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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER, ELMER A. WILCOX, JOHN LISLE, FREDERIC GREEN.

CONSENT IN SODOMY.

The criticism upon the California cases of *People v. Dong Pok Yip,* 127 Pac. 1031, and *People v. Hickey,* 109 Cal. 275, printed in the May number of this JOURNAL at pages 90-94, seems itself to call for comment. Those cases contain no hint of the doctrine, which a reader of the review might suppose to be attributed to them, that consent is a defense to a charge of sodomy or to a charge of an attempt to commit sodomy.

In *People v. Dong Pok Yip,* defendant was indicted for assault on a nine-year-old boy with intent to commit sodomy. The evidence showed that with some indecency of attitude he placed his hands on the boy's waist without objection from the boy. The jury acquitted him of intent to commit sodomy but convicted him of simple assault. He contended that the conviction for assault should be set aside because the evidence established that the boy consented to the laying on of hands, and that consent is a defense to a charge of simple assault. The district court of appeal held that the evidence was consistent with the boy's having merely submitted to what was done without consenting to it, and that as the jury were correctly instructed that a real consent would be a defense to a charge of assault, they must, in returning a verdict of guilty of simple assault, have found that there was no real consent. Accordingly, the conviction was affirmed. On further appeal to the supreme court, that court approved and adopted the views of the district court of appeal and again affirmed the conviction, taking occasion moreover to say that they thought the evidence would have justified a verdict of guilty not merely of simple assault, but of the aggravated assault charged.

It is hard to see in this ruling a startling pronounciamento "which sets at defiance all the established rules of law and the dictates of common sense."

In *People v. Hickey,* there is a dictum to the effect that one who commits sodomy with the consent of the other party cannot be punished for assaulting him, and that one who attempts with the other's consent to commit sodomy cannot be punished for assaulting him with intent to commit sodomy. It is true that in some cases where the essence of the attempted offense lies in physical disablement offenders have been held guilty of assault though the violence was consented to, as in prize fights or attempts to kill. But it would be a different thing to hold that every person who attempts by co-operation with another to commit a crime, is guilty of assault upon the other if in course of the attempt he comes into physical contact with him by his consent. And it was held in *State v. Romans,* 21 Wash. 284, that assault upon another with intent to commit sodomy is a distinct offense from an attempt to commit sodomy upon the person of another.

Even if it be true that in California one who attempts to commit sodomy with the other person's consent cannot be punished for assault, he can be punished under section 664 of the Penal Code for a criminal at-

tempt, and subjected to a punishment equally heavy—a long term in prison. Not one of the decisions cited in criticism of the California cases is inconsistent with the rulings or language of the California court.

FREDERIC GREEN, University of Illinois.

ARRAIGNMENT AND PLEA:

State v. Moss, Mo. App., 144 S. W. 1109. *Omission Fatal.* Defendant was convicted of a misdemeanor before a justice of the peace. He appealed to the circuit court and was again convicted. He then moved in arrest of judgment because the record did not show an arraignment and plea. While these motions were pending, the prosecuting attorney, by leave of court, filed an amended transcript of the record of the justice court, purporting to show that a formal arraignment was waived and a plea of not guilty entered before the justice. The motion in arrest was then overruled and defendant appealed. Held, that the motion should have been granted. The amended transcript was filed too late. As the record stood when the trial was held no conviction could stand and the defendant was not bound to offer any testimony or make objection to any offered by the state. If the amendment were then received the record would, after verdict, for the first time show that there was an issue made upon which the defendant must make his defense. "Such a proceeding is exceedingly dangerous, and we are of the opinion that it should not be permitted." The judgment was reversed and the case remanded.

CONSTITUTIONAL LAW.

Morgan v. State, Ind., 101 N. E. 6. *Discrimination by reason of sex.* Section 16½ of Laws 1909, c. 87, relating to the manner of holding insanity inquests in cases of convicts and for their transfer and discharge, provides that, where the defense of insanity is interposed upon the trial of any male person for felony, the court or jury shall find both whether defendant committed the act charged and as to his sanity at that time, and that, upon findings of guilty and of insanity, he shall be committed to the colony for insane criminals, conflicts with Const. U. S. Amend. 14, forbidding any state to deny equal protection of the law, because not applying to females.

Note: The Indiana Legislature, at its recent session, passed a new act applying to both sexes.

