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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.

APPEAL.

People v. Tomlins, 107 N. E. 496, N. Y. *Reversal for Error Where No Exception Taken.* Code Crim. Proc., Sec. 528, declares that in case of a death sentence the court of appeals may order a new trial, if justice requires it, though no exception was taken. No exception was reserved to an instruction charging that accused, whose assailant had attacked him in his dwelling, should have retreated. Accused claimed self-defense, and admitted, on cross-examination, that if he had fled from his house he would have been safe. Held, that a conviction of murder in the first degree must be reversed, though no exception was reserved to the instruction, for it deprived accused of all the benefits of his plea of self-defense. COLLIN and CUDDEBACK, JJ., dissenting.

BURGLARY.

Goins v. State, 107 N. E. 335, Ohio. *"Forcible Breaking."* Where any force, however slight, is required to effect an entrance into a building through a doorway partly open, such act constitutes forcible breaking under sec. 12438. Hence held a forcible breaking to enter a chicken house door, hung upon hinges and open 15 to 18 inches and so held by a fence post on one side and a brick on the other, where it was necessary for the prisoner to push the door further ajar for entry.

BURGLARY BY BREAKING OUT OF A BUILDING.

Lawson v. Commonwealth of Ky., 169 S. W. Rep. 587. Under the old English common law, it is said not to have constituted the offense of burglary if one succeeded in getting into a house for the purpose of felony, and then breaking out in order to get away. To obviate this, the statute of 12 Anne was passed to cover the crime committed in the manner mentioned. The Kentucky statute, enacted with the apparent purpose of "catching them coming and going," merely provides that "if any person * * * shall feloniously break any dwelling house, * * * and feloniously take away anything of value," etc. Appellant was convicted of violation of this statute. The evidence was somewhat circumstantial, but went to indicate that accused, in purloining some of the goods of a neighbor, succeeded in getting into the building without any technical breaking, but not so in getting out. His conviction is affirmed by the Kentucky Court of Appeals.

DISORDERLY HOUSE.

Tenement House Dept. of the City of New York v. McDevitt, 150 N. Y. S. 583. *Placing Penalty on Owner of Disorderly House Where So Used Without His Knowledge.* Tenement House Law (Consol. Laws, c. 61), sec. 124, provides that the owner of any tenement house, where any violation of that law exists,

shall be subject to a civil penalty of $50. Section 109 as amended by the laws of 1903, c. 598, provides that no tenement house shall be used for purposes of prostitution or assignation. Chapter 598 also amends sec. 150 to provide that a person soliciting another to enter a house of prostitution or a room in a tenement house for purposes of prostitution, etc., shall be deemed a vagrant, and sec. 154 to provide that proof of ill-repute and common fame shall constitute presumptive evidence and that it shall be presumed that the unlawful use was with the permission of the owner. Held, that construing sec. 124 in connection with all the amendments made in 1913, the owner of a tenement house used for the purposes of prostitution without his permission or knowledge is not liable for the penalty, especially in view of the doubtful constitutionality of the act if not so construed. McLAUGHLIN and DOWLING, JJ., dissenting.

EVIDENCE.

Commonwealth of Pa. v. Kester, A. L. Rep., 12 Feb., 1915, p. II. *Criminal Law—Statutory Rape—Reputation—Good Character—Evidence.*

1. On the trial of a prosecution for statutory rape and bastardy evidence of specific acts tending to show the bad character of the prosecutrix are inadmissible. The evidence must be confined to the general reputation. The words "not of good repute" in the proviso of sec. 1 of the Act of May 19, 1897, P. L. 128, means the reputation of the person for chastity in the community in which she lives; that is, what she is reputed to be, not what she actually is.

2. The evidence of good character is substantive and must be treated as such. It is not a mere makeweight to be thrown in to determine the balance in a doubtful case, but it may of itself by the creation of reasonable doubt produce an acquittal. J. L.

EXTRADITION.

Drew, Sheriff, v. Thaw, 35 Sup. Ct. Reptr., 137. *Sufficiency of Indictment.*

An indictment found by a New York grand jury, alleging that the accused, having been committed to a state hospital for insane criminals under a court order reciting that he had been acquitted at his trial upon a former indictment upon the ground of insanity, and that his discharge was deemed dangerous to public safety, conspired with certain persons to procure his escape from such hospital, and did escape, to the obstruction of justice and of the due administration of the laws, sufficiently charges a crime for the purpose of interstate extradition, in view of the provisions of the N. Y. Penal Law, secs. 580-583, making an agreement to commit any act for the perversion or obstruction of justice or of the due administration of the laws a misdemeanor if an overt act beside the agreement is done to effect the object.

