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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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ACQUITTAL.

Duvall v. *State,* Ohio, 146 N. E. 90. *Acquittal of murder while attempting to rob no bar to prosecution for robbery.*

An acquittal of a defendant upon the charge of murder in the first degree, while attempting to perpetrate a robbery (under Sec. 12400, General Code), is not a bar to a prosecution for the crime of robbery (under Sec. 12432, General Code), even though committed upon the same person named in the former charge, and the robbery was a part of the same criminal act referred to in the indictment for murder.

ADULTERY.

Lee v. *State,* Okla., 231 Pac. 324. *Effect of divorce of injured party on prosecution for adultery.*

If, after the prosecution has been commenced, the offense has been condoned by the injured party, it may be to the interest of the parties, as well as to the best interest of society, that the prosecution be discontinued; but, where the act has not been condoned, the injured party may still insist that the prosecution be carried on, notwithstanding the fact that pending the prosecution the marital relation has ceased because of a divorce procured by the offending spouse.

ALIBI.

People v. *Nichols,* Calif. D. C. A., 230 Pac. 997. *Error to asperse defense of alibi.*

Instruction that defense of alibi was entitled to full weight when established, but that jury should scrutinize testimony offered in support of alibi with care, that it might "be satisfied that a fabricated defense" is not being made, *held* reversible error as imposing upon defendant burden of establishing such defense, and casting suspicion upon his defense and evidence produced in support thereof.

ARRAIGNMENT.

State v. *Nilnch,* Wash., 230 Pac. 129. *Failure to arraign before empaneling jury.*

Where, after empaneling of jury and opening statement of counsel, court's attention was called to fact defendant had not been arraigned, and defendant was then arraigned, and, standing mute, court ordered plea of not guilty, and trial proceeded; no request being made for additional time to plead nor for continuance, action of court was mere irregularity not affecting defendant's substantial rights.

ATTEMPT.

State v. *McCarthy,* Kans., 224 Pac. 44.

A conviction upon a charge of attempting to commit burglary of freight cars is sustained by evidence tending to show these facts: One of the four

defendants obtained an agreement with a car inspector of the Missouri Pacific Railway at Atchison to cause cars on a specified freight train from Kansas City to be held at Atchison so as to give them an opportunity to get their contents. The defendants drove at night from Kansas City in two automobiles, containing a shotgun, revolvers, lanterns, wrenches, a screw driver, and a jimmy, and on arriving at Atchison stopped about 300 feet from the railroad track near where it entered the yards. Two of them went in search of the car inspector, but, after finding him, either became suspicious that he was acting in co-operation with the police and therefore abandoned their purpose, or else left him with an agreement to meet them in half an hour where their automobiles were parked. They were taken into custody, and the arrest of the others followed at the place where they had stopped.

This conclusion is not affected by evidence that the freight train did not arrive until the next morning and that the defendant, who made the arrangement with the car inspector, at one time in conversation with the others referred to the plan as one for receiving stolen goods.

BRIBERY.

People v. *Newmark,* Ill., 144 N. E. 338. *Meaning of "juror" in bribery statute.*

Cr. Code, Sec. 33, making it a crime to corrupt or attempt to corrupt "any juror," held applicable to person selected for jury service under Juror Act, Sec. 8, though strictly speaking a "juror" is one who has been sworn to try a cause.

CONSTITUTIONAL LAW.

State v. *Morse,* Ariz., 226 Pac. 537. *Validity of statute punishing obtaining labor by false pretenses.*

A statute making it a crime, punishable by imprisonment, to fail to pay debt is in violation of Const. Art. 2, Sec. 18, but Pen. Code 1913, Sec. 524, as amended by Laws 1919, c. 163, Sec. 1, and Laws 1921, c. 26, Sec. 1, does not make it a crime merely to neglect to pay wages, but penalizes obtaining labor by false pretenses, and is not invalid.

State v. *Franklin,* Utah, 226 Pac. 674. *Validity of statute authorizing imposition of jail sentences in proceedings to enjoin liquor nuisances.*

Provision of Comp. Laws 1917, Sec. 4282, authorizing imposition of jail sentences on persons found guilty of maintaining liquor nuisance, as defined by Sec. 3350, in injunction proceedings under Sec. 4276, is unauthorized and contrary to Const. Art. 1, Secs. 10, 12, relating to right to jury trial.

Commonwealth v. *Boston Transcript Co.,* Mass., 144 N. E. 400. *Validity of statute requiring newspapers to publish findings of minimum wage commission.*

G. L. c. 151, Secs. 12, 13, punishing any newspaper refusing to publish proceedings of minimum wage commission at regular rates, is invalid, as interfering with right of contract, under Const. pt. 1, Declaration of Rights, Arts. 1, 10, 12.

