Journal of Criminal Law and Criminology

Volume 29
Issue 5 *January-February*

Article 11

Winter 1939

Recent Criminal Cases

RECENT CRIMINAL CASES

Edited by the
LEGAL PUBLICATIONS BOARD OF
NORTHWESTERN UNIVERSITY SCHOOL OF LAW

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PUBLIC ENEMY LAWS—CONSTITUTIONALITY OF.—[New Jersey] Most legislative attempts to control criminality are generally, in application, designed to punish violators who may come within the defined limits of the act regardless of economic position, class distinctions, or personal fame. They seek to prevent crime by punishing crime. However such legislation has not always been successful in protecting the community, and the legislatures of several states have endeavored to enact laws which might prevent a criminal act by defining and classifying groups likely to commit such offenses. In other words the legislatures have proceeded upon the theory that certain persons in the community are more likely than others to commit crimes.

Under this broad and illusive principle, three types of statutes in particular have been passed, all designed to punish for what persons are, rather than what they did. First is the Habitual Criminal Laws; second, the well-known Vagrancy Acts; finally the statutes concerned in the present discussion, the "Reputation" or "Public Enemy" laws.

The Constitutionality of the Vagrancy and Habitual Criminal Acts appears to be well settled. As to Vagrancy see 8 R. C. L. 339, 92 A. L. R. 68. For Habitual Criminal Acts see 8 R. C. L. 271, 82 A. L. R. 345. As to the validity of the "Reputation" statutes, the case arising in New Jersey and now pending in the Supreme Court of the United States brings this strikingly to the fore. *State* v. *Lanzetti*, and *State* v. *Pius*, 118 N. J. L. 212, 192 Atl. 89 (1937), reviewed in 120 N. J. L. 189, 198 Atl. 837 (1938).

In this case the Supreme Court of New Jersey declared valid the "Gangster Act." This act provides for the punishment by fine not exceeding ten thousand dollars and imprisonment not exceeding twenty years or both of "any person not engaged in any lawful occupation, known to be a member of a gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other state . . . ." Participants in labor disputes are expressly excepted. N. J. Rev. Stat. (1937) §2:136-4.

In the state court the defendants were convicted of having violated the act and in answer to their allegations questioning its constitutionality, the court found that they were not denied due process nor

the equal protection of the laws, relying on a previous case of similar character. *State* v. *Bell,* 15 N. J. Misc. 109, 188 Atl. 737 (1937). In the case just cited the court reasoned that since the statute provides for the apprehension and punishment of a class that menaces the security of persons and property the act does not deprive the defendants of due process, and that it was within the province of the legislature to classify persons with respect to the criminal law providing the classification is a reasonable one. This latter argument also disposing of the equal protection objection that was raised. Two other contentions were raised in the principal case. The first concerned the defense of double jeopary which the court summarily disposes of by saying that "no prior conviction was even suggested" The other, that of the act being *ex post facto,* was thrown out on the ground that the act was based not on punishing convicted criminals because they are such, but on voluntary membership in a gang and voluntary abstention from work.

The New Jersey Court, in attempting to answer the equal protection allegations has failed anywhere to distinguish the ability of the legislature to classify affirmative conduct resulting in a certain type of criminality and what the legislature did here, namely, make reputation an offense. In the one case the classification results because of the commission of an act, in the other the classification attaches through association. This goes even further than the Conspiracy statutes which do not make association of itself unlawful, but rely on the illegality of the purpose, or the means used to obtain that purpose.

The present statute is not the first attempt by states to make criminal the association with disreputable persons. An outstanding example of a similar act was the amendment to the Illinois vagrancy act of 1933 which sought to classify as vagabonds those who were reputed to be habitual violators of the criminal law or carriers of concealed weapons. Ill. Sess. Law (1933) p. 489, §1. The Illinois Supreme Court in declaring the act unconstitutional stated that it was an arbitrary and unreasonable classification, and that the object of the due process clause is to preserve the personal and property rights of a person against arbitrary action. *People* v. *Belcastro,* 356 Ill. 144, 190 N. E. 301 (1934). A similar Michigan statute likewise was declared unconstitutional in *People* v. *Licavoli,* 264 Mich. 463, 250 N. W. 520 (1933). See also Feigen, Constitutionality of "Public Enemy" Laws (1934) 24 J. of Crim. Law 954; and Tipton, "Validity of the Reputation Amendment to the Vagrancy Statute" (1934) 25 J. of Crim. Law 279, 92 A. L. R. 1228.

