Journal of Criminal Law and Criminology

Volume 14 | Issue 1 Article 13

1923

Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER AND HAROLD SHEPHERD

ASSAULT AND BATTERY.

Senobaugh v. *State*, Texas, 244 S. W. 379. *Defenses. Statute justifying homicide by husband on person of one taken in adultery with the wife no defense to indictment for aggravated assault upon the paramour.*

The Texas Penal Code 1911, Art. 1102, provides that homicide is justifiable when committed by the husband upon the person of anyone taken in the act of adultery with the wife provided the killing takes place before the parties to the act have separated. Defendant in the principal case instead of killing the paramour detected in adultery expressly showed an intention not to kill, but made a grievious assault upon and maimed him. Defendant was convicted of aggravated assault, but contended that he had a defense under the statute. The court held it no defense although had the assault resulted in death or had it been made with the intent and in an attempt to kill the paramour the court thought there would be a defense. But the intent to kill being negatived by the facts, the statute was no defense to an action for aggravated assault. While this decision reaches the somewhat incongruous result that an act which would have been lawful had it resulted in death or had it been accompanied with an attempt and intent to kill is nevertheless unlawful when not accompanied by death or an attempt to kill, nevertheless it is within the power of the legislature to so provide and it is submitted that this construction of the Statute is sound.

At common law the rule was well settled that detecting one in the act of adultery with the wife was no justification for killing the paramour although it might reduce the crime to manslaughter. (4 Bl. Comm. 191; 2 Bishop Crim Law (7th Ed.) 708. Statutes in some states, however, have been enacted making it justifiable homicide to kill the paramour in the heat of passion caused by the attempt of another to rape or otherwise defile (which would include adultery) wife, daughter, sister or other family relation or when the defilement has actually been committed. (21 Cyc., p. 794, Notes 49 and cases cited.

Such statutes, of which the one in the principal case is merely typical, being in derogation of the common law rule and extending leniency have been strictly construed and have not been interpreted so as to include any other kind of killing than embraced in the words of the Statute. Thus in the Utah case of *People* v. *Halliday*, 5 Utah 467, 17 Pac. 122, the court in construing a statute justifying homicide by the husband in a sudden heat of passion caused by the defilement or attempt to defile made it plain that the statute includes only those killings without any deliberation and that "if the husband, after learning of the defilement of the wife waits and deliberates and then kills the defiler—the crime is murder." So in the principal case it would seem that the proper construction of the statute would be to make justifiable only those acts specifically mentioned in the Statute and not to make it include any other act which, in the opinion of the court, might be lesser and, therefore, included under the greater permission to kill under the circumstances. As before stated it might seem rather incongruous that a husband might have killed without incurring liability, but if he

restrains himself and only administers a sound thrashing, he becomes liable for criminal assault and battery, and yet conceivably if the other view were taken that because the husband may kill he may also do any other acts short of killing, the result would perhaps be more shocking, for the most inhuman tortures might then be inflicted under the protection of the law, as perhaps was largely true in the principal case. At any rate, in view of the common law rule (supra) it is for the legislature to say exactly under what circumstances such killing shall be justifiable and in the principal case the court has merely applied the proper principle of statutory construction.

CONFESSIONS.

Stone v. *State,* 93 So. 706. *Admissibility; duty of court to determine voluntary character of confession.*

While all the authorities are agreed that a confession to be admissible must be voluntarily made, yet there is considerable difference of opinion as to whether the question of its voluntary character must be finally determined by the court, by the jury or in a preliminary way by the court at the time it is offered, but to be again passed on ultimately by the jury. The principal case states what is submitted to be the proper rule, namely, that the admissibility of confessions, like the admissibility of any other evidence, is a proper question for the court alone. That the court must, in the process, determine an incidental question of fact is no objection, for it is clear that such incidental determinations of fact do not infringe upon the functions of the jury. Nor in so holding are we in any way preventing the jury from being the sole and ultimate determiner of the weight and credibility to be attached to the confession when once admitted.

The following cases have taken the view announced in the principal case: *Harrold* v. *Oklahoma,* 169 Fed. 47, where the court held it error to submit the question of voluntary character to the jury; *State* v. *Spanos,* Ore., 134 Pac. 6; *State* v. *Williams,* Nev., 102 Pac. 974; *Godau* v. *State,* Ala., 60 So. 908; *State* v. *Berberick,* Mont., 100 Pac. 209 (based on the Montant Statute).

