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COOLING TIME — A DESIRABLE TEST.—[Kentucky] The strict instructions and rulings of the courts on the element of "cooling time" in cases of homicide induced by adequate provocation have resulted in many unduly severe and unjust punishments. Most courts say that no matter how grievous the provocation may have been, if there was time for a *reasonable* man to cool his passion the offense is murder; whether or not the passion actually did subside is immaterial. *Nevada* v. *Hall,* 9 Nev. 58 (1893); *Nowacryk* v. *People,* 139 Ill. 336, 28 N. E. 961 (1891); *Ragland* v. *State,* 125 Ala. 12, 27 So. 983 (1900); *In Re Farley,* 3 Okla. Crim. 719, 101 Pac. 295 (1910); *Holcomb* v. *State,* 103 Tex. Crim. Rep. 348, 281 S. W. 204 (1926).

The legislatures have realized that a man greatly agitated and excited by a grave provocation, may attempt to "take the law into his own hands," and have felt that in the name of justice a less severe punishment than that for murder should be provided. Voluntary manslaughter statutes have been the result. The courts, however, appear to have unnecessarily limited this legislative intent.

Exemplary of the majority ruling limiting cooling time to that of a reasonable man is the case of *People* v. *Ashland,* 20 Cal. App. 168, 128 Pac. 798 (1912), wherein a conviction for murder was affirmed against a defendant who, informed by his wife that she had twice committed adultery with deceased, the first time under violence, searched for deceased and shot him seventeen hours after he had been first informed, a sufficient time to cool said the court. Another court in *Commonwealth* v. *Moore,* 2 Pa. 502 (1864), held that where the defendant's wife confessed a few hours before the homicide that she had committed adultery with deceased, there was no ground for holding that the offense was manslaughter rather than murder. There had been ample time for reflection after the defendant learned of the adultery. An extreme case is *Collins* v. *Florida,* 88 Fla. 578, 102 So. 880 (1924), where the deceased made several improper proposals to defendant's wife. To get away from him defendant and wife moved eighteen miles away. Finally, deceased visited the home of defendant, forced the wife into his car, drugged her and had intercourse with her. Upon learning of this incident, defendant searched for deceased and killed him, several hours later. The court, although

not disturbing the jury verdict of manslaughter, said, ". . . but in such case the slayer cannot take time and deliberate upon the wrong, and then act upon an impulse to avenge the insult by taking the life of the wrongdoer."

In the recent case of *Golden* v. *Commonwealth*, ... Ky. ..., 121 S. W. (2d) 21 (1938), it did not occur to the defense attorney to request, or to the trial court to give, an instruction on voluntary manslaughter, this failure to do so probably being the result of the previous strict interpretations of "cooling time."

In that case the defendant was found guilty of murder in the first degree. A trifle more than a year previous to the killing, the deceased's brother had seduced and gotten with child the appellant's fifteen year old daughter. The afternoon before the homicide the deceased, while returning the bastard child to the home of its mother, wilfully made an indecent exposure of his person before the women in the house. Defendant's efforts to stop such conduct resulted only in jeering replies and oaths from the deceased. Appellant was so greatly excited over the deceased's utter contempt for the women of his family that he was unable to sleep most of that night. The next morning he shot deceased. The Kentucky Court of Appeals expressed its dissatisfaction with the heavy penalty meted out, but found itself handcuffed so it could do nothing else but affirm. Evidently the court believed that this was not a place for an instruction on voluntary manslaughter although a conviction on that offense would have been the answer to what both the defense attorney and the Court were striving for—a less severe punishment.

The Court in *State* v. *Holmes*, 12 Wash. 169, 40 Pac. 735 (1895), also applied the majority rule with a great deal of hesitation. The defendant, a weak colored boy was assaulted in a most brutal and cowardly manner by the deceased, a large powerful white man, who bragged that he intended to have a "nigger" before the day was over. As soon as the defendant was able to break away from the deceased, he procured a gun and returned and shot him. The elapsed time between the beating and defendant's return was from ten to fifteen minutes.

The Court said "this is a hard case and the condition of the defendant is touching; and whether or not, if this court had sat as jurors in this case, we would have felt justified in returning a verdict of murder in the first degree is questionable . . . ." The Court then went on to say, that the case having been submitted to the jury under proper instructions, and it being a close question under the facts, they would not disturb the verdict. The trial court had instructed the jury not to consider whether the defendant did cool his passions but whether he had time to cool them.