The due process argument as it will be raised in the Court will be largely on the broad principle followed by a majority of the courts and to which the United States Supreme Court has committed itself, viz., that due process is satisfied if the statute is sufficiently certain and definite to inform citizens of the acts it is intended to prohibit. 14 Am. Juris. 779; *United States* v. *Cohen Grocery,* 255 U. S. 81 (1920); *Whitney* v. *People of the State of California,* 274 U. S. 357 (1926); *People* v. *Belcastro, supra; State* v. *Gaynor,* 119 N. J. L 582, 197 Atl. 360 (1938). It seems as a corollary that the act

must be reasonable and not one which might subject the accused to an arbitrary invasion of his personal rights. The question here for determination, then, is whether the act is such a definite and reasonable one that the accused is protected.

It seems that section 4 of the act steps beyond the just and necessary legislation needed to protect the community. This section, quoted heretofore, has potentialities of tremendous social significance. The discretion in the application of such a statute, must be guarded with a scrutiny not becoming criminal legislation. While it is useful in punishing those who associate with criminal intent, there is no safeguard for the innocent who by circumstances fall within its terms. Surely it was not the intention of the legislature to see ordinary citizens, possessing no criminal intentions whatsoever, suffer such extreme punishment with no protection other than the discretion of the prosecutor. To allow this kind of a statute to remain on the books seems only too apparent an infringement of the personal liberties protected by the due process clause of the 14th Amendment of the Federal Constitution.

JOHN L. COLMAR.

VOID SENTENCE—RECOGNITION OF GOOD TIME SERVED UNDER.—[Federal] Substantial disagreement exists among the courts of the nation concerning the judicial recognition to be accorded an imprisonment illegal because of the invalidity of the sentence. The learning devoted to this field of criminal procedure is meager; and this because of the relative paucity of cases presenting the problem.

The legal attributes of a void sentence to be evaluated in resentencing a prisoner who had served under an illegal imprisonment were considered in the case of *King* v. *United States,* 98 F. (2d) 291 (App. D. C. 1938); and it was held that a void sentence may not be ignored "in determining whether a resentence subjects the prisoner to more punishment than the legal maximum for his offense." That is, if the time served under the void sentence coupled with the term of the resentence were in excess of the statutory maximum of prescribed punishment, the new sentence would be illegal, or rather, the excessive part would be invalidated. Cf. *In re Bonner,* 151 U. S. 242 (1893). Thus a credit is given to the prisoner for the length of the former incarceration; and such credit will be presumed to have been applied if the new term added to the actual imprisonment under the void sentence is within the court's jurisdiction in the imposition of punishment.

As was recognized in the case of *Tinkoff* v. *United States,* 86 F. (2d) 868, 880 (C. C. A. 7th, 1936), jurisdictions are in disagreement as to whether credit should be given for imprisonment under an illegal sentence upon a valid resentence. The extreme view is taken by the Alabama court in *Minto* v. *State,* 9 Ala. App. 95, 64 So. 369 (1913), and *Ex parte Gunter,* 193 Ala. 486, 69 So. 442 (1915) that a void sentence is without legal significance or application. In the *Minto* case, *supra,* the court argued: "The defendant could not have served any part of a former sentence of imprisonment, as there has been no such sentence which the law can recognize." The antithesis of this is found in the Kentucky court's view

in *Jackson* v. *Commonwealth,* 187 Ky. 760, 220 S. W. 1045 (1920), wherein it was stated that in resentencing the defendants — the court being unconcerned as to whether the original sentence was void or merely erroneous—full credit should be allowed for time served under the erroneous sentence. The court, motivated by justice rather than legal metaphysics, said: "It would be an injustice, as well as a flagrant invasion of their legal rights, to require them to serve their term, or any part thereof, twice." *Ibid.,* at 1046. In *Bennet* v. *Hollowel,* 203 Iowa 352, 212 N. W. 701 (1927) not the remotest corollary of *Minto* v. *State, supra,* is recognized. The Iowa court goes even farther than the liberal Kentucky court in attaching legal attributes to a void sentence. The petitioner was originally sentenced to seven years in the penitentiary for the crime of false pretenses. After having served five months the prisoner escaped, was tried and convicted of the crime of escape, and was given a five year term in the penitentiary, which was to commence at the expiration of the seven year sentence. The original sentence was void for want of jurisdiction; after having served sixty months under it, the prisoner petitioned for habeas corpus. The court, in issuing the writ, held that the time served under the void sentence, which was equivalent to the new sentence, should be deemed to apply to the latter sentence. The result is far-reaching in that time served under an illegal sentence for the crime of false pretenses is applied to a valid sentence for an entirely unrelated offense, to-wit, "escape." It is highly probable that the dotrine of this case will be confined to factual situations as peculiar and sympathetic as the present.