People v. Heise, Ill., 100 N. E. 1000. *Payment of fines to wife.* Act of May 13, 1903 (Laws 1903, p. 155), denouncing the offense of wife abandonment and providing that the court may direct fines imposed to be paid to the wife, or instead of other punishment may order the defendant to pay the wife a weekly sum for a year, is not in violation of Constitution, article 4, section 20, providing that the state shall never pay, assume, or become responsible for the debts or liabilities of any corporation or individual; the constitutional provision being clearly not intended to affect the disposition of fines under a penal law.

Nor is it in violation of Constitution, article 4, section 22, providing that the General Assembly shall not pass local or special laws for the remitting of fines; the inhibition being directed solely against the Legislature.

Nor is it violative of Constitution, article 2, section 12, providing that no person shall be imprisoned for debt except upon refusal to deliver up his estate for the benefit of creditors; this inhibition being directed to imprisonment for civil debts.

Crenshaw v. State of Arkansas, 33 Sup. Ct. Repr. 294. *State regulations of "peddlers."* The business of traveling from place to place, taking orders and transmitting them to a non-resident manufacturer for articles to be delivered in fulfilment of such orders, and which are in fact shipped in interstate commerce and delivered to the persons who ordered them, or the business of making such deliveries, cannot consistently with the commerce clause of the Federal Constitution, be subjected to a license tax as is attempted by Ark. Act April 1, 1909, p. 292, and such statute cannot be sustained as a valid exercise of the police power of the state to tax the occupation of peddlers, because it defines peddlers in such a way as to include persons engaged in business of this character, and taxes them as such.

Hoke v. United States, 33 Sup. Ct. Repr. 281. *White Slave Act.* Congress in the exercise of its power to regulate commerce, could lawfully enact the provisions of the White Slave Act of June 25, 1910 (36 St. at L. 825, c. 395, U. S. Comp. Stat. Supp. 1911, p. 1343), making criminal the transportation of women or girls in interstate commerce for the purpose of prostitution, or debauchery, or other immoral purposes, or the obtaining, aiding, or inducing such transportation.

United States v. Patterson, 201 Fed. 697. *Criminal Section of Sherman Anti-Trust Act.* The Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647, U. S. Comp. St. 1901, p. 3200), making it a criminal offense to make any contract or engage in any combination or conspiracy in restraint of interstate trade or commerce, or to monopolize or attempt to monopolize or conspire with any other person or persons to monpolize any part of such trade or commerce, is a valid criminal statute, sufficiently clear in itself to inform the accused of the nature and cause of the accusation against him, and criminal prosecutions under it do not deprive the defendants of liberty or property without due process of law.

COMMENTS OF COUNSEL.

State v. Neiberg, Vt., 85 Atl., 769. *Harmless error.* In a prosecution for adultery, where the accused did not testify, but the woman did, a statement of the state's attorney, "In the terrible disaster of the Titanic * * * the cry was 'The women first,' and in this case a like fact stands out in favor of the respondent; the cry was 'Woman first,' and the woman took the stand"—was susceptible of the construction that it was a comment on the defendant's failure to take the stand; but such intent was disclaimed by the state's attorney. Held, that, being ambiguous, it would not be deemed reversible error, in view of the disclaimer.

DECOYS.

United States v. Healy, 202 Fed. 349. Decoys are permissible to entrap criminals, or to present opportunity to those having criminal intent to, or who are willing to commit crime, but not to create criminals, or to ensnare the law-abiding into committing an offense without an intent to do so.

Where a statute makes an act a crime, regardless of the actor's intent or knowledge, ignorance of that fact is no excuse if the act is done voluntarily; but if done on solicitation by the government's instrument to that end, ignorance of fact shows the act to have been involuntary, and estops the government from claiming a conviction.

Where an Indian decoy of government officers so concealed the fact that he was an Indian as to mislead the defendant and induce him to sell intoxicating liquors to him, in order to procure defendant to commit the crime of selling liquor to an Indian, the sale, under such circumstances, was insufficient to sustain a conviction.

ERROR.

Pettine v. Territory of New Mexico, 201 Fed. 489. *Prejudice presumed.* The legal presumption is that error produces prejudice. It is only when the fact so clearly appears as to be beyond a doubt that an erroneous ruling did not prejudice, and could not have prejudiced, the complaining party that the rule that error without prejudice is no ground for reversal is applicable.

