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OBSCENITY — PRODUCTION OF OBSCENE PLAY.—[New York] The defendants were prosecuted for a violation of the Penal Law (sec. 1140-a, Consol. Laws, c. 40) prohibiting the production of obscene plays. They had dramatized an ancient folk song by the name of "Frankie and Johnnie" which narrates the adventure of Johnnie, a country lad, in a resort for drinking, gambling and prostitution in the middle of the last century. The New York Court of Appeals finds itself sharply divided in rendering its decision. Judge Pound, who writes the majority opinion, supported by Judges Cardozo, Lehman and Kellogg, is of the belief that the plot and language of the play undoubtedly make it an "indecent" dramatic composition. However, he declares that the Court is not a censor of plays or a regulator of manners. "The question is whether the tendency of the play is to excite lustful and lecherous desire," says Judge Pound, "not whether the scene is laid in a low dive where refined people are not found and where the language is that of the barrom rather than the parlor." The question is whether young people who would see this play would tend to have their standards of right and wrong lowered, particularly as to the sexual relation. The question is not whether youth might be coarsened or vulgarized by the play. Continuing, Judge Pound believes that the production does not come within the statute merely because it uses the language of the street and not that of the scholar. Nor does a stage representation of prostitutes and their patrons in itself make a play obscene. In conclusion, however; the court issues a word of warning—"We do not purpose to sanction indecency on the stage by this decision or to let down the bars against immoral shows or to hold that the depiction of scenes of bawdry on the stage is to be tolerated."

The minority, in the instant case, make known their dissent but furnish no opinion to support it. It is not known why Judges Crane, O'Brien, and Hubbs do not concur. Perhaps, the subtle distinctions drawn by the majority do not appeal to them. They would condemn a play tending to "coarsen or vulgarize youth." To them a stage portrayal of women carrying on a vicious trade, surrounded by their male associates, is probably sufficient to arouse judicial disfavor, to say nothing of depicting the introduction of an unsophisticated country boy like Johnnie into such an environment: *People* v. *Wendling et al* (New York, 1932), 258 N. Y. 451, 180 N. E. 169.

Whatever may be the reasons which move the minority, this decision clearly is of the greatest importance, coming as it does from one of the most capable of the state courts. A case concerning obscenity does not involve a Federal question and is unlikely to come within the jurisdiction of the United States Supreme Court.

Censorship of one kind or another has always existed. It flourished in half savage peoples, in ancient China, in Greece, and in Rome: "Encyclopedia of the Social Sciences" (1931), Vol. 3 under "Censorship," p. 290. At first the problem was primarily a religious one. However, with the development of the Roman state political censorship was established in order to protect and preserve the government: *Grant* and *Angoff* "Massachusetts and Censorship" (1930) 10 Boston University Law Review 51, 52. "The censor, in ancient Rome, was a feared and mighty magistrate. As census taker, he could exclude from the privileged census or citizens those he censured as bad characters. Hence he became a despotic superintendent of private as well as public conduct and morals": *Rosenberg* "Censorship in the United States" (1928) 32 Law Notes 50; *Ferrero* "Characters and Events of History of the Romans" in Lowell Lectures, 1922 Reprint, p. 24; *Plutarch* "Life of Marcus Cato," Part XVII. For centuries political censorship of the sternest kind was taken as a matter of course. Even as late as 1516 Sir Thomas More in his "Utopia" proposed an ideal state wherein criticism of the governing powers was to be punishable by death. It was only after a number of European revolutions and a gradual intellectual evolution that freedom from the censor began to be felt politically. Censorship entered upon its third and last phase when the idea that obscenity could be punished took root in Anglo-Saxon law. Not until well into the 18th century was it thought "that a mere writing could be other than a direct offense against church and state": *Grant* and *Angoff* "Massachusetts and Censorship" (1930) 10 Boston University Law Review 51; *King* v. *Curl* (1715) 2 Str. 789. This case established obscenity as a crime at common law. Over a hundred years later Lord Chief Justice Cockburn attempted to lay down a test of obscenity, which has ever since caused difficulty because of its inadequacy: *Regina* v. *Hicklin* (1868) L. R. 3 Q. B. 360. This test was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." Cockburn's standard was unfortunately adopted in England, Canada, and the United States. It was too broad. "By this rule, that which would deprave any person whose mind was open to depravity was obscene. One living person possessing such a mind would embrace the matter within the law. The additional requirement that such person must be one into whose hands the publication might fall, afforded little solace. The most expensive work circulating among a very limited class of people, assuming that all the people in that particular class were virtuous, might be lost or stolen, falling eventually into the hands of a person ready to be depraved by the tome. Logically, no book which even in the most mildly soporific manner treated sex, could escape

such a law. There was certain to be at least one objectionable person whom the law must protect": *Grant* and *Angoff* "Massachusetts and Censorship" (1930) 10 Boston University Law Review 54. The fact that Lord Cockburn's standard was too broad did not, however, prevent its use: *Steele* v. *Brannan* (1872) L. R. 7 C. P. 261; 26 L. T. N. S. 509; *People* v. *Muller* (1884) 32 Hun. 209, 2 N. Y. Cr. R. 279 (affirmed 96 N. Y. 408, 2 N. Y. Cr. R. 375, 48 Am. Rep. 635); *United States* v. *Bebout* (D. C.) (1886) 28 Fed. 522; *Gilmore* v. *State* (1903) 118 Ga. 299, 45 S. E. 226; *Rex* v. *Beaver* (1905) 9 Ont. L. R. 418, 9 Can. Crim. Cases 415; *Commonwealth* v. *Buckley* (1909) 200 Mass. 346, 86 N. E. 910; *United States* v. *Kennerly* (1913) 209 Fed. 119; *Commonwealth* v. *Allison* (1917) 227 Mass. 57, 116 N. E. 265. The primary result of this adoption of the standard was to render the subject of obscenity still more ill-defined and uncertain, and to keep it in a continual chaotic state.

