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# Judicial Decisions on Criminal Law and Procedure

# JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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

CONSTITUTIONAL LAW.

*State v. Stevens,* N. H. 99 Atl. 723. *Sales of lightning rods: "privileges and immunities."* Laws 1915, c. 128, regulating the sale of lightning rods, section 3, providing that an agent under a license from the insurance commissioner shall be a resident of the state, if a discrimination against citizens of other states, is one that the state could lawfully make, and so is not violative of Const. U. S., art. 4, sec. 2, par. 1, providing that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, or the Fourteenth Amendment, prohibiting any state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

*State v. Collins.* Wash. 161 Pac. 467. *Validity of statute regulating operation of jitney busses.* Laws of 1915, page 227, requiring bonds from motor vehicles, but not from street car companies, does not violation Constitution, article 1, section 12, prohibiting class legislation, since the distinction is reasonable.

Nor is it invalid because it requires a security company's bond from jitney busses without providing for bonds of other companies, since the requirement is presumably reasonable.

Nor is it valid because it exempts carriers of United States mail from its provisions.

Nor does it violate Constitution, article 1, section 9, providing that no person shall be compelled in a criminal case to give evidence against himself, and that there shall be no imprisonment for debt except in case of absconding debtors.

Nor does it unconstitutionally take property without due process of law.

HOMICIDE.

*Parker v. State.* Wyo. 161 Pac. 552. *"Premeditated malice."* In a homicide case, it was error to instruct that to constitute "premeditated malice" no particular time need intervene between the formation of the intention and the act, but it is enough if the intent to commit the act with the full appreciation of the result likely to follow was present at the time the act was committed; such instruction in effect stating that defendant could be found guilty of murder in the first degree if the intent to kill was present in defendant's mind when the act was committed.

Where, in a capital case, it clearly appears from the record that such error has been committed as amounted to a denial of substantial justice and deprived defendant of a fair trial, the judgment should be reversed, though proper exceptions were not taken below.

INDICTMENT.

*State v. Laflamme.* Me. 99 Atl. 772. *Typographical error in caption.* An indictment for maintaining a liquor nuisance of which the typewritten caption alleged that it was found at a term of the Supreme Judicial Court at a certain place on the second Tuesday in October in the year one thousand nine hundred and "fieteen," and alleging the offense to have been committed on August 15, 1915, and between that date and the finding of the indictment was valid; the word "fieteen" being a palpable typographical error for "fifteen."

INDICTMENT AND INFORMATION.

*State v. Curley.* Okla. 161 Pac. 831. *Forgery: sufficiency: variance.* Where an information charged that the defendant uttered, and passed a forged check, but did not plead the names of the indorsers on the back of the check, held, that it was error for the trial court to hold that the information was defective, because it did not plead the names indorsed on the back of the check. This was error, for the reason that these names did not constitute any essential of the crime charged. Also held that, when this check was introduced in evidence, it was error for the court to hold that, because the names indorsed on the back of it were not pleaded in the information, there was a fatal variance between the proof and the allegations of the information. This was error because the crime charged was that the forged check had been uttered and passed, and the only function that the names of the indorsers on the back of the check performed was to furnish evidence as to the identity of the parties who uttered and passed the check.

*Lopez v. State.* Ariz. 161 Pac. 874. *Sufficiency.* An information for murder, the commencement of which recited "F. L. accused," etc., omitting the verb "is" before the word "accused," held sufficient, under Pen. Code 1913, section 943; the defect, if any, being one that could be cured by amendment, if timely objected to, and which is otherwise deemed cured by reference to the record.

*People v. Carrell.* Calif. 161 Pac. 994. *Sufficiency.* An information charging accused with committing "the acts technically known as fellatio," (quoted from the statute) made a felony by 1915 Pen. Code, section 288a, is fatally defective because not stating the offense so as to enable a person of ordinary understanding to know what is intended, as required by Pen. Code, section 950.

"Unexplained, the word 'fellatio' would, to a man of common understanding (indeed, we think also to one of uncommon understanding) be as cabalistic as if written in Egyptian or Mexican hieroglyphics or in Japanese or Chinese characters."

LARCENY.

*Clark v. State.* Ga. 91 S. E. 231. *Return of stolen property.* The evidence in this case, though circumstantial, is sufficient to exclude every other reasonable hypothesis than that of the guilt of the accused. Therefore the verdict finding him guilty of sheep stealing, which has the approval of the trial judge, will not be disturbed, although it does appear, as counsel for the plaintiff in error insist, that the stolen sheep came back, as was true in the case of "Bo-Peep," which is respectfully submitted to us as authority. While the sheep came back, it does not appear that this act on the part of the sheep is in any wise conclusive that they had not been in fact taken and carried away, as alleged in the indictment; it being entirely for the jury to say whether or not an extended search by the prosecutor, armed with a search warrant, made some three weeks before the home-coming of the sheep, of which the accused had actual notice, may not have influenced the return of the sheep.

