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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER AND WILLIAM G. HALE

APPEAL AND ERROR.

People v. *Mooney,* Calif. 171 Pac. 690. *Question for jury.*

In homicide case it cannot be contended on appeal that a witness could not have seen certain happenings from where he was standing, as the credibility of the witness was for the jury.

No matter how inconsistent the testimony of a witness, or of two witnesses, for the state in a homicide case, a reviewing court cannot reject the testimony; the jury having the right to choose and act on the part it believes.

The tendency of modern decisions is to admit any evidence in a criminal case which may have tendency to illustrate or throw any light on the transaction in controversy, leaving its weight to the jury.

If it was error to incidentally admit in evidence a pistol found in defendant's room in a homicide case, the crime having been committed with a bomb, it could not be prejudicial.

ARREST.

Wiley v. *State,* Ariz. 170 Pac. 869. *Reasonable suspicion of felony.*

Where peace officers were proceeding to an amusement park at midnight in an automobile on information that a woman had been beaten and robbed, and perceived another automobile in front of them, both cars having a speed of about 25 miles an hour, and their mufflers being open so that the occupants of the car ahead could not hear the officers' summons to stop, the officers did not have reasonable and probable cause to suspect the commission of felony by the occupants of the other car, justifying them in arresting without warrant, or attempting to do so by firing at the car, one of whose occupants they killed.

CONSPIRACY.

U. S. v. *Bathgate et al.,* 38 Sup. Ct. Repr. 269. *Oppression of personal rights.*

Criminal Code, sec. 19, punishing conspiracies to oppress the free exercise of rights secured by the federal constitution or laws, etc., is inapplicable to a conspiracy to bribe voters at an election for presidential electors and members of congress.

EXTRADITION.

Carpenter v. *Lord,* Ore. 171 Pac. 577. *Extradition of person "in custody" under Oregon statute.*

L. O. L., sec. 1874, providing that one in custody on a criminal charge cannot be delivered up to another state until legally discharged, is mandatory, and the governor has no discretion, in view of L. O. L., sec. 756, making judgments conclusive as to the legal condition of any person.

A convicted person, on parole under a judgment, is "in custody," within L. O. L., sec. 1874, providing that one in custody upon conviction of crime cannot be extradited.

McCamant and Moore, JJ., dissenting.

FALSE PRETENSES.

Clarke v. *People,* Colo. 171 Pac. 69. *Reliance on pretense.*

On a trial for false pretense the court charged that, if defendant falsely made alleged pretenses without at the time intending B to act thereon in purchasing stock, but afterwards sold stock to B with intent and design that B should rely thereon and be thereby influenced to buy the stock, "whether consciously or sub-consciously so induced on the part of B," then the jury should treat the former pretense as by adoption renewed upon such deal by defendant. *Held,* that this instruction was justified, though not required, by B's testimony that he believed the representations previously made by defendant and acted on them, and would not have but that he did not know that he turned over in his mind any specific statement at the time of the purchase, except, perhaps, in a sub-conscious manner.

GAMING.

State v. *Googin,* Me. 102 Atl. 970. *"Device of Chance."*

A slot machine which gives five cents worth of gum for each nickel dropped therein, but also gives trade checks when indicated, is a "device of chance" within Rev. St. 1916, c. 130, sec. 18, although the amount of the checks to be received is indicated before each play, and although the trade checks are supposed to be profit-sharing payments on a fixed percentage basis.

HOMICIDE.

State v. *Caterni,* Mont. 171 Pac. 284. *Intent where wrong person is killed.*

Killing one person undesignedly in the attempt to murder another, although not a guiltless homicide, is not murder in the first degree; the deliberate, premeditated design specifically to kill the person who was killed or to kill him as one of a crowd being lacking.

INDICTMENT.

