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county and with which they were familiar, this in itself might negative the idea of any criminal purpose in their actions."

This departure from orthodox law was inevitable in view of the doctrine laid down as to motive since it is just such evidence as this that establishes defendant's motive. Just how far the court will go in applying the doctrine it is difficult to estimate. The cases in regard to the element of malice in malicious prosecution supply a close analogy to the problem involved.⁴¹

A. H. Aston.

ENTRAPMENT BY PUBLIC OFFICERS AS A DEFENSE AGAINST CRIMINAL PROSECUTION

Entrapment has been defined as "The conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer."¹

In considering the availability of entrapment as a defense against criminal prosecution the basic principle to be kept in mind is that the doctrine rests upon the clear distinction between inducing a person to do an unlawful act and setting a trap to catch him in the execution of criminal designs of his own conception.²

The courts have long made allowance for the frailty of man when exposed to temptation by making available the defense of entrapment, but there have been wide variations in the extent and application of the doctrine in various jurisdictions. Before the recent United States Supreme Court case of *Sorrells v. U. S.*³ the various Federal courts seemed to have had two distinct conceptions of the defense.

One of these was best expressed in the case of *U. S. v. Healy*,⁴ in which the court held: "It will be observed that the case at bar is not one of those where the actor *knows his act violates the law*. Of the latter is he who, on solicitation, sells or passes money known to him to be counterfeit, or he who thus mails prohibited matter, or he who thus sells intoxicants without a license or in dry territory. *These latter acts are criminal, let the status of the solicitor be what it may; and hence that he is a decoy does not neutralize the criminal quality of the act.*" This case involved the violation of a federal statute

⁴¹See cases cited in note 25 ante.

¹From the concurring opinion of Justice Roberts in *Sorrells v. U. S.*, 53 Supreme Court Reporter 210.

²16 C. J. 88; 8 R. C. L. 128; 12 Cyc. 160.

³53 Supreme Court Reporter 210.

⁴202 Fed. 349.

prohibiting the sale of liquor to Indians. The defendant was not aware that he was violating the statute because the detectives had disguised an Indian as a Mexican in order to trap him in breaking the law.⁵

The other view of entrapment, and the one more often followed by the Federal courts, is best expressed in *Butts v. U. S.*⁶ Here the defendant was indicted for the unlawful sale of morphine. He was not and never had been a dealer in the drug. He was induced by a friend who knew he had become addicted to the drug when in pain caused by a long standing disease, to procure a quantity for him. This was all a device of the internal revenue agents to trap the defendant. The court held: "But when the accused had never committed such an offense as that charged against him prior to the time when he is charged with the offense prosecuted, and never conceived any intention of committing the offense prosecuted, or any such offense, and had not the means to do so, the fact that the officers of the government incited and by persuasion and representation lured him to commit the offense charged, in order to entrap, arrest and prosecute him therefor, is and ought to be fatal to the prosecution."⁷

In the *Sorrells* case the federal view of the defense has at last been definitely fixed. The court, after mentioning both conceptions, held that the limits of the defense of entrapment are not those expressed in the Healy case and adopted the other view. The court also settled the question as to the reasons for the defense, and its effect when available. *Sorrells* had been persuaded to procure liquor for a detective who was visiting his home, posing as a tourist. There was no evidence that the defendant had ever sold or possessed liquor before. The defendant, indicted for violation of the Prohibition Act, pleaded not guilty, and it was maintained that he could not afterward rely upon entrapment as a defense. The court decided that the defense of entrapment could be raised after a plea of not guilty, saying: "We are unable to conclude that it was the intention of Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and punish them. * * * * If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that *the case lies outside the purview of the Act* and that its general words should not be construed to demand a proceeding at once inconsistent with that policy and abhorrent to the sense of justice."

"The defense of entrapment is available, not in the view that the accused,

⁵See also *Voves v. U. S.*, 249 Fed. 191.

⁶273 Fed. 35.

⁷See also *Peterson v. U. S.*, 255 Fed. 433; *U. S. v. Echols*, 253 Fed. 862; *Sam Yick v. U. S.*, 240 Fed. 60; *Woo Wai et al. v. U. S.*, 223 Fed. 412.

though guilty, may go free, but that the government cannot be permitted to contend that he is guilty of a serious crime where the government officials are the instigators of his conduct."⁸

As to the effect that pleading entrapment may have on the introduction of evidence the court said: "If the defendant seeks an acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and pre-disposition as bearing upon the issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of his defense."

