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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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APPEAL.

Barks v. State, Okla., Cr. App., 147 Pac. 1055. *Failure to perfect in time.* By statute an appeal from a conviction of felony must be taken within six months after the rendition of judgment. Defendant was convicted of felony and judgment entered. The six-months period expired on November 21st. On November 19th, defendant's attorney delivered the petition in error, with a copy of case-made thereto attached, in duplicate, to an Express Company, properly directed. The petition and case-made should have been delivered to the Clerk of the Appellate Court on November 20th. Through some mistake made by the Express Company, the papers were not delivered until November 22nd. The Attorney General moved to dismiss the appeal because the papers were not filed in time. Held, that the "plaintiff in error at his peril takes the chances of delay by forwarding the record by express." The appeal was dismissed and the case remanded with directions to carry the judgment into execution.

BURGLARY.

State v. Hodgdon, 94 Atlantic, 301. Vermont. *Intent.* Under P. S. 5751, defining burglary as a nighttime breaking and entering of the dwelling house, etc., with an intent to commit larceny or other felony, a breaking and entry is burglarious if done with intent to commit larceny, whether the larceny done or intended is petty or grand larceny, although petty larceny is not a statutory felony.

CONSTITUTIONAL LAW.

Guinn v. U. S., 35 Supreme Court Reports, 926. *Validity of the Grandfather Clause.* The exemption from the literacy test prescribed by the 1910 amendment of the Oklahoma Constitution, Article 3, Section 4a, as a condition to voting, which that amendment makes in favor of persons, who, on January 1, 1866, or at any date prior thereto, were entitled to vote under any form of government, or who, at that time, resided in some foreign nation, and his lineal descendants, is a denial or abridgment of the right to vote on account of race, color, or previous condition of servitude, contrary to the United States Constitution, 15th amendment, as it creates a standard which, as a necessary result, recreates and perpetuates the very conditions which the 15th amendment was intended to destroy.

And the invalidity of this exemption renders invalid the literacy test itself.

State v. Sawyer, 94 Atl. 886 Me. *Validity of United States Migratory Bird Game Law.* The commerce clause of the Constitution, giving Congress the right to regulate commerce with foreign nations, among the several states, and with the Indian tribes, does not warrant act of Congress of March 4, 1913, purporting to regulate the killing and taking of migratory and insectivorous birds within the several states; the killing or taking of such birds not being acts of commerce.

Nor does the general welfare clause, declaring that Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, for wild game is not property belonging to the federal government.

CONSTITUTIONAL LAW.

Arrowsmith v. State, Tenn., 175 S. W. 545. *Right to a speedy trial.* Eleven indictments were found against the defendant. He was tried and convicted on one, and sentenced to three years in the penitentiary. The other cases were continued by consent to the January term. At the January term they were continued to the next term, not at the instance of the accused. At the next term, on the suggestion of the Attorney General that the defendant was serving a term in the penitentiary, the cases were "retired from the docket until the expiration of said sentence." After the expiration of the sentence the prosecuting attorney moved to reinstate four of the untried cases. The defendant objected, assigning as one ground that the case had been delayed, thus denying him a speedy and public trial as guaranteed by the Constitution of the United States and of the State, and by the State statute. The court sustained the motion, restored the cases and defendant was tried and convicted in one of them. He appealed. Held, that one "under conviction and while imprisoned in the pentitentiary may be brought to the bar for trial and sentence for another crime, whether charged to have been committed before or during such imprisonment. * * * * The right of the State to prosecute him is not abridged or delayed by the fact that the accused is in such confinement, and by parity of reasoning his rights to be tried and to speedy trial are not deferred until his period of sentence has been served or terminated." The accused was entitled to be released "from the harrassment of a criminal prosecution and the anxiety attending the same; * * * * A long delay may result in the loss of witnesses for the accused * * *. While imprisoned he is less able to keep posted as to the movements of his witnesses." As the trial court, without the consent or knowledge of the defendant or his counsel, continued the cases for approximately two years, needlessly and vexatiously, the accused was thereby denied the speedy trial contemplated in the constitutional provision. The conviction was reversed and the defendant ordered released from custody.