State v. *Perello,* Kans. 171 Pac. 630. *Necessity of averment of exception in penal statute.*

In an information charging the violation of section 1 of the "Bone-Dry Law" (Laws 1917, c. 215), making it unlawful "for any person to keep or have in his possession any intoxicating liquors . . . or to give away or furnish intoxicating liquors to another, except druggists or registered pharmacists as hereinafter provided," it is not necessary to allege that the defendant was not a druggist or registered pharmacist.

A negative averment of the matter of an exception or proviso in a penal statute is not necessary in an information, unless such matter enters into and becomes a material part of the description of the offense.

West, J., dissenting.

INTOXICATING LIQUOR.

Kunsberg v. *State,* Ga. 95 S. E. 12. *Right to prohibit manufacture, etc., of non-intoxicating substitutes.*

Section 2 of the act of the General Assembly, approved November 17, 1915 (Acts 1915 [Ex. Sess.], p. 77), makes penal the manufacture, sale, offering for sale, keeping for sale, etc., of prohibited liquors and beverages as defined in section 1 of the act; among them being: "All liquors and beverages or

drinks made in imitation of or intended as a substitute for beer, ale, wine or whisky, or other alcoholic or spirituous, vinous, or malt liquors, including those liquors and beverages commonly known and called near beer." On the basis of protecting health, morals, and the public safety, the provisions of the act making it illegal to manufacture, sell, etc., intoxicating liquors have been held to be a valid exercise of the police power. *Delaney* v. *Plunkett,* 146 Ga. 547, 91 S. E. 561, L. R. A. 1917D, 926, Ann. Cas. 1917E, 685. The manufacture and sale of drinks made in imitation of or intended as a substitute for intoxicating drinks as specified in the act, although not intoxicating themselves, afford a cloak for clandestine manufacture, sale, etc., of intoxicants—the evil which the legislation was designed to prevent. Under such circumstances, the power to prohibit the manufacture, sale, etc., of the beverages will include the power also to prohibit the manufacture and sale of substitutes and imitations. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184. Under this view, it is within the police power of the state to enact a law prohibiting the manufacture and sale of liquors and beverages not intoxicating in character, but made in imitation of or intended as a substitute for beer, ale, wine, whisky, or other alcoholic or vinous or malt liquors, or those liquors commonly known and called near beer. Under this view the provisions of the foregoing act which are assailed in this case are not violative of article 1, sec. 1, par. 3, of the constitution of this state (Civ. Code 1910, sec. 6359), which declares, "No person shall be deprived of life, liberty, or property, except by due process of law," or the Fourteenth Amendment to the Constitution of the United States (Civ. Code 1910, sec. 6700), for the alleged reason that the Legislature had no authority to declare the sale of an imitation of beer an offense. See, also, *Arthur* v. *State,* 146 Ga. 827, 92 S. E. 637.

(a) In none of the assignments of error was the question made that the act was void on the ground that it was indefinite, and no ruling is made on that point.

JURISDICTION.

State v. *Wellman,* Kans. 170 Pac. 1052. *Right to try person illegally extradited.*

Although the federal law does not provide for the surrender by a state as a fugitive from justice of one who has violated the criminal laws of another state without having been present therein, and although in the absence of state legislation no authority exists for such surrender, nevertheless, where, in the absence of any local statute, a person is surrendered by one state to another as a fugitive from justice, the fact that the accused had not been in the demanding state at the time of the alleged offense, or since then, does not deprive its courts of jurisdiction to try him therefor, nor does it show such an abuse of process as to warrant the dismissal of the case against him.

WEAPONS.

People v. *Smith,* Calif. 171 Pac. 696. *Constitutionality of statute forbidding the carrying of concealed weapons.*

St. 1917, p. 221, sec. 3, providing that every person who carries in any municipal corporation any pistol, revolver, or other firearm concealed upon his person without license, shall be guilty of a misdemeanor, and guilty of a felony

if previously convicted of any felony, or any crime made punishable by the act, is a reasonable police regulation.

