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RECENT CRIMINAL CASES

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CONSTITUTIONAL LAW—VALIDITY OF THE REPUTATION AMENDMENT TO THE VAGRANCY STATUTE.—[Illinois] James Belcastro and Louis Alterie were convicted separately under indictments charging them with vagrancy under the Vagrancy Act as amended in 1933. It provides that all persons who are "reputed to be habitual violators of the criminal laws of this State . . . or to habitually carry concealed weapons on or about their persons . . . and all persons who are reputed to act as associates . . . of persons reputed to be habitual violators of the criminal laws . . ." are vagrants: Ill. Rev. Stat. (Smith-Hurd 1933) c. 38 §578. They were convicted and sentenced to six months imprisonment. *Held:* on appeal, reversed. The amendment to the Vagrancy Act is unconstitutional in that it is arbitrary and unreasonable legislation, its terms are uncertain and it delegates arbitrary and discriminatory power to administrative officers: *People* v. *Belcastro* (Illinois 1934) 190 N. E. 301; *People* v. *Alterie* (Illinois 1934) 190 N. E. 305.

These decisions mark the failure of the latest legislative attempt to deal with organized crime. Due to the expertness with which the modern criminal carries out his projects and the skill with which they have heretofore been able to frustrate the efforts of law enforcing officials to prosecute for major depredations, public sentiment has forced these officers to try other means to curb crime, not with adequate punishment as the end in view but rather to harass the criminal and to satisfy public opinion. An attempt was made to prosecute under the old Vagrancy Act and the public was treated to the spectacle of the wealthy gangster being charged under a statute drawn to include penniless tramps and loiterers. The inadequacy of the statute to deal with the situation soon became apparent and whatever success might have been achieved through its use with a demand for exorbitant bail was blasted by the decision in *People ex rel. Sammons* v. *Snow* (1930) 340 Ill. 464, 173 N. E. 8. There it was held that bail of $50,000 was excessive and that such bail would be reduced on petition to the Supreme Court.

In 1931 an attempt was made to amend the old Vagrancy Act to provide, in effect, that any lawless and notorious character, accustomed to live by the rule of the gun, should become a public menace by merely appearing on the street. A number of specific acts such as intimidation of witnesses, perjury, bail jumping, etc., were inserted to insure its con-

stitutionality. This, however, met with no success in the legislature and was eventually dropped. Comment (1931) Notre Dame Law 254.

The amendment now under discussion was enacted in July, 1933, and since that time has operated most successfully in lower courts in the accomplishment of its purpose. The difficulty of proof of a specific crime against the criminal member of an organized gang was obviated by the provision that evidence of criminal reputation was not only admissible in evidence but was the essence of the crime itself. Other states have made reputation *prima facie* evidence of vagrancy or of being a disorderly person (see extended discussion of such statutes in Comment (1932) 30 Mich. L. Rev. 600 and Note (1934) 24 J. Crim. L. 984 where the fate of the Illinois act is correctly predicted) but none have gone so far as Illinois. The act under discussion makes it a crime for an individual to have a reputation as an habitual violator of the criminal laws or as an associate of one who is an habitual violator.

