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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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BIGAMY.

Pruett v. *State,* Texas, 265 S. W. 575. *Where second marriage contracted in good faith is a defense, what constitutes "want of care" in discovering whether divorce from first wife granted.*

Defendant and his wife separated, the former moving to another county. The wife began proceedings for a divorce and her attorney prepared an acceptance of service or waiver of citation which was mailed to defendant with the request that he execute the same in the presence of witnesses and return. This defendant did. As a matter of fact no further steps were taken in the divorce proceedings, save that a complaint was filed. The case was never tried or otherwise disposed of. Subsequently, the defendant wrote to his wife's brother suggesting a reconciliation, but was informed by letter that it was now too late, that his wife had already secured a divorce from him. Defendant then went to the justice of the peace that had married him and inquired whether a party might legally remarry within a year after a divorce had been granted and was informed that there was no criminal penalty attached except perhaps he might be held in contempt of court. Defendant then married the second time. He was charged with, and convicted of, bigamy. It was conceded that a mistake of fact as to the divorce, which arose not through a want of proper care, would be a defense. *Held,* that a verdict of the jury finding a want of care under the circumstances would be set aside by the court.

BURGLARY.

Gibson v. *Commonwealth,* Ky., 265 S. W. 339. *Opening door wider constitutes a "breaking."*

The trial court instructed the jury that if the defendant "met with any obstruction, however slight, to his entrance and removed the same by his own act that constitutes a 'breaking.'" The evidence was that defendant found the door partly open and it was necessary to open it wider to get in. *Held,* the instruction, in view of the facts, was proper.

In an earlier Kentucky case, *Rose* v. *Com.,* 40 S. W. 245 (1897), the court had held as a matter of law that if a door or window be partly open it was not a "breaking" to push it further open. The court's reason for abandoning the earlier rule is interesting. "There was a time when 'night air' was considered dangerous to health and people kept their doors and windows tightly closed. Anyone who left his window partly open or his door slightly ajar was considered so negligent as to be beyond the protection of the law." It would seem, in view of the interests to be protected against burglars, that the doctrine of the principal case could be supported quite independently of our changed knowledge of the laws of hygiene.

Lynch v. *State,* Ga., 125 S. E. 70. *Possession of burglar's tools a criminal offense. Constitutionality of statute.*

The defendant was charged with the possession of burglar's explosive under a statute making the possession of burglar's tools a penal offense. *Held,* the

lower court was right in overruling a demurrer to the indictment. Such a statute violates neither the due process nor equal protection clauses of the state constitution, nor the Privileges and Immunities Clause of the Federal Constitution.

CONFESSION.

Enoch v. *Com.*, Va., 126 S. E. 222. *Confession made after prolonged examination when accused mentally and physically exhausted not voluntary.*

Defendant, accused of murder in the first degree, was arrested on Saturday morning and from eleven o'clock until about one o'clock the next morning, at which time he fainted from exhaustion, was confined and under close examination by not less than two police detectives. The examination was continued on Sunday when the alleged confession was made. The principal case cites with approval the recent case of *Ziang Wan* v. *United States*, 45 Sup. Ct. Rep. 1 (see note on this case p. 641, Vol. 15, this journal), to the effect that the requisite of voluntariness is not satisfied by merely establishing that it was not induced by a promise or threat. "While no rewards of a temporal nature were offered to the accused and no threats of physical violence or additional punishment were made, the confession was obtained under such duress—such mental terror and physical exhaustion, as would have avoided a will or contract made under like circumstances."

COMPULSION.

People v. *Pantano*, N. Y., 146 N. E. 646.

One giving information as to usual customs of bank messengers in transporting funds, with view of assisting in commission of robbery on promise of reward, is guilty participant in conspiracy and liable for resulting murder, but if forced to give information by threats to destroy him and his family, element of willful participation necessary to conviction is wanting.

Pound, Crane and Andrews, JJ., dissenting.

CONDONATION.

