Journal of Criminal Law and Criminology

Volume 24
Issue 4 *November-December*

Article 10

Winter 1933

Recent Criminal Cases

RECENT CRIMINAL CASES

Edited by the

STUDENT PUBLICATIONS BOARD OF
NORTHWESTERN UNIVERSITY SCHOOL OF LAW

HARRY R. HORROW, Case Editor NEWMAN F. BAKER, Faculty Adviser

CRIMINAL LIABILITY OF CORPORATION DIRECTORS.—[New York] Bernard K. Marcus and Saul Singer were charged with violation of N. Y. Penal Law sec. 305, for abstracting and misapplying funds of the Municipal Safe Deposit Company of which they were directors. Both defendants were also directors and officers (Marcus president and Singer vice president) of the Bank of United States which owned the stock of the safe deposit company. The Bank of United States had loaned to its affiliates (The Bankus, City Financial, and Municipal Financial Corporations) $12,000,000, or $8,000,000 too much under the Banking Law limiting loans to ten per cent of its capital stock. As directors and principal officers defendants also controlled and dominated these financial corporations. To reduce these excessive loans, the following scheme was pursued. The three safe deposit companies (defendants were directors of three all told) borrowed $8,000,000 from the Bank of United States and with this bought real estate equities of $4,800,000 from the financial corporations (these real estate equities having been valued at $8,000,000 by Saul Singer on a rapidly falling market). With the money paid to them for the real estate equities, the financial corporations reduced their indebtedness to the Bank of United States by $8,000,000 *by the use of the bank's own money.* The purchase of these equities by the deposit companies was not made directly, but by means of two dummy or "desk drawer corporations"—the Premier Development Corporation and the Bolivar Development Corporation. Defendants were found guilty. *Held:* on appeal, affirmed: *People* v. *Marcus* (1933) 261 N. Y. 268, 185 N. E. 97.

The defendants were convicted under a section of the New York penal law which makes it a felony for any officer, director, employee or agent of any corporation to which the banking law is applicable wilfully to misapply its credit: N. Y. Consolidated Laws (Cahill 1930) ch. 41 (Penal Law), sec. 305. Under this and a similar statute in Massachusetts (Mass. Cum. Statutes (1927) ch. 266, sec. 53a) intent to defraud is not made an essential element of the crime as contrasted with a similar but more limited law enacted by Congress for national banks: 12 U. S. C. A. sec. 592.

The court in applying this penal statute to the instant case proceeded on the theory that if the defendants *knowingly* used the assets of the deposit companies "for other than corporate purposes of proper and legitimate investment," even though they had no intention of cheating

or defrauding the companies, the statute had been violated. In other words Marcus and Singer subjected themselves to criminal liability by wilfully abstracting funds from the Municipal Safe Deposit Company, the actual abstracting being the loaning of money on questionable and over-rated real estate and the use of this money for purposes not those of the deposit companies.

The dissent pointed out that though the defendants may have been guilty of criminal negligence as to the Bank of United States, still they were not charged with such wrong. It was also pointed out that due to the inter-connection of the various companies, the defendants thought this plan would prevent disaster to the whole chain of banking institutions. Marcus and Singer claimed that they "acted in honest reliance upon the advice of counsel that such use of the moneys of the safe deposit company was a proper and legitimate use of its corporate funds." Thus, though this use may have been improper, they can hardly be accused of *knowingly* misapplying these funds and to sustain conviction under section 305 the People must prove this knowledge.

Since the statute requires a willful misapplication, the question is raised in view of this advice of counsel and the close interlinking of the various companies, whether the misapplication was willful. The dissent considered intent important in this connection and raised the question of the majority court's omission of intent from their interpretation of the statute.

