Journal of Criminal Law and Criminology

Volume 7 | Issue 5 Article 10

1917

Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER, ELMER A. WILCOX, WILLIAM G. HALE

FROM E. A. WILCOX.

CONCURRENT JURISDICTION.

State v. Milano. La. 71 So. 131. *Effect of dismissal in one jurisdiction.* The defendant was one of many persons who were prosecuted for the illegal sale of liquors in Shreveport, on informations filed in the city court. Four of five of the cases were tried and the judge acquitted the defendants in each, announcing that he would not convict on the uncorroborated testimony of hired negro "spotters." As such testimony was relied upon in all the cases, the district attorney entered a nol. pros. in each of the remaining cases, which included the one against the defendant. The evidence was laid before the grand jury, and indictments for the same offenses were returned to the district court, which had concurrent jurisdiction. The defendant pleaded the former proceedings as depriving the district court of jurisdiction, but was tried, convicted and sentenced. He appealed. It was held that, "when a criminal prosecution is commenced in a court having jurisdiction there is no process by which it can be transferred to another court of concurrent jurisdiction, and what the prosecuting attorney cannot do directly he should not do indirectly." The court also thought that abondoning a prosecution in one court, "for an alleged violation of a sumptuary or blue law," and bringing a prosecution for the same offense in another court, for the purpose of getting it before a different judge, was "not calculated to increase the respect that is due to the courts." The conviction was reversed and it was ordered that the defendant be discharged. The same principle was applied in two similar cases, State v. Abraham, 71 So. 193 and State v. Abraham, 71 So. 769.

It is a rule generally recognized that when two or more courts have concurrent jurisdiction over a case "the tribunal which first gets it, holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked in exhausted." Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287. In most of the cases decided under this rule, a case was actually pending in the first court at the time when the second assumed jurisdiction. In the Milano case several of these cases were cited. But the Louisiana court also relied upon Coleman v. State, 83 Miss. 290, 35 So. 937, 64 L. R. A. 807, decided in 1904, which seems to be the earliest decision that the court which first gets a case before it retains exclusive jurisdiction over the subject matter after the case is dismissed. It was charged that Coleman had killed his wife under such circumstances that he might be indicted in either of two counties. He was indicted for manslaughter in one, but this case was dismissed before trial. He was later indicted for murder in the other county and convicted. The conviction was reversed upon the ground that the prosecution in the first county had vested exclusive jurisdiction in its court, so that the court of the second

county had no jurisdiction. It was said that as the case could not have been transferred from one county to the other, the same thing could not be done indirectly. It was further argued that while the rule was intended to prevent conflicts between courts of concurrent jurisdiction, it was more than a mere rule of procedure. "It is a substantial and valuable right guaranteed by the law to a party accused of crime. It insures that he shall not twice be placed in jeopardy for the same offense; that he shall be forced to undergo but one trial, and shall not be harassed by repeated indictments in different courts and different jurisdictions." It was conceded that he might still be indicted for murder in the first county, as he had not yet been in jeopardy. In 1910 this case was followed in State v. Hughes, 96 Miss. 581, 51 So. 464. But in 1912 the same court had to decide the same question in two cases, Rogers v. State, 58 So. 536 and Rogers v. State, 58 So. 537. These were cases dealing with violations of the liquor laws, over which the justice and circuit courts had concurrent jurisdiction. Affidavits were filed against the defendants in the justice court, on which they were arrested and bound over to appear for trial on the 9th of November. On the 6th of November indictments charging the same offenses were returned to the circuit court. On the day set for the trial in the justice court, the county attorney, with the consent of he court but against the protest of the defendants, dismissed the cases brought there. They objected to the jurisdiction of the circuit court, but were tried and convicted. On their appeal it was conceded that "where concurrent jurisdiction is vested in two courts, the court first acquiring jurisdiction acquires exclusive jurisdiction." But it was said that the rule had no application to this case. "The reason of the rule is to prevent confusion and conflicts in jurisdiction, and to prevent a person from being twice tried for the same offense, but no defendant has a vested right to be tried in any particular court of concurrent jurisdiction. When one court of concurrent jurisdiction has acquired jurisdiction and voluntarily relinquishes it by a nolle pros, or dismissal of the case, there can be no legal or logical reason for preventing the other court from proceeding. * * * At the date that this plea in abatement was filed, no other court had jurisdiction of the offense and there was therefore no impediment in the way to his trial under the indictment. It can make no difference to this appellant from what motives the justice of the peace may have acted in dismissing this suit. * * * The appellant can only be interested in having but one prosecution before a fair and impartial tribunal in whatever court he is arraigned for trial on the charge. The State is only interested in seeing to it that prosecutions for infraction of the law be conducted in at least one of the courts." The conviction was affirmed. The Coleman and Hughes cases were not mentioned and were evidently not brought to the attention of the court, though the judge who wrote the opinion also wrote that in the Hughes case. In following the Coleman case, the Louisiana court was apparently unaware of either the Hughes or the Rogers case. In unconsciously overruling its former decision the Mississippi court seems to have reached the correct result, as no sound reason has been given to show that upon the dismissal of a case brought in one court, the matter is not again within the concurrent jurisdiction of all.

