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Criminal Law–Indictment–Statutory Short Form

H. P. S.

West Virginia University College of Law

B. D. T.

West Virginia University College of Law

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further submitted that the cases allowing the extension may be distinguished on agency principles.⁶

The disposition of the instant case being on demurrer, it seems that the court could have adhered more strictly to the agency principles of management and control, which it articulates, rather than applying an extended doctrine of vicarious liability in sustaining the declaration. Nevertheless, in apparently allowing this extension, the court has followed the weight of authority in those jurisdictions committed to the family purpose doctrine.

L. R. M.

K. W. Jr.

CRIMINAL LAW — INDICTMENT — STATUTORY SHORT FORM. —

D was charged and convicted of statutory rape¹ under the statutory short-form indictment which failed to allege the age of the accused and the previous chastity of the prosecutrix. *Held*, that the indictment is demurrable although drawn in the form prescribed by statute.² *State v. Ray*.³

This case suggests that a limitation is placed upon the legislature as to what extent the common law indictment may be shortened and still protect the constitutional rights of the accused. Many courts of this country followed precedent, established at common law, of lengthy and technical indictments⁴ in which justice was

⁶ In *Grant v. Knepper*, 245 N. Y. 158, 156 N. E. 650 (1927), the relationship of master and servant was established on common law principles in that the servant was present and acquiesced in the negligent act and, moreover, was negligent in placing control in the hands of an incompetent person. In *Kayser v. Van Nest*, 125 Minn. 277, 146 N. W. 1091 (1914), the daughter, although not personally operating the car, had not relinquished control over it. In *Schreder v. Litchy*, 190 Minn. 264, 251 N. W. 513 (1933), there was evidence of direct authority in the servant to select a third person to operate the car. In *Thixton v. Palmer*, 210 Ky. 838, 276 S. W. 971 (1925), the case was based on the theory of constructive identity, *i.e.*, the negligence of the guest driver was the negligence of the member of the family present. The case of *Goss v. Williams*, 196 N. C. 213, 145 S. E. 169 (1928), presents the situation of the driver proceeding at a high rate of speed with the acquiescence of the member of the family present. In *Ulman v. Lindeman*, 44 N. D. 36, 176 N. W. 25 (1919), the court indulges in an extensive discussion of the principles of agency and observes that the declaration would only permit recovery under the doctrine of constructive identity, yet the court cites the leading family purpose extension cases.

¹ W. VA. CODE (Michie, 1937) c. 61, art. 2, § 15.

² *Id.* at c. 62, art. 9, § 7.

³ 7 S. E. (2d) 654 (W. Va. 1940).

⁴ *Marsh v. State*, 3 Ala. App. 80, 57 So. 387 (1912); *State v. Harris*, 3 Harr. 559 (Del. 1841); *State v. Shelledy*, 8 Iowa 477 (1859); *Lemons v. State*, 4 W. Va. 755 (1870).

sacrificed for formalism without reason.⁵ A crusade against this formalism headed by the American Law Institute and legislatures of various states has attempted to correct this by statutory short-form indictments.⁶ In many instances the statutes prescribe, either generally or in specific terms, short and relatively simple forms of indictments from which have been eliminated the technicalities and artificialities that characterized indictments in former times. Without substantial dissent, these statutes are upheld by the courts as valid.⁷ However, the courts recognize that it is fundamental for an indictment to set forth all the elements of the offense or it is void. The legislature, while it may simplify the form of an indictment or information, can not dispense with the necessity of placing therein a distinct presentation of the offense.⁸ It is sufficient if the allegations, when considered as a whole, charge the offense in such a manner as to enable a person of common understanding to know what is intended, and with such a degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case.⁹

The West Virginia legislature has prescribed statutory forms of indictments in order to eliminate some of these technicalities which existed at common law.¹⁰ The statutory indictments are a commendable step in the right direction since all allegations unnecessary to be proved may be omitted in any indictment or accusation.¹¹ The power of the legislature in drafting these statutory forms of indictment is fettered by both the State and the Federal Constitutions. The constitution of West Virginia, following in sub-

