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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER AND ELMER A. WILCOX.

FEDERAL DECISION RELATING TO THE STERILIZATION LAW IN IOWA.

Judicial Decision on Criminal Law and Procedure. District Court of the United States, in and for the Southern District of Iowa, Eastern Division.

Rudolph Davis, *Complainant, against* William H. Barry, John F. Howe, David C. Mott, James C. Sanders and Austin F. Philpott, *Defendants.* No. 9-A, Equity. *Opinion.*

George B. Stewart of Fort Madison, Iowa, for complainant; George Cosson of Des Moines, Iowa, Attorney General of Iowa, for defendants.

Before Walter I. Smith, Circuit Judge; John C. Pollock and Smith McPherson, District Judges.

Smith McPherson, District Judge:

The complainant is a prisoner in the Iowa penitentiary. Defendants Berry, Howe and Mott constitute the Iowa Board of Parole; Sanders is the warden, and Philpott is the physician of the penitentiary.

The case is one of diversity of citizenship, with federal questions presented by a bill in equity with an application for temporary injunction to restrain defendants as state officers from enforcing chapter 187 of the acts of the thirty-fifth general assembly (1913), authorizing a surgical operation called vasectomy on idiots, feeble-minded, drunkards, drug-fiends, epileptics, syphilitics, moral and sexual perverts, and mandatory as to criminals who have been twice convicted of a felony.

Complainant has been twice convicted of a felony, one of which was prior to the enactment of the statute in question (and in another state), and the other since (in this state), and for the latter he is now imprisoned. The defendant board of parole in February, 1914, made an order that the operation should be performed upon certain designated prisoners, including the complainant. This action was brought by the complainant for the purpose of enjoining each and every one of the defendants from subjecting him to the operation. Since the action was instituted the board of parole under a written opinion of the attorney general of the state has rescinded its order, and they and the prison physician say they will observe such opinion. The opinion of the attorney general is based upon the proposition that the statute is *ex post facto* if either of the convictions was for an offense committed prior to the enactment of the statute. Complainant's counsel, in argument, conceded the statute is not an *ex post facto* one.

The attorney general was in error when he advised the board of parole that the statute in question is void by reason of it being *ex post facto,* except only as to prisoners who have been twice convicted for felonies committed since the enactment of the statute. The statute under any construction is not an *ex post facto* one. *State of Iowa ex rel. Gregory v. Jones,* 128 Fed. Rep. 626; *Kelly v. People,* 115 Ill. 583 (4 N. E. 644); *Commonwealth v. Graves,* 155 Mass. 163 29 N. E. 579); *Sturtevant v. Commonwealth,* 158 Mass. 598 (33 N. E. 648); *In re Miller,* 68 N. W. 990 (Michigan); *Blackburn v. State,* 50 Ohio State, 428 (36 N. E. 18); *Moore v. State of Missouri,* 159 U. S. 673; Cooley's Constitutional

Limitations, 7th Ed. 382; *State v. Dowden,* 137 Iowa, 573; *Graham v. West Virginia,* 224 U. S. 616. He is not being subjected to the operation for that which was by him done prior to the enactment of the statute, but because he voluntarily brings himself within a class covered by the statute, and he does this subsequent to the enactment of the statute.

The attorney general also advised the board of parole that the statute should be so construed as to be applicable only to prisoners who have been twice convicted of felonies, committed since the enactment of the statute. Section 26, Article III, of the Iowa constitution, provides that a statute shall take effect July 4th following its enactment, or, if enacted at a special session, then at the expiration of ninety days after adjournment; or, in case of a declared emergency, by the publication thereof. But the attorney general to maintain the proposition that the law is *ex post facto* as applied to one who was convicted the one time prior to the statute is doing violence to the state constitution by contending that the statue would be effective only as to any prisoner many years after its enactment.

The defendant board of parole by rescinding the order subjecting complainant to the surgical operation, and the defendant warden and physician, through the attorney general, now insist that an injunction should not issue because it will serve no purpose. There are two answers to this: Death, resignation, and expiration of terms of office will bring other men into the positions now held by the defendants, who may not entertain the same views as these defendants. The opinion of the attorney general is advisory only and is not at all binding on either these defendants or their successors in office.

Again, the statute in question provides that certain persons may be subjected to the surgical operation; but the latter part of section 1 provides that such operations *shall* be performed upon prisoners who have been twice convicted of a felony, such as the complainant.

