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CRIMINAL LAW AND PROCEDURE - STATUTORY CONSTRUCTION

CRIMINAL LAW AND PROCEDURE — STATUTORY CONSTRUCTION — The rule of strict construction of criminal statutes is fortified and established by innumerable cases of both recent and early vintage.[1] Chief Justice Marshall, in the leading American case of *United States v. Wiltberger*, said, "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." [2]

I.

Such a formidable array of authority as fosters this rule would lead one to believe that any inquiry into the reasons behind the principle would be of purely academic worth. But recent developments and legislative enactments which will be discussed later rebut any such belief.

Chief Justice Marshall thus stated the reasons for the rule:[3]

> "It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislative, not in the judicial department.

[1] 2 LEWIS'S SUTHERLAND, STATUTORY CONSTRUCTION, 2d ed., sec. 520 (1904); Courteen's Case, Hob. 270, 80 Eng. Repr. 416 (1618); Rex v. Peckham, Comb. 438, 90 Eng. Repr. 577 (1703); Sutherland v. Commonwealth, 109 Va. 834, 65 S. E. 15 (1909); Colvin v. State, (Ind. 1932) 180 N. E. 479. See also 59 C. J. 1113 (1932) and cases there cited.

[2] United States v. Wiltberger, 5 Wheat. (U. S.) 76 at 93, 5 L. ed. 37 (1820).

[3] United States v. Wiltberger, 5 Wheat. (U. S.) 76 at 93, 5 L. ed. 37 (1820).

It is the legislature, not the court, which is to define a crime, and ordain its punishment."

The courts seem to feel that such a rule will assure the citizen an unequivocal warning before conduct on his part can be made the occasion of a criminal conviction.[4] The "tenderness of the law for the rights of individuals" has caused many safeguards to be thrown up around the defendant in a criminal action. He is presumed to be innocent till proved guilty. It is not strange, then, that courts require that his conduct must have been clearly within the statute under which he is prosecuted. Moreover, if it is once agreed that the purpose behind the criminal law is revenge for the wrong committed, the canon of construction in question is easily acceptable.[5] No great harm can be done if the State fails to get an eye for an eye in the particular case. It is only just that he who seeks revenge should be firmly held in check and have all doubts resolved against him. And finally, an analogy may be drawn to other fields of the law. As the insurance contract [6] and the deed [7] are construed strictly against the insurer and the grantor, so the criminal statute is construed strictly against its draftsman — the State.

2.

Adherence to the rule of strict construction has often given rise to decisions which are not a little shocking and which lead one to doubt the wisdom of such a rule. A recent English case[8] involved a statute which prohibited selling " . . . any substance purporting to be cream or artificial cream as defined in this Act unless — (a) The substance is cream as defined in this Act. . . . " Defendant was prosecuted for selling as cream-filled rolls a confection filled with emulsified fat. The court discharged the defendant, saying that the act applied to a substance purporting to *be* cream and not one purporting to *contain* cream.

In the case of *McBoyle v. United States*[9] defendant was convicted of transporting a stolen airplane from Illinois into Oklahoma under the National Motor Vehicle Theft Act which defines a motor vehicle as: " . . . an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." The Court discharged McBoyle, saying that the Act covered only vehicles moving on land. The Court stressed the idea that the public is

[4] McBoyle v. United States, 283 U. S. 25, 51 Sup. Ct. 340 (1931); People v. Phyfe, 136 N. Y. 554, 32 N. E. 978 (1893).

[5] For material dealing with the purpose behind the criminal law, see WAITE, CASES ON CRIMINAL LAW AND PROCEDURE 1-13 (1931).

[6] VANCE, INSURANCE, 2d ed., 690 (1930).

[7] 18 C. J. 263 (1919) and cases there cited.

[8] Lyons & Co., Ltd. v. Keating, [1931] 2 K. B. Div. 535.

[9] 283 U. S. 25, 51 Sup. Ct. 340 (1931).

entitled to a fair warning that certain conduct is criminal before such conduct may be punished. The Court felt that McBoyle had not had ample warning from the terms of the statute above quoted.

Decisions such as those in the English case and the *McBoyle* case indicate a rather blind and unreasoned acceptance of strict construction. There was no fair ground for showing tenderness for the accused in either of these cases. A defendant could not fairly complain if he were held criminally liable for an act which he must have known to be wrong.

3.

But some courts have managed to get around the rule of strict construction when they have so desired. Such results are usually accomplished by attaching limitations to the principle or by harmonizing it with other rules of statutory construction.[10]

In an early Massachussetts case[11] the defendant was prosecuted under a statute which provided the death penalty for one who robbed while armed with a dangerous weapon with the intent to kill or maim his victim. The defendant had robbed a person, threatening him with a gun, but accomplished his purpose without doing violence. Defendant appealed from the lower court's judgment of conviction, claiming that the State must show that he had the absolute intent to kill or maim the victim at all events. The upper court denied his plea, saying that though in case a statute is capable of two constructions the one favorable to the accused should be taken, the court should not imagine ambiguity just for the purpose of being lenient to the defendant.

