Journal of Criminal Law and Criminology

Volume 3 | Issue 2 Article 8

1912

Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

PROFESSORS CHESTER G. VERNIER AND ELMER A. WILCOX.

ASSAULT WITH INTENT TO KILL.

People v. Connors et al., Ill. 97 N. E. 643. *Specific Intent.* It is assault with intent to murder for one to point a loaded revolver at another, and command him to take off his overalls, and go out and join accused's labor union, where there is an intent to kill if the command is not complied with, though the intent is in the alternative, and is not executed because of compliance with the condition.

CONSPIRACY.

Harris v. Commonwealth, Va. App., 73 S. E. 561. *Monopoly of Fire Insurance Business.* Defendants were charged with criminal conspiracy in creating and maintaining a monopoly in the fire insurance business in the city of Newport News. There was no statute prohibiting such a combination. Held that the charge must show "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." The common law did not prohibit the creation of a monopoly by individuals. The laws enacted against forestalling, regrating and engrossing required a wrongful motive to injure others, as by an increase of prices, and applied to provisions, or the "necessaries of life," or "articles of prime necessity," or of "merchandise," or "manufacture in the market." Insurance is in none of these classes. At most the combination charged is an agreement in restraint of trade, but such agreements, though invalid, are not criminal. Hence a combination to accomplish a criminal or unlawful purpose is not charged. The charge does not show any illegal means, or that the acts were malicious, as intended for the injury of others rather than the benefit of the parties to the combination. Hence no common law crime is charged. If such combinations are contrary to public policy, it is for the legislature to prohibit them.

CONSTITUTIONAL LAW.

People v. Persce, (N. Y.) 97 N. E. 877. *Right to Bear Arms.* The Legislature had power to enact Penal Law (Consol. Laws 1900, c. 40) al 1897, making one who carries or possesses any weapon known as a slungshot, etc., guilty of a felony, without requiring proof of an intent to unlawfully use it, construing the statute as prohibiting the carrying of a slungshot, etc., within the immediate control and use for unlawful purposes; the Bill of Rights not invalidating such a statute.

The provision of the federal Constitution preserving the right of the people to keep and bear arms was not intended to affect action by the states.

CONTEMPT.

Re Merchants' Stock & Grain Company et al., Petitioners. 32 Supreme Court Reporter, 339. A judgment finding defendants in a pending suit in equity guilty of contempt of its authority in violating an interlocutory injunction previously granted in a suit for the benefit of the complainant, and ordering the payment of specified fines, three-fourths of which, when paid, should go to the complainant "as compensation in part for the expenses incurred in prosecuting these contempt proceedings," is punitive instead of remedial, and reviewable on writ of error without awaiting a final decree in the suit in equity.

CRIMINAL INTENT.

State v. White, Mo., 140 S. W. 895. *Mistake or Law.* Defendant was convicted of felony, thereby becoming ineligible to vote. After his discharge from the penitentiary he registered as a voter. His defense was that he disclosed the facts to the registration officers, was told by them that his discharge papers entitled him to vote, and believed that his citizenship had been restored. The trial court charged that this belief would not be a defense. Held that the charge was erroneous. "While it is true that everybody is supposed to know the law, it is nevertheless a fact that the most trained judicial minds often have great difficulty in determining what the law is on a given subject. * * * if it be true that defendant did exhibit his discharge papers from the penitentiary to the registration officers of his voting precinct, and said officers informed him that said discharge entitled him to vote, it would be a harsh rule to say that he can be convicted of felony, because these election officers were mistaken and gave him improper advice."

EVIDENCE.

Diaz v. U. S., 32 Sup. Ct. Repr., 250. *Hearsay; Admitted Without Objection.* Hearsay evidence admitted without objection is to be considered and given its natural probative effect as if it were in law admissible.

FORMER JEOPARDY.

Gabriel Diaz v. United States, 32 Supreme C. Rep. 250. The prosecution for homicide of a person previously convicted of an assault and battery from which the death afterwards ensued does not place the accused twice in jeopardy for the same offense, contrary to the act of July 1, 1902 (32 Stat. at L. 691, Chap. 1369), a 5, enacting a Bill of Rights for the Philippine Islands, especially where the jurisdiction of the justice of the peace before whom the assault and battery charge was tried did not extend to homicide cases. (Lamar, J., dissenting.)

