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JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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ATTEMPTS.

State v. *Stutzner,* La., 95 So. 701. *Attempted subornation of perjury no offense.*

The principal case held that it was no offense to attempt to procure a witness to swear falsely in a criminal prosecution although a statute (Sec. 857, Rev. Sts.) made it a felony to commit or to procure the commission of perjury. Said the court: "The statute does not denounce an *attempt* to procure a person to commit perjury, therefore, however reprehensible it is, an attempt at subornation is not made a crime."

By the common law every attempt to commit a felony, whether it be a common law crime or by statute, is a misdemeanor (Clark, Cr. Law, 3rd ed., 139). This, of course, would not necessarily be the rule in Louisiana, where the civil law obtains, nor does there appear to be any general statutory provision in the state making an attempt an independent crime.

HOMICIDE.

Stroud v. *State,* Miss., 95 So. 738. *Conditional threat to kill not assault with intent to commit murder.*

In the principal case the defendant drew his pistol, cocked it, pointed it at the head of Sanders and said with an oath that unless he (Sanders) signed certain papers he would kill him. Acting under this threat, S signed the papers. Held, that the facts did not support a charge of assault with intent to commit murder for the intent to kill had never yet come into existence and might never do so and would only in the event of S not signing. "Nevertheless, the rule is well settled that it is the conditional threat, whether such condition is right or wrong, that relieves the assaulter of the intent to kill and murder."

INFORMATION.

State v. *McDaniels,* N. D., 192 N. W. 974. *When necessary to negative in an information an exception in a crimenal statute.*

The statute in question prohibited the manufacture or sale of intoxicating liquors but contained a proviso excepting the manufacture or sale of liquors when permitted by Federal statute. The information in the instant case charged the offense without negativing the exception made in the statute. Held, that the information need not negative the exception, for the exception in no way tended to define or qualify the substantive crime, hence, strictly speaking, formed no part of the state's case, but was purely a matter to be raised by way of defense.

The case is right and is perfectly consistent with the rule in civil cases requiring the plaintiff in an action founded upon a statute to strictly bring himself within the statutory requirements by negativing the existence of any

facts mentioned in the statute which go to the substance of the right itself as distinguished from a matter of limitation which need not be negatived in the complaint. (See *Baker* v. *H. J. R. R. Co.,* 91 Mo. 86, *Sharrow* v. *Inland Lines,* L. R. A., 1915, E. 1192 Ann., for collection of cases.)

INTOXICATING LIQUORS.

Cooke v. *Commonwealth,* Ky., 250 S. W. 802. *Testimony of officers purchasing liquor admissable.*

Officers who purchase intoxicating liquor, not for the purpose of inducing the commission of a crime, but only to detect the existence of the unlawful traffic, do not participate in the offense so as to make them particeps criminis; and their testimony is not thereby brought under the rule as to accomplices. It has been suggested that the explanation is that the officer decoy is not an accomplice at all because of the lack on his part of the intent to commit crime, the intent being negatived by the purpose of detection. But quaere whether in a case of extreme zeal on the part of the officer this may not be more a a question of motive, leaving the requisite intent intact, especially in the case of purely statutory and regulatory measures. It seems quite clear that the element of public policy in the detection of crime enters.

Even if the officer were an accomplice, a conviction founded upon his testimony would be good at common law and it would be discretionary with the court, in the absence of statute, whether the jury should be cautioned against convicting upon the uncorroborated evidence of an accomplice; a failure so to caution has been held not to be error. *Smith* v. *S.,* 37 Ala. 472; *State* v. *Litchfield,* 57 Me. 267.

State v. *Clark,* Minn., 192 N. W. .... *Evidence; evidence of sales subsequent to one charged admissable.*

Defendant was accused of selling intoxicating liquors on March 18, 1922, and the court admitted evidence of subsequent sales as late as July 8th under the rule allowing evidence of similar acts or crimes to show a system or plan. That evidence of similar bad acts or crimes is admissable for such a purpose is well settled although when so admitted it should clearly appear, as pointed out by Wigmore in his Evidence, that there is an element in addition to that when other bad acts are admitted to show intent, namely, a general scheme or plan of which the acts in question are but manifestations.

