Journal of Criminal Law and Criminology

Volume 31
Issue 1 *May-June*

Article 9

Summer 1940

Recent Criminal Cases

RECENT CRIMINAL CASES

Edited by the
LEGAL PUBLICATIONS BOARD
NORTHWESTERN UNIVERSITY SCHOOL OF LAW

EDMUND G. PABST, Case Editor

LEONARD SHAPIRO, JOSEPH NELLIS } Associate Editors

INTOXICATION IN "MITIGATION" OF MURDER—[Ind.] Defendant was indicted for murder in the first degree, tried, found guilty of murder in the second degree, and sentenced to life imprisonment. The entire defense was based on the theory that accused was so drunk at the time of the killing that he could not have conceived a premeditated design *or* formed a criminal intent. The court instructed the jury that voluntary drunkenness could not justify, excuse, or mitigate the commission of crime, and the fact that the defendant may have been drunk to any degree at the time of the killing should not be taken into consideraion in reaching a verdict. Defendant's contention that the latter part of the instruction was erroneous was upheld on appeal to the Supreme Court of Indiana where reversal with directions for a new trial was ordered, one judge dissenting. *O'Neil* v. *State*, 22 N. E. (2d) 825 (Ind. 1939).

At common law the fact of intoxication had little or no bearing on the question of the guilt of one accused of murder. Drunkenness was never allowed to palliate a criminal homicide. *Regina* v. *Fogash*, 1 Plan (Eng.) 7 (1816). The view was expressed by several common law writers that inebrity served to aggravate the crime. *Coke, Upon Littleton*, p. 247 (1631). This latter view, however, has never attained acceptance by American courts, and intoxication is not held to aggravate the killing into a higher crime. *McIntyre* v. *People*, 38 Ill. 514 (1865). A few isolated cases in the United States have held that drunkenness is not a fact to be considered in determining the degree of the crime. *Com.* v. *Hawkins*, 3 Gray 463 (Mass. 1855); *State* v. *Brown*, 181 Mo. 192, 79 S. W. 111 (1904). The early English view as stated in *Rex.* v. *Grindley* in 1819 (1 Russell on Crimes, p. 80) allowed voluntary intoxication to be set up in mitigation and in succeeding cases the doctrine was firmly established that wherever it was necessary to prove a specific intent before conviction could be secured evidence of drunkenness was held to be properly admissible to rebut the crime charged. *Marshall's case*, 1 Levin (Eng.) 76 (1830); *Reg.* v. *Moore*, 3 C. C. (Eng.) 319 (1852); *Reg.* v. *Doherty*, 16 Col. C. C. (Eng.) 306 (1887). This latter requirement has been followed by American courts in cases of similar nature. Hence, according to both the American and English view, intoxication is highly relevant in determining the degree of homicide.

Murder was punishable with death at common law but obvious differences in the state of mind of the accused, together with a change of thought respecting punishment, led to the enactment in thirty-eight states of statutes dividing the crime into two or more degrees depending upon the specific intent of the slayer. Thus

the Indiana Criminal Code (Burns Ind. Stat. Ann. §10-3401), which seems typical, divides murder into two degrees and provides that "whoever, purposely and with premeditated malice, kills any human being, is guilty of murder in the first degree." Murder in the second degree is described as a killing "purposely and maliciously, but without premeditation." Under both sections a specific intent to kill a person is apparently required. Since deliberation and premeditation are the essence of murder in the first degree under the Indiana cases (*Booher* v. *State,* 156 Ind. 435, 60 N. E. 155 (1900)), a person accused of such crime must have mental capacity sufficient to think deliberately and rationally as to the consequences of his acts. And so the great weight of authority in states where two degrees of murder obtain is that intoxication in such degree that accused is incapable of forming the premeditated design to kill will generally serve to reduce the murder from first to second degree but not to manslaughter. *People* v. *Price,* 207 Cal. 131, 277 Pac. 316 (1929); *Garner* v. *State,* 28 Fla. 113, 9 So. 835 (1891); *Rucker* v. *State,* 119 Ohio St. 189, 162 N. E. 802 (1928); *Com.* v. *Walker,* 283 Pa. 468, 129 Atl. 453 (1925); and annos., 12 A. L. R. 894, 79 A. L. R. 906. Some jurisdictions apparently disregard the element of intoxication and apply to drunken persons the principals that would apply to sober individuals. *Fleenor* v. *Com.,* 221 Ky. 175, 198 So. 376 (1927); *Evers* v. *State,* 31 Tex. Crim. Rep. 318, 20 S. W. 744 (1892).

