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## Criminal Law Case Notes and Comments

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## CRIMINAL LAW CASE NOTES AND COMMENTS

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Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board

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### Abstracts of Recent Cases

**Federal District Court Has No Power to Suspend Sentence After Commencement of Term**—Defendant had been convicted under an indictment containing five counts and sentenced to serve a period of imprisonment under each count, such periods to run consecutively. After serving the time allotted to counts one and two, he petitioned the district court that sentenced him to grant probation as to the remaining counts. The Court of Appeals for the Eighth Circuit in a 2-1 decision affirmed the district court's determination that it was without power to grant the motion. *Phillips v. United States*, 212 F.2d 327 (8th cir. 1954). The court held that the defendant was in effect asking the district court to overrule the Board of Parole, with its superior opportunity to appraise his conduct, and that such would be usurpation of the authority of the executive branch. Moreover, the court observed that the passing of sentence represents the time when a criminal case should be finally disposed of by a district court. The ninth circuit, *Kirk v. United States*, 185 F.2d 185 (9th cir. 1950), has come to the opposite conclusion. The instant court expressed the hope that the Supreme Court would grant certiorari in the interest of uniformity throughout the circuits.

**Discharge of Jury Held to Bar Subsequent Prosecution**—After the third day of a murder trial the jurors were taken to a local hotel for the night. During the night, the police, upon being called to investigate the conduct of the jurors, found three in an intoxicated condition. When the court was convened the next day,

in the absence of the jury and upon the testimony of the officers, the judge withdrew a juror and declared a mistrial. The Supreme Court of North Carolina upheld defendant's plea of former jeopardy and reversed a subsequent conviction for manslaughter. *State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954). It is generally held that an order of mistrial, even in capital cases, rests in the discretion of the trial judge and will not be reviewed unless there is a clear abuse of discretion. However, a mistrial should be ordered only under urgent circumstances and only after a plain cause has been shown to exist. Thus the court ruled that "where no evidence is heard and no finding of facts are made as to the crucial question, i.e. the condition and fitness of the juror(s) to continue their service when court convened . . . there is no sufficient factual basis for the trial judge in the exercise of his discretion to order a mistrial"

**State Immunity Statute Does Not Destroy Privilege Against Self-Incrimination If Witness Reasonably Fears Federal Prosecution**—Relator was subpoenaed before a grand jury in Dade County, Florida in connection with an investigation into gambling activities. He was held in contempt for refusal to answer eleven questions on the ground that his answers would tend to incriminate him in the state and federal courts, whereupon he filed a writ of habeas corpus in the Supreme Court of Florida. Respondent, the sheriff of Dade County, then filed a motion to quash, alleging that relator was immune from prosecution in the state

court by statute, and that the privilege against self-incrimination conferred by the Constitution of Florida pertains only to proceedings under the laws of that state. Held, the privilege against self-incrimination exonerates from disclosure whenever there is a reasonable probability of prosecution in state or federal jurisdictions. *State ex rel. Mitchell v. Kelly*, 71 So.2d 887 (Fla. 1954). Federal immunity statutes afford protection in the state courts by a general prohibition of "prosecution". A state immunity statute, on the other hand, cannot afford protection against federal action. As the dissent argues, ordinarily the privilege against self-incrimination extends only to offenses of the interrogating sovereignty. The decision of the court can thus be regarded as a matter of policy.

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**State Statute Making Possession of Federal Gambling Tax Stamp Prima Facie Evidence of Gambling Violation Upheld**—The Florida Supreme Court has held that due process does not prevent a state from making possession of a federal tax stamp prima facie evidence of guilt in a prosecution for violation of the state gambling laws. *Jefferson v. Sweat*, 23 U.S.L. Week 2070 (August 10, 1954). The court declared that the power of the legislature to enact that one fact or set of facts may be presumptive evidence of another is generally conceded. However, there must be a rational connection between the fact proved and the ultimate fact presumed so that the inference of one from proof of the other is not unreasonable and arbitrary. Moreover, the accused must have a fair opportunity to make his defense in rebuttal and to remove the presumption. The court in determining that these conditions had been fulfilled said that a gambling stamp is secured for limited purposes only and "if the holder did in fact secure it to adorn his office or hang in the drawing room beside grandpa's picture . . . he is at liberty to prove it . . ."