In the following cases it has been held that while the court must pass in a preliminary way upon the voluntary character of the confession before allowing it to go to the jury, nevertheless once it has gone to the jury additional evidence as to its voluntary character may be introduced and the jury may pass ultimately on this matter as well as upon its credibility: *Com.* v. *Antaya,* Mass., 68 N. E. 330; *People* v. *Randazzio,* N. Y., 87 N. E. 112; *Clay* v. *State,* Wyo., 15 Wyo. 42, 86 Pac. 17; *State* v. *Wells,* Utah, 100 Pac. 681.

FALSE PRETENSES.

Carrol v. *State,* Alab., 94 So. 194. *Defenses; duty of prosecutor to use means at his disposal to detect falsity of the pretenses.*

This case raised the question whether under an indictment for obtaining a horse by false pretenses, the fact that the prosecutor had means of detecting the falsity of the pretenses, but failed to use them would be a defense. It was held that it would not be, Merritt, J., quoting with approval the language of the court in *Woodbury* v. *State,* 69 Alab. 242, "Whether the prosecutor could have avoided imposition from the false pretenses if he had exercised ordinary prudence and discretion to detect its falsity, is not a material inquiry." Unfortunately the alleged false pretenses in the principal case are not set out in the opinion, hence it is impossible to tell whether the court takes the extreme posi-

tion that absolutely on standard of care will be required on the part of the prosecutor to safeguard himself from imposition or whether merely the pretences involved constituted an imposition in excess of that against which the victim must safeguard himself. The problem, however, of whether any standard of case, and if so, what standard will be required of the victim before a defendant may be guilty under the statutes is interesting.

Historically, the false pretense statutes were intended to widen the scope of common law cheats, the essence of which was the employment of deceitful symbols or tokens which affected the public at large and "against which common prudence could not have guarded." (Wharton's Criminal Law, 11th Ed., vol. II, par. 1378, and cases cited). Like the Embezzlement Statutes, they were also intended to cover those cases where the taking of the property was with the same intent as in larceny (*Regina* v. *Kilham Law Reports,* 1 Crown Cases Reserved 261, Beale's Cases on Criminal Law, 3rd Ed., p. 750), but could not be dealt with as such because of the inability to make out the trespass. (7 and 8 Geo. IV, c. 29, Par. 53, recites "that a failure of justice frequently arises from the subtle distinct between larceny and fraud," and by way of remedy enacts "if any person shall by any false pretense obtain, etc.") Moreover the general language of the statutes both in England and this country provide against "obtaining property by *any* false pretense." (25 C. J., p. 598, note 71, and cases cited. Eng. Stat. 24 and 25 Vict., c. 96, par. 88. "By *any* false pretense.") Thus, the historical purpose of the statutes and their literal construction would indicate that the essential inquiry in any case is whether or not the victim has actually been defrauded and not whether a reasonable man under the circumstances or any other artificially standardized being would have been misled. This seems at present to be the clear weight of authority both in England (in *Regina* v. *Wickham,* Lord Denman Ch. J., in reply to the suggestion that the false pretense in order to be the subject of indictment should be such as would deceive a man of ordinary intelligence, said "I never could see why that should be." For later Eng. Cases, note 3, p. 1632, Wharton's Cr. Law, 11th ed., Vol. II) and the United States (*Com.* v. *Beckett,* 84 S. W. 758, 68 L. R. A. 638; 25 C. J., p. 598, note 77; *People* v. *Smith,* 84 Pac. 449 (Cal.)). In the language of the New Jersey Court, "The law (against false pretenses) are made to protect weak-minded and credulous as well as sagacious persons. The wise and wary can protect themselves." (*Oxx* v. *State,* 59 N. J. L. 99, 101, 35 Atl. 646.) While the foregoing represents the present prevailing view, the opposite view laying down a reasonable man standard and that if the prosecutor has at his disposal means of detecting the falsity of the pretense, but fails to use them, the crime cannot be made out, has been taken in some jurisdictions. (See the language of Soule in *Com.* v. *Harkins,* 128 Mass. 79; *People* v. *Williams,* Hill 9 (N. Y.) 40 Am. Dec. 258 (1842), the head note to this case reading: "A representation though false is not within the statute unless calculated to mislead persons of ordinary prudence and caution." *State* v. *Estes,* 46 Me. 150; *Com.* v. *Hutchinson,* 1 Clark (Pa.) 302; *De Laney* v. *State,* 7 Baxter 28), and in early cases in some of the jurisdictions which now refuse to set a reasonable man standard. (Compare *Com.* v. *Grady,* 13 Bush 285, 26 Amer. Rep. 192, with *Com.* v. *Beckett,* 119 Ken. 817, 84 S. W. 758. The former Kentucky case, however, may be readily explained by the theory (post) that the pretense involved did not really mislead and it is upon this ground distinguished in the latter case.)

