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Recent Decisions

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An officer receiving a description over the radio of persons who had committed the crime of armed robbery was held in Texas to have been justified in searching the automobile of persons answering the description, without a search warrant.[15] The officer found three pistols, a box of cartridges, and two suitcases, each containing $1800 in currency. The court said that the search without a warrant could be made since the conformity of the defendant to the radio description gave the officer such information as constituted a reasonable ground of suspicion.

All of these cases concern instances where the wrongful acts amounted to felonies. Apparently no case has reached the upper courts where radio information has led to an arrest for a misdemeanor. The answer should be that usually such arrests can only be made when the misdemeanor is committed in the officer's presence. But experience tells us that every day police are picking up men on charges of assault and battery, of petit larceny, and for traffic violations where the officers in the arresting squad cars did not witness the wrongful act, but received their information over the police radio. These arrests when questioned would be found to be in violation of the law of arrest. The same is true of the practice of "frisking" suspects, that is, passing one's hands over their outer clothing to ascertain whether they are carrying any deadly weapons. Officers who indulge in this practice, prompted by radio reports of suspicious persons being in the vicinity, are engaged in illegal searches.

The only answer to the question is that experience has shown the officers that they must often act on their own reasonable judgment and in haste in order to prevent the escape of the accused. To require strict compliance with the law would hamstring the police in their efforts to protect society. Until such a time as legislators see fit to grant wider latitude to arresting officers, such violations may have to be suffered in the interests of efficient regulation.

John E. Savord.

RECENT DECISIONS

ACCESSION IN PRESENT DAY BUSINESS.—Defendant held a chattel mortgage on an automobile belonging to one Goltrie. The Plaintiff sold Goltrie four tires and four tubes for the car on a conditional sales contract. Both the chattel mortgage on the automobile and the conditional sales contract on the tires and the tubes were recorded. Goltrie failed to make his installment payments to the Defendant and the Defendant repossessed the car. Plaintiff offered to return the original tires

15 Silver v. State, 110 Tex. Cr. R. 512, 8 S. W. 2d 144, 60 A. L. R. 290; rehearing denied: 110 Tex. Cr. R. 512, 9 S. W. 2d 358, 60 A. L. R. 290 (1928).

to the Defendant and demanded the return of his tires furnished Goltrie. This was refused. Defendant sold the car with the tires claimed by the Plaintiff. Plaintiff brings an action of replevin against the Defendant for the conversion of the four tires and tubes sold to Goltrie by the Plaintiff. Held, that the owner of a chattel mortgage on a principal thing is not entitled by accession to replacements thereon of severable parts which may readily be followed and identified and removed without material injury to the principal thing, as against the owner of the severable parts who has never parted with or invested the mortgagor with title. *Goodrich Silvertown Stores of B. F. Goodrich Co. v. F. M. Rugg Motor Sales Co.*, 28 N. E. 2d 364 (Ohio, 1940).

The doctrine of acquiring ownership by means of accession has been recognized from time immemorial and is both international and universal in scope. The Roman law may be regarded as the birthplace of its recognition. Moreover it is embodied in practically all modern civil law countries. INSTITUTES JUSTINIAN, lib. ii. tit. i., 19, 26, 33, 34, 35; ARGENTINE CIVIL CODE, Art. 62-65; SPANISH CIVIL CODE, Arts. 358-383; FRENCH CIVIL CODE, Art. 546. The common law recognized the doctrine of accession at an early date. *Lupton v. White,* 33 Eng. Rep. 817 (1803); 2 KENT COMM. 361; *Lampton v. Preston,* I J. J. Marsh (Ky.) 454, 19 Am. Dec. 104 (1829); *Pierce v. Goddard,* 22 Pick. (Mass.) 559, 33 Am. Dec. 764 (1839). It is generally held that ordinary repairs upon a chattel become a part thereof by accession even when the value of the repairs greatly exceeds the value of the original article. *Hamlin v. Jerrard,* 72 Me. 62 (1881); *Gregory v. Stryker,* 2 Den. (N. Y.) 628 (1846).

