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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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APPEAL AND ERROR.

Commonwealth v. Comporto, Pa., 81 Atl. 906. *Invited Error.* Where, at the request of defendant, the court strikes out a portion of his confession relating to his criminal record, he cannot afterwards demand that the entire confession be stricken out on the ground that it must go in as a whole, since he cannot complain on appeal of the action of the court at his own request in excluding a portion of the confession.

BIGAMY.

Bennett v. State, Miss., 56 So. 777. *Proof of Divorce.* In a prosecution for bigamy, the trial court charged that the state had made out a *prima facie* case by proof of a legal marriage, a subsequent marriage to another woman, and that the first wife was not dead, and that the burden was upon the defendant to prove, if he could, that the first marriage had been dissolved by divorce. Held, that the presumption which exists in civil cases, that the first marriage had been dissolved by divorce before the second was contracted, does not apply in a criminal prosecution for bigamy. The charge of the court was therefore correct. The conviction was affirmed.

BURGLARY.

Alinis v. State, Tex. Cr. App., 140 S. W. 227. *Private Residence.* Defendant was convicted of burglary under a statute which applied to breaking and entering a "house." He contends that the evidence showed a violation of a different statute, relating to "private residences." He broke into the middle room of a store-house which was divided into three rooms. A restaurant was carried on in the front room, the cooking was done in the middle room, the prosecutor and his wife slept in the rear room. Held, that the cook room was not part of a private residence. The conviction was affirmed.

CHANGE OF VENUE.

State v. Clifford, Wash., 118 Pac. 40. *Construction of Statute.* A statute provided for a change of venue for prejudice of the judge, on motion supported by the affidavit of the party or of his attorney. The statute did not state when the application should be made. A defendant, judging from the rulings made on certain preliminary matters that the judge was prejudiced against him, filed a motion and affidavit for a change of venue, which was denied. He then sought to enforce a change by mandamus. The court said that under the statute the right to a change of venue was absolute if the conditions imposed were complied with. But if the statute were applied literally the application for a change might be made at any time before the entry of judgment. The legislature could not have intended to so handicap the courts in the enforcement of the law, hence there was need of construction. It could not have been intended that a party could submit to the jurisdiction of the

court until from some ruling he became fearful that the judge was not favorable to his view of the case, and then ask for the change. Hence it was held that the application was properly denied, as it was not made until orders had been made in the case, though those orders were not on the merits.

CIRCUMSTANTIAL EVIDENCE.

Ex Parte Hages, Okla. Cr. App., 118 Pac. 609. *Cable Theory.* The petitioners were in custody awaiting trial, and applied for a writ of habeas corpus, on the ground that there was no evidence which showed that they were guilty of the charge upon which they were held. The evidence against them was wholly circumstantial. No one circumstance testified to was sufficient to prove their guilt, but each of them, standing alone, might be entirely consistent with innocence, yet when all were taken and combined together, they produced an irresistible conclusion that the defendants were guilty. Held, that circumstantial evidence is not like a chain, but like a cable. "No chain is stronger than its weakest link, and will never pull or bind more than its weakest link will stand. With its link broken, the power of the chain is gone; but it is altogether different with a cable. Its strength does not depend upon one strand, but is made up of a union and combination of the strength of all its strands." The petitioners were remanded into custody.

CONSTITUTIONAL LAW.

People v. Robinson, 132 N. Y. Supp. 674. *Equal Protection of Laws.* Discrimination between races.

In proceedings before a magistrate for disorderly conduct, consisting in sending to a woman letters declaring love and proposing and insisting upon marriage, the reception over defendant's objection of evidence that he is of the negro race, and the taking of that fact into consideration by the magistrate, do not violate any constitutional right of the defendant, and do not deprive him of the equal protection of the laws, nor descriminate against him on account of race or color.

DISORDERLY CONDUCT.

People v. Robinson, 132 N. Y. Supp. 674. *Elements of the Offense.* Where a man, upon slight acquaintance, sends to a woman letters declaring love and proposing and insisting upon marriage, notwithstanding requests through a third person to desist, and his failure to receive any replies, he may be found guilty of a violation of Consolidation Act, Sec. 1459, authorizing any police justice to have brought before him to answer the charge of disorderly conduct any person guilty of such disorderly conduct as in the opinion of the magistrate tends to a breach of the peace.

EMBEZZLEMENT.

State v. Ensley, Ind., 97 N. E. 113. *Necessity of a Demand Under Statute Relating to Public Officers.* Burns' Ann. Stat. 1908, Sec. 2284, requiring every county officer receiving money in his official capacity to pay over, at the end of his term, to his successor, all moneys in his hands, and declaring that any county officer failing to so pay over such moneys when called on to do so shall be guilty of embezzlement, when construed in the light of the history of the legislation on the subject as originally enacted in 1883, and the judicial construc-

tions placed on the original act, does not require a demand by the successor to make the predecessor guilty of embezzlement for failure to pay over money in his hands, so that an indictment charging a county treasurer with embezzlement need not allege that a demand for the delivery of the money by the accused to the successor in office was made.

