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RECENT CRIMINAL CASES

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CRIMINAL LAW—COMMENTS BY THE JUDGE ON THE EVIDENCE—ARGUMENTATIVE INSTRUCTIONS. — [New York] The defendant was convicted of manslaughter in the second degree, for having stabbed his wife with a bread knife while they were alone in their apartment. The defense was that she had committed suicide, the defendant testifying that he had not touched her but that she had stabbed herself while his back was turned. The judge instructed the jury that there was no evidence to support the defense of suicide and further summed up all the evidence relied on by the prosecution, ignoring or disparaging the testimony for the defense. *Held:* on appeal, reversed. The instructions were prejudicial to the defendant and this was not remedied by the final words of the judge informing the jury that they were the judges of the facts and were not to be influenced by the court's remarks: *People* v. *Thomas* (1934) 269 N. Y. Supp. 145.

The only limitations which the common law imposed on the trial judge in either a civil or criminal case, in the matter of expressing his opinion with reference to the merits of the case, were that he should make it clear to the jury that they were not bound by his opinion and that the decision upon the facts was exclusively for them: *Jessner* v. *State* (1930) 202 Wis. 184, 231 N. W. 634. That has remained the rule in England down to the present time: *Hale* "History of the Common Law of England" (4th ed., 1792) p. 291; *People* v. *O'Donnell* (1917) 12 Cr. Ap. Rep. 219. As part of the common law system of jury trial, the rule thus prevailed in the early American courts also, but today that practice obtains in only ten jurisdictions in this country, including the federal courts: (Conn., Minn., N. Y., N. J., Ohio, Penn., R. I., Utah, Vt., N. H.) *Hunter* v. *United States* (1925) 267 U. S. 597, 45 S. Ct. 352; *State* v. *Cianflone* (1923) 98 Conn. 454, 120 Atl. 347; *State* v. *Dragone* (1923) 99 N. J. Law 144, 122 Atl. 878; *Commonwealth* v. *Nofus* (1931) 303 Pa. 418, 154 Atl. 485; *United States* v. *Frankel* (C. C. A. 2d, 1933) 65 F. (2d) 285. In most jurisdictions it is now considered an invasion of the province of the jury for the court to express any opinion as to the weight of the evidence. This change has been brought about almost entirely by organic and statutory provisions (Statutes are found in: Ala., Fla., Ga., Ill., Iowa, La., Me., Mass., Miss., N. D., Ore., Texas, Mich., N. M., S. D.; while constitutional provisions are found in: Ark., Cal., Nevada, N. C., Tenn., Wash., S. C., Del.), though in some states it ap-

pears to have been the result of misinterpretation of the common law or judicial adoption of legislation in other states made necessary by evils which crept into the system (Ind., Kan., Ky., Neb., Mo., Mont., Md., Va., W. Va., Colo., Ohio, Okla.).

General Rule Against Comments on the Evidence: The tendency of some judges to impose their views on the jury and of juries to shirk the responsibility of deciding the issues for themselves had given cause for fear that the constitutional right of jury trial might be vitiated, and the pendulum swung the other way, impelled by those who watched jealously for any attempt to break down the line between the functions of judge and jury. For excellent comment on the history of this development see note in (1928) 12 Jour. Am. Jud. Soc. 76. The rule is interpreted with varying degrees of strictness in different states, but its enforcement is generally very stringent: *Johnson* v. *State* (1913) 8 Ala. App. 207, 62 So. 328; *Havill* v. *State* (1912) 7 Okla. Cr. 22, 121 Pac. 794; *State* v. *Green* (1908) 303 Utah 497, 94 Pac. 987; *State* v. *Hundley* (1870) 46 Mo. 414; but see *Durant* v. *Burt* (1867) 98 Mass. 161; *Cicero* v. *State* (1875) 54 Ga. 157; *State* v. *Elkins* (1876) 63 Mo. 159. The statement of it is usually to the effect that the judge may not in his charge comment on the evidence or express any opinion with regard to matters of fact: Note (1921) 10 A. L. R. 1116, though in some of these jurisdictions summing up is still allowed, and the judge may state or recapitulate the evidence so long as he is careful to remain absolutely neutral: *State* v. *Dawkins* (1890) 32 S. C. 17, 10 S. E. 772; *People* v. *Christenson* (1890) 85 Cal. 568, 21 Pac. 888; *Commonwealth* v. *Berry* (1810) 9 Allen (Mass.) 276. Any remarks by the judge during the course of the trial which indicate an opinion on the merits of the case are usually considered as within the rule or its logically necessary corollary, and in some states the statute expressly includes such remarks in its inhibition: Note, A. L. R., *supra.* (In Texas, the statute reads, ". . . nor shall he at any stage of the proceedings previous to the return of the verdict make any remarks calculated to convey to the jury his opinion of the case.")