Ex parte Lawrence, Okla., 233 Pac. 1101. *Condonation of adultery by the injured spouse under Oklahoma statute.*

The statute provides that: "Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife, as the case may be, or by the husband or wife of the other party to the crime." Comp. Stats. 1921, Sec. 1852.

Held, that the requirements are mandatory and a prosecution for adultery commenced on complaint of an injured spouse should be dismissed when he or she files an affidavit stating that the offense has been condoned and praying that the prosecution be dismissed.

CONSTITUTIONAL LAW.

Brooks v. *United States*, 45 Sup. Ct. Repr. 345. *National Motor Vehicle Theft Act held valid.*

National Motor Vehicle Theft Act, Oct. 29, 1919 (Comp. St. Ann. Supp., 1923, Secs. 10418b-10418f), prohibiting in section 3 (Comp. St. Ann. Supp. 1923, Sec. 10418d) the transportation in interstate or foreign commerce of motor

vehicle with knowledge that it has been stolen, and in section 4 (Comp. St. Ann. Supp., 1923, Sec. 10418e), the receipt, concealment, or sale of motor vehicle moving in interstate commerce with knowledge that it has been stolen, held valid, being within the police power.

United States v. *Johnston,* 45 Sup. Ct. Repr. 496.

One who fails to pay tax on admission fees received at boxing matches, under Act Feb. 24, 1919, Secs. 800, 802, 1380 (b), being Comp. St. Ann. Supp., 1919, Secs. 6309 5/8a, 6309 5/8c, 6371 1/2h, is not guilty of embezzlement of amounts collected for taxes, under Criminal Code, Sec. 47 (Comp. St. 10214), since person required to pay such tax is not bound to keep separate fund therefor in view of sections 502 (Comp. St. Ann. Supp. 1919, Sec. 6309 1/3c) and 802 and is a debtor and not a bailee.

CRIMINAL SYNDICALISM.

People v. *Ruthenberg,* Mich., 201 N. W. 358 (1924). *Legislature may constitutionally make mere advocacy, a criminal offense.*

Sec. 2 of the Michigan criminal syndicalism law contains the provision common to such legislation in other states, making advocacy of crime, sabotage, violene, etc., a felony.

Held, that this is within the power of the legislature, quoting with approval from State v. Laundy, 103 Ore. 443, "If it is within the power of the legislature to declare that a given act when done. constitutes a crime, then it is likewise within the power of the legislature to declare that to advocate the doing of such act is a crime . . ."

EMBEZZLEMENT.

State v. *Meininger,* Mo., 268 S. W. 71. *Personal benefit or profit from money appropriated not essential to crime of embezzlement.*

In a prosecution of a bank cashier for embezzlement of moneys which he permitted customer to use without security, the transactions being covered by so-called cash items or slips purporting to represent cash on hand, while such acts must be shown to have been done with fraudulent intent to deprive the owner of his property, still it is not necessary in order to make out the crime that defendant obtained any part of the money or any benefit therefrom.

Baker v. *State, Neb.,* 200 N. W. 876 (1924). *Liability of de facto officer under embezzlement statute relating to public officers.*

Defendant was indicted under a Nebraska statute providing that any officer or other person charged with the collection, receipt of public money, who should convert the same to his own use should be guilty of embezzlement, which is then declared to be a high crime and punishable by imprisonment in the state penitentiary and a fine double the amount of the money converted. The defendant, at the time of the alleged acts of conversion, although regularly acting in the discharge of the duties of deputy county treasurer, had not taken the oath reuired by statute nor had he filed the requisite official bonds. *Held,* he was nevertheless an officer de facto and was properly charged with embezzlement under the statute. The case is undoubtedly correct, both in holding the defendant to be an officer de facto and in holding that the lack of de jure status is not a defense. For many purposes (wherever official character is attacked in