⁵ 4 BL. COMM. (1791) 18. Blackstone lamented the existence, in his day, of one hundred and sixty capital offenses. In face of this severity of punishment one might well expect to find humane judges searching for technicalities merely to save miserable offenders from penalties which were outrageously excessive in particular cases. The offender was not allowed to have a copy of the indictment, but was forced to rely entirely upon what he could gather from hearing it read to him. Unfortunately, however, every such decision became a precedent for all future cases even though the harshness of penal provisions and unreasonable severity were removed from the procedure itself. The former practice had been that of "trying the record" instead of the defendant and has outlived its purpose.

⁶ Perkins, *Short Indictments and Informations* (1929) 15 A. B. A. J. 292-6.

⁷ Fitzpatrick v. United States, 178 U. S. 304, 44 L. Ed. 1078 (1900); Caldwell v. Texas, 137 U. S. 692, 11 S. Ct. 224, 34 L. Ed. 816 (1891); People v. Brady, 272 Ill. 401, 112 N. E. 126 (1916).

⁸ Goeller v. State, 119 Md. 61, 85 Atl. 954 (1912).

⁹ Ray v. Commonwealth, 230 Ky. 656, 20 S. W. (2d) 484 (1929); State v. Davis, 39 R. I. 276, 97 Atl. 818 (1916).

¹⁰ W. VA. CODE (Michie, 1937) c. 62, art. 9, §§ 1-21.

¹¹ *Id.* at c. 62, art. 2, § 9.

stance the provisions of the Federal Constitution,¹² guarantees in trials of crimes and misdemeanors that "The accused shall be fully and plainly informed of the character and cause of the accusation . . ."¹³ The reason generally given for this provision is that the accused is entitled to know with certainty what offense is charged so that he may prepare an adequate defense and not be taken by surprise by evidence offered at the trial.¹⁴ The theory of the short-form indictment is to eliminate the necessity of pleading ultimate facts since such facts may be demanded by a defendant by a bill of particulars.¹⁵ In states using the statutory indictments a bill of particulars is compulsory¹⁶ and not a matter in the discretion of the court as in West Virginia.¹⁷ However, an argument against the use of a statutory short-form indictment is that it may be possible for the prosecuting attorney to bring in facts for the prosecution that the grand jury never considered.¹⁸ Since 1931 there has been a tendency on the part of the West Virginia court to declare the statutory indictments void unless every essential element of the offense is charged.¹⁹

H. P. S.

B. D. T.

EVIDENCE — PRIVILEGED COMMUNICATIONS — STATE SECRETS.

—*P*, who was also the plaintiff in a civil action for wrongful death, sought mandamus to compel the circuit court to permit examination by her attorney of a copy of the report of the officers who investigated the death. *Held*, that if the discretion of the trial court in refusing the use by counsel of such communications is not arbitrary, the court's ruling will not be disturbed. *State v. Bouchelle, Judge*.¹

It is usually recognized in West Virginia that there are at

¹² U. S. CONST. Amend. VI.

¹³ W. VA. CONST. art. III, § 14.

¹⁴ *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *United States v. Cruikshank*, 92 U. S. 542, 2 L. Ed. 588 (1875); *Clifford v. State*, 29 Wis. 327 (1871).

¹⁵ *Husty v. United States*, 282 U. S. 694, 51 S. Ct. 240, 75 L. Ed. 629 (1931).

¹⁶ *People v. Bogdanoff*, 254 N. Y. 16, 23, 171 N. E. 890 (1930).

¹⁷ *Dale v. Atwell*, 103 W. Va. 590, 592, 138 S. E. 201 (1927); *State v. Counts*, 90 W. Va. 338, 110 S. E. 812 (1922).

¹⁸ Comment (1937) 35 MICH. L. REV. 456, 463.

¹⁹ *Scott v. Harshbarger*, 116 W. Va. 30, 180 S. E. 187 (1935); *State v. McGinnis*, 116 W. Va. 473, 181 S. E. 820 (1935).

¹ 11 S. E. (2d) 119 (W. Va. 1940).