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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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CONSTITUTIONAL LAW.

May v. U. S., 199 Fed. 53. *Self incrimination.* "That internal revenue officers, in raiding defendant's place of business for alleged violations of Oleomargarine Act Aug. 2, 1886, c. 840, section 17, 24, stat. 212 (U. S. Comp. St. 1901, p. 2234), seized certain articles, letters, papers and two promissory notes signed by defendant M., which notes were afterwards introduced in evidence against him, did not constitute a violation of his constitutional right against being compelled to testify against himself."

COURTS.

People v. Miller, Ill. 99 N. E. 873. *Amendment of record.* "Though the record of the Criminal Court of Cook County sent up on appeal showed that the July term, 1905, was opened on July 5th, instead of on July 3d, which was the first Monday in July, as required by statute, where the records of the criminal court showed that it was opened on July 3d, by the judge who convened the July term, another judge of the same court could permit an amendment of the record so as to make it speak the truth by reciting that fact as a placita to a judgment in a case tried by him in the July term."

EVIDENCE.

People v. Enright, Ill. 99 N. E. 936. *"Criminal law—evidence—privilege of defendant.* In a criminal prosecution where the defendant did not testify, an instruction that the jury should consider as though the defendant was not allowed to testify, was properly refused."

State v. Flanagan, N. J., 84 Atl. 1046. "On a trial of the defendant for manslaughter for pushing one from a trolley car, causing his death, evidence of the disorderly conduct of the defendant towards others in the car just prior to the embarking of the deceased and the act of the defendant which caused his death was allowed to show his state of mind and continuity of disposition toward those about him on the car. Held, that this was competent as evidencing his state of mind as carried forward and exhibited in a criminal act."

People v. Gibson, Ill. 99 N. E. 599. *Admissibility of evidence of other offenses.* "In a prosecution for statutory rape, evidence that about the same time and in the same room accused committed the crime against nature upon the prosecutrix, and had intercourse several times afterwards, was admissible.

"In a prosecution for statutory rape, evidence was not admissible that the accused had intercourse with a playmate of prosecutrix in the same room a few minutes after the act charged; the two acts not being so connected as to be part of the same transaction."

Fritz v. State, Ind. 99 N. E. 728. *Burden of proof as to sanity.* "Defendant's sanity or mental capacity to form an intent to kill is, if in issue, an essential element of murder, and this element the state is bound to prove beyond a reasonable doubt, and not merely by a preponderance of the evidence. The

evidence of the defendant's insanity need not predominate in weight over that going to show his sanity, but if the jury find it sufficient to raise a reasonable doubt as to his sanity, the law requires an acquittal."

ELEMENTS OF OFFENSE—INTENT.

State v. Gallagher, N. J. 85 Atl. 207. "Indictment charged defendant with an assault upon William H. Edwards with intent to kill the said Edwards. Upon the trial it was proven that defendant intended to kill Mayor Gaynor. This was a statutory crime. The court held that the common-law principle, that the intent with which an act is done determines the legal character of its consequences although such consequences operate upon a different person from that intended, applied to statutory crimes.

FORMER JEOPARDY.

Roman v. State, Tex. Cr. App. 142 S. W. 912. *Crime Used as Circumstantial Evidence of Another Crime.* Defendant was tried and acquitted for statutory burglary by breaking and entering a railroad car. He was then tried on an indictment for larceny of the contents of the car. His plea of former jeopardy was overruled and the court refused his request for an instruction that the jury, in determining the question of his guilt or innocence of larceny, could not consider for any purpose whether or not he broke and entered the car from which the property was stolen. Held, that the common law rule merging burglary and theft when committed contemporaneously and making conviction of one bar a prosecution for the other is abrogated by the provisions of the Penal Code making burglary and theft, though growing out of the same transaction, two separate and distinct offenses. While defendant could not be prosecuted a second time for burglary, any evidence tending to show that he was guilty of theft should be admitted, even though it prove that he was really guilty of burglary. The conviction was reversed on another ground.

People v. Darr, Ill. 99 N. E. 651. *Offense Charged.* "An indictment charging that the defendants conspired to obtain a bank check for $650 from an insurance company by obtaining a policy on certain chattels and thereafter setting fire to the chattels with intent to defraud the company by falsely pretending that a loss of $650 resulted from the fire, etc., charged an offense of conspiring to burn goods with an intent to defraud an insurance company, and did not bar a subsequent prosecution for the offense of burning goods to defraud the insurance company."

People v. Goldfarb, 138 N. Y. Supp. 62. "Accused was arrested without warrant and charged by affidavit before a magistrate having jurisdiction with disorderly conduct tending to a breach of the peace contrary to Consolidation Act (Laws 1882, c. 410), section 1458, making persons using threatening or insulting behavior in a public place, whereby a breach of the peace may be occasioned, guilty of an offense, and was duly arraigned and entered upon trial, and after one witness was sworn the magistrate directed that the accused be discharged and a new complaint made; and the new complaint, based on the same facts, charged a violation of Penal Law (Consol. Laws 1909, c. 40), section 720, making it a misdemeanor to disturb the occupants of a car by disorderly conduct, of which offense the magistrate did not have jurisdiction. Held, that the accused was put in jeopardy on the hearing on the first complaint, so that his

discharge was a bar to a subsequent prosecution under the second complaint. even though the magistrate did not actually intend to acquit the accused by discharging him on the first complaint."

