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JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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CERTIFICATE OF TRIAL JUDGE.

State v. Sehon, La., 68 So. 221. *Cannot be contradicted by agreement of counsel.* On a trial for manslaughter the defendants contended that there were two separate fights at the same time and place, and requested an instruction that "If, while two men are fighting, two others engage in a fight on the same spot and one of them kills the other, the two first are not responsible for the killing, providing they in no way aided or abetted the killing." The trial court refused to give the instruction and defendants excepted. They were convicted and appealed. The evidence given at the trial was not taken down, and there was no agreed statement of facts. The bill of exceptions contained no statement that evidence of any kind was adduced. The judge certified that he refused to give the requested charge "because there was no evidence nor contention of counsel in argument before the jury to warrant such a charge." To correct an error in this statement, the district attorney and the attorney for the defendants filed in the record the following admission, namely: "It is admitted that counsel for the defendants did contend before the jury in argument that the fight in which J. Hodge was killed was separate from the one between W. T. Sehon and Sam Hodge, which had been prearranged between them."

At the first hearing on this appeal it was held that the instructions should have covered this theory of the defense, that the refusal to give the requested charge was prejudicial and the conviction was reversed.

A rehearing was granted. It was then held that the certificate of the trial judge that there was no evidence upon which the requested charge could be based was not contradicted by the admission filed, which was only that counsel for the defense made such contention in argument. But that prosecuting attorneys have no authority to alter or modify statements by the court attached to bills of exceptions. That recitals in a bill of exceptions as to the testimony offered are controlled by the statement per curiam attached to the bill. Hence the judge properly refused to charge the jury on an abstract proposition of law.

The former decree was vacated, and it was ordered that the verdict and sentence below be affirmed.

ERROR WITHOUT PREJUDICE.

People v. Kilfoil, Cal. App., 148 Pac. 812. *Misconduct of district attorney.* "There is no doubt that in these instances, and in some others less pronounced, the district attorney gave examples of conduct very different from that which should characterize the conduct of the prosecuting officer toward the defendant in trying an action of this kind, or in any criminal case. * * * Our opinion is that in this case the effect of the misconduct that we have referred to was materially reduced by the rulings of the court, and the instructions then and

thereafter given to the jury; and that it cannot reasonably be held that without these acts of the district attorney the verdict would have been different from that which was returned by the jury." As the record did not show that the error complained of resulted in a miscarriage of justice, the conviction was affirmed.

State v. Lucken, Minn., 152 N. W. 769. *Court will overlook technical errors not presented.* Defendant was convicted of forgery. The defendant appealed. The action of the trial court was sustained on all points as to which the defendant claimed there was error. The Appellate Court said further, "this record may not be free from technical errors, but it is not our duty to interpose a technicality, not presented by the assignments of error or the brief in a case such as this, where defendant's guilt is established so convincingly by a multitude of disinterested witnesses."

State v. Tatman, Mo., 175 S. W. 69. *If guilt established, technical error harmless.* The defendant was convicted of murder and sentenced to death. He appealed. The Appellate Court said that the general principle which should govern its decision of the appeal was that where "there is any doubt of the party's guilt, then any infraction of the well established rules of crimnial procedure, which may reasonably be held to be prejudicial, may well work a reversal; but if it appears that there is no doubt of guilt, and that a ruthless murder has been committed by the appellant, then only errors tending to prevent a fair and impartial trial, under the forms of law, should be considered of sufficient magnitude to justify an interference with the judgment." The court then reviewed the evidence, reaching the conclusion that the defendant's guilt was conclusively established. It then considered the errors relied upon for a reversal, which were: 1. That the prosecuting attorney persistently referred to other crimes than that for which appellant was on trial. The record showed that in each instance appellant's objections to these references were sustained, and the officer was reprimanded; also that the objections made by counsel for the appellant "were not sufficiently saved to entitle them to consideration on review, if they had been of the nature calculated to prejudice the rights of the appellant." 2. References by the prosecuting attorney to the fact that appellant shot at a witness on the same night on which the murder was committed, but at a different place; and his statement that a certain bulletin described the appellant and his co-defendant as hold-up men. The court said: "Such conduct on the part of the public prosecutor, charged with dignified enforcement of the criminal law, should not be sanctioned. It lessens the vigor and effect of a prosecution, and oftentimes necessitates reversals. In this instance, however, no such objection was made as to entitle the error complained of to reverse. We have repeatedly held a general objection is no objection. * * * Not only this tribunal, but the trial court, is entitled to know the grounds upon which an objection to matters occurring during the trial is based. * * * An objection based upon a substantial reason is easily stated. If based upon no reason, and having for its purpose only a captious spirit to effect the exclusion of any fact which counsel may regard as damaging to the defense, it does not merit consideration. 3. The prosecution offered evidence that the defendant had committed other crimes. When such offers were made the trial court said, "There will be no evidence admitted of other offenses." Though the defendant's objection was thus sustained, the defendant excepted to the ruling on the ground that it assumed that other offenses had been committed by appellant, and was consequently prejudicial. The court said, "without in-