SENTENCE.

*State v. Lottridge.* Ida. 162 Pac. 672. Error in form of sentence under indeterminate sentence law. Under the indeterminate sentence law of this state (Sess. Laws 1909, p. 82) any attempt by the trial court to fix a maximum sentence in a criminal case, where such sentence is fixed by law, is surplussage,

and it is not reversible error, where the trial court fixed a sentence at not less than one year and not more than fourteen years, when the statute fixes the maximum penalty at twenty years' imprisonment.

WHITE SLAVE ACT.

*Caminetti v. U. S. Diggs v. U. S.* 37 Sup. Ct. Repr. 192. *White Slave Act construed; non-mercenary transportation.* Transportation of a woman in interstate commerce in order that she may be debauched or become a mistress or concubine, although unaccompanied by the expectation of pecuniary gain, is condemned by the provisions of the White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Comp. Stat., 1913, sec. 8813), making it an offense knowingly to transport or cause to be transported in interstate commerce any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose to induce such woman or girl to become a prostitute, or to give herself up to debauchery, or engage in any other immoral practice.

The name given to a congressional enactment by way of designation or description in the act or the report of the committee accompanying the introduction of the bill into the House of Representatives cannot change the plain implication of the words of the statute.

White, C. J., McKenna, Clarke, J. J., dissenting.

CORPUS DELICTI.

*Choate v. State.* Okla. 160 Pac. 34. *Sufficiency of proof based wholly on uncorroborated extrajudicial confession of the accused.*

In an action for embezzlement where the state proved by competent and sufficient evidence, the fiduciary position of the accused and his receipt of the funds and the failure to account for them at the proper time, but failed to prove that he did not have them at the time of the trial, except by his own extrajudicial confession of misappropriation. Held, that the court erred in leaving the case to the jury.

This case raises two questions:

1. Whether the state prove the corpus delicti.

2. Whether the uncorroborated extrajudicial confession of the accused is sufficient to establish that element.

Both of these rules are directly traceable to a quotation from Lord Hale, to the effect that no one should be convicted of larceny without proof that goods were stolen or for murder without proof that the alleged victims were dead. Hale, Pleas of the Crown II, 290. On principle and by weight of authority the *corpus delicti* consists only of the fact of loss, though some courts include the fact that it was caused by some criminal agency. III Wig. Evidence, section 2072, sub-section 1. The first rule in this proper form, though the necessity for it except as a caution to the jury similar to the reasonable doubt rule in weighing the evidence rather than as a rule of law which might compel the court to refuse to let the case go to the jury, may be doubted, seems at least harmless as it is hardly possible that any jury at the present time would convict even without this rule where there was neither direct nor circumstantial evidence of the *corpus delicti.*

But the second rule seems open to much more objection. Where it is followed, there is considerable doubt as to the kind of corroboration necessary. Some courts require only general corroboration such as to inspire confidence in

the confession. *Bergen v. People,* 17 Ill. 426. While others require other direct or circumstantial evidence of the *corpus delicti. Gilbert v. Com.,* 111 Ky. 793. But these distinctions are here unimportant, as the rule seems superfluous in either form.

The rule is based on the inherent weakness of such confessions as evidence (State v. Stephen, 11 Ga. 225) and the fact that false confessions are not easily rebutted as is direct or circumstantial evidence of occurrences (as distinguished from words). *White v. State,* 49 Ala. 344. But these bases for the rule seem unsound. There is a direct conflict of opinion as to whether the evidence is weak or strong. Blackstone holds it weak. 4 Black. Comm. 357. Gilbert considers it the strongest kind of evidence. Gilbert Evid. 123. Regina v. Baldry, 2 Den. Cr. Cas. 430. Hopt v. U. S., 574, 504. Furthermore it is universally held inadmissible, if induced by hopes of favor or fear of punishment. U. S. v. Bram, 168 U. S. 532.

The rule seems to have originated as a humanitarian rule at a time when the accused could not be a witness for himself, had no right to process to compel the attendance of witnesses, had no right to counsel or right of appeal, but all these rights have at the present time been given him. Wigmore, 33 Am. Law Rev. 376, 384 *et seq.* Instances of miscarriage of justice due to uncorroborated confessions are exceedingly rare and all arose in England before the above-mentioned rights were given. III Wigmore Evidence 2794, note 4.