It is the duty of an officer to follow the mandates of the statute. Of course, every officer must act at his peril under a statute that another party claims to be unconstitutional and void; but where a person will suffer an irreparable injury if the statute is carried out, the presumption is that such statute will be observed and that an injunction should issue to enjoin the enforcement of a void statute. *Williams v. Boynton,* 147 N. Y. 426 (42 N. E. 184); *Osborne v. Bank,* 9 Wheaton, 739, 840; 2 High on Injunctions (4th Ed.), Section 310.

Complainant in his verified bill alleges that the statute is in violation of the United States constitution in that it is in effect a bill of attainder in that there is to be no indictment or trial; that the statute abridges his privileges, and that he is denied the equal protection of the laws; that he is denied due process of law; that the statute is in conflict with the Iowa constitution in that the statute denies the inalienable right to enjoy life, liberty and to pursue and obtain safety and happiness; that there is no jury trial awarded him, and that the statute provides cruel and unusual punishment.

The case presents important questions. Statutes like this are of recent years, the first one upon the subject enacted less than fifteen years ago. The question has been before appellate courts but twice. In one case, that of *State of Washington v. Feilen,* 126 Pac. Rep. 75 (41 L. R. A., N. S. 418), the statute was upheld. The court held that the punishment was not cruel or unusual in the constitutional sense. That case involved a most heinous offense, that of the ravishment of a

female child, and the statute provided that in addition to life imprisonment the jury and the court might determine whether he should be subjected to the operation of vasectomy. So that on the question now presented there was due process of law in that the matter was judicially determined. The other case, by the Supreme Court of New Jersey, was that of *Smith v. Board of Examiners,* 88 Atl. Rep. 963. In that case the operation was to be performed upon a woman who was an epileptic, an inmate of a state charitable institution, and that court held that the statute was based upon an unreasonable police regulation and denied to her and persons of her class the equal protection of the laws as guaranteed by the fourteenth amendment.

The sole purpose of the operation is to destroy the power of procreation. The operation as originally performed was that of castration. In the twelfth century Henry II declared it treason for any person to bring over any mandate from the Pope or any one in authority in church affairs. This he made punishable as to secular clergymen by the loss of their eyes and by castration. Goldsmith's History of England, volume 1, page 88. In *Weems v. United States,* 217 U. S. 349, 377, the fact that castration was once inflicted is recognized—and see the case of *Whitton v. Georgia,* 47 Georgia 301.

There is a difference between the operation of castration and vasectomy; castration being physically more severe than the other. But vasectomy in its results is much the coarser and more vulgar. But the purpose and result of the two operations are one and the same.

When Blackstone wrote his Commentaries he did not mention castration as one of the cruel punishments, quite likely for the reason that with the advance of civilization the operation was looked upon as too cruel and was no longer performed. But each operation is to destroy the power of procreation. It is of course to follow the man during the balance of his life. The physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering are always present and known by all the public and will follow him wheresoever he may go. This belongs to the dark ages.

As of course all persons concede that it would be better for society if some men did not beget children: diseased, deformed, mentally weak children and criminally inclined, are brought into the world, oftentimes to their own shame and against the interest of the public. But are they not at the minimum?

And must the marriage relation be formed under these newly-conceived laws, based upon the brutalities of many centuries since, and be allowed to take the place of the marriage relation formed along the true lines? Must the marriage relation be based and enforced by statute according to the teachings of the farmer in selecting his male animals to be mated with certain female animals only?

It is somewhat difficult to define with precision what is cruel and unusual punishment in the constitutional sense. Usually the length of imprisonment following a conviction is within the discretion of the legislative body, and we have an extreme case in *O'Neil v. Vermont,* 144 U. S. 323, in which the judgment of the lower court was affirmed and the statute upheld. But quite a per cent of the bar of the country are of the opinion that the dissenting opinion by Justice Field (concurred in by Justices Brewer and Harlan) was the stronger.