tending to exhibit impatience, we deem this contention too technically trivial for further remark." 4. That testimony was admitted that an hour before the commission of the crime, the appellant was seen in another part of the city, carrying a pistol, and that he shot at the witness who testified to this fact. The court said, "This testimony was objected to generally. This precludes our considering it, if error." But it was held to have been properly admitted as "the unexplained possession of fire arms in violation of law, shortly before the shooting, and the conduct and flight of the parties from the drug store upon their discovery of the officer, and their subsequent acts, were sufficient to render the fact in question admissible as circumstances tending to throw light upon the homicide." 5. That the prosecuting attorney was allowed to ask the appellant on cross-examination why he was in the neighborhood of the drug store the night of the crime. A statute provides that "A defendant * * * shall be liable to cross-examination, as to any matter referred to in his examination in chief." In defendant's direct examination he had testified that he had gone into the locality of the drug store just before the commission of the crime. Held, that the state in the cross-examination could properly require him to state why he went there. 6. There were exceptions to eight of the instructions given to the jury. The Appellate Court thought that upon the whole the instructions presented every phase of the case under the evidence, and that appellant had no substantial ground of complaint.

The court added, "We feel impelled to say that the manner in which this trial was conducted by counsel for the state is not to be commended; but in view of the prompt rulings of the court in excluding what would otherwise have been error, and the failure of counsel for appellant in many instances to save proper exceptions, the defendant, in the face of the unquestioned fact of his guilt, was either not prejudiced or the errors complianed of are not subject to review." All the justices concurred in an affirmance of the conviction. Conviction, and order that the sentence be executed.

EVIDENCE.

Carter v. State, Ala., 67 So. 981. *Cross-examination.* The trial court refused to allow the defense, on cross-examination, to bring out a fact not testified to in his examination in chief. Held on appeal that a witness may be cross-examined "fully as to his knowledge touching any and all facts material to the case." Hence it was error to restrict the cross-examination to matters brought out in the examination in chief. The conviction was reversed.

Langham v. State, Ala. App., 68 So. 504. *Witness disqualified by marrying defendant.* At the preliminary hearing on a charge of murder, a young woman testified in favor of the defendant. Before the trial she married the defendant, thus becoming disqualified to testify in his behalf. At the trial the defendant offered in evidence the testimony that she gave at the examination. The evidence was excluded. Held, that under the English rule the testimony of a witness given on a former trial cannot be used as evidence unless the witness has died. In this country, this rule has been relaxed, and such evidence is admissible (1) where the witness is dead; (2) insane or mentally incapacitated; (3) shown to be beyond the seas; (4) is kept away by the contrivance of the opposite party; (5) cannot be obtained by the exercise of due diligence; and, (6) has been rendered incompetent by subsequent facts for which the party offering the testimony is not responsible, and over which he had no control. But the former testimony is not admissible, if the absence or incapacity of the witness has

been caused by the voluntary act of the person who desires to introduce it in evidence. As the incompetency of the witness in this case was occasioned by the voluntary act of the defendant in marrying her, he was not entitled to offer testimony given on the preliminagry hearing. The conviction was sustained.

