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Criminal Law—Motion for Mistrial—Exclusive Character of Criminal Code

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prescribed by law for those inhabitants, who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society." It is argued, with merit, that people who voluntarily leave their employment are not beset with a misfortune which gives them a claim upon the sympathy of society. But what about the families of such people? Certainly the family of a man who is simply shiftless should not be and is not denied aid or granted only one-half of the assistance necessary to meet a minimum subsistence compatible with decency and health. The family of a man participating in an ill-timed or prolonged strike is enduring as much misfortune as anyone else if there is not amply food for the table.

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CRIMINAL LAW—MOTION FOR MISTRIAL—EXCLUSIVE CHARACTER OF CRIMINAL CODE—Defendant was convicted of assault in the third degree. During the course of the trial, on four different occasions, the court denied defendant's motions to direct a mistrial on grounds of improper questions by the prosecuting attorney and of allegedly prejudicial testimony of a witness. On appeal to the Montana Supreme Court, *held,* affirmed. The denial of the motions for mistrial was not error where the prejudicial effect of the testimony and questions was cured by the trial judge's admonitions to the jury. *State v. Straight,* 347 P.2d 482 (Mont. 1959).

Implied in the decision of the instant case is a recognition of the permissibility of a motion for mistrial, a motion not provided for by statute. The court said, in passing, "Regarding the propriety of a motion for mistrial, see *Hayward v. Richardson Construction Company.*"[1]

Dictum in the *Hayward case,*[2] decided at the same time, expressly approved the motion for mistrial in civil cases and overruled an earlier case which had held that "there is no authority in this state for making such a motion, based on such grounds, nor any for a trial to make such an order, on such grounds."[3] Justice Angstman in the *Hayward* case declared the earlier decision to be contrary to the rule recognized throughout the country, and announced the correct rule to be as follows:[4]

> Whenever it appears that there has been such misconduct in a trial, or prejudicial matter has been allowed to go to the jury, without opportunity to object in advance, the effect of which cannot be removed by an admonition on the part of the court, the aggrieved party may move the court to declare a mistrial. Failing in that, he will be deemed to have taken his chances with the jury.

In contrast, Justice Bottomly dissented from the majority statement of the rule on the ground that there is no statutory provision in this state

[1]Instant case at 487.
[2]347 P.2d 475 (Mont. 1959).
[3]Robinson v. F. W. Woolworth Co., 80 Mont. 431, 443, 261 Pac. 253, (1927).
[4]*Supra* note 2 at 480.

for "either a motion for mistrial nor any statutory authority for a judge to declare a mistrial as in some other states."[5] He added that the majority of the court was assuming legislative prerogatives by initiating such a procedure.

The instant case, which in context with the *Hayward* case clearly means to approve the use of the motion for mistrial in criminal case over Justice Bottomly's objection that such motion is not provided for by statute, raises once more the issue to what extent the procedural provisions in the Montana criminal code are complete and exclusive. Seven years earlier, in *State v. Bosch,*[6] the Montana Supreme Court, speaking through Justice Bottomly, enunciated the doctrine that the Montana criminal code is complete and, therefore, if a given procedure is not authorized by statute the trial court has no power to use it. Scrutiny of the case shows that this was only dictum, but as in the *Hayward* case, it was explicit dictum and was accompanied by the express overruling of prior inconsistent cases.

The statement in the *Bosch* case was made with reference to the propriety of using bills of particulars, which have neither statutory nor specific constitutional authorization. Although the court had, at various times earlier, declared the bill to be a commendable discretionary practice,[7] a "right,"[8] and a right guaranteed by the Montana Constitution,[9] its dictum in the *Bosch* case expressly declared that no such bill could be ordered by the courts and overruled the earlier cases to the contrary. The court said:[10]

> We hold that in this state, where our Criminal Code is complete, and the legislature has designated specifically each step in the criminal procedure and practice, there is no authority for a demand for, nor for an order, requiring the furnishing of a bill of particulars. There is nothing to move the discretion of a trial court. Either every defendant is entitled to a bill of particulars as a matter of law, or where there is no law authorizing the same, no defendant is entitled to it.

The quoted language seems broad enough to exclude *any* procedure in a criminal action not expressly provided for in the code.

Despite the position taken in the *Bosch* case, however, several procedures and motions not provided for in the statutes have received recognition by the Montana Supreme Court. Among these are the withdrawal of a plea of guilty after judgment has been rendered, the right of review by the writ of error *coram nobis,* the pre-trial motion to supress evidence, and the motion for mistrial, already discussed.

No provision is made in the code which will allow a defendant to with-

[5] *Id.* at 481.
[6] 125 Mont. 566, 242 P.2d 477 (1952).
[7] State v. Gondeiro, 82 Mont. 530, 541, 268 Pac. 507, 511 (1928).
[8] State v. Shannon, 95 Mont. 280, 26 P.2d 360 (1933).
[9] State *ex rel.* Wong Sun v. District Court, 112 Mont. 153, 156, 113 P.2d 996, 997 (1941).
[10] *Supra* note 6 at 588, 242 P.2d at 488. Those cases expressly overruled by the court, however, did not include the *Wong Sun* decision (*supra* note 9). This is a disconcerting omission since *Wong Sun* was the most recent decision and the one which elevated the right to a bill of particulars to a constitutional guarantee.

draw a plea of guilty *after* judgment has been rendered. The statute[11] provides in part: "The court may, at any time *before* judgment, upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted." (Emphasis added.) In construing this provision the Montana court, in *State ex rel. Foot v. District Court,* stated:[12] "It is our opinion that a motion to withdraw a plea of guilty and substitute therefor one of not guilty, either before or after judgment, is addressed to the sound discretion of the trial court." The court construed the clear legislative limitation that the motion must be made *before* judgment not to bar those motions made *after* judgment. This procedure was allowed in several other decisions both before[13] and after[14] the *Bosch* case.