The question before the court in the two present cases, therefore, was whether an individual might be imprisoned because of an evil reputation without violating the "due process" clause of the Federal and State Constitutions. In both cases the court construed the statute as is suggested above and then held that it was void as unreasonable and arbitrary legislation in that the accused was to be held responsible not for what he was but for what other people said about him. This same situation has arisen concerning statutes providing for the prosecution of unlicensed dispensers of liquor and prosecution of houses of prostitution. A case squarely in point is *State* v. *Kartz* (1833) 13 R. I. 528. The statute in question provided that any person who shall keep a place in which it is reputed that intoxicating liquors are kept for sale without a license shall be fined. The court stated the question to be whether a man could be fined and imprisoned for what others said or believed. It was then held that the law was ". . . repugnant to the fundamental rules of our jurisprudence and so utterly at variance with the general spirit and principles of the Constitution in regard to the rights of property and personal freedom that it must be held to be unconstitutional even though no particular provision can be pointed out the literal terms of which it violates. To introduce into the law the principle that a person may be punished for what other people say about him is to render all the constitutional safeguards of life, liberty and property unavailing for his protection . . ." This decision is followed in cases involving prosecution for operating a disorderly house in that general reputation though admissible in evidence must be corroborated by fact to establish the character of the house: *Putnam* v. *State* (1913) 9 Okla. Crim. 535, 132 Pac. 916; *State* v. *Haberle* (1887) 72 Iowa 138, 33 N. W. 461; *Botts* v. *United States* (1907) 155 Fed. 50. There are cases holding to the contrary, however: *People* v. *Buchanan* (1878) 1 Idaho 681; *Territory* v. *Bowen* (1890) 2 Idaho 640, 23 Pac. 82; *Moore* v. *State* (1908) 53 Tex. Crim. 59, 110 S. W. 911; *Ramey* v. *State* (1898) 39 Tex. Crim. 200, 45 S. W. 489. But it must be noted that the cases dealing with houses of prostitution concern only the sufficiency of evidence to establish the character of the house and the repu-

tation is not the gist of the offense as it is in the statute discussed in the instant cases and *State* v. *Kartz, supra.* A statute identical with that discussed in the latter case was attacked in *State* v. *Morgan* (1873) 40 Conn. 44 but it was there construed to mean that the prosecution must charge and prove not merely the reputation but the fact of unlicensed sale of liquor. It was therefore deemed constitutional. Counsel for the defendant in the *Alterie* case argued that the statute here should be so construed; that it must be proved that the defendant was in fact an habitual violator. If an analogy can be drawn between this and the construction in the *Morgan* case the objection to the statute might be removed but the court, assuming this to be true, held the term "habitual violator" to be undefined and uncertain.

It has been said that "due process of law requires that one shall not be held criminally responsible under statutes by which offenses are so indefinitely defined or described as not to enable one to determine whether or not he is committing them": 3 *Willoughby* "Constitutional Law" (1929) §1142. The legislature must so closely define the offense as to leave nothing to be determined but the guilt or innocence of the person charged: *People* v. *Beak* (1920) 291 Ill. 449, 126 N. E. 201; *Connally* v. *General Construction Co.* (1926) 269 U. S. 385, 46 S. Ct. 126; *United States* v. *Cohen Grocery Co.* (1920) 255 U. S. 81, 41 S. Ct. 298. It was in this regard also that the statute offended for it is "silent as to the degree or extent of reputation or opinion necessary to warrant action under the amendment." Due to the fact that the statute was so uncertain it involved another constitutional objection; *i. e.,* delegation of legislative power. The all important question of reputation was left to the determination of individuals without perscribing any standards to act as a guide for their determination. It has been repeatedly held in Illinois that such delegation involves a deprivation of liberty and property without due process: *Sheldon* v. *Hoyne* (1914) 261 Ill. 222, 103 N. E. 1021; *People* v. *Sholem* (1920) 294 Ill. 204, 128 N. E. 377.

The two principal cases seem to be clearly correct for all of the authorities point to but one solution of the problem involved. When the statute was enacted its fate must have been foreseen by the legislators, but no attempt was made to cure its obvious constitutional defects. The purpose was worthy but it may be doubted whether this justifies the enactment of the statute and expensive prosecution under it when it was clear that no lasting benefit would be derived from the effort. This marks another clash between official zeal for law enforcement by drawing special laws for gangsters and judicial anxiety for the integrity of the constitution. We have the same general problem here presented as in the illegal arrest cases under the concealed weapon statutes, and the Illinois court has taken the same stand in the instant cases as in the cases last mentioned. (See note to *People* v. *Davies* in this issue.) At the present time, when the public is clamoring for speedy extermination of gangsters, the court will be criticized for its backwardness but later, in retrospect, it may possibly be praised for its determined stand to preserve constitutional rights.