Publishers of newspapers are subject to reasonable legislative regulation, but are not affected with public interest, so as to stand on less favorable ground with respect to legislative regulations than ordinary person.

State v. *Putney,* Ore., 224 Pac. 279. *Validity of statute giving women right to claim exemption from jury service.*

Or. L. Sec. 991, as amended by Laws 1921, c. 273, Sec. 6, par. 11, giving women the right to claim exemption from jury service, held not violative of Const. Art. 1, Sec. 20, providing that no law shall be passed granting to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens.

CORPORATIONS.

State v. *Truax,* et al., Wash., 226 Pac. 259. *Indictment of corporation for crime punishable by imprisonment only.*

An indictment, charging a corporation with a crime which is punishable only by imprsionment, is not good because of the impossibility of inflicting such punishment.

Indictment against bank for grand larceny, based on Rem. Comp. Stat. Sec. 2601, punishment for which, under Sec. 2605, is imprisonment in state penitentiary for not more than 15 years, held not to charge against bank a crime as defined by Sec. 2253, because of impossibility of inflicting punishment; Sec. 2265, punishing by imprisonment or fine one convicted of a felony for which no punishment is specially "prescribed," being inapplicable; "prescribed" denoting to lay down authoritatively as a guide, direction, or rule; to impose as a peremptory order; to dictate; to point; to direct.

CRIMINAL SYNDICALISM.

Ex parte Moore, Ida., 224 Pac. 662. *"Sabotage."*

Held, that by the use of the word "sabotage," in the criminal syndicalism law, the legislature of this state did not include striking on the job.

Budge, J., and McCarthy, C. J., dissenting.

EVIDENCE.

Committi v. *State,* Okla., 231 Pac. 316. *Admissibility of evidence secured by unlawful search warrant.*

Evidence obtained by a search of the defendant's home, under a search warrant issued without authority of law, for the sole purpose of obtaining evidence against him, in violation of Bill of Rights, Sec. 30, guaranteeing the security of the people in their right to be exempt in their persons, houses, and effects from unreasonable searches and seizures, is inadmissible against him.

State v. *Johnson,* Kans., 226 Pac. 245. *Admissibility of evidence illegally seized.*

A liquor still and apparatus taken from a dwelling house during the owner's absence, by the sheriff and county attorney, acting without semblance of lawful authority to search or seize, may be retained by the sheriff, and may be used as evidence in a criminal prosecution against the possessor for maintaining a liquor nuisance, although he made timely application to the court for return of the articles; possession of them having become a crime before the application was made.

Harvery, J., dissenting.

EXTRADITION.

People ex rel Gottschalk v. *Brown,* Sheriff, N. Y., 143 N. E. 653. *Extradition for non-support.*

A divorced husband, indicted in Ohio for non-support of his children during a period during which he visited Ohio on two occasions for a few hours, was subject to extradition as a fugitive from justice.

Hiscock, C. J., and McLaughlin and Andrews, J.J., dissenting.

"It may be conceded that this relator entered the state of Ohio for an innocent purpose and that he committed there no overt act in furtherance of the crime with which he is charged, but that charge by its very nature is founded not upon the commission of overt acts, but upon the neglect of a duty. Guilty intent may be presumed from the neglect of duty, and the crime continues as long as the neglect does not cease. There is no evidence conclusive or otherwise that at the very time the relator was in Ohio he was not guilty of failure to provide for his children; in fact he admits that because of disagreement with his wife as to the custody of his children he had discontinued the payment of an allowance for their support. Absence of overt acts is irrelevant when the charge is founded only upon neglect of duty, and the innocence of the purpose with which the relator entered the state cannot affect his guilt while there, if the neglect which forms the basis of the charge continued during that time."

FORMER JEOPARDY.

Cumpton v. *City of Muskogee,* Okla., 225 Pac. 562. *Whether prosecution under municipal ordinance bars prosecution under state law.*

A prosecution in a city court for violation of a municipal ordinance which prohibits an act which is also an offense under the general criminal law of the state is not a bar to a prosecution under such state law; such a second prosecution would not be in conflict with Sec. 21 of our Bill of Rights, providing that no person shall be twice put in jeopardy for the same offense.

The violation of a municipal ordinance is an offense against the municipality, and the same facts and circumstances may constitute another and different offense against the state, the same facts constituting different offenses against different governing bodies.

Watson v. *State,* Okla., 224 Pac. 368.

