Journal of Criminal Law and Criminology

Volume 24
Issue 5 *January-February*

Article 9

Winter 1934

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

VAGRANCY STATUTES — CONSTITUTIONALITY OF "PUBLIC ENEMY" LAWS.—[Michigan] A Michigan statute provides that: "Any person who engages in an illegal occupation or business . . . shall be deemed a disorderly person. Proof of recent reputation for engaging in an illegal occupation or business shall be prima facie evidence of being engaged in an illegal occupation or business": Mich. Pub. Acts of 1931, No. 328, §167. Defendants were charged with engaging in an unlawful occupation and business in that they had combined and confederated with others for the purpose of violating the statutes against extortion, the statutes governing the carrying of concealed weapons, the robbery statutes, and the murder statutes of Michigan. Police officers testified that the defendants associated with men having the reputation of being murderers, "stick-up" men, bootleggers and robbers, and that the defendants themselves had the reputation of being bootleggers, "stick-up" men, robbers and murderers. After trial by jury defendants were convicted and sentenced to imprisonment for ninety days, that being the maximum penalty. *Held:* on appeal, reversed. The provision of the statute is unconstitutional as it deprived the accused of the constitutionol presumption of innocence until proved guilty: *People* v. *Licavoli* (Mich. 1933) 250 N. W. 520. (Four to three decision.)

The principle is well established that there is no vested right in a rule of evidence, and apart from constitutional objections the legislature has the power to alter or create rules of evidence: *Board of Commissioners* v. *Merchant* (1886) 103 N. Y. 143, 8 N. E. 484; 2 *Wigmore,* "Evidence" (2d. ed. 1923) §1356. Such legislation may go so far as to permit the establishment of *prima facie* presumptions against the accused, *State* v. *LaPointe* (1924) 81 N. H. 227, 123 Atl. 692, but the legislature may not arbitrarily create a presumption of guilt against the accused: *Manley* v. *Georgia* (1928) 279 U. S. 1, 49 S. Ct. 215; *Hammond* v. *State* (1908) 78 Ohio St. 15, 84 N. E. 416; *State* v. *Kartz* (1882) 13 R. I. 531; *Dick* v. *Commonwealth* (1914) 159 Ky. 761, 161 S. W. 496.

In the instant case the majority of the court stated in its opinion: "If proof of reputation for engaging in an illegal occupation or business is constituted *prima facie* evidence of being engaged in an illegal occupation or business, and, without more, establishes guilt, then we are all agreed that the statute is unconstitutional because violative of 'due process of law.' We are divided, however, upon whether the statute so provides." The majority

adopted the view that the Michigan statute established a conclusive rule of evidence, and as such was a denial of "due process," while the minority was of the opinion that the proof of reputation established should be corroborated by further competent testimony.

The conflicting views indicated in the opinions of the instant case are but illustrative of the variance of opinion in cases dealing with statutes of a similar nature. The objection most often directed against the validity of statutes raising those presumptions of a *prima facie* character is the broad one, that they constitute deprivations of due process. See *Brosman,* "The Statutory Presumption" (1930) 5 Tulane L. Rev. 17, 178. No doubt this objection would be valid if such a statute operated to place the *burden of proof* on the defendant, but the weight of opinion, however, appears to be that, considered as a rule of evidence the effect of which is merely to transfer to the party against whom the presumption operates at least some *burden of producing evidence,* the statutory presumption in the usual case should not be considered to be a deprivation of due process. Nevertheless, the contrary conclusion has been reached in a number of cases: *State* v. *Beswick* (1883) 13 R. I. 211; *Hammond* v. *State, supra; Manley* v. *Georgia, supra.* And at least the tendency of the courts in more recent times has been to place a limitation on the power of the legislature to declare that proof of one fact or group of facts shall constitute *prima facie* evidence of the main or ultimate fact in issue, by holding that such legislation is valid only if there is a rational connection between what is proved and what is to be inferred: *Mobile, Jackson & K. C. R. R.* v. *Turnipseed* (1910) 219 U. S. 35, 31 S. Ct. 136; *Griffin* v. *State* (1914) 142 Ga. 636, 83 S. E. 520; *People* v. *McBride* (1908) 234 Ill. 146, 84 N. E. 865; *Manley* v. *Georgia, supra.* This doctrine is contrary to that so strongly contended for by Professor Wigmore, *i. e.,* that "if the legislature can abolish rules of disqualification of witnesses and grant the rule of discovery from an opponent, it can shift the burden of producing evidence. If the legislature can make a rule of evidence at all, it cannot be controlled by judicial standards or rationality": 2 *Wigmore,* "Evidence," *op. cit. supra* §1354. This doctrine was generally accepted by the courts until 1910. See *Keeton,* "Statutory Presumptions — Their Constitutionality and Legal Effect" (1931) 10 Texas L. Rev. 34. The decision in the *Turnipseed* case, *supra,* in that year and the recent case of *Manley* v. *Georgia, supra,* have apparently and effectively wrought a vital change in the latter viewpoint.