A very different question is raised, however, where, as in the principal case, the repairs (parts) consist of parts which can be identified and severed. In such a case it is agreed that title to the parts shall remain in the person adding or furnishing such parts until they are paid for. The majority view seems to hold that the repairs do not pass to the owner of the dominant chattel in such cases. *Clarke v. Wells,* 45 Vt. 4, 12 Am. Rep. 187 (1872) — where new wheels were placed on a stage coach; *Hallman v. Dothan Foundry & Machine Co.,* 17 Ala. App. 152, 82 So. 642 (1919) — where a truck body was placed on a Ford chassis; *Clark v. Johnson,* 43 Nev. 359, 187 Pac. 510 (1920) — where truck tires were placed on a motor truck. *Contra — Blackwood Tire & Vulcanizing Co. v. Auto Storage Co.,* 133 Tenn. 515, 182 S. W. 576, L. R. A. 1916 E. 254 — where two casings were furnished for an auto; *Diamond Service Station v. Broadway Motor* Co., 12 S. W. 2d 705 (Tenn., 1929) — where tires were furnished for an auto. However, it is not quite proper and correct to state that the latter two cases held contrary to the principal case and the general rule because in both of these cases the seller did not retain the title to the merchandise furnished, whereas in the principal case the seller of the accessories retained the title. The principal case reaches an equitable solution to a very weighted subject, even though it does place a limitation on the general doctrine of accession.

The courts of Tennessee and Delaware, however, apparently have refused to except from the general rule of accession the cases wherein title to added articles was not retained by the conditional seller. In *Diamond Service Station v. Broadway Motor Co., supra,* the Tennessee court carried the doctrine of accession to the point of passing title to the conditional seller to accessories which are readily detachable where the owner of the accessories has failed to retain title. In *Purnell v. Fooks,* 122 A. 901, 2 W. W. Harrison, (Del.) 336 (1923), the Delaware court has fully agreed that doctrine of accession should give the conditional vendor the accessories under facts similar to those in the Tennessee case just cited. There is a serious doubt whether the majority of the courts, which have held that the principle of accession does not apply where the conditional seller of detachable

accessories has retained title, would follow the decision reached under circumstances like those in the Delaware and Tennessee cases.

The authorities generally agree that property incorporated with or labor expended upon property which is the object of a chattel mortgage or conditional sale will pass by accession with the prinicipal object or article upon foreclosure of a mortgage or upon the vendor reclaiming it under a conditional sale or where the articles attached become so closely incorporated with the principal article that they cannot be readily identified and detached without injury to the latter. However, when it is possible readily to identify and detach these articles without injury to the principal article they will not pass by accession to the chattel mortgagee or conditional vendor of, the principal article. The following cases hold that property does not pass by accession. *Franklin Service Stations v. Sterling Motor Truck Co.,* 50 R. I. 336, 147 Atl. 754 (1929) — where truck tires and rings were furnished for a truck and the rings passed by accession, tires did not pass by accession; *Clarke v. Wells, supra; Clark v. Johnson, supra; Goodrich Silvertown Stores of B. F. Goodrich Co. v. Pratt Motor Co.,* 198 Minn. 259, 269 N. W. 464 (1936) — where a battery and new casings were furnished; *Lincoln Road Equipment Co. v. Bolton,* 127 Neb. 224, 254 N. W. 884 (1934) — where a gasoline engine was bolted to the frame of a road grader; *Motor Credit Co. v. Smith,* 181 Ark. 127, 24 S. W. 2d 974, 68 A. L. R. 1239 (1930) — where casings and inner tubes were furnished for a pleasure automobile; *Bousquet v. Mack Motors Truck Co.,* 269 Mass. 200, 168 N. E. 800 (1929) — where tires were furnished for a truck; *Snyder v. Auker,* 134 Misc. 721, 236 N. Y. S. 28 (1929) — where truck tires and tubes were furnished; *General Motors Truck Co. v. Kenwood Tire Co.,* 94 Ind. App. 25, 179 N. E. 394 (1932) — where tires were furnished for a truck; *K. C. Tire Co. v. Way Motor Co.,* 143 Okla. 87, 287 Pac. 993 (1930) — where tires and tubes were furnished for a car; *D. Q. Service Corp. v. Securities Loan & Discount Co.,* 210 Cal. 327, 292 Pac. 497 (1930) — where truck tires were furnished; *Hallman v. Dothan Foundry Co., supra; Passieu v. Goodrich Co.,* 58 Ga. App. 691, 199 S. E. 775 (1938) — where auto tires and tubes were furnished; *Tire Shop v. Peat,* 115 Conn. 187, 161 Atl. 96 (1932) — where tires and tubes were furnished for a truck; *Firestone Service Stores v. Darden,* Tex. App. Civ. 96 S. W. 2d 316 (1936) — where tires and tubes were furnished for a car.

