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RECENT CRIMINAL CASES

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HOMICIDE—MALICE AFORETHOUGHT. —[Florida] The deceased, one Elbie Ellis, made a call upon the defendant's daughter; the defendant ordered his daughter into the house as Ellis came walking up, and as she went in, the deceased followed her, swearing as he went. The evidence shows without contradiction that Ellis made an indecent proposal to the girl which the father overheard, and he thereupon ordered the young man out of the house. When Ellis retorted, "I won't get out until I get ready," the father shot him with a shotgun, which he testifies (without any substantial contradiction other than the fact that no weapon was afterward found on the body of the deceased) was used by him when he noticed that the young man was about to draw a pistol. The defendant was tried and convicted of second degree murder. The following state statutory provisions were considered as controlling: "The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed . . . shall be murder in the first degree; . . . when perpetrated by an act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree." Fla. Comp. Laws (1927) §7137. "The offense of manslaughter embraces all killings which are neither justifiable nor excusable homicide nor murder." Fla. Comp. Laws (1927) §7141. *Held:* on appeal, reversed. "The evidence failed to establish in the accused that depravity of mind essential to conviction of murder in the second degree; . . . in the most unfavorable view of the evidence against the accused, he was at most guilty of a reasonably provoked but unnecessary killing which, as a matter of law, is no greater crime than that of manslaughter": *Ramsey* v. *State* (Fla. 1934) 154 So. 855.

In the popular sense malice has come to imply hatred, revenge, ill-will, or evil intent. As applied in the field of criminal law, however, the layman's definition would either be inadequate or entirely erroneous. Malice may be found, for example, where there is no hatred or personal ill-will, as in cases involving suicide pacts: *Turner* v. *State* (1907) 119 Tenn. 663, 108 S. W. 1139; *People* v. *Roberts* (1920) 211 Mich. 187, 178 N. W. 690; or where a mother kills her illegitimate offspring: *Jones* v. *State* (1860) 29 Ga. 594; or in cases of felony murder, where the accused was an accomplice in the commission of a felony, but took no part in the

actual killing: *People* v. *Peranio* (1923) 225 Mich. 125, 195 N. W. 670; or was even unaware that a killing had occurred: *State* v. *Carlino* (1922) 98 N. J. L. 48, 118 Atl. 784; or in cases where third parties are the innocent victims of the assailant's attack: *Carpis* v. *State* (1921) 27 N. M. 265, 199 P. 1012; *Honeycutt* v. *State* (1900) 42 Tex. Cr. App. 129, 57 S. W. 806; *People* v. *Cohen* (1922) 305 Ill. 506, 137 N. E. 511. In the *Cohen* case the defendant made an attack upon one person, but unintentionally wounded another instead. The indictment charged assault with intent to kill and murder the injured individual, and the court gave an instruction authorizing a verdict of guilty if the jury found from the evidence, beyond a reasonable doubt, that the defendant with malice aforethought, either express or implied, made an assault with a deadly weapon upon the first individual with intent to kill and murder, even though it would appear that there was no intention to shoot the victim himself. A conviction was affirmed. In cases of felony murder, however, courts exercise a discretion; the court said in the case of *Powers* v. *Commonwealth* (1901) 110 Ky. 386, 61 S. W. 935, 63 S. W. 776: "Under our statute the removal of a cornerstone is punishable by a short term in the penitentiary, and is therefore a felony. If, in attempting this offense, death were to result to one conspirator by his fellow accidentally dropping the stone upon him, no Christian court would hesitate to apply this limitation." The limitation referred to is the reduction of the offense to manslaughter, although the killing occurred in the commission of a felony.

