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Note and Comment

Harry B. Hutchins
University of Michigan Law School

John R. Rood
University of Michigan Law School

Roy L. Black

Ivan E. Chapman

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NOTE AND COMMENT

WAIVER OF THE STATUTORY PROTECTION TO THE CONFIDENTIAL RELATION OF PHYSICIAN AND PATIENT.—The subject of the disclosure by the physician upon the witness stand of confidential communications between himself and his patient has already received attention in this journal: 2 MICHIGAN LAW REVIEW, p. 687; 3 MICHIGAN LAW REVIEW, p. 311. The case of *Long* v. *Garey Investment Company*, decided by the Iowa Supreme Court December 15, 1906, may be briefly noticed, as it discusses a phase of the subject in regard to which the courts are not in entire harmony, namely, the waiver of the privilege that the statute confers.

The action in the above noted case was brought by the administrator of a deceased person to set aside conveyances made by deceased shortly before his death, on the ground among others of want of mental capacity to execute the conveyances. Among the witnesses by whom it was sought to show mental incapacity, was the physician who attended deceased just previous to his death and at the time of the execution of the conveyances. The defendant objected to this testimony on the ground that it was prohibited by the statute provision that "no practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any person, who obtains such infor-

mation by reason of his employment, minister of the gospel or priest of any denomination, shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline," but that "such prohibition shall not apply to cases where the party in whose favor the same is made waives the right conferred."

The testimony of the physician, the court held, was clearly within the inhibition of the statute, unless the privilege conferred by the statute was waived, and this the court held was done by the administrator when he called the physician as a witness. "We think," said the court, "that, as bearing on the issue of deceased's inability to execute the instruments, the administrator so far represents the deceased that he may waive the privilege of the patient by calling the physician to testify concerning communications made to him as such."

The conclusion of the court in this case was in accordance with its former decisions as to the effect of the statute. Thus in *Denning* v. *Butcher,* 91 Iowa, 425, it was held that, if called by the executor, the physician of a deceased person could give testimony as to his physical and mental condition at the time of the execution of the will, the executor having power to waive the statute. The reasoning was that as the deceased, if living, might waive the statute, his personal representative, after his death, ought to be allowed to do the same thing. In *Winters* v. *Winters,* 102 Iowa 53, 71 N. W. Rep. 184, 63 Am. St. Rep. 428, the court held that the protection of the statute could not be urged in a case where the dispute was as to the testamentary capacity of the testator, the parties to the contest being the devisee and heir-at-law, each claiming under the deceased, for the reason that the proceedings were not adverse to the estate and that the interest of the deceased as well as of the estate was that the truth be ascertained. But it was suggested that "the court might well, in its discretion, prevent blackening the memory of the dead." "It is not very material to the result," said the court, "whether we say the heir or devisee may in the interest of the estate of the deceased, waive the privilege, or that the statute does not apply to a case where the proceedings are not adverse to the estate, and the interest of the deceased as well as his estate could only be the determination of the truth. In either event, we hold that in a dispute between the devisee or legal representative and the heirs-at-law, all claiming under the deceased, the attending physician may be called by either party." The same doctrine is declared in *Thompson* v. *Ish,* 99 Mo. 160, 17 Am. St. Rep. 552. And the Supreme Court of Michigan in *Fraser* v. *Jennison,* 42 Mich. 209, in construing the statute of that state said: "The rule it establishes is one of privilege for the protection of the patient, and he may waive it if he sees fit; * * * and what he may do in his lifetime those who represent him after his death may also do for the protection of the interests they claim under him."

But it has been held that the right to waive the privilege conferred by the statute is the personal right of the patient only, and that it cannot be exercised after his death by his representative or those interested in the

estate. Undoubtedly this conclusion is sometimes due to some extent to the fact that the wording of the statute seems to confine the privilege of waiver to the patient and to him alone. For example, the New York statute that was in force when the decisions cited below were rendered, required that the privilege be "expressly waived by the patient." It was held by the Court of Appeals of the state that the seal of secrecy would remain forever unless removed by the patient himself. "The purpose of the laws," said the court, "would be thwarted, and the policy intended to be promoted thereby would be defeated, if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician. * * * Whenever the evidence comes within the purview of the statute, it is absolutely prohibited, and may be objected to by anyone unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave, the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications and disclosures made under the seal of the statutes. An executor or administrator does not represent the deceased for the purpose of making such a waiver. He represents him simply in reference to rights of property, and not in reference to those rights which pertain to the person and character of the testator." *Westover* v. *Ætna Life Ins. Co.*, 99 N. Y. 56, 52 Am. Rep. 1; *Renihan* v. *Dennin*, 103 N. Y. 573, 57 Am. Rep. 770. But it is now provided by statute in New York that "a physician or surgeon may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient when the provisions" of the statute protecting the patient from disclosures "have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will, or the surviving husband, widow, or any heir-at-law or any of the next of kin, of such deceased, or any other party in interest." It is further provided that the waiver must be made in open court, on the trial of the action or proceeding. STOVER'S NEW YORK ANN. CODE (6th Ed.), § 836. It has been held that the protection of the statute is sufficiently waived by the legal representative of the deceased person, if he calls the physician of the deceased to the stand in the trial of an action against the estate and asks him to disclose professional information falling within the inhibition of the statute, and that such representative need not, under such circumstances, specifically state his intention to waive the statute. *Holcomb* v. *Harris*, 166 N. Y. 257.

