

CRIMINAL LAW AND PROCEDURE

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LEGISLATION

Chapter 148 of the Acts of 1941 made several significant changes in the substantive criminal law, which were described in detail in "Indiana Legislation—1941."¹ That discussion raised certain questions: (1) whether second degree rape had been impliedly repealed by its omission in the 1941 rape statute;² (2) whether felonious intent remains an element of the statutory grand larceny—the question has impliedly been answered in the affirmative;³ (3) whether the disorderly conduct statute was invalid because of indefiniteness.⁴ The 1941 act on disorderly conduct was repealed in 1943.⁵ The new statute specifies that the act "disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting."⁶

Chapter 233 of the Acts of 1941 provided for juvenile courts.⁷ Penal sections 18 and 19, providing penalties for encouraging delinquency and for neglect of a child, have been held unconstitutional as violative of Section 19 Art 4 of the Indiana Constitution. The Supreme Court held that the title of the act was not broad enough to "justify the inclusion of sections declaring, defining . . . felonies and misdemeanors."⁸

The 1943 legislature made few enactments affecting criminal law; the following are the more important ones: *Law practice.* "Unauthorized solicitation" was extended from bringing a suit for damages in which the accused would

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1. (1941) 17 Ind. L. J. 150-160.

2. *id.* 151-152.

3. *id.* 153. The question has not been directly presented but judicial definitions of larceny continue to include felonious intent. E.g., *Warren v. State*, — Ind. —, 62 N.E. (2d) 624, 625 (1945).

4. *id.* 160.

5. Acts 1943, c. 243, §2.

6. Ind. Stat. Anno. (Burns' 1943 Supp.) §10-1510.

7. Ind. Stat. Anno. (Burns' 1941 Supp.) §9-2801b-9-2861.

8. *Stone v. State*, 220 Ind. 165, 172, 41 N.E. (2d) 609 (1942).

receive compensation dependent upon the amount of recovery to any "employment as attorney." The maximum fine was increased from \$100 to \$500; both fine and imprisonment may be imposed.⁹

Sunday Laws. Hunting on Sunday with firearms is prohibited.¹⁰ (In 1941, fishing was deleted from the list of occupations prohibited on Sunday.)¹¹

Defrauding newsboys. "Any person who obtains newspapers from person under eighteen years of age engaged in selling newspapers at retail, without paying therefor, with intent to defraud such person selling newspapers, shall be guilty of a misdemeanor and may upon conviction, be imprisoned not to exceed thirty days, or fined in any sum not exceeding twenty-five dollars."¹² "Proof that any person refused or neglected to pay for such newspapers upon demand shall be prima facie evidence of the fraudulent intent contemplated in this act."¹³

Weapons. Exceptions were made for members of the Indiana State Guard, law enforcement officers of this State or of the United States, persons testing or using fireworks, and ordinance manufacturers.¹⁴ The procedure for securing a license to carry firearms was changed.¹⁵

The emergency acts of 1945 legislature contain few changes in the substantive criminal law; the following are the most important ones:

Intoxicating Liquor Offenses. Chapter 357 §7, Emergency Acts of 1945, prohibits selling to members of the armed forces in knowing violation of military regulations¹⁶ and

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9. Ind. Stat. Anno., (Burns' 1943 Supp.) §10-3110-11. "Evidence that any person charged with violation of this act, either (1) was not a member of the bar of the Supreme Court of Indiana, or (2) was not a member of the bar of the county in which the offense was committed, at the time the offense was committed, shall be prima facie evidence that such person was not admitted to the bar of this state." Ind. Stat. Anno. (Burns' 1943 Supp.) §10-3110.
 10. Ind. Stat. Anno. (Burns' 1943 Supp.) §10-4303.
 11. Ind. Stat. Anno. (Burns' 1941 Supp.) §10-4301.
 12. Ind. Stat. Anno. (Burns' 1943 Supp.) §10-2122.
 13. Ind. Stat. Anno. (Burns' 1943 Supp.) §10-2123.
 14. Ind. Stat. Anno. (Burns' 1943 Supp.) §10-4714.
 15. Ind. Stat. Anno. (Burns' 1943 Supp.) §10-4738.
 16. § 7a.

restates without substantial modification the offenses specified under the expressly repealed Chapter 226, Acts of 1935.¹⁷ The gradation in penalties for various violations of the Intoxicating Liquor laws has been eliminated. Any person violating any of the penal sections is subject to a fine not exceeding \$500 or six months' imprisonment or both.