CONFLICT OF COURTS.

State v. Clark. Tex. Ct. App., 187 S. W. 760. *Writ of prohibition against injunction preventing criminal prosecution.* The old conflict between the

courts of King's Bench and Chancery, which came to a deadlock when Coke was Chief Justice, and Ellsmere was Chancellor, has broken out again, in somewhat different form, in Texas. After a truce of three hundred years, the war of injunctions and prohibitions is on once more. When the framers of the Texas constitution provided that the Supreme Court should have final authority over all civil cases and the Court of Criminal Appeals should be the ultimate arbiter in criminal prosecutions, they doubtless thought they had constructed a lawful fence, bull-proof and hog-tight, between the two jurisdictions. They were mistaken. The legislature enacted a local option law governing pool rooms, similar to the local option liquor laws. The constitutionality of this law was promptly attacked, on the ground that it delegated legisative power, in violation of article 1, section 28 of the state constitution. The Court of Criminal Appeals declared the statute to be constitutional; Ex parte Francis, 72 Tex. Ct. Rep. 304, 165 S. W. 147. McLennan county voted to close the pool rooms, and one Reed, who was running a pool room there, obediently closed. A little later the Supreme Court, in a habeas corpus case, declared the law to be unconstitutional; Ex parte Mitchell, 177 S. W. 953. Mr. Reed promptly reopened. The county attorney threatened to prosecute him. Reed petitioned the State District Court, alleging that he had property in pool tables, a hall, licenses to run a pool room, and in the prospective earnings to be derived from that industry; that the county attorney was about to prosecute him under the statute; and that the statute was unconstitutional. He asked that the county attorney and his assistants be enjoined from instituting any criminal proceedings under the law. Judge Clark, of the district court, issued the injunction. Soon after this, the Court of Criminal Appeals, in Ex parte John Mode, 180 S. W. 709, reaffirmed the constitutionality of the statute. Thereupon the county attorney sought its aid, asking for writs of habeas corpus, prohibition, and mandamus. He was directed to apply to the district court for a dissolution of the injunction. He did so, but the application was denied. The Court of Criminal Appeals then ordered the writs asked for to issue, preliminary to a hearing. After a hearing it was ordered that a writ issue prohibiting the judge of the district court from interfering further with the action of the county attorney in bringing criminal proceedings, and prohibiting Reed and his attorneys from taking any steps to prevent the institution of prosecutions. The court declared that the injunction was void and that the county attorney was released from all restraint sought to be placed upon him in the performance of his duties. It directed that any other writs, necessary to the enforcement of its judgment, be issued.

The majority opinion, by Judge Harper, was to the effect that as courts of equity deal only with civil and property rights, they will not enjoin criminal proceedings, unless it is necessary to preserve property rights that are clearly involved. As there is an adequate remedy at law in case of criminal prosecution under an unconstitutional statute, by setting up the invalidity of the act as a defense, equity has no jurisdiction to enjoin such prosecutions. The license to run a pool room is but a permit, and grants no vested right that may not be revoked. In portions of the state pool rooms have become the resort of thieves and criminals of every class; more "bootlegging" is carried on in them than in any other place; such places are clearly subject to the police power of the state, and no one would have a vested right to run one which

equity could or would protect by injunction. Equity cannot enjoin a grand jury from indicting, nor the trial court from trying the case, and if the county attorney is enjoined from acting, the trial court may appoint a special prosecutor; but any court that has jurisdiction to issue an order or writ should have power to enforce its order. Because of the constitutional and statutory limitations upon its power, the Supreme Court could not release an indicted person on habeas corpus. For these reasons the civil courts have no jurisdiction to interfere with criminal prosecutions. If an appeal should be taken from the order of the district court that the injunction issue, it would be two or three years before it would be finally determined whether the county attorney could institute criminal proceedings. Meanwhile all who chose could openly run pool rooms in the county. Where an inferior court is acting outside of its jurisdiction, the remedy by appeal in inadequate, and the interests of the public are affected, a writ of prohibition may issue. Hence the writ should be issued in this case.

