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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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FROM WILLIAM G. HALE

CARRYING CONCEALED WEAPONS.

People v. McPherson, 115 N. E. 515, N. Y. *"Bludgeon."* Penal Law (Consol. Laws C. 40). Par. 1897, as amended by Laws 1915, C. 390, and section 1898, provides for the punishment of any person who carries or possesses any concealed instrument commonly known as a bludgeon, etc., or any other dangerous or deadly weapon. Held, that part of a boy's baseball bat, the upper end of which had been broken off, is a bludgeon.

CONSPIRACY.

Berstein v. United States, 238 Fed. 923. *Variance.* The indictment was for a conspiracy to present and prove a false claim against a bankrupt. The indictment charged both the conspiracy and the overt act in Richmond, Va. The proof was that the conspiracy was entered into in the City of Philadelphia, and that only the overt act of presenting and proving the false claim was committed in the City of Richmond.

Held, this was not a fatal variance. The conspiracy formed in Philadelphia is to be considered as having extended into Richmond, where the overt act in pursuance of it was committed.

CONSPIRACY TO SMUGGLE CHINESE.

Sam Yick et al v. United States, 240 Fed. 60. *Criminal Act induced by government officers.* The defendants had approached a certain Chinese immigration inspector with a view to bribing him to let them bring Chinese from Mexico. The inspector reported this to the chief inspector and the U. S. District Attorney and was advised by them "to go ahead and try to apprehend him (Sam Yick) by going in with him." Thereafter several meetings were had between the inspector and Yick. A verdict of conviction was reversed on the ground of improper instructions relating to the effect of the acts of the inspector in bringing about the alleged criminal acts. The court in reversing the case said, "It is of course, not a matter for this court to say what conclusion the jury would or should have drawn from the testimony tending to show that the alleged conspiracy was first suggested by the officers of the law, and that they lured the alleged conspirators on to commit the necessary overt act or acts and thus consummate the alleged crime; all of those matters being exclusively for the determination of the jury. And while it may be true that the mere aiding of one in the commission of a criminal act by a government officer or agent does not preclude the conviction of the party committing the crime, yet where the officers of the law have incited the party to commit the crime charged and lured him on to its consummation, the law will not authorize a verdict of guilty."

ERROR.

People v. O'Brien, 115 N. E. 123 (Ill.). *When erroneous ruling as to admission or exclusion of evidence is harmless.* A judgment of conviction of the crime of receiving a bribe, as a police officer, for furnishing protection to

certain individuals engaged in operating confidence games, was sustained notwithstanding certain admitted errors in the reception of improper evidence. The court said: "It is essential that the defendant shall be accorded all the rights he is entitled to under the law, and, if errors were committed denying him substantial rights, a reversal of the judgment of conviction would be required. It is not necessary, however, to sustain a conviction that the record should be free from all error, and where guilt is conclusively proven by competent evidence, and no other rational conclusion could be reached but that defendant is guilty, it would require more substantial errors than any shown by this record to justify a reversal of the judgment, and it is affirmed."

For a discussion of the state of the law in Illinois on this question and a consideration of the principles that ought to control, see a note by Dean John H. Wigmore in 12 *Illinois Law Review* 39, under the heading, "New Trial for Erroneous Ruling on Evidence."

EVIDENCE.

Knoell et al v. United States, 239 Fed. 16. *Testimony of an accomplice.* By the decided weight of authority a jury may rely solely upon the testimony of an accomplice, but the judge should caution them as to unreliable character of such testimony and against believing it unless it has been corroborated.

Declarations of the accused. Testimony given before the referee in bankruptcy by those subsequently accused of conspiracy to receive property of the bankrupt, is voluntary and admissible in the subsequent prosecution though they were subpoenaed to testify before the referee, if when called they made no claim of privilege to avoid incrimination. The court said, "They were attended by counsel, and were examined without claiming the right to be silent because their answers might criminate them. Clearly the subpoena did not compel them to testify; it only compelled them to attend; and whatever testimony they gave afterwards without claiming their privilege was voluntary."

EVIDENCE.