The Delaware Court, in *Kozlowski* v. *Board of Trustees of New Castle County Workhouse,* 2 Harr 29, 118 Atl. 596 (1921), joined the jurisdictions dissenting from the *Minto* v. *State* doctrine. The petitioner, after having served fourteen days under a void sentence, was resentenced for the statutory maximum of one year. The court, in allowing habeas corpus, held that the fourteen days served under the void sentence plus the one year resentence was in excess of the legal maximum. The subsequent Delaware decision in *Biddle* v. *Board of Trustees of New Castle Workhouse,* 3 Harr 432, 138 Atl. 631 (1927), did not repudiate, but soundly qualified the holding in the *Kozlowski* case, *supra.* The attitude expressed there is that, though incarceration before valid sentence added to such sentence may exceed the prescribed maximum, the prisoner cannot be discharged on habeas corpus before having served that part of the term which the court could legally impose. Or, conversely, the prisoner could be released if imprisonment before resentence coupled with the time of incarceration under the valid sentence was equal to or in excess of the legal limit of confinement. This is an application of the severability theory of an excessive sentence (*In re Bonner, supra;* 51 L. R. A. (N. S.) 377, Note 2) to a situation where excessive punishment resulted from a failure to consider the duration of imprisonment under a void sentence. The excess is invalidated and the prisoner is required to serve the remainder. Concluding that such a result is logical and reasonable and entailing no hardships, the court

said: "The State is protected, the conviction is undisturbed, and the prisoner is not injured by the mistake because his discharge will be granted when he has served the legal part of his sentence." *Ibid.*, at 632 of 138 Atl..

To give judicial recognition to incarceration under an illegal sentence in determining the term of the resentence is a result compatible with reason and justice. To refuse it would bring "a result more consistent with dry logic than natural justice." 9 A. L. R. 958. Full credit should be given for an illegal imprisonment; and if upon resentence excessive punishment is inflicted in that the time served under the void sentence has been ignored, that part of the sentence beyond statutory limits should be invalidated. The prisoner is neither penalized by nor permitted to capitalize upon judicial blunder.

In the instant case, the court disallows a deduction from a valid resentence a good time allowance in respect of time previously served under a void sentence. This conclusion was derived from two thoughts: 1. That such good time allowance was not within the purview of the statute. 18 USCA Sec. 709a, 710; 2. That as "the former sentence was not only at an end before the new sentence was imposed but was also 'void,' i. e., not entitled to legal effect," the good time earned under the void sentence cannot be considered in determining whether the resentence exceeded the statutory maximum.

As for the second contention: By some judicial prestidigitation the void sentence is to have legal effect "in determining whether a resentence subjects the prisoner to more punishment than the legal maximum for his offense," but is to be detached of legal significance as far as good time rights are concerned—the same thing legal and illegal in one decision. Suffice it to say that if the court is correct in according recognition to the duration of incarceration under a void sentence, in determining whether the resentence was excessive—and logic and justice make such a position tenable—consistency demands that the accrual of good time under the void sentence be given the same recognition. It is strange logic that places a thing within judicial contemplation on the inhale and withdraws it on the exhale.

As to the first proposition: 1. The statute, providing that "when a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated" (18 USCA Sec. 710), has been held to refer to two sentences which are in existence at the same time. *Morgan* v. *Aderhold*, 73 F. (2d) 171 (C. C. A. 5th, 1934). Recognizing the legal significance of a void sentence (*Jackson* v. *Commonwealth, supra*), it would not abuse the prerogative of statutory interpretation to have the statute comprehend, also, a situation, as in the present case, where the two sentences arose from and applied to but one offense. Why the statute should be held to apply in a case of two or more sentences, each imposed for a different offense, though pronounced at the same time, and not in the case of two sentences imposed at different intervals, but addressed to the same offense, is not easily understandable. It is a hard presumption that Congress intended a forfeiture because of an error in the judicial process of sentencing notwithstand-

ing prisoner's meritorious behavior. 2. The provision (18 USCA Sec. 709a) that a sentence of imprisonment "shall commence to run from the date on which such person is received at the penitentiary," and the prohibition of any other method of computation in a sentence, ought not to block the accrual of good time earned under the void sentence from consideration in resentencing. If judicial cognizance be accorded the void sentence under the *Jackson* v. *Commonwealth* doctrine, which was approved in the principal case, then the sentence did commence to run at the date of actual incarceration. The resentence does not abrogate the rights derived from the prior imprisonment. *Ex parte Silva,* 38 Cal. App. 98, 175 Pac. 481 (1918); *Ex parte Bouchard,* 38 Cal. App. 441, 176 Pac. 692 (1918); but see *Ex parte Fritz,* 179 Cal. 415, 177 Pac. 157 (1918) which disapproves of the *Silva* and *Bouchard* cases without challenging their reasoning. See also *State ex rel Bone* v. *Barr, Warden,* 133 Iowa 132, 110 N. W. 280 (1907) citing with approval *Howard* v. *United States,* 75 Fed. 986 (C. C. A. 6th, 1896).

