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Criminal Law and Procedure: Criminal Law

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bodily harm at the time of the homicide. It would have tended to negative intent and was thus relevant and admissible under Article 441 of the Code of Criminal Procedure, which provides: 'Relevant evidence is that tending * * to negative the commission of the offense and the intent.' "[49]

Criminal Law and Procedure

CRIMINAL LAW

*Dale E. Bennett**

CRIMINAL NEGLECT OF FAMILY

Criminal Neglect of Family is defined in Article 74 of the Criminal Code[1] as "the desertion or *intentional non-support*" of a wife or "*minor child*" who is in necessitous circumstances. In *State v. Woods*[2] the court properly held that the term "minor child" meant any child under twenty-one years of age, and hence applied to a high school senior who had passed his seventeenth birthday. However, we may pause to question the court's further holding that "the earnings of the father are not an essential element of the crime of neglect of family," and that "the father's duty to support is absolute. His failure to do so constituted the offense."[3] Since Article 74 requires the "intentional" non-support, it would appear that a father who is financially unable to furnish such support should at least have an affirmative defense. A normal construction of the language employed in the statutory definition would only justify its application to the parent who is able to furnish support and wilfully refuses to do so. Possibly all the court means to hold is that the state establishes its case by showing that the child is in necessitous circumstances as a result of the parent's failure to furnish proper support, and that the affirmative defense of inability to furnish such support must be urged and proven by the defense, just as reasonable mistake of fact and other

49. Id. at 857.

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1. La. R.S. 1950, 14:74.
2. 66 So. 2d 315 (La. 1953).
3. Justice Moise, id. at 317.

exculpatory matters are raised by defense. If so construed, the decision achieves a sound practical result. If construed to mean that the parent's ability to furnish support is an immaterial consideration, the decision would be imposing a virtual strict liability under a statutory provision which expressly stated the requirement of a general criminal intent.[4]

CRUELTY TO JUVENILES

In *State v. Towns*[5] a father had been charged with standing by while his wife inflicted a severe beating upon the couple's young son. In holding that the failure to prevent the beating did not constitute *cruelty to juveniles*, the Supreme Court correctly states that "Article 93[6] does not denounce the presence of a bystander at the whipping of a juvenile as a crime."[7] The question that is left somewhat hazy by Justice Moise's opinion is whether, upon proper allegation and proof of the parental relationship, the father's standing passively by while his young son was beaten should constitute a cruelty to juveniles. It should be noted that the statutory definition of the offense embraces "the intentional or criminally negligent mistreatment or *neglect*" of the juvenile. Justice Hawthorne's dissenting opinion approves the juvenile court judge's conclusion that since the defendant was the father of the child he was guilty of criminal neglect in permitting him to be cruelly beaten and whipped.[8] A careful study of Justice Moise's majority opinion indicates that the reversal of the conviction was predicated on the insufficiency of the affidavit upon which the conviction was based. In short, the affidavit failed to charge neglect for it did not allege the parent-son relationship which would place a special duty of protection on the defendant. In this regard Justice Moise significantly states, "Merely 'permitting a juvenile to be struck, beaten and whipped' does not constitute a crime under Art. 93, for even if provided by statute, which we deny, some relationship at least must be alleged between the observer or bystander and the juvenile cruelly mistreated."[9] If additional

4. La. R.S. 1950, 14:11: ". . . in the absence of qualifying provisions, the terms 'intent' and 'intentional' have reference to 'general criminal intent'."

5. 222 La. 437, 62 So. 2d 634 (1952).

6. La. R.S. 1950, 14:93.

7. Justice Moise, 222 La. 437, 441, 62 So. 2d 634, 635.

8. 222 La. 437, 445, 62 So. 2d 634, 637.