Among those jurisdictions allowing a reduction to second degree murder, a few vary the general rule and permit the intoxication in extreme cases to reduce the homicide to manslaughter, usually under particular statutory requirements regarding the intent necessary for second degree murder. *State* v. *Rumble,* 81 Kan. 16, 105 Pac. 1 (1909) (use of the word "purposely" in second degree murder statute held to imply the existence of an intention to cause death; hence if defendant so drunk there could be no intention, homicide could be reduced to manslaughter); *Perryman* v. *State,* 12 Okla. Cr. 500, 159 Pac. 937 (1916). The instant case, since it reverses a conviction of second degree murder, would seem to fall into the category of states that will under certain circumstances allow a reduction to manslaughter. But this clearly seems to be a minority doctrine. See *Garner* v. *State,* 28 Fla. 113, So. 835 (1891); and anno., 8 A. L. R. 1053.

In states where murder is not divided into degrees a reduction to manslaughter is also allowed. *People* v. *Brisbane,* 295 Ill. 241, 129 N. E. 185 (1920); *Cagle* v. *State,* 221 Ala. 346, 100 So. 318 (1924). This seems logical enough since there is no other method of reducing the degree of crime. The question arises whether the mere fact that there is no degree of murder should make it any easier to reduce the crime to manslaughter. In so far as most states where degrees of murder obtain do not allow a reduction beyond second degree murder it apparently is; but in those states which do allow a reduction to manslaughter the test seems to be the same whether degrees of murder exist or not. This follows from the fact that the reduction depends upon the nonexistence of a felonious intent in either case.

Manslaughter is generally described as "an unlawful killing done without malice, express or implied, either in a sudden quarrel or unintentionally while in the commission of an unlawful act." *State v. Schaeffer,* 96 Ohio St. 215, 117 N. E. 220 (1917). The distinction between murder in the second degree and manslaughter is the element of malice, which is a necessary constituent of the former but is entirely wanting in the latter. *State* v. *Hartley,* 185 Mo. 669, 84 S. W. 910. Consequently, to secure a reduction from murder to manslaughter it must clearly appear that the intoxication was so extreme as to suspend entirely the power of reason and to render the accused incapable of any mental action since the essential element of murder, "malice aforethought," implies some action of the brain prior to the act which causes death. *People* v. *Brisbane,* 295 Ill. 241, 129 N. E. 185 (1920) *People* v. *Cochran,* 313 Ill. 508, 145 N. E. 207 (1925). To secure the reduction to manslaughter the intoxication must be so complete as to render impossible all ability to reason or to form any

intent and where the defendant himself testifies to his acts, thoughts, and intentions at the time of the killing, murder in the first degree is sustainable despite drunkenness. *People* v. *Anderson,* 337 Ill. 310, 169 N. E. 243 (1929); *Cogle* v. *State,* 211 Ala. 346, 100 So. 318 (1924); *Choate* v. *State,* 19 Okla. Cr. Rep. 169, 197 Pac. 1070 (1921). Consistent with this analysis is a recent Alabama holding (*Ivory* v. *State,* 237 Ala. 344, 186 So. 460 (1939)) to the effect that a reduction of the killing to manslaughter is only proper in a situation where the accused is so drunk that rational action is impossible, thereby negativing the possibility of specific intent or a reduction of the homicide to murder in the second degree where the drunkenness refutes the essential of premeditation and deliberation. In a situation where the killing is with adequate provocation, drunkenness may go to show that the act was committed under the influence of sudden passion, caused by the provocation, and not from a precedent malice, thereby reducing the crime to manslaughter. *Williams* v. *State,* 81 Ala. 1, 1 So. 179 (1886); *Buchannan* v. *Com.,* 86 Ky. 110 (1887); *Director of Public Prosecutions* v. *Beard* (1920), A. C. 479.

Of course, intoxication at most will reduce the crime to manslaughter and never can work an acquittal unless it is so extreme that actual insanity has resulted. *Beasley* v. *State,* 50 Ala. 149; Anno., 12 A. L. R. 897. Also, it is important to note that where the homicidal intent was formed before the intoxication, murder in the first degree is clearly sustainable; intoxication is here viewed as serving only to nerve or brace the already formulated intent. *State v. Hammonds,* 216 N. C. 67, 3 S. E. (2d) 439 (1939); *Bishop* v. *United States,* 107 F. (2d) 297 (1939). On the other hand, a complete defense is permitted where the situation involves one who is involuntarily intoxicated or who has been drugged against his will. *Bartholomew* v. *People,* 104 Ill. 601 (1882).