St. 1917, p. 221, sec. 3, is not objectionable, as ex post facto, on account of the provision prescribing a heavier penalty for one previously convicted.

FROM WILLIAM G. HALE.

ACCESSORY.

People v. *Birntner* (N. Y. Supr.), 168 N. Y. S. 945. *Conviction of "Accessory" after Acquittal of Principal—Admissibility of Judgment Against Principal.*

The defendant moved for a dismissal of the indictment against by which he is charged as an accessory to the crimes of rape, abduction and assault, on the ground that the principal felon had been acquitted. Motion denied.

(1) Under our statute the offense of being an accessory to a felony is now a substantive crime, punishable without regard to the disposition of the principal felon. (2) A judgment in the principal felon's case, whether of conviction or acquittal, is not admissible for any purpose in an action against the accessory.

CONFESSION.

People v. *Reilly* (N. Y. Sup. Ct., App. Div.), 169 N. Y. S. 119. *Voluntary character—Involuntary admissions of accused.*

(1) A promise of clemency made to the accused by a priest in the presence of the assistant district attorney and not opposed by him, will render a confession inadmissible, the statement of the priest being in effect adopted by the district attorney. (2) To come within the rule that excludes involuntary confessions, the statement of the accused need not be a complete confession.

CONSPIRACY.

People v. *La Bow* (Ill.), 118 N. E. 395. *Reversal as to one of two conspirators, jointly tried.*

La Bow and Shapiro were convicted of a conspiracy to obtain money by means of a confidence game. The Appellate Court reversed the judgment as to Shapiro. Held: It was error for the Appellate Court to affirm the judgment of the Criminal Court as to La Bow and reverse it and remand the cause as to Shapiro. Both must either be found guilty or not guilty. In order to sustain a conviction of conspiracy there must be more than one person shown to be guilty. Since there was no evidence of the existence of any other co-conspirator than Shapiro, it must follow that if Shapiro was not guilty, La Bow was not guilty. The case should, therefore, be reversed and remanded as to both La Bow and Shapiro.

IMPEACHMENT OF WITNESS.

People v. *Richardson* (N. Y. Ct. of Appeals), 118 N. E. 514. *Cross-examination of a witness which besmirches character of accused.*

The defendant was convicted of keeping a disorderly house. K. N., who was employed as housekeeper at the Fulton Hotel (the house involved), was a witness for the defendant. Upon her cross-examination she was asked whether she had not worked for the defendant at certain other hotels with knowledge that they had been abated as public nuisances because conducted by the defendant

as disorderly houses, and with knowledge that the defendant had been convicted and sentenced to jail for running one of them, and other questions of a similar sort. Held: This was improper cross-examination. While it had a tendency to impeach the witness by showing what manner of person she was, yet it should be excluded because it brought the defendant's conduct and general character into the case when he was not a witness and had not first put his character in issue. Such evidence would be unfair to the accused. Chase, J., dissenting.

INDICTMENT.

People v. *Van Every* (N. Y. Ct. of Appeals), 118 N. E. 214. *Allegation as to time—Amendment.*

The Code of Criminal Procedure, sec. 293, provides: "Upon the trial of an indictment, when a variance between the allegation therein and the proof, in respect to time, or in the name or description of any place, person or thing, shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment to be amended, according to the proof, on such terms as to the postponement of the trial, to be had before the same or another jury, as the court may deem reasonable."

In the instant case the indictment alleged a time subsequent to the finding of the indictment, the year 1915 instead of 1914 being inserted. Held: The indictment could not be amended. Such omission was not one of form but of substance. The indictment did not show that any crime had been committed. If the court were to allow an amendment in such a case, it would be exercising the power of the grand jury.

SETTING ASIDE VERDICT.

