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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.

BAIL.

*Ford v. Dilley,* Ia., 156 N. W. 513. *Presumption of guilt from indictment.*

By a divided court, it was held that the lower court erred in refusing bail to one indicted for murder in the first degree, such refusal having been based on the fact of the indictment, alone.

Under common law procedure the minutes of the grand jury were not available for any purpose, and indictment of a capital offense raised a presumption of guilt necessary to overcome the right to demand bail. An order of commitment or finding of a coroner's jury or ruling on preliminary hearing were subject to review and the evidence admitted of a summary revision, and such findings or order were of no effect on the hearing of an application for bail. *People v. Tinder,* 19 Cal. 539.

In the United States the names of witnesses for the prosecution are usually on the indictment and these may be called on the application for bail. The minutes of the grand jury may be examined by a court on application for bail. And in spite of these facts the American courts quite generally have held that an indictment for a capital offense is conclusive against the right to demand bail, while findings on preliminary examinations have been consistently held of no evidential weight in the determination of the right. *Hight v. United States,* 1 Morris, 407, *State v. Jenkins,* 129 La. 1019, *In re Thomas,* 20 Okla. 167, *Cowell v. Patterson,* 49 La. 516. In such cases the American courts seem to lose sight of the reason for the English rule in cases of indictment. They also seem to lose sight of the fact that a grand jury proceeding is *ex parte,* that life and liberty are synonymous in America, that one is presumed innocent until proven guilty, and that there is no reason for resorting to a fiction—that the presumption falls because of the indictment and later revives at the trial of the accused. They lose sight of the fact that the burden of proof of guilt is on the state, that grand juries have no authority to find degrees of offense, that the prosecuting attorney has practically full control of the grand jury proceedings, and that the indictment is found in the highest degree as a matter of form. They lose sight of the fact that evidence to support an indictment is not necessarily such as to make the proof evident or the presumption great. *Lynch v. People,* 38 Ill. 497

Statutes allowing bail to all persons before conviction, except for capital offence, where the proof is evident or the presumption great, make bail the rule, and the logical rule is that the state must show that the proof is evident to bring the case into the exception. *Re Haigler* 15 Ariz. 153, *State ex rel. Murray v. D. Court* of the 2nd Jud. D., 35 Mont. 504, *Ex parte Bramer,* 37 Tex. 2, *ex parte Newman,* 41 S. W. 629, *ex parte Finlen,* 20 Neb. 141. The defendant should be presumed innocent until proven guilty in any case. *State v. Kauffman,* 20 S. D. 620.

The reason for the English rule in case of indictment was because of secrecy in grand jury proceedings. Chitty's Crim. L. 128-129.

Since the indictment is of no weight on the final trial of the accused, and since by the better rule in America the evidence given before a grand jury can only be used for impeachment purposes, an indictment should not even be considered in the question of right to demand bail. The prisoner should be entitled to make his first appeal for bail to the discretion of the Court by presenting circumstances and facts from which the Court may find him entitled to bail. *In re Losasso,* 15 Colo. 163, *Ex parte McAnnally,* 53 Ala. 495, *People v. Tinder,* 19 Cal. 539.

Some states now say that after an indictment for a capital offense the burden of proof is on the accused on the application for bail. *In re Thomas,* 20 Okla. 167, *In re Froley,* 3 Okla. Crim. 719, *Ex Parte Alexander,* 59 Mo. 598.

Some states have amended constitutions to expressly allow bail after indictment for capital offense. *Ex parte Ezell,* 40 Tex. 451. Such an amendment seems surplusage however, in view of the wording "before conviction."

The case of *Hight v. U. S.,* 1 Morris 407, has been cited in one-half of the states and still represents the rule in many.

The Iowa Court in *Ford v. Dilley* in overruling *Hight v. U. S.,* say that it represented the law before the constitution was framed and statutes enacted to the effect that an indictment should be open to the examination of the courts. The Iowa courts in *Ford v. Dilley,* in fact, did overrule *Hight v. U. S.,* since at the time of that case, the ordinance of 1787 carried identical provisions. And in spite of the dissent in *Ford v. Dilley* this case represents a logical rule; one toward which the courts of America seem to be tending through the aid of definite legislation or in spite of historical reasons which clearly do not apply to the present criminal procedure of America.

A. H. BOLTON, Iowa City.

BURDEN OF PROOF.