Common Law Rule: New York is a common law jurisdiction, and it has been stated that the only limitation to the privilege allowing the judge to express his opinions on the weight of the evidence was that the ultimate decision of the facts must be left to the jury. That limitation is of greater significance than mere statement would indicate. For the fundamental concept of the Anglo-American system of jury trial lies in the division of labor between the judge and jury, and even when the judge is permitted to give the jury the benefit of his greater experience and understanding, any invasion by him of the jury's function is condemned, the difference being in the notion of the line dividing their respective functions. So in the common law jurisdictions like New York great care must be taken that the jury are not misled into the belief that they are bound by the judge's views of the evidence, and the opinion of the judge must be offered only as such and to be leaned on only in time of difficulty: *Nudd* v. *Burrows* (1875) 91 U. S. 439; *N. Y. Fire Insurance Co.* v. *Walden* (1815) 12 Johns (New York) 519; *Carney* v. *United States* (C. C. A. 9th, 1924) 295 Fed. 606. It has been held in England that a summing up, in effect

recommending a verdict of guilty, which does not adequately put the prisoner's case before the jury is reason for quashing a conviction: *Rex* v. *O'Donnell* (1917) 12 Cr. Ap. Rep. 219; *Rex* v. *Beeby* (1911) 6 Cr. Ap. Rep. 138, for the judge in summing up is bound to put the defense, however weak, to the jury: *Rex* v. *Diminck* (1909) 26 I. L. R. 74, 3 Cr. Ap. Rep. 77. During the trial in the instant case the court in colloquy with counsel said that there was no evidence of suicide and later charged the jury that "Every killing is a homicide and this killing was either manslaughter in the first degree or in the second degree, or else it was suicide on the part of the deceased, *according to the allegations of counsel and the theory of the defense,*" and that "It is *suggested* by the defendant's counsel and by the defendant that this woman must have killed herself." These instructions taken with the foregoing remark tended to weaken the suicide defense. The court completely ignored the testimony of the medical examiner that a previous injury to the deceased's wrist had not weakened it so as to make self-infliction of the death wound unlikely and charged the jury, "Now, in considering that testimony there are two things which you should dwell upon. The first is the amount of force necessary to drive a knife that far into a human being; and secondly, on the question of suicide, is it or is it not likely that a woman who meant to kill herself would stab herself in that particular place? That is a question that seems to me of great importance." The judge further called to the attention of the jury the unlikelihood of falsehood on the part of the medical examiner, a paid officer of the state, and went on to make it clear that a man on trial in the position of the defendant would have no regard for truth if his life or freedom were at stake. Of these remarks and instructions the appellate court said, "The statements are not made in the form of a mere narrative of the claims made by the prosecution in connection with the testimony, but are advanced as personal arguments of the court concerning the significance which should be attached to various parts of the testimony contained in the record. They amount in effect to an animated argument in support of the people's claim." The test appears to be in fact if not in theory whether the instructions complained of were such as actually influence the jury prejudicially. Here the instructions were "advanced as personal arguments of the court" and while the mere fact that they were argumentative in form will not usually operate a reversal, argumentative instructions are always condemned as rendering more uncertain a fair and just disposition of the cause and will always constitute reversible error when otherwise vicious and unfair: *Baldwin* v. *State* (1896) 111 Ala. 11, 20 So. 528; *Jones* v. *State* (1880) 65 Ga. 621; *Weare* v. *United States* (C. C. A. 8th, 1924) 1 F. (2d) 617; *Duigman* v. *State* (1880) 48 Wis. 485, 4 N. W. 668; *McAllister* v. *State* (1913) 67 Ore. 480, 136 Pac. 354.

To the present day, the rule has been the subject of much controversy. It has been sought on several occasions to limit even the federal judiciary in this regard: *Osborne,* "Some Problems of Procedural Reform" (1921) 7 A. B. A. J. 249 and editorial comment on "Whittling Away at Federal Tribunals" (1928) 14 A. B. A. J. 200. At the same time there have been attempts to free state judges of the restrictions

already imposed. In Illinois, a statute providing that the court in charging the jury shall only instruct as to the law of the case (Ill. Rev. Stat., Cahill 1929, c. 110, §72) was attacked as repugnant to the constitutional guarantee that "the right of trial by jury as heretofore enjoyed shall remain inviolate": *People* v. *Kelly* (1931) 347 Ill. 221, 179 N. E. 898. The court upheld the statute on the ground that since the judge's comments on the evidence were not subject to the demand of the defendant as a matter of right at common law, the privilege was not an essential element of the common law system and therefore was not protected by the constitutional provision. But a strong dissent by DeYoung concurred in by Dunn argued that the right of the defendant that the judge should not be hampered as under the statute was inviolate: *Note* (1932) 23 J. Crim. Law 1034. While it is not difficult to see the necessity for preventing unbridled partiality in the judge, it is also apparent in the light of present day restrictions on him that the reaction has made almost as much a mockery of jury trial as could the abuse have done: *Cartwright,* "Present But Taking No Part" (1915) 10 Ill. L. Rev. 537. With the elaborate system of appellate courts that exists in this country, there would probably be small chance for abuse of the privilege by the trial judges with correction so readily forthcoming as in the instant case, and it would seem that if a really impartial trial is desired and not merely one favoring the accused at every point, the common law rule is likely to secure it.

ROBERT N. BURCHMORE.