Callahan v. United States, 240 Fed. 683. *Complaint by victim of rape.* In a prosecution for statutory rape upon a girl under the age of consent, testimony that the girl informed a girl acquaintance and friend, whom she met on the street shortly after leaving the place of the act, of the circumstances and that she had received compensation, is not admissible as part of the *res gestal,* it appearing that the act complained of was not the first act of its kind and the statement being in the nature of interesting information between intimate friends, instead of a spontaneous exclamation produced by the shock of an outrage.

EVIDENCE.

Ruse v. State, 115 N. E. 778 Ind. *Bloodhounds.* Evidence as to the conduct of bloodhounds in trailing persons accused of crime is inadmissible. Even under the most favorable circumstances it is attended with some degree of uncertainty, which may readily lead to the conviction or accusation of innocent persons. "Both reason and instinct condemn such evidence, and courts should be too jealous of the life and liberty of human beings to permit its reception in a criminal case as proof of guilt." Lairy, C. J., and Myers, J., dissent. Authorities pro and con reviewed.

INDICTMENT.

People v. Osborne, 115 N. E. 890, Ill. *Surplusage.*

The following comment is made by the court upon the indictment under which the defendant was convicted of an assault with a deadly weapon with intent to kill:

While this "indictment could not be used as a model for faultless pleading, its defects are not such as to destroy the sufficiency of the charge against plaintiff in error. It is contended by plaintiff in error that the language in the first count, 'and the said Harry Osborne in and upon clothing, to wit, coat, of him, the said Daniel Smith, then and there feloniously and unlawfully did shoot,' and in the second count, 'and the said Harry Osborne at, against, into, and upon the clothing of him, the said Daniel Smith, then and there feloniously and unlawfully did shoot,' is descriptive of the particular manner in which the offense charged was committed, and while it might have been admitted from the indictment, having been thus alleged, it becomes an essential ingredient of the charge made. From this premise it is then argued that the indictment does not charge the commission of any offense against plaintiff in error, because it does not state where the clothing was, and that if it was not on or about Smith's person no assault could have been committed upon Smith by shooting the clothing. It is also argued that, even if plaintiff in error deliberately shot into the clothing while it was on Smith's person, and that was all he was intending to do, that act of itself negatives any intention of assaulting Smith. On the other hand, the people contend that the language last above quoted is mere surplusage and should be rejected.

The indictment will not bear the construction sought to be placed upon it by plaintiff in error. It is quite clear that the language pointed out was not meant to be descriptive of the assault made, but was simply intended to describe the effect of the assault. The only reasonable construction which the language used in the two counts of this indictment will bear is that plaintiff in error made a felonious assault upon Smith with a gun or rifle with intent to kill him, and that in making such assault he fired a shot which struck Smith's clothing. The statement in regard to the effect of the assault was unnecessary and under the authorities may be treated as surplusage. An averment in an indictment may be treated on the trial as surplusage and be rejected where it can be stricken out without vitiating the indictment."

SETTING ASIDE VERDICT.

People v. Jurek, 115 N. E. 644, Ill. *Jury judges of law as well as fact.* Under a statute providing that juries shall be judges of the law and fact, the court cannot direct a verdict of not guilty, but may, if the evidence is thought insufficient, advise the states attorney, that a verdict of guilty, if returned, will be set aside.

Comment. The absurdity of the law which makes juries judges of the law as well as the fact has been often commented upon. That it is absurd is fully conceded except by those who desire additional loopholes for securing the acquittal of those in fact guilty of crime. The above decision furnishes an additional reason for changing the law.

TRIAL—CONDUCT OF COURT.

