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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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ACCOMPLICES.

People v. Coffey, Cal., 119 Pac. 901. *The Giver and Recipient of a Bribe.* The defendant was indicted for agreeing to receive and receiving a bribe. He was a member of the board of supervisors. Another member of the board, testifying under a promise of immunity, swore that he offered the defendant $4,000 for his vote in the matter of the over-head trolley, that defendant agreed to vote for the franchise, and did so and that the witness paid the defendant the $4,000.00. It was proved by the testimony of independent witnesses that the defendant voted in favor of the ordinance relating to the over-head trolley system, and that a fund was paid by the street railway company into the hands of the man from whom the principal witness for the State testified that he received it. Held that as the guilty act of two persons was necessary to constitute an agreement to receive the bribe, and as the principal witness for the State, by offering the bribe, became "an actual participant in the crime, as well as an aider, abettor, adviser and encourager in its commission," he was an accomplice. The fact that the penal code made it a separate offense to offer or give a bribe, did not prevent the witness from being an accomplice in the crime of agreeing to receive one. As there was no evidence, excepting that of the accomplice, that the defendant entered into a corrupt agreement, or that he received any money for his vote, the conviction was in violation of the statutory provision "that a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence." Hence the conviction should be reversed.

ASSAULT AND BATTERY.

Luther v. State, Ind. 98 N. E. 640. *Intent.* An assault and battery may be committed upon one riding on a bicycle by another driving an automobile in unison with the bicycle, since the force need not be direct, but intent is an essential element of the offense.

Intent by an automobile driver to commit an assault and battery by driving his car against another may be inferred from circumstances legitimately permitting it, as by intentional acts directly causing the injury done under reckless disregard of the safety of others, or the commission of an unlawful act naturally leading to such injury, but intent to injure cannot be implied from a lack of ordinary care.

BRIBERY.

United States v. Van Wert, 195 Fed. 974. *Meaning of "Officer of the United States."* Under Const. art. 2, sec. 2, providing for the appointment of officers of the United States, an "officer of the United States" within Pen. Code, sec. 117 (Act March 4, 1909, c. 321, 35 Stat. 1109; U. S. Comp. St. Supp. 1911, pp. 1623), punishing the acceptance of bribes by the president by and with the advice and consent of the Senate, or by the president alone, the courts of law or heads of some executive department of the government, and a special officer appointed by the Commissioner of Indian Affairs for the suppression of the liquor traffic among the Indians, is not an "officer of the United States."

Pen. Code, sec. 117 (Act March 4, 1909, c. 321, 35 Stat. 1109; U. S. Comp

St. Supp. 1911, p. 1623), punishing any officer of the United States accepting a bribe to influence official action, is highly penal and must be construed at least with reasonable strictness, and unless the act charged to have been done by accused is a violation of some act of Congress or some departmental rule or regulation authorized by Congress, the violation of which is declared by it to be an offense, no crime has been committed.

BURGLARY.

People ex. rel. Hurbert v. Kaiser, Warden, 135 N. Y. Supp. 274. *Meaning of "Break."* Penal law (Consol. Laws 1909, c. 40) sec. 400, defines the word "break" as breaking or violently detaching any part, internal or external, of a building, opening any outer door of a building, or any window, shutter, scuttle, or other thing closing an opening, or obtaining an entrance by or through any pipe, chimney or other opening. Held, that the admission that accused in the night-time without invitation, right, or lawful occasion entered the dwelling of another and therein committed an offense was sufficient to sustain a conviction of burglary in the first degree, notwithstanding he testified that he entered by a basement gate, ash hoist, and cellar door, all of which he found open.

CARRYING WEAPONS.