The term "malice aforethought" was used as early as 1200 A. D., and certain cases wherein there was no "malice aforethought" were pardoned at that early date: *2 Pollock and Maitland,* "History of English Law" (1895) 478; and the term "malice prepensed" appears in the statutes, 4 *Hen. VIII,* c. 2 (1512). The earliest constructions placed significance upon the time element, *i.e.,* the space for premeditation; thus a case is reported wherein "malice aforethought" is contrasted with "a sudden falling out:" *2 Pollock and Maitland, op. cit. supra* at p. 484, n. 2. It may readily be observed that this association of "aforethought" with "premeditation" was but confusing the definitions of malice and intent, and this confusion has prevailed until modern times in some jurisdictions; *e.g.,* "Premeditation, or malice aforethought, is a necessary ingredient to the crime of murder:" *People* v. *Erno* (1925) 195 Cal. 272, 232 Pac. 710. None will deny the kinship of malice and intent, but the growing tendency is away from the definition of malice as an intent and toward the "state of mind" aspect of malice: *Perkins,* "Malice Aforethought," 43 Yale L. Jour. 537 (1934). Professor Perkins, referring to the legal aspects of negligence and the variation from civil negligence through criminal negligence to that "greater than criminal negligence," he says: "To express this notion the courts have resorted to such forms of expression as, 'an act dangerous to others—done so recklessly or wantonly as to evince depravity of mind and a disregard of human life,' *State* v. *Capps* (1904) 134 N. C. 629, 46 S. E. 730; 'such cruel acts and conduct as indicate a reckless disregard of human life,' *State* v. *Collins* (Del. 1903) 5 Penn. 263, 62 Atl. 224; 'an intent to do any unlawful act which

may probably result in depriving the party of life,' *Shorter* v. *State* (1922) 147 Tenn. 355, 247 S. W. 985; or 'an unlawful act, which in its consequences naturally tends to destroy the life of a human being,' *Ashford* v. *State* (1916) 144 Ga. 832, 88 S. E. 205."

It is well settled that malice aforethought is not the produce of premeditation; for example, a killing may be with malice aforethought although the design or intent to kill was formed "at the very moment the fatal shot was fired": *State* v. *Hall* (1932) 54 Nev. 213, 13 P (2d) 624; or "on the spur of the moment": *State* v. *Heidelberg* (1908) 102 La. 300, 45 So. 256; but then, too, premeditation can transpire as instantaneously as malice aforethought, according to what was said in *Commonwealth* v. *Dreher* (1922) 274 Pa. 325, 118 Atl. 215: "An act is premeditated if there was a previous deliberation or a previous intent to kill, however sudden and however quickly put into execution; an instant of time being sufficient." The decisions are not unanimous, however, in distinguishing malice from intent. Professor Perkins shows in his article "Malice Aforethought," *supra,* how courts have determined malice on the existence or non-existence of intent; quoting: "Express malice aforethought has been said to mean (assuming the absence of justification or excuse or any mitigating circumstances sufficient to reduce the homicide to manslaughter): (1) an intent to kill the very person killed, *Ferell* v. *State* (1875) 43 Tex. 503; (2) an intent to kill the very person killed or to inflict great bodily injury upon him, *State* v. *Faino* (Del. 1894) 1 Mary. 492, 41 Atl. 134; (3) an intent to kill some person, *People* v. *Cochran* (1924) 313 Ill. 508, 145 N. E. 207; and (4) an intent to cause the death or great bodily injury to some person, *Rex* v. *Oneby* (1727) 2 Ld. Raym. 1485, 1489, 92 Eng. Rep. R. 465; *State* v. *Brown* (Del. 1902) 4 Penn. 120, 124, 53 Atl. 354, 355." Decisions such as these incorporate intent in the term malice; often statutes do too. The Illinois statute, for example, provides: "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." Ill. Rev. Stat. (Smith-Hurd, 1933) C. 38, §358. But in the light of modern aspects of malice, it seems a more accurate wording would be: "Express malice accompanies . . ." or "is denoted by that deliberate intention . . ." The section relating to implied malice would not be open to this correction ("malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart").

