

1955

## Criminal Law Case Notes and Comments: Abstracts of Recent Cases

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### Recommended Citation

Criminal Law Case Notes and Comments: Abstracts of Recent Cases, 46 J. Crim. L. Criminology & Police Sci. 364 (1955-1956)

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## CRIMINAL LAW CASE NOTES AND COMMENTS

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### Abstracts of Recent Cases

#### Testimony of Bibulous Accomplice to "Pig Larceny" Insufficient to Sustain Conviction Where Material Corroboration is Lacking.—

Three gay comrades entered upon a tour of the local pubs, living almost entirely upon liquid sustenance for a three day period. Sometime during the second day the three replenished their dwindling assets by appropriating a number of *shoats* from an unguarded farm in the area and selling them to a local stock dealer. An unfortunate error on the part of the miscreants proved their undoing. It appears that one of the swine which they had seized had the distinctive marking of red ears and was recognized by his owner at an auction sale held by the stock dealer. In the meanwhile, one of the conspirators was nursing a well-deserved hangover in the local lock-up and "this new association and law-abiding influence resulted in full repentance for his sins and a conscience-relieving confession" was signed and delivered to the sheriff. Two of the defendants pleaded guilty at the arraignment, one being sentenced and the other applying for probation. It was this latter who turned state's evidence at the defendant's trial for *hog larceny*, the subsequent conviction being based almost entirely on the evidence which the turncoat gave at the trial. On appeal, the Supreme Court of Illinois reversed the conviction, holding that "[b]ecause the testimony of the accomplice Davis lacks material corroboration, it is denied by the defendant and another accomplice whose testimony is not such as to be unworthy of belief, and because of the prejudicial statements about other offenses, we are not satisfied that defendant's guilt has been established beyond a reasonable doubt." *People v. Hermens*, 125 N.E.2d 500 (1955)

Although this holding on its face does not appear to be of earth-shaking consequence, other portions of the court's opinion may be of material aid to prosecutors. During the course of the trial photographs of the reunited crea-

tures were introduced to establish their ownership and origin. "And when the first owner saw that little shoat with the red ears, and when he spoke to them and they came running to him, he knew his lost prodigals had been found. Upon their return home they were photographed, in six different poses, both with and without a group of their brothers and sisters. While these photographs are not in color, to show the identifying red ears, they are not without color dramatically. In addition to the aesthetic and artistic value which they add to the record, their evidentiary value, cursorily inconsequential, is subtly inferential. A lingering concentration, such as true art deserves, reveals that these pigs appear just as well fed and contented as their stay-at-home kin; nor is there anything in their forms, figures or faces indicating that they possess more daring or adventurous spirits. Consequently, *any possible inference that they voluntarily ran away from home, either because of mistreatment or a spirit of wanderlust, is effectively dispelled*" (emphasis supplied). The court further noted that another area of confusion had been laid to rest by a state expert who stated "that 'swine,' 'hogs,' 'pigs,' and 'shoats' were all appropriate designations for these little creatures, thus legally establishing, at long last, the oft-heard profundity that 'pigs is pigs.'" Other portions of the opinion will likewise repay many-fold a close and careful study.

**Judge Does Not Possess Unfettered Discretion to Exclude Public and Press From Court-Room Where Defendant Has Waived Privilege for Public Trial**—In a prosecution for pandering the defendant requested that the trial judge exclude the public, including the press, from the court-room during the cross-examination of the prosecuting witness. The ground for the request was that counsel for defendant would "be 'better able to compel the witness to tell the truth'" if she could be cross-examined in pri-

vate. The trial judge entered an order granting the request and the order was enforced. An Ohio Appellate court issued a writ of prohibition to the trial judge precluding him from issuing such orders in future cases, absent certain enumerated discretionary exceptions. *E. W. Scripps Co. v. Fulton*, 125 N.E.2d 896 (1955). The court distinguished between the defendant's constitutional right to insist on a public trial and the supposed right of a defendant to insist on a private trial. In the latter instance the right of the public is paramount and the open court-room is a necessary and integral part of the administration of criminal justice. A trial judge may, at his discretion, exclude persons from a court room when their conduct disturbs the proceedings, if their presence is likely to interfere with substantial justice to the parties involved in the proceedings, or where such exclusion is necessary to the public health, safety or morals. Beyond this point a trial judge has no discretion to award a defendant in a criminal proceeding a private trial. The fact that the petitioner in this proceeding happened to be a representative of the press did not change the basic issue, which was the right of the public to demand an open hearing. For the purposes of this proceeding the petitioner stood as a representative of the public.