The decision on the vital question of the extent of the defendant's intoxication at the time of the offense is left to the jury, under proper instructions, permitting it thereby to set the measure of the crime. *People* v. *Burkhart,* 211 Gal. 726, 297 Pac. 11 (1931). Almost all courts instruct the jury that intoxication is not to be considered for the purpose of excusing or mitigating the killing but only for the purpose of determining whether the defendant was capable of entertaining the necessary purpose, malice, or intent which is an indispensable ingredient of the crime charged. But such talk is mere sophistry; how intoxication may be a circumstance to be considered by the jury in determining intent and yet not be an excuse for the crime is a distinction for lawyers, not lay jurors, to draw. See *Evers* v. *State,* 31 Tex. Crim. Rep. 318, 20 S. W. 744 (1892). Obviously the distinction is designed to disguise the odious position of allowing a citizen already violating public morals by being drunk to escape the same offense with a lighter punishment than a sober person. Such highly legalistic reasoning, as is often the case, leads to confusion and was the cause of the erroneous instruction in the instant case. If, as the Supreme court held, the first part of the instruction that drunkenness can not excuse, justify, or mitigate the commission of crime was correct, it can easily be understood why the trial judge went on to say that intoxication cannot be taken into consideration at all in determining guilt. For if drunkenness is taken into consideration at all it is difficult to understand how it can act anyway other than in mitigation. It would seem more sensible if the courts would face the facts and, rather than say intoxication can not be considered in one part of an instruction and yet hold it can not be ignored in another part, instruct that drunkenness *may* mitigate murder—but only if it is so severe that the defendant is rendered incapable of forming the necessary felonious intent.

EXTORTION—THE SPEED-TRAP [III.]—The recent case of *People* v. *Braun,* 24 N. E. (2) 879 (Ill. App., 1940) is one which may have far-reaching repercussions. It has the added distinction of being the first case of its kind, if not in the United States, at least in Illinois.

The defendants in the principal case were police officers, a police magistrate, and the president of the village of Dixmoor. They were charged with conspir-

ing to extort money from motorists, in maintaining a "speed trap," arresting motorists on the slightest infraction of traffic rules, and sometimes on doubtful violations thereof. These motorists were brought before Braun, the magistrate, who would threaten to impose large fines; and when they were convinced of the futility of refusing to pay, he would impose smaller fines, which they were only too glad to pay. The motorists all pleaded guilty, evidently realizing it was useless to do otherwise. Under Ill. Rev. Stats. (1937), C. 53, §59, the magistrate should have assessed maximum costs of $2; but, as the evidence showed, many were fined above the statutory rate. To further substantiate the illegal purpose, it was shown that these officials received their compensation from this fund so collected—which proved no small amount. The defendants were all found guilty, and sentenced to imprisonment of 1 year plus fines ranging from $500 to $1,000. On appeal, this conviction was affirmed in the case reported.

The unusual feature of this case is that the authorities—all public officials—were brought to trial on a criminal charge, and the fines imposed were not merely reversed as denials of "due process." Most, if not all, of these cases where there is a trial before an official who is financially interested in the conviction of defendants, have arisen as denials of due process. The leading case of this nature is *Tumey* v. *Ohio,* 273 U. S. 510 (1927). There, the mayor of an Ohio town was trying liquor violation cases under a State statute, which allowed to the community adjudging such cases one-half of the fines levied. By a city ordinance, he and the officers were to be paid out of the fund collected. Tumey, the defendant, objected to a trial before the mayor, claiming denial of due process. The Supreme court upheld this contention, saying that the mayor had a direct, pecuniary interest in convicting defendant, viz., in the costs imposed, and a system by which an inferior judge is paid for his services only on convictions is not due process unless the costs are so small that they come within the de minimis rule. Though following this decision, *Williams* v. *Brannen,* W. Va. 1, 178 S. E. 67 (1935), strikes nearer the core. There, the court in a very discerning opinion expresses the pungent observation that it is ordinarily cheaper to pay a moderate fine than to pay the expenses necessary for an appeal; wherefore, many an innocent man has submitted to an unjust decision in an inferior court. The Constitution requires a fair and impartial tribunal in the first instance, where the defendant won't face the alternative of paying an unjust fine or resorting to the delay of appeal. Most of the cases reiterate these principles, and those holding contra can be distinguished either on the ground that no direct, pecuniary interest was shown, or that no objection to the interest of the judge was made at the appropriate time, and was therefore deemed to have been waived.

