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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

BIGAMY.

Biddy v. *State,* Texas, 256 S. W. 271. *Effect of remarriage within a year after a decree of divorce providing that neither party shall remarry within a year except to each other.*

The facts of the case are interesting. On Jan. 6, 1923, the defendant was granted a divorce from wife No. 1, it being provided in the divorce decree that neither party should remarry within a year except to each other. On Jan. 20, 1923, the defendant married wife No. 2. On Jan. 29 of the same year he married wife No. 3. On March 13 wife No. 2 was granted an annulment of her marriage on grounds of defendant's marriage within a year from the divorce of his first wife. The defendant is now indicted for bigamy and his defense is that under the decree of divorce from the first wife he could not, on Jan. 20, legally marry wife No. 2, and since he was already divorced from wife No. 1, his marriage to wife No. 3 was not bigamous.

The defense is clearly without merit, for (1) it is clearly no defense to the crime that the second marriage is either defective, voidable or void "for because of the first marriage the second marriage is always necessarily void" (Clark Criminal Law, 3rd Ed. 407), consequently the offense of bigamy would have been complete at the time defendant married the second time unless the decree of divorce would be a defense and (2) a second "attempted" marriage within the time prohibited by the divorce decree is bigamous (*People* v. *Faber,* 92 N. Y. 146; *Baker* v. *People, 2* Hill (N. Y.) 325; *Com.* v. *Putnam,* 1 Pick. (Mass.) 136). Such a decree of divorce does not offer the protection to a charge of bigamy that a final decree a vinculo matrimonii does, by the terms of most, if not all, of the bigamy statutes.

It would seem, therefore, that either of the last two marriages alone would have completed the crime of bigamy both being within the year from the divorce. Certainly there is no defense in doing two acts either one of which alone would constitute the crime.

COERCION.

Dressler v. *State,* Ind., 141 N. E. 801. *Offense by wife in presence of husband.*

The wife being under the protection, influence and authority of the husband, it is rebuttable presumption that when she commits an offense in his presence she acts under his direction and compulsion, so that, if accused wife in her husband's presence assisted him in possessing a still in violation of law (Burns' Ann. St. Supp. 1921, Sec. 8356d; Acts 1921, c. 250, Sec. 1, amending Acts 1917, c. 4, Sec. 4), she was excused from punishment in the absence of evidence rebutting the presumption.

In a prosecution for possessing a still for manufacturing liquor in violation of Burns' Ann. St. Supp. 1921, Sec. 8356d, Acts 1921, c. 250, Sec. 1, amending Acts 1917, c. 4, Sec. 4, presumption that accused wife in committing the offense.

in his presence, if any, acted under the directions of her husband held not rebutted.

Ewbank, C. J., and Gause, J., dissenting in part.

CONSTITUTIONAL LAW.

Ex parte Campbell, Calif., 221 Pac. 952. *Freedom of speech.*

Ordinance No. 813, Sec. 4, City of Eureka, prohibiting printing or distribution of membership cards or literature of I. W. W., held to violate Const. Art. 1, Sec. 9, guaranteeing freedom of speech.

If it may be assumed that principles of the I. W. W. have been pernicious, there is no presumption that they will always remain so, or that the organization has not so changed as to make the principles accord with rights guaranteed by Constitutions to all citizens.

EVIDENCE.

Shell v. *Commonwealth,* Kentucky, 255 S. W. 516. *Dying Declaration; admissibility not affected by a subsequent temporary revival of the declarant.*

Deceased on the day following the making of the declaration offered in evidence was taken to a hospital and while there expressed the belief that he would recover. Held, that such a temporary revival and expression of hope of recovery did not affect the competency of a former dying declaration made under the conditions required by law. The case is obviously sound since it is the subjective state of mind of the declarant at the time of making the declaration that governs its admissibility as an exception to the hearsay rule. Accordingly, it has been uniformly held that the actual period of survival after making the declaration cannot per se exclude it. (See Wigmore Evidence 1441 for text and collection of cases.)

GAMBLING.

Johnson v. *Commonwealth,* Kentucky, 256 S. W. 388. *What constitutes completed separate offenses.*

Where one is a player in a number of hands of "stud poker," and there is a separate bet on each one, each hand constitutes a separate offense even though played at the same sitting; consequently a conviction for engaging in one hand is not a bar to a subsequent conviction for playing another hand at the same place and at the same sitting.