Professor Perkins' concluding definition of malice aforethought is "an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind," which includes, he points out: (1) intent to kill; (2) intent to inflict great bodily injury, (3) wanton and wilful disregard; (4) perpetration of felony, and resisting lawful arrest; that is, the wilful doing of any act which involves a subsequent element of human risk. Significance has long attached to this "man-endangering" or human risk element as evidenced by statutes which constitute murder of those homicides occurring in the perpetration of the commonly enumerated felonies of rape, robbery, arson, and burglary.

Florida decisions have held that

the statutory definitions of murder do not make malice an element of the offense, *Riggins* v. *State* (1919) 78 Fla. 459, 83 So. 267; but that premeditation is an essential element of that crime, *Miller* v. *State* (1918) 75 Fla. 136, 77 So. 669. The principal case holds that "malice in law refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward that citizen," citing *Colwell* v. *Tinker* (1902) 169 N. Y. 531, 62 N. E. 668, 58 L. R. A. 765, 98 Am. St. Rep. 587; and later *Davis* v. *Hearst* (1911) 160 Cal. 143, 116 Pac. 530; but it is important to note that these last two mentioned cases are both civil suits, the one an action for criminal conversion, the other an action for libel. Definitions of malice as they occur in decisions handed down in civil actions have little bearing on the malice aforethought of the criminal law, and reference to such decisions by the courts sitting in criminal cases should be made cautiously. A holding in the case of *State* v. *Moynihan* (1919) 93 N. J. L. 253, 106 Atl. 817 is that "malice, in its legal sense, means nothing more than an evil state of mind. The premeditated and deliberate design of a sane man to kill a human being, purposely executed without adequate legal justification, stamps the act as the result of an evil state of mind; hence, an act conceived in malice. The law implies malice from the commission of the wrongful act."

Professor Perkins' "man-endangering-state-of-mind" definition appears remarkably adequate, on a study of the decisions; the state of mind aspect seems indeed a more accurate approach to the problem.

LAWRENCE B. MURDOCK.

ASSAULT WITH INTENT TO KILL—INTOXICATION AS A DEFENSE.—[Oklahoma] The defendant while in a state of partial intoxication went to the residence of his tenant, one Wilson, with whom he had had some prior difficulty, and engaged in a quarrel, which resulted in Wilson's being ordered to vacate the premises within thirty days. As Wilson started to leave, the defendant shot at him three times, barely missing him. The defendant was prosecuted for assault with intent to kill, and as a defense he claimed to have been intoxicated to such an extent that he was incapable of forming a specific intent. He was convicted and sentenced to one year in the penitentiary. *Held:* on appeal, affirmed. The question of intoxication is one of fact to be decided by the trial court (a jury having been waived) and that court had sufficient evidence before it to find that the defendant was not intoxicated to a degree that would render him incapable of forming an intent. *Weber* v. *State* (Okla. 1934) 33 Pac. (2d) 232.

The state has the burden of proving every accusation made in the indictment. Consequently, all charges which include an "intent," such as assault with intent to kill, assault with intent to rob, or assault with intent to rape, *etc.*, require the prosecuting attorney to prove an intent to commit the particular crime. In order to disprove the presence of such a condition of mind, an accused frequently defends upon the ground of having been in a mental lapse due to intoxication, drugs, or various mental diseases. The degree to which a defendant has become intoxicated, is a matter to be decided by the jury, as is the question of whether the intoxication is so complete as

