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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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CONSTITUTIONAL LAW.

Jackson, Chief of Police, et al v. Berger. 110 N. E. 732, Ohio. *Discrimination against labor union.*

Gen. Code, sec. 12943, making it a criminal offense for an employer to discharge or threaten to discharge an employe because of his connection with a labor union or organization, is violative of the due process of law provision of Const. U. S. Amend. 14. Wanamaker and Donahue, JJ. dissenting.

Heim v. McCall, 36 Sup. Ct. Reptr. 78, and *Crane v. People of State of N. Y.* 36 Sup. Ct. Reptr. 85. *Anti-Alien Employment Law.*

N. Y. Consol. Laws chap. 31, sec. 14, making it a misdemeanor to employ aliens on public works is not unconstitutional, either as violating the principle of classification, the privileges and immunities of citizens clause, the due process clause or equal protection of the law clause of the U. S. constitution.

Freeman v. U. S. 227 Fed. 733. *Change of presiding judge during trial for felony.*

Defendant and others were indicted for conspiracy to defraud by use of the United States mails. Defendants were convicted after a rather remarkable trial lasting four months. The record of the case filled ten large volumes of 7,000 printed pages. The charge of the trial judge covered 87 pages, and in behalf of defendant Freeman, who alone appeals, 210 assignments of error have been filed. After the trial had proceeded for eight weeks the presiding judge became critically ill, and by consent of all the parties another judge was substituted. The new judge familiarized himself with the proceedings by reading the record. Held judgment must be reversed. "It is the opinion of this court" said Rogers, Cir. Judge, "that in a criminal case trial by jury means trial by a tribunal consisting of at least one judge and twelve jurors, all of whom must remain identical from the beginning to the end. It is not possible for either the government or the accused, or for both, to consent to a substitution either of one judge for another judge, or of one juror for another juror." (For criticism of the case see 29 *Harvard Law Review* 83).

CONTEMPT.

In re Independent Pub. Co. et al. 228 Fed. 787. *Newspaper publication regarding pending proceedings.*

Jud. Code sec. 268 (Comp. Stat. 1913, sec. 1245), provides that United States courts shall have power to punish contempts of their authority, provided such power shall not extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, etc. Pending a trial for felony, a newspaper published what purported to be the past history of the defendant on trial, mentioning similar felonies, trials, sentences, imprisonments, parole, and exile to escape prosecution of and by such defendant. Several of the

jurors having read the article, it was necessary to discharge the jury. *Held*, that the publication of the article obstructed the administration of justice, and was "so near" to the court as to obstruct its administration, as "so near" means not so far off or distant but what it may obstruct the administration of justice, and it is not a question of linear measurment, but of probable effect. Nor is the fact that the article was true or the lack of wilful intent to obstruct justice a defense.

DISORDERLY CONDUCT.

People v. Garstenfeld, 156 N. Y. Supp. 991.

Where defendant publicly greeted another by placing the end of his thumb against the tip of his nose, at the same time extending and wiggling the fingers of his hand, and it appeared that he had committed the same offense against the complaining witness on previous occasions, thus indicating a determination to annoy him to the limit of patient endurance, his conviction of disorderly conduct was authorized.

FORGERY.

State v. Fleming, Ind. 111 N. E. 310. *Alteration of a search warrant.*

Const. Art. 1, sec. 11 provides that no search warrant shall issue except upon affidavit of probable cause. Burns Ann. St. 1914, sec. 1924, provides that such an affidavit shall be filed with a justice of the peace, whereupon the warrant may be issued. Sec. 2278 provides that whoever maliciously, mischievously, or fraudulently alters, defaces, injuries, mutilates or destroys any record authorized by law belonging or pertaining to any court of record, justice of the peace, or any state, county, township, or municipal office or officer, or any other public record, or any paper, pleading, exhibit, or other writing filed in or by any such court, office or officer, shall, on conviction be imprisoned, etc. *Held*, that defendant, who procured from the justice a search warrant for the premises of T. S., and altered it so that it purported to authorize a search of the premises of J. S., did not violate sec. 2278, since the search warrant was not a public record in any sense, while no statutory provision contemplated its filing to bring it within the latter part of the statute. Morris, C. J., dissenting.