The Supreme Court of Indiana has excluded the testimony of a physician as to the physical and mental condition of a testator, when offered by the heir-at-law in contesting the will, the executor and devisees objecting, *Heuston* v. *Simpson*, 115 Ind. 62, but this court has held that the privilege of the statute might be waived by the administrator with the will annexed of the estate of a deceased person, upon the ground that such administrator was the representative of the deceased and was seeking to maintain the will.

Morris v. *Morris,* 119 Ind. 341. In California it has been held that an heir-at-law who is contesting with a devisee the probate of a will cannot waive for deceased the protection of the statute, as it cannot properly be said that the heir is representing the deceased in attempting to defeat the will. *In re Flint,* 100 Cal. 391, 34 Pac. Rep. 863. H. B. H.

INTER-STATE RENDITION.—The decision of the Supreme Court of the United States, Dec. 3, 1906, in the cases of *Pettibone* v. *Nichols,* — U. S. —, 27 Sup. Ct. Rep. 111, and *Moyer* v. *Nichols,* — U. S. —, 27 Sup. Ct. Rep. 121, again calls attention of the public to a defect in our inter-state rendition laws first manifested by the decision of the same court in 1860, in the case of *Kentucky* v. *Dennison,* 65 U. S. (24 How.) 66, 16 L. Ed. 717, and emphasized in several later decisions. In the *Pettibone* and *Moyer* cases it was admitted by demurrer to a petition for a writ of habeas corpus in the United States Court for the circuit of Idaho, that the prosecuting officers of Idaho, the prosecuting attorney, governor, etc., and the governor and police officers of Colorado, had, by conspiracy, secured the arrest of the petitioners in Denver, Colorado, and their secret and forcible removal at night to Idaho, in such a manner as not to give them opportunity to consult counsel or appeal to the courts before removal, intending to put them to trial on the charge of murdering ex-Governor Steunenberg at Caldwell, Idaho, well knowing all the time that the petitioners were in Denver at the time the alleged murder was committed and had not been in Idaho at all, and also knowing that the proposed removal would be frustrated if petitioners were permitted to get a hearing in court before the removal to Idaho. The demurrer was sustained in the court below and by the United States Supreme Court on appeal, on the ground that the federal courts had no jurisdiction to inquire as to the method of obtaining custody of one held on a criminal charge in a state court, nor as to the method of getting him into the state. Mr. JUSTICE MCKENNA dissented. The petitioners claimed that the conspiracy was formed and executed by the procurement of the mine-owners association for the purpose of accomplishing the destruction of the Western Federation of Miners, of which the petitioners were the chief officers.

It is believed that the beginning of the trouble can be traced to the decision in *Kentucky* v. *Dennison* (1860), 65 U. S. (24 How.) 66, 16 L. Ed. 717, in which a petition by the governor of Kentucky for a writ of mandamus to compel the governor of Ohio to surrender one Lago as a fugitive from prosecution for aiding the escape of slaves in Kentucky was denied on the ground that the federal courts had no power to compel obedience to the command of the Constitution of the United States, that "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." It is, to say the least, very doubtful whether such a decision would ever have been rendered but for the nature of the case in which it arose and the state of northern and south-

ern public sentiment on the slave question at the time the case was presented for decision. In view of the decision in this case, the governors of various states have at various times refused to surrender persons charged with crimes in other states, and the case of ex-Governor Taylor of Kentucky obtaining refuge in Indiana is still fresh in the public mind. It being understood that rendition could not be compelled, and the governor of West Viriginia having refused to surrender to Kentucky one Mahon charged with murder, a posse of citizens went to West Virginia, kidnaped Mahon, and surrendered him to the sheriff in Kentucky to be held to answer the charge of murder. A petition by Mahon to the United States courts for release on writ of habeas corpus was denied by the Supreme Court of the United States on the same ground as in the *Pettibone* and *Moyer cases;* and the decision in the case of *Kentucky* v. *Dennison* would seem in sense to justify the action of the court, though that decision was not mentioned. *Mahon* v. *Justice,* 127 U. S. 712, 32 L. Ed. 287, 8 Sup. Ct. Rep. 1204.