to render him incapable of forming a specific intent. *State* v. *Massey* (1924) 20 Ala. App. 56, 100 So. 625. Intoxication as a defense may be used when the charge is of any crime in which the state has the burden of proving an intent. *State* v. *Johnson* (Iowa, 1934) 245 N. W. 728. If the essential element is lacking, namely intent, by reason that the intoxication rendered the assailant incapable of having an intent, the criminal prosecution is thereby defeated. This appears to be the general rule, as it is well substantiated in *Weick* v. *Commonwealth* (1924) 201 Ky. 632, 258 S. W. 90; *People* v. *Neetens* (1919) 42 Cal. App. 596, 184 Pac. 27; *People* v. *Cochran* (1924) 313 Ill. 508, 142 N. E. 207; *Graham* v. *Commonwealth* (1923) 200 Ky. 161, 252 S. W. 1012. However, drunkenness cannot be a successful defense in a case of assault with intent to rape. *State* v. *Comer* (1922) 296 Mo. 1, 247 S. W. 179. The crime of assault with intent to commit rape appears to be an exception to the rule because of its nature being such that a man could not attempt to commit the act without having a desire to do so; the matter of intent being liberally construed by the court.

Although intoxication may be such as to preclude the possibility of there being a specific intent, the defense in certain cases may be held unavailable on the ground that the defendant has voluntarily put himself in that condition. In *State* v. *Jordon* (1920) 285 Mo. 62, 225 S. W. 905, involving the crime of assault with intent to kill, the court was willing to supply intent by construction, giving as a reason the well recognized principle that "one who voluntarily assumes an attitude likely to produce harm to others, despite any specific intention to injure, is responsible for the consequences of his act." (2 Coke, Litt. sec. 247a).

The Illinois Supreme Court correctly states the general view in *People* v. *Brislane* (1920) 295 Ill. 241, 129 N. E. 185, that if the defendant at the time of the commission of the crime charged, was wholly incapable of forming an intent, whether from intoxication or any other causes, he is guilty of no crime. This rule was supported by *Crosby* v. *People* (1891) 137 Ill. 325, 27 N. E. 49; *Schwabacker* v. *People* (1897) 165 Ill. 618, 46 N. E. 809; *Bruen* v. *People* (1903) 206 Ill. 417, 69 N. E. 24; *People* v. *Jones* (1914) 263 Ill. 564, 105 N. E. 744.

FRANKLIN B. WITTER.

PRESENCE OF ACCUSED DURING PRELIMINARY PROCEEDINGS. — [Mississippi] The defendant was indicted for murder. His attorney, before the setting of trial date, moved for a special venire and the order was entered. When the case came to trial, the attorney made a motion to quash the special venire on the ground that the defendant was not present when the order was entered. There was a conflict of evidence as to whether the defendant was present, but the motion was denied and an exception was taken. *Held:* on appeal, affirmed. Even if the defendant were absent it was not a denial of his constitutional right to be present during his trial since the absence occurred at a preliminary proceeding: *Ford* v. *State* (Miss. 1934) 155 So. 220.

This case is the latest in a line of decisions that are apparently unanimous in holding that absence from a preliminary proceeding is

not prejudicial to a defendant: *Mabry* v. *State* (1888) 50 Ark. 492, 8 S. W. 823; *Milton* v. *State* (1902) 134 Ala. 42, 32 So. 653; *Vogel* v. *State* (1908) 138 Wis. 315, 119 N. W. 180; *Oliver* v. *State* (1913) 70 Tex. Crim. App. 140, 159 S. W. 235; *Ammons* v. *State* (1913) 65 Fla. 166, 61 So. 496; *Logan* v. *State* (1915) 131 Tenn. 75, 173 S. W. 443; *Benton* v. *State* (1928) 108 Tex. Crim. App. 285, 300 S. W. 75. The reasons assigned for the immateriality are similar in the various jurisdictions. In *Logan* v. *State, supra,* it was said that such an order constituted an administrative duty with which the defendant had no concern. In *Milton* v. *State, supra,* it was called "ministerial," while in *Mabry* v. *State, supra,* the court said it formed no part of the trial.

The rule enunciated in the instant case seems to be the only sensible one to apply. There is a growing tendency throughout the country not to disturb jury verdicts in criminal cases on technicalities which occasion no substantial harm to the defendant. The error complained of in the principal case is harmless and certainly should not be made the basis of a reversal and a new trial which would cost the state money and at the same time serve no useful purpose.