On the trial of the defendant for murder in the first degree, the witnesses for the government had testified to a state of facts tending to show his guilt, and the defendant and his witnesses to a state of facts tending to show justifiable homicide, and the defendant had testified that he had never intended to kill the deceased until in fear of his life he fired to save it, when the counsel for the prosecution asked him if he had not told one Campagnoli that he had intended to kill the deceased and two other men, but could not find them together, and he answered the question in the negative, and immediately rested his case. On rebuttal Campagnoli was called by the government, and testified that the defendant had made such a statement to him. There was a verdict of murder in the second degree. Thereafter the defendant made a motion for a new trial on the affidavit of Campagnoli that the defendant never made any such statement to him as he had testified to, that he was intoxicated when he gave his evidence, and after he became sober he knew that the defendant had never made any such statement, and upon the affidavit of the defendant to the same effect and that he had no notice or information that Campagnoli would testify as he did until he came upon the stand in rebuttal. The court denied this motion for a new trial.

Held, (1) It did not appear beyond a doubt that this ruling did not prejudice and could not have prejudiced the defendant, but the record strongly indicated that the ruling was prejudicial error.

(2) It was a rule of the Supreme Court of the territory of New Mexico that a denial by the trial court of a motion for a new trial based upon facts not presented at the trial rested in the sound discretion of the trial court, but that an abuse of that discretion entitled the defeated party to a reversal of the order by the Supreme Court of the territory on an appeal or a writ of error.

(3) The denial of the motion for a new trial by the trial court and its failure to grant the defendant a subsequent fair trial in which the false testimony of Campagnoli should be excluded from the minds of the triers was a gross abuse of the discretion fatal to the judgment below.

EVIDENCE.

People v. Vitusky, 140 N. Y. Supp. 19. *Threats.* In a prosecution for attempted blackmail on Saturday, when defendant threatened to blow prosecuting witness' head off, evidence that a bomb was exploded by some one in his apartment the next Monday was admissible.

SCOTT and MCLAUGHLIN, JJ., dissented.

Donnelly v. United States, 33 Sup. Ct. Repr. 449. *Extrajudicial confession of third person—Hearsay.* The extrajudicial confession of a third person, since deceased, that he had committed the murder with which the accused is charged, is not admissible in evidence in behalf of the accused.

HOLMES, LURTON and HUGHES, JJ., dissented on this point.

State v. Rasco, Mo., 144 S. W. 449. *Bloodhounds.* On a trial for murder the state offered evidence that the defendant had been trailed by bloodhounds. In the absence of the jury the court heard the testimony of the master of the dogs as to their ability in following a trail; that when put upon a trail they would adhere to it no matter how many other trails might intervene, and if taken off for a short time they would return to it and not follow any other trail, with instances of what they had done. The court ruled that the evidence was admissible, the jury was recalled, and the evidence as to the experience and capacity of the dogs was repeated before them. The state then proved that the day after the murder the hounds had been taken to the place where it occurred and put upon a trail starting from a peculiar heel mark near a pool of blood. They followed this trail about two and a half miles and were then taken off to feed and rest. They were then taken in an automobile to a point about a mile from where they left the trail, soon took up a scent, followed it to defendant's house and room, where they smelled a pair of overalls on which human blood was found. The heel of one of a pair of shoes found there corresponded to the peculiar track. Marks of this heel were found along the trail first followed by the hounds, also from the place where they were taken from the trail to that where they again took up the scent, and along this trail. Many people had walked over the same ground since the murder. There was ample evidence, other than this, to connect the defendant with the crime. Held, that while this evidence was perhaps of slight weight, it was competent to go to the jury, together with all the other evidence, as a circumstance tending to connect the defendant with the crime.

State v. Rasco, Mo. 144 S. W. 449. *Harmless error.* On a trial for murder the defense was an alibi. A witness testified to hearing a jar and children's voices over the telephone at about the time the murder was committed. The deceased had a telephone on the same party line. The body of one of the victims was in a position indicating that she was at the telephone when killed. It was not shown that the sounds came from the house in which some of the murders were committed. The Appellate Court thought the evidence was probably competent, but though incompetent, not ground for reversal, as it did not in the slightest degree tend to connect the defendant with the crime and could in no way affect or prejudice the jury upon any material question in the case.