A much more satisfying and just result was reached by the Missouri Supreme Court in the case of *State* v. *Gruggin*, 147 Mo. 39, 47 S. W. 1058 (1898), by applying a liberal interpretation of the "cooling time" factor. In this case the defendant was informed at nine o'clock in the morning that his young daughter had been raped by the deceased, about a month previously. The defendant was deeply affected by this incident, and at

three o'clock that afternoon shot the deceased. The trial judge charged the jury that they should find the defendant guilty of murder, there being sufficient cooling time. The Supreme Court reversed, saying a manslaughter charge should have been given.

Wharton in his treatise on criminal law (12 ed., Sec. 609) succinctly states the more desirable view.

"Whether there has been cooling time is eminently a question of fact, varying with the particular case and the condition of the party. There are some provocations which, with persons of even temperament, lose their power in a few moments; while there are others which rankle in the breast for days and even weeks, producing temporary insanity. Men's temperaments, also, vary greatly as to the *duration* of hot blood; and it must be remembered that we must determine the question of malice in each case, not by the standard of an ideal "reasonable man," but by that of the party to whom the malice is imputed. Hence, whether there has been cooling time, so as to impute to the defendant malice, is to be decided not by an absolute rule, but by the conditions of each case."

Surely, the view as expressed by Wharton and applied in *State* v. *Gruggin* (*supra*) is much more intelligent and better serves the ends of justice than does the view applied in the majority of the cases.

HUGO KORANDA.

CONSTRUCTION—HABITUAL OFFENDER STATUTES

I.

Upon conviction in the New York State court for burglary, defendant was sentenced as a second offender by virtue of a prior conviction in a United States District court in New York for uttering a counterfeit federal reserve bank note. The state court held that the burglary was his second crime because his first offense, uttering a counterfeit bill, was punishable under a state statute also. *People* v. *Fury,* 18 N. E. (2d) 650, (N. Y., 1939).

The habitual offender statute under which the defendant was sentenced, states that, "A person, who, after having been once or twice convicted *within this state,* of a felony, of an attempt to commit a felony, or, under the laws of any other state, government, or country, of a crime which, if committed *within this state,* would be a felony, commits any felony, *within this state,* is punishable upon conviction of such second or third offense, as follows . . ." (italics supplied). N. Y. CONSOL. LAWS (Baldwin, 1938), PENAL LAW, sec. 881.

This statute is representative of the ambiguity which exists in the habitual offender statute of many states. (COLO. STAT. ANN. (Michie, 1935) c. 550, sec. 551, MINN. STAT. (Mason, 1927) sec. 9931-1, ORE. CODE ANN. (1930) sec. 13-2801, UTAH REV. STAT. ANN. (1933) sec. 103-1-18) "Within this state," may be taken to mean, within the state boundaries, as opposed to, within the jurisdiction of the state courts.

In *People* v. *Gutterson,* 244 N. Y. 243, 155 N. E. 113 (1926), the ambiguity in the wording of the statute was removed by qualifying it through another of the state statutes. The holding of that case was that a prior conviction in a federal court for using the mails to defraud did not bar the defendant from being sentenced under the indeter-

minate sentence statute. This statute provided that, "a person never before convicted of a crime *punishable by imprisonment in a state prison,*" shall receive an indeterminate sentence (italics supplied). N. Y. CONSOL. LAWS (Baldwin, 1938), PENAL LAW, sec. 2189.

The holding of the *Gutterson* case left the possible scope of sentencing under the habitual offender statute to only those offenses, "punishable by imprisonment in a state prison." The principal case extended the statute completely over that scope by holding that the prior conviction need not be in a state court, providing only, that the prior offense would have been a felony if committed within the jurisdiction of the state courts.

Other states having the same type of ambiguity in their habitual offender statute (*supra*), must in the future face the same problem. If there is no qualifying statute as in New York, their courts may have to decide on the merits of one construction in preference to the other, as a possible basis for indicating legislative intent.

Convictions under jurisdictions other than that of the state are of two types: 1. Convictions under the laws of the other states. 2. Convictions under federal laws.

The state may legislate in any field which a sister state may. Thus, the laws of the principal state would be a true standard of the legislature's attitude as to the penal nature of a prior offense committed under the laws of another state.

This is not true in respect to prior federal convictions. The principal state is precluded from legislating in most of the fields which Congress acts. Only where there are constitutional state statutes giving concurrent jurisdiction in respect to the particular type of offense involved will the principal state's laws be a valid standard.

But, under the broader construction of the statute, the standard is expanded to include federal laws, that is, within the state boundaries, it covers the federal courts in the state as well as the state courts. Hence, any federal offense if committed within the state boundaries, would be a felony in the federal courts of the state, and fall within the purview of the statute.

