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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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GRAND JURY.

Commonwealth v. *Harris* (Mass.), 121 N. E. 409. *Secrecy of proceedings.*

Under a plea in abatement it was made to appear that while the cause was being heard before the grand jury, one or more persons, witnesses in the case, were present in the grand jury room while other witnesses were testifying. Held, that the plea in abatement should have been sustained, the law requiring that the deliberations of the grand jury be secret. The opinion quotes from Chief Justice Shaw, as follows:

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty."

Continuing the court says: "It is manifest an examination of witnesses by the grand jury in the presence of others, witnesses, bystanders or judges, necessarily and inevitably subjects the accused to a public trial without right to testify in his own behalf or to be represented by counsel or attorney. It is equally plain such procedure destroys the force and vital principle of the oath which enjoins the grand jury to keep secret the commonwealth's counsel, your fellow's and your own."

SENTENCE.

People v. *Siman* (Ill.), 119 N. E. 940. *Both fine and imprisonment imposed under a statute which provided for alternative penalty.*

The defendant was sentenced to serve a prison sentence and to pay a fine of one dollar. He paid the fine and brought habeas corpus proceedings on the ground that the prison sentence was void. Held, that the prison sentence was void, when the fine was paid. Carter, J., dissenting.

See a note in 28 Yale Law Journal 292, approving the dissenting opinion.

VERDICT.

People v. *Tananevicz* (Ill.), 120 N. E. 766. *Rejecting part of verdict as surplusage.*

The defendant was indicted for receiving, as a banker, a deposit while knowingly insolvent. The jury returned a verdict of guilty and fixed the punishment at three years' imprisonment in the penitentiary and the payment of a fine of $280. Section 2 of the Parole Act requires an indeterminate sentence in such cases. The court in passing judgment, however, sentenced the defendant to serve an indeterminate term of imprisonment. Held, that the

portion of the verdict of the jury which lay beyond their legitimate province was properly rejected as surplusage and the judgment of the court was in full accord with the remaining and valid part thereof.

BURGLARY.

Sloan v. *People,* Colo. 176 Pac. 481. *Allegation of ownership.*

Under the statute, burglary includes the breaking and entering into an unoccupied as well as occupied dwelling house, thus making it an offense against property, and not merely against the habitation.

Where an indictment alleged that defendant burglarized the house of "W.," a conviction was proper on proof that "W.," did not occupy the house, was the agent for a non-resident owner, his duties consisting in the sale, renting, and care of the property generally.

CONSTITUTIONAL LAW.

Proctor v. *State,* Okla. 176 Pac. 771. *Intoxicating liquors: Due process.*

The legislative act making it a crime "for any person . . . to keep a place with the intent of or for the purpose of manufacturing, selling, bartering, giving away, or otherwise furnishing, any spirituous, vinous, fermented or malt liquors, or compounds whatever, . . . " is condemned by the constitutional provisions guaranteeing due process of law and the equal protection of the law.

A guilty intention, unconnected with an overt act or outward manifestation, cannot be made the subject of punishment under the law.

An unexecuted intent to violate the law amounts to no more than a thought, and is not punishable as a crime.

DEFENSE OF PROPERTY.

McLean v. *Colf,* Calif. (Sup. Ct.) 176 Pac. 168. *Regaining possession.*

Where plaintiff seized paper, property of a defendant, she gained only a momentary custody, rather than its possession, and defendant had right to use force to protect his possession, or to regain his momentarily interrupted possession.

Defendant's right to use force, particularly as against plaintiff's person, in defending or recovering momentarily interrupted possession of a paper, was limited by condition that force must be no more than reasonably necessary.

In action for assault and battery in attempting to recover paper belonging to one defendant and taken by plaintiff, evidence *held* to sustain finding that amount of force used by defendants was unreasonable, excessive, and violent.

Question whether excessive force has been used by defendants in regaining possession of property momentarily interrupted is one of fact for trial court or jury, and, evidence sustaining finding. Supreme Court cannot interfere with conclusion reached.

DOUBLE JEOPARDY.

