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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.[1]

RECENT CRIMINAL CASES.

I. CONSTITUTIONAL LAW.

Hack vs. State, Wis., 124 N. W. 492. 1. *Arraignment and Plea.* Arraignment and plea being essential to due process of law guaranteed by Const. Amend. U. S. 14, a state may not pass a law providing for trial without arraignment or plea. 2. *Rights of Accused.* One accused of a lesser crime, or misdemeanor, waives a right for which he does not ask at the time of trial.

II. CRUEL AND UNUSUAL PUNISHMENT.

State vs. Ross, Ore., 106 Pac. 1022. A fine which the defendant was unable to pay during a lifetime of effort, although within the maximum of the statute, is a cruel and unusual punishment within the prohibition of the Constitution.

III. PAROLE.

State vs. Collins, Mo., 125 S. W. 465. *Statutes.* Providing for the parole of prisoners and the termination thereof, without further hearing, in the discretion of the court or judge granting the same, is constitutional.

People *ex rel.* vs. Strassheim, Ill., 90 N. E. 118. 1. *Parole Law.* Relator was paroled and re-imprisoned on the ground that he had forfeited his parole by violating the regulations. *Held,* that, under section 4 (authorizing the warden to re-imprison any paroled prisoner), a paroled prisoner was entitled to a hearing before the board of pardons as to whether he had violated his parole, and hence such section did not deprive relator of his liberty without due process of law, as it would have done had he not been entitled to a hearing. 2. *Legal Custody.* Under the direct provisions of the parole act, as well as in absence thereof, paroled prisoners remain in the legal custody of the penitentiary warden.

State vs. Smith, Ind., 90 N. E. 607. *Suspension of Sentence.* A statute authorizing the court, on the entry of judgment of conviction, to suspend sentence and parole the person convicted by order duly entered of record as a part of the judgment in the case, etc., does not authorize courts to suspend sentence and parole persons after the rendition of final judgment, and an order suspending the collection of a fine made after the entry of final judgment of conviction is erroneous.

IV. JUVENILE COURTS.

State vs. Ragan, La., 51 So. 89. 1. *Organization.* An amendment to the Constitution created a special juvenile court in the parish of Orleans, and provided that district courts outside of said parish should hold separate

[1]These cases have been digested from the current volumes of the National Reporter system, including all issues of the current volume to March 20. By courtesy of the West Publishing Company of St. Paul, their headnotes have been utilized.

sessions as juvenile courts. No organization of district courts as juvenile courts is required, and such sessions of district courts may be held without the appointment of a "probation officer." 2. *Sessions.* Sessions of a juvenile court in the country parishes must be held apart, and a separate record kept of the proceedings. 3. *Delinquents.* Children are proceeded against as delinquents for the sole purpose of reformation, and cannot be prosecuted for crime for the purpose of punishment, except, perhaps, in capital cases.

V. INSANITY.

People vs. Oppenheimer, Cal., 106 Pac. 74. 1. *Evidence.* Evidence as to confinement subsequent to the commission of the assault is not evidence of the condition of defendant's mind at the time of the assault. . . . Evidence by non-experts as to whether some persons confined in incorrigible cells had not become insane while so confined, is inadmissible. 2. *Sufficiency.* Defendant in order to show insanity, must show such insanity by a preponderance of evidence.

People vs. Brent, Cal., App., 106 Pac. 110. 1. *Evidence or Mental Condition.* When mental condition of an individual at a particular time is in issue, conduct, acts and declarations, after as well as before the time in question, are admissible, if sufficiently near in point of time, and if they appear to have any tendency to show what that mental condition was at the time in issue; but the admissibility of statements made by accused before and after the commission of the crime, and offered to show insanity, is very much in the discretion of the trial court.