The children of the deceased were murdered at the same time and their bodies burned. A medical witness testified that in his opinion their skulls had been crushed. The defense moved to strike this testimony from the record. The Court: "Well, I do not know that it makes any difference whether it is in or not." Counsel for defendant: "Well, it tends to prejudice the minds of the jurors:" The Court: "O, fiddlesticks! Go ahead." "Without stopping to consider the very undignified and improper manner in which the Court disposed of this objection," the Supreme Court held that the answer should have been stricken, as it was hardly a scientific opinion, but was little more than a

mere guess. But as it had no tendency to connect defendant with the crime, it was not prejudicial to him. Had there been any question as to the degree of the crime, the intensifying of the picture before the eyes of the jury might have been prejudicial, but not where the only question was as to the identity of the murderer. The Court said: "It cannot be expected that a trial of this length and importance will be wholly free from minor errors. So long as judges and lawyers are human, and are called upon to act promptly, without opportunity for due deliberation, mistakes must occur. But cases must come to an end. It is the wise policy of the law to reverse judgments for errors only that go to the substantial rights of parties." Though the case was capital, the conviction was affirmed.

EXTRADITION.

Hyland v. Rochelle, Ind., 100 N. E. 842. *Meaning of "Judge of this state" in extradition statute.* The judge of a city court created by Acts March 6, 1905 (Acts 1905, c. 129), vesting the judicial power of cities of designated classes in a city court, which shall be a court of record, and declaring that the judge thereof shall be elected by the voters and shall have original and concurrent jurisdiction with the circuit or criminal courts in cases of petit larceny and other violations of the law, where the penalty cannot exceed a fine of $500 and imprisonment not exceeding six months, or both, etc., is a "Judge of this state" within Burns' Ann. St. 1908, section 1893 (Act March 10, 1905, c. 169, section 26) relating to fugitives from justice and requiring the Governor on demand of the executive authority of any state for the surrender of any fugitive to issue his warrant commanding the fugitive to be apprehended and brought before the "Circuit, superior or criminal court, or judge of this state" nearest to the place at which the arrest may be made, and the judge of the city court of Indianapolis has jurisdiction to determine the question of the identity of a fugitive.

FORMER JEOPARDY.

Commonwealth v. Browning, Ky., 143 S. W. 407. *Two crimes from one act.* Defendant was engaged in a difficulty with Stewart and Caywood. He shot at them once and thereby wounded both. He was tried for shooting at and wounding Stewart with intent to kill him, was convicted of the included crime of shooting and wounding him in a sudden affray, and was fined and imprisoned therefor. He was later tried for shooting at and wounding Caywood with intent to kill him and pleaded in bar his conviction for shooting and wounding Stewart. The Court distinguished the case from those holding "that more than one offense cannot be carved out of the same unlawful acts, where such acts had but one result," as where a conviction of shooting at random on the public highway was held to bar a subsequent prosecution for flourishing and using a deadly weapon in a threatening manner, both prosecutions being based on the same transaction. It was held that as defendant could not be convicted on this indictment on proof that he shot Stewart, he had not been in jeopardy for the offense now charged. The offenses "were not included within one another, though resulting from the same act, but were separate and distinct offenses."

HABEAS CORPUS.

Johnson v. Hoy, 33 Sup. Ct. Repr. 240. Habeas corpus is not ordinarily

available to test in advance of trial the constitutionality of a statute under which the petitioner was indicted, but the orderly course of the trial should be pursued and the usual remedies exhausted.

A requirement of excessive bail on prohibitive conditions cannot be urged as a reason for according the accused a hearing as to the constitutionality of the statute under which he was indicted on an appeal from an order denying relief by habeas corpus in advance of trial, where, since the appeal, he has given bond, and has been released from arrest under the warrant issued on the indictment.

IMPEACHMENT OF WITNESS.

Anderson v. State, Tex., Cr. App., 144 S. W. 281. *Use of cocaine.* Defendant offered evidence that one of the witnesses for the state was a confirmed cocaine fiend, and medical testimony to show the effect of the habitual use of the drug. The evidence was excluded. Held, error. If the witness used the drug to such an extent as to impair her mental and moral sensibilities it would affect her credibility. Reversed. In *Williams v. United States,* 6 Ind. Ter. 1, 88 S. W. 334, it was held that like evidence was inadmissible to impeach the credibility of a witness unless it was shown that he was under the influence of cocaine when testifying or that his powers of observation and recollection had been affected by the use of the drug.