GERALD F. WHITE.

TESTIMONY OF ACCOMPLICES — DISQUALIFICATION BY APPROVEMENT.—[Florida] The defendant and four other persons were jointly indicted for murder and found guilty. The defendant appealed, one assignment of error being that two of his co-defendants who appeared as the state's witnesses were "approvers" and therefore disqualified to testify, since a Florida statute provided that "approvers shall not be admitted in any case whatever." (Fla. Comp. Laws, 1927, §8381.) Although the trial court's verdict was reversed on other grounds, the appellate court decided, upon this issue, that the abolition of this ancient practice of approvement did not disqualify the co-defendants as witnesses since they are not considered "approvers" within the common law meaning of that term. *Lee* v. *State* (Fla. 1934) 155 So. 123.

Blackstone states that approvement occurs "when a person indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded: and appeals or accuses others, his accomplices, in order to obtain his pardon." The party appealed or accused is called the appellee, and the party accusing the approver. 4 Bl. Com. (15th Ed., 1809) 330. A successful approver was entitled to his pardon as of right.

A prisoner could be allowed by the court to be an approver only when he had in fact committed a capital offense, either treason or felony, and had pleaded guilty. If so allowed the prisoner took an oath in court to discover all crimes of felony or treason that were committed by the approver in company with the appellee. A coroner was appointed by the court to take the approver's appeal which was equivalent to an indictment. *2 Hawkins,* Pleas of the Crown" (1788) 296.

The law held approvers up to a high standard of honesty and integrity, and the penalty for any misstatement in the appeal or act showing a lack of good faith was hanging. If the approver claimed that the appeal was made by duress, the coroner was examined under oath

concerning the claim, and if the coroner affirmed that it was made of the approver's own free will, the approver was executed. The coroner put the appeal in writing when the approver first recited it, and some days later the approver was made to repeat it word for word in court. If a mistake was made in a single detail the court considered that the appeal was falsified, and hanged the approver forthwith. A like penalty was inflicted if the approver appealed against someone not found in the kingdom, but process of outlawry issued against the appellee regardless of the execution of the approver. 2 *Hale,* "Pleas of the Crown" (1778) 234. If the accused once plead not guilty he could not be an approver, for if he changed his plea to guilty and asked to be sworn as an approver it was obvious to the court that he had told a falsehood as his confession contradicted his former plea." *Hawkins, op. cit. supra* at p. 295. It was entirely discretionary with the court whether a prisoner should be allowed to be sworn as an approver and if it appeared that he was a principal and tempted the others the court would reject him as an approver. *Rex* v. *Rudd* (1775) 1 Cowp. 331, 98 Eng. Rep. R. 1114.

The appellee was allowed to take his exceptions to the sufficiency of the appeal. Grounds for such exceptions were: that the approver was not in prison but at large; that the approver was over seventy years of age, or a woman, or maimed, whereby appellee would be deprived of his right to trial by battle; or that the approver was already outlawed because of another felony. 2 *Hale, op. cit. supra* at p. 233. An appellee could not, however, himself become an approver "not only because it would falsify the appeal of the first approver in supposing that he had omitted some of his partners, but also because it would cause him an indefinite delay: for the appellee of such an approver might as well become an approver of others, and so on." 2 *Hawkins, op. cit. supra* at p. 295.

If the appellee did not take exception to the appeal, but pleaded to the felony, he could put himself on trial either by battle or by the country. If trial by battle were chosen and the appellee vanquished the approver, the appellee was set free and the approver hanged, but if the approver prevailed, the appellee was held for the crime and the approver was entitled to a pardon as of right. If an approver should appeal several persons it was necessary for him to vanquish them all before he could demand his pardon. 2 *Hale, op. cit. supra* at p. 233.

