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Abstracts of Recent Cases

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Amendment, but the result reached by the court might be rationalized on the theory that inquiry into political sympathies is forbidden by the First Amendment, so that testimony elicited by such inquiry is not material within the statutory definition of perjury and thus may not be made the basis of a perjury indictment even though the testimony is intentionally false.²⁷

A fundamental problem which the district court failed to examine, and which seems to have received almost no previous treatment, is whether a voluntary statement is to be dealt with the same as an elicited answer. Certainly if a Committee exceeds its Constitutional authority in interrogating a witness, his answers can not be made the basis of a perjury indictment. Lattimore, however, did not make the allegedly perjurious statement in response to a question which he could, by the contempt power, be forced to answer. His was a previously prepared voluntary statement. The only case in which a similar problem was raised is *United States v. Cameron*,²⁸ where the defendant, a senatorial candidate, was indicted for perjury for a false statement in an affidavit which he was not required to make. The District Court for Arizona held that such a statement, even though false, could not be made the basis of a perjury indictment when the Senate could not have required the statement. Although this problem was summarily treated, the underlying reasoning seems to be well-founded.

²⁷ *United States v. Cameron*, 282 Fed. 684 (D. Ariz. 1922).

²⁸ 282 Fed. 684 (D. Ariz. 1922).

Consistently with the *Cameron* opinion, unless the Committee could have required Lattimore's statement, it can not be the basis of a perjury indictment. On this analysis, then, the issue is whether the Committee could have forced the defendant to respond to a question concerning his sympathies. The court held that the First Amendment guarantee of freedom of belief prohibits inquiry into the political sympathies of a witness and that therefore the indictment must fail.

For the several reasons here set forth it would seem that the court was justified in holding that upon the information furnished him Lattimore would be wholly unable to prepare an adequate defense, and that one's belief as to his sympathy is incapable of adequate proof. While many may be opposed to the economic and political beliefs that Owen Lattimore has been depicted as representing, it is in accord with the American philosophy of justice that even those with whom we do not agree are fully entitled to the guarantees of the Constitution.²⁹

²⁹ Subsequent to the preparation of this paper the Circuit Court of Appeals for the District of Columbia affirmed the District Court's dismissal of the first count. The government then decided to drop their challenge on the sympathy issue and reindicted the defendant charging perjury in saying that he had never been a follower of the Communist line or a promoter of Communist interests. The prosecution fortified the new indictment with specific statements and acts upon which they hoped to prove his following and promotion. The adequacy of this indictment is still to be tested by the court. It is apparent however that several of the above mentioned objections are now avoided.

ABSTRACTS OF RECENT CASES

Constitutional Rights Afforded to Persons Accused of a Crime are not Applicable in Juvenile Court—Petitioner was committed to an industrial school by order of a Pennsylvania juvenile court after a proceeding in which he was denied the privilege against self-incrimination and hearsay evidence was utilized. The reviewing court refused to invalidate the commitment, holding the proceedings not to be

in the nature of a criminal trial but constituting merely a civil inquiry looking to rehabilitation. *In re Holmes*, 23 U.S.L. WEEK 2257 (Dec. 7, 1954). The court observed that no taint of criminality attaches to any finding of delinquency by a juvenile court. While an offender may be referred to the district attorney for prosecution, the court stated that this action should not be taken by the juvenile court after

it has made an adjudication of delinquency "nor, perhaps, after any self-incriminatory examination." The Juvenile Court Act provides that any evidence given in a juvenile court "shall not be admissible as evidence against the child in any case or proceeding in any other court." The dissent argued that commitment to an industrial school was punishment and that the privilege against self-incrimination is not limited to criminal trials. New York has adopted a rule contrary to the result in this case.

Court Had Inherent Power to Require Pre-trial Production of Physical Evidence—Although the common law gave a criminal defendant no right of discovery or inspection prior to trial, the Arizona Supreme Court ordered the prosecuting attorney to produce physical items of evidence intended to be used against the defendant. *Mahoney v. Superior Court of Maricopa City*, 275 P.2d 887 (Ariz. 1954). The court relied on its inherent powers necessary to the due administration of justice. "We believe justice dictates that the defendant be entitled to the benefit of any reasonable opportunity to prepare his defense and to prove his innocence. Even so . . . the accused is not, as a matter of right, entitled to have evidence which is in the possession of the prosecution before trial. This is a matter peculiarly within the trial court's discretion . . . and if it appears that the request for such inspection is merely a 'fishing expedition to see what may turn up' it should be denied."

