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JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.[1]

I. Constitutional Law.

Commonwealth vs. Hodges, Ky., 125 S. W. 689. *Violation of Contract as an Offense.* The legislature has power to make a violation of a contract an offense as it does by Act March 21, 1906 (Laws, 1906, c. 117), amended by Act March 13, 1908 (Laws 1908, c. 8), by making it a misdemeanor for the owner of products in a pool to violate his pooling contract by selling without the written consent of the agent selected by the pooling parties. The legislature may also make it an offense for one to buy, knowing that the seller in selling is violating his contract with others. Such provisions do not violate the constitutional right to acquire property, nor the provisions of the 14th Amendment to the Constitution of the United States guaranteeing the equal protection of the laws. These acts being confined in their operation products grown and pooled in the state, and to sales therein, do not violate the provisions of the Federal Anti-Trust Act of July 2, 1890.

II. Assault and Battery.

People vs. Carlson, Mich., 125 N. W. 361. *Elements of Offense.* An assault is any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote at the time an intention to do it, coupled with a present ability to carry such intention into effect; or an assault is any unlawful physical force partly or fully put in motion creating a reasonable apprehension of immediate injury to a human being.

Farmer vs. State, Ga., 67 S. E. 834. *Justification.* A brother has the right to defend the reputation of his sister; and where he is tried for assault and battery upon one assailing in his presence his sister's character for chastity, modesty, and virtue, it is for the jury to say whether the language used was sufficient provocation to justify an assault and battery, and whether the assault and battery exceeded the provocation. A charge to this effect was applicable to the facts of this case, and not erroneous.

Cheatham vs. State, Tex., 125 S. W. 565. 1. *Self-Defense.* The fact that one accused of assault with intent to murder waylaid prosecutor, did not per se deprive him of the right of self-defense, and where accused was lying in wait to kill prosecutor, who shot at accused before the latter had done anything to execute his purpose, the latter had an imperfect right of self-defense. An instruction on a trial for assault with intent to murder that accused, on learning that prosecutor had insulted a female relative, could seek prosecutor and talk to him concerning the same to ascertain the facts, with a view to settle it peaceably with him, and that, if accused feared that prosecutor might attack him, he

[1]These cases have been digested from the current volumes of the *National Reporter System.* By courtesy of the West Publishing Company their ehad notes have been utilized.

could arm himself to protect himself, and that, if he did so, none of his rights of self-defense would be lost, was erroneous for failing to state the rights of self-defense alluded to. 2. *Manslaughter.* If accused had waylaid prosecutor and killed him at a time when his mind was incapable of cool reflection on first meeting prosecutor after being informed of prosecutor's insults to a female relative of accused, he would be guilty only of manslaughter. 3. *Aggravated Assault.* If accused waylaid prosecutor and shot him without killing him at a time his mind was incapable of cool reflection on first meeting prosecutor after being informed of insults to a female relative, he was guilty of aggravated assault. 4. *Assault with Intent to Murder.* Where accused waylaid prosecutor and shot him without killing him when his mind was capable of cool reflection, and his mind was cool, he was guilty of assault with intent to murder. 5. *Charge.* An instruction on a trial for assault with intent to murder that accused after being informed that prosecutor had insulted a female relative, did not have the right to arm himself for the purpose of seeking and killing prosecutor, etc., was misleading as failing to state the offense accused was guilty of because he shot prosecutor without killing him.

State vs. Kenner, Mo., 125 S. W. 747. *Assault with Intent to Murder; Indictment.* An information for felonions assault, which alleges that accused in and upon prosecutor "feloniously, on purpose and of his malice aforethought, did make and assault, and then and there, on purpose and of his malice aforethought, feloniously assault" and stab prosecutor with a knife with intent to murder, is sufficient as against the objection that the word "did" is omitted between the words "and" and "then" in the quoted phrase, for the word "did," used in immediate connection with the charge of assault, is carried in meaning in connection with the following clause. Under Rev. St. 1899, sec. 1847 (Ann. St. 1906, p. 1277), providing that every person who shall on purpose and of malice aforethought shoot at or stab another or assault another with a deadly weapon shall be punished, a felonious stabbing of another with intent to kill is an offense, and, where the assault is charged to have been made with a certain knife, it is not necessary to charge that the knife was a deadly weapon.