The granting of a new trial to a defendant convicted of petit larceny, upon an information for grand larceny, is not a bar to another trial under the same information for the higher offense.

"There is a great and irreconcilable conflict of authority as to the effect of a new trial granted at the instance of the defendant, in cases where he was convicted of a lower degree of the offense charged, or a lower offense embraced within the charge laid in the indictment or information. The main reason underlying this conflict arises from the fundamental difference in the judicial construction of the nature of the verdict in such cases. All adjudications are a unit on the proposition that a verdict of conviction of a lower offense embraced within the offense charged is an implied acquittal of the higher offense embraced within the offense charged, but some of the courts hold that such a verdict is an entirety, and cannot be severed and must stand or fall as an entirety, so when a new trial is granted it opens up the whole controversy anew, and the defendant,

by obtaining a new trial on his own motion, waives the former jeopardy, not only as to the offense of which he was convicted, but also as to the one of which he was thereby impliedly acquitted."

HOMICIDE.

Harding v. *State,* Ariz., 225 Pac. 482. *Manslaughter; unintentional killing in effecting arrest.*

Where peace officer, in attempting to arrest a drunken driver, shot at a tire to disable automobile, and killed driver, even though killing was unintentional, his act being unlawful, offense was, in view of Pen. Code 1913, Secs. 175, 1046, involuntary manslaughter.

State v. *Scott,* Kans., 231 Pac. 56. *Error to exclude circumstantial evidence to connect another with homicide.*

In a trial for murder, committed by one person in a residence, the state relied upon circumstantial evidence. The defendant's theory was that the murder was committed by an intruder fearing identification, and offered evidence tending to show that within five minutes after the homicide a named person, whose home was in another town and who had a penal record for burglary, larceny, and similar crimes, was observed near the scene of the homicide, and that he made his escape from the city in a few hours, and undertook by circumstantial evidence to connect him with the homicide. *Held,* it was error to exclude this evidence.

Hopkins, J., and Johnston, C. H., dissenting.

State v. *Jackson,* Mont., 230 Pac. 370. *When killing by bank robber during pursuit after robbery is committed in perpetration of robbery.*

Where bank was robbed, and pursuit immediately began and continued until bank robber killed pursuer 30 miles from bank, and over hour after robbery, whether killing was committed in perpetration of robbery, within Rev. Codes 1921, Sec. 10955, defining first degree murder, held for jury, in view of Sec. 10973.

"It cannot be said, therefore, as a matter of law, that the crime of robbery was complete at the time of the wounding of McKain, and it was entirely proper to submit the question for determination by the jury from all the facts proven. The cases of *Conrad* v. *State,* 75 Ohio St. 52, 78 N. E. 957, 6 L. R. A. (N. S.) 1154, 8 Ann. Cas. 966, and *State* v. *Habig,* supra, and in effect *Francis* v. *State,* 104 Neb. 5, 175 N. W. 675, support the above reasoning on facts exhibiting less continuity of action than are here presented.

"*People* v. *Huter,* 184 N. Y. 237, 77 N. E. 6; *Dolan* v. *People,* 64 N. Y. 485; *People* v. *Wardrip,* 141 Cal. 229, 74 P. 744—cited and relied upon by the defendant—deal with murders perpetrated in connection with burglaries, and in each instance the shooting occurred, not while the bandit was in the act of breaking and entering, but after he had abandoned that course, or had effected a breaking and entering and was in flight. In other words, in those cases it can be argued that the felon's original course of action and intent had ceased when the killing occurred, though the reasoning in *Conrad* v. *State,* supra, seems to us more persuasive. There actions and intentions were in process of fulfillment. The decision in *Griffin* v. *Western Mutual Benefit Assn.,* 20 Neb. 620, 31 N. W. 124, 57 Am. Rep. 848, rests on a refinement of analysis which we are unable to

appreciate. It itemizes and separates the incidental movements in an unbroken action in much the same manner as slow motion pictures make fiction of fact. No authority is cited, and the facts stated in that opinion do not justify the conclusion there reached. There is nothing in *Pleimling* v. *State,* 46 Wis. 516, 1 N. W. 278, nor *Hoffman* v. *State,* 88 Wis. 166, 59 N. W. 588, inconsistent with the views here expressed."

INDICTMENT.

State v. *Gauthier,* Ore., 231 Pac. 141. *Use of "person" for "child"; failure to allege prosecutrix unmarried.*

Under Or. L. Sec. 1437, prescribing requirements, an indictment under Sec. 1912, charging statutory rape, is not vitiated by substitution therein of the word "person" for "child" in clause alleging the assault on and sexual intercourse with a female person of the age of 13 years; a "child" being specifically a very young person, one not old enough to dispense with maternal aid and care.