No doubt delegates to the conventions, in providing against cruel punish-

ment, had largely in mind what Blackstone had then recently written in volume 4, page 376, such as being drawn or dragged to the place of execution, embowelling alive, cutting off the hands or ears, branding on the face or hand, slitting the nostrils, placing the prisoner in the pillory, the ducking, the rack, and the torture, and, as in Spanish countries, crucifying. In a very few states of the Union the whipping post has been retained as a constitutional mode of punishment. But it will be found that the courts in those states have construed the statute thus imposing such punishment in the light of their history, and what had been done and was being done at the time of the adoption of their constitution. No one can doubt but that under our present civilization if castration were to be adopted as a mode of punishment for any crime, all minds would so revolt that all courts, without hesitation, would declare it to be a cruel and unusual punishment. As we understand it, castration was never inflicted after the revolution of 1688. So that if, as some now contend, it is now competent for a legislature to impose such punishment as existed by the common law. the validity of the statute providing for castration could not be upheld, because that punishment was one imposed back of the time of the common law as, generally speaking, it comes down to us. In *O'Neil v. Vermont,* 144 U. S. 323, and *Weems v. United States,* 217 U. S. 349, and *In re Kemler,* 136 U. S. 436, all phases of the question are so presented as to leave nothing further to be said.

While it is true that there are differences between the two operations of castration and vasectomy, and while it is true that the effect upon the man would be different in several respects, yet the fact remains that the purpose and the same shame and humiliation and degradation and mental torture are the same in one case as in the other. And our conclusion is that the infliction of this penalty is in violation of the constitution, which provides that cruel and unusual punishment shall not be inflicted.

This statute not only allows but commands the operation of vasectomy to be performed upon all twice convicted of a felony. A felony in Iowa is not only murder, arson, rape, counterfeiting, and other serious crimes known as felonies at the common law, but they have been much extended under the Iowa statute, and some things are now felonies which until recently were misdemeanors with trials before a justice of the peace, or else no crime at all; wife abandonment, cutting electric light wires, breaking an electric globe, obstructing highway, unfastening a strap in a harness, and other things. So that if a person commits two or more of these, he is to be subjected to the operation if this statute is enforced.

And it is of no importance in argument whether the prison physician does this on his own motion or under an order of the state board of parole. The hearing is by an administrative board or officer. There is no actual hearing. There is no evidence. The proceedings are private. The public does not know what is being done until it is done. Witnesses are not produced, or if produced, they are not cross-examined. What records are examined is not known. The prisoner is not advised of the proceedings until ordered to submit to the operation. And yet in many cases there will be involved a serious controverted question of fact. The records of two convictions may show the same name of the party or parties convicted; but there are many men of the same name, but which is no proof that the person in the one case is the same person convicted in the other case. It is common knowledge that many prisoners take assumed

names. Who is to determine whether the various names represent one and the same person? And if one of the convictions was in another state, the question will arise whether it was for a felony. These are inquiries that must be held in the open, with full opportunities to present evidence and argument for and against. To uphold this statute it must be affirmed that the board of parole or prison physician must hear the evidence and examine laws of other states without notice and in the prisoner's absence and determine these questions. And if determined adversely, the prisoner has no remedy but must submit to the operation.

In the case at bar, the hearing was a private hearing,and the prisoner first knew of it when advised of the order. Due process of law means that every person must have his day in court, and this is as old as magna charta; that some time in the proceedings he must be confronted by his accuser and given a public hearing. Or as was stated in *Leeper v. Texas,* 139 U. S. 462:

> "Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied."

Under the habitual criminal laws of the state, if a prior conviction is relied on, the same must be pleaded and established by the evidence. But we have cases, this one included, in which the prior conviction has not been judicially established. But in *Hayes v. Missouri,* 120 U. S. 68, it was said that due process of law and the equal protection of the laws was secured if the laws operated on all alike and that all persons subject to the laws are treated alike under the limitations imposed. And the same holding was made in *Duncan v. Missouri,* 152 U. S. 377. The cases are numerous and without conflict as to such holdings and further citations need not be made.

But assuming that the prior convictions all appear of record, and assuming there is no conflict in the testimony and no difficulty in reaching the conclusion, but little or no advance is made in determining the question. If it be said that the statute automatically decides the question and nothing remains for the prison physician to do but to execute that which is already of record, then the statute becomes a bill of attainder. One of the rights of every man of sound mind is to enter into the marriage relation. Such is one of his civil rights, and deprivation or suspension of any civil right for past conduct is punishment for such conduct, and this fulfills the definition of a bill of attainder, because a bill of attainder is a legislative act which inflicts punishment without a jury trial, as is fully discussed and held in the case of *Cummings v. Missouri,* 71 U. S. 277, The Federalist, No. 44, by Madison; Justice Samuel F. Miller on the Constitution, 584; Watson on the Constitution, 733-738.