The decision is sound. The authorities are practically unanimous that the offense of gambling is completed even though a person engage in only one hand or game. It would necessarily follow, therefore, that one who engaged in more than one hand or game would have committed more than one offense. There are a few cases apparently contra to the principal case. In *Ramsay* v. *State* (37 Tenn. 651) it was held that there was but one offense committed where the defendant offered and had accepted by one person nine separate bets of various amounts that Buchannan would beat Fillmore in the election in Tennessee by 500, 1,000, 1,500, etc., votes respectively. In *Wingard* v. *Georgia* (13 Ga. 396) it was held that there was but one offense although several different hands and several different card games were played where all were played at one time at

one sitting. It is to be remembered, however, that these offenses are purely statutory and in the two cases last cited the court expressly states that its finding is "under the particular statute."

HIGHWAYS.

Gallaher v. *State,* Ind., 141 N. E. 347. *Certainty in definition of offense.*

Acts of 1913, c. 300, sec. 16 (Burns' Ann. St. 1914, Sec. 10476c), prohibiting the operation of a motor vehicle upon any highway "at a speed greater than is reasonable and prudent, having regard to the traffic and the use of the way," and declaring that a speed in excess of 25 miles per hour shall be prima facie evidence of guilt, held not invalid as uncertain and indefinite in its definition of the offense.

Myers, J., dissenting.

HOMICIDE.

State v. *Champion,* Ohio, 142 N. E. 141. *Self-defense.*

The right of self-defense, to repeal actual or threatened force, requires that defendant shall bona fide believe herself to be in danger of death or great bodily harm, and shall bona fide believe her only means of escape from such danger to be in using the force she used, and that she have reasonable grounds for such belief. (*Marts* v. *State,* 26 Ohio St. 162, approved and followed.)

In a case of homicide, where defendant testifies that she did not intend to fire the fatal shot, and that she did not knowingly "pull the trigger," such testimony is entirely inconsistent and irreconcilable with the right of self-defense.

People v. *Carrico,* Ill., 142 N. E. 164. *Conviction of manslaughter after acquittal of murder by abortion.*

Where one charged with murder by abortion has by a conviction for manslaughter been acquitted of the offense of murder and granted a new trial, the fact that Cr. Code, Sec. 145, defining involuntary manslaughter, contains the provision that, if such involuntary killing is committed in the prosecution of a felonious intent, the offense shall be deemed murder, and that criminnal abortion is a felony, does not preclude a conviction of manslaughter.

People v. *Dugas,* Ill., 141 N. E. 769. *Defense of other persons.*

Where defendant was assaulted and companion came to his rescue, defendant had the same right to defend him as companion had to defend himself, the right to take life in defense against a felonious attack extending not only to defense of one's self, but to defense of others, whether relatives or strangers.

Long v. *State,* Ohio, 141 N. E. 691. *Intoxication as defense: burden of proof.*

Where, in the trial of a first degree murder case, the defendant asserts voluntary intoxication as a defense to the prosecution, it will be incumbent upon him to establish that degree of intoxication which rendered him incapable of forming the intent to kill, or of acting with premeditation and deliberation, and the burden is upon such defendant to establish such defense by a preponderance of the evidence. This does not, however, relieve the state of the general burden to prove each and every element going to make up the defense charged by proof beyond a reasonable doubt.

INDICTMENT.

State v. *Brozich,* Ohio, 141 N. E. 491. *Variance between indictment and proof.*

An indictment charging larceny of nine "rungs" of the value of $360, in connection with and in the same count with a charge of burglary, is neither fatal to the charge of burglary nor larceny, where the evidence shows unquestionably that the personal property stolen was not nine "rungs" but nine "rugs" of the value of $360.

Where the variance is complained of as fatal because of a difference "in the name or description of a matter or thing" set forth in the indictment, section 13582 requires that, before such variance can be ground for an acquittal of the defendant, the court must find "that such variance is material to the merits of the case or may be prejudicial to the defendant."

INFANTS.

Ridge v. *State,* Okla., 220 Pac. 965. *Prosecution of child under 14 for murder.*

Where a delinquent child under the age of 14 years is charged with a capital offense, the proceedings in the juvenile court and at the preliminary trial and in the district court should be conducted with deliberation, giving the accused the benefit of every substantial rule of procedure in his favor.

An infant defendant, without parent, guardian, or next friend, should not be permitted to waive such rights unless it appears beyond all doubt that the child comprehends the import and effect of such waiver.