In the cases now under consideration the further additional features were involved: 1, the public officials were parties to the proceeding to get custody of the petitioners; and, 2, petitioners were not fugitives from justice. even admitting their guilt, unless it could be said that by conniving at the murder of Steunenberg in Idaho they were constructively there, and by remaining out of the state they constructively fled from justice. This theory of constructive flight has already been repudiated by the Supreme Court of the United States in *Hyatt* v. *New York,* 188 U. S. 691, 47 L. Ed. 657, 23 Sup. Ct. Rep. 456.

It is believed that the present state of the law is an inducement to kidnaping and lawlessness, and that congress should provide such remedy as may be to cure the defect. J. R. R.

WHEN A PUBLIC OFFICER MISAPPROPRIATING PUBLIC FUNDS IS NOT AN EMBEZZLER.—An indictment charged that David E. Sherrick, Auditor of the State of Indiana, being then and there charged and intrusted with the collection, receipt, and safe keeping of moneys, funds, etc., for the state, did receive for the state, funds amounting to $1,000,000 and on June 30, 1905, feloniously converted to his own use $120,000 thereof. This was money received by him, as such auditor, from insurance companies. Indiana, by statute (§ 8477), requires foreign insurance companies, doing business in the state, to pay certain insurance taxes *into the treasury of the state,* based on reports made to the state auditor. For many years the state auditors had been collecting the insurance taxes and thought they were doing what the law required. On the back of the statements that had been sent to the insurance companies, year after year, was the inferential direction to pay the money to the auditor. This sentence on the back of the statement purported to be taken from the tax laws. Under another provision of the statute (§ 389), providing that whoever being charged or in any manner intrusted with the collection or disbursement of funds belonging to the state converts the same to his own use shall be guilty of embezzlement, the defendant was indicted and convicted. *Held,* that, since under the statute, providing *that the money should be paid into the treasury,* the state auditor had

no authority to collect such taxes in his official capacity, a payment to him by the insurance companies operated as a payment to their own agent, so that the auditor's failure to account therefore to the state did not constitute embezzlement. *Sherrick* v. *State* (1906), — Ind. —, 79 N. E. Rep. 193.

This recent decision by the Supreme Court of Indiana is a very interesting one and raises four important questions: viz., First: May a public officer, in such a case, of right, demand a bill of particulars as a means of obtaining information as to how, and from whom and on what account, the property alleged to have been converted came into his hands. *Held,* that he cannot, for the code does not recognize a bill of particulars. Acts 1905, p. 601, c. 169, § 167. Any failure in the indictment to reasonably apprise the defendant of what he is required to meet, may be reached by motion to quash. Acts 1905, p. 626, c. 169, § 194. Under the adjudications in some states, the right to call for a bill of particulars arises, not from a statute, but from the inherent power of the court, to be exercised in any case, when from the peculiar nature of the case, justice would be greatly imperiled without the advanced information obtainable through a bill. WHART. CR. PL. & PR., § 702; BISH. CR. PROC., § 643; *People* v. *Jaehne,* 4 N. J. Cr. R. 161; *State* v. *Wooley,* 59 Vt. 357; *People* v. *McKinney,* 10 Mich. 54; *Commonwealth* v. *Snelling,* 15 Pick. (Mass.) 321; *Westbrooks* v. *State,* 76 Miss. 710. That it rests within the sound judicial discretion of the trial court, subject to review on appeal only for its abuse. *State* v. *Davis,* 38 Fla. 169. Another reason for not allowing the bill is that, the auditor of state, being his own master, and pursuing his own methods, is the only person who knows and can know the details of his office, and is in no position to ask for that information which he has or has the opportunity to have. *People* v. *McKinney,* 10 Mich. 54; *State* v. *Munch, 22* Minn. 67.

