *Krahm* (1925) 230 Mich. 528, 203 N. W. 105 (same). But cf. *Hoyer* v. *State* (1923) 180 Wis. 407, 193 N. W. 89 (holding invalid a search made after a collision, where officer had no suspicion of a violation until he saw the liquor in the car). Actions of the driver of an automobile which may lead to the belief that the law is being violated have been held to constitute probable cause: *People* v. *Chyc* (1922) 219 Mich. 273, 189 N. W. 70 (officers saw the defendant intoxicated beside his car); *United States* v. *Rembert* (D. C., S. D. Tex., 1922) 284 F. 996 (officer saw driver of automobile was intoxicated); *Borders* v. *State* (Tex. Cr. App., 1930) 27 S. W. (2d) 172 (sight of containers, coupled with the sight of the defendant breaking bottles); *Murray* v. *State* (Tex. Cr. App., 1930) 29 S. W. (2d) 354 (same). But cf. *Sellers* v. *Lofton,* supra (holding that loud talking and laughing and driving automobile in a zigzag course, considered apart from other information or knowledge, does not constitute probable cause). See also *Emite* v. *United States* (C. C. A., 5th, 1926) 15 F. (2d) 623 (holding that the sight of an automobile heavily loaded and carefully driven over a bad road does not constitute probable cause). Where the officer smells liquor, either alone or in connection with other knowledge or information, some courts have held that this was good probable cause: *Hinds* v. *State* (Ind. 1930) 170 N. E. 539 (officer smelled liquor, in addition to possessing other information); *Gree* v. *State* (Ind. 1929) 168 N. E. 581 (same); *Beauchamp* v. *State* (Tex. Cr. App. 1930) 32 S. W. (2d) 476 (the smell of liquor, unsupported by other evidence); *State ex rel. Hanson* v. *District Court* (1925) 72 Mont. 245, 233 Pac. 126 (holding that smell and sight alone were sufficient).

As said above, the bases of probable cause are not limited to sensory knowledge, but may include information furnished to the officer from external sources. Here the question of establishing probable cause is rendered more difficult due to the infinite gradations in the type of information received, its reliability and sources, and similar considerations, and consequently, the decisions are not in accord. It appears to be well settled, however, that mere suspiciou alone will not constitute probable cause: *King* v. *State* (1928) 151 Miss. 482, 118 So. 413; *Karlen* v. *State* (Ind. 1930) 174 N. E. 89. See also *Hamilton* v. *State,* supra. The question is

often complicated by the fact that the officer acted partly on sensory knowledge and partly on information from an external source: *Faut* v. *State* (Ind. 1929) 168 N. E. 124 (holding that information, when supported by circumstances within the knowledge of the officer, is good cause): *State* v. *Kelly* (1928) 38 Wyo., 455, 268 Pac. 571 (same); *Burnett* v. *State* (Ind. 1929) 166 N. E. 430 (same). A very common situation appears to be where the officer is informed, by another officer or some other person, that a described car will be found at a certain place and time in the act of transporting liquor: *State ex rel. Brown* v. *District Court of Fourth Judicial District in and for Ravalli County* (1925) 72 Mont. 213, 232 Pac. 201 (information from another officer) *Hanger* v. *State* (1928) 199 Ind. 727, 160 N. E. 449 (same); *Burnett* v. *State,* supra (information from private individual); *Jenkins* v. *State* (Tex. Cr. App. 1930) 32 S. W. (2d) 848 (same). In many cases, the source of the information does not appear, the receipt of the information alone being stated: *People* v. *Deyo* (1930) 250 Mich. 692, 230 N. W. 918; *Malmin* v. *State* (1926) 30 Ariz. 258, 246 Pac. 548, *Houck* v. *State* (1922) 106 Ohio St. 195, 140 N. E. 112; *Johnson* v. *State* (1928) 111 Tex. Cr. App. 417, 13 S. W. (2d) 114. It has been held that such information must be furnished by a reliable or credible person: *Kirk* v. *State* (1929) 111 Tex. Cr. App. 388, 13 S. W. (2d) 106; *State ex rel. Brown* v. *District Court,* supra. Where then the information is from an anonymous source, as an anonymous telephone call, some courts have stated that this is not sufficient to establish probable cause: *State* v. *Knudsen,* supra; *Faut* v. *State,* supra. But where circumstances within the officer's own knowledge and observation support such anonymous information, probable cause may be established: *Faut* v. *State,* supra