Nevertheless, any existing uncertainty has never lessened the clamor of many for a greater censorship in all fields where obscenity might enter. Every state has enacted statutes against things obscene, and all of these statutes treat the subject in practically the same way. For a typical illustration of these state statutes see: Ill. Crim Code, ch. 38, sections 468-472. Such organizations as the New England Watch and Ward Society and the New York Society for the Suppression of Vice also have been founded, to say nothing of the appointment in many large cities of boards of censors for dramatic presentations, motion pictures, and publications. However, all such activity eventually leads back to the inevitable question, "Just what is 'obscene' and what should be kept from publication?" Some courts and writers have decided, notwithstanding Lord Cockburn, that "obscene," "indecent," and words of like connotation have no technical significance, nor that they can be defined by law: *United States* v. *Harmon* (1891) 45 Fed. 414 (affirmed 50 Fed. 921); *Timmons* v. *United States* (1898) 85 Fed. 204, 30 C. C. A. 74; *Law Notes,* July, 1924, p. 65; *New York Law Review,* March-April, 1927, p. 86; *Law Notes,* May, 1927, p. 25. One author says, "There is not and cannot be any definite and universally accepted standard by which may be decided what is decent and clean and what is indecent and obscene. Under our system of laws this issue must be determined by judges and juries and upon the trial of an indictment for indecency all twelve of the jurors must agree as to the quality of the act charged, or no guilt can be established": *New York Law Review,* March-April, 1927, p. 86.

It may be expected that decisions of courts have sharply conflicted (as in the instant case) when interpreting the problem of how far the state should go in the field of censorship. The state has two ideals, (1) to encourage individualism in all fields of artistic enterprise, and (2) to protect the individual against everything harmful. In the statutory interpretation of the word "obscene" these two ideals often conflict. The resulting decisions seem to depend upon whether judges are "liberal" or "strict." Decisions have been rather too numerous to cite other than a few of the leading ones: *In re Worthington Co.* (1894) 30 N. Y. S. 361, 24

L. R. A. 110; *People* v. *Eastman* (1907) 188 N. Y. 478, 81 N. E. 459; *St. Hubert Guild* v. *Quinn* (1909) 118 N. Y. S. 582, 64 Misc. Rep. 336; *Commonwealth* v. *Buckley* (1909) 200 Mass. 346, 86 N. E. 910; *United States* v. *Kennerly* (1913) 209 Fed. 119; *People* v. *Brainard* (1920) 183 N. Y. S. 452, 192 App. Div. 816; *Halsey* v. *The New York Society* (1922) 234 N. Y. 1, 136 N. E. 219; *American Mercury, Inc.* v. *Chase* (1926) (D. C. Mass.) 13 Fed. (2d) 224; *American Mercury, Inc.* v. *Kiely* (1927) 19 Fed. (2d) 295; *Commonwealth* v. *Friede* (1930) 271 Mass. 318, 171 N. E. 472; *Commonwealth* v. *De Lacey* (1930) 271 Mass. 327, 171 N. E. 455; *United States* v. *Dennett* (1930) (C. C. A. N. Y.) 39 Fed. (2d) 564; *People* v. *Pesky* (1930) 243 N. Y. S. 193, 230 App. Div. 200 (affirmed 254 N. Y. 373, 173 N. E. 227).

In the instant case, after considering the problem, the writer is inclined to dissent. The production of the play "Frankie and Johnnie" was a public one advertised to draw people from all walks of life. It was performed in a theater constantly attended by those not knowing the nature of the performance they were to see. If we allow the need of the second ideal of the state—that of protecting the individual from everything harmful—then there is no place, outside of the magazine trade, where the law should be more stringent in carrying out this idea. Had the performance been a private one, and not attended by the general public, then the majority opinion would bear greater weight.

It is admitted that many may argue, as does Judge Pound, that a court is neither a censor of plays nor a regulator of manners. A system wherein judges were licensors of plays would be odious to them. Courts refuse to enjoin people's attempted speech: *Ex parte Tucker* (1920) 110 Tex. 335, 220 S. W. 75. Should they not also refrain from suppressing the plays that people wish to see? The problem presents worthy arguments on both sides. How can the individual conclude which position is more nearly correct in view of the indecision which has marked the past?

"The matter is one incapable of a logical solution. The best that can be done is to see that the sober common sense of average men controls it, excluding both the bigots for revenue and the filth exploiters for revenue": "Obscene Plays" (1927) 31 Law Notes 25.

JOHN KNOX.

ENTRAPMENT—LIQUOR SALE—NATIONAL PROHIBITION ACT.—[Federal] A Federal prohibition agent, Martin, went to the defendant's home accompanied by three men, residents of the community, who introduced Martin as a business man on vacation who desired to obtain whiskey. After Martin made several fruitless requests for liquor, conversation disclosed that the defendant, Martin, and one of the others were soldiers in the same World War army division. After the agent expressed another request, the defendant left home and returned within thirty minutes with whiskey which he exchanged for five dollars offered by Martin. Defendant was convicted of selling intoxicating liquor in violation of the National Prohibition Act 27 U. S. C. A. and sentenced to eighteen months' imprisonment. He assigned as error that the trial judge withdrew from the jury the defense of

entrapment. *Held:* On appeal (Soper, J. dissenting), the judgment was affirmed; the trial court properly instructed the jury that there was no evidence that the defendant was induced or entrapped to sell liquor: *Sorrells* v. *United States* (C. C. A. 4th 1932) 57 F. (2d) 973.