It is interesting at this point to look to the more limited but similar federal law. Under this law two factors must be proved—the willful misapplication *and* the intent to injure or defraud: *Robinson* v. *U. S.* (C. C. A. 6th, 1929) 30 F. (2d) 25; 12 U. S. C. A. sec. 592. Nevertheless, the various interpretations of intent and misapplication under this statute do differ. Some courts hold advice of counsel as material, *Bishop* v. *U. S.* (C. C. A. 8th, 1926) 16 F. (2d) 410; or that the essence of the criminal misapplication is a conversion of the funds of the corporation to the defendant's or others' use, *Cooper* v. *U. S.* (C. C. A. 4th, 1926) 13 F. (2d) 16, *U. S.* v. *Britton,* 107 U. S. 655, 2 S. Ct. 512; or that there is a misapplication even though made in the hope that the bank's or corporation's welfare would be ultimately promoted *if* the necessary effect is or may be to injure or defraud the bank, *U. S.* v. *Breese,* (D. C. N. C. 1906) 131 Fed. 922, and intent may even be presumed from such disastrous effects: *Walsh* v. *U. S.* (D. C. Ill. 1909) 174 Fed. 615. In a very recent case, the federal court went so far as to say that "intent to defraud may be present even though pecuniary injury to the bank is not intended and doesn't occur": *Robinson* v. *U. S., supra* (intent to deceive higher officers of the bank concerning certain fictitious transactions constituted "intent to defraud"). These decisions justify the conclusion that under the federal law, with policy and purpose much the same as the New York statute, the instant case might reach a far different result.

In view of the violations of the banking law in connection with the Bank of United States, such as the excessive loans to the subsidiary corporations, the "desk drawer corporations" and the questionable value of the securities passed off on the safe deposit cimpanies, the conclusion seems justifiable that the

defendants well merited their sentence—this in spite of the significant but liberal dissent. However, in spite of the strict construction of this penal statute the question remains—is a decision like that of the instant case a sufficient prophylactic? When corporate directors will gamble with the life earnings of thousands on falling markets, or speculate with such funds with the conviction that the economic equilibrium can never be disturbed, it would seem that there are two constructive courses open, on the basis of public policy and considering the many interests involved. There should be either a stricter governmental supervision over corporate affairs, especially in the case of banks, or a more drastic application of the penal statutes now applicable. In the latter a revision of some with longer sentences might be very effective in impressing on directors the duties of trust and loyalty due a corporation and its stockholders.

FRANCIS ROBERT FITZSIMONS.

CRIMINAL LAW — ROBBERY — NECESSITY OF FELONIOUS INTENT.—[Mississippi] Defendant was convicted of the crime of robbing the prosecuting witness of a cow and a yearling calf. The defendant's dog had the habit of sucking eggs, and for a period of about two months prior to the alleged robbery, this dog had been making nightly raids on the witness' hen yard. Although repeatedly driven away, the dog returned and wandered near the witness' home where it was killed. On the following morning the defendant, armed with a shotgun, went with his two sons into a field where the witness was at work and accused the latter of killing the dog, which act was readily admitted. The witness was ordered to throw up his hands and the defendant thereupon had his sons search him, demanding that he either be paid twenty dollars or turn over a cow and yearling in payment for the loss of the dog. Being unable to pay the twenty dollars and fearing death or bodily injury, a cow and yearling were relinquished and driven away. A statement was made by the defendant that the property could be redeemed by the payment of twenty dollars. *Held:* on appeal, affirmed. The collection of an unliquidated claim for damages by force and violence is robbery: *Thomas* v. *State* (Miss. 1933) 148 So. 225.

However ludicrous the factual situation, this case serves to raise some fine distinctions between the crimes of robbery and larceny. Although robbery has been distinguished from assault, larceny, theft, and forcible trespass, still in a generic sense larceny and robbery are but different degrees of the same crime: *Montsdoca* v. *State* (1922) 84 Fla. 82, 93 So. 157, Note 27 A. L. R. 1291. At common law robbery has been defined as the felonious taking of goods or money from the person or presence of another by means of force or intimidation: *Deal* v. *United States* (1927) 274 U. S. 277, 47 S. Ct. 613; *People* v. *Covelesky* (1921) 217 Mich. 90, 185 N. W. 770; *O'Donnell* v. *People* (1906) 224 Ill. 218, 79 N. E. 639; *Langford* v. *Commonwealth* (1925) 209 Ky. 693, 273 S. W. 492; *Long* v. *State* (1852) 12 Ga. 293. The robbery statutes of most of the states are merely reassertions of this common law definition: *People* v. *Shuler* (1865) 28 Cal. 490, 492; *State* v. *Gorham* (1875) 55 N. H. 152, 166. Robbery under these definitions is obviously a mere aggravated form of larceny, the ag-