The purposes for which the Michigan statute was enacted, namely, greater facilitation in the prosecution of habitual criminals, racketeers and hoodlums, all of them so-called "public enemies" who had been successfully evading both prosecution and conviction, and the making more certain their conviction and punishment, were also the moving factors in the passage of the recent amendments to the vagrancy statute of Illinois, Ill. Rev. Stat. (Smith-Hurd 1933) ch. 38, §578, and the disorderly conduct statute of New York. The New York amendment provides that one is guilty of disorderly conduct who "is engaged in some illegal occupation or who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful

resorts': Laws of N. Y. (1932) ch. 58. The Illinois statute, on the other hand, states that "all persons who, not being persons authorized by law to carry concealed upon or about their persons, deadly weapons, are reputed to be habitual violators of the criminal laws of this state or of the United States . . . and all persons who are reputed to act as associates, companions or bodyguards of such persons reputed as aforesaid to be such habitual violators of the criminal laws of this state . . . shall be deemed to be and are declared to be vagabonds." The statutes of all the other states dealing with vagabonds and vagrants generally include such persons as common gamblers, drunkards, prostitutes, beggars, burglars and idle or dissolute persons. Some go so far as to include persons *known* to be pickpockets or thieves. The Rhode Island vagrancy statute, R. I. Pub. Laws (1932) ch. 1902, p. 169, includes idle persons who are of *doubtful* reputation and have no visible means of support, and the South Dakota statute, S. Dak. Sess. Laws (1931) p. 101, establishes a *prima facie* presumption that a person is a vagrant if proof is introduced that he comes within any one of the enumerated classes of vagrants.

The constitutionality of the various vagrancy laws, as contrasted to the more recent "reputation" statutes, has long been well established: 8 R. C. L., p. 340. Thus, a recent case involving an unamended vagrancy statute of the state of Washington, Rem. Rev. Stat. §2688, par. 7, in which a woman was prosecuted for being a "lewd and dissolute person," was contended by the defendant, on appeal, to be unconstitutional on the ground of its pertaining to a "state of being" instead of to any specific act. The evidence showed the defendant to have been found in the company of a known criminal, and she confessed to having cohabited with him although not married at the time. The statute was declared to be constitutional and the conviction was affirmed: *Washington* v. *Harlowe* (Wash. 1933) 24 P. (2d) 601.

Of the three "reputation" statutes quoted, Michigan, Illinois, and New York, and even including the Rhode Island and South Dakota amendments, only the Michigan statute, as in the instant case, has so far been attacked in the higher court. The fate of that statute was correctly predicted even before it was so attacked: Comment (1932) 30 Mich. L. Rev. 600. It is inevitable that the constitutionality of the amended Illinois statute will be questioned, and the prosecution, on whom the duty of upholding its constitutionality will fall, will be faced with the fact that its terms are unequivocal and the intent of the legislature as to its effect is unmistakable. The prosecution will also be confronted with the fact that, as the statute reads, mere evidence of reputation apparently creates a conclusive presumption of guilt. Effective as the statute may be in the war against public enemies, it is nevertheless too sweeping and so apparently arbitrary that, when eventually brought before the higher court, doubts as to its validity will in all probability be seriously entertained. Such a fate would seem to be more certain in the light of the instant decision, for the Michigan statute, though it endeavored to apply only a *prima facie* presumption based on proof of recent reputation, was still declared to shift the burden of proof to the defendants, whereas the Illinois statute includes not even a presumption

but simply declares that persons of bad reputation are deemed to be vagrants.

ALBERT J. FEIGEN.

FAITH HEALERS — PRACTICING WITHOUT A LICENSE.—[Iowa] The State of Iowa sought to enjoin the defendant from practicing medicine under a statute describing those engaged in such practice as persons "who publicly profess to assume the duties incident to the practice of medicine": Iowa Code (1931) §2538. The defendant was a so-called faith healer who claimed divine power and who believed that through faith one could be healed. His method of treatment consisted solely of silent prayer, accompanied by a slight manipulation of his hands over the afflicted portion of the patient's body. Such believers as he had, received the cure at the healer's home, the latter maintaining no office nor publicly advertising himself as a physician. Nevertheless, the defendant was widely known to his friends and neighbors as "Doc" and at one time had had the initials "Dr." preceding his name in the telephone directory. As his fee the defendant accepted voluntary contributions from his patients. *Held:* a healer who relies solely on faith as his medium of cure, making no physical examination or diagnosis, nor publicly professing his ability to heal is not required to secure a medical license nor may he be prosecuted for failure to do so: *State* v. *Miller* (Iowa, 1933) 249 N. W. 141.