Election Offenses. Chapter 208, Acts 1945, the Indiana Election Code, forbids the buying or selling of votes, influencing voters not to vote, bribing voters, falsifying expense records, participating in corrupt election practices, interfering with the process of election, etc. The penalty for misdemeanors defined under the act is a fine not exceeding \$500 or imprisonment from 30 days to 1 year or both; in addition disfranchisement up to 5 years is discretionary. The penalty for felonies defined under the act is a fine not less than \$50 and not more than \$1,000 with imprisonment from 1 to 5 years and discretionary terminate disfranchisement.

Blind Persons. A guarantee of "full privileges of all public conveyance and all places of public accommodation" was made more definite by specific reference to "hotels, lodging places, amusement or resort and other places to which the general public is invited."¹⁸ The penalties for depriving any such person of these rights were increased; the fine from \$25 to \$100, imprisonment from 60 days to 3 months, or both.

Miscellaneous Provisions

Chapter 11 of the Acts of 1945 allows each prosecuting attorney in each judicial circuit \$600 a year from Jan. 1, 1945, to Mar. 31, 1947, as reimbursement for expenses incurred.¹⁹

Chapter 38 of the Acts of 1945 created the office of Public Defender. Appointment of a resident of Indiana, a practicing lawyer for at least 3 years, is to be made by the Supreme Court. Service is "at pleasure" of the court

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17. See Ind. Stat. Anno. (Burns' 1941 Supp.) §§12-601-12-621. A sale to any person under 21 is prohibited (§7b.), but notice in writing that a minor is under 21 is required to make the permitted presence of such a person on the premises unlawful (§7 e).
 18. Chap. 34 of Acts of 1945 amending Chap. 193 of Acts of 1937.
 19. Compensation of prosecuting attorneys is strictly limited to statutory grants. Ind. Stat. Anno. (Burns' 1933) 49-2695; see §§49-2601-49-2695.

for a term of 4 years at a salary not to exceed \$5,000. The duty of the public defender is "to represent any person in any penal institution who is without funds to employ his own counsel in any matter in which he may assert "after his time for appeal shall have expired," that he was "unlawfully and illegally imprisoned."²⁰

JUDICIAL DECISIONS

General Defenses

The presumption of coercion by husband was tacitly recognized in a case of perjury.²¹ On trial for vagrancy, riot, etc., the defendant pleaded that she was the wife of the co-defendant and that it must therefore be presumed that she was acting under coercion when she did the acts charged against her. She was discharged.

The defense of reasonable mistake of fact was extended to defense of members of one's family: "'A person has a right to act on appearance, and if he believes, in good faith and upon reasonable ground, from the facts and circumstances as they appear to him at the time, that he is about to be assaulted, he has a right, . . . to use such force as will protect him from the assault.' This right also extends to the protection of one's family."²²

Certain features of the defense of insanity have been clarified. After a special plea of insanity has been made, the burden is "upon the state to prove sanity of defendant beyond a reasonable doubt." It was reversible error to instruct that the jury must find the defendant insane at the time of the act rather than to acquit if they entertained a reasonable doubt as to his sanity.²³ But the "presumption of sanity is sufficient to constitute a prima facie case in favor of the State where there is no evidence to dispute it"

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20. Sec. 2. The duties are apparently limited to pursuit of a coram nobis.
 21. *Davis v. State*, 218 Ind. 506, 34 N.E. (2d) 23 (1941) (by implication). The charge of perjury was based on the defendant's testimony in the vagrancy trial as to the time and place of the marriage.
 22. *Branmn v. State*, 221 Ind. 123, 124, 46 N.E. (2d) 599 (1943) (manslaughter) extending *Hughes v. State*, 212 Ind. 577, 585, 586, 10 N.E. (2d) 629, 633 (1937) (assault and battery).
 23. *Sweet v. State*, 218 Ind. 182, 190, 31 N.E. (2d) 993 (1941).