Where an infant charged with murder was in the juvenile court adjudicated a delinquent child, and then accorded a preliminary hearing before a magistrate, and tried and sentenced to death in the district court all in one day, this, considered with other facts appearing of record, indicates that the accused was deprived of the benefits of several statutory rules of procedure designed for his protection, as pointed out in the opinion.

INTENT.

People v. *Ramirez,* Calif., 221 Pac. 960. *Assault with intent to kill: transfer of intent.*

In prosecution for assault with intent to kill, where the facts showed defendant's shot, which struck prosecuting witness, was directed toward another, in view of Pen. Code, Sec. 217, providing that every person who assaults another with intent to commit murder is punishable, it was not error to instruct that, when one intends to assault a certain person and by mistake assaults another, the intent is transferred, and the party making the assault will be deemed guilty the same as if he had originally intended to assault will be deemed guilty the same as if he had originally intended to assault the person so assaulted by mistake.

LARCENY.

Moore v. *State,* Texas, 255 S. W. 988. *What constitutes one single transaction.*

The defendant had connected a small pipe from the complaining witnesses' oil tanks to tanks of his own and over a period of time had thus taken

approximately 1,000 gallons of oil. Theft of property of value less than fifty dollars was a misdemeanor; over fifty dollars a felony. Defendant was convicted of the felony and now contends that the appropriation of oil under the circumstances constituted a series of misdemeanors. The court, however, construed the appropriation of the oil as one continuous transaction, though accomplished at various intervals and over a period of time. Defendant, therefore, was properly convicted of the felony. The case on its facts is obviously sound. Certainly the man who chooses a means requiring a longer time to accomplish a given result is no less guilty of the completed offense than the man who selects a means capable of accomplishing it in a shorter time or even in one instant. The time element is not controlling. The test in any case would seem to be whether there was sufficient unity of purpose and continuity of action to make one single transaction with one continuous intent or whether the incidents were so remotely connected in purpose and execution that as a matter of fact they may be fairly said to make up a series of transactions independently executed both in act and intent.

Rosenblum v. *State,* Ala., 98 So. 216. *Appropriation of goods by one having mere custody, larceny.*

Where one was given mere custody of a shipment of flour for the purpose of delivering it from the railroad station to the consignee, and appropriated a part thereof with the intent to deprive the true owner, the offense is larceny and not embezzlement. To constitute the common law offense of larceny it is essential that there be a trespass to the possession and had the delivery to the cartman here constituted an entrustment of possession his subsequent appropriation would have been embezzlement under the statute. The case properly holds, however, that the custody of the cartman for purposes of delivery was not "possession" within the meaning of the embezzlement statutes, but was a bare charge of the goods, constructive possession remaining in the consignee. A subsequent appropriation by the cartman accompanied by the requisite intent constituted a sufficient trespass to the possession to make out a larceny.

PARDON.

Ex parte Jones, Okla., 220 Pac. 978. *Effect of lack of authentication.*

Under Const. Art. 6, Sec. 17, providing that the Secretary of State shall keep a register of the official acts of the Governor, an instrument purporting to be a pardon, not authenticated by the great seal of the state, is not entitled to be registered by the Secretary of State as an official act of the Governor.

The instrument in question in this case, purporting to be a pardon, signed by J. C. Walton, then Governor, was not authenticated under the great seal of the state or registered in the office of the Secretary of State. Held, that to be a valid pardon it must be authenticated under the great seal of the state, and without such authentication such instrument is insufficient in law to authorize the discharge of petitioner from the imprisonment of which he complains.

Montgomery et al. v. *Cleveland,* Miss., 98 So. 111. *Power to pardon an act of the state. When may be exercised by the Lieutenant Governor.*

The Governor of the state was temporarily absent from the state for a period of six hours during which time the Lieutenant Governor granted a pardon to the petitioner. Sec. 131 of the state constitution provided that when

the office of Governor should become vacant by death or otherwise the Lieutenant Governor should possess the *powers and discharge the duties of said office,* but when the Governor should be absent from the state the Lieutenant Governor should *discharge the duties of said office.* It was contended that the pardon was invalid on the ground that the power to pardon was not a "duty of the office" of Governor, but was a "power" personal to the Governor and involving the exercise of his personal discretion and that the omission of the word "powers" in the state constitution in defining the duties of the Lieutenant Governor in cases of temporary absence of the Governor was intentional. Held, in habeas corpus proceedings that the power to pardon was a "duty of the office" and could, therefore, be exercised by the Lieutenant Governor during a temporary absence of the Governor. "While a pardon is a matter of grace, it is nevertheless the grace of the state, and not the personal favor of the Governor. It is granted out of consideration of public policy, for the benefit of the public as well as of the individual, and is to be exercised as the act of the sovereign state, not of the individual caprice of the occupant of the executive office as an individual."

