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One Year Review of Criminal Law and Procedure

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ONE YEAR REVIEW OF CRIMINAL LAW AND PROCEDURE

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During 1961[1] the Colorado Supreme Court decided over fifty cases dealing with criminal law and procedure, including cases concerned with violations of municipal ordinances.[2] In addition, the 1961 Colorado legislature enacted a dozen statutes on criminal matters.[3]

I. SUBSTANTIVE CRIMINAL LAW

A. Municipal Power to Enact Penal Ordinances

Pre-1961 Colorado cases had held that, in the absence of legislation enlarging municipal power to enact penal ordinances, (1) a home-rule city has no power to enact a penal ordinance dealing with a matter of statewide concern which is already covered by a counterpart state statute;[4] and (2) a "statutory" municipality (*i.e.*, one without home rule), besides being subject to the above limitation applicable to home-rule cities, also lacks the power to enact an ordinance even on a matter of local concern, if there is a state statute on the matter so complete that the state may be said to have pre-empted the field.[5] A 1961 case re-enforced this last straight-jacket proposition, holding that a statutory city has no power to punish reckless driving[6]—a matter which was earlier held to be of local concern.[7]

In 1961 the process continued, at a reduced rate, of pigeon-holing various types of forbidden conduct into the statewide category and the local category. Thus vagrancy was held to be a matter of local concern.[8] But two important events occurred during the year to diminish the importance of these pigeon holes. First, a Colorado case, *Woolverton v. Denver*,[9] recognized that conduct is not necessarily purely local or exclusively statewide; that some types of conduct have both statewide and local implications; and that with such types the home-rule city has power if the state does not forbid it. Second, the 1961 Colorado legislature, in response to a 1959 invi-

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1 The cases discussed in this article are found in 358 P.2d No. 2 through 367 P.2d, except for Gallegos v. People, 358 P.2d 1028 (Colo. 1960), discussed in the review of 1960 cases, 38 DICTA 65 (1961).

2 Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958), as explained by Geer v. Alaniz, 138 Colo. 177, 331 P.2d 260 (1958), holds that a municipal penal ordinance of a home-rule city creates a crime, not a civil wrong, if either (a) there exists a counterpart state statute punishing the same conduct or (b) the ordinance authorizes imprisonment as punishment. The penal ordinance of a "statutory" municipality (*i.e.*, one without home rule) doubtless is also a crime if there is a counterpart state statute or the ordinance authorizes imprisonment.

3 In this article the author departs from his practice of prior years by including herein the 1961 legislative developments in the field of criminal law and procedure.

4 Canon City v. Merris, *supra* note 2.

5 Aurora v. Mitchell, 144 Colo. 526, 357 P.2d 923 (1960), discussed by the author of this article in 38 DICTA 65,at 66 (1961).

6 Vanatta v. Steamboat Springs, 361 P.2d 441 (Colo. 1961).

7 Retallick v. Colorado Springs, 142 Colo. 214, 351 P.2d 884 (1960) (since the matter is local, a home-rule city has power to enact an ordinance punishing reckless and careless driving).

8 Dominguez v. Denver, 363 P.2d 661 (Colo. 1961) (a home-rule city has power to punish vagrancy).

9 361 P.2d 982 (Colo. 1961) (a home-rule city has power to punish gambling).

tation by the Colorado Supreme Court,[10] passed a statute authorizing municipalities (statutory as well as home-rule) to enact penal ordinances punishing most traffic offenses committed within their municipal borders.[11]

As to the first of these events, the Colorado Supreme Court in *Woolverton v. Denver* held that gambling (an offense punishable by a Denver ordinance with a maximum punishment of ninety days in jail and $300 fine, and punishable more lightly by a state statute with a maximum punishment of $150 fine) is a matter of local as well as statewide concern; and, since the state legislature has not forbidden municipalities to deal with gambling (and in fact has affirmatively consented[12] to their doing so), the city has power to punish the offense of gambling.[13] The *Woolverton* case involved gambling in a home-rule city; but its rule probably would apply also to gambling in a statutory city or town because the state legislature has affirmatively invited both types of municipalities to regulate gambling. *Woolverton* is not altogether clear, for purposes of home-rule city regulation of matters in the partly-local-partly-statewide category, whether it is enough that the legislature has not forbidden municipal regulation, or whether an affirmative legislative consent to regulation is also required.

The second event—the 1961 statute[14] expressly authorizing both home-rule cities and statutory municipalities[15] to enact penal ordinances punishing many traffic offenses which are also punishable by state statutes—is a continuation of the trend, disclosed in *Woolverton*, toward recognition of concurrent power of state and municipalities over minor offenses committed within municipal boundaries. Three traffic offenses are expressly excepted by the statute from the exercise of municipal power and left solely in the hands of the state. These are driving under the influence, driving an unregistered car or after license revocation or suspension, and hit-and-run driving. Other traffic matters may be regulated by municipalities. An ordinance punishing a traffic offense need not be worded exactly like the statute and need not provide exactly the same punishment.[16] The statute further contains provision forbidding state prosecution of a traffic violation after a municipal court conviction of the offense on a guilty or not-guilty plea. Doubtless, though the statute does not say so, the converse is true that

10 Davis v. Denver, 140 Colo. 30, 342 P.2d 674 (1959), invited the Colorado legislature to enact legislation delegating to home-rule cities concurrent power to enact penal ordinances dealing with matters which are of both statewide and local concern.

11 Colo. Sess. Laws 1961, ch. 66, amending Colo. Rev. Stat. §§ 13-4-6, 7 (1953).

12 Colo. Rev. Stat. § 139-32-1 (52) (1953), empowering home-rule and statutory cities and towns "to suppress gaming and gambling houses."

13 Woolverton v. Denver, *supra* note 9. The opinion of Doyle, J., concurred in by Day, Sutton and McWilliams, JJ., spoke in terms of black and white (matters exclusively local or exclusively statewide) and gray (partaking of both local and statewide qualities), with gambling falling in the gray area. The other three justices rejected the gray category in favor of pure black and pure white; but Moore, J., concurring, thought that gambling is black (purely local) whereas Hall, C.J., and Frantz, J., dissented on the ground that gambling is white (exclusively statewide).

14 Colo. Sess. Laws 1961, ch. 66, amending Colo. Rev. Stat. §§ 13-4-6, 7 (1953).

15 The 1961 statute authorizes the adoption of traffic regulations by "all local municipal authorities," *i.e.*, by both home-rule and statutory cities and towns.

16 Thus the 1961 statute amends Colo. Rev. Stat. § 13-4-6 (1953) by deleting the narrow former language permitting municipalities to adopt traffic regulations "not in conflict" with state traffic statutes and by substituting broader language allowing them to adopt traffic regulations "which cover the same subject matter" as the state traffic statutes.

a state conviction bars municipal prosecution for the same traffic offense.[17]

Assume that, in spite of the above-described expansions of municipal power, a municipality nevertheless lacks the power to enact a penal ordinance punishing certain conduct, but that, in spite of this lack, the municipality, having enacted a void ordinance, charges a defendant with violating the ordinance and convicts him thereof and collects a fine. Can the defendant, on learning of the mistake, thereafter recover the fine he paid under a mistake of law? A 1961 case holds that he cannot.[18]

B. Particular Crimes

1. Murder — Premeditation and Deliberation. — If the defendant without justification or excuse intentionally kills his victim, he is guilty of murder; but first degree murder under the Colorado statute[19] requires not just an intent to kill ("willfulness"), but premeditation and deliberation besides. It is difficult to ascribe any exact meaning to these vague words.[20] Perhaps it may be said that premeditation involves asking oneself the question, "Shall I kill him?"; willfulness involves the answer, "Yes, I shall"; and deliberation involves the further thought: "But if I do, what are the consequences? Well, I'll do it anyway." It is often said that each of these three separate thoughts requires very little time. A 1961 case upheld the trial court's instruction, objected to by the defendant, to the effect that the three thoughts require only enough time "for one thought to follow another."[21] Another case held that premeditation, as well as the intent to kill, may be inferred from the defend-

17 The *Woolverton* case itself, 361 P.2d 982, 990, recognizes, in a dictum, that the municipality, being a creature of the state, is not, for double jeopardy purposes, a separate sovereign from its creator the state. See also Kneier, *Prosecution Under State Law And Municipal Ordinance As Double Jeopardy*, 16 Cornell L.Q. 201 (1931), and Scott, *Municipal Penal Ordinances in Colorado*, 30 Rocky Mt. L. Rev. 267, 281, 283 (1958).

18 Prilliman v. Canon City, 360 P.2d 812 (Colo. 1961) (defendant, convicted and fined in municipal court for drunken driving before the *Merris* case held that there is no municipal power over drunk driving, cannot recover back the amount of his fine, for there can be no restitution for money voluntarily paid under mistake of law concerning the constitutionality of an ordinance).