GAMING.

Ferguson v. State, Ind. 99, W. W. 806. "A slot machine operated by the player depositing a nickel therein and then turning a crank, whereupon the machine will automatically pay the reward, which will always contain a package of chewing gum of the retail value of five cents, and sometimes in addition thereto one or more checks which may be used in playing the machine in the same manner as nickels are used, is a gambling device, within Burns' Ann. St. 1908, Par. 2474, punishing the keeping of devices for gaming; though by means of indicators the player is informed as to what the record will be before each play, though there is no method of knowing what the reward will be as to subsequent plays."

GRAND JURY—MANNER OF SELECTING JURORS.

United States v. Nevin, 199 Fed. 831. "Where members of a grand jury are summoned by order the court from the body of the district without the drawing of names, the validity of the indictment is not affected if the members are duly qualified."

INDICTMENT.

Commonwealth v. Cornell, Mass. 99 N. E. 975. *Sufficiency.* "In view of R. L. c. 218, sections 17, 39, making a detailed description unnecessary, giving the defendant a right to a bill of particulars if the charge is not sufficiently set out, and making the charge sufficient when in the words of the statute, an indictment for exposing poison to cattle was not indefinite in using the word 'cattle.'"

People v. Feinman, 137 N. Y. Supp. 933. *Sufficiency.* "Accused cannot be adjudged guilty of larceny under allegations of an indictment under Penal Law (Consol. Laws 1909, c. 40), section 947, which after charging that the accused, with intent to defraud and deprive C. of certain goods and appropriate them to the use of the defendant and defendant's principal, did falsely pretend and represent to C. by a written instrument, set out in full, relating to the means and ability of the principal of the accused to pay for the goods, and that the representations were in all respects false, and that C. did sell to the principal of the accused on credit certain goods, and delivered them; such indictment plainly indicating that it was not the intent of C. to sell the goods to the defendant, but to the defendant's principal."

Reese v. U. S., 33 Sup. Ct. Repr. *Formal defect.* "The delivery of an indictment to the court by the foreman of the grand jury in the absence of the other jurors, if a defect at all, is 'in matter of form only' within the meaning of U. S. Rev. St., Sect. 1025, U. S. Comp. St. 1901, p. 720, providing that no indictment presented by a grand jury shall be deemed insufficient nor the trial, judgment, or other proceedings thereon be affected by any such defect which shall not tend to the prejudice of the defendant, it not being disputed but that the indictment was found and returned into court as a true bill."

People v. Clark, Ill. 99 N. E. 866. *Validity of statute.* "Cr. Code Sec. 98 (Hurd's Rev. St. 1911, c. 38), provides that every person who shall obtain from

any other person any money or property by any device commonly called the confidence game shall be imprisoned, etc., and section 99 provides that in every indictment under the preceding section it shall be a sufficient description of the offense to charge that the accused did unlawfully, etc., obtain from the person named "his money (or property in case it be not money)" by means of the confidence game. Held, that section 99 when construed to authorize the charging of obtaining 'money' by the confidence game without any added words of description, did not violate bill of rights, section 9, giving the accused the right to demand the nature and cause of the accusation against him."

INDICTMENT AND INFORMATION.

Hawkins v. State, Tex. Cr. App. 142 S. W. 917. *Clerical Error.* An indictment for theft charged the defendant with stealing property with intent to "apprpriate" it to his own use. Held that as only one letter was omitted, and with this omission no other word was spelled, and no other meaning conveyed, the court would refuse to quash the indictment. It was said that if an entire syllable was omitted, or with a letter missing a different word was spelled with a different meaning, the indictment would be quashed.

The case of *Jones v. State,* 25 Tex. App. 621, 8 S. W. 801, 8 Am., St. Rep. 449, in which the same word was spelled "appriate" and the indictment quashed, was distinguished on the ground that an entire syllable "pro" was omitted. It is not clear how the court knew that the letters omitted were "pro" rather than "rop."

Roman v. State, Tex. Cr. App., 142 S. W. 912. *Description of Stolen Property.* An indictment charged the larceny of 92 buckets of "lard." The proof was that the defendant stole a compound of cottonseed oil and beef fat, which was used as a substitute for lard, looked like lard, and was called lard by the witnesses, several of whom thought it was lard. The trial court charged the jury that if the "property had the appearance of the product of the hog known as 'lard,' and was called, used as, for and as a substitute for said hog product known as lard, then in law it is lard." Held that as it was commonly called lard in Texas and also in Louisiana, where it was made, there was no variance, the evidence was properly admitted to prove the charge in the indictment, and the instruction to the jury was correct.