People v. *Bond* (Ill.), 118 N. E. 14. *Sufficiency of evidence.*

The defendant, a negro, was convicted of the murder of a white woman. Seven witnesses, all friends of the defendant, testified to an alibi. Held: Notwithstanding the evidence tending to establish an alibi, there was sufficient evidence to sustain the verdict. The jury obviously did not believe the witnesses for the defendant. Judging of their credibility was the province of the jury.

CRIMINAL LAW.

Former jeopardy—Conspiracy to steal.

Where the accused has engaged with another in a criminal conspiracy or plan having for its purpose the larceny of specific automobiles belonging to separate owners, and in pursuance of such plan the confederate steals such automobiles at divers times and places, each theft is held in the Ohio case of *Patterson* v. *State,* 117 N. E. 169, annotated in L. R. A. 1918 A, 583, to constitute a distinct and separate offense, and an acquittal of one is not available under the doctrine of jeopardy on the trial of the other.

Witness—Remark by the court.

It was held fatal error in the North Carolina case of *State* v. *Rogers,* 91 S. E. 854, annotated in L. R. A. 1917 E, 857, for the judge to direct defendant as a witness in a criminal case to answer the questions of the prosecutor yes or no, and not to be dodging, notwithstanding the court thereafter instructed the jury that he did not intend to reflect upon the witness by using the word dodging.

JOSEPH MATTHEW SULLIVAN, Boston, Massachusetts.

FROM THE HON. CHARLES S. LOBINGIER

IN THE UNITED STATES COURT FOR CHINA.

United States v. *A Juvenile Offender.* (Filed February 9, 1918.)

SYLLABUS

(1) Criminal Law: *Penalties* for false pretense and petit larceny in this jurisdiction may extend to one year or more.

(2) *Juvenile Offenders* are not, according to the notions of modern penology, to be treated in the same way as adults.

(3) *The Juvenile Court Law,* enacted by Congress for the District of Columbia, found necessary and suitable in this jurisdiction and applied.

Chauncey P. Holcomb, Esquire, U. S. District Attorney, for the prosecution.

The accused appeared in his own behalf.

Lobingier, J.: The accused, who is an American subject born in Shanghai of Filipino parentage, pleads guilty to two informations, the first charging him with

"the crime of False Pretense, in that * * * * on or about the thirty-first day of January, 1918, at Shanghai, in the Republic of China, and within the jurisdiction of said Court," he "did by false pretense and intent to defraud, obtain a pair of shoes, of the value of less than thirty-five dollars."

The second charges him with

"the crime of Petit Larceny, in that * * * * on or about the fifteenth day of December, 1917, at a dwelling house known as 139 Paoshang Road, in Shanghai, in the Republic of China, and within the jurisdiction of said Court," he "did feloniously take and carry away a blue cloth coat, the personal property of a Chinese woman, whose name is unknown, of the value of less than thirty-five dollars."

The complaining witnesses in each cause are defendant's father and mother each of whom, testifying on the question of the proper penalty, relates a harrowing story of youthful incorrigibility and lawless, irresponsible conduct for which there appears to be no remedy except authoritative discipline; for the father is a mariner and necessarily absent from home a considerable portion of the time, and the mother states that she is absolutely unable to control the accused.

Both of the offenses charged and admitted in these proceedings are serious, each justifying penal servitude.[1] In this case, however, the offender, according to his parents, is but fifteen years old and it is contrary to the spirit of modern penology to impose upon juvenile offenders (whose need is reclamation and reform rather than punishment) the penalties intended for adults. As the result of a growing sentiment in that direction juvenile courts have been established in many parts of the United States and special laws have been enacted for the

[1](*False Pretense*) Act of Congress of June 30, 1902, 31 U. S. Stats. at Large, ch. 854, sec. 842, 32 U. S. Stats. at Large, ch. 1329, sec. 842, Dist. of Col. Code, sec. 842 (maximum penalty one year and fine); Act of Congress of March 3, 1899, 30 U. S. Stats. at Large, ch. 429, sec. 54, Alaska Compiled Laws, sec. 1934 (maximum penalty five years).

