Journal of Criminal Law and Criminology

Volume 27
Issue 3 *September-October*

Article 9

Fall 1936

Recent Criminal Cases

RECENT CRIMINAL CASES

Edited by the
LEGAL PUBLICATIONS BOARD
NORTHWESTERN UNIVERSITY SCHOOL OF LAW

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JURISDICTION—JUVENILE COURT V. CRIMINAL COURT.—[Illinois] Defendant, a fifteen year old girl, was found guilty of murder and sentenced to imprisonment by the criminal court of Cook county. Prior to the trial, the juvenile court of Cook county, acting pursuant to the "Juvenile Court Act" (ILL. STATE BAR STAT. (1935) c. 23, §319), had declared the defendant delinquent on the basis of other misconduct. Defendant contended that wards of the juvenile court were not to be tried without its consent because Section 9a of the Juvenile Court Act provides that "The court may in its discretion in any case of a delinquent child permit such child to be proceeded against in accordance with the laws that may be in force in this state governing the commission of crimes." On appeal, affirmed. *Held:* "The legislature is without power to confer upon an inferior court the power to stay a court created by the constitution from proceeding with the trial of a cause jurisdiction of which is expressly granted to it by the constitution." See ILL. CONST., Art. VI, §26. Moreover, the legislature did not attempt to confer such power; Section 9a, like many sections in the Act, has reference only to cases pending before the juvenile court in which the issue of delinquency is undecided. It is then that the juvenile court judge may, in his discretion, either declare the child delinquent or transfer the case to the criminal court. *People* v. *Larrimore,* 362 Ill. 206, 199 N. E. 275 (1935).

On the day of the *Larrimore* decision the court also held in *People* v. *Lewis,* 362 Ill. 229, 199 N. E. 276 (1935), that Section 10 of the Juvenile Court Act providing that "In any case, the court shall require notice to be given and investigation to be made as in other cases under this act . . . ." did not prevent it from following the *Larrimore* decision, since the notice referred to was clearly notice to be given by, rather than to, the juvenile court. The sweeping language of the *Lewis* opinion makes clearer that it is unimportant whether the child be declared delinquent before the commission of the crime, or after the crime but before the indictment, or after the indictment but before the trial.

By these decisions the court has completed its overthrow of the *dictum* in *People* v. *Fitzgerald,* 322 Ill. 54, 152 N. E. 542 (1926), where, in affirming the conviction of a boy for rape, it was stated that if the boy had been a ward of the juvenile court prosecution would depend upon its consent. *People* v. *Bruno,*

346 Ill. 449, 179 N. E. 129 (1931), had already cast doubt on the validity of the *Fitzgerald dictum*. Bruno, a ward at the time of his conviction by the criminal court, sought thereafter to raise this jurisdictional point by a writ of *coram nobis*. It was held by the court that the writ furnished no relief from the consequences of a negligent defense. The difficulty inherent in the position taken by the court is that the question of negligence should be irrelevant in determining whether the criminal court has jurisdiction over the subject matter. See Note (1932) 26 Ill. L. Rev. 901 (able discussion of these cases and correct prophecy of the result of the instant case by Mr. Riley).

For at least two reasons little fault should be found with the interpretation placed upon Section 9a by the court, though it destroys the effectiveness of the section. The section is ambiguous, and furthermore the constitution precludes an opposite holding irrespective of how Section 9a be construed. It seems unlikely, however, that the drafters of this amendment were aware they were not conferring exclusive jurisdiction over delinquent children upon the juvenile court. Note that other amendments to Section 9, passed at the same time as Section 9a, deal with the care of children after a declaration of delinquency. Certainly Julian W. Mack, early juvenile court judge, implies that the court was given exclusive jurisdiction, and, when the purpose of juvenile court legislation is taken into account, such an interpretation seems plausible. See Mack, *The Juvenile Court* (1909) 23 Harv. L. Rev. 104 at 109; RILEY, A WORKING MANUAL FOR JUVENILE COURT OFFICERS (1932) 35. Nor would such a holding, as the court believes, render meaningless the last part of Section 9a. That part would simply not be permitted to limit the preceding, nor the spirit of the section. However, the last part of Section 9a does make the contrary reasoning of the court very tenable, if not inevitable—particularly in view of the rule that, if possible, an ambiguous statute should be construed as constitutional.

