Journal of Criminal Law and Criminology

Volume 8 | Issue 4 Article 11

1918

# Judicial Decisions on Criminal Law and Procedure

# JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER AND WILLIAM G. HALE.

FROM WILLIAM G. HALE.

APPOINTMENT OF COUNSEL.

*People* v. *Bopp,* Ill. 116 N. E. 679. *Time for Preparation.*

Held, that it was an abuse of discretion of the court for a murder case to appoint counsel for the defense without giving him an opportunity for investigations or even to prepare his case. "It is not to be assumed that the appointment of counsel by the court for a person charged with crime, who is unable to procure counsel for himself, is an empty formality, and that the counsel thus appointed should be compelled to act, without being allowed a reasonable time in which to understand the case and prepare the defense. It is the duty of the court not only to appoint counsel of sufficient ability and experience to present the prisoner's defense and protect him from undue oppression, but the court should also appoint counsel who have no interest adverse to the prisoner which would interfere with a fair presentation of his defense, and time and opportunity should also be given to prepare for such defense."

CONFIDENCE GAME.

*People* v. *Miller,* Ill. 116 N. E. 131. *Breach of promise to marry.*

Where a woman, with no intention of marrying a man, promised to marry him solely for the purpose of obtaining his money and property, which she did obtain by such pretenses, she was not guilty merely of a breach of the marriage contract, but was guilty of an offense under the confidence game statute (Hurd's Rev. St. 1915-16. C. 38, 98, 99).

EMBEZZLEMENT.

*People* v. *Dettmering,* Ill. 116 N. E. 205. *Ownership of property.*

The ownership of property must be alleged with the same accuracy in embezzlement as in larceny.

In this case it was alleged that the money taken by the defendant belonged to a partnership, and certain individuals were named as among the partners, who, as shown by the proof, were not in the firm at the time of the alleged defalcation. Moreover, no evidence was introduced to negative the presumption of joint ownership, which arises from the allegation that the property belonged to a partnership, of which the evidence shows the defendant was a member. Fraudulent conversion must be of property belonging exclusively to a person other than the one charged.

EVIDENCE.

*People* v. *McDonald et al.* N. Y. Sup. Ct., Appel. Div. *Papers illegally seized.*

Held, that under the law of New York, documentary evidence which is relevant to the issue must be admitted in a criminal trial without inquiry as to whether it was seized in violation of the provisions of the Civil Rights Law,

which affirms the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. Likewise as to evidence obtained by an illegal tapping of telephone wires.

INSTRUCTIONS.

*People* v. *Wallace, Ill.* 116 N. E. 700. *Reasonable doubt.*

With reference to instructions concerning proof of the accused's guilt, beyond a reasonable doubt, the court said: "We have more than once held that the giving of numerous instructions containing all the language restrictive of the application of the doctrine of reasonable doubt which it has been held in various cases not erroneous to give is improper, yet in this case, again two pages of the abstract are filled with five instructions, warning the jury against being misled by undue sensibility into regarding as reasonable doubts which were only chimerical or conjectural, and against going outside the evidence to hunt up doubts created by resorting to trivial and fanciful suppositions and remote conjectures. The object of instructing the jury is to give them a concise statement of the principles of law which they should apply to the case, and not an exhaustive treatise on those principles in detail. Two pages of discussion of the doctrine of reasonable doubt are not illuminating, but the reverse. Two lines are better."

MURDER.

*People* v. *Ahrling,* Ill. 116 N. E. 764. *Sanity. Burden of proof.*

Whenever the defense of insanity is interposed, it devolves upon the state to establish the sanity of the accused. If after all the evidence is in, the jury entertains a reasonable doubt of the sanity of the accused, he must be acquitted.

*Weight of Evidence.* While the verdict based on controverted questions of fact in a criminal prosecutions will rarely be disturbed, the Supreme Court will reverse a conviction where the evidence is of unsatisfactory character.

PERJURY.

