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RECENT CRIMINAL CASES

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ADULTERY—MISTAKE OF LAW AS DEFENSE.—[Vermont] One Shufelt, a resident of Vermont, went to Nevada and obtained a divorce. Defendant, also a resident of Vermont, accompanied him and they were married in Nevada. Shortly afterwards they returned to Vermont where they cohabitated as man and wife. Defendant was prosecuted and convicted of adultery, the court holding that the Nevada divorce was invalid in Vermont. On appeal, affirmed. *Held:* An honest belief in the validity of a void divorce is no defense to a charge of adultery. *State* v. *Woods,* 179 Atl. 1 (Vt. 1935).

As a general principle of criminal law, an act, in order to be a crime, must be done with a criminal intent. But legislatures have passed some statutes so framed and construed that "the intention with which the act is done or the lack of any criminal intent in the premises will be immaterial." 1 *Wharton,* CRIMINAL LAW (12th ed. 1932) §143. See also *Bishop,* "Statutory Crimes" (3rd ed. 1901) §596b. In this category of statutory offenses are (1) police regulations such as unlawful sales of liquor, drugs, and adulterated foods, election laws, building ordinances, etc., (2) abduction, seduction, and statutory rape, (3) bigamy and adultery. These supplement the common law and give effect to considerations of modern public policy. Some are quite old, such as the bigamy statute which dates back to 1 Jac. I, c. 11, (1604). This exercise of police power is well recognized and is rarely, if ever, questioned, the courts tending to construe these statutes strictly in the modern cases. In the face of the inevitable injustices done, however, where intent is not considered, it may be time to reconsider the bases for the existence of these statutes. Perhaps we have gone further than is necessary for the protection of the public. See Comment 94 Cent. L. J. 13 (1922).

The public policy upon which any particular statute is based may depend on one or more considerations. Thus, society jealously protects the marriage status by prohibiting adultery and bigamy. Again, parental and guardian interests in minors finds protection by statutes against abduction. Then, the nature of some offenses is such that it is difficult to prove that a criminal mind exists when the unlawful act occurs. Unlawful sales and bigamy prosecution, among others, are subject to this obstacle. In *Reg.* v. *Tolson,* 23 Q. B. D. 168 (1889), some judges feared that prolific use of excuses would make it almost impossible to prove a crimi-

nal mind. By dispensing with the need for such proof, prosecution is made simpler and conviction more certain. Lastly, minor police cases are more quickly and inexpensively disposed of when proof of criminal intent is not necessary.

But the results obtained from these statutes are sometimes very harsh. Witness the bigamous guilt of a woman who married a second time while reasonably believing that her first husband was dead, when he had not been gone for the statutory seven years. *Comm.* v. *Nash,* 48 Mass. 472 (1844). Again, a second marriage effected upon faith in a clerk's certificate of divorce was held to be bigamous, *Russell* v. *State,* 66 Ark. 185, 49 S. W. 821 (1899), as was also a marriage entered into upon advice of a lawyer, *State* v. *Armington,* 25 Minn. 29 (1878), and upon advice of a Justice of the Peace, *State* v. *Goodenow,* 65 Me. 30 (1876). Similar results have obtained where divorces were procured but not recognized as valid. *The People* v. *Baker,* 76 N. Y. 78 (1879) *Hood* v. *State,* 56 Ind. 263 (1877); *State* v. *Hendrickson,* 67 Utah 15 245 Pac. 375 (1926); *The People* v. *Spoor,* 235 Ill. 230, 85 N. E. 207 (1908); *Earl Russell's Case,* [1901] A. C. 446.