S. G. Tipton.

CRIMINAL LAW — SEARCH AND SEIZURE — CONCEALED WEAPONS.— [Illinois] The defendant was arrested by police officers without a warrant, following curses and threats of injury by shooting made by the defendant from within his home to the officers standing upon the porch. A later search of the premises revealed the pistol with which the defendant had threatened the officers. Following his indictment for altering and obliterating the identification number of his pistol as prohibited by statute, Ill. Rev. Stat. (Smith-Hurd 1933) c. 38, §153a, the defendant moved to suppress the evidence as having been obtained by an unlawful entry into the defendant's home, and an unlawful search and seizure of the gun in question. The trial court denied the motion and admitted the pistol in question as evidence. *Held:* on appeal, affirmed. No error was committed in refusing to grant the motion, for a sufficient criminal offense had been perpetrated in the presence of the officers to warrant the arrest of the defendant and a search of him and his premises: *People* v. *Davies* (1933) 354 Ill. 168, 188 N. E. 337.

This case marks a continuance of the gradual change of policy of the Illinois Supreme Court in regard to the competency of evidence obtained by an act of trespass. Illinois has consistently adhered to the minority rule, advanced by the United States Supreme Court, to the effect that evidence illegally obtained by unlawful search and seizure, even if competent otherwise, is inadmissible: *Weeks* v. *U. S.* (1914) 232 U. S. 383, 34 S. Ct. 341; *Silverthorne Lumber Co.* v. *U. S.* (1919) 251 U. S. 385, 40 S. Ct. 182; *People* v. *Scalisi* (1926) 324 Ill. 131, 154 N. E. 715; *People* v. *McGurn* (1930) 341 Ill. 632, 173 N. E. 754, Note (1932) 22 J. Crim. Law 589; *People* v. *De Luca* (1931) 343 Ill. 269, 175 N. E. 370, Note (1932) 22 J. Crim. Law 593; *People* v. *Macklin* (1933) 353 Ill. 64, 186 N. E. 531. Other states also follow this doctrine, but they are recognized to be in the minority: *Atz* v. *Andrews* (1922) 84 Fla. 43, 93 So. 329; *Flum* v. *State* (1923) 193 Ind. 585, 141 N. E. 353; *Banks* v. *Commonwealth* (1924) 202 Ky. 702, 261 S. W. 262; *People* v. *Thompson* (1923) 221 Mich. 618, 192 N. W. 560; *State* v. *Owens* (1924) 302 Mo. 340, 259 S. W. 100; *State* v. *Jokosh* (1923) 181 Wis. 160, 193 N. W. 976. The English courts and the majority of the State courts in the United States take the opposite view; *i. e.,* that such illegally obtained evidence, if competent otherwise, is admissible: *Phelps* v. *Prew* (1854) 3 E. & B. 430; *Rex* v. *Doyle* (1886) 12 Ont. 350; *Cornelson* v. *State* (1922) 18 Ala. App. 639, 94 So. 202; *People* v. *Le Doux* (1909) 155 Cal. 535, 102 Pac. 517; *Commonwealth* v. *Donnelly* (1923) 246 Mass. 507, 141 N. E. 500; *People* v. *Defore* (1926) 242 N. Y. 13, 150 N. E. 585; *State* v. *Simmons* (1922) 183 N. C. 684, 110 S. E. 591; *Adams* v. *New York* (1904) 192 U. S. 585, 24 S. Ct. 372.

This difference in judicial "points of view" presents an acute problem in the administration of criminal justice and this is aggravated by the skillful and scientific methods now used by the criminal "profession." The problem has been nicely stated by Justice Cardozo as follows, "The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime be repressed. On the other, the social

need that law shall not be flouted by the insolence of office": *People* v. *Defore* (1926) 242 N. Y. 13 at page 24. The loose constructionists demand that crime be repressed by the courts finding probable cause for arrest in the mere fact of weapon concealment, while they are answered by the claim that over-tolerance toward violations of the law by officers would lead to rashness and carelessness in their methods of enforcement.

