Criminal Law-Effect of Breach of Duty by Ministerial Officer-Sentences of State and Federal Courts

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of the forum to determine this question. Is it not rather anomalous, however, that the law of the forum should be applied to determine the classification of a rule of law which is to be made applicable to a transaction which was completely consummated in another state, and which was necessarily signed, sealed, and delivered according to the rules of law applicable in that state? If the law of the place of contracting, as is conceded in the principal case, determines the nature, validity, construction, and effect of the instrument, should it not also determine whether the distinction which it makes between sealed instruments and simple contracts is substantive or procedural in nature?

On the assumption that the law of Florida treats the distinction as one of substance, the next step is to look to the Florida law to determine the juristic category into which the instrument should be placed. Under the law of Florida, it is clear that the contract is to be treated as a sealed instrument. It seems, then, that it should be so considered by the court at the forum when the statute of limitations of New Hampshire is applied. If, on the other hand, the Florida law treats the distinction between simple contracts and contracts under seal as a matter of procedure, there could be no technical objection to a similar qualification under the New Hampshire law.

Since, by this process, uniformity in result can be obtained, it would appear to be a valid criticism of the instant case that the court ignored an important question, upon the solution of which may depend that uniformity which it is the function of Conflict of Laws to obtain.

R. W. W.

Criminal Law—Effect of Breach of Duty by Ministerial Officer—Sentences of State and Federal Courts—On June 2, 1930, the federal court convicted the petitioner of impersonating a federal officer, sentenced him to six years in prison, and issued a warrant for his commitment on the same day, directing the marshal to deliver him to the United States penitentiary "forthwith." The marshal neglected to carry out the order, retained custody of the prisoner, and later over the protests of the petitioner turned him over to state authorities who had previously filed an information (on May 14, 1930) charging forgery against him. The state arraigned him for trial, and on July 31, 1930, the final draft of the Restatement materially rephrases this section.

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petitioner changed his former plea of "not guilty" to "guilty." The state court then sentenced him for an indeterminate period of one to fourteen years in the state prison. After serving five years in the state prison he was released on parole and then the marshal took him to the federal penitentiary to serve out his time under the sentence of the federal court. In habeas corpus proceedings petitioner sought to have the time served in the state prison counted upon his federal sentence. On June 29, 1932, a federal statute was enacted which provided that the sentence of a federal prisoner was to start from the date on which the prisoner was received at the place of detention (18 U.S.C.A., Sec. 709a). The majority of the court held that the petitioner was entitled to count the time spent in the state prison upon his federal sentence.\(^1\)

In this case the prisoner has committed different and distinct offenses against two jurisdictions. Logically it should follow that he should have to serve both sentences to satisfy the debt exacted by society. But by the decision of the majority the unauthorized act of the marshal destroyed all rights the federal government had to have its power vindicated. It is respectfully suggested that the opposite decision should have been reached.

The majority did not take into consideration that the effect of the unauthorized act of the marshal was abetted by failure of the petitioner to maintain his plea of "not guilty." It has been decided that a federal court is not required to allow the effect of its judgment to be nullified in any part by act of a petitioner or of a state court.\(^2\) Moreover, in absence of positive statutes covering the subject, inaction, procrastination, or delay on the part of public officials does not prejudice the rights of a sovereign.\(^3\)

The majority opinion held that the sentence of the petitioner started "at the time of his sentence and the commitment and custody thereunder by the marshal." No mention was made of the statute stating that sentence was to start only when the prisoner was delivered to the place of detention. Upon a review of the authorities, it is found that the 1932 statute merely codified the prevalent practice and thus did not prejudice the petitioner's position. In 16 Corpus Juris, section 3228, it is said "as a general rule the term of imprisonment for which D is sentenced begins with the first day of actual incarceration in prison." Two other rules are quoted as being minority views. (1) Sentence begins from the time sentence is pronounced.\(^4\) (2) Sentence begins from the time of date of entry in the judgment.\(^5\) It is evident then that it is error for

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\(^1\) Smith v. Swope (1937), 91 F. (2d) 260.
\(^2\) Ex Parte McCullen (1923), 29 F. (2d) 852.
\(^5\) Ex parte Adams (1911), Ala. 105, 54 So. 501; Ex parte Meyers (1869), 44 Mo. 279.
\(^6\) Braxton v. State (1912), 103 Miss. 127, 60 S. 66; Rhea v. United States (1897), 6 Okla. 249, 50 P. 992.
a court to attribute any effect to the warrant of commitment for determining when a sentence shall begin.

At most the warrant is but an order or process by which the court directs a ministerial officer to take a person to prison or detain him there. It supplies authority for a warden to receive a prisoner and to hold him for a given length of time; when the warrant expires so does the authority to hold the prisoner any longer. The commitment represents merely a ministerial act, as distinguished from a judicial function; therefore, the decision of Bernstein v. United States should control the court's decision. It was there decided "if, for any reason, execution of the sentence has been delayed, the court at a subsequent term may change the commitment order and may compel the petitioner to serve the added time".

The federal court has power to vacate any order entered in respect to a remittitur when it learns that serving of federal sentence has been interfered with by the prisoner's serving of a state sentence for an entirely different offense than that imposed by the federal court. So it could have done here.

It is conceded that ordinarily sentences run concurrently in the absence of specific provisions in a judgment to the contrary. The American Law Institute substantiates our view that the sentences should not have been deemed to be concurrent; it holds "sentences of imprisonment for offenses not charged in the same indictment or information shall be served consecutively unless expressly directed otherwise." Sentence to imprisonment in a federal penitentiary cannot be satisfied by servitude in a state prison.

By the decision of the majority the petitioner began serving his sentence at the date of the sentence and commitment and custody thereunder by the marshal; it would follow then that at the time he was on trial before the state court he was serving his sentence. Both the federal courts and the state courts hold that where one who is already serving a sentence is convicted in another court the sentences will not run concurrently. How then could the sentences be concurrent here?

W. E. O.

8 United States v. Marrin (1915), 227 F. 314.
9 (1918), 254 F. 967; see authorities collected in 3 A. L. R. 1569.
10 Bernstein v. United States (1918), 254 F. 967.
11 Ex parte McCullen (1928), 29 F. (2d) 852.
14 Ex parte Aubert (1931), 51 F. (2d) 136; Ex parte Lamar (1921), 274 F. 160.
15 Ex parte McCullen (1928), 29 F. (2d) 852; Bernstein v. United States (1918), 254 F. 967; Ex parte Aubert (1931), 51 F. (2d) 136.
16 State v. Ryder (1930), 119 Neb. 704, 230 N. W. 586. "When sentence is pronounced upon one already serving a sentence from another court a second sentence doesn't begin until the sentence which the prisoner is serving has expired."