The following cases hold that property passed by accession. *Blackwood Tire & Vulcanizing Co. v. Auto Storage Co.,* 133 Tenn. 515, L. R. A. 254, 1916E — where tire casings were furnished for an auto; *Diamond Service Station v. Broadway Motor Co., supra; Purnell v. Fooks, supra.*

Keeping in mind that we live in a highly mechanized age and that the present trend is toward the standardization of all parts and materials and when it is a known fact that aeroplanes and automobiles are made up of parts that are generally standardized, uniform and interchangeable, it seems that the rule and result reached in the principal case, in agreement with the vast majority of decisions, is sound and a principle not only legally necessary but a commercial and business exigency.

Ronald Rejent.

AUTOMOBILES — CONCURRENT AND CONFLICTING REGULATIONS — STATE STATUTE VERSUS MUNICIPAL ORDINANCE IN REGULATING TRAFFIC AT STREET INTERSECTIONS.— Plaintiff while driving in a funeral procession crossed street intersection against the red light of the crossing's traffic signal, and was struck by the defendant's car which was crossing the intersection in obedience to the traffic light. The defendant testified he did not see the funeral tag on the windshield of the plaintiff's car.

nor that he knew that the plaintiff's car was in a funeral procession. The trial court held, without a jury, that the Municipal Code of Cleveland, section 2445-4, gave the plaintiff in the procession an absolute right of way and that the defendant was guilty of negligence since he had the duty to yield the right of way to the funeral procession, whether he knew it was a funeral procession or not. The court of appeals reversed the decision of the trial court and held that the Municipal Code was superseded by the state statute requiring all motorists to obey the automatic traffic signals. *Otto v. Whearty,* 63 Ohio App. 495, 27 N. E. 2d 190 (1940).

The plaintiff relied on the Municipal Code, section 2445-4, which reads as follows "all motor vehicles forming a funeral procession, when going to any place of burial, shall have the right of way over all other vehicles, except authorized emergency vehicles, at any street or highway intersection provided that each vehicle in such funeral procession shall have conspicuously displayed on the front thereof a suitable sign of the form and design approved by the commissioners of traffic." The defendant relied on the General Code of the state, section 6310-35, which reads, "Pedestrians and drivers of vehicles shall obey and abide by all signals, signs, whistles and directions of police officers, and shall obey all automatic traffic signals."

The Ohio statute as quoted, *supra,* provides that drivers of vehicles shall obey all automatic traffic signals. The question to be decided is whether the Municipal Code is in conflict with the state statute, and if so, which law is to be enforced. The city is granted "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Constitution of Ohio, Article XVIII, section 3. In determining whether an ordinance is in conflict with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Village of Struthers v. Sokol,* 108 Ohio 263, 140 N. E. 519 (1923). This test was followed in *Schneiderman v. Sesanstein,* 121 Ohio 80, 167 N. E. 158, 64 A. L. R. 981 (1929), a case of speed regulation of automobiles in school zones, and also in *Schwartz Administration v. Badila, Jr.,* 133 Ohio 441, 14 N. E. 2d 609 (1938), in which an ordinance of a municipality which prescribed a manner of driving was in conflict with general laws and invalid.

The General Code, section 6310-35, is more comprehensive than the Cleveland Municipal Code, section 2445-4. If the Municipal Code section is enforced it would have the effect of introducing an exception to the General Code, an exception not found in the General Code. There is then a direct conflict between the two Codes in so far as they apply to street intersections with traffic signals. The court of appeals for this reason held the Municipal Code invalid in this respect. The conclusion as reached by the court is that "a person driving an automobile in a funeral procession, who enters a street intersection while the red or stop signal is displayed against him, and collides with an automobile entering the intersection on the green or go signal, cannot, in a negligence action arising from such collision, rely on a city ordinance giving him the right of way at intersections." — paragraph 2 of the court's syllabus. This decision, that the General Law or General Code prevails over the municipal code in cases regarding traffic at street intersections is upheld by other cases in various jurisdictions. *Davidson v. Woolworth Mfg. Co.,* 5 Fed. 2d 232 (1925), in which city ordinance conflicted with state statute regulating whether a motorcycle or an automobile had the right of way at a street intersection, is a supporting authority, as are *Reverra Fewell Undertaking Co. v. James,* 13 S. W. 2d 464 (Tex. Civ. App., 1929) where an ordinance regulating traffic on all streets conflicted with a state statute regulating on streets where traffic was heavy was held invalid; *State v. Stallings,* 189 N. C. 104, 126 S. E. 187 (1925) where city ordinance providing that automobiles should

stop at all intersections conflicted with a state statute and was held invalid; *Tharp v. Elbert Coal and Teaming Co.*, 226 Ky. 421, 11 S. W. 2d 93 (1928), where a statute requiring automobiles to turn left from the middle of the street took precedence over a city ordinance.