collateral proceedings) a de facto status is sufficient to give the act validity, and is equivalent for the purposes of that action to a de jure status. This doctrine of course affords the defendant no comfort, for had his status been de jure, his guilt would be beyond question. For many other purposes a de jure status must be shown, as, for example, where the officer is attempting to enforce in his own name some right incident to the office or is made a defendant in some direct proceeding like trespass, where his only defense is official character. The reason underlying both classes of cases is well stated by Mr. Justice Field in *Norton* v. *Shelby County,* 118 U. S. 425. "The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions." To allow a defendant's own neglect to achieve a de jure status to be a cloak for his own crime would be repugnant to every consideration of policy. A de facto deputy treasurer has all the opportunities to convert public money that a de jure deputy would have; the public treasury is just as depleted, official morale just as much undermined, and the body politic injured just as much as though the oath had been taken and bond filed. That such acts are condemned by the spirit and intent of the statute is beyond question.

ENTRAPMENT.

P. v. *Lanzit,* Calif. D. C. A., 233 Pac. 817.

In prosecution for attempt to commit murder, instruction that if jury believed beyond reasonable doubt that defendant originated and formed intent to kill and that he communicated his intent to another, fact that officers planned to and furnished defendant an opportunity to carry out his offense is no defense held correct.

EVIDENCE.

People v. *Ruthenberg,* Mich., 201 N. W. 358 (1924). *Excerpts from official organs and pronouncements of Communist Party admissible in prosecution under Criminal Syndicalism Act.*

The Michigan act declares guilty of felony one who "organizes or helps to organize or becomes a member of or voluntarily assembles with any society, etc., formed to teach or advocate the doctrines of Criminal Syndicalism."

Held, that in a prosecution under this act of a member of the central executive committee of the Communist Party the following were properly received in evidence: excerpts from article published in official organ of the Communist party written by a member of the general executive committee, excerpts from the theses and resolutions adopted by the third world congress of the Communist International, a written attack on religion by a member of the central committee of Communist party published in official organ of that party, declaring religion and communism incompatible, and excerpts from article published in official organ of the party attacking the government for prosecution of war time offenders.

EVIDENCE.

State v. *Rossi,* Wash., 233 Pac. 951. *Admissibility of evidence of possession of burglary tools by occupants of stolen car.*

In prosecution for grand larceny of automobile which was driven into Canada and apprehended by custom officials on its return within few hours after theft, possession of burglary tools by occupants held properly shown as being likely incidents to act of stealing car from garage.

Bridges, J., and Tolman, C.J., dissenting, because evidence showed garage from which car was stolen was unlocked and evidence admitted tended to show a plan to commit burglary at another place.

EVIDENCE.

Wells v. *State,* Alab., 101 So. 624. *Defendant in a criminal case cannot be compelled to stand up for inspection and identification.*

Defendant was charged with burglary. A witness for the state was asked: "I will ask you to look at the defendant there and say if he was about the size and build of the man who did the shooting that night." Witness answered: "I could tell if he would stand up so that I could look at him." The judge then, over the objection of defendant's counsel (accused was not a witness) ordered the defendant to stand up. *Held,* this was error in view of Sec. 6, Art. 1, of the state constitution providing that the accused may not be compelled to give evidence against himself.

The case is interesting in view of the contrary construction put upon similar constitutional provisions in other states. In the following cases it has been held that compelling a defendant in a criminal case to stand up for identification violates no constitutional immunity: California: *People* v. *Goldenson,* 76 Cal. 328 (1888); New York: *People* v. *Gardner,* 144 N. Y. 119 (1894). The pertinent language in these cases was, "no person shall be compelled in any criminal case to be a witness against himself." In *State* v. *Ah Chuey,* 14 Nev. 79, where the identify of the accused was in question a witness testified that he knew the accused had certain tattoo marks on his arm and it was held not to violate accused's constitutional rights to compel him to exhibit his tattooed arm to the jury. The language of the Nevada constitution was similar to that of California.