State v. *Felch,* Vt. 105 Atl. 23. *Constitutionality of statute authorizing appeal by the state.*

Defendant, charged with murder, was acquitted and the state asks for retrial under Gen. Laws, par. 2598. Held, the statute is constitutional and new trial ordered for errors prejudicial to the state. After holding that the double jeopardy provision of the 5th Amend. to U. S. Constitution does not apply to state action, and that the statute does not abridge the privileges or immunities of United States citizenship, the court also holds that a statute authorizing review by the state, though not limited to determination of legal points, does not violate the due process clauses of either the State or Federal Constitutions. The opinion of Powers, J., in part, follows: "On considering the constitutionality of the statute, we shall omit reference to statutes merely giving the prosecution the right of exception to such preliminary rulings as we have referred to, and shall pay no attention to statutes giving the prosecution the right of exception to other questions for the sole purpose of settling the law for future guidance, as decisions under them will afford us no assistance in the solution of the question here presented. We shall assume, though it has been doubted (*State* v. *Lee,* 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202; *United States* v. *Sanges,* 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445), that it was the well-recognized doctrine of the ancient common law that no man could be twice put in jeopardy for the same offense. We are mindful of the fact that this rule was deemed of such importance that it was given a place in Magna Charta, and that it was regarded so vital to the maintenance of the Anglo-Saxon concept of individual liberty that it was made a part of the Constitution of the United States by the Fifth Amendment, and in one form or another has found expression in the Constitutions of a majority of the states of the Union. Under such constitutional provisions it has been consistently and uniformly held that any legislative attempt to confer upon the state the right of exceptions for the correction of trial errors was futile.

A statute of California attempted to give the state a right of appeal to the Supreme Court on all questions of law arising in prosecutions for felonies. In *People* v. *Webb,* 38 Cal. 467, it was held that the respondent's acquittal in the court below was final, and that he could not again be put in jeopardy. A statute of Illinois attempted to give the complainant a right of appeal in prosecutions for illegal fishing. In *People* v. *Miner,* 144 Ill. 308, 33 N. E. 40, 19 L. R. A. 342, it was held that the respondent's acquittal below was a complete protection from another trial and that the statute was unconstitutional. In West Virginia an act of the legislature attempted to give the state a right of appeal in criminal cases, but it was held in *Ex parte Bornee,* 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915F, 1093, that the act was unconstitutional.

By the provisions of a certain military order regularly promulgated for the government of the Philippine Islands, the right of the government to appeal from a judgment of acquittal in a court of first instance was recognized. But in *Kepner* v. *United States,* 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655, it was held that this was repugnant to a provision that no person for the same offense shall be twice put in jeopardy of punishment, contained in an act of Congress, subsequently passed for the administration of the affairs of the Islands, and was repealed by it. Though the question was not directly involved, it was said in *State* v. *Hart,* 90 N. J. Law, 261, 101 Atl. 278, L. R. A. 1917F, 985, that "it is clear that it is not within the constitutional

power of legislative authority to confer by statute" upon the state the right of exception in criminal cases.

The foregoing views seem to be accepted as sound by one or two other cases not now at hand and are generally approved by text-writers and commentators. However, the theory that the jeopardy involved is single and continuous until a result is reached that is free from error is not without its defenders. See *State* v. *Lee,* supra, and dissenting opinion by Holmes, J., in *Kepner* v. *United States,* supra."

"It is interesting to note in this connection that the question whether double jeopardy amounts to want of due process under the Federal Constitution was suggested and its importance recognized by Mr. Justice Harlan in *Dreyer* v. *Illinois,* 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79, but was left undecided. It is also of interest to note that in *Ex parte Ulrich* (D. C.) 42 Fed. 587, it was held by Judge Philips that, inasmuch as it is a principle of the common law that no one shall be twice placed in jeopardy for the same offense, the trial and commitment of one who has already been partly tried and in legal effect acquitted of the same offense is depriving him of his liberty without due process of law, within the meaning of the Fourteenth Amendment. Of that decision, whatever else might be said, it is enough now to say that it was put wholly on common-law grounds, no statutory provision being involved, it arose in a state whose constitution contains a provision against double jeopardy, and it is predicated upon a view of legal jeopardy wholly at variance with that of this court as expressed in *State* v. *Champeau,* 52 Vt. 313, 36 Am. Rep. 754. The case in hand does not require a discussion of the true meaning of the term "jeopardy," as used in the cases hereinbefore referred to. They were decided under provisions, either constitutional or statutory, expressly prohibiting a second jeopardy for the same offense. Our own constitution contains no such provision. If the statute in question conflicts with any of its provisions, it is with the one contained in this clause of the tenth article of the Bill of Rights:

"Nor can any person be justly deprived of his liberty, except by the laws of the land."