19 Colo. Rev. Stat. § 40-2-3 (1953). "[W]ilful, deliberate and premeditated killing" is first-degree murder.

20 Cardozo, Law and Literature and Other Essays, 96-101 (1931).

21 Hammil v. People, 361 P.2d 117 (Colo. 1961). Frantz, J., dissented on the ground that the instruction requiring only enough time "for one thought to follow another" was improper in the setting of this case because the evidence had shown that the defendant was particularly slow-witted. On principle, of course, the jury should be instructed in the case of a mentally-retarded defendant, not only that the defendant needs a little *time* to premeditate and deliberate, but also that he should have *capacity* to do so. Cf. Fisher v. United States, 328 U.S. 463 (1945) (especially dissent by Frankfurter, J.), discussed at 34 Calif. L. Rev. 625 (1946), 46 Colum. L. Rev. 1005 (1946), 99 U. Pa. L. Rev. 267 (1950), 56 Yale L.J. 959 (1947).

ant's intentional use of a deadly weapon, in a deadly way, upon the body of his victim.[22] It would seem, however, that, although an intent to kill may be properly inferred from such conduct, the fact that this intent was premeditated and deliberate ought to require something further in the way of evidence concerning the circumstances surrounding the delivery of the lethal blow.[23]

2. Robbery. — A 1961 case stated that robbery, defined by Colorado statute as "the felonious and violent taking of money, goods or other valuable thing from the person of another by force or intimidation,"[24] is not a crime requiring a specific intent, so that defendant's proffered evidence of his mental incapacity to form a specific intent to rob is irrelevant.[25] But the word "felonious" in the definition of robbery requires a specific intent, the same specific intent to steal (to deprive the owner of his property) which larceny requires. Robbery is nothing more than larceny-plus, *i.e.*, with all the elements of larceny, plus (a) a taking from the person or presence of the victim, (b) done by force or intimidation.[26] Of course, one must be pretty far gone mentally to be placed in the category in which, even though he is not insane, he lacks the capacity to intend to steal, when, as in the case under discussion, he enters a hotel lobby with a hammer hidden in his coat, hits the desk clerk several lethal blows with the hammer and a pipe wrench, and then thoughtfully empties the cash register, cash drawer and change bowl before leaving the premises with his pockets full of money.

3. Forgery. — A borrower, in order to induce a bank to make him a loan, wrote out and signed four invoices which stated that he had sold goods to and performed services for X, for which X owed him $2,000. In fact, he had never delivered such goods or performed such services for X, who was a non-existent person. The borrower assigned the false invoices to the bank with intent to defraud. On the strength of these invoices, the bank lent him money, which he never repaid. The bank had an insurance policy insuring it against losses caused by accepting documents with the "forged" signature of a maker, drawer, endorser or assignor. The Colorado Supreme Court properly held that the bank's loss was not covered by the forgery insurance, for, whatever his crimes, the borrower did not commit forgery.[27] The borrower wrote out and signed a genuine writing containing lies and by obtaining the bank's money he was no doubt guilty of false pretenses, but he was not guilty of forgery. Thus it is sometimes said that "a forgery tells not merely a lie but a lie about itself."

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22 Mills v. People, 362 P.2d 152 (Colo. 1961).

23 Thus in People v. Bjornsen, 79 Cal.App.2d 519, 180 P.2d 443 (1947), there was evidence that the defendant had "thoughtfully taken the precaution" of taking several cartridges with him before shooting the victim twice with a single-barreled shotgun. The court said, "We think these circumstances sufficiently supply the necessary proof of premeditation, deliberation and malice" to support a conviction for first-degree murder.

24 Colo. Rev. Stat. § 40-5-1 (1953).

25 Jones v. People, 360 P.2d 686 (Colo. 1961), noted at 34 Rocky Mt. L. Rev. 243 (1962), reversing the conviction of robbery on other grounds, however. Doyle, J., concurring, properly points out that nothing is clearer than that robbery is a specific-intent crime.

26 Perkins, Criminal Law, 236-37 (1957): "The word 'felonious' [in the usual definition of robbery] means a taking with intent to steal;" and "robbery is larceny plus certain circumstances of aggravation."

27 United States Fid. & Guar. Co. v. First Nat'l Bank, 364 P.2d 202 (Colo. 1961), following the famous Colorado case, DeRose v. People, 64 Colo. 332, 171 Pac. 359, 1918C L.R.A. 1193 (1918) (an employee who writes out and signs a time sheet showing he has worked 40 hours when he in fact has worked but 30, is not guilty of forgery even though he intends to defraud his employer).

4. Possession of Narcotics. — In Colorado, as in other jurisdictions, it is a crime to "possess" narcotics.[28] The statute does not say "knowingly possess." In civil law, as first year students of the law of personal property know, there may be such a thing as unconscious possession, *i.e.,* possession of an article of whose existence or of whose nature the possessor is unaware, if he is in possession of the place wherein the article lies.[29] But in criminal law unconscious possession ought not to do, and the Colorado courts properly require that, for the crime of narcotics possession, the defendant must both (a) know of the presence of the forbidden article and (b) know that the article is a narcotic drug.[30]

5. Larceny by Bailee. — An accountant and tax consultant advised a taxpayer, after making out his return, that he owed $1250 federal income taxes. The taxpayer gave the accountant his check for $1250, payable to the accountant, with which to pay the taxes to the federal government. The accountant, however, filed a return showing that the taxpayer had overpaid his tax. Then the accountant deposited the check in his checking account and withdrew $1200 for his private purposes. In most other states a bailee or agent who is handed money by his bailor or principal to deal with according to the bailment or agency agreement is guilty of embezzlement if he fraudulently converts the money to his own use, but in Colorado he is guilty of the crime of "larceny by bailee,"[31] a crime which is considered neither embezzlement nor larceny.

6. Constitutional Issues. — One 1961 case involved the constitutionality of the Colorado sex offenders act,[32] upholding the one-day-to-life sentence feature of the act against the contention that, by providing different penalties depending upon whether the trial court decides to use the act or not, the act denies the equal protection of the laws, and against the contention that the act confers judicial power on the parole board (charged with the task of determining when to release the offender from the institution).[33] Another case, after construing Denver's vagrancy ordinance, upheld the constitutionality of that hard-to-define offense.[34] Still another case upset a conviction for driving after license suspension because

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28 Colo. Rev. Stat. §§ 48-6-2, 20 (1953).

29 Brown, Personal Property 22 (2d ed. 1955).

30 Mickens v. People, 365 P.2d 679 (Colo. 1961) (such a definition held to be "a fair exposition of the law's contemplation of 'possession' and eminently fair to the defendant"); Duran v. People, 360 P.2d 132 (Colo. 1961). A leading case is State v. Cox, 91 Ore. 518, 179 Pac. 575 (1919) (hotel porter carrying suitcase containing liquor not guilty of possessing liquor in absence of knowledge of contents of baggage).

Model Penal Code, § 2.01(4) (Tent. Draft No. 4, 1955), even more accurately provides that possession of contraband can give rise to criminal liability only if the possessor knowingly procured or knowingly received the forbidden article or was aware of his control of it for so long a time that he could have gotten rid of it.

31 Fine v. People, 360 P.2d 682 (Colo. 1961) (evidence, set forth in the text, supports conviction of larceny by bailee).

32 Colo. Rev. Stat. §§ 39-19-1 to 39-19-9 (1953), permits the trial judge, in his discretion, to sentence anyone convicted of certain sex crimes (including indecent liberties) to a state institution for a one-day-to-life term, instead of sentencing him according to the provisions of the statute defining and punishing the crime. Colo. Rev. Stat. § 40-2-32 provides for a ten year maximum term for the crime of taking indecent liberties with a child.