It is perhaps generally conceded that there is no infringement of the constitutional immunity where the accused is pointed out from the crowd in the court room as the guilty one. *State* v. *Johnson,* 67 N. C. 55, where the witness was asked to look around the court room and point out the person who committed the offense. The court in the principal case would perhaps distinguish cases of this type on the ground that no affirmative act whatever was here required from accused, erroneoulsy assuming that the constitutional provision guarantees immunity from doing any affirmative act which may connect him with the crime.

In other cases not identical in fact but similar in principle, the majority rule seems opposed to the principal case, *Holt* v. *United States,* 31 Sup. Ct. 2, holding it to be no violation of accused's rights to compel him to put on a blouse, the fit of which served as identification. A great number of cases have arisen where the identification consists of comparing defendant's footprints with those found at the scene of the crime. The following cases permit such

comparisons even though obtained against the will of the accused: *Walker* v. *State,* 7 Tex. App. 245; *State* v. *Jeffries,* Mo., 109 S. W. 614; *State* v. *Thompson,* 161 N. C. 238; *State* v. *McIntosh,* 94 S. C. 439; *Hahn* v. *State,* 165 S. W. 218. Where the comparison has been made voluntarily by the defendent or by some third party such evidence is clearly admissible: *Webb* v. *State,* 11 Alab. App. 123; *Lee* v. *State,* 69 Fla. 255; *Underwood* v. *State,* 108 Miss. 34; *State* v. *Sirmay,* 40 Utah 525.

In the following cases identification of footprints made under compulsion held inadmissible: *Elder* v. *State,* 143 Ga. 363; *Day* v. *State,* 63 Ga. 667; *Stokes* v. *State,* 8 Leg. Gaz. 166 (Pa. 1876); *Stokes* v. *State,* 64 Tenn. 619.

The principal case recognizes the contrary view taken elsewhere, but is supported by prior dicta in Alabama: *Williams* v. *State,* 98 Ala. 52, defendant was compelled to come around before the jury that they might determine her age from her appearance. The Supreme Court upheld such procedure solely on the ground that defendant had voluntarily made herself a witness in the cause. See also *Davis* v. *State,* 131 Ala. 10. The court attempts rather unsuccessfully to reconcile the Alabama decisions with those of other states by reason of slight differences in language in the constitutions. The Alabama language is: "Accused may not be compelled *to give evidence* against himself." It is extremely doubtful whether the substantive guarantees in the various states were intended by the framers to be different. The real basis for the Alabama decision is found in the concluding paragraph of the opinion, to the effect that such procedure, indirectly establishes defendant's guilt. This argument is, however, unsound, for the immunity never was intended to protect accused persons *from being convicted,* but merely to guarantee immunity from testimonial compulsion and such bodily inspections cannot, as Wigmore has pointed out, violate the privilege, "because it does not call upon the accused as a witness, i. e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—is immaterial—unless all bodily action was synonymous with testimonial utterance, for not compulsion alone is the component idea of the privilege, but testimonial compulsion." Wigmore, Evidence, Vol. 4, Sec. 2265.

FOOD.

Longbrake v. *State,* O., 146 N. E. 417. *Legality of act prohibiting use of saccharin.*

Sec. 1089-9, General Code, prohibiting the use of saccharin in bottled soft drinks, is constitutionally valid and within the inherent police powers of the state.

Whether such use of saccharin would be a menace to or might be injurious to health, or whether because of its intense sweetening power it might be used as a substitute for sugar, is a question for legislative determination, and is conclusive upon the courts. Within its discretion the legislature may regulate or prohibit the use of saccharin in food or drinks.

FORGERY.

State v. *Rosborough,* La., 101 So. 413. *District judge's recommendation of pardon subject of forgery within statute covering "public record or document."*

Defendant addressed to the board of pardons what purported to be a recommendation for commutation of a prisoner's sentence signed by a district

judge. *Held,* this constituted forgery under Sec. 833 Rev. Sts. providing, "whoever shall forge—any public record with intention to injure any person or any body politic."

HOMICIDE.

State v. *Dunlap,* Ida., 235 Pac. 432. *Malice.*

That portion of an instruction in a trial for homicide which reads, "Malice includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive," is erroneous, as it tends to lead the jury to believe that they would be justified in finding that an act was done with malice, if done in anger, whereas, a killing done in anger might amount only to manslaughter.