even though a special plea of insanity has been entered.²⁴ The Supreme Court affirmed the exclusion of evidence of glandular imbalance offered in a rape case to prove that a person "with such . . . would not know what he was doing or remember what he had done." The contention had been made that the evidence would tend to "show an 'irresistable urge' and thus a partial lack of responsibility." It was decided that abnormal, physical conditions cannot be urged "as a partial defense, unless . . . mental condition is thereby affected to the extent of being unsound, and a proper plea filed."²⁵ In a later murder case in which no plea of insanity was interposed, the Supreme Court held that "a fair presentation of the case required the giving of the instruction upon temporary insanity submitted by the defense."²⁶

Intoxication is a defense only to the extent of disproving such crimes as require "a specific intent."²⁷

Specific Offenses

Criminal Syndicalism and Riotous Conspiracy

Members of Jehovah's Witnesses were convicted for conspiracy to incite the people against all forms of organized government and to disrespect the flag of the United States. The conviction was reversed²⁸ on the ground that neither statute under which the charge was made had been violated. The general conspiracy statute requires a conspiracy to commit a felony: desecration of the flag is a misdemeanor; and there is "no such statutory offense as conspiracy to commit a misdemeanor."²⁹ The literature advocating overthrow of all government did not "advocate, or incite the overthrow,

24. *Brattain v. State*, — Ind. —, 61 N.E. (2d) 462, 465 (1945) (Second degree murder.)

25. *Foster v. State*, 222 Ind. 133, 52 N.E. (2d) 358 (1944).

26. *Miller v. State*, — Ind. —, 58 N.E. (2d) 114, 116 (1944). The defense had contended that immediately after the shot was accidentally fired, the defendant became temporarily insane, and that for that reason little, if any, consideration should be given to his statements made immediately thereafter.

27. ". . . when the degree of intoxication is such as to render a person incapable of entertaining a specific intent it is an effective defense as to such crimes." *Brattain v. State*, — Ind. —, 61 N.E. (2d) 462, 465 (1945).

28. *McKee v. State*, 219 Ind. 247, 37 N.E. (2d) 940 (1941). See Note (1942) 17 Ind. L. J. 435.

29. See Ind. Stat. Anno. (Burns' 1933) §§10-1101, 10-506.

by use of force and violence.”³⁰ At the time this decision was rendered the much publicized case, *Minersville School District v. Gobitis*, had not been reversed. Thus the Indiana Supreme Court anticipated the United States Supreme Court in arriving at a sound judgment that strengthened highly important civil liberties.

Homicide

The Indiana murder statute incorporates, in certain situations, the felony-murder doctrine.³¹ “. . . neither premeditation, intent to kill, nor malice is a necessary element”³² To sustain a conviction under this section, it is sufficient if “the facts disclosed no motive . . . but robbery.”³³ The felony-murder section was held applicable to accessories before or after the felony.³⁴ Thus, an automobile salesman, taking a prospective buyer for a ride, waited while his passenger, a stranger, went to “stick-up” a filling station. The filling-station attendant died of gunshot wounds. The automobile salesman was convicted of murder in the attempt to perpetrate a robbery. The conviction was affirmed: “It is immaterial that appellant did not know nor expect that Hafer would shoot in the attempt at robbery. They were together engaged in the commission of an unlawful act and he is liable *criminaliter* for that which Hafer did in furtherance of the unlawful common object.”³⁵ The section is, however, strictly limited to the enumerated felonies; “robbery” in the murder section does not include “bank robbery.”³⁶

A related doctrine has been evolved to cover situations in which the felony-murder section is strictly inapplicable

30. Ind. Stat. Anno. (Burns' 1933) §10-1302.

31. Ind. Stat. Anno. (Burns' 1941 Supp.) §10-3401 “. . . provided, whoever in the perpetration of or attempt to perpetrate a rape, arson, robbery or burglary . . .”

32. *Hawkins v. State*, 219 Ind. 116, 125, 126, 37 N.E. (2d) 79 (1941). It was held that the trial court properly refused to instruct that, under an indictment for murder while in perpetration of a robbery, the defendant could be convicted of murder in second degree, manslaughter, or involuntary manslaughter.

33. *Finch v. State*, 222 Ind. 633, 638, 56 N.E. (2d) 851 (1944).

34. See Ind. Stat. Anno. (Burns' 1933) §9-102.

35. *White v. State*, 219 Ind. 290, 297, 37 N.E. (2d) 937 (1941). following *Breaz v. State*, 214 Ind. 31, 13 N.E. (2d) 952 (1938).