Cheney v. State, Ga. App., 73 S. E. 617. *Temporary Possession.* A statute prohibited all persons from having or carrying about their persons, any pistol or revolver outside of their own homes or places of business, without first having obtained a license so to do. It was proved that the defendant had a pistol in his possession on the public road of the county in which he was indicted, and that he did not have the required license. The defense was that the pistol had been left at his house by his neighbor, to whom it belonged, and that he was carrying it to the house of the owner for the purpose of delivering it to him, and was not carrying it about his person within the purview of the statute. Held that if this were true, it would constitute no defense. While it may be that the owner of a pistol that had fallen from the window of his house on the public street might pick it up for the purpose of carrying it back into his house without violating the statute, or that other like cases of emergency might occur, the construction contended for by the defendant would not only make evasion of the statute easy, but would render the act practically ineffective.

CONSTITUTIONAL LAW.

State v. Dawson, Kan., 119 Pac. 360. *See that the Laws are Faithfully Executed.* The constitution provided that "the supreme executive power of the State shall be vested in a governor, who shall see that the laws are faithfully executed." A statute made it the duty of the county attorney or the attorney general to issue subpoenas for such persons as he should have reason to believe to have knowledge of any violation of the prohibitory law. A newspaper writer had published an article, stating that there were habitual violations of this law in certain cities. The governor directed the attorney general to examine this writer. The attorney general refused to make the examination authorized by the statute, stating that he had made private inquiries of the writer and satisfied himself that he had no information of value. The governor then brought mandamus proceedings to compel the attorney general to make an investigation under the statute. Held that the constitutional provision gave the governor power to secure efficient execution of the laws. That the statutory investiga-

tion was a cause or matter within the purview of a statute requiring an attorney general to appear for the State and prosecute when required by the governor or either branch of the legislature. Hence the mandamus should be issued.

James H. Graham, Plff. in Err., v. State of West Virginia, 32 Sup. Ct. Rep. 583. *Punishing habitual criminals; due process of law.* A former convict is not denied due process of law by bringing him, after conviction, before the court of another county in a separate proceeding instituted conformable to W. Va. Code, chap. 165, secs. 1-5, by information charging him with prior convictions, which were not alleged in the indictment on which he was last tried and convicted, and, on the finding of the jury that he was the former convict, sentencing him to the additional punishment which chap. 152, secs. 23, 24, in such cases prescribes.

Chester S. Jordan, Plff. in Err., v. Commonwealth of Mass., 23 Sup. Ct. Repr. 651. *Due Process of Law.* One convicted of crime in a state court is not denied due process of law because, on the motion for a new trial, based upon the suggestion of the insanity of a juror, the state, conformably to the local law, was only required to establish the sanity of the juror by a fair preponderance of the evidence, and not beyond a reasonable doubt.

EMBEZZLEMENT.

Jackson v. State, Ala., 57 S. 110. *Vendee or Agent.* Under a written contract, goods were consigned to the defendant at a fixed price, payable at fixed times. He was at liberty to sell them to any person, at any price and on any terms he pleased, except that when he sold on credit he was required to take a note on a form furnished by the consignor. The defendant sold a part of the goods on credit and took the required notes from the purchasers. He then executed his own notes to the consignor for the prices he was required by the contract to pay, and assigned to the consignor as collateral security the notes received from the purchasers. He collected the amounts due on the purchasers' notes, and converted this money to his own use. He said to a witness that the money belonged to the consignor, but that he was going to keep it himself. Held that the contract was one of sale rather than of agency. "A person to whom goods are consigned to be sold, and who is at liberty to sell them at any price and on any terms that he pleases, he paying a fixed price to the owner, is not an agent, but a vendee." But when the defendant was authorized to collect the notes given by the purchasers, which had become the property of the consignor by the assignment, he was the agent of the consignor. Hence, when he converted the proceeds of these notes, he thereby embezzled the money belonging to his principal, which had come into his possession by virtue of his employment. The conviction was affirmed.

ESCAPE.

Ex Parte Shores, 195 Fed. 627. *Liability of a State Sheriff in the Care of Federal Prisoners.* A sheriff in charge of a county jail in Iowa who permits a federal prisoner legally sentenced to the jail to go at large from time to time violates Rev. St. sec. 5409 (U. S. Comp. St. 1901, p. 3658), and Code Iowa 1897, sec. 4891 et seq. punishing escapes, an "escape" being defined to be the voluntarily or negligently permitting a person lawfully confined in jail to leave the prison where he is confined before he is entitled to be released therefrom.