VI. PARTIES TO CRIME.

People vs Giro, New York, 90 N. E. 432. 1. *Liability.* Where two persons acting together armed themselves and broke into a dwelling to rob it, and were, when discovered, engaged, one in robbing the house and the other in watching, and one of them killed an occupant of the dwelling in their attempt to escape, both were guilty of murder in the first degree, as all that they did was in furtherance of their original design to rob.

VII. INTENT.

Heath vs. State, Ind., 90 N. E. 310. *Erroneous Belief as to Age.* An erroneous belief as to the age of the girl, however well founded, is not a defense to a prosecution for rape, if she was in fact within the prohibited age.

VIII. JURISDICTION.

People vs. Poindexter, Ill., 90 N. E. 261. *Conspiracy.* A conspiracy, which is a misdemeanor, formed in one state, to commit a felony, does not merge in the felony committed in another state, so as to prevent conviction of the conspiracy in the first state.

IX. CONSENT.

State vs. Allison, S. D., 124 N. W. 747. *Rape.* A female under 18 cannot consent to indecent liberties with her person, accompanied with intent to have intercourse, and thus make that not an assault with intent to rape, which would have been such an assault if without her consent.

X. SELF-DEFENSE.

State vs. Driggers, S. C., 66 S. E. 1042. *Self-Defense.* When, after accused and decedent had started home after the quarrel had ended, accused, while in no peril, shot decedent, there was no issue of self-defense.

Wheatley vs. State, Ark., 125 S. W. 414. 1. *Self-Defense.* 2. *Necessity of Act.* One in resisting an assault in the course of a sudden quarrel is not justified in killing the assailant, unless he is so endangered by the assault as to make it necessary to kill to save his own life or prevent a great bodily injury, and unless he employs all the means in his power, consistent with that of safety, to avoid the danger and avert the necessity of the killing. 3. *Apprehension of Danger.* One justified in acting on appearances, and killing his assailant to save his own life, must honestly believe, without carelessness on his part, that the danger is so urgent that it is necessary to kill his assailant in order to save his own life, or to prevent a great bodily injury, and he must act with due circumspection; and, where there is no danger, and his belief of the existence thereof is imputable to negligence, he is not excused. 4. *Provoking Attack.* One speaking opprobrious words is not precluded from acting in self-defense, unless he uses them for the purpose of bringing on an attack and an opportunity of killing the person provoked, or to do him great bodily injury. 5. *Withdrawal.* One may not intentionally provoke an attack and slay his assailant and rely on self-defense, and before he can do so, he must in good faith withdraw from the combat as far as he can, and do all in his power to avoid the danger and avert the necessity of the killing. 6. *Defense of Another.* A person may lawfully do for his brother when threatened with death or great bodily injury, what he can lawfully do for himself under the same circumstances.

XI. MANSLAUGHTER.

Leonard vs. State, Ga., 66 S. E. 251. 1. *Involuntary Manslaughter.* The evidence for the state making a case of murder by intentionally pointing a pistol at and shooting at another, and that for the defendant tending to show an accidental killing, it was not error, to instruct the jury only on the law of involuntary manslaughter in the performance of an unlawful act; the court having also charged on the subject of accidental killing, which would require a verdict of not guilty. 2. *Involuntary Manslaughter in Performance of Unlawful Act.* Death from the accidental discharge of a pistol while being unlawfully pointed, renders the accused, if not guilty of murder, then of involuntary manslaughter.

XII. LARCENY.

Brewer vs. State, Ark., 125 S. W. 127. 1. *Elements of Offense.* A finder of lost goods is not guilty of larceny thereof, where he had no felonious intent to withhold them from the owner at the time they were found, though he afterward appropriated them to his own use. 2. *Instructions.* A request to charge that if defendant found prosecutor's pocketbook, and either knew, or ascertained, to whom it belonged, and on demand of the owner denied having it, or did not voluntarily return it to him, he would be guilty of larceny, was erroneous as eliminating the idea of good faith in making inquiry for the owner, or the absence of a felonious intent at the time of the original taking. An instruction that if defendant found prosecutor's pocketbook, and contents, and within a reasonable time thereafter made inquiry as to the ownership thereof, defendant was not guilty of larceny as charged, unless "he knew, or soon learned, who the owner was, and denied having it," was rendered erroneous by the addition of such quoted clause.