People v. *England,* Mich., 192 N. W. 612. *Sale to a police decoy no defense.*

The defendant sold liquor to a police decoy who made repeated inducements and assurances that it could be safely done. Held, that the inducements and assurances of the officer constituted no defense. The doctrine of the case is clearly sound. Wrong as it may seem to our moral sense for officers to actively instigate and procure the commission of crime in order to secure convictions, nevertheless, unless the acts of procurement have gone so far as to negative on the defendant's part either the essential mental element of the crime or the act itself (as, for example, where the acts of inducement actually amount to consent in larceny cases), they can constitute no legal defense. Accord *People* v. *Murphy,* 93 Mich. 41, 52 N. W. 1042.

TRIAL.

Cornwell v. *State,* Ohio, 140 N. E. 363. *New trial awarded for disagreement of defendant's counsel in conducting defense.*

Where counsel employed by defendant and counsel appointed by the state to assist in his defense were unable to agree as to the line of defense to be adopted, and engaged in continuous wrangling in the presence of th jury, each charging the other with withholding information, and each giving contradictory advice to the client, held, that a new trial will be awarded.

State v. *Rasmussen,* Wash., 215 Pac. 332. *Effect of allowing jury to separate without defendant's consent.*

Where, in a felony prosecution, the jury was allowed to separate for an entire week during adjournment without defendant's consent, that defendant failed to object at the time of the separation, did not avoid the prejudicial effect thereof, since it was the plain mandatory duty of the court to keep the jury together, unless consent to their separaion was plainly evidenced in an affirmative manner.

People v. *Zwela,* Calif., 215 Pac. 907. *Failure to impose sentence within prescribed time.*

Failure to impose sentence within the time prescribed by Pen. Code, Sec. 1191, held an error of procedure merely, not resulting in a miscarriage of justice within Const., Art. 6, Sec. 4½, so as to warrant reversal for purpose fo having new trial under Pen. Cod, Sec. 1202.

FORMER JEOPARDY.

Collins v. *Loisel,* 43 Sup. Ct. Rep. 618. *Preliminary examination does not constitute jeopardy.*

The constitutional provision in the Fifth Amendment against double jeopardy cannot apply, unless a prisoner has theretofore been placed on trial, and the preliminary examination of one arrested on suspicion is not a trial, so that his discharge under a warrant of arrest for extradition does not bar a subsequent arrest on new papers for the same offense.

The precise question appears not to have been passed upon by this court in any case involving international extradition.

HOMICIDE.

State v. *Habig,* Ohio, 140 N. E. 195. *When homicide "committed in perpetrating robbery."*

Where several persons have jointly committed the crime of robbery of several victims and have taken from one or more of them property of value and are fleeing from the scene of the robbery and immediately thereafter one of the victims runs a short distance in the opposite direction and notifies policeman of the crime and the direction in which the robbers are fleeing, and the policemen pursue the robbers and intercept them within a few minutes thereafter, and when the robbers have proceeded in their flight a distance of not more than five city squares and while they are still in flight carrying the proceeds of the robbery which had not yet been divided among them and the robbers refuse to surrender and one of their number shoots a policeman and inflicts injuries result-

ing in his death, such homicide is committed in perpetrating a robbery. *Conrad* v. *State,* 75 Ohio St. 52, 78 N. E. 957, 6 L. R. A. (N. S.) 1154, 8 Ann. Cas. 966, approved and followed.

LARCENY.

P. v. *Otis,* N. Y., 139 N. E. 562. *Liquor unlawfully possessed as subject of larceny.*

National Prohibition Act, tit. 2, Sec. 25 et seq., must be construed as a whole in the light of the general object, and, though it is declared that "no property rights shall exist," in liquor illegally possessed, a conviction for larceny of liquor illegally possessed will be sustained, since the value of the chattel to its possessor is not the test as to whether it is subject to larceny.

CONSTITUTIONAL LAW.

Cunard S. S. Co., et al. v. *Mellon,* 43 Sup. Ct. Repr. 504. *Intoxicating liquors. Territory subject to 18th Amendment.*

Const. Amend. 18, prohibiting the transportation of intoxicating liquor within or the importation thereof into the United States and territory subject to its jurisdiction, uses the word "territory" as meaning the regional areas of land and adjacent waters over which the United States claims and exercises dominion and control as a sovereign power.