33 Trueblood v. Tinsley, 366 P.2d 655 (Colo. 1961) (one-day-to-life sentence imposed for taking indecent liberties).

34 Dominguez v. Denver, 363 P.2d 661 (Colo. 1961) (vagrancy ordinance construed so as to require an explanation of his conduct from one who by the commission of an overt act has aroused a reasonable suspicion of crime; defendant, at 3 a.m., was seen running away from a car, which had a broken window, and dropping a frozen chicken en route. When asked by police why he was running, the defendant first said he was just running and then said he was running to his girl's house).

the underlying statute by whose authority the license was suspended (Colorado's driver safety responsibility law) was unconstitutional.[35]

7. Statutory Changes. — The 1961 Colorado legislature created two new crimes — shoplifting[36] and misuse of a party-line telephone.[37] It extended the narcotics law to punish some new forms of misconduct connected therewith,[38] and it amended two old crimes — malicious mischief[39] and obscenity.[40]

C. General Principles

1. Attempt. — A Colorado case holds that one is not guilty of embezzlement where, being in possession of his employer's valueless piece of paper (a forged check) by virtue of his employment, he fraudulently converts it to his own use believing it to be a genuine check.[41] Although not an issue in the case,[42] this fact situation raises the interesting question whether it is attempted larceny, attemped embezzlement, attempted false pretenses or attempted receiving (insofar as these are crimes)[43] for one to steal, embezzle, obtain by false pretenses or receive property which he believes to be genuine and therefore valuable but which in fact is forged and worthless. It is submitted that the answer should be yes, *i.e.*, that the impossibility of committing the completed crime does not negative the attempt.[44]

2. Parties: Accomplices. — The lookout who aids the burglar and the driver of the get-away car who assists the robber are of course accomplices of the burglar or robber; they are working together on the same side of the crime. A harder question is involved when the two are working at opposite ends of the crime, *e.g.*, bribe-

35 People v. Nothaus, 363 P.2d 180 (Colo. 1961), noted at 34 Rocky Mt. L. Rev. 252 (1962).

36 Colo. Sess. Laws 1961, ch. 106, adding Colo. Rev. Stat. § 40-5-30 et seq., defining shoplifting as wilfully and unlawfully taking possession of merchandise displayed in a store, with intent to feloniously convert the same without paying the purchase price. Concealment of unpurchased merchandise is prima facie evidence of this intent. Maximum punishment is five years in the penitentiary for shoplifting of merchandise worth more than $100; when the merchandise is worth less than $100, the maximum punishment is six months jail sentence and $300 fine for the first offense, one year in jail and $500 fine for the second offense, and five years in the penitentiary for the third offense. The statute also protects merchants against civil liability for slander, false arrest, false imprisonment, or malicious prosecution by questioning persons reasonably suspected of shoplifting.

37 Colo. Sess. Laws 1961, ch. 105, provides for a punishment of 90 days in jail and $1,000 fine for wilfully refusing to yield a party line when informed of the need for an emergency call to a fire or police department or for medical aid or ambulance service and provides for a 10 day imprisonment and $100 fine maximum for falsely stating that an emergency exists in order to obtain the use of a party line.

38 Colo. Sess. Laws 1961, ch. 117, adding Colo. Rev. Stat. § 48-6-20(6), punishes as a misdemeanor (two years in jail maximum) certain unlawful conduct concerning narcotic drugs by apothecaries, doctors, dentists and veterinarians.

39 Colo. Sess. Laws 1961, ch. 109, amended Colo. Rev. Stat. § 40-18-1 (1953) by eliminating the long list of types of injury and types of property covered by the crime and inserting simply "destroy, damage or in any manner injure the real or personal property belonging to another." The new statute also alters somewhat the penalties for malicious mischief.

40 Colo. Sess. Laws 1961, ch. 107, amended Colo. Rev. Stat. §§ 40-9-16, 17, 18, 21 (1953), concerning the knowing importation, exhibition, sale, possession and mailing of obscene literature. The amended statute requires that the defendant *knowingly* deal with obscenity, apparently to conform to the due process requirement laid down by th United States Supreme Court in Smith v. California, 361 U.S. 147 (1959) (ordinance punishing possession of obscene book though without knowledge of its contents violates fourteenth amendment due process, since it inhibits free expression because bookseller cannot safely sell books without first studying them).

41 Burns v. People, 360 P.2d 106 (Colo. 1961).

42 Colo. Rev. Stat. § 40-5-16 (1953), defining and punishing embezzlement, does not punish attempted embezzlement, and Colorado, unlike most (perhaps all) other states, lacks a general attempt statute.

43 Colo. Rev. Stat. § 40-14-2 (Supp. 1960), makes attempted false pretenses a crime; but attempted larceny and attempted receiving, as well as attempted embezzlement, seem not to be Colorado crimes. This is a glaring loop-hole in the criminal law which should be plugged by a general statute punishing attempts to commit crimes.

44 Thus it is attempted larceny for one, with intent to steal, to put his hand into an empty pocket or cash drawer. Perkins, Criminal Law 492 (1957). It is attempted receiving stolen property for one to receive property he believes to be stolen but which is not in fact stolen. People v. Rojas, 358 P.2d 921 (Cal. 1961).

giver and bribe-taker, statutory rapist and underage girl, liquor-seller and liquor-buyer, abortionist and expectant mother, receiver and thief. Are the bribe-taker, underage girl, liquor purchaser, expectant mother and thief accomplices in the other's criminal venture? A 1961 Colorado case settled a conflict in the Colorado law by following the majority rule that a thief is not an accomplice of the receiver (for purposes of the requirement that one accomplice's testimony against the other should be viewed with caution),[45] the test as to an accomplice being whether he could be charged with the same offense as the criminal himself.[46]

3. Parties: Withdrawal. — A, after agreeing with B to burglarize X's restaurant in a town some miles away, drives B there; after investigating the restaurant, however, they decide it is too risky. A lets B out of the car and drives off. B then, without A's knowledge, robs Y, proprietor of another restaurant in the same town. Thereafter B, hitchhiking out of town with the loot from the robbery, is picked up by A, who by happy coincidence drives by at the right moment. Is A guilty of robbery of Y? The Colorado court held no, for, having voluntarily withdrawn from the original conspiracy, he was not responsible for what his erstwhile co-conspirator thereafter did.[47] This seems a correct view of the law; A would not be guilty, even though B had robbed X instead of Y, if A by words or conduct notified B of his withdrawal "before the act in question has become so imminent that its avoidance is practically out of the question."[48]

4. Mental Deficiency Short of Insanity. — A defendant's mental defect which does not amount to insanity may negative the specific intent which a particular crime may require.[49] This proposition was recognized in a 1961 case which, however, held that neither felony murder (unintended killing in the commission of a felony) nor robbery was a crime requiring a specific intent. The court was correct with respect to felony murder but, as noted earlier, wrong as regards robbery.[50]

II. CRIMINAL PROCEDURE

A. Colorado Rules of Criminal Procedure

The big news of 1961 in the area of criminal procedure was the adoption, by the Colorado Supreme Court, effective November 1, 1961, of the new Colorado Rules of Criminal Procedure, based

45 Burns v. People, 365 P.2d 698 (Colo. 1961), following Newman v. People, 55 Colo. 374, 135 Pac. 460 (1913), and overruling Moynahan v. People, 63 Colo. 433, 167 Pac. 1175 (1917).
It is generally held that the underage girl and the pregnant lady are victims rather than accomplices, and that a liquor-buyer is not an accomplice of a liquor-seller because the legislature carefully made liquor-selling, but not liquor-buying, a crime.

46 Burns v. People, 365 P.2d 698, 700 (Colo. 1961). This test may not be altogether workable, for whether one can be charged with the same crime depends on whether he is an accomplice, and whether he is an accomplice (by the test) depends on whether he can be charged with the same crime.

47 Johnson v. People, 358 P.2d 873 (Colo. 1961) (since the jury might have found, on the evidence, the facts to be true, the court committed reversible error in not instructing the jury, on its own motion, that this would amount to a withdrawal which would relieve A from liability for the robbery committed by B; Doyle, J., dissented on the ground that A requested no such instruction).

48 Commonwealth v. Doris, 287 Pa. 547, 135 Atl. 313 (1926) (A and B committed a robbery, after which A was captured while B fled; B shot a pursuing policeman to death; *held*, A is liable for murder, in spite of the contention that he withdrew at the moment of capture).

49 Colo. Rev. Stat. § 39-8-1 (Supp. 1960) provides that "evidence of mental condition may be offered in a proper case as bearing on the capacity of the accused to form the specific intent essential to constitute a crime," although no insanity plea has been made. Even without such a statute, this ought to be the law.

50 Jones v. People, 360 P.2d 686 (Colo. 1961), discussed *supra* note 25 and text. The court did hold, however, that the mental defect was a factor for the jury to consider in fixing punishment for first-degree murder at life or death.

upon, but not slavishly imitating, the Federal Rules of Criminal Procedure. The Rules are commented upon at length, by members of the committee which drafted them, in the fall, 1961, symposium issue of the Rocky Mountain Law Review.[51] Generally speaking, the Rules do not greatly change pre-existing Colorado criminal procedure,[52] though they do make certain, without making changes, some matters which formerly were vague.[53] The principal innovations made by the Rules are these: in some circumstances a summons, instead of an arrest warrant, may be used;[54] the miscellaneous array of pretrial defense motions and pleas (the plea in abatement, plea in bar, motion to quash and demurrer) are abolished, and a simple motion to dismiss or grant appropriate relief is substituted;[55] pretrial discovery and inspection by the defendant of the prosecution's evidence is provided for to a limited degree;[56] no time limitation applies in the case of a motion for a new trial based on newly discovered evidence;[57] a new post-conviction remedy, without limitation of time, for prisoners in custody under criminal sentence is created for exceptional cases of unconstitutional or otherwise seriously defective convictions;[58] the requirement of abstracts of the record and assignments of error for appellate review on writ of error is abolished;[59] a new provision on search warrants permits a warrant to search for and seize evidentiary material as well as the fruits of or instruments of crime, and creates a new pretrial motion to surpress evidence obtained by an unreasonable search and seizure;[60] assignment of counsel is mandatory for indigents in all felony cases, unless the defendant refuses counsel;[61] and the archaic term-of-court concept of time limitations on criminal procedural steps is abolished.[62]

A problem exists, in the relatively few areas of conflict between the pre-existing statutory procedural provision and the new

51 34 Rocky Mt. L. Rev. No. 1 (1961).