State v. *Taylor,* S. D., 196 N. W. 494. *Power to suspend execution of sentence not a judicial function.*

Where a court, after pronouncing judgment against a defendant, purported to suspend the same during good behavior and release the defendant upon parol conditioned upon good behavior, held that a court is without authority to thus suspend execution of its sentence, such power being part of the power to pardon and under the constitution (Art. 4, Sec. 5) is lodged exclusively with the Governor. Any legislative attempt to confer such authority upon the courts would be unconstitutional.

ROBBERY.

Jarrott v. *State,* Texas, 257 S. W. 256. *Distinguished from Theft from the Person.*

The defendant was indicted for the crime of theft from the person. The evidence showed that a third party had just handed the prosecutor $25 in payment of a loan and that the defendant snatched the money from prosecutor's hand. The evidence was clear that there was a scuffle between the prosecutor and the defendant, but whether it preceded or followed the taking of the money was in dispute. Held on appeal that the trial court should have submitted to the jury the law applicable to the crime of robbery. The distinction between the two offenses is obvious. Robbery combines the elements of an offense to the person as well as to property. Theft from the person, on the other hand, does not involve the same personal element. It is essential to the crime of robbery that there be some violence or intimidation used and that there be involved the use of force either to overcome the resistance of the person or the thing taken. It is quite clear, therefore, that where one suddenly snatches away property without having used intimidation and under circumstances where it was not necessary to use force to overcome resistance of the person or thing taken, the elements of the personal offense are lacking and we have only a larceny, generally made under our statutes the offense of theft from the person. (*Johnson* v. *State,* Texas, 32 S. W. 537.) Where, however, as in the principal

case the evidence is conflicting as to whether resistance was made by the prosecutor and the property taken by force overcoming this resistance, or whether the only force used was after the offense was completed and in an effort to recover the property taken, the issues should be submitted to the jury under appropriate instructions.

TRIAL.

People v. *Spady,* Calif., 222 Pac. 191. *Conviction of simple assault on indictment for statutory rape.*

In a prosecution for assault with intent to commit rape on a girl under the age of consent, under Pen. Code, Sec. 220, defendant could not be convicted of simple assault notwithstanding section 1157, requiring the jury to find the degree of crime, and section 1159, authorizing verdict for any offense necessarily included in that charged, since assault to commit rape is not divided into degrees.

People v. *Waller,* Calif., 222 Pac. 171. *Effect on verdict of misunderstanding by jury of the extent of punishment.*

One convicted of a felony is not entitled to a reversal on the ground jurors were mistaken as to the extent of the punishment provided or mistaken as to whose official duty it was to determine the punishment; as where the jury, not apprehending that under the indeterminate sentence law the court did not fix the term of imprisonment, appended to the verdict a recommendation to leniency.

WITNESSES.

Cargill v. *State,* Okla., 220 Pac. 64. *Competency of wife in prosecution of husband.*

A woman is not a competent withness against her husband in a prosecution against him for rape or assault to commit rape upon a third person, under a statute permitting her to testify in a prosecution for a crime committed by the husband against the wife.

To enlarge the scope of the statutory rule permitting the husband or wife to testify against the other, where the offense charged is an offense against the innocent spouse, so as to include every offense remotely or indirectly vexing, humiliating, or distressing the innocent spouse, would be to state the rule too broadly and would amount to judicial legislation. Such a construction would throw the doors wide open for the introduction of evidence by one against the other in any and every case affecting their domestic affairs. In other words, such a construction of the exception to the rule would in a large measure abrogate the rule itself.

Northwestern University Law School

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Founded 1859

JOHN H. WIGMORE, Dean

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¶ *Admission:* Students entering for the first time are required to submit proof of the satisfactory completion of three years of college study.

¶ *Graduation:* Students entering the Law School with a bachelor's degree representing a four-year course in an approved college may complete the course in three years. For all others, four academic years of nine months each of resident study is required. By study during the summer sessions the four-year course may be completed in three calendar years.

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