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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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BIGAMY.

Bryan v. State, Tex. Ct. Cr. App., 139 S. W. 981. *Proof of Prior Marriage.* There was proof that defendant had lived with Laura, that they had children, that they were recognized in the community as man and wife, and that defendant had stated, both before and after his second marriage that Laura was his wife. Thereafter he married Minnie in the lifetime of Laura. Held that while reputation alone is not sufficient proof of marriage to support a conviction of bigamy, the additional evidence of cohabitation and the admissions of the defendant made the proof sufficient.

CONSTITUTIONAL LAW.

State v. Meyers, Or., 117 Pac. 818. *Right to be Confronted by Witness.* Defendant had been tried and convicted and the conviction had been set aside. At the time of the second trial a witness who had testified before was out of the state, and his attendance could not be procured by the exercise of diligence. Over defendants's objection, the stenographic report of the testimony of this witness given at the former trial was read at the new trial. Held, that as the witness had formerly testified orally in the presence of the court and jury at the first trial, and the defendant at that time had full and fair opportunity to cross-examine him, he had met the witness face to face, and the report of the testimony so given could be read.

State v. Parker Distilling Co., Mo., 139 S. W. 453. *Interstate Commerce.* A statute required all persons manufacturing, rectifying, or selling intoxicating liquors in the state, except wines or spirits made from grapes or fruits grown in the state, to take out a license and pay specified fees. Held that the statute, by discriminating in favor of wines and spirits made from grapes or fruits grown in the state, and against the same kind of wines and spirits made from grapes or fruits grown elsewhere, imposed a burden in the form of license fees upon interstate commerce. The statute was not aided by the Wilson act, 26 Stat. 313, U. S. Comp. St. 1901, p. 3177, as that act was not intended to authorize the enactment of state laws materially interfering with interstate commerce, but to subject intoxicating liquors brought into a state, to the same law as applied to domestic liquors.

HOMICIDE.

CRIMINAL INTENT.

State v. Tillotson, Kan., 117 Pac. 1030. *Mistake of Law.* In a contest between the mother and foster mother of a child, the circuit court of Illinois awarded the custody to the mother, who took the child to Kansas. The foster mother brought suit in the Kansas court, which decided in favor of the mother on the ground that the Illinois judgment was conclusive. Four days later the

Illinois judgment was reversed. Defendant, acting for the foster mother, then employed an armed man who forcibly took the child from its mother. Held that the mother was still entitled to the custody as the Kansas judgment was in effect. No mistaken view that the reversal of the Illinois judgment gave the foster mother the right to the custody of the child would protect defendant. The trial court properly refused to instruct that defendant should not be convicted if the child was taken under a claim of right, resting upon reasonable grounds. The defendant was properly convicted of "maliciously, forcibly or fraudulently" carrying away a child under the age of twelve years.

CRIMINAL LAW.

State v. Lindsay, Ia., 132 N. W. 857. *Instructions—Alibi Evidence.* Accused, having gone from P., to C., on a Sunday afternoon, in an automobile, was charged with having committed rape on prosecutrix while taking her for a ride. All of the witnesses who testified as to the hour stated that it was between 5 and 6 o'clock. One witness for defense fixed the time of accused's return to P. at 5 minutes before 6, and prosecutrix, testified that when she saw M., who was one of the first persons she saw after defendant left her, it had been 15 minutes or less since defendant returned with her from the ride, and M. fixed that time at 5.30. P. was a nearby town in the same county as C., and there was no claim that the distance could not have been traversed by accused in half an hour. Held, that it was error, under such testimony, to submit the case on the theory that the defense was alibi. Reversed and remanded. Justices McClain and Deemer dissenting.

State v. Sandlin, No. Car., 72 S. E. 203. *Issues—Insanity—Submission.* Appeal from a conviction of murder. Assigned as error that the court permitted the defendant to amend his plea to allege insanity at the trial and then submitted to the jury the double issue as to the prisoner's insanity at the trial and as to his guilt. Held, that submission of the double issue was not error. Affirmed.

Dewberry v. State, Ga., 72 S. E., 282. *Questions of Fact.* Appeal from a conviction of violation of the prohibition on the ground that the State's principal witness was impeached and that the jury should not have believed him. Held, "the facts of this case afford this court an opportunity of repeating with emphasis that in no case will it interfere with the verdict of a jury, where that verdict it attacked solely on the ground that it is unsupported by credible evidence. The credibility of witnesses is wisely left by the law of this state exclusively to the determination of the jury; and this court has frequently held that it has neither the inclination nor the right to interfere with any verdict which is supported by some evidence, however slight that evidence, and however apparently unreliable the character of the witnesses who give that evidence." Affirmed.

State v. Brown, Ia., 132 N. W. 862. *Right of Accused to Confront Witnesses.* Appeal from a conviction of murder in the second degree. It was assigned as error that the court had permitted to be introduced in evidence the testimony given by a witness at a former trial who was then out of the state. Held, that the testimony of a witness who has since died may be given in evidence and that the reasoning which admits such testimony is quite as

forceful and applicable where the witness is living but out of the state and therefore beyond the reach of a subpoena. Affirmed. Justice Weaver dissenting.