People v. Thaw, 154 N. Y. Supp. 949. *Rights of accused after extradition.* One who has been acquitted of a charge of murder on the ground of insanity, and has escaped from the asylum wherein he was confined, may upon recapture, and after extradition from a sister state on a charge of conspiracy to effect his escape, be recommitted to the asylum, notwithstanding his acquittal of the charge of conspiracy.

Reed v. U. S., 224 Fed. 378. *For crime barred by statute of limitation.* The question of whether the crime charged against a fugitive from justice is barred by the statute of limitations of the demanding state will not be determined by the court on habeas corpus for the discharge of the accused under extradition proceedings, but will be left to the decision of the courts of the demanding state.

FORMER JEOPARDY.

Ex parte Bornee, W. Va., 85 S. E. 529. *Appeal by state.* The constitution contains the usual provision that no one may be twice put in jeopardy of life or liberty for the same offense. An amendment gives to the supreme court jurisdiction of appeals by the state in revenue cases "and such other appellate jurisdiction in both civil and criminal cases as may be prescribed by law." The statute regulating the sale of liquors provides that the state shall have the right of appeal in all cases arising thereunder. Bornee was tried for a violation of that statute, and acquitted by the jury. The court, on motion of the state, set aside the verdict as contrary to law and the evidence, and granted a new trial over the defendant's objection. He pleaded former acquittal, but his plea was rejected. He was tried before another jury which disagreed, his case was continued, and he was committed to the county jail to answer the indictment. He petitioned for a writ of habeas corpus. Held, that the amendment to the constitution was not adopted to limit the operation of the provision against double jeopardy in the original bill of rights. There was no glaring or irreconcilable repugnancy between them. Hence the grant to the supreme court of appellate jurisdiction in criminal cases as may be prescribed by law, did not deprive persons charged with crime of their immunity from a second prosecution for a crime of which they had once been acquitted. The statute allowing such an appeal by the state was unconstitutional. The defendant was entitled to be discharged after his acquittal, and his subsequent imprisonment was unlawful. The prisoner was discharged.

Jackson v. State, Okla. Crim. App., 148 Pac. 1058. *Not waived by plea of not guilty.* An information charged that the defendant did "unlawfully carry and convey four barrels of whiskey and one barrel of beer from the city jail" to another place unknown. The defendant was tried on this information, demurred to the State's evidence, his demurrer was sustained, and he was discharged. The court ordered the defendant held for one day to enable the county attorney to file a second information. This information charged that the defendant "did unlawfully have in his possession certain intoxicating liquors, to-wit, four barrels of whiskey and one barrel of beer," with intent to sell the same. Defendant was arraigned and pleaded not guilty. After the jury had been impaneled, but before any evidence was introduced, the defendant inter-

posed a special plea of former acquittal, and in support of it introduced the record and judgment in the prior cause. The trial court overruled this plea, and defendant was tried and convicted. Held, that the constitutional privilege of immunity from a second prosecution was not waived. The plea of former conviction or acquittal may be imposed at any time before the jury has been impaneled to try the case. In the present case, the facts were all before the court as a part of its own record of the case, and the objection of former jeopardy raised only a question of law, which may be done at any time before the taking of testimony. The plea was, therefore, interposed in time. "The two informations allege the same date and have reference to the same intoxicating liquors, and while the offenses charged are not necessarily the same, they are of the same nature and kind. The acquittal under the first information was a finding that the defendant did not have possession of the liquors in question, and this finding was conclusive." As such unlawful possession, with the intent to sell, was an essential fact in the second information, defendant was put in jeopardy a second time when arraigned on this charge. "A series of criminal charges cannot, under our system of jurisprudence, be based upon the same criminal act or transaction. If the State elects through its authorized officers to prosecute the offense in one of its phases or aspects, and upon a trial the defendant is acquitted, it cannot afterwards prosecute the same criminal act under color of another name." The conviction was reversed.

FRAUDULENT USE OF MAILS.

Bettman v. U. S., 224 Fed. 819. Defendant, who was president of a corporation, mailed a false statement of the corporation's financial condition to a company from which the corporation desired to borrow money. Held, that Criminal Code, sec. 215 (Comp. stat. 1913, sec. 10385) applies to the act of one engaged generally in a legitimate business, who for the purpose of obtaining money or property, knowingly makes a false statement of his financial condition and sends such statement through the mails. And, though the corporation was then solvent, an intent to injure might still be inferred.