gravation consisting of the use of actual or constructive violence against the person of the victim: *Butts* v. *Commonwealth* (1926) 145 Va. 800, 133 S. E. 764; *Montsdoca* v. *State, supra.* In other words, robbery may be defined as a forcible larceny from the person: *People* v. *Clary* (1887) 72 Cal. 59, 13 Pac. 77; *State* v. *Wasson* (1905) 126 Iowa 320, 101 N. W. 1125; *Commonwealth* v. *Clifford* (1851) 8 Cush. (62 Mass.) 215. Still, it is a distinct crime, for there can be no robbery without violence and no larceny, including that from the person, with it: *Montsdoca* v. *State, supra.* A further distinction is found, however in the fact that larceny may or may not include a taking from the person or presence, whereas the crime of robbery must include such a taking: *Armstrong* v. *Commonwealth* (1921) 190 Ky. 217, 227 S. W. 162. Secrecy, therefore, cannot be an element in the crime of robbery: *State* v. *Powell* (1889) 103 N. C. 424, 9 S. E. 627. It thus becomes evident that while robbery is, like larceny an offense against property in that there must be an intent to appropriate the property permanently, it is also, and primarily, an offense against the person, with the result that any forcible taking of personal property from the possession of a person is robbery. Such a taking will be so considered even if the force employed is not actual, but is effective to put the victim in fear, and the property is taken from his mere custodianship: *People* v. *Carpenter* (1924) 315 Ill. 87, 145 N. E. 664; *Bowen* v. *State* (1915) 16 Ga. App. 110, 84 S. E. 730; *Langford* v. *Commonwealth, supra; Montsdoca* v. *State, supra.*

The instant case did not concern the more obvious distinctions suggested above, but raised the question of whether or not felonious intent is a necessary element of the crime of robbery. The rule has been constantly reiterated that no matter how vicious the taking, still the crime of robbery will not have been committed in the absence of a felonious intention to deprive the victim of his property permanently: *Kennedy* v. *State* (1922) 208 Ala. 66, 93 So. 822; *Butts* v. *Commonwealth, supra.* The absence of such intent has resulted in acquittal: *People* v. *McKeighan* (1919) 205 Mich. 367, 171 N. W. 500; *State* v. *Morris* (1924) 96 W. Va. 291, 122 S. E. 914 (in the course of an arrest); *In re Lewis* (1897) 83 Fed. 159 (in pursuance of a warrant even though it be insufficient); *Southerland* v. *Commonwealth* (1926) 217 Ky. 94, 288 S. W. 1051 (as a matter of self-protection); *Johnson* v. *State* (1923) 24 Okla. Crim. 326, 218 Pac. 179 (by mistake); *Commonwealth* v. *White* (1890) 133 Pa. 182, 19 Atl. 350 (as a joke). As a further extension of this rule, it has been held by the majority that it is not robbery to take property under a *bona fide* claim of right or title: *State* v. *Culpepper* (1921) 293 Mo. 249, 238 S. W. 801; *State* v. *Wasson, supra; People* v. *Sheasbey* (1927) 82 Cal. App. 459, 255 Pac. 836 (specific property); *People* v. *Hall* (1865) 6 Parker Crim. (N. Y.) 642 (property taken as security); *State* v. *Steele* (1929) 150 Wash. 466, 273 Pac. 742 (money recovered from an alleged thief). This rule has also been employed to free from a charge of robbery persons who have by force or intimidation proceeded to the collection of a debt honestly believed due: *State* v. *Halloway* (1875) 41 Iowa 200; *State* v. *Culpepper, supra; Butts* v. *Commonwealth, supra.* But *cf. Common-*

wealth v. *Stebbins* (1857) 8 Gray (74 Mass.) 492 (grabbing and retaining bank notes from a table in payment of a note long over due held larceny). Apparently, then, the element of force or intimidation is not a substitute for the intent to steal: *People* v. *Sheasbey, supra.* But under circumstances similar to the unusual situation found in the instant case it has been held by the two courts previously to consider the problem, that the rule should not be extended to protect from a charge of robbery one who by force or intimidation collected unliquidated damages: *Fannin* v. *State* (1907) 51 Tex. Crim. 41, 100 S. W. 916, Note 10 L. R. A. (N. S.) 744; *Tipton* v. *State* (1923) 23 Okla. Crim. 86, 212 Pac. 612, Note 31 A. L. R. 1074. *Cf. People* v. *Smith* (1863) 5 Parker Crim. (N. Y.) 490. In support of this rule the defendant in the principal case was found guilty of robbery despite the fact that it was acknowledged by the court that he had no felonious intent. The reason for refusing to extend the rule of the *Culpepper* case, *supra,* was admittedly due to the fact that the prosecuting witness' civil liability was questionable and in any event he would only have been liable for unliquidated damages.