Before taking up the Pennsylvania view of entrapment it might be well to consider, that in crimes against persons or property, though the defense of entrapment is available, however it may be limited in a particular jurisdiction, it may also be necessary to inquire whether or not the acts of the entrappers amount to consent or cause the absence of certain physical conditions necessary to the crime. However, strictly speaking, this is not a question of entrapment at all, but merely a determination as to whether all the essential elements of the crime charged are present.⁹

In Pennsylvania the position taken by the courts concerning entrapment is very uncertain.¹⁰ There have been comparatively few cases in which the defense was raised, and many of the references to it which have appeared are merely dicta. The conflicting and indefinite views found in the Pennsylvania cases on this subject are ample evidence that this phase of the criminal law is yet in its formative stage; which is true in all jurisdictions. It is to be hoped that the decision in the *Sorrells* case will serve as the much needed foundation and guide for the unification and extension of the rules concerning entrapment. The fundamental requisite of the defense, instigation by public officers of a crime which the victim would not otherwise have committed, is, with slight modifications, generally recognized, and now that the Supreme Court has given this requisite definite expression and explained the reasons behind the defense and its effect when raised, the groundwork is laid for clarification

⁸Justice Roberts, in his concurring opinion, stated that the proper justification of the defense was not that the entrapped offender was beyond the purview of the statute in question, but that, following a principle of the civil courts, the criminal courts will not tolerate the use of their process to consummate a wrong. This seems to be a more logical justification of the defense, inasmuch as it covers both common law and statutory crimes, and it makes the defense a matter to be dealt with by the court at whatever stage of the proceedings it may see fit, rather than an issue for determination by the jury.

See *O'Brien v. U. S.* for a discussion of entrapment as a form of estoppel. 51 Fed. (2nd) 674.

⁹See 18 A. L. R. 146 and 66 A. L. R. 478 for an exhaustive list of cases involving this question.

¹⁰It has always been the law in Pennsylvania that the mere fact that officers afforded an opportunity for committing a crime cannot be used as a defense. *Campbell v. Comm.*, 84 Pa. 187; *Comm. v. Seybert*, 4 Pa. Co. Ct. 152; *Comm. v. Hollister*, 157 Pa. 13; *Comm. v. Dougherty*, 37 Pa. Co. Ct. 62; *Comm. v. Earl*, 91 Pa. Super. Ct. 447; *Comm. v. Johnson*, 312 Pa. 140.

of the remaining uncertainties.¹¹

The Pennsylvania courts, along with many others, have been careless in distinguishing between traps set by private individuals and traps set by public officers. Obviously it should be no defense that the offender was persuaded to commit the crime in question by a private individual.¹² It is a very difficult question and one which has not yet been satisfactorily answered, as to where to draw the line of division between situations involving traps set by private individuals and those involving public officers.

Cases in which the public officials have acted alone in setting the trap do not present much difficulty since all that is necessary is to determine whether their acts constitute a defense according to the requisites laid down in that particular jurisdiction. However, the problem becomes much more involved in situations such as those in which the trap is set by private detectives or when one of a band of criminals turns informer and the public officials do little more than apprehend the criminals. The courts do not seem to have expressed any definite rules as to what portion of the acts of setting the trap must have been done by public officers or as to what persons may be considered public officers in order to open the door for the application of the principles of the availability of entrapment as a defense.

In light of this it may be found helpful in attempting to reconcile the Pennsylvania cases to keep in mind that there are really two separate questions concerning the defense. First, in what capacity must the entrappers have been acting in order to permit the defense to be raised; and second, if the situation is one in which the defense may be resorted to, what conduct on the part of the entrappers is required to make it effective?