Stouse v. State, Okla. App., 119 Pac. 271. *Exclusion of Evidence.* It was claimed on appeal that the trial court erred in excluding material evidence in

behalf of the defendant. The record did not show what the excluded testimony would have been. Held "when objections to a question are sustained, if it is desired to reserve the question as to the competency of the testimony sought to be introduced, for the determination of this court, the record must contain the same, showing what the testimony of the witness would have been had he been permitted to answer the question. Otherwise this court cannot determine as to whether the defendant has been injured by the ruling of the trial court." The conviction was affirmed.

Jamison v. People, Colo., 119 Pac., 474. *Dying Declaration.* On a trial for murder, a dying declaration, that the deceased had been murdered, was admitted in evidence. Held that the statement was inadmissible as being a conclusion or the expression of an opinion which tended to fix the degree of the homicide. As the jury may have fixed the degree by this statement, the judgment should be reversed. A statement that the defendant had shot the deceased was properly admitted as a dying declaration.

FORMER JEOPARDY.

State v. Van Ness, N. J., 83 Atl. 195. *Discharge of Jury.* Act March 22, 1899 (2 Comp. St. 1910, p. 1844), sec. 74a, permits the court in any criminal case to direct the verdict to be taken by the clerk of the court, and Act April 3, 1902 (2 Comp. St. 1910 p. 1523) sec. 29 empowers the deputy clerk, in the absence of his superior, to exercise all of the powers of the latter, including the reception of verdict. In a criminal prosecution, the court directed the clerk to receive the verdict in his absence, and the deputy clerk on receiving word from the jury that they could not agree discharged them. Held, that while this act was clearly beyond his powers, and did not relieve the jury from further consideration of the case, the jury having wrongfully disbanded without finding a verdict, accused cannot set up that trial as a former jeopardy; the essence of former jeopardy being either a former acquittal or conviction.

GRAND JURY.

Cannon v. State, Fla., 57 S. 240. *May be Reconvened to Correct Mistake.* A grand jury which found an indictment against the defendant was discharged. The term of court was adjourned until a later date, and a term held in another county during the interval. It was discovered that the name of the victim, as given in the indictment, was incorrect. When the term was resumed, after the recess, the grand jury was recalled. Sixteen of the original eighteen members returned, were sworn and charged, and without hearing any additional testimony, returned a new indictment for the same offense with the name of the deceased correctly stated. Held that the term of court could be adjourned and a term held elsewhere in the interval. A grand jury that has been discharged may be recalled during the same term of court. As this jury had previously investigated the case, they could correct the error without taking additional testimony. As more than twelve members were present and concurred in finding the new indictment, it was immaterial that two of the original body were not present. The conviction was affirmed.

In re Grand Jury, 135 N. Y. Supp. 103. *Immunity.* Under Penal Law, Sec. 584, as added by Laws 1910, c. 395, providing that no person shall be excused from attending and testifying before any court, magistrate, or referee on any investigation, proceeding, or trial for violation of the law against conspiracy, on the ground that the testimony required of him may tend to convict him

of a crime; but no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may so testify, and no testimony so given or produced shall be received against him on any criminal investigation, proceeding, or trial, one cannot testify before a grand jury on an investigation of a conspiracy, without becoming immune from prosecution and punishment for the conspiracy, even though he stipulate to the contrary.

HOMICIDE.

People v. Friedman, N. Y. 98 N. E. 471. *First Degree Murder.* Where defendant and K. conspired to rob decedent in the night-time, and during such robbery decedent was shot and killed, defendant would be liable for murder in the first degree, although he did not do the actual killing, if the natural and probable consequence of the common enterprise was the killing of the deceased in case of resistance on his part, and hence a request to charge, assuming that if defendant did not fire the fatal shot he could escape liability unless the conspiracy contemplated the use of such force or violence as might cause death, was properly refused.

