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Criminal Law and Procedure - Unconstitutionality of Statutes

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tended by analogy so as to create crimes not provided for herein," the court concluded, "it would definitely appear that the Criminal Code does not provide for a combination of inchoate offenses resulting in such a crime as an attempt to conspire to commit simple burglary."[5]

While recognizing the general rule that one who has been tried in a court of competent jurisdiction cannot, without having appealed from the judgment of the lower court, be released from custody by habeas corpus,[6] the court held that such relief is available where the sentence imposed is for a non-existent crime. "Such a sentence obviously deprives the accused of his liberty without any basis or color of authority and without due process of law. . . . no court has jurisdiction to commit a person for the doing of an act which is not an offense under the law and for which the law does not direct that he be committed. In doing so the court acts without *Jurisdiction Ratione Materiae* and its action is *wholly void*. . . . the remedy of one committed under such a sentence is by habeas corpus."[7] (Italics supplied.)

The *Duhon* case has thus settled our jurisprudence on two novel, important issues. First, the inchoate offenses in Chapter V of the criminal code are to be applied separately to the various basic offenses of that code and other criminal statutes; second, the remedy of habeas corpus will lie for one convicted of a non-existent crime, even if there is a failure to exhaust the usual remedies in the trial court.[8]

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CRIMINAL LAW AND PROCEDURE—CONSTITUTIONAL LAW—UNCONSTITUTIONALITY OF STATUTES—Defendant was prosecuted under Article 106(2) of the Louisiana Criminal Code of 1942 "for having in his possession with intent to display an indecent print and movie film." *Held*, the obscenity article was so vague that it vio-

5. Opinion of Holcombe, J., p. 2.

6. State ex rel. Williams v. Klock, 45 La. Ann. 316, 12 So. 307 (1893); State ex rel. Cayard, 52 La. Ann. 4, 26 So. 773 (1899); State v. Conradi, 130 La. 701, 58 So. 515 (1912).

7. State of Louisiana ex rel. Clarence Duhon v. General Manager, Louisiana State Penitentiary, Nineteenth Judicial Court, Docket Number 29,390.

8. Harlan v. McGourin, 218 U. S. 442, 31 S.Ct. 44, 54 L.Ed. 1101 (1910), holding that the remedy of habeas corpus was available for one who was convicted at an unauthorized term of court; State v. Bush, 12 Ala. App. 309, 68 So. 492 (1915), holding that one held under a void warrant of arrest should be released by habeas corpus; Commonwealth v. Frances, 61 Pa. Super. 445 (1915), where such a remedy was held available to one sentenced to the penitentiary for an offense not punishable by confinement therein; Manning v. Biddle, 14 F.(2d) 518 (C.C.A. 8th, 1926), where the accused was discharged for the reason that he had been convicted and sentenced for an offense which the court held did not exist.

lated Article I, Section 10, of the Louisiana Constitution[1] in that it failed to apprise the defendant of the exact line between criminal and non-criminal conduct. *State v. Kraft*, 37 So.(2d) 815 (La. 1948).

The courts, in Louisiana and elsewhere, have said that a criminal statute must serve a dual function—that is, to notify the persons subject to it of the conduct that will be considered criminal and to serve as a guide for the adjudicative process. In testing a statute for certainty, the courts determine if it is sufficiently definite to meet these two requirements.[2] A failure to give sufficient notice will result in violation of both the Federal and State Constitutions.[3] When the language of a statute is too uncertain to provide a comparatively definite guide for judicial decision, the courts have held that it constitutes an invalid delegation of the legislative function to the judiciary.

The Louisiana Supreme Court has recently had occasion to consider attacks made on the constitutionality of certain articles of the Criminal Code employing such broad language in defining crimes. In *State v. Truby*[4] the words "immoral purpose" were held to be so vague and indefinite that they permitted the trial court to formulate its own definition of what constitutes keeping a "disorderly house."[5] The phrase "to perform any immoral act" was held to be an inadequate definition of "contributing to the delinquency of minors"[6] in *State v. Vallery*.[7] In two precode cases, similar language was held to be too indefinite.[8] This does not mean, however, that crimes can be defined only by a verbose, detailed enumeration of all the specific ways in which the offense may be committed. Broad language, if sufficiently definite and certain, has been upheld in morality laws both before and

1. "In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusations against him."