It might be said that the legislature would not desire to have all federal offenses deemed prior convictions. This may be answered by pointing out that there is no bar to excluding any offense they may so desire by subsequent statutes.

The advantage of the broader interpretation is the bringing of federal offenses within the scope of the state penal statutes indirectly, which except in cases of concurrent jurisdiction statutes, could not be done directly. Is it unreasonable to infer that the statute was worded with the intent to protect the state from the habitual criminal, who, though having been convicted many times in the federal courts, is facing his first state sentence?

The concurrent jurisdiction statute involved in the principal case raises many other problems that as yet have not been before the courts. The defendant had committed the counterfeiting in New York. Hence he may have been tried and convicted under the New York counterfeiting statute without double jeapardy, *United States* v. *Lanza,* 260 U. S. 377 (1922). The question is then, do these two convictions for the same offense make such an offender subject to the second offender statute? Or, to

carry the question one step further, will a subsequent state conviction for another act subject him to a sentence as third offender?

It would seem that under a literal interpretation of the holding of the principal case, the answer to both questions would be in the affirmative.

It would seem more reasonable, however, that the legislative intent to get at the habitual criminal would best be served by judging the prior offenses by the number of criminal acts perpetrated, as opposed to the number of convictions.

JACK JACOBS.

II.

Upon prosecution for murder, defendant was convicted of manslaughter. Previously he had been convicted of grand larceny in Oregon, and later was convicted of the crime of "stealing an automobile" in Canada. Now the State successfully obtained his conviction as a third offender under the Louisiana multiple offender statute. Upon appeal, the conviction was amended, finding the accused guilty as a second offender. Held: the Canadian offense would not have been a felony in Louisiana so cannot be considered in determining the number of previous offenses committed, *State* v. *O'Day,* 185 So. 290 (La. 1938).

The Canadian statute under which the defendant was previously convicted provides in part, "Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it," Dom. Crim. Code, Art. 347.

From this provision it is obvious that asportation is no longer necessary to the crime of theft in Canada, and it has been so held; *Henderson* v. *Northwestern Mutual Fire Ass'n,* 34 B. C. R. 411, 43 C. C. C. 217 1 D. L. R. 339 (1925). Thus, this Canadian statute covers both the common law larceny when asportation is necessary and a new crime of theft. In the instant case the court held that the crime of stealing an automobile, with no asportation, a felony under the Canadian code did not amount to a felony under the Louisiana code of Criminal Procedure (Crim. Stat. Ann., 1932, Ch. 7, "Habitual Criminals," Art. 709) which provides that "Any person who, after having been convicted, within this State, of a felony, or of an attempt to commit a felony, or who, after having been convicted under the laws of any other State, government, or county, of a crime which, if committed within this State, would be a felony, commits any felony, within this State, upon conviction of such second offense, shall be punished as follows: . . ."

California, New York, Texas, Michigan, Colorado, and Oregon among others have similar habitual criminal statutes; Cal. Penal Code (Deering, 1937) sec. 644, N. Y. Penal Law, sec. 1942, Tex. Ann. Penal Code (Vernon, 1925) Art. 63, Mich. Comp. Laws (1929) sec. 17, 339, Colo. Stat. Ann. Ch. 48, sec 551, Oregon Code Ann. (1930) sec. 13-2802. In New York, attempts to commit felonies within a statute providing for punishment for fourth or subsequent convictions include attempts which are no more than misdemeanors, while the word felony, as used in the same statute, refers only to crimes (including attempts) which are strictly of the grade of felony as defined by section 2 of the Penal Law, *Stauber* v. *Larkin,* 271 N. Y.

S. 305 (1934). Therefore, under the New York interpretation, the defendant in the instant case, if his Canadian crime were declared an attempt in Louisiana (whether misdemeanor or felony), would have been found guilty as a third offender.

The Supreme Court of Louisiana interpreted their statute strictly, however, allowing no deviation from the formal tenor of the words. Thus defendant was freed of the third offender charge because the Canadian crime did not amount to a felony in Louisiana. Owing to the fact that there is no crime of attempt to commit larceny in Louisiana, this defendant would have been guilty of nothing under that state's laws.