In *Com.* v. *Drew,* 19 Pick. 179 (Mass.) (1937), the court said, in a case where the defendant presented to the bank a check which overdrew his account: "but there must be some limit and it would seem to be unreasonable to extend it (false pretense Statute) to those who, having the means in their own hands, neglect to protect themselves."

It is generally said, however, that even in those jurisdictions which take the position that the actual imposition on the victim is the gist of the offense under the statutes and which refuse to set a standard such as would be calculated to deceive a reasonably prudent man, the courts nevertheless set the limitation that the pretense must not be absurd, incredible or irrational and that if it is so the conviction cannot be maintained. A close examination of these cases, however, reveals the fact that what many of these cases really decide is that the alleged pretenses involved were so absurd, incredible or irrational that they really did not mislead or defraud the prosecutor (i. e.) were not the proximate cause of the deprivation of the property. (*State* v. *Crane,* 38 Pac. 270 (Kans.); *Walker* v. *The State,* 67 So. 94 (where the physical boundaries of the land sold by defendant and represented as containing ten acres, but which actually were clearly pointed out to the prosecutor). The court said, "It (the pretense), even if false, must have been perfectly apparent to the prosecutor." *Clark* v. *State,* 72 So. 291 (Ala.), where the court says, "The representation . . . may or may not have been cogent and controlling in inducing Hill to act in the premises. However, these were jury questions." It would seem, therefore, on principle that while care should be taken in determining whether or not the pretense involved is so irrational, incredible or absurd as to actually mislead the prosecutor, nevertheless the irrationality, absurdity or incredibility should bear solely on this fact of whether the prosecutor has actually been misled or defrauded and where it once appears that he has, then the language of the court in *State* v. *Woodbury* cited in the principal case (supra) that "Whether the prosecutor could have avoided imposition from the false pretense if he had exercised ordinary prudence and discretion—is not a material inquiry."

FALSE PRETENSE.

Dill v. *State,* Neb., 191 N. W. 646. *Obtaining extension of credit by false pretenses.*

Defendant had lawfully secured credit to the extent of $104.48 for certain merchandise purchased and then, by false pretenses relating to certain chattels which he offered to give as collateral security, secured an extension of the credti. Held that this did not fall within the statute making unlawful the obtaining credit by false pretenses. The credit having been secured lawfully originally, could not be made unlawful by fraudulently securing an extension, and the fraudulent extension not being embraced in the statute, there was no crime.

FALSE PRETENSES.

Corscott v. *State,* Wisc. *Representation. Words in form of promise may under circumstances amount to representation of existing fact.*

The defendant had had prior business dealings with the complaining witness in the course of which he had negotiated a loan secured by a certificate of stock in the Madison Square Company. About six months later defendant attempted to make another loan, saying that he had immediate need of the money and that he would give her some more of the same stock as security.

Defendant then left and shortly thereafter returned and, handing the victim an envelope, said: "The stock and note are in there." Some time later it was discovered that the stock securing the note was not stock of the Madison Square Company, but of the Starck Company, which was worthless. Held in the principal case that while the words, *"I will give you* some more of the same stock" were in form of a promise relating to future events, nevertheless when viewed in light of all the circumstances and the later statement: "The stock and note are in these," which was part of the same transaction, "it can have but one meaning and that is that when the security was actually delivered it meant: I *am* giving you some more of the same stock (meaning the Madison Square Company Stock)." This constituted a representation of an existing fact and was sufficient to satisfy this requirement of the crime of false pretense.