But in *Birmingham Stove and Range Co. v. Vanderford*, 217 Ala. 342, 116 So. 334, 27 N. C. C. A. 338 (1928), it was held that the general rule established by the code, giving vehicles at the intersection of public roads the right of way, was subject to reasonable municipal laws regulating traffic in congested areas. Also in *Hammel Dry Goods Co. v. Hinton*, 216 Ala. 127, 112 So. 638 (1927) an ordinance providing that no motor vehicle shall be driven out of any side road which enters into or crosses any hard surface road, without coming to a stop before entering upon or crossing said hard surface road, was held not in conflict with such provision of the Code, which provided further, that it should not prevent municipalities from adopting ordinances for the regulation of traffic within their boundaries. A like decision on similar facts was given in *Westlake v. Cole*, 115 Okla. 109, 241 Pac. 809 (1925) wherein it was held an ordinance designating certain streets as right-of-way streets, and making it an offense to drive any vehicle therein from a cross street, without coming to a full stop, is not a speed regulation, and is not invalid as in conflict with a statute stating limitations as to rates of speed, and providing that these shall be exclusive of all other limitations fixed by any municipality, but giving the latter power to enact regulations applicable to crossings where traffic is heavy. In a rehearing in the same case the ordinance was held not invalid as being in conflict with the provisions of a statute that a motor vehicle approaching an intersection shall yield the right of way to a vehicle approaching such intersection from the right, and that in case of conflict between an ordinance and a state law, the former should yield, where the statute further provided that it had no application to localities controlled by ordinances rightfully enacted by local authorities, which might otherwise conflict. A similar decision is given in *Lamar & Smith v. Strand*, 5 S. W. 2d 824 (TEX. CIV. APP., 1928). In a Michigan case, *Mancuso v. Yellow Taxicab Co.*, 231 Mich. 189, 203 N. W. 875 (1925), there was held to be no conflict between an ordinance setting reckless driving to include entering intersections at more than one half the legal rate of speed of 10 miles per hour in business districts and 15 miles per hour outside business districts, and a statute which provided that on entering the intersection of a highway a person operating a motor vehicle shall have it under control, and operate it at such speed as is reasonable and proper having regard to the traffic on such highway and the safety of the public. Decisions in accord with these are found in both *Quillin v. Colquhoun*, 42 Idaho 522, 247 Pac. 740 (1926), where a city ordinance regulated the rights of pedestrians at street intersections, and *State v. Brown*, 142 Md. 27, 119 Atl. 684 (1922), in which an ordinance exempted certain motor vehicles from yielding right of way to motor vehicles approaching from the right on cross streets and was held invalid.

Though the case of *Schneiderman v. Sesanstein, supra*, is in accord with the view of Ohio, there is an excellent dissenting opinion offered by Judge Allen in which she points out that Ohio holds the minority rule in the United States. The suit was brought by Goldie Schneiderman, an infant, against Barbara Sesanstein for personal injuries claimed because of the defendants alleged negligence in operating her automobile in excess of the rate of speed of the regulating ordinance and in a manner whereby she struck the plaintiff, a girl of about ten years, as she was crossing the street in the vicinity of the school. A city ordinance offered in evidence was excluded by the trial court. It provided that a driver of an automobile could not proceed at a speed greater than 15 miles per hour when approaching within two hundred feet of or in passing a school on school days between eight o'clock in the morning and four o'clock in the afternoon. This ordinance was held to be invalid as opposed to the General Code of Ohio, section