Budge, J., dissenting.

State v. *Scott,* Kans., 235 Pac. 380. *Exclusion of circumstantial evidence tending to show that killing was by another.*

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. J., dissenting.

State v. *Fixley,* Kans., 233 Pac. 796. *Admissibility of trailing by bloodhounds.*

Testimony as to trailing accused with bloodhounds uncorroborated by other evidence held insufficient to sustain conviction; evidence of trailing accused by bloodhounds without other evidence held insufficient to sustain conviction of murder.

State v. *Weiner,* N. J., 127 Atl. 582. *Burden of proof and criminal negligence.*

Upon the trial of an indictment for involuntary manslaughter the court in its charge said: "Whoever seeks to excuse himself for having unfortunately occasioned, by any act of his own, an injury to another, ought, at least, to show that he took that care to avoid it, which persons in similar situations are accustomed to do. It is for you to say whether his conduct, under the circumstances, evinced such care as was proportionate to the danger, whether it has been proved that there was such gross and reckless want of care, or such gross and culpable want of skill, as the defendant under the circumstances should not have been guilty of."

Held, erroneous, first, in that it placed the burden upon the defendant of excusing himself for the accident, when the burden rested upon the state and never shifts, and, second, in that it applied to a criminal action the rule applicable in civil actions where the standard of duty is not the same.

INDICTMENT.

Elkins v. *State,* Okla., 233 Pac. 491. *Mistake in date.*

An information for murder which charges the homicide to have occurred on the 30th day of December, 1923, and from the effects of which deceased died on the 30th day of December, 1922, is not fatally defective. The mistake of date is merely clerical, and its correction by amendment is a matter of form, which may be made even after the jury is impaneled.

INSANITY.

People v. *Krauser,* Ill., 146 N. E. 593. *Reading extract from case ridiculing mental age tests.*

In murder prosecution, where defense was insanity, permitting state's attorney in argument to read statement of facts or opinion from reported case that mental age theory of experts was based on such arbitrary and unnatural scale of ages as to be useless, was erroneous and prejudicial.

Farmer and Thompson, JJ., dissenting.

INTENT.

Commonwealth v. *Coleman,* Mass., 147 N. E. 553. *Whether intent needed in statute punishing use of motor vehicle without authority.*

Wrongful intent is not part of offense of using motor vehicle without authority, defined by G. L., c. 90, Sec. 24, and mere passive invited guest, who rides in machine, believing person in control has authority to use it, may be guilty of unlawful use without authority.

INTOXICATING LIQUOR. SALES ON THE HIGH SEAS.

Lathan et al. v. *United States,* U. S. Circ. Ct. App. 4th Circ. 2 F (2d) 208. *Selling intoxicating liquor on the high seas outside the territorial waters of the United States, knowing that such liquor is to be used to violate the laws of the United States is punishable and jurisdiction over the crime is acquired when the vendors, even though by inadvertence, come within the territorial limits of the United States.*

The defendants, in charge of the whiskey laden British schooner Pesaquid, made numerous sales of intoxicating liquor to boats coming from the shore, the sales being made on the high seas and outside the territorial waters of the United States. The schooner was seized when it inadvertently approached within two miles of the Virginia coast and its officers charged with possession, sale and transportation of intoxicating liquor. Held, that under sec. 332 of the U. S. criminal code providing "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands or induces or procures its commission, is a principal," defendants were liable. "It is argued on behalf of the defendants, however, that they should escape because the aiding and abetting in the crime of those who sold in the United States whiskey purchased from the ship was on the high seas outside of the territorial waters of the United States. The facts do not bring the case within the general rule that the character of an act as lawful or unlawful must be determined solely by the law of the country or place where the act is done. The defense, therefore, that the defendant sold the whiskey on the high seas where it was lawful to sell it is not available. The defend-

ants being under arrest in the United States, it makes no difference that they were outside the jurisdiction when by aiding and abetting they became principals in crime committed in the United States." The court quotes with approval from *Strassheim* v. *Daily*, 221 U. S. 280, "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."