The weakness of confessions, if any exists, is not in the confession itself, but in the reports and testimony given in regard thereto. Erle. J., in *Reg. v. Baldry,* 2 Den. A. C. 446. This danger of falsification of testimony as to confession it seems is minimized by giving the accused the right to counsel and process. The rule is purely theoretical. In the previous reported cases there are none where there have not been some corroboration. *People v. Hennessy,* 15 Wend. 149. It seems impossible to imagine a case where the confession if true could not be corroborated. Hence it seems the only effect of the rule is to lead the court into error and thus secure retrial. And where the court correctly lays down the rule it seems that the jury may often be confused thereby and fail to convict when they might justly have done so.

Hence it seems that the rule is not founded in reason, is unnecessary, and is a device for unscrupulous counsel to secure delay or acquittal by trapping the court or the jury. The principal case seems an excellent example of such delay.

W. C. DALZELL, Palo Alto, California.

FORMER JEOPARDY.

*Morris v. State.* 90 S. E. 361. A conviction by a municipality will not bar an action by the state for the same act, providing that there enters some essential ingredient in the ordinance which is lacking in the state law.

This case is supported by practically all the authorities that allow a municipality to pass an ordinance, which is practically the same as the state law, and it is the great weight of authority that a municipality has that power. There is no question as to the power if the intention of the Legislature is to grant it.

Assuming that the municipality has the power to pass the ordinance, the question naturally arises whether the person convicted in a municipal court may be tried for the same act under a state law substantially the same, if he pleads the constitutional provision of a "former jeopardy" for the same offense.

The great weight of American authority is to the effect that he may be tried under both the ordinance and statute. Most of the decisions so holding are based on the reasoning that the state and municipality are separate sovereignties. Mayor v. Allaire, 14 Ala. 400; Bueno v. State, 40 Fla. 160, 23 So. 862; Ambrose v. State, 6 Ind. 351; Repass v. Commonwealth, 107 Ky. 139; Miss. v. Johnson, 59 Miss. 543; State v. Reid, 115 N. C. 741, 20 S. E. 468; Kock v. State, 53 Ohio St. 433, 41 N. E. 689; Anderson v. O'Donnell, 29 S. C. 355; Greenwood v. State, 6 Baxt. (Tenn.) 567; Hamilton v. State, 3 Tex. App. 643; Ex Parte Simmons, 4 Okla. 662; State v. Sly, 4 Ore. 277; Town of Van Buren v. Wells, 53 Ark. 368. Other jurisdictions and many of the above hold that the action under the ordinance is in the nature of a civil action to recover a penalty and hence no bar to a criminal action by the state. Levy v. State, 6 Ind. 281; Hughes v. People, 8 Colo. 536.

Many of the cases cited by the books as authority for the above proposition are not in point in that the state law is a felony, while the municipal by-law is a misdemeanor. Robbins v. People, 95 Ill. 175; State v. Lee, 29 Minn. 445, 13 N. W. 913.

Michigan, Connecticut and Missouri were the only states against the weight of authority for many years. People v. Hanrahan, 75 Mich. 611; State v. Welch, 36 Conn. 216; State v. Simmons, 3 Mo. 414; State v. Cowan, 29 Mo. 330.

Alabama, Arkansas and Texas have reversed their former rule, which followed the weight of authority, by statute. Ark. Statute acts 1891, pp. 97, Sec. 1; Ratley v. State (Ala.), 16 So. 147; Cast v. State (Ala.), 65 So. 718; Davis v. State, 37 Tex. Cr. R. 359, 39 S. W. 937.

Missouri, which held contra to the weight of authority consistently, recently apparently reversed itself in State v. Muir, 86 Mo. App. 642.

The reason for the two sovereignty theory is that the courts applied the analogy to the United States and the State courts trying a person for the same act. This analogy does not appear to me to be supportable. While there is no doubt as to the rule in the State and the Federal cases it does not appear clear why the courts should use those decisions as a rule on which to base the decision in municipal and state cases. It is generally and correctly stated that a municipal corporation is created by the state to aid in the management of the affairs of the state, and is generally considered as the agent of the state. In State v. Cowan, *supra,* it was said: "To hold that he can be (convicted by both state and municipality) would be to overthrow the power of the assembly to create corporations to aid in the management of the affairs of state. For the power in the state to punish, after punishment has been inflicted by the corporate authorities, could only find support in the assumption that all the proceedings on the part of the corporation were null and void."

The rule that the municipal by-law action is civil is historical. Anciently in England a municipal corporation could not, by a by-law, authorize an indictment or summary prosecution, nor could it provide either for imprisonment or disfranchisement for disobedience. The ancient by-law used to direct that, for a breach of its provision, the offender forfeit a sum named. This forfeiture could not be recovered in the Mayor's court but was recoverable in an action of debt, or sometimes assumpsit in one of the Westminster Hall Courts. Bishop Statutory Crimes, 4th Ed., Sec. 403.