An attempt is an intended apparent unfinshed crime. *Graham* v. *People,* 181 Ill. 477, 155 N. E. 179 (1899). The question of whether an attempt has been made to commit a crime is determined solely by the condition of the actor's mind and his conduct in the attempted commission of his design, *People* v. *Moran,* 123 N. Y. 254, 25 N. E. 412 (1890). *People* v. *Jaffee,* 98 N. Y. S. 486, affirmed in 185 N. Y. 497 (1906). To constitute attempt to commit larceny there must be an overt act which if not intercepted by some intervening cause would culminate in larceny, *People* v. *Edwards,* 79 Cal. App. 514, 249 Pac. 1090, 1091 (1926). The above definitions and limitations of attempt were fully satisfied by the act of the defendant in the principal case when he got into the automobile, threw the ignition switch on, and stepped on the starter. His design to steal the automobile was frustrated by an intervening agency, a policeman, but the turning of the switch certainly was an overt act, which if not stopped by an outside agency would have culminated in the completed crime.

Therefore the defendant's act in Canada, although not a felony in Louisiana by this court's interpretation, actually was, or would have been an *attempt* to commit the felony of grand larceny, and would have resulted in the conviction of O'Day as a third offender, in any state wherein an attempt to commit grand larceny is punishable, if coupled with the New York construction of the statute. This hiatus in the Louisiana law results in a discriminatory inconsistency as attempts to commit rape, to steal automobile parts, and the like are made criminal acts by statute, and thus, under the New York rule, would subject perpetrators of such acts in other states to the habitual offender statute if they subsequently committed a crime in Louisiana. But an attempt to steal an automobile as in the instant case is not an offence within the purview of the statute. Perhaps the legislature will plug this loophole by a suitable statute.

LEO BULLINGER.

INDICTMENT—PARTICULARITY NECESSARY.—[Missouri] Defendant, a city mayor and chief officer of public safety, was charged with misconduct and negligence in office for having willfully and knowingly neglected his official duty by taking no action against gambling houses and bawdy houses which he knew to be operating in the city. The indictment omitted to include exact information concerning the location of the houses or the names of their operators, merely identifying the gambling houses as located "in certain buildings situated upon

certain streets and highways of said city, known and designated as Main Street near the intersection of Seventh Street, the exact numerous street locations being to this Grand Jury unknown," and using similar wording in describing the location of the brothels. In the trial court, there was a judgment sustaining a motion to quash the indictment; upon appeal by the state the judgment was affirmed. The indictment was defective because too indefinite in not describing with reasonable accuracy the location of any one of the houses or describing any individuals connected with them. *State* v. *Maher*, ... Mo. ..., 124 S. W. (2d) 679 (1939).

At common law criminal indictments were required to conform to very strict standards both as to the form of indictment and substance of the charge therein. But by the modern interpretation, no indictment is held to be insufficient by reason of imperfection of form alone, if the substantial rights of the defendant are not prejudiced Still, the indictment returned by the grand jury is required to identify with certainty the charge against the defendant. The sixth amendment to the Federal Constitution and most state constitutions contain provisions to this effect. Section 22 of Article II of the Constitution of the State of Missouri applies in the instant case: "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation . . . ." The courts have generally construed such constitutional provisions to mean that an indictment is sufficiently certain if it so identifies the charge against the defendant that he is clearly apprised of the offense alleged and can prepare his defense, if it will guide the court in deciding questions of the admissibility of evidence and in pronouncing judgment in the event of conviction, and if defendant's conviction or acquittal on this charge will be a bar to another prosecution for the same offense. *Mundy* v. *Commonwealth*, 161 Va. 1049, 171 S. E. 691 (1933), *City of Seattle* v. *Proctor*, 183 Wash. 299, 48 P. (2d) 241 (1935), *People* v. *Farson*, 244 N. Y. 413, 155 N. E. 724 (1927).

As Bishop points out in his Criminal Procedure, volume II, sections 517 et seq., these requirements for certainty in the indictment are grounded in sound reason. Every defendant is innocent in the eyes of the law until convicted, and should be given full and fair notice of what is charged against him so that he may have every chance to prove his innocence to the court. He can know only what appears in the indictment, so that instrument should allege every fact which is material to the proceedings.

The indictment in the instant case was based upon Section 3950, Rev. Stats. Mo. 1929, which reads, in part: "Every officer or person holding any trust or appointment, who shall be convicted of any willful misconduct or misdemeanor in office, or neglect to perform any duty enjoined on him by law, where no special provision is made for the punishment of such misdemeanor, misconduct, or negligence, shall be punished . . . ." But an indictment for a statutory offense which merely follows the language of the statute is not good unless it charges the offense with precision and certainty, and leaves no room for doubt of the exact offense intended to be charged.