XIII. INDICTMENT, EVIDENCE AND TRIAL.

Mills vs. State, Fla., 51 So. 278. 1. *Indictment and Information.* An indictment charging the crime substantially in the language of the statute will be adjudged good, unless it becomes necessary to state the circumstances which constitute the definition of the offense charged in order to advise the prisoner of the nature of the charge against him. 2. *Quashing.* An indictment will not be quashed or judgment arrested on account of any defect in the form of the indictment, unless the court is of the opinion that the indictment is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense, or expose him after conviction or acquital to substantial danger of a new prosecution for the same offense. 3. *Certainty Required.* The requisite degree of certainty in an indictment must have reference to the matter to be charged, and the manner of form of charging it. Objections to the sufficiency of the indictment cannot be made by objecting to the evidence in support of it. A motion in arrest of judgment will not lie for the improper admission or exclusion of evidence.

State vs. Jeanisse, La., 51 So. 290. *Error or Informality.* Until a verdict is received and recorded, there is no verdict, and the jury have the right to alter it. Informality in the rendition of a verdict, is waived by the failure of the defendants to object and except at the time, and the defendants here were not prejudiced by the alleged irregularity in the proceedings.

Gragg vs. State, Okla., 106 Pac. 350. *Sufficiency.* It is not imperative under the laws of this state that an information shall contain the words "by the authority of the state of Oklahoma," if the record discloses that the prosecution is in fact by the authority of the legal representative of the state authorized to prosecute.

Nicholson vs. State, Wyo., 106 Pac. 929. *Charge.* Rev. St. 1899, 5273, provides that an information may be filed without a preliminary examination, whenever an offense shall be charged immediately preceding the first day of a regular term of court of the county wherein such offense is charged to have been committed. *Held,* that the filing of the information constitutes the "charge," where there has been no prior proceeding, and that the thirty days are to be computed from the date of preferring the charge, and not from the date of the commission of the offense.

People vs. Leavens, Cal., 106 Pac. 1103. 1. *Evidence.* To justify a conviction of obtaining money by false pretenses by the sale of fraudulent certificates of stock represented by accused to be owned by him, the prosecution must prove that accused obtained the money on the representation that he was the owner of the stock which he sold, and that such representation was false. By statute a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence tending to connect accused with the commission of the offense, but evidence outside of that of the accomplice need not be sufficient to establish the guilt of accused, but it must in some way tend to implicate and connect him with the crime. 2. *Testimony of Accomplice.* The actual commission of an offense may be established by the evidence of an accomplice. There is no variance between the allegation in an information for false pretenses that accused procured

money from prosecutor and the proof that he procured money by means of a check which prosecutor drew.

Burge vs. State, Ga., 66 S. E. 243. 1. *Abandonment.* Grounds of a motion for new trial, which are not referred to in the brief of the counsel for the plaintiff in error, will be considered as abandoned. 2. *New Trial.* Applications for new trial on the grounds of newly discovered evidence are not favored, and should be supported by the affidavits of the witnesses by whom the new facts are to be proved, and it must also appear that the newly discovered evidence is not cumulative only, nor solely to impeach the credit of a witness, and that the probable effect thereof, if another trial be had, will be to produce a different verdict.

Sedlack vs. State, Wis., 124 N. W. 510. 1. *Conclusiveness.* A conviction by an impartial jury, sustained by credible evidence and approved by the presiding judge, is conclusive on appeal, though there is much to discredit the evidence. 2. *Misconduct of Jury.* The remark of the clerk of the court made to the jury in passing through the courtroom in the morning in charge of an officer, after deliberating all night, that their beds were made up for the night, and the reply of a juror that he thought the jury would be out before night, did not constitute prejudicial misconduct.