Solution of the dilemma seems to lie in a clear enunciation of the arrest and search and seizure laws by the legislatures of the various states. This relief does not appear to be presently forthcoming and with the entire problem having obtained its present status of acute realism, it was natural for numerous state courts to make a change of front in order to protect the citizens against encroachment by the criminal classes: *Bruce and Rosmarin,* "The Gunman and His Gun" (1933) 24 J. Crim. Law 521, note page 541. The more liberal rule or majority doctrine, as set out in the case of *Adams* v. *New York, supra,* is strenuously advocated by both Professors Wigmore and Greenleaf, who claim the problem to be one of evidence, that the evidence of the gun is evidence of the best type, no matter how obtained, and that the Constitution is sufficiently adhered to if a suit for civil damages be allowed for any wrong committed in obtaining it: 4 *Wigmore,* "Evidence" (2nd ed. 1923) §2183 *et seq.*; 1 *Greenleaf,* "Evidence" (16th ed. 1899) §254a. Judge Bruce, as is made clear in "The Gunman and His Gun," *supra,* would go even further and advocates that it should be held that a gun speaks for itself and that the finding of a concealed weapon upon a person estops the carrier from questioning the legality of his arrest. Such a holding would, however, be severe and strained under present statutes and might present a serious constitutional question.

In the recent cases of *People* v. *Kissane* (1932) 347 Ill. 385, 179 N. E. 850, and *People* v. *Roberta* (1933) 352 Ill. 189, 185 N. E. 253, Note (1933) 24 J. Crim. Law 448, guns were found on the persons of the defendants and convictions were affirmed regardless of the lack of a search warrant and the fact that the arrests were made on suspicion alone. In those cases as in the one under discussion the proper result was reached by a relaxation of the rules governing the power of arrest. In other words, in some but certainly not all cases, the Illinois Supreme Court satisfies public clamor by allowing almost any suspicion to be the basis for arrest, and of course, once arrested the prisoner may be searched. Therefore, the Court apparently remains on the minority side as far as the use of illegally obtained evidence is concerned, but they are able to achieve the desired result by allowing "suspicion arrests," a type of seizure not originally intended by the Illinois arrest statute: Ill. Rev. Stat. (Smith-Hurd 1933) c. 38, §657. This, however, seems to be the most satisfactory result which can be reached under present conditions for the court is thus able to curb official over-enthusiasm and protect the innocent individual while it may also, in the proper case, aid in curbing crime by relaxing the requirements for legal arrest.

CLYDE THEODORE NISSEN.

HOMICIDE—LIABILITY OF ROBBER FOR DEATH CAUSED BY SHOT OF THIRD PERSON.—[Arkansas] Ap-

pellant and two others, in an attempt to escape from a bank which they had just robbed, compelled the deceased, a teller, to accompany them out of the bank as a shield from attack from the town marshal. While attempting to arrest them, the town marshal intending to shoot the robbers, accidentally killed the teller. Appellant was indicted and convicted of first degree murder. *Held:* on appeal, affirmed. The conviction was justified in that the use of the deceased as a breastwork for the defendant's protection in completing his robbery was the cause of the death: *Wilson* v. *State* (Ark. 1934) 68 S. W. (2d) 100.