It is submitted that the case is correct. While the rule is clear to the effect that the representation relied upon must be of past or existing fact and not a mere promise of future acts or events. (Clark Criminal Law, 363 (Mikell's Third Ed.), *People* v. *Blanchard,* 90 N. Y. 314; *Com* v. *Moore,* 99 Pa. St. 570.) Nevertheless it is also a well settled principle that no particular kind of representation is necessary to constitute the offense, and that a false pretense may be made by conduct or actions even without words. (*Rex.* v. *Barnard,* 7 Car. & P. 784 (person fraudulently wearing a cap and gown leading tradesmen to believe he was a commoner in Oxford College.) *Reg.* v. *Goss,* 8 Cox Cr. C. 262 (showing false samples); giving a check on a certain bank held to be a representation that defendant kept an account at the bank (*Foote* v. *People,* 17 Hun. 218); Contra: *Martin* v. *State,* 35 S. W. 976) or a representation may be made in connection with spoken words, and even when a promise constitutes part of the inducement. (*Thomas* v. *State,* 90 Ga. 437, 16 S. E. 94; where defendant represented that he had already made a sale of certain property and promising prosecutor with a certain sum out of it; *State* v. *Fooks,* 65 Iowa 196, 21 N. W. 561. A representation that defendant's brother was to arrive with money coupled with a promise to use it in payment of the sum borrowed amounts to a pretense that he had the money; see also *Com.* v. *Moore,* 89 Ken. 542, 12 S. W. 1066. *Smith* v. *State,* 42 S. E. 766 (Ga.); *State* v. *Briggs,* 86 Pac. 447 (Kans.)). In any event it would seem that inasmuch as representations may be communicated through a member of media ("false pretense, being a misrepresentation, may be made in any of the ways (*or by a combination of ways*) in which ideas may be communicated from one person to another," per Curiam in *Commonwealth* v. *Drew* v. *Pick,* 179 Mass.) that all of these things constituting the entire transaction should be taken together in determining whether a representation has been made, and the time of fact represented (i. e.) whether past, present or prospective should likewise be determined not by an isolated statement in the conversation, but by the sum total of the representation making media constituting the whole transaction. It would also seem to be well established in the law that mere words inconsistent with the overt acts and conduct of a party can never determine the character or legal effect of those acts and conduct. And so in the principal case the mere fact that the defendant used the future tense, which, if taken as a purely isolated statement, would only be a promise, yet his other acts and conduct in that same transaction accompanied by the statement that "the stock and note are in there," which in view of the whole transaction could only mean the stock referred to in the prior promise, all together clearly

made a representation of an existing fact, which, together with its falsity and the reliance thereon, completed the crime.

HOMICIDE.

Thacker v. *Commonwealth,* Va., 114 S. E. 504. *Attempt to murder; specific intent.*

The facts showed that the prosecutor with her children were sleeping in a tent in which they were camping out during the summer; a lighted lamp was left on a trunk near the head of the bed in expectation of the husband's return that evening. Defendant, who was intoxicated, passing along the road near the tent, saw the light and said he was going to shoot "that God damned light out," and later, after learning of the presence of the prosecutor and her children in the tent, the defendant recklessly shot three times, two shots passing through the tent, one passing through the head of the bed in which the prosecutor was lying and narrowly missing her head and the head of a child sleeping with her. *Held;* that the crime of an attempt to murder was not made out, because of a lack of the requisite intent.

To constitute the crime of attempt it is usually said that the following elements must appear:

(1) The act must fail of completion. (2) Must come sufficiently near success to warrant apprehension and action on the part of the state. (3) Acts done must be apparently adapted to accomplish the results sought. (4) the act *intended* must, if completed, be a criminal offense. (5) There must be a specific intent to commit the particular crime at the time of the act. (Clark Criminal Law, 3rd Ed., p. 138.)

It is at once apparent that the facts of the principal case satisfy the first three requirements but fail entirely to satisfy the fourth and fifth. The act intended, and the only one supported by the evidence as being intended, was to extinguish the light, which had it entirely succeeded would not constitute a crime. True it is that in attempting to accomplish this purpose the defendant acted with wantonness and gross negligence and with an utter disregard for human life; he used a means which was most reasonably adapted to the killing of human beings, and it came dangerously near bringing about that result, and had it actually brought about the death of a human being there would undoubtedly have been the crime of murder, the requisite intent being supplied by the defendant's knowledge that in so acting he is likely to cause the death or serious bodily injury to some person. Thus in *Pool* v. *State,* 87 Ga. 526, 13 S. E. 556, it was said that the intentional firing of a pistol into a crowded street resulting in the death of a person in the street was murder even though the defendant had no actual intent to kill the person so killed, for the law implies an actual intention to kill from the mere wantonness of the act. (*Bailey* v. *State,* 32 So. 57 (Ala.); *Brown* v. *Com.,* 11 S. W. 220; *State* v. *Edwards,* 71 Mo. 312.) The rule is well settled that the intent necessary to make out the crime of murder may be implied from the wantonness and gross negligence of the act and the defendant's act in the principal case had it resulted in death would come within this rule. But a substantive crime not having ensued, the authorities are well settled that the specific intent to do the act which is alleged to have been attempted cannot be implied from the wantonness or gross negligence of the act, even though had death resulted, the substantive crime of murder would have been made out. (See Clark Criminal Law (3rd Ed.), p. 148; Bishop Crim-