It may be argued that by allowing a credit for good time under the illegal sentence the rule would also prohibit any good time privileges under the resentence in event of misbehavior during the void incarceration. Justice dictates the adoption of a rule of law favoring good behavior rather than capitulating to misbehavior.

LEONARD SHAPIRO

EMPLOYMENT BY COURT OF SPECIAL PROSECUTOR WHERE PROSECUTING ATTORNEY IS DISQUALIFIED.—[Indiana] The judge of the criminal court of Marion County on his own motion appointed special prosecutors, over the objection of the regular prosecuting attorney, to investigate suspected violations of the law concerning a primary election. Reports released by the recount commissioners in contests respecting the nomination for the offices of mayor and sheriff in the Marion County primary election indicated that one of the regular prosecutor's deputies served as clerk of the board in one of the precincts where discrepancies between the official and the recount vote appeared. Twelve members of the prosecutor's staff were also candidates in this primary. In an original action in the Indiana Supreme Court by the regular prosecutor a writ of prohibition against the special prosecutors was granted. The Court said, "The prosecuting attorney is a constitutional judicial officer and cannot be removed upon mere suspicion or rumor but only where it is established that he is an interested party or otherwise clearly incapacitated." *State ex. rel. Spencer* v. *Criminal Court of Marion County, et al.,* 15 N. E. (2d) 1020 (1938).

Acting under a statute, Ind. Rev. Stats. (Burns 1914) §9407, giving it a right to appoint a special prosecutor for a term when the regular prosecutor is absent, the Indiana Court has appointed a special prosecutor when the regular prosecutor is absent, *Choen* v. *State,* 85 Ind. 209 (1882), where the prosecuting attorney is disqualified by having been attorney for the accused for many years, *Perfect* v. *State,* 197 Ind. 401, 141 N. E. 52 (1923), where he was disqualified to act in his official capacity when one of his deputies was charged with crime growing out of alleged

official misconduct, *State ex. rel. Williams* v. *Ellis,* 184 Ind. 307, 112 N. E. 98 (1916), and where he was disqualified because of political interest from conducting the prosecution of an election inspector indicted for consenting to the removal of a hundred and fifty ballots from his possession as election official, *Huffman* v. *State,* 183 Ind. 698, 109 N. E. 401 (1915).

The Illinois and Missouri courts hold similar statutes as merely declaratory of the common law and have said that the courts have inherent power to appoint a special prosecutor when the prosecuting attorney is disqualified by interest to act in his official capacity: *State* v. *Jones,* 306 Mo. 437, 268 S. W. 83 (1924) (when his car and defendant's car were in a collision); *Wilson* v. *Marshall County,* 257 Ill. App. 220 (1930) (where the county board was permitted to employ special attorneys in a particular case when the regular prosecutor was disqualified and the court had made a valid appointment).

However, whether the court acts under a statute or under its inherent power the interest of the prosecutor must first be established as a fact, *State ex. rel. Williams* v. *Ellis, supra, State* v. *Jones, supra.* The appointment cannot be made on what the court in the principal case calls "mere suspicion or rumor" of such interest, but the appointment can be made as in the instant case by the court on its own motion, *Huffman* v. *State, supra,* or upon the petition of a citizen, *People* v. *Northrup,* 184 Ill. App. 638 (1914).

In *State ex. rel. Williams* v. *Ellis, supra,* the Indiana court faced a situation similar to that in the principal case and upheld the appointment of a special prosecutor. But in that case the grand jury requested the appointment of a special attorney and the regular prosecutor filed his written consent to the appointment, whereas in the instant case the appointment was made on the ex parte motion of the judge and over the objection of the regular prosecutor. In *Huffman* v. *State, supra,* the Indiana court again upheld the appointment of a special prosecutor although made on the motion of the judge and over the objection of the regular prosecutor. In that case, however, there was an actual indictment of the person held to disqualify the regular prosecutor because of interest whereas in the principal case the court seems to specifically object to the fact that the appointment was made "upon mere suspicion or rumor" before the guilt of anyone had been definitely established.

Although under the Indiana statute or under the inherent power of the court there is authority for the appointment of a special attorney by the judge on his own motion and over the objection of the regular prosecutor when the prosecutor is disqualified, there is no authority for such an appointment before the interest of the regular prosecutor has been established as a fact—in this case by the subsequent indictment of the deputy prosecutor and other members of the regular prosecutor's staff. Consequently in its decision in the principal case the court is well within the law.