DISORDERLY HOUSE.

Tenement House Department of the City of New York v. McDevitt, 109 N. E. 88, N. Y. *Validity of Tenement House Law.* The Tenement House Law, as amended by the laws of 1913, Chapt. 598, forbidding the use of any part of a tenement for the purpose of prostitution, though construed to inflict a penalty independently of the knowledge of the owner as to the use, is a valid act.

ENTRAPMENT.

Quey v. U. S., 22 Fed. 766. *Consent of government officer.* It is no defense to a prosecution for conspiracy to receive opium imported contrary to law that the opium was taken ashore by a steward, not one of the defendants, with the permission of the United States officers, given for the purpose of detecting the criminals.

ERROR WAIVED BY FAILURE TO OBJECT.

State v. Baker, Mo., 175 S. W. 64. *Misconduct of prosecuting attorneys.* "Much stress is laid by defendant upon the alleged misconduct of special counsel for the prosecution, from the superabundance of which and the overzeal of whom the record

seriously suffers. This is always the case when special hired counsel for the state assist the prosecuting attorney in a state case. The overzeal of dollars always outruns the zeal of duty, and the record resulting, as a rule, bristles with error. This record is no exception. It is filled with things which utterly disregard the rights of defendant, and which were clearly begotten of a desire of hired counsel to richly earn their fees. But these erroneous matters were not objected to, or excepted to, and thus saved for our review. This condition applies as well to the offering of testimony, much of which was utterly inadmissible, as it does to the language of hired counsel, which was reprehensible in the extreme. But to this language of counsel for the state no objection was made by defendant, nor did the learned trial court rule, nor was he asked to rule, nor was any objection or exception made or saved to his lack of action in failing to rule. In this state of the case we ought not to convict the trial court of error. Defendant simply "excepted" to the remarks of counsel. He did not ask the trial judge either to rebuke or further rebuke counsel or fine them or put them in jail, some one of which the trial judge might have done if he had been asked. It is sufficient ordinarily to except simply to the erroneous things which the trial court himself does; but it is ordinarily necessary, first, to object to the errouеous things which the opposing side does, and then except when the court refuses to afford relief upon the objection made."

EVIDENCE.

People v. Roach, 109 N. E. 618, N. Y. *Expert evidence as to finger prints.* In a prosecution for murder, where there was testimony of five separate marks upon the clapboards of the deceased's house, and proof that such marks were made in human blood, the expert testimony of witness who fully explained his qualifications, specified the circumstances upon which he predicated his opinion, swore that he was able to express an opinion with reasonable certainty, and who was exhaustively and skillfully cross examined as to the identity of finger prints upon paper with the marks upon the clapboards, was competent.

People v. Becker, 109 N. E. 127, N. Y. *Dying declarations.* The declaration of one convicted of murder, made just before execution, that defendant, on trial as instigator of murder, had nothing to do with it as far as he knew, is inadmissible.

State v. Murphy, 94 Atlantic 640, N. J. *Admissibility of confession.* A trial judge is justified in admitting in evidence the confession of a criminal defendant, notwithstanding that the friends and family of the accused were denied admission to the jail until after the confession was made, there being no statute or rule of law which provides that a confession shall not be taken from a prisoner until after he shall have been advised either by friends or relatives.

The provision of the New Jersey constitution, guaranteeing a defendant the assistance of counsel in his defense, cannot be construed to mean that one accused of crime shall have the benefit of counsel to advise him as to whether he shall confess.

FORMER JEOPARDY.

Morgan, Warden of the United States Penitentiary at Leavenworth v. Devine, 35 Supreme Court Reporter 712. *Identity of offenses.* The conviction and sentence as for two distinct offenses, of persons who steal postage stamps and postal funds from a post office of the United States, having first burglariously entered the post office with intent to commit a larceny therein, does not put them twice in jeopardy within the meaning of the United States Constitution, Fifth Amendment, since the offense, though committed in the same transaction, are made separate and dis-

tinct by the provisions of the United States penal code, Section 190, making it a criminal offense to steal any mail bag or other property belonging to the post office department, and of Section 192, declaring that whoever shall break forcibly into, or attempt to break into, any post office with the intent to commit therein any larceny or depredation, shall be punished by fine and imprisonment.