ERROR.

Coates v. State, Ala. App., 56 So. 6. *Wrong Jury List.* The court ordered the sheriff to summon the jurors specially drawn and to serve upon the defendant a list of all the jurors summoned for the week in which the trial was set. By a mistake, the sheriff served on the defendant the list of jurors for the week after the trial. On discovering the mistake, he then served the proper list. The first list showed upon its face that it was not the list from which the jurors to try the defendant would be selected. Held, the service of the wrong list was no ground for quashing the venire subsequently served on the defendant.

Dauson v. State, Fla., 56 So. 677. *Proof of Prejudice.* The trial judge had given an instruction upon the right of police officers to make arrests without warrant, although there was no evidence that an arrest had been made. The Appellate Court was satisfied, from the entire record, that the defendant was not and could not have been injured by this charge. Held, that upon a writ of error, the points at issue are presumed to have been fairly and impartially tried and determined in accordance with the law, and the final judgment is presumed to be correct. This presumption must be met in the Appellate Court and overcome by the plaintiff in error. "It is incumbent upon him to show that the different rulings of the trial court of which he complains, or some of them, are so infected with errors as to call for a complete reversal of the judgment. The mere fact that a technical error was committed in the trial court in some of its rulings, may not be sufficient. The errors must have been harmful and prejudicial to the rights of the plaintiff in error." As no reversable error was shown, the judgment was affirmed.

Coleman v. State, Okla. Cr. App., 118 Pac. 594. *Proof of Prejudice.* On a trial for perjury, the court submitted the materiality of the false testimony to the jury. The Appellate Court held that the testimony so submitted, was material, but said that if it was error to leave it to the jury, the defendant could not have been harmed thereby, as it gave him an additional opportunity of escaping punishment, if the jury had erroneously decided that the evidence was not material. "The doctrine of this court is that no man can be heard to complain of the commission of an error upon his trial, unless he can reasonably show by the record that he suffered injury on account of such error. To secure the reversal of a conviction in this court, the burden is upon the appellant to show both error and injury therefrom. In other words, before error committed on trial, will be ground for reversal, it must reasonably appear from the inspection of the entire record that such error deprived the appellant of some substantial right and thereby worked to his injury." The conviction was affirmed.

Still v. State, Tenn., 140 S. W., 298. *Admission of Incompetent Evidence Is Prejudicial.* On a trial for murder, a dying declaration was received. It accused defendant of the crime, stated the circumstances, and disclosed jealousy as a motive. Held, that while the statements identifying the perpetrator and

narrating the circumstances of the crime were properly received, the statement showing jealousy was improperly received as it related to a past transaction, not part of the *res gestae,* and involved a threat made by defendant. As there was no other evidence of motive or of threats, this evidence was prejudicial. The court cannot inquire whether if this statement be disregarded the lawful evidence sustains the verdict, that is for the jury. The constitution guarantees a trial by jury. This means a trial upon competent legal testimony. "It is only where the court can see that the incompetent evidence admitted did not prejudice the defendant in the trial court that this court will consider and determine the case upon the facts." The conviction was reversed.

ERROR AFTER VERDICT.

People v. Scheuren, 132 N. Y. Supp. 1025. *Cure by Re-sentence.* Defendant was indicted for "feloniously and extorsively" attempting "feloniously and extorsively to obtain" money, and was convicted, and sentenced to state's prison for not less than three years nor more than five years and six months. The threat was verbal, and defendant was guilty of a misdemeanor only. Held, that, as the error in sentencing defendant occurred after the verdict, it does not affect the conviction and the proper procedure is to re-sentence the defendant.

EVIDENCE.

State v. Stapp, Wash., 118 Pac. 337. *Testimony of Accomplices.* A conviction may be sustained although the defendant's connection with the crime is shown only by the uncorroborated testimony of accomplices, and though there are some inconsistent statements in their testimony.

Martin v. State, Ala. App., 56 So. 3. *Illegal Search.* The defendant was sitting on a porch of a house owned by a mining company. The manager of the mines and a deputy sheriff came up. The manager drew a pistol and ordered the defendant to throw up his hands and when his hands went up, the manager ordered the officer to search the defendant's person and valise. They found twenty-eight half pints of whisky in his suit case. On trial for violation of the prohibition law, the manager and deputy sheriff were permitted to testify as to finding the whisky in the suit case. Held, the evidence was admissible, even though the search by the parties arresting him may have been illegal.