inal Law, vol. 1 (8th Ed.), Secs. 729 and 730, cited in the principal case. *Brown* v. *State,* 27 Tex. App. 330, 11 S. W. 412, "It (attempt) cannot be founded on mere general malevolence.") Hence in the California case of *People* v. *Mize,* 22 Pac. 10, it was held error to instruct "if the testimony showed, that had the prosecuting witness been killed, one of the defendants would have been guilty of murder, then that one should be convicted," for "in the crime of attempt to murder the *intent* is an essential ingredient and must be proved," and in the Louisiana case of *State* v. *Evans,* 3 So. 63, it was held error to instruct the jury "where the evidence shows that it would have been murder if death had ensued, that in itself will be sufficient ground for the jury to infer the existence of the intention to murder."

The decision of the principal case, then, namely, that the specific intent required in the crime of attempt cannot be implied from circumstances which, merely because had they resulted in death, would supply the intent requisite to make out the crime of murder, would seem to be in accord with a well recognized rule.

INTOXICATING LIQUORS.

Giles v. *United States,* N. H., 284 Fed. 208. *Evidence illegally obtained; evidence obtained by means of search warrant improperly issued not admissible.*

In the first case to come before the Circuit Court of Appeals for the First Circuit involving the use of search warrants under the National Prohibition Act in obtaining evidence of its violation, it was held that where the warrant was issued on affidavit of the enforcement officer and from the affidavit it did not appear affirmatively that the affiant had personal knowledge of competent evidence for a prosecution under the Act, and where the premises to be searched were not specifically described in the warrant and where, therefore, the issuing of the warrant was illegal under the Statute (tit. 11, 40 Stat. 228) evidence obtained by the use of such a defective warrant was inadmissible in a prosecution for a violation of the National Prohibition Act. In so holding the court was merely applying the rule prevailing in the Supreme and Federal Courts established by the much criticized case of *Boyd* v. *United States,* 116 U. S. 616, 6 Sup. Ct. 524. Professor Wigmore, in a recent article in the American Bar Association Journal, Vol. 8, No. 8, p. 840, criticizing the prevailing Federal Court rule, refers to it (the Boyd case) as the "ill-starred majority opinion which has exercised unhealthy influence upon subsequent judicial opinion in many states."

The majority rule in the state courts, however, is clear to the effect that evidence obtained by illegal seizure is nevertheless admissible (see 136 Am. St. Rep. 129 for an exhaustive note and collection of authorities; Greenleaf on Evidence (Lewis' Ed., vol. 1, par. 254a; Wigmore Evidence, par. 2183) and as typical of the reaction to the so-called Federal rule is the recent case of *State* v. *Toom,* Ia., 191 N. W. 530, which, in a prosecution under the Iowa Criminal Syndicalism Law, involved the admissibility of evidence illegally obtained without warrant. The court in that case said it was squarely confronted with the proposition "of whether or not we will continue to follow the Supreme Court of the United States in the rule of the Boyd case." The court decided not to follow it, but admitted the evidence.

CHILDREN.

State v. *Hawkins,* S. Car., 114 S. E. 538. *Child's incapacity not measured by mental age.*

On trial of a criminal case, the presumption of incapacity to commit crime, arising from evidence that defendant has the mentality of one under 14 years of age, obtains only when it has been shown that the defendant has not lived 14 years.

DOUBLE JEOPARDY.