12603, 12603-1, and the Constitution of Ohio, article 18, section 3. The result of this exclusion was a verdict for the defendant. Judge Allen in her dissent believes there is no conflict between the General Code and the City Ordinance. She says the ordinance imposes a 15 mile per hour speed while passing a school and the statute imposes no such limit in this regard but merely prohibits reckless driving. She contends that the ordinance carries out and makes more specific the provisions of the statute prohibiting reckless driving. Secondly, says Judge Allen, the weight of authority is against the decision in the case. She lists *Braizier v. Philadelphia,* 215 Pa. 297, 64 Atl. 508 (1906), in which a city ordinance requiring the owner of an automobile to carry a license tag was not in conflict with a state statute requiring the owner to procure and display a state license tag; *Christensen v. Tate,* 87 Neb. 848, 128 N. W. 622 (1910); *City of Bellingham v. Cissna,* 44 Wash. 397, 87 Pac. 481 (1910); *Roper v. Greenspan,* 272 Mo. 288, 198 S. W. 1107, L. R. A. 1918D, 126 (1917); *City of Winsor v. Bast,* 199 S. W. 722 (1917); *District of Columbia v. Bailey,* 57 App. D. C. 151, 18 F. 2d 367 (1927); *Sims v. Martin,* 33 Ga. App. 486, 126 S. E. 872 (1925); *Ham v. County of Los Angeles,* 46 Cal. App. 148, 189 Pac. 462 (1920); *Brennan v. Recorder of the City of Detroit,* 207 Mich. 35, 173 N. W. 511 (1919); *City of Chicago v. Keogh,* 291 Ill. 188, 125 N. E. 881 (1920), where the city ordinance regulated the manner of passing street cars; *Kolankiewiz v. Burke,* 91 N. J. Law 567, 103 Atl. 249 (1918); and other cases as being opposed to the holding in the principal case.

BERRY ON AUTOMOBILES, volume I, section 97, p. 75 (6th ed.) states: "In some states it has been held that, aside from statutory prohibitions, however, a municipal corporation may enact an ordinance establishing a lower maximum rate of speed for automobiles than that provided by statute" — citing *Dowell v. Beasley,* 17 Ala. App. 100, 82 So. 40 (1919). Also in BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW, *volume* I, p. 238, 239, the principle of home rule, whereby a municipality is allowed to make and regulate its own police and speed laws is explained. "The home rule principle recognized by many of the states, would seem to guarantee to the inhabitants of a city the right to legislate on matters so vitally affecting their lives and property as the rate of speed of such vehicles." The states holding against this home rule principle, Ohio among them, are in the minority and the only reason urged for such holding is that the home rule creates a divergent character of municipal regulations as to speed, making it hard for the motorist to know the law.

William J. Syring.

GRAND JURY—SECRECY OF PROCEEDINGS—REFUSAL BY WITNESS TO TAKE OATH OF SECRECY AS CONTEMPT.—A grand jury in investigating activities possibly violating the Sherman Anti-trust Act, subpoenaed a stenographer, the daughter of the employer, as a witness and tendered an oath of secrecy thusly: "You do solemnly swear that you will keep secret the testimony that you are about to give before the grand jury. . . . " The appellant refused to take this oath of secrecy and the district court adjudged her guilty of contempt. Appellant appealed on the ground that the oath had no historical basis or statutory authority, and that it violated the right of freedom of speech. The district court's judgment was affirmed. *Goodman v. United States,* 108 F. 2d 516 (1939).

According to CLARK'S CRIMINAL PROCEDURE (Mikel's 2nd Edition), the primary reasons for secrecy of grand jury proceedings are: "(1) To secure the utmost freedom of disclosure of alleged crimes and offenses by prosecutors; (2) To prevent perjury by withholding knowledge of facts testified to before the grand jury which if known would be to the interest of the accused or their confederates to attempt

to disprove by procuring false testimony; (3) To conceal the fact of an indictment being found against a party in order to avoid the danger that they ma escape and elude arrest upon it, before presentment is made." WIGMORE ON EVIDENCE (2nd Ed.) § 2360 confirms that the reason for secrecy is to protect the grand jurors in their opinions and votings and the witness in order to obtain his testimony. However, as stated in 12 RULING CASE LAW 1039, a witness before a grand jury has no privilege (such as a juror has) to have his testimony treated as a confidential communication but must be considered as testifying under all the obligations of an oath in a judicial proceeding. Thus a witness's testimony may be disclosed whenever it becomes material to the administration of justice. Therefore, the testimony of a witness before a grand jury may be disclosed before a petit jury after the indictment has been returned: *Metzler v. United States,* 64 F. 2d 203 (1933); *In Re Attwell,* 140 F. 368 (1905); *Atty.-General v. Pettelier,* 240 Mass. 264, 134 N. E. 406 (1922); or where perjury has been attempted by the witness: *Izer v. State,* 77 Md. 110, 26 A. 282 (1893); or in order to protect public or private rights: *Atwell v. United States,* 162 F. 97, 17 L. R. A. (N. S.) 1049 (1908).