People v. Bevins, 134 N. Y. Suppl. 212. *Different Offenses in Same Transaction.* The Legislature can carve out of a single transaction several crimes, so that the individual may in the same transaction commit several distinct crimes, in which case an acquittal or conviction of one will not be a bar to an indictment for another, under Code Cr. Proc. Sec. 9, providing that no person can be subject to a second prosecution for a crime for which he has once been prosecuted and duly convicted or acquitted.

FORMER JEOPARDY.

Commonwealth v. Endrukat, Pa., 80 Atl. 1089. Where the insanity of a prisoner at the time of the trial has been set up in defense in a prosecution for murder, and the jury, being instructed to pass on both the question of guilt and of insanity, has returned as one verdict, against the objection of the prisoner, that he is guilty of murder in the first degree, and is insane at the time of trial, and the jury has been discharged, and thereafter the court of its own motion sets aside the verdict and grants a new trial, the prisoner may again be put on trial on the same indictment, the finding that he was guilty of murder being without authority and a mere nullity, which should not have been accepted by the court, so that there was no trial at all of the charge against him, and no jeopardy.

Clarence v. State, 132 N. W. 395. *Waived by Appeal.* Defendant was charged with murder in the first degree and convicted of murder in the second degree. On appeal the conviction was set aside. He then asked for an order that he be put on trial for manslaughter only, as he had been acquitted of murder in the first degree, the Supreme Court had reversed the conviction of murder in the second degree, and no new witnesses had been indorsed on the information, so the same state of facts would be presented at the new trial. Held, that the reversal of the judgment and remanding the case for another trial placed the defendant in the same position in which he would have been had there been no former trial. On proper evidence he could have been convicted of murder in either the first or second degree. Hence the denial of his motion was not error.

GRAND JURY.

U. S. v. Lewis, 192 Fed. 633. *Regularity of Organization.* Organization of a federal grand jury was not vitiated because the jurors were sworn and impaneled the day before the date fixed by the court for their appearance; it not being claimed that any of the jurors were incompetent or disqualified, or that accused was prejudiced.

HABEAS CORPUS.

State v. Riley, Minn., 133 N. W. 86. *Not a Substitute for an Appeal.* Relator was convicted on a charge of using "vile and obscene language in the presence of women." The statute made it a misdemeanor to "use in reference to and in the presence of another * * * abusive or obscene language, * * *naturally tending to provoke an assault or any breach of the peace." He brought habeas corpus on the ground that the complaint did not charge any public offense and therefore the court had no jurisdiction and the judgment was void. Held that while the judgment must have been reversed on an appeal, as the complaint did not state the name of the person in reference to whom and in whose presence the language was used, or the language itself and its natural tendency, the relator must be remanded into custody. The court had jurisdiction of the person and of the offense attempted to be charged, and the complaint, though defective, was sufficient to invoke its jurisdiction. But habeas corpus reaches only jurisdictional defects, and cannot be used as a substitute for an appeal or writ of error.

INDETERMINATE SENTENCE ILLEGALLY IMPOSED.

Ex Parte Forscutt, Mich., 133 N. W. 315. *Treated as Fixed Sentence for Minimum Term.* A statute provided a maximum of fifteen years' imprisonment for burglary. In 1903 an indeterminate sentence act was passed. In 1905 this was repealed, with no exception as to offenses already committed, and a substitute enacted, applying to crimes "committed after this act takes effect." After the act of 1905 took effect petitioner was convicted of a burglary committed in 1904, and sentenced to not less than seven years and six months nor more than fifteen years' imprisonment. At the end of the minimum term, as shortened by the allowance for good behavoir, he petitioned for a writ of habeas corpus. Held that an indeterminate sentence could not be imposed under the act of 1903, as that act was not in force when he was sentenced, nor under the act of 1905 as that act did not apply to prior crimes. But the statute providing for the punishment of burglary was still in force and the sentence should be treated as a fixed sentence for the minimum term imposed. That term having expired the prisoner should be discharged.