The proposition that a constitutional court may not be stayed from proceeding with the trial of a cause over which it has been given jurisdiction by the constitution is sound; whether the interfering court be inferior or also constitutional is immaterial. *People* v. *Warren*, 260 Ill. 297, 103 N. E. 248 (1913) (overruled by *People* v. *Feinberg*, 348 Ill. 549, 181 N. E. 437 (1932) only insofar as it follows *Berkowitz* v. *Lester*, 121 Ill. 99, 11 N. E. 860 (1887)). The court in the *Lewis* opinion stated that the facts did not make it necessary to decide what the result would be if the charge against the defendant pending in the juvenile court was the same as the charge against him in the criminal court. By the reasoning of the instant decisions it would seem, however, that if the criminal court had obtained jurisdiction over the person in such a case, nothing could bar a prosecution. The possibility that perhaps the juvenile court had retained jurisdiction over the defendants in the instant cases until they reached twenty-one was not discussed by the court. See *Hamerick* v. *People*, 126 Ill. App. 491 (1906). Elsewhere it has been properly held that where juvenile court legisla-

tion continues the jurisdiction after a declaration of delinquency, it was not contemplated that this should prevent criminal prosecution. If such were contemplated, the section would be unconstitutional as an unreasonable and arbitrary criminal provision. *State* v. *Pence,* 303 Mo. 598, 262 S. W. 360 (1924); *cf.* §1 of the Juvenile Court Act. The court in the instant cases could have eliminated the constitutional obstacle to an opposite holding only by the strained construction that the jurisdiction given the criminal court was impliedly limited by the inherent right of the state to act as *parens patriae.*

That the Juvenile Court Act did not repeal by implication the sections of the criminal code providing that children above ten years are capable of crime (ILL. STATE BAR STATS. (1935) c. 38, §§619, 620) is clear since the Act is not criminal legislation, and also because to be reasonable the Act must repeal criminal jurisdiction whether or not the child be a ward of the juvenile court. Nothing in the Act supports the latter position, and it is contrary to the holding in *People* v. *Fitzgerald, supra.* See also *People* v. *Fisher,* 303 Ill. 430, 135 N. E. 751 (1922).

Typical provisions in the juvenile court acts of other states stipulate that the juvenile court shall have exclusive jurisdiction in all cases; or that the jurisdiction shall be exclusive in the discretion of the juvenile judge; or that the child shall be prosecuted for serious crimes only; or that the child shall be prosecuted only after a finding by the juvenile judge of hopeless incorrigibility. It is apparent that if this type provision were passed by the Illinois legislature, it would be invalid when invoked to support a "lack of jurisdiction" defense to prosecution in a criminal court of Illinois. On this problem generally, see 1 WHARTON, CRIMINAL LAW (12th ed. 1932) §§369, 371, 375; MILLER, CRIMINAL LAW (1934) c. 1, §1r, c. 8, §34c; ELLIOTT, CONFLICTING PENAL THEORIES IN STATUTORY CRIMINAL LAW (1931) cc. 3, 4, 5; Flexner and Oppenheimer, *The Legal Aspect of the Juvenile Court* (1923) 57 Am. L. Rev. 65 at 75, 79; (1935) 20 St. Louis L. Rev. 282; (1929) 14 St. Louis L. Rev. 429. However, it is interesting to note that the majority of state constitutions, unlike Illinois, vest the judicial power in a supreme court, circuit courts, and such other courts as the legislature may establish. If such a constitution also leaves the apportionment of jurisdiction to the legislature, the constitutional question of the instant case could not arise. At best there would be merely a statutory conflict between the criminal code and the juvenile court act. It is reasonable to suppose that the problem is not so apt to develop where the court having criminal jurisdiction over the child also has juvenile court powers.