**Unauthorized Presence of Defendant in School Building Constitutes Disorderly Conduct**—Defendant was apprehended by a school teacher for loitering in the halls of a school building. His explanation justifying his presence on the premises was ambiguous and he was prosecuted for disorderly conduct under the applicable New York statute, which states in part: "Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any public school building or grounds . . . shall be guilty of disorderly conduct." *N.Y. PENAL LAW* §722-b. Defendant moved to dismiss the complaint on the ground that the statute was too vague, and even if not vague, that his actions did not constitute a violation thereof. The trial court denied the motion and found the defendant guilty of disorderly conduct. *People v. Parker*,

138 N.Y.S.2d 2 (City Mag. Ct., Youth Term Ct. 1955). The court first found that the statute was not so vague that it could not be enforced. In arriving at this conclusion the court examined similar statutes in California and Arizona which have been held to be valid. Turning to the defendant's contention that his actions did not constitute a breach of the peace, the court observed that the term "is quite broad and includes not only all violations of the public peace and order but acts tending to the disturbance thereof." The defendant's unauthorized and inadequately explained presence was found sufficient to establish a violation of the statute. The result in the instant case was justified on policy grounds, the court stating that it is common knowledge that "school children are the prey and victims of vicious dealers in narcotics and lewd literature, and subject to molestation by sex degenerates. . . . Teachers have been annoyed and attacked, public property destroyed or other breach of the peace may be occasioned by trespassers."

The result reached in this case points to a possible solution to what seems to be a growing problem in affording adequate protection to public property and to children and teachers from abuse by unscrupulous individuals.

**Arrest by State Officer Pursuant to Information Supplied by Federal Agent Insufficient to Establish Degree of Cooperation Required to Render Illegally Seized Evidence Inadmissible**—A Federal Narcotics Agent informed a state police official that the defendant was believed to be transporting narcotics from Mexico into the United States. Solely on the basis of this information the officer arrested the defendant, placed him in custody of another state official and then searched his car where packages of marihuana were found. Although the federal agent and the state official were not "working together" it was shown that they "kept constantly in touch". Defendant appealed from his conviction for unlawfully obtaining marihuana without paying the special transfer tax thereon, assigning as error, *inter alia*, that the trial court erred in denying his motion to suppress the evidence obtained by the state officer without a

search warrant. The Court of Appeals for the Fifth Circuit held that although the search was illegal the evidence was nonetheless admissible since the defendant had failed to establish that the Federal Narcotics Agent had used this means to obtain the evidence illegally. *Shurman v. United States*, 219 F.2d 282 (5th Cir. 1955) (reversed on other grounds). After finding that the search was illegal because the state officer had failed to obtain a search warrant under circumstances which showed ample opportunity to do so, the court found that the illegal search did not render the evidence so obtained inadmissible. Noting that evidence illegally obtained by a state officer will not provide a basis to suppress the evidence in a subsequent federal prosecution, the court stated that "without some showing of a tacit or expressed understanding, difficult though it may be to find proof thereof, we would be unwilling to hold that giving of information which results in an illegal search, constitutes an attempt to procure evidence illegally. . . . We cannot denounce such exchange of information between law enforcement agencies where no attempt is otherwise shown to do indirectly what is prohibited to do directly."

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**Preliminary Motion to Suppress Illegally Seized Evidence Not Required Under Newly-Formulated California Exclusionary Rule**—A considerable amount of documentary evidence was seized under a general warrant authorizing unlimited search and seizure. Pursuant to a hearing on a writ of mandamus the Superior Court quashed the warrant and directed that the illegally seized evidence be returned to the defendant. During the course of the proceedings, however, the District Attorney had made photostats of the papers. A second writ of mandamus for delivery of the photos was prayed for by defendant, but the writ was denied, although no formal judgment was entered in this second proceeding. The photostats were admitted at the trial over the objection that they had been illegally obtained and the defendant was convicted of conspiracy to commit grand and petty theft and conspiracy

to solicit for charitable purposes without a permit. On appeal to the Supreme Court of California the conviction was reversed. *People v. Berger*, 282 P.2d 509 (1955).

"Since the photostats are as much a product of the illegal search and seizure and are as tainted by it as the original papers themselves, . . . the deception practiced by the prosecution in this case cannot circumvent the rule adopted in *People v. Cahan*, 282 P.2d 905 (Calif. 1955)." Rejecting the argument that the objection by the defendant was not seasonably presented, the court stated that since preliminary questions of fact governing admissibility are determined at the time of objection that "there are no compelling reasons why an exception to the general rule should be made in the case of illegally obtained evidence."

A dissenting group of three judges would affirm the conviction since the guilt of the defendant was clearly established. The dissent points out that the majority decision rests entirely upon the *Cahan* case in which it also dissented.

The instant case was decided on the same day as the *Cahan* case, (abstracted in the Police Science Legal Abstracts and Notes section of this issue), and serves notice on California prosecutors and law enforcement officers that the Supreme Court of California does not intend to be restricted by any of the qualifications imposed upon the federal exclusionary rule. In denying the prosecution any opportunity to make indirect or derivative use of illegally seized evidence the court does follow established doctrines. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1921); *Gouled v. United States*, 277 U.S. 438 (1920); *Nardone v. United States*, 308 U.S. 338 (1939). However, in rejecting the argument that a defendant who is aware of an illegal seizure must move to suppress the evidence prior to the trial, the court is espousing a minority view enunciated in *United States v. Asendio*, 171 F.2d 122 (3rd Cir. 1948) and which has not been widely accepted by the federal courts. See, Comment, *The Federal Search and Seizure Exclusionary Rule*, 45 J. CRIM. L., C. & P.S. 51, at 60 (1954).