We hold the statute to be void, and unite in holding that a temporary writ of injunction should be issued as prayed.

Keokuk, Iowa, June 24, 1914.

SMITH, Circuit Judge, Concurring.

The foregoing opinion is supported by a wealth of historical and other references and I do not wish to dissent from any portion of it. But the Iowa law does not provide for a judicial investigation of the identity of the prisoner with the one previously convicted of a felony, as did the law in Washington, construed in *State v. Feilen,* referred to in the foregoing opinion. The fourteenth amendment to the Federal Constitution provides that no state shall

deprive any person of life, liberty or property without due process of law. It seems so manifest to me that the law which provides that such operation (vasectomy or ligation of the Fallopian tubes) shall be performed by the physician of the institution or one selected by him upon any convict or inmate who has twice been convicted of a felony deprives the party in question of due process of law that it can scarcely be discussed. Suppose a person had been twice convicted of a felony and has served his entire time and should subsequently be an inmate of the penitentiary unconvicted of any crime, but simply held there for safe keeping, this law in its strictness would require the prison physician to perform the operation upon him in person or by some person selected by such physician. It seems to me that the victim of this operation is so clearly deprived under this statute of the process of law that an injunction must issue, and I therefore express no opinion upon the other interesting questions presented.

ORDER BY JUDGES.

The order by Judges McPherson, Smith and Pollock is as follows:

In the District Court of the United States in, and for the southern district of Iowa, eastern division.

Rudolph Davis, complainant, against William H. Berry, John F. Howe, David C. Mott, James C. Sanders and Austin F. Philpott, defendants—No. 9-A, equity.—Order.

"This case was heretofore presented by an application of complainant for a temporary injunction. Thereupon the resident judge of said court by written order designated Walter I. Smith, one of the United States circuit judges for this the Eighth Circuit, and John C. Pollock, the United States district judge for the District of Kansas, to sit with and assist him in the determination of said application for a temporary injunction herein.

"After said designations had been made and made of record herein, the said application came on for hearing in open court at Keokuk, Iowa, viz., April 17, 1914, the complainant appearing by George B. Stewart, Esq., his solicitor, and the said defendants all appearing by George Cosson, Esq., attorney general of Iowa.

"And after full argument the said application was fully submitted on the said application and the pleadings and was by the court taken under advisement.

"And now at this time the court being fully advised, files a written opinion herein with a concurring opinion, each and both of which are now ordered of record and made a part hereof.

"And it is further ordered that a temporary writ of injunction issue under the seal of this court restraining and enjoining the said William H. Berry. John F. Howe and David C. Mott, members of and composing the Iowa state board of parole, James C. Sanders, the warden of the Iowa State penitentiary, at Fort Madison, Iowa, and Austin F. Philpott, the physician of said penitentiary, and the successors in office of each and every of said officers aforesaid from performing the operation of vasectomy on the said complainant, the Iowa statute, chapter 187, acts of the 35 general assembly, laws of Iowa, being unconstitutional, null and void.

"And this order and the whole thereof will be and remain in full force until final hearing.

"Witness our official signatures this June 24, A. D. 1914.

(Signed) "WALTER I. SMITH, United States Circuit Judge.
"JOHN C. POLLOCK, United States District Judge.
"SMITH MCPHERSON, United States District Judge."

AN ITALIAN DECISION ON A WOMAN'S SUIT TO PRACTICE LAW.

Considerable criticism has fallen upon the Supreme Court of Italy for its recent decision in the case of Teresa Labriola, who had sued for the right to practice law. The decision is called grammatically correct, but totally out of harmony with modern progressive ideas of law, no less than of women. Unfortunately the decision, while extremely learned and well argued, took on too much of the nature of polemic. It begins with noting that the repeated movement in Parliament for the admission of women to the bar indicates the common understanding that women are not admissible, and that they are held both in public and private law to occupy a position inferior to that of men; hence that they are excluded from holding any public office. Now the profession of the lawyer is, by its very nature and by definite construction of the law regulating the practice of the lawyer, distinctly a species of public office. And the right to practice law falls within that class and sphere of rights which for the very existence of civil society must be expressly conferred by law. This, of course, disposes of the plaintiff's contention that the law of 1874 regulating the practice of law is silent on the subject of admitting women to the bar, or that at least it nowhere prohibits their admission. No express prohibition was necessary. On the other hand, an express inclusion must have been made if such peculiar rights were to be conferred upon women. Other countries have found it necessary to pass special legislation for extending these rights to women (among them Sweden, Norway, Finland, Denmark, Iceland, Holland, Switzerland and the United States); for in general the spirit of the *jus commune* excluded them. The court goes out of its way to explain that its decision is based not on the common tradition of a law of force, nor on the supposed physical and mental inferiority of woman, nor on the egoism of men, nor on economic rivalry, but simply and solely on the positive law of 1874. The *Rivista Penale,* in reporting this decision, is inclined to believe that the court might have "made" law to good purpose here by a little broader construction of the statute in question. *(Rivista Penale,* Sept., 1913.)