Attempted Perjury—Defendant was charged with perjury but found guilty of the lesser offense. On appeal, she argued that there are some crimes, like assault, which by their nature preclude the possibility of an attempt. In support of the contention that perjury is such a crime, appellant argued that to be guilty of an attempt one had to have a specific intent to commit a crime and had to do an overt act in furtherance of such intent. The argument continued that since the overt act in case of attempt to commit perjury would result in every case in the completed offense, there is no such crime as attempted perjury. The court, in

affirming the conviction, used the example that if a board or official for some reason was not legally authorized to take testimony or administer the oath, there would not be an offense of perjury but only an attempted offense. The facts of the instant case were not reported. *State v. Latiolais*, 74 So.2d 148 (La. 1954).

Memorandum of Oral Confession Need Not Be Verbatim—Defendant made an oral confession of guilt to a police captain. The officer made notes of the statements and an hour or so later "wrote them up" and had them typewritten. At the trial, the captain used the notes to refresh his recollection. He testified that certain parts had been paraphrased to avoid extreme vulgarity. Defendant appealed his conviction contending that the confession should not have been admitted since it was not taken verbatim and represented a false interpretation of what was said. The highest court of Maryland refused to invalidate the otherwise acceptable oral confession and upheld the trial court's finding that it "was put down almost verbatim, and, in any event, without material omission and without elaboration" *Cooper v. State*, 106 A.2d 129 (Md. 1954). It would seem that the decision of the court was correct since only the credibility of the offerer's oral testimony was at issue, the memorandum being merely to refresh his memory and not having been admitted into evidence. The Supreme Court has denied certiorari.

Husband Cannot Be Guilty of Rape of His Wife—The wife was living apart from her husband and had instituted divorce proceedings. Subsequently he had intercourse with her against her will. He was committed for trial, charged with rape and as an alternate count with assault. The court, reviewing the indictment, held that he could not be guilty of rape but could have committed an assault. *Regina v. Miller*, 2 W.L.R. 138 (Winchester Assizes, 1954). The theory given is that by the contract of matrimony the wife gives a continuing consent to intercourse which can only be revoked by legal termination of the marital status. Since the absence of consent is an essential ingredient of the crime of rape, and the divorce

proceedings were not yet completed, the first count was dismissed. With regard to the second count, the defendant argued that having the right to marital intercourse, he was entitled for the purpose of exercising that right to use as much force as was reasonably necessary. The court rejected this contention and held that even if no actual bodily harm ensued, the causing of a hysterical and nervous condition constitutes assault.

Witness Discovered as Result of Illegal Search May Not Testify—Police officers, without a warrant, went to the apartment of defendant under a belief that narcotic drugs were being dispensed and, on gaining admission, found both the defendant and a drug addict engaged in transacting an illegal sale. The trial court ruled the search illegal and suppressed physical evidence seized on the premises, but permitted the addict to testify as to events prior to the arrival of the police. Defendant's conviction followed. The Supreme Court of Illinois reversed the conviction and held that the discovery of a witness by means of an illegal search was to be deemed no different than

the discovery of physical evidence. *State v. Albee*, 2 Ill.2d 317, 118 N.E.2d 277 (1954). Illinois has long followed the so-called "federal exclusionary rule." The rule is based upon the constitutional right against self-incrimination, and, under prior decisions, excludes at the instance of the defendant evidence obtained directly or by leads resulting from an illegal search. The court conceded that such evidence may be used when it is disclosed from an independent source. However, here it was obvious "but for" the search the witness would not have been discovered.

Criminal Registration Ordinances—Enactment of these ordinances has become increasingly prevalent in recent years as an aid to law enforcement agencies. In general they require persons in the jurisdiction with a criminal record to register with the local police. The desirability and constitutionality of such provisions are a matter of controversy. For an extensive article dealing with their scope, administration, constitutionality, and effectiveness see Comment, *Criminal Registration Ordinances: Police Control over Potential Recidivists*, 103 U. of Pa. L. Rev. 60 (1954).