People v. Jennings, 96 N. E. 1077. *Evidence of Finger Marks—Admissibility.* Where, on the issue of identity of accused as the person committing a crime, there was evidence of the imprint of finger marks on the fresh paint on a railing of the house in which the offense charged was committed, photographs of the imprint and of finger prints of accused were admissible in evidence for comparison, together with the testimony of experts that the two sets of prints were made by the fingers of the same person, the accuracy of the photograph not being questioned.

The classification of finger-print impressions, and their method of identification, is a subject requiring special study, and persons who have made a special study of the subject are competent to testify as experts and to give their opinion that two sets of finger prints were made by the same person.

EXPERT WITNESS.

Odom v. State, Ala., 56 So. 913. *Non-Medical Witness.* A person who has handled a great many insane persons and has observed and studied them

while they were in his charge, being transferred from one place to another, and has "lately read medical works on the subject and studied in that way," is not qualified to testify as an expert on insanity. "As a general rule, only medical men, that is, persons licensed by law to practice the profession of medicine, can testify as experts on the question of insanity. . . . An exception may perhaps be recognized where the witness has made a protracted and systematic study of mental science and disease under approved conditions."

EXTORTION.

In Re Shepard, Cal., 118 Pac. 513. *By Securing Loans.* Defendant was a member of a city council. He solicited loans from parties having petitions for the granting of franchises or privileges by the council, or having large claims against the city, while their petitions or claims were pending or accruing, and moneys were advanced to him on his unsecured notes unwillingly by these parties to prevent unfavorable official action by him. It was not charged that the defendant voted in favor of any of these claims or petitions, when, to protect the rights and interests of the public, he should have opposed them. Held, that it is extortion for a public official to demand money as a condition of doing his duty, and more especially if it is demanded as a condition to allowing a just claim against a public corporation.

EXTRADITION.

Ex Parte Wilson, Tex. Cr. App., 140 S. W. 98. *Kidnaping.* The relator was unlawfully seized in Mexico and forcibly brought across the international bridge at El Paso. On the American end of the bridge he was arrested by El Paso officers, who were guarding the bridge during the Mexican revolution, as a fugitive from justice from Nevada. The governor of Nevada issued requisition papers and the governor of Texas issued a warrant directing that the relator be delivered to the agent of Nevada. Relator then brought habeas corpus. Held, that as the El Paso officers were not shown to have had anything to do with the case till after relator had been brought across the boundary, the arrest by them and subsequent detention were lawful. Query whether the result would have been the same had the officers participated in the illegal seizure in Mexico. The relator was remanded into custody.

FALSE PRETENSES.

Horton v. State, Ohio, 96 N. E. 797. *Defenses.* It is no defense to an indictment for obtaining money by false pretenses that the transaction in which the money was so obtained was unlawful.

FORGERY.

People v. Lewinger, Ill., 96 N. E. 837. *Materiality of Alteration of a Check.* Under the Negotiable Instruments Act, Sec. 17, providing that where the sum payable in a check, etc., is expressed both in words and figures, and there is a discrepancy between the two, the sum expressed by the words is that payable, if the words are unambiguous, where a check recited that the sum payable was "$2,500" and the words in the body of the check were "twenty-five hundred and no/100 dollars," the alteration of the figures so as to read "$2,500/00" did not change the legal effect of the instrument, so as to constitute forgery.

INDICTMENT AND INFORMATION.

Davis v. State, Tex. Cr. App., 140 S. W. 349. *Ownership.* An information for larceny alleged that the property of J. S. was stolen. The proof was that it belonged to J. S. and E. S. as partners. A statute provided that when property is owned in common or jointly by two or more persons, the ownership may be alleged to be in all or either of them. Held, there was no variance.

Commonwealth v. Roberts, Ky. App., 140 S. W. 312. *Immaterial Repugnancy.* One paragraph of an indictment for bribery charged that the offense was committed on the "27th day of February, 1911," another paragraph alleged that it was committed "at the November election, 1910." As it was manifest from the indictment that the offense intended to be charged was committed at the November election, the insertion of the erroneous February date did not and could not mislead the defendant. Hence the judgment overruling a demurrer to the indictment was affirmed.

Chapman v. State, Tex. Cr. App., 140 S. W. 441. *Sufficiency.* A statute made it criminal to "bet or wager any money, at any game of cards, except in a private residence occupied by a family." Defendant was convicted on an indictment charging that he did "unlawfully bet and wager money at a game played with cards." Held, that the indictment was fatally defective because it did not negative the exception. The conviction was reversed and the case dismissed.

State v. Carruth, Vt., 81 Atl. 922. *Negativing Exceptions.* The mere fact that an exception is contained in a section of a criminal statute subsequent to that defining the offense, or in a later statute, is not conclusive that it need not be negatived in an indictment, the true test being whether the exception is so incorporated with the enactment as to be a material part of the definition or description of the offense.

