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JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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ATTEMPTS.

State v. *Redmon,* S. Car., 113 S. E. 467. *Attempt to commit a misdemeanor held not indictable.*

It is elementary law that an attempt to commit a misdemeanor is not an indictable offense.

Cothran and Marion, JJ., dissenting.

ARSON.

State v. *Meservie,* Me., 118 Atl. 483. *"Dwelling House."*

Where the dwelling house, ell, woodshed, carriage house, and barn were connected, forming one continuous set of buildings, with passageway from house to barn without going out of doors, a defendant who set fire to the barn was guilty of setting fire to a "dwelling house," under Rev. St. c. 121, Sec. 8, making it a crime to set fire to a dwelling house and defining what constitutes a "dwelling house."

ASSAULT AND BATTERY.

State v. *Maggert,* Mont., 209 Pac. 989. *Joint principals.*

Where two defendants in a prosecution for assault admit they confronted plaintiff with the common purpose of accusing him of certain statements, and one or the other of them beating him, depending upon whether he admitted or denied the statements, each is a principal and they are not entitled to an instruction that, if each was acting individually and for separate purposes, and not under a common design, neither can be convicted.

CONFESSION.

State v. *Elwell,* Ore., 209 Pac. 616. *"Other proof" required for admissibility.*

Under Or. L. Sec. 1537, providing that a confession is insufficient to warrant conviction without "some other proof that the crime has been committed," in arson prosecution, where the state had proved only that the building occupied by accused as tenant had burned, and that accused and his family were in it when it caught fire, proof offered by the state, in connection with accused's confession, that accused was in debt, and that he carried insurance upon his stock of merchandise and furniture in the building at the time of the fire, did not supply the statutory requirement of "some other proof that the crime has been committed."

Burnett, C. J., and Brown and McBride, JJ., dissenting.

FORMER JEOPARDY.

Ex parte Hall, M. J., 118 Atl. 347. *Waiver.*

Assuming that where the defense of former jeopardy is duly raised, the fact of the identity of the two offenses is fatal to any futher jurisdiction in

respect of the second charge, the right of immunity from double conviction under Const. Art. 1, Sec. 10, is a personal right, and may be waived, and when waived does not affect the court's jurisdiction as to the further proceedings in the cause.

Where one charged in one indictment with embezzling $55,000, and in eight other indictments with embezzling parts of such sum, after pleading not guilty withdrew the plea and pleaded nolo contendere to all the indictments without offering to so plead, either to the first indictment or to the other eight, and without in any way raising the objection of double conviction, he waived the objection, especially where sentence under the last eight indictments was not imposed at the same time as sentence under the first indictment, and during the interval defendant made no attempt to withdraw his plea and plead a former conviction.

HOMICIDE.

Giddens v. *State,* Ga., 113 S. E. 386. *Killing officer to prevent illegal arrest.*

"To slay an officer who is without authority of law to make an arrest for a misdemeanor, where the motive of the slayer is merely to avoid an illegal arrest, would be manslaughter." Under the evidence in the case, the defendant is guilty of manslaughter, if guilty of anything.

Under the evidence in this case, the verdict of the jury finding the defendant guilty of murder is contrary to law and contrary to the evidence, and the court erred in refusing a new trial.

HOMICIDE.

McAndrews v. *People,* Colo., 208 Pac. 486. *Malice.*

Where death results from an attack made with hands and feet only on a person of mature years and in full health and strength, the law will not imply malice, because ordinarily death would not result therefrom.

Burk and Denison, JJ., dissenting. Burke, J., said in part:

"From the undisputed testimony in this case it is perfectly apparent that the death of Keim was directly and solely due to a fractured skull caused by a blow delivered by defendant, and no reasonable man sitting as a juror in this case could, in my opinion, by any possibility, reach any other conclusion, or have a shadow of a doubt about that one. . . .

"It is said that malice may never be implied from the use of the bare fists. But malice is not an implication of law, but one of fact, and facts are implied by the jury, not by the court. . . .

"The majority opinion seems to me a sign-board to those who seek to take human life, pointing out to them the means which may be used by one who would be immune from the penalty which the law fixes for murder. It is a warning to those who would fearlessly do their part to put a stop to that reckless driving of automobiles which leaves wrecked vehicles and maimed and lifeless bodies in its wake, that they take their own lives in their hands when they interfere. It is another stone in the wall of unsound precedent behind which criminals seek to barricade themselves in their war upon society. We should be diligent in tearing down that barrier, not in strengthening it. The judgment should be affirmed."

HUSBAND AND WIFE.