Apparently the earliest instances of using the defense of entrapment occurred where property was taken by the defendant with the owner's consent or inducement and hence not "against the owner's will": Parker, J., in *Sorrells* v. *United States,* supra; Bishop "Criminal Law" (9th ed. 1923) secs. 926t.—z. e. The entrapment plea was later extended to the situation where the defendant committed an act at the suggestion or procurement of government officials or their agents; recently its use has multiplied where indictments concern offenses against narcotics and liquor laws. See annotations to *Butts* v. *United States* (C. C. A. 8th 1921) 273 F. 35, 18 A. L. R. 143 at 146; *Robinson* v. *United States* (C. C. A. 8th 1928) 32 F. (2d) 505, 66 A. L. R. 468 at 478. This increase possibly may illustrate the fact that "everybody knows that more devices and subterfuges are resorted to in attempting to violate prohibitory liquor laws, and to evade punishment therefor, than in all other departments of criminal law combined": *DeGraff* v. *State* (1909) 2 Okla. Cr. 519, 532, 103 Pac. 538, 550.

In decisions dealing with liquor violations under the National Prohibition Act, the Federal courts probably agree that there should be "some evidence" of entrapment before the plea can be supported: *Hall* v. *United States* (C. C. A. 4th 1931) 46 F. (2d) 461. Courts are divided whether entrapment is a question of law for the judge or a question of fact for the jury: *Jarl* v. *United States* (C. C. A. 8th 1927) 19 F. (2d) 891; cases infra. Opinions are diverse whether or not the evidence of entrapment goes to nullify and purge the defendant's physical acts of criminality and culpability or merely measures and mitigates the punishment for the criminal act. See Woodrough, J. in *United States* v. *Washington* (D. C. Neb. 1927) 20 F. (2d) 160.

In the principal case, Judge Parker and the dissenting judge disagree about the effect of two alleged precedents: *Butts* v. *United States,* supra, and *Newman* v. *United States* (C. C. A. 4th 1924) 299 F. 128, (1923) 289 F. 712. Judge Parker is willing to limit the latter case, but Judge Soper declares: "The opinion of the court (in the principal case) announces a rule of law contrary to that stated in its former decision in *Newman* v. *United States* . . . It is likely enough that the rule of entrapment now generally accepted in other federal circuits is an extension of the law laid down in those cases like larceny, in which the consent of the injured party is inconsistent with the existence of the crime; but the development, illogical though it may have been, has taken place, and we should gain nothing if we should now retrace our steps. . . . The facts in the pending case justify an application of the prevailing rule." Both the *Butts* and *Newman* decisions involve violations of narcotics statutes, and it is difficult to understand what valid effect those cases could have in liquor sale fact situations unless we are willing to assume that a "rule" or "principle" or "doctrine" can be "derived" from a

past, decided narcotics case and then can be "applied" to future, different and new facts arising from a liquor sale. Judge Soper assumes this, and Judge Parker does also: "While the case at bar is one involving the violation of the liquor laws, the rule which we are asked to approve would not apply in liquor cases alone, but would furnish a haven of refuge to criminals generally." It is not easy to assent to the assumptions of either judge.

The dissenting judge maintains that the "doctrine" of *Butts* v. *United States* has been accepted in every Federal circuit; the cases cited originated in such varied circumstances as possession, sale, and transportation of liquor, liquor conspiracy, liquor nuisance, liquor sale to soldier in uniform, narcotics sale, and possession, and bribery. United States Supreme Court decisions on entrapment deal with violations of postal regulations. There is no high court opinion on entrapment in a liquor sale offense under the National Prohibition Act. See *Casey* v. *United States* (1928) 276 U. S. 413, 72 L. Ed. 632, 48 S. Ct. 373 (narcotics).

In lower Federal court opinions in liquor offenses since the National Prohibition Act, where entrapment has been advanced defensively, certain formulae or tests receive emphasis by the judges. The ordinary type of jury instruction appears in *Weiderman* v. *United States* (C. C. A. 8th 1926) 10 F. (2d) 745; see *United States* v. *Washington,* supra. After examining the whole field of the evidence, sometimes courts are content to declare the government is "estopped" from prosecuting or is prevented by "public policy"; how illusory such phrases may become are illustrated in subsequent citations. If the court believe that testimony reveals a "sale," there is no ground available for pleading entrapment: *Johnstone* v. *United States* (C. C. A. 9th 1924) 1 F. (2d) 928. When the eye of the court focuses upon the defendant, the judge attempts to discover the defendant's conduct or mental state before and at the commission of the alleged crime. Cf. *United States* v. *Certain Quantities of Intoxicating Liquors* (D. C. N. H. 1923) 290 F. 824. If the criminal intent to violate the law originated in the accused's mind prior to the alleged offense, he is not likely to be successful in his entrapment plea: *Reyff* v. *United States* (C. C. A. 9th 1924) 2 F. (2d) 39; *Ritter* v. *United States* (C. C. A. 9th 1923) 293 F. 187; see decisions infra. It appears that "origin of the criminal intent" in whole or in part as a formula would be difficult to use in trying to allocate the time and portion of the criminal intent supplied by the defendant or the entrapping government officials.