The appellant relied upon the general principle that if A assaults B and B, while resisting the assault, shoots at A and accidently kills C who is an innocent third party, A cannot be convicted of the murder of C: *Commonwealth* v. *Moore*, (1905) 121 Ky. 97, 88 S. W. 1085; *Commonwealth* v. *Campbell* (1863) 89 Mass. 541; *Butler* v. *People* (1887) 125 Ill. 641, 18 N. E. 338. However, these cases and the principle therein involved are not applicable here. In the *Moore* case, *supra,* the deceased, in no wise connected with either party, was killed by a shot from one Young who at the time was assaulted by the defendant with the intent to rob and kill Young. The court sustained a demurrer to the indictment. Both the *Campbell* and the *Butler* cases, *supra,* were cases of riot where certain officers, in attempting to quell the disturbance, accidentally killed bystanders who were not engaged in the riot. The prosecution attempted to hold the rioters responsible for the killing by the officers who were opposed to them but the court refused on the ground that the act was not done by the rioters nor in pursuance of any design by them; that the sheriff was not acting with them, and they were in no way responsible for his acts. The general doctrine was laid down in these cases that no person can be held responsible for a homicide unless the act was either actually or constructively committed by him; and in order to be his act, it must be committed by his hand, or by someone acting in concert with him or in furtherance of the common design or purpose. This is correct doctrine, and applicable to the facts of those cases, but there is clearly lacking in them a causal connection between the act of the accused and the homicide. This element is brought out by the language in the *Butler* case. There the court said: ". . . the parties would be responsible for a homicide actually or constructively committed by them, and they would be responsible for what they did themselves, and such consequences as might naturally flow from their acts and conduct." This doctrine would not apply in the type of case where rioters might forcibly make use of another in their design and cause him to be killed by putting him in a place of danger.

The case of *Taylor* v. *State* (1900) 41 Tex. Crim. R. 564, 55 S. W. 961, is very similar to the present case both in the facts and in the decision. There, the accused and three others in the attempt to rob a train, boarded the engine, took out the engineer and fireman, placed the latter in front of the express car and then demanded that the express agent open the door. A passenger appeared and in attempting to prevent the robbery accidentally killed the fireman. The court held that since the death of the fireman was directly caused by accused and

the other robbers in placing him in a dangerous place, accused was liable, whether the shot was actually fired by him or the passenger. This decision was followed in *Keaton* v. *State* (1900) 41 Tex. Crim. R. 621, 57 S. W. 1125. The holding in the present case might likewise be based upon the question of causal connection. If the accused directly set in motion the cause which occasioned the death of deceased, it appears to be a sound doctrine that he would be as culpable as if he had done the deed with his own hands. It is said in *Greenleaf,* "Evidence" (16th ed. 1899) §1420: "Forcing a person to do an act which causes his death renders the death the guilty deed of him who compelled the deceased to do the act, and it is not material whether the force was applied to the body or mind." Again in 1 *Russell* "Crimes" (8th ed. 1923) p. 675 it is said that "forcing a person to do an act which is likely to produce his death, and which does produce it, is murder, and threats may constitute such force." See also 2 *Bishop* "New Criminal Law" (9th ed. 1923) §§424, 636, 637, 657, 679, 689; 1 *Wharton* "Criminal Law" (12th ed. 1932) §§152, 167. The robbers had commanded deceased to take his place as a breastwork for them and by threats and force compelled him to assume such a position so that they might escape with their loot from the bank. The causal connection between the acts of the robbers and the death of the deceased was complete.

There is a line of cases holding that if the act intended was criminal (here, for example, forcing the deceased to take a known place of danger) the accused must abide the consequences of his unlawful act, although the result was not intended: *Ringer* v. *State* (1905) 74 Ark. 262, 85 S. W. 410 (the intentional killing of another through carelessness, without criminal intent or design); *Gilmore* v. *State* (1909) 92 Ark. 205, 122 S. W. 493 (blows struck by the defendant caused death of deceased by causing him to fall off of a wagon); *Commonwealth* v. *Mink* (1877) 123 Mass. 422 (the killing of one trying to prevent the accomplishment of a suicide). It is clear that the act intended to be performed in the present case was criminal, and the consummation of the act should render the appellant liable for the consequences of the unlawful attempt to rob the bank. Not only does the court's reasoning seem logical but the result reached is eminently desirable since the modern bank robber often uses an innocent third person as an aid to effecting an escape from the scene of the crime.

SHERMAN ALLEN PERLSTEIN.