The territory subject to the jurisdiction of the United States includes the land areas under its dominion and control, the ports, harbors, bays, and other inclosed arms of the sea along the coast, and a marginal belt of the sea extending from the coast line outward a marine league or three geographical miles, and all of this territory constitutes the field of operation of the Eighteenth Amendment.

The Prohibition Amendment covers, and is confined to, the physical territory of the United States, and does not apply to domestic merchant ships outside the waters of the United States, whether on the high seas or in foreign waters, but does apply to foreign merchant ships when within the territorial waters of the United States.

Mr. Justice Sutherland and Mr. Justice McReynolds, dissenting.

EVIDENCE.

State v. *Chuchola,* Dela., 120 Atl. 212. *Intoxicating liquor may be used in evidence though illegally seized.*

Though property taken illegally from a person suspected of crime should be returned on proper proceedings, even though it would be competent evidence against him, under 29 Del. Laws, c. 10, sec. 2, providing that the possession of intoxicating liquor constitutes the crime, intoxicating liquor is not property, and, though illegally seized, may be used in evidence without violating any constitutional provision.

Rodney, J., dissenting.

State v. *Dena,* N. Mex., 214 Pac. 583. *Whether confession voluntary.*

Where it affirmatively appears from the state's evidence that the accused, being Indians, unable to speak the English language, asked the deputy sheriff who then had them under arrest and in his custody if they would be hurt if they

confessed, that such officer assured them they would not be hurt, and that it would be better for them to tell the truth, such confessions made immediately thereafter are not admissible.

HOMICIDE.

Commonwealth v. *Newson,* Pa., 120 Atl. 707. *Statements indicative of infidelity by a mistress not provocation.*

Where defendant disarmed and shot a woman with whom he had been living when she refused to return to him, after statements by her that she did not want him, but only his money, that she had not been true to him, and had tried to dope him, refusal to give an instruction based on the words used by deceased as raising a reasonable doubt whether defendant acted with deliberation *held* proper.

INDICTMENT.

State v. *Mitchell,* Idaho, 214 Pac. 217. *Indictment charging taking of "currency" sustained by proof of taking silver coin.*

A charge of robbery by feloniously taking from one's person "currency" of a certain value is sustained by proof of the felonious taking of silver coin.

INSANITY.

McHargue v. *State,* Ind., 13 N. E. 316. *Instruction that insanity not inferable from certain facts held erroneous as invading the province of jury.*

An instruction that "the jury is not warranted in inferring that a man is insane from the mere fact of his committing a crime, or from the enormity of the crime, or from the mere apparent absence of motive for it," held errnoeous under Const. art. 1, sec. 19 (Burns' Ann. St., 1914, sec. 64), as invading the province of the jury, who had a right to decide what inferences they will draw from the facts proved.

Commonwealth v. *Bryson,* Pa., 120 Atl. 552. *Court's comment on medical theories of insanity held not belittling physician's testimony.*

In a murder prosecution, the court's remarks that, to determine the existence of insanity, the law applies the right and wrong test, "one which men can understand, not the refinement or distinctions of medical science," held not reversible error as belittling the testimony of physicians, being adequately corrected by a subsequent instruction to carefully consider the expert testimony of the doctors on both sides.

TRIAL.

State v. *Newman,* Mont., 213 Pac. 805.

In a trial for rape defendant objected to the competency of the prosecutrix on the ground that she was his common law wife. The trial judge overruled the objection, remarking: "we will presume she is not."

Held properly convicted, since defendant could not prevent the witness testifying by merely asserting incompetency, without proving it.

Galen, J., dissented.

People v. *Krakowski,* Ill., 139 N. E. 399. *Presence of accused when verdict returned presumed under facts.*

Where the common-law record showed that accused was present during the trial, but did not affirmatively show that he was present when the verdict was received before a judge other than the one who presided at the trial, held, in view of the fact that the whole proceeding was completed within two successive days, the presence of the accused when the verdict was returned might be fairly implied.

Tillery v. *State,* Okla., 214 Pac. 198. *Placing part of jury in one room and part in another, in charge of different bailiffs, not failure to keep jury together.*

Where, after the law and the evidence were finally submitted to the jury, and the jury placed in charge of two bailiffs, who were admonished to keep the jury together, the bailiffs took the jury to a hotel for the purpose of procuring lodging for the night, and seven of the jurors were placed in one room in charge of one of the bailiffs, and five in another room in charge of the other bailiff, this constitutes no substantial deviation from the court's order.

