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NOTES.

INDICTMENT AND INFORMATION—SUFFICIENCY AND CERTAINTY OF INFORMATION IN LANGUAGE OF STATUTE.—A statute of the state of Utah (Sess. Laws, 1911, c. 108) provides that "any person who shall by promises, threats, violence, or by any device or scheme, cause, induce, persuade, encourage, inveigle or entice an inmate of a house of prostitution or place of assignation to remain therein as such inmate" is guilty of the crime of pandering. An information based upon this statute charged that the defendant "did then and there wilfully, unlawfully and feloniously by promises and threats and by divers devices and schemes, cause, induce, persuade and encourage" a certain named female, "being then and there an inmate of a certain" designated "house of prostitution to remain therein as such inmate." The defendant, being convicted, appealed assigning for error the overruling of a demurrer to the information and a motion in arrest of judgment. The appellate court held that the information was insufficient and uncertain because it did not set forth the facts and circumstances constituting the promises

and threats, devices and schemes by which the female was induced to remain an inmate.[1] It is the purpose of this note to discuss the law underlying this decision.

There are numerous reasons for the rule requiring particularity in the charges of an indictment, and whether or not the indictment particularizes sufficiently to answer the purposes enumerated is the test of its sufficiency. Without setting forth the various reasons given by the text writers[2] and the cases[3] it is submitted that an indictment which gives such notice to the defendant that he is informed of the nature and cause of the accusation against him and may prepare his defense thereto both in respect to the law and the facts is sufficient to serve all the other purposes for which the charging part is designed. Thus an indictment fulfilling this requirement, surely identifies the charge to such an extent that the record of conviction or acquittal may be pleaded in a subsequent prosecution for the same offense, and to give the judge such information that he may apply the law correctly. Therefore, the test of the sufficiency of the charging part of an indictment is whether it gives the defendant such notice that he may prepare his defense.

This test applies alike to common law and to statutory offenses. Standard forms of indictment for common law offenses have been formulated which comply with the requirement above stated. Such forms developed contemporaneously with the offenses themselves, but when the legislature makes criminal an act heretofore not penal, the first indictment drawn under the act has no precedent. Many penal acts so specify the acts which are made criminal that an indictment following the words of the statute and setting out that the defendant did the prohibited acts at a certain time and place is sufficient to give the defendant the requisite notice.[4] Other criminal statutes use words of a general and comprehensive meaning or words with a peculiar legal significance, in which case an indictment following the exact words of the statute fails in the above requirement.[5]

A statute may penalize the doing of any one of a number of acts of a similar nature looking toward the same illegal end. There is but little difference of opinion in one particular in regard to the sufficiency and certainty of indictments under such acts. The cases hold that it is proper to charge the doing of any number of the prohibited acts in a single count, since the doing of any one, any number or all of the prohibited acts constitutes but a single offense.

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[1] State v. Topham, 123 Pac. Rep. 888 (Utah, 1912).

[2] Joyce on Indictments, Sec. 242.

[3] Wingard v. State, 13 Ga. 396 (1853).

[4] Holman v. State, 90 S. W. Rep. 174 (Tex. 1905); State v. Holedger, 15 Wash. 443 (1896); State v. Beebe, 53 So. Rep. 730 (La. 1910), but see People v. Perales, 141 Cal. 581 (1904).

[5] United States v. Cruickshank, 92 W. S. 542 (1875); Young v. State, 60 S. W. Rep. 767 (Tex. 1901); Bickel v. State, 32 Ind. App. 656 (1903).

The pleader must be careful, however, to charge the acts conjunctively. Thus it is proper to charge that the defendant did sell, barter, give away, *and* otherwise furnish intoxicating liquors;[6] whereas it would be held to be duplicitous, uncertain and vague to charge that the defendant did sell, barter, give away *or* otherwise furnish intoxicating liquors.[7] Now under the first charge, the defendant could be convicted upon proof that he did any one of the acts charged,[8] nor would he know until the trial which one the state would attempt to prove against him. It is therefore difficult to see that the indictment which charged the acts disjunctively gives the defendant any less notice than the one which charged him conjunctively, but such is the law. If it is not permissible to state such charges disjunctively, the mistake should be taken to be one merely of form to be cured by amendment at any time. The principal case states the charges conjunctively and so is not to be attacked on those grounds.