Judge Davidson, who had dissented in the Francis and Mode cases, dissented upon the grounds that the injunction is a civil suit and not within the jurisdiction of the Court of Criminal Appeals. Delay in the decision of a civil suit does not confer jurisdiction over such case on a criminal court. Under the constitution this court can issue extraordinary writs only to enforce its own jurisdiction, but there is no criminal prosecution pending, over which this court may enforce its jurisdiction. Hence the writ should not issue.

Presiding Judge Prendergast than filed a concurring opinion in which he argued that the Court of Criminal Appeals has exclusive, supreme and final jurisdiction in all criminal matters, while the Supreme Court has no jurisdiction in criminal matters, but is prohibited from taking such jurisdiction. The Court of Criminal Appeals alone has power to pass upon the constitutionality of criminal statutes, and its decisions in such cases are binding upon all other courts. It does not appear how the Supreme Court got jurisdiction of the question in the Mitchell case, and its decision therein was erroneous. The Court of Criminal Appeals has held the pool room law to be constitutional. Reed has attempted to nullify that decision by enjoining the county attorney from prosecuting under the statute. If this can be done, every other opinion of the court can be set aside by any and every district judge and no criminal law can be enforced unless permitted by inferior judges. To prevent this the Court of Criminal Appeals may protect its jurisdiction by issuing writs of prohibition. Reed had no vested property rights to be protected. When the law was put in force in McLennan county, he closed the pool room he had previously operated. After the decision in the Mitchell case he paid the state and county pool room taxes and hired a hall. Equity will not protect property rights acquired after a criminal law is in force, against the operation of that law. Reed should rely upon the unconstitutionality of the statute as a defense, if a prosecution is brought against him.

Writs were also issued to another district judge in two similar cases; State v. Nabers, 187 S. W. 783 and State v. Nabers, 187 S. W. 784.

CORRUPT PRACTICES ACT.

People v. Gansley. Mich. 158 N. W. 195. *Application to local option election. Constitutionality.* Defendant, an officer of a Brewing Company, paid $500 of the corporation's money to a "Personal Liberty League", to be used

in opposing prohibition at a pending local option election. He was convicted under a statute prohibiting any officer of a corporation, nor formed for political purposes, from paying "any money belonging to such corporation to any candidate or to any political committee, for the payment of any election expenses whatever." He appealed, contending that the statute applied only to elections of officers, and not to local option elections; and that if it should be construed to apply to the latter it was unconstitutional because it denied to corporations the right granted to natural persons to make political contributions, and denied them the right to make expenditures to protect their interests in contests at the polls. The appellate court being equally divided, the conviction was affirmed. Four judges thought that "while most of the provisions of the act relate to the conduct and duties of candidates and political committees, yet that it was intended to regulate and control all elections and election expenses, wherever the electors are called upon to decide any measure or measures that may be before the people" was clear. The abuse to be guarded against was as apparent in a local option election as in the election of officers, since partisan zeal and spirit were as intense in one case as in the other. The fact that two other sections of the act applied to "measures" as well as to candidates aided in reaching this conclusion, and the question to be determined at the election would be a "political measure." They also thought that the act did not deprive the corporation of its property, impair the value of that property, nor deprive the corporation of any right or privilege granted by the laws under which it was created and existed, so as to violate the Fourteenth Amendment, and that in view of the historical abuse of corporate funds to influence elections, and the fact that the privilege of contributing to campaign funds has not been granted to corporations, the Legislature could properly put them into a class of persons who should not be allowed to contribute at all. As the act did not prevent the officers and members of corporations from freely speaking, writing and publishing their views, it did not violate the provision of the state constitution guaranteeing freedom of speech.

The other four judges thought it doubtful whether the act was intended to cover local option elections, and that this doubt should be resolved in favor of the defendant, since penal statutes should be construed strictly.

CUSTODY OF CHILD.