The interstate extradition of a person charged with having successfully conspired to effect his escape from a state hospital for insane criminals ought not to be interfered with by habeas corpus on the theory that if he was insane when he contrived his escape, he could not be builty of crime, while if he was not insane he was entitled to be discharged, where the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the governor of the demanding state allege to be a crime in that state, and the reasonable probability that it may be such, all appear, since the question is one as to the laws of the demanding state which the courts of that state must decide.

HOMICIDE.

State v. Reitze, 92 Atl. 576, N. J. *Legal Cause—Malum Prohibitum.* An

innkeeper who sells intoxicating liquors to a person already under its influence in defiance of 3 Comp. St. 1910, p. 2907, sec. 83, providing for forfeiture of licenses in such cases, is not criminally responsible for the death of the patron, who fell and fractured his spine while getting in his wagon when leaving the inn.

INDICTMENT AND INFORMATION.

State v. Madden, Ia., 148 N. W. 995. *Sufficiency of Charge.* Defendant was convicted on an indictment charging a conspiracy to burn property and commit a felony—to wit, arson. He moved in arrest of judgment, one ground of the motion being that no such crime as arson is known to the statutes of Iowa and, therefore, no crime is charged. The criminal law of Iowa is codified and there can be no conviction of a common law crime, not covered by the statute. Held, that the supreme court had designated the different burnings, covered by several sections of the code, as arson, and this name is now generally applied to these offenses. Further, the indictment made the charge more specific by setting out the different burnings that resulted from the conspiracy. In charging conspiracy the crime intended need not be described with the accuracy or detail that would be essential in an indictment for that crime. Hence the charge was sufficient and the conviction was affirmed.

State v. Staples, Minn., 148 N. W. 283. *Form—Repugnancy.*

The Minnesota statutes provided that "No indictment shall be insufficient * * * by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Holding that the language of the indictment sufficiently charged that the acts or neglect of defendant caused the death of the deceased the court said, "The indictment abounds in repetition, but repetition alone does not vitiate an indictment. It would have much better satisfied every requirement of law, had it cut loose from antiquated forms and charged facts in ordinary language, plainly understood."

The indictment charged that the defendant acted "without premeditated design to effect the death of said" deceased "wilfully, unlawfully and feloniously, and without authority of law, with intent to effect the death of said" deceased. It was contended that these allegations negativated each other and left the indictment as if neither had been stated, consequently making it void. Held, that in an indictment for manslaughter it was not necessary to allege an intent to kill, for this would charge murder, and it was not necessary for the state to allege and prove that the killing was without any intent to cause death, for a defendant charged with manslaughter could not secure an acquittal on proof that he intended to kill, as proof of murder justifies a conviction of the included crime of manslaughter. Hence the indictment would have been sufficient if the two inconsistent allegations had been wholly omitted.

MANSLAUGHTER.

People v. Rogulski, Mich., 148 N. W. 189. *Unintended Result of Unlawful Act.* The owner of a farm posted signs forbidding shooting upon it. Defendant was employed upon the farm. There was evidence that he had been offered a reward for getting a gun. Three boys came upon the farm, one carrying a gun. The defendant met them. After a friendly greeting he took the gun and told them they must go with him. The owner of the gun asked him to return it, and immediately it was discharged, killing the owner. The trial court instructed the jury that defendant had no right to take the gun, and if he did so by force he would be engaged in an unlawful act and if, while so engaged, he even acci-

dently shot the deceased he would be guilty of involuntary manslaughter. Held, that, taking into consideration the entire charge in connection with the evidence, it was not misleading. If the defendant obtained the gun either by a ruse or by violence with a wrongful intention to permanently deprive the owner of it and convert it to his own use to get a reward, his acts would amount to larceny, if not to robbery. If he intentionally, but without malice, pointed the gun at deceased, designing no mischief, he was guilty of the careless use of firearms in violation of statute, and death so caused would be manslaughter. Further, at common law, death resulting from the making use of a dangerous agency, particularly firearms, was manslaughter. "Taken as a whole, we think the charge of the court was very moderate and extremely favorable to the accused." The conviction was affirmed.