The chicanery of the quack is, of course, not the method of the licensed practitioner. At just what point, however, such quackery does become the practice of medicine within the legislative purview has been a subject of judicial disagreement. While permitting some harmless healer to administer home remedies may not endanger the welfare of the community, to allow such practice to receive judicial condonation would result in wholesale quackery being perpetrated on the gullible, attendant with its mulcting of fees and danger to human lives. The various medical practice acts devised by the legislature, describing those engaged in the "practice of medicine," and requiring that they secure licenses are the prophylactics designed to preclude such a state of affairs.

The majority of courts cognizant of legislative intent have construed the term "practice of medicine" in its broadest sense, and have stated that the disciples of any particular school of healing were engaged in such practice, regardless of whether or not the prescription of drugs constituted a part of their cure. Such practitioners who eschew the use of drugs must nevertheless secure a license or be subject to the penalty provided in the act: *Parks* v. *State* (1902) 159 Ind. 211, 64 N. E. 862. The phrase engaged in the "practice of medicine" is not restricted to its popular meaning as being inclusive of only those who furnish drugs, or attempt a diagnosis, but is application has been extended to include those engaged in the art of faith healing: *Ohio* v. *Marble* (1905) 72 Ohio St. 21, 73 N. E. 1063; *State* v. *Bushwell* (1894) 40 Neb. 158, 58 N. W. 728. Under this broad interpretation an application for a charter to establish and maintain a place for the support of the Christian Science Church was refused by the court, when it was shown that one of the purposes of the organization besides the preaching of the gospel, was to heal the sick: *In re First Church of Christ* (1903) 205

Pa. 543, 55 Atl. 536. The court believed that when the healer knows nothing of the science of anatomy, physiology, or pathology, to allow him to practice would be contrary to the general law of Pennsylvania, relative to the treatment of diseases. And on this broad interpretation a conviction of a Christian Scientist for violation of the medical practice act was upheld, the court holding the practice of Christian Science, was the practice of medicine: *State* v. *Bushwell, supra.* Nor are the religious tenets of any church a shelter behind which one may conduct the art of healing for pay, for if the practitioner is guilty of practicing medicine he is none the less guilty although he also practices his religion: *People* v. *Smith* (1912) 51 Colo. 27, 117 Pac. 612. The police power of the state is applicable to limit the freedom of religious worship, when the practice of such religion is injurious to the public welfare.

The minority view seems to be that the term "practice of medicine" does not include those engaged in Christian Science healing, or faith healers who exclude the use of all drugs. Under this latter view Christian Scientists have not been required to secure a license, on the ground that the provisions requiring a license were not for the purpose of compelling people suffering from a disease to resort to a particular remedy, but were designed to secure for those desiring medical remedies, competent physicians to administer them: *State* v. *Mylod* (1898) 20 R. I. 16, 40 Atl. 536. Nor is the fact that the court is convinced that the healer may be a fraud or an imposter sufficient reason to bar him under this latter view, when the healer has used no drugs: *Bennet* v. *Ware* (1908) 4 Ga. App. 293, 61 S. E. 546. The decision in this case was rendered despite a very broad statute defining the practice of medicine as, "to suggest, recommend, prescribe or direct, for the use of any person, any drugs, medicines, appliance, apparatus or agency whether material or not," the court holding "other agency" meant only another medical agency as the term was popularly understood.

The courts have usually held that when the legislature in its discretion has seen fit to recognize only certain schools of medicines, and established medical boards to supervise such schools, that such recognition was exclusive of any other school of healing: *Dent* v. *W. Va.* (1888) 129 U. S. 114, 9 S. Ct. 231. So where the statute made no provision for Christian Scientists, they were enjoined from practicing, despite their contention that they be given an examination on their ability to pray: *Marble* v. *State supra.* But in a very strained decision, *Bennet* v. *Ware, supra,* the court refused to uphold a prosecution against a drugless healer, stating that since the legislature had recognized only three schools, *viz.,* the eclectic, regular, homeopathic, and since respondent belonged to neither, he was not practicing medicine, and was not required to secure a license.

