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Judicial Decisions of Criminal Law and Procedure

JUDICIAL DECISIONS OF CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER

ALIBI.

State v. *Danelly,* S. Car., 107 S. E. 149. *Effect of disparaging remarks.*

In the prosecution for burglary, where the defense was alibi, a charge that an alibi has been said to be a rogue's defense is erroneous as impliedly assigning defendant to a class to which he is resumed not to belong until he is convicted, and as disparaging a perfectly legal defense.

Error in a charge which stated that an alibi had been said to be a rogue's defense is not cured by an explanation that the reason was because it was a good defense and possibly the best defense that could be put up, since that explanation aggravated rather than mitigated the effect of the error, as implying that a guilty man fabricating a defense would naturally select the most effective one.

Gary, C. J., and Memminger, Rice, and Frank B. Gary, Circuit Judges, dissenting.

ATTEMPT.

State v. *Tripp,* Mont., 199 Pac. 716. *Preparation distinguished from attempt.*

In a prosecution for an attempt to obtain money by false pretenses, evidence that defendant had concealed two kegs containing colored water, and that he had offered to sell to the prosecuting witness two kegs of whisky for a stated price, and agreed to take the witness to a place where the test was to be made, which was not the place the kegs of water were concealed, without evidence that they even started to go to that place, shows merely intent and preparation, and is insufficient to sustain a conviction.

COERCION.

State v. *Goldfarb,* N. J., 114 Atl. 143.

The legal presumption that, where the wife commits a crime in the presence of her husband, she is under his coercion and that her acts are not voluntary on her part, is rebuttable, and, when there is evidence from which a jury may infer that the participation of the wife was voluntary, the refusal to direct an acquittal of the wife is not error.

In a prosecution of a husband and wife for joint participation in a crime, an instruction that if the jury was satisfied that the wife was under the coercion or influence of her husband it could not find her guilty was not error, as requiring that defendant satisfy the jury of her innocence, in view of the rest of the instruction that, if the jury were not satisfied beyond a reasonable doubt that what she did was done voluntarily, it could not find her guilty.

EMBEZZLEMENT.

P. v. *Holder,* Calif. (D. C. A.), 199 Pac. 832.

Pen. Code, Sec. 506, as amended by St. 1919, p. 1090, providing that a contractor appropriating money paid him for any use or purpose other than that for which he received it is guilty of embezzlement, and that the payment of laborers and materialmen is thereby declared to be the use and purpose to which the contract price received by the contractor shall be applied, if construed as making it embezzlement for a contractor to break his agreement to pay for labor and materials with moneys paid him under the contract, though the title to the moneys is vested in him, violates Const. art. 1, Sec. 15, prohibiting imprisonment for debt.

ESCAPE.

P. v. *Quijada,* Calif. (D. C. A.), 199 Pac. 854. *When offense is complete.*

Defendant, who, with other prisoners in a state prison, unlawfully seized an engine in the prison yard and drove it through a locked gate to a point outside the prison walls, was guilty of an escape within Pen. Code, Sec. 105, relative to escapes from state prison, and not merely of an attempt to escape, though he was captured while within the territory connected with the prison grounds; an "escape" being the unlawful departure of a prisoner from the limits of his custody.

FORMER JEOPARDY.

State v. *Smith,* Ore., 109 Pac. 194. *Prosecution in federal court under Volstead Act as a bar to prosecution in state court for same offense.*

Under Volstead Act, tit. 2, Sec. 3, prohibiting the manufacture, sale, etc., of intoxicating liquors, enacted pursuant to Const. U. S. Amend. 18, a person against whom an information had been filed in the federal court, charging a violation of the act, to which he pleaded guilty and paid his fine cannot again be indicted, prosecuted, and convicted in the state court under Const. Or. art. 1, Sec. 36, and Laws 1915, p. 150, Sec. 5, as amended by Laws 1917, p. 46, Sec. 1, for the doing of the identical thing on the same day charged in the former information, in view of the former jeopardy provisions of Const. U. S. Art. 5, and Const. Or. art. 1, Sec. 12, Const. U. S. Amend. 18, Sec. 2, granting to the state courts concurrent power with the federal court to enforce national prohibition through appropriate legislation by the state, and Const. U. S. Amend. 10, reserving to the states powers not delegated to the United States, being applicable only to the exercise of separate and distinct powers.

HOMICIDE.

State v. *Smith,* Wash., 197 Pac. 770. *Shooting to protect property.*

I. W. W. members, who were not stationed at the I. W. W. hall, but were stationed at other points in the same neighborhood more or less distant therefrom, were not, as a matter of law, justified under Rem. Code 1915, Secs. 2405, 2406, defining justifiable homicide, in shooting members of the American Legion participating in Armistice Day parade to protect the hall from expected raid.