36. *Loftus v. State*, 222 Ind. 139, 52 N.E. (2d) 488 (1944).

because the intended felony has been fully perpetrated. When a victim of a prior felony dies as a result of an otherwise intervening act, the dependence of that act upon the psychological distress produced by the crime is made the basis for finding the wrongdoer responsible. Thus, as a result of having been ravished by the defendant, and "while in the throes of bodily pain and mental grief and distraction caused therefrom," an 11-year old girl fell or jumped into a stream from which the defendant "intentionally failed and refused to rescue her, although he was fully able to rescue her." The conviction of second degree murder was affirmed. "The question, however, is not so much one of duty and breach thereof as one of cause and effect."³⁷ The failure to rescue the child was "one link in a chain of causation, beginning with defendant's wrongful acts and leading directly to the death of the child."

Recent second degree murder cases have emphasized "the necessity of proving malice and intent."³⁸ Similarly, it was error to instruct the jury that "if the killing of the person . . . has been satisfactorily shown . . . to have been the act of the defendant, then the law presumes it to have been murder . . ." This instruction erroneously "eliminates the necessity of proving malice and intent. The 'law' never presumes murder under any state of fact."³⁹

The Reckless Homicide Statute⁴⁰ was declared valid against the contention that the phrase "reckless disregard for the safety of others" was indefinite. The phrase had "a definite meaning at common law and was therefore sufficiently certain."⁴¹ The judicial definition given a corresponding phrase in the Guest Statute was presumptively known to the legislature.⁴² The death must be "proximately caused by the acts described."⁴³

37. *Jones v. State*, 220 Ind. 384, 386, 387, 43 N.E. (2d) 1017 (1942), following *Stephenson v. State*, 205 Ind. 141, 179 N.E. 633 (1932).

38. *Dickinson v. State*, 222 Ind. 551, 555, 55 N.E. (2d) 325 (1944).

39. *Miller v. State*, — Ind. —, 58 N.E. (2d) 114, 116 (1944).

40. Ind. Stat. Anno. (Burns' 1937) §47-2001.

41. *State v. Beckman*, 219 Ind. 176, 186, 37 N.E. (2d) 531 (1941). See Note (1940) 30 Geo. L. J. 408.

42. *id.* 184 " . . . voluntarily does an improper or wrongful act, or with knowledge of existing conditions, voluntarily refrains from doing a proper and prudent act, under circumstances when his action, or his failure to act, evinces an active abandonment of any care, and a heedless indifference to results which may follow, . . ." *Armstrong vs. Binzer*, 102 Ind. App. 497, 507, 199 N.E. 863, 867 (1936).

43. *ibid.*

The penalty for reckless homicide is less than that imposed for involuntary manslaughter. Both crimes may be charged in one affidavit or indictment. Two cases show interesting applications of these statutes. A conviction for reckless homicide on a charge of "driving at a rate of speed which was greater than reasonable and prudent . . . to-wit: 89 miles per hour knowing that brakes were in poor working order" was reversed because of failure to prove that the brakes were defective. Evidence of unreasonable speed was insufficient. "Both elements, speed and inadequate brakes, were essential to establish the crime charged in the affidavit."⁴⁴ In contrast, a conviction for involuntary manslaughter was affirmed on evidence "from which the jury could draw an inference that the unlawful speed at which the appellant operated the automobile was the proximate cause of the death." The defendant, driving at 60 miles per hour, saw a child when his automobile was more than 30 feet from her, sounded his horn and applied the brakes but the child was struck. Tests by police showed that at 30 miles per hour, the car could have been controlled in due time.⁴⁵

Mayhem. "Construed in the light of the common law," "intent to break a leg" is "insufficient because it does not imply a permanent injury."⁴⁶

Kidnapping. A convict detained a visitor at the prison hospital for two hours, threatening to kill her unless he was liberated and given an automobile and a machine gun. He was convicted of kidnapping for ransom.⁴⁷ Although the lesser crime of kidnapping⁴⁸ requires proof of an intention to carry away "from any place within this state," kidnapping for ransom does not.⁴⁹ The statute incorporates the com-

44. *Turrell v. State*, 221 Ind. 662, 670, 666, 51 N.E. (2d) 359 (1943).

45. *Cross v. State*, 222 Ind. 241, 243, 52 N.E. (2d) 727 (1944).