IMPRISONMENT.

People, ex rel, Johnson v. Murphy, Ill., 100 N. E. 980. *"Commutation" of "sentence."* Hurd's Rev. St. 1911, c. 108, section 11, provided for the location of a southern penitentiary to which all convicts in the southern part of the state should be sent, with power to exchange prisoners in the interest of discipline and on approval by the Governor. Petitioner was convicted of murder in a county required to send its convicts to the southern penitentiary and sentenced to be hanged, and the Governor, in the exercise of his constitutional power, commuted his sentence to life imprisonment, a punishment authorized by law for murder, and directed that he be taken from the county jail and delivered to the penitentiary at Joliet to serve his life sentence. Held, on habeas corpus on the ground that the petitioner could only be imprisoned in the southern penitentiary, and that his detention at Joliet was illegal, that "sentence" denotes the act of a court of criminal jurisdiction, declaring the consequences to a convict of the fact of guilt confessed or ascertained by verdict, that a "commutation" is the substitution of a punishment of a lower degree for one of higher degree and that as the prisoner was confined by virtue of the Governor's command and not by any sentence, his detention at Joliet was authorized.

INCEST.

Foote v. State, Tex. Cr. App., 144 S. W. 275. *Presumption of legitimacy.* Defendant was indicted for incest with his brother's daughter. His defense was that she was not related to him, but was an illegitimate child of his brother's wife. He offered the girl's mother and her alleged father as witnesses to testify to illicit intercourse during the period when the girl was conceived. He also offered evidence that the girl, her mother and the alleged father were black, while his brother was "gingercake" in color. None of this evidence was admitted. Held, that the mother could not testify to any fact that would bastardize

her child. The alleged father could not testify to intercourse, as the only evidence admissible to rebut the presumption of legitimacy arising from birth in wedlock was testimony that the husband was impotent or was absent from home for such a length and at such a time as would render it impossible that he was the father of the child. As the child's color may have come from her mother, the evidence as to color was properly excluded. The conviction was affirmed.

INDICTMENT.

Nemcof v. U. S., 202 Fed. 911. *Defects of form.* Where an indictment for conspiracy to conceal assets of a bankrupt from his trustee omitted to charge a conspiracy with the bankrupt, and did not allege that the defendants had conspired, not only with each other, but with "other persons to the grand inquest unknown," such defect, when objected to for the first time after conviction, would be regarded as one of form only within Rev. St., section 1025 (U. S. Comp. Stat. 1901, p. 720), and therefore not fatal.

GRAY, J., dissented.

Bennett v. United States, 33 Sup. Ct. Repr. 288. *Variance—Misnomer.* A double variance between the name by which a woman transported, contrary to the White Slave Act of June 25, 1910, was called in the indictment, and the name by which she was known to the defendant, and her real name is not fatal, where the record shows that the defendant was informed of the charge against her, and is in such shape as to protect her against another prosecution for the same offense.

People v. Reilly, Ill., 101 N. E. 54. *Designation of person injured—Initials.* Even if the full Christian name of a third party, necessary to the description of a crime, should be given in the indictment, the Court will not presume from the indictment alone, without proof, that letters are merely initials rather than the full Christian name of the party designated.

The Christian name may consist of a single letter or letters.

Moore v. State, Ind., 101 N. E. 295. *Variance.* Under an indictment charging that the defendant stole from the person "$7.10 in lawful money of the United States of America," proof that defendant stole from such person $7.10 in money, without specific proof that it was money issued by the United States Government, was not such failure to prove the allegations as to be reversible error, since Burns' Ann. St. 1908, section 2058, only requires that money be described as money.

INDICTMENT AND INFORMATION.

State v. Henan, Mo. App., 143 S. W. 877. *Information need not be based on evidence.* Under a statute authorizing the prosecuting attorney to file an information when he has personal knowledge, or information and belief that an offense has been committed, it is not a ground to quash an information that the prosecuting attorney filed it without first having heard evidence of the commission of the offense. If the information is properly signed and verified, upon the prosecuting attorney's information and belief, it is sufficient. While a grand jury is not justified in returning an indictment unless evidence is presented before it, the prosecuting attorney may act under his oath of office, without the examination of evidence, upon his information and belief.

