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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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ABDUCTION.

Yeates v. *State,* Okla., 236 Pac. 62. *For the purpose of marriage.*

A divorced person in this state, within the six-month period during which he is prohibited from contracting a second marriage, may be guilty of the abduction of a female child under the age of 15 years "for the purpose of marriage," where it is shown the purpose of the abductor was to marry the girl in Texas and to establish a permanent residence there.

An attempted common-law marriage of a divorced man to a girl under the age of 15 years, entered into during the prohibited period after the divorce decree is rendered in this state, is void, and constitutes no defense to a prosecution for the abduction of the female child.

BRIBERY.

Streeter v. *State,* Fla., 104 So. 858. *Offer to purchase immunity for crime to be committed in the future, not indictable under Florida statute.*

A offered to pay B, an officer, $100.00 if he would fail to arrest one M for a violation of the liquor laws. It appeared that M had not yet violated the law, but intended to do so during the Christmas holidays if immunity from arrest could be purchased. Held, there was no offense under Sec. 5346 Rev. General Statutes making it an offense to corruptly give, offer or promise any gift or gratuity to any officer with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding which may be then pending or which may by law be brought before him in his official capacity. "The offer to bribe related to an offense not yet committed, but presumably in contemplation only. Therefore, there was no matter, question, cause or proceeding then pending concerning which the act . . . or decision of the officer could be influenced."

BURDEN OF PROOF.

Ex Parte Williams, Ala., 104 So. 282. *Instruction in a homicide case that the defendant has burden of satisfying jury on self-defense issue prejudicial.*

The trial court instructed the jury: "The burden rests on this defendant to satisfy the jury that two of the elements of self-defense existed; with regard to self-defense there are two points about which the defendant must satisfy you. . . . And the burden is upon him to establish the existence of these two elements; he must reasonably satisfy you there." Held, this instruction constituted reversible error.

In its opinion the court carefully distinguishes between the burden of proof in the real sense and the burden of going forward with the evidence. The former in a criminal case rests upon the state and never shifts during the course of the trial as the instruction of the trial court led the jury to believe. The latter burden of producing some evidence may frequently in the course of a trial shift to the defendant, but this burden is satisfied by the production of sufficient

evidence to bring the minds of the jury to the doubting point, and it does not require, as the trial court erroneously supposed, that the defendant convince the jury of an issue. The distinction taken in the opinion is in accord with the most modern views of scholars and writers, and such opinions will do much to avoid the confusion that has resulted in the cases from a failure to make this differentiation.

COMPULSION.

Nall v. *Commonwealth,* Ky., 271 S. W. 1059. *Crimes committed under coercion or compulsion excused.*

Defendant was accused of breaking and entering a storehouse with intent to steal. His defense was that he did so under compulsion; that one Mattie Culver drove him in an automobile to the gas station, drew a revolver, pointed it at him and said that unless he robbed the station she would kill him; that she followed him and kept the pistol pointed at him until the act was competed. The trial court refused to give an instruction on compulsion as a defense. Held, this was error. The question of whether compulsion would be a defense to crime was thus raised for the first time in Kentucky, and the court decided in accordance with authorities elsewhere, and what seems to be the correct rule on principle. In the following cases compulsion, consisting of threats of immediate death or serious bodily injury, was held a defense: *Rex* v. *Crutchley,* 5 Car. and P. 616 (Compulsion to join in a riot); *U. S.* v. *Haskell,* 4 Wash. C. C. 402, Fed. Cas. 15321 (mutiny); *Republica* v. *McCarty,* 2 Dall. (Pa.) 86 (treason), 8 R. C. L. 125. On principle there should be some concurrence of the will in order to incur criminal liability (Clark Crim. Law 3rd Ed. 99). By dictum, the court in the principal case excluded the crime of murder from those excused by compusion. This also is in accordance with authorities elsewhere. In at least some states this is the rule by statute. (*State* v. *Moretti,* 66 Wash. 537, Cal. P. C. 26 subsection 8.)

State v. *Ethridge,* Wash., 238 Pac. 19.