46. *Pierce v. State*, 220 Ind. 225, 226, 41 N.E. (2d) 797 (1942). Ind. Stat. Anno. (Burns' 1933) §10-407 "or disable a limb . . ."; §10-408, ". . . deprives another of the use of any bodily member . . ."

47. *Sweet v. State*, 218 Ind. 182, 31 N.E. (2d) 993 (1941) (conviction reversed on other grounds).

48. Ind. Stat. Anno. (Burns' 1941 Supp.) §10-2901.

49. "Whoever shall imprison, detain or hold any person at any place in this state with intent of obtaining from anyone any money, means, property or thing of value, as ransom, reward or price for return, liberation or surrender of person so imprisoned, detained or held . . ." Ind. Stat. Anno. (Burns' 1941 Supp.) §10-2903.

mon law crime of false imprisonment.⁵⁰ A consequence of this conclusion is that the "lesser" offense of kidnapping is not included in the "greater" offense of kidnapping for ransom."⁵¹ "Ransom" is not limited to money demands.⁵² "Property" is broad enough to include a machine gun and automobile and both are within definitions of "things of value." "The purpose for which they were to be used, in our opinion, was immaterial."⁵³

Failure to Support Parent. A person, who, as a child, was supported by his parents only until emancipation does not come within the statute.⁵⁴ No legal obligation exists unless the child has been supported "throughout minority."⁵⁵

Theft. In distinguishing between larceny by trick and obtaining property by false pretenses, the Court held that "The fact that the owner intends to part with the title to the property and not merely the possession makes the distinction . . ." ⁵⁶ The distinction between custody and possession as a basis for distinguishing larceny from embezzlement has been emphasized in a recent decision. An "employee who has 'mere custody of personal property, as distinguished from

50. Sweet v. State, 218 Ind. 182, 193-4, 31 N.E. (2d) 993 (1941). For comparable construction of kidnapping statutes as analogous to aggravated false imprisonment, see Fisher and McGuire, "Kidnapping and the So-Called Lindbergh Law" (1935) 12 N. Y. U. L. Q. Rev. 646.

51. *id.* 193.

52. Cp. Gooch v. United States, 297 U.S. 124 (1936).

53. Sweet v. State, 218 Ind. 182, 196, 31 N.E. (2d) 993 (1941)

54. Ind. Stat. Anno. (Burns' 1942 Replacement) §10-1410: ". . . the provisions of this act shall not apply to children who have not lived with or who have not been supported by their parents when . . . minors."

55. Hindman et al. v. State, 221 Ind. 611, 50 N.E. (2d) 1913 (1943). The court admitted the moral obligation but "in the absence of some language of qualification or limitation in the statute itself there is no basis for judicial compromise. The provisions of penal statutes such as this may not be extended by intentment." *id.* 613.

56. Johnson v. State, 222 Ind. 473, 54 N.E. (2d) 273 (1944). Parties conducting community sales of livestock delivered possession of livestock purchased by the defendant in exchange for a check, accepted as full payment. Payments on the check were stopped by the defendant's wife who had not been informed that her husband was issuing checks in her name. After attempting to collect the check from the wife, the seller filed a complaint. A conviction for grand larceny was reversed on the ground that the offense committed was obtaining property by false pretences. The seller intended to part with title.

legal possession' and with animo furandi converts same to his own use is guilty of larceny"⁵⁷ A member of a corporation's maintenance crew, bonded for embezzlement, removed the property from the storage building to which he had a key but from which he was not allowed to remove property without procuring a requisition. He sold and divided the proceeds with an accomplice. The Court sustained a conviction of larceny, holding that the embezzlement statute was limited to "cases in which such persons have, as an element of their employment, a special trust concerning the money, article, or thing of value that involves an actual possession thereof or a special right of access to or control over the same."⁵⁸

Felonious intent, though not expressly required in the statute,⁵⁹ remains a requisite of embezzlement.⁶⁰ The felonious intent may be inferred from shortages in sales records and receipts that are not accounted for.⁶¹ Certain clarifications have been made in the scope of embezzlement by private employees. Thus chattels are now definitely the subject matter of embezzlement.⁶² But difficulties persist in the distinction between larceny and embezzlement,⁶³ and in the definition of an agency relationship. Thus a person who accepts money which he knows is to be paid to a third person becomes an agent to deliver. It is not necessary to prove that he "agreed to act as agent and employee, since his consent to act . . . may be implied from his acceptance of the

57. *Warren v. State*, — Ind. —, 62 N.E. (2d) 624, 625 (1945). See Note (1945) — Ind. L. J. —

58. *id.* 625.