On this point, Illinois has held that the purpose of the due process clause in the Ill. Constitution, Art. 2, Sec. 2 of Smith-Hurd, is to protect every citizen in his personal and property rights against arbitrary action of any person or authority, 356 Ill. 230, 190 N. E. 273 (1934), and of public officials, *People* v. *Belcantro,* 356 Ill. 144, 190 N. E. 301 (1934); it is not necessarily confined to judicial proceedings in court, 233 Ill. 417, 84 N. E. 376 (1908), the court said that due process means the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights, one of the foremost of which is an impartial tribunal for the adjudication of such rights. In so holding, the court held unconstitutional a statute giving the court power to direct one of the commissioners of a drainage district to act with the others in assessing benefits, when the first commissioner owned lands which might be subject to the assessment. So there seems little doubt that the actions of the officials of Dixmoor, in this instance, were a violation of due process. But—and this is the significant point—violation of due process is not a punishable offense; at most it is merely grounds for reversal, for it is a protection which is, in many instances, indefinable until a situation arises in which the court believes the facts show such a palpable denial of a fair and just proceeding as to warrant a reversal. Therefore,

if these officials were to be punished criminally, it was necessary to employ some other machinery, namely, an appropriate criminal action, which proved to be the crime of conspiracy to extort money.

Under the common law extortion was limited to the obtaining of money or other things of value through misuse of official power; but by statute (Ill. Rev. Stats. (1937), C. 38, §240) the crime is widened so as to include anyone. Generally, any person clothed with official privileges and duties may commit extortion, and this includes justices, sheriffs, etc. The gist of the offense by a public official is the taking under color of his office; and the person paying such money must have yielded to such authority. Moreover, an extortion is committed by an officer who wilfully demands or receives fines not allowed or greater than allowed, by law; and the taking must be wilful and corrupt. 20 American Jurisprudence, Extortion and Blackmail.

In the instant case, the taking of illegal costs—that is, fees higher than allowed by Ill. Rev. Stats. (1937) C. 53, §59—constituted an extortion, as the court found. Though the state might have brought its action under Section 240, they undoubtedly felt that the punishment thereunder was not so severe as under the conspiracy section, and wisely chose the latter, where the imprisonment and fine provided for is twice that of the former section.

The essence of conspiracy is not the accomplishment of an unlawful purpose, but it is the unlawful combination or agreement to accomplish the unlawful purpose, and the conspiracy is complete when the agreement is made. *People* v. *Drury,* 338 Ill. 539, 551, 167 N. E. 523) (1929); *People* v. *Cohn,* 358 Ill. 326, 193 N. E. 180 (1934). At common law every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, was an indictable offense, *People* v. *Amore,* 369 Ill. 245, 16 N. E. (2d) 720 (1938). In *Smith* v. *People,* 251 Ill. 9 (1860), the court held that conspiracies to accomplish purposes which are not by law punishable as crimes, but which are unlawful as violative of the rights of individuals, and for which the civil law will afford a remedy to the injured party, and will at the same time and by the same process punish the offender for the wrong done to society by giving exemplary damages beyond the damages actually proved, have been sustained as indictable offenses. The law doesn't punish criminally every act, unlawful though it is, though the offense may be a grievous one to society. It is the influence of the act or purpose on society, however, which determines whether a combination to accomplish it is a criminal conspiracy. From this case we may conclude that, in Illinois it is possible to indict for a conspiracy to do an unlawful act when the unlawful act is not made so by a criminal statute but where such act, if completed, would be the subject of a civil suit for compensatory and punitive damages. This was also true common law, where it was not necessary that the object to be accomplished by the combination be a crime to make the conspiracy an indictable offense, 11 American Jurisprudence, sec. 11. The common law is still in force and effect in Illinois (Ch, 28, Smith-Hurd), and this indictment, though it comes under ch. 38, sec. 138, still states a common law offense. Thus it is evident that the facts of the principal case show there could be no error in bringing this indictment on a charge of conspiracy, either for doing an unlawful act or for doing a lawful act for an illegal purpose; the unlawful act being the imposition of fees beyond the statutory limit; the illegal purpose, that of furthering their own pecuniary interests by arresting these motorists and fining them accordingly without due process of law.

From the standpoint of public policy, this decision is unimpeachable. The dangers of such practices as have been set out in the instant case are not so remote as to be disregarded; in fact, they are quite imminent. This same condition, namely, that of "speed traps," is quite prevalent, and in the last decade has emerged from the fledgling stage to that of thriving self-subsistence, fostered by the stolid refusal of motorists who are either too respectful of any authority or

are too lethargic to contest such actions by "overzealous" public officials. The general attitude seems to be that these officials are acting within the scope of their power; and, even if they are not, of what use would it be to refuse to pay? The possibility of a jail sentence and of the costly and slow processes of appeal are certainly not worth a refusal to pay a relatively small fine. Since these are undoubtedly the conditions prevailing, the realistic approach is to do something for these innocents, who are unaware of the extent of their rights or the limits of the official powers. The State, in assuming the burden of stamping out such practices, has taken the only really effective way to safeguard the Constitutional principles of personal and property rights, and justice to be dispensed by the doctrine of due process of law. It is hoped that the Illinois Supreme court, if called on to decide this question, will affirm this unprecedented, but highly desirable view taken by these lower courts.