The cases seem to indicate that where an officer has searched an automobile without a warrant, but on probable cause, the source of external information is frequently not disclosed and more frequently is not put in issue. Consequently, in this class of cases, there appear to be few decisions which treat directly of the disclosure of the source of information as a necessary element to establish probable cause. The rule in Mississippi may be cited as an example of the requirement that the officer must disclose the source of his information, including the name of his informant, on demand of the person accused: *Hamilton* v. *State,* supra; *McNutt* v. *State* (1926) 143 Miss. 347, 108 So. 721; *Ford* v. *City of Jackson,* supra; *Story* v. *City of Greenwood,* supra. A similar rule seems to be followed in the Federal courts, where it has been held that the court should have the opportunity to examine the information of the officer for the purpose of ascertaining its reliability and the fact whether such officer was justified in believing it: *United States* v. *Allen* (D. C., S. D. Fla. 1926) 16 F. (2d) 320; *Emite* v. *United States,* supra.

The instant case illustrates the very common situation where the officers are informed by some person that at a certain time and place they may find liquor being transported in a described automobile or by a described person. Here the defendant demanded to know the source of the information relied upon to institute the search without warrant, but the officers refused to

disclose it. In holding that the officers must disclose every element going to establish probable cause, and that such disclosure might reasonably include the name of the informant, the District Court was in accord with the prevailing rule in some States and in the higher Federal courts: *Emite* v. *United States,* supra; *United States* v. *Allen,* supra.

STUART C. ABBEY.

SUNDAY STATUTES—MOTION PICTURE SHOWS ON SUNDAY.—[Texas] Two decisions from Texas again present the problem of operating motion picture show entertainments on Sunday. In one case a sign in front of defendant's theater read: "Regular Admission—10c & 30c—Today Your Free Will Offering." Defendant was found guilty of violating the Sunday law, set out in the Texas Penal Code, articles 286, 287, in keeping open a place of public amusement for traffic on Sunday. *Held,* on appeal, that the conviction should be affirmed because the "free will offering" was a mere subterfuge to circumvent charging an admission fee. The opinion also stated that the Code sections are not unconstitutional in excepting certain businesses from the operation of the Sunday law. *Sayeg* v. *State* (Tex. Crim. App. 1930) 25 S. W. (2d) 865. By the second decision the defendant was fined for keeping a picture show open on the Sabbath. *Held,* on appeal, that the information charging the offense was sufficient. *Hodge* v. *State* (Tex. Crim. App. 1930. 32 S. W. (2d) 191.

There appear to be no decisions convicting persons for attending performances on the Lord's Day as patrons. Conviction of owners or employees operating motion picture shows on Sunday have been justified under several types of Sunday law statutes, but generally the accused persons have been held criminally responsible for violating general statutes prohibiting disturbing "the peace and good order of society by labor, works of necessity and charity" (or mercy) "excepted." Illinois Rev. Stat. (Cahill 1929) ch. 38, sec. 573, 574; (Smith-Hurd Annot'd 1930) ch. 38, sec. 549, 550. On what constitutes "necessity" or "charity" see (1926, 1927) 12 St. Louis Law Rev. 77-80, 123-138; (1923) 9 Va. Law Rev. 473-5 (violation is a question of fact for jury); (1922) 94 Central Law J. 12. Cases of convictions under this type of statute include: *Rosenbaum* v. *State* (1917) 131 Ark. 251, 199 S. W. 388, *State* v. *Ryan* (1908) 80 Conn. 582, 69 Atl. 536; *Gillooley* v. *Vaughn* (1926) 92 Fla. 943, 110 So. 653 (combined with municipal ordinance); *State* v. *Kelly* (1930) 129 Kan. 849, 284 Pac. 363; *State* v. *Blair* (1930) 130 Kan. 863, 288 Pac. 729; *Capitol Theater Co.* v. *Commonwealth* (1918) 178 Ky. 780, 199 S. W. 1076 ("profit for amusement"); *State* v. *Smith* and cases seq. (1921) 19 Okla. Cr. 184, 198 Pac. 879 ("servile labor"); *State* v. *Kennedy* (Mo. App. 1925) 277 S. W. 943. The Illinois statute, supra, appears not to have been invoked directly in a prosecution by the State as applying to Sabbath operation of a cinema show. Confusion in New York on the same type of statute is shown by Frohlich and Schwartz "The Law of Motion Pictures and the Theater" (1918) sec. 120. A conviction was obtained as late as *People ex rel. Bender* v. *Joyce* (1916) 161 N. Y. S. 771, 174 App. Div. 574, but now Sunday photoplay performers are permitted by statute: see *Wertheimer* v.

