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# RECENT CASES

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**CRIMINAL LAW — ABORTION — ELEMENT OF QUICKENING.**—The defendant was indicted for committing abortion upon prosecutrix under Section 1112 of the South Carolina Code, which provides that a person "who shall use any means of force, with intent to procure abortion, shall, in case the death of such child or of such woman results, be deemed quilty of a felony," and under Section 1113 which covers attempted abortion. The prosecutrix was between two and one-half and three months pregnant when the alleged abortion was committed. Upon conviction defendant appealed to S. C. Supreme Court, on the ground that there was not sufficient proof of the *corpus delicti* in that the fetus had not reached a stage of development to have an independent existence within the meaning of the statute. HELD, reversed. Life, in contemplation of law, commences at the moment of quickening and within the first three months of pregnancy the child has no independent existence. However, the case was remanded for trial of the defendant for attempted abortion. *State v. Steadman,* 214 S. C. 1, 51 S. E. (2d) 91 (1948).

The greater weight of authority holds that at common law an abortion, produced with the woman's consent, was not a crime unless the woman was "quick with child", because the crime is against the child and until the child has life there can be no crime. *E. g. Commonwealth v. Parker,* 9 Metc. 263, 50 Mass. 263, 43 Am. Dec. 398 (1845); *State v. Cooper,* 22 N. J. L. 52, 51 Am. Dec. 248 (1849). A few courts, however, have held that an abortion was a crime at common law any time during gestation as the crime is against nature because it interferes with and violates the mysteries of nature. *Mills v. Commonwealth,* 13 Pa. 630 (1850). Two courts adopting this minority view have gone further and held that an attempt to procure an abortion was a crime at common law. *State v. Reed,* 45 Ark. 333 (1885), *Wells v. New England Mut. Life Ins. Co.,* 191 Pa. 207, 43 Atl. 126, 53 L. R. A. 327 (1899). Although no case has gone so far as to say at what specific date of pregnancy a woman becomes "quick with child", those courts following the majority view agree that quickening occurs at that moment when the embryo gives physical

proof of life, no matter when it first received it. *E. g., State v. Cooper, supra.* The woman is "quick with child" when the embryo has advanced to that degree of maturity where the child has a separate and independent existence, and the woman has herself felt the child alive and quick within her. *Commonwealth v. Parker, supra. State v. Forte,* 222 N. C. 537, 23 S. E. (2d) 842 (1943). This stage of the fetus is usually perceptible about the middle of the period of pregnancy. *State v. Patterson,* 105 Kan. 9, 181 P. 609 (1919); *Foster v. State,* 182 Wis. 298, 196 N. W. 233 (1923). However, the woman could not be "quick with child" within thirty days after conception. *State v. Jordon,* 227 N. C. 579, 42 S. E. (2d) 764 (1947).

The failure of the Legislature to include in the abortion statute a definition of the word "child", as therein used, necessitated an application of the common law meaning of the word and this the South Carolina Supreme Court did when it held that the Legislature did not intend the word "child" to be used in the same sense in both the abortion and the attempt statutes. This construction of the abortion statute is to be approved not merely because it is in accord with the majority view, but because it is a sounder application of the common law inasmuch as penal statutes are to be strictly construed. Whether or not the law laid down in the instant case reached the result intended by the enactment of the statute is a question for the Legislature to answer since with that body alone lies the power to ameliorate the statute, if society so demands. Some states have expressly declared, in their abortion statutes, the necessity of quickening as an essential of the crime where the death of the child is alleged, while the other extreme is reached in the statutes of a few states. *E. g.,* California, which has dispensed with the necessity of proving pregnancy to establish guilt, and Washington, which makes no distinction between the attempt and the completed act. In view of the practice followed in practically all of the states in treating the offense as strictly statutory, the minority view, as expressed by the Pennsylvania Court, is not too convincing or logical as it shows an unwarranted infringement on the powers of the legislative body by the court; and although the result reached by courts following the minority view may in some degree be justified, since other states have statutes which reach a similar result, the manner in which they arrive at their result certainly cannot. Thus it is seen that the South

Carolina Supreme Court, in construing the abortion statute, has followed the greater weight of authority in determining when an unborn child is sufficiently developed to be regarded as having a life capable of being destroyed. However, in considering the result reached by the law laid down in the instant case, it must be remembered that Section 1113 of the South Carolina Code covers the attempt phase of the crime of abortion and that this case was decided under Section 1112.