There will naturally be disagreement as to the effect and policy of the instant decisions. It must be remembered that juvenile court legislation has been sustained on the ground that it is legislation enacted by the state as *parens patriae.* See *People* v. *Piccolo,* 275 Ill. 453, 114 N. E. 145 (1916); *Lindsay* v. *Lindsay,* 257 Ill. 328, 100 N. E. 892 (1913); HURLEY, ORIGIN OF THE ILLINOIS JUVENILE COURT LAW (1907); FLEXNER AND BALDWIN, JUVENILE COURTS AND PROBATION (1914) pt. 1. As it is not criminal

legislation (*Witter* v. *County Commissioners of Cook County,* 256 Ill. 616, 100 N. E. 148 (1912)), the constitution does not require that the right of trial by jury be preserved in delinquency cases. See §2 of the Juvenile Court Act. *Cf.* (1933) 22 Ill. Bar J. 117; (1933) 10 N. Y. U. L. Q. Rev. 398. It follows also that the juvenile court, a part of the circuit court of Cook County (*Lindsay* v. *Lindsay, supra*), does not contravene the rule of *People* v. *Feinberg, supra,* that the criminal courts of Cook County has exclusive, rather than concurrent criminal jurisdiction with the circuit court.

To many the instant decisions will seem a backward step, a frustration of the purpose behind juvenile court legislation of insuring a humane and understanding handling of each delinquent by a special court. See LOU, JUVENILE COURTS IN THE U. S. (1927) 42; STANDARD JUVENILE COURT LAW at 232, §§5, 11, 12. Note also that Congress in 1932 provided that children accused of federal crimes should be transferred to state juvenile courts. 47 STAT. 301 (1933), 18 U. S. C. A. §662a (1935); Wahrenbrock, *State Juvenile Court Procedure for Federal Juvenile Offenders* (1931) 30 Mich. L. Rev. 113. See also *Ex parte Januszewski,* 196 Fed. 123 (1911). Such thought, however, probably overlooks the fact that the administrators of the criminal law will seldom desire to obstruct the valuable work of the juvenile court, as well as the importance to the welfare of society of retaining the moral law, and threat of punishment. See Note (1926) 21 Ill. L. Rev. 375. An amendment to the criminal code creating a conclusive presumption that children under twenty-one are incapable of crime would give the juvenile court exclusive jurisdiction. See (1920) 91 Cent. L. J. 78, and *Miller* v. *Brown,* 31 Utah 473, 88 Pac. 609 (1907). An amendment stating that children under twenty-one were *prima facie* incapable of crime, but that the juvenile judge could find them capable and transfer them to the criminal court would likely be held unconstitutional as an attempt to restrict the jurisdiction of the criminal court.

JACK L. O'DONNELL.

EMBEZZLEMENT — PROSECUTION OF RETAILER FOR FAILURE TO TURN OVER GAS TAX.—[Wisconsin] Defendant was licensed as a dealer in motor fuel oil. He was charged and convicted of embezzlement of moneys belonging to the state, collected by him from purchasers paying the motor fuel tax imposed by statute. The statute provided that any dealer who fails to pay the tax should be guilty of a misdemeanor punishable only by fine. Defendant contended that a debtor-creditor relationship existed, and that the sole penalty was that provided by the statute. On appeal, affirmed. *Held:* The relationship between the defendant and the state was that of principal and agent, and he was thus properly convicted of embezzlement. *Anderson* v. *State,* 265 N. W. 210 (Wis. 1936).

This case followed the almost identical case of a conviction of embezzlement for failure to turn over the gas tax in Illinois. *People* v. *Kopman,* 358 Ill. 479, 193 N. E. 516 (1934). Both courts reasoned that the statute imposed an

agency relationship upon the retailer, making him a fiduciary to collect the tax and to turn it over to the state. The Wisconsin statute explicitly provides that the tax collected shall be held in trust in a separate fund for the sole use of the state. As an abstract proposition of law, then, the relationship might be such as to warrant a conviction for embezzlement.