The imposition of unnecessary hardship and inconvenience has sometimes been prevented by statutory construction. *Rex* v. *Banks,* 1 Esp. 144 (1794) (unlawful possession of navy stores); *Bernard* v. *Vaughan,* 8 T. R. 149 (1799) (bankruptcy). Lord Kenyon, in *Fowler* v. *Padget,* 7 T. R. 509 (1798) (bankruptcy) said, "I would adopt any construction of the statute that the words will bear to avoid such monstrous consequences." And even where ordinary construction of bigamy statutes impels a strict interpretation, a minority of courts have permitted the defense of an honest and reasonable mistake of fact. *Baker* v. *State,* 86 Neb. 775, 126 N. W. 300 (1910) (bigamy); *State* v. *Cain,* 106 La. 708, 31 S. 300 (1902); *Squires* v. *State,* 46 Ind. 459 (1874); *Chapman* v. *State,* 77 Tex. Crim. Rep. 591, 179 S. W. 570 (1915); *Regina* v. *Tolson, supra; State* v. *Audette,* 81 Vt. 400, 70 Atl. 833 (1908) (adultery). But, as in the instant case, none permit the defense of mistake of law. Even in England, where the rule in *Reg.* v. *Tolson, supra,* in bigamy cases, permits a defense of mistake of fact as to the death of a spouse within the seven year period of absence, the courts refuse to permit a similar defense where one marries a second time upon the mistaken belief in the finality of attempted divorce proceedings, *Rex* v. *Wheat* [1921] 2 K. B. 119, or in the validity of a divorce. *Earl Russell's Case* [1901] A. C., 446.

Courts have uniformly refused to recognize any distinction between ignorance of law and a mistake of law. But such a distinction might well be made. Surely there is a difference between the state of mind of one who acts in utter indifference to the fact that a law may exist and one, who while knowing of the existence of a law, acts upon his reasonable though mistaken understanding of it. To maintain that the law is certain and therefore ignorance (including mistake) is no excuse, especially in the field of divorce, is to disregard self-evident conflicts. Thus, a mistaken application of law to facts seems very much comparable to a mistake of fact, both negativing the existence of a criminal mind, and where the courts permit the latter as a defense, they might, with as much

reason, also permit the former. See Keedy, *Ignorance and Mistake in the Criminal Law* (1908) 22 Harv. L. Rev. 75.

Must individuals inevitably suffer injustices in order that public policy may be adequately enforced? Perhaps some such solution as this might be resorted to: In the administration of minor police regulations, often punishable merely by fines, or where the act is in itself immoral, such as taking away a girl from the care of her father, *Reg.* v. *Prince,* L. R. 2 C. C. 154 (1875) (abduction) or having sexual intercourse where the girl is below a statutory age, *Comm.* v. *Murphy,* 165 Mass. 66, 42 N. E. 504 (1896) (statutory rape), there is more justification for strict statutory construction, with no need for proof of intent. But there is nothing so inherently immoral about marriage to warrant similar treatment in bigamy cases. Nor does there seem to be anything immoral about the fact that a woman is found in bed with a man after the two have made all possible efforts to legally become husband and wife. Surely here is no attempt to transgress the law, but rather to conform to it. Such unintentional breaches of statutory regulations or prohibitions should not carry with it the disgrace of conviction and a prison sentence as punishment.

Conceding that the majority of bigamy and adultery statutes in the United States are so framed that anything but strict construction would be contra to usual statutory interpretation, it may be appropriate to suggest that provisos be added to these statutes permitting a defendant to present a defense of good faith, on a showing of a mistake of law or fact, which would go towards rebutting the presumption that criminal intent is inherent in the act. The effect of this would be to permit a jury to make a full determination of guilt or innocence, taking all the facts into consideration. The defendant, facing a serious and severe punishment, would have a chance to defend himself where he has been an innocent victim of circumstances, deluded as to the actual facts or the law applicable thereto. The presumption of intent would remain so strong against the defendant that there would be little or no loss of effectiveness in enforcement, while deserving defendants in hard cases would not suffer the indignities and disgrace of conviction, as in the instant case, with little or no compensating public gain.

MARVIN FINDER.

ELECTIONS — ADDING IMPROPER VOTES AT GENERAL ELECTION AS FEDERAL OFFENSE.—[Federal].—Appellants, at the general election of November 8, 1932, where both federal and state officers were to be elected, interfered with voters at the voting machines, rang up votes on the machines, forged signatures of voters, and turned the voting machines in improper positions in the polling places. They were convicted below under a federal statute making it a crime for two or more persons to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right secured to him by the Constitution or laws of the United States. 16 STAT. 140 (1870) 18 U. S. C. A. § 51 (1927). On appeal, reversed. *Held*: the government must prove every fact necessary to constitute the offense, and there was here no evidence that any qualified voter who was interfered with intended to vote

for a candidate for federal office. The trial court's charge to the jury that ". . . if some one improperly rang up votes, that may be considered an injury to persons who had . . . legally . . . cast their votes . . . because they were not getting the full value of their votes" was error. *United States* v. *Kantor,* 78 F. (2d) 710 (C. C. A. 2d, 1935).

