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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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ARREST.

People v. *Preuss,* Mich., 195 N. W. 684. *Arrest and seizure made by misuse of search warrant not justified on theory of offense committed in officer's presence.*

The court having taken the position (see same case under Searches and Seizures) that intoxicating liquor seized on defendant's premises by an officer conducting a search under a warrant authorizing search for certain stolen beans was inadmissible as evidence in a prosecution for unlawful possession of intoxicating liquor, the prosecution contended that the arrest could be justified on the theory that the officer being lawfully in the building to search for the beans could arrest for, and seize evidence of, an offense being committed in his presence. Held, the contention was untenable.

The court distinguishes this type of case where the officer's entry is originally by virtue of a warrant with a mandate to search only for evidence of crime A, in which case evidence of a totally different offense, B, may not be seized, and the case where the officer's original entry is authorized not by a warrant, but by his duty to arrest for crime A actually being committed in his presence, in which case, being lawfully on the premises he may arrest for and seize evidence of crime B. In the former case to allow the arrest for, and seizure of evidence of crime B would violate the constitutional prohibition against unreasonable searches and seizures while in the latter case no such right is violated. The court cites as illustrative of this latter type of case *People* v. *Woodward,* Mich., 190 N. W. 721, where officers entered a residence to quell a noisy brawl amounting to a disturbance of the peace, held that the arrest of inmates of the house for violation of the prohibition laws and seizure of intoxicating liquor in the house as evidence were justifiable.

BREACH OF THE PEACE.

State v. *Steger,* W. Va., 119 S. E. 682. *Mere use of abusive, profane and insulting language not a common law breach of the peace.*

Buchner and his two boys were passing defendant's house near a public highway, the defendant claiming that they were trespassing on his property. He then called to them in a loud voice and in an insulting manner: "Get up on the road you God damned thieving son of a bitch." No one except Buchner and his two boys were within hearing distance. Held, there were insufficient facts to constitute the common law offense of breach of the peace.

The decision, while recognizing that the use of insulting, profane and provocative words under other circumstances might amount to the common law offense, rested its decision in the principal case upon the grounds: (1) that the words used involved no threat of violence on the part of the speaker nor were they under the circumstances (defendant was some distance away from B

when he called to him and B made no effort to retaliate) provocative of any immediate affray; (2) the public peace was not disturbed since no one except the three persons heard the language. The authorities cited by the court sustain in general the position taken. (See in addition, language of the text in 9 C. J., p. 338, and for a partial collection of the cases see note to *People* v. *Johnson,* 13 L. R. A. 163.)

Statutes and ordinances have been enacted in some states and municipalities extending the scope of the common law offense and making penal the uttering of profane, obscene or insulting language under circumstances that would fall short of the common law offense. For example, the Georgia statute makes the use of profane language without provocation in the presence of a female a misdemeanor. (*Foster* v. *State,* 43 S. E. 436.) A New Hampshire statute (Pub. St. C. 264, par. 2) made it unlawful "to address any offensive, derisive or annoying words to any other person who is lawfully in any street or other public place." (*State* v. *McConnel,* 70 N. H. 294.) A Connecticut statute made it unlawful for any person to break the peace "by following or mocking any person with scurrilous or abusive or indecent language or gestures." An Arkansas statute (Mansf. Dig. 1880) made it an offense "to profanely swear and curse." Held, in *Bodenhamer* v. *State* (28 S. W. 507) upon demurrer brought to an indictment under this statute, that in order to constitute the offense it was unnecessary that the language be used publicly. Calling a man "a damned fool and a bastard" was held to constitute an offense under sec 22 of a municipal ordinance of the City of Topeka enacting that if any person "shall disturb the quiet of the city, he shall be punished, etc." (*City of Topeka* v. *Heitman,* 28 Pac. 1096.)