A. J. T.

Italian Appeal Dismissed—Not Definitive.

Ugo Conti, Professor in the University of Cagliari, has published a pamphlet, *Decisioni Penali Definitive E non Definitiv* (Vallerti Milan, 1913), in which he discusses the decision of the Court of Cassation, in holding that no appeal can be taken from anything of an interlocutory order. In this case, the lower court remanded a case to a magistrate for the correction of a material error, where no final judgment had been entered. From such order the defendants appealed. The appeal was dismissed on the grounds that the order was not definitive. The refusal of such order prior to sentence resulted in much needless formality. "We believe that the said exclusion of immediate appeal from every order, and thus from those which deal with penal procedural relations, entails, necessarily, dangerous freedom to caprice. Hence, the need of the most careful and accurate interpretation of the statutes.

J. L.

Relating to the employment of children in Brussels, certain of the decisions of the Eighth Court of Justice of Brussels are published in the *Revue de Droit Penal et de Criminologie,* Vol. 7, No. 2, Nov., 1913 (p. 739 to p. 742). Of these two, which concern the employment of children in dangerous and unhealthy establishments, are of interest.

I. The manager of a factory having among his powers the engagement of workmen, the signing of their contracts and the control of all the employees, is responsible for any violation of the law of the 13th of December, 1889. Consequently the employment of children under 12 years of age, and of making children of 14 work outside the hours decreed by the law involves his responsibility.

Prosecution can be instituted for direct complicity even when the chief offender has been acquitted.

On the 7th of July the Eighth Court of Brussels decided, on an appeal, against a first judgment which condemned the manager of a factory for having co-operated directly and knowingly with the general director in employing two children under twelve years and making them work before 5 o'clock in the morning and after 5 o'clock in the evening.

Though the general director had been acquitted the Court of Appeal maintained the penalties pronounced by the first Judge and the appellant was condemned to pay the costs of the second trial.

II. The second decision concerns the obligation of factory directors.

According to the law of the 13th of December, 1889, the director of an unhealthy or dangerous factory must oversee personally that children under 12 are not employed in the work. The fact of entrusting this work to a subordinate who does not respect the law involves his own responsibility.

According to these dispositions, the Eighth Court of Justice accepted the appeal of the prosecuting magistrate against a first judgment which acquitted the director of a factory, guilty of having let a subordinate engage three children under twelve. Upon the consideration that the director ought to have controlled the actions of his subordinates and that by his carelessness he rendered possible the violation of the law, the Court of Appeals unanimously reversed the first judgment and condemned the director to pay two fines of 26 francs each and the costs of the second trial.

JEAN WEIDENSALL, Reformatory for Women, Bedford Hills, N. Y.

CONFESSION.

Johnson v. State, Miss. 65 So. 218. *Improper Influence.* The defendant had been accused of murder and was confined in jail. He was sick with fever and afraid he would be lynched. A newspaper man, who had prior experience in securing confessions, visited him three times, urging him to confess. He told the defendant there was no doubt about his guilt, that he had not slept since he killed that boy and would have no peace until he confessed; he asked what church the defendant belonged to and said he had better look beyond the grave for comfort, and that his only hope was salvation. He said to the defnedant, "I am a spiritualist and I can look down into your black heart and see this diabolical crime you committeed the other night." Held by the majority of the court that in view of all the circumstances attending the confession it was not of such free and voluntary character that would render it admissible. The

Chief Justice dissented upon the ground that invoking the terrors of punishment based upon theological belief and holding out hope of a spiritual nature would not make a confession thereby obtained incompetent.

CONSTITUTIONAL LAW.

Coomer v. United States, 213 Fed. 1. *Test of Obscenity.* Criminal Code, Sec. 211, making obscene matter nonmailable, and prescribing the punishment for depositing it for mailing or delivery, is not invalid as failing to provide any test of obscenity or of guilt, thereby denying due process of law, the equal protection of the laws, and the guaranty against *ex post facto* laws.