In a great many state followers of Christian Science are exempted from the necessity of securing a license by provisions which state that the regulation of the practice of medicine shall not be construed to affect the religious tenets of any church: *People* v. *Cole* (1916) 219 N. Y. 298, 113 N. E. 790. In Illinois the statute provides that the provisions of the medical act do not apply to those who administer to the sick by mental or spiritual means without the use of any drugs or

material remedy. However, where skill is a necessary requisite in addition to mental and spiritual means, as in the case of psychoanalysts, the statutes of various states require that such practitioners procure medical licenses: *Crane* v. *Johnson* (1916) 242 U. S. 339, 37 S. Ct. 176.

While some courts have allowed faith healers to practice unless expressly prohibited by statute, the courts have been more uniformly harsh in imposing penalties upon those whom they considered as quacks in cases where the patient died as a result of treatment administered by such persons. Thus in the case of *State* v. *Barrow* (1920) 170 Okla. Crim. 340, 188 Pac. 351, the court upheld a conviction for manslaughter imposed upon the defendant, an ignorant doctor, whose patient had died as a result of a treatment consisting of rubbing a brew concocted of refuse over the patient's body, all the while chanting weird incantations. This penalty was imposed despite the fact that the patient before applying for this abnormal remedy was suffering from a disease which physicians estimate kills from ten to forty per cent of its victims in any event. The court was desirous of ridding the community of this "faith-healer" and established as its rule of law that a person assuming to treat a disease is bound to know the nature of the remedies he prescribes, and the treatment he adopts, and he is criminally liable for his negligence resulting from the lack of such knowledge. The general rule in this country is that criminal liability does not depend on whether or not the person assuming to treat the disease is a duly licensed practitioner or merely assumes to act as such: *People* v. *Hunt* (1915) 26 Cal. App. 514, 147 Pac. 476; *Hampton* v. *State* (1905) 50 Fla. 55, 39 So. 421. The real question is whether there was criminal negligence—a jury question: *State* v. *Barrow, supra.* Such negligence exists where the physician or person assuming to act as such, exhibits gross lack of competency and this may arise from his absolute ignorance of the science of medicine and of the effect of the remedies employed: *State* v. *Hampton, supra.* The result of such a stringent rule is practically to insure criminal liability where one, ignorant of the medical science, has undertaken the duties of a physician and caused the death of his patient thereby. A few courts have held, however, that the honest intent of the practitioner will preclude criminal responsibility, even though the practitioner be ignorant of the science of medicine and has assumed to act as a physician: *Rice* v. *State* (1844) 8 Mo. 561; *Comm.* v. *Thompson* (1809) 6 Mass. 134. Iowa is in accord with this more lenient view: *State* v. *Schulz* (1881) 551 Ia. 628; 187 N. W. 469. Apparently there is but one reported case involving a prosecution against a Christian Scientist where the patient died as a result of treatment administered: *Regina* v. *Beer,* 32 Can. L. J. 416. The prosecution in such cases generally is directed against those in charge of the patient for failure to procure proper medical care: *People* v. *Pierson* (1903) 176 N. Y. 201, 68 N. E. 243.

Even in this enlightened day, magnetic healers, faith healers, and ordinary quacks are still able to ply a profitable trade at the expense of much human misery and suffering. The issue is not solely between practitioner and patient for the welfare of the community may well be endangered, and the members thereof subjected to contagious diseases

when a patient fails to take proper medical precautions. It seems that the courts could best serve the interests of the community by excluding all would-be healers from continuing their practice, rather than by lending their efforts to the prosecution of such healers when the patient has already died.

DANIEL A. PANTER.

EVIDENCE—EXPERT TESTIMONY.—[Illinois] Defendant was convicted of manslaughter. The deceased had been struck by a "hit and run" driver, and defendant was charged with the offense. The case of the People rested heavily upon the testimony of an expert witness who sought to prove that it was defendant's car that struck the deceased. The witness testified that he clipped from the shirt, worn by the deceased, a small portion of cloth which had on it some paint flakes. Upon dissolution in alcohol, the paint formed a color similar to dissolved paint from the fender of defendant's car. He testified further that close to a dent on the said fender, there was a series of line scratches, which had been covered with shellac for preservation purposes, and that these numbered thirty-one parallel lines per inch. Examination under a microscope revealed that there were thirty-one raised threads per inch in the cloth of the decedent's shirt, and the witness testified that in his opinion the fender scratches were caused by violent contact between the deceased's body and the defendant's car. Certain deeper scratches upon the fender were found in close proximity to the parallel lines and the deceased's suspender buttons had a figured design upon them which fitted the grooves of the deeper fender scratches. The witness concluded that they also had been struck violently against the fender's painted surface. The evidence was uncontradicted although the defendant charged that the removal of the piece of shirt and the suspender button from the decedent's clothing, together with the shellacking of the fender were substantial changes in the condition of those exhibits. *Held:* judgment affirmed. The removal of the State's exhibits from their original location and preservation measures taken by the sheriff in order to aid the prosecution's expert witness in experimentation were not substantial change sufficient to bar the use of the exhibits: *People* v. *Wallage* (1933) 353 Ill. 95, 186 N. E. 540.