Thus in the light of the majority rule that the element of force or intimidation is not a substitute for the intent to steal, the *Fannin* and *Tipton,* as well as the instant case, would appear to be contrary to the common law as well as the statutory doctrines of robbery, with the possible exception of some suggestions contained in certain *obiter dicta* of Justice Clerke in the *Smith* case, *supra.* Although it would seem necessary in the light of pure logic, or the doctrine of *stare decisis* to adhere to the majority rule, nevertheless, it is quite apparent that there was in these cases, such unreasonable conduct on the part of the defendant in view of questionable liability of the victim that the courts might be justified in meting out the severe punishment accompanying a conviction for robbery. The policy of the law has never been to give any man the right to self-redress except in instances of self-defense, recaption and reprisals, entry on lands, and the abatement of nuisances. In the only two instances of self-redress which relate to the repossession of property, the law limits the right to cases where it can be exercised without force or terror or any breach of the peace. Further to allow such conduct to pass unmolested is, in effect, to take from a debtor his rights, whereas he may, as in the instant case, have a defense to the claim the sufficiency of which can be properly determined only by tribunals appointed by the law. Even from the standpoint of the logic which requires intent to constitute the crime of robbery, it would also be unjust to allow an alleged creditor to recover his demand without requiring him to prove it, where it is, or may be, disputed. To allow such a practice will deprive more debtors of their rights than cause injuries to creditors. Would, for instance, the law allow a man to take money furtively out of the desk of his alleged debtor and apply it to the payment of his debt? He has, in effect, the opportunity of doing this under the majority rule, where he is excused when his object is to get that which he honestly believes his due. It is submitted, however, that his lack of felonious intent would be as positive as in the present case. The only difference would be that in the one case he obtained the money

by means which the law, in most cases, calls justifiable collection of a debt, while in the case supposed, he would have obtained it by means which the law, in ordinary cases, calls larceny, and no doubt he would be convicted of larceny in the supposed case.

ROBERT T. WRIGHT.

VENUE IN CONSPIRACY CASES.—[Illinois] The appellant was convicted in the criminal court of Cook County of conspiracy to obtain money by false pretenses. It was admitted that he entered into the conspiracy in St. Louis, Mo., and later met with another conspirator in Springfield, Ill., to do the acts mentioned in the indictment. A co-conspirator, Blaine, consummated the crime in Cook County. The appellant admitted encouraging, aiding and abetting the activities of Blaine in Cook County, but argued that he was only an accessory who was not present, and therefore not subject to the jurisdiction of a court of Cook County. He relied on sec. 4 of div. 10 of the criminal code, Ill. Rev. Stat. (Smith-Hurd 1931) ch. 38, sec. 703; "The local jurisdiction of all offenses, not otherwise provided by law, shall be in the county where the offense was committed." He contended that since the conspiracy was committed in one county and the overt act was committed by Blaine in another (Cook) the charge of conspiracy cannot be legally laid in Cook County against him as one of the conspirators as he was not in Cook County in furtherance of the conspiracy, and therefore the proof failed to support the indictment that two or more persons committed the crime of conspiracy in Cook County. *Held:* the overt act of one of the co-conspirators in Cook County gave the court jurisdiction over all the conspirators, even though they had not appeared in that county in furtherance of the conspiracy: *People* v. *Miller* (1933) 352 Ill. 537, 186 N. E. 180.