Dobbins v. *State,* Okla., 208 Pac. 1056. *Marriage under duress as a defense to charge of wife abandonment.*

Where there had been no effort to annul the marriage, the fact that the husband married his wife under duress is no valid defense to a charge of wife abandonment.

INDICTMENT.

State v. *Brumfield;* Ore., 209 Pac. 120.

Refusal to quash indictment on the ground that an attorney who was a resident of another county was permitted to be in the grand jury room, and to examine witnesses, in violation of Or. L. Sec. 1424, prohibiting the presence of persons other than the district attorney and witnesses actually under examination, held proper where such attorney had been regularly appointed and sworn as a deputy prosecuting attorney for the county, since he was a de facto officer, even if a resident of other county.

INSANITY.

State v. *White,* Kans., 209 Pac. 660. *Test of.*

Charged with assaulting her former husband with intent to commit a felony, the defendant interposed the defense of insanity. In substance the court charged that the test of her responsibility was whether at the time of the act she was capable of understanding what she was doing and had the power to know that her act was wrong. Held, following *State* v. *Nixon,* 32 Kan. 205, 4 Pac. 159, and *State* v. *Mowry,* 37 Kan. 369, 15 Pac. 282, and authorities cited therein, that the instruction was proper, and further held, that the court properly refused to instruct that if the defendant knew the act to be wrong, but was driven to it by an irrestible impulse arising from an insane delusion, she would not be responsible.

JURY.

People v. *Wismer,* Calif. D. C. A., 209 Pac. 259. *"Impartial Juror."*

Under Pen. Code, Sec. 1076, a juror, who, on his voir dire in a prosecution for criminal syndicalism, stated that he had served in a similar trial previously, and formed the opinion that the I. W. W., in which defendant was accused of being a member, was an unlawful organization, was legally ineligible for actual bias as defined by Sec. 1073, subd. 2, and his disqualification was not cured by his asseverations that he would be able to accord defendant a fair and impartial trial.

JURY.

Littrell v. *State,* Okla., 209 Pac. 184. *"Impartial Juror."*

The words "impartial juror," as expressed in the Constitution, have no such fixed meaning as would preclude the Legislature from defining, in some measure, what should constitute an impartial juror. There was no intention to exclude persons who read newspapers, and it was never intended that an opinion formed from such information should necessarily disqualify such persons as a juror.

a. The mere fact that a juror has a settled impression or opinion as to the merits of the case, resulting from reading newspaper accounts or from current rumor, and not obtained from personal knowledge of the facts or whom witnesses who purport to know the facts, does not necessarily render the juror incompetent. R. L. 1910, Secs. 5858 and 5861.

b. Ordinarily, where a juror testified that he believes he can and the court finds as a matter of fact that he would, if selected, render an impartial verdict upon the evidence, he is an impartial juror, under our Constitution and the statutes of this state.

MALICIOUS MISCHIEF.

Thissen v. *State,* Okla., 209 Pac. 224. *Malice.*

In a prosecution for malicious mischief under section 2765, Rev. Laws, 1910, malice toward the owner of the property defaced, injured, or destroyed is a necessary ingredient of the offense.

To support a conviction for malicious mischief arising out of the killing of a dog belonging to another, the state need not show actual or express malice toward the owner of such dog, but it must establish such a degree of malice against the owner which the law deems sufficient to be inferred from the nature of the act itself and from the circumstances which accompany and characterize it.

TRIAL.

West v. *State,* Ariz., 208 Pac. 412. *Failure to submit form of verdict for acquittal on ground of insanity.*

Where the court instructed the jury that if they found defendant insane they should return a verdict of not guilty, and submitted, among other forms for verdict, a form of verdict simply finding defendant not guilty, his failure to submit a form finding defendant not guilty on the ground of insanity was not prejudicial to accused, since the reason for requiring such verdict is that the court may take further steps to restrain and confine defendant, as provided in Pen. Code 1913, Sec. 1100, so that it is not for the benefit of accused, and it cannot be supposed that if the jury had found him to be insane they would have refused to return a verdict of not guilty under the instructions because of the failure to submit the other form.

VERDICT.

State v. *Turco.,* N. J., 118 Atl. 579.

Upon the trial of an indictment charging that the defendant did willfully, feloniously, and of his malice aforethought kill and murder the deceased, our statute (P. L. 1917, p. 801, Sec. 107) requiring the jury, if they find any person guilty of murder, to "designate by their verdict whether it be murder in the first degree or in the second degree," is imperative, and no judgment can be rendered upon a verdict of "guilty" which does not designate the degree. And if the jury be discharged and judgment pronounced without the insufficient verdict being amended by the jury by adding the intended degree, the judgment will be reversed, and a new trial awarded.