CRIMINAL LAW—SEALED VERDICT — DOUBLE JEOPARDY. — [Kansas] Richard E. Brown was tried by a jury on an information containing two counts, one of which charged him with the commission of the crime of rape within two years last prior to May 25, 1933. After evidence was offered by the state as to numerous acts constituting the crime charged, on the defendant's motion, the state elected to rely for conviction upon acts on or about March 18, 1932. Upon the conclusion of the trial, the jury was informed that they should render a sealed verdict to the bailiff, and that they might separate, go home, and return to court the next morning. The next day the court convened with all the jurors present except one, and reported that they had reached a verdict the previous day, and had sealed and delivered it in accordance with the court's instructions. The defendant stated his willingness to waive the presence of the absent juror, who was ill, but the court continued the case until the following Friday. On Friday, all the jurors were present, but reported that they were not agreed. Upon being sent back for further consideration, and again failing to reach an agreement, the court discharged the jury. The cause was then continued to the next term, the sealed verdict being preserved in the hands of the clerk. Following this, the defendant was rearrested on a warrant charging statutory rape on the same person named in the above proceedings on or about five designated days all prior to May 25, 1933, one of them being March 18, 1932. After a preliminary hearing the defendant was bound over for trial. Defendant instituted an original proceeding in *habeas corpus* in the Kansas Supreme Court, seeking his release from custody under the first indictment on the ground that the court erred in refusing to allow him

to waive the presence of one juror and that the jury may not alter a verdict once arrived at and sealed. He further sought his release under the second charge on grounds of double jeopardy. *Held:* writ of *habeas corpus* allowed as to the commitment under which petitioner was held for a new trial by reason of the failure of the court to receive the verdict following the trial commenced on November 23, 1933, and writ of *habeas corpus* denied as to the commitment on which the defendant is held, having been bound over to the district court on January 23, 1934: *Ex parte Brown* (1934) 139 Kan. 614, 32 P. (2d) 507.

The first question to arise in the instant case involves the validity of a verdict reached by a full jury, but returned into court by a partial jury. The court seems to follow the reasoning of *Patton* v. *United States* (1930) 281 U. S. 276, 50 S. Ct. 253, in which it was held that the constitutional right of one on trial for crime to a jury of twelve persons may be waived, either altogether, or by consenting to a trial by a less number than twelve. This had the effect of overruling the previous holding of the Kansas court in *State* v. *Simons* (1900) 61 Kan. 752, 60 Pac. 1052, that such an agreement by the defendant to waive a full jury would be ineffectual to bind him. There is no specific provision in the Kansas statutes for a sealed verdict, and there is no previous case, where under similar circumstances the force and effect of a sealed verdict has been considered. However, an early Kansas case, *Bishop* v. *Mugler* (1885) 33 Kan. 145, 5 Pac. 756, held that a sealed verdict should be presented by a full jury in open court, so that the parties may avail themselves of the right of polling the jury, and until the verdict is regularly received and filed, it is without force or validity. But this was a civil case, and the court, in the instant case, makes a very sensible distinction between civil and criminal cases in this respect: "In a civil case, the parties are on a parity; in a criminal case, the defendant is hedged about with constitutional and statutory protection which the state does not enjoy. The defendant is entitled to demand strict compliance with every requirement in his favor, but . . . he has power to waive at least some of those requirements." The verdict may be returned in the absence of the judge: *State* v. *Keehn* (1911) 85 Kan. 765, 118 Pac. 851; the defendant may waive attendance at the return of the verdict: *State* v. *Way* (1907) 76 Kan. 928, 93 Pac. 159; the verdict in a capital case may be returned after adjournment of court: *State* v. *McKinney* (1884) 31 Kan. 570, 3 Pac. 356. Reasoning from the above authorities the court concludes that, in the absence of statutory prohibition, the defendant could certainly waive the presence of one juror when the verdict, reached by a full number, was returned into court.

As to the ability of a jury to alter a sealed verdict after it is arrived at, it has been held in civil cases that the jury may be allowed to correct or amend a sealed verdict, even after sealing the verdict and separating: *Bishop* v. *Mugler, supra; Porret* v. *City of New York* (1929) 252 N. Y. 208, 169 N. E. 280; *Charles* v. *Boston Elev. R. Co.* (1918) 230 Mass. 536, 120 N. E. 69; 66 A. L. R. 560-2 for other cases. However, the rule is different in a criminal trial. Where the jury have sealed their verdict and separated, they cannot, upon returning into court, amend or correct it in a matter of substance:

Williams v. *People* (1867) 44 Ill. 478; *Sargeant* v. *State* (1842) 11 Ohio St. 472; *Koch* v. *State* (1906) 126 Wis. 470, 106 N. W. 531; 66 A. L. R. 571 for other cases. In holding that the verdict in the instant case could not be altered after the jury separated, and should have been received, the Kansas court has followed the holding of a majority of state courts, while in holding that the presence of the absent juror could be waived, it recognizes that the sealing of a verdict in a criminal case ends the jury's consideration in the matter, and that the return and reception of the verdict are not judicial acts, but are primarily ministerial in nature, and may be waived as to strict conformity with statutory provisions: 1 *Bishop* "New Criminal Procedure" (4th ed. 1895) §1001 and cases cited. The court granted the writ of *habeas corpus* as to the commitment under the first indictment.