In *ex parte Delaney* (43 Cal. 478) (1872) petitioner had been convicted under a municipal ordinance of the City of San Francisco prohibiting "the utterance of profane language, words or epithets in the hearing of two or more persons." On application for habeas corpus he contended, inter alia, that since profane swearing was indictable at common law and since there was a California statute making "every act or offense not defined by statute which is a misdemeanor at common law is a misdemeanor in this state," that it was, therefore, not competent for the Board of Supervisors of the city, under any authority given them by law to reduce or in any manner change the penalty which the statute has declared upon a conviction of a common law misdemeanor. The court disposed of this contention by holding that the acts complained of were not indictable at common law. "The words charged to have been uttered by the petitioner . . . were not blasphemous within the definition given nor within any definition which we have seen, nor do they appear to have been uttered under such circumstances as to constitute a case of public profane swearing."

BRIBERY.

Scott v. *State,* Ohio, 141 N. E. 19. *"Valuable thing" within bribery statute.*

Surrender of virtue by a woman in return for police protection in illicit traffic in intoxicating liquors held a "valuable thing" within bribery statute.

Under section 12823, General Code, "whoever, being . . . a state or other officer beneficial thing to influence him with respect to his official duty," is guilty of a felony. A substantial favor asked by a public official in return for

the official's promise to give protection in illicit traffic in intoxicating liquors is a "valuable thing" within the meaning of the statute.

CONSPIRACY.

United States v. *Walter,* 44 Sup. Ct. Repr. 10. *Constitutionality of statute forbidding conspiracy to defraud a corporation in which the United States holds stock.*

Act Oct. 23, 1918, amending Criminal Code, Sec. 35 (Comp. St. Ann. Supp., 1919, Sec. 10199), making it an offense to present or obtain payment of a fraudulent claim against any corporation in which the United States is a stockholder, is constitutional, as it refers only to corporations like the United States Emergency Fleet Corporation, that are instrumentalities of the government.

ESCAPE.

Wiggins v. *State,* Ind., 141 N. E. 56. *Criminal intent.*

Evidence of a departure from the state farm under permission of an officer, who had no authority to grant such permission, with an alleged intent to return, *held* sufficient to sustain a conviction under Acts 1915, c. 101, Sec. 1 (Burns' Ann. St. Supp., 1921, Sec. 2406a), providing "that any person sentenced to the Indiana state farm, who shall escape therefrom, . . . shall be deemed guilty of a felony. . . ."

Criminal is not an essential element of this offense.

EVIDENCE.

Maddox v. *State,* Texas, 254 S. W. 800. *Evidence of experiment made day after the killing admissable.*

Defendant was on trial for murder. The state offered testimony of one Birch, who had seen deceased's body lying in defendant's yard shortly after the killing, to the effect that on the day following the killing he and one Wakefield went to the place, that he had Wakefield stand at the place where the body lay and that he, Birch, went inside the house, took a gun and pointed it toward Wakefield and sighted through a certain hole in the wall along the gun barrel and from such a position it could be aimed at a point on Wakefield's breast and shoulder similar to the one on the body of deceased penetrated by the buckshot.

Held, the evidence was admissible. Assuming the similarity of the conditions of the experiment to the ultimate fact which the state wished to prove, viz.: that defendant shot deceased from his own house, the case is correct.

Experiments made before the jury in open court, are commonly admitted. See Wigmore, Evidence, Sec. 1160, for discussion and illustrative cases. In the principal case, however, the experiment was not made in open court or before the jury, but by a witness outside of court who now merely relates the result of his experiment: On principle, however, assuming the similarity of the conditions of the experiment, and the qualification of the witness, it should be none the less admissible. Wigmore's Evidence, Sec. 45. *State* v. *Nagle,* 54 Atl. 1063 (R. I.), where it was held, in a case where it became necessary to determine from the nature of a powder burn around the wound the position in which the revolver was held when fired, that an expert on gunshot wounds could testify

as to experiments he had made with 32 calibre revolvers to determine the nature of the powder burn produced by them.

The possible objection to the admissibility of such evidence (which, however, was not made in the principal case, viz.: that it is ex parte testimony and that no notice is given to the defense that the experiment was to be conducted and hence no opportunity for cross examination, is clearly without merit. Wigmore, Sec. 1385, sub. 3. For the experiment itself is not testimony, "it is nothing until adopted by a competent witness as a part of his testimony and a mode of communication," and at that time, of course, full opportunity for cross examination is afforded.