For other authorities on the principal proposition see 12 Cyc. 288; Dillon on Municipal Corporations 4th Ed. Sec. 368 and note; Cooley on Constitutional Limitations, 4th Ed., 239 and 240 and note.

F. M. OSTRANDER, Palo Alto, California.

FROM WILLIAM G. HALE

CONFESSIONS.

*State v. Maranda.* Ohio 114 N. E. 1038. *Corpus delicti.* (1) An extra-judicial confession is not sufficient in and of itself to sustain a conviction of a crime. (2) Some corroborating circumstances tending to prove criminal agency, which is one of the elements of the *corpus delicti,* should be offered by the state before such extra-judicial confession is competent. In this case the defendant was charged with arson, and there was, apart from the confession, evidence that the buildings were burned and some evidence tending to show that the fires were not accidental. The confession, therefore, was admissible.

INDICTMENT.

*United States v. Gaag,* 237 Fed. 728. *Allegation of offense as of a day certain.* In an indictment for giving an order for opium and failing to preserve a duplicate thereof in such a way as to be readily accessible, in violation of the Anti-Drug Act (Dec. 17, 1914, c. 1. 38 Stat. 875), time is of the essence, since the offense can be committed only within two years after the acceptance of the order. The indictment must, therefore, allege that the offense was committed within the essential period, or it fails to allege an offense. The proof, however, need not correspond with the averment, with exactness. The proof may be of any day within such two-year period. The following language from the opinion is of interest: "The general rule is that, even though a grand jury has not evidence of the exact date of an offense, and though its oath is to true presentment make, and though time be not of the essence, it must in the indictment allege the offense of a day certain. To escape the sometime difficulty thus created is another and necessary rule that at trial the day alleged may be disregarded, and the offense proven as of any day prior to indictment and within limitations. Perhaps the interests of both accuser and accused and good pleading require that the indictment shall definitely allege the date of the offense when known. But to compel it to be alleged when unknown often defeats the objects of the requirement, is illogical, falsified by the proof, and works to the prejudice of both parties and to the impairment of justice. At any rate, the first rule is emasculated, "weaseled," by the second, and in the main is but a technicality of time-honored precedent. So in England and elsewhere are statutes that no indictment shall be holden insufficient for failure to allege the time, or for erroneous allegation thereof, when time is not of the essence. And under such circumstances the allegation is so far of form, rather than of substance, that it is believed to be within section 1025, R. S. (Comp. St., 1913, Par. 1691), nullifying defects of form and accomplishing the same statutory end."

EVIDENCE.

*People v. Halpin.* Ill. 114 N. E. 932. *Cross-examination.* The cross-examination of a witness as to his occupation, associations, and conduct, and also as to other things immaterial to the issues, to determine his credibility, is largely in the discretion of the court, and does not constitute error, unless the

discretion is abused. In this case it was brought out on cross-examination that one of the witnesses for the defendant kept saloons, allowed women in them, ran houses of prostitution, etc.

PERJURY.

*People v. Ashbrook.* Ill. 114 N. E. 922. *Indictment.* An indictment for perjury may either allege that the false testimony was material, or set forth the facts showing its materiality, and so an indictment, charging that the defendant committed the crime of perjury by falsely testifying that he had not illegally sold intoxicants, in a prosecution against him for such illegal sale, is sufficient, though merely alleging that the testimony was material. Nor need it be alleged that the testimony was *feloniously given.* The indictment was in the words of the statute and every indictment is to be deemed sufficiently technical and correct which alleges and charges the offense in the language of the statute creating the offense.

RAPE.

*People v. Kingcannon.* Ill. 114 N. E. 508. *Sufficiency of indictment.* A count in an indictment charging statutory rape without force, which failed to allege that the prosecutrix was not the wife of the accused, was fatally defective on motion in arrest of judgment.

*Duplicity.* As every indictment for rape, if sufficient, includes the charge of assault with intent to commit rape, where a count in an indictment for rape charged specifically both the offenses of rape and assault with intent to commit rape, it was not bad for duplicity and was good as against a motion to quash.

*Evidence.* In a statutory rape case, evidence that the defendant, the putative father had, or had had, supernumerary fingers, and that the child also had them, is competent as tending to show the paternity of the child, when accompanied by further evidence that supernumerary fingers are usually hereditary, and by the positive testimony of the prosecutrix that the defendant is the father of the child.

*People v. Moore.* Ill. 114 N. E. 906. *Complaint by prosecutrix.* In a prosecution for rape, a complaint made by the prosecutrix is admissible as corroborative of her testimony, *because* it is the natural and spontaneous expression of feelings; but such complaint made in answer to questions is inadmissible. In this case the complaint was in response to the question, "What are you crying about?" Held, error, but harmless error, since conviction was of assault with intent to rape and not to rape.