Indiana Law Journal

Volume 14 | Issue 4 Article 5

4-1939

Criminal Law: Effect of an Impossible Future Date in an Indictment

CRIMINAL LAW: EFFECT OF AN IMPOSSIBLE FUTURE DATE IN AN INDICTMENT. —The defendant was indicted on three counts for his part in a bank robbery committed December 1, 1934. The indictment was returned and filed on September 18, 1936. The time of commission of the robbery was stated correctly in the first and third counts as "December 15, 1934"; but the second

---

by the will); Ala. Power Co. v. Gulf Power Co. (1922), 283 Fed. 606. (Pendency of condemnation proceeding in state court held not to abate similar proceeding in federal court.) Compare, Dennison Brick Co. v. Chicago Trust Co. (1923), 286 Fed. 818 (suit to quiet title in state court barred subsequent suit in federal court to foreclose a mortgage on the same land. The mortgage could have been foreclosed in the state action.)

[17] The instant case is illustrative on this point.

[18] Kline v. Burke Const. Co. (1922), 260 U. S. 226, 43 S. Ct. 79.

[19] United States v. Howland (1819), 4 Wheat. 108; Mississippi Mills v. Cohn (1893), 150 U. S. 202, 14 S. Ct. 75.

[20] This is more than can be said as to those situations where the United States Supreme Court has held that the doctrine is strictly applicable. See Willis, Constitutional Law, p. 236.

count charged the commission as of a date subsequent to the return and filing of the indictment, i.e. upon "December 15, 1936," obviously an impossible date and equally as obvious, a clerical error. A motion to quash was made and was overruled; exception was taken. Then the prosecuting attorney amended the erroneous date to conform to the evidence presented and to the allegations of the other counts. This was done prior to the instructing of the jury. From a verdict of "guilty" on the second count, Pagotis appealed and his conviction was reversed. The Supreme Court said that an indictment which charged a crime to have been committed subsequent to the return thereof did not state a public offense; that it was bad upon a motion to quash; and that the error was one which could not be amended. *Pagotis v. State* (Ind. 1938), 17 N. E. (2d) 830.

The court premised that a count with a future date does not charge a public offense; and that an amendment to make the count good would necessarily be one substantive in nature, changing the bad to the good; therefore, a 1935 act permitting amendments in matters of form would be inapplicable. The court cited several cases as supporting this principle, an analysis of which is to be found below.[1]

The Indiana statutes have attempted to make it clear that errors as to time of commission of a crime are not to be held of a substantive nature. One applicable statute provides that omitting to state the time at which the offense was committed in any case in which time is not of the essence, or, stating the time imperfectly are "immaterial defects" and are not to be the grounds for quashing nor rendering an indictment invalid.[2] There has been little attention paid to these provisions, or the interpretation has been so narrow as to exclude the impossible future date case. Defendant was indicted here under the accessory and conspiracy statutes, neither of which makes time the essence of the crime.[3]

A study of all Indiana cases discloses that there is a clear split of authority upon the problem. One court has held that an indictment with

---

[1] Ten cases are cited as supporting the court's position.

A. Five are not even treated as impossible future date cases. (1) State v. Sammons (1884), 95 Ind. 22; no year of commission of offense stated. (2) Murphy v. State (1886), 106 Ind. 96, 5 N. E. 767; year stated "18184." (3) State v. McDonald (1886), 106 Ind. 233, 6 N. E. 607; no time of commission stated. (4) Terrell v. State (1905), 165 Ind. 443, 75 N. E. 884; year of offense dated "18903". (5) Hunt v. State (1927), 199 Ind. 550, 159 N. E. 149; year stated as "nineteen hundred 1923".

B. Two sustain every detail of the court's premise. (1) State v. Noland (1867), 29 Ind. 214. (2) Shonfield v. State (1925), 196 Ind. 579, 149 N. E. 53.

C. Two hold that the indictment does charge a public offense, though stating that a motion to quash would lie. (1) Trout v. State (1886), 107 Ind. 578, 8 N. E. 618. (2) Boos v. State (1914), 181 Ind. 562, 75 N. E. 884.

D. One holds exactly contra to the premise it supposedly supports. (1) State v. Patterson (1888), 116 Ind. 46, 10 N. E. 289.

[2] Burns' Ind. Stat. (1933), § 9-1127. "No indictment shall be deemed invalid, nor . . . quashed . . . for any of the following defects;

Eighth. For omitting to state the time at which the offense was committed in any case in which time is not the essence of the offense, or for stating the time imperfectly, unless time is the essence of the offense."

[3] Accessory statute—Burns' Ind. Stat. (1933), § 9-102. Conspiracy statute—Burns' Ind. Stat. (1933), § 10-1101.

this impossible future date does charge a public offense, with the result that a motion to quash would be overruled.[4] Other decisions have held that a motion to quash will be sustained, not discussing whether the grounds for this was that the indictment did not state a public offense or that the offense was not charged with sufficient certainty.[5] Still others have held the error to be "technical" and non-prejudicial to the substantive rights of the defendant so that upon appeal the appellate court would disregard the error.[6]

Now if it is held that the count here does charge a public offense, then the amendment might be made as a matter of form. Our court has held that the count sufficiently charges a violation of our statutes.[7] Moreover, the alternative theory that the defect is but a technical, non-prejudicial imperfection which will be disregarded upon appeal has been advanced.[8] To be a substantial defect, it must be such as to have misled the defendant; but he could hardly show this to have been the fact, since he did not try to quash the second count until after all the evidence had been presented.