A statute which made it criminal to sell, give, or in any way deal or traffic in spiritous liquors to or with a minor was involved in the Wisconsin case of *Nelson v. State*.[12] Nelson sold liquor to the adult companions of a minor who in turn gave liquor to the boy who drank with them at the bar. The court held that Nelson's conduct came within the statute. The court brushed aside his claim for strict construction, saying that the rule of strict construction always permits a sensible construction having in view the purpose of the law to be construed; and that when that purpose is manifest, strict construction does not militate against any departure from the primary meaning of words which is within the scope of that purpose.

In neither the Wisconsin nor the Massachussetts case could the defendant justly complain that he was being held liable criminally for

[10] State v. Indiana and Illinois Southern R. R., 133 Ind. 69, 32 N. E. 817 (1892); Chizum v. State, (Ind. 1932) 180 N. E. 674; State v. Sibley, 131 Mo. 519, 33 S. W. 167 (1895); United States v. Bowman, 260 U. S. 94, 43 Sup. Ct. 39 (1922); Schraeder v. State, 28 Ohio App. 248, 162 N. E. 647 (1928).

[11] Commonwealth v. Martin, 17 Mass. 359 (1821).

[12] 111 Wis. 394, 87 N. W. 235 (1901).

an act which he thought proper. Nor was a substantial interest of either defendant overlooked.

4.

About one-fourth of the state legislatures have deemed it advisable *expressly* to repudiate the common law rule of strict construction.[13] Justice Paterson of the California Supreme Court, in answering the defendant's claim for strict construction, said of such a provision:[14]

> "Such is always the contention made, and too often followed; but it is no longer the rule. In former days, when the law-maker acted upon the idea that penal legislation was an important factor in shaping the morals of the people, many acts trivial in their consequences were declared criminal, and cruel punishments (whipping, and even death) were imposed on conviction of offences which are now regarded as mere misdemeanors. The courts, as conservators of the natural and inalienable rights of the citizen, found it expedient and just in the administration of the law to strictly construe the provisions of penal statutes, and to resolve every doubtful question of construction in favor of the person charged. But the reason for such a rule of construction is no longer existent, and in this state it has been repudiated by express legislative enactment."

What has been the practical effect of such statutes? In Kentucky the court said that the difference between a construction under the statutory rule and a construction under the common law rule of strict construction is, that under the liberal rule a case may come within a statute unless the language of the statute excludes it; while under the common law rule a case does not come within a statute unless the language of the statute clearly includes it.[15] Many liberal decisions have been founded on these statutory provisions, but an examination of the cases will show that they have not always served to liberalize the decision. There are many cases in jurisdictions which have such a statute in which the courts have boldly announced and affirmed the rule of strict construction, apparently wholly unmindful of the legislature's repudi-

[13] *Arizona*, Rev. Code Ariz. (1928), sec. 4477; *Arkansas*, Ark. Dig. Stat. (Crawford & Moses 1921), secs. 9728, 9729; *California*, Calif. Penal Code (Deering 1931), sec. 4; *Kentucky*, Ky. Stat. (Carroll 1930), sec. 459; *Minnesota*, Minn. Stat. (Mason 1927), sec. 9908; *Montana*, Mont. Rev. Code (Choate 1921), sec. 10710; *Nebraska*, Neb. Comp. Stat. (1929), sec. 29-106; *New York*, N. Y. Ann. Cons. Laws (McKinney 1917), c. 39, sec. 21; *North Dakota*, N. D. Comp. Laws (1913), sec. 9201; *Oregon*, Ore. Ann. Code (1930), sec. 14-1043; *Texas*, Penal Code (1928), art. 7; *Utah*, Utah Comp. Laws (1917), sec. 7892.

[14] People v. Fowler, 88 Cal. 136 at 139, 25 Pac. 1110 (1891).

[15] Lyons v. Hodgen and Miller, 10 KY. L. REP. 271 (1888).

ation of the rule.[16] In many instances these statements were dictum and had no real bearing on the decision; but there are cases where results in conformity with the old rule have been reached because the court ignored the statute.

In *McCall v. State*,[17] the Arizona court failed to mention the liberal construction statute and held that a statute which prohibited conducting "any banking or percentage game whatsoever played with cards, dice, or any other device" did not cover the operation of a parimutuel machine at horse races. Franklin, J., dissenting, cited the construction provision in his argument.