HARMLESS ERROR.

People v. Hunt, Cal. App., 147 Pac. 476. *Erroneous instructions cured by undisputed proof of guilt.* An osteopathic physician, who was not authorized to perform major operations, did perform such an operation in a case in which the parties had been unable to secure the attendance of a regular surgeon. The patient died. The physician was convicted of manslaughter. In charging the jury the trial judge failed to inform them that "if the defendant believed, and as a reasonable person, under the circumstances of the case as presented to him at the time, had reasonable cause to believe, that the attempted operation was necessary to save the life of the deceased, and that if, acting upon such belief, he attempted to perform the operation in question, and acted with due caution and circumspection, in so doing he would not be guilty of manslaughter, and that whatever reasonable doubt the jury might have upon this subject they were to resolve in favor of the defendant." He did tell them that "the defendant was not, as an osteopathic practitioner, licensed to perform major operations, and that if he did attempt to perform such an operation upon the deceased, as the result of which her death occurred, he would be guilty of manslaughter." Held, that the instructions were erroneous in both of these respects, and that the defendant would have been entitled to a reversal, if he had asked for a proper instruction, and there had been any evidence tending to show that he acted with due caution in the performance of the operation. But all of the instructions upon this point requested by the defendant were defective, and were properly refused by the court. There was no evidence which would have justified the jury in finding that the defendant acted with due care or in entertaining a reasonable doubt whether he had not exercised such care; "on the contrary, the evidence affirmatively and indisputably shows that the defendant, in his attempted performance of the operation in question, acted with a shocking degree of unskillfulness, evincing an almost incredible ignorance of surgery and anatomy, and utterly wanting in those elements of skill, caution, and circumspection which the law requires and which should invariably attend upon such an operation. These being the undisputed facts and uncontradicted proofs in the case, the errors of the court in giving the instructions to which the defendant has objected become immaterial, as does also the failure of the court, if the same be error, to have amended and then given instructions covering the points ineffectively presented in the requested instructions of the defendant; and this for the reason that in any event it would have been the duty of the jury to have found the defendant guilty of manslaughter, and for the jury to have failed to have performed this duty in this case would have clearly amounted to a miscarriage of justice." The conviction was affirmed.

IMPEACHING VERDICT.

State v. Dreiling, Kan., 147 Pac. 1108. *Taking defendant's failure to testify into consideration.* A Kansas statute forbids jurors to consider the fact that the defendant in a criminal action has failed to take the witness stand in his own behalf. After a conviction, on a motion for a new trial, the defendant produced the affidavits of two jurors to the effect that, in the jury room, reference was made to the failure of defendant to testify and that they considered that in agreeing to the con-

viction. Two other jurors testified that they had no recollection that any such statements were made, and that they did not hear the subject discussed by the jurors. The trial court, in the opinion denying a new trial, said "it does not believe the testimony of those two jurors who say they considered that* * * * The court * * * * does not believe that they willfully disregarded the instructions. * * * * No matter what they say about it now." Held, that while a juror "may testify to facts that transpired in the jury room;" he "cannot impeach his verdict by an affidavit or testimony to the effect that he considered this or considered that, or by attempting to relate the working of his mind or the mental process by which he arrived at an agreement to the verdict." As the trial court disbelieved the testimony of the jurors, it was authorized to deny a new trial. The judgment was affirmed.

INDETERMINATE SENTENCE.

Stephens v. Commonwealth, Ky., 175 S. W. 353. *Maximum and minimum sentence.* Under the indeterminate sentence law of Kentucky the jury are required in their verdict to state the minimum and maximum limits of the term of imprisonment to be imposed upon the defendant, which must be within the limits prescribed by law for the punishment of the offense. A jury convicted the defendant of larceny "and fix his punishment at not less than one year and not more than one year in the state penitentiary." Thereupon the court sentenced defendant to the penitentiary for a period of not less than one year nor more than two years. Held, that the punishment thus fixed is not "indeterminate" or "for an indefinate term." The verdict does not conform either to the letter or spirit of the indeterminate sentence law. The trial court was without authority to extend the punishment fixed by the verdict. The court should have refused to receive the verdict, and instructed the jury to retire and agree, if they could, upon a verdict and put it in proper form. The judgment was reversed.