*Dietzel v. State,* Tenn., 177 S. W. 47. *Unexplained suspicious circumstances.* It is an axiom of the criminal law that the state must prove beyond a reasonable doubt that the defendant is guilty of the crime with which he is charged. When the evidence is wholly circumstantial it is often said that it must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis; that it is not enough to rouse suspicion, and that the defendant need not explain suspicious circumstances until the state has made out a *prima facie* case against him. The familiar presumption of guilt arising from the unexplained possession of stolen property, soon after the theft, is accounted for as being an exception to the general rule that the defendant need not explain suspicious circumstances. Such a rule in favor of the defendant was proper as an offset to a system which allowed him neither counsel nor the power to compel the attendance of witnesses. It does not seem necessary under modern conditions, and is often overlooked, perhaps unconsciously. It is seldom however that a conviction is so completely supported upon the failure to explain suspicious facts as in this case. The evidence showed that George Wehman was a painter, about 55 years of age. He was eccentric, miserly, and it was known that he usually carried considerable sums of money upon his person. He had separated from his wife and boarded in Union City. Only two persons in the city were known to be intimately associated with him. On Saturday, July 11, 1914, he returned to his boarding house from his work at about 8 o'clock, washed, counted his money, which was in two tobacco sacks,

silver in one and bills in the other, paid his board, and about 9 o'clock walked to the business part of the town with the man at whose house he boarded. They separated, agreeing to meet at 10:30 and go home. Wehman took a bath, leaving about 10, and about 10:20 was seen standing on the street, three blocks from his boarding place, as though waiting for some one. He was not seen again alive, but on July 24 his body was found in a well a little more than three miles from the place where he was last seen. A gunshot wound in the back of his head had caused his death. Several articles that he probably had with him, including the sack of silver money, were also found in the well, but the sack of bills was missing.

Dietzel was charged with the crime. He was a young man about 21 years of age, the son of a man of considerable means. He had sought Wehman's company, and a few days before the murder had driven with him to a neighboring town, where they had supper together. On the night of the 11th, Dietzel went down town and hired a horse and open buggy about 9 or 9:30 He was seen on the street, apparently without the horse and buggy, several times between 9 and 10. One witness saw him talking to a man he thought was Wehman. He was seen near his father's house at about 10:15. This was on a street parallel with that on which Wehman was last seen alive, and two blocks from that street. His father, mother, sister, and a young man who was calling on his sister, testified that he came home about 10:30 and went to his room. At 11:30 the horse Dietzel had hired earlier in the evening was returned to the stable by some one who left it in front of the stable and immediately went away without being seen. The horse was hot and excited. That night a witness saw a man who was closely wrapped in a lap robe, so that he could not be identified, driving toward the city along a road leading from the well in which the body was found. The next morning a bloody lap robe was found at the stable, that was pretty clearly proved to have been in the buggy let to Dietzel, though there was a possibility that it had been in another buggy, but there was evidence that it could not have gotten bloody in the other buggy. The well in which the body was found was one of three near a lane which ran between two roads. Dietzel was seen in that lane on the morning of July 12, at dusk July 13, and again about 11 or 12 o'clock that night, on the evening of the 15th, and two or three other times before the body was found. He was alone and there was no apparent reason why he should be there. July 12 Dietzel paid his club dues, which were six months in arrears, amounting to $12. On the same day he paid his sister $15 on account of a debt he owed her and two or three days later paid $8 to a tailor, giving him a ten dollar bill. A few days later the tailor made a bank deposit of $55 which included a ten dollar bill that he thought was the one received from Dietzel. This bill had a red stain, was worn on one edge, and was torn in the upper right hand corner. A few days before he disappeared, Wehman had paid out a ten dollar bill, stained red from the red tobacco pouch in which he carried his bills, which was worn and torn like the one deposited by the tailor, so that apparently both had been carried in the same roll and worn and torn at the same time. A ten dollar bill, part of the money with which Dietzel paid his club dues, was also stained red, but there was proof that red stains were common on paper money in that locality. A few days after the murder a man was sent to search the wells. He took Dietzel, who was familiar with

that section, to show him where the wells were. Four were searched, three of which Dietzel pointed out, but though they went through the lane near which the body was subsequently found, Dietzel did not show him either of the three wells there.