If the appellee elected to stand trial, the approver was sworn as a witness, and Lord Hale points out that although he is a confessed felon, yet his testimony against the appellee gains a "probable credibility" because "he accuseth himself by his confession." *Ibid.* The approver's testimony or evidence is not conclusive, as the credibility of the witness was, then as now, a matter for the determination of the jury.

By the beginning of the 16th century the practice of approvement had fallen into disuse because it was found that more harm came to innocent men as a result of false accusations of villains than benefit to the public by discovery and conviction of real criminals. 2 *Hale, op. cit. supra* at p. 226. In the leading case of *Rex* v. *Rudd, supra,* Lord Mansfield said that approvement was one method by which an accom-

plice could acquire a right to a pardon, but that, while approvement was still a part of the common law, the practice by long discontinuance had grown into disuse. He distinguished this old practice of approvement under which the approver had a legal right to a pardon from the practice of turning evidence for the Crown. In the latter case, he points out, if the accused acts fairly and openly, and discovers the whole truth, though he is not entitled of right to a pardon, yet the usage of the courts is to suspend prosecution against him, and he has an equitable title to a recommendation for the King's mercy. But he is not entitled to this exemption from prosecution as a matter of right: *Rex* v. *Brunton* (1821) Russ. & Ry. 454, 168 Eng. Rep. R. 894; *Ex Parte Wells* (1855) 18 How. 307. This rule has always been followed in the United States: *United States* v. *Ford* (1878) 99 U. S. 594. In the *Ford* case the court, in holding that a district attorney has no authority to contract that a person accused of an offense against the United States shall not be prosecuted if, when examined as a witness against his accomplices, he fully discloses his and their guilt, said that the usage of not prosecuting an accomplice who has fully testified against his associates in guilt had its origin in the ancient practice of approvement.

The old Illinois Code, like the present Florida Code, declares that approvers shall not be allowed to give testimony: §17, Scates' Comp. 337 (1858). The courts at first made no distinction between an accomplice and an approver, but the Supreme court in *Stevens* v. *People* (1905) 215 Ill. 593, 74 N. E. 786, said: "More recently the courts have come to recognize the public necessity of admitting such evidence in order that criminals may be brought to justice." In the instant case the Florida court made a sharp distinction between accomplices and approvers on the ground that the alleged approvers had fulfilled relatively few of the old common law requirements of an approver.

DAVID B. RICHARDSON.

DOUBLE JEOPARDY — ADULTERY — LEWDNESS.—[Wisconsin] The defendant, having lived with a woman not his wife for a period of about one year, was convicted on a charge of lewd and lascivious conduct under a Wisconsin statute (St. 1933, No. 351.04). When, following service of sentence, it was learned that the defendant was a married man, a warrant issued charging him with having committed the crime of adultery in violation of statute (Wis. St. 1933, No. 351.01). The defendant contended that the act with which he was originally charged was a continuous offense made so by a series of acts creating but one offense within the meaning of the statute under which he had already been convicted and punished. The defendant therefore claimed that his prior conviction precluded a prosecution for adultery on the grounds of a former jeopardy for the offense committed. On the trial for adultery, the following question was certified to the Supreme Court of Wisconsin for settlement: did the conviction of the defendant in the district court for lewd and lascivious conduct constitute a bar to the prosecution for adultery in the municipal court, where the evidence produced in the second trial was the same as that brought forward

in first except for additional proof of the defendant being a married man. The court held that prior conviction was not a bar and that no double jeopardy right would be violated, for offenses are not the same when there are distinct elements in one which are not included in the other, even though both relate to one transaction: *State* v. *Brooks* (Wis. 1934) 254 N. W. 374.