Still pointing to the accused, a court often inquires into defendant's previous reputation and conduct to note whether he is an innocent, law-abiding, or honest citizen or whether he is a bootlegger "criminal," habitual offender, or in the business of crime or selling illicit liquor. *United States* v. *Washington,* supra. Defendants who claimed no prior illegal transactions in alcohol won new trials: *Silk and Meek* v. *United States* (C. C. A. 8th 1927) 16 F. (2d) 568; *Driskill* v. *United States* (C. C. A. 9th 1928) 24 F. (2d) 535. In indictments for conspiracy to violate the National Prohibition Act, usually coupled with counts for illegal sales of liquor, past conduct of defendants will be investigated: *O'Brien*

v. *United States* (C. C. A. 7th 1931) 51 F. (2d) 674; *Polski* v. *United States* (C. C. A. 8th 1929) 33 F. (2d) 686, certiorari denied (1929) 280 U. S. 591, 74 L. Ed. 640, 50 S. Ct. 39; *DeMayo* v. *United States* (C. C. A. 8th 1929) 32 F. (2d) 472; *Newman* v. *United States* (C. C. A. 9th 1928) 28 F. (2d) 681, certiorari denied (1929) 279 U. S. 839, 73 L. Ed. 869, 49 S. Ct. 253; *Corcoran* v. *United States* (C. C. A. 8th 1927) 19 F. (2d) 901; *St. Clair* v. *United States* (C. C. A. 8th 1927) 17 F. (2d) 886; *Silk and Meek* v. *United States,* supra; *United States* v. *Wray* (D. C., N. D., Ga. 1925) 8 F. (2d) 429; *Grove* v. *United States* (C. C. A. 4th 1925) 3 F. (2d) 965, certiorari denied (1925) 268 U. S. 691, 69 L. Ed. 1159, 45 S. Ct. 511; *Zucker* v. *United States* (C. C. A. 3rd 1923) 288 F. 12, certiorari denied *Krivit* v. *United States* (1923) 262 U. S. 750, 756, 67 L. Ed. 1214, 1218, 43 S. Ct. 525, 703. Researches into defendant's past acts may be relevant to reach his criminal intent or to measure and mitigate his punishment, but it is doubtful whether such explorations aid the jury to decide the issue, namely, the alleged act for which the accused is tried.

Evidence of defendant's prior conduct will often be mentioned in formulae and tests regarding the government agents. Purchases of liquor by decoys, agents, or officials were not entrapments: *Kendjerski* v. *United States* (C. C. A. 6th 1926) 9 F. (2d) 909; *Ramsey* v. *United States* (C. C. A. 6th 1920) 268 F. 825; *Saucedo* v. *United States* (C. C. A. 5th 1920) 268 F. 830. If the government officials had reasonable suspicions that the defendant was engaging in crime, entrapment was not available as a defense: *Driskill* v. *United States,* supra; *DeLong* v. *United States* (C. C. A. 8th 1925) 4 F. (2d) 244; cf. *Rossi* v. *United States* (C. C. A. 8th 1923) 293 F. 896. Formulae occasionally contain expressions of the officers' good faith, honest belief, or purpose in ascertaining defendant's activities or their purpose to detect and entrap the accused in an offense: *Murphy* v. *United States* (C. C. A. 5th 1924) 2 F. (2d) 599; *United States* v. *Reisenweber* (C. C. A. 2nd 1923) 288 F. 520 (liquor nuisance); *Farley* v. *United States* (C. C. A. 8th 1921) 269 F. 721. These latter tests tend to confuse the issue before the jury by entering discussion of the officers' suspicions; see Parker, J., in *Sorrells* v. *United States,* supra.

Where the entrapping officer's conduct is in evidence, the courts' formulae and tests question whether or not the officer misrepresented himself or pretended a plan, whether he offered, originated or initiated a plan, or whether he suggested, solicited, encouraged, persuaded, aided, abetted, procured, beguiled, induced, deceived, enticed, or lured the defendant into committing a crime. If the officer merely presented the accused with an opportunity to violate the statute and the accused "took the bait," the entrapment plea will not be successful: *Jordan* v. *United States* (C. C. A. 5th 1924) 2 F. (2d) 598; *Porter* v. *United States* (C. C. A. 8th 1929) 31 F. (2d) 544; *Hadley* v. *United States* (C. C. A. 8th 1927) 18 F. (2d) 507; *United States* v. *Smith* (D. C., S. D., Tex. 1930) 43 F. (2d) 173. The general assumption appears to be that the government agents should not create crime or manufacture it for the purpose of prosecuting.

The principal decision seems to indicate the court's unwillingness to interfere with results of government agent's tactics in a liquor sale situation. The court does not sanction the idea that prosecuting crime is a game in which entrapment is another sporting defense. Although the entrapment plea was unknown at common law and has not been granted by legislatures, courts have assumed the power to grant an accused this privilege. Since it is not within the province of a court to censure government action, unless constitutional guarantees are in issue, the entrapment defense should be discouraged by the courts. Entrapment might well be a political and not a judicial controversy: see *United States* v. *Washington,* supra. Condemnation or criticism of the government entrapping defendants to commit crime should come from the public, not from the courts.