In an earlier decision, *Harris v. Commonwealth*, 174 S. W. 476, noted in the September JOURNAL on page 435, the same court affirmed a conviction based upon a sentense of not less than one year nor more than one year and one day.

INSTRUCTIONS.

People v. Rees, 109 N. E. 473, Illinois. *Promise of Immunity.* Where an accomplice, who testified for the state, had been promised immunity from prosecution, and two other witnesses for the state, who were not implicated in the particular crime had been promised immunity from prosecution for criminal offenses, and one of the latter felt resentment against one of the defendants, for procuring his indictment, it was error to refuse an instruction, requested by defendants, that the jury should consider whether any witness had become interested or hoped to receive any reward, immunity or benefit, or had his feelings or passions enlisted against the defendants, and if they so found, whether the testimony of the witness on the material facts was thereby affected.

MISCONDUCT OF JURY.

State v. Coleman, Mo., 175 S. W. 209. *Evidence of Eavesdropper.* The defendant was convicted of murder. In support of a motion for a new trial, he introduced an affidavit that the jury in discussing the case in the jury room, took into consideration matters known to them, as to which no evidence had been introduced on the trial, namely the defendant's habits as to drinking, and the fact that another jury had acquitted the defendant in another trial for murder at the same term of court, and they would be subject to public criticism if the acquitted this defendant. The

State did not introduce any affidavit of the jurors to deny this statement, but put the man who had made the affidavit for defendant upon the stand. He testified that when he heard what occurred in the jury room, he was standing by the door listening. The trial court denied the motion for a new trial and the defendant appealed. Held, that the trial court doubtless considered the witness, inasmuch as he was an eavesdropper, not to be a disinterested witness, and therefore did not consider his affidavit sufficient to overthrow the presumption in favor of the right conduct of the jury. The court properly considered that presumption, as against the evidence, and was justified in denying the motion. The conviction was affirmed.

State v. Tilden, Idaho, 147 Pac. 1056. *Reading newspapers.* The defendant was convicted of manslaughter. One ground for a motion for a new trial was misconduct on the part of the jury. This was supported by the affidavit of one of defendant's attorneys to the effect that at the request of a juror the trial court allowed members of the jury to procure magazines or other reading material, provided that any reports concerning the pending trial should be cut from daily newspapers supplied to them and that the members of the jury should not read any such report. That the affiant has been informed and believes that newspapers containing what purported to be a dying declaration of the man who was killed by the defendant were given to the jury and that members of the jury read these reports during the progress of the trial, and were thereby biased and prejudiced against the defendant. An affidavit of one of the jurors was filed stating that the bailiff permitted the jury to have and to read copies of the newspapers which contained these reports. The State contended that the affidavits did not show that any juror read the objectionable articles or were influenced thereby; nor that the articles were not cut from the papers. Held, as it would be difficult for the defendant to prove a violation of the court's order, and easy for the prosecution to prove compliance; the burden of proof was on the State. Failure to introduce affidavits of members of the jury that they had not read the articles, raises a strong presumption that they did. There was no evidence of such dying declaration properly introduced. The jurors were likely to be influenced by the newspaper reports. Hence the judgment of conviction should be arrested and a new trial granted.

NEW TRIAL.

Nichols v. Flannigan, Mich., 152 N. W. 482. *No power to grant at Common Law.* A statute provided that in a criminal case a new trial might be granted "at the same term or at the next term thereafter." The defendants who had been convicted in a criminal prosecution, moved for a new trial, which was denied. Within the period fixed by statute, they renewed their motion. There was a hearing on this motion, and the matter was taken under advisement. After the expiration of the statutory period, the defendants filed an amendment to their motion for a new trial, adding another ground. This was done with the express consent, in open court, of the prosecuting attorney, and he waived any objection to the granting of the motion. There was a hearing upon the motion as amended, and the court denied the motion in so far as it was based upon the original grounds, but granted it upon the ground set out in the amendment. Mandamus proceedings were then brought to compel the Judge to vacate the order for a new trial and to compel him to remand the defendants to serve the remainder of their sentences. It was held that at common law there was no power to grant a new trial in a criminal case, the only relief in case of an improper conviction being by recommendation for pardon. The statute granting the power having limited the period during which it could be exer-