If the decision in the principal case is proper it is to be sustained on the grounds that the statute uses words and phrases of a general and comprehensive meaning and of a peculiar legal significance. A brief analysis of the cases would seem to support the decision, although the case is on the border line. In United States vs. Hess[9] the devising of any "artifice or scheme to defraud" through the use of the mails was prohibited by statute, and it was held that the device or scheme should be set out in detail in the indictment. It would follow that the scheme to induce this inmate to remain should have been set out. There was, however, another element in United States vs. Hess, namely, that it was a scheme "to defraud," and it is a general rule that where fraud is an essential element in the offense, the facts and circumstances constituting the fraud must be set out,[10] the reason being that fraud in law has a precise significance somewhat different from fraud in common understanding. There is no allegation of fraud in the information under discussion, nor in the statute under which the information was drawn, but we do find the words "threats" and "promises." Now in legal contemplation, these words "promises" and "threats" have a slightly different meaning from their ordinary significance. To come within the reach of the law promises and threats must be such as would be reasonably calculated to effectuate the desired purpose. In ordinary language, a promise is a promise, and a threat a threat whether an ordinary person would act thereon or not. In the last analysis

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[6] Hayes v. State, 111 Pac. Rep. 1020 (Okla. 1910); Regardanz v. State, 86 N. E. Rep. 449 (Ind. 1908); State v. Schleuter, 110 Mo. App. 7 (1904).

[7] Thompson v. State, 37 Ark. 408 (1881); but see U. S. v. D. L. & W. R. R. 152 Fed. 269 (1907).

[8] State v. Holedger, 15 Wash. 443 (1896).

[9] 124 U. S. 483 (1888).

[10] State v. Farmer, 104 N. C. 887 (1889); People v. Klippel, 160 N. Y. 371 (1899).

the correctness of the decision depends on whether the legislature intended to restrict these words to their legal significance, or to apply them in their ordinary meaning. Since the statute in question is a highly penal statute under which the judge might sentence to twenty years imprisonment, it would seem that the words should be restricted to their legal significance, and the case is therefore correct.

L. P. S.

JUDGMENTS BY CONFESSION—WHEN A POWER OF ATTORNEY TO CONFESS JUDGMENT IS *Functus Officio*.—In Borough of Bellevue vs. Hallett,[1] the grantee of a power of attorney to confess judgment proceeded to have judgment entered. He filed a statement of claim but neglected to file a formal confession of judgment. For this reason the judgment was subsequently stricken off upon motion. A second judgment was then filed, regular in every particular. But upon a motion to strike off, this judgment was also nullified on the ground that the entry of the first judgment, despite its irregularity, was an exhaustion of the power of attorney: " . . . this court, after argument and due consideration, made absolute the rule to strike off the first judgment. . . . True, this was done because of irregularities appearing on the face of the record; but the power authorized by the warrant had nevertheless been exhausted. We cannot breathe into it the breath of life, in view of the unbroken line of decisions sustaining this construction . . . " On appeal the Supreme Court of Pennsylvania in a short *per curiam* opinion, affirmed the rules of the trial court.

The courts are unanimously of opinion that after a valid judgment has been confessed under a power of attorney, the power is *functus officio*. Accordingly where judgment has been entered in one state under a power of attorney, it cannot subsequently be entered in another state on the same warrant.[2] Even "if the warrant had been to confess a judgment or judgments, in the plural, it seems that a second judgment could not be entered until the first judgment had been reversed or set aside." And in a number of Pennsylvania cases it has been determined that after a warrant has been exercised by a confession of judgment in one county, a subsequent judgment cannot be entered under the same power in another county.[3] Similarly it was held in Campbell vs. Canon [4] that where a year and a day was allowed to elapse without execution upon a judgment by confession, a second judgment could not be entered

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[1] 83 Atl. Rep. (Penna. 1912).