That the federal government has power to regulate the election of federal officers is well established. U. S. CONST., Art. I, Section 4; *Ex Parte Yarbrough,* 110 U. S. 651 (1884) (beating a negro to prevent his voting); *Ex Parte Siebold,* 100 U. S. 399 (1879) (stuffing ballot box); *Ex Parte Clark,* 100 U. S. 399 (1879) (election officer permitted breaking ballot box). See generally, 18 U. S. C. A. §51, p. 70. In 1870 a comprehensive law specifically designed to protect and regulate federal elections was passed. Act of May 31, 1870, 16 STAT. 140; REV. STAT. §§5506, 5511 to 5515 inclusive, 5520 to 5523 inclusive. At that time this section prohibiting a conspiracy to deprive a citizen of rights secured to him under the laws of the United States was also passed. By Act of February 8, 1894 (28 STAT. 36), most of the above sections relating to offenses against the elective franchise were repealed; however, this conspiracy section (§51) was retained, as were several other sections dealing specifically with elections: 18 U. S. C. A. §§52, 55, 56, 57, 58, 59. Section 51 has long been held to afford protection against a conspiracy to deprive a citizen of the right to vote. *United States* v. *Stone,* 188 Fed. 836 (D. Md., 1911) (held an "injury" under §51 to so complicate the ballots as to make it difficult for illiterate negro voters to vote).

However, these statutes have generally been strictly construed. Even under a section of the Act of 1870 specifically dealing with election offenses (REV. STAT. §5511, now repealed), the indictment, which stated a fradulant attempt to vote at an election where both federal and state officers were to be elected but failed to allege specifically an attempt to vote for a federal officer, was held insufficient. *Blitz* v. *United States,* 153 U. S. 308 (1893) (even though the indictment followed substantially the words of the statute); *United States* v. *Seaman,* 23 Fed. 882 (C. C. S. D. N. Y. 1885). But see *In Re Coy,* 127 U. S. 731, 734 (1888).

In the instant case the indictment was sufficient since it charged that qualified voters had been prevented from casting ballots in a federal election, but the court held that the supporting proof was inadequate. Apparently the defense counsel offered to concede, in a written stipulation, that "at the election of 1932 there were candidates named for the office of representative in Congress . . . and for United States Senator" and the attorney for the United States, relying on this concession as sufficient proof, did not call upon his witnesses to testify that they actually attempted to or did vote for federal offices. It then developed that the so-called concession was "merely that voters had the right to vote for federal offices, not that they attempted to or did vote for them." The court's reasoning appears technical since it seems almost certain that the persons in question intended to vote for federal as well as state officers. This was a national election and the intent to vote for national officers as alleged might well have been presumed. Nevertheless, the court

decision is legally sound since an intent to exercise a federal right is an essential part of the government's case and should have been proved beyond a reasonable doubt.

In deciding the question of whether the citizen was entitled to get full value for his vote by receiving federal protection from "ballot-stuffing," three United States Supreme Court decisions are referred to by this court. *United States* v. *Gradwell,* 243 U. S. 476 (1916), does not seem to be in point as is decided on the fact that the alleged conspiracy occurred during a party primary election to select candidates and not during a congressionl election to select officers. *United States* v. *Bathgate,* 246 U. S. 220 (1917), is more difficult to distinguish. The decision is based on the fact that a conspiracy to bribe voters, the crime charged, was "not clearly within §51, while bribery was specifically covered by a section of the Act of 1870, previously repealed" hence it was concluded that the legislative intent was to leave the punishment of bribery committed during federal elections to the several states. This same reasoning is applied, in the instant case, to "ballot stuffing." However, it is to be noticed that Mr. Justice McReynolds, who wrote the opinion in the *Bathgate* case specifically stated that the citizen's "right to vote" is shielded by §51. On this point he cites *United States* v. *Mosley,* 238 U. S. 383 (1914), which is the last of the three supreme court cases referred to in the instant opinion.