Under the second information the defendant was charged with offenses which could have been proved under the former information and thus a question of former jeopardy arose. On this question the Kansas courts have adopted the view of the majority of jurisdictions. Jeopardy is said to attach at the time "trial is begun before a court of competent jurisdiction upon an indictment or information which is sufficient to sustain a conviction": *State* v. *Pittsburg Paving Brick Co.* (1924) 117 Kan. 192, 230 Pac. 1035. Trial begins after the defendant has been arraigned and has pleaded to the indictment, and after a competent jury has been impanelled and sworn: *State* v. *Rook* (1900) 61 Kan. 382, 59 Pac. 653; 16 C. J. 237 and cases cited. The problem which faced the court here was one of determining whether the offenses charged in the warrant upon which the defendant was bound over on January 23, 1934, were the same offenses for which he was tried in November, 1933, for if they were, then defendant's plea of former jeopardy bars further prosecution: *Kan. Const.*, Bill of Rights, §10; 8 R. C. L. 143; 16 C. J. 265. At the first trial numerous acts and transactions were testified to, any one of which would have constituted the offenses charged in the first count of the information, which specified no particular date other than "within two years last prior to May 25, 1933." The Kansas court has held that "where the state has offered evidence tending to prove several distinct and substantive offenses, it is the duty of the court, upon the motion of the defendant, to require the prosecutor, before the defendant is put upon his defense, to elect upon which particular transaction the prosecutor will rely for a conviction": *State* v. *Crimmins* (1884) 31 Kan. 376, 2 Pac. 574; *State* v. *Schweiter* (1882) 27 Kan. 500. When this election has been made, proof of other offenses, already in the record are not proof of guilt, but merely of a course of conduct, motive, *etc.* Since this evidence was not proof of guilt but merely proof of a course of conduct it cannot be said that defendant was in jeopardy for any offense except that relied upon by the state for conviction.

A verdict of acquittal of the elected offense does not work an acquittal of the other offenses charged in the indictment: *State* v. *Patterson* (1928) 126 Kan. 770, 271 Pac. 390; *State* v. *Learned* (1906) 73 Kan. 328, 85 Pac. 233; *State* v. *Kuhuke* (1883) 30 Kan. 462, 2 Pac. 689; *State* v. *Shafer* (1878) 20 Kan. 226. A state statute which provides that a verdict of not guilty imports

an acquittal of every material allegation in the indictment alters the rule: *State* v. *Price* (1905) 127 Iowa 301, 103 N. W. 195.

The defendant argued that had each of the offenses charged been placed in separate counts, then the election of one count by the state would have ended all further prosecution on the abandoned counts: *State* v. *Rush* (1933) 138 Kan. 465, 26 Pac. (2d) 581. Thus he contends that whether the offenses are pleaded separately in different counts or are combined in a single count there should be no difference in result. Mr. Justice Smith in a dissenting opinion also argues that there should be no difference, saying that jeopardy attaches as soon as the jury is sworn to try the case, and that the defendant was in jeopardy here for any crime of which he could have been convicted under the original information. His status as to subsequent prosecutions was fixed at the time the jury was sworn. Undoubtedly this view is in strict accord with the holding of the *Rook* case, *supra,* and if the majority of the courts were not of the opinion that a situation such as the one in the instant case required an exception to be made, the defendant's contention should be upheld. The distinction is a subtle one and it does require some extension of the general doctrine of jeopardy to uphold it. The rule of election of offenses was adopted for the benefit of the accused. It gives him a definite idea of what defense must be made, rather than requiring to defend against a number of charged offenses which might vary as to time, seriousness, and susceptibility of proof. The fears of the dissent that this will lead to abuse in that prosecutors may file charges on part of the states' case, and so continue to file informations until a conviction is obtained, seems unfounded in view of the fact that this policy has been used in Kansas since 1907 when it was approved in *State* v. *Hibbard* (1907) 76 Kan. 376, 92 Pac. 304, and no such abuse has been manifested to date. This policy seems to be reasonable and more helpful to the accused than detrimental.

THOMAS M. BARGER, JR.

HOMICIDE — PERMISSIBLE DURATION OF TIME BETWEEN INJURY AND DEATH.—[New York] The defendant was charged with the murder of John Kennedy, a uniformed county policeman. Although shot on July 22, 1928, the deceased did not die until July 13, 1932, four years later. The defendant argued that he was not amenable to prosecution for murder since the death occurred more than a year and a day after the shot. This argument being overruled, the defendant was convicted in the lower court. *Held:* on appeal, affirmed. Under the modern statute a murder indictment will lie although death occurred more than a year and a day after the assault: *People* v. *Brengard* (1934) 265 N. Y. 100, 191 N. E. 850.

Though considerable time elapsed between the assault and the death, there was no material conflict of evidence as to the cause of the death. The court, therefore, passed rapidly over that point to discuss the availability of the common law "year and a day" rule. The result above noted was reached by tracing the history of the criminal law in New York. It was found that the intention of the writers of the Code was to do away with all common law crimes and to define each crime completely. Their object, as stated by the commissioners, was "to bring

within the compass of a single volume the whole body of the law of crimes and punishments in force within the State." The court further said, "As long as the criminality of acts is left to depend upon the uncertain definitions or conflicting authorities of the common law, uncertainty must pervade our criminal jurisprudence. . . . Killing is not common law murder unless the victim dies within a year and a day. According to common law definitions, time is one of the elements. Since the crime of murder as defined with exactitude in the Penal Law does not include any limitation as to time, for a court to introduce any limitation would be a defiance of section 21 of this act, which directs that it be construed 'according to the fair import of (its) terms'."