State vs. Fowler, N. C., 66 S. E. 243. *Presumptions.* Where the killing with a deadly weapon was established, or admitted, and the plea was self-defense, the two presumptions that the killing was unlawful and that it was done with malice arose, and, where accused merely rebutted the presumption of malice, the presumption that the killing was unlawful, stood, and justified a conviction of "manslaughter," which becomes "murder in the second degree" when it has the added element malice.

Sapir et al. vs. United States, 174 Fed. 219. *Evidence of Similar Offenses.* In a prosecution for knowingly receiving property stolen from a navy yard of the United States, on the question of knowledge, evidence is admissible to show that the defendant had received and purchased articles of the same general character stolen from such navy yard at other times.

Walsh vs. United States, 174 Fed. 615. 1. *Other Offenses as Evidence of Intent.* Where fraudulent intent is an essential element of the offense charged, evidence of other acts of the defendant of a kindred nature are competent to illustrate the character of the transaction in question and throw light on the intent with which this particular act was done. 2. *Inconsistent Findings.* Where the gravamen of the charge in several counts of an indictment is the same, a verdict of guilty on each is not inconsistent because they differ in respect to immaterial particulars concerning the means by which the crime was committed. 3. *Impeachment by Juror.* A juror in a criminal case cannot afterward impeach a verdict in which he joined.

Morse vs. United States, 174 Fed. 539. 1. *Harmless Error.* An error in an instruction applying to certain counts only of the indictment does not warrant a reversal, where there was a verdict of guilty also on other counts not affected by such instruction, which is sufficient to support the judgment. 2. *Making False Entries.* Upon a charge against an officer of a national bank of making false entries in the books of the bank, it is immaterial whether defendant made the entries in person or caused them to be made by a clerk or bookkeeper. 3. *Instructions.* In the prosecution of defendants,

charged as officers with having made false entries in the books of a National Bank, and in reports to the Comptroller, with intent to injure and defraud the bank and deceive its officers and the examiner, it was not error to charge the jury that, if they found that such false entries were made, they were authorized to presume therefrom, in the absence of any explanation, that defendants knew them to be false, and that, if the natural and probable consequence of such entries was to defraud or deceive, they might presume, in the absence of explanation, that such was defendant's intention.

Placker vs. State, Tex., 125 S. W. 409. 1. *Cross-Examination of Accused.* In a prosecution for theft, where defendant sought to explain his possession of three $5 bills by testimony that one S. gave him four $5 bills, and he gave one of them back a day or two before the alleged offense, it was proper to allow the state to show by the witness that the money paid was won in a card game. 2. *Remarks of Judge.* It was error for the court to remark, in overruling defendant's objections to a question, that it was the most material question that had been asked by the state.

Parker vs. State, Ala., 51 So. 260. 1. *Variance in Names.* The name of G. C. Ahhatt was drawn as juror and the list of jurors served on defendant contained that name when no such person was found and G. C. Abbott was the person really summoned; this would not affect the validity of the venire; the name drawn being the same as that in the list served. 2. *Admissibility.* A statement made about 4 or 5 o'clock in the evening before the morning deceased died, in which he said several times that he suffered very much and could not live, was made under a sense of impending death, and was admissible as a dying declaration. 3. *Opinion Evidence.* A question in a homicide case as to whether witness or another was in a better position to see the difficulty was properly excluded as calling for witness' opinion.