MURDER—RECANTATION OF TESTIMONY BY STATE'S PRINCIPAL WITNESS.—[Massachusetts] The defendant was here charged and convicted of murder almost entirely upon the evidence of one Dombzalski. This evidence was uncorroborated and was flatly contradicted by the defendant. The defendant moved for a new trial based on Dombzalski's affidavit stating that his testimony against the defendant was false. The trial court denied the motion. *Held:* on appeal, affirmed. On a motion for a new trial it was the judge's duty to gravely consider whether the testimony of the recanting witness was true, but as a matter of law he was not required to grant a new trial: *Commonwealth* v. *Gwizdowski* (Mass. 1933) 188 N. E. 383.

Even though the question of recantation requires a decision as to the truth of two conflicting statements, it is a matter of law for judge rather than jury determination: *State* v. *Birzer* (1928) 126 Kan. 214, 268 Pac. 842. So far as is known only in one court has the principle been enunciated that a trial court is bound to grant a new trial in a criminal case when there is a recantation of material testimony: *Martin* v. *United States* (C. C. A. 5th, 1927) 17 F. (2d) 973. It is generally held that the granting of a new trial because of the recantation of a witness is within the discretion of the trial court: *Wilson* v. *State* (Ga. App. 1915) 84 S. E. 81. This discretion is not abused if there is other evidence to support the verdict or if there are facts and circumstances which show that the testimony was not false or at least that the recantation was not true: *State* v. *Burton* (1927) 124 Kan. 509, 260 Pac. 634. Three New York cases probably contain the best discussion of the problem: *People* v. *Shilitano* (1916) 218 N. Y. 161, 112 N. E. 733; *People* v. *Giordano* (1919) 175 N. Y. Supp. 715, 106 Misc. Rep. 235; and *People* v. *Cohen* (1921) 191 N. Y. Supp. 831, 117 Misc. Rep. 158. In the *Shilitano* case Judge Seabury said: "There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character." According to the majority opinion, once the materiality of the recanted testimony has been ascertained, the chief problem for the trial judge is the weighing of possible motives for the two contradictory efforts of the witness, and a new trial should not be awarded unless the judge believes that the recantation is true. The dissent of Judge Hogan was based on his belief that a prosecution for perjury was the best means of discovering whether the original testimony or the recanting testimony was true, but as is pointed out in the *Giordano* case convictions of witnesses for perjury committed either at the trial or by recantation are very infrequent. Since it is always necessary to prove which statements were true and which false, evidence not connected with the trial must be unearthed. Furthermore, the state is not often anxious to prosecute its witness for perjury at the trial. Yet in the *Cohen* case the witness, as a matter of fact, had been convicted of perjury committed at the trial by the time the case came up to the reviewing court, but in spite of this the judge said that a new trial would not be granted unless he was convinced that the testimony of the witness was material and that its recantation would undermine the state's case. In other words it must appear that the recantation was true and that a new trial would result in an acquittal. See also *Shepherd* v. *State* (Okl. Cr. App. 1931) 300 Pac. 421.

In only a few cases have appellate courts differed with the trial court, and the difference ordinarily is over the truth of the recanting statements rather than their materiality. For example, it has been held that an eleven year old prosecutrix in a rape case was probably influenced in her original testimony by her neighbors who were enemies of the accused: *Myers* v. *State* (1914) 111 Ark. 399, 163 S. W. 1177; that the testimony at trial of a woman in a homicide case involving a love triangle should be considered false when later recanted: *Roath* v. *State*