In essence, the naked issue here is the one formed by the clash of two conflicting basic theories. One would protect the individual by requiring the State to allege with the greatest exactness and accuracy every point involved so that the defendant would not be misled. The other policy would eliminate "technicalities" as a means of escape to one who stands convicted; this is the modern view.[9] Each premise, one emphasizing individual liberty and the other the promotion of law and order, is of fundamental importance; the balancing of the two provide the answer to our issue here.

Careful consideration brings the writer to the view that the error here is by the weight of authority but an immaterial technicality, permissive of amendment, that our court should eliminate as a basis for reversal of a conviction. The amendment would not in practice harm the substantive rights of the defendant; it is unlikely that the clerical error is truly misleading. Common experience shows that each crime differs factually from others with the result that no two could be so identical that the defendant could truly show he was not sufficiently apprised by the count of the exact crime with which he was being charged.

Precedent from other states amply supports the writer's opinion. The impossible future date is deemed either an error not vitiating the indictment,[10] or one which does not mislead the defendant to the prejudice of his

---

[4] State v. Patterson (1888), 116 Ind. 46, 10 N. E. 289.

[5] State v. Noland (1867), 29 Ind. 214; Shonfield v. State (1925), 196 Ind. 579, 149 N. E. 53.

[6] State v. Patterson (1888), 116 Ind. 46, 10 N. E. 289; Boos v. State (1914), 181 Ind. 562, 105 N. E. 117.

[7] Trout v. State (1886), 107 Ind. 578, 8 N. E. 618.

[8] State v. Patterson (1888), 116 Ind. 46, 10 N. E. 289.

[9] 14 R. C. L. 172.

[10] State v. Ballamah (1922), 28 N. M. 212, 210 P. 391; Van Immons v. State (1905), 29 Ohio Cir. Ct. Rep. 681, 19 Ct. Dec. 681; State v. Mowry (1899), 21 R. I. 376, 43 A. 871; Commonwealth v. Smith (1871), 108 Mass. 486; Cornet v. Commonwealth (1909), 134 Ky. 613, 121 S. W. 424; State v. Crawford (1885), 66 Iowa 318.

substantial rights and is to be disregarded upon appeal.[11] These courts concur in the view that the error is but a harmless mistake, to be amended at any time. W. E. O.

EQUITABLE SERVITUDES—RESTRICTION OF USE OF LAND RETAINED BY VENDOR.—In 1931 plaintiffs were induced to buy a lot upon verbal assurances that they, in conjunction with other lot owners, were securing rights to the enjoyment of an open space from the road to the Atlantic Ocean. An unrecorded plat was exhibited showing the section as being free of any plan for house lots and was marked "Community Beach". Admission tickets to the beach were distributed to the lot owners. In 1935 the area was rented to a public shore resort. In 1937 a plat was recorded showing the entire area divided into lots. Plaintiffs seek an injunction against the new use. HELD, injunction granted. *Williams Realty Co. v. Robey,* (Md. 1938), 2 A. (2d) 683.

The principal case presents the problem of restricting the use of land retained by the vendor when no mention of the restricted use is made in the deed or a recorded plat. A restriction of use in favor of adjoining land is an equitable interest in land within the purview of the Statute of Frauds and is therefore ordinarily required to be in writing.[1] In situations analogous to the principal case, however, three methods have been used whereby the Statute of Frauds has been circumvented and a desired result obtained; implied covenant, dedication, and estoppel.

In a case analogous to the principal one, the New Jersey Equity Court granted the relief prayed for on the ground that "such transactions raise an implied covenant by the grantor that he will devote the specially designated lands to the beneficial uses the declaration of which enabled him to sell his lots".[2] The New Jersey Court seems to be alone in using the term "implied covenant" to refer to something other than a provision that can be inferred from the use of certain words of conveyance.[3] If a more logical basis for relief can be found, it seems desirable as a matter of policy not to extend

---

[11] Faustre v. Commonwealth (1891), 92 Ky. 34, 17 S. W. 189; Cornet v. Commonwealth (1909), 134 Ky. 613, 121 S. W. 424; Conner v. State (1858), 25 Ga. 516, 71 Am. Dec. 184; State v. Brooks (1892), 85 Iowa 366, 52 N. W. 240; State v. Carmel (1915), 36 S. D. 293, 154 N. W. 808; State v. Blaisdell (1879), 49 N. H. 81; State v. Pierre (1887), 39 La. Ann. 916, 3 So. 60; State v. Thompson (1915), 137 La. 547, 68 So. 949; Smith v. State (Tex. Crim. 1907), 102 S. W. 407.

[1] Jacksonville Public Service Corp. v. Calhoun Water Co. (1929), 219 Ala. 616, 120 So. 79; Borland v. Walters (1931), 346 Ill. 184, 178 N. E. 184; Novello v. Caprigno (1931), 276 Mass. 193, 176 N. E. 809; Giddings, Restrictions on the Use of Land (1892), 5 Harv. L. Rev. 274.

[2] Bridgewater v. Ocean City Railroad Co. (1901), 62 N. J. Eq. 276, 49 A. 801, *aff'd,* 63 N. J. Eq. 798, 52 A. 1130.

[3] McDonough v. Martin (1892), 88 Ga. 675, 16 S. E. 59; Baltimore v. Frick (1895), 82 Md. 83, 33 A. 628; Rawle on Covenants for Title (1887), Ch. XII; I Tiffany on Real Property (2nd ed., 1920) 124. The several New Jersey cases relying on an implied covenant as the basis for granting relief relate to the same piece of land. Lennig v. Ocean City Association (1886), 41 N. J. Eq. 606; Bridgewater v. Ocean City Ry. Co. (1901), 62 N. J. Eq. 276, 49 A. 801, *aff'd,* 63 N. J. Eq. 798, 52 A. 1130; Bridgewater v. Ocean