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Criminal Law - Failure to Register Not Punishable Without Actual Knowledge of Felon Registration Ordinance

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During this long history of litigation the Supreme Court has accepted and then abandoned "consent," "doing business," and "presence" as the standard for measuring the extent of state judicial power over foreign corporations. A trend is clearly discernible toward expanding the permissible scope of state jurisdiction over such corporations. The *McGee* case underscores this trend by minimizing the contacts needed for "substantial connection" with the state.

CRIMINAL LAW–FAILURE TO REGISTER NOT PUNISHABLE WITHOUT ACTUAL KNOWLEDGE OF FELON REGISTRATION ORDINANCE

The defendant, Lambert, was convicted of violating an ordinance of the city of Los Angeles requiring the registration of persons previously convicted of a felony if they remained in the city for over five days. The defendant was a resident of Los Angeles for over seven years at the time of her arrest. Within that time, she had been convicted of forgery which the State of California classified as a felony. She had not been registered under the ordinance at the time of her arrest. The defendant was found guilty and fined $250. On appeal, the United States Supreme Court held that although Blackstone's requisite of a "vicious will"[1] is not necessary to constitute a crime, since conduct alone will often suffice, nevertheless, where conduct wholly passive is involved–a mere failure to register–there must be actual knowledge of a duty to register coupled with that failure before a conviction under the ordinance could stand. The court had to assume that the defendant had no actual knowledge of the registration requirement as she offered proof of this defense which was refused in the California trial. The judgment was reversed. *Lambert v. California*, 355 U.S. 225 (1957).

Blackstone defined the requisites for public wrongs as follows:

> For though, *in foro conscientiae*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all.[2]

Certain civil cases dispensing with the element of wilfulness involve statutes enacted to protect employees or dependents of employees engaged in hazardous industries operated by the defendant. The employee

[1] 4 Blackstone, Commentaries *21. [2] Ibid.

is assured of physical safety or his dependents are assured of economic security regardless of the wilfulness of the defendant's statutory violations.[3]

There are cases where wilfulness has relevancy only to a possible criminal aspect of a proceeding and where its absence has no relevancy as to its civil aspect. Thus it has been held that where proof of a wilful attempt to evade payment of a tax is not enough to overcome all reasonable doubt as to the existence of a guilty will so as to convict a defendant for a felony, the defendant may nevertheless remain liable to pay fifty percent again as much as the tax deficiency so that the government can collect revenue and reimbursement for the court proceedings.[4]

In addition to the last case discussed, the requisite of wilfulness is a factor in other cases involving fraud and the recovery of criminal penalties. Defendants have exhibited a wilful disposition and have been held for penalties for conspiracy to defraud the government in the submission of bids[5] and for wilful misrepresentations on sales of dairy products to the government.[6]

In certain criminal cases, the requisite of wilfulness is not explicitly resorted to in holding a defendant responsible for his violations. The results may be had by balancing the interests between equally innocent parties, or by imputing knowledge and wilfulness to the defendant, or the record may disclose a wantonness as to probable consequences. *United States v. Balint*[7] held that to constitute the offense of selling drugs contrary to the Anti Narcotics Act, it is not necessary that the seller be aware of their character as narcotic drugs. Congress was said to have weighed the hardships to the equally innocent sellers and buyers and to have decided that it was preferable to make the seller suffer a penalty.[8] Another narcotics case, *United States v. Behrman*,[9] held that a physician who gave narcotic drug prescriptions to a drug addict cannot escape conviction for

[3] Chicago B. & Q. Ry. Co. v. United States, 220 U.S. 559 (1911) where the court held that whether the carrier knew its cars were out of order or not was immaterial. Its duty was to know that they were in order and kept in order at all times. New York Central R.R. Co. v. White, 243 U.S. 188 (1917) held that Congress can require railroads to pay compensation to dependents of employees killed in the course of employment regardless of the wilfulness or fault of defendant railroad.

[4] Helvering v. Mitchell, 303 U.S. 391 (1938).

[5] United States ex rel. Marcus v. Hess, 41 F. Supp. 197 (W.D. Pa., 1941).

[6] Nye & Nissen v. United States, 336 U.S. 613 (1949).

[7] 258 U.S. 250 (1922).

[8] Ibid., at 254: "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."