On the question of whether such appointments actually promote justice there are convincing arguments on both sides. The main objection to this practice of employing special prosecutors is that "they are usually employed by

private individuals solely to secure a conviction and their zeal and energies are bent to accomplish that end losing sight of the fact that the accused is entitled to a fair trial." *State* v. *Morreaux*, 254 Mo. 398, 162 S. W. 158 (1914). However it is said that "the prosecuting attorney owes a duty to both the state and the defendant and if the facts are such as to preclude the exercise of his full duty to both he should step aside." *State ex. rel. Williams* v. *Ellis, supra.* In the case of a political investigation such as this the better view would seem to be that which sanctions such appointments in order that in the eyes of the public, at least, the investigation will appear to be conducted without partisanship.

MALCOLM NICKOLSON.

INTOXICATING LIQUORS—SALES TO MINORS.—[South Dakota] The defendant, in the recent South Dakota case of *State* v. *Schull*, 279 N. W. 241 (1938), was convicted for violation of chapter twelve of the Special Session Laws for 1933 which states: "It shall be unlawful for any licensee under the provisions of this act to sell or give any non-intoxicating beer or wine to any person under the age of eighteen years." Relying on section 3583, subdivision five, Revised Code of 1919, the provisions of which are: "All persons are capable of committing crimes, except those belonging to the following classes . . . persons who committed the act under an ignorance or mistake of fact which disproves any criminal intent . . .," the defendant requested the trial court to instruct the jury that the defendant acted in good faith, the beer being sold by an employee during his absence and contrary to his express instructions, and that the appearance of the prosecuting witness, who stated he was eighteen years of age at the time of the sale, was that of an adult. The trial court refused to instruct the jury in this manner, and its decision was affirmed by the South Dakota Supreme Court.

Malum prohibitum acts are those barred under penalty for the public interest; they are not crimes inherently evil in themselves, but are made crimes by a legislature which believes that such acts should be prohibited for the common good. Whether scienter is a necessary element of a statutory crime, though not expressed in the statute, is a question of legislative intent to be answered only by a construction of a statute. Punishment for an illegal act done by one who is ignorant of the facts which make it illegal, is not contrary to due process of law. *United States* v. *Balint et al.*, 258 U. S. 250 (1922). When a statute makes an act indictable, irrespective of guilty knowledge, then even "sincere ignorance of fact" is not a defense. *State* v. *Dorman*, 9 S. D. 528, 70 N. W. 848 (1897). In *State* v. *Sasse*, 6 S. D. 212, 60 N. W. 853 (1894), involving a statute similar to that of the principal case, it was held that since the word "knowingly" was omitted from the act in that section relating to minors, and no word of similar import was used to denote such meaning, it is evident that good faith is not important, nor proof of criminal intent necessary for conviction where there had been in fact a sale of intoxicating liquor to one under the age of twenty-one years. Other jurisdictions have similarly held that the mere fact of selling intoxicating liquors to a minor constitues the entire offense. *Seele* v.

State, 85 Neb. 109, 122 N. W. 686 (1909); *State* v. *Gilmore,* 80 Vt. 514, 68 Atl. 658 (1908); *State* v. *Nichols,* 67 W. Va. 659, 69 S. E. 304 (1910).

The majority of the states have statutes prohibiting the sale of liquors to minors wherein the word "knowingly" or one of equivalent import is absent. The justification for such an extreme rule is that the act in question is a police regulation, and the legislature intended to inflict the penalty, irrespective of the knowledge or motives of the offender. The object of the statute was to prohibit absolutely sales of liquors to minors by persons licensed to sell, and the latter, in procuring their licenses, are fully aware of the penalties for violation thereof, and accordingly, act at their own peril. *State* v. *Cain,* 9 W. Va. 559 (1876); *State* v. *Hartfiel,* 24 Wis. 60 (1869). It is a risk incident to the business defendant undertook to conduct, and since he receives the gains connected therewith, he must therefore assume with it all the hazards. *McCutcheon* v. *People,* 69 Ill. 601 (1873). Texas courts are among a minority in holding that though it is unnecessary under Tex. Ann. Code (Vernon, 1925), art. 693, for the state to prove that the defendant, in a prosecution for giving liquor to a minor, knew that the prosecuting witness was a minor, since the word "knowingly" was omitted from the statute, nevertheless, mistake of fact is available as a defense under article 41. *Gilbreath* v. *State,* 107 Tex. Cr. R. 110, 295 S. W. 925 (1927).

The changing attitudes of jurisdictions on the subject of absolute liability in prosecutions concerning liquor sales to minors are exemplified in the following Michigan cases. In *Faulks* v. *People,* 39 Mich. 200 (1878), it was decreed: "It cannot be assumed that the legislature would attempt such a wrong as to punish as criminal an act which involves no criminal intent. There can be no crime where there is no criminal mind." But in *People* v. *Roby,* 52 Mich. 577, 18 N. W. 365 (1884), the court said: "It was held in *Faulks* v. *People,* 39 Mich. 200, under a former statute, that one should not be convicted of the offense of selling liquor to a minor who had reason to believe and did believe he was of age; but I doubt if we ought so to hold under the statute of 1881, the purpose of which very plainly is, as I think, to compel every person who engages in the sale of intoxicating drinks to keep within the statute at his peril." A later Michigan statute of 1887, however, declared a sale of liquor to any minor as mere *prima facie* evidence of an intent to violate the law, and accordingly, defendant was exempted from liability when he relied on the minor's statements that he was of full age at the time of the sale, which was made in good faith, since the court held that criminal intent was material. *People* v. *Welch,* 71 Mich. 548, 39 N. W. 747 (1888).