So it remains to consider whether the statute violates this provision or the due process provision of the Fourteenth Amendment to the Federal Constitution.

We have not far to look for a satisfactory and authoritative interpretation of our constitutional provision, for it received the painstaking attention of Judge Rowell in *State* v. *Stimpson,* 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N S.) 1153, 6 Ann. Cas. 639. It was claimed in that case that this provision required prosecutions for common-law felonies to be by indictment, since, as the phrase in question was used in Magna Charta, it so required by the settled judicial construction in England prior to the adoption of our constitution; and that, when we took the phrase, we took the construction with it. It was held otherwise, however, and the true meaning of the expression "the law of the land," and its legal equivalent "due process of law," was fully considered and discussed, and the conclusion was reached that the law of the land was not beyond the reach of the legislature, that it varies from time to time according to legislative fiat, and that any statute otherwise valid that leaves unimpaired the fundamentals of individual rights of life, liberty, and property is not

inconsistent therewith. And this is in entire accord with the holding of the Federal Supreme Court already referred to. The question before us, then, comes to this: Does this statute affect the respondent's fundamental rights? That it violates the rules of the ancient common law, that it infringes rights specified in Magna Charta, that it revises the policy of the state in criminal matters, and imparts something of a shock to a mind trained in the common law—these considerations are not controlling.

Due process of law—the law of the land—is not immutable. It changes from time to time. What due process requires in New Hampshire may not be necessary in Vermont. It is a matter of legislation, provided, always, that express constitutional provisions and the fundamental rights referred to are not infringed or impaired. *Brown* v. *New Jersey,* 175 U. S. 175, 20 Sup. Ct. 77, 44 L. Ed. 119.

To determine just what those fundamental rights are—to enumerate or define them—would be a matter of some difficulty. It has never been attempted, and will not be now. *State* v. *Stimpson,* supra, shows that a presentment by indictment is not one; and *Brown* v. *New Jersey,* supra, shows that trial by jury even is not one. Of course we are now speaking of what due process requires, and leave out of consideration express constitutional requirements.

We now hold that relief from the vexation of a second trial is not one, and that the constitutional provisions under discussion are not infringed by the statute in question. This view is indirectly approved in *Ex parte Bornee,* supra, wherein attention is called to the fact that the Constitution of Virginia (which in this respect is like our own) does not prevent the passage of an act granting the state the right of appeal in criminal cases."

Commonwealth v. *Perrow,* Va. 97 S. E. 820. *Right of appeal by government.*

Under Const., Sec. 8, allowing appeal to commonwealth in prosecutions for violation of a state revenue law, when commonwealth seeks reversal and new trial, as distinguished from decision of legal questions for use as precedent, rule against second jeopardy, proprio vigore destroys right of appeal, and accused need not abide result of appeal, and then resort to plea of autrefois acquit or autrefois convict.

Under Const., Sec. 8, and section 88, as to second jeopardy, legislature may allow commonwealth appeal in any criminal case involving revenue law, regardless of degree of punishment.

While "jeopardy," as ordinarily understood in legal parlance, refers to danger of conviction and punishment which accused incurs in a criminal case, where a jury has been impaneled and sworn, the spirit of the constitution extends its meaning to any discharge upon a defense constituting a bar to the prosecution.

Violation of Acts 1899-1900, c. 806, imposing penalty for soliciting men to leave Buckingham county, without securing a license as a labor agent, is not a violation of a state revenue law, and therefore commonwealth cannot, in view of Const., Sec. 8, and Code, 1904, Sec. 4052, appeal, under Const., Sec. 88, from a judgment of a justice of the peace, quashing warrant on ground that such act is unconstitutional.

GAMING.

State v. *Johnson,* Okla. 177 Pac. 926. *Slot machine.*

A slot machine which delivers an article, the sale price of which is the coin deposited in the machine, and in addition thereto sometimes delivers certain trade checks, ranging in quantity and value from 2 to 20 times the value of the coin deposited, and also indicates before each play what the machine will deliver on that particular play, but does not indicate what will be delivered on any subsequent play, is prohibited from being set up and operated in a place of business, under sections 4 each of chapter 128, Session Laws, 1913, and chapter 26, Session Laws, 1916.