[2] Manufacturers and Mechanics' Bank v. Cowden *et al.*, 3 Hill (N. Y.) 461 (1842).

[3] Livezly v. Pennock, 2 Browne 321 (1813); Ely v. Karmany, 23 Pa. 314 (1854); Ulrich v. Voneida, 1 P. and W. 245 (1830); Martin v. Rex, 6 Sergeant and Rawle 296 (1820); Neff v. Barr, 14 S. and R. 166 (1826).

[4] Addison (Pa.) 267 (1795).

under the same power of attorney, even though the first judgment could be revived by a *scire facias*. The "warrant of attorney authorized the entry of only one judgment, and was satisfied by the entry of the first judgment." Likewise after judgment has been recovered before a justice of the peace on a judgment note, the warrant of attorney therein is *functus officio*, and no judgment can be entered thereon in the common pleas.[5] And obviously, where a judgment in one county is but a transcript of the record of a judgment by confession in another, the two judgments fall together when the original judgment is stricken off.[6]

On the other hand it has been held in a Delaware case[7] that an attempt to enter judgment under a warrant of attorney in the name of the obligee in a bond several terms of court after his death, was so utterly inconsistent with the power conferred that it must be considered "a total failure to execute the warrant, and an absolute nullity in the contemplation of law." Accordingly a subsequent judgment, entered in the name of the obligee's administrator, was allowed to stand. And there can be no doubt that where an entry of judgment is absolutely void, it has not exhausted the power of attorney authorizing it.

The cases which cannot be so readily justified have arisen where the power of attorney was irregularly exercised and therefore voidable as against the grantor of the power. Can a second judgment be entered under the same power after the first judgment has been set aside? The Pennsylvania courts have answered this question negatively. In Osterhout vs. Briggs[8] it was held that where judgment on a judgment note is irregular because of its premature entry, the power of attorney is nevertheless *functus officio*. A second judgment, regularly entered, will therefore be stricken off together with the premature judgment. The first judgment "it is true was irregular and voidable at the instance of the defendant only, but it was not absolutely void, and as against parties other than the defendants, it was not even voidable." And in Philadelphia vs. Johnson[9], in which similar facts were before the court, Judge Smith of the Superior Court said: "A power exists in law only for some purpose, and when fully executed by the accomplishment of its purpose it is exhausted. The authority given by it ends when nothing remains to be done in pursuance of it. It may even be exhausted without being executed, when its purpose has been otherwise accomplished." And again: "It was not a case of an imperfect execution of the power, but of a perfect execution, with its

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[5] Dixon v. Miller, 20 Pa. C. C. 335 (1897).

[6] Banning v. Taylor, 24 Pa. 297 (1855).

[7] Guyer's Administrator v. Guyer, 6 Houst. 431 (1880). *Accord:* Kellerman v. Kerst, Phila. C. P. No. 2, Dec. T. 1900, 634, unreported.

[8] 37 Sup. Ct. 169 (1908).

[9] 23 Sup. Ct. 591 (1903), affirmed *per curiam* in 208 Pa. 645 (1904).

effect liable to be defeated through matters not entering into the act of execution." [10]