Brana v. Brana. La. 71 So. 519. *Conflict between juvenile and divorce courts.* A wife charged her husband, before the juvenile court, with failure to support their nine-months-old child. On the same day her husband sued for a divorce from bed and board, in the district court. The juvenile court gave the mother temporary custory of the child until further orders of the court. Five days later the district court entered an order in the divorce proceedings, giving custody to the mother. Five months later, the district court, after a hearing on the husband's application for a change of custody, ruled that the juvenile court had no jurisdiction over the child, since it was not a "neglected child", and awarded the custody of the child to the husband. The wife applied for writs of certiorari and prohibition. The court held that while the juvenile court would have no jurisdiction if the child was not a "neglected child", yet the condition of the child was only quasi-jurisdictional, and the juvenile court had jurisdiction to determine whether the child fell within the statutory description. Its decision that the child was "neglected" could not be attacked

collaterally, hence the district court could not award custody on the ground that the juvenile court was without jurisdiction.

The juvenile court got jurisdiction first, by its order made five days before that of the district court. But the authority to act does not depend upon priority, as the jurisdiction of the two courts is not concurrent. "The one jurisdiction is civil, it acts as between the parents. The other is quasi-criminal; it acts as between the state and the parents, or as between the state and the child." After the district court had awarded the custody to one parent, "as being the one most worthy, or least unworthy, of the charge, there is nothing to prevent the juvenile court from finding that the child is being neglected, and therefore should be taken away from both parents, or from the parent who is neglecting it." As the court could not review the facts in a certiorari proceeding, it must assume that the finding of the juvenile court was correct. Hence the writ of prohibition was issued.

TRIAL.

State v. Tracy. N. Dak. 158 N. W. 1069. *At hospital.* After the jury had been impaneled and sworn on motion of the state's attorney, supported by the affidavits of two doctors that the prosecuting witness was confined in a hospital on account of an operation for appendicitis and was in no condition to be brought into court to testify, the court directed that the jury, court officials, the defendant, and his attorney, be conveyed to the hospital to take the testimony of this witness. The defendant objected. On appeal it was held that this deprived him of no constitutional or statutory right. While it is contemplated that court shall be holden in the court room provided for that purpose, it is not expressly required that it be so held. The statutes provide that if the court room prove inadequate or insufficient, adequate quarters may be obtained, and that the jury may be taken to the place where the transaction in suit occurred, to view the place. Trial courts are vested with great discretion as regards the conduct of trials, and its exercise may be reviewed by the appellate court only in case of manifest abuse. In this case the court's rulings "were not only within its discretion, but constituted an eminently proper and wise exercise of such discretion." Affirmed.

SELF INCRIMINATION.

State v. Lyon. Ia. 157 N. W. 742. *Articles taken from person.* The Supreme Court of Iowa held that in a prosecution for perjury, in which defendant testified that he did not sell intoxicating liquor to a named person on a certain date and did not accept money thereon, a marked one-dollar bill given by an officer to another for the purpose of buying liquor of defendant, was admissible in evidence, though it was taken from defendant in a search of his person and against his will.

The constitutional guaranty of due process of law denies the right to make defendant give incriminating testimony in any case. (State of Iowa v. Height 117 Iowa 650.) This clause in the Federal constitution seems to restrict as narrowly as the express stipulations in state constitutions against compelling witness to incriminate himself, and statutes compelling the witness to so testify but guaranteeing immunity from prosecution on such evidence are declared unconstitutional.

It is due process to admit evidence of inculpating facts discovered through

an involuntary confession. This was allowed at common law, even in view of the stringent laws against the old inquisition with its thumb screws and what not,—1 Leach 263, State v. Motley 7 Rich Law 327. And there is no rule of law forbidding an officer upon the arrest of one charged with crime from making a close and careful search of the person of the individual for stolen property, instruments used in commission of crime, or any article which may give a clue to the commission of the crime, or identify the criminal. Reifsuyder v. Lee et al., 44 Iowa 401.

Some courts receive evidence obtained from compelling the defendant to make tracks, State v. Graham, 75 N. C. 256; Walker v. State Tex., App. 256. Other courts will not admit such evidence, People v. Meade, 50 Mich. 228; Jordan v. State, 32 Miss. 382. It seems that so long as the facts learned and introduced are not derived directly from language used in an involuntary confession, or from an unreasonable search and seizure for the primary purpose of securing evidence, such facts are admissible.

The Iowa Court allows the right to require a defendant charged with crime to stand up before the court for the purpose of identification. State v. Reasby, 100 Ia. 231.

An accused person cannot be compelled to exhibit those portions of his body which are usually covered, for the purpose of securing identification or other evidence against him. State v. Nordstrom, 7 Wash. 506.

Nor can evidence secured by a forced physical examination of accused defendant as to covered portions of his person be introduced (Iowa v. Height, 117 Ia. 650), even when for the purpose of identification. Facts disclosed on a search of his pockets may be evidenced. A. H. BOLTON.