Jarl v. *United States,* 19 F. (2d) 891 (1927). It is permissible under some circumstances to allege in an indictment that some facts are unknown to the grand jury, but this is only justifiable on grounds of reasonable necessity—which does not include a case such as this where the grand jury leaves out facts which they could have ascertained and which were essential to the charge made. *State* v. *Stowe,* 132 Mo. 199, 33 S. W. 799 (1896). Though the indictment in the present case used the words of the statute it was nevertheless not sufficiently specific, for it described the houses, knowledge of which defendant is alleged to possess, in such ambiguous and indefinite terms that defendant could prepare virtually no defense. Further, because of the large and vaguely described area referred to in the indictment, it would be difficult to plead defendant's acquittal or conviction in bar of future proceedings of the same sort which might be based on the identical fact situation. Finally, the judge and jury could not tell whether the evidence produced at the trial proved what the indictment so indistinctly alleged. This case clearly falls within the rule requiring certainty of indictment, and the rule is supported here by reason as well as precedent.

In similar cases charging malfeasance of public officers in neglecting to act against known gambling houses and houses of prostitution, indictments have been held sufficient which identified the houses by street and number. *State* v. *Castle,* 75 N. J. L. 187, 66 Atl. 1059 (1907), *People* v. *Herlihy,* 66 App. Div. 534, 73 N. Y. S. 236 (1901), *State* v. *Boyd,* 196 Mo. 52, 94 S. W. 536 (1906).

An indictment charging this same offense of official misconduct has been held sufficiently definite which alleged that the mayor, captain of police, and chief of police unlawfully conspired and agreed with a certain named person, operator of houses of ill fame, to allow the operation of houses of prostitution "at various places in the city of Hamtramck." *People* v. *Tenerowicz et al.,* 266 Mich. 276, 253 N. W. 296 (1934).

The particularity required in an indictment for malfeasance in office depends of course upon the nature of the exact misconduct charged. In *Turner* v. *State,* ... Ga. ..., 199 S. E. 837 (1938), transferred 185 Ga. 432, 195 S. E. 431 (1938), the defendant and another city policeman were indicted for accepting a bribe from a certain named person to refrain from arresting persons unknown to the grand jurors for violating the lottery law, and for furnishing police protection to such persons. It would at first glance seem that this indictment was insufficient for not naming the persons conducting the lottery nor specifying what kind of lottery was conducted; but the indictment was rightly held sufficiently definite since the nature of the lottery and the operator's name were merely incidental to the bribery charge. Another indictment was held adequate which charged a commissioner of city works generally with conspiring with a certain named person to willfully omit, neglect, and violate his duty as commissioner. In addition, five specific acts in furtherance of the conspiracy were listed, with the time and place and the name of the city's contractor upon whom, according to the plot, tribute was to be levied by the conspirators. This was held sufficiently to individuate the of-

fense charged. *People* v. *Willis et al.*, 158 N. Y. 392, 53 N. E. 29 (1899).

An unusual case in which a surprisingly indefinite indictment was upheld as valid was *Castle* v. *Commonwealth*, 232 Ky. 561, 24 S. W. (2d) 298 (1930). There the indictment charged that a constable took money from "various and divers persons whose names are unknown to the grand jury" for the purpose of preventing their prosecution, "thereby obstructing public justice, and violating the oath of his office." If the charge was true, this was clearly an offense under the Kentucky statutes. A bill of particulars was filed which gave in detail a particular transaction in which the constable accepted a bribe. Although the original indictment was couched in general terms, the court said it was definite enough and "the filing of the bill of particulars did not cure a defective indictment, but only aided a good one." This is a singular decision, however, with which most courts would probably not agree.

The courts, in order to protect public officers from indefinite and ambiguous charges of neglect of their official duty, have generally inspected indictments very closely to insure that they are sufficiently complete in their charges. It would seem that groups attempting to reform their city governments will need more than general information, for the grand jury must include in the indictment definite and specific instances of malfeasance in order to sustain a charge of misconduct in office.

JAMES CLEMENT.

OPTIONAL, ALTERNATIVE, AND CONDITIONAL SENTENCES.—[New York] Defendant plead guilty to a charge of speeding in violation of a city ordinance. The court sentenced him to pay a $60 fine. However the sentence was to be suspended entirely if the defendant left his driver's license with the court for a period of 60 days, or suspended in part if a public liability insurance policy was filed with the court. On appeal to the county court it was held: in criminal prosecution, the court must determine the sentence and has no power to make it optional with the defendant; a sentence must be certain and definite and, in absence of statute authorizing it, must not be in the alternative. Nevertheless the conviction was sustained, the county court reducing the fine to $10 and striking off the conditions imposed. *City of Rochester* v. *Newton*, 8 N. Y. S. (2d) 441 (1938).