III. ADULTERY.

State vs. Sanderson, Vt., 75 Atl. 961. *Evidence.* Where it is shown, in a prosecution for adultery, that the parties lived in the same family, with opportunity of criminal intimacy, and two acts of intercourse are shown, though two years apart, evidence is admissible that the woman gave birth to a child during the intervening time. Where it is shown that defendant's paramour gave birth to a child, it may be shown that on the death of the child defendant obtained a burial permit and buried the body, and that no one else was present

IV. SEDUCTION.

People ex rel. Scharff vs. Frost, N. Y., 91 N. E. 376. *Subsequent Marriage.* Under Pen. Code, secs. 284, 285 (Penal Law (Consol. Laws, c. 40) secs. 2175, 2176, as added by Laws 1909, c. 524, sec. 2), providing that the subsequent intermarriage of the parties is a bar to a prosecution for seduction, a prosecution for seduction is barred by the marriage of the parties, occurring after verdict or plea of guilty and before the rendition of judgment thereon, and, where the court before which accused is arraigned for sentence is satisfied of such marriage, it must discharge him.

V. LARCENY.

Teel vs. State, Ga., 67 S. E. 699. *Objects.* The landlord cannot acquire title to the crops grown on the rented land simply by taking possession of them. He therefore cannot, by his own act, without the consent of the tenant, acquire such title to the crops grown on the rented premises as to support an indictment for larceny against the tenant for taking and carrying away the crop.

VI. EMBEZZLEMENT.

Axtell vs. State, Ind., 91 N. E. 354. 1. *Elements.* Larceny is predicated on the wrongful taking of property with intent to convert it. Embezzlement is predicated on a wrongful conversion of property rightfully in possession. 2. *Indictment.* Since larceny and embezzlement chiefly differ in the manner of obtaining possession, the facts necessary to constitute the offense charged, whether embezzlement or larceny, must be averred positively and unequivocally to enable the court to distinguish the offense charged and to test the legal sufficiency of the charge and to avoid a subsequent conviction for the same offense. The facts constituting the offense charged must be affirmatively alleged, and cannot be introduced by way of recital. An indictment charging embezzlement in violation of Burns' Ann, St. 1908, sec. 2285, must show that at the time of the commission of the offense there existed between accused and prosecutor, by contract of employment or otherwise, the relation of special confidence, and that by virtue of such relation accused was intrusted by prosecutor with the property embezzled. An indictment, alleging that, "being an officer, agent, and employe" of a domestic corporation, receiving money on deposit and in payment of loans, accused had access to, control, and possession of a specified sum, and that accused, by virtue and because of his being an officer, agent, and employe of the corporation, fraudulently appropriated to his own use the sum, does not charge embezzlement.

Simpson vs. People, Colo., 108 Pac. 169. *Elements.* Before one, charged with embezzlement of money intrusted to him as agent, can be convicted, it is necessary to prove that the money, or some part of it, was intrusted to him as agent.

VII. BURGLARY.

Brown vs. State, Tex., 125 S. W. 915. *Want of Consent of Owner.* In a burglary case, where the burglarious entry was alleged to have been made with intent to commit the crime of theft, the want of consent of the owner of the property must be alleged and proved, and it may be shown by circumstances which would absolutely exclude every reasonable presumption that the owner gave his consent. While the want of consent of the owner of property stolen may be proved in a prosecution for burglary by circumstantial evidence, such evidence cannot be resorted to, if positive or direct proof is available. Where no objection was made, upon a trial for burglary, to the admission of circumstantial evidence to prove a want of consent of the owner of the property stolen, and no bill of exceptions was reserved, the objection cannot be raised on appeal.

State vs. Short, Del., 75 Atl. 787. *Possession of Stolen Property.* Where a house has recently been broken into and property taken therefrom, possession of the property by a person is prima facie evidence of his commission of the breaking and entering, as well as of the intent to commit larceny.