*People* v. *Brill,* N. Y. Court of Gen'l Sessions, N. Y., 165 N. Y. Supp. 65. *Materiality of false testimony.*

In a prosecution for perjury the test is of materiality is not "whether as a matter of formality the testimony might have been included under the rules of procedure, or whether it was correctly admitted under the rules of evidence, but rather, having been received, being false, whether it was material matter, that is, whether it had probative value rationally to influence the result upon the merits.

*Correction of false testimony.* The following dictum is of interest. It is said that "even assuming the evidence was material, the indictment could not be sustained, for it appears from the record in the civil trial that this defendant's attentions was not at first directed to the particular paper, and when a photographic copy of it was subsequently shown him he told the truth and admitted that he had signed it. The law encourages the correction of erroneous and even intentionally false statements on the part of a witness, and perjury will not be predicated upon such statements when the witness, before the submission of the case, fully corrects his testimony."

FROM CHESTER G. VERNIER.

EMBEZZLEMENT.

*State* v. *McAvoy,* R. I. 101 Atl. 109. *Defense of del credere factor.*

That an agent charged with embezzlement is a del credere factor of his principal constitutes no defense, such relation not changing the ordinary one existing between himself and his principal within. Gen. Laws, 1909, c. 345, par. 16, providing that every officer, agent, clerk, or servant who shall embezzle property, which shall have come into his possession by virtue of his employment, shall be deemed guilty of larceny.

INTOXICATING LIQUORS.

*Hall* v. *State,* Ariz. 165 Pac. 300. *Violation of law in good faith; mistake of fact.*

It is no defense to a sale in violation of prohibitory law that defendants relied on a guaranty of the brewers that the beer was non-intoxicating, and an investigation showing it did not contain enough alcohol to require an internal revenue license.

INTOXICATING LIQUOR.

*State* v. *Kane,* Dela. 101 Atl. 239. *Effect of repealing statute on existing license.*

James Kane was indicted for selling intoxicating liquor on April 27, 1917, in less quantity than one quart to be drank off the premises. The sale was made under a special license, issued to him on the 14th day of March, 1917, authorizing such a sale. The act under which the special license had been issued was repealed April 4th, 1917. Held, that since the repealing statute did not make the sale of intoxicating liquor unlawful, and contained no express provision concerning existing licenses issued under the repealed act, the license was good and the sale lawful.

JUDGES.

*Harrison* v. *State,* Ga. 92 S. E. 970. *Disqualification of trial judge.*

The trial judge was not disqualified from passing upon a motion for a new trial, because when imposing sentence, he had used language strongly indicating his belief in the guilt of the defendant. Any rational disinterested person compelled to give attention to the testimony adduced at a criminal trial, by reason of the fact that the proper conduct thereof rested upon him as presiding judge, must necessarily form some opinion as to the guilt or innocence of the accused. To hold that the expression from a trial judge of his opinion that the accused is guilty, after the jury has returned a verdict so finding, would effectually disqualify such judge from passing upon a motion for a new trial, and would negative the possibility of his fairly exercising his discretionary power to grant a new trial on a review of the evidence, or would either invite or insure rulings on questions of law raised in such a motion adverse to the defendant, would bring into question the impartiality of every trial judge who uttered a word of condemnation of the convicted criminal or the crime when imposing sentence, and would throw an unmerited cloud of suspicion upon his purpose to execute the law in accordance with his official oath where anything more was said than was simply necessary to indicate the punishment fixed by the judgment of the court. A rational, intelligent judge, acquainted with the law of evidence, necessarily reaches some opinion during the progress of the trial as to the guilt of the accused; but this opinion, whether or not expressed at the time sentence is imposed, is presumably not fixed and irre-

vocable, but subject to change upon a review of the record when the motion for a new trial is presented for determination.

LARCENY.