In the principal case, defendant was convicted, even though the sale was consummated by an employee during his absence, without authority and contrary to instructions. The courts differ in their attitudes toward liability of the master for illegal sales of intoxicating liquor transacted by the agent. According to some, if the general course of the business is legal, the principal is not criminally liable for the unlawful sales made by his clerk without his knowledge or consent, or in his absence and

contrary to his instructions. *Daniel* v. *State,* 149 Ala. 44, 43 So. 22 (1907); *People* v. *Kryl,* 168 Ill. App. 298 (1912); *Lathrope* v. *State,* 51 Ind. 192 (1875). Under this rule, the master is not liable unless such an unlawful act was directed, or knowingly assented to, acquiesced in, or permitted by the employer. *Elliot* v. *State,* 19 Ariz. 1, 164 Pac. 1179 (1917). Kentucky, however, held that the employer is liable for violations of the liquor laws by his servants or agents while pursuing the ordinary business entrusted to them. *Paducah* v. *Jones,* 126 Ky. 809, 104 S. W. 971 (1907). Other jurisdictions have further extended liability, even where the violations were committed in the master's absence, and without his knowledge or consent. *People* v. *Roby, supra; Reismier* v. *State,* 148 Wis. 593, 135 N. W. 153 (1912). Liability has similarly been imposed where the act was contrary to express instructions of the principal. If an agent is left to conduct a liquor business, and he infringes any law or statute, his principal is responsible even though such agent acted contrary to his principal's direct commands. *Carrol* v. *State,* 63 Md. 551, 3 Atl. 29 (1885); *Riley* v. *State,* 43 Miss. 397 (1870); *State* v. *Gilmore, supra.* But, in *Steinkuhler* v. *State,* 100 Neb. 95, 158 N. W. 437 (1916), it was held that in sales of intoxicating liquors to minors, although the owner of the saloon is responsible for acts of his servants, and a sale by a servant is, in law, a sale made by the saloon-keeper himself, nevertheless, where the sale is consummated in the defendant's absence, and in violation of his orders, and without his authority, the master is held free from criminal prosecution.

Where courts have held that absolute liability is imposed on the employer, they have expressed justification for such a strict rule in similar terms to the following extract from *O'Donnell* v. *Commissioner,* 108 Va. 882, 890, 62 S. E. 373, 376 (1908): "The cases which hold that a principal is bound for the acts of his agent, done not only without his authority, but in violation of his instructions in the making of the sale of ardent spirits, constitute an exception to the general rule, that the doctrine of *respondeat superior* does not apply to criminal cases; and . . . the doctrine is based upon the postulate that a man who engages in this business as a licensee of the state engages in it at his peril, and must see to it that the requirements of the law are rigidly complied with, and is responsible for any failure of any agent of his to comply with those requirements.

Recognizing the fact that in general, governments aim to protect women and minors, and to accomplish such end, have so legislated as to make it an offense to sell liquors to minors, nevertheless, the rule seems too harsh to hold, as in the principal case, that an employer is liable for a sale by his servant even though it was made in his absence and without his consent, and contrary to his instructions. As stated in *Commissioner* v. *Stevens,* 153 Mass. 421, 26 N. E. 992 (1891), it is carrying the doctrine of criminal responsibility too far to convict one for an innocent mistake by his clerk, where the principal sincerely and honestly intended that his instructions be followed in good faith, and he was not negligent in the selection of his clerks, nor in the precautions which he prescribed for their guidance.

MARVIN S. FENCHEL.

HABEAS CORPUS — UNCORROBORATED TESTIMONY IN PROSECUTION FOR RAPE OF AN INSANE FEMALE.— [Wisconsin] Defendant was arrested on a charge of having ravished a female over sixteen years of age, by force and against her will. When the prosecutrix was sworn, counsel for the defendant objected to her competency on the ground that she was of such limited intelligence and suffering from such insane delusions and hallucinations as to be incompetent as a witness. At the preliminary examination the prosecutrix showed a "lack of capacity to recollect and to narrate the facts" of the transaction, as well as a "failure to understand and appreciate her obligations as a witness." Her testimony, if admitted, did not show rape by force, but defendant could have been bound over and charged with committing fornication with a female who was insane—Wis. Stat. (1935), sec. 351.06. The court held that the prosecutrix was wholly incompetent as a witness, and since there was no other evidence warranting the holding of defendant for trial, the trial court was in error in refusing a writ of *habeas corpus*. *Hancock* v. *Hallman*, 281 N. W. 703 (1938).