At the foundation of our federal government, the inquisitorial function of the grand jury and the compulsion of witnesses are recognized as incidents of the judicial power of the United States — *Blair v. United States,* 250 U. S. 273, 63 L. Ed. 979 (1919). Also as stated in *State v. Fox,* 122 Ark. 197, 182 S. W. 906 (1916), the inquisitorial proceedings of this body are intended to be kept secret. Thus the accused, in the absence of statute, has no right to be apprised of the names of the witnesses who appeared before the grand jury nor to the minutes of the grand jury, as the indictment itself sufficiently advises him of the charge he is expected to meet.

The principal case, being one of first impression, has little or no authority substantiating or overruling it. The cases of *Addison v. State,* 83 Tex. Cr. R. 181, 211 S. W. 225 (1919), *Misso v. State,* 61 Tex. Cr. R. 241, 135 S. W. 1173 (1911), and of *Gutgesell v. State,* 43 S. W. 1016 (1898), all Texas cases, stated that a witness who violated the oath of secrecy before the grand jury was guilty of a misdemeanor and subject to fine. Here, however, a statute necessitated the taking of the oath by a witness. In *State v. Fasset,* 16 Conn. 470 (1844), the court said that it had long been the policy of the law in order to further justice to conduct investigations and deliberations of a grand jury in secret, and for the most part all its proceedings are legally sealed against divulgence. Similarly, the court in *State v. Kemp,* 124 Conn. 639, 1 A. 2d 761 (1938) said that the oath would prevent such witnesses from disclosing what took place in the grand jury, including the testimony they or others there gave. However, in both of these cases, the oath was extracted principally due to usage. The court in the same case, *State v. Kemp, supra,* further went on to say that the oath would not prevent a witness from giving to the defendants any information they might have relevant to the prosecution even though it was the same information which they testified to before the grand jury, thus for the main part obviating its need. *Gitchell v. People,* 146 Ill. 175, 33 N. E. 757 (1893) states that the same principle which forbids disclosure by the grand jurors, applies to all persons authorized by law to be present in the grand jury, whether it be their clerk, or the officer in charge, or the prosecuting attorney. At first glance one might conclude that an oath of secrecy must be observed by a witness in the state of Illinois. However, the court seems to make it perfectly clear that it refers to a clerk, officer in charge, or prosecuting attorney, and the position of a witness is hardly, even by *innuendo,* comparable to these. Finally, the court in the principal case pointed out that it was the practice to require such an oath in thirty seven districts in the federal jurisdiction.

In contrast to the above paragraph is the case of *State v. Fish,* 90 N. J. Law 17, 100 A. 181 (1917), affirmed in 91 N. J. Law 228, 102 A. 378, L. R. A. 1918E 12 (1917). Here the court in clear language stated that a witness who has been examined before a grand jury is not under any legal obligation to refrain from stating what was said to him while there, the obligation of secrecy resting only on the members of the grand jury and those associated with them in the administration of justice. A later case, *State v. Borg,* 8 N. J. Misc. R. 349, 150 A. 189 (1930), affirms that a witness who has been examined before a grand jury is under no legal obligation to refrain from stating what was said to him and by him while there. Similarly in New York, the court in *People v. Naughton,* 38 How. Prac. 430 (1870) agreed that no secrecy is imposed upon a witness before the grand jury, either as to the fact of his being called or as to his testimony before them. In *Commonwealth v. Campbell,* 116 Pa. Sup. 180, 176 A. 246 (1935), the rule which forbids grand jurors to disclose what has transpired in the grand jury room was construed as not applicable to a witness. CORPUS JURIS, Grand Juries, § 113, p. 813, note 30, also mentions that an oath of secrecy is seldom given to a witness before a grand jury.