U. S. v. *Lanza,* 43 Sup. Ct. Repr. 141. *Prosecution under National Prohibition Act after conviction under state statute.*

An act which was made an offense both by the state prohibition law and by the National Prohibition Act is an offense against each sovereignty, and may be punished by each without violating Const. U. S. Amend. 5, prohibiting double jeopardy, which applies only to proceedings by the federal government, and forbids only a second prosecution under the authority of the federal government after a first trial for the same offense under the same authority.

HOMICIDE.

State v. *Ehlers,* N. J., 119 Atl. 15. *Motive: killing child to prevent suffering.*

A man (unless not sufficiently sane to know the quality and nature of the act, or that it was wrong) who kills his seven-year-old child to save it from anticipated future suffering and unhappiness is guilty of murder in the first degree if the killing be willful, premeditated, and deliberate, although actuated only by motives of pure, even if mistaken, love and kindness.

HOMICIDE.

State v. *Ehlers,* N. J., 119 Atl. 15. *Use of mental age tests for adults.*

Expert testimony that an adult defendant in a trial for murder is of a mental age of only 12 years, coupled with the further testimony by the same expert that 12 years was also the average mental age of our American soldiers in the World War, and that the mental age theory "does not amount to shucks" so far as adults are concerned, commented on as tending to demonstrate that the mental age theory of the medical experts is, at least as applied to adults, based upon so arbitrary and unnatural a scale of years as a standard as to be misleading to a layman, and useless, if not worse than useless, in the administration of justice by trial by jury.

HOMICIDE.

State v. *Bowers,* S. Car., 115 S. E. 303. *Duty to retreat.*

One assaulted in his own house is not required to retreat before exercising his right of self-defense, and a man's place of business is his house within the meaning of that rule.

A requested charge that a man assaulted in his place of business need not retreat before exercising his right of self-defense was not covered by the general charge stating the law as applied to a man's house, and adding that

it had been argued that the rule applied also to his place of business, but not so charging as a proposition of law except by implication.

Gary, C. J., and Fraser, J., dissenting.

HOMICIDE.

Pierce v. *Commonwealth,* Va., 115 S. E. 686. *Murder by use of spring gun.*

Where a spring gun was set in a building not a private dwelling with the intention that it would take the life of anyone attempting to force an entrance therein, and a homicide resulted, the person setting the gun could be convicted of murder in the second degree.

Evidence that accused, whose store had previously been feloniously entered, had set therein a spring gun in such a manner as to discharge its load into the body of anyone attempting to open the door, and had failed to warn the policeman, who patrolled that beat, of the presence of the gun, though he knew such policeman tried the door to see if it was locked, as a result of which a policeman was killed on a night when the door had been left unlocked, is sufficient to sustain a conviction of murder in the second degree.

INDICTMENT.

State v. *Portee,* S. Car., 115 S. E. 238. *Charging murder by use of automobile.*

An indictment for murder by striking deceased with plaintiff's automobile, although reciting that accused "did make an assault" with his automobile and did "run against, strike, throw to the ground, run over, crush, bruise and wound" deceased, *held* not objectionable as charging three or more distinct offenses, under Cr. Code 1912, Sec. 87, as to indictment for murder.

In trial for murder by running into deceased with automobile, a charge that "implied malice is such as you have a right to infer from the use of a deadly weapon, as in this case, you have a right to infer malice from the reckless handling of a dangerous instrumentality until the circumstances show that it was not of that character," *held* not erroneous as a charge on the facts; it being the apparent intention of the trial court simply to charge the jury that it was for them to draw the inference from the testimony, as to implied malice, in the instant case.

INDICTMENT.

State v. *Nunn,* Wash., 210 Pac. 771. *Sufficiency.*

An information charging defendant with transporting with intent to sell five sacks of whisky *held* not void, a sack meaning a measure of quantity or a receptacle of some pliable material, as cloth, leather, or the like, for holding and carrying goods of any kind, and, in absence of a showing of prejudice, an objection thereto first made on appeal came too late.

INSTRUCTION.

State v. *Tischler,* N. J., 119 Atl. 372. *Error to charge that verdict should be based on rules of logic and estimates of probability.*

In a prosecution for assault with intent carnally to abuse a female under the age of 16, where prosecutrix testified as to the circumstance of the

assault, which defendant denied, an instruction that, if state's witnesses were to be believed, the crime was made out, and, if the defense was believed, defendant is not guilty. "Who is telling the truth? Which is the more logical, the more probable story? That, after all, is the real question," and "within your province"—was harmful error, requiring reversal.