The court assumed its duty on *habeas corpus* to examine the evidence and treated the examining magistrate as outside of his jurisdiction since no competent evidence was found upon which he could properly have acted. Because the preliminary examination is statutory and special, evidence tending to establish the facts justifying a commitment, or holding to bail for trial, is jurisdictional like any other statutory essential. *State ex rel. Durner* v. *Huegin*, 110 Wis. 189, 85 N. W. 1046 (1901). See also *Ex parte Bollman*, 8 U. S. 75 (1807).

The Wisconsin statute under which defendant might have been held (sec. 351.06) is an outgrowth of the crime of rape by force. Under earlier Wisconsin law and in other jurisdictions, defendant would have been charged with rape by force; the force being implied from the victim's lack of ability to give consent. *Whitaker* v. *State*, 50 Wis. 518, 7 N. W. 431 (1880). Wharton, *Crim. Law* (12th Ed. 1931), sec. 704.

Prosecution for rape on the basis of uncorroborated testimony of the accusing female has always presented a difficult problem for the courts. 26 J. Crim. L. 463. The act of intercourse almost always takes place in such secrecy that it is impossible to present other persons who knew of the circumstances or who witnessed the act. 1 Hale P. C. 634. The closest witness whom the prosecution was able to present in the principal case was a mail carrier: prosecutrix got out of defendant's car to take the mail from him and then got back in. In *Rice* v. *State*, 195 Wis. 181, 217 N. W. 697 (1928), for example, a twelve year old girl claimed to have had intercourse with defendant near an open highway during the daylight. The court in reversing the conviction said, "Sex crimes, even by depraved criminals, are crimes of seclusion and secrecy." For this reason the courts will not sustain such convictions unless the testimony and surrounding circumstances are clear and decisive. *Cleveland* v. *State*, 211 Wis. 565, 248 N. W. 408 (1933). Where the evidence of the prosecuting witness bears upon its face evidence of unreliability, to sustain a conviction there should

be corroboration by other evidence as to the principal facts relied on to constitute the crime. *O'Boyle* v. *State,* 100 Wis. 296, 75 N. W. 989 (1898). In the principal case a physician who made an examination a few hours after the alleged incident testified that although prosecutrix had suffered an internal injury at one time, it could not have occurred such a short time before. He said that there might have been some penetration, however. This rule requiring corroboration has special significance where the prosecutrix is a person of feeble mind. *Donovan* v. *State,* 140 Wis. 570, 122 N. W. 1022 (1909). In the principal case the prosecutrix was not able to give her correct age and was able to tell her story only through leading questions.

Thus, it can be seen how difficult the problem is rendered when the uncorroborated prosecutrix is feebleminded or insane. Even up into the nineteenth century such persons, except for lunatics during lucid intervals, were totally barred from acting as witnesses. A superstition prevailed which branded them as the objects of divine wrath. Wigmore, *Evidence,* sec. 492. They were one of the classes listed by Lord Coke as being barred from giving testimony. *Co. Litt.* 6b. At first there seems to have been some tendency on the part of our state courts to follow this inflexible rule of exclusion. *Livingston* v. *Kiersted,* 10 Johns. (N. Y.) 362 (1813), *Armstrong* v. *Timmons,* 3 Harr. (Del.) 342 (1841), *Phebe et al.* v. *Prince et al.,* 1 Miss. 131 (1822) obiter.

As a result of the scientific advancement of the nineteenth century this superstition was overthrown. In 1851 in *Regina* v. *Hill,* 2 Den. & P. C. 244, a patient at a lunatic asylum suffering under a delusion that spirits were talking to him was allowed to testify as to the killing of a fellow patient. Lord Campbell, C. J., said that "The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath?" This modern doctrine was expressly followed by the United States Supreme Court in *District of Columbia* v. *Armes,* 107 U. S. 519 (1882). Almost with unanimity the various state courts seem to have adopted the view against automatic exclusion. Wigmore, *op. cit.,* Note 26 A. L. R. 1491, *Kendall* v. *May,* 92 Mass. 59 (1865), *Holcomb* v. *Holcomb,* 28 Conn. 177, (1859) *Burns* v. *State,* 145 Wis. 373, 128 N. W. 987 (1911). An elaboration of the view may be found in *State* v. *Brown et al.,* 2 Marvel (Del.) 380, 36 Atl. 458 (1896), where the court refused to accept a certificate of admission to an insane, asylum as a *prima facie* presumption of insanity to make a witness incompetent to testify.