State v. Dobbins, Ia., 132 N. W. 805. *Evidence—Other Offenses.* Facts stated under Larceny. Held, that where the state claimed that defendant and others had conspired to defraud persons generally by the same scheme, it was not error to permit a witness to testify that in August prior to the October when the transaction in question occurred he had been swindled by the same parties in the same manner, and that immediately prior thereto he saw defendant in association with the other alleged conspirators, the court having limited the evidence by an instruction that it could not be considered to prove a conspiracy, but, if the conspiracy had been otherwise established, it was admissable on the question of its scope and purpose. Judgment below affirmed.

McKay v. State, Neb. 132 N. W. 741. Facts stand under indictment and information.

Former Jeopardy. Trial for the commission of a felony under an information void upon its face, and, after trial begun, the information is amended and the trial proceeded with does not amount to placing the defendant in jeopardy a second time.

Private Counsel for State. Where other statute provides that private counsel to assist the state prosecutor may be procured only by the county attorney, under the direction of the district court and such assistant is otherwise procured it is error to overrule an objection made on behalf of the accused to his participation in the trial.

Demonstrative Evidence. Where the evidence clearly established that the deceased had been murdered it was improper to admit in evidence two shirts found in the house of decedent stained in blood.

HOMICIDE.

State v. Brumo, Ia., 132 N. W. 817. *Defenses—Non-fatal Wound.* Decedent lived nineteen days after receiving a mortal wound. The court below refused to permit evidence to be introduced tending to show that the wound inflicted by defendant was not necessarily fatal. Held, that such refusal was not error, not being a matter of defense. Judgment below affirmed.

State v. Brown, Ia., 132 N. W. 162. *Presumption of Malice.* Appeal from conviction of murder in second degree. An assignment of error was that the state had not shown malice aforethought. Held, on the killing of a human being, when done by the use of a dangerous weapon calculated to produce death, the presumption is, in the absence of any explanation to the contrary, that such taking of life was with malice aforethought. Affirmed, Justice Weaver dissenting.

Caughron v. State, Ark., 139 S. W. 315. *Cause of Death.* There was evidence that as the deceased, who was mounted on a mule, approached, defendant shot him; that the mule wheeled about and began to run, with deceased sitting erect in the saddle, and that defendant then shot him again. Both wounds were mortal. Held that though the first shot was fired in necessary self-defense, if the second shot was fired when it was not necessary

for defendant to further defend himself, and it contributed in any manner to the death of the deceased, defendant was guilty of felonious homicide.

INDICTMENT AND INFORMATION.

McKay v. State, Neb., 132 N. W. 741. *Date of Offense.* The accused had been convicted of murder in the first degree, after being forced to immediate trial over his objection on an amended indictment. Held, that an information is fatally defective if it charges the commission of the offense as subsequent to the date upon which the information is filed, or on an otherwise impossible date and that it is error after amending to cure such defect in date to require the accused over his objections, to immediately proceed to trial, without arraignment under and plea to the only information filed which stated an offense, without giving him statutory time to plead thereto, and before a jury impaneled under a void information. Reversed and remanded.

Sanders v. State, Ala., App. Ct., 56 So. 69. *Clerical Error.* An indictment charged that the defendant killed the deceased with malice "aforethought." Held, that the word as spelled sounded enough like "aforethought" to be covered by the doctrine of *idem sonans.* An ordinary man reading the indictment would probably not detect the defect, and if he did would know from the context what word was meant. Neither the court, counsel, defendant nor jury could have been misled. *Griffith v. State,* 90 Ala. 583, 8 So. 812, in which a conviction was reversed because the word was spelled "aforethou" was affirmed and distinguished on the ground that the sound represented by the letters "aforethou" is not like any word in the English language; *Parker v. State,* 114 Ala. 690, 22 So. 791, in which a conviction of burglary was reversed because the indictment charged that the defendant broke and entered the "dwell house" of another, was distinguished, as "dwell house" is not *idem sonans* with "dwelling house."

Flowers v. State, Ala., App. Ct., 56 So. 98. *Clerical Error.* An indictment for murder charged that the killing was with "malice of forethought." Held, "of forethought" has the same meaning as "aforethought" and the substitution has no tendency to mislead or leave in obscurity the meaning sought to be conveyed, even to a person of ordinary understanding and intelligence.

People v. Spencer, Cal. Ct. App., 117 Pac. 1039. *Variance.* An information charged that the defendant drew a draft on the "National Bank of Commerce, doing business in the city of Seattle." The legal name of the bank was "National Bank of Commerce of Seattle." Held that the variance was immaterial.

City of St. Louis v. Ringold, Mo., 139 S. W. 186. *Pleading Municipal Ordinances.* An information charged defendant with keeping a bawdyhouse "in violation of an ordinance of the said city entitled an 'ordinance in revision of the General Ordinances of the City of St. Louis' being general ordinance No. 22,902, Sec. —, Clause —. Approved March 19, 1907," and concluded "contrary to the ordinance in such case made and provided." At the trial section 1518, cl. 1 of the revised ordinances was received in evidence, over defendant's objection. Held that as the information must state all facts necessary to constitute the offense intended to be charged, and the courts do not take judicial notice of municipal ordinances, the ordinance must be pleaded.