Second: Is the defendant within the class designated by the statute (§ 399 *supra*)? It is observed that the statute (§ 8477 *supra*), does not in terms provide to what officer or person the taxes due the state from foreign insurance companies shall be paid; but it does provide that such taxes *shall be paid into the treasury of the state.* It is fundamental that, an offense not within the words of the statute cannot be adjudged a crime because within the reason. MARSHALL, J., in *United States* v. *Wiltberger,* 5 Wheat. 76. Penal statutes can reach no further in meaning than their words. *Johns* v. *State,* 19 Ind. 429; *State* v. *Meyers,* 56 Ohio St. 340. For example, a statute making the county treasurer who converts the public moneys in his custody guilty of embezzlement, cannot be extended to embrace his deputy, *State* v. *Meyers,* 56 Ohio St. 340; so an officer not charged by law to collect and who has no right to the public money, cannot be convicted of embezzling money received under color of his office, though he falsely represented that he was entitled by virtue of his office to receive it. *State* v. *Bolin,* 110 Mo. 209. The act of Congress which makes it embezzlement for any person employed in the U. S. mint to convert any of the metals used in coinage, does not apply to a clerk employed but whose duties had nothing to do with the metals in relation to coinage. *Commonwealth* v. *Hutchinson,* 2 Pars. Sel. Eq. Cas. (Pa.) 384. Under the laws of Ohio a county auditor is not

an officer charged by law with the possession or custody of money belonging to the state, and an indictment which charged the defendant, a county auditor, with converting money which belonged to the state, which money had come into the possession and custody of the defendant by virtue of his office, was an insufficient charge of embezzlement. *State* v. *Newton,* 26 Ohio St. 265. When penalties are denounced against a particular class, a description of the class, and of the defendant as coming therein, are essential elements of the crime and must be charged and proved. *Moore* v. *State,* 53 Neb. 831.

Third: Are insurance taxes in the hands of the auditor, the state's money? It is manifest from the various statutes that it is the general policy, as established by the system of checks and balances, that the auditor of state shall collect and receive no moneys for the state, but fees for official services rendered by him. Rather than a receiver of public moneys, his duties are akin to those of a watchman who stands at the door of the state treasury, and without whose knowledge and consent, except in a few instances, no public moneys can legally get into or out of the state treasury. He has no duty or authority that is not conferred by statute. The insurance companies were bound to know the auditor's authority. Under these statutes, therefore, there is no ground for saying that the auditor of state was charged or intrusted by law with the collection and receipt of foreign insurance taxes; and, it not being his duty "enjoined by law," if he assumed to collect them, his acts were the acts of an individual and not of a public officer. The auditor, in other words, was the agent of the insurance companies and not of the state. *Bowers* v. *Fleming,* 67 Ind. 541; *Warswick* v. *State,* 36 Tex. Cr. R. 63, 65. Nor does the general authority conferred upon the auditor of state by statute, "to direct and superintend the collection of all moneys due the state," warrant his collection and receipt of these insurance taxes. This authority to direct and superintend the collection cannot, in the presence of direct and positive directions to the contrary, be held to include the power to personally collect and receive. To constitute embezzlement under § 389 *supra,* two things must concur: It must be shown that the money converted was the property of the state, and that it came into the possession of the accused according to the law. *Brady* v. *State,* 21 Tex. App. 659; *State* v. *Johnson,* 49 Ia. 142. Here, then, the money converted did not come into the hands of the auditor according to the law and therefore did not become the property of the state.

Fourth: Having solicited and received payment of foreign insurance taxes, as auditor of state, will such auditor, in the prosecution by the state for such conversion, be heard to say that the money so received was not the money of the state? The doctrine of estoppel is so novel in criminal procedure, and so inconsistent with the fundamental principles of criminal law, that such celebrated authorities on criminal law as WHARTON and RUSSELL, and on the law of estoppel as BIGELOW and HERMAN, take no notice of it whatever. Estoppel is purely a defensive weapon, having its origin in equitable principles, and is designed to supplement or aid the law in accomplishing justice, where without its assistance, injustice may be done. Its purpose

is to preserve rights previously acquired, not to create new ones. *Emmons* v. *Harding*, 162 Ind. 154, 160; *Lindsay* v. *Cooper*, 94 Ala. 170. The argument on the part of the prosecution, followed to its logical conclusion, comes to this: "The state as the injured party is not entitled to maintain this prosecution because the money alleged to have been converted was the money of the insurance companies. However, to secure the auditor's punishment, the state has the right to invoke the interposition of estoppel to exclude proof of a fact that would establish the defendant's innocence of the particular crime for which he is being tried." But, the true rule was stated by HADLEY, J., in the principal case, "an offense not within the words cannot be adjudged a crime because within the reason or spirit, and this principle cannot be evaded by holding that one performing acts which are denounced as a crime when committed by a certain class of people, is estopped from denying that he is within that class." *Moore* v. *State*, 53 Neb. 831, 74 N. W. 319; *State* v. *Bailey*, 57 Neb. 204, 77 N. W. 654. R. L. B.