The crime of conspiracy is generally considered to be founded upon an unlawful agreement, and no act in furtherance of the unlawful design is necessary to complete the offense: *People* v. *Drury* (1929) 335 Ill. 539, 167 N. E. 823; *People* v. *Glassberg* (1917) 326 Ill. 379, 158 N. E. 103; *People* v. *Blumenberg* (1915) 271 Ill. 180, 110 N. E. 788. Logically, then, the county where the conspiracy was formed would have jurisdiction. But since conspiracy is in the nature of a continuous offense, any act of furtherance of the unlawful design is a renewal of the offense: *People* v. *Drury* (1929) 335 Ill. 539, 167 N. E. 823, and venue may be laid as to any or all conspirators in the county in which the overt act was done by any of them: 2 *Wharton,* Criminal Procedure (12th ed. 1922) sec. 1666. Thus a double jurisdiction arises in which a venue of conspiracy may be properly laid in either the county where the unlawful agreement was made or in the county where the overt act was done: *Yenckichi* v. *U. S.* (C. C. A. 9th, 1933) 64 F. (2d) 73; *Commonwealth* v. *Barnes* (1932) 107 Pa. 46, 162 Atl. 670; *Commonwealth* v. *Saul* (1927) 260 Mass. 97, 156 N. E. 679. In cases where the overt act was done in a foreign country the district court where the conspiracy was proved had jurisdiction: *Horwitz et al.* v. *United States* (C. C. A. 5th, 1932) 63 F. (2d) 706. Where the conspiracy was committed in a foreign country, the district court where the overt act was proved had jurisdiction: *United*

States v. *Ford* (1927) 273 U. S. 593, 47 S. Ct. 531. The rule allowing double jurisdiction is a practical one inasmuch as it is often impossible for a grand jury to find just where the conspiracy was formed. Its constitutionality has been settled in *Hyde* v. *U. S.* (1912) 225 U. S. 347, 32 S. Ct. 793; *Armour Packing Co.* v. *U. S.* (1908) 209 U. S. 56, 28 S. Ct. 474, where it has been said that where a continuing offense is committed in more than one district, the Sixth Amendment does not preclude a trial in any one of those districts. The constitutional requirement is that the crime shall be tried in the state or district where the party committing it happened to be at the time. This distinction is brought out in the case of *In Re Palliser* (1890) 136 U. S. 257, 265, 10 S. Ct. 1034, and reaffirmed in the *Hyde* case.

Another question arises when the conspirator is tried in the county where the overt act was done, but where this particular conspirator had never been physically present in furtherance of the conspiracy. Can he be deemed present even though it was actually his co-conspirator who had done the act? In conspiracy at common law, each conspirator was responsible in any place where any overt act by one of his co-conspirators was done: *Ex parte Rogers* (1881) 10 Tex. Cr. App. 655; *Commonwealth* v. *White* (1877) 123 Mass. 430. In the Federal courts it has generally been held that he would be *constructively* present by virtue of the act of his co-conspirator: *Easterday* v. *McCarthy* (C. C. A. 2nd, 1919) 256 Fed. 651; *Hyde* v. *U. S., supra.* In the *Hyde* case the majority held that there may be a constructive presence distinct from a personal presence by which a crime may be consummated, and an overt act of one is the act of all. Although four justices dissented, led by Holmes, the majority holding has been followed: *Burns* v. *U. S.* (C. C. A. 8th, 1922) 279 Fed. 986; *Morris* v. *U. S.* (C. C. A. 8th, 1925) 7 F. (2d) 789; *Easterday* v. *McCarthy* (C. C. A. 2d, 1919) 256 Fed. 651.

By a federal statute (U. S. C. tit. 18, sec. 88) an overt act is necessary to complete the federal offense of conspiracy, whereas most states follow the common law in holding that the unlawful agreement in itself completes the offense. The distinction does not, however, affect the holdings on venue of conspiracy cases, because, as has been pointed out, venue may lie in either the district where the conspiracy was committed or where the overt act was done.

Mr. Justice Holmes in his dissenting opinion in the *Hyde* case, pointed out serious objections to the use of the fiction of constructive presence to draw jurisdiction to the place of the overt act. Although by federal statute the overt act is necessary to complete the offense, it is in fact no part of the conspiracy: *Hyde* v. *Shine* (1905) 199 U. S. 62, 76, 25 S. Ct. 760. Thus, reasons Mr. Justice Holmes, it should not be said that an act constituting no part of the crime charged, draws jurisdiction to the place where it is done. If the conspiracy is present wherever an overt act is done, it may be at the choice of the government to prosecute in any one of many states, in none of which the conspirators have been. This is a hardship on the conspirators, amounting to a grievous wrong.