HUSBAND AND WIFE.

People v. *Graff,* Calif. D. C. A., 211 Pac. 829. *Wife can embezzle husband's property.*

Notwithstanding Pol. Code, Sec. 4468, which provides that the common law, so far as it is not repugnant to or inconsistent with the United States Constitution or the constitution or laws of this state, is the rule of decision in all courts of this state, and in view of Code Civ. Proc., Sec. 1881, providing that neither husband nor wife can be a witness against the other without consent, except for a crime committed by one against the other, Pen. Code, Secs. 26, 1322, providing that all persons are capable of committing crimes, except, inter alia, married women (except for felonies) acting under coercion of their husbands, and that neither is a competent witness against the other in a criminal action, except in case of a crime committed by one against the person or property of the other, "any person," "every person," and "a person" as used in Pen. Code, Secs. 470, 503, 506, 507, defining embezzlement and forgery to include, in substance, both husbands and wives, hence a motion to quash an indictment against a wife for embezzlement and forgery concerning the property of her husband was improperly granted.

"The question whether a wife may offend against the property of her husband through a commission of the crimes of embezzlement and forgery has never been passed upon, apparently, in any jurisdiction. Courts of last resort in several of the states have had before them, however, the question whether one spouse may commit larceny of the effects of the other, or may commit other crimes, notably arson, against the property of the other, with the result that the authorities upon the question are divided. In those cases in which it has been determined that the crimes mentioned may not be committed by one spouse against the other the courts have descanted upon the sanctity of the marriage relation as the foundation upon which a stable condition of society can alone exist. The view is taken that the peace of the home will be destroyed if husbands and wives may be charged with the commission of crimes against the property of each other, and it is said that it were better to permit the escape from punishment of a husband or wife who robs a spouse than to encourage the dissention which would enter a family if a criminal charge could be pressed against the thief. It is said in effect that the commission of such a theft would have a slight tendency to produce a warfare internecine to the family, while the pressure of a criminal charge because of the immoral act would tend to cause a disruption of the marital relation. We cannot adopt such a line of reasoning. We cannot believe that such events can be so smothered in the family circle that no ripple, or that but a slight ripple, will disturb the serenity of the home. A spouse will not lightly forgive a robbery committed against him by his marital partner, and a home in which one of the partners will steal the prop-

erty of the other cannot be regarded as one resting on a particularly solid foundation.

"In passing upon the question involved in this appeal we cannot but contemplate the effect upon society if our decision should be favorable to respondent. Such a termination of the cause would advertise to the world the fact that wives may rob their husbands with impunity, that they may commit against their husbands inherently immoral acts which if committed by them against others, or if committed by others against their husbands, would bring down condign punishment upon the offender under the laws denouncing the serious crimes of embezzlement and forgery. Such a conclusion on our part could not but encourage and multiply the commission of such acts, thus bringing into some households at least the very strife and dissension which it is the purpose of some of the decided cases to prevent, through arguments unconvincing, unsound, and illogical."

JURISDICTION.

United States v. *Bowman,* 43 Sup. Ct. Repr. 39. *Statute punishing false claims applied to vessels of U. S. on high seas or in foreign ports.*

Criminal Code, Sec. 35, as amended by Act Oct. 23, 1918 (Comp. St. Amn. Supp. 1919, Sec. 10199), making it an offense to present a false claim to the government, or any corporation in which the United States is a stockholder, etc., when construed with other sections of that chapter, is not limited to the land jurisdiction of the United States, but extends to such frauds when committed on vessels of the United States on the high seas. or in foreign ports, at least when committed by American citizens.

Notwithstanding the rule that criminal statutes are to be strictly construed, they must, like all other statutes, be fairly construed according to the legislative intent, as expressed in the enactment.

It is no offense to the dignity or right of sovereignty of a foreign country to hold American citizens for a crime against the United States government, to which they owe allegiance, committed on vessels of the United States in a port of such foreign country.

JURY.

People v. *Garcia,* Calif. D. C. A., 211 Pac. 58. *Application to membership in K. K. K. as disqualification to jurymen.*

In kidnapping prosecution, *held* that the fact that a deputy sheriff who summoned the jurors and certain jurors were applicants for membership in, or members of, an organization called the "K. K. K.," was not ground for challenge to the panel or individual members selected to compose the jury, where examination did not disclose that their action would be influenced by their obligation.