Overstreet v. Commonwealth, Ky., 144 S. W. 751. *Repugnancy between caption and charge.* In the caption defendant was accused of "the offense of

arson," while the charging part alleged that he "did feloniously, willfully and maliciously set fire to and burn the storehouse of" one Friedman. The trial court overruled a demurrer. Held, that strictly the indictment was not good as a charge of either common law arson or the statutory crime of unlawfully burning a storehouse. But under statutes providing that an indictment shall contain a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and such degree of certainty as to enable the Court to pronounce judgment on conviction according to the rights of the case, and that a conviction shall be reversed for any error of law when the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby, the conviction should be affirmed. As the word "arson" is generally and commonly understood to mean the unlawful burning of the property of another, and all the sections of the statutes relating to the willful and malicious burning of property are grouped in a subdivision entited "Arson," the use of the word in the caption was not misleading.

INSTRUCTIONS.

People v. Lingley, N. Y., 101 N. E. 170. *Presumption of good character.* Where there is no evidence as to the character of the defendant he is not entitled to an instruction that his character is presumed to be good; there being no presumption either for or against, and the defendant's character being a non-existent quantity in the evidence.

JUROR.

State v. Rasco, Mo., 144 S. W. 449. *Opinion as to defendant's guilt.* When examined as to his competency a juror stated that he had formed and expressed an opinion as to the guilt or innocence of the defendant and "had that opinion now," but believed he could render a fair and impartial verdict; that he had formed the opinion from what he had read in the newspapers and heard in his neighborhood, and it would require evidence to remove it. Examined at length by the Court and the defense, he said in answer to one that he would not convict unless the defendant's guilt was proved beyond a reasonable doubt, and in answer to the other that he would convict unless there was evidence that the defendant was not guilty. The Court was satisfied that he was sincere, but did not understand the questions, and further examination resulting in answers that the defendant's guilt must be proved beyond a reasonable doubt, and that he would be governed by the evidence and instructions of the court, uninfluenced by anything he knew before the trial, he was accepted. A statute provided that a juror who had formed an opinion which it would require evidence to remove was competent if the Court thought that he would determine the issues on the evidence, without bias. Held, that it was for the trial court, which had the advantage of seeing the juror and hearing him testify, to determine whether he was competent. As the answers as a whole, in the light of the juror's demeanor while testifying, satisfied the trial court, the ruling was not error.

JURY.

Cooper v. State, Tex. Cr. App., 144 S. W. 937. *Challenged juror sitting.* A member of the jury panel named Oxford qualified on his *voir dire,* but was peremptorily challenged by defendant. Neither the Court nor the prosecuting

attorney knew he had been challenged. When the jury was called Oxford mistook another name for his, took the other man's place in the box and served on the jury. The defendant's counsel knew Oxford well, but did not notice that he was on the jury till their names were called after the verdict was returned. Held, that the objection came too late. The judgment was affirmed.

LIBEL.

People v. Bihler, 139 N. Y. Supp. 819. *Place of publication.* A libelous letter is published both in the place where it is posted in the mail and in the place to which it is addressed, the post mark being *prima facie* evidence that the letter was in the postoffice on the date of the post mark, so that the publication of a libelous letter addressed to one in Switzerland was complete when deposited in the postoffice in New York City with postage prepaid for its transmission to Switzerland.

REVERSAL.

Treadway v. State, Tex. Cr. App., 144 S. W. 655, 663. *As a cause of murder.* Treadway married Box's daughter. Box was told and believed that Treadway had beaten her and otherwise mistreated her. He instituted a criminal prosecution against Treadway for the assault, which resulted in a conviction, but on appeal the conviction was reversed. Box then made repeated threats to kill Treadway, saying he could get no redress from the courts, and that he ought to have taken the matter into his own hands to get justice. These threats were reported to Treadway. On several occasions when Box was near, Treadway either kept out of his sight or remained near other men so that Box could not shoot at him without endangering the others. Finally Treadway shot and killed Box, in self defense, as he claimed. Other witnesses testified that there was no provocation or excuse for the killing at the time, and Treadway was convicted of murder. This conviction was affirmed, two judges for affirmance, one for reversal.