HOOVER C. BLANTON

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**CRIMINAL LAW—Plea of Former Jeopardy No Bar Where Court Proceedings are Dismissed Due to "Manifest Necessity".**—Petitioner, while serving with the 76th Army Division, was arraigned before a court-martial board in Germany charged with the criminal assault of a German girl. After hearing evidence and arguments of counsel and taking the case under consideration, the court-martial board was ordered to cease further proceedings due to the tactical situation. The charges were then transmitted to the 15th Army headquarters via the 3rd Army upon orders to proceed with the trial under a new court-martial board. Petitioner immediately filed a plea alleging former jeopardy under the 5th Amendment to the U. S. Constitution. The plea was overruled and the Petitioner was convicted. After exhausting his right to military review, the Petitioner brought habeas corpus proceedings in a federal district court. Upon a decree by the Circuit Court of Appeals reversing the district court which had ruled that the plea should have been allowed, a writ of certiorari was issued by the U. S. Supreme Court. HELD, conviction affirmed. The former jeopardy provision of the 5th Amendment to the United States Constitution does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. *Wade v. Hunter,* 69 Sup. Ct. 834 (1949).

It is a well established and ancient principle of law, guaranteed by the Federal Constitution, that no person shall be twice put in jeopardy of life or limb for the same offense. U. S. CONST. AMEND. V. The courts unanimously agree that a defendant is not in jeopardy until he has been arrainged on a valid indictment or information, has pleaded and a jury has been impaneled and sworn. *McCarthy v. Zerbst,* 85 F. 2d 640

(C. C. A. 10th 1936). However, if the jury is discharged before a verdict is rendered due to a "manifest necessity", a plea of former jeopardy will not prevail on a subsequent trial. *Collins v. Leisel,* 262 U. S. 426 (1923). The question now arises as to what will constitute a legal "manifest necessity". The only causes for which a jury impaneled and sworn to try an accused on a criminal charge can be discharged by the court, without a verdict are: (1) Consent of prisoner; (2) illness of (a) one of jurors, (b) the prisoner, or (c) the court; (3) absence of a juryman; (4) impossibility of the jurors agreeing on a verdict; (5) some untoward accident that renders a verdict impossible; and (6) extreme and overwhelming physical or legal necessity. *Wharton's Criminal Law,* Vol. 1, Sec. 394. But if the dismissal of the jury does not fall under one or more of the above stipulations the discharge may be pleaded as a bar on another trial for the same offense. *Thompson v. United States,* 155 U. S. 271 (1894). In the case of *Cornero v. United States,* 48 F. 69 (C. C. A. 9th 1931), the court of appeals held that the mere absence of witnesses discovered after the jury is impaneled is insufficient to deprive the accused of this right to claim former jeopardy upon a subsequent trial where the jury is discharged without his consent and notwithstanding his objection. In following the established precedents that the trial should be free from the corrosion of a substantial legal error favorable to the defendant or the state, *Palko v. Conn.,* 302 U. S. 319 (1937), it is definitely settled that if the indictment under which the defendant is tried is so radically defective that it would not support a judgment of conviction, it cannot be pleaded as a bar to a future trial. *Shoener v. Pa.,* 207 U. S. 188 (1907). The court has the power to cause its records to be set forth correctly as well as to set aside an order which it has made through mistake or inadvertence. *Ex parte Altman,* 34 F. Supp. 106 (1940). The Supreme Court has held that the accused is not in double jeopardy because after a demurrer to the indictment which had been entertained after a plea of not guilty had been entered and not withdrawn was overruled, the jury which had been impaneled and sworn was dismissed and accused was forthwith arraigned and required to plead and this having been done and both sides again announcing themselves ready for trial, same jury previously impaneled and sworn and trial proceeded. *Lovato v. State,* 242

U. S. 199 (1916). Likewise, the courts for the most part hold that a jury may be dismissed if the court thinks or has reason to believe that bias or prejudice through outside influence is present. *Simmons v. United States, supra.* The question of "manifest necessity" has been an ever increasing worry to the courts in determining when such exist. The Supreme Court went into a very lengthy discussion of the subject and held that when a jury had been retired for 24 hours and there was a probability that they would not agree, the court should declare a mistrial. *Keerl v. Montana,* 213 U. S. 135 (1909). In the case of *Thompson v. United States, supra,* the United States Supreme Court also held that a member who sat on the grand jury could not be a member of the petit jury in the same case. The jury was discharged over defendant's protest. Likewise, when an indictment is *nolle prossed* and the jury dismissed, the defendant not having been put to trial thereon, such is not a bar to second indictment for same offense. *Wolff v. United States,* 299 F. 90 (C. C. A. 1st 1924). Hence the discharge of a jury before a verdict is rendered due to a "manifest necessity" will not be a bar to a subsequent trial if after *taking all the circumstances into consideration* the court finds that the ends of public justice would otherwise be defeated. *United States v. Perez,* 9 Wheat. 579 (U. S. 1824).