People v. Lurie, 115 N. E. 130, (Ill.). *Remarks of Court as Prejudicial error. Right of Court to question witnesses.*

"The general rule is that the trial judge has a right to ask questions of witnesses or call other witnesses to the stand in order to ascertain the facts and elicit the truth as to the points at issue. No well-considered authority has ever stated that the trial judge is a mere moderator or umpire between the contending parties. In order to establish justice and prevent wrong, he has a large discretion in applying the rules of practice; but all this must be done in a fair and impartial manner, without in any way showing bias for or prejudice against either party to the litigation. The respective counsel in any case are usually much more familiar with the facts than the presiding judge, and as a rule the trial will proceed in a more orderly and satisfactory manner when they are allowed to examine and conduct the examination of the witnesses. It is important, however, that the trial judge should also become acquainted with the facts, and on this account he may, if necessary to ascertain them, propound questions to the witnesses. It is the judge's duty to see that justice is done, and, where justice is liable to fail because a certain fact has not been developed or a certain line of inquiry has not been pursued, it is his duty to interpose and either by suggestions to counsel or an examination conducted by himself avoid the miscarriage of justice; but in so doing he must not forget the function of the judge and assume that of the advocate."

It is, however, an abuse of discretion for the presiding judge to so frame his questions as to intimate any opinion as to the credibility of witnesses or to convey to the jury the court's opinion of the evidence in the case. In this case, where the evidence of the guilt of the accused was close, the action of the trial judge in making statements, and asking questions of witnesses in such form as to lead the jury to believe he thought accused was guilty of murder as charged in the indictment, and that he thought certain witnesses for the defense were not telling the entire truth, and that certain witnesses for the state were stating the facts as they actually existed, constituted an abuse of his discretionary duties and as the appellate court cannot say that regardless of this abuse the jury could reach no other verdict, it was prejudicial to the defendant.

WHITE SLAVE ACT.

Van Pelt v. United States, 240 Fed. 346. *Purpose of Transportation.* A man who procured the inter-state transportation of a girl, with whom he had had intercourse whenever he sought it during the past three years, for the purpose of procuring a place where she could remain until after her confinement, cannot be convicted under the White Slave Act, though he accompanied her and anticipated that he would have intercourse with her after she left the state, if such anticipation played no part in inducing him to procure the transportation. Woods, J., dissenting.

FROM C. G. VERNIER.

ABANDONMENT OF CHILD.

Shelton v. State. Ga. 91 S. E. 923. *Application of statute to unborn child.* A father who, within this state, wilfully and voluntarily abandons his child

before it is born, and persists in the abandonment afterwards, leaving it in a dependent condition, is guilty of a misdemeanor under section 116 of the Penal Code of 1910; but a father is not guilty under that section unless the child has been born. Accordingly no offense was set out in an indictment charging the defendant with abandoning his minor child "not yet born," and the court erred in overruling the demurrer thereto. Bull v. State, 80 Ga. 704, 6 S. E. 178; Boyd v. State, 18 Ga. app 623, 89 S. E. 1091.

BAIL.

In re Welisch. Ariz. 163 Pac. 264. *Effect on bail before conviction of adoption of initiative measure abolishing capital punishment.* Const. art. 2, sec. 22, provides that all persons charged with crime shall be bailable, except for capital offenses, when the proof is evident or the presumption great. Pen. Code 1913, sec. 1188, provides that a defendant charged with an offense punishable with death cannot be admitted to bail, where the proof of crime is evident, or the presumption great. Section 1189 provides, if the charge is for "any other offense," accused may be admitted to bail before conviction as a matter or right. The people of Arizona adopted an initiated measure abolishing capital punishment for murder. Held, there being no longer any offense punishable with death, section 1189 provides in effect that any person charged with crime may be admitted to bail before conviction as a matter of right, for the law-making power can enlarge the constitutional grant, so as to include persons convicted of crime and give to such persons in all cases the right to be admitted to bail on appeal.

EVIDENCE.

Damas v. People. Colo. 163 Pac. 289. *Repudiated confession as direct evidence.* Under Rev. St. 1908, Sec. 1624, declaring that no person shall suffer the death penalty who shall have been convicted on circumstantial evidence alone, testimony as to an alleged confession by accused which he repudiated and denied is not direct evidence which would justify a conviction and imposition of the death penalty, all other evidence in the case being circumstantial.

A confession repudiated by accused should be received with caution, being admitted as an exception to the rule against hearsay and open to many objections and while testimony as to an alleged confession is direct evidence of the making of the confession, it is not direct evidence of the facts contained in the confession.