Whether or not the argument in these cases, and the conclusion which it compels, are sound, depends entirely upon the nature and purpose of a power of attorney to confess judgment. If by giving such a power, the grantor merely endows his attorney with the privilege of perfunctorily executing certain formalities, there can be no difference of opinion with reference to the court's conclusion that, once the formalities have been accomplished, however barren of result, the power has been exhausted. Moreover, if this is the true purpose of a power of attorney to confess judgment, there can be no distinction between a void execution, and an execution merely voidable. For in both instances the outward forms have been executed. But it is difficult to believe that the parties to a warrant of attorney ever regard it as no more than a grant of the right to execute certain formal technicalities. It is submitted that the grantor of a power of attorney to confess judgment intends to enable his grantee to avail himself of a substantial, not merely a formal, remedy against him without a court trial. That being true, how can the power be said to be *functus officio* until a judgment of full validity has been entered against the grantor of the power? Accepting Judge Smith's statement that "The authority given by it ends when nothing remains to be done in pursuance of it," can it be said that nothing remains to be done until a judgment, regular in every particular, has been entered? Indeed it would seem that the reasoning in the Pennsylvania cases cited cannot be sustained if judgments by confession are not to be deemed wholly artificial in the eyes of the law. Certainly form and substance are not given the relative importance which modern legal thought accords them.

What has been said applies in cases where the first judgment is voidable as against the defendant only, as in Osterhout vs. Briggs and Philadelphia vs. Johnson, *supra*. But its force is even more patent in the principal case where the judgment was wholly irregular as well against third parties as against the grantor of the power.[11]

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[10] See also Commonwealth v. Massi, 225 Pa. 548 (1909) in which Philadelphia v. Johnson, *supra*, and Osterhout v. Briggs, *supra*, are re-affirmed in an opinion by Mr. Justice Potter.

[11] That this is probably the law seems a reasonable deduction from the cases. Weaver v. McDevitt, 21 Sup. Ct. 597 (1902) presents the necessity of having a formal confession on the record. See also Lytle v. Colts, 27 Pa. 193 (1856). In Summy v. Hiestand, 65 Pa. 300 (1870) Judge Sharswood points out that the mere failure to enter a judgment on the record "May perhaps endanger the lien of it as to third persons; but as between the parties there is a valid final judgment of record." But in the principal case, the Supreme Court apparently aproved the lower court's action in striking off the judgment at the instance of the defendant for the reason that the formal confession had not been entered up. Hence failure to enter the judgment would appear to stamp it as irregular as against all parties concerned.

The view taken in this note is substantiated by the Supreme Court of Iowa in Huner vs. Doolittle.[12] The reversal of the first decree, it was held, "placed the case and the rights of the parties the same as if the first decree had not been rendered. The intention of the power had not been carried out, consequently the object was not accomplished, and the authority was not exhausted by the first act." And a similar opinion was intimated by Judge Washington, sitting in the United States Circuit Court, in Fairchild vs. Camac.[13]

Much may be said against the desirability of permitting judgments by confession to be entered under powers of attorney in any case. Indeed in England today the practice of taking judgment in this way is almost obsolete.[14] But where the practice still prevails, there is scant justification for a rule of law which permits the intention of the parties to be defeated by a barren technicality.

W. A. S.

LEGAL ETHICS.—The following questions were recently answered by the New York County Lawyers' Association Committee on Legal Ethics:

I. QUESTION:

Is it proper professional conduct for attorneys to solicit employment by the use of literature such as that annexed hereto?

"Dear Sir:

We submit to you herewith a form Retainer setting forth the plan under which we are employed as attorneys and general counsel by many large and small firms and corporations.

We would appreciate the privilege of an appointment with you at your office or ours, to explain the moderate terms and the advantages of this arrangement.

Yours very truly,

.....

RETAINER.

Dear Sirs:

We hereby retain you as our attorneys and general counsel in New York City in connection with any and all legal matters which we may refer to you, for the term of years from the date hereof, at an annual compensation for all legal services hereunder of
dollars ($), payable in equal quarterly installments at the end of each quarter-year.

We understand that within the term hereof we are to have the right to call upon you for all legal services of every kind and nature in and about our regular business, including all matters of litigation and negotiation, and we are to have the privilege of consultation and advice at all reasonable times.

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[12] 3 Greene 76 (1851).

[13] 8 Fed. Cas. No. 4610; 3 Wash. C. C. 558 (1819).