But in view of the present day need for every effective weapon to combat organized crime, the use of double jurisdiction in conspiracy

cases, is not to be severely condemned. In the hands of the prosecuting attorneys conspiracy charges have been very effectively used as a "catch-all" device for every type of crime. Everybody from corrupt bank officials to labor disturbers are being brought to justice by the use of this drag-net offense. To restrict its use would be to hinder greatly the administration of criminal law. In practice, prosecution of conspirators is greatly facilitated by allowing it to take place in either the jurisdiction of the crime or of the overt act. It may be true that it is a hardship on the conspirators to be subject to the jurisdiction of as many states as there were overt acts committed, but to hold otherwise would be to say that once the place of conspiracy is concealed, as it may be, they may execute their crime in every state in the Union and defeat punishment in all. Rather should the conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs.

Theoretically, a conspirator may be convicted in a state court for his overt act, and after serving his sentence, may in turn be convicted of the same offense in each and every other state where other acts were committed, as well as in the state where the conspiracy was originally formed. In no state could he plead a former conviction in another state in bar of his prosecution, because the overt act in each state constitutes a new offense in the eyes of the state where it was committed. Thus he might be convicted for the same offense in fact, in twenty states and serve sentences in all. A state court may take cognizance of a former conviction in another state for actually the same offense, but in the absence of statute there is nothing to compel this to be done. As a matter of practice, it is doubtful whether a prosecuting attorney, knowing the conspirator had previously served a prison term in another state for the same offense, would prosecute. Yet there is nothing to stop him, and this fact makes it a serious consideration whether Mr. Justice Holmes and the minority might not be right in their belief that jurisdiction should not follow the overt act.

STANLEY A. TWEEDLE.

DOUBLE JEOPARDY. — [Pennsylvania] The defendant Simpson was tried on an indictment charging murder in the first degree. The jury had been sworn, and without the accused's acquiescence, or any apparent cause, the jury was discharged on the motion of the state. Later Simpson was charged with murder in the second degree and voluntary manslaughter upon the original indictment stating (verbatim) the same set of facts. The defendant entered a plea of former jeopardy, and the prosecution demurred. The lower court overruled the demurrer from which an appeal was taken. By virtue of the fact that the appeal involved purely a question of law the state had the right of appeal. *Held:* on appeal, reversed. Where the jury is discharged in a capital case before rendering a verdict, the state may subsequently try the defendant on the same indictment for a degree of homicide less than murder in the first degree: *Commonwealth* v. *Simpson* (1933) 310 Pa. 380, 165 Atl. 498.

The question that confronted the Supreme Court of Pennsylvania was whether or not the defendant may be tried again upon the same

indictment charging murder, when the state strives not for a conviction for murder in the first degree, but for murder in the second degree or manslaughter. The majority conceded that Simpson could not be reindicted on the same set of facts for first degree murder, as he then would again be in jeopardy of life: *Hilands* v. *Commonwealth* (1885) 111 Pa. 1, 2 Atl. 70. Pennsylvania has given the double jeopardy provision of the constitution of that state a singular construction, holding that this provision shall apply only to capital punishment cases: *Commonwealth* v. *Cook* (1821) 6 Serg. & R. 577; *McCreary* v. *Commonwealth* (1857) 29 Pa. 323. Although the Pennsylvania provision is not unlike that of the Federal Constitution: "No person shall, for the same offense be twice put in jeopardy of life or limb," *Pennsylvania Constitution* Art. I, Sec. 10, the courts of that state have held that language of this provision must be plainly and strictly construed. Under the Pennsylvania Criminal Code the only capital case is that of murder in the first degree, hence the former jeopardy plea applies only to this one offense wherein under present law, life or limb is placed in jeopardy, and as was suggested in the present case, "if at some future time the punishment for murder should be made life imprisonment in all cases, the clause in question would be of no service." The United States Supreme Court in construing the double jeopardy provision of the Federal Constitution has extended the protection of this clause to all criminal offenses: *Ex Parte Lange* (1874) 18 Wall. 163; *Berkowitz* v. *United States* (C. C. A. 3d. 1899) 93 Fed. 452; *Murphy* v. *United States* (C. C. A. 7th 1923) 285 Fed. 801. The majority of the states are in accord with the Federal view: *City of St. Paul* v. *Stamn* (1908) 106 Minn. 81, 118 N. W. 154; *Brink* v. *State* (1885) 18 Tex. Cr. App. 344; *Hazelton* v. *State* (1915) 13 Ala. 243, 68 So. 715; *People* v. *Miner* (1893) 144 Ill. 308, 33 N. E. 40. "The plea of once in jeopardy on a statutory bar applies to all misdemeanors as well as felonies": *Ex parte Harron* (1923) 191 Cal. 457, 217 Pac. 728. Following the rationale of its precedents the court in the instant case utilized this construction to modernize criminal law procedure. It openly declared that the law must throw off unnecessary steps in order to keep apace with organized crime, reasoning that on a trial for first degree murder, the jury being discharged before verdict, the defendant should not be set scot free, for his offense which, as the proofs showed rose no higher than manslaughter; whereas if the indictment *in the first instance* had been drawn for manslaughter, the court could have achieved a successful conviction.