In the case of *Comm. v. Bickings*,¹³ often cited as a Pennsylvania authority upon entrapment, the defendant was indicted for subornation of perjury. He had been involved in some litigation with his brother, during which it became necessary to prove some facts by a certain witness. The defendant's brother arranged with this witness to throw himself in the defendant's way, and as a result the defendant seized the opportunity which presented itself

¹¹In *Meyer v. U. S.*, 67 Fed. (2nd) 223, the decision of the Sorrells case is followed in determining that the judge in the lower court did not err in refusing to direct a verdict for the defendant on the ground of entrapment.

¹²*People v. Bock*, 125 N. Y. Supp. 301. "Even though Adamski went farther than laying a trap, and actually solicited the defendants to commit the crime, it would furnish no defense to them, since Adamski was not a prosecuting or other public official of any kind." Wharton's Criminal Law, 9th. ed. Sec. 149. "When the decoy ceases to be a detective and becomes the originator of the crime, then one of two consequences follows. If he was not employed by the government then he becomes a co-conspirator liable to the same punishment as his associates. * * * If, on the other hand, he was employed by the government to cause the offense to be committed, the government is precluded from asking that the offenders thus decoyed should be convicted." See also *Hazen v. Comm.*, 23 Pa. 355 and *Comm. v. Leeds, Sheriff*, 9 Phila. 569, holding that a conspiracy by private individuals to entrap is indictable.

¹³12 Pa. Dist. 206.

and gave the witness a statement of facts to be testified to and a sum of money. This all appeared to have been a trap so to discredit the defendant in the civil proceedings as to compel him to abate all or a part of his claim. The defendant was acquitted after raising the defense of entrapment, the court saying: "The liability of men to fall into crime by consulting their interests and passions is unfortunately great, without the stimulation of encouragement. No state, therefore, can safely adopt a policy by which crime is to be artificially propogated. This principle it is which leads to the limitations of the doctrine as laid down by Wharton, namely that the defendant who is trapped must himself have previously intended the offense into which he is trapped, and also that the offense is one to be committed by himself, alone or with others." The court then goes on to say that unless these conditions are present "Such a proceeding is not a reality, but merely a tragical farce, in which the detective masquerading as a criminal, captivates the unsophisticated defendant and then, with mock heroics, denounces him."

Behind this rather flowery language the opinion seems to have expressed what is generally considered to be the basic test as to the availability of the defense of entrapment, the absence of criminal designs of the defendant's own conception. However, this case cannot be accepted as an authority for it clearly presents an example of a trap set by a private individual. The court evidently failed to make the distinction between public officers and private individuals for the section of Wharton's Criminal Law cited in support of the decision concerned entrapment by public officers.

What seems to be regarded as the leading Pennsylvania case on the subject is *Comm. v. Wasson*.¹⁴ In this case detectives employed by a voters' league approached three members of the city council of Pittsburgh and induced them by promises of bribes to them and other councilmen to join in a conspiracy to get legislation passed which would create a market for wood paving blocks sold by a company for which the detectives claimed to be representatives. It was held that entrapment was no defense in this situation, and the court's conception of the requisites of the defense was expressed as follows: "Again, in considering the question of public policy the clear distinction, founded upon principle as well as authority, is to be observed between measures used to entrap a person into a crime in order, *by making him a criminal, to aid the instigator in the accomplishment of some corrupt private purpose of his own*, and artifice used to detect persons suspected of being engaged in criminal practices, particularly if such criminal practices vitally affect the public welfare, rather than individuals."

This decision seems to be in accord with the weight of authority as to what conduct on the part of those setting the trap will not constitute a defense, but its statement as to when the acts of the entrappers are of such a nature as to bar prosecution does not seem to be very satisfactory. By its language it

¹⁴42 Pa. Super. Ct. 38.

makes the test of availability not only whether the entrapper instigated the commission of a crime which the defendant would not otherwise have committed, but also whether the entrapper did so to accomplish some corrupt private purpose of his own. It is evident that situations of this sort are relatively few and so to restrict the defense of entrapment would in large measure defeat the very purpose for which it was developed.

It is interesting to note that the trap in this case was set by private detectives. Whether the court here, too, failed to make the distinction mentioned above or whether it regarded private detectives in the same status as public officers is problematical.¹⁵

In the case of *Comm. v. Brown*¹⁶ the court citing the *Wasson* case, approved the charge of the lower court to the effect " * * * * that if this was the only offense that has been proven by the Commonwealth against the defendant in this case and that these men induced him at that time to do a thing which he would not have done except for their inducement * * * * that he was an innocent man and that they laid a trap for him for the purpose of convicting him * * * * the defendant ought not to be convicted." In this case the defendant was indicted for pandering, and here again the trap was set by private individuals.