9. 222 La. 437, 442, 62 So. 2d 634, 636.

authority is necessary to establish the legal duty of the father to interfere when cruel and unusual punishment is being meted out by the mother, the Louisiana Civil Code expressly recognizes the authority of the father as prevailing in case of difference between the parents.[10]

PERJURY

The perjury conviction in *State v. Conforto*[11] was based upon a false oath executed by the defendant as a bail bond surety. The oath falsely stated ownership of a specified piece of New Orleans property when, according to the information charging the offense, the defendant "then and there well knew that he was not the owner of said immovable property." The principal issue on appeal was whether the false oath related "to matter material to the issue or question in controversy," as required for the crime of perjury.[12] The majority opinion, sustaining the conviction, held that the false allegation was "material" since the Code of Criminal Procedure expressly provided that the surety must take oath "that after the payment of all of his debts he is owner in his own right of property, real or personal or both, liable to seizure, in an amount equal to that named in said bond."[13] The dissenting opinion stressed the technical argument that only a general statement of financial responsibility is required of the surety; but Justice Hawthorne's majority opinion found ample support in other jurisdictions for his conclusion that "a statement regarding particular property is a matter material to the issue of the surety's sufficiency on the bond, and that a false statement regarding particular property in an affidavit of suretyship is perjury."[14]

Chief Justice Fournet's dissenting opinion concludes with the statement that "The last clause in Article 104 [Code of Criminal Procedure]—'any surety who shall swear falsely to any of the material facts set up in his affidavit of justification shall be deemed guilty of perjury and upon conviction thereof, shall be punished in accordance with law in such case made and provided'—*adds nothing and is without any effect* unless

10. Art. 216, La. Civil Code of 1870.
11. 222 La. 427, 62 So. 2d 630 (1952).
12. Art. 123, La. Crim. Code of 1942, La. R.S. 1950, 14:123.
13. Art. 103, La. Code of Crim. Proc. of 1928, La. R.S. 1950, 15:103.
14. 222 La. 427, 432, 62 So. 2d 630, 632 (1952), citing cases from New York, Massachusetts and Michigan.

it be to place the surety on guard that if in taking the required oath he has sworn falsely he is subject to prosecution under the criminal laws of this state."[15] (Italics supplied.) This statement is in agreement with the writer's belief that such provisions should be disregarded, at least in statutes enacted before the Criminal Code of 1942, and that the offense should be governed by the appropriate articles of that code.[16] If this were done, the offender's false non-judicial oath in the *Conforto* case should have been prosecuted as False Swearing rather than as Perjury. However, in *State v. Smith*[17] with Chief Justice O'Niell writing the court's opinion, it was held that such special penal provisions were not impliedly repealed by the inconsistent general definitions of offenses in the criminal code. Apparently this view was tacitly reaffirmed by the majority of the court when it upheld the perjury conviction of the falsifying surety.

CRIMINAL PROCEDURE

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PRELIMINARY EXAMINATIONS

After an indictment has been found or an information filed, the granting of a preliminary examination is "wholly within the discretion of the district court, and not subject to review by any other court."[1] In such cases the grand jury's deliberations, or the district attorney's investigations, insure good faith and probable cause. Of course the preliminary examination may be granted for the purpose of fixing bail, taking depositions of witnesses who may be unavailable at the time of the trial, or bonding key witnesses to appear. In *State v. Gaspard*[2] a defendant had been charged with theft of rice valued at $4,234.91, and sought a preliminary examination, claiming that the charge was unfounded and made to extort money from him. In upholding the refusal to grant a preliminary hearing, the Supreme Court

15. 222 La. 427, 436, 62 So. 2d 630, 634.
16. Arts. 123-128, La. R.S. 1950, 14:123-128. For a complete discussion of this point see The Work of the Louisiana Supreme Court for the 1944-1945 Term, 6 LOUISIANA LAW REVIEW 647 (1946).
17. 207 La. 735, 21 So. 2d 890 (1945).
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1. Art. 154, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:154.
2. 222 La. 222, 62 So. 2d 281 (1952).