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**Husband Convicted for Larceny of Wife's Property**—In a case of first impression in New York, an appellate court ruled that the present statutory law permits a husband to be con-

victed for larceny of his wife's property. *People v. Morton*, 132 N.Y.S.2d 302 (1954). The common law concepts that a wife could not own property separate from her husband and that neither spouse was a "person" separate and apart from the other, formerly prevented such an action. The court declared that under present legislation husband and wife may each be a party to an action as if single; each is alone liable for his or her tortious act; each may carry on a separate business; each may own and dispose of property; each may contract with the other as if unmarried, and each may sue the other for injuries to person or property. Therefore, "it would be a retrogression to hold that, though a husband may be convicted for stealing from anybody else in the world, he may not be convicted for stealing from his wife." In other states, where the question has been raised, there is a conflict of authority.

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**Circumstantial Nature of Evidence Does Not Require Proving Guilt to a Moral Certainty Rather Than Merely Beyond Reasonable Doubt**—The convicted criminal defendant argued on appeal that the evidence against him being entirely circumstantial, the state must prove his guilt to a moral certainty. The court, in rejecting this contention, recognized that there are a number of cases using this phrase. However, it is clearly settled that a man may be convicted on circumstantial evidence alone, provided his guilt is proved beyond a reasonable doubt. The type of evidence does not alter the standard to be applied. The court cautioned "that the use of the words 'moral certainty' serves to confuse and befog the jury instead of enlightening and aiding them in determining whether the commonwealth has convinced them of the guilt of the defendant beyond a reasonable doubt, and that in the future it would be wiser if the charge did not contain any reference to 'moral certainty'." *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954).

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**Statute Rendering Criminal the Association With Known Thieves Declared Unconstitutional**—A California statute providing for a

vagrancy conviction of anyone found to be "an associate of known thieves" has been declared unconstitutional by a California superior court. The court reasoned that "if it can be made a penal offense for a person to associate with those of his own choosing, however disreputable they may be, when not in furtherance of some overt act of public indecency or the perpetration of some crime, then it necessarily follows that by the same authority he may be compelled to associate with persons not of his own choosing. Our constitution and laws guarantee to every citizen the right to go where and when he pleases and to associate with whom he pleases, exacting from him only that he conducts himself in a decent and orderly manner, that he disturb no one and he interfere with the rights of no other citizen. We deny the power of any legislative body in this country to choose for our citizens whom their associates shall be." *People v. Berta*, 23 U.S.L. Week 2070 (August 10, 1954).

**Pennsylvania Joins States Which Admit Evidence Obtained by Wire-Tapping**—The trial court admitted into evidence the testimony of local police officers relating conversations of the accused heard through tapping a telephone wire. Defendant's conviction on the charge of bookmaking followed. On appeal, affirmed. *Commonwealth v. Chait*, 107 A.2d 214 (1954). The highest courts of New York, Maryland, California, and Texas are in accord with this decision. At common law the admissibility of evidence was not affected by the illegality of the means by which it was obtained. In the federal courts, however, evidence obtained illegally by federal officers is excluded. This rule of evidence is not binding upon the state courts and two-thirds of the states, including Pennsylvania, have adhered to the common law rule.

The appellant thus based his principal contention on Section 605 of the Federal Communication Act which provides, "no person . . . shall intercept any communication and divulge . . . the . . . contents. . . ." He advanced the novel argument that since state officials are subject to federal prosecution for obtaining evidence in violation of the Act even though the evidence is admissible in a state court, the court participates in a crime by allowing its admission. The court dismissed this contention saying, "How can Congress intend to make a crime of what it did not intend to prohibit?" Section 605 was termed a "sneak amendment" by the court because it was a rider on a bigger bill and because of the failure of Congress to enact legislation prohibiting wire-tapping every time the issue was directly presented to it. Therefore, the court reasoned that while this does not affect its validity, it substantially weakens its persuasiveness upon a court not bound by it.

The dissent pointed out that since this question has never been passed upon by an appellate court in the State of Pennsylvania, the rule of stare decisis is not binding as it is regarding the admissibility of evidence obtained by an illegal search or seizure. An attempt was made to draw a distinction between wire-tapping and other means of illegally obtaining evidence. "An illegal search or seizure is open and notorious and can be readily redressed, whereas the interference with the person's privacy of conversation is necessarily secret" and "he is therefore not in a position to invoke official machinery to protect himself." While this question is still open the courts should "take a sound American position" and refuse to admit such evidence. The dissent also suggests that evidence obtained through wire-tapping might be justified in "the detection of crimes of great social significance even though not justifiable in cases such as the present."