In view of Or. L. Sec. 9720, fixing the age at which legal marriage may be contracted by female at 15 years, the allegation of prosecutrix's age in indictment, under Sec. 1912, for statutory rape, as 13 years, precludes the inference that she was married, and such fact need not in any event be alleged.

State v. *Polich,* Mont., 226 Pac. 519. *Crerical misprision of date.*

In view of Rev. Codes 1921, Secs. 11853, 11874, providing no indictment or information shall be insufficient for non-prejudicial defect in form or error or mistake, and in view of Sec. 11848, where time was not essence of crime as in case of prosecution for selling liquor, clercial misprision charging defendant on September 4, A. D., 19122, with unlawful sale held not prejudicial.

INSANITY.

People v. *Little,* Calif. D. C. A., 230 Pac. 178. *Insanity at time of trial.*

Where a request is made, under Pen. Code, Secs. 1367, 1368, to have accused's present insanity determined, trial court is not required to submit that question to jury in advance of trial, where evidence submitted in support of request does not create doubt in judge's mind as to accused's insanity.

Even if presumption that insanity, once shown, continues until contrary is shown is applicable in criminal cases, fact of accused's having previously been committed to an insane asylum, while an important circumstance in tending to establish his later insanity, as when he committed the act for which he was on trial, amounted to no more than a circumstance to be considered with all the other evidence on the question.

Commonwealth v. *Barnes,* Pa., 124 Atl. 636. *Construction of statute authorizing removal of insane prisoner to hospital.*

A Salvation Army ensign could not petition for removal of an insane prisoner to a hospital under Act July 11, 1923, Sec. 308 (Pa. St. Supp., 1924, Sec. 14726a-308), since the term "other responsible person" or "responsible officer of the institution or other person" used therein must be read under the ejusdem generis rule as referring to persons connected with or in some measure responsible for the care of the prisoner in question.

INTOXICATING LIQUORS.

State v. *Hoffman,* Wash., 232 Pac. 278. *"Manufacturing."*

Defendant was guilty of manufacturing intoxicating liquor, under Rem.

Comp. Stat. Sec. 7309, though it did not appear that intoxicating liquor had actually been produced, where it was shown that it was in process of manufacture; "manufacturing" meaning not only to produce or create, but covering as well active efforts and means employed in making of intoxicating liquor.

JEOPARDY.

State v. *Stiff,* Kans., 231 Pac. 48.

A person who is brought to trial, on an information which, although defective, sufficiently charges an offense to sustain a judgment on a verdict of guilty, is placed in "jeopardy" when the jury is sworn to try the cause; and, where the jury is afterward discharged for a reason other than one of those contained in Sec. 60-2914 of the Revised Statutes, he cannot be again brought to trial for the same offense charged in another information.

A defendant charged with a criminal offense cannot be said to have consented to the discharge of a jury without a verdict, where, before pleading, his motion to quash the information had been denied, and afterward a jury had been sworn to try the cause, and was discharged before the introduction of evidence, without the request of the defendant other than by his motion to quash the information.

Dawson and Hopkins, JJ., dissenting.

JURISDICTION.

Salinger v. *Loisel* (U. S. Marshal), 44 Sup. Ct. Repr. 519. *Crime of using mail to defraud may be prosecuted at place of delivery of matter mailed.*

One who, for purpose of executing fraudulent scheme, placed matter in post office in one district for delivery to other person in other district, could be prosecuted in other district, under Criminal Code Sec. 215 (Comp. St. Sec. 10385), making it a crime to "place, or cause to be placed, any letter . . . in any post office . . . or authorized depository for mail matter," a letter for purpose of executing fraudulent scheme; the crime having been committed in other district in which letter was to be delivered.

PARDON.

State v. *Magee Pub. Co.,* New Mex., 224 Pac. 1028. *Power of governor to pardon for criminal contempt.*

Writing, printing, publishing, and circulating articles regarding a pending case, in which the acts and conduct of the judge are discussed and criticized, constitute "criminal" rather than civil contempt.

Under constitutional grant of power the governor can pardon, after conviction, for criminal contempt.

"The offense is therefore one against the community when considered as a social entity—it is one against the state, and the state, being the offended party, has the power to extend grace or forgiveness. That power is exercised through another department of the government, namely, the executive, and when he has granted the same, the subject is freed and the incident closed. In the first instance the sovereign state is represented by its judicial department, acting through the particular court against which the contumacy is directed, and in the second instance, by the executive department, acting through the governor."

Ryan, District Judge, dissenting.