INDETERMINATE SENTENCE.

Ex parte Lee, Calif. 171 Pac. 958. *Constitutionality.*

Pen. Code, sec. 1168, providing for indeterminate sentences in offenses punishable by imprisonment in a reformatory or in a state prison, and giving the reformatory or prison authorities power to determine after expiration of the minimum term what length of time such prisoner shall be confined, does not violate Const., art. 3, sec. 1, providing for the division of the state into the executive, legislative, and judicial departments, and prohibiting the exercise of the powers of one department by either of the others; such act constituting neither a delegation of legislative nor judicial functions.

Such provision is ex post facto as to a person convicted for a crime committed prior to its enactment, since it substitutes the discretion of the board of prison directors for the statutory right formerly existing to credits for good behavior during impisonment.

INDICTMENT.

Stewart v. *State,* Ga. 97 S. E. 871. *Variance.*

Where defendant is indicted for the larceny of an automobile, the charge in detail being that he did take and carry away with intent to steal, etc., "one seven-passenger automobile Overland" of a certain designated number and model, and the evidence showing that the automobile was a "seven-passenger Willys-Overland" of the same number and model as alleged in the indictment, the description in the evidence conforming in every detail with that contained in the indictment, except that the indictment alleges "Overland" when the proof shows the automobile to have been a "Willys-Overland," there is no such variance between the charge and the proof as would amount to a failure of the evidence to sustain the charge set out in the indictment. In the absence of proof that an "Overland" and a "Willys-Overland" are separate and distinct types of automobiles, the word "Overland" will be taken as generic and generally descriptive of a certain type of automobile, and the word "Willys" will be taken as an adjective describing specifically a particular species of automobile. It follows therefore that, where an indictment alleges generally that the automobile stolen was an "Overland" of a certain number and model this allegation is sustained by evidence to the effect that the automobile claimed to have been stolen was a particular kind of Overland, such as a "Willys-Overland."

JUVENILE COURT.

Ex parte Songer, Colo. 177 Pac. 141. *Jurisdiction: rape.*

The Juvenile Court has no jurisdiction of prosecution of an adult for rape, under Laws, 1907, p. 324, limiting jurisdiction to criminal cases "in which the disposition, custody or control of any child or minor, or any other person, may be involved under the acts concerning delinquent, dependent or neglected children, or any other acts, statute or law of this state, now or hereafter existing, concerning dependent, delinquent or neglected children, or which may in any manner concern or relate to the person, liberty, protection, correction, morality, control, adoption or disposition of any infant, child, or minor, or the duties to, or responsibility for such infant, child or minor, or any parent, guardian or of any other person, corporation or institution whatsoever."

Scott and Allen, JJ., dissenting.

LARCENY.

State v. *Fitzsimmons,* Dela. 104 Atl. 834. *Larceny by trick: switching diamonds.*

Where defendant, offered three unset diamonds for sale, took prospective customer to jeweler who tested and found diamonds to be genuine, refused to sell at purchaser's price, and after having left purchaser substituted glass stones for the diamonds, and returned and sold stones as though they were the ones previously tested, he was guilty of larceny by trick.

NON-SUPPORT.

State v. *Langford,* Ore. 176 Pac. 197.

Oregon Laws, 1917, p. 175, making it an offense for any person without just or sufficient cause to fail to support his children construed. Held: (1) the duty of support imposed by this statute is not impaired by a decree of divorce, awarding custody of a minor child to the mother; (2) the father's duty remains primary despite L. O. L., sec. 7039, etc., relating to the duty of both parents to support their children; (3) that a wife has means of her own and supports the child is no defense to the father under Laws, 1917, p. 175; (4) nor is remarriage of the mother a defense; (5) but where the father also remarried before the passage of the 1917 law, held he has a defense by showing that he is unable to support his second wife, much less the child.

SENTENCE.

State v. *Piper,* Kans. 176 Pac. 626.