(1932) 185 Ark. 1039, 50 S. W. (2d) 985; and that a daughter angry at her father because of a family quarrel probably falsely testified against him only to later repent: *Douglas* v. *State* (Tex. Cr. App. 1932) 54 S. W. (2d) 515. Likewise an appellate court refused to affirm a denial of a motion for a new trial when the state's sole witness was of doubtful character and had recanted while in jail awaiting grand jury action on two felony charges: *Green* v. *State* (1923) 94 Tex. Cr. App. 637, 252 S. W. 499. A most unusual case was one in which the three witnesses for the state, who alone identified the accused, later wrote letters to the state's attorney saying that they believed their identification was erroneous and that they would not testify against the accused on a rehearing. A motion for a new trial having been denied, the question before the court on appeal was whether this was a collusive recantation or one made in good faith. It was held to have been made in good faith, and a new trial was granted: *People* v. *Heinen* (1921) 300 Ill. 498, 133 N. E. 232. See also *Powell* v. *Commonwealth* (1922) 133 Va. 741, 112 S. E. 657. On the other hand, reviewing courts have affirmed denials of the motion for a new trial when statute or precedent seemed to require a perjury conviction as a condition precedent: *State* v. *Burrick* (1906) 129 Ga. 589, 59 S. E. 288; *Morrow* v. *State* (1926) 36 Ga. App. 217, 136 S. E. 92; where the recantation seemed to be merely the result of a change of heart on the part of the witness: *State* v. *Hughes* (1926) 78 Mont. 87, 252 Pac. 320; or where the recanting witness appeared to be a moron: *State* v. *Dodge* (1925) 124 Me. 243, 127 Atl. 899.

With the above principles and decisions in mind the instant case presents a rather close question. There is no doubt that the testimony of Dombzalski was necessary to support the verdict, but the question as to which of his statements was true is not so easy of solution. On the night of the murder the defendant asked the witness to go in his Ford with him to get some beer. It was the testimony of the witness as to what happened on this ride which was largely responsible for the conviction. Nevertheless, the opinion of the court does not indicate that there was either a peculiar relation between the witness and the deceased or between the witness and the defendant which would create a motive for false testimony. Apparently the former were not acquainted while the latter seemingly were on good terms, regardless of whether they were fast friends or merely acquaintances. On the contrary, these circumstances show a motive for a false recantation. It has been said that the fact that the recantation may be perjured weakens the former testimony: *Green* v. *State* (1923) 94 Tex. Cr. App. 637, 252 S. W. 499. However, it is believed that the opinion is sound and shows a tendency which should encourage fair-minded and sincere prosecutors.

GEORGE F. DYCHE.

HOMICIDE—PRESENCE AT A SUICIDE AS AIDING AND ABETTING—DUTY TO INTERFERE.—[English] In a prosecution for murder, the defendant was charged with sitting by and watching his wife drown their two children and then drown herself. The trial court instructed the jury that if the defendant, having power to interfere, had passively watched his wife drown her chil-

dren and then herself he was guilty of manslaughter even though he had not persuaded or encouraged her. The jury found the defendant guilty of manslaughter of both children and wife. *Held:* on appeal, affirmed and modified. The relationship of husband and wife and that of parent and child placed the defendant under a positive duty to interfere and his failure to do so was tantamount to encouragement. He was therefore an accessory before the fact and guilty of murder in the second degree: *Rex* v. *Russel* (1933) Vict. L. R. 59.

If an individual has performed no overt act or has done nothing to assist, encourage or show approval of the execution of the homicide and it only appears that he was present and tacitly approved of it he cannot be held guilty of murder: *Clem* v. *State* (1870) 33 Ind. 418. It is the general rule that to constitute murder in the second degree the accused must have participated in the act committed and mere presence at the scene of the crime does not impose an obligation to prevent it: *Plummer* v. *Commonwealth* (1866) 64 Ky. 76; *Wharton,* "Criminal Law" (12th ed. 1932) §246; *United States* v. *Neverson* (D. C. 1880) 1 Mackey 152; *State* v. *Hildreth* (1849) 31 N. C. 440. Presence alone is merely some evidence of the existence of assent and approval: *People* v. *Cione* (1920) 293 Ill. 321, 127 N. E. 626.