WHEN A DISCHARGED TEACHER MAY RESORT TO THE COURTS.—The plaintiff entered into a contract with the defendant school district whereby he was employed to teach a school for a period of nine months. Before a third of the term had expired he was discharged. The defendant contended that an appeal to the county superintendent, and from his decision to the state superintendent, were conditions precedent to the right to maintain an action upon the contract, and since the appeal was not made plaintiff could not recover. *Held*, that the appeal was a condition precedent and, therefore, the plaintiff was not entitled to recover. *Van Dyke* v. *School Dist. No. 77 of Lewis County* (1906), — Wash. —, 86 Pac. Rep. 402.

Ballinger's Ann. Codes & St., § 2318, declares that "any person aggrieved by any decision * * * of the board of directors may, within thirty days after the decision * * * appeal therefrom to the county superintendent * * * " The court held that "may" as here used should be construed in a mandatory sense. In support of this view is cited 20 AM. & ENG. ENCY. LAW (2nd Ed.) 237. The writer can find no authority for such an interpretation. On the contrary it is said that "may" cannot be construed in a mandatory sense except to give effect to the clear intention of the legislature; and if there is nothing in the provision to require an unusual interpretation its use is merely permissive. There seems to be no provision in this statute to require any other than the customary meaning. But on page 238 of the above reference are the following words, "where a statute requires that an individual or individuals may do a certain act or have a certain remedy which is intended for his or their own benefit, he or they will have a discretion to do the act or pursue the remedy or to refrain therefrom." This seems to cover the principal case. The statute is permissive and for the benefit of those aggrieved. Here no public interests or rights are concerned and therefore the statute in regard to appeals is optional. "The words shall or may when used in a statute, are imperative only when the public interests and rights are concerned; but when a statute declares that an individual or individuals shall or may do a certain act, or have a certain remedy, which is intended

for his or their own benefit, he or they have a discretion to do the act, or pursue the remedy, or not." *Malcom* v. *Rogers,* 5 Cow. (N. Y.) 188. In the principal case the public have no direct interest, neither have third persons a vested right. The statute is permissive and not compulsory. *Amason et al.* v. *Nash,* 24 Ala. 281.

In support of the decision are cited several Iowa cases based on a similar statute. Two of these seem to be somewhat contradictory. In *Kirkpatrick* v. *School District,* 53 Ia. 585, the court held that if the teacher were discharged he must appeal even though he was not given a hearing before the board as provided in the code. In *Burkhead* v. *School District,* 107 Ia. 29, the court said, "But when a teacher is discharged without the hearing contemplated, the act is wrongful, and resort may be had to the courts; in other words, in order to discharge a teacher, the board of directors must pursue the method prescribed by statute." Certainly if it is permissive in one case it ought to be in the other.

The decision in the principle case is directly contrary to *School Dist.* v. *Hale,* 15 Colo. 367. The question at issue in that case was whether the plaintiff had to show a compliance with the General Statutes providing for an appeal, within thirty days, to the county superintendent in case he was aggrieved by the action of the board of directors. The court in a very able decision held that such compliance was unnecessary. One of the defenses set up was that the act of the legislature ousted the court of its jurisdiction. With reference to this the court said: "Our whole judicial system is at variance with the idea that in the absence of specific, mandatory legislative restriction, the court may not be appealed to, to determine the rights of contract between citizens, or between citizens and corporate bodies which the statutes have created." The inference to be drawn from the principal case is that both the county and state superintendents have judicial powers, but have no remedy to enforce their decrees. That is to say, after a teacher has obtained a decision in his or her favor from the superintendent of public instruction it then becomes necessary to go into the courts to enforce that decree. "This is to require the plaintiff to take two useless, ineffectual, and expensive steps before he resorts to the only tribunal which can afford him relief." Surely it was not the intention of the legislature to make such a law. Further, according to the tenor of the statute it would be necessary for every person aggrieved by the action of the board to take such steps. This would include janitors, mechanics, and many others who have more or less business dealings with the board. In fact, the time would soon come when the total business of the county and state superintendent would be the hearing of such complaints. This is the view of the dissenting judges in the principal case. They also contend that the court has overruled many of its own decisions which support the Colorado case above cited. In those cases, although the appeal question was not mentioned, the court acquiesced in actions on contracts brought in the court without first making the appeal. *Kennedy* v. *School District,* 20 Wash. 399; *Trumbull* v. *School Dist.,* 22 Wash. 631; *Taylor* v. *School Dist.,* 16 Wash. 365. I. E. C.