GAME LAWS.

State v. Ward, Iowa, 152 N. W. 501. *Killing deer doing damage.* Sections 2551-a and 2551-b of the Code Supplement prohibit the killing of deer. Under 35 G. A., Chap. 206, § 3, state game warden may authorize the killing of deer, when it shall become necessary in his opinion. The same chapter makes all wild game the property of the State. A large number of deer roamed about near the defendant's farm. No ordinary lawful fence would keep them out. They went where they pleased and ate such crops as they liked. Defendant had driven off these deer several times, but they came back to his yard and began eating fodder. The defendant shot and killed one of them while it was eating his fodder. Held, that if it was reasonably necessary for the defendant to kill the deer, to prevent substantial injury to his property, the killing would be justified, under the constitutional right to defend person and property given by Art. 1, § 1, of the Constitution of Iowa. "Whether a deer may be lawfully killed today by way of retaliation for the damage wrought by it yesterday, or whether it may be so killed by way of reprisal for damage wrought by other deer, are questions not involved herein, and we would not purport to pass on them." As the trial court had ruled that the defendant could not kill the deer without getting authority from the game warden, the conviction was reversed.

HABIT FORMING DRUGS.

U. S. v. Wilson, 225 Fed. 82. *New Harrison Anti-Narcotic Law construed.* The Harrison Anti-Narcotic Law, Dec. 17, 1914, c. 11, 38 Stat. 785, providing that persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away any opium or coca leaves must register and pay a special tax, and making it unlawful to fail to do so, is a criminal statute, and must be strictly construed. Section 8, providing that it shall be unlawful for any person not registered under the act, to have in his possession or in his control any opium or coca leaves, refers only to those who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away as enumerated in section 1; hence the mere keeping of a small quantity of opium for personal use does not constitute an offense within the meaning of the act.

INDICTMENT.

People v. Butler, Ill. 109 N. E. 677. *Sufficiency.* An indictment charged that accused, being of the age of 17 years and upwards, feloniously took certain immoral, improper and indecent liberties with a child of the age of 9 years named therein, with the intent of arousing, appealing to, or gratifying accused's lust, passions and sexual desires, and that a more particular description of such liberties was too obscene and too gross to be spread upon the record. Held, that a verdict finding accused "guilty of indecent liberties with child in manner and form as charged in the indictment," was sufficient.

INSANITY.

People v. Eggleston, Mich., 152 N. W. 944; *People v. Loomis,* Cal., 149 Pac. 581. *Burden of proof.* These two cases, decided three days apart, illustrate the conflict as to the burden of proof of insanity. The first holds an instruction that the defense of insanity must be established by a preponderance of proof, is erroneous. "While it is true that at the outset there is a presumption of sanity, as soon as evidence is introduced on behalf of respondent tending to overthrow that presumption, the burden of proof rests with the people to convince the jury beyond a reasonable doubt of respondent's sanity, that being one of the necessary conditions upon which guilt may be predicated." The conviction was reversed. In the second case the court said, "The prosecution was not required to prove the defendant's sanity as a part of its case in chief. Sanity is presumed. If sanity is urged as a defense in a criminal case, it is for the defendant to prove it by a preponderance of the evidence. * * * The proposition that the defendant is entitled to acquittal if the evidence raises a reasonable doubt of his sanity is not the law in this state. The court properly refused to instruct the jury to that effect." The conviction was affirmed.

INTOXICATING LIQUORS.

Katzenmyer v. U. S. 225 Fed. 523. *Constitutionality of statute forbidding sale of liquor to tribal Indian who is a citizen.* It was within the power of Congress to enact Act Jan. 30, 1897, c. 109 (Comp. Stat. 1913, sec. 4137) making it an offense to sell liuqor to any Indians, wards of the government, under the charge of any Indian superintendent or agent, though they may be citizens, since federal guardianship is in full force as to both the persons and property of Indians living in tribal relations.