State v. *Seidel,* Kans., 214 Pac. 565. *Correcting verdict for mistake of law.*

When various forms of verdict in a criminal case are submitted to a jury, and by mistake they enter a verdict on one of these forms which apparently found the defendant guilty of a misdemeanor when it was obvious that, if the jury were honest men, they must have intended to find him guilty of a felony, it was not prejudicial error for the trial court to make reasonable comment and inquiry concerning the verdict; and, when such comment and inquiry of the court elicited responses from the jury that they had written their verdict on the wrong form and that they did not intend to convict defendant of a misdemeanor only, it was not error to send the jury back to reconsider and correct their verdict; and, when the jury retired and later returned a verdict of guilty of a felony as charged in the information, it was not error to receive and enter such corrected verdict and to render judgment thereon.

ESCAPE.

State v. *Cahill,* Iowa, 194 N. W. 191. *Sanitary conditions of cell where prisoner is kept in solitary confinement no justification for escape.*

Prisoner was placed in solitary confinement for violation of prison rules against fighting, was furnished an inadequate quantity of bread to eat, "and was kept in a cell infested with bugs, worms and vermin, without a chair or bed, with a toilet so out of repair (the evidence was conflicting on this point) that when it was flushed the water ran out on the floor." Prisoner was suffering from lung trouble, which made such conditions the more unhealthful.

Defendant left his cell, and in a prosecution under the Iowa statute for escaping, held that such conditions did not violate the constitutional provision against cruel and unusual punishment, and did not constitute a defense.

State v. *Cahill* (supra). *When offense is completed.*

Prisoner left his cell and was apprehended on the top of the penitentiary wall, but before he had left the enclosure. Held, under the Iowa statute providing "if any person committed to the penitentiary . . . shall break such prison

and escape therefrom, or shall escape from or leave without due authority any building, camp, farm, garden, city, town, road, street, or any place whatsoever in which he is placed," etc. the offense was completed the moment that person opened the door of his cell and went to another part of the prison. It was proper, therefore, to charge the completed offense and not merely an "attempt."

The decision is clearly justified under the wording of the statute and, while, perhaps, an unusually severe one, is nevertheless a disciplinary measure and well within the power of the legislature.

EXTRADITION.

Gaines v. *State,* Texas, 251 S. W. 245. *Extradition not involved where the Federal Government arrests a person in one state and brings him to another.*

Prisoner robbed a postoffice and murdered an employee in Dallas, Texas. He was arrested in Indiana by the U. S. Government, and brought to Texas for trial for the robbery, where he was arrested by state officers and charged with the murder.

He contests the jurisdiction of the Texas court and relies on the rule that a person extradited from one jurisdiction to another for one crime cannot be tried for a different crime.

The court, while admitting that this is the rule where the government extradites a criminal from a foreign country (citing *Dominguez* v. *State,* 234 S. W. 79, and *Blandford* v. *State,* 10 Texas App. 640), says by way of dictum that the rule does not apply in the transfer of offenders from one state to another. The actual ground of decision, however, is that under the facts no extradition was involved for, when arrested, the prisoner was within the jurisdition of the U. S. and, with that jurisdiction still continuing, was brought into the state of Texas. Once in the state of Texas, it was optional with the Federal Government whether he should be given over to state authorities, but having been given over he is in no position to complain.

INDICTMENT.

Meredith v. *Commonwealth,* Kent., 252 S. W. 894. *Erroneous naming of offense does not invalidate.*