INDICTMENT AND INFORMATION.

Sumpter v. State, Fla., 57 S. 202. *Sufficiency.* A statute defined murder in the second degree as caused by "an act imminently dangerous to another." An indictment under this statute charged that the defendant assaulted deceased with a shot gun loaded and charged with leaden balls, and discharged the said leaden balls into the head and body of the deceased, thereby inflicting ten mortal wounds, of which the deceased did die. After conviction, it was objected that the indictment did not allege that the act was imminently dangerous to another. Held that the courts will take judicial notice that the facts charged constitute an act imminently dangerous to the person shot at, and that it would be superfluous to state that such an act was dangerous. The conviction was affirmed.

Marsh v. State, Ala., 57 S. 387. *Variance.* On trial of an indictment for larceny of a cow, proof of the larceny of a bull calf is a fatal variance. Legally the word cow is restricted to the female of the bovine species. A former decision that the word cow included a heifer was distinguished.

State v. Ireland et al. Me. 83 Atl. 453. *Substituting Copy of Lost Indictment.* Copy of a lost or mislaid indictment may be substituted by order of the trial court as soon as the loss is discovered and before the case is submitted to the jury, but omission to do so before conviction is not fatal; the substitution being properly made upon satisfactory evidence at a forthcoming *nisi prius* term.

Bennett v. United States, 194 Fed. 630. *Variance.* An indictment, charging defendant with inducing the interstate transportation for an unlawful purpose of Opal Clark, and evidence that the woman transported was known to defendant as Jeanette Clark, and that her real name was entirely different, did not constitute a variance, in view of the fact that the record clearly indicated the identity of the woman named in the indictment with the woman whom defendant must have known to the one intended to be named and with the woman who was actually transported.

Burchett v. United States, 194 Fed. 821. *Records.* The record in a criminal case should show that the grand jury which returned the indictment was

duly sworn. That the grand jury which returned the indictment was duly sworn is sufficiently shown by a recital in a record that the grand jury was "impaneled" and by a recital in the caption of the indictment that the grand jurors were impaneled, sworn, and charged.

United States v. Winslow et al., 195 Fed. 578. *Demurrer.* Where the questions raised by demurrer to an indictment are both intricate and doubtful, the demurrer may be overruled, and their decision postponed until the trial on the merits.

INSTRUCTIONS.

Flowers v. State, Miss., 57 S. 226. *Error without Prejudice.* Defendant was indicted for assault and battery with intent to murder. It was proved that he shot at another and with intent to murder her, but failed to hit her. The court charged that if the jury found the defendant was guilty of assault with intent to murder they should find him guilty as charged in the indictment and he was convicted. Held that on this indictment the defendant could be convicted of the offense of assault with intent to murder, and a charge to that effect would have been correct. The same punishment would have been imposed had the conviction been for assault with intent to murder. Hence the error was harmless, although the defendant was convicted of a battery which he had not committed. But the court will not reverse a judgment for an error not prejudiced to the party complaining. Hence the conviction was affirmed.

Barker v. State, Ala. App., 57 S. 88. *Modification of the Instructions.* At defendant's request, the court gave a written charge as to reasonable doubt, remarking "this is a fool charge, but I will give it to you, gentlemen of the jury, as the Supreme Court has said that it is good law; but in my opinion it is misleading." A statute provided "charges moved for by either party must be in writing, and must be given or refused in the terms in which they are written." Held the comment upon the written charge constituted a modification of the instruction, as the jury would not give it respectful consideration, when the court expressed the opinion that the proposition was not good law but mere foolishness and misleading. The conviction was reversed.

Hay v. State, Ind. 98 N. E. 172. *Harmless Error.* Under Burns Ann. St. 1908, sec. 2221, which provides that the Supreme Court in appeals in criminal cases shall disregard technical errors and defects which did not prejudice the substantial rights of the accused, an instruction in a prosecution for seduction, erroneously giving corroborative effect to the fact that prosecutrix had made preparations for marriage, was harmless where, with all the evidence as to such preparations eliminated, the jury could not have failed to convict.