Gabbert, C. J., and Garrigues, J., dissenting.

FALSE ADVERTISING.

State v. Massey. Wash. 163 Pac. 7. An advertisement that a piano was $400, but now $200, does not amount to a statement that the market value of the instrument was $400, but was now $200, so as to render the advertiser guilty of violating Rem. Code 1915, Sec. 2622-1, declaring that any person who with intent to sell merchandise publishes an advertisement which is untrue, deceptive, or misleading, shall be guilty of a misdemeanor, notwithstanding the market value of the piano was never $400; the obvious meaning of the advertisement being that its selling price, which had been $400, was reduced to $200.

JURY.

Perry v. People. Colo. 163 Pac. 844. *Jury reading false newspaper article.* The reading by members of the jury of a newspaper article falsely stating the finding in defendant's cell of articles to effect an escape in case of conviction requires a reversal; it being impossible to say that it was not, as was its tendency, prejudicial to defendant.

Garrigues, J., dissenting.

LOTTERIES.

State v. Gilbert. Dela. 100 Atl. 410. *Element of chance.* A certificate, stating that a certain article would be given without extra charge to the holder of certificate bearing number corresponding to the last three figures of the Philadelphia bank clearings as published, etc., made the rights to such article depend on chance in the nature of a lottery prohibited by Rev. Code 1915, Sec. 3564, in that it provided a chance to get one of a list of articles without payment of the full price and a scheme for the distribution of money or property by chance is a lottery.

The fact that the element of chance pertaining to the purchase of a ticket goes to the amount of return rather than to the fact of any return does not prevent its being a lottery, since as it gives the purchaser a chance to obtain something more than he paid for, the gambling element is there; the difference between such transaction and a simple wager being only in degree.

SENTENCE.

Owen v. State. Okla. 163 Pac. 548. *Grounds for modifying sentence in upper court.* The record shows that on September 4, 1916, the defendant was arraigned, for murder and on September 6th he filed a motion for continuance based on the absence of material witnesses, one of whom was a non-resident of the state. On the same day the motion was overruled by the court, and the defendant was put upon trial. Held, that the affidavit for continuance is sufficient, because it fails to show that the defendant could procure the attendance of such non-resident witness, and fails to state that he intends to take the deposition of such non-resident witness. However, technical objections should not ordinarily prevent the granting of a continuance, and in this case the county attorney should have admitted that said witness, if present, would testify as stated in the defendant's affidavit, and that said affidavit might be read and treated as the deposition of the absent witness, and for this reason the judgment and sentence of death is modified to imprisonment for life at hard labor.

TRIAL.

State v. Rogers. N. Car. 91 S. E. 854. *Effect of improper remark by court after its withdrawal.* In prosecution for cruelty to animals, it was prejudicial error for the court, during examination of defendant, to say, "Answer yes or no, and don't be dodging;" and such error cannot be cured by subsequent admonition, however often repeated, and however strong, not to regard the word "dodging."

TRIAL.

People v. Herrera. Calif. 163 Pac. 879. *Effect of improperly taking exhibits into jury room.* In a homicide case, where the door through which bullets were fired was introduced in evidence, as well as blackboard illustrations, the fact that the jury were allowed to carry such exhibits with them in their deliberations, though they were not included among the things which the jury might, by Pen. Code, Sec. 1137, carry into the jury room, does not warrant reversal; there being no showing that the jury used such articles in their deliberations, or received any improper impressions therefrom.

SELF-DEFENSE.

People v. McDonnell. Calif. 163 Pac. 1046. *Duty to retreat.* Where defendant was violently and inexcusably beaten in his own home by deceased, a man of quarrelsome disposition, and ordered deceased to leave the house, and told him he would kill him if he returned, whereupon deceased apparently seized a deadly weapon, and turned with manner and language plainly indicating his intention to kill or seriously injure defendant, defendant was not required to retreat, even though it would not have increased his peril, but had a right to stand his ground and slay his adversary if he believed himself in imminent peril.