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## Masthead and Recent Cases

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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Recent Cases

CRIMINAL LAW—STATUTORY CRIME—INTENT REQUESTED

*Morissette v. United States*<sup>1</sup>

While hunting deer on government land the defendant picked up, and later sold, some United States practice bomb casings which had been piled in a heap and were rusting away. He testified that he thought the casings were abandoned. At the trial the judge instructed the jury that if Morissette intended to take the property, this was all the intent required. The court of appeals<sup>2</sup> affirmed a con-

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1. 342 U.S. 246, 72 Sup. Ct. 240 (1952).

2. 187 F.2d 427 (8th Cir. 1951).

viction of a violation of the United States Code,<sup>3</sup> and ruled that this particular offense required no element of criminal intent. The Supreme Court, in reversing the conviction by an unanimous decision (8-0), attributed to Congress, in drafting this statute, the purpose of consolidating and simplifying the law of larceny without, however, departing from the common law tradition that these are crimes of intentment.

Historically, mens rea has been essential to crimes,<sup>4</sup> and at one time was required for virtually all offenses.<sup>5</sup> However, the impossibility of proving the intent of the wrongdoer and the necessity, from a social viewpoint, for more convictions led to movements, both here<sup>6</sup> and in England,<sup>7</sup> that begat a class of cases where intent was not required. This new category of cases, commonly called "public welfare offenses,"<sup>8</sup> quickly gained favor with the courts and legislatures of America and has been continually expanding to include new types of cases.<sup>9</sup> Fear that the constant multiplication of the new crimes might wholly eliminate the element of

3. 18 U.S.C. § 641 (1948): "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any . . . thing of value of the United States . . . [s] shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

4. BL. COMM. \*21; Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932); Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922). Exceptions were certain sex crimes which do not effect this discussion. See *Commonwealth v. Welansky*, 216 Mass. 383, 55 N.E. 2d 902 (1944).

5. BISHOP, CRIMINAL LAW § 287 (8th ed. 1892) ("There can be no crime large or small, without an evil mind."); Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933) ("But apart from exceptional isolated cases criminal liability depended upon proof of a criminal intent"); See *Rex v. Vantandillo*, 4 M. & S. 73, 105 Eng. Rep. 762 (K.B. 1815) (Defendant was found guilty of carrying baby with small pox, but the court said one couldn't be found guilty unless she acted "with full knowledge of the fact.").

6. One of the first of these cases was *Barnes v. State*, 19 Conn. 398 (1849) where the defendant was convicted of selling liquor to a drunkard, when he was absent from the store and had no knowledge that buyer was a drunkard; *Ulrich v. Commonwealth*, 69 Ky. 400 (1896) (sale of liquor to a minor); *Commonwealth v. Farren*, 9 Allen 489 (Mass. 1864) (sale of adulterated milk); *State v. Baltimore and Susquehanna Steam Co.*, 13 Md. 181 (1859) (transportation of a slave).

7. *Regina v. Woodrow*, 15 M. & W. 404, 153 Eng. Rep. 907 (1846), was probably the start of the trend in England. There a tobacco dealer was convicted of having in his possession adulterated tobacco. Baron Parks said, "It is very true that in particular instances it may produce mischief, because an innocent man may suffer . . . but the public inconvenience would be greater, if in every case the officers were obliged to prove knowledge." *Queen v. Stephens*, L.R. 1 Q.B. 702 (1866) (casting rubbish in a river); *Hobbs v. Winchester Corp.*, [1910] 2 K.B. 471 (sale of unsound meat).

8. This phrase was probably coined by Francis Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933).

9. Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933) cites and classifies a large number of such cases as falling into the following groups; (1) illegal sales of intoxicating liquor, (2) sales of impure or adulterated food or drugs, (3) sales of misbranded articles, (4) violations of anti-narcotics acts, (5) criminal nuisances, (6) violations of traffic regulations, (7) violations of motor-vehicle laws, and (8) violations of general police regulations, passed for the safety, health, or well-being of the community.

intent has moved some students of the law to make many, and perhaps, sound objections.<sup>10</sup>

The unanswered question is: When the statute is silent, what rules or guides can be followed to distinguish between those crimes which require intent and those which do not? The present case is an important step toward the solution of that problem. The Supreme Court's opinion applied two set of guides in reaching its decision as to whether or not this was a public welfare offense. The first set consists of those guides which must be rigidly followed. They are: (1) that to constitute a public welfare crime, whatever the intent of the violator, the injury to the public must be the same;<sup>11</sup> (2) with a few exceptions,<sup>12</sup> for such violations the penalty must be small;<sup>13</sup> and (3) when the statute is silent concerning intent, it can be classified as a non-intent crime only if the common law has not placed a contrary meaning on it.<sup>14</sup> The second set of guides consists of signposts which do not necessarily form a part of every public welfare offense, but are often indicative of them. They are: (1) that many of these offenses do not involve affirmative acts but are in the nature of neglect or inaction where the law imposes a duty to act;<sup>15</sup> (2) that many such violations result in no direct injury, but merely create the danger or probability of it which the law seeks to minimize;<sup>16</sup> (3) that such offenses are against the authority of the state in that they impair the efficiency of controls deemed essential to the social order;<sup>17</sup> and (4) that the accused is usually

10. *Felton v. United States*, 96 U.S. 699, 24 L.Ed. 875 (1877); *Hall Prolegomena to a Science of Criminal Law*, 89 U. OF PA. L. REV. 549 (1941); *Stallybrass, The Eclipse of Mens Rea*, 52 L. Q. REV. 60 (1936); *Radin, Intent, Criminal*, 8 ENC. SOC. SCI. 126 (1932); For citations to other articles on this subject see CLARK & MARSHALL, *CRIMES* § 42, n. 35 (5th ed. 1952).