No question was raised as to the admissibility of testimony from an expert witness, since the testimony of experienced and well trained experts has been affirmed many times in various fields of criminal science: *People* v. *Fisher* (1930) 340 Ill. 216, 172 N. E. 743 (expert on ballistics); *State* v. *Mohrbacher* (1928) 173 Minn. 567, 218 N. W. 112 (expert on hand writing); *State* v. *Clark* (1930) 156 Wash. 543, 287 Pac. 18 (expert on photomicrography); *State* v. *Kuhl* (1918) 42 Nev. 185, 175 Pac. 190 (expert on palmprints); *Magnuson* v. *State* (1925) 187 Wis. 122, 203 N. W. 749 (experts on metallographic, ink and documentary analysis, ballistics, sawdust and wood types, and chemical analysis); *People* v. *Jennings* (1911) 252 Ill. 534, 96 N. E. 1077 (finger-print expert); *State* v. *Crivelli* (1916) 89 N. J. Law 259, 98 Atl. 250 (expert on chemical analysis).

Although the court did not state the qualifications of the witness, he was referred to as "the expert chemist Wiedeman" and again as "the

expert witness Wiedeman," the court probably having satisfied itself as to his abilities without additional comment. In numerous cases, however, evidence has been refused or cases reversed due to the testimony of unqualified pseudo-experts; *People* v. *Berkman* (1923) 307 Ill. 492, 139 N. E. 91 (so-called ballistics expert); *Jack* v. *Commonwealth* (1928) 222 Ky. 546, 1 S. W. (2d) 961 (ballistics testimony refused due to the lack of expert's qualifications); *Matthews* v. *People* (1931) 89 Colo. 421, 3 P. (2d) 409, 23 J. Crim. L. 115 (pseudo-experts' method of bullet identification held incompetent). It is held universally that the competency of witnesses to testify as experts is a matter resting solely within the sound discretion of the court: *People* v. *Fisher, supra* (ballistics testimony); *State* v. *Johnson* (1932) 111 W. Va. 653, 164 S. E. 31 (finger-print testimony); *People* v. *Miller* (1931 Cal. App.) 299 Pac. 742 (medical testimony); *State* v. *Lowe* (1931) 50 Idaho 96, 294 Pac. 339 (handwriting testimony); *White* v. *State* (1930) 52 Nev. 235, 285 Pac. 503 (testimony of experienced criminologist); *State* v. *Stuart* (1933 Me.) 167 Atl. 550 (testimony on chemical analysis).

The charge of substantial change in the evidence made by the defendant serves only to demonstrate new methods developed in the field of scientific crime detection. The portion of the fender on defendant's car, which contained the dent declared to have been caused by violent contact with the decedent's body, was removed and shellacked for purposes of preservation. Only that part of the fender which contained the dent was removed, in order to facilitate handling, while the application of transparent shellac preserved, in their original state, the scratches upon which the testimony of the prosecution's expert witness was based. In the recent case of *State* v. *Johnson* (1933 N. M.) 21 P. (2d) 813, expert testimony was introduced to show defendant's participation in a criminal assault and murder. A finger-print expert testified that certain prints were left by defendant on a vase which he used to club an unexpected intruder. An expert, who was qualified in the use of the microscope and as a chemical analyst, conducted miscroscopic examinations of the debris taken from under the defendant's finger nails. He found therein a number of small bright carmine red particles, which in a series of tests reacted in the same manner as the lipstick used by the deceased. Since the deceased had been gagged, it was concluded that the defendant had acquired the particles under his finger nails due to contact with the deceased's lips. The testimony of the experts was upheld and the conviction affirmed.