D. V. LANSDEN.

INDICTMENT AND INFORMATION—AMENDMENT—CHANGING THE NATURE OF THE OFFENSE.—[Virginia] The defendant was indicted for breaking and entering a dwelling house with the intent "to commit an assault" and "to maim, disfigure, disable, and kill." At the trial the defendant's counsel moved that the Commonwealth elect under what section of the statute the accused would be tried. The prosecution elected to try him under a section defining as a crime the breaking and entering "with intent to commit murder, rape, or robbery" (Virginia Code [1919], sec. 4438). The defendant objected to the court's instructions based on that section on the ground that the indictment charged, as all parties seemed to admit, a crime defined in another section as breaking and entering "with intent to commit . . . any felony other than murder, rape, or robbery" and carrying lesser penalties (Virginia Code [1919], sec. 4439). The jury found the defendant guilty and imposed a sentence of five years in the penitentiary, a term possible under either section of the statute. *Held:* that the election after motion by the defendant had the effect of amending the indictment as provided by statute: *Sullivan* v. *Commonwealth* (Va. 1931) 161 S. E. 297.

The amending statute upon which the court relied provides that an indictment may be amended by the trial court, to cure any defect in form or variance with the proof, "provided such amendment does not change the nature of the offense charged . . . ": Virginia Code (1919) sec. 4878. This restriction on the amending power is, in other jurisdictions, usually implied from the prohibition, constitutional, statutory, or both, against changes of substance. At common law there can be no amendment, either as to form or substance, without the consent of the grand jury presenting the indictment: Ex parte *Bain* (1887) 7 Sup. Ct. 781, 121 U. S. 1; *Joyce* "Indictments" (2d ed. 1924) sec. 13; 2 *Bishop* "Criminal Procedure" (1913) sec. 708. *A fortiori* is this true whenever there is a constitutional requirement; *Patrick* v. *People* (1890) 132 Ill. 529, 24 N. E. 619. These rights may be abrogated by statute in so far as constitutional guarantees are not infringed upon: See 1 *Bishop,* supra, sec. 97; 2 *Id.* sec. 711. But, irrespective of statutes, any amendment changing the nature of the offense is prohibited as being a change of substance, violating the constitutional right to presentment

by a grand jury: *State* v. *Goodrich* (1865) 46 N. H. 186; *Wilbur* v. *State* (1912) 101 Miss. 392, 58 So. 7; *Joyce,* supra, Sec. 137. The only difficult part of the problem is, as illustrated by the instant case, in determining what is a change in the nature of the offense. It is usually sufficient ground to reverse a case if statute makes any distinction between the original and amended charge; courts jealously enforce the principle with little regard to the actual prejudice to the defendant: *State* v. *Jones* (1888) 101 N. C. 719, 8 S. E. 147 (indictment charging "an attempt to burn a dwelling house" amended to read "an attempt to burn a store"); *State* v. *Sowell* (1910) 85 S. C. 278, 67 S. E. 316 (indictment for larceny and housebreaking committed in the daytime amended to allege that the crime was committed in the nighttime); *State* v. *Quinn* (N. J. 1932) 158 Atl. 834 (charge of carrying deadly weapons changed to one of concealment of weapons). It is immaterial that the amendment charges a lesser crime: *Commonwealth* v. *Adams* (1891) 92 Ky. 134, 17 S. W. 276 (the judge, thinking evidence insufficient to support indictment charging forgery, altered it to charge obtaining money under false pretenses); *People* v. *Motello* (1913) 157 App. Div. 510, 142 N. Y. Sup. 622 (words "malice aforethought" stricken out to change indictment for murder to one for manslaughter). However, where an indictment charges a number of crimes the prosecution may strike out some of them: *State* v. *Clement* (1910) 80 N. J. L. 669, 77 Atl. 1067; *State* v. *Lamb* (1911) 81 N. J. L. 234, 80 Atl. 111; *Commonwealth* v. *Smith* (1914) 24 Pa. Dist. Rep. 936. But this is strictly not an amendment: it is hardly more than the ordinary *nolle prosequi* and could not possibly prejudice the defendant. This situation is to be distinguished from that where part of the allegations are quashed to make a different charge: *Duty* v. *State* (1908) 54 Tex. Crim. Rep. 613, 114 S. W. 817. But necessary allegations may be added when the original indictment was plainly intended to charge the same crime as charged after the amendment: *Chrisman* v. *Superior Court* (1922) 59 Cal. App. 305, 210 Pac. 632; *People* v. *Sims* (Mich. 1932) 241 N. W. 247.

The Virginia Constitution is lacking in the usual safeguards; the only provision relevant here being "That in all criminal prosecutions a man hath a right to demand the cause and nature of his accusation . . . ": Constitution of Virginia (1902) sec. 8, par. 2. But this should not affect the holding of the court, as the precise point is covered by the statute. It is also to be noted that the requirement of presentment by grand jury contained in the Fifth Amendment of the Federal Constitution is applicable; the provision is considered as jurisdictional and therefore binding on state courts: Ex parte *Bain, supra.* So it can hardly be said that the Virginia court is to be judged under any separate standard.