[14] 18 Halsbury's "The Laws of England," 190.

In the event that any member or representative of your firm is required to leave New York City in connection with our legal business, we agree to pay you additional compensation for such service at the rate of dollars ($) per day for each day or part of a day so actually and necessarily spent outside said city.

After the expiration of the term herein limited, the arrangement herein set forth shall continue until terminated upon thirty days written notice by either party to the other.

This retainer shall take effect upon your acceptance hereof in writing.

Yours respectfully,

.....

By.....

NOTE.—We do not desire to displace by our proposition any existing satisfactory relation."

ANSWER:

RESOLVED that this method of solicitation of employment by members of the Bar is unworthy, does not conform to the ethical standards of our profession, and should be condemned.

II. QUESTION:

A v. X. A's claim is undoubtedly dishonest, but serious difficulties will be encountered by X in his defense. Y has knowledge of certain material facts and is also in possession of certain documentary evidence which, without the slightest difficulty—by simply affixing or withholding his signature—could be used to aid A or to strengthen X's defense. Y is evidently a person not affected by conscientious scruples as to the sanctity of an oath. He has a claim of $..... against S, a person closely related to A, and has made an offer to B, defendant's attorney, to withhold his signature from said papers and to testify for the defendant if his claim against S is fully paid by X. B refuses to dicker with Y and tells Y that he will have none of his offers. B feels that he is perfectly right in the matter, deeming the acceptance of such an offer absolutely and unqualifiedly unethical, immoral and dishonest.

So far, so good. But, now, what about X and his interests? Is it B's duty to divulge to him the foregoing facts, he being ignorant thereof at this time? And, if X upon learning these facts, should decide that his interests would best be served by accepting Y's offer, what attitude should B assume? Under no circumstances will B make a deal with Y, with or without instructions from X. Then, should B withdraw from the case if X does not agree with him as to the moral turpitude involved in making a deal with Y?

Further, Y being willing to aid A upon the same terms, should that fact have any weight? Would X be justified, under these circumstances, B refusing to dicker with Y, in bowing to the inevitable and committing an obviously immoral act, although probably necessary to an otherwise absolutely honest defense?

Lastly, if your Committee is of the opinion that the foregoing matter should be brought to X's attention by B, and X should accept Y's offer against B's wishes, would not B be justified in refusing further to conduct X's defense? B feels that he should not wink at such obviously nefarious and immoral conduct on Y's part and on X's possibly favorable attitude towards Y's offer. Is not B right?

Kindly treat this matter as though it were impossible to obtain evidence of the numerous crimes involved.

ANSWER:

RESOLVED that neither the interests nor instructions of clients justify their lawyers in countenancing or utilizing corrupt practices. A lawyer is under no duty to submit to his client for his decision a proposition in fraud of justice. A mere difference of view between lawyer and client does not require the lawyer to withdraw. Under the circumstances suggested, the lawyer should not assist his client to avail himself of the corrupt activities of another. If so instructed by a client who will not be persuaded in the opinion of the Committee he is justified in withdrawing from the cause.

As to the correctness of the committee's answers to the questions put, there can be no doubt. It has always been considered unprofessional to solicit practice in the manner indicated in the first question; and the committee's answer to the second problem is in accord with the views of no less an authority on legal ethics than Judge Sharswood:[1] "Counsel . . . ought to refuse to act under instructions from a client to defeat what he believes to be an honest and just claim, by insisting upon the slips of the opposite party, by sharp practice, or special pleading, in short, by any other means than a fair trial on the merits in open court. There is no professional duty, no virtual engagement with the client, which compels an advocate to resort to such measures, to secure success in any cause, just or unjust; and when so instructed, if he believes it to be intended to gain an unrighteous object, he ought to throw up the cause, and retire from all connection with it, rather than thus be a participator in other men's sins." *W. A. S.*

[1] "Legal Ethics," p. 42.