52 Several Colorado procedural "pets" have been retained even though they differ from the procedure provided for in the Federal Rules:

1. The information is the normal method of accusation.
2. The names of witnesses are endorsed on the information or indictment.
3. The direct filing of the information without a preliminary examination is allowed.
4. The special insanity plea is required to raise that defense.
5. The defendant alone may waive jury trial.
6. The attorneys conduct the voir dire examination of prospective jurors.
7. Written instructions are used, and they are given before the summing up.
8. The trial court must not comment on the evidence.
9. There is no appellate review of an issue not raised by a motion for new trial or motion in arrest of judgment.

53 *E.g.*, the duty of one who arrests with a warrant to take the arrested person "without unnecessary delay" before a justice of the peace; and, if without a warrant, to do so "within a reasonable time" (Colo. R. Crim. P. 5(a)); exactly what happens at the preliminary examination (Colo. R. Crim. P. 5(d)); the extent to which a defendant is entitled to examine a prosecution witness statement to the police for use in cross-examination of the witness (Colo. R. Crim. P. 16 (b), (c), (d)).

54 Colo. R. Crim. P. 4, 9.

55 Colo. R. Crim. P. 12.

56 Colo. R. Crim. P. 16(a), permitting defendant on court order to inspect and copy or photograph designated books, documents or tangible objects "obtained from or belonging to the defendant or obtained from others by seizure or by process" if items thus sought may be material to his defense.

57 Colo. R. Crim. P. 33.

58 Colo. R. Crim. P. 35(b), covering an area of relief formerly dealt with by Colorado's habeas corpus but going somewhat beyond the scope of that inadequate remedy, which has been construed so narrowly in Colorado. Under Rule 35 (b) the defendant moves in the court which tried him to vacate, set aside or correct his sentence.

59 Colo. R. Crim. P. 39(c), providing also that the procedure concerning briefs and records in criminal cases on error shall be the same as in civil cases.

60 Colo. R. Crim. P. 41.

61 Colo. R. Crim. P. 44.

62 Colo. R. Crim. P. 45(c). This fundamental policy change necessitated changes in the time allowed for motions for new trial and in arrest of judgment (Rules 33, 34) and the time beyond which an accused person can no longer be prosecuted (Rule 48 (b)), matters which formerly were governed by the term-of-court concept of time.

procedural rule, as to which should govern, the statute or the rule. The 1960 enabling act,[63] authorizing the Colorado Supreme Court to promulgate rules of criminal procedure, limits the scope of the rules to procedural (*i.e.*, excluding substantive)[64] matters, and it contains no provision, like that found in the enabling act for the civil rules,[65] that the procedural rules shall operate to repeal conflicting procedural statutes. This gives rise to two questions: (1) Do the procedural provisions in the Rules operate to repeal conflicting procedural statutes? (2) What matters covered by the rules are procedural and what matters are substantive?[66]

(1) I believe that the legislature's sweeping provision in the 1960 enabling act empowering the supreme court to promulgate rules "with respect to any or all proceedings in all criminal cases" necessarily implies, as a matter of the intent of the legislature, that the Rules when promulgated will repeal conflicting statutes. Furthermore, aside from the matter of legislative intent, there is the sound principle, recognized by the Colorado Supreme Court long ago,[67] that the courts, not the legislature, are the final authority on what procedural rules are to be applied in the courts as part of the tripartite division of governmental power among the executive, judicial and legislative branches.[68]

(2) I believe that nothing in the new Rules can be held to be substantive, rather than procedural, law.[69] Just because a matter is important does not mean that it is substantive; just because a procedural change is big does not make it a substantive change. Insofar as the new Colorado Rules have altered the former statutory law of criminal procedure, they may have made "substantial" procedural changes but they have not made "substantive" changes.[70] The new Rules provide that the trial court must provide counsel for indigent defendants in all felony cases, whereas the old statutory law was that the court may do so. The new Rules provide for dismissal of the prosecution if a year passes after the filing of the indictment or information without bringing the defendant to trial; the old statutory law provided for this dismissal after two terms of court, which might be more or less than a year. These changes are no doubt important, with important consequences, but

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63 Colo. Rev. Stat. § 37-2-34 (Supp. 1960).

64 Colo. Rev. Stat. § 37-2-8 (1953).

65 Not only has the legislature in the enabling act thus impliedly limited the power of the supreme court to exclude substantive matters, but doubtless in addition the legislature could not delegate its power to promulgate general rules of substantive law to the courts.

66 For light on the answers to these questions, I am indebted to my colleague Professor Douglas H. Parker, of the University of Colorado School of Law, who has prepared a scholarly manuscript, not yet published, entitled *Some Illusory Pitfalls: The Repealing Effect of the Colorado Criminal Rules, Procedural Law versus Substantive Law, and the Ex Post Facto Limitation.*

67 Kolkman v. People, 89 Colo. 8, 300 Pac. 575 (1931) (" . . . the power to make rules of procedure is our [the supreme court's] constitutional right"), discussed in McCormick, *Legislature and Supreme Court Clash on Rule-Making Power in Colorado,* 27 Ill. L. Rev. 664 (1933).

68 See Levin and Amsterdam, *Legislative Control over Judicial Rule-Making,* 107 U. Pa. L. Rev. 1 (1958).

69 Parker, *supra* note 66, discussing the terms "substantive" and "procedural," relates these words to criminal law as follows: "Thus, in the field of criminal law, the substantive criminal law is concerned with the elements of the various crimes (from murder down to disturbance), as contained in their definitions, and with the punishments which may be awarded for their violations, plus those broader matters called "general principles" of criminal law, which, because they are applicable to several or many or all crimes (*e.g.*, attempt, conspiracy, self-defense, insanity) do not appear in the definitions of the various crimes. The criminal procedural law, on the other hand, concerns the steps taken, from arrest through trial and appellate review to post-conviction remedies, to determine the guilt or innocence of the accused person."

70 Sibbach v. Wilson, 312 U.S. 1 (1941) (Fed. R. Civ. P. 35, 37, authorizing one party in civil action to conduct a physical or mental examination of opposite party in appropriate cases, are not invalid as substantive rules; "substantive" does not mean "important" or "substantial").

they are nonetheless procedural changes, not substantive changes.

It has been suggested that the Colorado legislature (a) should enact the Rules as legislative law and (b) should expressly, "by the numbers," repeal those statutes still on the books which are inconsistent with the Rules.[71] Those who believe in the supremacy of the judiciary over the legislature in the area of court procedure might not approve of the first suggestion on the ground that it is unnecessary and seems to acknowledge the supremacy of the legislature in the procedural field and might call for legislative enactment of any subsequent amendments to the Rules. But the second suggestion is sound, for, whether absolutely necessary or not, it would certainly serve to eliminate confusion.

B. Declaratory Judgment

One who wishes to engage in conduct which a statute or ordinance of questionable validity purports to punish as a crime may prudently wish to test its validity before he undertakes to violate its terms, rather than engage in the forbidden conduct and later, when prosecuted, defend on the ground of the invalidity of the law. A 1960 Colorado case allowed the use of a declaratory judgment for such a purpose.[72] This view seems right both as a matter of interpreting the language of the declaratory judgment law[73] (*i.e.*, what the law is) and as a matter of what the law ought to be. But a 1961 Colorado case, without referring to the 1960 case, held that a declaratory judgment cannot be used for such a purpose;[74] one must instead wait and raise the invalidity issue when prosecuted for violating the statute or ordinance.

C. Information

1. Forms. — A 1961 Colorado event of some importance is the publication of the 1961 revision of Criminal Informations and Forms Annotated," by the late Max D. Melville, published by the Office of the District Attorney, Denver, Colorado. The Appendix of Forms to the Colorado Rules of Criminal Procedure refers to the Melville forms for guidance in charging particular crimes, from "Abortion" to "Violations of Motor Vehicle Law." The Appendix makes one suggested change to the Melville forms which should serve a useful purpose: instead of unhelpfully concluding, in the traditionally vague way, "contrary to the form of the statute in such case made and provided, and against the peace" etc., the form concludes, "in violation of C.R.S. 1953, §—, and against the peace" etc.

2. Allegations. — An information charging a crime committed by two co-defendants, one of whom was in fact a principal and the other an accessory, need not specify that a particular defendant is principal or accessory, but can properly remain silent as to

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71 A subcommittee of the Colorado Bar Association's Criminal Law Committee is charged with preparing a list of such statutes for submission to the 1963 legislature.