Overstreet v. Commonwealth, Ky., 144 S. W., 751. *For errors of substance only.* A statute originally provided, "A judgment of conviction shall be reversed for any error of law to the defendant's prejudice appearing on the record." It was amended to read, "A judgment of conviction shall be reversed for any error of law appearing on the record when, upon consideration of the whole case, the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby." The court says that this amendment has "in vested this Court, as a final arbiter between the commonwealth and the accused, with wide discretion, and this discretion puts upon us large power and responsibility, leaving it to our judgment to say for what errors there shall be reversal.

"We may also observe that it would be a rare thing in the trial of an important and hotly contested case if errors of law could not be found in the record, judged by strict legal standard. But every judge and lawyer who has had experience in the trial of criminal cases knows that a great many of these errors do not at all prejudice or affect the substantial rights of the accused. The basic rule of our system of criminal pleading and practice is that every person accused of crime has the right to demand and have a fair trial, in substance as well as in form; and when he has had such a trial before the tribunal created by law for that purpose, which, under our practice, is a trial judge and a jury,

he must abide by the decision, unless it be that his substantial rights have in some manner been prejudiced.

"There is no right of appeal guaranteed by the Constitution; but the Legislature has given the accused who is convicted the right of appeal, and has conferred upon this Court the right to review the trial in which he was convicted.

"And so it is the settled practice in this Court not to remand for a new trial, if there is any error of law appearing in the record, but to order a new trial only for errors that, upon a consideration of the whole case, appear to us to have been pejudicial to the substantial rights of the accused."

RULES OF ADMINISTRATION.

United States v. Patterson, 201 Fed. 697. *Technicalities.* At the present time the reasons which formerly impelled courts to resort to technicalities to avoid the infliction of unjustly severe penalties have ceased to exist, and the effort now on the part of the judges is to overlook technicalities so far as possible, and to administer the law from a broad viewpoint, looking to ultimate justice upon the merits.

SEDUCTION.

People v. Weinstock, 140 N. Y. Supp. 453. *Meaning of "chaste."* Under Penal Law (Consol. Laws 1909, c. 40), section 2175, making the seduction of an unmarried female of previous chaste character under promise of marriage a criminal offense, virginity is not required, but a widow, divorced woman, or even a woman guilty of unchaste conduct, but who has reformed, may be "chaste."

MARRIED WOMAN.

State v. Hoelcher, Mo. App., 143 S. W. 850. *Presumption of marital coercion.* Defendant, a married woman, was convicted of keeping a bawdy house. Her husband lived with her, but stayed most of the time on a farm. She had applied to the mayor and city marshal for permission to run the place, offering to pay the same rate as others, but had been refused. She had then said she would do it anyway, and later told an officer that the marshal had not treated her right and she would keep her house there in spite of him. Held, that where a husband lives in the house with his wife, he is presumed to be in control of it, and is liable for its unlawful use. But this presumption is like that which arises when a crime is committed by a married woman in the presence of her husband, only *prima facie.* It may be easily rebutted, especially in cases of this sort. The facts shown in this case were sufficient to rebut the presumption. The conviction was affirmed.

RECEIVING STOLEN GOODS.

People v. Pollak, 139 N. Y. Supp. 831. *Receiving from a juvenile delinquent.* Under Penal Law (Consol. Laws 1909, c. 40), section 1308, punishing one receiving stolen property, knowing the same to have been stolen, and section 1309 making it unnecessary to aver in the indictment or prove that the person who stole the property had been convicted or was amenable to justice, and section 1290, defining larceny as taking from the possession of the owner or any other person any property with intent to defraud the true owner, and section 2186 providing that a child between the ages of 7 and 16 years of age who shall

commit any act which, if committed by an adult, would be a crime, shall be deemed guilty of juvenile delinquency only, one receiving goods from a child under 16 years of age who appropriated the same in a manner to constitute larceny if appropriated by one over the age of 16 years, with knowledge of the wrongful act of the child, is guilty of receiving stolen goods.

SERVICE ON CORPORATION.

Good Roads Machinery Co. v. Commonwealth, Ky., 143 S. W. 18. *Agent for single transaction.* A foreign corporation was indicted for violation of the Anti-Trust Act. Service was made on a domestic corporation which had aided defendant in making one sale of goods, collected and remitted the purchase money, and had received a commission therefor. It had no authority to solicit business or act for defendant in any other transaction. It sent defendant a copy of the indictment in time for defendant to answer, but defendant did not do so. Defendant had a general agent and one or two other agents in the state. Defendant was convicted, fined $1,500, and an execution returned unsatisfied. Suit in the nature of a bill of discovery was then brought, a debtor or defendant was made garnishee, and defendant answered and set up lack of jurisdiction in the prior criminal proceedings. Held, that one who brings a buyer and seller together in a single transaction, though he receive pay therefor, does not thereby become an agent of the seller in other or different matters. Service on the domestic company was not service on the defendant. There having been no legal service on the defendant, the fact that it had actual notice of the proceedings was immaterial. The judgment charging the garnishee was reversed.