11. For examples see *United States v. Dotterweich*, 320 U.S. 277 (1943); *Commonwealth v. New York Cent.*, 202 Mass. 394, 88 N.E. 764 (1909) (where defendant tried to move train from obstructing the road to comply with an ordinance but could not since the air brakes had been tampered with by strangers); *Laird v. Dobell*, [1906] 1 K.B. 131; *Rex v. Larsonneur*, 97 J.P. 206, 24 Cr. App. 74 (1933) (where defendant was convicted of illegally entering the country when she was brought there under police custody).

12. These exceptions are, for the most part, certain sex crimes such as rape and bigamy.

13. See *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 121 N.E. 474 (1918); *Tenement House Department v. McDevit*, 215 N. Y. 160, 109 N.E. 88 (1915).

14. Cf. KENNY, *OUTLINES OF CRIMINAL LAW* § 31 (1952); MILLER, *CRIMINAL LAW* § 20 (a) (1934); Examples of where the common law definition was applied are, *State v. DeWolfe*, 67 Neb. 321, 93 N.W. 746 (1903) (nuisance was ascribed the meaning it had at common law); *Prindle v. State*, 31 Tex. Cr. Rep. 551, 21 S.W. 360 (1893); *Mitchell v. State*, 42 Ohio St. 383 (1884).

15. For examples see *Hays v. Schueler*, 107 Kan. 635, 193 Pac. 311 (1920) (failure to carry a rear red light on a motor car); *People v. Shoepflin*, 78 Misc. 62 (N. Y. County Court 1912) (driving an automobile with a distinctive number); *City of Emporia v. Becker*, 76 Kan. 181, 90 Pac. 798 (1907) (liability of employee who is ignorant that his employer has failed to pay a license tax).

16. For examples see *Commonwealth v. Savery*, 145 Mass. 212, 13 N.E. 611 (1887) (keeping liquor for sale); *Commonwealth v. Goodman*, 97 Mass. 117 (1867).

17. Examples are, *American Car and Foundry Co. v. Armentraut*, 214 Ill. 509, 73 N.E. 766 (1905) (employment of child under statutory age); *State v. Welch*, 218 Miss. 32 (1954) (double voting).

in a position to prevent the violation by no more care than society expects from a person who assumed his responsibility.<sup>18</sup> It should be evident that the above discussion is not the definition of a crime, but can only act as a guide to the correct solution of the case.

A second ground for the decision of the court was the interpretation of the requirement that the defendant "knowingly convert"<sup>19</sup> the property. It was urged by the government that, while the stated offenses of embezzlement, stealing and purloining are crimes requiring criminal intent, the Congress joined with these offenses a new and different crime, knowingly to convert government property, where no criminal intent was necessary. In discarding this contention the court pointed out the pains to which Congress had gone to differentiate between ordinary, unwitting acts which can constitute a conversion and make a defendant liable for a civil tort, and acts necessary to a "knowing conversion." For civil liability, good faith, mistake, motive, intent, and knowledge are generally irrelevant. But for criminal liability, to knowingly convert, one must be in possession of facts under which he is aware that he cannot lawfully do an act, but nevertheless proceeds to do it.<sup>20</sup> "He must have knowledge of the facts . . . that makes the taking a conversion."<sup>21</sup> The court concluded that a person can not knowingly convert property that he did not know could be converted, as would have been the case if he truly believed it to be abandoned property. It is fortunate for the development of the law that the court saw fit not to base its decision solely upon this more simple ground.

THOMAS G. STRONG

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18. For examples see *United States v. Behrman*, 258 U.S. 280, 66 L.Ed. 619, 42 Sup. Ct. 303 (1921) (sale of narcotics by a doctor to a dope addict); *State v. Sharp*, 121 Minn. 381, 141 N.W. 526 (1913) ("Such statutes are in the nature of police regulations . . . ; the object being to require a degree of the public which shall render violation impossible.").

19. *United States v. Hughes*, 278 Fed. 262 (E.D. Pa. 1922) (statute made punishable persons who "knowingly circulate . . . any written or printed matter . . . teaching the overthrow by force or violence of the government of the United States or of all forms of law."); For an interpretation of "knowingly" see *Perkins, Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939).

20. MILLER, CRIMINAL LAW § 20 (e) (1934).

21. *Morrisette v. United States*, 362 U.S. 246, 271 (1952).