INDICTMENT AND INFORMATION.

Arseneaux v. State, Tex. Cr. App., 140 S. W. 776. *Sufficiency.* Defendant was convicted of larceny. The indictment charged that he stole property of Hutchinson & Mitchell, a firm composed of Moses Hutchinson and H. L. Mitchell, out of the possession of said Hutchinson & Mitchell, "then and there without the consent of said Hutchinson & Mitchell." Held that it was not sufficient to allege the want of consent jointly, but the non-consent of each owner should be alleged. Reversed and remanded.

State v. Duvenick, Mo., 140 S. W. 897. *Clerical* Error. An indictment concluded "agains the peace." Held that the defect was unworthy of serious consideration or discussion. Though the clause was required by the state constitution, it added nothing to the substance of the information. The omission of the letter "t" was obviously a clerical error, and "agains" is *idem sonas* with "against."

Hogue v. United States, 192 Fed. 918. *Sufficiency; Clerical Mistake.* An indictment charging perjury under oath before "a competent tribunal, to-wit, before the United States District Clerk for the Northern District of Texas," is not vitiated by the obvious clerical mistake in using the word "clerk" instead of "court."

State v. Silverman, N. H., 82 Atl. 536. *Constitutional Validity.* Pub. St. 1901, c. 273, aa 16, 17, relates to the embezzlement of certain specified things and "any other effects or property whatever" of the principal; and section 18 declares that an indictment for an offense mentioned in the two preceding sections shall be sufficient, if it alleges that the offender embezzled or converted to his own use property of a certain amount, without specifying any particulars of the embezzlement, and on the trial evidence that any property specified in section 16 or 17 to any amount had been embezzled would sustain the indictment Held, that section 18, in so far as it authorized a conviction on an indictment failing to specifically describe the property embezzled was violative of Bills of Rights, art. 15, providing that no subject shall be held to answer for any crime, unless the same is fully, plainly, substantially, and formally described

to him; and hence an indictment, charging embezzlement of "property" of R. & Son to the amount of $695, was fatally defective.

Robinson v. State, Ind., 97 N. E. 929. *Sufficiency.* An indictment can be successfully attacked for the first time on appeal only when it fails to state facts sufficient to constitute a public offense; and an objection made for the first time on appeal will not reach mere uncertainty or a defective statement of the facts or a failure to observe technical formalities which could have been corrected in the trial court.

Under Burns' Ann. St. 1908, sec. 2221, requiring the court on appeal to disregard defects not prejudicing the substantial rights of accused, and which could have been corrected before trial, an objection that the affidavit, on which accused was tried, filed in open court by the prosecuting attorney, was not indorsed as required by section 1990 will not be considered, when raised for the first time on appeal. The court saying, p. 930, "It would be a reproach to the law to require a judgment to be held for naught and the state put to the expense of another trial for a defect which did not prejudice the substantial rights of appellant, and which he could have had corrected before trial, if it in fact existed."

Hendricks v. U. S., 32 Supreme Court Reporter, 313. *Frivolousness of Federal Question.* The contention that an indictment charging subordination of perjury before a federal grand jury did not sufficiently set forth "the nature and cause of the accusation" within the meaning of the U. S. Const., 6th Amend., because it did not "set forth in some definite way the matter or thing which was under investigation at the particular time, so that the defendant may know as to what particular controversy the alleged false testimony is claimed to be material, and how to meet the allegation of materiality," is too frivolous to serve as the basis of a writ of error from the Federal Supreme Court to a Circuit Court, to review a conviction under such indictment, where the description therein of the proceeding in which the perjury was committed is as follows: "* * * Sitting as a grand jury * * * and, among other matters, inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same and the unlawful fencing thereof, which had then lately before been committed within the said district."

INTOXICATING LIQUORS.