FROM C. G. VERNIER.

BURDEN OF PROOF.

Smith v. State. Okla. 159 Pac. 668. *Proof of self-defense.* In a homicide case, where defendent denied firing the fatal shot and there was evidence tending to show that the homicide was justifiable on the ground of self-defense, the court instructed the jury in part as follows:

"If they believe from the evidence beyond a reasonable doubt that at the time the said shooting was done, it was done in self-defense as defined and set out in the instructions herein, you should find the defendant not guilty."

"No. 18. The court instructs the jury, that if they believe from the evidence in this case beyond a reasonable doubt that the defendant and one Charles Williams were just immediately prior to the firing of the shots which caused the death of the deceased, engaged in a difficulty, and that the deceased, armed with a deadly weapon, voluntarily engaged in said difficulty and struck the defendant over the head and knocked him down, and that both the said Charles Williams and the deceased jumped or fell upon the defendant and all three, while on the ground engaged in a scramble, and during the said scuffle or scramble the shots were fired which produced the death of the deceased, and shall further believe from the evidence, beyond a reasonable doubt, that defendent did not fire the shot that took deceased's life, then and in that event, they should find the defendant not guilty."

Held, prejudicial error, as placing the burden of proof upon the defendant, and requiring the jury, before finding for acquittal, to believe from the evidence beyond a reasonable doubt that the defendant was innocent.

CONSTITUTIONAL LAW.

State v. Sterrin. N. H. 98 Atl. 482. *Regulating use of automobiles; self-incrimination.*

Laws 1911, c. 133, sec. 20, requiring automobile drivers, knowing that they have injured a person, to stop, return to the scene of the accident, and to give name and address, and other information to any proper person demanding it, applies even where the only person to be found is the injured party, and he is unconscious, but the accident occurred at 6 p. m. on a city street where persons might be expected to pass.

Such act is not unconstitutional as violating Bill of Rights, art. 15, requiring accused to furnish evidence which might be used against him in a criminal proceeding, the operation of an automobile being a privilege and not a right, and therefore subject to such restrictions and conditions as the Legislature may impose.

State v. Latham. Me. 98 Atl. 579. *Validity of semi-monthly pay bill.*

Rev. St. c. 136, sec. 12, requiring milk dealers to pay for purchases semi-monthly and providing for punishment by fine on default in payment, is unconstitutional as violating Const. U. S., Amend. 14, as to class legislation, and is not justifiable under the police power as being for promotion of public health.

State v. Murphy. Conn. 98 Atl. 343. *Validity of statute regulating display of advertisements upon real estate.*

Pub. Acts 1915, c. 314, requiring the issuance of a license and the payment of a license fee for the display upon real estate of an advertisement containing more than four square feet of surface, held not an arbitrary and unwarranted interference with a lawful business, in an attempt to prohibit such business, and not contrary to the Constitution as authorizing the taking of property without just compensation, without due process of law, or in denial of equal rights.

EVIDENCE.

State v. Messervey. S. Car. 89 S. E. 662. *Evidence of malice in homicide case.*

In trial for murder of A., accused having killed him and F., testimony that accused, while F.'s son was crying at his father's casket, said: "It is not a damn bit of use crying over these old men; they did not have much time to live" —was admissable, since it was for the jury to say whether accused was speaking of A. as well as F., and it was competent on the question of malice.

Watts, J., dissenting.

INDICTMENT.

People v. Ferrara. Cal. 159 Pac. 621. *Instructions; disjunctive; force and fear.*

Under Pen. Code, sec. 211, defining robbery as felonious taking of personalty from person against his will by force or fear, instruction, permitting conviction if the offense was accomplished by "force or fear," is proper, though the information alleged "force and fear."

JURY.

Griffin v. State. Ga. 98 S. E. 625. *Competency of jurors: relation to parties.*

One who is related within the prohibited degree to a mere depositor of a bank is not incompetent to sit as a juror upon the trial of the president of the bank, on the charge of violating sec. 204, Pen. Code 1910.

Hodges, J., dissenting.

SELF-DEFENSE.

State v. Kilgore. S. Car. 89 S. E. 668. *Propriety of referring to abuse of this defense in instructions.*

In a prosecution for assault and battery, the instruction of the court, referring to the many times in which the plea of self-defense is asserted, where the facts do not make out a case of necessity, held not erroneous.

Fraser and Watts, JJ., dissenting.

VERDICT.