From the foregoing we can observe that the court's decision is substantiated only where there has been a definite statute on the matter and in a few other jurisdictions on the ground of practice. Practice is justifiable only if grounded upon reason or necessity. As a witness may be compelled to testify before a grand jury without being apprised of the subject matter of the inquiry or names of persons against whom such inquiry is addressed, *in Re Black,* 47 F. 2d 542 (1931), the necessity or reason for the practice in order to preserve the secrecy of the grand jury, as pointed out earlier, fails. Thus the conclusion is that an oath of secrecy by a witness is necessary only when a statute requires it. The harm resulting from a refusal to take such an oath is very slight in comparison to the attack on one's natural right of freedom of speech. The weighing of the two in view of what authority is present, compels the view that the court erred in punishing appellant for contempt. The secrecy of a grand jury proceeding which seeks to protect the individual witness's own safety and freedom in testifying should not be so construed as to penalize a witness, who is willing to testify, simply because she refuses to keep her testimony secret.

William T. Meyers.

HOMICIDE—JUSTIFICATION BY THE UNWRITTEN LAW.—The defendant's wife fell in love with the deceased, and obtained a divorce from the defendant on September 30, 1938. On October 15, 1938, the defendant saw his former wife with the deceased on the street several times. Defendant immediately went home to get his .32 pistol. When he encountered the deceased alone he shot him four times after a short struggle. The defendant was convicted of manslaughter in the first degree. On appeal the conviction was affirmed and the court said: "We have often held that the breaking up of the home of a person does not justify the taking of human life." The court added that the defendant had already been given a very fair sentence of six years in the pentitentiary, when the facts and law would have upheld a sentence for murder. *Neece v. State,* 104 P. 2d 568 (Okla., 1940.)

The Oklahoma courts have been very strict in refusing to recognize the "Unwritten Law." Many times the courts have specifically stated that such a law does not exist in Oklahoma. In *January v. State,* 16 Okla. Cr. 166, 181 P. 514 (1919), the defendant's daughter had been engaged to one Milton Keck, the de-

ceased. Keck had seduced her promising to marry her. When she became pregnant he refused to fulfill his promise. She took carbolic acid in a futile suicide attempt. Five days later she miscarried. January, having leared of these facts, met Keck a month later and killed him, although Keck carried no weapon and made no threatening move. The court said: "The unpardonable wrong done the defendant's daughter by the deceased does not constitute a defense to the crime for which the defendant was convicted. The so-called unwritten law referred to in the brief of counsel for defendant, that is, 'the right to avenge a wrong done a female member of one's family by killing the wrongdoer,' does not exist in this jurisdiction." Other Oklahoma cases have expressly followed this case. *Pickett v. State,* 40 Okla. Cr. 289, 268 P. 527 (1928); *Posey v. State,* 50 Okla. Cr. 129, 296 P. 527 (1931); *Kell v. State,* 53 Okla. Cr. 45, 6 P. 2d 732 (1931).

In *Litchfield v. State,* 8 Okla. Cr. 164, 126 P. 707, 45 L. R. A. (N. S.) 153 (1912), the court upheld the conviction of the defendant who had shot the deceased in the act of attempting to attack the defendant's drunken daughter. The same court a few days later held that one cannot kill another for an anticipated attempt to attack one's female relative. *Nutt v. State,* 8 Okla. Cr. 266, 128 P. 165 (1912).

In contrast to the strict Oklahoma holdings is the old Jewish law which justifies homicide when committed by a private person as a punishment for a felony already committed. Shechem the Hivite had defiled Dinah, the daughter of Jacob. Jacob upon learning of this waited for his sons to return home. The brothers Simeon and Levi slew Shechem, his father and all his household and spoiled all in his city and house. (34th Chapter of the Book of Genesis in the Bible.) Levi was later called the "man of blood," but from his tribe later came all of the priests who were permitted to enter the holy of holies, the *sanctum sanctorum* of the temple, and there wait upon the altar of the Lord.

Blackstone in the fourth volume of his Commentaries says that the Law of Solon and the Roman Civil Law allowed the husband to kill his wife's paramour if the husband found the adulterer in the husband's house, or if the husband caught them in the act. The ancient Goths also allowed this. The English Common Law, however, ranked such a killing as manslaughter and not as justified homicide. Before 1670 the English juries were liable to fines if they did not render verdicts in accordance with the law and facts presented to them. But since *Bushnell's Case* in that year juries have not been liable to fines for ignoring the law and facts of a case. So since that time juries have often risen above the law with impunity and have interpreted the will of the people. Thus the unwritten law has a sort of existence although the courts continue to deny it.