In the *Mosley* case, supra, election officers were held guilty under §51 for conspiring to omit certain precinct returns from their count. Mr. Justice Holmes, who wrote the opinion for the court, said: "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." Accord: *Diulius* v. *United States,* 79 F. (2d) 371 (C. C. A. 3rd, 1935); *Connelly* v. *United States* 79 F. (2d) 373 (C. C. A. 3rd, 1935) (defendant was convicted for certifying only forty-three votes for democratic candidates when eighty-one voters testified they voted straight democratic tickets). It is submitted that the *Mosley* decision definitely points to a conclusion contrary to the one reached in the instant case. Holmes said the statute was violated if a fraudulent *reduction* was made in the total number of votes cast, while this court now says that the statute is not violated if a fraudulent *addition is made.* The court attempts to distinguish the *Mosley* case by saying that "subtracting votes from the final tally actually deprives individuals of votes honestly cast." But these individuals seem to be just as effectively deprived of their vote if sufficient "stuffed ballots" are counted to cancel their legal votes. A further distinction is apparently attempted by referring to the one right as a "definite personal one, capable of enforcement by a court" and to the other as a "political, non-judiciable one common to all that the public shall be protected against harmful acts." Is this any more than a juggling of words in which a decision is made rather than a reason given? In fact, do not both rights involve a political relationship which is protected by a statute making it criminal to conspire to prevent a citizen from casting his legal weight upon the electoral scales?

The validity of the distinction between addition and subtraction of votes is questionable in view of the fact that in 1933 the present court,

the same judges sitting, in *United States* v. *Pleva,* 66 F. (2d) 529 (C. C. A. 2d, 1933), convicted election officers of a crime under §51, where the evidence showed that these officers in reading off the eighty-nine totals from the voting machine failed to read off a single one correctly. The totals for eighteen democratic candidates were all raised those for sixteen republican candidates were raised, and for two decreased; and the vote cast for every other candidate was decreased. This court there made no distinction between *adding* and *subtracting* votes from the totals. Instead it expressly approved the *Mosley* case, *supra,* and carefully distinguished *United States* v. *Gradwell, supra,* and *United States* v. *Bathgate, supra.*

There is no doubt that there was here a flagrant interference with the right of citizens to get full value for their votes. The decision seems regretably technical. There is no need to stress the danger which hovers over the ballot-box, particularly in large metropolitan centers. This danger to the most vital element of representative government has been met by the state courts with such scant success that the failure of the federal courts to carry their share of the burden by protecting federal elections will be doubly unfortunate. Editorials, Chicago Daily News, October 1, 1935, p. 18; October 1, 1935, p. 12; October 21, 1935, p. 8; October 24, 1935, p. 18 ("Voters are losing faith in the ballot. That is one of the greatest dangers now threatening Democracy . . ." On the whole problem of state administration of elections, see HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES, Brookings Institution for Government Research, No. 27, especially pp. 103, 114, 236, 328, 358, and 359. This is particularly true in view of the fact that a policy of liberal construction, made so easy by Mr. Justice Holmes' decision in *United States* v. *Mosley,* would quickly put the fear of the federal courts upon the ballot-box gangster.

CHARLES BARNES.

LARCENY FROM REPAIRMAN BY OWNER—POSSESSORY LIEN AS SUBJECT OF LARCENY.—[Minnesota] Defendant was convicted of larceny in the second degree for the felonious taking of her own fur coat from a furrier with whom she had left the coat for repairs at the agreed price of $50. The defendant, at her own request, was given the coat for the purpose of trying it on. Having obtained possession, she refused to return the garment and concealed it. The jury believed that the taking was deliberate and felonious. On appeal to the Supreme Court of Minnesota, the conviction was affirmed. *Held*: the felonious taking of a fur coat by its owner from the possession of a furrier who has according to statute a lien thereon for the price of the repairs is larceny. MINN. STAT. (Mason 1927) §§8507, 8508, 10372. *State* v. *Cohen,* 263 N. W. 922 (Minn. 1935).