Where, in prosecution for possession of intoxicating liquors, it appeared that defendant, while driving automobile through United States military reservation, was by military officers taken into custody because suspected of recently committing robbery, and forced to drive automobile into another county, and while in such county police found liquor in automobile, *held* motion to suppress liquor as evidence was improperly deniel. Hocomb and Bridges, JJ., dissenting.

CONSTITUTIONAL LAW.

Gitlow v. *People of State of New York,* 45 Sup. Ct. Rep. 625. *Freedom of speech.*

New York Penal Law, Secs. 160 and 161, defining criminal "anarchy" as doctrine that organized government should be overthrown by force or violence or by assassination of executive heads or officers or by unlawful means, and declaring that any person who by word of mouth and writing advocates, advises or teaches criminal anarchy as defined, or who prints, publishes, edits, issues, or knowingly circulates, sells, distributes, or publicly displays any book, paper, document, or written or printed matter containing or advocating advising or teaching, that organized government should be overthrown by force or violence

or unlawful means, is guilty of felony, is not violative of constitutional guaranty of freedom of speech or press, protected by Const. Amend. 1, or Amendment 14, assuming such rights to be among the liberties protected by due process clause thereof; "advocacy" meaning the act of pleading for, supporting, or recommending active espousal.

Mr. Justice Holmes and Mr. Justice Brandeis dissenting.

Benjamin Gitlow, a member of the Left Wing Section of the Socialist party, a dissenting branch of that party formed in opposition to its dominant policy of "moderate Socialism," was convicted in the New York Supreme Court under the statute making the advocacy of criminal anarchy a felony.

The indictment was based upon the publication, of "The Left wing Manifesto," which had been adopted by the organization's National Council. The gist of the "manifesto" was the repudiation of the policy of introducing Socialism by legislative measures and the stressing of the necessity of a militant Socialism, mobilizing the power of the proletariat through mass industrial revolts, for the purpose of destroying the parliamentary state and establishing Communist Socialism.

The defenses were that the language used did not advocate "definite immediate acts of violence" toward government, and that the statute deprived defendant of his liberty of expression in violation of the Constitution.

The statute was upheld in both the Appellate Division of the Supreme Court and the Court of Appeals, and on writ of error to the United States Supreme Court it was held to be a valid exercise of the police power of the state. In the opinion of that court, written by Mr. Justice Sanford, 45 Sup. Ct. Repr. 625, the limitations on the right to speak or publish are clearly defined. To quote therefrom:

"It is a fundamental principle long established that the freedom of speech and of the press, which is secured by the Constitution, does not confer . . . an unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. . . . A state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional state."

In response to the contentions that the language used advocates no definite immediate acts of violence toward government, and that there was no evidence or likelihood of any concrete results, the court points out that a sufficient danger is presented by utterances inciting the overthrow of government by unlawful means, and that a state cannot reasonably be required to defer the adoption of measures for its own safety until the utterances lead to actual disturbances and imminent danger of its own destruction.

DENIAL OF SPEEDY TRIAL.

State ex rel. Moreau v. *Bond,* Texas, 271 S. W. 379. *Denial of speedy trial not warranted because accused is at time confined in state penitentiary under sentence for previous offense.*

Relator was charged by indictment with the murder of A and B. He was tried and convicted for the murder of A and sentenced to life imprisonment in the state penitentiary. The judge of the district court, despite requests of the accused that his case for the trial of B be set down for trial, refused, contending that since relator was already confined in the state penitentiary "he is wholly

without and beyond the jurisdiction of the court of Van Zandt County or the judge thereof to try him for another offense," and that there was no process known to the laws of Texas by which the penitentiary authorities could be compelled to release a prisoner in their charge to stand trial for another offense. *Held,* that a writ of mandamus should be directed to the district judge requiring him to grant the speedy trial guaranteed by the Bill of Rights. Such rights are fundamental in their nature and not the subject for judicial discretion. "If they (the penitentiary authorities) should fail (to obey a bench warrant) which is not to be presumed, upon proper application adequate remedy may be had."

DOUBLE JEOPARDY.