If this general rule had been applicable in the instant case no conviction could have been obtained for the defendant had done nothing to encourage the suicide. He had been on the spot and had failed to prevent it. However, there are said to be several limitations to this rule. Eminent authorities have stated that consenting to the perpetration of a crime is sufficient to constitute aiding and abetting: 1 *Chitty* "Criminal Law," p. 256; *Hale's* P. C., pp. 374, 618. But the sense in which these authorities have used the word "consent," as drawn from the decisions cited therein, implies more than its proper and popular import and they are not authority for the proposition that mere consent without encouragement is sufficient: *Clem* v. *State, supra; Clark and Marshall* "Crimes" (2d ed. 1905) §179.

Another alleged limitation to the general rule as stated in *Wharton, op. cit. supra* is where an amicable relationship exists. In such a case mere presence may be sufficient to constitute encouragement, but the basis for this limitation is that the presence of a friend lends confidence to the perpetrator by the former's potential readiness to assist if necessary and to aid in a possible retreat or escape. Thus the rule applies to the encouragement of the perpetrator of a crime against a third person and is not applicable here for the deceased was engaged in the commission of an act for which only she could suffer and for which she need not fear punishment.

A further limitation to the general rule appears when there is a positive duty to interfere or prevent the crime: *Bishop,* "Criminal Law" (9th ed. 1923) §633. According to *Wharton, op. cit. supra,* the duty here contemplated is a contract obligation the nonfeasance of which in itself constitutes the commission of a crime, such as where a watchman, whose duty it is to tend a railroad switch, fails to turn the switch for the malicious purpose of wrecking the train. In such a case the original plan, for its execution, called for no affirmative act. It is

upon this exception that the conviction in the present case rests but here the duty is of a different character. The crime itself is independent of the obligation. The obligation which is said to require the interference of the defendant is predicated on the duty of a man to provide food, clothing, shelter, and protection to his wife and children. Thus, a parent who negligently withholds food and other necessaries for his child, having the means to supply such necessaries, in consequence of which the child dies, is guilty of manslaughter, and if such withholding is wilful, the act is murder: *Regina* v. *Conde* (1867) 10 Cox C. C. 547; *Pallis* v. *State* (1898) 123 Ala. 12, 26 So. 339. Likewise, if a husband wilfully abandons his wife to the destruction of the elements when he can save her the crime is murder, although he committed no affirmative act: *Territory* v. *Manton* (1887) 7 Mont. 162, 14 Pac. 639. But this duty only extends to a case where the wife is helpless and unable to take care of herself: *Territory* v. *Manton* (1888) 8 Mont. 95, 19 Pac. 387; *State* v. *Smith* (1876) 65 Me. 257. Since the wife in this case was not helpless, the defendant was not, because of his duty to support and protect her, liable for failing to prevent her drowning herself.

As to the children, in virtually all the cases consulted where criminal liability was imposed for failure of support, the direct gist of the crime which caused the death of the infant has been the non-feasance of the father or mother, analogous to the case of the switchman above, rather than a non-feasance in preventing the affirmative act of another. See *Regina* v. *Conde, supra,* where the father was held for manslaughter in negligently failing to provide food for his child, who consequently died of starvation; and see *Stehr* v. *State* (1913) 92 Neb. 755, 139 N. W. 676, where the crime was a failure to provide medical assistance for a child with frozen feet who subsequently developed gangrene and died.

The distinction between a non-feasance as the cause of the death, and one which merely fails to prevent a death caused by the affirmative act of another is somewhat tenuous, but should, nevertheless, be drawn to prevent such an extreme extension of criminal liability as was imposed in this case. It is submitted that to hold a man as a murderer for failing to prevent a suicide is contrary to the general principles of Anglo-American jurisprudence. It is true that the trial court in this case found the defendant guilty of manslaughter only. But in view of the fact that his guilt was considered by the appellate court as that of an accessory before the fact, a verdict of murder, as the majority of the court decided, would have been more logical. One cannot be an accessory before the fact to manslaughter since it is an unpremeditated crime: *Regina* v. *Taylor* (1875) L. R. 2 C. C. 147, 13 Cox C. C. 68. The defendant's crime was silence; a conviction for murder under such circumstances is too drastic.

ALEXANDER S. MALTMAN.