In order to understand the effect of this decision, it is necessary to consider what kind of ownership in property may be the subject matter of larceny. Larceny at common law is a felony, and is defined as the felonious taking and carrying away of the personal goods of another, *Miller,* CRIMINAL LAW (1934) p. 340. That ownership must be in someone other than the thief, has always been a fundamental prerequisite. *Benton* v. *State,* 21 Tex. App. 554, 2 S. W. 885 (1886); *Love* v. *State,* 78 Ga. 66, 3 S. E. 893

(1886) (larceny by vendor of the property; the contract of sale must be complete); *State* v. *Williamson,* 118 Mo. 146, 23 S. W. 1054 (1893) (larceny by assignor; assignment must be valid). Furthermore, it has even been held that the person from whom the property was taken must have ownership as well as possession. *State* v. *James* 133 Mo. App. 300, 113 S. W. 232 (1908). An authoritative exception to this general ownership requirement may be found in the leading case of *Henry* v. *State* 110 Ga. 750, 36 S. E. 55 (1899) which expresses the well-settled rule that property in the hands of a bailee may be the subject of larceny by its general owner where it is taken with intent to charge the bailee with its value. Property upon which a repairman has a lien for services has also been held a fitting subject for larceny by its general owner when removed clandestinely from the possession of the repairman, *People* v. *Long,* 50 Mich. 249, 15 N. W. 105 (1882). From a general inspection of the cases, it would seem that the rule making a chattel the proper subject of larceny by its general owner from a repairman, or bailee, has been evolved in those cases where the lien was created by services of actual value. *State* v. *Hubbard,* 126 Kan. 129, 266 Pac. 939 (1928); *Tumulty* v. *Parker,* 100 Ill. App. 382 (1902); annotation 58 A. L. R. 330.

In the light of the above survey of the ownership requirement in larceny, it would seem that the Minnesota Supreme Court has stretched the subject matter of larceny to include a very extreme situation. In the instant case, there was neither intent to charge the furrier with the value of the coat, nor was there a clandestine taking. Furthermore, the court denied admission of expert testimony on the part of the defendant to show that the furrier's services were of no value and that therefore, no lien or special ownership was created in the furrier. It would seem that the court might find some support in the old case of *State* v. *Samuel Stephens,* 32 Tex. 156 (1869). There the defendant had left a watch for repairs. After the job was done, the defandant feloniously took the watch without the knowledge of the watchmaker, and without paying for the work. The Texas court said, "The repairs imply value. Repairs are alleged. No value of repairs need be alleged. . . . It is but a question of fact to be proved on trial that the repairs were made, in order to show that the bailee had an interest in the thing fraudulently taken." Yet it might be pointed out that at least inferentially, the court meant that the defendant had the power of overthrowing the implication of value and showing that the bailee had no interest in the thing fraudulently taken. In view of the fact that value and ownership have always been considered necessary prerequisites in determining whether a particular chattel is a proper subject for larceny, it seems rather harsh to convict a woman of larceny of her own coat from a furrier regardless of whether the furrier has in fact given some value for the interest automatically created for him.

The result of the instant case is to extend the borderline of larceny into what ordinarily has been considered a field of civil law. It seems that the prosecuting attorney's office has been made a collection agency for the unpaid accounts of business men. The existence of a complete civil remedy for the recovery of

damages seems to make this undesirable.

SIDNEY M. LIBIT.

SPEEDY TRIAL—RIGHT TO TRIAL WITHIN FOUR MONTHS OF COMMITMENT.—[Illinois] Defendant was arrested on October 19, 1934, on a charge of conspiracy. He voluntarily accompanied the police officers to Chicago where they wished to question him concerning his participation in the beating of one Daiches. Until the latter part of February, 1935, defendant was continuously confined in the Administration building in Chicago. At that time he was transferred to the county jail where he remained until some time in June, 1935. No formal commitment was ever issued. The conspiracy indictment was subsequently stricken. On June 5th an indictment was returned charging defendant with assault with intent to kill. He was found guilty and sentenced to the penitentiary. On writ of error he maintained that the court erred in not granting his petition for discharge filed more than four months following his arrest and confinement. The Illinois Supreme Court reversed the conviction and ordered defendant's discharge. Held: ILL. STATE BAR STAT. (1935) c. 38, §771 provides that any prisoner committed for a criminal offense, and not admitted to bail or tried within four months of such commitment, shall be set at liberty by the court unless the delay be at his application. The confinement was tantamount to commitment. Defendant was deprived of his liberty and his right to a speedy trial within the meaning of the statute and was entitled to be discharged. *People* v. *Emblem,* 199 N. E. 281 (Ill. 1935).