LARCENY.

Segal v. *State, Texas,* 265 S. W. 911 (1924). *One converting to his own use personalty, received from a vendor who intended to part with both possession and title, cannot be guilty of larceny.*

Defendant purchased 56 dozen pairs of overalls, to be paid for within 60 days with an option of a discount of 2% if paid for in cash. He immediately resold the lot at a reduced price appropriating to his own use the proceeds. This, with other evidence, satisfied the jury that at the time defendant bought the goods he fully intended not to pay for them.

Held, notwithstanding the existing intent not to pay for them there could not be the crime of larceny for the vendor had intended to part both with possession and title thus negativing the trespass element necessary to larceny.

PARTIES.

State v. *Quintana,* N. Mex., 234 Pac. 306. *Charging principal in second degree as principal in first degree.*

A person may be indicted in general terms with being a principal in the first degree, and then be convicted upon evidence establishing his guilt as a principal in the second degree, such as an aider or abettor at the fact. It is only in those states where the punishment for the two divisions is different that a principal in the second degree must be necessarily charged as such.

ROBBERY.

Weisman v. *United States,* Circ. Ct. App. 8th Circ., 1 Fed (2) 696. *Feloniously taking property from the presence of another is a "taking from the person."*

Defendants held up the armored truck in which U. S. mail was being transported from the post office to sub-stations and absconded with its entire contents. The first count of the indictment which was based upon Sec. 197 of the Penal Code ("Whoever shall rob any such person of any such mail, etc.") charged that, "defendants did—against the will of Dorlac, who was then and there in lawful charge and control—feloniously and by putting in fear the said Dorlac, did rob, steal take and carry away." *Held,* that the crime of robbery was properly charged, the taking from the presence of the lawful custodian by putting him in fear being in legal contemplation a taking from the person.

SEARCHES AND SEIZURES.

Carroll v. *United States,* 45 Sup. Ct. Repr. 280. *Searching automobiles for intoxicating liquor without search-warrant.*

Under National Prohibition Act., tit. 2, Secs. 25, 26 (Comp. St. Ann. Supp., 1923, Secs. 10138 1/2m, 10138 1/2mm), section 6 of act supplemental thereto (Comp. St. Ann. Supp., 1923, Sec. 10184a) and Const. U. S. Amend. 4, contraband liquors, concealed and being illegally transported in automobile or other vehicle

may be searched for without warrant by officers having probable cause to believe that such vehicles are carrying contraband.

SENTENCE.

Ex parte Eaton, Okla., 233 Pac. 781. *Revocation of suspended sentence.*

Where a youth has been sentenced for an offense imposing confinement in the penitentiary for a term of two years and such sentence is suspended during good behavior under the provisions of sections 2803 and 2804, Compiled Statutes, 1921, the language "to report to the judge of the court wherein convicted, at each succeeding term during the pendency of said judgment, or when required by the court or judge," imports that the sentence can be revoked only within the period imposed in the sentence, and that a revocation of a parole after that period is ineffective, and after that period the court is without power to enforce the original judgment.

Ex parte Schiaffino, Calif., D. C. A., 232 Pac. 719. *Place of imprisonment where statute silent.*

Under Pen. Code, Sec. 464, providing that punishment for burglary with explosives shall be imprisonment for not less than 25 nor more than 40 years, without designating such crime a felony, or providing that imprisonment shall be in state prison, a person convicted of such crime must be confined in county jail, in view of section 17.

PRIOR CONVICTION.

People v. *Pagni,* Calif. D. C. A., 230 Pac. 1001. *Conviction under Volstead Act not prior conviction under state prohibitory Act.*

The Wright Act, although adopting the penal provisions of the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, Sec. 10138¼, et seq.), does not constitute a "prior conviction" warranting increased punishment for second and subsequent offenses, as provided by Wright Act, Sec. 29, notwithstanding latter act adopted penal provisions of Volstead Act.

