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Criminal Procedure--Indictment--Offense Laid on a Date Subsequent to Indictment

L. H. B.

West Virginia University College of Law

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Powers (1937) 44 W. VA. L. Q. 270. In other connections, such a tendency has in fact appeared. Compare *Sims v. Fisher*, 125 W. Va. 513, 25 S. E. (2d) 216 (1943), with *McClure v. Maitland*, 24 W. Va. 561 (1884). In the instant case, the court concedes that had the *Union Mines* case been decided on the rule in the *Hodges* case, a different result would have been reached, yet adheres to the result actually reached as one of the "exceptions to what we have come to believe is the sound rule as to the separation of powers." Early American constitution makers did not intend the separation of powers to be complete nor to stand in the way of a delegation of legislative power, but contemplated only that no power definitely assigned to one branch could belong to or definitely be assigned to another branch. Cheadle, *The Delegation of Legislative Functions* (1918) 27 YALE L. J. 892. It has been judicially recognized that no absolute fixation and rigidity of powers between the three departments of government were envisaged where the necessities of government are involved. See *Morris v. Taylor*, 70 W. Va. 618, 624, 74 S. E. 872, 875 (1912); *Ferretti v. Jackson*, 88 N. H. 296, 299-302, 188 Atl. 474, 476-8 (1936); *Springer v. Government of Philippine Islands*, 277 U. S. 189, 211 (1928) (dissenting opinion by Justice Holmes). The approach of the court in the instant case portends no wholesale relaxation of the "new and strict" doctrine of the *Hodges* case. But it does show that on occasion logic will bow to reason and particular modifications of the *Hodges* doctrine be permitted. The result, at least, seems eminently practical and sound.

W. E. P.

CRIMINAL PROCEDURE—INDICTMENT—OFFENSE LAID ON A DATE SUBSEQUENT TO INDICTMENT.—Defendant was convicted of nonsupport on an indictment containing two counts, one of which alleged that defendant "within one year *from* the finding of the indictment, on the . . . day of December, 1946, and from said date to the finding of this indictment, did without just cause desert and wilfully neglect and refuse to provide for the support of his infant children." (Italics supplied). The indictment was returned at the April term in 1946 and the case tried in July, 1946. Before entry of judgment, defendant's motion to set aside the verdict and a new trial was overruled and defendant excepted. *Held*, that the indictment was good and the motion to quash, on the grounds that the indictment charges the commission of an offense subsequent to the return thereof, was properly overruled. *State v. Rector*, 43 S. E. (2d) 821 (W. Va. 1947).