In *Comm. v. Wright*¹⁷ the court again cites the *Wasson* case and says: "If it had appeared that the offense had originated in the minds of the state police and that the idea of its commission had by them been suggested or transferred to the appellants, who until then had been innocent of it, and that but for the suggestion or instigation the thought of the crime would not have occurred to the appellants, then there might be some basis for the contention (entrapment, instigation) but on evidence referred to there is no foundation for that contention."

Regarding these cases as a group it is evident that they present but meagre authority for answering either of the two questions mentioned above. The defense has been considered in cases where the entrapment was the act of public officers, private detectives, and private individuals. It does not seem likely that any court could have intended to extend the type of situation in which the defense might be available so far as to include entrapment by mere private individuals and the only explanation seems to be the failure to make the distinction between them and public officers. However, it may well be argued that such an explanation is mere rationalization and that by the actual words of the cases the defense is available in cases of entrapment by private individuals.

As to the requisites of the defense, whatever the limits may be as to the

¹⁵That entrapment is an available defense in such cases see *State v. Feldman*, 129 S. W. 998; and *Koscak v. State*, 152 N. W. 181.

¹⁶54 Pa. Super. Ct. 439.

¹⁷85 Pa. Super. Ct. 412.

situations in which it is permitted, it seems safe to say that they are essentially the same as those stated in the *Sorrells* case. True, the *Wasson* case apparently injects a corrupt private motive on the part of the entrapper as an additional requisite, but this was completely ignored in the references to entrapment in the cases which followed it.

Oftentimes when a case involves the defense of entrapment, the parallel question is raised as to the status of the entrappers, the contention being made that when they instigate the act or aid in its commission, they are equally guilty with the defendant.¹⁸ The Pennsylvania doctrine on this point seems to be unequivocal. In the leading case of *Campbell v. Comm.*¹⁹ it is stated as follows: " * * * * if he intended and continued in that intention from the time he came into the coal regions as a detective, to ferret out and make known the crimes and secret frauds of such others, in order to effect their arrest and punishment, then he is not to be regarded as an accessory before the fact." This case has been cited and followed in *Comm. v. Wasson*, *Comm. v. Earl*,²⁰ *Comm. v. Smith*,²¹ and *Comm. v. Hollister*.²²

W. H. Wood.

RISK OF LOSS DUE TO FORGERY OF DRAWER'S SIGNATURE ON A BILL OF EXCHANGE OR CHECK—THE OPERATION OF THE DOCTRINE OF PRICE v. NEAL IN PENNSYLVANIA

In 1762 Lord Mansfield, in the famous case of *Price v. Neal*,¹ decided that the drawee of a bill of exchange is bound to know the drawer's signature, and if the drawee pays a bill on which the drawer's signature is forged, he cannot recover back from a holder the amount paid. This doctrine constitutes a well recognized exception to the rule that money paid under mistake of fact can be recovered. The case leading to the adoption of this rule in America was the Pennsylvania case of *Levy v. The Bank*.² In the many states in this country in which the question arose prior to the adoption of the Uniform Negotiable Instruments Law, the rule of *Price v. Neal* was adopted.³

¹⁸It has been suggested that entrapment by public officers should be a punishable offense on their part. 29 H. L. Rev. 100.

¹⁹84 Pa. 187.

²⁰91 Pa. Super. Ct. 447.

²¹89 Pa. Super. Ct. 190.

²²157 Pa. 13.

¹3 Burr. 1354, 97 Eng. Repr. 871; 1 W. Bl. 390, 96 Eng. Repr. 221.

²1 Binn. (Pa.) 37 (1802).

³Cases collected in 3 R. C. L. 615; 7 C. J. 688; 12 A. L. R. 1089, 71 A. L. R. 337; Bran-
nan's Negotiable Instruments Law (5th), 615; Morse on Banks and Banking, Sec. 463 et seq.,
Woodward on Quasi-Contracts, Sec. 80.