Cases are not infrequent where different offenses are committed in the same transaction or transactions and it is generally held that the rule that a person cannot twice be tried or put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. Thus an acquittal on a charge of arson does not bar a prosecution for burning goods to injure an insurance company, *People* v. *Fox* (1915) 269 Ill. 300, 110 N. E. 29; a conviction for an assault with a deadly weapon, with intent to commit murder, is not a bar to a subsequent prosecution for an attempt to commit robbery, *People* v. *Bentley* (1888) 77 Cal. 7, 18 Pac. 799; a conviction for assault and battery will be no bar to a trial for manslaughter, where the injuries result in death after the former conviction, *State* v. *Littlefield* (1880) 70 Me. 452; conviction for disturbing the peace by loud and vociferous language does not bar a conviction for assault by use of a gun in an angry, threatening manner, *Clayton* v. *State* (1917) 81 Tex. Cr. 385, 197 S. W. 591; conviction for an assault with intent to rape forms no bar to a prosecution for lewd, immoral, and lascivious acts with a child, *State* v. *Jacobson* (1924) 197 Iowa 547, 197 N. W. 638; also in England, a conviction for sodomy was held not to prevent a prosecution on a charge of gross indecency, *The King* v. *Barron* (1914) 2 K. B. 570. It may therefore be stated that as a general rule, where two offenses grow out of the same transaction and are severable and distinct, prosecution for one offense resulting in either a conviction or an acquittal will not bar prosecution for the other offense.

In the instant case therefore the problem becomes one of differentiating between the statutory crimes of adultery and lewdness, the lewdness in question being that lewd and lascivious conduct involved in illicit cohabitation. The question is whether or not the crimes coincide, or not doing so, what additional evidence is necessary for proof of the one crime after a trial has been had for the other. There are four elements in which the two crimes are totally different and easily distinguishable. In the first element, that of public policy, the two crimes are not the same. Lewd and lascivious behavior is a defiance of the usual conventions recognized in our laws as standards of decency. It is sought by law to prevent acts detrimental to the morals of the community. However in the matter of adultery, the offense is a transgression against the marriage relation, which relation the law seeks to protect. Although both might be classed as questions of public policy, they are different, lewd and lascivious conduct being a violation to the entire field of public morals whereas a single act of adultery is damaging in the main only to the offender's marital relationship.

In the second element, that of continuity of offense, the two crimes differ materially. Lewdness constitutes a continuing offense,

coupled with the willful creation of a bad reputation for the parties involved. Where lewd and lascivious conduct is charged, the evidence necessary to support a prosecution must be something more than that of a single act of fornication or adultery, or even of several such acts where disconnected and secret. 2 *Wharton,* "Criminal Law" (12th ed. 1932) sec. 2109. However, where the crime of adultery has been charged against the offender, it is generally held that a single act of intercourse between one married person and another, makes that married person liable to prosecution. In a majority of states, adultery is held not to be a continuing offense, but each act of adultery constitutes a separate offense. 2 C. J. 13.

In two other elements also, the crimes may be noted to possess substantial differences. Under most statutes, it is an essential element of the offense of lewdness that the cohabitation involved be open and notorious, *People* v. *Stern* (1918) 207 Ill. App. 154; *Commonwealth* v. *Munson* (1879) 127 Mass. 459; *Jamison* v. *State* (1906) 117 Tenn. 58, 94 S. W. 675. On the other hand, no notoriety is attached to adultery, only proof of marriage and the act or acts of intercourse need be given. 2 *Wharton,* "Criminal Law" (12th ed. 1932) sec. 2095, 2096. A fourth element is that of marriage. To the charge of adultery, a claim of non-marriage would be a defense while in a prosecution for lewdness, the problem of marriage is immaterial and of no consequence except as bearing on subsequent charges.

Even though these several material differences exist, proof of unlawful intercourse is necessary for conviction in each criminal charge. However complete proof might be of a charge of lewdness, it would not be sufficient to warrant a conviction for a subsequent charge of adultery without the additional proof of the defendant's marriage. The problem of justice in so punishing an offender for two distinct offenses growing out of the same act is a perplexing one and should be left to the discretion of the trial judge. The defendant, having committed two crimes by a single act, must stand or fall by his separate defenses.

CLYDE THEODORE NISSEN.