The court was faced with the holding in *State v. Runyon*, 100 W. Va. 647, 131 S. E. 466 (1926), that an indictment is fatally defective which charges the commission of an offense subsequent to the date upon which the indictment is found. That case was distinguished as involving an indictment for a felony while the instant offense was a misdemeanor. The court in thus sanctioning opposite rules seems to have arrived at a unique position as other jurisdictions hold such an indictment either good or bad in misdemeanor and felony cases alike and attempt no differentiation. *Elmore v. State*, 126 Tex. Crim. Rep. 519, 73 S. W. (2d) 107 (1934) (misdemeanor, held bad); *Eshom v. State*, 120 Tex. Crim. Rep. 136, 48 S. W. (2d) 631 (1932) (felony, held bad); *Barnett v. State*, 183 Ark. 884, 39 S. W. (2d) 321 (1931) (misdemeanor, held good); *Taylor v. State*, 169 Ark. 589, 276 S. W. 577 (1925) (felony, held good). Some misdemeanor cases cite felony cases as authority and vice versa. *Elmore v. State*, *supra*; *Eshom v. State*, *supra*; *Shonfield v. State*, 196 Ind. 579, 149 N. E. 53 (1925); *Murphy v. State*, 106 Ind. 96, 5 N. E. 967 (1886). The majority view is that an indictment is fatally defective which lays the offense on a day subsequent to the finding of the indictment. *Cincinnati v. Smith*, 68 N. E. (2d) 846 (Ohio C. P. 1946); *People v. Campbell*, 251 Ill. App. 425 (1929); *McKay v. State*, 90 Neb. 63, 132 N. W. 741 (1911); 1 BISHOP, NEW CRIMINAL PROCEDURE (2d ed. 1913) §403. Some cases hold that the defect makes the indictment not void, only voidable on timely motion, *James v. Amrine*, 157 Kan. 397, 140 P. (2d) 362 (1943); *Goulson v. United States*, 16 F. (2d) 44 (C. C. A. 6th, 1926), and others that pleading over cures the defect. *Trout v. State*, 107 Ind. 578, 8 N. E. 618 (1886); *Conner v. State*, 25 Ga. 515 (1858). In *Elmore v. State*, *supra*, and *Cincinnati v. Smith*, *supra*, facts were strictly parallel and the holdings thus necessarily opposed to the instant case. There is authority of the opposite tenor, however, treating the defect as not fatal, *Barnett v. State*, *supra*; *People v. Meyers*, 1 Cal. App. 620, 37 P. (2d) 191 (1934); *Saunders v. State*, 33 Okla. Crim. 336, 244 Pac. 55 (1926); *Taylor v. State*, *supra*, and at least one state has a statute specifically stating that the defect does not invalidate the indictment. MO. REV. STAT. (1939) §3952; *State v. Crawford*, 99 Mo. 74, 12 S. W. 354 (1889). In *People v. Meyers*, the court reasoned that "where it appears that the date was merely a typographical error the rule is that to accuse one of the commission of a crime is to charge that it was committed before the accusation," 1 Cal. App. at 622; and *Taylor v. State*, took the still more advanced ground that "an accusation implies the commission of a crime and it is apparent that the alleged date thereof was a clerical error and did not affect the validity of the indictment."

169 Ark. at 590. It thus appears that there is a substantial split of authority among the states, now reflected in a single state by our court's simultaneous adherence to both rules. Another error charged against the indictment was its allegation that "defendant within one year from the finding of this indictment" (italics supplied) committed the offense. The state must allege that the offense was committed within one year prior to the finding of the indictment, *State v. Ball*, 30 W. Va. 382, 4 S. E. 649 (1887); *State v. Bruce*, 26 W. Va. 153 (1885), and the language used might literally mean either a year before or a year after the indictment. But the count further alleged that from the date of the offense to the finding of the indictment defendant unlawfully deserted his infant children and together these phrases indicated that the offense was committed before the finding of the indictment, and so that upon consideration of the whole count an offense committed within one year prior to the finding of the indictment was alleged. Where it can be understood from the indictment that the offense was committed at a time before the finding of the indictment, an allegation of a future impossible date will not invalidate the indictment. *Williams v. Commonwealth*, 18 S. W. 1024 (Ky. 1892); *Stevenson v. State*, 5 Baxt. 683 (Tenn. 1875). In the instant case there was almost no chance that defendant was misled or the error was prejudicial and no quarrel is had with the court's refusal to find the indictment bad because of an obviously clerical error. One may, however, regret the proposed distinction between misdemeanor and felony cases, which, while in line with a general attitude of greater liberality in misdemeanor cases, is wholly novel. The direct overruling of *State v. Runyon*, *supra*, would have had much to commend it.

L. H. B.

INJUNCTIONS—COVENANTS IN EMPLOYMENT CONTRACTS—EXTENT OF RESTRICTION.—Complainant small loan company employed defendant as representative and thereafter as office manager. On January 1, 1946, they executed a printed form contract wherein defendant agreed (1) that he would not within one year after leaving complainant's employment engage or become interested directly or indirectly in "any business the whole or any part of which is the lending of money in sums of \$500 or less" in Clarksburg or its trade area; (2) that he would not disclose complainant's "trade secrets"; (3) for liquidated damages in case of a breach. Two months later defendant voluntarily resigned and was immediately employed as manager of a bank "personal loan department" in Clarksburg. Complainant sought an injunction against the former employee and the bank and liquidated damages.