Morgan v. *State,* Ala., 104 So. 341. *Conviction for violation of city ordinance no bar to conviction for violating state law for same offense.*

It is, of course, well established that there is no double jeopardy where the same act is made punishable by a state and the United States: *Grafton* v. *U. S.,* 206 U. S. 333, *State* v. *Kenney,* 83 Wash. 441, 16 C. J. 282. Where the same act is made punishable by a state and a city ordinance, the general rule in the absence of statute is in accord with the principal case: 16 C. J. 281. This was the original rule in Alabama (*Bell* v. *State,* 75 So. 181), but was changed by statute in 1907, so that a judgment on the trial of an offense charged against either jurisdiction barred a prosecution by the other for the same offense. (Sec. 1222 Code of 1907.) This statute was repealed in 1915 thus restoring the rule of the Bell case (supra). In some other states statutes prohibit punishment for the same act by the state and municipality: Kent, Const. Sec. 168, *Davis* v. *State,* 37 Tex. Cr. 359.

FALSE PRETENSES.

People v. *Bartels,* Colo., 238 Pac. 51.

In prosecution for obtaining money by false pretenses, in that defendant, employed by school district to purchase land for lowest price, purchased it for less amount than he disclosed to employer, an instruction that, unless property was not worth price which district paid for it, it was not defrauded and defendant not guilty, *held* erroneous, as it is not necessary that prosecutor should sustain a pecuniary loss.

Com. v. *Morrison,* Mass., 147 N. E. 588. *Implied representation as to present intention.*

A misrepresentation as to a person's present intention may be a false pretense.

When one contracts to buy goods, he implicitly represents that he intends to make a genuine contract; if such is not his intention, he may be found to have made a false representation.

INTENT.

Kendall v. *State,* Ohio, 148 N. E. 367. *Intent in statutory crime.*

As clear purpose of Gen. Code, Secs. 12968, 12969, is protection of childhood, knowledge of fact that child employed is within prohibited age is not ingredient of offense of employing child under 14 in connection with moving picture theater or place of public amusement.

HOMICIDE.

Means v. *State,* Texas, 271 S. W. 613. *Placing dead bodies in sight of the jury while it was considering murder charge prejudicial.*

Accused, a negro, was charged with murdering a white man. While the jury in his case was deliberating, the sheriff and his deputy were out attempting the arrest of another negro bootlegger. While making the arrest the deputy was killed and the sheriff wounded. The dead body was brought and placed in the courthouse yard within about 35 feet of the jury room within view and hearing of the jury. A large crowd collected and began condemning negroes killing white men. The jury heard and saw the conduct and temper of the crowd and later returned with a verdict of guilty. *Held,* that such conduct was prejudicial to the defendant and the trial court erred in refusing to grant a new trial.

PAROLE.

Jacobs v. *Crawford,* Mo., 272 S. W. 931.

Prisoner who was serving a ten-year sentence in the state penitentiary for robbery was paroled by the governor, one condition of the parole being that if he failed to meet the various conditions, or upon the order of the governor "he may be arrested and returned to the penitentiary, there to serve out the remainder fo his sentence." A year later prisoner was rearrested for violating his parole. *Held,* that he was not entitled to have time during which he was at large counted in computing time which he had served. "It is apparent that the governor intended to impose, as one of the conditions of the parole, that the full unexpired sentence of petitioner should hang over him like a 'Sword of Damocles' to keep him faithful to the end of the period of parole. If the unexpired sentence conditionally commuted lessens from day to day while a paroled convict is at large under parole, one of the very greatest inducements to persuade such convict to remain a law-abiding citizen becomes less of an inducement from day to day, and he may arrive at a point where he will calculate supposed benefits accruing from his failure to remain a law-abiding citizen against the diminishing penalty for failure to live such a life."

PRESUMPTION OF INNOCENCE.

