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Abstracts of Recent Cases

fense preparation and reasonableness of demand are creatures of the court's ruling, but are probably as sound a norm as can be had to achieve the two-fold purpose of adequate opportunity for the defense to prepare for trial while providing a check against discovery petitions run riot. Because the self-incrimination immunity is exclusively available to the defendant perhaps the case law demand for "evidentiary character" and the statutory limitation of "seizure or process" are intended means to even the scales. Grand jury minutes could be very material and relevant to the defendant's preparation, but that information is not found *in the proper place* to render it admissible, so one writer[31] (and the courts with singular unanimity) would exclude it from discovery. Statements volunteered from eyewitnesses are disqualified under the rule because the information is not found in the *proper manner*. Former Attorney General Homer Cummings has coined a description for such procedural defects which the writer believes to be not out of place here, viz., "the long accumulated legal impedimenta that are one of the deepest wrongs a free people can suffer."[32]

If more nearly perfect administration of criminal justice would make truth the only real issue, if the mark of contest and surprise have no accepted place, and "having justified the broadest kind of discovery in civil procedure . . . where only property rights are at stake,"[33] what is the logic that can defend *tangible objects . . . by seizure or by process* and disown *statements or confessions of defendants and witnesses?*

Abstracts of Recent Cases

Requirements for Mistrial Because of Juror's Relationship to the Defendant—During the prosecutor's opening statement in *Maddox v. State,* 102 N.E. 2d 225 (Indiana, 1951), a juror informed the judge that one of the two defendants was his nephew. The other defendant objected to the juror but made no motion to withdraw submission of the case. The prosecuting attorney did so move and the court granted the motion. The Indiana Supreme Court held that the trial court should have determined the question of whether or not there existed a legal necessity before granting the prosecutor's motion to withdraw submission, and that the facts constituting the legal necessity should have been shown of record. They therefore held that it was error for the trial court to withdraw the submission from the jury without either the consent of the defendant or the existence of a legal necessity. The Supreme Court decided that the defendant had been placed in jeopardy twice. A dissenting judge presents an interesting and apparently valid objection to the decision. He was of the view that the majority of the court was inconsistent when it held that if the defendant wished to examine a juror further, he must first move to withdraw the submission; but if the state wishes to show a legal necessity for discharging the juror, it must be shown before moving to withdraw the submission. This, he felt, is an unfounded distinction.

Conviction Not Set Aside Despite Conclusive Proof of Innocence By Showing Mistaken Identity—In *United States* v. *Kaplan,* 101 F. Supp. 7 (S.D. N.Y., 1951), Nathan Kaplan, who had served six years in prison but was released on parole, moved to set aside the judgment of conviction and to vacate the sentence against him. He had been convicted for the possession and sale

31. See Note 30 *supra.*
32. Cummings, The Third Great Adventure, 29 A.B.A.J. 654 (1943).
33. Freed, The Rules of Criminal Procedure, 33 A.B.A.J. 1010 (1947).

of narcotics, but was able to prove conclusively that there had been a case of mistaken identity. His motion was nevertheless denied. The court holds 1) that the statute under which Kaplan has moved (28 U.S.C.A. §2255) is a codification of the common law writ of coram nobis which empowers a court to determine only whether or not there has been a fair trial and not to review the findings of fact of the trial court, and 2) that Federal Rule of Criminal Procedure 33, in regard to newly discovered evidence, has a two year limitation period and despite the fact that Kaplan could not have discovered the new evidence in that time because the person for whom he was mistaken was a fugitive, the period must be applied. The court was fully aware of the injustice of its opinion and justified it only by illustrating how its hands are tied by statute. In an attempt to aid the petitioner the court forwarded its opinion to the Pardon Attorney to aid in attaining executive clemency for Kaplan.

Contradictory Sworn Statements Not Alone Enough to Sustain Perjury Conviction—In *McWhorter v. United States,* 193 F. 2d 982 (5th Cir., 1952), the defendant had been convicted of perjury on the basis of her testimony before the grand jury that she had testified falsely before a United States Commissioner. The court held that the conviction must be reversed since perjury must be established either by testimony of two independent witnesses, or by one witness and independent corroborating evidence which is inconsistent with the innocence of the accused. The mere testimony of other people that they had heard these contradictory statements is not such corroborating evidence.

Poor Jail Conditions Not Cruel and Unusual Punishment—In *Ex parte Pickens,* 101 F. Supp. 285 (Alaska, 1951), the court reiterated the doctrine that the fact that the physical plant in which a person is confined is in poor condition, and that non-violent mental patients were placed in the same cell with sane people, is not cruel and unusual punishment within the meaning of the Eighth Amendment to the United States Constitution. The prisoner's petition for habeas corpus was denied.