72 Memorial Trusts, Inc. v. Beery, 144 Colo. 448, 356 P.2d 884 (1960), discussed at 38 DICTA 65, 71 (1961).

73 Colo. Rev. Stat. § 77-11-2 (1953); Colo. R. Civ. P. 57 (b): "Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute, ordinance . . . ."

74 Meier v. Schooley, 363 P.2d 653 (Colo. 1961) (one of two grounds for denying declaratory judgment). A concurring opinion by Sutton, J., though not citing Memorial Trusts, Inc. v. Beery, *supra* note 72, would follow the statute and rule, *supra* note 73.

the matter.[75] An information dealing with robbery of the manager of a supermarket may properly allege that the money was taken from the person and against the will of the manager, though the money actually belonged to the supermarket rather than to him.[76] An information charging burglary of a business building in the language of the old burglary statute ("office, shop or warehouse") rather than the new statute ("building") is good; the information need not charge the crime in the exact language of the statute; it is enough if the defendant and the jury can readily understand the offense charged.

3. Variance. — A larceny information charged the defendant with stealing property of the Continental Oil Co., "a corporation," and at the trial the prosecution proved that he stole property of that oil company, but it failed to prove the oil company was a corporation. The supreme court properly upheld the larceny conviction, holding that the defendant could not have been misled or prejudiced by the failure of the prosecution to prove this irrelevant fact.[77] On the other hand, an embezzlement information charged the defendant with embezzling a $133 check duly signed by an officer of a named corporation, but at the trial the prosecution's proof showed that the check was a forgery. The supreme court properly reversed the embezzlement conviction on the ground of a fatal variance, since here the prosecution's own proof disclosed that no embezzlement was committed.[78] Someone, perhaps the defendant, committed a forgery, but as forgery was not the crime charged, the defendant could not be convicted of that.

D. Arraignment

One defendant, charged with armed robbery, failed to plead—at least the record contained no reference to a plea—but the case proceeded to trial as if he had pleaded not guilty. After conviction, the defendant noticed the lack of a plea, but the conviction was affirmed on the basis of a sensible Colorado statute.[79]

E. Pre-Trial Discovery

The district attorney lawfully obtained possession of the defendant's books before trial. The trial court ordered that the district

75 Schreiner v. People, 360 P.2d 443 (Colo. 1961).
76 Hampton v. People, 362 P.2d 864 (Colo. 1961).
77 Straub v. People, 358 P.2d 615 (Colo. 1961).
78 Burns v. People, 360 P.2d 106 (Colo. 1961).
79 Landford v. People, 365 P.2d 893 (Colo. 1961), relying on Colo. Rev. Stat. § 37-7-9 (1953).

attorney permit the defendant to inspect these books for the purpose of preparing his defense.[80] This ruling, perhaps a little bold in view of the traditional Colorado notion that pre-trial inspection is not allowed,[81] would also be upheld under the new Rules.[82]

F. Trial Through Verdict

1. Voir Dire Examination. — A prospective juror stated on voir dire that he had formed an opinion that defendant was guilty but that he would put aside this opinion and be guided solely by the evidence. Defendant's challenge for cause was denied and defendant did not use a peremptory challenge on him. It was held that (a) the trial court properly denied the challenge for cause and (b) anyway the defendant, not having exercised all his peremptory challenges, could not complain of the erroneous denial of a challenge for cause.[83] In another criminal case in which the two sides, each entitled to three peremptory challenges, actually without objection exercised four, the defendant could not secure a new trial on the ground that the prosecution used too many challenges.[84] In a murder case it was held not reversible error for the district attorney to examine prospective jurors concerning their scruples about the death penalty, though he possessed only circumstantial evidence of the defendant's guilt,[85] since there is always the possibility that direct evidence might turn up unexpectedly at the trial.[86]

2. Conduct of District Attorney. — A district attorney, trying separately a defendant and his accomplice, is guilty of misconduct if, at the defendant's trial to a jury, he calls the accomplice to the witness stand without any real expectation of eliciting from him any evidence against the defendant, knowing instead that the accomplice will probably refuse to testify on the grounds of self-incrimination and thus harm the defendant's case in the eyes of the jury.[87] It is doubtless misconduct too for the district attorney to intimate, on cross-examination of the defendant in a criminal case, that the defendant had threatened witnesses, if he possesses no evidence of such threats.[88] Although it is wrong for the district attorney in his closing argument to misstate the facts in evidence, an unintentional misstatement, immediately corrected, does the defendant no harm and so cannot be reversible error.[89]

3. Fair Trial: Impartial Tribunal. — It is necessary for a fair trial that judge and jury be impartial. In one Colorado case the supreme court reversed a murder conviction and remanded for a new trial before another judge because it was convinced that it found in the record of the trial evidence of the judge's prejudice

80 Fine v. People, 360 P.2d 682 (Colo. 1961).
81 See Walker v. People, 126 Colo. 135, 162-63, 248 P.2d 287, 302 (1952) (trial court has no discretionary power to permit inspection of tangible evidence, for it has no such power with respect to documentary evidence).
82 Colo. R. Crim. P. 16 (a), discussed *supra* note 56.
83 Skeels v. People, 358 P.2d 605 (Colo. 1961).
84 Righi v. People, 359 P.2d 656 (Colo. 1961).
85 Colo. Rev. Stat. § 40-2-3 (1953) provides that the death penalty may not be imposed for first-degree murder where the evidence of guilt is circumstantial rather than direct.
86 Atencio v. People, 364 P.2d 575 (Colo. 1961).
87 De Gesualdo v. People, 364 P.2d 374 (Colo. 1961) (burglary conviction reversed for this misconduct in view of trial court's failure, on defendant's request, to caution the jury to disregard the incident), noted at 34 Rocky Mt. L. Rev. 245 (1962).
88 Johnson v. People, 367 P.2d 896 (Colo. 1961) (holding, however, that the misconduct did not constitute reversible error because the court promptly struck the question as improper).
89 Gallegos v. People, 362 P.2d 178 (Colo. 1961).

against the defendant.[90] In another case, in which the defendant's counsel accepted as a juror a lady whom he knew to be the wife of a merchant policeman, the defendant was not entitled to a new trial when his counsel learned, after the defendant's conviction, that the lady's husband was also a deputy sheriff.[91]

4. Fair Trial: Newspaper Publicity. — One of the difficulties in giving the defendant a fair trial is created by pre-trial publicity about the defendant and his case. Such publicity may contain damaging information as to the defendant's former convictions for other crimes or his confession to this crime. The matter is particularly bad if the defendant's confession or prior record is inadmissible evidence at the trial. However, when an article appeared in a newspaper referring to the defendant as an "ex-convict," but no juror saw it, the incident did not harm the defendant's cause.[92]

5. Free Transcript. — All the states, including Colorado, are constitutionally required to furnish a free transcript or its equivalent to any indigent defendant who after conviction has something which he is entitled to have an appellate court review. Thus a Colorado trial court must, on an indigent defendant's request,[93] or even without a request,[94] supply at government expense a court reporter for the trial in Colorado county courts as well as district courts.[95]

6. Speedy Trial. — In one 1961 case the defendant, after a prompt trial in municipal court, appealed to the superior court where he was entitled to a trial de novo, but fourteen months passed (during which time he was free on bail) before he was brought to trial. He did not, meanwhile, demand a trial. After his trial and conviction, over his objection that he had been denied his constitutional right to a speedy trial, the supreme court reversed, holding (a) his right to a speedy trial in the superior court was not satisfied by a speedy trial in the municipal court, and (b) his failure to demand a trial did not constitute a waiver of his right to a speedy trial.[96] On the waiver point, some authorities in other jurisdictions have taken the contrary view,[97] but it would seem that the Colorado rule, that it is not the defendant's duty to press for trial under the penalty of waiving his right to speedy trial if he does not do so, is the better one.[98]

Another 1961 case holds that the defendant's right to a speedy trial is not violated when he is speedily tried and sentenced, but sentenced erroneously to a term of imprisonment in excess of that allowable by law, and two years later, on defendant's motion

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90 Penney v. People, 360 P.2d 671 (Colo. 1961). Doyle, J., dissented on the ground that the record does not show the judge was biased, and even if he were biased his bias did not prejudice defendant. As to the latter point, no doubt a defendant need not prove that he was actually prejudiced if in fact the judge is shown to be biased. See Scott, *State Criminal Procedure, the Fourteenth Amendment, and Prejudice*, 49 Nw. U. L. Rev. 319 (1954).

91 Ray v. People, 364 P.2d 578 (Colo. 1961).

92 Gallegos v. People, 362 P.2d 178 (Colo. 1961).

93 Pacheco v. People, 360 P.2d 975 (Colo. 1961) (clerk's long-hand notes of objections and rulings will not do).

94 Herren v. People, 363 P.2d 1044 (Colo. 1961) (failure to request is not a waiver).

95 *Ibid.* Speeding case tried de novo on appeal to county court after trial in justice court. But there is no need to do so in justice or municipal courts, which are not "courts of record."