Dietzel was convicted. In considering the sufficiency of the evidence, the supreme court disposed of the alibi by pointing out that the defendant's life was at stake, and that the testimony was destroyed by the proof that the buggy was not returned till 11:30, and the failure to show that the defendant turned the buggy over to anyone else. As a motive, there was the evidence that the defendant was short of money, as shown by his club dues being in arrears. It was asked why he sought the company of this eccentric laborer and drove him about the country; why he hired the rig, what he did with it, and how the lap robe became saturated with blood. Who else was on such terms with Wehman that he would have taken a midnight drive with them? Why was the defendant paying his debts on Sunday after the murder? Where did he get the money? Where could the bills, so stained, worn and torn have come from except from Wehman's red tobacco sack? Why did not the defendant point out the wells along the lane? Why was he there repeatedly after the murder? As the defendant had explained none of these circumstances, the conviction was affirmed, but "since there is here, as in every case of circumstantial evidence, a possibility (a bare possibility in this case) of mistake, we prefer to heed the expression of the jury and commute this sentence to life imprisonment." As thus modified the conviction was affirmed.

E. A. WILCOX, Iowa City.

CARRIERS.

*U. S. v. Union Mfg. Co.,* 36 Sup. Ct. Reptr. 429. *"Obtaining" transportation at less than the established rates.*

A consignee is none the less guilty of fraudulently obtaining interstate transportation at less than the established rates, contrary to the prohibition of the act of Feb. 4, 1887 (Comp. St., 1913, sec. 8574) where he falsely and fraudulently understates the weight of the shipment, with the effect of influencing the adjustment of the freight, because the transportation had been completed and the shipment delivered to him before the fraudulent representations were made.

CONSPIRACY.

*U. S. v. Bopp et al.* 230 Fed. 723. *Indictment.*

Criminal Code (Comp. Stat. 1913, sec. 10201) makes it an offense to conspire to commit an offense against the United States. Sec. 13, (Comp. Stat. 1913, sec. 10177) makes it an offense for any person within the territory or jurisdiction of the United States to begin or set on foot or provide or prepare the means of any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince with whom the United States are at peace. An indictment charged that defendants conspired to begin and set on foot and provide and prepare the means for certain military enterprises to be carried on against the territory of the king of Great Britain, and alleged that such enterprises were to be carried on against the Dominion of Canada and certain British steamships, and that it was the intention of the defendants to blow up, damage, and destroy certain railroad tunnels, railroads, bridges, trains, and ships engaged in transporting munitions of

war to England, France, Russia and Japan. Held, that the indictment was insufficient, as the charge that defendants conspired to set on foot or provide means for a military enterprise were mere conclusion, and it did not charge a conspiracy to do any acts which would constitute a setting on foot of a military enterprise or a providing of means therefore, nor was it aided by the allegations as to defendants' intention, since an attempt to destroy such tunnels, etc., was not necessarily a military enterprise, especially as it was not even alleged that the purpose of such destruction was to prevent the transportation of munitions of war.

C. G. VERNIER, Palo Alto.

FALSE PERSONATION.

*Lamar v. U. S.*, 36 Sup. Ct. Reptr. 535. *Of Federal "officer."*

A member of the House of Representatives of the Congress of the United States is an officer acting under the authority of the United States, within the meaning of U. S. Crim. Code, sec. 32 (Comp. Stat. 1913), making criminal the false personation of such an officer with intent to defraud.

FALSE PRETENSES.

*People v. Brady.* Ill. 112 N. E. 126. *Confidence game: elements of indictment.*

Cr. Code (Hurd's Rev. St. 1913, c. 38), sec. 99, providing that in every indictment for obtaining money or property by means of the confidence game it shall be deemed a sufficient description of the offense to charge that accused did, on, etc., unlawfully and feloneously obtain from a named person his money or property by means and by use of the confidence game, does not violate Const. art. 13, sec. 9, giving the accused the right to demand the nature and cause of the accusation against him. The indictment need not set out the acts constituting the offense. Cartwright, Dunn and Cooke, JJ., dissenting.

FORMER JEOPARDY.

*Morgan, Warden, v. Sylvester.* 231 Fed. 886. *Identity of offenses.*

It is not double "jeopardy" to convict and punish one, who broke into a post office and stole stamps therefrom, for larceny, under Penal Code (Comp. Stat. 1913, sec. 10214), though the larceny was in a sense a continuation of the breaking and entering.