PRESENCE OF DEFENDANT.

State v. Trull, N. C., 85 S. E. 133. *Opiate.* The defendant was convicted of murder. One ground for his motion for new trial was that he was under the influence of an opiate during a part of the trial. He was asleep part of the time while the court was charging the jury, but the court did not know this, and his counsel, who did, failed to call the court's attention to it. Late one afternoon during the trial the judge discovered the prisoner did not seem to be right, and at once adjourned court. The county physician examined the prisoner the next morning and reported him in good condition. Thereafter the judge and the county physician observed his condition during the trial, and saw that he was in full possession of his faculties and capable of conducting his defense. If he was under the influence of an opiate at any time, it was smuggled to him without the knowledge of the officers and was taken by him voluntarily. Held, that the precautions taken by the court in the prisoner's behalf were adequate and the prisoner was not entitled to a new trial.

SELF DEFENSE.

State v. Huber, Nev., 148 Pac. 562. *May original aggressor kill.* Billings demanded payment of $25.00, that he claimed defendant owed him. Defendant denied that he owed the debt. Billings assaulted the defendant and took his saddle in payment of the claim, and went away. Soon after the defendant took a gun and went to a neighbor's on an errand. He found Billings there, dismounted, and with the shotgun held under his arm, the muzzle pointing toward Billings, walked toward him, and demanded the return of the saddle. Billings walked toward the defendant, who three times told him to stop. Billings did not stop, but made a lunge for the gun, whereupon defendant stepped back a couple of steps, jerked the gun slightly to one side and fired, killing Billings. The jury were instructed that if defendant was the original aggressor, and Billings made a counter attack, the defendant would not have the right to kill Billings to save his own life. The appellate court held that the conduct of defendant in walking toward Billings with the gun held under his arm was merely a menace, not an assault. "If one makes an attack upon another for the purpose of committing a felony and of reeking his malice upon the person so attacked, and the person thus attacked makes a counter attack and is slain, the plea of self-defense is not available; but, if such attack is not made with felonious intent, the plea of self-defense is available." Hence the trial court erred in not limiting the instruction to cases in which the original attack is felonious. The conviction of murder in the first degree was reversed.

State v. Kennedy, N. C., 85 S. E. 42. Defendant had a quarrel with one Morton during which he slapped Morton's face. A fight followed, during which defendant's coat was cut with a knife. Defendant called to his assailants two or three times to "get off me, boys," and then "get off me or I'll shoot you off," and then shot, killing Morton. The jury were instructed that "if a person by his own conduct, either by words or acts calculated and intended to provoke a difficulty," brings on a fight and kills his opponent, he is at least guilty of manslaughter, unless before killing he has abandoned the fight and retreated as far as he can with safety. If he has done this he may kill in self-defense. The appellate court held that this was a correct statement of the law, disapproving decisions in other jurisdictions which allowed life to be taken in self-defense by the aggressor if his original attack was not felonious, and one prior case in

the same court which seemed to approve that rule. The conviction of manslaughter was affirmed.

Langham v. State, Ala. App., 68 So. 504. The defendant and one Thornton were paying attention to the same young lady. There was enmity between them, and Thornton had threatened to kill the defendant. This threat was reported to the defendant. The defendant was driving along a road, when he passed Thornton, who said he wanted to speak to him. Defendant stopped, got out of his buggy and walked off to one side with Thornton. Thornton demanded a retraction of some statement that defendant had made about Thornton's sister. They quarreled, Thornton struck the defendant in the face, knocking him back against the buggy to which they had returned. The defendant drew his pistol, fired and killed Thornton. There was proof that Thornton was a man of violent and bloodthirsty nature. The trial court refused to give a requested instruction on self-defense, which was a correct statement of the law applicable, if defendant was not at fault. The appellate court held that the right to kill in self-defense is restricted to cases in which the defendant is not at fault. In this case the defendant knew that Thornton had made threats. Doubtless because of this, he had armed himself. Thornton's reputation was such that the defendant may have anticipated trouble when he stopped and engaged in an altercation with Thornton about one of the matters that had caused enmity between them. While Thornton struck the first blow, he was not armed for a deadly combat. It was for the jury to decide whether the defendant was not at fault, under the circumstances. As the requested charge did not cover this phase of the evidence, it was properly refused. The conviction of manslaughter was affirmed.