Schwab (1925) 210 N. Y. S. 312, 315, 124 Misc. 822. The exception of theaters and places of amusement from Sunday laws is also seen in *City of Bogalusa* v. *Blanchard* (1917) 141 La. 33, 74 So. 588.

Another type of statute is that which forbids Sabbath motion picture performances for pay; Sunday operation was within the prohibition of such statute in *Consolidated Enterprises Inc.* v. *State* (1924) 150 Tenn. 148, 263 S. W. 74; *State ex rel. Temple* v. *Barnes* (1911) 22 N. D. 18, 132 N. W. 215. Cf. *State* v. *Goethal* (1921) 44 S. D. 222, 182 N. W. 943 (statute held to prohibit only certain kinds of picture films on Sunday). A statute forbidding "theatrical performances" was found applicable in *Richards* v. *State* (1924) 110 Ohio St. 311, 143 N. E. 714, (1924) 11 Va. Law. Rev. 60-2. Contra: *State* v. *Penny* (1910) 42 Mont. 118, 111 Pac. 727 (strict construction of "theater"). Further cases of convictions are as follows: *Crawford* v. *City of Pascagoula* (1920) 123 Miss. 131, 85 So. 181; *State* v. *Rosenburg* (N. J. 1915) 115 Atl. 203, (1922) 2 Boston Univ. Law Rev. 214 ("disorderly house") see *Hogan* v. *Firth* (N. J. 1921) 115 Atl. 204 ("worldly business"); *State* v. *Reade* (1923) 98 N. J. L. 596, 121 Atl. 288 ("playhouse for gain").

The principal cases are only two of a numerous series from Texas arising under the Texas Penal Code, which forbids a place of public amusement to be open for traffic on Sunday: *Spooner* v. *State* (Tex. 1916) 182 S. W. 1121; *Zuccaro* v. *State* (1917) 82 Tex. Cr. R. 1, 197 S. W. 982, L. R. A. 1918B 354, 361n; *Hegman* v. *State* (1921) 88 Tex. Cr. R. 548, 227 S. W. 954; *Brockman* v. *State* (Tex. 1930) 28 S. W. (2d) 820, 29 S. W. (2d) 790; *Fulgham* v. *State* (Tex. 1930) 29 S. W. (2d) 791.

In addition to *State* v. *Penny*, supra, cases which indicate that Sunday picture shows are not in contravention of the local Sunday laws are: *State* v. *Morris* (1916) 28 Ida. 599, 155 Pac. 296 (religious lecture illustrated by pictures—conviction under statute against Sunday operation of "any theater" reversed); *State* v. *Chamberlain* (1910) 112 Minn. 52, 127 N. W. 444 (Sunday photoplay show is not within the Lord's Day statute against "public sports, exercises, and shows").

In conclusion, it would be well to mention that a defendant's criminal responsibility for operating a cinema performance on the Sabbath usually arises by way of indictment or information, but cases have appeared where an injunction against a Sunday show was sought on the grounds of nuisance. Injunctive relief was granted in *Albany Theater* v. *Short* (Ga. 1930) 154 S. E. 895. Contra: *State* v. *Barry* (Tex. 1919) 212 S. W. 304, 217 S. W. 957 (a dignified performance was neither a nuisance nor injury to property rights although the acts charged constituted a violation of the Penal Code; same sections as involved in the principal cases). However, courts are not in the habit of granting an injunction to enforce the criminal law: *Twiggar* v. *Rosenburg* (1916) 163 N. Y. S. 771; *Lyric Theater Co.* v. *State* (1911) 98 Ark. 437, 136 S. W. 174; *Carrell* v. *State ex rel. Little* (1911) 33 L. R. A. (N. S.) 325n.

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