INDICTMENT.

State v. *Warfield,* Md., 114 Atl. 835. *Sufficiency of indictment containing misspelled words.*

Indictment charging that defendant placed obstructions upon the "tract" of a railroad, in violation of Code Pub. Gen. Laws, art. 27, Sec. 412, prohibiting the placing of anything "on any railroad in this state calculated to obstruct, overthrow, or direct from the track of such railroad any car," etc., held sufficient as against contention that use of word "tract," instead of word "track," rendered the indictment bad, whether word "tract" was used intentionally or by mistake, since, if used intentionally, the indictment charged an offense under the statute, and if used by mistake, the indictment would be saved by the doctrine of idem sonans.

Errors in spelling which do not obscure the sense are not fatal to indictment.

JUDGMENT.

Antonopoulas v. *State,* Ga., 107 S. S. 156.

"Where one has pleaded guilty to a misdemeanor charge and has been placed on probation, and his sentence so molded by the court as to allow him to serve the sentence outside the confines of the chain gang, jail, or other place of detention, under the supervision of the court, and in such manner and on such conditions as the court may see fit to impose, the General Assembly, approved August 16, 1913 (Ga. L. 1913, p. 112; Park's Penal Code, Sec. 1081 (a), (b), (c), (d)), and thereafter, but prior to the expiration of the sentence, the probationer is brought before the court on the charge that he has been delinquent in observing the rules prescribed by the court for his court revokes its leave to the probationer to serve the remainder of his sentence outside the confines of the chain gang, jail, or other place of detention, the order of the court revoking the probationer's parole" is not such a final judgment as is subject to review on a bill of exceptions.

Hill and Gilbert, JJ., dissenting.

SELF-DEFENSE.

State v. *Shuler,* S. Car., 107 S. E. 147. *Duty to retreat and burden of proof.*

In a homicide prosecution in which the defendant claimed to have acted in self-defense, instruction, "If you can get away without danger of losing your life or suffering serious bodily harm, you must do it, and you have to prove every one of these defenses, or elements of self-defense, by the preponderance of the evidence," held not erroneous.

TRIAL.

Burdeau v. *McDowell,* 41 Sup. Ct. Repr. *Use of papers unlawfully seized by individual and turned over to government officers.*

Const. U. S. Amend. 5, securing a citizen from compulsory testimony against himself, is not violated by the use of his private books and papers in a criminal prosection against him, where the books and papers had been seized, even though unlawfully, by a private corporation of which he was director,

without the knowledge or connivance of any public officer, and had been thereafter turned over to a special agent or the Attorney General.

Mr. Justice Brandeis and Mr. Justice Holmes dissenting.

WEAPONS.

State v. *Kerner,* N. Car., 107 S. E. 222. *Restricting right to bear arms by statute.*

Under Const. art. 1, Sec. 24, providing that the right of the people to keep and bear arms shall not be infringed, but that nothing therein shall justify the practice of carrying concealed weapons or prevent the Legislature from enacting penal statutes against such practice, the exception indicates the extent to which the right to bear arms can be restricted, and the Legislature can prohibit the carrying of concealed weapons but no further.

Notwithstanding the right to bear arms under Const. art. 1, Sec. 24, it would be a valid and reasonable regulation to prohibit the carrying of deadly weapons when intoxicated, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror which was forbidden at common law.

Notwithstanding the right to bear arms under Const. art. 1, Sec. 24, the Legislature may prohibit the carrying of pistols of such small size as to be easily and ordinarily carried concealed.

Pub. Loc. Laws 1919, c. 317, so far as it prohibits the carrying of a pistol unconcealed off of one's own premises without a permit for which a fee of $5 and a bond in the sum of $500 is required, is invalid under Const. art. 1, Sec. 24.

WITNESSES.

State v. *Driver,* W. Va., 107 S. E. 189. *Impeaching witness by medical testimony based on courtroom observation.*

The usual method of impeaching the credibility of a witness as one who will not tell the truth and is unworthy of belief is to show the bad general reputation of the witness for truth and veracity in the community where she lives, by impeaching witnesses who know that reputation. It is not proper to permit medical experts, who have heard only a portion of the evidence given, to testify from what they have heard and seen in the courtroom, and from observation of the witness on the stand, that she is what is termed in the medical profession a "moron," and belongs to a kind or class of morons who are prone to tell lies, and that therefore she is unworthy of belief, and no weight should be given to her testimony.