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Criminal Procedure--Conclusion of Indictment

Mary Louise Barton
University of Kentucky

Even though these cases say the violation of a penal statute is evidence of negligence, the result reached is the same as that reached by the cases holding such breach to be negligence per se.

Three methods of treating the breach of a penal statute which has for its purpose the protection of the individual members of the general public as evidence of negligence have been presented. The breach has been treated as mere evidence of negligence and no great weight given to the statutory standard. It has been treated as prima facie evidence creating a presumption of negligence on the part of the defendant. And it has been treated as negligence per se, making the defendant's negligence absolute. Which of these three methods will best accomplish the purpose of the statutes and at the same time deal justly with the parties?

It is submitted that, if the breach of penal statutes which have for their purpose the protection of the individual members of the general public, is treated as negligence per se by all the courts instead of a majority of them, the social end for which the statutes were passed will be substantially and justifiably implemented.

The rule that breach of such penal statutes is negligence per se, or as a matter of law, does not necessarily render the defendant liable in every case where he breaches a statute. But where the plaintiff relies on the breach of a penal statute, to recover he must prove, (1) that the statute was intended to protect him as an individual;[15] (2) that the interest invaded is the interest the act intended to protect;[16] (3) that the violation is the legal or proximate cause of his injury;[17] and the defendant may prove contributory negligence to defeat the claim of the plaintiff.[18]

Thus, we see that while the violation of penal statutes which have for their purpose the protection of the individual members of the general public, if treated as negligence per se, would make the negligence of the defendant conclusive, the defendant would not be liable every time a statute of this nature was violated. Therefore, while the social end of protection of the public would thus be attained, the defendant in such a negligence action would not be dealt with unjustly.

GLENN DENHAM

CRIMINAL PROCEDURE—CONCLUSION OF INDICTMENT

The defendant was convicted of voluntary manslaughter under an indictment which did not conclude "against the peace and dignity of the Commonwealth of Kentucky", as required by Kentucky Constitution, Section 123.[1] No demurrer was made to the indictment

Weimer et al. v. Westmoreland Water Co., — Pa. —, 193 Atl. 665 (1937).

[15] Falk v. Finkelman, 268 Mass. 89, 168 N. E. 89 (1929).

[16] Dunbar v. Olivieri, 97 Colo. 381, 50 Pac. (2d) 64 (1935).

[17] Hataway v. F. Strauss & Son, Inc., — La. —, 158 So. 408 (1935).

[18] Patton v. Pa. R. Co., 136 Ohio St. 159, 24 N. E. (2d) 597 (1939).

[1] Kentucky Constitution Sec. 123: "The style of process shall be, 'The Commonwealth of Kentucky.' All prosecutions shall be carried

and its defectiveness was not a ground for the motion for a new trial. The question of the defective indictment was first raised on appeal. In reversing the conviction the court said: "It is, therefore, apparent that the indictment in this case was wholly insufficient, even to the extent of being void and when so it is the duty of the court, passing upon the validity of a trial thereunder, to take cognizance of the fatal defect at any and all stages of the proceeding, and render its judgment accordingly. *Couch* v. *Commonwealth*, 281 Ky. 543, 136 S. W. (2d) 781, 784 (1940).

At Common law it was necessary that an indictment for an offense should conclude "against the peace of the king."[2] In this country today where the constitution of a state makes no provision for the conclusion of an indictment, but there is only a statute prescribing the specific conclusion, the omission of the conclusion may not be a ground for quashing the indictment or finding that it is fatally defective.[3] Where the conclusion is required by statute it is treated as a matter of form and if the indictment is otherwise definite and clear and there is no danger that the defendant may be subject to a new prosecution upon the same facts the conclusion is treated as immaterial and the indictment is allowed to stand.[4]

Where there is a constitutional provision prescribing the formal conclusion of an indictment, however, it has been uniformly held that this requirement is mandatory and that the indictment is fatally defective if it does not so conclude.[5] Some states have gone so far as to hold an indictment bad when it concluded "against the peace and dignity of state" whereas the Constitution required that it conclude "against the peace and dignity of the state."[6] This has been recognized as an unreasonable result, however, and it is generally held that a literal transcript of the required conclusion is not necessary but that a substantial compliance with the form is sufficient.[7]

The writer has been unable to find but one case upholding an information which did not carry the formal conclusion required by

on in the name and by the authority of the 'Commonwealth of Kentucky', and conclude against the peace and dignity of the same."

[2] Clark, Criminal Procedure (2nd ed. 1918) 356.

[3] Shiver v. State, 41 Fla. 630, 27 So. 36 (1899); State v. Schilling, 14 Iowa 455 (1862); State v. Kirkham, 104 N. C. 911, 10 S. E. 312 (1889).

[4] Shiver v. State, 41 Fla. 630, 27 So. 36 (1899).

[5] Fowler v. State, 155 Ala. 21, 45 So. 913 (1908); Cagle v. State, 151 Ala. 84, 44 So. 381 (1907); State v. Froelich, 316 Ill. 77, 146 N. E. 733 (1925); Clingan v. State, 135 Miss. 621, 100 So. 185 (1924); State v. Warner, 220 Mo. 23, 119 S. W. 399 (1909); State v. Lopez, 19 Mo. 254 (1853); Revill v. State, 87 Tex. Cr. R. 1, 218 S. W. 1004 (1920); Commonwealth v. Carney, 4 Grat. 546 (Va. 1847); Williams v. State, 27 Wis. 402 (1871).