This decision was supported by *People* v. *Legeri* (1933) 239 App. Div. 47, 266 N. Y. Supp. 86, a very similar case. There the defendant had been convicted of an assault, and three years later when the victim died, he was indicted and convicted of first degree homicide. The court there said that the definitions of the nature of homicides in various degrees were clearly set forth in detail and do not include the "year and a day" rule. The early statutes made the quality of the act dependent upon the length of time between the blow and death, but the 1928 Revised Statutes included a general repealing act. "When the legislature was compiling and consolidating the laws with reference to crime, it expressly repealed statutory rules similar to the year and a day rule. This indicates an intent to abrogate that rule."

The Indiana court has taken the opposite view in a case involving the same facts and a statute similar to that of New York. The court there held that the word "murder" had a definite and well defined meaning in law long before the statute was enacted, and that it logically followed that the offense designated as murder at common law is such under the statute. They reasoned that the legislature by its silence upon the subject meant that the common law rule of a year and a day should govern: *State* v. *Dailey* (1921) 191 Ind. 678, 134 N. E. 481. See also *Epps* v. *State* (1885) 102 Ind. 539, 1 N. E. 491.

Many courts, in holding that it is not necessary for the indictment to allege the death as occurring within a year and a day, appear to agree with the New York decisions. Their reasoning, in general, is that the year and a day rule is merely a rule of evidence and not part of the definition of the crime: *People* v. *Murphy* (1870) 39 Cal. 52; *Roberts* v. *State* (1915) 17 Ariz. 159, 149 Pac. 380. *Contra: Commonwealth* v. *Snell* (1905) 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019. These courts practically all agree that the victim must die within a year and a day, but hold that it is not necessary to allege it in those exact words in the indictment. These cases therefore should not be mistakenly thought to be in accord with the principal case.

The question is one of statutory interpretation; that is whether or not the statute should be considered as complete in itself. Upon this point the New York court is not alone in its method of reasoning. In *Ross* v. *State* (1908) 16 Wyo. 285, 9 Pac. 299, it was said, "The court in construing a statute, defining an offense by adding thereto elements not found in the common law definition, is not bound by the construction which obtained with reference to the common law offense and

where a statute creates and defines a crime which is a substitute for a common law offense, the rules appertaining to the latter, except in so far as they are applicable, must yield to the statutory rules of construction." *State* v. *Benson* (1927) 171 Minn. 292, 213 N. W. 910, holds that where the statute defines a crime, the statutory definition is to be adhered to. In the state of Washington it was held that the offense of bribery having been defined by the legislature, its act supersedes the common law; and hence only the elements of the crime as defined in the statute need be alleged in the indictment: *State* v. *Benson* (1927) 144 Wash. 170, 257 Pac. 236. For an interesting note dealing with the interpretation of a penal statute see 6 Tulane L. Rev. 135 (1931).

However, all of the authority is not in accord on this question. A number of states have abolished the common law crimes and in their place have substituted a code which attempts to define the various crimes. To discover the meaning of the definitions is often difficult. All codes do not define the crimes; some of them merely state that a certain offense is a crime. Courts then generally hold that the common law definition will be adopted. *Stewart* v. *State* (1910) 4 Okla. Cr. 564, 109 Pac. 243, 32 L. R. A. (N. S.) 505, was a case involving a disturbance of the peace. The defendant claimed that the statute was void for uncertainty and that hence the information was bad. The court said, "It is true that there are no common law crimes in this state but nevertheless, when the legislature creates, without defining, an offense which was a crime under the common law, the common law definition of the crime will be adopted." *People* v. *Aro* (1856) 6 Cal. 208; *Dunnelle* v. *State* (1919) 188 Ind. 373, 123 N. E. 689; *Shires* v. *State* (1909) 2 Okla. Cr. 89, 99 Pac. 1100; In Re *Green* (C. C. Ohio, 1892) 52 Fed. 104; and *United States* v. *Cardish* (D. C. Wis. 1906) 143 Fed. 640.

The reasoning in the instant case with regard to construction of the statute is supported by the presence of a "catch-all" provision in the Penal Code. Section 675 provides that, "A person who wilfully and wrongfully commits any act which seriously injures the person or property of another or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is expressly prescribed by this code is guilty of a misdemeanor." Thus the commissioners in making their definitions exclusive provided for a possible omission by including a section under which any common law crime not otherwise covered in the code might be prosecuted. The section is a "catch-all" and a plain indication that the rest of the code is to be construed strictly without reference to the common law: See *People* v. *Most* (1901) 36 Misc. 139, 73 N. Y. Supp. 220.

The original reason for the "year and a day" rule was suitable to the time of primitive medicine, but today with modern medical skill the cause of death can more readily and accurately be determined. The reason for the rule has to a large extent vanished.