VIII. FORGERY.

People vs. Campbell, Mich., 125 N. W. 42. *Evidence.* In a prosecution of a loan agent for forgery in signing the name of a purported borrower to a note for a loan, the payee in the note may testify that the amount given to defendant for the loan has never been returned to her. An alleged forged note is admissible in evidence in a prosecution for forgery, though it was obtained from the defendant's desk in his absence by witness taking the desk apart, without a warrant to search for and seize it. An instruction in a prosecution of a loan agent for forgery of a note, purporting to have been made by a borrower to the lender, held to sufficiently cover the questions of defendant's intent to defraud, and the necessity of finding who it was intended to defraud. In a prosecution for the forgery of a note, the same presumptions as in a civil action that the date on the instrument is the date of its execution should be indulged.

IX. TRIAL AND EVIDENCE.

Kammerer vs. Commonwealth, Ky., 125 S. W. 723. *Self-Defense.* Defendant, an officer having a capias pro fine, attempted to arrest deceased on Sunday, but deceased resisted arrest, and placed his hand in his hip pocket as if to draw a pistol, when defendant, believing his own life was in danger, fired and shot deceased. Held sufficient to entitle accused to an instruction on self-defense. An instruction that if defendant in good faith believed that he had a right to execute a capias pro fine under which he was seeking to arrest deceased on Sunday, then they should find defendant guilty of manslaughter, was erroneous.

Loescher vs. State, Wis., 125 N. W. 459. 1. *Force and Fear.* While to constitute rape the act must be committed by force and against the will of the female, if she is rendered insensible through fright, or ceases resistance under fear of death or great bodily harm, the consummated act is rape. 2. *Evidence.* Held on facts to be rape. (Winslow, C. J., and Marshall, J., dissenting.) In a prosecution for rape, evidence held sufficient to sustain a conviction. Where, in a prosecution for rape, it was necessary for the prosecuting attorney to ask leading questions in order to get at the facts, it was not an abuse of discretion for the court to permit them.

Liles vs. State, Tex., 125 S. W. 921. *Evidence.* In a prosecution for assault to rape upon a little girl by a grown man, where there was evidence that, when defendant brought the girl home on the evening of the alleged assault, her mother noticed nothing wrong, and when questioned three weeks later she at first denied that there was any assault, it was error to refuse to allow defendant to show by the testimony of the girl that a niece of his wife, who the testimony showed was very unfriendly toward defendant, and who exercised considerable influence over the girl, went to her house just before the prosecution was instituted, and prior to the trial told the girl when she went on the witness stand to swear to enough to put defendant in the penitentiary. In a prosecution for assault to rape, testimony of a party, who went to the place of the alleged assault the next morning, that he saw where the parties had sat down or wallowed on the ground, was objectionable, being a conclusion of the witness, and not a statement of fact.

Talbot vs. State, Tex., 125 S. W. 906. *Negligent Homicide. Charge.* In view of Pen. Code 1895, arts. 683-689, 693, 694, to constitute "negligent homicide," the act must be unlawful and a misdemeanor, and must be accompanied by want

of proper care and caution, and there must be apparent danger of causing the death of the person killed, and no apparent intention to kill. In a prosecution for murder, the court, after defining negligent homicide in the second degree, charged that if the jury believed from the evidence beyond reasonable doubt that defendant struck deceased with a stick or a club with no apparent intention of killing him, and he did so, he was not acting in self-defense. Held not erroneous, as requiring him to prove beyond a reasonable doubt no apparent intention to kill, the gravamen of negligent homicide, which would not be in the case if there was an intention to kill.