59. Ind. Stat. Anno. (Burns' 1933) §§10-1701, 10-1704.

60. *Lawver v. State*, 221 Ind. 101, 46 N.E. (2d) 592 (1943) A deputy treasurer took \$30 from a cash drawer in the county treasurer's office, depositing in lieu a personal check which he later cashed for the same amount. A conviction for embezzlement of county funds was reversed on the ground that there was "no evidence that supports an inference of criminal or evil intent or intent to abstract or misappropriate or deprive the county of its funds." *id.* 106.

61. *Hurst v. State*, 222 Ind. 599, 56 N.E. (2d) 493 (1944). Cp. Ind. Stat. Anno. (Burns' 1943 Supp.) §10-2123: Prima Facie Evidence of Intent to Defraud Newsboys.

62. *Gentry v. State*, — Ind. —, 61 N.E. (2d) 641 (1915) impliedly overruling *Mendenhall v. State*, 189 Ind. 175, 126 N.E. 434 (1920), expressly overruled in *Warren v. State*, — Ind. —, 62 N.E. (2d) 624, 625 (1945)

63. See especially *Warren v. State*, — Ind. —, 62 N.E. (2d) 624 (1945).

money.”⁶⁴ On the other hand, a person who expressly agrees to sell property belonging to another and to turn over immediately the proceeds of the sale to the owner is “not an agent for sale of goods and servant for delivery of proceeds of sale.”⁶⁵

Receiving Stolen Goods. The statute⁶⁶ defines two distinct offenses: receiving stolen goods and receiving embezzled goods. A conviction for receiving stolen goods was reversed because the evidence established receipt of embezzled good.⁶⁷

Converting Mortgaged Personal Property. The statute⁶⁸ defines two distinct offenses: removal of mortgaged property from the county where it is situated, without the written consent of the mortgagee; secreting or converting mortgaged chattels. A farmer who had mortgaged his growing crop of corn “converted mortgaged property” to his own use “by turning his livestock into the field and permitting them to consume it.”⁶⁹

Issuing Fraudulent Check. The statute⁷⁰ defines two distinct offenses: issuing a fraudulent check to obtain property and issuing a fraudulent check in payment of an obligation. A defendant who gave a fraudulent check in payment for a steer was convicted of issuing a fraudulent check in payment of an obligation. The conviction was reversed on the ground that the offense committed was issuing a fraudulent check to obtain property.⁷¹

64. *Hart v. State*, 220 Ind. 469, 485-6, 44 N.E. (2d) 346 (1942) (conviction for embezzlement affirmed); *Jones v. State*, 59 Ind. 229 (1877).

65. *Sheets v. State*, 217 Ind. 676, 680, 30 N.E. (2d) 309 (1940) (conviction for embezzlement reversed). The decision insofar as it relates to the problem of agency is complicated by the fact that the defendant was a conditional sales vendee acting at the request of the conditional sales vendor.

66. Ind. Stat. Anno. (Burns' 1933) §10-3017.

67. *Gentry v. State*, — Ind. —, 61 N.E. (2d) 641 (1945) Noted (1945) — Ind. L. J. —.

68. Ind. Stat. Anno. (Burns' 1933) §10-4004.

69. *Sheets v. State*, 217 Ind. 277, 279, 281, 27 N.E. (2d) 769 (1940).

70. Ind. Stat. Anno. (Burns' 1933) §10-2105.

71. *Rogers v. State*, 220 Ind. 443, 445, 44 N.E. (2d) 343 (1942), 143 A.L.R. 1074, 1076 (1943).