The reference to the revised ordinances was no more than a reference to the whole of the book of ordinances of the city. As the specific ordinance relied on was not identified by title or number, nor were its contents stated, the information was fatally defective. Hence the conviction was reversed.

State v. Robinson, Mo., 139 S. W. 140. *"Against the Peace.* An indictment charging that the defendant was accessory before the fact to the crime of false registration concluded "against the peace and dignity of the state." But the included allegation that the principal registered falsely did not so conclude. Held that the indictment was sufficient. "In view of the fact that it is only by force of the Constitution that the antiquated phrase keeps its place at the end of the indictment or count, we can see no reason for enlarging the power of its uselessness, especially as we have not been shown any authority for it."

INSANE PERSONS.

Northfoss v. Welch, Minn., 133 N. W. 82. *Punishment—Release—Habeas Corpus.* Appeal from an order remanding petitioner to hospital for insane. Petitioner was tried in 1904 for assault and acquitted by the jury on the ground of insanity. Under the statute then in force he was committed to a state hospital for insane for safe-keeping and treatment until discharged. A statute passed in 1907 provided that no such person should be liberated except on the order of the committing court and until the superintendent of the hospital where he is confined shall certify, in writing, that in his opinion such person is wholly recovered, and that no person shall be endangered by his discharge. The superintendent in this case would certify that petitioner was cured but would not certify that no person would be endangered in the future by his release. Held, that the statute of 1907 does not apply to commitments prior to its passage and that in cases where the superintendent refuses to discharge such persons, habeas corpus is a proper remedy. Reversed, with directions to discharge the petitioner.

JURY.

State v. Harmon, 84 Kas. 137; 113 Pac. 418. *Prior Service in Similar and Related Cause Harmless Error.* The defendant was convicted of statutory rape and the court while holding that the jury was improperly empanelled by reason of the fact that a number of the jurors had just sat upon a companion case involving identically the same evidence, both offenses being alleged to have occurred at the same time and place and differing only from the companion case as to the defendant and the victim. Affirmed on the ground that the error was injurious in theory only and not in fact.

LARCENY.

State v. Dobbins, Ia., 132 N. W. 805. *Elements of Offense. Scheme to Defraud. Distinction from False Pretenses.* Appeal from conviction on a charge of larceny. The complainant was induced to pay over his money to a stakeholder in a fraudulent horse-racing scheme, on the representation that he was not to part with the title thereof, but only to deposit it with a stakeholder to induce

more betting by others, when in fact defendant and his confederates intended to convert the money to their own use. Held, "that a felonious taking is necessary to constitute larceny and that, generally speaking, a taking which is accomplished with the consent or acquiescence of the owner of the property is not felonious, will be readily conceded, but where such consent is obtained by trick or fraud, with promise to return the property after it has served some temporary use or purpose, but with the secret intention on the part of the receiver to convert it, then, as has already been said, the fraud supplies the place of trespass in the taking and the offense committed is larceny. If this does not constitute larceny, it will be very difficult to frame any definition of that crime through which a cunning thief may not find an avenue of escape with his booty." Affirmed.

PRESENCE OF DEFENDANT AFTER TRIAL.

Fleming v. State, Fla., 56 So. 298. *At Hearing on Motions in Arrest of Judgment and for a New Trial.* One of two possible interpretations of the record was that the trial court refused to pass upon motions in arrest of judgment and for a new trial because the defendant was not in court, though he was represented by counsel. Held, the court may insist upon the personal presence of the defendant, when practical. As there was no evidence that he could not have been brought into court, and it was plainly evident that the motion in arrest was without merit, the conviction was affirmed.

SELF-DEFENSE.

Taylor v. State, Ark., 139 S. W. 285. *Duty to Retreat.* The defendant testified that in a controversy Cain called the defendant's wife a liar; defendant then struck him with his open hand; Cain began to draw a pistol from under his vest; defendant shot him once, hesitated, and as Cain continued to pull at his pistol defendant fired three more shots, as fast as he could, and killed Cain. Held that by his own testimony he was guilty of manslaughter. He brought on the combat by striking Cain in the face, and could not thereafter kill in self-defense until he had in good faith withdrawn from the combat as far as he could, and done all in his power to avoid the danger and avert the necessity of killing. He made no attempt to show Cain that he intended to withdraw, though a number of persons were present who might have interfered to stop the combat if he had attempted to avoid it.

INDICTMENT AND INFORMATION.

SEDUCTION.

State v. Cotter, Ia., 132 N. W. 760. *Corroboration Instructions.* Appeal from a verdict of guilty on a charge of seduction. Held, that mere proof of acquaintanceship between the principals, or opportunity to commit the crime, or the fact that the prosecuting witness gave birth to an illegitimate child, does not constitute such corroboration of the prosecuting witness as is required to justify a finding of guilt, and that where the fact of the birth of an illegitimate child is in evidence, the defendant is entitled to have the limits of its probative value stated in an appropriate instruction. Reversed and remanded.