The main objection was lodged against the public liability condition. Section 2188 of the Penal Code provides that on conviction the court may suspend sentence or impose sentence and suspend the execution of judgment. Under this section, if sentence is imposed and execution of judgment is suspended, the authority of the court is confined to suspension of the entire sentence, not merely part of it. *Ex Parte Kuney*, 5 N. Y. S. (2d) 644 (1936). By permitting the cost of the policy to be deducted from the fine, the court suspended only part of the sentence, contrary to the rule in the Kuney case. Even assuming this statute nonexistent, the court admitted no power to require the defendant to take out an insurance policy, for the legislature had not enacted a law compelling automobile liability insurance. It has been often held that the diminution or termination

of the sentence may not be conditioned on acts which the criminal court could not directly order the convicted defendant to perform. *Smith* v. *Barrow,* 21 Ga. App. 145, 94 S. E. 860 (1917); *State* v. *Perkins,* 82 N. C. 68 (1880); *Ray* v. *State,* 40 Ga. App. 145, 149 S. E. 64 (1929). In a minority of states, however, trial courts are considered to have inherent power to suspend execution of sentence on any reasonable condition prescribed. *Rayland* v. *State,* 55 Fla. 157, 46 So. 724 (1928); *Scriggs* v. *City of North Little Rock,* 179 Ark. 200, 14 S. W. (2d) 1112 (1929). Under most statutory systems the criminal courts are restricted to penalties and procedure set out in the statutes and have no inherent power to suspend on condition. *In re Mills,* 135 U. S. 263, (1889); *Medjourous* v. *State,* 240 Ohio App. 146, 156 N. E. 918 (1924).

The county court was greatly alarmed at the defendant being given an option to fix the amount of his sentence, or being permitted alternative courses of conduct. Sentences giving a defendant an option or alternative course of conduct have long been condemned. "One of the glories of the common law was the fixed character of its criminal punishment." 4 Blackstones Comm. 378; 1 Chitty Cr. Law (4th Am. Ed. 184) 701. "Term of imprisonment or the amount of the fine may not depend on future contingency." See Holt K. B. 320 (1700). Per Holt, C. J., "a fine ought to be absolute and not conditional." "It is fundamental law that the sentence in a criminal case must be definite and certain." Bishop, Crim. Proc. No. 1309; 12 Cyc. 779 and cases cited. All of this terminology has formed a "seductive cliche" that still entraps judges, as is evidenced in the instant case.

Many states have abrogated the common law rule, authorizing alternative sentence by statute, such as, Illinois—Smith-Hurd Stats. c. 38, Secs. 192, 93; Montana—Rev. Codes 1921 Sec. 12069; Missouri—Rev. Stats. 1909 Sec. 8315. Section 483 of the N. Y. Code of Crim. Proc. permits trial courts to prescribe "such terms and conditions as they may deem best," but, "with the consent of the defendant." No doubt Sec. 483 is typical of the language in state statutes which do authorize conditional sentences. An exception is Ill. Rev. Stats. (Cahill 1937) c. 38, Sec. 812 et seq., where all authorized conditions are outlined and specifically enumerated. These statutes would appear to provide trial courts with a way to evade the 'seductive cliches' of the common law.

Perhaps the statutes like that of New York have given the courts too much discretionary power. Although the consent of the defendant is necessary for a valid suspension on condition, the defendant has little choice but to acquiesce. The fact that defendant in the principal case objected and appealed is indeed unusual. The number of appeals in this type of case is quite negligible, since the reward of a light or suspended sentence is a strong inducement to the convicted defendant to accede to any suggestion by the court. The Illinois statute which authorizes only the imposition of enumerated conditions may be the best solution. For without some statutory check on the procedure, the defendant, who often cannot appeal from the order and conviction once he has accepted the suspension (on the theory that the suspension is not a

final judgment from which an appeal can be taken—*Walther* v. *State,* 179 Ind. 565, 101 N. E. 1005 (1913)) is subject to the will of the trial court. This gives appellate courts practically no opportunity to prevent "illegal practices" on the part of trial courts who abuse their discretionary power.

Whatever may be the extent of so-called "illegal practices," they have been condemned as such quite ineffectively by the appellate courts. In *Medjourous* v. *State, supra,* the court said, "the practices which have grown up among trial courts in this state of remitting parts of fines which have been imposed, or permitting the accused to serve less time than provided by law, or serve none at all . . . are illegal, contrary to public policy, and inimical to the public good. These practices are also a reflection upon the integrity of the courts, create a distrust in the minds of the people, establish a lack of uniformity throughout the state in the imposition of sentence for the same offense."