II. PROCEDURE

Affidavit and Indictment. Pleading of separate and distinct offenses, created by separate and distinct sections of a statute, or by separate statutes is generally forbidden.⁷² But "where a criminal statute enumerates several acts disjunctively, and provides the same punishment for doing any one or all of the acts, then two or more said acts may be charged conjunctively in a single count without objection for duplicity."⁷³ "Proof of any one of several acts forbidden and charged conjunctively will support conviction."⁷⁴ Where a statute defines two distinct offenses, an affidavit may properly be based upon either.⁷⁵ But when a statute defines two distinct offenses, "it necessarily follows that evidence of one is not sufficient to sustain a conviction of the other."⁷⁶

Power of Court to Amend. "The court may at any time before, during or after the trial amend the indictment or affidavit in respect to any defect, imperfection or omission in form, providing no change is made in the name or identity of the defendant or defendants or of the crime sought to be charged."⁷⁷ "If however, the original affidavit was not sufficient to charge the crime . . . the amendment of the affidavit during the course of the trial constituted 'reversible error.'"⁷⁸ An amendment of an affidavit charging assault and battery to charge assault and battery with intent to kill was held erroneous because the change was "from a misdemeanor to a felony."⁷⁹ The Court expressly reserved the

72. Ind. Stat. Anno. (Burns' 1933) §9-1112.

73. Strickland v. State, 217 Ind. 588, 591, 29 N.E. (2d) 950 (1940) (fraudulently forging and uttering a conditional sales contract).

74. Cooprider v. State, 218 Ind. 122, 31 N.E. (2d) 53 (1941), 132 A.L.R. 553, 557 (1941). Under a statute prohibiting "wilfully, mischievously or maliciously removing tombstone," proof of wilful removal was sufficient to support conviction on an indictment charging wilful, mischievous and malicious removal. *id.* 126.

75. Sheets v. State, 217 Ind. 277, 27 N.E. (2d) 769 (1940).

76. Rogers v. State, 220 Ind. 443, 44 N.E. (2d) 343 (1942), 143 A.L.R. 1074, 1076 (1942). See note: "Required application of section more specifically applying to the accused." (1935) 10 Ind. L.J. 467.

77. Ind. Stat. Anno. (Burns' 1941 Supp.) §9-1133. Ind. Stat. Anno. (Burns' 1942 Replacement) §9-1124: "before the defendant pleads . . ."

78. Edwards v. State, 220 Ind. 490, 493, 44 N.E. (2d) 304 (1942). The opinion contains an excellent discussion of the purposes of such legislation.

79. Drury v. State, — Ind. —, 59 N.E. (2d) 116 (1945).

question of whether such amendment would be erroneous if made without objection. The statute has been limited to the immaterial defects specified in the Ind. Stat. Ann. (Burns' 1933) §9-1127.

Plea of Guilty. "A verified motion to vacate a judgment entered on a plea of guilty raises the issue as to whether the plea of guilty was freely and understandingly made but does not tend to prove it."⁸⁰ The question is one of fact for the trial court.⁸¹ A motion for a new trial is ineffectual in a case where judgment had been rendered upon a plea of guilty.⁸² A petition to set aside a judgment on a plea of guilty or for permission to substitute a plea of not guilty, filed after the term in which judgment was entered, was filed too late.⁸³

Motion to Quash. Where an affidavit brought against an habitual criminal, charges prior convictions, sentences, and imprisonment but does not designate the place of imprisonment, this motion should be sustained.⁸⁴

Plea in Abatement. Mere "irregularities in drawing and organizing the grand jury which involved no charge of fraud or corruption and in no way prejudiced defendant's substantial rights, assuming, in absence of anything appearing to the contrary, that the body as constituted was composed of persons duly examined and qualified and not subject to any statutory causes of challenge, is not available as a plea to abate an indictment."⁸⁵ A plea in abatement is a proper method to assert immunity from prosecution of an offense regarding which the defendant had been compelled to testify before the grand jury.⁸⁶

80. Kuhn v. State, 222 Ind. 179, 52 N.E. (2d) 491 (1944).

81. Hoelscher v. State, — Ind. —, 57 N.E. (2d) 770 (1944).

82. Chaplain v. State, 219 Ind. 55, 36 N.E. (2d) 277 (1941).

83. State ex rel. Thomas v. Murray, Judge, 219 Ind. 461, 39 N.E. (2d) 450 (1942); Sessler v. State, 222 Ind. 608, 56 N.E. (2d) 851 (1944).

84. Midland v. State, 220 Ind. 668, 46 N.E. (2d) 200 (1943). The date of conviction and sentence in a federal court was given.

85. Anderson v. State, 218 Ind. 299, 32 N.E. (2d) 705 (1941). So held, also, where a court ordered the names of twelve persons instead of six to be drawn. Weer v. State, 219 Ind. 217, 36 N.E. (2d) 787 (1941).