Governments which have deprived their subjects of liberty arbitrarily and without opportunity to be heard are not unknown to history. See *"Lettres de cachet,"* 3 ENCYC. SOCIAL SCIENCES (1931) p. 136. But such practices are fundamentally opposed to the spirit of Anglo-American law. The right to a speedy trial was early recognized at common law (See *State* v. *Keefe,* 17 Wyo. 227, 244, 98 Pac. 122, 126 (1908) for authorities and discussion) and was assured by statute in the Habeas Corpus Act of 1680, 31 Car. II c. 2 (1680) (persons committed for felony or treason to be tried or admitted to bail within specified time). 8 R. C. L. 70, The Sixth Amendment to the United States Constitution gives the right to a speedy trial in the federal courts. Most state constitutions contain similar safeguards. E. g. ILL. CONST. (1870) Art. II sec. 9.

In some jurisdictions relief from undue delay may be had by mandamus proceedings. *Frankel* v. *Woodrough,* 7 F. (2d) 796 (C. C. A. 8th, 1925); *Hicks* v. *Judge of Recorder's Court,* 236 Mich. 689, 211 N. W. 35 (1926). In others habeas corpus is available. *Re Miller,* 66 Colo. 261, 180 Pac. 749 (1919); *State* v. *Dilts,* 76 N. J. L. 410, 69 Atl. 255 (1908). *Contra*: *People ex rel. Freeman* v. *Murphy,* 212 Ill. 584, 72 N. E. 902 (1904). In many states, including Illinois, where the defendant in a criminal action has not been brought to trial within the constitutional or statutory period and a motion to the trial court for discharge from the indictment has been denied, the practice has been for him to take an appeal or procure a writ of error after having been tried and convicted. *Von Feldstein* v. *State,* 17 Ariz. 245, 150 Pac. 235 (1915); *Flagg* v. *State,* 11 Ga. App. 37, 74 S. E. 562 (1912); *People ex rel. Freeman* v. *Murphy, supra; State* v.

Lewis, 85 Kan. 586, 118 Pac. 59 (1911); *State* v. *Keefe, supra.* See generally annotation (1929) 58 A. L. R. 1510.

The right to speedy trial secured by the Illinois Constitution and statute, *supra,* is absolute and not one to be allowed at the discretion of the trial court. *People* v. *Heider,* 225 Ill. 37, 80 N. E. 291 (1907); *Newlin* v. *People,* 221 Ill. 66, 77, N. E. 529 (1906); *People* v. *Jonas,* 234 Ill. 56, 84 N. E. 685 (1908); *People* v. *Szobar,* 360 Ill. 233, 195 N. E. 648 (1935). It should be noted, however, that under the express terms of the statute the court may allow a continuance for sixty days if satisfied that there is additional evidence which the state can obtain within that time and which it has made due exertion to obtain in the past. *Quinn* v. *People,* 220 Ill. 28, 77 N. E. 101 (1906) (where the court granted a continuance under such circumstances the right to discharge under the statute was suspended). But to justify the continuance the prosecutor must show that it is reasonably probable that such evidence will be forthcoming. *Brooks* v. *People,* 88 Ill. 527 (1878). If a discharge is granted the prisoner is rendered completely immune from further prosecution for the same offense. *People* v. *Heider, supra.*

The Illinois statute provides that if the defendant is admitted to bail the four months shall run only from the date on which a demand is made for trial, *People* v. *Fox,* 269 Ill. 300, N. E. (1915), but where, as in the instant case no bail was allowed, no demand is necessary and the statute commences to run at commitment, *People* v. *Grandstaff,* 324 Ill. 70, 154 N. E. 448 (1926). However, if defendant himself is responsible for the delay he will be held to have waived the right. *Phillips* v. *United States,* 201 Fed. 259 (C. C. A. 8th, 1912) (defendant acquiesced in postponement of trial); *Hunter* v. State, 30 P. (2d) 499, Ariz. (1934) (defendant asked for continuance); the Illinois statute by its terms does not run if defendant asked for a continuance. *Cf. People* v. *Jonas, supra; Newlin* v. *People, supra* (fact that one or several judges of superior court were sick is no excuse for delay); *State* v. *Clark,* 86 Ore. 464, 168 Pac. 944 (1917).