[9] 258 U.S. 280 (1922).

violating the act by contending that he comes within the dispensation granted to registered physicians prescribing drugs for patients. The facts show that the defendant knew that his patient was a drug addict but was not concerned with the consequences resulting to the patient from the treatment.[10]

There was a conviction for violation of the Federal Food, Drug, and Cosmetic Act in *United States v. Dotterweich*.[11] The defendant, president of a pharmaceutical concern, was held guilty of a misdemeanor when his firm committed a misbranding violation under the act. He had no personal knowledge of the violation but knowledge and fault were imputed to him in his status as president. The court put the result partly on the congressional balancing of relative hardships between equally innocent parties and partly on the defendant's opportunity to inform himself of the necessary measures to protect the public.[12] There were convictions in other cases involving the same act, where the defendant wantonly and negligently placed drugs in different boxes not containing instructions as to their use[13] and where the defendant was held bound to know that his goods violated the provisions of the act as a creator of a dangerous instrumentality so that a lack of any actual knowledge indicated a recklessness on his part.[14]

In accordance with what has been already discussed, it has been said that in the field of criminal law the meaning of the terms "wilful" and "wilfully" is rather flexible.[15]

There may be a wilful act without knowingly doing a wrong[16] as a malicious act is not necessary,[17] and neither is an intent to violate the law.[18] The words "wilful" and "wilfully" are used to characterize conduct such as evinces an intentional or reckless indifference to the safety

[10] Ibid.

[11] 320 U.S. 277 (1943).

[12] Ibid., at 281: "Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." At 285: "Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."

[13] United States v. Sullivan, 332 U.S. 689 (1948).

[14] United States v. Parfait Powder Puff Co., 163 F. 2d 1008 (C.A. 7th, 1947).

[15] Greer v. Franklin Life Ins. Co., 148 Tex. 166, 221 S.W. 2d 857 (1949).

[16] Lehnen v. Dickson, 148 U.S. 71 (1893); Lawrence-Williams Co. v. Societe Enfants Gombault Et Cie., 52 F. 2d 774 (C.A. 6th, 1931); Ex Parte Allen, 241 Ala. 137, 2 So. 2d 321 (1941).

[17] Brown v. Brown, 124 N.C. 19, 32 S.E. 320 (1899).

[18] State v. James, 36 Wash. 2d 882, 221 P. 2d 482 (1950).

of others,[19] or a disregard for the rights of others,[20] or the wanton indifference to the natural consequences of the act,[21] or a reckless disregard as to whether or not the act is in violation of law.[22]

"Wilful" and "wilfully" may also import a specific intent to violate the law,[23] a specific intent to do what the law forbids,[24] a deliberate intent,[25] or purpose,[26] to do a wrongful act.

However, the terms may also be used to signify that a person has failed to obey a statute when he had knowledge of the facts of his disobedience.[27] In *District of Columbia v. Brooke*,[28] the defendant, a resident property owner of the District of Columbia, was obligated to pay a penal fine for failure to connect his property with a public sewer within thirty days after notice of his failure was given to him. The court in the case of *Shevlin-Carpenter Co. v. Minnesota*,[29] affirmed a judgment whereby the defendant had to pay damages to the state when it had continued to cut timber after it had notice that the extension of the timber cutting permit granted to it by the state had expired. The defendant in *United States v. Ryan*[30] was held guilty of a misdemeanor when he wilfully violated a provision of the Labor Management Relations Act forbidding a representative of employees from accepting money from an employer of such employees. The court said in part that wilfulness is shown by taking money with knowledge in the defendant that he was so taking it and with knowledge that the giver was an employer of the employees represented by him.

"Wilful" and "wilfully" describe a person who, having free choice, either intentionally disregards a statute or is plainly indifferent to its requirements.[31] Violations of registration laws often fall into this aspect of the definition. The defendant in *United States v. Kahriger*[32] did not

[19] Haacke v. Lease, 41 N.E. 2d 590 (Ohio App., 1941); Southern Ry. Co. v. McNeeley, 44 Ind. App. 126, 88 N.E. 710 (1909).

[20] Beatty v. United States, 191 F. 2d 317 (C.A. 8th, 1951); Nelson v. Deering Implement Co., 241 Iowa 1248, 42 N.W. 2d 522 (1950); Piazza v. Zimmermann, 49 So. 2d 491 (La. App., 1950); Haacke v. Lease, 41 N.E. 2d 590 (Ohio App., 1941).

[21] Duro Co. v. Wishnevsky, 126 N.J.L. 7, 16 A. 2d 64 (1940).

[22] United States v. Schneiderman, 102 F. Supp. 87 (S.D. Cal., 1951).

[23] Ibid. [24] Ibid.

[25] Williams v. People, 26 Colo. 272, 57 Pac. 701 (1899).

[26] City of Baird v. West Texas Utilities Co., 145 S.W. 2d 965 (Tex. Civ. App., 1940).

[27] Schmeller v. United States, 143 F. 2d 544 (C.A. 6th, 1944).

[28] 214 U.S. 138 (1909). [29] 218 U.S. 57 (1910).