2. See Note (1948) 62 Harv. L. Rev. 77 for a good discussion of the factors that vary the degree of necessary certainty.

3. U.S. Const. Amend. XIV (due process clause); La. Const. of 1921, Art. I, § 10.

4. 211 La. 178, 29 So.(2d) 758 (1947), discussed in (1947) 8 LOUISIANA LAW REVIEW 129.

5. Art. 104, La. Crim. Code of 1942: "Keeping a Disorderly Place is the intentional maintaining of a place to be used habitually for any illegal or immoral purpose."

6. Art. 92(7), La. Crim. Code of 1942: "Perform any immoral act; . . . ."

7. 212 La. 1095, 34 So.(2d) 329 (1948).

8. In State v. Comeaux, 131 La. 930, 60 So. 620 (1913), the words "indecent assault," as used in La. Act 202 of 1912, were held too indefinite and vague to constitute a crime. City of Shreveport v. Wilson, 145 La. 906, 83 So. 186 (1919), held that the words "lewd or indecent act" in a Shreveport ordinance prohibiting prostitution and assignation did nothing more than make clear the meaning of prostitution.

since the adoption of the Criminal Code. In *State v. Rose*,[9] a 1912 act defining a disorderly house as one where "lewd dancing" was permitted met the test of certainty. The court said that the word "lewd" has, "particularly when applied to dancing, the very well and generally understood and unmistakable meaning."[10] Article 81, defining "indecent behavior with juveniles" as the commission of "any lewd or lascivious act upon the person or in the presence of any child, with the intention of arousing or satisfying the sexual desires of either person" was held constitutional in two recent cases, *State v. Saibold*[11] and *State v. LeBlanc*.[12] In the *Saibold* case the court declared that the term "lewd or lascivious" had, by itself, a sufficiently definite meaning. The court's conclusion was reinforced by the fact that the definition is further limited by the statutory requirement of a specific intention to arouse or gratify sexual desires.

The problem in the instant case was to fit the definition of obscenity into the pattern of Louisiana jurisprudence. Was the definition in Article 106(2) of obscenity as the production, sale or possession of an "indecent" print, picture or model sufficiently definite to meet the dual requirements of notification to the defendant and guidance for the adjudicative process; or was it, like the phrase "immoral," susceptible of such varying interpretations as to fall short of an adequate definition of the crime? The United States Supreme Court, in a recent case,[13] said in dicta that the words obscene, lewd, lascivious, filthy, indecent or disgusting were within the field of permissible uncertainty because they were well understood by long use in the criminal law.[14] There is much justification, however, for the Louisiana Supreme Court's position that the words "indecent print," like the words "immoral purpose," are insufficient unless they are further qualified.[15]

It may well be argued that the Louisiana Supreme Court has

9. 147 La. 243, 84 So. 643 (1920).
10. 147 La. 243, 251, 84 So. 643, 646.
11. 213 La. 415, 34 So.(2d) 909 (1948).
12. 213 La. 404, 34 So.(2d) 905 (1948).
13. Winters v. New York, 333 U.S. 507, 518, 68 S.Ct. 665, 671, 92 L.Ed. 654, 661 (1948).
14. 33 Am. Jur. 20, § 9: "While the statutes relating to obscenity do not generally undertake to define obscene or indecent pictures or publications, nevertheless the words usually employed in the statutes are themselves descriptive, being words in common use and readily understood by persons of ordinary intelligence."
15. In a recent Ohio case, State v. Lerner, 81 N.E.(2d) 282 (Ohio, 1948), a statute prohibiting exhibition of obscene, lewd or lascivious books and pictures was under consideration. The court said in dicta that what may be a basic weakness in the statute is that it does not define obscenity nor

been unduly technical in the *Truby, Vallery* and *Kraft* decisions.[16] However, the decisions to date indicate that the supreme court is not going to strike down all general definitions of crimes, but will invalidate only those which it believes are entirely too broad to serve the desired functions. The *Saibold* case[17] illustrates approximately where the line is to be drawn. The supreme court, in construing these statutes, must balance two conflicting considerations. On the one hand, it is impossible for the legislature to specify and define separately every type of immoral conduct that it wishes to designate as criminal. At the same time a criminal statute must give clear notice to affected persons and serve as a definite guide to adjudication. The reconciliation of these two interests, especially with a new system of criminal law, has posed some close questions. It is difficult to say whether a word or phrase has achieved a well-understood meaning. It is a matter of degree, and no categorical test can be laid down that will determine if a statute has exceeded the line of permissible uncertainty.