In the instant case the state's objection that the indictment under which defendant actually went to trial was issued shortly before the trial could not prevail, for the statute runs from the date of commitment not from the date of the indictment or information. *Gunthmann* v. *People,* 203 Ill. 260, 67 N. N. 821 (1903). To hold otherwise would permit the prosecution to avoid the discharge merely by dismissing the indictment on which the four months had run and procuring a second under another section of the statutes. The state further suggested that §771 could not run in this case because there had been no formal commitment by a court, but it was properly held that any imprisonment of an accused is, broadly speaking, a commitment and that the statute ran from the date of defendant's original confinement. *Gunthmann* v. *People, supra.*

Many difficulties face a prosecuting officer sincerely attempting to collect evidence against clever criminals. There may be cases in which the laws should be strained to give him lee-way in temporarily detaining notorious persons for questioning or pending further investigation, but it is submitted that the instant case is not one of them. It seems impossible to justify on any ground this purely extra-legal detention of

defendant for a period of over seven months. The decision seems correct in holding that both the letter and the spirit of the statute and the constitution were violated by this unwarranted deprivation of a right to a speedy trial.

CLARENCE LAMBESIS.

WAIVER OF JURY TRIAL IN CRIMINAL CASE—COURT'S CONSENT.—[California] The defendant in a robbery prosecution waived jury trial with the concurrence of the state's attorney, under the California Constitution, Art. I, Sec. 7, which provides that "a trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel." Nevertheless, the trial judge ordered a jury and defendant was convicted. On appeal, affirmed. *Held*: The constitutional provision for waiver of jury trial does not take away from the trial court the power to require the cause to be tried by jury. *People* v. *Eubanks,* 46 P. (2d) 789 (Cal. App. 1935).

In the early days of the common law criminal trials were by battle, by compurgation or by jury at the election of the accused. Trial by jury, or by the country, as it was called, was available only if the accused consented. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3rd ed. 1922) p. 823. This volitional element became purely theoretical, however, for an unwilling defendant was submitted to the rigors of *peine fort et dure* until he gave his consent. THAYER, PRELIMINARY TREATISE ON EVIDENCE (1896) p. 74 *et seq.* Nevertheless, trial by jury came to be looked upon as a great privilege and safe-guard against the inquisitorial methods of the Star Chamber and the king's agents. The right to a jury trial is assured to all citizens of the United States by the federal and all state constitutions. It has been held that these constitutional provisions establish the jury as an essential part of the judicial system and that a court has no jurisdiction to try a criminal case without a jury. See *State* v. *Camby,* 82 S. E. 715 (N. C. 1936). The better rule, however, is that jury trial is a privilege which the accused may waive if he sees fit. *Patton* v. *U. S.,* 281 U. S. 276 (1930); *People* v. *Fisher,* 340 Ill. 250, 172 N. E. 722 (1930), Note (1931) 22 J. Crim. Law 113. In Maryland the practice of allowing the defendant in a criminal trial to elect whether he will be tried by the court or the jury dates back to colonial days. Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries,* (1925) 11 A. B. A. J. 699. The majority of states now allow waiver of jury trial by statutory or constitutional provision, and some by judicial decision. The waiver may be allowed in all criminal cases or in misdemeanor cases only. See generally Oppenheim, *Waiver of Jury Trial in Criminal Cases* (1927) 25 Mich. L. Rev. 695.