W. H. THOMAS.

GAMING—"BEANO."—[Massachusetts] The defendants were charged with maintaining a gaming nuisance; *i. e.*, premises "resorted to . . . and . . . used for illegal gaming." The game of "Beano" was conducted by the defendants. Each player, upon

payment of 10 cents, received a score card with 5 horizontal and 5 vertical rows of numbers, 4 feathered darts, and a number of beans. Five feet before each player's position was a target composed of one inch squares numbered from one to ninety-nine. The purpose of the game was to pierce the numbers on the target which corresponded to those numbers on the score card needed to win. Prizes of $1.50 in merchandise were offered to the player first making "Beano," the covering of 5 numbers in a row with beans. If no player made "Beano" with his own darts—and this seldom happened—the announcer would then call out the numbers pierced by other players on their individual targets, and the first player whose card showed "five in a row" was declared winner. Upon trial, and at the close of the testimony the defendants asked for an instruction stating that if the element of skill is the dominant factor in determining the winner in the game of "Beano," then it is a game of skill, and a verdict of not guilty should be returned. The court, however, instructed the jury that the playing of any game of chance or skill on the issue of which the payment of money or property depends is illegal gaming. It added that the determining factor is not whether the game is one of skill or chance but rather whether the receipt of money or a prize in any way depends on the playing of that game. In the lower court the defendants were convicted. *Held:* on appeal, affirmed. With regard to the facts of this case the lower court's instruction on the question of skill was correct: *Commonwealth* v. *Theatre Advertising Co.* (Mass. 1934) 190 N. E. 518.

The earliest Massachusetts statute (Stat. of 1785, c. 58) had been interpreted to regard all gaming for money or other property as illegal regardless of the skill involved: *Mason* v. *White* (1822) 17 Mass. 560; *Babcock* v. *Thompson* (1825) 20 Mass. 446; *White* v. *Buss* (1849) 57 Mass. 448; *Commonwealth* v. *Gourdier* (1860) 80 Mass. 390. By the middle of the 19th century the Massachusetts Court began to revise its former attitude in regard to illegal gaming. The necessity for healthful and vigorous games with prizes for the victor became apparent, and the classification of all games as illegal gaming was broken down. The decisions came to recognize as illegal gaming only those devices or games that resulted in victory or loss due to hazard or chance: *Commonwealth* v. *Taylor* (1860) 80 Mass. 26; *Wilkinson* v. *Stitt, supra; Murphy* v. *Rogers* (1890) 151 Mass. 118, 24 N. E. 35; *Commonwealth* v. *Ward* (1932) 281 Mass. 119, 183 N. E. 271; *Commonwealth* v. *McClintock* (1926) 257 Mass. 431, 154 N. E. 264. Thus it was held that racing for a prize was not against public policy since the winning of the prize depended not on some fortuitous circumstances or accident but on the application of skill: *Wilkinson* v. *Stitt* (1900) 175 Mass. 581, 56 N. E. 830.

The trial court in the principal case, evidently relying upon the rule in *White* v. *Buss, supra,* failed to consider the modification of the rule as evidenced by the later Massachusetts decisions, and by other decisions in this country and Canada: *City of Moberly* v. *Deskin* (1913) 155 S. W. 842; *Equitable Loan and Security Co.* v. *Waring* (1903) 117 Ga. 599, 44 S. E. 320; *McInnis* v. *State* (1874) 51 Ala. 23; *State* v. *DeBoy* (1895) 117 N. C. 702, 23 S. E. 167; *People* ex rel. *Ellison* v. *Lavin* (1904) 179 N. Y. 164, 71 N.

E. 753; *State* v. *Quaid* (1891) 43 La. Ann. 1076, 10 So. 183; *State* v. *Grimes* (1892) 49 Minn. 443, 52 N. W. 42; *Portis* v. *State* (1872) 27 Ark. 360; *D'Orio* v. *Startup Candy Co.* (1928) 71 Utah 410, 266 Pac. 1037; *D'Orio* v. *Jacobs* (1929) 151 Wash. 297, 275 Pac. 563; *State* v. *Mint Vending Machine* (1931) 85 N. H. 22, 154 Atl. 224, Note (1931) 22 J. Crim. L. 282; In re *Lee Tong* (D. C. Ore. 1883) 18 Fed. 253; *State* v. *Randall* (1927) 121 Ore. 545, 256 Pac. 393; *Swigart* v. *People* (1895) 154 Ill. 284, 40 N. E. 432; *People* v. *Monroe* (1932) 349 Ill. 270, 182 N. E. 439; *Rex* v. *Langlois* (1914) 23 Can. Cr. Cas. 43. Writers on the subject of criminal law have also recognized the change in the rule: 2 *Wharton* "Criminal Law" (11th ed. 1912) §1738. From these authorities it would seem that the case was sent to the jury on erroneous instructions and that the instructions requested by the defendants were a correct statement of the law. But the court on appeal affirmed the lower court's ruling on the instructions and attempted to justify their holding by stating that there was no evidence that "Beano" was a game of skill and that the correct rule was "inapplicable."