Palmer vs. State, Ala., 51 So. 358. 1. *Continuance.* To fasten error on the court as denying accused his constitutional right to compulsory process for obtaining witness, it must appear that the application was seasonably made, and accompanied by a showing as to what the absent witness is expected to testify. 2. *Accomplice.* On a prosecution for adultery, the age of the female is a matter of importance, as if she was over the age of consent at the time of intercourse, she was *particeps criminis,* if she consented, so that no conviction could be had on her uncorroborated testimony. 3. *Exception to Hearsay Rule.* Testimony of witness on a prosecution for adultery that her daughter on the evening after the morning on which she gave birth to a child, stated defendant was the father, is not within the exception to the rule against hearsay that birth, age, relationship, marriage, death, and legitimacy, when involved in a question of pedigree, may be shown by the declarations of relatives since deceased, made before the controversy arose.

Barnett vs. State, Ala., 51 So. 299. *Admissibility.* In a prosecution for homicide by shooting, it was proper to allow the clothes which decedent was wearing when killed, to be exhibited to the jury, showing the location of the shot. 2. *Character.* In a prosecution for homicide, where defendant testified, the state was properly allowed to introduce evidence as to his general character, and it is proper to ask witness on cross-examination, if he had not heard that prior to the shooting, defendant had a difficulty with the party on the road and shot him. 3. *Remarks of Counsel.* In a prosecution for

homicide, it is not permissible for counsel to comment on the failure to examine a witness who was accessible to both parties.

Thomas vs. State, Tex., 125 S. W. 35. 1. *Presumptions as to Intent.* Though it is a legal maxim that every one is presumed to intend whatever would be the reasonable or probable result of his act and the means used by him, it is never permissible to so instruct the jury, as defendant is entitled to reasonable doubt in every phase of the case. 2. *Instruction as to Murder in First Degree.* Where the evidence shows a homicide by a blow struck in a sudden heat of passion, without any former ill will or premeditated design to kill, an instruction on murder in the first degree should not be given.

Nelson vs. State, Okla., 106 Pac. 647. 1. *Dying Declarations.* Dying declarations are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed when made under the belief of certainty of death. 2. *Credibility.* For the purpose of affecting the credibility of a witness he may be asked, on cross-examination, if he has been convicted of a felony or of any crime which involves moral turpitude; but it is prejudicial error to ask such witness if he has been indicted, arrested, or imprisoned for a misdemeanor, of if he has been charged or arrested, or imprisoned, before conviction, for any offense whatever.

People vs. Argentos, Cal., 106 Pac. 65. 1. *Evidence.* 2. *Other Offenses.* On a trial for a particular crime, evidence which shows, or tends to show, the commission of another distinct offense by accused, is, in general, inadmissible, but where evidence has a direct bearing on the question of guilt, it is admissible, though it tends to show the commission of another offense. 3. *Accusation.* The rule that evidence showing a distinct offense other than that for which accused is being tried is inadmissible extends to proof of an accusation of another crime, as well as to evidence of its actual commission. 4. *Motive.* Evidence showing that defendant was accused of another offense for which he had given bail with decedent as surety was admissible to show motive.

State vs. Johnson, S. D., 124 N. W., 847. 1. *Appointment of Counsel to Assist State's Attorney.* A statute authorizing the court to appoint an attorney to perform temporarily the duties required of the state's attorney, when in the court's opinion the ends of justice would be promoted thereby, confers upon the court authority to appoint an attorney to assist the state's attorney in a trial where, in its opinion, justice requires. 2. *Selection of Jury.* Error, if any, in overruling challenges for bias to two jurors cannot be held prejudicial where accused did not exercise any of his three peremptory challenges. 3. *Admonishing Jury.* The record being silent whether the court admonished the jury, upon separation at a noon recess, not to converse among themselves, etc., it will be presumed, in the absence of a contrary showing, that the court performed its duty and gave the proper admonition. 4. *Judgment.* Where neither the amount of costs is specified in a judgment, nor the number of days of imprisonment therefor, such portion of the judgment is void for indefiniteness. 5. *Indictment and Information.* An information for keeping and maintaining gambling apparatus need not designate the town or building in which the offense was committed.[1] C. H. H.

[1]A digest of the State statutes for 1909 will appear in the July issue of the JOURNAL.—EDITORS.