Three persons pleaded guilty to violations of the prohibitory law before a justice of the peace, and were sentenced to jail and to pay fines and costs. Later the justice paroled the defendants and remitted the jail sentences when the fines and costs were paid. The justice of the peace resigned and his successor issued commitments for their incarceration. The probate judge discharged them on writs of habeas corpus. *Held,* that the justice of the peace was without jurisdiction to parole or remit the jail sentences, and that the

probate judge had no jurisdiction to discharge the convicted persons from the custody of the sheriff, who held them under the commitments for the terms of imprisonment which had been executed; and *held,* also, that mandamus should issue to secure the execution of the judgments originally imposed.

SENTENCE.

Ex parte Germino, Calif. 176 Pac. 701. *Re-sentence.*

Although the provisions of Pen. Code, Section 1191, fixing the time for the passing of sentence after verdict of guilty in a criminal case, are mandatory, they do not apply to a judgment merely irregular in form, and, where a prisoner has been erroneously sentenced under the Indeterminate Sentence Law, for a crime committed prior to its passage, he may be re-sentenced under the previous law, although the time limited by the statute has elapsed.

STATUTES.

State v. *Blaisdell,* Me. 105 Atl. 359. *Construing penal statute; "corrupting" spring.*

One who stirs up and roils the water of a spring by digging into the mud with a stick, does not "corrupt" or "defile" the water within the meaning of Rev. St., c. 130, sec. 1, as amended by Laws, 1917, c. 126.

Penal statutes are strictly construed, but a statute declaring an act to be a felony calls for a more strict construction than one which declares an act to be a misdemeanor.

TRIAL.

In re Smith, N. Mex. 176 Pac. 819. *Insanity after conviction.*

Chapter 70, Code, 1915, which provides for the issuance by a district judge of a commission in the nature of a writ de lunatico inquiriendo to inquire into the lunacy or habitual drunkenness of any person within this state, or having real or personal estate therein, has no application to a person in the custody of the law awaiting execution for a capital offense or to a convict undergoing imprisonment for crime. Said statute was enacted solely for the purpose of protecting the civil and property rights of insane persons and habitual drunkards and for the care of indigent persons by the various counties. Hence an adjudication by a district court under such statute that a person who has been tried and convicted for the crime of murder and sentenced to death is a person of unsound mind is void, and does not have the effect to stay the execution.

The common law forbids the trial, sentencing, or execution of an insane person for a crime while he continues in that state. Where a person has been convicted of a crime and sentenced to death, and, pending the execution, a suggestion is made to the court, so passing sentence that the accused has become insane, and the court is satisfied from such suggestion that there is a question as to the sanity of such party, the court will, as a matter of humanity, make such investigation as may be necessary to become informed as to the sanity or insanity of such party.

TRIAL.

State v. *Warm,* Vt. 105 Atl. 244. *New trial: juror betting on result of trial.*

Public policy will not permit verdicts to stand which are rendered by jurymen who bet on the issue, be the stake great or small.

On a petition to the Supreme Court for a new trial by one convicted of manslaughter, based on disqualification of a juror in having wagered on the result of the trial, affidavits *held* to show that the juror had in fact made such wager.

TRIAL.

State v. *Craig,* N. Car. 97 S. E. 400. *Procedure where defendant acquitted on ground of insanity.*

Revisal, 1905, sec 4618 (a part of chapter 97, sub-chapter 7), providing that when a person accused of murder, rape, etc., "or other crimes," shall be acquitted upon ground of insanity, the court shall detain such person until an inquisition shall be had, does not apply to the crime of resisting an officer; the quoted words meaning crimes of like kind and grade as those enumerated.

That verdict of not guilty of resisting an officer was based upon belief that defendant did not have sufficient mental capacity to commit a crime did not authorize trial court to make an order inquiring into his mental condition with a view of having him confined in the department of "dangerous insane," in the penitentiary, pursuant to Revisal, 1905, sec. 4618.

VERDICT.

Autrey v. *State,* Ga. 97 S. E. 753. *Uncertain verdict.*

Upon a trial under an indictment for assault with intent to murder, alleged to have been committed by shooting another with a pistol, a verdict finding the defendant "guilty of shooting a man" is not void for uncertainty. Its reasonable intendment and meaning is that the defendant was guilty of the offense of shooting at another, not in his own defense, nor under other circumstances of justification.