SELWYN COLEMAN

NECESSITY OF A PRECAUTIONARY WARNING BY POLICE OFFICER TO VALIDATE A CONFESSION—The case of [Iowa] *State* v. *Mikesh*, 288 N. W. 606, (Iowa, 1940), in which the Iowa court held that the precautionary warning "whatever you say may be used against you" is not necessary to make admissible a criminal confession made to a police officer by the defendant while in custody before trial, raises the question which has caused a great deal of misunderstanding among police officers and prosecutors today. The question is whether in the absence of a statute the inquisitorial precautionary warning is a constitutional or judicial requirement in the personal investigation of persons suspected of a crime. If the warning is omitted, will the courts consider an admission of guilt or a confession as invalid? The answer to the foregoing question is no.

Nevertheless most law enforcement agencies have used this warning statement before all personal investigations are commenced, laboring under the mistaken notion that it was an absolute necessity required by the Constitution, or dogmatically insisted upon by the courts, and if the warning was omitted, the accused could invalidate the complete testimonial by simply showing that he was not warned that whatever he would say would be used against him. Perhaps this notion is an outgrowth of the observance of the privilege against self incrimination being exercised during the trial in the court. However, the privilege against self incrimination applies only to judicial confessions (those made before a court and part of the pleading) and is in no way connected with extra-judicial confessions (those made under preliminary police investigation before the trial). 2 Wharton, Criminal Evidence, (11th Ed., 1935) §627; 20 Amer. Jur. §505.

The origin of the extra-judicial precautionary warning can be traced back to the early common-law days of England. Under the common law a person was not allowed to testify as a witness, though his confessions or incriminating statements, if voluntarily made, could be used as evidence against him. As a result of the absolute effect of these admissions in the courts, the kings officers quite commonly tortured a confession from the defendant while he was confined in prison. Realizing the harsh injustice of this practice, the common law courts developed rules of evidence requiring the prosecutors to show that the confession they were introducing was made voluntarily and free from torture and intimidation. It was in such a situation that the precautionary warning seems to have had its birth. See 20 Amer. Jur. §482. The practice of the warning seems to have survived ever since and probably found its way to the American Colonies with other common law doctrines.

Until late in the last century, the privilege of the accused not to testify against himself was coupled with a corresponding disability to be unable to testify in his own behalf. Until 1878, the accused was an incompetent witness in the Federal courts. The legislature, removing his disability, said, "the person . . . charged shall, at his own request, but not otherwise, be a competent witness." 20 Stat. 30 (1878); 28 U. S. C. 632 (1934). Even with this improvement in criminal procedure the common-law precautionary warning still

lingered. As the Wyoming court has observed, "The rules surrounding such confessions or admissions that developed under the common law have been extended and applied in cases where the common law disability has been removed by statute." See *Maki* v. *State,* 18 Wyo. 481, 112 P. 334, 33 L. R. A. (N. S.) 465 (1911).

While the extra-judicial precautionary warning undoubtedly had been a valuable safeguard for the accused in the common-law days, its benefit in protecting the rights of the modern criminal has dwindled to the point where its detriments far outweigh the now slight and questionable protection it affords. The great advancement and humanitarian approach in the field of criminal investigation, the constitutional safeguards, the right of the accused to testify in his own behalf, and his right to a civil action against the officers who might torture him, constitute a few of the more obvious reasons for the change. Perhaps the greatest practical objection to giving the warning is that it transforms a suspect, who might willingly relate the facts to the police as he saw them, into an unimpeachable "clam" whose stubbornness as a source of constructive information is exceeded only by his flat refusal to "talk" until he has seen a lawyer; and after that, the police will never have the story as the accused might have told it if the precautionary warning had not been interposed. In most cases it distorts what would be a truthful confession, needlessly interferes with the investigation of detectives and prosecutors, and generally obstructs the prompt solution of many crimes. Yet, ironically, the very investigators and prosecutors it hinders cause their own inconvenience through their mistaken belief that the warning is necessary. There is no American court that absolutely requires a warning to be given, and, at most, there are only a small minority of jurisdictions that recognize it as evidence of the voluntary nature of the confession where there is a statute or constitutional provision or an iron-clad common law doctrine which requires that all prosecutors have the burden of proving that the confession of the accused was voluntary. Most of the recognized legal writers observe that "a confession is admissible although it does not appear that the prisoner was warned that whatever he said might be used against him, or although it appears that he was not so warned." Cf. Joy, Confessions, §5, p. 45; 2 Wharton, Criminal Evidence (11th Ed. 1935) §627. This unequivocably means that the warning is not necessary to make the confession valid in the eyes of the court.