In *Patton* v. *U. S., supra,* the court while holding that an accused could waive a jury trial in a proper case indicated that the right was not absolute. The court said, p. 312 "Not only must the right of the accused to trial by jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the

accused." This view that the jury is an instrumentality of the court which the judge may insist on to aid him in a trial of the facts, in spite of defendant's waiver, is the one usually taken by the courts in absence of express statutory or constitutional provision. *State* v. *Mead,* 4 Blackf. 309 (Ind. 1837); *Grand Rapids* v. *Bateman,* 93 Mich. 135, 53 N. W. 6 (1892) *Ickes* v. *State,* 63 Ohio St. 549, 59 N. E. 233 (1900). In some states it is held that a waiver by defendant shall be effective only if the state consents. *State* v. *Nash,* 51 S. C. 319 (1897) (statute); *People* v. *Scornavache,* 347 Ill. 403, 129 N. E. 909 (1931) (judicial decision). See *Morrison* v. *State,* 31 Okla. Crim. Rep. 11, 236 Pac. 901 (1925). See Hall, *Has the State a Right to Trial by Jury in Criminal Cases?* (1932) 18 A. B. A. J. 226. Statutes in some states require that defendant's waiver be approved by the state and the court both. *Ind Ann. Stat.* (Burns, 1933) §9-1803; *Wash. Comp. Stat.* (Remington, 1932) §2144; *N. J. Comp. Stat.* (1915) §1824.

But where a statutory or constitutional provision confers the privilege on the accused in absolute terms, it has been held almost uniformly that the statute is mandatory and that the court has no discretion to deny the right if it is demanded. *Boader* v. *State,* 201 Ala. 76, 77 So. 370 (1917); *State* v. *Worden,* 46 Conn. 349 (1878); *Wadkins* v. *State,* 127 Ga. 45, 56 S. E. 74 (1906); *People* v. *Martin,* 256 Mich. 33, 239 N. W. 341 (1931); *State* v. *Smith,* 123 Ohio St. 237, 174 N. E. 758 (1931); *Schulman* v. *State,* 76 Tex. Crim. Rep. 229, 173 S. W. 1195 (1915). But see *Morrison* v. *State, supra.* The theory of these cases is that the statute secures a personal privilege to the accused and that neither the state nor the court have any such interest as will permit of their interfering with the right to waive. In *State* v. *Worden, supra,* the court said, speaking of the Connecticut statute, (p. 364) "The natural and obvious meaning is to secure to suitors and persons accused of crime, as individuals, the right and privilege of having their causes heard and determined by a jury; and it is difficult to see how the principles of liberty and self-government or the interests of the body politic, can in any way be put in jeopardy by a waiver of the right." The instant case would seem to be practically alone in allowing the court to override the defendant's waiver in the face of positive statutory authority.

The historical and theoretical aspects of jury trial are instructive in respect to the judge's control over the defendant's right to waive a jury trial, but more important is a consideration of the actual part which a jury plays in the administration of criminal justice at the present time. In the great majority of cases the courts or legislatures creating the right of waiver were interested not in securing any new privilege for the accused, but in cutting down the use of the jury, an expensive, cumbersome and time wasting institution. Oppenheim, *supra* p. 695, 6; GREEN, JUDGE AND JURY (1930) c. 15. See *State* v. *Rankin,* 102 Conn. 46, 127 Atl. 916 (1925). The accused, however, often has a definite and legitimate interest in trial by the court rather than by a jury. In cases involving sexual offense, or situations which have been publicized by the newspapers a jury is apt to be strongly prejudiced. In the case of crimes involving complicated and technical fact situations like embezzlement or

false pretenses the jury is often not a competent body to pass on the facts. See Maltbie, *Criminal Trials Without a Jury in Connecticut* (1926) 17 J. Crim. L. 335; Bond, *supra*. As a practical matter what interest has the judge in retaining a jury in a given case if the defendant chooses to waive it? A trial by the court places an additional burden on the judge as a trier of facts. It places additional responsibility on the court particularly where capital offenses are concerned, since it forces the single judge to pronounce the death penalty. If powerful political interests were involved the court might prefer to have the pronouncement of guilty made by a jury. Judge Maltbie, *supra*, does not feel that these objections are important.

The court in the instant case gave no reasons for its holding. The decision is against the overwhelming weight of authority. It does not seem sound when viewed from an historical point of view. If jury trial is a privilege the defendant should be able to waive it. From a practical standpoint it is hard to see what interest the judge or the community would have of sufficient importance to justify a denial of the waiver. Finally, the result seems undesirable since it retards the progress which is being made toward trial by the court in all criminal cases.

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