Coram nobis, also, is not provided for in the code. This writ was altogether unknown to Montana law until 1951 when the court apparently assumed its availability in the case of *State v. Hales.*[15] Hales, serving a prison term for the crime of grand larceny, submitted papers in the nature of a writ of error *coram nobis* to the Supreme Court. The court noted that proper application for such a writ is to the court which rendered the judgment and ordered the petition forwarded to the trial court without further comment. Although in a later case[16] the writ was denied, it was upon grounds other than the exclusive character of the code, and Justice Davis, referring to *coram nobis,* conceded:[17]

> It may be that where the legislature has not spelled out the regulations and limitations, which are to bound our jurisdiction, we may act consistent with our own concept of the authority given this court by the Constitution . . . It is undoubtedly true also that if the case is exigent, this court may act to meet the emergency, even though the legislature has prescribed regulations adequate to review the ordinary case by appeal, *i.e.,* by framing and issuing its own original writ to fit the case.

Furthermore, in an original proceeding before the Montana Supreme Court in September, 1959, one Blakeslee, an inmate of the state prison, petitioned the court for a "Writ of Coram Nobis."[18] The court denied the petition but without prejudice to his right to apply to the district court for the same relief. Thus the Montana court remains willing to admit the availability of coram nobis in criminal practice.[19]

The pre-trial motion to suppress evidence obtained by an unconstitutional search and seizure is another extra-statutory procedure existing in

[11] REVISED CODES OF MONTANA, 1947, § 94-6803.
[12] 81 Mont. 495, 503, 263 Pac. 979, 982 (1928).
[13] *E.g.,* State v. McAllister, 96 Mont. 348, 30 P.2d 821 (1934); State v. Casaras, 104 Mont. 404, 66 P.2d 774 (1937).
[14] *E.g.,* State v. Morgan, 131 Mont. 58, 307 P.2d 244 (1957).
[15] 124 Mont. 614, 230 P.2d 960 (1951). See Briggs, *"Coram Nobis"—Is It Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings?,* 17 MONT. L. REV. 160, 167 (1956).
[16] State v. Zumwalt, 129 Mont. 529, 291 P.2d 257 (1955).
[17] *Id.* at 534, 291 P.2d at 260.
[18] Petition of Blakeslee, 343 P.2d 564 (Mont. 1959).
[19] Although this writ is technically civil in its nature, it has always been used exclusively in connection with criminal proceedings in a manner somewhat similar to habeas corpus which, though civil, is embodied in the criminal code.

Montana. The right to suppress illegally obtained evidence could be given effect by objection to introduction of the evidence at trial, as is done in other states.[20] But in Montana, despite omission by the criminal code of mention of any such pre-trial motion, a failure to make it will ordinarily constitute a waiver of the constitutional right to exclusion.[21] Placing such weight on pre-trial procedures which do not appear in the code is, to say the least, inconsistent with any conception that our criminal code is complete and exclusive.

While there may be basis for some distinctions among them, in total the instances described above indicate a clear disregard of the position of the *Bosch* case that the criminal code is exclusive in denominating procedures which may be used. Whether the *Bosch* case should stand to bar the ordering of a bill of particulars may even be open to question, but in any event the broad language of that decision has not controlled the Montana Supreme Court in its rulings with respect to other non-statutory procedures.

MELVYN M. RYAN

EQUITY—APPEALS FROM EQUITY DECREES—SCOPE OF APPELLATE REVIEW—Plaintiff brought an action to enforce a judgment lien against real property standing in the name of the wife of the judgment debtor. Defendants' evidence was not materially contradicted and tended to show that funds of the wife were used to buy the property. The district court, sitting without a jury, found for the defendants. On appeal to the Montana Supreme Court, *held,* affirmed. In an equity case if the record contains substantial evidence supporting the findings of the trial court the Supreme Court will not interfere with those findings. *Beard v. Myers,* 347 P.2d 719 (Mont. 1959) (Justice Adair concurring in the result).

Prior to 1903, appeals from equity decrees were considered on review under the same rules as appeals from judgments at law. Findings of fact made by a judge sitting without a jury were allowed to stand on appeal if there was evidence to support them.[1]

In 1903 the statute providing for appellate review[2] was amended[3] to provide as follows: "In equity cases, and in matters and proceedings of an equitable nature, the Supreme Court shall review all questions of fact arising upon the evidence presented in the record . . . and determine the

[20]See Note, *Procedures for Suppressing Illegally Seized Evidence,* 20 MONT. L. REV. 225, 233 (1959).
[21]Weeks v. United States, 232 U.S. 383 (1914) appeared to base the right to suppress in federal courts on a constitutional basis. State v. Gardner, 74 Mont. 377, 240 Pac. 984 (1925) did the same in Montana. While the case of Wolf v. Colorado, 338 U.S. 25 (1949) has cast doubt upon the constitutional basis for the federal rule, the *Gardner* rule has been repeatedly applied in Montana without any questioning of its basis.
[1]McCauley v. Tyler, 11 Mont. 51 (1891).
[2]Then Mont. Code of Civ. Proc. 1895, § 21, now REVISED CODES OF MONTANA, 1947, § 93-216.
[3]Laws of Montana 1903, Second Extraordinary Session, ch. 1,