Courts have been ready of late to accept with willingness the scientific means afforded to aid in the seizure and conviction of criminals: *Inbau*, "The Courts on Police Evidence" (1933) Police "13-13," April, 1933; *Baker and Inbau*, "The Scientific Detection of Crime" (1933) 17 Minn. L. Rev. 602. But they are continually forced to justify their use of discretion in permitting experts to testify against the charge of allowing the technical witness to usurp the functions of the jury, by giving his opinion as to facts ultimately to be found by the jury: *State* v. *Campbell* (1931) 213 Iowa 677, 239 N. W. 715, 3 Am. J. Pol. Science 21 (ballistics testimony); *Evans* v. *Commonwealth* (1929) 230 Ky. 411, 19 S. W. (2d) 1091 (bal-

listics testimony); *State* v. *Bohner* (1933) 210 Wis. 651, 246 N. W. 314, 24 J. Crim. L. 440 (admissibility of lie-detector evidence). This is rightfully so, since a great deal of harm can be done to either side by a pseudo-expert claiming experience and training in some particular field of scientific knowledge. Since, as shown, it is within the discretion of the court to determine the competency of alleged experts, it is imperative that courts be ever ready to protect both the prosecution and defense against the testimony of claimed experts. All courts demand evidence of qualifications before a technical or expert witness is allowed to offer the opinions which he has worked out: 1 *Wigmore,* "Evidence" (2d ed., 1923) §556. It is very possible that so-called experts will have their testimony proven faulty upon examination or cross-examination but it is far better to prevent any opportunity of committing injury by subjecting the claimant to a vigorous and searching examination of qualifications prior to the taking of testimony: *Smith,* "Unmasking the Pseudo-Expert" (1931) 1 Am. J. Pol. Science 89; *Wiard,* "Preparation and Presentation of Expert Testimony" (1932) 2 Am. J. Pol. Science 143.

Since courts have repeatedly demonstrated their disposition to affirm the use of new methods of crime detection if presented by a technical witness adequately qualified, the problem of what constitutes adequate qualification becomes acute. If the determination of competency is to remain in the hands of the court without restrictions, different degrees of ability will be acceptable by various courts unless a similar or identical group of qualifying questions is employed by all the courts. With all courts putting to use a similar body of rigid questions as to competency, the true expert will attain his proper position and the pseudo-expert will be put to rout.

CLYDE T. NISSEN.

TRIAL—JURORS' COMMUNICATIONS —PRESUMPTION OF INJURY.—[Texas] Davis was indicted in Texas for murder and at the trial, after impaneling and before rendition of the verdict, the jurors were permitted by the bailiff who had them in charge to converse with outsiders by telephone. Evidence disclosed that these conversations were with their wives concerning domestic affairs. Defendant was found guilty, and judgment was entered on the verdict. On appeal, the judgment was reversed, and a new trial ordered, upon the ground a Texas statute had been violated: Code Crim. Proc. 1925, arts. 671, 673. The statute is merely a codification of the common law rule that the jury shall not be permitted to hold outside communication during the course of a trial. Where statutory provisions have been violated, a presumption of injury exists, which the State may rebut by a proper showing that no harm was done. Here there was no such showing, therefore there was error in refusing a new trial: *Davis* v. *State* (Tex. Crim. App. 1933) 60 S. W. (2d) 783.

The doctrine of the *Davis* case is not at all new. The rule had been in vogue in Texas long before the statute was enacted: *McWilliams* v. *State* (1893) 32 Tex. Crim. Rep. 269, 22 S. W. 970; *Mitchell* v. *State* (1895) 36 Tex. Crim. Rep. 318, 33 S. W. 367. The solution to the problem of the jurors' com-

munication with the outside, as well as other problems of misconduct at trial, has taken, and must of necessity take, two main forms. In the first form, the burden is on the State to rebut the presumption of injury declared to have arisen when evidence of misconduct is introduced. This is the doctrine of the Texas cases, and has also been announced in other jurisdictions: *State* v. *Burns* (1932) 79 Utah 575, 11 P. (2d) 605; *Crow* v. *State* (1928) 39 Okla. Crim. Rep. 145, 263 Pac. 677; *Aylward* v. *State* (1927) 216 Ala. 218, 113 So. 22; *State* v. *Maheras* (1926) 42 Idaho 544, 246 Pac. 304. In the other type of solution the defendant must affirmatively show that he was prejudiced by communication between the jury and other persons: *State* v. *Williams* (1924) 132 Wash. 40, 231 Pac. 31; *State* v. *Hernandez* (1931) 36 N. M. 35, 7 P. (2d) 930; *Wallace* v. *State* (1929) 180 Ark. 627, 22 S. W. (2d) 395; *Stengnach* v. *State* (Ind. App. 1929) 165 N. E. 919; *People* v. *Rogers* (1922) 303 Ill. 578, 136 N. E. 470. The Texas rule is exact in application where the State introduces no evidence to rebut the presumption. The judge has no choice but to order a new trial. But after the State has introduced some rebuttal testimony a question arises as to just what weight should be accorded the presumption. It is possible to consider it (a) as a procedural device which casts only the burden of proceeding on the State, the risk of ultimate failure of persuasion remaining on the defendant, or (b) as part of the evidence and of some weight in the decision on the merits.