TRIAL.

Polk v. *State,* Okla., 224 Pac. 194. *Refusal of new trial to defendant hastily convicted without benefit of counsel.*

In this case the defendant, a 19 year old boy, was placed in jail on a murder charge without the aid of counsel; he there waived preliminary examination, and was then taken to the courthouse, where, without the benefit of counsel or being informed of his rights by the court, he entered a plea of guilty, qualified by his statement to the court, which, upon the facts as stated by him, did not show that he was guilty of the offense charged, and was then by the judgment of the court sentenced to imprisonment for life at hard labor. The second day after judgment a motion to set aside the judgment and permit defendant to withdraw his plea and substitute a plea of not guilty instead was filed, which motion was by the court overruled. *Held,* that the overruling of the motion to vacate and set aside the judgment of conviction and grant a new trial was a manifest abuse of judicial discretion.

Humphreys v. *State,* Wash., 224 Pac. 937. *Use of writ of coram nobis.*

A judgment cannot be set aside on a petition for a writ of coram nobis on a showing which in fact constitutes but newly discovered evidence on the actual

merits of the controversy tried and decided by the judgment, however conclusively such evidence may seem to establish that the judgment was wrong.

Affidavits, filed and made a part of a petition for a writ of coram nobis seeking the vacation of a judgment of conviction for larceny, wherein other parties acknowledged guilt of the offense for which defendant had been convicted, held to constitute but newly discovered evidence of the very issue determined by the judgment, and not to warrant setting it aside.

Pemberton, J., dissenting.

State v. *Deloria,* Wash., 225 Pac. 405. *Effect of failure to prosecute.*

Where accused, charged with bigamy, was discharged for failure to prosecute within 60 days, as required by Rem. Comp. Stat. Sec. 2312, a second information thereafter filed and brought to trial within 30 days was not barred under Sec. 2315, relating to misdemeanors and gross misdmeanors, despite Const. Art. 1, Sec. 22, relative to speedy trial. (Affirmed by divided court.)

Mullen v. *State,* Okla., 230 Pac. 285. *Whether plea of guilty voluntary.*

Where two defendants accused of murder were arraigned without counsel and the court did not inform them that, in case they were tried by a jury and found guilty of murder, the jury in its discretion would have the right to decide whether the penalty to be imposed should be death or imprisonment for life, and that by pleading guilty they waived the right to have a jury exercise its discretion as to that matter, it cannot be said that their pleas of guilty were entered voluntarily and understandingly.

Johnson v. *State,* 230 Pac. 525. *Examination of prospective jurors in trial of negro as to membership in Ku Klux Klan.*

Ku Klux Klan and its members in this state sustain unfriendly relations towards some of the fiscal, social, and political aspirations of certain classes of citizens, including negroes.

In the examination of jurors on their voir dire, in a case where a negro is charged with the larceny of live stock in a community surcharged with racial animosity which had resulted in hostile demonstrations against the negro race, presumably fostered by the Ku Klux Klan, the prospective jurors may be asked if they are members of that order and whether they are bound by any oath, rule, or obligation of the order amounting to bias, express or implied.

Where an inquiry is made in good faith, predicated upon probable cause indicating that the rights of the accused may be affected, counsel for the defendant may, within reasonable bounds, limited by a fair discretion of the court, interrogate prospective jurors as to their membership in the Ku Klux Klan, in order that the accused may intelligently exercise his right to challenge jurors for cause, or peremptorily without cause, in such manner as will facilitate the selection of a jury that is in fact impartial.

WITNESSES.

Lacey v. *State,* Okla., 224 Pac. 994. *Whether incest by husband is crime against the wife.*

Under Comp. St. 1921, Sec. 2699, providing "that neither husband nor wife shall in any case be a witness against the other except in a criminal prosecution for a crime committed one against the other," the wife is not a competent witness against her husband in a prosecution against him for incest.