Barker v. *State,* Ala., 103 So. 914. *Presumption of innocence evidentiary in character.*

In a prosecution for possession of a still for manufacture of prohibited liquors, the court used this language: "It is true . . . the testimony adduced by the state made a prima facie case against the defendant, but . . . this did not operate to shift the burden of proof resting upon the state to prove the guilt of the defendant to the satisfaction of the jury beyond a reasonable doubt. . . . The presumption of innocence, *evidentiary* in character, attended the accused upon this trial, and the state's evidence in our opinion failed to overcome this presumption." The true effect of a presumption on the burden of proof is greatly obscured in the cases because of a failure to distinguish clearly between the burden of proof in the ultimate sense and the mere burden of going forward with the evidence. The former is determined by considerations other than presumptions and is fixed on one party or the other before any evidence is given at all. This burden remains fixed and never shifts, no matter what the

state of the evidence. The burden of going forward with the evidence, however, is determined by the state of the evidence introduced in the case at any one time and may frequently shift during the course of the trial. The sole function and effect of a presumption is to shift this duty of going forward with the evidence. It has nothing to do with the burden of proof on the issues involved. When once the presumption has determined the duty of producing evidence it has done its duty, has exhausted itself and disappears from the case. That the primary burden of proof in the instant case was never shifted from the state is, therefore, clear.

In criminal cases further confusion has arisen and positive harm done from a failure to analyze the true character of the so-called "presumption of innocence." Wigmore has shown (sec. 2511 Evidence) that it is not a genuine addition to the number of presumptions at all, but is rather merely another form of expression for the generally accepted rule of criminal law that the burden of proof in criminal cases rests upon the state. It is also perhaps but a guise for another equally accepted rule of criminal law having to do with the quantum of proof, viz.: that the proof must be beyond a reasonable doubt. This latter rule, however, affects only the measure of persuasion and has nothing to do with either the incidence of the duty or burden of proof as between the parties or with presumptions. (Wigmore, Evidence, Secs. 2497, 2511.)

Assuming, then, that the presumption of innocence for our purpose merely means (1) that the burden of proof is on the state, and (2) that the measure of proof must be beyond a reasonable doubt, the error of calling it evidence is apparent. The burden of proof merely apportions the duties of the litigants on the trial and presumptions are essentially rules *about* evidence and not evidence themselves. (Wigmore, Sec. 2490.) There were many of the earlier authorities holding the position that the presumption of innocence was evidence in favor of the accused: Greenleaf, Evidence, Sec. 34, and the celebrated case of *Coffin* v. *U. S.* (156 U. S. 432). Cases in the state courts following the "heresy" of the Coffin case are collected in Note 6, Sec. 2511 of Wigmore's Evidence. The true nature of the "presumption of innocence" was expounded and the fallacy of the Coffin case exposed by Professor Thayer in his lecture, "The Presumption of Innocence in Criminal Cases" (printed in the appendix of his Preliminary Treatise on Evidence). Subsequently the Coffin case was repudiated in the Federal courts: *Agnew* v. *U. S.*, 165 U. S. 36, and *Holt* v. *U. S.* (1910), 218 U. S. 245. Many state courts have squarely rejected the idea that the presumption is evidence for the accused: *Com.* v. *Sinclair,* 195 Mass. 100; *Detroit, etc., Ins. Co.* v. *Ellison,* 268 Mo. 239; *Culpepper* v. *State,* 4 Okla. Cr. 103.

The court in the principal case by saying that the state had produced enough evidence to constitute a "prima facie" case must have meant either that it had produced enough evidence to support a verdict of guilty, or else that it had produced enough evidence to get by the court and go to the jury. If it meant the former, but thought that the "presumption of innocence," operating as so much evidence for the accused, was sufficient to overcome this "evidence," then it is submitted that the case is wrong. It is wrong because it attributes to the presumption a double function, first of placing the burden of going forward on the state and secondly operating as evidence for the accused. If the court used "prima facie" in the latter sense then it seems quite unnecessary to talk about the presumption as "evidentiary in character." Such language serves no useful purpose and is apt to be confusing.

RAPE.