96 Hicks v. People, 364 P.2d 877 (Colo. 1961).

97 *E.g.*, United States v. Lustman, 258 F.2d 475 (2d Cir. 1958), *cert. denied* 358 U.S. 880 (1958) (defendant's failure to demand trial is waiver of right to speedy trial).

98 Compare Herren v. People, *supra* note 94, (failure of defendant to request a court reporter is not a waiver of his right to have one present).

pointing out the error in the sentence, he is resentenced to a valid term.[99]

Just as too much delay between accusation and trial may violate the constitution, conversely too much speed may do so. In a 1961 case a motorist involved in an accident shortly after midnight was arrested at the scene for driving under the influence and taken before a justice of the peace; a complaint was drawn up charging him with the crime; the justice held a trial at 2:30 a.m. at which the defendant (after being informed of the possibility of fine and imprisonment but not of the probability of the loss of his license) pleaded guilty and was fined. The supreme court held that "the summary, hasty, middle of the night justice" here dispensed was a violation of the defendant's constitutional (due process) right to a fair trial.[100] The court held that the defendant's guilty plea was not a waiver of his right not to be tried too speedily, for (a) he did not know all the consequences of conviction (*i.e.*, the probability of license revocation) and (b) if he was in effect under the influence, as charged, he could not understandably waive his right. All this is true, the court says, even though the justice may have acted in a most considerate fashion by arising from his bed in the middle of the night in order to accommodate the errant motorist by letting him have his trial and continue on his way without a long delay.

7. *Evidence.* — The big event of 1961 in the area of criminal evidence was the United States Supreme Court's holding, in *Mapp v. Ohio*[101] (overruling *Wolf v. Colorado*[102]), that a state which admits evidence obtained by unreasonable police search and seizure violates due process of law guaranteed by the Fourteenth Amendment. This, of course, will require a considerable change in pre-existing Colorado police practices if criminals who are caught are to be convicted. Colorado, however, need not slavishly follow federal cases as to what searches and seizures are unreasonable. Thus evidence seized without a search warrant as a result of a search incident to an unlawful arrest is no doubt inadmissible, for the search is then unreasonable; but Colorado, within certain limits required by fairness, may have a different law of arrest from the federal law of arrest. So, too, a federal search warrant cannot be issued which goes beyond searching for the fruits (*e.g.*, stolen property) or instruments (*e.g.*, burglar's tools, counterfeiting dies) of crime; but the new Colorado Rules[103] allow a search warrant for evidence of crime (*e.g.*, defendant's diary or his blood-stained clothing) as well. To the extent that the Colorado law concerning arrest and concerning search warrants differs from the federal law, the reasonableness of the search and seizure will vary; and hence the admissibility in Colorado courts of evidence searched for and seized by Colorado police may, in a particular fact situation, differ from the admissibility in federal courts of evidence obtained by federal police in exactly the same fashion.

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99 Casias v. People, 367 P.2d 327 (Colo. 1961).
100 Toland v. Strohl, 364 P.2d 588 (Colo. 1961).
101 367 U.S. 643 (1961), discussed, with reference to Colorado in particular, in Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 Rocky Mt. L. Rev. 150 (1962).
102 338 U.S. 25 (1949).
103 Colo. R. Crim. P. 41 (b)(3).

A number of Colorado criminal cases decided in 1961 necessarily involved evidentiary problems. The admissibility of photographs vividly portraying the shocking details of the crime[104] and the admissibility in a variety of situations of evidence of defendant's former convictions[105] were, as usual, favorite topics. A number of cases dealt with the application of the rule permitting the jury to draw an inference that the defendant stole or got property through burglary or robbery, from the defendant's recent, exclusive, unexplained possession of property taken by larceny, burglary or robbery.[106] Two cases concerned the testimony of prosecution witnesses whose names were not endorsed on the information.[107] Although a coerced confession is of course inadmissible, a confession is admissible without a hearing as to its voluntariness unless defendant first suggests that it is involuntary.[108] A psychiatrist was allowed to testify as an expert on insanity though he had once said in a speech that a plumber is just as good as a psychiatrist at determining the capacity of an accused to recognize right and wrong![109] Evidence of defendant's flight after waiting several days following the crime,[110] as well as evidence that defendant fabricated favorable evidence or tried to suppress unfavorable evidence,[111] is admissible as showing consciousness of guilt. In Colorado there is no absolute rule that an accomplice's testimony must be corroborated if the prosecution is to avoid a directed verdict.[112]

8. Burden of Proof: Presumption v. Inference. — A criminal defendant may use certain defenses negativing guilt, sometimes loosely termed "affirmative defenses," all of which, except for insanity, may be shown under a plea of not guilty — such as the general defenses of alibi, self-defense, mistake of fact or law, compulsion, insanity, intoxication, infancy, and the special defenses created by a specific proviso or exception applicable to a particular crime (*e.g.*, death after a year and a day, for murder or manslaughter; termination of pregnancy on doctor's advice to save life, for abortion). With all these defenses it is clear that the defendant has the burden of going forward with some evidence showing that such a defense may exist, for there is, as it were, a sort of presumption, in the absence of contrary evidence, that the defense does not exist. But the defendant's burden of persuasion is one only of raising

104 Skeels v. People, 358 P.2d 605 (Colo. 1961); Jones v. People, 360 P.2d 686 (Colo. 1961); Mills v. People, 362 P.2d 152 (Colo. 1961); Atencio v. People, 364 P.2d 575 (Colo. 1961); Wooley v. People, 367 P.2d 903 (Colo. 1961).

105 Gallegos v. People, 362 P.2d 178 (Colo. 1961); Stanmore v. People, 362 P.2d 1042 (Colo. 1961) (better to refer to former crimes as "former transactions"); Hampton v. People, 362 P.2d 864 (Colo. 1961); Garrison v. People, 364 P.2d 197 (Colo. 1961); Ciccarelli v. People, 364 P.2d 368 (Colo. 1961); Burns v. People, 365 P.2d 698 (Colo. 1961); Wooley v. People, 367 P.2d 903 (Colo. 1961).

106 Pena v. People, 363 P.2d 672 (Colo. 1961) (under the rule conviction of burglary sustained); Ciccarelli v. People, 364 P.2d 368 (Colo. 1961) (recognizing that the rule is one involving an inference, not a presumption in a mandatory sense, *i.e.*, the jury may infer guilt but it need not do so); Cruz v. People, 364 P.2d 561 (Colo. 1961) (rule applies to robbery as well as to larceny and burglary); Stevenson v. People, 367 P.2d 339 (Colo. 1961) (rule inoperative where no proof that defendant was lessee, co-lessee, occupant or resident of premises where burglary loot found).

107 Fine v. People, 360 P.2d 682 (Colo. 1961) (allowing such a witness to testify is not reversible error when defendant failed to object); Landford v. People, 365 P.2d 893 (Colo. 1961) (defendant not prejudiced even though witness was not endorsed until day of trial).

108 Ciccarelli v. People, 364 P.2d 368 (Colo. 1961).

109 Hammil v. People, 361 P.2d 117 (Colo. 1961).

110 Mills v. People, 362 P.2d 152 (Colo. 1961), noted at 34 Rocky Mt. L. Rev. 241 (1962).

111 Johnson v. People, 367 P.2d 896 (Colo. 1961).

112 Burns v. People, 365 P.2d 698 (Colo. 1961).

a reasonable doubt in the minds of the fact-finder (generally, the jury).[113]

One 1961 case[114] involved the rule that the fact-finder may (though it need not) infer defendant's guilt of larceny of property from his recent, exclusive, unexplained possession of stolen property. The trial court's instruction was that recent, exclusive, unexplained possession of stolen property raises a "presumption" that the possessor stole it; that the burden of explaining recent, exclusive possession was on the defendant; and that his explanation must be sufficient to raise a reasonable doubt as to his guilt in the jury's minds. The instruction did not specifically state that the jury must (as distinguished from may) find the defendant guilty on proof of recent, exclusive possession if the defendant does not explain it away to the extent of raising a reasonable doubt; but the word "presumption" is so ambiguous as to be susceptible of that meaning.[115] The supreme court held that the instruction, though not a model one, was not so bad as to constitute reversible error. It is submitted that an instruction which states an inference in the language of a presumption without further explanation is so dangerously misleading that it ought to be held to constitute reversible error.[116]

9. Directed Verdict. — In order for the prosecution to avoid a directed verdict, it must put on a prima facie case,[117] but need not put on all the evidence it has.[118]

10. Instructions. — In a 1960 criminal case the Colorado Supreme Court advised Colorado trial courts to couch their instructions in the language of the applicable criminal statute.[119] In a 1961 case, however, the supreme court reversed a trial court which too literally followed this advice.[120] The trouble is that the statute sometimes contains too much law, sometimes too little law, and

113 2 King, Colorado Practice Methods § 2377 (1956, Supp. 1961).