The question of competency is clearly one of law to be determined by the court and in that determination it may be found proper to call other witnesses to testify. *District of Columbia* v. *Armes, supra.* In the principal case the mother of prosecutrix testified that her daughter had to be helped in such simple tasks as dressing and eating. The question of competency of a witness should be disposed of as soon as it arises and before the witness is allowed to testify to the facts in issue. *Weeks* v. *State,* 126 Md. 223, 94 Atl. 774 (1915). However, mental infirmity ordinarily goes to the weight of the witness' evidence, not to competency to

testify, unless the impairment is substantially total or such as to render the person wholly unconscious of the obligations of an oath. *Burns* v. *State, supra.* In the principal case the attempt to elicit from the prosecutrix an expression of any clear sense of moral responsibility was futile.

The situation presented in the principal case is not a new one in American criminal law but the question of the prosecutrix's competency seems to have been discussed mainly on appeal from conviction rather than on appeal from a refusal to allow a writ of *habeas corpus.* Thus, in an early New York case, *People* v. *McGee,* 1 Denio. 19 (1845), defendant had been convicted of the rape of a thirty year old imbecile who was able to communicate only by signs. Other witnesses had been allowed to tell of her communications made immediately after the alleged episode, but the prosecutrix did not testify because it was thought that she did not have sufficient intelligence to be examined as a witness. In the face of other convincing evidence, the court was forced to invoke the rule against hearsay and reverse the conviction.

As in the principal case, however, the prosecution seems to have usually presented the offended female as a witness in spite of her mental infirmity. With the possible exception of Texas, the courts seem to hold that if the prosecutrix has sufficient understanding to appreciate the nature and obligation of an oath and sufficient capacity to observe and describe correctly the facts in regard to which she is called to testify, there is no reason why her testimony should be excluded. 26 A. L. R. 1491. The fact that the indictment alleges that the female is of unsound mind does not *per se* establish her incompetency. *State* v. *Simes,* 12 Idaho 310, 85 Pac. 914 (1906); *People* v. *Perry,* 26 Cal. App. 143, 146 Pac. 44 (1914); *State* v. *Prokosch,* 152 Minn. 86, 187 N. W. 971 (1922); *State* v. *Leonard,* 60 S. D. 144, 244 N. W. 88 (1932); *Beard* v. *State,* 37 Okla. Cr. 62, 256 Pac. 354 (1927); *Wilkinson* v. *People,* 86 Colo. 406, 282 Pac. 257 (1929).

Several states have a statutory prohibition against insane persons testifying but such statutes have been construed to follow the general rule of *Regina* v. *Hill. Pittsburgh & W. R. Co.* v. *Thompson,* 82 Fed. 720 (1897), *State* v. *Simes, supra.* Wisconsin has no such positive statutory prohibition, but on the contrary has a statute which codifies the rule of *Regina* v. *Hill.* Wis. Stat. (1938) sec. 325.30.

The rule seems to be different under a Texas criminal statute which says that "Insane persons are not competent to testify, etc." Vernon's Code of Crim. Proc., Art. 768. The broad rule of automatic exclusion was set out in *Lee* v. *State,* 43 Tex. Cr. 285, 64 S. W. 1047 (1901), where because the indictment set out the insanity of the prosecutrix she was held not to be a competent witness. The harshness of any such rule is demonstrated by a statement of the Texas court itself in reversing the conviction of a defendant who had been charged with rape on an insane negro woman by actual force. The court said that the facts "all tend to show most conclusively and almost beyond a doubt that she had indeed been ravished as she stated that she had; and if, under our law, she be held a competent witness under any circumstances, we would feel warranted in concluding from

the record, as it is shown to us, that the defendant's guilt was fully established by the evidence." *Lopez* v. *State*, 30 Tex. App. 487, 17 S. W. 1058 (1891) The Texas court itself shows a tendency to restrict the rule. See *Hubbard* v. *State*, 66 Tex. Cr. Rep. 378, 147 S. W. 260 (1912).

It is submitted that the flexible test as to competency of *Regina* v. *Hill* which the Wisconsin court has applied is the only one compatible with modern understanding of mental impairment. It must be pointed out, however, that the principal case is somewhat unusual in two respects: first, rather than totally excluding her, the feebleminded or insane witness is usually allowed to testify before a jury who may take her story for what it is worth; that is, her mental infirmity usually goes to her credibility rather than to her competence as a witness. And secondly, courts of appeal are generally reluctant to judge the real character or degree of intelligence of a witness from mere paper evidence. The judge or examining magistrate who comes face to face with the witnesses has a superior means to evaluate their testimony. *New York Evening Post Co.* v. *Chaloner*, 265 Fed. 204; writ of certiorari dismissed, 252 U. S. 591 (1920).

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