(*Petit Larceny*) Act of Congress of June 30, 1902, 32 U. S. Stats. at Large, pt. I, p. 535, sec. 837, Dist. of Col. Code, sec. 827 (maximum penalty one year and fine); Act of Congress of March 3, 1899, 30 U. S. Stats. at Large, ch. 429, sec. 41, Alaska Compiled Laws, sec. 1921 (maximum penalty one year and fine); Fed. Pen. Code (1910), sec. 287 (maximum penalty one year and fine).

juvenile offender. Such a statute[2] was passed by Congress in 1906 and, while primarily intended for the District of Columbia, seems fully applicable here by virtue of the prior enactment extending over Americans in China "the laws of the United States * * * so far as is necessary to execute such treaties" and "so far as such laws are suitable,"[3] etc.

The court which is empowered to enforce and apply said statute (and which in this jurisdiction would necessarily be this because none other is provided and the one nearest corresponding must therefore be utilized[4]) is expressly authorized

"to defer sentence, at its discretion, in the case of any juvenile offender under the age of seventeen years, and parole such child under the care of the chief probation officer for a probation period discretionary with him, who shall cause said child to return to court at the end of such term either for sentence or dismissal."[5]

The Supreme Court has indeed decided[6] that the Federal Courts have no *inherent* power to suspend sentences, but that decision would clearly not apply to cases arising under a statute which, like this, expressly provides for such suspension. We hold that the statute is both necessary and suitable for cases like the one at bar because the laws above referred to, prescribing the penalty, are wholly unsuitable. We feel also that the offender, being a Filipino, can most properly be placed in the custody of the Philippine authorities.

Final sentence is accordingly suspended in these causes, and the Philippine Director of Prisons, Dr. Walter H. Dade, is hereby named as probation officer to whose care and custody the accused is accordingly committed for a probation period discretionary with said officer but not exceeding three years, during which time the accused may, in the discretion of said probation officer, be confined in any penal or reformatory institution of the Philippine Government under the control and direction of said officer. Pending his transfer to the custody of said officer the accused is remanded to the custody of the United States Marshal for China.

By The Court,

CHARLES S. LOBINGIER, Judge.

PRESS COMMENT

(From the North China Daily News, February 11)

"So soon after our article on the need of new methods of dealing with juvenile offenders in Shanghai as well as the 'won't works,' it is interesting to see that the United States Court has had such a case before it, which Judge Lobingier has been able to dispose of very satisfactorily by sending the offender to a reformatory in Manila for any necessary period up to three years. Long

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[2]34 U. S. Stats. at Large, pt. I, p. 3, Dist. of Col. Code, App.

[3]12 U. S. Stats. at Large, p. 73, sec. 4; U. S. Rev. Stats., sec. 4086; *Biddle* v. *U. S.* 156 Fed. 759.

[4]*Alaska Gold Mining Co.* v. *Ebner,* 2 Alaska 611, Cf. U. S. ex rel. *Raven* v. *McRae,* No. 586.

[5]Act of Congress of March 19, 1906, 34 U. S. Stats. at Large, pt. I, p. 73 (D. C. Code, Appendix), sec. 5.

[6]Ex parte U. S., 242 U. S. 27.

before that, it is to be hoped, the youth will have seen the folly of his ways. In having an available reformatory at Manila and laws which enable juvenile offenders to be sent there the American community is more fortunate than others. The British have nothing to offer but goal, and both police and magistrate are naturally most reluctant to send boys there who, under the wiser treatment which most civilized communities have now instituted, might be made useful members of society. The difficulty is, of course, that there are not enough of such cases to warrant building a reformatory. Some years ago one was built privately and presented to the Hongkong Government, which eventually found a use for it by turning it into a Door of Hope. Still, juvenile offenders exist and will not tend to diminish in number. The industrial homes suggested for 'won't works' with a separate wing for juveniles might meet the need."