People v. Barnes, Mich., 148 N. W. 400. *Exceeding Speed Limit.* The Michigan statute provided that motor vehicles on public highways should be operated at a reasonable speed so as not to endanger life or limb, and that upon approaching persons walking in the roadway such vehicles should slow down to a speed not exceeding ten miles an hour. The defendant while driving an automobile ran over and killed a girl who was walking in the highway. The evidence as to his speed at the time varied from eight to twenty miles per hour. There was evidence that he would have passed the girl safely had she not suddenly stepped in front of the machine. The trial court instructed the jury that if the defendant was driving at a speed in excess of ten miles an hour, it was an unlawful act, and if in so doing he killed the deceased, the act was manslaughter. Held, that the question of the speed of the automobile should have been submitted to the jury, in connection with other facts, as bearing upon the question of whether he was guilty of gross negligence. While wilful violation of the statute might constitute negligence it would not necessarily amount to such gross negligence as is required to make out a case of manslaughter. The judge took from the jury all question as to whether the defendant, in good faith, believed he was running within the statutory limit. Further the defendant's negligence must have been the cause of the death. If he could not have avoided killing deceased, had he been running at the legal speed, the fact that he was running at an excessive speed would not have been the cause of the death. "The ultimate inquiry should be: Was the respondent criminally negligent, and if so, did his criminal negligence cause the death of the deceased?" Hence the conviction was reversed.

NEW TRIAL.

People v DeBellis, 150 N. Y. S. 1064. *Second Offender: Collateral Attack on Validity of First Conviction.* Where defendant was convicted as a second offender under Penal Law, sec. 1941, of feloneously carrying a pistol, he could not on a motion for a new trial, made on the ground of newly discovered evidence which would establish that at the time of his prior conviction he was not 16 sixteen years of age, and therefore under sec. 2186, guilty of no crime, attack the validity of such conviction: the only question on his trial as second offender being whether there was such a prior conviction.

PARDON.

Burdick v. U. S., 35 Sup. Ct. Reptr. 267. *Necessity of Acceptance: Effect of Rejection.* A pardon from the President to be effective, must be accepted by the person to whom it is tendered. The tender of a pardon by the President

does not destroy the privilege of a witness against self-incrimination, but he may reject the pardon and refuse to testify on the ground that his testimony may have an incriminating effect.

TRIAL.

State v Madden, Ia., 148 N. W. 995. *Comment on Failure to Testify.* On the trial of one defendant indicted, with others, for conspiracy, the county attorney referred to the failure of another defendant, who was not then on trial, to testify. Held, that the statute prohibiting comment upon the defendant's failure to testify applies only to a defendant who is on trial. Hence there was no violation of the statute and the conviction was affirmed.

WHITE SLAVE ACT.

U. S. v Clara Holte, 35 Sup. Ct. Reptr. 271. *Guilt of the Woman.* A woman may conspire to commit an offense against the United States within the meaning of the provision of the Crim. Code of March 4, 1909 (Comp. St. 1913, sec. 10, 201), sec. 37, although the object of the conspiracy is her own transportation in interstate commerce for purposes of prostitution, contrary to the white slave act of June 25, 1910 (Comp. St. 1913, sec. 8812). Justice Lamar dissenting, said in part: "The fact that prostitutes and others have used this statute as a means by which to levy blackmail may furnish a reason why that should be made a federal offense, so that she and they can be prosecuted for blackmail or malicious prosecution. But those evils are not to be remedied by extending the law of conspiracy so as to treat the enslaved subject of transportation as a guilty actor in her own transportation: and then punish her because she agreed with her slaver to be shipped in interstate commerce for purposes of prostitution. Such a construction would make every willing victim indictable for conspiracy. Even that elastic offense cannot be extended to cover such a case." Justice Day concurring in dissent.

WITNESSES.

People v Gerold, 107 N. E. 165 Ill. *Credibility.* An instruction that persons charged with crime may testify in their own behalf and that an accused who testifies in his own behalf differs from other witnesses only in the fact that he is being tried for crime, which may be considered in passing upon his credibility, is objectionable as tending to lead the jury to treat the testimony of accused as different from that of other witnesses.

DECISIONS FROM LA GIUSTIZIA PENALE.

Robert Ferrari.

Sept., 1914. Col. 1525—No. 1278.