However trial courts, attempting to effect a complete if rough justice in situations involving non-capital offenses, have tempered the rigidity of the direct sentencing power resulting from these restrictions "with all sorts of mitigating devices . . . running through the whole course of a prosecution." See Pound, Foreword: Predictability in the Administration of Criminal Justice (1928) 42 Harv. L. Rev. 297. Some of these trial court practices may be technically illegal, others are merely opportune utilizations of discretionary procedure, much of which has survived from the day when common law courts could grant neither an appeal nor a new trial.

Despite the legalistic arguments *pro* and *con,* the use of such devices by the courts is an informal attempt to approximate the aims of criminologists in recent years. The natural reaction from the futile, cast iron, prescribed penal treatment characteristic of the last century was a movement for the development of individualized penal treatment, which was to make the punishment fit the criminal rather than the punishment fit the crime. It may be that the reaction will lead to a thorough reorganization of our system by which the treatment to be accorded all offenders would be conferred on a specially qualified tribunal. Until that happens the real problem that remains is devising appropriate machinery for the administration of these minor offenses.

HOWARD A. MCKEE.

POWER OF COURTS TO VACATE SENTENCE AFTER PARTIAL EXECUTION AND IMPOSE A NEW SENTENCE INCREASING THE PUNISHMENT. — [Florida] After conviction on charge of larceny and sentence thereunder for 6 months in the county jail, petitioner by his physician came before the court asking removal from jail to save petitioner's life for he was suffering from a severe attack of pneumonia. The court vacated sentence and discharged petitioner. At a subsequent term of court petitioner was sentenced for 2 years under the previous conviction. Petitioner now alleges that because of partial execution of the first sentence the court had no power to revoke it, and thus the sentence imposed at the later date was void.

The Supreme Court held that as a rule a court is without power to

set aside a criminal judgment after it has been partly satisfied by the defendant and impose a new and different sentence increasing the punishment, even at the same term of court at which the original judgment was imposed. But, where the sentence is vacated during the same term of court at defendant's request, and the proposition of imposing a new sentence is deferred to a subsequent term of court, to which the case is considered pending, the court may at the subsequent term of court impose a new sentence, even increasing the punishment, upon the original conviction. The court then interpreted the representations of the physician as equivalent to a motion by the defendant to vacate the sentence and held that, as a consequence of that motion, the second sentence was not void and could not be attacked by habeas corpus proceedings. *Smith* v. *Brown,* 185 So. 732 (1939). The holding was directly supported by another Florida case. *Rhoden* v. *Chapman,* 127 Fla. 9, 172 So. 56 (1937).

Whether, in absence of statute, a court may suspend the pronouncement of a sentence to a subsequent term is a hurdle that must be jumped before dealing with the power of the court to vacate, during term of imposition, a sentence partially satisfied and impose a greater one at a subsequent term. In cases where the pronouncement of the sentence is delayed for an indefinite time, or dependent on the defendant's good behavior, the courts have rather consistently held that such suspension deprived the court of jurisdiction to impose a sentence at a later term. The basis of these holdings is that the court is infringing upon the executive power of pardoning. *State* v. *Sapp,* 87 Kan. 740, 125 Pac. 78 (1912); *Grundel* v. *People,* 33 Colo. 191, 79 Pac. 1022 (1906); *People* v. *Allen,* 155 Ill. 61, 39 N. E. 568, (1895). *Contra: Ex Parte,* Williams, 26 Fla. 310, 5 So. 833 (1890); *Sylvester* v. *State,* 65 N. H. 193, 20 Atl. 954 (1889). However, when the pronouncement of sentence is unconditionally suspended for a definite time and for some good cause incident to the administration of justice by the court, the courts have consistently held that sentence may be imposed at a subsequent term. For, in these cases, the purpose is not to pardon or parole the defendant; but merely to enable the court to more justly exercise its power of imposing sentence. *Miner* v. *United States,* 244 Fed. 422 (C. C. A. 3d, 1917); *In Re St. Hilaire,* 101 Me. 522, 64 Atl. 882 (1906); *State* v. *Ray,* 50 Iowa 520 (1879); 25 Harv. L. Rev. 739; 12 Col. L. Rev. 543. Thus, in the instant case, as the deferring of the pronouncement of sentence to a subsequent term was in no manner indefinite or an attempt to exercise the executive pardoning power, the validity of the subsequent sentence cannot be challenged merely because it was imposed at a later term.