Gay vs. State, Tex., 125 So. 896. 1. *Defense of Property.* In a prosecution for murder, wherein it appeared accused killed deceased when the accused was endeavoring to gain possession of a house on land which he had recently bought, and which, with the vendor's consent and the acquiescence of accused deceased was occupying by virtue of a trade with a tenant, who was to keep possession till the crops were gathered, it was not error to permit the vendor to testify, in order to show that deceased was in rightful possession, that he accepted him as the payor of the obligation owed him by the tenant. Whether or not deceased was in wrongful possession of a house on land of accused, accused could not go on the premises and eject him by force, as was sought to be done when he went to the place with a shotgun and killed deceased in the difficulty that ensued, as accused, who occupied a neighboring house on the same land, was not in such case acting under the statute authorizing the defense of property or habitation, but requiring him to be in possession, and Pen. Code, 1895, art. 680, subd. 3, provides, as to homicide committed in protecting property, that if possession be lost it is not lawful to regain it by such means as result in homicide. In a prosecution for murder, wherein it appeared accused killed deceased when endeavoring to gain possession of a house on land which he had recently bought, occupied by deceased as a subtenant, the evidence clearly raised the issue whether deceased was in possession with the acquiescence of accused, and under authority of his vendor. Held, that in such case testimony as to any lease, rent, or permission to occupy subsequent to the deed to accused was admissible, and there was no error in refusing to exclude it from the jury on motion before argument, based on the ground that subsequent to the deed there could be no sublease of the premises to deceased without consent of accused, because of Rev. St. 1895, art. 3250, prohibiting subleases without consent of the landlord.

United States vs. Heike, 175 Fed. 852. 1. *Plea in Bar.* Where defendant's attorneys in his presence claimed the opening and the affrmative of the issue on a special plea in bar, to which the government's attorney assented, the ordinary legal presumption of innocence did not apply as to such plea, on which the government joined issue, but the burden was on defendant to establish the facts pleaded by a fair balance of the evidence. 2. *Confession and Avoidance.* A plea of confession and avoidance removes the requirement of proof beyond a reasonable doubt, which is applicable only to criminal cases wherein accused pleads not guilty. 3. *Immunity.* Whether accused is entitled to immunity from prosecution because of prior evidence given by him before a grand jury depends, not on whether it is barely possible that some fact to which he testified before the grand jury would be used against him, but whether his former testimony or the documents which he produced would probably become a link in the chain of evidence to establish his guilt of the offense charged. That accused in a

prior investigation before the grand jury of the probable violation of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200)) by the American Sugar Refining Company testified that he was secretary thereof was insufficient to afford him immunity from prosecution individually for customs' frauds and conspiracy to defraud the government in connection with the business of such corporation. A prior proceeding before a federal grand jury involved an investigation of whether the American Sugar Refining Company had violated the Sherman anti-trust act; no claim being there made that the government had been defrauded of its customs' duties by such company. Accused, who was the corporation's secretary, was subpœnaed to produce the corporation's books showing the amount of sugar melted at its different refineries as bearing on the extent of the corporation's business, and it appeared that neither accused nor the attorney for the government at the time he testified conceived that defendant was guilty of customs' frauds, nor was he asked any questions conveying such inference. He produced, however, certain schedules made from the company's books showing the quantity of sugar actually melted at the company's works, but did not swear that they were correct, and it further appeared that defendant when he gave such testimony knew that the corporation's president had invited a full and free examination of the corporation's books by the government's officers. Held, that defendant's testimony before the grand jury and the production of such documentary evidence did not entitle him to immunity from subsequent prosecution for customs' frauds, it not appearing that at any time while defendant was being examined before the grand jury he urged his privilege not to testify on the ground that he might incriminate himself. In determining a question of alleged immunity from prosecution, by reason of previous testimony given by accused before a grand jury, it is important to consider the good or bad faith on the part of the prosecuting officers. 4. *Privilege.* To entitle a witness to the privilege of silence, the court must say from the circumstances of the case and the nature of the evidence which the witness is called on to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer, but, this being made to appear, great latitude should be allowed him.

People vs. Hill, N. Y., 91 N. E. 272. 1. *Confessions.* Where one accused of homicide made confessions on being advised to do so by his father, who is not shown to have been influenced by any desire to prove the son guilty, but thought the son could clear himself by stating what he knew about the crime, and there was no pretense that the son was induced to speak through threats or promises, but was advised that he need not talk unless he chose to, and that what he said might be used against him, his legal rights were not infringed in obtaining the confession, although he was not advised as to his rights to counsel. 2. *Other Offenses.* In a prosecution for murder, where revolvers, one of which was found placed in the hand of the decedent, another given by defendant a few days after the homicide to a woman, and a third discovered in a cellar near which defendant was seen shortly after the murder, had been taken from a house burglarized a few days before the murder, it was proper to allow evidence of defendant's connection with the burglary. C. H. H.