JURY.

People v. Toledo, 135 N. Y. Supp. 49. *Waiver of Objections.* In a prosecution for a felony, where one juror became ill after the evidence was all in, thus causing a mistrial, and accused and his attorney consented to a new trial before a second jury composed of one new juror and the eleven old ones, to whom the entire testimony was read, a conviction by that jury was valid; for while one accused of a felony cannot be legally tried upon an indictment except by a jury of twelve men, and a conviction of any less number is invalid, though defendant agrees to waive his rights, yet accused, though entitled to a jury of twelve new men, had the right to waive objection to the eleven old jurors.

In a prosecution for a felony, where one juror became ill after the evidence

was all in, thus causing a mistrial, and accused and his attorney consented to a new trial before a second jury composed of one new juror and the eleven old ones, accused is entitled to have all of the witnesses produced before the jury, though his consent to the reading of their testimony as taken in the former trial is a waiver of his rights.

LARCENY.

People v. Harold, Cal. App., 119 Pac., 949. *Distinguished from False Pretences.* The defendant was convicted of grand larceny upon proof that by fraud, trick and device, he induced the prosecutor to agree to buy from a third party certain moving picture films of little or no value, and received from the prosecutor $145 to be paid for the films, paid some of the money to the third party and put the balance of it in his own pocket. The defendant and the third party had conspired to defraud the prosecutor and the defendant intended to steal the money when he received it. The prosecutor intended the $145 to be paid to the third party for the films. Held that as the defendant purported to be acting for the prosecutor, so long as the money remained in the hands of the defendant it was the prosecutor's money. As the defendant then intended to steal it, and accomplished his purpose, the crime committed was larceny rather than obtaining money under false pretences.

LOTTERIES.

United States v. Purvis, 195 Fed. 618. *Acts Constituting a Lottery.* A company operated a scheme containing investment and loan features. The opportunity to obtain a loan was determined to a large extent by the way in which the applications were received at the office of the company, and where a number of applications were received at the same time they were put on the records of the company as they were opened and recorded. The investment features were not particularly attractive, and the main feature of the scheme was the loan feature, and the propsed loan contracts contained attractive terms. Held, that the scheme was a lottery because of a consideration and because of the existence of chance, based on obtaining a low number and thereby obtaining a loan, and because the obtaining of a loan at an early date was the prize in the scheme, since to constitute a lottery there must be a consideration, chance, and prize.

PARDONING POWER.

In re Opinion of the Justices. Mass, 98 N. E. 101. *Extent of Pardoning Power.* Under Const. p. 2, c. 2, sec. 1, art. 8, vesting the power to pardon offenses, except after conviction by impeachment, in the Governor, by and with the advice of counsel, conditional pardons or commutations or respites of sentences can be granted only in conformity to the advice of counsel; the words "power of pardoning offenses" including not only absolute pardons, but also lesser exercises of clemency.

PERJURY.

Allen v. United States, 194 Fed. 664. *Double Jeopardy.* One may be convicted of perjury for testifying falsely in his own behalf of his trial for counterfeiting of which he is acquitted, and is not thereby twice put in jeopardy for the same offense, but the government should not institute a prosecution for perjury on substantially the same evidence presented on the trial for counterfeiting.

PLACE OF OFFENSE.

United States v. Reddin et al., 193 Fed. 798. *Place of Offense.* Shipment in Indiana of dynamite or nitroglycerine in interstate commerce by participants in a conspiracy to violate the federal laws against such shipment was the act of all the conspirators, permitting trial in Indiana of conspirators found in another state.

POLLING JURY.

McCullough v. State, Ga. App., 73 S. E. 546. *Denial Reversible Error.* In a case in which the defendant's guilt was doubtful, the jury, after several hours of consideration, returned a verdict of guilty. While the jury was still standing, and without giving counsel for the defendant time to demand a poll of the jury, the judge imposed the following sentence, "Twenty years in the penitentiary." Held that the judge had deprived the accused of his right to have the jury polled, or at least impaired the value of the right, as the strong approval of the verdict by the court "would have induced any wavering juror to abandon any intended dissent." The conviction was reversed.