A vigorous and sharp dissent was directed against the majority. The minority, even though cognizant of the construction of the jeopardy provision, objected strongly to its application to this particular case, holding, "Heretofore this court has uniformly held that when a defendant is called to answer an indictment charging murder, and the jury is sworn, and then, before verdict is rendered, the jury is, without the defendant's consent and without absolute necessity, discharged, the defendant cannot again be tried on the same indictment if he has interposed the plea of former jeopardy." A person having been acquitted on an indictment, it is not permissible to use this same indict-

ment, with the same facts, to reindict him again: *Hilands* v. *Commonwealth* (1885) 111 Pa. 1, 2 Atl. 70. In *Commonwealth* v. *Fitzpatrick* (1886) 121 Pa. 109, 15 Atl. 466, where the jury had been discharged for failing to agree, the court held that this was a bar to a subsequent trial on the same indictment.

The majority opinion does not clearly define its reasoning, and it can be said that other jurisdictions will not follow the principle of allowing the discarded indictment to be used on a subsequent charge. "Where a person is prosecuted for an offense and acquitted generally, . . . , he shall not again be prosecuted for any offense, based on the same act, of which he could have been convicted on the first prosecution." *Preliminary Draft Number 2; Model Code of Criminal Procedure* (*Double Jeopardy*) Sec. 8. In section 10 of this code it is said, "Where proof of the same facts would be sufficient to convict a person of either of two offenses, an acquittal or conviction of such person of one of such offenses is a bar to a prosecution of such person for the other of such offenses based on the same facts." Likewise in the case of *State* v. *Messervery* (1916) 105 S. C. 254, 89 S. E. 662, two indictments charging the same offense were drawn against the accused by different counties. The defendant asked that he be protected against the indictment of county B, as he was on trial on indictment by county A. The court said, "If he wanted protection from the indictment in Colleton county (B) he now has it, in former jeopardy." A review of the decisions throughout the United States shows a general affirmance of the statement of the *Model Code of Criminal Procedure, Sec. 8, supra: People* v. *Dugas* (1923) 141 N. E. 769, 310 Ill. 291; *Commonwealth* v. *Weston* (1922) 241 Mass. 131, 135 N. E. 465. No decisions can be found in accord with the majority opinion of the present case.

On the question of whether or not the discharge of a jury for disagreement, without the accused's consent, shall be a bar to a subsequent trial for the same offense, the majority of the states and the Federal Courts are not in harmony with the Pennsylvania holding. In *Commonwealth* v. *Fitzpatrick* (1886) 121 Pa. 109, 15 Atl. 466, the court held that in consideration of the fact that the jury had been out for five days and was discharged, such an action constituted a bar to a subsequent trial for the same offense. Accord: *State* v. *Nelson* (1896) 19 R. I. 467, 33 L. R. A. 559. The Federal Courts hold that such a discharge of a jury shall not be a bar: *United States* v. *Perez* (1824) 22 U. S. 9. Accord: *Dobbins* v. *State* (1863) 14 Ohio St. 493; *Commonwealth* v. *Bowden* (1813) 9 Mass. 494; *Dreyer* v. *People* (1900) 188 Ill. 40, 58 N. E. 687.

The Supreme Court of Pennsylvania was faced with a difficult decision. Its bench was cognizant of the dilatory and unnecessary complexities of criminal law procedure. In its zeal for reform it felt, ". . . our present construction comports more with sound public policy and with the necessity, now existing in dealing with lawbreakers, for a reasonable interpretation of a criminal law." However, it is very doubtful whether the other states will follow the precedent set by Pennsylvania. By virtue of the fact that other jurisdictions have not followed the Pennsylvania construction of the double jeopardy provi-

sion, it seems rather obvious that this even more restricted application of that provision will be championed by Pennsylvania alone.