INDICTMENT AND INFORMATION—PRESENTMENT.

Bresse v. United States, 33 Sup. Ct. Rep. 1. "Where more than twelve grand jurors voted to find the indictment a true bill, a delivery of the indictment to the presiding judge by the foreman, unaccompanied by the grand jurors, was not a defect as would work such a prejudice on the defendant as to justify a reversal of the conviction."

INDICTMENT AND INFORMATION—MOTIONS TO QUASH—GROUNDS.

Pittsburgh, C. C. and St. L. Ry. Co. v. State, Ind. 99 N. E. 801. "The question whether Act March 8, 1909 (Acts 1909, c. 178), requiring railroad locomotives to be equipped with automatic bell-ringers, violated Const. U. S. art. 1, Par. 8, or the Interstate Commerce Laws enacted thereunder, was not raised by the motion to quash an indictment for a violation thereof not showing on its face that defendant's road or locomotives was operated outside the state, in

view of Burns' Ann. St. 1908, Par. 3065, expressly limiting such a motion to defects apparent on the fact of the indictment."

IMPROPER ARGUMENT OF COUNSEL—OBJECTIONS NECESSITY.

McPherson v. State, Ind. 99 N. E. 984. "The misconduct of the prosecuting attorney in his argument to the jury cannot be taken advantage of on appeal, unless accused moved to set aside the submission and discharge of the jury, or asked the court to direct the jury to disregard the improper statement, or take other action to neutralize the misconduct."

INSTRUCTIONS.

People v. Barkas, Ill. 99 N. E. 699. "In a prosecution for homicide, an instruction that the jury need not believe the testimony of the accused, and should not do so, if, after fairly and impartially considering all the evidence, they believed that the accused wilfully and knowingly testified falsely to any material matter, is erroneous because improperly directing the jury to disregard defendant's testimony; the word 'should' being equivalent to 'ought to.'

"In a prosecution for homicide, an instruction that, though the accused is a competent witness, the jury are the judges of the weight to be given his testimony, and that the jury should consider all the circumstances surrounding the case, and give the accused's testimony 'only' such weight as they believe it entitled to, is improper; the word 'only' constituting a caution to the jury to be careful in giving credit to the accused's testimony."

JURISDICTION.

State v. Hall, Conn. 84 Atl. 923. "Whether a case is a criminal one is not to be determined from the form of the complaint and process alone, so that a proceeding under Acts 1909, c. 260, section 8, as amended by Acts 1911, c. 205, section 5, providing for a proceeding whereby delinquent taxpayers may be committed to jail or to the workhouse, is not rendered a criminal proceeding within Gen. St. 1902, sections 1482, 1483, which provide that the criminal courts of common pleas shall have jurisdiction of only such criminal cases as are appealed to them from lower courts, and prescribe the procedure therein, by the fact that the complaint therein was in criminal form."

JURY.

Rigsby v. State, Tex. Cr. App., 142 S. W. 901. *Improper Inflence.* After the jury had been sworn in the trial of a prosecution for the illegal sale of liquor, the court adjourned that a prohibition speech might be delivered in the courthouse, in a campaign to secure state-wide prohibition. The jurors remained during the speech, which lasted an hour and a half and contained "much forcible oratory and invective with regard to the violation of the local option law." When the court reconvened the defendant moved to dismiss the jury because they had heard the speech. The motion was overruled. This was held to be error. As the jury had been exposed to improper influences which may have affected their verdict, the presumption of law is against the purity of that verdict. As the state did not show that the jury had not been influenced by the speech the conviction was reversed.

MOTIONS IN ARREST OF JUDGMENT—GROUNDS.

Pittsburgh, C. C. and St. L. Ry. Co. v. State, Ind. 99 N. E. 801. "The question whether Act March 8, 1909, is constitutional, was not raised by a motion in arrest of judgment in view of Burns' Ann. St. 1908, Par. 2159, authorizing such motion only where the grand jury had no jurisdiction of the offense, or where the facts stated in the indictment do not constitute a public offense. The sufficiency of the evidence in a criminal cause cannot be reviewed by a motion in arrest of judgment."

PROOF OF MOTIVE.

People v. Enright, Ill. 99 N. E. 936. "The state is not required to prove the motive for a crime, although evidence of motive is admissible, and hence an instruction that, if the evidence failed to show any motive, this was a circumstance which should be considered by the jury was properly refused."

TRIAL.

State v. Brennan, N. J., 84 Atl. 1066. *Necessity of plea.* "Where an allegation filed by the prosecutor of the pleas charged distinct offenses in two counts, and accused plead not guilty to the second count only, a conviction of the offense charged in the first count was invalid, because not supported by a plea, without which there can be no issue and no valid trial.

"Error in convicting a person of an offense charged in a count to which he has not pleaded cannot be cured after verdict by entering a plea of not guilty without the accused's consent."