114 Ciccarelli v. People, 364 P.2d 368 (Colo. 1961).

115 See McCormick, Evidence § 308 (1954), on "Presumptions, Permissive and Mandatory."

116 So held in Barfield v. United States, 229 F.2d 936, 940 (5th Cir. 1956) (the court said, concerning the inference of guilt of larceny from recent, exclusive, unexplained possession: "We think too, that the use of the words 'presumption' and 'presume' in the instruction was misleading. What the court was dealing with was an inference rather than a presumption."); United States v. Sherman, 171 F.2d 619, 624 (2d Cir. 1948), per L. Hand, J. (same; "the jury may be misled by the word 'presumption' ").

117 In two 1961 Colorado cases the supreme court reversed convictions for failure to make out a prima facie case: Gonzales v. People, 361 P.2d 358 (Colo. 1961) (prosecution's proof: defendant borrowed uncle's car; five hours later uncle's car, occupied by persons unknown, was seen pushing a stolen car; *held*, in prosecution for larceny of car, verdict should have been directed for defendant); Burmeister v. People, 361 P.2d 784 (Colo. 1961) (in prosecution for false pretenses, prosecution's proof was that defendant was paid as if he had used own car for official trips, when in fact he used government car; *held*, verdict should have been directed for defendant because of lack of evidence that defendant ever represented that he used own car).

118 Tafoya v. People, 366 P.2d 860 (Colo. 1961).

119 Vigil v. People, 143 Colo. 328, 334, 353 P.2d 82, 85-86 (1960), discussed at 38 DICTA 65, 75-76 (1961), not altogether with approval, for the particular statutes which the supreme court advised the trial court to cite in a case involving the defense of self-defense included a lot of matter which had nothing to do with self-defense.

120 Johnson v. People, 358 P.2d 873 (Colo. 1961). A single Colorado statute, Colo. Rev. Stat. § 40-1-12 (1953) defines and punishes as a principal an accessory before the fact (one, not present, who has advised or encouraged the perpetration of a crime) and defines (though it is the following section which punishes, less severely than a principal is punished) an accessory during the fact (one who, finding himself present when a crime is being committed, does not do what he can to prevent it). In the *Johnson* case the undisputed evidence showed the defendant, who had driven two robbers to the scene, left before they committed the robbery. The trial court, reading from the statute, unfortunately included the inapplicable part concerning an accessory during the fact, and then, because it did not also give the following section of the statute punishing less severely the crime of being an accessory during the fact, may have left the impression that an accessory during the fact was punishable as a principal. The supreme court, with one dissent, reversed the defendant's robbery conviction.

sometimes ambiguous formulations of the law, so that to follow the statute too closely may confuse or mislead the jury.

One case held that the trial court erred in failing, on its own motion, to give an instruction dealing with the defendant's theory of his defense after it properly failed to give the defendant's tendered instruction, which erroneously stated the law concerning his theory of defense.[121] A number of other cases dealt with the prejudicial effect of erroneous instructions. Thus it was held not to be reversible error, in a murder case, to instruct on involuntary manslaughter (as to which there was no evidence), where the jury convicted of murder,[122] in spite of the rule expressed in another case that "generally it is improper to instruct on a degree of homicide not sustained by the evidence."[123] Erroneous instructions favorable to the defendant do not, of course, constitute reversible error.[124] In a case wherein the defendant, after pleading insanity, virtually abandoned this defense there is no need for instructions on insanity especially if the defendant did not request any instruction thereon.[125] The court need not instruct specifically on such "defenses" to a homicide charge as that the victim committed suicide or accidentally shot himself where the given instructions adequately set forth the elements of murder, the law on burden of proof, and the need to acquit if the crime is not proved.[126]

The trial court should not communicate instructions to the jury outside the courtroom and without the presence of counsel when the jury, having retired to consider its verdict, desires further instructions; but this conduct, although improper, does not constitute reversible error where no harm is done.[127]

11. Verdict. — A jury which was given the standard "third degree" instruction[128] after becoming "hopelessly dead-locked" twenty-five hours after submission to it of a murder case, was held not to have been coerced into a verdict.[129]

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121 *Ibid.* (Doyle, J., dissenting).

122 Atencio v. People, 364 P.2d 575 (Colo. 1961). Had the jury found the defendant guilty of involuntary manslaughter, however, the instruction would have been reversible error because the jury might have acquitted him if the opportunity for a compromise verdict had not been presented. Dickens v. People, 67 Colo. 409, 186 Pac. 277 (1919).

123 See Mills v. People, 362 P.2d 152 (Colo. 1961), noted at 34 Rocky Mt. L. Rev. 241 (1962).

124 Jones v. People, 360 P.2d 686 (Colo. 1961).

125 Cruz v. People, 364 P.2d 561 (Colo. 1961).

126 Atencio v. People, 364 P.2d 575 (Colo. 1961).

127 Ray v. People, 364 P.2d 578 (Colo. 1961) (jury, deliberating fate of two co-defendants, sent message to judge at home via the bailiff asking whether it could convict one defendant and acquit the other; the judge told the bailiff to write "yes" on a slip of paper and deliver it to the jury).

128 "You should consider that this case must at sometime be decided; that you have been selected in the same manner and from the same source as any future jury must be; that there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other; that in order to bring twelve minds to a unanimous conclusion you must examine the questions submitted to you with candor and a proper regard and deference to the opinions of each other; that you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments.

"If a majority of your number are for conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest and intelligent with himself, who under the sanction of the same oath have heard the same evidence, with the same attention and an equal desire to arrive at the truth.

"On the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment from which so many of their number dissent, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

"And, while at the last each juror must act upon his own judgment concerning the evidence in the case and not upon the judgment of his fellows, it is your duty, guided by the foregoing and by all of the instructions heretofore given in this case, to decide the case, if you can conscientiously do so.

"It is accordingly ordered by the court that you be returned to your jury room for further deliberation."

129 Mills v. People, 362 P.2d 152 (Colo. 1961).

G. *Sentence*

One convicted of any one of several named sex crimes may be sentenced (for one day to life) to the penitentiary, under the Colorado statute.[130] The trial court, in deciding whether to sentence the sex offender under the regular law or to do so under the sex offender law (*i.e.*, in deciding whether he is a threat to the public or is an habitual offender and mentally ill) need not follow the advice contained in the psychiatric report which the court requested before imposing sentence.[131]

In sentencing habitual criminals, trial courts sometimes make mistakes. It is, of course, improper to sentence the two time habitual offender to two consecutive terms of imprisonment, one for the substantive crime and one for the former crime.[132] A felony conviction in another state counts for habitual criminal purposes, even though the conduct for which convicted there does not constitute a felony under Colorado law.[133] Trial courts sometimes make other sorts of mistakes in sentencing. Where the court orally stated, in sentencing the defendant, that the sentence was to be served concurrently with another sentence he had earlier received, but the mittimus stated the sentence was to be served consecutively, the supreme court ordered the mittimus corrected to conform to the sentence as actually imposed.[134] The trial court has power to correct an illegal sentence, on defendant's motion, even after the expiration of the term of court.[135] But it may not increase a sentence once the defendant has begun to serve it.[136]

130 Trueblood v. Tinsley, 366 P.2d 655 (Colo. 1961) (the statute, however, empowers the parole board to transfer the sex offender from the penitentiary to the state hospital or other institution).

131 *Ibid.* (psychiatric report stated defendant was not mentally deficient, and contained no statement that he was a threat to the public.)

132 Righi v. People, 359 P.2d 656 (Colo. 1961).

133 Burns v. People, 365 P.2d 698 (Colo. 1961) (carrying concealed weapons is a Nebraska felony, as proved by a certified copy of the Nebraska statute defining and punishing that crime).

134 Duran v. People, 360 P.2d 132 (Colo. 1961).

135 Casias v. People, 367 P.2d 327 (Colo. 1961) (defendant illegally received 25-30 year sentence in 1959 for burglary as a third felony offender, when in fact he was only a second offender; defendant properly resentenced in 1961 to 10-15 years as a second offender; Villalon v. People, 358 P.2d 1018 (Colo. 1961). Colo. R. Crim. P. 35 (a) provides that an illegal sentence (*e.g.*, punishment for a crime awarded in excess of that allowed by law for that crime; multiple and consecutive punishment for what is in effect one offense) may be corrected at any time. A sentence is not illegal, however, because it comes at the end of a trial during which errors occurred. Hill v. United States, 82 Sup. Ct. 468 (U.S. 1962).