Davis v. *State,* Texas, 272 S. W. 480. *Mental capacity of prosecutrix to give or withhold consent vouched for by the state tendering her as a witness.*

Prosecutrix although twenty-two years of age was partly paralyzed in her arms and hands, had an undeveloped brain and in addition had infirmities of speech which made it impossible for her to articulate plainly. She seemed to understand, however, questions couched in simple language, and made her answers partly in words and partly by signs. Although the evidence of the prosecutrix was to the effect that she had been ravished by force (the theory of rape upon a woman so mentally diseased as to have no will to resist the act of carnal knowledge having been abandoned by the prosecution), she made absolutely no complaint and told no one of the act until pregnancy made it no longer possible to conceal it. *Held,* that by offering her as a witness (and her competency to testify was sustained by the appellate court) the state vouched for her mental capacity to give or withhold consent and, having such capacity, her failure to complain brings the case under the operation of the rule that a conviction cannot be sustained where a woman claiming to have been forcibly ravished fails to make complaint except where her pregnancy was the motive for her statement.

SENTENCE.

State v. *Dist. Ct.,* Mont., 237 Pac. 525. *Validity of suspended sentence statute.*

Suspended sentence statute (Rev. Codes 1921, Sec. 12078) *held* not void under Const. Art. 4, Sec. 1, as impinging upon executive's pardoning power, under Const. Art. 7, Sec. 9, in view of Rev. Codes 1921, Secs. 12455, 12456, and history of legislation on the subject; terms "pardon," "commutation," "reprieve," and "respite," as used in Const. Art. 7, Sec. 9, not comprehending suspension of execution of judgment, covered by Rev. Codes 1921, Sec. 12078; a "pardon" being an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed, or a remission of guilt, a forgiveness of the offense; "commutation" being a remission of a part of the punishment, a substitution of a less penalty for the one originally imposed; a "reprieve" or "respite" being the withholding of a sentence for an interval of time, a postponement of execution, a temporary suspension of execution.

Ex parte Wilson, Calif., 238 Pac. 352.

Pen. Code, Sec. 464, prohibiting the crime of burglary with explosives, *held* to prescribe a felony punishable by imprisonment in the state penitentiary for not less than 25 nor more than 40 years, despite failure of section to declare the offense a felony, or expressly provide for imprisonment in state penitentiary for its violation, in view of Sections 4, 459-461, 463, 464, and despite Section 17, and Const. Art. 1, Sec. 6.

This case overrules the holding in *Ex parte Schiaffino,* Calif. D. C. A., 232 Pac. 719, reported at p. 303 of August number of the JOURNAL.

Ex parte Howard, Calif. D. C. A., 237 Pac. 406. *Effect of unrevoked suspension.*

Where execution of sentence for 180 days was "suspended for 3 days," and prisoner remained at liberty from May 13th to Feb. 17th following, without any revocation of suspension of sentence, *held* that suspension should not be presumed an admission to probation, under Pen. Code, Sec. 1203, and judgment was not satisfied, and was still enforceable.

TRIAL.

State v. *Keck,* Kans., 237 Pac. 880. *Correcting erroneous verdict, opened in absence of defendant.*

In the trial of the defendant, the jurors to whom two forms of verdict were submitted reached an agreement that the defendant was guilty, and the foreman, without examination, attached his name to the form of verdict, finding the defendant not guilty, and returned it into court. When the jurors announced that they had agreed upon a verdict, the court sent for the defendant, who was in custody, but he did not reach the court room until after the jury brought in the verdict. On examination of the verdict returned the court noted that it was a finding of not guilty, concluded that it was not necessary to wait for the arrival of the defendant, handed the verdict to the clerk, who read it, whereupon the jurors united in saying that was not their verdict. About that time the defendant arrived, and the court then directed the jurors to return to the jury room and bring in a verdict upon which they had agreed. The defendant was present when this order was made. *Held,* that the court rightly ordered the jury to return and bring in a verdict upon which the jurors had agreed, and, further, it is *held* that the absence of the defendant when the verdict inadvertently signed was read and declared to be a mistake by the jurors was not such an error as requires the the reversal of the conviction.

WITNESSES.

Willis v. *State,* Ala., 104 So. 141. *Court cannot limit number of character witnesses for defendant in criminal trial.*

Defendant, who was on trial for offense of distilling, put in issue his character and offered four witnesses who testified that his character was good. He then stated that he had three additional witnesses who would testify to his good character. The trial court refused to allow them to testify, saying: "We cannot stay here all day examining character witnesses as we have too many cases to try." "I repeat it; we have too many cases to try; I will let you examine two more character witnesses." *Held,* this was error.