The Court distinguished a prior case in which it had sustained the service of civil process on an agent who had acted in a single transaction on the ground that in that case the suit had arisen out of the transaction in which he had acted.

STATUTE OF LIMITATIONS.

People v. Heise, Ill., 100 N. E. 1000. *Abandonment of family.* Under Act May 13, 1903 (Laws 1903, p. 155) providing that one who shall abandon his wife or minor child in destitute circumstances, and willfully refuse to maintain or provide for them, shall be guilty of a misdemeanor, two elements are required to constitute the offense—the act of abandonment and the refusal to maintain—and as the act of abandonment can occur but once, the crime becomes complete upon abandonment and refusal to maintain, and the Statute of Limitations then begins to run; the continued neglect and refusal to provide not being new offenses.

TRIAL.

Johnson v. State, Tenn., 143 S. W. 1134. *Improper argument.* Defendant was convicted of manslaughter. Owing to his absence from the state he had not been tried till eight years after the homicide was committed. This trial had resulted in a conviction, which was reversed on appeal. Five years later he was tried again. In this trial there was great conflict between the testimony of the witnesses for the state and those for the defense. During the final argument the state's attorney said that the witnesses for the state were more likely to remember the transaction correctly, because they had testified before the grand jury, and had thereby gotten the facts more deeply impressed upon their memories than had the witness for the defense. Defendant objected on the ground

that there was no testimony that they had been before the grand jury. The state's attorney then read to the jury a memorandum on the back of the indictment, purporting to show that the witnesses referred to had been examined before the grand jury. Defendant objected on the ground that this memorandum had not been put in evidence. The objection was overruled. Held, that the memorandum was not evidence and should not have been referred to at all. For this and other errors the conviction was reversed.

Davis v. State, Tex. Cr. App., 143 S. W. 1161. *Expression of judge's opinion on the evidence.* During the trial and in the presence of the jury, a question was raised whether there should be an instruction on the law of circumstantial evidence. The case clearly depended on circumstantial evidence. The Court said he did not know whether he would so charge or not; that he had not made up his mind on that question. This was held to be a violation of the statute prohibiting the judge from making any remark calculated to convey to the jury his opinion of the case, as it indicated to the jury that the Court thought that "the facts were sufficiently cogent to preclude the idea of charging on the law of circumstantial evidence." For this and other errors, the conviction was reversed.

Drake v. State, Tex. Cr. App., 143 S. W. 1157. *Interrogation of witnesses by judge.* The Appellate Court, apparently without any adequate exception reserved by the defendant, cautioned trial judges about questioning witnesses and developing evidence which had not been introduced into the case before, saying it might prevent the reversal of cases in the future. A statute prohibits the judge from making "any remark calculated to convey to the jury, his opinion of the case." The Court said it was almost impossible for the trial judge to examine witnesses without indicating that he was on one side or the other; and experience had shown that judges were apt to ask leading and otherwise objectionable questions. "By carefully attending to his own duties and conserving his own functions, he will best be able to hold the scales of justice impartially as between the counsel who are managing the case for and against the state; and whenever he does interfere, it is generally at the expense of his own authority and dignity, which should be rigidly guarded, in order that he may administer the law with fairness and impartiality, and with that authority and power which pertains to the office.

People v. Pettanza, N. Y., 101 N. E., 428 *Misconduct of counsel.* On a trial for kidnapping, after evidence that a certain article was found in the accused's room had been stricken out, it was improper for the district attorney to again exhibit it to a witness, again ask where and how it was found, and then offer it for identification, apparently in order that the jury might appreciate that it contained dynamite.

Reagan v. United States, 202 Fed. 488. *Exclusion of spectators.* Defendant, in a prosecution for rape, was not deprived of a public trial by an order clearing the courtroom of spectators, but permitting all persons connected with the court, either as officers or members of the bar, and all persons in any manner connected with the case as witnesses, etc., to remain.