There is no doubt that the decision in the instant case is correct, and the plea of former jeopardy was properly denied. Of vast importance, however, is the fact that the case produces the realization that the subject matter discussed is a delicate one and must be dealt with very carefully. The courts have held consistently that there must exist a "manifest necessity" for the discharge of a jury before a verdict is reached. This is a far cry from the common law rule, and the obligation rests upon our judicial tribunals upon whom the power is endowed to exercise this discretion wisely. If a defendant were allowed to go free before he was duly tried due to circumstances beyond the court's control which would prevent a fair and just trial, the ends of justice would be thwarted and society would be at the mercy of a few.

WILLIAM SEALS

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**REAL PROPERTY—PAROL GIFTS OF LAND.**—Defendant, illegitimate daughter of the deceased, entered into

possession of a 60-acre tract of land under a sharecropping agreement with her father. She was told that the land was to be hers as a gift, but she was to sharecrop for several years until he realized some return on his investment. The defendant remained in possession under this agreement, making such improvements as removing stumps and repairing terraces, until the death of her father two years later. One month before the father's death, he executed a will devising all of his property, including the tract given to daughter under the agreement and excluding her from any benefits thereunder. In an action by executors to recover possession of the land, the trial court gave judgment for the alleged donee, holding that a parol gift of the land had been proven. On appeal, HELD, reversed. The donee failed to establish by clear and convincing evidence that possession was taken in pursuance of the gift and that valuable and permanent improvements had been made on the land so as to remove case from Statute of Frauds. *Knight v. Stroud,* 214 S. C. 437, 53 S. E. 2d 72 (1949).

A parol gift of land will be enforced in equity only when there has been a gift *in praesenti,* possession delivered and held by the donee in furtherance of the gift, and *permanent and valuable improvements* made upon the premises by the donee in reliance upon the gift with the knowledge of the donor. *Reinhardt v. Fleming,* 18 Wash. 2d 637, 140 P. 2d 504 (1943). The law courts will not recognize such oral gifts of realty because the Statute of Frauds requires a deed under seal to convey an interest in land. Section 7043, S. C. Code of Laws 1942. Equity enforces the parol gift on the same basis as it decrees specific performance of a contract to convey realty under the doctrine of part performance. *Hart v. Hart,* 3 Des. Eq. 592 (S. C. 1813). However, equity will not decree specific performance in the absence of actual and valuable consideration. *Cabeen v. Gordon,* 1 Hill Eq. 51 (S. C. 1833). In parol gifts, there being no consideration, there must be certain acts done by the donee equivalent to a part performance or acts performed in reliance on the gift that would result in fraud or prejudice to the donee unless the gift were enforced. *Neale v. Neale,* 9 Wall. 1 (U. S. 1870). The donee must take possession under the gift and make valuable and permanent improvements thereon in reliance upon the gift. These conditions furnish the consideration and entitle the donee to specific performance. *Mackall v. Mackall,* 135 U. S. 167, 10 S. Ct. 705 (1890). To establish a parol gift of land

the courts universally hold that the evidence must be of a higher convincing nature than the preponderance or greater weight which, in civil cases, is required and the evidence must be clear, unequivocal, convincing and definite. However, it need not be absolutely conclusive or undisputed. *Reinhardt v. Fleming, supra; Young v. Levy,* 206 S. C. 1, 32 S. E. 2d 889 (1945).

The evidence must establish the existence of a present gift and not a parol gift to commence in the future. *Pitts v. Mangum,* 2 Bailey 588 (S. C. 1832). Possession taken under any agreement other than under the terms of the gift will not give the donee any enforceable equitable right. *Henslin v. Wingew,* 203 Minn. 166, 280 N. W. 281 (1938). The necessity of proving the making of permanent and valuable improvements on the land in reliance upon the gift is in the nature of equitable estoppel. *Hodgson v. Hodgson,* 28 Ga. App. 250, 110 S. E. 754 (1922). These improvements must be such as one would have made in confidence of being the owner in fee and not such as would have been made by a tenant for the immediate enjoyment of the land. *Whitten v. Dethloff,* ____ Tex. ____, 214 S. W. 2d 480 (1948); *Caldwell v. Williams,* Bailey's Eq. 175 (S. C. 1831). In *Whitten v. Dethloff, supra,* the construction of a Grade A milk barn with concrete floor was held to be of a valuable and permanent nature, whereas, in *Caldwell v. Williams, supra,* the clearing of fifty (50) acres of land and the building of a barn and stables were held to be not of such character. The improvements must be such that cannot be compensated for in damages and if the improvements do not exceed the rental value of the property for the time in possession, the gift will not be enforced. *Reinhardt v. Fleming, supra.*