*Gates* v. *State,* Ga. 92 S. E. 974. *Is intoxicating liquor subject of larceny in a prohibition state?*

The tenth and eleventh grounds of the amendment to the motion for a new trial complains that the property alleged to have been stolen was of no value and was not property under the laws of the State of Georgia, and that the state failed to prove that the said property had any legal value, for the reason that Georgia was a prohibition state. There is no merit in this objection. There was proof as to the value of the stolen intoxicants, which were legally in the possession of a common carrier for inter-state transportation at the time of the burglary. Also, "value," as the word is used in prosecutions for larceny, does not necessarily mean money value or market value.

RAPE.

*Gracy* v. *State,* Okla. 166 Pac. 442. *Does use of narcotic constitute force?*

Under an information for rape which alleged that the defendant committed the offense "by force and violence, overcoming the resistance of the prosecutrix," as set forth in subdivision 4, Par. 2414, Rev. Laws 1910, evidence is admissable that the offence was committed by means of an intoxicating narcotic administered to her by the defendant or with his privity.

TRIAL.

*State* v. *Gens,* S. Car. 93 S. E. 139. *Misconduct of bystanders.*

Where, in a prosecution for bringing intoxicating liquor into the state, certain women sat directly in front of the jury holding large posters condemning the liquor traffic, which the jury saw and read, a new trial should have been granted, since their act was an attempt to impede justice, to deny the defendant a fair and impartial trial, and to influence the jury to arrive at a verdict improperly.

TRIAL.

*Allen* v. *State,* Okla. 165 Pac. 745. *Delegating reception of verdict.*

Where during the trial of a homicide case, the jury having retired to deliberate on their verdict, the judge was incapacitated from further proceeding with the trial on account of sickness, and by agreement of the parties, he designated an attorney of the court to receive the verdict of the jury.

Held, that the reception of the verdict in a criminal case is a judicial act, which cannot be delegated, and a verdict so received is a nullity, and that no judgment of conviction could be lawfully pronounced upon such a verdict.

Held, further, that the discharge of the jury under such circumstances must be deemed to have been with the consent of the defendant.

TRIAL.

*Commonwealth* v. *Staush,* Pa. 101 Atl. 72. *Passing sentence on plea of guilty without hearing evidence.*

Act of March 31, 1860 (P. L. 402) Sec. 74, providing that, where a defendant pleads guilty to an indictment for murder, the court shall proceed by examination of witnesses to determine the degree of the crime, must be strictly construed, and thereunder the examination of witnesses by the court means the seeing and hearing of the witnesses, and the mere reading of their testi-

mony by a judge or judges who did not see or hear them is not a compliance with the act.

Under such provision held that every member of a court passing upon the degree of guilt must see and hear the witnesses upon whose testimony the degree of homicide is to be determined, and where three of the five judges heard the testimony and thereafter the president judge, who was not present during the examination of witnesses, read the evidence, and joined in the deliberations, and wrote the court's opinion, fixing the crime as murder in the first degree, the judgment should be reversed, and a procedendo awarded with leave to defendant to renew in the court below a motion to withdraw his plea of guilty.

BY MR. JUSTICE O'NEIL.

*State of Louisiana*
v.
*Ernest Carmouche and George Chust.* } No. 22,296.

Appeal from the Twenty-first Judicial District Court, Parish of Point Coupee—C. K. Schwing, Judge.

The defendants have appealed from a verdict convicting them of cattle stealing and from a sentence of imprisonment in the peniteniary.

Two bills of exception were taken to the rulings of the trial judge ordering a juror discharged and another impaneled in his stead, after twelve jurors had been impaneled and sworn and the bill of indictment or information had been read to them.