[30] 128 F. Supp. 128 (S.D. N.Y., 1955).

[31] United States v. Illinois Central R.R. Co., 303 U.S. 239 (1938); Paddock v. Siemoneit, 147 Tex. 571, 218 S.W. 2d 428 (1949).

[32] 345 U.S. 22 (1953).

register for a Federal Excise Tax on the business of accepting wagers because he feared possible self-incrimination for a potential charge of state gambling regulation laws. In *Bryant v. Zimmerman*,[33] the defendant was convicted of a misdemeanor for belonging to a secret oath bound organization after he became aware that it had not filed a membership list in accordance with a New York registration law. The court in *Lewis Publishing Co. v. Morgan*[34] upheld the contention of the government that the defendant should be denied the use of the privileges of second class mail when he refused to file with the Postmaster General a statement of the names and addresses of his publishers and editors after having been given the statutory requisite of ten days notice of its original failure to file.

However the courts are particularly insistent that notice of criminal violation be properly given the defendant so that he may have adequate knowledge of the facts of his violation. A notice given by registered mail is proper notice of a violation of a state Blue Sky Law requiring registration for a permit to sell securities.[35] A defendant, aware that the business in which he is engaged, could affect adversely the public health and safety if wantonly and improperly performed, is given fair notice that an activity connected with that business is a criminal violation of a statute enacted to protect the public health and safety against such improper performance, if the reasonable scope of the terms of the statute could be said to comprise such an activity. A provision against misbranding could be said to include misleading advertising.[36] A section of the Immigration Act requiring the deportation of aliens convicted more than once in this country of a "crime involving moral turpitude" was upheld where the court held that the phrase includes fraudulent conduct and noted that Congress had forewarned the defendant that he was subject to deportation for twice conspiring to defraud the United States.[37]

However where the terms of a statute are so vague and indefinite as not to inform men of common intelligence as to what comprises a violation of a state penal law prohibiting the sales of literature which glorifies crime there is no fair notice of such a violation.[38] Likewise, a defendant is not put on notice as to how a public presentation of a motion picture distributed by it violates a state statute forbidding the public showing of

[33] 278 U.S. 63 (1928). [34] 229 U.S. 288 (1913).

[35] Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).

[36] Kordel v. United States, 335 U.S. 345 (1948); United States v. Hohensee, 243 F. 2d 367 (C.A. 3d, 1957).

[37] Jordan v. De George, 341 U.S. 223 (1951).

[38] Winters v. New York, 333 U.S. 507 (1948).

"sacrilegious" films.[39] The United States Supreme Court has invalidated a statute imposing punishment on "gangsters" who were classified as any person "not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or any other state." The statute was said to be too vague to notify a person of a criminal violation.[40]

It has long been a principle of Anglo-American jurisprudence that the element of will is to be taken into consideration in determining guilt for crimes and it is not lightly to be imputed to the defendant nor is it to be supposed that a legislature had intended to eliminate consideration of this element.[41]

Although it has been held that the terms "wilful" and "wilfully" may be used in a sense which does not imply any malice or wrong,[42] or anything necessarily blamable,[43] Mr. Justice Holmes has written:

> [A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.[44]

And as Mr. Justice Douglas concludes in the *Lambert* case:

> Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process.[45]

[39] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[40] Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[41] Mr. Justice Murphy dissenting in United States v. Dotterweich, 320 U.S. 277 (1943).

[42] Cole v. Loew's Inc., 8 F.R.D. 508 (S.D. Cal., 1948); Peterson v. Peterson, 112 Utah 542, 189 P. 2d 961 (1948); Davis v. Morris, 37 Cal. 2d 269, 99 P. 2d 345 (1940); Shields v. State, 184 Okla. 618, 89 P. 2d 756 (1939).

[43] Cole v. Loew's Inc., 8 F.R.D. 508 (S.D. Cal., 1948); Wilson v. Security-First Nat'l Bank of Los Angeles, 84 Cal. 2d 427, 190 P. 2d 975 (1948); Davis v. Morris, 37 Cal. 2d 269, 99 P. 2d 345 (1940).

[44] Holmes, The Common Law 50 (1881).

[45] 355 U.S. 225, 229 (1957).

CRIMINAL LAW–SUCCESSIVE SENTENCES FOR SEPARATE REFUSALS TO ANSWER RELATED QUESTIONS AFTER A GENERAL REFUSAL HELD IMPROPER MULTIPLICATION OF OFFENSES

Mrs. Oleta Yates, an admitted executive of the American Communist Party, while on trial for conspiracy to violate the Smith Act,[1] took the

[1] 18 U.S.C.A. § 2385 (1951), as amended, 18 U.S.C.A. § 2385 (Supp. 1956).