CORPORATIONS.

State v. Ice & Fuel Co., N. C., 81 S. E. 737. *Criminally Liable for False Pretense.* The defendant's agents, acting for it, sold and delivered a quantity of coke which they represented to be a ton, and they collected $5.00 for it, which was the price of a ton. The prosecutor later found that it weighed only 1,750 pounds. The corporation was indicted and convicted of obtaining money by false pretenses. An exception was taken on the ground that a corporation cannot be convicted of a crime which requires intent. Held that in view of the transactions of every kind now carried on by corporations, it would nullify many criminal statutes if they were not applied to corporations. While the statute imposed a penalty of a fine or imprisonment, only the fine could be imposed upon the corporation. But the corporation should not be fully exempt because it could not be imprisoned. The officer or agent who conducted the criminal transaction should be indicted, with the corporation as a co-principal or accessory, as the case may be.

CRIMINAL CONTEMPT.

Gompers v. United States, 34 Sup. Ct.. Reptr. 693. *Statute of Limitations.* Proceedings to punish acts not committed in the presence of the court as criminal contempts of an injunction previously granted are none the less governed by the three years' limitation of U. S. Rev. Stat. Sec. 1044, which provides that "no person shall be prosecuted, tried or punished for any offense not capital * * * unless that indictment is found or the information is instituted within three years next after such offense shall have been committed," because such contempt proceedings may not be instituted by an indictment or information.

EMBEZZLEMENT.

Barr v. State, Ala. App., 65 So. 197. *Proceeds of Illegal Transaction.* A statute rendered null and void all contracts with foreign corporations, unless the conditions authorizing them to do business in the state had first been complied with. It also made any corporation violating the act, or its agent, servant or officer, liable to criminal punishment. The defendant, acting as agent for a foreign corporation which had not complied with the conditions, sold an automobile for it within the state, collected the proceeds and embezzled them. The indictment charged that as an agent he had embezzled money which came into his possession by virtue of his employment. Held that while the statute prevented any enforcible contract obligation from arising out of the unlawful sale, the ownership of the money received was not changed or destroyed, nor was the capacity in which it was held by the defendant different from that of an agent or bailee holding for another. The illegality did not make the entire transaction such a nonentity that the law could take no cognizance of it for any purpose.

The statute relating to the embezzlement by agents does not require that the money embezzled be the property of the principal. An agent's principal may himself be the agent or bailee of the owner of the property. Hence every fact necessary to bring the case under the statute relating to embezzlement by agents of money coming into their possession by virtue of their employment existed, and the conviction was proper.

ERROR WITHOUT PREJUDICE.

Beiser v. State, Ala. App., 65 So. 312. *Exclusion of Evidence.* The state had proved that the defendant went away shortly after the crime with which he was charged was committed. Evidently for the purpose of showing that the trip was contemplated before that time and hence not due to an effort to escape from prosecution, the defendant's counsel asked whether the defendant had previously said he was going away. The trial court sustained an objection to the question. The bill of exceptions did not state that the defendant informed the court whether he expected an affirmative or negative reply. As the negative reply would have been prejudicial to the defense, the record does not show that the exclusion deprived the defendant of favorable testimony. It is not made to appear that the result of the action of the court in sustaining the state's objection to the question was to deprive the appellant of the opportunity of introducing testimony that would have been favorable to him. It is not prejudicial error to sustain an objection to a question a responsive answer to which may be either favorable or unfavorable to the party asking it, when the court is not informed, either by the question itself or in any other way, of the kind of answer which is expected.

EVIDENCE.

People v. Pfanschmidt, Ill. 104 N. E. 804. *Trailing by Bloodhounds.* While a bloodhound may be used to track and run down a known fugitive from justice, where the offender is known and it can be determined whether the bloodhound is trailing the right person, evidence of the actions of a bloodhound who was trailing an unknown criminal should not be admitted to establish guilt.

Where it was claimed that the murderer drove away in a buggy drawn by a team of horses, evidence that a bloodhound, put on the trail some thirty hours later, and carried most of the way in an automobile, followed the trail until it ended in accused's stable, where the bloodhound picked out the particular horse he had been trailing, was inadmissible.

FALSE PRETENSES.