136 Righi v. People, 359 P.2d 656 (Colo. 1961).

A justice of the peace may sentence a youth between sixteen and twenty-one, convicted of a misdemeanor, to the reformatory even though the reformatory is in another county.[137]

H. Review on Writ of Error

As noted above, abstracts of record and assignments of error in criminal cases have been abolished by the new Rules and the procedure which governs the form and filing of records and briefs on writ of error in civil cases applies in criminal cases.[138] But, for the time being at least, the present cumbersome procedure for obtaining a writ of error in a criminal case — "lodging" the record in the supreme court within six months from the judgment of conviction — rather than the simple act of filing a praecipe in the supreme court as in a civil case, is still required.[139]

Also as previously noted, the present procedural rule requiring the defendant to raise an alleged trial court error by a motion for new trial or a motion in arrest of judgment before the supreme court will review the error[140] is continued under the new Rules.[141]

In a case in which the convicted defendant showed that the justice court in convicting him (at too hasty a trial) "exceeded its jurisdiction,"[142] the supreme court upheld the district court's granting him the extraordinary remedy of certiorari, vacating the judgment of conviction and ordering a new trial, because it was doubtful whether the defendant (having pleaded guilty) could have appealed his conviction in the regular way.[143]

Another case concerned the conclusiveness, upon supreme court review on writ of error, of recitals in the record.[144] Perhaps the record showed the defendant was arraigned and pleaded, but on error he denied that these events ever took place. The supreme court held that, at least where the defendant is represented at his trial by competent counsel, recitals in the record are conclusive on writ of error, for the defendant must seasonably call the trial court's attention to the defect for correction at the time.[145]

The scope of supreme court review of trial court action in punishing a direct criminal contempt (misbehavior in the court's presence) is limited.[146] So too is judicial review on certiorari of the parole board's discretionary action in revoking parole.[147]

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137 Aranda v. People, 361 P.2d 782 (Colo. 1961).
138 Colo. R. Crim. P. 39 (a).
139 Colo. R. Crim. P. 39 (a), discussed at 34 Rocky Mt. L. Rev. 83-84 (1961).
140 Cruz v. People, 364 P.2d 561 (Colo. 1961); Dyer v. People, 364 P.2d 1062 (Colo. 1961) (unless justice requires review).
141 Colo. R. Crim. P. 37(b) ("except that plain error or defects affecting substantive rights may be noted although they were not brought to the attention of the trial court").
142 Colo. R. Civ. P. 106(a)(4) permits district courts to grant certiorari relief where an inferior tribunal has "exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy." On certiorari, review is limited to a determination of whether the tribunal exceeded its jurisdiction. "Jurisdiction" is here not used in its usual sense of power to hear and decide, for a justice court has power to hear and decide misdemeanor cases. A court apparently "exceeds its jurisdiction" when it tries a defendant in a manner which violates constitutional rights.
143 Tolland v. Strohl, 364 P.2d 588 (Colo. 1961).
144 Apparently meaning the clerk's record containing minutes of the proceedings, rather than the transcript prepared by the court reporter.
145 Madrid v. People, 365 P.2d 39 (Colo. 1961).
146 Wall v. District Court, 360 P.2d 452 (Colo. 1961).
147 Berry v. People, 367 P.2d 338 (Colo. 1961). It would seem, however, that there can be court review of the procedure involved in parole revocation. Colo. Rev. Stat. § 39-17-6 (1953), as amended by Colo. Sess. Laws 1961, ch. 104, requires at least a parole board investigation before revocation. No statute requires a hearing, however. Cf., Colo. Rev. Stat. § 39-16-9, requiring a court hearing before revocations of probation, as distinguished from parole.

The facts of one 1961 case raise an interesting double-jeopardy problem, although it is not discussed by the court. A defendant, charged with robbery and murder, was convicted of robbery but acquitted of murder, and on writ of error he obtained a reversal of his robbery conviction, the supreme court remanding the case for a new trial.[148] On the new trial can the defendant be tried for murder as well as robbery, or does his acquittal on the murder charge at the first trial give him on his second trial the defense of former jeopardy?[149]

I. Post-Conviction Remedies

Since Rule 35 (b) of the new Rules of Criminal Procedure provides a new post-conviction remedy (a motion in the court which imposed the sentence to vacate, set aside or correct the sentence) for prisoners in custody, under certain limited circumstances (which are, however, broader circumstances than the ones which Colorado recognizes for habeas corpus purposes),[150] the remedy of habeas corpus for prisoners in custody will henceforth have less significance than heretofore.[151] Up until November of 1961, however, habeas corpus was still in vogue. But habeas corpus cannot help a prisoner who complains that the parole board is not giving his case proper consideration;[152] and it will not help one who fails to attach, as required by law, the warrant of commitment to his petition.[153] A petition for habeas corpus which alleges a commutation of sentence by the governor entitling the prisoner to release from imprisonment states a good claim for habeas corpus relief, and, if the state wishes to contest his release on the ground that the governor revoked the commutation, it must do so by evidence at the hearing held to determine whether to release the prisoner.[154] It would seem, however, that the matter of revocation of the commutation could be determined on the basis of the files and records of the case so that there need not be a hearing to decide the matter.[155]

J. Confession of Error

In at least two 1961 cases the attorney general, in appearing before the supreme court on writ of error obtained by a convicted defendant, confessed error, in the tradition of the office of the Solicitor General of the United States before the United States Supreme Court.[156]

K. Statutory Changes

The 1961 Colorado legislature made several changes in existing criminal procedure. Upon an insanity plea being made, the court

148 Johnson v. People, 358 P.2d 873 (Colo. 1961).
149 The matter is discussed briefly in King, Colorado Practice Methods § 2389 n. 94 (Supp. 1961).
150 See comment on Rule 35 in 34 Rocky Mt. L. Rev. 63-78 (1961).
151 See *id.* at 66-67, for the proposition that a prisoner in custody cannot seek habeas corpus relief without first making a motion under Rule 35(b).
152 Trueblood v. Tinsley, 366 P.2d 655 (Colo. 1961).
153 Wright v. Tinsley, 365 P.2d 691 (Colo. 1961). A less technical reason, not used by the court, for upholding the lower court's denial of habeas corpus sought on the ground that at his trial he was deprived of a jury trial, is that he actually obtained a review of his conviction on writ of error without mentioning this ground, and his conviction was affirmed. If the matter is reviewable on error, as here, it must be so reviewed, for habeas corpus is no substitute for a writ of error.
154 Sharp v. Tinsley, 362 P.2d 859 (Colo. 1961).
155 Rule 35 (b), on the post-conviction motion to vacate sentence, provides that if "the files and record of the case show to the satisfaction of the court that the prisoner is entitled to no relief," then no hearing is necessary.
156 Penny v. People, 360 P.2d 671 (Colo. 1961) (confessing that the trial court erred in not directing a verdict of acquittal); Pacheco v. People, 360 P.2d 974 (Colo. 1961) (confessing that the trial court erred in not having a court reporter present to transcribe the proceedings).

may order the defendant examined by psychiatrists at the jail in which he is confined, rather than having him sent (as has had to be done heretofore) either to the State Hospital at Pueblo or the Colorado Psychopathic Hospital at Denver for his examination.[157] Cash security for a bail bond is authorized in addition to the security of sureties on the bail bond.[158] A criminal complaint made for the purpose of the issuance of an arrest warrant may be made before not only a judge or justice, as in the past, but also before his clerk or deputy clerk.[159] An amended statute provides for dismissal of a criminal case unless tried within two terms of court after commitment of the defendant;[160] but the effect of this statute is uncertain, for the new Rules, after sensibly doing away with the term-of-court concept of time, made the period of time one year.[161] County and municipal police officers are now specifically authorized to cross county and municipal boundaries in fresh pursuit of a traffic violator.[162] A final 1961 statute changes the composition of the parole board and it makes some small alterations in the procedure to be used by parole officials in revocation of parole.[163]

157 Colo. Sess. Laws 1961, ch. 102, amending Colo. Rev. Stat. § 39-8-2 (1953). The change was made to reduce the defendant's use of the plea as a method of improving his chances to escape.
158 Colo. Sess. Laws 1961, ch. 100, amending Colo. Rev. Stat. § 39-2-17 (1953). Colo. R. Crim. P. 46(c) (1961) authorizes cash bail as well as a bond with surety or a personal recognizance bond.
159 Colo. Sess. Laws 1961, ch. 99, amending Colo. Rev. Stat. §§ 39-2-3, 7 (1953). See Colo. R. Crim. P. 3 for issuance of a complaint.
160 Colo. Sess. Laws 1961, ch. 101, amending Colo. Rev. Stat. § 39-7-12 (1953).
161 Colo. R. Crim. P. 48(b). The effect of a conflict between statute and rule is discussed *supra* notes 63-70 and text.
162 Colo. Sess. Laws 1961, ch. 103.
163 Colo. Sess. Laws 1961, ch. 104, amending Colo. Rev. Stat. §§ 39-17-3, 6 (1953).