INSANITY.

Adair v. State, Okla. App., 118 Pac. 416. *Burden of Proof.* The defendant is presumed to be sane, and this presumption of law stands until it is overcome by the evidence in the case. If any evidence is introduced, tending to prove that the defendant was insane at the time of the commission of the act charged, then the burden of proving the sanity of the defendant devolves upon the prosecution, and the state is bound to establish the sanity of the defendant, like all other elements of the crime, beyond a reasonable doubt.

INSTRUCTIONS.

Irving v. State, Miss., 56 So. 377. *Circumstantial Evidence.* An instruction that circumstantial evidence "may arise so high in the scale of belief as to generate full and complete conviction beyond a reasonable doubt, and when it does arise so high in the minds of the jury as to convince them of the defendant's guilt beyond a reasonable doubt and to a moral certainty, then they are authorized to act upon it and convict the defendant," is fatally defective, because it omits the necessary qualification, that circumstantial evidence, in order to prove guilt beyond a reasonable doubt, must exclude every reasonable hypothesis than that of guilt.

PAROLE.

Ex Parte McClure, Okla. Cr. App., 118 Pac. 591. *Illegal Parole by Court.* The defendant was convicted of a misdemeanor, sentenced to the county jail

for a period of six months and committed. After he had been imprisoned a month, he was discharged by the court on giving an appeal bond, and the time for perfecting his appeal was extended. It was agreed with the judge that the appeal would not be perfected, but that the prisoner would be discharged on probation during his good behavior. He was required to and did report to the judge until notified that he need not report further. Later he was rearrested and committed to the county jail to serve out the sentence. The constitution vested the power to grant a parole in the governor. The court did not have such power. Held, that as the judgment had not been stayed as provided by law, and the defendant had not served his sentence and was at liberty, he might be arrested as an escape and ordered into custody upon the unexecuted judgment.

PERJURY.

State v. Parrish, La., 56 So. 503. *Oath Not Required by Law.* In an affidavit made for the purpose of obtaining a saloon license, the defendant falsely swore that he had never been charged with violating any of the laws of the State or municipality. The statute under which the license was granted did not require that the applicant should make oath that he had not violated any such law. Held, that the oath must be administered in accordance with the law in order to make one who has sworn falsely guilty of perjury, and that it must clearly appear that the matter sworn to was required by law. The ruling of lower court quashing the indictment was affirmed.

RAPE.

People v. Lewis, Ill., 96 N. E. 1005. *Harmless Error.* In a prosecution for rape, where the evidence tended to show that the act had been consummated, and not that a mere assault had been made, the giving of an instruction that an assault with an intent to commit any felony shall subject the offender to imprisonment not less than one nor more than 14 years, while erroneous, was not prejudicial to the accused.

RIGHT TO SPEEDY TRIAL.

State v. Lewis, Kan., 118 Pac. 59. *Delay Caused by the Defendant.* A statute provided that a person accused of a criminal offense should be discharged if he was not brought to trial before the end of the third term of the court after the information was filed, unless the delay happened on his application or was occasioned by want of time to try the case. The defendant was not tried at the first term after the information was filed. At the second term the judge was sick and a pro tempore judge was elected and qualified. The defendant objected to the jurisdiction of this judge and the case was continued. At the third term, defendant objected to the jurisdiction of the pro tempore judge and the case was again continued. At the fourth term, the defendant moved for a discharge. Held, that as the delay was due to the defendant's objection to the pro tempore judge, "the delay happened on his application," within the meaning of the statute, hence the defendant was not entitled to be discharged.

SELF-DEFENSE.

Lett v. State, Ala. App., 56 So. 5. *Arming With a Deadly Weapon.* Defendant and deceased were on unfriendly terms. The deceased, accompanied by two

men, and armed with a Winchester rifle and a pistol, went to the defendant's gate and called him to come out, saying he wanted to see him a minute. The defendant picked up his gun, walked towards the deceased, and shot him. It was disputed whether the shooting was in self-defense. Held, that if the defendant armed himself, not for the purpose of aggression, but for the purpose of defense, he did not thereby lose the right to invoke the doctrine of self-defense.

SELF INCRIMINATION.

People v. Reichman, 132 N. Y. Supp. 556. Where a person indicted for crime is subpoenaed before the grand jury and questioned as to a transaction connected with the charge on which the indictment against him was based, and he refuses to answer on the ground that his answer might tend to incriminate him, and he is then taken before a justice of the Supreme Court, who directs him to answer the questions, which he then did, his conviction is of such doubtful validity that a certificate of reasonable doubt will be granted; his rights having been preserved by proper motions, objections and exceptions.