The result reached in the instant case is in accord with the greater weight of the decided cases in this country. The hesitancy of the court to enforce a parol gift of land is justified by the fact that such gifts are in direct violation of the Statute of Frauds and should be enforced only when failure to do so would result in fraud on the donee or would greatly prejudice his rights. No case has been found where the courts have enforced a parol gift of land where the donee had not complied with the strict requirements as set forth above. These requirements do not appear too harsh on the donee when one considers the fraud that might be perpetrated on the lawful heirs of the donor.

JOHN E. CUMBEE

**STATUTES — Construction of — Both Remedial and Penal.**—Plaintiff won money of the defendants' in a dice game whereupon defendant executed a promissory note to plaintiff for the amount lost. Defendants made payments on the note thereafter. Subsequently defendants notified plaintiff of their desire to complete payment. Plaintiff surrendered the promissory note for certain checks given therefor by the defendants. Upon discovering that such checks were invalid, plaintiff instituted an action for fraud and deceit. Upon an overruling of a demurrer to a counterclaim seeking recovery of such payments under Section 6308, S. C. Code, plaintiff appeals. HELD: That the statute was to be liberally construed in favor of the claimant and thus the words "a gambling or dice game" came within the purview of the statute. The Court also held that although the money had been paid subsequent to the dice game, such money was nonetheless lost within the meaning of the statute. *Francis v. Mauldin,* —— S. C. ——, 55 S. E. (2d) 337 (1949).

Section 6308 of the South Carolina Code gives the loser of fifty dollars at gaming the right to recover where money is lost at "any time or sitting". Section 6309 provides that if the loser fails to bring his action within three months, any person may bring an action and recover from the winner treble the amount lost. In the South Carolina case of *Trumbo v. Finley,* 18 S. C. 305 (1881), the Court interpreted these sections to be both remedial and penal. The difficulty with such statutes, lies in the determination of the intention of the Legislature, for the prime responsibility of the judiciary in the construction of statutes is to effectuate the will of the representatives of the people. *Kitchen v. Southern Ry.,* 68 S. C. 554, 48 S. E. 4 (1903); *In re Costellos Estate,* 92 S. W. 2d 723 (Mo. 1936). In giving effect to Legislative intent, the Courts have often brought to their aid certain well settled canons of construction, to-wit, remedial statutes are to be construed liberally in favor of the plaintiff and penal statutes are to be construed strictly in favor of the defendant. *Glaser v. Rothchild,* 221 Mo. 180, 120 S. W. 1 (1909); *State v. Lovell,* 23 Iowa 304 (1867); *State v. Blair,* 32 Ind. 313 (1869). The Courts are in accord that statutes may be both penal and remedial in nature, *Gardner v. New York & N. E. R. Co.,* 17 R. I. 790, 24 Atl. 831 (1892), but there is a decided split of authority as to how they should be construed. Some Courts are inclined to emphasize the penal features and thus subject

them to the rule of strict construction. *E. g., Abott v. Wood,* 22 Me. 541 (1843); *Clymer v. Zane,* 128 Ohio St. 359, 191 N. E. 123 (1934). A contrary result is reached by many jurisdictions where the remedial provisions are stressed, thus giving the statute a liberal construction. *E. g., First National Bank of Blakely v. Davis,* 135 Ga. 687, 70 S. E. 246 (1911); *Robinson v. Harmon,* 157 Mich. 272, 117 N. W. 664 (1908). A majority of the Courts, however, separate the remedial and penal sections, believing the Legislative intention to be that where the remedy is sought the statute is to be interpreted liberally and where the action comes within the penal section, it is to be construed strictly. *Trammel v. Victor Manufacturing Co.,* 102 S. C. 483, 86 S. E. 1057 (1915); *Dubreuil v. Waterman,* 84 Conn. 47, 78 Atl. 726 (1911); *Credit Men's Adjustment Co. v. Vickery,* 62 Colo. 214, 161 Pac. 297 (1916). Thus it has been held, that the loser is to be given the benefit of a liberal construction in bringing an action for the recovery of losses under the same statute as involved in the instant case. *See, Trumbo v. Finley, supra; accord, Bones v. Booth,* 2 W. Bl. 1227 (K. B. 1779).