INSANITY.

People v. Smidt, 110 N. E. 945 N. Y. *Right and wrong test under the N. Y. statute.*

Penal Law (Consol. Laws chap. 40) sec. 1120, provides that a person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person unless he did not know the nature of his act, or did not know that the act was wrong. In a prosecution for murder defended on the ground of insanity, the court charged that the "wrong" of the statute was "wrong according to the laws of the state." *Held*, that such definition was too narrow, and that one committing a criminal act is not responsible therefor if he is unable to distinguish between right and wrong in the moral sense. *Held*, second, that this error was not ground for a reversal where defendant's motion for a new trial admitted that the defense of insanity was a mere fabrication. (See comment on this case in 29 *Harvard Law Review* 538-540.)

Perkins v. U. S. 228 Fed. 408. *Using Thaw case by way of illustration.*

On a trial for homicide, in which the defense was insanity, while it would have been better to refrain from alluding by way of illustration to the Thaw case because of the danger of prejudicing defendant, such allusion was not sufficiently prejudicial to warrant a reversal, if there had been no other error.

NEUTRALITY.

U. S. v. Blair-Murdock Co. et al. 228 Fed. 77. *Procuring enlistment in foreign service.* In San Francisco.

The British Consul General in San Francisco by order of his Government published a notice calling to actual service the Royal Naval Reserve. Some 600 men responded, but few of whom were in fact reserves, but all were registered. The consul general procured the services of defendants, who organized a voluntary association under the name of the British Friendly Association, and established an office. The register of names was turned over to such association, with instructions (1) to send only British subjects who had had military training; (2) to make no engagements of any description whatever; (3) to give no pay or advance; (4) to make no solicitation; (5) not to send more than 50 men at a time; (6) to require such proof of British nationality as such men were usually able to give; (7) to give no information as to pay, allotments, etc.; and (8) to examine such men to see if they were physically suitable. These instructions were obeyed by defendants, who communicated with the persons whose names were on the register, paid the board and lodging of those who responded until their examination, sent those found "suitable" to New York, and paid their transportation and sustenance on the way. All funds were furnished by the consul general. It was the expectation of defendants that the men would proceed from New York, under direction of the consul general there to England, and there enlist in the British service, and such was the intention of most of the men. *Held,* that the defendants were guilty of a conspiracy to violate Criminal Code (Comp. St. 1913, sec. 10174) sec. 10, which provides that "whoever, within the territory or jurisdiction of the United States * * * hires or retains another person to * * * go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district or people as a soldier or as a marine or seaman on board of any vessel of war, etc, shall be guilty of a criminal offense: that while the arrangement was probably designed to evade the letter of the statute, it was clearly the intention to violate it in substance.

TRIAL.

State v. Carta, 96 Atl. 411 Conn. *Using a voluntary plea of guilty which is withdrawn as an admission.*

Where accused entered a plea of guilty, and thereafter withdrew it, on trial for the offense the plea was admissible as an extrajudicial confession, inconsistent with the claim of innocence urged on the subsequent trial, not conclusive, but requiring further proof to establish the corpus delicti in order to justify a conviction. Wheeler and Roraback, J. J., dissenting.

People v. Watson, 111 N. E. 243 N. Y. *Improper argument of prosecuting attorney.*

Argument by the prosecutor, urging the jury not to burden the state with the expense of maintaining accused, if he was guilty of murder in the first degree and indirect comment on defendant's failure to take the stand in his own defense are improper but accused's guilt being abundantly shown are not ground for reversal.

VENUE.

People v. O'Gara, 119 N. E. 828 Ill.

Where the indictment for murder charged that the killing occurred in the County of Cook, state of Illinois, testimony that it occurred at 2943 Lyman Street is not sufficient to establish venue, the court not judicially knowing that such street and number was in the County of Cook, state of Illinois, and hence the conviction must be reversed.