In evaluating the comparative desirability of these views, it must be remembered that these rules are designed to cover only the trial judge's disposition of a motion for a new trial. If the Texas view is a procedural device, the difference between that rule and that of other jurisdictions is only one of form, since under both the defendant must show injury. If the Texas presumption is of evidentiary value, a real difference between the two rules is apparent. However, as a practical matter, it seems more reasonable to believe that the Texas rule should be used as a procedural device. It is doubtful if the niceties of these distinctions are apparent to some courts, and it is rather hard to believe that a trial judge's reasoning processes are so adjusted as to conform to the declarations of appellate courts in matters where pristine emotional judgment must inevitably play so large a part as in these cases. Rules of law reach their highest utility in appellate courts, but their functional aspects are never so pronounced as in trial courts, where discretion is largely lodged in the trial judge.

It is evident that irregularities in the conduct of jury trials are certain to appear in the vast array of cases with which courts are confronted. In order to facilitate legal business it long ago became necessary for the United States Supreme Court to adopt the view that new devices may be used to adapt the ancient institution of jury trial to present needs and to make of it an efficient instrument in the administration of justice. "The command of the Seventh Amendment that the 'right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained": *Ex parte Peterson* (1920) 253 U. S. 300, 309, 40 S. Ct. 534. The proper degree of stringency in the enforcement of the purity of trial by jury has been a troublesome

question. The infinite variety of the fact situations presented, together with the sacrosanct quality with which jury trial is supposedly invested, combine to put before the courts a vexing problem. A more flexible system is the desired end. In the *Davis* case may be found a groping toward practicality, which, while admirable in conception nevertheless is not wholly successful. The true evaluation of the merits of defendant's motion for a new trial is difficult to reach, and refinements in technique have not made the task appreciably easier. In fact there is danger that they may obscure the goal still more. In treating the problem of misconduct in the jury, there is no substitute for judgment. What we must seek is wisdom in the trial judge, not energy in the legislature nor zeal for procedural rules in the appellate courts.

EDWARD J. TAYLOR.

ATTEMPT — DEGREE OF PERFORMANCE REQUIRED.—[California] The defendants, Lombard and Snyder, were convicted of an attempt to kidnap for the purpose of extortion. Dow, a feigned accomplice in the transaction, had informed the police of the defendants' intentions to kidnap someone in the city of Redlands. As a result of this information, the police were present at the time Lombard entered the premises of the intended victim, and saw him return, after an interval, to the car in which he, his co-defendant Snyder and Dow, the supposed accomplice, had used in making the trip from San Bernardino to Redlands. As the car neared San Bernardino on the return trip, the police recovered scraps of paper which had been thrown from the defendants' car. The scraps proved to be an extortion note written by Lombard. Some few minutes thereafter, the arrest was made. In the car, which was owned by the informer Dow, were found a ball of twine, two sheets, two pillow cases, and the paper pad which had been used in writing the extortion note. Later Snyder took the officers to the cabin in which they intended to secrete their victim. At the trial Dow's testimony revealed the details of the kidnapping plans. To this testimony was added that of the defendants' landlady who testified that she frequently heard them discuss plans to kidnap someone. *Held:* on appeal, affirmed. The evidence was sufficient to warrant the conviction: *People* v. *Lombard* (Cal. 1933) 21 P. (2d) 955.

The courts are in substantial agreement that to constitute an attempt to commit a crime there must be an intent, followed by an overt act, or acts, tending, but failing to accomplish it. See 1 *Bishop,* "Criminal Law" (9th ed. 1923) §728. It is also settled that an act of attempt to be punishable must go beyond mere preparation for the commission of a crime: *State* v. *Dumas* (1912) 118 Minn. 77, 83, 136 N. W. 310; *Ex parte Floyd* (1908) 7 Cal. App. 588, 95 Pac. 175; *Bishop, op. cit. supra,* §729. But once a defendant's acts have gone beyond the preparatory stage, he is liable for a criminal attempt, no matter whether the reason for the failure to consummate the intended crime is due to interruption which prevents his completing the acts, or his voluntary abandonment of his intended course of conduct: *Glover* v. *Commonwealth* (1889) 86 W. Va. 382, 10 S. E. 420; *State* v. *Mchaffey* (1903) 132 N. C. 1062; 44 S. E. 107; *State* v. *McCarthy* (1924) 115 Kan. 583, 224 Pac. 44. The difficult question,