Thus the jury was not allowed to determine whether this was a game in which skill or chance predominated and this question was determined adversely to the defendants by the appellate court from the record. The only defense advanced by the defendants was that this was a game in which skill predominated, a defense which is sufficient, under the statute and modern decisions, if proved. If the court sends the case to a jury at all, it is reversible error to take the defendant's defense from their consideration. However, it would not seem necessary to send the question to the jury in a clear case. A better method of handling these cases would be to allow the court to decide whether the given game is lawful or not; *Rex* v. *Hendrick* (1921) 15 Cr. App. Rep. 149; *Rex* v. *Davies* (1897) 2 Q. B. 199. In the event of a dispute of facts the jury should be permitted to determine whether the game is one of skill or of chance: *Rex* v. *Hendrick, supra.* The court at this stage would assist the jury with instructions that clearly enunciated the law. This is the view of the English courts but this procedure would seem to be possible even under the usual Constitutional guarantee in this country of trial by jury in criminal offenses. The numerous rules which come under the name of police regulations need not be enforced by use of jury trial: *Frankfurter and Corcoran,* "Petty Federal Offenses and Trial by Jury" (1926) 39 Harv. L. Rev. 582. Under the common law many minor offenses, including gambling, were punishable by summary proceedings before a magistrate; and this was true in Massachusetts.

To decide whether the game is one of chance or of skill it is not necessary to determine whether elements of skill and judgment, or elements of hazard and chance enter into the final result; but whether by its character the game results in triumph for the play by virtue of dominating factors of knowledge, strength, ability or practice. The best instruction on this matter would follow the rule of *State* v. *Gupton* (1848) 30 N. C. 271. "A game of chance is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance."

PAUL FREEMAN.

CRIMINAL LAW — PLEA OF NON-VULT — ITS NATURE, EFFECT, AND LIMITATIONS. — [New York] The defendant was indicted and sentenced to serve a term of not less than three years nor more than ten, for second degree forgery. While the defendant was serving his term, it was discovered that he had been previously convicted in New Jersey of defrauding a bank, upon an indictment to which he had pleaded *non vult*. The warden thereupon sent him back for resentence as a second offender. Con. Laws of New York (Cahill 1930) c. 41, art. 174, §§1941-1943. The defendant was adjudged a second offender by the General Sessions Court and received an additional sentence. The Appellate Division reversed on the grounds that the plea *non vult* followed by judgment placing the defendant on probation for 2 years and payment of a fine of 25 cents a day, was not a previous conviction of a crime within the meaning of the statute. *Held:* on appeal, reversed. Although the plea *non vult* was not recognized by this state, its use in a prior case followed by judgment is a prior conviction within the meaning of the statute: *People* v. *Daiboch* (1934) 265 N. Y. 125, 191 N. E. 859.

The above case suggests an inquiry into the rules governing the nature, effect, and limitations of the plea *non vult* or *nolo contendere*, as it is sometimes called. These rules are not new to the American law, being derivative of the ancient common law. The plea was recognized by many of the greatest English authorities of the eighteenth century, the rules governing its use being well settled at that early date. In 2 *Hawkins*, "Pleas of the Crown" 8th Eng. ed. 1788, c. 31 p. 469 the author sets out the common law rule: "An implied confession is where a defendant in a case not capital doth not directly own himself guilty but in a manner admits it by yielding to the King's mercy, and desiring to submit to a small fine; in which case if the court thinks proper to accept such submission, and make an entry that defendant *'se posuit se in gratiam regis,'* without putting him to a direct confession, or plea, which in such cases seems to be left to discretion, the defendant shall not be estopped to plead not guilty to an action for the same fact as he shall be if the entry is *'quod cognovit indicta mentum.'*" This rule was given judicial recognition as early as 1702: *Regina* v. *Templeman* (1702) 1 Salk. 55. As the plea is understood in the United States, it is in substance an implied confession whereby the defendant refuses to contend against the charges of the indictment, but is content to throw himself upon the mercy of the court to inflict such punishment as it decrees proper, usually less than the amount assessable on a plea of guilty: *Tucker* v. *United States* (C. C. A. 7th, 1912) 196 Fed. 260; *State* v. *Hopkins* (Del. 1913) 4 Boyce 306, 88 Atl. 473; *Hocking Valley Railway Co.* v. *United States* (C. C. A. 6th, 1914) 210 Fed. 735. It should be especially noted at this point that the plea is not a general plea allowable to all criminal prosecutions, but is allowable only on consent of the court: *Tucker* v. *United States, supra; State* v. *Henson* (1901) 66 N. J. Law 601, 50 Atl. 468; *State* v. *Martin* (1915) 92 N. J. Law 436, 106 Atl. 385; *Commonwealth* v. *Ingersoll* (1887) 145 Mass. 381, 14 N. E. 449. For the purposes of the case at hand when accepted by the court it is equivalent to a plea of guilty: *State* v. *Siddall* (1907) 103 Me. 144, 68 Atl. 634; *Tucker* v.