A grand jury indictment charged the defendant with the offense of "unlawfully operating an illicit or moonshine still," but in the body of the indictment the offense was described as "manufacturing and attempting to manufacture spirituous liquors." The statute under which the indictment was found (Sec. 3, Chap. 33, Acts Gen. Assembly, 1922), made unlawful the manufacturing of intoxicating liquor, but nowhere did it in express terms make unlawful the mere operation of a still. Upon a demurrer, (1) that the indictment charged no offense under the statute, (2) that the acts named in the descriptive part did not constitute the offense named in the accusatory part; it was held that the erroneous naming of the offense was not fatal where the descriptive part was sufficient to identify it as the one intended to be charged and where the indictment as a whole states the charge with sufficient clearness and certainty to enable a person of common understanding to know what he is charged with. The court quotes with approval from *Overstreet* v. *Com.,* 147 Ky. 471, "and so if the indictment is to be judged by strict standards of criminal pleading, the

demurrer should have been sustained because under exact rules of pleading, the identical offense charged should be described both in the accusative and descrptive parts; and the indictment that designated in the accusative part one offense and described another in the body would be demurrable. But the strict and technical rules of criminal pleading that prevailed at common law and for many years in this state have been superseded by the more just and sensible practice that declines to be controlled by unimportant and unsubstantial forms that serve to delay and obstruct the administration of the criminal law without protecting the accused if any right guaranteed to him by either the common law or the constitution or statutes of the state."

PROSTITUTION.

Ex Parte Cannon, Texas, 250 S. W. 429. *Constitutionality of penal ordinance prohibiting riding and walking with or visiting prostitutes.*

The ordinance in question made it unlawful for any man to ride with or to walk along the street, or to be together in public with a prostitute, or to be found with a woman in a house of prostitution. Upon application for habeas corpus, held, that the ordinance violated both the Federal and state constitutions guaranteeing right to life, liberty and property.

The obvious purpose of the ordinance is wholesome, but its terms are too broad and many of its sections make penal acts and persons which and who by no construction could be held to be crimes or criminals.

ROBBERY.

Karnes v. *State,* Ark., 252 S. W. 1. *Abandonment of project as defense to one accused as accessory.*

Defendant and Dill made a plan to rob one Black while Black was driving a load of cotton between a certain town and his home.

Dill was to actually accompany Black and do the robbing, while it was arranged that afterwards he was to meet the defendant at an appointed place. The plan to rob entirely miscarried on the day set, but was subsequently committed at another place and under different circumstances. Defendant never met Dill at the appointed place, and testified that he had entirely abandoned the project.

Held: There was not sufficient evidence justifying an instruction on abandonment as a defense, McCollough, C.J., dissenting.

The decision is rested upon two main grounds: (1) That mere mental determination to abandon a project, without being communicated to the principal before commission of the crime is not a defense (which is obviously sound). (2) Fact that crime was committed at a different time, place, and in a different manner from that counselled is no defense. This is obviously sound where the conspiracy centemplates the ultimate commission of the crime, the means, date, and manner of commission being a mere detail.

As a general rule, however, withdrawal may be evidenced by acts as well as words when the acts are of such a nature as to show to his confederates that he disapproves or opposes the contempated crime. 16 C. J., pp 133-134.

Conceivably defendant's failure to meet his confederate at the place appointed (which was before the robbery actually took place) might be such an

act; at any rate it would seem that the defendant was entitled to an instruction, as the chief justice indicates in his dissenting opinion.

VENUE.

State v. *Brown,* Minn., 193 N. W. 169. *C. O. D. sale of intoxicating liquor.*

The syllabus to the case states that where an order for liquor was taken in Warren, Marshall County, by a firm doing business in Minneapolis, and the liquor shipped to consignee, there was a sale at point of delivery. Taken alone, such a statement is misleading and had the court meant a "sale" in the ordinary legal meaning would be wrong on principle and contra to the great weight of authority.

In a previous consideration of the case on appeal (186 N. W. 946), the point was raised that the sale took place in Minneapolis and the court admitted the general rule under the Sales Act that title in such cases passed when goods answering to the description were delivered to the carrier. But the court went on to say that the rule has no application to present facts, because intoxicating liquors cannot be sold. "This was not a sale of goods that could be lawfully sold. It requires a contract to pass title before actual delivery. There was no contract in this case. The transaction was void at every step." Such an argument would ordinarily defeat itself, for, if true, there could never be accomplished that which the statute has forbidden. This argument was mere dictum, for the court expressly refused to pass upon the question whether there had been a violation of the law either at Minneapolis or any other part prior to their delivery at Warren, and placed its decision upon the ground that there was a "furnishing" of the goods at Warren within the language of the statute (Ch. 455, Laws of 1919)). "The terms sale and sell shall include all barters, gifts and all means of furnishing liquor in violation or evasion of the law."