HAROLD J. HODGSON.

CONFIDENCE GAME — CONDUCT OF PROSECUTING WITNESS AS A DEFENSE. — [California] Defendant Lewis ingratiated himself into the company of one Stine. In a hotel in Oakland defendant Hall appeared, and was introduced to Stine by Lewis as a betting commissioner for a wealthy man, and the possessor of a method by which he secured infallible tips before each race. Lewis, using Hall's ticket to a fictitious "exchange," and his gratuitous advice on the horses, returned several times with sums of money which purported to be his winnings. Finally Hall gave him a faked credit slip for $50,000 and Lewis reported, after a time, that he had won $153,000, but would have to produce $50,000 in cash before collecting the winnings, in order to demonstrate that he could have honored the wager in the event he had lost. Stine agreed to contribute $10,000 into a pool of $50.000 to gain a share of the winnings. Later he grew suspicious, and informed the police. The defendants were convicted of attempt to commit grand theft and conspiracy to commit the same. *Held:* on appeal, affirmed. There is no principle of law which bars a state from prosecuting a criminal because the complainant is a *particeps criminis: People* v. *Hall* (Cal. 1933) 23 P. (2d) 783.

The defendant sought reversal on the ground that "neither the law nor public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness, as between each other, in their dishonest practices," citing an old New York case to that effect: *McCord* v. *People* (1848) 46 N. Y. 470. But the court denied the contention on the ground that the acts and conduct of the prosecuting witness can never bar the state from the prosecution of a criminal: *People* v. *Martin* (1894) 102 Cal. 558, 36 Pac. 952.

The rule in the *McCord* case has often been adverted to under circumstances similar to those in the instant case, and has been strongly criticised. It has been pointed out, in *People* v. *Tompkins* (1906) 186 N. Y. 413, 79 N. E. 326, that the rule was based upon an earlier case wherein the assumption was entertained that the New York law rested upon and was limited to the conditions recited in Stat. 30 Geo. II, chap. 24—that the law is "designed to reach the evil-disposed persons whose stratagems . . . have enabled them to obtain money to the great injury of industrious families and to the manifest injury of trade and credit": *People* v. *Stetson* (1848) 4 Barbour's Reports 151.

This rather righteous limitation on the law of false pretences has also been entertained in Wisconsin in *State* v. *Crowley* (1876) 41 Wis. 271, and was adopted as recently as 1915 in Oregon: *State* v. *Alexander* (1915) 76 Ore. 329, 148 Pac. 1136. However, most jurisdictions are in agreement with the theory governing the case under discussion limiting the application of the *McCord* case to civil actions: *People* v. *Koscielniak* (1930) 257 Ill. App. 514; *State* v. *Wolf* (1926) 168 Minn. 505, 210 N. W. 589; *People* v. *Watson* (1889) 75 Mich. 582, 42 N. W. 1005; *Cunningham* v. *State* (1897) 38 Atl. 847, 61 N. J. L. 67.

Granting that the principle of the

McCord case might have possessed some utility in a less complicated era when the presumption that every man knows the law was indulged more completely, by warning criminals that the law would not punish those who profited by their folly, it would seem to have been based upon a legal misconception from the first. The obvious distinction between civil suits and indictments for breaches of the criminal law was apparently overlooked. The doctrine, applied properly in a civil suit between rogues for contribution or reimbursement, has no application in a criminal prosecution against one of several wrongdoers for a crime committed against a fellow-criminal, or against one whose hands are soiled, at least, by having been involved in an illegal transaction connected with the crime. The wrong is perpetrated against the peace of the state. The prosecuting witness is to be regarded as an instrument to aid the state in punishing a wrongdoer against its laws, not as an individual seeking vengeance with the state as an impartial referee.

More important than any purely theoretical consideration, practical necessity censures the rule. At a time when every resource must be utilized to keep the criminal at bay, it would give him an unwarranted protection by tying the hands of the prosecution. It grants virtual immunity to the confidence man provided the scheme by which his victim is fleeced involves the victim's own turpitude. It is a challenge to him to perfect a plan by which the victim, perhaps a future prosecuting witness, will be sufficiently besmirched to protect him. Nothing could be more carefully designed to encourage the criminal mind.

CLARKE J. MUNN, JR.