United States, supra. As in all cases where the court is allowed to exercise a discretion, the higher courts will not inquire into the propriety of its acceptance unless a gross abuse of that discretion is discernible: *State* v. *Martin, supra.*

The next question which presents itself involves the effect of the use of this plea upon the rights of the defendant. Generally, when accepted, the plea *non vult* cannot be withdrawn except by consent of the court: *State v. Siddall, supra.* In the absence of statute to the contrary, by its use the defendant waives all formal defects in the proceedings which he could have attacked on a plea to the merits, abatement, or motion to quash: *State* v. *Alderman* (1911) 81 N. J. Law 549, 79 Atl. 283; *Commonwealth* v. *Hinds* (1868) 101 Mass. 209; *United States* v. *Norris* (1930) 281 U. S. 619, 50 S. Ct. 424. But the defendant is not estopped from testing the question, whether the indictment charges an offense, as he could have done on a writ of error after a plea of guilty: *Hocking Valley Railway Co.* v. *United States, supra.* Thus it follows that when the defendant enters a plea of *non vult* and it is accepted by the court, to all intents and purposes the defendant has pleaded guilty and sentence follows as a matter of course: *Tucker* v. *United States, supra.* Although it is always permissible for a defendant after a plea of guilty to testify himself and to introduce witnesses in mitigation of punishment, no authority can be found giving this right to the defendant after a plea of *non vult.* It seems unquestionable, however, that the defendant might take the stand in his own behalf under any circumstances. When judgment is entered on the plea the record is competent evidence of the fact of conviction, although unlike the conviction on a plea of guilty, it cannot be used against the defendant in any subsequent civil suit based upon the same act. *State* v. *Henson, supra; State* v. *Herlihy* (1906) 102 Me. 310, 66 Atl. 643; *State* v. *Radoff* (1926) 140 Wash. 202, 248 Pac. 405; *United States* v. *Lair* (C. C. A. 8th, 1912) 195 Fed. 47; *Tucker* v. *United States, supra.*

In the same manner that the rules regarding the nature and effect of the plea of *non vult* were borrowed from the common law, certain distinctions as to limitations upon its use, recognized by the common law, are also given great weight in this country. All of our states with the exception of Illinois, Indiana, New York, and Minnesota, recognize the place of the plea in criminal cases, but the courts differ as to the class of criminal cases to which it will apply: *People* v. *Miller* (1914) 264 Ill. 148, 106 N. E. 191; *Mahoney* v. *State* (1925) 197 Ind. 335, 149 N. E. 444; *People* v. *Daiboch* (1934) 265 N. Y. 125, 191 N. E. 859 (*dictum*); *State* v. *Kiewel* (1926) 166 Minn. 302, 207 N. W. 646. It is universally held that the plea *non vult* cannot be accepted in cases of felonies requiring infamous punishment or life imprisonment: *Commonwealth* v. *Schrope* (1919) 264 Pa. 246, 107 Atl. 729; 2 *Bishop,* "New Criminal Law Procedure" (2d ed. 1913) § 802. Under the common law rule, which governs in the federal courts, to authorize a tribunal to entertain the plea the case must fall into that class of misdemeanors punishable by fine alone; and is *not* allowed in cases of misdemeanors where punishment by imprisonment is mandatory. It may be allowed, however, where imprisonment may be assessed, in the discretion of the court either as an

alternative of fine, or in addition thereto, or to enforce the payment of the fine: *Tucker* v. *United State, supra; Shapiro* v. *United States* (C. C. A. 7th, 1912) 196 Fed. 268; *Blum* v. *United States* (C. C. A. 7th, 1912) 196 Fed. 269. The courts in the foregoing cases reason that such a limitation existed at common law, and since we have no statute to the contrary, the courts in this country are bound to enforce it. The positions of the various state courts on this question are extremely varied and of little enlightenment as to the most desirable bounds of limitation on the use of the plea. Some state courts impose a fine only without discussing the problem at all; while others, in cases where fine and imprisonment are provided for, will impose only a fine: *Young* v. *People* (1912) 53 Col. 251, 125 Pac. 117; *Williams* v. *State* (1923) 130 Miss. 827, 94 So. 882. The majority of the state court decisions impose imprisonment on the plea without discussing the matter: *Commonwealth* v. *Holstine* (1890) 132 Pa. 357, 9 Atl. 273; *State* ex rel. *Peacock* v. *Judges* (1884) 46 N. J. Law 112; *State* v. *Burnett* (1917) 174 N. C. 796, 93 S. E. 473; *Commonwealth* v. *Ferguson* (1910) 44 Pa. Super. Ct. 626. In a relatively recent case the United States Supreme Court vigorously attacked the decision laid down in the *Tucker Case,* saying that the historical background of the common law was too meager to substantiate any belief that such a limitation existed. *Hudson* v. *United States* (1926) 272 U. S. 451, 47 S. Ct. 127. It went on to say that "whereas the court may in its discretion mitigate the punishment in case of a plea *non vult,* and may feel constrained to do so whenever the plea is accepted with the understanding that a fine only would be imposed, but such restriction is not mandatory upon the court." Because of the noticeable scarcity of cases dealing with the subject, coupled with the utter lack of discussion in the decisions as to the advantages or disadvantages of holding one way or another, it is practically impossible to measure the merits of the positions of the various courts.

The plea has a distinctly beneficial use in those cases where the facts upon which the action is based might at the same time operate to render the defendant liable to a civil as well as a criminal action. By using the plea in the criminal action the defendant has a chance of mitigating his sentence and at the same time precludes an estoppel from pleading his innocence in a subsequent civil suit. This would not be possible under a plea of guilty. In all other respects the pleas are of similar nature and effect. However, it is interesting to note that if the policy of Justice White's opinion in the *Hudson* case (*supra*) is followed by the courts generally, we can look for a radical loosening of the old common law limitations, and may expect a decided increase in the popularity of the plea.

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