86. Metz et al. v. State, Hasenour v. State, 217 Ind. 293, 296, 27 N.E. (2d) 761 (1940). Immunity granted in Ind. Stat. Anno. (Burns' 1933) §9-1605.

Separate Trial. Granting a change of venue to one of several defendants, jointly charged, does not of itself entitle any of them to a separate trial.⁸⁷

Double Jeopardy. This may be proved under a plea of not guilty.⁸⁸ Failure to object to the discharge of the jury forecloses the defendant's taking advantage of a court's discharging a jury after jeopardy has attached.⁸⁹

Motion for Continuance. One who claims surprise at the admission of testimony against him must ask for postponement of the trial or a continuance so that he may be prepared to meet such testimony. Surprise at testimony introduced is not a ground for a new trial.⁹⁰

Directed Verdict for the Accused. "A peremptory instruction directing verdict in favor of accused in the trial of a criminal case can only be given where there is a total absence of evidence upon some essential issue, or where there is no conflict in the evidence, and it is susceptible of but one inference, and that in favor of accused."⁹¹

Motion for Discharge. The Indiana Bill of Rights, Art. 1 §12 provides that "Justice shall be administered . . . speedily, and without delay." The statute embodying this provision⁹² "prescribes no procedure and therefore must be governed by the procedure applicable to other similar issues presented by motion."⁹³ The defendant "must allege that the delay was without his fault." "The motion itself is not proof even when it is verified."⁹⁴ The State is not answerable for "delay . . . caused by pleas in abatement, efforts to change venue, etc."⁹⁵ Failure to ask for a trial constitutes a waiver insofar as it is "silent acquiescence in delay"⁹⁶

87. *Weer v. State*, 219 Ind. 217, 224, 36 N.E. (2d) 787 (1941). See Ind. Stat. Anno. (Burns' 1933) §9-1804.

88. *Marks v. State*, 220 Ind. 9, 21, 40 N.E. (2d) 108 (1941).

89. *Holt v. State*, — Ind. —, 59 N.E. (2d) 563, 564 (1945) (continuance requested by defendant).

90. *Mosier v. State*, 219 Ind. 669, 40 N.E. (2d) 698 (1941).

91. *State v. Torphy*, 217 Ind. 383, 388, 28 N.E. (2d) 70 (1940).

92. Ind. Stat. Anno. (Burns' 1933) §9-1402-3.

93. *State v. Beckwith*, 222 Ind. 618, 624, 57 N.E. (2d) 193 (1944).

94. *Soucie v. State*, 218 Ind. 215, 226, 31 N.E. (2d) 1018, 1022 (1941).

95. *Weer v. State*, 219 Ind. 217, 225, 36 N.E. (2d) 787 (1941).

96. *State v. Beckwith*, 222 Ind. 618, 632, 57 N.E. (2d) 193 (1944).

Waiver of Presence. Voluntary absence of the defendant is not ground for a new trial.⁹⁷

Counsel. Even though the defendant is not a pauper, "a request of attorneys of record to withdraw their appearance on the eve of the trial ought to have been denied or the trial postponed sufficiently long for new counsel who were willing to appear to familiarize themselves with the case."⁹⁸ A pauper has the right to have counsel to perfect and prosecute an appeal.⁹⁹ A pauper's counsel will not be furnished to pursue a writ of coram nobis; there is "no duty on the state to aid a pauper" in "a new proceeding, civil in nature,—a remedy by which relief may be had from an unconscionable judgment."¹⁰⁰ The recently created office of Public Defender alters the situation as regards writs of coram nobis.

97. At time of the return of the verdict. *Dudley et al. v. State*, 218 Ind. 131, 30 N.E. (2d) 718 (1941).

98. *Rice v. State*, 220 Ind. 523, 44 N.E. (2d) 829 (1941), on the basis of *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

99. *State ex rel. White v. Hilgemann, Judge*, 218 Ind. 572, 34 N.E. (2d) 129 (1941). See *Johnson v. Zerbst, Warden*, 304 U.S. 458 (1938).

100. *State ex rel. Cutsinger v. Spencer, Judge*, 219 Ind. 148, 155, 41 N.E. (2d) 601 (1941) (murder); *State ex rel. Sawa v. Criminal Court of Lake County*, 220 Ind. 4, 40 N.E. (2d) 971 (1942) (murder).