The Louisiana Supreme Court pointed out in the *Vallery* and *Saibold* cases that the word "immoral," standing alone, does not sufficiently designate the prohibited conduct. In conformity with this suggestion the 1948 legislature amended Articles 104[18] and 92(7)[19] to indicate that *sexual* immorality characterized the offense sought to be prohibited. In upholding the comprehensive theft[20] and gambling[21] articles of the Criminal Code, the Louisiana

say what it is in literature and to do so clearly is a legislative and not a judicial function.

16. For a critical discussion of *State v. Truby*, see Morrow, Civilian Codification under Judicial Review: The Generality of "Immorality" in Louisiana (1947) 21 Tulane L. Rev. 545.

17. State v. Saibold, 213 La. 415, 34 So.(2d) 909 (1948); State v. LeBlanc, 213 La. 404, 34 So.(2d) 905 (1948).

18. La. Act 389 of 1948, amending Art. 104, La. Crim. Code of 1942 to read "for any immoral *sexual* purpose," discussed in The Louisiana Legislation of 1948 (1948) 9 LOUISIANA LAW REVIEW 47.

19. La. Act 388 of 1948, amending Art. 92(7), La. Crim. Code of 1942, to read "perform any *sexually* immoral act," discussed in The Louisiana Legislation of 1948 (1948) 9 LOUISIANA LAW REVIEW 47.

20. Art. 90, La. Crim. Code of 1942: "Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit."

This article was held constitutional in State v. Varnado, 208 La. 319, 23 So.(2d) 106 (1945). It is interesting to note in this connection the following language used by Justice Fournet: "We know of no inhibition to the legislature's authority to pass such a general statute so long as the offense sought to be denounced is clearly defined so that the one accused thereunder cannot complain if the particular acts with which he is charged fall within this definition." 208 La. 319, 383, 23 So.(2d) 106, 127.

21. Art. 67, La. Crim. Code of 1942: "Theft is the misappropriation or

Supreme Court has recognized the impossibility of embracing in a statute every variation of the type of conduct prescribed as criminal; and has sanctioned the use of broad language in defining crimes, provided the line between criminal and non-criminal conduct is clearly and distinctly drawn.

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PRICE FIXING AGREEMENTS—PATENTED PRODUCTS—Defendants, Line Material Company and Southern State Equipment Company, cross-licensed each other to use complementary patents on an electrical product. The Line Material Company was authorized to sublicense on condition that the sublicensee maintain the same price schedule as Southern States and other licensees. *Held*, this violates the Sherman Anti-Trust Act.[1] "Even if a patentee has a right in the absence of a purpose to restrain or monopolize trade, to fix prices on a licensee's sale of the patented product in order to exploit properly his invention or inventions, when patentees join in an agreement as here to maintain prices on their several products, that agreement, however advantageous it may be to stimulate the broader use of patents, is unlawful per se under the Sherman Act."[2] *United States v. Line Material Company*, 68 S. Ct. 550 (U.S. 1948).

The conflict between the monopoly granted by the patent laws[3] and the competition prescribed by the Sherman Act has been recognized in a series of cases. The immediate problem of price fixing under the protection of the patent laws was considered in *United States v. General Electric Company* and *Bement & Sons v. National Harrow Company*.[5] Both cases upheld the validity of price fixing provisions in contracts between the patentee and a licensee to make and sell. Although the decisions suffered subsequent sharp attack,[6] they were never overruled.

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taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential."

This article was held constitutional in State v. Pete, 206 La. 1078, 20 So.(2d) 368 (1944).

1. 26 Stat. 209 (1890).
2. 68 S.Ct. 550, 564 (U.S. 1948).
3. 35 U.S.C.A § 31 and annotations thereunder.
4. 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926).
5. 186 U.S. 70, 22 S.Ct. 747, 46 L.Ed. 1058 (1902).
6. Kelley, Restraints of Trade and the Patent Law (1944) 32 Geo. L. J. 213; Note (1927) 40 Harv. L. Rev. 656; Note (1927) 27 Col. L. Rev. 567.