SELF INCRIMINATION.

Elder v. State, Ga., 85 S. E. 97. *Prisoner ordered to step in tracks.* The defendant was convicted of murder, his motion for a new trial denied, and he appealed. After the defendant had been arrested for the murder he was taken by the sheriff, handcuffed, to certain tracks leading from a field, near which the murder was committed, to the defendant's house. The sheriff ordered him to put his foot in one of the tracks. Defendant appeared to be scared. He did not approach the tracks and put his foot in them until ordered to do so, but obeyed the sheriff's order. At the trial witnesses testified that his foot fitted the tracks. The defendant objected to this evidence on the ground that it violated his constitutional right not to "be compelled to give testimony tending in any manner to criminate himself." Held, that under the circumstances, there was such a show of force as amounted to the actual use of force and to coercion. If the accused had been assured by the sheriff that he was in no danger and had been asked if he was willing to put his foot in the track, and had then consented and voluntarily done so, the evidence would have been admissible. But "gotten by the means and under the circumstances shown to exist," it should have been excluded. The conviction was reversed, and a new trial granted.

SENTENCE.

Myers v. Morgan, 224 Fed. 413. For two offenses, not continuous, charged in one indictment. Accused under an indictment charging two offenses, was convicted of violating the Mann Act (Comp. Stat. 1913, secs. 8812-8819), and sentenced to imprisonment for ten years. The maximum punishment provided

in the act for one offense is five years. Nothing appeared to show that the offenses were continuous in their nature. Held, that under the circumstances the court did not exceed its jurisdiction in sentencing petitioner for ten years, for one sentence may be imposed on a conviction for two or more offenses, where the sentence is not in excess of the maximum allowed by law for all of the offenses of which accused has been convicted. The court declined to follow *U. S. v. Peeke,* 153 Fed. 166, and distinguished *In re Snow,* 120 U. S. 274.

TRIAL.

People ex rel. Thaw v. Grifenhagen, Sheriff, 154 N. Y. Supp. 965. *Determination of sanity on habeas corpus.* Relator in 1907 was tried for murder before a jury, and pending the trial a commission reported that he was insane, and on retrial in 1908 he pleaded insanity, and was found not guilty on the ground of insanity when the act charged was committed, and was then committed to an asylum for the criminal insane "until thence discharged in due course of law," and upon two applications for habeas corpus in 1908, one in 1909, and another in 1912, was adjudged still insane, and in 1913 in a judicial proceeding was adjudged not a lunatic, and in the same year was found by a commission not to be insane and not dangerous. Held, on application for habeas corpus to try the issue of his present sanity, that in view of the history of the case the court would refer the issue to a jury, although the relator was not entitled as of right to have it so referred, the finding to be merely for the information of the court and not binding on it.

Dobosky v. State, Ind., 109 N. E. 742. *Withdrawal of plea of guilty.* On a petition to set aside a conviction and to permit defendant to withdraw his plea of guilty and plead not guilty, where it appeared that petitioner, having but a meager understanding of English, was charged with grand larceny by affidavit and was arraigned and pleaded guilty and was sentenced on the same day, that on arrest he had been taken to jail and had no opportunity to consult friends or relatives, that while in custody police officers had advised him to plead guilty, representing that if he did so he would receive a light sentence, that he did not know of his right to a trial by jury and did not want to plead guilty, the denial of the petition was an abuse of the trial court's discretion, and the conviction will be reversed with directions to grant the petition.

VARIANCE.