Toles v. State, Ga. App., 73 S. E. 597. *Keeping in Place of Business.* Defendant was convicted of the statutory offense of unlawfully keeping intoxicating liquors on hand at his place of business. He was employed to manage and run a poolroom, and there was evidence justifying the inference that he had an interest in the business. Sixteen barrels of whiskey and several empty whiskey barrels were found in the room. All had been shipped, as indicated by their marks, to persons other than the defendant. Some at least had been put into the room in defendant's absence, after the place had been closed for the night, and the officers entered before it was opened in the morning. Held that it is a violation of the law to keep intoxicating liquors on hand at one's place of business when it is closed as well as when it is open to the public. The place where the performance of the duties of a employee is re-

quired is "his place of business" within the meaning of the prohibition law. As all engaged in a misdemeanor are principals, one who, though not himself an owner, keeps intoxicating liquors on hand at his public place of business, as an employee or agent of the owner, violates the statute. The conviction was affirmed.

State v. Donovan, S. Dak., 132 N. W. 698. *Sunday Closing.* With permission from the police, defendant, a saloon keeper, entered his saloon on Sunday to put coal on the fire and pump air on the beer. He was there about three minutes and did not sell liquor to anyone or take any himself. The court charged that "the statutes nowhere make any exceptions or make any provisions whereby anyone can go into a saloon on Sunday for any purpose whatever." Held, that the police had no power to suspend the operation of the statute or to determine its proper interpretation, hence the fact that defendant had acted in good faith on their suggestion would be no defense, but could properly be urged in mitigation of punishment. As an abstract statement of law, the charge was erroneous, for, though the statute contained no express exceptions, it would not apply to entering the saloon in case of fire, the breaking of a waterpipe, or other unusual circumstance, not incidental to or connected with the conduct of the business. But as the defendant's own testimony showed that he entered for two purposes, one of which was unnecessary and the other incidental to the saloon business, the error was without prejudice and the conviction was affirmed.

Phillips v. State, Ga. Ct. App., 72 S. E. 429. *Liability of Landlord.* Defendant leased a small space at the rear of his store to a tenant who had a pasteboard sign there indicating that he was a fish and oyster dealer. The tenant's stock consisted of about a barrel and a half of bottled whisky, some glasses and spoons, and there were about two barrels of empty whisky bottles. There was no partition between this space and defendant's store. The trial judge charged that if, with the knowledge of the landlord, the whisky was kept in the portion of the store rented to the tenant, the landlord was guilty of keeping liquor on hand at his place of business. Held, that while the charge was not abstractly a correct statement of the law, under the evidence it was not prejudicial. "The landlord must hide his knowledge behind something more substantial than a sign made from a piece of pasteboard taken from the top of a whisky barrel, advertising the sale of fish and oysters consisting of quart and pint bottles of whisky."

LOAN SHARKS.

State v. Davis, N. Car., 73 S. E. 130. *Mortgage on Household and Kitchen Furniture a Proper Classification.* A statute made it a misdemeanor to charge more than six per cent interest on any loan secured by mortgage or otherwise upon articles of household or kitchen furniture. Held that this did not deny to persons within the jurisdiction of the state the equal protection of the laws by making one law for those who loaned or borrowed on such security, and a different law for those who loaned or borrowed with other or no security. The statute made a proper classification, as those who mortgage their household goods are poor or ignorant men, who especially need protection from usurers; in some of the cities there is a class of men against whom such protection is

necessary; and the loss of those articles necessary for comfortable and decent living entails great suffering on women and children and tends to break up the home.

LARCENY.

Town of Wolcott v. Stickles et al., Conn., 82 Atl. 572. A complaint, alleging that accused stole chickens of a specified value, charges the larceny of "poultry" punishable by Gen. St. 1902, a 1211; the word chickens meaning poultry, and the word "poultry" including domestic fowls, generally or collectively, reared for the table or for their eggs or feathers.

People v. Smith, Ill., 95 N. E. 1041. *Solicitation of the Offense.* G. having been arrested with a large number of postage stamps on his person, and having said he got them of defendant, who was in charge of the mailing department of L., the detectives consulted with representatives of L., and, as then arranged, G. telephoned defendant that he had the money for the last stamps, asking if defendant could get more stamps, and arranged to meet him. L.'s representatives then marked some of its stamps. Defendant later met G., as he had telephoned that he would, bringing $130 worth of stamps, including some of those marked. Held, that there was no encouragement, soliciting, urging, or advising of defendant by L., or its agents to commit the crime, preventing a conviction, but that the criminal design and intent originated with defendant.