In view of the general attitude of strictness obtaining in the enforcement of safeguards established for the benefit of accused persons, it is difficult to agree with the holding of the court in the instant case. The court was of the opinion that the two sections of the statute merely defined degrees of the same crime. In other words, it considered that the difference in intent indicated in the two sections

did not change the fundamental nature of the offense. But, as was pointed out in the dissenting opinion, a difference of intent may be the distinction between two crimes, or a crime and no crime at all; the subjective test is frequently used in the field of criminal law. It is common professional knowledge that the subjective attitude or mental phenomena of "malice aforethought" marks the distinction between murder and manslaughter; and it has been held that an indictment for manslaughter cannot be amended to charge murder; *People* v. *Granice* (1875) 50 Cal. 447; and cf. the converse, *People* v. *Motello,* supra. It is true that these two crimes are designated by different names, which is not true in the instant case, but it does not seem that the mere nomenclature should be controlling. The court relied on two other Virginia decisions holding that the word "feloniously" could be stricken out: *Kelley* v. *Commonwealth* (1924) 140 Va. 522, 125 S. E. 437; *Young* v. *Commonwealth* (1931) 155 Va. 1156, 156 S. E. 565. But, as mentioned in the dissenting opinion of the principal case, these two cases involved indictments really charging misdemeanors; hence, the word "feloniously" was surplusage, and its deletion did not change the nature of the offense. In England, where there is a very broad amending statute practically leaving the matter to the discretion of the trial judge (14 & 15 Victoria, chap. 100, sec. 1) it is held that the word "felonious" cannot be stricken out when the effect would be to change a felony to a misdemeanor; *Regis* v. *Wright* (1860) 2 Fost. & F. 320. Another case cited by the court seems still less in point; it involved only the amending of a bill of particulars: *Jennings* v. *Commonwealth* (1922) 133 Va. 726, 112, S. E. 602.

The mere fact that the legislature saw fit to use separate sections should be some indication that each section was intended to describe a separate offense: cf. *State* v. *Jones,* supra; *State* v. *Sowell,* supra; *State* v. *Quinn,* supra. A distinction was in fact made and separate penalties provided. It is submitted that, even if the two sections may be said only to differentiate different degrees of the same crime, the distinction comes within the meaning of the amending statute; perhaps the latter statute should have been worded more explicitly: cf. *State* v. *Keifer* (1917) 183 Iowa 319, 163 N. W. 698, and statute there cited.

The court reinforced its decision by considering that, as the amendment was brought about by the defendant's motion, any irregularity was waived. It is usually held, however, that consent to an improper amendment does not estop the defendant from making later objection: *People* v. *Campbell* (N. Y. 1859) 4 Parker Crim. Rep. 386; *Commonwealth* v. *Adams,* supra; *Dodge* v. *United States* (1919) 258 Fed. 300. Contra: *State* v. *Faile* (1895) 43 S. C. 52, 20 S. E. 798. The court also held that the error, if any, was immaterial, as the sentence given was possible under either section. But the jury would likely be influenced by the possible penalties available.

The guaranty of presentment by a grand jury appears to be founded on two principles: first, to minimize the danger of false official accusation with its accompanying stigma and suffering; second, to give the accused adequate opportunity to prepare his defense. The facts of the instant case suggest that these

principles were satisfied. But it must be remembered that these safeguards are primarily for the protection of the innocent, and their inviolability has always been one of the deep-rooted principles of Anglo-American law. On this basis the decision in the instant case can hardly stand. But whether it is desirable, because of modern circumstances, to relax the strictness of these principles—to give the courts a greater discretion in their application—is a matter beyond the scope of this comment. The case may indicate an official reaction against an ancient criminal law applied to present day needs.

L. W. Hess.

Verdict—Necessity for Consistency.—[Federal] Defendant was indicted for violation of the National Prohibition Act. The indictment contained three counts under 41 Stat. 308, 314 (27 U. S. C. A. 12, 33): (1) for maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor, (2) for unlawful possession of intoxicating liquor, and (3) for unlawful sale of such liquor. The jury returned a verdict of guilty on the first count but not guilty on the other two counts. The defendant appealed on the ground of inconsistency in the verdict. *Held:* Affirmed. Consistency in the verdict is not necessary: *Dunn* v. *U. S.* (1932) 52 S. Ct. 189.

There was a vigorous dissent by Mr. Justice Butler who stated his conception of the law to be that (1) "When, upon an indictment charging the *same* offense in different counts, the jury acquits as to one and convicts as to the other, defendant is entitled to a new trial; and (2) that when *different* crimes are charged in separate counts and the jury acquits as to one and convicts on the other, the conviction will be sustained, unless, excluding the facts which the jury in reaching its verdict necessarily found not proved, it must be held as a matter of law that there is not sufficient evidence to warrant the verdict of guilty; and where the evidence outside the facts so conclusively negatived by the acquittal on one count is not sufficient to sustain guilt on the other count, defendant is entitled to a new trial."

It must be admitted that there is much authority for Mr. Justice Butler's view. The general rule is that no form of verdict in criminal cases will be good which creates a repugnancy or absurdity in the conviction: 2 *Bishop* "New Criminal Procedure (2nd Ed.)" No. 1015, a, (5). Thus, where one by different counts is accused of two crimes which by reason of their nature cannot be committed by the same person, a verdict of guilty on both counts has been held so inconsistent that no judgment can be entered thereon: *Regina* v. *Evans* (1856) 7 Cox C. C. 151; *Rosenthal* v. *U. S.* (C. C. A. 9, 1921) 276 F. 714; *Commonwealth* v. *Haskins* (1879) 128 Mass. 60; *Tobin* v. *People* (1882) 104 Ill. 565.

Regina v. *Evans, supra,* often is cited as a leading case. There, one count accused the prisoner of stealing sheep. Another charged him with having received them on the same day. There was a general verdict of guilty on both counts. In announcing a new trial for inconsistency in the verdict, the court said, "This record must, therefore, be dealt with as if there had been a special verdict on which the court should find matter which would not justify either an acquittal or a conviction."

In *Rosenthal* v. *U. S.*, *supra*, three were indicted under Act of February 13, 1913, 37 Stat. 670, on two counts: (1) having bought and received property stolen from a car then being a shipment in interstate commerce, knowing it to have been stolen and (2) that at the same time and place they had that property in their possession under like circumstances and with like knowledge. The appellant was acquitted by the jury on the first count, but was found guilty on the second count. The court reversed the judgment for the reason that the two findings were "wholly inconsistent and conflicting."