[6] State v. Warner, 220 Mo. 23, 119 S. W. 399 (1909); State v. Campbell, 210 Mo. 202, 109 S. W. 706 (1908); Anderson v. The State, 5 Ark. 444 (1843).

[7] State v. Adkins, 284 Mo. 680, 225 S. W. 981 (1920); State v. Kean, 10 N. H. 347, 34 Am. Dec. 162 (1839).

the constitution.[8] The constitution of Colorado contained a provision substantially the same as Section 123 of the Kentucky Constitution. In holding the information good the court stated that the phrase "against the peace and dignity of the state" was a mere legal conclusion which did not enter into that part of the information which charged the offense. The defect should have been attacked by motion to quash or in arrest of judgment instead of in a collateral attack by habeas corpus. The dissenting opinion in this case, however, sharply points out:

> "In one sense the constitutional requirement may be matter of form. Nevertheless, by virtue of the fact that it is a part of the constitution, it is likewise matter of substance. Courts, which are creatures of the Constitution and the law thereunder, have no authority to dispense with that which the constitution requires. For if it be once held that courts can dispense with any portion of the constitutional requirements, then there is no limit upon the power of the courts in that respect. They may dispense with the entire constitution."[9]

The reasoning of this court in the majority opinion has not been followed and it is the overwhelming weight of authority that a constitutional provision prescribing the words of conclusion of the indictment is mandatory and an indictment must conclude with those words or be insufficient.[10]

It is the opinion of the writer that the result of this rule, while unavoidable if constitutions are to be given their traditional respect and integrity, is objectionable from a practical point of view. Many cases are reversed on the sole ground that the indictment did not conclude with the conclusion prescribed by the constitution. In the principal case the court says:

> "From what has been said it is apparent that the prosecution was and is free from reversible error, except for the fact that the indictment is fatally defective for the reason pointed out, and which was not waived by the defendant failing to call attention of the trial court to it."[11]

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[8] Chemgas v. Tynan, 51 Colo. 35, 116 Pac. 1045 (1911); (Dictum) Commonwealth v. Paxton, 14 Phila. 665 (1879). In this case there were two counts to the indictment. The first did not conclude "against the peace and dignity of the Commonwealth of Pennsylvania," but the second count did so conclude. The indictment was held sufficient but this result would have been reached where the constitutional form is mandatory and at least a substantial compliance is absolutely necessary for there the prescribed conclusion at the end of the indictment is sufficient without concluding each count. In this case, however, the court said every indictment has matters which are merely form and those which are substance; that words of conclusion are matters of form and that the constitution did not change this but they remained no less matters of form.

[9] Chemgas v. Tynan, 51 Colo. 35, 116 Pac. 1045, 1048 (1911).

[10] See cases cited *Supra* note 5.

[11] Couch v. Commonwealth, 281 Ky. 543, 136 S. W. (2d) 781, 784 (1940).

The trial was a complete nullity and the state was put to the necessity of proceeding de novo from a new indictment by a grand jury. The state must bear the expense of two complete trials because of an error which could not have injured or prejudiced the defendant's rights in any conceivable manner.

Fundamentally the conclusion of an indictment is a matter of form. The words concluding the indictment do not charge the offense or so describe it that the defendant will be endangered by another trial upon the same set of facts if the conclusion is omitted. The courts have said that, by reason of the fact that the constitution prescribes the conclusion of an indictment, it becomes a matter of substance. It is hard to see how the constitution can change the fundamental nature of the conclusion.

The conclusion is not matter of substance but merely a formal requirement that has passed down from antiquity and has outlived any usefulness that it might have once had. It is conceivable that in England at a time when there were a hundred or more crimes punishable by death that there was some excuse for technicalities that might mitigate the harshness of the law. This technicality of the common law has been accepted by us. The constitutions of many states have merely codified the common law upon this point. The justification that might have existed for the rule that an indictment was void if it did not carry the conclusion "against the peace and dignity of the king (state)" has passed away. Our criminal law is not unreasonably harsh, yet those who commit offenses may still have the advantage of an archaic technicality. The ends of justice are defeated and unreasonably delayed because a technicality which has outlived its justification has been preserved and raised to the dignity of a matter of substance by a constitutional provision. It is small wonder that the layman loses respect for the dignity and fairness of the law when an offender may by so frail an excuse avoid the result of a fair trial.

As this situation cannot be remedied by judicial decision it is suggested that, by constitutional amendment, or if a time should ever come for a general revision of the constitution, Section 123 of the Constitution of the State of Kentucky be so changed as to read:

> "The style of process shall be, 'The Commonwealth of Kentucky.' All prosecutions shall be carried on in the name and by the authority of the 'Commonwealth of Kentucky', *but it shall not be necessary to the validity of a prosecution that it should terminate in the words 'against the peace and dignity of the Commonwealth'.*"

MARY LOUISE BARTON