People v. Hunt, Ill., 96 N. E. 220. *Requisites of Indictment.* A common law indictment for the larceny of money, which merely describes the subject of the larceny as a certain number of dollars in lawful money of the government. of a stated value, is too indefinite, and an indictment must contain a description, so as to call to mind the particular coins and bills, and thus identify the thing stolen, to identify the transaction charged, and to notify accused of the particular transaction; and this rule applies where the description is or may be known to the grand jury.

Where an indictment for the larceny of money described the same as lawful of the United States, of the value of $55, and alleged that a more particular description was unknown to the grand jury, and the prosecutor testified that the money stolen consisted of five $10 bills and a $5 bill, and stated that he so testified before the grand jury, and there was no evidence that the grand jury was unable to obtain a particular description of the money, the state failed to prove the averment that a more particular description was unknown, necessitating a discharge of accused from prosecution under the indictment, subject to the right of the state to try him under a new indictment.

LOCAL OPTION LAW.

People v. Eberle, Mich., 133 N. W. 519. *Depriving of Property Without Due Process of Law.* Under a local option law a county voted to prohibit the manufacture and sale of intoxicating liquors. When the prohibition took effect a brewing company in the county had on hand about 1700 barrels of beer which they had been unable to sell. This would become worthless and unmarketable if a new brew were not made and introduced into it occasionally, to keep it alive. The company did this, the beer made after the manufacture and sale had been prohibited being used only for this purpose, and not being

old enough to be in a fit condition for drinking. The company contended that it would be taking their property without due process of law if they were prevented from doing this. Held that the manufacture and sale of intoxicating liquors may be regulated under the police power. If the exercise of the police power causes a depreciation in value or loss of property affected thereby, this is incidental to the business engaged in, and does not amount to a deprivation of property without due process of law. The property was not taken for public use but the owner was left free to make any lawful use of it, hence the restrictions governing the exercise of the power of eminent domain do not apply. The conviction was affirmed.

People v. Eberle, Mich., 133 N. W. 519. *Excepting Local Wine and Cider.* A local option statute was enacted in 1889. It was amended in 1899 to permit the sale of wine or cider from home-grown fruits in quantities not less than five gallons, and again in 1903 to permit the sale at wholesale of wine and cider made in the county adopting the law, to parties residing outside of that county. The state conceded that these exceptions were unconstitutional, because they discriminated against the citizens and products of other states. Held that as these amendments did not enter into legislative consideration until long after the original act was in active operation they could be stricken out, leaving the act "complete in itself, and capable of being executed wholly independent of that which was rejected." Hence the statute, as originally enacted, was in force.

OATH.

State v. Browning, Ia., 133 N. W. 330. *Form of Oath.* The ordinary form of oath was administered to two Jewish witnesses. They stated that they regarded it as binding on their consciences. On cross-examination each was asked whether or not there was any other form of oath that he regarded as of higher or greater sanctity or of greater solemnity or more binding upon him than the oath taken. An objection to the question was sustained. Held any form of oath is sufficient that the witness considers binding upon his conscience. It was immaterial that the witness might consider some other form of oath more binding upon him, as in such cases the law does not deal with comparisons. Moreover, objection to the form of an oath must be made before it is administered, or it will be deemed waived. Nor was the question admissible to discredit the witness. If one understands the nature of an oath and assumes to take it as binding upon him he is a competent witness. Hence it was not error to exclude the question.

ORDINANCES.

State v. Staples, N. Car., 73 S. E. 112. *Regulating Billboards.* While the regulation of billboards, standing on private property, based upon aesthetic considerations, is not within the police power of a city, an ordinance prohibiting the erection and maintenance of such boards if the bottoms are less than twenty-four inches from the ground, unless they are erected against a solid wall, is a valid exercise of that power. The requirement is reasonable and necessary to prevent the accumulation of leaves, papers and other waste materials against the board, thus creating a fire hazard to neighboring property, and also to keep the property on which they are erected in a sanitary condition.

PARDON.

TRIAL.