Thus, one accused in different counts of the same crime. there being no difference in the means alleged to have been employed, may not be deemed guilty on a verdict of conviction on one count but of acquittal on the other: *Speiller* v. *U. S.* (C. C. A. 3, 1929) 31 F. (2nd) 682, 684; *State* v. *Akers* (1919) 278 Mo. 368, 370; *State* v. *Hendrick* (1904) 179 Mo. 300, 307. Cf. *U. S.* v. *Malone* (C. C. A. 2, 1881) 9 F. 897, 900. In every such case the question of law for the court is always whether, outside the fact eliminated by the verdict of not guilty, the evidence was sufficient to warrant the conviction: *Hohenadel Brewing Co.* v. *U. S.* (C. C. A. 3, 1924) 295 F. 489; *Peru* v. *U. S.* (C. C. A. 8, 1925) 4 F. (2nd) 881; *Murphy* v. *U. S.* (C. C. A. 8, 1927) 18 F. (2nd) 509; *Boyle* v. *U. S.* (C. C. A. 8, 1927) 22 F. (2d) 547; and see *Baldini* v. *U. S.* (C. C. A. 6, 1923) 286 F. 133.

The reason for the rule against inconsistency is said to be grounded upon the inference that the jury has made a mistake. The modern tendency, however, is to give effect to the verdict where the jury's action reflects mere inconsistency in the consideration of the evidence which results in an apparently illogical conclusion: *Hesse* v. *U. S.* (C. C. A. 9, 1928) 28 F (2d) 770; *U. S.* v. *Anderson* (C. C. A. 9, 1929) 31 F(2nd) 436; *Pancratz Lumber Co.* v. *U. S.* (C. C. A. 9, 1931) 50 F(2nd) 174; *People* v. *Haupt* (1928) 247 N. Y. 369, 160 N. E. 643.

There is no more reason to say that the jury made a mistake to the prejudice of the defendant than to say that its mistake was in his favor. The tender regard for the defendant under the old rule is certainly an obstacle to the protection of the general public against criminals. Instead of making a *presumption* that the inconsistency in the verdict prejudiced the defendant, it seems more sensible for the reviewing court to determine whether or not the so-called error is such as would probably cause a different result in a new trial. A reasonable explanation of the jury's conduct in reaching such inconsistent verdicts is that, "The jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret their acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through leniency": *Steckler* v. *U. S.* (C. C. A. 2, 1925) 7 F(2nd) 59, 60; cf. *Carrignan* v. *U. S.* (C. C. A. 7, 1923) 290 F. 189; *Marshallo* v. *U. S.* (C. C. A. 2, 1924) 298 F. 74; *Gozner* v. *U. S.* (C. C. A. 6, 1925) 9 F(2nd) 603; and *Seiden* v. *U. S.* (C. C. A. 2, 1926) 16 F(2nd) 197.

The present case is interesting as an example of the division of power between the judge and the jury.

Under the federal rule, the offenses which may be joined in the same action are not limited to the consolidation of counts which might have been joined at common law, but the trial court is merely vested with discretion to refuse to permit joinder if it would prevent a fair trial or be unjust to the defendant: 10 Stat. 162 (18 U. S. C. A. 557); *Dolan* v. *U. S.* (C. C. A. 8, 1904) 133 F. 440; *Kidwell* v. *U. S.* (1912) 38 App. D. C. 566. Each count in an indictment is regarded as if it were a separate indictment: *Latham* v. *The Queen,* 5 Best and Smith 635; *Selvester* v. *U. S.* (1897) 170 U. S. 262, 18 S. Ct. 580. Thus it has been held that the number of counts in an indictment may be determined by the number of purchases of narcotics made from defendant by the government agents: *Blockburger* v. *U. S.* (1932) 284 U. S. —, 52 S. Ct. 180, and see *comment* (March, 1932) 22 Journal of Criminal Law and Criminology 902. Whether or not the maximum penalty may be assessed on each count charging a separate offense and the sentences made to run consecutively instead of concurrently is in the discretion of the judge: *Blockburger* v. *U. S. supra; Parmagini* v. *U. S.* (C. C. A. 9, 1930) 42 F(2nd) 721. (There the defendant amassed five consecutive sentences aggregating seventeen years in the penitentiary plus $17,000 in fines by reason of his violation of five different statutes by a single sale of narcotics.)

Thus, in allocating the powers of the different instrumentalities in the administration of criminal law, it is seen (1) that the government agents can prepare evidence for many counts in an indictment merely by inducing several breaches of the statute by the defendant, as by making many different purchases of liquor or narcotics from him. (2) The prosecutor can add to the number of counts by drawing a separate one for each of the different laws that the defendant has transgressed in the illegal transaction, or he can limit the number of counts by grouping all of the purchases into the same count. (3) The court, in its discretion, may refuse joinder of counts it deems unjust to the defendant. (4) The court may make its sentence on each count run concurrently or consecutively. (5) But the jury may check the judge's power to levy consecutive sentences on the different counts by finding the defendant guilty on only so many of the counts as it wishes to see punished, and it may exercise this power in spite of the fact that it may make the verdict seem inconsistent.

EMERSON WHITNEY.