PROBATION STATUTE.

Gehrmann v. Osborne, Warden, N. J., 82 Atl. 424. *Suspending Sentence.* Jurisdiction of a court to suspend the sentencing of a person convicted of an offense and to thereafter impose sentence, either before or after the term, was not taken away by P. L. 1900, p. 289, repealed by P. L. 1906, p. 104, c. 74, and re-enacted by chapter 75, p. 104, of the laws of that year providing a system of probation in the punishment of criminals. The term "suspended sentence," as used in criminal law, refers to the suspension of the execution of a sentence already imposed, and not correctly to the suspending of sentence.

PURE FOOD LAW.

State v. Gruber, Minn., 133 N. W. 571. *Sale in Another State.* The defendant was a traveling salesman for a company incorporated and located in the state of New York. While in Minnesota, he took an order for candy, subject to acceptance or rejection by the company, and sent it to the company's place of business in New York. This candy was shipped from New York and received by the customer in Minnesota. It contained coal tar dye. The Minnesota statutes prohibited the sale of candy containing coal tar dye. Held that the legislature could not and did not prohibit the sale of such candy outside the state, nor did it prohibit the shipment of such candy into the state. As the sale took place in New York it was not a violation of the statute. As the sale was not a crime the defendant did not become a criminal by aiding and abetting it in Minnesota, especially if it was not a crime in New York. Taking the order was not a part of the sale, so that no part of the sale took place in Minnesota. Hence the conviction was reversed.

REFORMATORY ACT.

People v. Smith, Ill., 97 N. E. 649. *Age of Offender.* Reformatory Act (Hurd's Rev. St. 1909, c. 118, sec. 10) divides persons who may be sentenced thereunder into two classes, viz., males between 10 and 16 years of age, and males between 16 and 21. Section 11 provides that a boy between 10 and 16 years of age "shall be committed" to the reformatory; while section 9 provides that both classes "may be sentenced" to the reformatory. Section 10 declares that in all criminal cases tried by a jury, where it is found that the defendant is between 10 and 21 years of age, the jury shall not fix the punish-

ment, unless it shall also appear that defendant has been previously sentenced to the penitentiary, or that the offense is a capital one and Parole Law, sec. 1 (Hurd's Rev. St. 1909, c. 38, sec. 498), excepts from its application treason, murder, rape, and kidnapping. Held, that the parole law was not intended to destroy by implication the application of the reformatory act to males between the ages of 10 and 21, convicted of rape; but that the word "may" in section 9 of the reformatory act should be construed to mean "must;" and hence a boy of 19, on being convicted of rape could not be properly sentenced to the penitentiary.

Under Reformatory Act (Hurd's Rev. St. 1909, c. 118), a 10, providing for sentence of criminals under 21 years of age to the reformatory, where accused was convicted of rape, committed when he was 19 years old, and, at the time of the sentence, he was a male person over 21 years, he was not subject to sentence, either to the reformatory or to the penitentiary.

SELF-DEFENSE.

State v. Short, (Dela.), 82 Atl. 239. *Duty to Retrial.* In repelling an assault, no more force than is necessary may be used, and one assaulted cannot take the life of his assailant, where by retreat he may escape death or great bodily harm.

Sandford v. State, Ala., 57 S. 134. *Defense at Dwelling.* A man who is attacked at his dwelling by another does not have the right to stand his ground and if necessary, kill his adversary, unless he is free from fault in bringing on the difficulty, and is acting under an impending necessity to protect himself or his home.

SELF-INCRIMINATION.

Powers v. U. S., 32 Supreme Court Rep. 281. The admission in evidence at the trial of the testimony of the accused, voluntarily and understandingly given at the preliminary hearing, does not violate his privilege against self-crimination accorded by U. S. Const., 5th Amend., although he was not warned at the time that what he said might be used against him.