Under the Fifth Amendment which was enacted shortly after the adoption of the United States Constitution, one might expect the terms against self-incrimination, declaratory of the American Revolutionary sentiment against English common law practices, to require such warning as a precedent to criminal investigations. But the United States Supreme Court has held, in effect, that simply because the confession is made to a police officer while the accused is under arrest, in or out of prison, or was drawn out by his question, does not necessarily render the confession involuntary and therefore invalid; but, at most, such imprisonment or interrogatories made without warning may be taken into account in determining whether or not the statements of the prisoner were involuntary. See *Sparf and Hansen* v. *United States,* 156 U. S. 51 (1894). The case of *Bram* v. *United States,* 168 U. S. 532 (1897), requires the prosecution to show that the confession of guilt or any other incriminating statement was freely and voluntarily rendered by the accused before the court will receive it as evidence against him. Thus, the "federal" rule, the strictest of three general opinions on this subject, does not require that the precautionary warning be given, but only demands that the confession be voluntary. Cf. *Com.* v. *Szczepanek,* 235 Mass. 411, 126 N. E. 847 (1920); *Com.* v. *Dilsworth,* 289 Pa. 498, 137 Atl. 683 (1927); and others in Underhill, Criminal Evidence (4th ed. 1935) §267. The giving of a warning may be evidence that such confession was voluntary. While this means that the burden of proving the voluntary character lies on the prosecutor, it does not necessarily mean that the warning must be used, as there are other means of showing that the confession was voluntary

without sacrificing the advantages of a confession free from the fear that exists in a person accused of crime when he is cautioned that whatever he says may be used against him.

The great majority of American jurisdictions have no statute on the question and most of them follow the rule as illustrated by the instant case, and as set out in 16 Cor. Jur. §1482, p. 723 . . . "In absence of a statute requiring caution or a warning, the fact that a voluntary confession was made without the accused having been cautioned or warned that it might be used against him does not affect its admissibility." These courts, not being bound by the English common law traditions as closely as the Federal and New England jurisdictions, refuse to follow the rule requiring the prosecution to establish a presumption of the voluntary nature of any incriminating confession. See *Roberts* v. *State,* 2 Boyce (Dela) 385, 79 Atl. 396 (1911); *State* v. *Baker,* 58 S. C. 111, 36 S. E. 501 (1900); *Simon* v. *State,* 36 Miss. 636, (1857). These tribunals have moulded their rules of evidence so as to require the defendant to show that the confession, which appears valid on its face, is incompetent. In other words, the burden of proving invalidity is not on the prosecutor, as under the "federal" rule, but on the defendant. The Illinois court seems to accept the majority view in the case of *Fahner* v. *People,* 330 Ill. 516, 162 N. E. 133 (1928), where it was said, "The fact that the evidence does not show that the defendant was warned against his interest that what he would say might be used against him, does not render the statement incompetent, where, so far as the record shows, no promises or threats were made; . . .". Therefore, in most jurisdictions, there is no reason at all for giving the warning as long as the testimonial appears valid on its face.

We may categorize a third class of jurisdictions as those states which follow the majority rule but in dictum suggest that the better course for an officer to pursue, when a prisoner is about to make a statement, is to warn him that it may be used against him. In the case of *People* v. *Randazzio,* 194 N. Y. 147, 87 N. E. 112, (1909) the court said, "Some criticism has been made of the district attorney in taking the confession of the defendant without warning him." Here the statement of the defendant had just been made to a third person, and the subsequent statement made to the district attorney for the purpose of having it taken down verbatum by a stenographer. The court went on, "It may be that we should have been better satisfied with the action of the district attorney had he given such a warning, but his failure to do so does not furnish ground for reversal of this case." See also *Greenwood* v. *State,* 107 Ark. 568, 156 S. W. 427, (1913) and *Reagan* v. *People,* 49 Colo. 316, 112 P. 785 (1911). Decided 1910.

In Chicago many of the law enforcement agencies have made a practice of questioning the suspect orally to obtain the needed information; then, before calling in a stenographer to have the testimony written down, warn the accused that his statements may be used against him. They next proceed to re-question him for the purpose of record and the suspect is bound by his former statements. Other branches of the police make use of printed forms on which the confession is written down and when the accused signs the form he also affixes his name to a clause on the paper which admits that the accused was duly warned of the importance of his statements. These investigation agencies believe they are fulfilling a requirement of the court when, as a matter of judicial fact, there seems to be no such requirement in Illinois. In addition, they are extending absolutely no protection, what little there still remains, by "warning" the prisoner in such a manner. If this practise is being followed on a nation-wide scale, the extra-judicial precautionary warning, which is not necessary in the eyes of the American courts, and which serves no practical benefit because it is not a warning if given after the accused's real confession, is useless.