State v. Ice & Fuel Co., N. C., 81 S. E. 737, Affd., 81 S. E. 956. *Prosecutor's Belief.* The prosecutor suspected the defendant was giving short weight. To test the matter he ordered a ton of coke and paid for it when the coke was delivered. He previously had found that the defendant had given him short weight on several occasions, and strongly suspected that he had not received a full ton when he paid for this coke, but was not positive until he weighed it lated and found there was only 1,750 pounds. The defendant contended that the prosecutor was not deceived by the representation that there was a ton. Held that the prosecutor could rely upon the representation in spite of his suspicions until he found by weighing the coke that it was not a full ton. The fact that the prosecutor laid a trap for the defendant is immaterial, as he did not induce the defendant to commit the crime but merely furnished the opportunity, and the defendant acted at its own volition.

FORGERY.

Moore v. State, Miss., 65 So. 126. *Invalid Instrument.* The defendant forged what purported to be a report of the public school signed by his daughter as assistant teacher, and approved by the trustees of the school, and delivered it to the county superintendent of public instruction. On the receipt of the certificate the superintendent issued a pay certificate to the defendant, who obtained thereon $25.00. His daughter had not taught the length of time set out in the report, and was not a regularly elected teacher of that school. By statute the superintendent could issue pay certificates to only those who had been regularly elected. The defendant was convicted and sentenced to ten years in the penitentiary. Held that if the forged report had in fact been made by the teacher and certified to by the trustees, it would have given no authority to pay anyone for having taught the school, hence the instrument was not within the protection of the statute relating to forgery. That a pay certificate was in fact issued was immaterial. The conviction was reversed and the defendant discharged.

FORMER JEOPARDY.

Gustin v. State, Ala. App., 65 So. 302. *Acquittal in Municipal Court.* Defendant was prosecuted in the County Court for violation of the state statute prohibiting the sale of intoxicating liquors. While the prosecution was pending, a new prosecution was brought against him in a Municipal Court, for the violation of a city ordinance prohibiting such sale, and he was tried and acquitted. A statute provided that an acquittal for the violation of a municipal ordinance should bar a prosecution in the State Court for a misdemeanor based on the same act. Held that the statute does not apply to cases where the State Cour first acquires jurisdiction of the offence, as "the jurisdiction depends upon the state of affairs at the time it was invoked, and if the jurisdiction once attaches to the person and subject matter of the litigation, the subsequent happening of events, though they are of such a character as would have prevented the jurisdiction from attaching in the first instance, will not operate to oust jurisdiction already attached." The defendant should have pleaded the pendency of the prosecution in the State Court as a bar to the proceedings in the City Court. The conviction was affirmed. It is difficult to see how the question of jurisdiction was involved in this case. The State Court clearly had jurisdiction of the person and subject matter. The plea of former jeopardy did not challenge the jurisdiction of the court, but merely interposed a defence against the prosecution. A defence arising while the prosecution is pending is usually available at the trial, if within the scope of the pleadings.

HOMICIDE.

Clements v. State, Ga., 81 S. E. 1117. *Cause of Death.* The defendant, after a slight quarrel, shot at the deceased, wounding in the leg near the knee and in the hands. The wound was not mortal and would not of itself have caused death, but nine ten days later blood poisoning developed, from which the deceased died. Held that the shooting was the legal cause of the death. The conviction of murder was affirmed.

INDICTMENT AND INFORMATION.

Busby v. State, Ala. App., 65 So. 307. *Allegation of Time.* The complaint upon which defendant was convicted of the illegal sale of intoxicating liquors alleged that the sale was made "within the last twelve months," but did not

state any specific date. A demurrer upon the grounds that the affidavit did not show that the offense charged was committed within twelve months next before the date of making said affidavit, nor that the offense charged was committed before the making of the affidavit, was overruled. Held that the complaint was sufficient. The conviction was affirmed.

INSURRECTION.

State v. Scott, N. J., 90 Atl. 235. One who attacks in a newspaper the actions of the police in suppressing a strike, but does not attack the governmental system, or all governments, is not guilty of a violation of Crimes Act, Sec. 5, Par. e, denouncing the offense of encouraging hostility to any and all government, the statute being directed against anarchy, as shown by the use of the expression "any and all government," which can not be separated so as to include hostility to particular administrations, for that would preclude freedom of speech.

INSTRUCTIONS.