TRIAL.

Leach v. State, Ind., 97 N. E. 793. *Harmless Error.* Under Burns' Ann. St. 1908, a 2221, which requires technical defects in action of the trial court not prejudicing accused's substantial rights to be disregarded, any error in permitting a witness for the state to refresh her memory from a memorandum, and in refusing to require her to deliver the memorandum to accused's counsel for examination, was harmless, where the other evidence conclusively established accused's guilt.

State v. Brown. (N. J.), 82 Atl. 302. *Harmless Error.* One challenging the validity of his conviction of crime under Criminal Procedure Act (2 Comp. St. 1910, p. 1863) a 136, may not obtain a reversal on the ground of inaccuracies in the instructions not producing manifest injury.

Diaz v. U. S., 32 Sup. Ct. Rep. 250. *Waiving Personal Presence.* One accused of an offense not capital, who is not in custody, and who was present when the trial was begun, may waive his right under the act of July 1, 1902, a 5, enacting a Bill of Rights for the Philippine Islands, to be personally present at every stage of the trial (Lamar, J., dissenting.)

SHIPPING.

United States v. Jones, 195 Fed. 860. *Wireless Equipment of Passenger*

Vessels. In the prosecution of the captain of a steamship under Act June 24, 1910, c. 379, 36 Stat. 629 (U. S. Comp. St. Supp. 1911, p. 1265), which makes it a punishable offense for the master of any ocean going vessel carrying passengers, and carrying 50 or more persons, including passengers and crew, to leave any port of the United States on a voyage of more than 200 miles, unless equipped with a wireless telegraph apparatus, a plea setting up that the vessel did not carry passengers is insufficient where it also admits that the vessel carried to Europe four persons, not members of her regular crew, who contributed a fund of $200 to one of the officers for extra food and accommodations, but avers that they paid nothing for transportation, but were assigned as members of the crew at a shilling a month although they were not paid and performed no services; the question of whether they were or were not in fact passengers being one for the jury under the facts.

SUSPENDED SENTENCE.

Fuller v. State, Miss., 57 S. 6. *Common Law Power.* The defendant was convicted of unlawfully selling intoxicating liquors and sentenced to be fined and imprisoned in the county jail for ninety days and pay the costs of the prosecution. It was further ordered that the jail sentence be suspended during the good behavior of the defendant. Defendant paid the fine and costs and was released. Later, on motion of the District Attorney and proof that he was still selling liquor illegally, the court adjudged that he had violated the condition, and ordered him to serve the suspended sentence. There was no statute authorizing the court to suspend the sentence. Held that at common law the power to suspend sentence in a criminal action is inherent in every court of record. This power is distinguished from the executive power to grant reprieves and pardons, as "the suspension of sentence simply postpones the judgment of the court temporarily or indefinitely; but the conviction and the liability following it, and all civil disabilities remain and become operative when judgment is rendered," while a pardon "removes the penalties and disabilities and restores the offender to all his civil rights." Hence the order was affirmed.

TRIAL.

Martin v. State, Ga. App., 73 S. E. 686. *Absence of the Judge.* While the jury were considering their verdict in a criminal case, the presiding judge left the county, and opened a special court in another county. He evidently returned to receive the verdict. It was not shown that the defendant was prejudiced by the absence of the judge. The evidence fully authorized the conviction, and there was no showing that the verdict was affected by any improper influence, or that the jurors knew that the judge was absent from the county, or that the verdict was in any way affected by that fact. Held that the personal supervision and control of the presiding judge is essential to a legal trial. When the judge left the county, the court ceased, for the time being at least, to exist in that county, and all that was done during his absence was nugatory and void. The case was distinguished from cases in which the judge was temporarily absent, but remained within the call of the jury. The Supreme Court had held that such temporary absence did not invalidate the verdict.