But there can be no doubt that the two courts have stretched the basic concept of embezzlement. That crime has always required the breach of a trust or fiduciary relationship on the part of the agent. *Raine* v. *State*, 143 Tenn. 168, 226 S. W. 189 (1920); *State* v. *Berdell*, 87 Tex. Cr. Rep. 310, 220 S. W. 1101 (1920). The existence of a fiduciary relationship is essential. *People* v. *Heinzeman*, 351 Ill. 402, 184 N. E. 600 (1933). It seems obvious that the relative trust and confidence of each retailer is not considered either by the state or by the purchaser. If courts will sustain a conviction for embezzlement in such a situation as this, the road is left open for their legislature, by the use of a few words, to make *every* retailer an agent of the state to collect the "sales" tax, thus subjecting him to the possibility of being indicted for embezzlement if he does not turn the money in promptly. A much more common sense view of this matter would be to regard the relationship as one of debtor-creditor, and not to put retailers in a category different from that of any other taxpayer.

ANDREW BUNTA.

CONTEMPT—PERJURY PUNISHABLE AS CONTEMPT.—[Illinois] Respondent having testified in a criminal proceeding, was ordered by the trial judge to appear and answer questions concerning the truth of certain of his statements. Upon inquiry, respondent admitted that he had testified falsely, whereupon the court committed him for contempt. On appeal, reversed. *Held:* No additional testimony in a subsequent proceeding is permitted to prove the falsity of the statements questioned. *People* v. *La Scola*, 282 Ill. App. 328 (1935).

Although to testify falsely often constitutes perjury (see ILL. STATE BAR STATS. (1935) c. 38, §482), it likewise has been declared to be "undoubtedly a great contempt of court." *Stockham* v. *French*, 130 Eng. Rep. 147 (1823); *Ex parte Hudgings*, 249 U. S. 378 (1919); *United States* v. *Dachis*, 36 F. (2d) 601 (S. D. N. Y. 1929); *Berkson* v. *People*, 154 Ill. 81, 39 N. E. 1079 (1894). Indeed, one court found it "difficult to see why the penalty for each offense should not be imposed." *In re Steiner*, 195 Fed. 299, 302 (S. D. N. Y. 1912). False swearing has been made punishable as contempt by statute in at least one jurisdiction (see *People* v. *Fourquet*, 17 Porto Rico 1037 (1911)), and in bankruptcy proceedings it is punishable under §41 of the Bankruptcy Act, 30 STAT. 556 (1890), 11 U. S. C. A. §69 (1927); see (1921) 11 A. L. R. 344 and cases cited.

In the ordinary case, however, because the power may be exercised summarily, certain limitations have been placed upon its use as a means of punishing perjury. *United States* v. *McGovern*, 60 F. (2d) 880 (C. C. A. 2d, 1932); *People* v. *Paynter*, 250 Ill. App. 235 (1930); *People* v. *Berrell*, 216 Ill. App. 341 (1920). In the first place,