LARCENY.

State v. *Schoonover,* Wash., 211 Pac. 756. *Intoxicating liquor as subject of larceny.*

That intoxicating liquors are contraband under both state and national laws does not prevent them from being the subject of larceny, though National Prohibition Act, tit. 2, Sec. 25, provides that no property rights shall exist therein.

Testimony that intoxicating liquor, which the evidence showed had a ready sale and was in demand, had a market value in excess of the statutory requirement for grand larceny, together with the fact that accused considered it of sufficient value to justify its wrongful taking, *held* sufficient to make the offense grand larceny, though, being outlawed by both state and national laws, it had no value in the market overt for purposes of barter and sale.

PARENT AND CHILD.

State v. *Bell,* N. Car., 115 S. E. 190. *"Husband"; abandonment by father of children after divorce.*

Under C. S., Sec. 4447, providing that any husband who willfully abandons his wife without providing adequate support for her, and the children which he may have begotten upon her, is guilty of a misdemeanor, and in view of sections 4448-4450, a husband, from whom the wife has obtained an absolute divorce, is subject to prosecution for the abandonment of his children without providing adequate support for them.

Stacy and Walker, JJ., dissenting.

PAROLE.

Crook v. *Sanders, Sup't of State Penitentiary,* C. Car., 115 S. E. 760. *Good time allowance while on parole.*

The word "parole," when construed in accordance with its etymology, excludes the meaning of a suspended sentence, and implies that the prisoner on parole is still in custody, though released from the bounds of prison.

Where petitioner for habeas corpus to secure his release from custody after parole was revoked for misconduct, alleged that his time expired on the date it would have expired if he had been entitled to his credit for good behavior, thereby impliedly alleging he was entitled to such credit, and there was no showing his conduct was not good prior to the revocation of his parole five months after the expiration of his sentence, he is entitled to the credit for good behavior, so that his sentence had expired before the parole was revoked.

Gary, C. J., dissenting.

SEARCHES AND SEIZURES.

State v. *Myers,* Ida., 211 Pac. 438. *Recovery of and use of papers illegally seized.*

An application on behalf of a defendant in a criminal case to the trial court for the return of papers illegally seized creates a collateral issue, whether made prior to or at the time of the trial of the person against whom such papers are sought to be introduced as evidence. A proceeding for the recovery of such papers so taken is of a civil nature, and under our procedure is no part of a criminal action.

Evidence, if competent and relevant, is admissible, irrespective of the manner in which it was obtained. If a defendant in a criminal action is entitled to the possession of papers which have been illegally seized and are about to be used as evidence against him, he must seek his remedy in an independent proceeding.

McCarthy, Dunn and Lee, JJ., dissenting.

SUNDAY LAW.

Pirkey Bros. v. *Commonwealth,* Va., 114 S. E. 764. *"Necessities."*

The Sunday law (Code 1919, Sec. 4570) should be construed in the light of the age in which we live, recognizing that there are things which the community regard as necessary that were not "necessities" when the statute was first enacted, and that, to escape the penalty pronounced by the statute, the labor performed must be of the class excepted thereby or recognized by the community as a necessity, and what is or is not a necessity is generally a question for the jury in criminal prosecutions.

In a prosecution for violating the Sunday law (Code 1919, Sec. 4570), by keeping open on Sunday a certain cave or grotto, charging admission fees to tourists, and keeping the cave lighted up by electricity for the occasion, a verdict of guilty will not be disturbed, since the question of whether the work done was one of necessity in view of modern conditions of life was for the jury, as one whereon reasonably fair-minded men might draw different conclusions.

TRIAL.

Moore v. *State,* Ga., 115 S. E. 25. *Absence of judge from court room during trial.*

Where during the trial of a capital case the presiding judge leaves the court room, even for a few minutes, during the prosecuting attorney's argument to the jury, without suspending the trial, and at the conclusion of that argument the defendant's counsel makes a motion for a mistrial because of such absence, the motion should be granted.

TRIAL.

State v. *Johnson,* Wash., 210 Pac. 774. *Inadvertent separation of jury.*

Where, during the trial for forgery, the jury was taken from the jury room in charge of two bailiffs to witness a demonstration on the street, but by error one juror was left in the jury room, which was locked, during which time he did not see nor talk with anyone, *held* not such a separation of the jury as to constitute error to the prejudice of accused.