Texas is the only jurisdiction with a statute, PEN. CODE 1925, Art. 1220, making homicide justifiable when committed by a husband on one committing adultery with his wife. The statute reads: "Homicide is justifiable when committed by the husband upon the person of anyone taken in the act of adultery with the wife, provided the killing takes place before the parties to the act of adultery have separated." As liberal as this statute is the Texas courts have gone still further in their interpretation of the statute. In *Cook v. State,* 180 S. W. 254, 78 Tex. Cr. R. 116 (1915), the court held that the defendant husband was entitled to a charge that he did not violate the law in killing his wife also. The court held the killing of the wife was justifiable under the statute whenever the killing of the third person was justifiable. In *Morrison v. State,* 39 Tex. Cr. R. 519, 47 S. W. 369 (1898), under an earlier statute, the court went still further and said that the killing of the third person was justifiable under the statute even after the act was accomplished, if the guilty parties were still in each other's company. The Court in *Price v. State,* 18 Tex. App. 474 (1885), also said that the parties need

not be taken in the act to justify the killing. But in spite of the statute and the liberal interpretations made of it the Texas courts are still in accord with *Neece v. State, supra,* in denying the justification when the wife has not lived with the husband for a considerable length of time. *Duhig v. State,* 180 S. W. 252, 78 Tex. Cr. R. 125 (1915). Nor will the statute be held to justify a wife for killing her husband's paramour. *Reed v. State,* 123 Tex. Cr. R. 348, 59 S. W. 2d 122 (1933).

Another point where Texas is liberal in regards to this question is the case where one kills to protect his own paramour or mistress. Under an early statute allowing one to protect a female relative, the Texas court held that one also has the legal right to protect one's mistress as a female relative. Thus the privilege of killing extends even to the protection of a woman with whom the defendant has been living in adultery. *Gaines v. State,* 67 Tex. Cr. R. 325, 148 S. W. 717 (1912). The majority is *contra* to this holding. *State v. Kennedy,* 207 Mo. 528, 106 S. W. 57 (1907). However, another southern state sides with Texas. In *State v. Johnson,* 164 La. 420, 114 So. 528 (1927), the court said that one may protect his paramour and may interefere with an attack upon her, as though she were his wife.

The Oregon rule is very strict. It has been held that the husband is not only unjustified in killing another to prevent the seduction of his wife by artifice or fraud, but that he is guilty of manslaughter for killing another in the very act of committing adultery with his wife. The charge of manslaughter is the usual charge when the defendant actually finds the parties in the act of adultery and kills the offender then and there. But if he waits and kills him later, the charge is then murder, the same as though he never saw the act, but killed after hearing of it. *State v. Young,* 52 Ore. 227, 96 P. 1067, 18 L. R. A. (N. S.) 688, 122 Am. St. Rep. 689 (1908).

Actual discovery of the act seems unnecessary in Mississippi where the court held one is permitted to kill where one believes and has reasonable ground to apprehend a design upon part of another to violate the chastity of women in his household, and there is imminent danger of this design being accomplished. *McNeal v. State,* 115 Miss. 678, 76 So. 625 (1919). The Mississippi court found its precedence in *Staten v. State,* 30 Miss. 619 (1856), where the deceased approached the defendant's sister in her bed and upon being repulsed hid under the defendant's wife's bed. The defendant shot the intruder and the court held that he was entitled to an instruction to the jury with reference to the rule justifying homicide when committed in just apprehension of immediate danger of commission of a felony, or of great personal injury or bodily harm.

The chivalry of the South appears once more in the Georgia decisions. The Georgia courts will tolerate the killing of another man if necessary to prevent the rape of his wife, but will not tolerate the killing at a later date for any such previous act. *Ellison v. State,* 137 Ga. 193, 73 S. E. 255 (1911). Thus Georgia permits one to act against any intended wrong, but not as punishment or revenge for any past wrong. *Brown v. State,* 110 Ga. App. 50, 72 S. E. 537 (1911). However, the Georgia courts have refused to justify the husband's acts when the husband was ignorant of the justifying circumstances at the time of the killing and they were later communicated to him by his wife. *Best v. State,* 26 Ga. App. 671, 107 S. E. 266 (1921).

The reason for leniency or strictness in various cases is well shown in *State v. Thomas,* 172 Ia. 485, 154 N. W. 768 (1915). The court here said: "The distinction between a case where the husband kills a person ravishing his wife and committing adultery is that the former offense is perpetrated by force, against which he may resort to force in protecting his wife the same as she might have done, while the latter is by her consent." The North Carolina court in *State v. Neville,* 51 N. C. (6 Jones, Law) 423 (1859), also seems to distinguish between adultery