since the power to punish for contempt is a defensive weapon of the court to protect its dignity and the administration of justice, it is an almost universal requirement that the false testimony be obstructive (*Clark* v. *United States*, 289 U. S. 1 (1933) noted in (1933) 28 Ill. L. Rev. 292, (1933) 24 J. Crim. L. 446, (1933) 31 Mich. L. Rev. 850; *People* v. *Freeman*, 256 Ill. App. 423 (1928)), this element being required in addition to those necessary to support a charge of perjury. *Ex parte Hudgings, supra; Blankenburg* v. *Commonwealth*, 272 Mass. 25, 172 N. E. 209 (1930); but see In re *Bronstein*, 182 Fed. 349 (S. D. N. Y. 1910); In re *Fellerman*, 149 Fed. 244 (S. D. N. Y. 1906). Of greater importance, however, is the requirement that the falsity be evident to the court from its judicial knowledge. *People* v. *Richman*, 222 Ill. App. 147 (1921); *People* v. *Stone*, 181 Ill. App. 475 (1913); *Riley* v. *Wallace*, 188 Ky. 470, 22 S. W. 1085, 11 A. L. R. 342 (1920); *Hegelaw* v. *State*, 24 Ohio 103, 155 N. E. 620 (1927); see Comment (1933) 21 Calif. L. Rev. 582, 585. If the testimony is obviously untrue, the court may proceed summarily (*United States* v. *Appel*, 211 Fed. 495 (S. D. N. Y. (1913); *Berkson* v. *People, supra*); but if its falsity is controverted or rests upon a mere conclusion of the judge the remedy is prosecution for perjury—not commitment for contempt. *People* v. *Anderson*, 272 Ill. App. 93 (1933). Judicial knowledge of the falsity may be acquired by the court from conflicting affidavits, or by admissions made by the witness. *People* v. *Freeman, supra; People* v. *Hadesman*, 223 Ill. App. 219 (1921); *People* v. *Gard*, 259 Ill. 238 (1913); *The Dunnegan Sisters*, 53 F. (2d) 502 (S. D. N. Y. 1932); *Young* v. *State*, 198 Ind. 629, 154 N. E. 478 (1926). Indeed, one court in Illinois has required that the untruth must have been disclosed by the witness himself and not by the testimony of other witnesses. *People* v. *Hille*, 192 Ill. App. 139 (1915). *Accord: Blankenburg* v. *Commonwealth*, 272 Mass. 25, 172 N. E. 209 (1930); *State* v. *Meese*, 200 Wis. 454, 229 N. W. 31 (1930). The instant case adds still a further requirement: The untruth must be disclosed on cross-examination and not upon a subsequent inquiry instituted by a suspicious judge.

The insistence of the courts on prosecutions for perjury, with the attendant safeguard of jury trial in all but exceptional cases, is to be commended; but where an untruth of an obstructive nature has been admitted by the witness himself, there seems to be little reason to insist upon prosecution for perjury, convictions for which are notoriously hard to obtain. Indeed, as one writer has stated, even the requirement that the statement be judicially known to be false "is not in harmony with the established power of the courts to deal with other contempts such as newspaper libels on the court." See Comment (1933) 21 Calif. L. Rev. 582, 584. The fear that the threat of summary punishment for contempt might be used as an inquisitorial weapon to secure a desired answer seems almost unfounded.

WILLIAM HYNDS.

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199 YEAR SENTENCE—VALIDITY IN LIGHT OF PAROLE LAW.—[Illinois] Defendant was convicted of mur-

der and sentenced to a term of 199 years in prison. Under the Illinois statute (ILL. STATE BAR STATS. (1935) c. 38, §801) a prisoner under a determinate sentence is not eligible for parole until he has served at least one-third of his term. Contending that so long a sentence was an attempt to circumvent the parole act, since it deprived him of any possible chance of parole, defendant appealed. Affirmed. *Held:* The parole law does not prevent a sentence of 199 years, for that act is one of clemency, and relates only to prison government and discipline. *People* v. *Pace,* 362 Ill. 224, 198 N. E. 319 (1935).

It may well be that the legislature did not consider the possibility that so long a sentence might be imposed, or that any criminal might, by this device, seemingly be deprived of all opportunity for parole. But the wording of the applicable statutes is so clear that there seems to be no room for interpretation, at least so far as the validity of the original sentence is concerned. *Cf. Hickam* v. *People,* 137 Ill. 75, 27 N. E. 88 (1891) (99 year sentence upheld). It is generally held improper for the prosecuting attorney to refer to the parole laws in argument to the jury for a drastic penalty, though taken by itself such argument may not be sufficient cause for reversal. *Farrell* v. *People,* 133 Ill. 244, 24 N. E. 423 (1890); *People* v. *Murphy,* 276 Ill. 304, 114 N. E. 609 (1916). But since the mental processes of juries are generally not open to examination to impeach their result, the inference that the jury, without official prompting, probably did intend to circumvent the parole law is not material. See 5 WIGMORE, EVIDENCE (2d ed. 1923) §§2348-49.