State v. Williams. N. J. 98 Atl. 416. *Form of verdict.*

A verdict in the form, "the jury has agreed to convict defendant guilty of murder with recommendation of mercy by the court if the court will accept," is inadequate to support judgment of conviction; there being in fact no verdict as long as process of agreement continues or there is a contingency.

The Chancellor, the Chief Justice, and Swayze, Terhune, Heppinheimer, and Williams, JJ., dissenting.

IDEM SONANS.

Watkins v. State. Ga., 89 S. E. 624. *Variance between allegations and evidence.*

On a writ of error for refusal to instruct the jury that no conviction could be had on an indictment for a criminal assault upon Maria Story, where the only evidence was of such criminal assault upon Marie Story, it was held that there was no error for—

1. The two names are idem sonans.

2. *Identitate personae* and not *identate nominis* is and should always have been the true and only issue in cases of this kind.

Under common law criminal procedure, the indictment or information must charge a definite person with a definite criminal act. Consequently the indictment must contain the name of the defendant (*Campbell v. State,* 109 Ill. 420), and if the crime charged is committed upon or in connection with another person (except an accomplice) must also contain the name of such other person. *State v. Hover,* 58 Vt. 497. The reasons for these requirements are, at common law, to properly notify the defendant of the act of which he is accused so that he may be able to defend himself, and in the United States under provisions of the state constitutions, to prevent him from being put in double jeopardy. *United States v. Bennett,* 194 Federal 630. But as to the elements of the crime itself it is immaterial whether it is committed by A or B and whether it is committed upon X or Y. *Commonwealth v. Buckley,* 145 Mass. 181. Accordingly where the name of the accused or the victim is unknown it has always been allowable to aver that fact and charge the crime by a description of the accused, *United States v. Upham,* 43 Federal 68, or of the victim as the case may require, *United States v. Durand,* 161 U. S. 307.

To meet these requirements and at the same time avoid a failure of jus-

tice through clerical errors in the framing of the indictment or information, the courts as early as the time of Elizabeth adopted the rule that in naming the accused or his victim the sound of the name and not the spelling thereof should govern. 21 *Am. & Eng. Encyclopedia of Law,* 313 (XV). As defined by modern courts, names are *idem sonans* if the ear has difficulty in distinguishing them as ordinarily pronounced. *State v. Alva,* 134 Pac. 209. Since its establishment this rule has been firmly imbedded in the American law, no less than 300 cases having been appealed on this rule alone, and of these nearly 100 have been held not within the rule and the defendant either released or a new trial ordered.

But owing to incongruities of English orthography, the prevalence of foreign names of peculiar orthography and pronunciation and the changes in the mode of spelling and pronouncing the same name by the same person at different times, the rule of *idem sonans* has not proven satisfactory in securing punishment of offenders against the law, and at the same time protecting the accused in his rights of notification of the act of which he is accused and freedom from "double jeopardy."

In view of the considerations on which the rule is founded, it appears that it never was founded on reason. The name of the person (accused or victim) is merely a convenient means of identifying such person. And when the person is sufficiently identified by other means the mere failure to use the most convenient one should not be allowed to affect the case. Dissenting opinion of Carter, J., in *People v. Smith,* 258 Ill. 502. In addition to such identification all that should be required is notice to the accused. Ordinarily the identification itself will be notice to the accused, but it is conceivable that in some cases the victim of the crime could be so described by means of hidden marks as to identify him perfectly, but at the same time not give the defendant sufficient notice before the trial as to enable him to properly defend the case. The adoption of such a rule is founded in reason and will not materially affect the present procedure beyond what is necessary, for indictments will still generally be framed by use of the name of the accused and the victim rather than by description, for that is the most convenient means of so doing.

The present rule leads to useless technicality. In *State v. Smith, supra,* the verdict of guilty was reversed and a new trial ordered although it was proved that the defendant knew of what specific act he was charged including the person on whom he was accused of having committed it and although it was proved that he did the act as charged, because the victim was named in the indictment as Rosetta, while her true name was Rosalia. Though here there was probably no miscarriage or failure of justice, as it is almost certain that on the new trial the defendant was convicted, the rule led to a useless delay of justice, and an additional expense to the state.

But it seems that in those cases which are left to the jury to determine whether two names are *idem sonans,* a verdict in favor of the defendant would lead to a failure of justice though it was proved that the defendent did the act, for it seems that another prosecution could be defeated by a plea of former jeopardy. A plea of former jeopardy is sufficient if it alleges that the defendant had on a previous day been tried for the identical offense. *McCullough v. State,* 34 S. W. 753.