cised, at the expiration of that period the court lost jurisdiction over the case. The consent of the prosecuting attorney could not give jurisdiction. Consequently the action upon the amendment, "which was in fact a new motion," was invalid. Mandamus issued, vacating the order for a new trail and directing that the prisoners be remanded, to be dealt with in accordance with the original sentence.

PAROLE.

Duehay et al v. Thompson, 223 Fed. 305. *Effect of commutation of sentence.* The Act of January 23, Chapt. 9, provides that every convict imprisoned for a definite term, whose record shows that he has observed the rules of the institution and who has served one-third of the total of the term for which he was sentenced, may be released on parole. Act of June 25, 1910, Chapt. 387, a part of the original act relative to paroles provides that nothing herein shall impair the power of the President to grant a pardon or commutation. Held that, where the President commutes a prisoner's term of imprisonment from eight to four years, the prisoner was eligible to parole when he had served one-third of the computed sentence of four years, as a commutation of sentence or punishment is a change from a higher to a lower punishment, or the substitution of a less for a greater punishment, and the commutation did not substitute a sentence by the President for the judgment of the court, but left the judgment of the court in force, though in a modified form. (Ross, J., dissenting.)

PLEA.

Ex parte Super. Tex. Cr. App., 175 S. W. 697. *Made by defendant's mother.* Under the Constitution and statutes of Texas, a defendant who is charged with a misdemeanor may appear in person or by counsel, and a plea of guilty may be entered through his counsel. Super was charged, in a Justice court, with a misdemeanor. His mother, who was not an attorney, and had no authority to do so, entered a plea of guilty. The Justice gave judgment on this plea and issued a commitment under which Super was arrested. He applied for a writ of habeas corpus. Held, that the statute gave no authority to the relator's mother to enter the plea, hence there had been no legal conviction and a commitment could not be lawfully issued. The relator was discharged.

PRIVATE DETECTIVES.

Koscak v. State, Wis., 152 N. W. 181. *Crime instigated by.* Defendant was seriously injured while at work for a corporation. He was thereafter employed by the company at light work for about three years, when he was discharged. He tried to get reinstated without success, and wrote to an officer of the company a letter containing vague threats. The officer sent for him and he demanded either permanent employment or pay for his injury. He was re-employed, and private detectives were hired to watch him. One of these reported that he was dangerous, but testified at the trial that this report was false. There was evidence, which was denied by the officers of the company and of the detective agency, that there was a plan to entice the defendant upon the premises of the manager of the company, and to shoot him when he was there, but no attempt was made to put this plan into execution. A detective, ostensibly employed as a workman by the company, failed in an attempt to get defendant to join with him in stealing the company's property, the object being to have the defendant imprisoned. Soon after this failure, the detective was discharged as a workman, and the next day the defendant was discharged. The detective pretended to be the defendant's friend, promised

to aid him in getting revenge, and proposed to dynamite the manager's house. Another detective purported to enter the plot as an accomplice. He posed as a desperate man, and intimidated defendant by displaying a revolver. In furtherance of the plan to blow up the manager's house, the defendant and one of the detectives went to another town where the defendant ordered dynamite. The next day defendant went alone, got it and took it home. It was agreed that he should keep it till night when the detectives were to get it, and blow up the house. That evening he was arrested. He had done nothing to prevent the detectives from carrying out the proposed plot, but explained this by saying they had threatened to kill him if he told.

At the trial, the court charged the jury that it was no defense for the defendant that the detectives did not have any intent to use the dynamite for any unlawful purpose. It refused to instruct them that the defendant was not guilty "if he bought the dynamite and had it in his possession, not because of a desire and intent that it be so used, but because he was induced by threats and intimidation to buy, transport and possess it."