It is generally held that the judgments, decrees, and orders of a court are within the control of the court during the term at which they were made and may be amended or altered by the court during term. 2 Co. Lit. 1st Am. Ed., Sec. 438; *State* v. *White,* 3 N. J. M. 1016, 130 Atl. 470 (1925). To this rule there is a well recognized limitation; namely, that a court may not vacate the old sentence and increase the punishment after part of the old sentence has been executed. 44 A. L. R. 1203; 8 R. C.

L. 244; Wharton, Criminal Pleading and Practice, 9th ed, Sec. 913. The reason for this rule is often said to be that once the prisoner begins to serve his sentence the court loses its power over his destiny and has no more jurisdiction over the case. *Brown* v. *Rice,* 57 Me. 55 (1869); *People* v. *Meservey,* 76 Mich. 223, 42 N. W. 1133 (1889). Thus the old sentence is void and the first one still remains in effect. *Brown* v. *Rice, supra; State* v. *Cannon,* 11 Ore. 312, 2 Pac. 191 (1884); *Turner* v. *State,* 31 S. W. (2d) 809 (Tex. Civ. App. 1930); *In Re Sullivan,* 3 Cal. App. 193, 84 Pac. 781 (1906). However, the underlying reason for this generally accepted limitation to the court's control over its sentences is that to allow the defendant to suffer twice under the same verdict and conviction would be to put him in double jeopardy. *Ex Parte Lange,* 85 U. S. 163, 173 (1874).

That double jeopardy is the *only* fundamental reason why the court cannot set aside its judgment after partial execution was also pointed out in a later United States Supreme Court decision in which the court held that a court could vacate a sentence and mitigate the punishment after partial execution of the original sentence. *United States* v. *Benz,* 282 U. S. 304, 307 (1931); Note 19 Geo. L. J. 365; Note 15 Minn. L. Rev., p. 828.

However, many states have also denied their courts the power to mitigate punishment after partial execution of the sentence, on three different grounds, namely: (1) it is an infringement on the pardoning power of the executive; (2) it is prohibited by statutory restrictions; (3) the practice of allowing the court to alter a sentence after partial execution would be destructive to the object of punishment, namely, the reformation of the offender, as his term of punishment would always be an uncertainty to him. *People* v. *Williams,* 352 Ill. 227, 185 N. E. 598 (1933); *Com.* v. *Mayloy,* 57 Pa. 281 (1868); *Brabandt* v. *Com.,* 157 Ky. 130, 162 S. W. 786 (1914); 15 Minn. L. Rev. 828; 19 Geo. L. J. 365; 22 J. C. L. 591.

It is logical to say that in those jurisdictions where the court is not allowed to vacate a sentence partially served, on motion of defendant and during the same term of court, and impose a lighter sentence because of any of the reasons above given, they would not be allowed to vacate the old sentence and impose a new one inflicting a greater punishment, even on motion of the defendant to vacate the old sentence. But, what would be the action of those courts that recognize that the foundation of the rule is the double jeopardy in which defendant is placed, and that have no statutes on the subject? Would they, as the Florida court did in the instant case, hold that the defendant had waived his right not to be placed in double jeopardy by moving for the old sentence to be vacated; and, consequently, the court, under its common law power to alter sentences during term time, could impose a sentence inflicting greater punishment on the defendant?

In the case of *Emerson* v. *Boyles,* 170 Ark. 621, 280 S. W. 1005 (1926), the defendant, after partial execution, was by order of the court, and with full approval and on motion of defendant, to be released on his good behavior. The Supreme Court of the state held that the trial court had no power to authorize the release: "for the rea-

son that to permit the judgment to be set aside and another sentence to be imposed some time in the future, after the first sentence had been partially executed, would, in effect put the defendant in jeopary twice for the same offense." Here, although it may be questioned whether the mere putting the defendant in a position where his punishment may later be increased is to place him in double jeopardy, it is clear that the court does not, in any manner, consider the consent of the defendant to the vacating of the original sentence as a waiver of his right not to be placed in double jeopardy.

However, assuming that one may waive his right not to have punishment already partly executed be increased by the court, can a motion to vacate the sentence be considered as a waiver of that right? The increasing of the sentence, that is the infliction of the new increased sentence, is the double jeopardy, not the vacating of the old sentence. *Benz* v. *United States, supra; Ex Parte Lange, supra; In Re Brittain,* 93 N. C. 587 (1885). Consequently, it seems to be a frank contradiction of facts to contend that a person has waived his right not to be placed in double jeopardy by moving for a sentence to be vacated when it is not the vacating of the sentence that constitutes the double jeopardy, but the later imposition of the new sentence increasing the punishment.

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