State v. Gibson, N. C., 85 S. E. 7. *Allegation, "money;" proof, a promissory note.* Defendant was indicted for obtaining "three hundred and fifty dollars" by false pretenses. The proof was that the prosecutor was induced to sign a note for $350.00, for the accommodation of the defendant, by the defendant's false statement that three other solvent parties had agreed to sign with the prosecutor. They had not agreed to sign, and did not do so. The defendant got the note discounted at a bank, and when it fell due the prosecutor took it up by giving a renewal note in his own name. The defendant moved for a nonsuit, which was overruled, and he excepted. He was convicted. He then moved in arrest of judgment on the ground of the variance between the indictment and the proof. The motion was overruled and the defendant appealed. Held, that the defendant has a constitutional right to be informed of the accusation against him and to be convicted by the unanimous verdict of a jury upon the charge so made. The evidence must conform to the charge, at least in substance, before there can be a conviction. In this case the defendant was charged

with obtaining "money," the property of the prosecutor, while the proof shows that he did not obtain the prosecutor's money, but his signature to a note, and that the prosecutor has never paid any money on the note, and certainly none to the defendant. "We never properly speak of such a note as 'money' or as 'so many dollars.' Money is any lawful currency, whether coin or paper, issued by the Government as a medium of exchange, and does not embrace within its meaning a note given by one individual to another." The statute in regard to larceny distinguishes between "money" and a "promissory note or other obligation." There was thus a fatal variance between the charge and the proof. But a variance cannot be taken advantage of by a motion in arrest of judgment. It is waived if there is no objection to it before the verdict is rendered. The objection is properly raised by a motion to non-suit. The motion for non-suit should have been sustained and the indictment dismissed. This would not prevent a conviction upon another indictment for obtaining the notes by false pretenses. The conviction was reversed, the verdict set aside, and the indictment dismissed as of non-suit.

WITNESSES.

Maxey v. United States, 207 Fed. 327. *Competency.* A person convicted of a felony and sentenced to the penitentiary for 15 months was incompetent as a witness in a criminal case in a United States court, since at common law conviction and punishment for treason, felony, and the *crimen falsi* disqualifies a witness, and the common law rule has been changed by congress only as to civil suits.

MARRIAGE VOIDED BY FORNICATION.

Commonwealth of Penna. v. Reigel. Endlich, P. J., Q. S. Berks Co., Dec. Sessions 1911, No. 8. "Upon the trial of an indictment for incestuous fornication and fornication and bastardy, it appeared that in June, 1911, the defendant had intercourse with a woman who was a half-sister of his father's (having the same mother); that in October, 1911, the parties both being residents of Pennsylvania, while on a visit to New York, went to New Jersey for the purpose of being, and there were, married; that, returning to Berks county, Pennsylvania, they thereafter lived together as man and wife until separated by the woman's father; and that in April, 1912, a child was in said county born to them. Upon conviction and rule for a new trial: Held, (1) that under the Act of March 31, 1860, Sec. 39, P. L. 393, the defendant was guilty of incestuous fornication and the marriage void; (2) that a void marriage is not a defense to a charge of fornication."

"A marriage prohibited and punished by the laws of a state as against good morals and contrary to public policy, and entered into by citizens of that state going into another for that purpose and returning after its consummation, will not be recognized as the basis of a lawful relation in the state of the parties' domicile, although it may be valid in the state in which it was performed."

ADVERTISING MEDICAL TREATMENT.

People v. Kennedy, Supreme Court of Michigan, 142 N. W. 771. In a prosecution under Act No. 62 of the Public Acts of 1911, providing that any person who shall advertise "the treating or curing of veneral diseases, the restoration of 'lost manhood' or 'lost vitality or vigor,'" or "that he is a special-

ist in diseases of the sexual organs or diseases caused by sexual vice, self abuse or any disease of like cause," or "any medicine, etc., whereby sexual diseases of men or women may be cured, etc., or miscarriage or abortion produced," shall be guilty of a misdemeanor, etc., and that "any advertisement, etc., containing the words 'lost manhood,' 'lost vitality or vigor,' or other expressions synonymous therewith, shall be *prima facie* evidence of the guilt," etc., and that "the same penalties shall apply to the publishers of papers containing the same," etc. Held, that the statute is a reasonable police regulation and constitutional.

The theory of the defendant on this question is not disclosed by the report and the court simply announces its conclusion as aforesaid with the remark that "it is the duty of the court to give effect to a legitimate legislative purpose plainly indicated, if it can reasonably be done, and not construe language so as to invalidate an act where the language is fairly susceptible of a construction consistent with validity."