INDICTMENT.

*U. S. v. Schwartz et al.* 230 Fed. 537. *Fraudulent use of mails: sufficiency of indictment.*

An indictment for using the mails in furtherance of a scheme to defraud alleged that the scheme consisted of inducing persons to buy lots by false representations concerning the locality in which the lots were situated, and by falsely representing that the lots were worth from $150 to $200, and that a number of lots were to be given away to leading members of various communities; the only expense to them being the sum of $19.50 to cover the cost of a deed. It did not allege that the lost were valueless, and neither the real value or the proposed selling price was stated. Held, that the indictment was insufficient, as failing to show a real purpose to defraud purchasers out of their money, as a purchaser of a lot worth more than he pays for it is not defrauded, though it is worth less than its represented value.

INTOXICATING LIQUORS.

*People v. Brown.* Ill. 112 N. E. 462. *Local option: temporary suspension and effect as to prior offense.*

One charged with a violation of Local Option Law (Laws 1907, p. 297) and with previous conviction under the same act cannot plead, regarding former conviction, that during a period between that conviction and the alleged offense the law was not in force in that territory, since the vote did not repeal the law, and, if it did, such a repeal would not be a remission under Rev. Stat. 1874, c. 131, sec. 4, providing that no law shall be so construed to repeal a former one as to an offense committed or penalty or punishment incurred under the former law.

MANSLAUGHTER.

*Commonwealth v. Webb,* Pa. 97 Atl. 189. *Provocation.*

An attack by a woman, five feet seven inches in height and weighing from 200 to 250 pounds, upon her husband, six feet in height and weighing 165 pounds, with a poker fifteen inches in length and one-quarter of an inch in diameter, is not such provocation as to create the irritation and passion necessary in a reasonable being to reduce homicide to manslaughter.

POST OFFICE.

*U. S. v. Lophansky.* 232 Fed. 297. *Statute: construction.*

Act March 4, 1909 c. 321 (Comp. Stat. 1913, sec. 10364) making it an offense to extract from or out of a letter box or authorized depository mail matter which has been deposited therein, does not apply to the act of taking mail matter which has been placed on and outside the box.

*McShann v. United States.* 231 Fed. 922. *Tampering with the mail: "letter intended to be conveyed by mail".*

Decoy letters addressed to fictitous persons, which were placed in the mails by post office inspectors, so as to be carried over the route of a suspected railway mail clerk, and intended to be removed from the mails at the end of his route without being carried to the place of address are letters intended to be conveyed by mail, within Penal Code (Comp. Stat. 1913, sec. 10365), making it punishable for an employee in the postal service to detain, delay, or open any "letter intended to be conveyed by mail".

SELF DEFENSE.

*State v. DiMaria.* N. J. 97 Alt. 248. *Duty to retreat.*

A person upon whom an assault is made so violent in its character as to endanger his life or to threaten him with serious bodily injury, is not justified or excusable in standing his ground and killing his assailant if he can avoid the impending danger by retreating.

SENTENCE.

*Walsh v. Commonwealth,* Mass. 112 N. E. 486. *Discharge in upper court for error in sentence.*

Under Rev. Laws, c. 193, sec. 12, providing that if a final judgment is reversed by reason of error in the sentence, such judgment shall be rendered in the case as the court below should have rendered, or it may be remanded to said court for that purpose, the Supreme Court has power to discharge the prisoner, judgment being reversed for error in the sentence, if justice

requires it, as where one convicted of a first offense in taking claims within prohibited bounds has paid an excessive fine after imprisonment for twelve days, though defendant will escape without a record of conviction of crime.

WEAPONS.

*State v. Menge,* Dela. 97 Alt. 588. *Concealed weapons—Defenses.*

Under the act of the Gen. Assembly of March 14, 1911 (26 Del. Laws c. 275), which substantially re-enacted act of Gen. Assembly April 8, 1881 (16 Del. Laws, c, 548), making it a crime for any person to carry concealed upon or about his person a deadly weapon other than an ordinary pocket knife, and imposes a more stringent penalty, allows peace officers to search any person suspected of carrying a deadly weapon, but provides for obtaining permission from the court, it is no defense to a prosecution for carrying concealed a revolver that accused was carrying same for the lawful purpose of returning it to his home: it having been borrowed and returned to him while he was on the street.