In an endeavor to follow the rule courts are guilty of great inconsistency. Williams and William (surname) are *idem sonans. Williams v. State,* 5 Tex. Cr. App. 226. But Wilkin and Wilkins are not *idem sonans. Brown v. State,* 28 Tex. Cr. App. 65. Nor are Frank and Franks *idem sonans. Pardman v. State,* 2 Tex. Cr. App. 228. Nor Wood and Woods. 21 Tex. Cr. App. 320. But Michael and Michaels are *idem sonans. State v. House,* Busb. 410 (North Carolina) cited by the Texas court with approval.

The explanation of these cases seems to be that the courts adhere to the rule of *idem sonans,* but that their real reasons for the decision is based on the fact of whether the name as used was prejudicial to the rights of the defendant. So in *Williams v. State, supra,* the court while holding that the variance did not prejudice the rights of the defendant and so was not a fatal defect, yet devotes three pages to proving that the names are *idem sonans.* 5 Tex. Cr. App. 226, at 229 to 232. Other courts habitually, when stretching or distorting this rule to meet the requirements of the case, express in terms of *idem sonans,* what in reality is not *idem sonans* but *identitae personae. Balswic v. Balswic,* 102 N. E. 139; *State v. Cowser,* 157 S. W. 758; *Demis v. State,* 11 S. W. 647; *Mindex v. Satte,* 38 S. W. 995.

And it seems that the state constitutions and statutes which forbid a reversal of a decision unless the error has subjected the appellant to substantial injustice should lead to an abolition of this rule. *Kennedy v. State,* 62 Ind. 138; *State v. McKunnif,* 70 Ia. 217.

In the case under discussion the court went further than most courts are willing to go, but nevertheless they relied on the old rule while stating the new one. It is submitted that adherence to the rule of *idem sonans* merely tends to confuse the courts, prolong prosecution, and occasionally offers the guilty defendant a loophole of escape. W. C. DALZELL, Palo Alto, Cal.

FROM WILLIAM G. HALE.

CONFESSIONS.

People v. Trybus. 113 N. E. 538 (N. Y.) *Voluntary character of confessions—Inducements.*

The conduct of a private detective, employed by a district attorney to investigate a murder, in grabbing defendant quickly, shoving him against a radiator, and searching him when he was brought to his office, and in holding him as a private captive locked up in a police station, in order to obtain statements from him before formal complaint, and before he might see friends or counsel, did not *per se* make the defendant's confession of guilt involuntary and hence inadmissible, although such circumstances might be considered by the jury in determining their voluntary character.

Reprehensible conduct of detective.

"The conduct of a detective in needlessly laying hands on a helpless man detained by him without legal warrant deserves the severest censure. The practice of detectives to take in custody and hold in durance persons merely suspected of crime, in order to obtain statements from them before formal complaint and arraignment, and before they can see friends and counsel, is without legal sanction."

EVIDENCE.

Erber v. United States. 234 Fed Rep. 221. *Accomplice's Testimony.*

In the federal courts a conviction may be had on the testimony of an accomplice without corroboration, but the absence of corroboration may give emphasis to errors so as to justify a reversal of a judgment of conviction.

DEFRAUDING GOVERNMENT.

United States v. Gradwell et al. 234 Fed. Rep. 446. *Corrupting Elections —Criminal Code* (Act March 4, 1909, C. 321); Par. 37, 35 Stat. 1096 (Comp. St. 1913, Par. 10201), *Construed.*

The above statute making it an offense to conspire "to defraud the United States in any manner or for any purpose", is not intended for protection against corruption of a state election at which a Representative in Congress is chosen, but for the protection of the operations of the organized government. "Primarily a fraud upon a state election for Representatives in Congress is a fraud upon the right, not of the United States government, but of the people of a particular state. * * * As the defendants' brief points out, there is a sharp and clear distinction between a conspiracy to obstruct the administration of a law of the United States and a conspiracy which affects the constitution of one of the great departments of government. While there are two sides to the matter, one state and one national, the interest of the United States is so well protected otherwise that it cannot be presumed that the conspiracy statute was enacted with any thought of the application which the government now seeks to make.