State v. Mallahan, Wash., 118 Pac. 898. *At Court House.* Upon the trial of a criminal case, the defendant's counsel stated that a witness was confined to her bed, and unable to attend court, and asked that the jury might go where she was and take her testimony at her home. The state objected and the objection was sustained. Held, that the method and manner of conducting the trial is purely within the discretion of the trial court, except where regulated by statute. There is no absolute right to have any part of the trial take place anywhere except in the place fixed by law. Hence it was not error to deny the request.

Cina et al. v. U. S., 191 Fed. 718. *Conduct of Trial Judge.* Remarks made by the trial judge to counsel for defendants in a criminal case, and his refusal to permit counsel to continue the cross-examination of a witness, held, while error, to have been without prejudice, where the same witness was on the stand, and there was a further opportunity for cross-examination.

Carter v. State, Miss., 56 So. 454. *At Court House.* The defendant, in a criminal case, applied for a continuance on account of the absence of a material witness, who was very sick in his home at the town where the court was held. The court denied the application, and over the defendant's objection, adjourned the whole court, parties, sheriff, clerk, and district attorney to the home of the witness, and there tendered the witness to counsel for the defendant for examination. He declined to examine the witness on the ground that the court house was the place provided by law for the trial of cases. Held, that the defendant could not be forced to trial at any place other than the court house. If he had consented to examine the witness at his home, he could not have objected to the irregularity, but as he refused, it was a fatal error to deny his application for a continuance, and the conviction was reversed.

VERDICT DEFECTIVE.

Suitor v. Lewis, Okla. App., 118 Pac. 412. *Harmless Error.* One of the forms of verdict handed to the jury by the court was defective because it by implication instructed the jury that, if they convicted the defendant of assault and battery, they must both sentence him to imprisonment in the county jail and fine him, while under the statute they might do either or both. The jury adopted this form of verdict. There was a general exception to all the forms submitted and a special exception to one of the other forms. In the general charge there was a correct instruction as to the punishment. The evidence clearly established that the defendant was guilty, not merely of an assault and battery, but of a felonious assault. Held, that it was error in favor of the defendant for the court to charge on the law of assault and battery, of which he cannot complain. Therefore no purpose would be served by granting a new trial on account of the error in the form of the verdict. In the light of the entire testimony, the error was clearly harmless.

Glickstein v. U. S., 32 Sup. Ct. Reptr. 71. *Immunity Clause in Bankrupt Act.* The immunity clause in the bankrupt act of July 1, 1898, Sec. 7, Subd. 9, that no testimony given by the bankrupt under command of that section shall be offered in evidence against him in any criminal proceeding, does not bar a criminal prosecution for perjury for false swearing when giving such testimony.

WITNESSES.

Commonwealth v. Shooshanian, Mass., 96 N. E. 70. A witness may, in English and without an interpreter, state a conversation held in a foreign language.

Holloway v. State, Ga. Ct. App., 72 S. E. 512. *Effect of Impeachment.* Defendant was convicted of the illegal sale of liquors. The only direct evidence of a sale by the defendant was given by a witness who testified on cross-examination as follows: "I know my character. It is bad. Sometimes I would, and sometimes I would not, believe myself under oath. I believe myself in this case." It was proved that he went into the defendant's house without having any whisky and brought out a bottle of whisky and the change from the money given him to buy it. The defendant testified that she sold him no liquor, but that he had left a basket containing whisky in her house a few days before and that he came in, took something from the basket and carried it out. Held, that though the witness was unworthy of credit, yet the circumstances of corroboration shown by the other evidence might authorize the inference that he was telling the truth in this case. The jury have power to credit a witness unless the facts testified to by him be, according to the common knowledge of mankind, inherently impossible. Conviction affirmed.

Berry v. State, Ga. Ct. App., 72 S. E. 433. *Children.* On examination as to her competency, a girl of twelve testified that she knew right from wrong, that she ought to do right and that it was wrong to tell a lie and right to tell the truth, but said she did not know where she would go after death if she failed to do right. Held, that she was competent. "She could hardly be expected to give a categorical answer to a question which has been from time immemorial, and which still is, puzzling some of the wisest men of all times."