as in the principal case, is whether the overt acts, done pursuant to an intent to commit a crime, are sufficient to constitute an attempt which comes within the cognizance of the law. Field, C. J., in *People* v. *Murray* (1859) 14 Cal. 159, the leading case on this subject, said: "The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparation." The difficulty in distinguishing between an act of preparation and an act of attempt has not been alleviated by the application of Field's statement, and any attempt to find an arbitrary line of demarcation must fail, as in the last analysis the difference is one of degree: *Commonwealth* v. *Peaslee* (1900) 177 Mass. 267, 272, 59 N. E. 55.

Despite the recognition by the courts of the futility of analogy in these cases, they continually refer to the *Murray* case, *supra,* and other cases involving entirely different crimes. In the *Murray* case the defendant was charged with an attempt to contract an incestuous marriage; he had eloped with his niece and had sent for a magistrate to perform the ceremony; it was held that a punishable attempt had not been committed. Inasmuch as the only thing necessary to complete the offense was the actual performance of the ceremony, the *Murray* case has become the bulwark of defendants in contending that any series of acts in a given case, of whatever nature, have not gone beyond the stage of mere preparation. Its application in a New York case, *People* v. *Rizzo* (1927) 246 N. Y. 334, 158 N. E. 888, resulted in the reversal of a verdict convicting the defendants of attempted robbery. The defendants had planned to rob a payroll messenger. Armed with guns they rode about searching for their intended victim. They were arrested by the police as they ran into a building to commit the robbery, although it later developed that the messenger was not in the building and the defendants had never seen him. The Court of Appeals held that the defendants' conduct constituted mere preparation. The liberality of the New York Court may be contrasted with the decision of the Kansas Supreme Court in the case of *State* v. *McCarthy, supra.* In that case the defendants had colluded with a railroad inspector to stop cars in order to give the defendants an opportunity to steal their contents. They drove to the agreed place with tools and munitions, but they became suspicious of the inspector and abandoned their plan. They were arrested as they were about to leave, and charged with attempted burglary. The car did not reach the designated spot until the next day. The court held that the defendants' acts transcended mere preparation and constituted an attempt to burglarize. While many more cases might be cited, the New York and Kansas cases are illustrative of the wide latitude allowed by the courts in some "attempts" as compared with their conservatism in others.

In the closing paragraph of the *Murray* case, Chief Justice Field makes the statement that an attempt "must be manifested by acts which would end in the commission of the particular act, but for the intervention of circumstances independent of the will of the party." The application of such a rule in the principal case would not sustain the conviction, inasmuch as the police did not intervene until the defendants

were some miles from the scene of the intended kidnapping. But Justice Field's statement is not supported by the authorities. See *Glover* v. *Commonwealth, supra,* and cases immediately following. In the case of *People* v. *Stites* (1888) 75 Cal. 570, 17 Pac. 693, the California Supreme Court made a material modification of the strict rule of the *Murray* case. There the defendant was charged with the crime of attempting to place an obstruction upon a street railway track. The evidence tended to show that he had a dynamite bomb in his possession, which he intended to place on the track, and was on his way to meet a confederate, when he discovered that he was being watched by police officers. He immediately abandoned all thoughts of carrying out his intended crime, deposited the bomb in a flower garden, and ran away. The court held the evidence was sufficient to warrant his conviction. In the principal case, it does not even appear that the defendants were aware that they were being watched by the officers.

Seemingly, the California Appellate Court by its decision in the principal case, has been motivated by the factor to which several writers on this subject have adverted, namely, that the facts in each case should be considered in the light of the seriousness of the crime attempted, and the desirability of extending the rule prohibiting that particular crime, or as Mr. Chief Justice Holmes said in the *Peaslee* case, *supra:* "The degree of proximity held sufficient may vary with the circumstances, including among other things, the apprehension which the particular crime is calculated to excite." See also *Holmes,* "The Common Law" (1881) pp. 68-69, and his opinion in *Commonwealth* v. *Kennedy* (1897) 170 Mass. 18, 20, 48 N. E. 770; *Sayre,* "Criminal Attempts" (1928) 41 Harv. L. Rev. 821, 845; *Arnold,* "Criminal Attempts" (1930) 40 Yale L. J. 53, 73. To this extent, the fact that the crime intended was that of kidnapping, and the recent nation-wide wave of that offense, apparently played an important part in reaching a decision in a field where the question is one of degree.

ALBERT BELL.