In conclusion, we have seen that although theoretically, the warning today has little benefit when measured with the obstacles it throws into the paths of justice, practically, the insignificant benefit which could be derived, is nullified by the inquisitorial practises in Chicago and

other large American cities. When one eliminates its practical necessity, the only thing left is the theoretical necessity out of which its practical necessity arose, namely that the courts might require the warning before they recognize the confession as valid. But we have seen that the courts do not require it, and a mere minority say that they will recognize it only as evidence of the voluntary nature of a confession. It can readily be seen that the extra-judicial precautionary warning is really only a vestigial appendix and must soon take its place with other common-law antiques which have lost their practical value in the enforcement of American jurisprudence.

WILLIAM R. STEAD
JOSEPH R. SCHWABA

JURISDICTION OF LARCENY AND ROBBERY AS AFFECTING THE RIGHT OF A SPEEDY TRIAL (ILL.)—The defendant was convicted of robbery in the circuit court of Lake County, Illinois. On February 8, 1937, before the case was called for trial, defendant filed a motion for discharge alleging that he had been arrested in Chicago on August 20, 1936 and continuously kept in custody for more than four months contrary to Ill. Rev. Stats. (1939) C. 38 §748. Defendant was a participant in a hold-up in Lake County, and was apprehended in Cook County with the stolen goods in his possession. He was indicted in Cook County for larceny of a motor truck, larceny of its contents, and receiving the truck as stolen property. On November 18th the indictment was stricken with leave to reinstate and the defendant released from custody. Immediately afterwards, the sheriff of Lake County, Illinois, arrested the defendant and returned him to that county, where he was held from November 18th, 1936 to February 8th, 1937. On these facts the Supreme Court held that the accused was not denied a "speedy trial" within the constitutional requisite even though he had not been brought to trial within four months of his commitment in Cook County jail, since the Cook County court lacked jurisdiction to convict him of the charge of robbery. *People* v. *Stillwagon,* 373 Ill. 211, 25 N. E. (2d) (1940).

Both at common law and by express provision of Ill. Rev. Stats. (1939) C. 38 §707 "Where property is stolen . . . in one county of this state and carried into another, the jurisdiction shall be in any county into or through which the property may be passed, or where the same may be found," and the accused may be prosecuted for larceny in either county. Under such circumstances the transporting of the goods into another county is regarded as a continuation of the original trespass, so that there is in that county a taking, an asportation, and a felonious intent. The defendant could have been tried in Cook County for larceny, since he had brought the stolen goods into that county. *People* v. *Brickey,* 346 Ill. 273, 178 N. E. 483 (1931); *Campbell* v. *People,* 109 Ill. 565, 50 A. R. 621, (1884); *People* v. *Flynn,* 302 Ill. 549, 135 N. E. 101, (1922); *People* v. *McGovern,* 307 Ill. 373, 138 N. E. 632 (1923).

Larceny and robbery are distinct offenses, in that, in the latter, the taking is by physical force and without the consent of the owner. (Ill. Rev. Stats. (1937) C. 38 §501). Under Ill. Rev. Stats (1939) C. 38 §703, as at common law, the local jurisdiction of all offenses not otherwise provided for by law, is in a county where the offense was committeed. Since a robbery is completed when the property has come into the actual possession of the robber, the offense is committed in the county where such possession is obtained, and the robber can only be prosecuted there. *Watt* v. *People,* 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403 (1888); *Johnson* v. *People,* 66 Ill. App. 103 (1895). A person who commits robbery in one county and carries the stolen property into another county is not guilty of robbery in the latter county, but of larceny only. *People* v. *Brickey, supra; Campbell* v. *People, supra.* Therefore Cook County never had jurisdiction to try this defendant for robbery.

The historical basis for the provisions of Ill. Rev. Stats. (1939) C. 38 §748 is the so-called English Habeas Corpus Act (31 Car. 2 c. 2) by the provisions of which a person committed for treason or felony must be indicted by the next term of court or else discharged. A time is usually set within which the accused person must be

indicted or tried, and the time prescribed in the statutes is that during which defendant was held by the sheriff of the court to which application for discharge was made. The requirements of the Habeas Corpus Act cannot be evaded by discharging the prisoner and at once re-arresting him on another indictment for the same charge, (*Crosby's cases,* 12 Mod. 66), though on his discharge, he may be re-arrested and held on an indictment for a substantially different cause. *Brown* v. *State,* 85 Ga. 713, 11 S. E. 831 (1889).