Short of executive clemency, the defendant's only hope must be the rather strained construction of the parole section that since persons serving life sentences are eligible for parole in twenty years the legislature intended that no prisoner otherwise a suitable subject for parole should be confined for a longer period. Such a contention, even if accepted, should not affect the validity of the original sentence and could not properly be passed upon by the court in the instant case.

DONALD J. BELL.

HORSE RACING—PROSECUTION UNDER GENERAL OR SPECIAL GAMING STATUTE—EJUSDEM GENERIS.—[Texas] Defendant was tried and convicted of keeping a place for betting on horse races. The indictment was framed under Article 625 of the Texas Penal Code which states that any person who "shall keep . . . any . . . place . . . to bet or wager, or to gamble with cards, dice or dominoes, . . . or as a place where people resort to gamble, bet or wager upon anything whatever," shall be guilty of a felony. A few years subsequent to the passage of the Article the legislature passed Article 649 providing for punishment as a misdemeanor any "owner, agent or lessee of any property" who permits the same to be used as a place for betting on horse races. The evidence showed that defendant kept a place for betting on horse races but did not show that he was an owner, agent or lessee. Defendant contended he should be punished for a misdemeanor and not for a felony.

On appeal, reversed. *Held:* The second statute controls, being special and embracing the same or similar subject matter. *Thomas* v. *State,* 91 S. W. (2d) 716 (Tex. Cr. Rep. 1936).

The court stated that since the first statute was general and the latter pertained only to horse racing, it would supersede the first, and substantiated its position by saying that betting on horse racing was not *ejusdem generis* with betting on cards, dice or dominoes. Doubtless horse racing is not *ejusdem generis* with cards, dice or dominoes, but that argument does not seem pertinent here. The rule of *ejusdem generis*—that when general words follow a series of specific words, they must be held to be qualified by and similar in nature to the preceding specific words—is merely a rule of construction to be applied when the language itself is ambiguous. *United States* v. *Bitty,* 208 U. S. 393, 402 (1907). See also *State* v. *Grosvenor,* 149 Tenn. 158, 258 S. W. 140 (1924), and other cases cited by the dissent at 721. But the rule should not be arbitrarily applied where the section as a whole and the popular feeling then prevailing show the purpose of the legislation. *United States Cement Co.* v. *Cooper,* 172 Ind. 599, 88 N. E. 69 (1909).

The statute here seems unambiguous when it condemns keeping a place "to gamble, bet or wager upon anything whatever." Surely it would require no stretch of the imagination to include betting on horse races within these words. In *Gillock* v. *People,* 171 Ill. 307, 49 N. E. 712 (1898), the Illinois court sustained a conviction of burglary of a henhouse under a statute enumerating a dwelling house, kitchen, office, shop, storehouse, or any other building. See also *Commonwealth* v. *Chicago, etc., R. R.,* 124 Ky. 497, 99 S. W. 596 (1907); *State* v. *Eckhart,* 332 Mo. 49, 133 S. W. 321 (1910).

The dissent makes the startling statement that this defendant would be guilty of no crime, saying that he could not be prosecuted under the special statute. That Article applies only to an "owner, agent or lessee" of property used for gambling on races. The evidence in this case showed that defendant was not an owner, agent or lessee, but was only "keeping" the premises and thus could not be guilty under that law. If this be true, then the majority overlooked a serious defect in the special statute, for in many cases it would be next to impossible to prove that one who only kept a gambling place was an owner, agent or lessee.

A reasonable correlation of the two articles would be that the legislature had left it to the discretion of the prosecutor to determine under which statute the accused should be prosecuted. Choices of statutes for framing indictments are not uncommon. But under the reasoning of the majority opinion the prosecutor is forced to rely upon the special statute (assuming that he can prove accused was an owner, agent or lessee). But since, as stated by the dissent, "the vice of gambling is so ruinous and the denunciations of same so plain in all our common law and statutory utterances," a more practical solution might be to allow prosecution under the general statute with its more severe penalties when warranted by the facts of the particular case.

RUSSELL BUNDESEN.