INCEST—EVIDENCE—UNCORROBORATED TESTIMONY OF ACCOMPLICE.—[Texas] Defendant was convicted of the crime of incest with his sixteen year old daughter and sentenced to eight years in the penitentiary. The only evidence supporting the conviction was the clearly uncorroborated testimony of defendant's daughter, the prosecutrix, who testified that her consent was induced by promises to buy her new clothes. No other force or persuasion appeared. *Held:* judgment reversed as the prosecutrix was, as a matter of law, an accomplice so the conviction could not be sustained in the absence of corroborating testimony. *Tindall* v. *State* (1931) 43 S. W. (2d) 1101.

From this reversal it is quite apparent that Texas is one of the jurisdictions which refuses to follow

the common law that the uncorroborated testimony of an accomplice, if it satisfies the jury beyond a reasonable doubt, may be sufficient to warrant a conviction. This result has been reached by statute: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; * * *": *Vernon's* Annotated Code of Criminal Procedure of Texas (1925) Article 718. Laying aside the question of the advisability of such a statute, it would appear, at first glance, that it could easily be administered. However, the courts have found the same difficulties in its application which have been encountered in numerous other statutes designed to change or abrogate well settled law by a statement made in general terms but lacking in a well defined exposition of legislative intent. The principal difficulty the Texas courts have encountered with the above statute is to determine who is an accomplice. In the instant case, the decision held that a person, regardless of her age, participating in an incestuous relationship, was an accomplice within the meaning of the statute, in the absence of "force, threats, fraud, or undue influence" practiced by the defendant, the other participating party.

The point which seemed to interest the court most was whether the defendant's promise to buy the prosecutrix clothes constituted such undue influence as to take the prosecutrix from the court's definition of an accomplice. The court decided this mercenary persuasion did not amount to undue influence so that the prosecutrix was treated as an accomplice as a matter of law, regardless of her age, in accordance with a long line of prior Texas decisions: *Mercer* v. *State* (1884) 17 Tex. App. 452; *Bradshaw* v. *State* (1917) 82 Tex. Cr. R. 351, 198 S. W. 942; *Cottrell* v. *State* (1922) 91 Tex. Cr. R. 506, 240 S. W. 313; *Master* v. *State* (1925) 100 Tex. Cr. R. 30, 271 S. W. 920.

The reasoning used by the Texas court in this incest case is characteristic of other decisions on this point. If force, threats, fraud, or undue influence are absent, then the prosecutrix is assumed to have participated voluntarily, is an accomplice as a matter of law, and a conviction on her testimony alone cannot be sustained. It is submitted that the logic of the court would be less open to question if, in determining whether she was an accomplice or not, it also had taken into consideration the age of the prosecutrix in order to decide whether her participation was voluntary. The age of consent in Texas is eighteen: *Vernon's* Annotated Penal Code of Texas (1925) Article 1183. Consequently, as the prosecutrix was under the age of consent, it is difficult to conceive how she could have voluntarily consented to participate in an incestuous act, when the law prescribes that she cannot so consent, out of regard for her immaturity, until she reaches the age of consent. Even in the absence of force, fraud, threats and undue influence, the prosecutrix could not consent or participate voluntarily as the law had removed her power to consent, without regard to her blood relationship to the male participant. The law had removed the "volition" of the prosecutrix and yet the court assumed that, regardless of her immaturity, she could voluntarily consent to the incestuous relationship,

would be a *particeps criminis,* and hence an accomplice.

The Supreme Court of Iowa, in construing an almost identical statute (Code of Iowa, 1927, Chapter 647, Section 13901) has taken into consideration the age of the prosecutrix, the alleged accomplice, in order to determine whether it would be possible in law for her to consent to the incestuous relationship: *State* v. *Goodsell* (1908) 138 Ia. 504, 116 N. W. 605; *State* v. *Sparks* (1914) 167 Ia. 746, 149 N. W. 871; *State* v. *Stalker* (1915) 169 Ia. 396, 151 N. W. 527; *State* v. *Pelser* (1917) 182 Ia. 1, 163 N. W. 600; *State* v. *Chambers* (1893) 87 Ia. 1, 53 N. W. 1090. The Iowa Court takes into consideration the same distinctions as does the Texas Court in the case of a prosecutrix upon whom force, threats, fraud or undue influence have been exercised, but adds an additional distinction in case the law has destroyed the prosecutrix' power to consent. Certainly if the law makes the consent of the prosecutrix impossible, she can logically no more consent to the act than if force, fraud or undue influence were practiced upon her. In either case, her volition is gone, and she should not be held an accomplice within the meaning of the statute.

It is submitted that the Iowa construction of this accomplice statute in an incest case is preferable where the common law rule has been abrogated by legislation. However, the great mass of decisions construing such statutes, with their hair line distinctions concerning accomplices, illustrates the futility of such legislation. Such a statute creates a rule of evidence inflexible in form, yet it must be applied in numberless criminal cases of infinite variety. Obviously, in order to avoid hardships, each case should be considered on its facts in order to determine whether a witness is an accomplice; no general rule is possible. In order to consider the individual case, jurisdictions having such a statute have evolved a subterfuge of distinctions and interpretations. Such distinctions and interpretations, a few of which are illustrated in the instant case, depart from the purpose of the statute which is designed to be a mere rule of evidence, and yet such subterfuges are inevitable if justice is to be reached in the individual case. It is unfortunate that jurisdictions having such a statute thrust upon them by their legislature are forced to so manipulate their decisions. Certainly the common law rule of accomplice testimony obviates the necessity of having to consider who are accomplices and whether their testimony has been corroborated or not. The simplicity of its operation in the individual case, as compared with the usual accomplice statute, does much to commend its continued existence.

HENRY R. BARBER.