The facts set forth in the two bills of exception were as follows: When the impaneling of the jury was completed, each of the defendants had used all of his twelve peremptory challenges and the state had used ten of its twelve peremptory challenges. The oath was administered to each of the twelve jurors impaneled to try the case, and the district attorney read to them the bill of information. It being then late in the evening, the court adjourned until the next morning. During the night, a juror named Beatty, who had been impaneled, and to whom the oath had been administered and the bill of information read, met with an accident, and was, in the opinion of the trial judge, physically unable to serve on the jury. When court convened on the following morning the judge announced that, on account of the physical disability of the juror, Beatty, it would be necessary to discharge him from the jury and select another juror from the talesmen who had been drawn and called the day before. The defendant's attorneys requested that the trial of the case be postponed, to allow the disabled juror time to recover and serve on the jury. In the alternative, the defendant's attorneys requested that, if the court should insist upon removing Mr. Beatty from the jury and the immediate drawing of another juror in his stead, then that each of the defendants should be allowed one or more peremptory challenge, because the state had yet two peremptory challenges, and, in using and exhausting their twenty-four peremptory challenges, the defendants had anticipated and believed that only twelve jurors would be impaneled, whereas the discharge of Mr. Beatty and the drawing of another juror in his stead would amount to the impaneling of thirteen jurors. The court ordered that the trial should be proceeded with immediately, by the discharge of the disabled juror, Beatty, and the drawing of another juror in his stead, and ruled that the defendants

would not be allowed another peremptory challenge in the drawing of a juror to take the place of Mr. Beatty. It appears that Beatty was the sixth juror impaneled, and that, when the state and the defendants accepted him as a juror, the state had used two peremptory challenges, the defendant, Chust, had used seven, and the defendant, Carmouche, had used five. To the rulings stated above, the defendant's attorneys reserved a bill of exceptions and announced that they would take part in the selection of another juror only under protest.

The remaining tales jurors who had been drawn and called on the day previous, were then called on their *voire dire,* and, the list of talesmen being exhausted, the court ordered other talesmen drawn and called. The district attorney was permitted to exercise his right to challenge peremptorily two of the tales jurors who were called on their *voire dire.* The district attorney finally accepted a juror to take the place of Beatty, and the attorneys for the defendants challenged him peremptorily. The district attorney objected to the peremptory challenge, on the ground that the defendants had exhausted their peremtory challenges in the original drawing of the jury. The court sustained the objection and the juror was impaneled and sworn, and served on the jury. To that ruling, the defendant's attorneys reserved another bill of exceptions.

There is no merit in the bill of exceptions taken to the ruling of the court, refusing to postpone the trial long enough for the disabled juror to recover. He was suffering from a broken arm, and the judge exercised his discretion wisely in removing him from the jury instead of postponing the trial long enough for him to recover from such an injury.

It is well settled that the trial judge may, after the jury has been impaneled and sworn, discharge a juror who has become physically incapable of serving on the jury. See State v. Costello, 11 La. Ann. 283; State v. Diskin, 34 La. Ann. 919; State v. Lawson, 36 La. Ann. 275; State v. Moncla, 39 La. Ann. 868, 2 South, 814; State v. Nash & Barnett, 46 La. Ann. 194, 14 South. 607; State v. Duvall, 135 La. 710, 65 South. 904.

If an incompetent juror who has been impaneled and sworn be discharged from the panel before the trial is commenced by the reading of the indictment to the jury, the defendant is not entitled to have his peremptory challenges restored to him, or to have the remaining 11 jurors re-tendered on their *voire dire* for acceptance or rejection, even though the defendant had exhausted his peremptory challenges when the disqualified juror was discharged. But, if a juror be removed from the panel for any cause, against the protest of the defendant, after the trial has commenced by the reading of the indictment to the jury, the discharging of the disqualified juror and the drawing of another juror in his stead is, in effect, the entering of a mistrial and the beginning of a new trial; and the defendant is then entitled to have his peremptory challenges restored to him and to have the remaining 11 jurors re-tendered on their *voire dire* for acceptance or rejection, especially if the defendant's peremptory challenges were exhausted in the original drawing of the jury. See State v. Moncla, 39 La. Ann. 868, 2 South. 814; State v. Nash & Barnett, 46 La. Ann. 194, 14 South. 607; State v. Duvall et al., 135 La. 710, 65 South. 904; 14 Cent. Dig. Crim. L. So. 302; Bishop's Cr. Proc. No. 809. In the case last cited, State v. Duvall et al., where the disqualified juror was discharged after the indictment had been read to the jury, the defendants did not insist upon having

their peremptory challenges restored to them or the remaining 11 jurors re-tendered on their *voir dire* for acceptance or rejection. They asked merely "that the remaining 11 jurors be sworn *de novo* to try the case." It was held, on rehearing, that that request implied an acceptance of the 11 jurors by the defendants, and that the re-swearing of the jurors to try the case would have been an idle and useless ceremony.