People v. Schafer, Cal., 119 Pac., 920. *Challenge of Juror.* The trial court disallowed a challenge for cause, and the jury was then challenged peremptorily. The defendant subsequently exhausted his peremptory challenges, but it did not appear that he had occasion or desire to use an additional peremptory

challenge, or that the jurors finally accepted were not entirely satisfactory to him. Held that even though the trial court erred in disallowing the challenge, yet it was without prejudice in the absence of a showing that an objectionable juror was thereby forced upon the defendant. The conviction was affirmed.

Callahan v. United States, 195 Fed. 924. *Ground for Continuance.* A defendant in a criminal case in a state court, who while at large on bail pending an appeal from a judgment of conviction which is afterward affirmed, commits a crime against the United States, cannot be heard himself to ask for a continuance of the trial of the case against him in the federal court, on the ground that he has not served the sentence imposed by the state court.

VARIANCE BETWEEN INDICTMENT AND PROOF.

Cain v. State, Ga. App., 73 S. E. 623. *Allegations according to Legal Effect.* An indictment for perjury alleged that the oath was administered by the presiding magistrate. The proof was that it was administered by an attorney at law, by the authority or permission of the court. Held the attorney acted in behalf of the court so that in legal effect it was administered by the presiding magistrate. Consequently there was no variance.

VARIANCE.

Clark v. State, Miss., 57 S. 209. *Name of Victim.* Defendant was convicted on an indictment charging the murder of one Tode Wallace. The bill of exceptions showed that he killed Tode Hollis. He moved for a new trial on the ground that the verdict was contrary to the law and the evidence, and appealed from the order denying the motion. A statute provided that such a variance between the indictment and proof could be amended in the trial court. Another statute provided that no judgment should be reversed unless the record showed that the errors complained of were made the ground of special exception in the trial court. The name of the deceased in the bill of exceptions had in most cases been written Tode Wallace, and then changed to Hollis. The stenographer made an affidavit that the deceased was called Wallace by the witnesses, but that one of the attorneys called him Hollis, and that the stenographer in transcribing his notes thought he had probably made a mistake in taking the name from the witness as Wallace and consequently had made the correction in the transcript. Held that the record could not be contradicted by parol evidence. It was immaterial that the indictment could have been amended so as to conform to the proof, since this was not done. The statute forbidding a reversal unless the error complained of was specially excepted to does not apply when the offense charged has not been proved. "It will be a sad, sad day in the jurisprudence of any country when the courts will permit one of its citizens to be hung for the commission of a crime of which the record made by the State completely and fully acquits him of the charge. The standing aside from the beaten path of immemorial usage, worn hard and bare by the footsteps of our forefathers in the law, in order to make way for the passing of the funeral cortege, brought about by a too liberal construction of a criminal statute enacted in derogation of the common law, is the recognition and enforcement of too dangerous a doctrine to comport with the humane and beneficent conduct of a civilized court. * * * The question which this record presents is not what may be termed a technicality in any sense of the term. It is a matter of substantive right. To permit a person to be hanged when the evident shows that he was convicted for the murder of a person different from

the one charged in the indictment is absolutely shocking in the extreme. Our conscience recoils with absolute horror from such a proposition."

One judge dissented on the ground that the defect could have been cured by amending the indictment to conform to the proof, and that the defendant, by failing to call attention to the variance, had waived his right to have the amendment made. The conviction was reversed.

O'Neal v. State, Ga. App., 73 S. E. 695. *Person Injured.* The indictment charged that the defendant, by false pretences, induced one Hutchinson to cash a check. The proof was that Hutchinson was assistant cashier of a bank. The defendant induced Hutchinson to cash the check with the bank's money, as its agent. On learning that the check was worthless, Hutchinson paid the bank the amount lost, out of his own pocket, in accordance with a custom of the bank that any loss resulting from the work of Hutchinson should be sustained by him. Held that the crime was complete when Hutchinson paid out the bank's money for the worthless check. The subsequent indemnification of the bank did not relate back to the time when the offense was committed. It was the bank, and not Hutchinson as an individual, that was cheated and defrauded. Hence there was a fatal variance between the allegations and the proof.