State v. *Royall,* W. Va., 119 S. E. 801. *Proof by the records of former conviction essential where made the basis for an additional penalty.*

Where defendant is indicted under a statute imposing a greater penalty for a "second" violation of the prohibition law, the former conviction must be proved by the introduction of the record and it is reversible error to allow the clerk and the judge of the circuit who presided at the former trial to testify as to that fact.

HOMICIDE.

Moore v. *State,* Okla., 218 Pac. 1102. *Defense of relative: withdrawal.*

If one enters a conflict to defend a relative and afterwards abandons his plan to defend such relative and himself withdraws in good faith from such conflict and is thereafter pursued, his right to defend himself from the latter attack is complete, although the relative to whose aid he first entered the conflict has not withdrawn therefrom.

People v. *Creasy, N. Y.,* 140 N. E. 563. *Permitting evidence to remain with jury after its falsity is known to district attorney.*

In a prosecution for murder where a letter had been introduced in evidence on testimony that it was in the handwriting of deceased, and thereafter a witness was permitted to testify to the contents of a post card which she had seen and which she claimed was in the same handwriting as the letter, which testimony was substantially the only evidence that deceased broke her engagement with defendant, which was claimed as the motive for the crime, it was error requiring reversal for the district attorney to permit that evidence to remain in the record after he had conclusive knowledge that the letter was not written by deceased.

Pound and Crane, JJ., dissenting.

INSANITY.

Travis v. *State,* Ark., 254 S. W. 464. *Legal Tests for Insanity. Mental disease making one incapable of choosing between right and wrong, a defense.*

Defendant who was prosecuted for murder, interposed the defense of insanity. The trial court in purporting to define the legal tests of insanity gave two tests joined by the conjunction "and," thus instructing in effect that before the defendant could be excused it must appear not only that she was in such a condition when the deed was committed as not to know the consequences of the act, but also that she did not know right from wrong. Such instruction was

held to be erroneous, for it ignores the legal test that even assuming the defendant knew the nature and quality of the act and that it was wrong, but was under such duress of mental disease as to be incapable of choosing between right and wrong, there should be an acquittal.

JUDGMENT.

State, ex rel. Reid v. *District Court,* Mont., 218 Pac. 558. *Power of trial court to modify judgment.*

Though a court may amend a judgment to express what was actually decided, it cannot set aside or modify it, so as to change rights fixed by it, except on motion for new trial; it being necessary to seek the appellate court for other relief from the judgment.

An order of the trial court, made eight days after final judgment of sentence was pronounced, and in process of execution, attempting, under Rev. Codes, 1921, Sec. 12078, to suspend and reduce punishment, *held* void, as having been made in excess of court's jurisdiction, and as an attempt to exercise power which Const., Art. 7, Sec. 9, reposed in the governor and the board of pardons.

SEARCHES AND SEIZURES.

People v. *Preuss,* Mich., 195 N. W. 684. *Warrant authorizing search for and seizure of beans does not authorize seizure of unlawfully possessed liquor.*

Where a sheriff went upon the defendant's premises with a warrant authorizing search for and seizure if found, of certain stolen beans and while upon the premises discovered in one of the defendant's bedrooms a quantity of moonshine whisky which he seized, at the same time arresting the defendant for unlawful possession of liquor, held that the officer in thus seizing the liquor was a trespasser, the arrest for the unlawful possession was unjustifiable and the liquor seized inadmissible as evidence in a prosecution for the unlawful possession thereof.

That an officer exceeding the limit of the mandate of the warrant under which he acts either as to the place to be searched or thing to be seized becomes a trespasser is well established (2 R. C. L. 709, 24 R. C. L. 714, cited by the court). As to the admissibility, however, of evidence illegally obtained there is conflict of authority. (On this latter point see note on the recent case of *Giles* v. *United States,* 284 Fed. 208, in vol. 14, No. 1, American Journal Criminal Law, page 123.)