In this case also, the request of the defendants, that only one peremptory challenge be restored to each of them, was an implied acceptance of the remaining 11 jurors who had been sworn to try the case. The defendants were entitled to have a mistrial entered and a new trial commenced by having the remaining 11 jurors discharged from the panel, having the twelve peremptory challenges restored to each of the defendants, and the impaneling of the jury commenced anew. But they did not demand that. On the contrary, they waived that privilege by accepting the remaining 11 jurors who had been impaneled and sworn. They were not then entitled to another peremptory challenge. The defendant is not, under any circumstances, entitled to more than twelve peremtory challenges. State v. Nash & Barnett, 46 La. Ann. 193, 14 South. 607; Jackson v. State, 78 Ala. 471; State of North Dakota v. Hasledahl, 16 L. R. A. (N. S.) 152. It must be borne in mind that the defendants had each exhausted their twelve peremptory challenges in the selection of the twelve jurors, of whom they were willing that 11 should be retained; and they were not any more entitled to another peremptory challenge than if the juror who became incapacitated to serve after he was impaneled had been excused from the jury before he was sworn to try the case. The refusal to allow either of the accused more than twelve challenges in the impaneling of the jury was a correct ruling.

Two other bills of exception were taken to the rulings of the judge in admitting certain testimony that was objected to as hearsay evidence. The evidence was admitted against one of the defendants, because the trial judge concluded that the declaration made by the third party, not under oath, was made in the presence and hearing of that defendant without contradiction or protest on his part. The testimony on the question, whether the defendant heard or was near enough to hear, the statement that was introduced in evidence against him, was not reduced to writing, in accordance with the Act No. 113 of 1896; and the facts recited in the bill of exceptions do not warrant our reversing the ruling.

The verdict and sentence appealed from are affirmed.

*Syllabus.*

(1) If a juror becomes physically disabled after the jury has been impaneled and sworn in a criminal case, the trial judge has authority to discharge the disqualified or disabled juror and immediately order another juror drawn in his stead.

(2) If the discharge or removal of a disqualified juror who was impaneled and sworn for the trial of a criminal case be made before the indictment is read to the jury, the defendant is not entitled to have his peremptory challenges restored to him or to have the remaining 11 jurors re-tendered for acceptance or rejection, even though the defendant had exhausted his peremptory challenges when the disqualified juror was discharged.

(3) If a juror be removed from the panel for any cause, against the protest of the defendant, after the trial has commenced by the reading of the

indictment to the jury, the discharge of the disqualified juror and the drawing of another juror in his stead, is, in effect, the entering of a mistrial and the beginning of a new trial; and the defendant is then entitled to have his peremptory challenges restored to him, and to have the remaining 11 jurors re-tendered for acceptance or rejection, especially if the defendant's peremptory challenges were exhausted in the original drawing of the jury . But, if the defendant, instead of requiring that the 12 peremptory challenges be restored to him and that the remaining 11 jurors be re-tendered for acceptance or rejection, accepts them, he is not entitled to another or thirteenth challenge.

(4) If the defendant, appealing from a conviction in a criminal prosecution, fails to avail himself of the privilege accorded him by the Act No. 113 of 1896, of having the evidence on a question of fact on which an adverse ruling of the trial judge was based, reduced to writing and embodied in the transcript of appeal, the Supreme Court will accept the statement made or approved by the trial judge in the bill of exceptions.

W. O. HART, New Orleans.