Sec. 748, supra, provides that "Any person committed for a criminal . . . offense and not admitted to bail, and not tried by the court having jurisdiction of the offense within four months of the date of commitment, shall be set at liberty by the court unless the delay shall happen on the application of the prisoner, or unless the court is satisfied that due exertion has been made to procure the evidence on the part of the People and that there is reasonable ground to believe that such evidence may be procured at a later day, in which case the court may continue the cause for not more than sixty days.

The Illinois Supreme Court has repeatedly held that this statute which gives effect to the constitutional provision guaranteeing the right to a speedy trial, (Art. II, §9, Ill. Const. 1872) is mandatory, and cannot be nullified by technical evasions.

The following cases illustrate the cardinal principal that the statute (Sec. 748, supra), cannot be technically evaded by methods described below. To understand the principle of "evasion" in its relation to the instant case, it will be necessary to review briefly some leading Illinois cases which interpret Art. II, Sec. 9 and Sec. 748 supra. (*People* v. *Schmagien,* 361 Ill. 371, 198 N. E. 142, (1935); *Guthmann* v. *People,* 203 Ill. 260, 67 N. E. 821 (1903).

In *People* v. *Emblem,* 362 Ill. 142, 199 N. E. 281 (1936) it was held in reversing defendant's conviction, that although he voluntarily accompanied police officers to Chicago for the purpose of testifying in another case, and was confined without formal commitment for over four months, he was protected by this statute. In *Newlin* v. *People,* 221 Ill. 166, 77 N. E. 529 (1906) the first indictment against the defendant was nolle prossed and a second indictment returned alleging the same offense as the first. The court held that the defendant even though tried within four months after the return of the second indictment was entitled to liberty. In *People* v. *Jonas,* 234 Ill. 56, 84 N. E. 685 (1908) it was held that a prisoner held under a void sentence by a court having no jurisdiction of the offense for which he was tried and convicted must be regarded as being held for trial in the proper court.

To give effect to the constitutional intent, the period fixed must date from the arrest and not from the time the indictment is returned. *People* v. *Szobar,* 360 Ill. 233, 195 N. E. 233 (1935); *People* v. *Franzone,* 359 Ill. 391, 194 N. E. 567 (1935); *People* v. *Wilson,* 356 Ill. 256, 190 N. E. 270 (1934); *Guthmann* v. *People,* supra; *People* v. *Heider,* 225 Ill. 347, 80 N. E. 291 (1907); *People* v. *Lindner,* 262 Ill. 223, 104 N. E. 329 (1914).

In *People* v. *Emblem, supra,* the Supreme Court of Illinois stated "the defendant was as effectively and completely restrained of his liberty during such interim as though he had been committed by the judicial order of some magistrate or court of record having jurisdiction of the subject-matter in issue and of the person of the defendant. Officers may not thwart the provisions of the statute by arresting without warrant and incarcerating a prisoner without an order of commitment of some court of competent jurisdiction."

In *Guthmann* v. *People, supra,* the court quotes from *Gillespie* v. *People,* 176 Ill. 238, 52 N. E. 250 (1898) where in discussing the right to a discharge under this statute, it was said: "The intent of the statute is that the right to discharge shall result from a want of prosecution." In discussing the Guthmann case the Supreme Court in *People* v. *Kidd,* 357 Ill. 133, 191 N. E. 245 (1934) said: "The decision in that case is based upon the doctrine that the evil intended to be prevented was wrongful incarceration rather than wrongful accusation. The right to a speedy trial means the right to have speedily heard the charge

upon which the accused is detained and that this constitutional provision is based on the right of an individual to be at liberty."

Wharton, Criminal Evidence (11th ed. 1935) §850 states, "Where a crime is partly consummated in each of several jurisdictions, so that the courts each have jurisdiction of the offense, a prosecution cannot be instituted in one jurisdiction, then dismissed at the pleasure of the prosecution, and commenced in another, and so harass the accused in every place in which prosecution can be obtained. (Diblee v. Davison, 25 Ill. 403 (1861)." In the instant case the defendant was apprehended in Cook County, kept in the Cook County jail almost three months, and then released to the Lake County sheriff within the confines of the Cook County jail. Defendant was never accused of more than one offense. The offense was alleged to be either larceny or robbery or receiving stolen property, but it was not charged that he was guilty of more than one of them. Under this ruling a person accused of robbery can be confined in the jail of each county through which he has carried the goods for almost four months and finally taken to the county in which the robbery has taken place and again have the statutory four month period begin. This holding appears to be a technical evasion, and it would be better in these cases to have the period begin when the accused is first arrested, so that the prosecutor of the county where the robbery has taken place would be forced to ask for an extension of time as provided in the statute before the four month period has terminated.

FRANK A. EDELMAN.