CRIMINAL PROCEDURE—NAME IN SUMMONS WRONGLY SPELLED.

Tho the surname of the foreign name of a defendant be incorrectly written in a summons, service is good if made upon him personally.

This is an advance over the law of some states.

March, 1914. Col. 413—No. 258.

ILLEGAL PRACTICE OF MEDICINE.

In order to convict of wrongful practice of medicine, it is not necessary to prove several acts, nor habitual acts; it is sufficient to prove only one act.

This is refreshing after the decisions in some of our State Courts that to convict a person of the unlawful practice of medicine, it is necessary to prove

a series of acts. In other words, the Courts are not satisfied when a man abuses the confidence of one patient, or twenty: they will have the confidence of a hundred who have been abused, and the alleged doctor may set up as a lawfully admitted physician with office, sign, visiting cards, and troops of patients.

The decision holds also that a pharmacist is practicing medicine when he determines that a "pharmaceutical specialty" will cure a certain disease, and prescribes it for that disease.

Idem. Col. 415—No. 264.

Held, that an instrument with which eels are fished, having teeth turned back and not straight, is not a cutting instrument, and so not a weapon the carrying of which is prohibited by law.

Feb. 25, 1914. Col. 304.

The law concerning weekly rest imposes upon employers and directors of commercial businesses, the duty of giving to their employes a weekly continuous rest of twenty-four hours. The President of the Administrative Council of a savings bank is not liable to the penal law, he being neither an employer, nor a director of the bank. But the director who has employes under his immediate dependence, even tho he does not have the right of employing them, or of determining their wages and the work they do, is liable.

The New York Court of Appeals has just held a law for weekly continuous rest of twenty-four hours, constitutional.

Oct. 23, 1914. Col. 1737.

The following decision may be read with profit by those students who desire to get an inkling into the philosophic reason for the rule of English law in civil negligence cases, that contributory negligence on the part of the plaintiff frustrates recovery against the defendant, even tho the latter have been negligent. The decisions are replete with discussions of facts indicating contributory negligence, and the text-books repeatedly make the assertion that contributory negligence bars recovery; yet rarely, if ever, do you see stated the reason such negligence bars.

Shearman and Redfield in their work on Negligence, 6th edition, secs. 61 and 63, have a short and solid statement of rule, and the reason for it. It is to be noted that the decisions do not agree as to the reason for the rule, nor do they agree as to the statement of what contributory negligence is. The authors say, and they seem to be near the truth, if they do not have it, that the California Court which holds the reason to be the impossibility of apportioning and admeasuring the amount of negligence of both parties, makes the law, which is a gross and approximate thing, cut the Gordian Knot instead of unravelling it; that it, makes a comparatively easy rule to avoid the intricacies and difficulties of complex facts. However this may be there is no question that the rule in the first case of contributory negligence recorded in the books, that of *Butterfield v. Forrester,* decided by Lord Ellenborough, was based on the principle of the instant Italian Case, the Lord Ellenborough does not give any, except a practical, rule of thumb reason, which instinctively appeals to the common man. That case is on all fours with the Italian case in respect to the material and determining fact, that the negligence of the defendant preceded that of the plaintiff, and therefore, the act of the plaintiff broke the continuity of the events set in motion by the

defendant, and was the proximate cause of the injury of the plaintiff. This is contributory negligence as the law first knew it. Since the first English case, the rule has been extended, till now it is a luxuriant jungle.

The case is a criminal one, but the reasoning is in part applicable to civil cases of negligence, and the reason given for the criminal non-liability of the trainmen for the death of the passenger is the break in the continuity of the cause set in motion by the former: The proximate cause of death, in other words, is the act of the passenger, and not of the trainman.

A passenger was alighting from a train. Before completing the act, a conductor rang the bell and the train started, throwing the passenger to the ground, and killing him. The conductor was indicted for manslaughter ("culpable homicide"). The lower court acquitted the defendant, holding that the death of the passenger was due to his own carelessness in attempting to alight after the train had started. A higher court reversed the judgment of the lower court, and held the conductor liable—but did not refute, explicitly or implicitly, the arguments upon which the judges of the lower Court had held that the carelessness of the deceased had broken the connection of casualty between the negligence of the conductor when he gave the signal while the deceased was getting off, and the injury. The Court of Appeals quashes the opinion of the higher Court.