State v. Hessenius, Ia., 146 N. W. 58. *Failure to Request.* On a trial for murder the theory of the state was that the defendant had choked the deceased to death, that of the defense was that the deceased had been killed by an accidental fall. There was substantial evidence to support both theories. The court did not instruct the jury upon the theory of the defense. The defense requested certain instructions, but asked for none upon this point. The court, following *State v. Lightfoot,* 107 Ia. 344, 78 N. W. 41, and apparently overrulling *State v. O'Hagan,* 38 Ia. 506, held that in the absence of a request to charge upon the theory of the defense, failure to do so was not reversible error.

LARCENY.

Harris v. State, Ind., 104 N. E. 969. It is not essential to constitute larceny that the taking be for the purpose of gain to the thief if it deprive the owner of his property, so that an indictment charging the theft of a check need not allege that accused cashed the check or presented it for payment, and was not bad because the check, which was payable to the order of a third person could not have been cashed by accused.

POST OFFICE.

United States v. Foster, 34 Sup. Ct. Reptr. 666. The authority of the postmaster general under U. S. Rev. Stat., Sec. 161, to make regulations not inconsistent with law for the government of his department, and the conduct of its officers and clerks, includes the power to prescribe that, in determining the gross receipts of a post office, upon which, under the act of March 3, 1883, the salary of the postmaster is to be fixed, stamps sold in large or unusual quantities, to be used in mailing matter at other postoffices, will not be included, and to require the postmaster to ascertain and report the intention of the purchaser of stamps or stamped paper in large or unusual quantities, such regulations being purely administrative of the law, which manifestly intends that the gross receipts from lawful sales only are to be the measure of the postmaster's salary, excluding receipts growing out of violations of the Federal Criminal Code, Sec. 208, making criminal unlawfully induced sales outside of the delivery of the office, and sales otherwise than as provided by law or the regulation of the postoffice department.

REASONABLE DOUBT.

People v. Hansen, Ill., 104 N. E. 1069. *Necessity of Definition.* The meaning of the term "reasonable doubt" is commonly known and understood, and an instruction defining it need not be given.

RECEIVING STOLEN GOODS.

State v. Golt, Del., 90 Atl. 83. *Constructive Concealment.* While defendants are not guilty of receiving or concealing stolen money merely because of the thief, without their assent, acquiescence or participation, burying it on their premises, yet they, knowing thereof, or from facts with which they are conversant being reasonably chargeable with further concealment or preventing discovery of it, may be held constructively to have concealed it.

SECOND OFFENDERS.

Carlesi v. People of the State of New York, 34 Sup. Ct. Reptr. 576. *Effect of President's Pardon on Prior Conviction.* No rights under the Federal Constitution are infringed by the provisions of the N. Y. Penal Law, Sec. 1941, under which a person committing a crime against the laws of that state may be punished as a second offender because of a prior conviction of an offense against the United States, notwithstanding a pardon granted by the President of the United States after the convict had completed his term of imprisonment under such prior conviction.

TRIAL.

Smith v. State, Ga. App., 81 S. E. 801. *Improper Argument.* While the defendant's attorney was arguing the case to the jury, he stated that the defendant had never been arrested and had never had a case against him in the courts before. The prosecuting attorney objected to this, as the defendant's character had never been put in evidence, and "in fact the defendant's counsel knew that the statement was untrue, and that the defendant had in fact served a term in the penitentiary." The defendant's counsel immediately moved the court to declare a mistrial on account of this statement. Held that the motion should have been granted. The improper argument of the defendant's counsel does not justify the prosecution in violating the rules prohibiting statements of facts not in evidence. While the state's evidence clearly established the defendant's guilt, this evidence was contradicted by the defendant's statement and he was entitled to have that statement considered by the jury, without improper comment by the prosecuting attorney tending to destroy his credibility.

TRIAL.

People v. Howard, Mich., 146 N. W. 315. *Improper Argument.* The trial court charged that the jury must convict of assault with intent to do great bodily harm, and refused to charge that they could find the defendant guilty of assault and battery or not guilty. The defendant's attorney, in arguing the case, asked the jury to disregard the instructions of the court. Held that upon the evidence the instruction given by the court was erroneous, and it should have given the instructions refused. But it was the duty of the jury to follow the direction of the court as to the law of the case, and it was the duty of counsel to acquiesce during the trial in the ruling and the instructions. The rights of his client could be protected by exceptions. "The argument was unprofessional and outrageous, and merited immediate discipline at the hands of the trial court." Because of the error in the instructions the conviction was reversed.