Perara v. United States, 235 Fed. Rep. 515. *Good Character.*

The defendant was charged with stealing certain mail matter while acting as a railway postal clerk. The court, after referring to the fact that the defendant had introduced evidence for the purpose of showing his good character for honesty, integrity, and mortality, instructed the jury as follows: "Such evidence is admissible and should be considered by the jury; and, if it is of such a nature as to lead the jury to believe that it is improbable that a man of such high character would commit such a crime, and for that reason it raises a reasonable doubt in your minds as to whether the defendant really is guilty of the offense as charged, he is entitled to the benefit of that doubt and your verdict should be not guilty." But this part of the instruction was followed by an extended caution against giving too much weight to such evidence, in which the court stated among other things that, "We often hear of cases where men of the very highest character, even ministers of the gospel, deacons of the church—have been sometimes found to be secretly engaged in vice and crime. Not only that, there are many crimes that can only be committed by men who bear a good reputation, such as the crime in this case. * * * Under the law, before he (a postal clerk) can obtain employment, he must upon his application, get the recommendation of two reputable citizens vouching for his integrity, etc." In holding the latter part of the charge erroneous, the court on appeal, says: "By direct statement, innuendo, and suggestion it, in effect, nullified the true rule as first stated, and made good reputation of doubtful value and probably a positive disadvantage to the defendant."

FORMER JEOPARDY.

Crowley v. State, 113 N. E. 658 (Ohio).

The defendant was charged in this action with an assault with intent to

commit rape. He pleaded in defense that he had previously been charged with an *assault* based on the same act and had been tried before the mayor of Lancaster, convicted and sentenced to 120 days in the workhouse and that under the provisions of Section 10, Art. 1, of the Constitution, he could not be placed in jeopardy again for the same offense. Held: Conviction sustained. The Court in which the defendant was convicted of assault had no jurisdiction to try the accused on a charge for a greater offense, hence, in that court he could not have been tried for an assault with intent to commit rape. Therefore, he has not previously been in jeopardy on the present charge.

RECEIVING STOLEN GOODS.

Kasle v. United States. 233 Fed. Rep. 878.

(1) Where talleysmen employed by a railroad were required to check freight in and out of cars, the freight did not pass into their possession, so that their wrongful appropriation would amount merely to embezzlement; but such appropriation is larceny, and one knowingly receiving goods so appropriated is, when they are part of an interstate shipment, guilty of the offense of receiving goods stolen while part of an interstate shipment, denounced by Act Feb. 13, 1913, C. 50, 37 Stat., 670.

(2) It is not necessary under this act to prove that the defendant knew the goods to have been part of an interstate shipment. If he knows the goods were stolen, he receives them at the peril of their having been stolen while in the course of interstate shipment.

(3) It is erroneous to instruct the jury that they may convict the accused where it appears that the circumstances under which the defendant received the goods were such that a reasonable man would have doubted the title of his transfer. "The result of the rule of the charge would be to convict a man, not because guilty, but because stupid."

RELIGIOUS LIBERTY.

People v. Cole, 113 N. E. 790 (N. Y. Court of Appeals).

The defendant, a member of the Christian Science Church and a recognized practitioner within its rules was indicted under the New York medical practice act for practicing medicine without a license. Held, judgment of conviction reversed. The New York statute expressly provides that the section relating to the practice of medicine "shall not be construed to affect . . . the practice of the religious tenets of any church" and the constitution provides that "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in the state to all mankind; . . ." "The Christian Science Church is in terms expressly excepted from the prohibition contained in the medical practice acts of many of the states. It is so expressly excepted in the statutes of Maine, New Hampshire, Massachusetts, Connecticut, North Carolina, North and South Dakota, Kentucky, Tennessee, and Wisconsin."

"We think the exception in the statute in this state is broad enough to permit offering prayer for the healing of disease in accordance with the recognized tenets of the Christian Science Church."

BARTLETT, C. J., in concurring said: "I concur in Judge Chase's construction of the statute. But I would go farther. I deny the power of the Legislature to make it a crime to treat disease by prayer."

USURY.

People v. Silverberg, 160. N. Y. Supp. 727. *The Loan Shark.*

The complainant, who was in sharp need of money, applied to the defendant for a loan of $100 and was told by the defendant that he would sell him a diamond ring which he could pawn for that amount. The ring was delivered to the complainant upon his offering to pay the defendant $295 in monthly installments. The ring was pawned for $125. The wholesale value of the ring was $145 and its retail value $180. Held: This transaction was usurious. "Courts always attempt to search out the real nature of a transaction, and will never allow more form to circumvent the law." . . . Where usury is disguised under a sale of merchandise, the property in the goods passes to the vendor, but the excess of price over the just value is considered as a premium for the forbearance of the debt, founded on a presumed loan of so much of the purchase money as is equivalent to the cash value of the commodity sold; . . . any consideration paid or secured to the vendor beyond that will, in general, be considered as interest for its forbearance."