It is submitted that the construction in the instant case is preferred. Courts which do not separate the provisions of a dual nature statute, rationalize that such a course is to simplify the task of determining legislative intent. But in their zealous effort to ascertain that intent, these courts actually lose sight of it. For it is obvious that the sole purpose behind dual nature statutes is to provide a remedy and a penalty in the same enactment. The intent of the legislature in passing a remedial statute is to give a remedy where none was had before. If the courts construe such statutes strictly, this would be in effect, depriving the people of the benefit which was given to them. A penal statute, on the other hand, sets up a standard of conduct; establishing a line of demarcation between that which is legal and illegal. Such line should, at all times, be unwavering and steady, for it is necessary that the people be clearly apprised of the point at which the right ends and the wrong begins. To construe such a statute liberally would be to render the line of demarcation uncertain and destroy the intent of the legislature. It can readily be seen that to construe a dual purpose statute either liberally or strictly in its entirety would be to fall into one of the above errors. But none of these difficulties will arise if the construction is applied as in the instant case; construing the statute both

penally and remedially, depending on the section of the statute involved. By such a construction the intention of the legislature is affectuated. It is pointed out, however, that the court in the instant case did not consider whether the statute involved was in derrogation of the common law. Had this point arisen, the decision might have been decided differently, for such statutes are generally construed strictly.

BEN GOLDBURG

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**TAXATION—Exemptions—What Constitutes an Eleemosynary Institution so as to be Exempt from Taxation.—** Plaintiff corporation was incorporated primarily for the purpose of holding biannual expositions dealing with the textile industry. The income received from the exposition was used to promote general usuage of its realty. The corporation's charter was obtained in 1923 under the provisions of Section 8158 of the S. C. Code providing for the formation of eleemosynary institutions. In 1936 a special statute (Acts 1936, 39 Statute at Large, page 1666) was enacted purporting to exempt the corporation, by name, from the payment of property taxes and declaring corporation to be eleemosynary. Action was brought by corporation against the Treasurer of Greenville County to recover the amount of taxes levied upon corporation's property and paid under protest. Upon an order by Circuit Court granting the corporation its claim for exemption, the defendant appeals. HELD, reversed. The special exemption statute was an invalid exercise of legislative power and the corporation did not come within the constitutional definition of eleemosynary institutions. *Textile Hall Corporation v. Hall,* ____ S. C.____; 54 S. E. (2d) 809 (1949).

The South Carolina Constitution provides that "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property, real and personal and possessary, * * * excepting such property as be exempted by law for municipal, educational, literary, scientific, religious, or charitable purpose." S. C. CONST., Art. 10, § 1. The term "charitable" has been defined as relating or devoted to charity, alms or alms giving, having the nature of alms. *Hamburger v. Cornell University,* 166 N. Y. S. 46 (1917). To be entitled to exemption an institution

must be purely charitable and, when its primary purpose is other than charitable and its charitable activities are subordinate and incidental, it is not entitled to exemption as a charitable or benevolent institution. *Bangor v. Rising Virtue Lodge No.* 10 *F. & A. M.*, 73 Me. 428 (1882). A publishing house of a reformed church, publishing material for special benefit of membership of church for purpose of disseminating religious literature was held not to be a charitable corporation. *Central Publishing House of Reformed Church in United States v. Flury*, Ohio, 157 N. E. 794 (1927). The property of a Young Men's Christian Association which was used solely for purposes of public charity was held not taxable, provided its income was not used, nor intended to be used, as dividends or profits. *City of Waycross v. Waycross Savings & Trust Co.*, 146 Ga. 68, 90 S. E. 382 (1916). A Masonic lodge, used in the characteristic of Freemasons is exempt from taxation as a charitable institution. *Savannah v. Solomon's Lodge No.* 1, 53 Ga. 93 (1874). A hospital organized as a business corporation, which accepted charity patients and conducted nurses' school, was held not tax exempt as a "charitable association". *Salisbury Hospital v. Rowan County*, 205 N. C. 8, 169 S. E. 805 (1933). However, it has been held that even though a hospital received compensation from patients who were able to pay for the accommodations, this would not render it any the less a charitable institution. *Hospital of St. Vincent of Paul in City of Norfolk v. Thompson*, 116 Va. 101, 81 S. E. 13 (1914).

When the statute granted eleemosynary institutions exemptions from taxation, the determination of the exemption in a particular case depends upon whether the organization claiming the exemption is in fact a charitable one, and whether the property on which the exemption is claimed is being devoted to charitable purposes. The word charity, as commonly used, implies any act of kindness or benevolence. In the legal sense, the term may be more fully defined as a gift, for the benefit of an indefinite number of persons, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is in this sense that the term is used in the tax exemption statute and the plaintiff did not meet this test.

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