The defendant was convicted of the statutory crime of buying, transporting and having in his possession dynamite, with the intent that it should be used for the destruction of property or the murder of any person, or knowing that it was intended by other persons for such purposes. He was sentenced to five years in the penitentiary, and appealed. Held, that as the detectives had no intent to destroy property or to murder the manager, the defendant was not guilty of buying, transporting and having in his possession dynamite, knowing that it was intended to be used by others unlawfully. But under the instructions the jury may have convicted him of that offense. It was further held that it was error not to give an instruction that "if the detectives promoted, urged, or originated the perpetration of these offenses," or "intimidated defendant and thereby became the active parties to instigate and perpetrate the offense charged," and "defendant under the facts and circumstances of the case was only a passive participant in the crime charged, then he was not guilty." The argument in support of this latter ruling was that the officer and manager who employed the detectives were bound by their acts in originating and carrying out the perpetration of the offense. "It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it, for himself, but they must not aid, encourage, or solicit him that they seek to punish."

The conviction was reversed and the case remanded for new trial.

SENTENCE.

Mathews v. Swatts, Ga. App., 84 S. E. 980. *Not modified by oral statements.* One Donald was convicted of two offenses. In imposing sentence, the judge stated in open court that he would be relieved of the sentences upon the payment of $37.50 for each of the offenses. By mistake the clerk of the court made the fine in each case $50.00 in entering the judgment, and the trial judge signed it as entered. Donald served the first sentence and paid the $37.50 in full payment of the fine imposed by the second sentence. The warden refused to release him, and habeas corpus proceedings were brought to secure his discharge. The trial judge ordered him to be discharged. Held on appeal, that "oral announcements of a judge are no part of his judgment in a case. * * * * A trial judge cannot amend or

modify a sentence after it has been duly entered up and signed by him, and the term of court has passed. * * * * A judgment of a court of record can only be shown by its records." The evidence that Donald was to be released upon payment of $37.50 should not have been received. To discharge Donald would clearly remit a penalty, and usurp the executive power vested in the Governor alone. Hence the judgment was reversed, and the writ quashed.

STATUTE OF LIMITATIONS.

Berkley v. Commonwealth, Ky., 175 S. W. 364. *Continuous prosecution.* A Kentucky statute provides that if a demurrer be sustained to an indictment, the matter may be referred to another grand jury, and the defendant held in custody. An indictment was found against defendant before the expiration of the period fixed by the statute of limitations. After that time had expired a demurrer to the indictment was sustained and the indictment dismissed, with leave to resubmit to the grand jury. A few days later a new indictment was found, upon which the defendant was tried and convicted. He objected that the prosecution was barred by the statute of limitations. Held, that the prosecution was continuous and dated from the time the first indictment was returned. Hence the prosecution was not barred by limitation. The judgment was affirmed.

SUSPENDED SENTENCE.

Ex parte Lawson, Tex. Cr. App., 175 S. W. 698. *Setting aside the suspension.* The relator was convicted of felony, and on the recommendation of the jury, the sentence was suspended during good behavior. Later she was convicted of three other felonies, filed a motion for a new trial in each case, and appealed from the orders denying her motion. Pending the appeal, the trial court cited the relator to show cause why the order suspending the sentence on the first conviction should not be set aside. The relator showed for cause that the last three judgments were not final judgments, because she had perfected an appeal in each of the cases. The trial court set aside the suspension and refused to permit the relator to appeal from its order. The relator sued out a writ of habes corpus. Held, that the trial court had no authority to set aside the suspension of the sentence until the judgment in one of the subsequent prosecutions had become final by judgment or affirmance of the Supreme Court. As the record shows that the court did not have authority to set aside the suspension, and the court improperly denied the relator the right to appeal from its order, habeas corpus would properly lie to relieve the defendant from imprisonment under the order. Judgment was reversed and the relator discharged from imprisonment.

TRIAL.

Commonwealth v. Filer, 94 Atl. 822 Pa. *Conduct of jury.* That the jury in a homicide case, while taking a walk in the custody of an officer, viewed in the absence of defendant and his counsel a location mentioned by defendant in his testimony, did not require a new trial, where it did not appear that defendant was prejudiced thereby.