In a later case[18] the Arizona court noticed the provision but managed to reach what appears to be a strict construction of the statute involved. The defendant in that case had secretly placed a dictaphone over the transom of a hotel room in order to get a record of the telephone conversations of the occupant of the room. He was prosecuted under a statute which provided: "Every person who, by means of any machine, instrument or contrivance, or in any other manner willfully and fraudulently reads, or attempts to read, any message, or to learn the contents thereof, while the same is being sent over any telegraph or telephone line . . . is punishable. . . . " The court held that defendant's conduct did not come within the statute since the message was not *on the line* when his device recorded it. The court said that the liberal construction provision cannot be used to include all cognate and related acts in addition to those actually condemned since there can be no crime by implication just because it is within the reason and policy of the statute.

A recent California case[19] seems to have construed the California statute so as partially to nullify its effect. The defendant serving as a receiver converted funds to his own use. He was indicted under a statute providing for punishment of public officers who convert public funds to their own use. Public funds were defined by statute as funds held by a public officer in his official capacity, so whether or not defendant came within the statute turned solely on whether or not a receiver is a public officer. The court mentioned authorities holding that a receiver is a public officer. There is California authority which holds that

[16] St. L. I. M. & S. Ry. v. State, 125 Ark. 40, 187 S. W. 1064 (1916); Ex parte Kohler, 74 Cal. 38, 15 Pac. 436 (1887); State v. Bowker, 63 Mont. 1, 205 Pac. 961 (1922); Preston v. State, 106 Neb. 848, 184 N. W. 925 (1921); Lane v. State, 120 Neb. 302, 232 N. W. 96 (1930); Weber v. State, 122 Neb. 369, 240 N. W. 429 (1932); People v. Liberty Light & Power Co., 121 Misc. 424, 201 N. Y. S. 302 (1923); People v. Lowe, 209 App. Div. 498, 205 N. Y. S. 77 (1924); Ratcliff v. State, 106 Tex. Cr. 37, 289 S. W. 1072 (1926).

[17] 18 Ariz. 408, 161 Pac. 893 (1916).

[18] State v. Behringer, 19 Ariz. 502, 172 Pac. 660 (1918).

[19] People v. Showalter, (Cal. App. 1932) 14 Pac. (2d) 1034.

a receiver is at least an officer of the court.[20] With this background the court might easily have held that a receiver is a public officer and thus the defendant's conduct would have come within the criminal statute. One might even say that that result should be expected of a court in a State whose legislature has provided for liberal construction. But the court took the opposite view. It said:[21]

> "As affects criminal statutes, the policy of the law is to make plain that which is intended to constitute an infraction of its provisions. Where the language employed is ambiguous or doubtful in its intent, a construction of the statute should always be favorable, rather than unfavorable, to any person accused of a violation of the law. In other words, although the common-law rule that penal statutes be strictly construed has no application to the provisions contained in the Penal Code, nevertheless a criminal statute should be construed according to the fair import of its terms."

Of course a construction according to the fair import of the terms of the law is to be desired. But if all ambiguities and doubts are to be resolved in favor of the accused, has the court not repudiated the provision in the code for liberal construction? It seems that the proper office of a rule of construction is to help solve ambiguities. The California Legislature has provided liberal construction as an aid to the courts in solving ambiguities. It would seem to follow, then, that ambiguities should not generally be resolved indiscriminately in favor of the accused.

5.

The above observations lead us to conclude that the sort of treatment penal statutes are to be accorded depends solely on the judicial mind, and any real abrogation of the rule of strict construction must emanate from that source. So it seems that the problem resolves itself into an inquiry as to what sort of construction is desirable. It is submitted that the principle of strict construction has outlived its usefulness. The need now is rather for liberal construction. As Justice Paterson said in the quotation above set forth, much of the reason behind the old rule has disappeared. The change which has come about in the criminal law, procedural and substantive, and the change in the treatment of criminals would seem to do away with the need for the courts to be over-zealous to protect the accused. In this day of "Crime Inc." it may reasonably be said that the public welfare will be better served by an effort on the part of the courts to eliminate the so-called technical acquittals which so astound the layman. The clever criminal lawyer

[20] Kreling v. Kreling, 118 Cal. 421, 150 Pac. 549 (1897).
[21] People v. Showalter, (Cal. App. 1932) 14 Pac. (2d) 1034 at 1035.

has distorted bona fide safeguards into convenient loopholes. The idea of giving the individual a fair warning is not objectionable. But it is here suggested that in most cases the statutes do give a fair warning, notwithstanding the decisions to the contrary. At least in cases of conduct which the actor must know to be wrong, one might reasonably question the necessity of a statutory warning; if the defendant's conduct is so nearly identical with that prohibited by the statute as to raise a serious question of construction, the chances are that the defendant is an anti-social individual from whom society needs protection.

J. I. L.