Journal of Criminal Law and Criminology

Volume 17
Issue 3 *November*

Article 10

Fall 1926

Judicial Decisions

JUDICIAL DECISIONS

CHESTER G. VERNIER AND HAROLD SHEPHERD

CONFESSIONS

State v. *Morro,* Mo., 281 S. W. 720. *Necessity of independent proof of corpus delicti in embezzlement action before confession will support verdict of guilty.*

Indictment charged defendant, while cashier of a bank, with embezzling money. His confession was offered in evidence and defendant found guilty. He invokes the rule that independent proof of the corpus delicti must be made before a confession will support verdict of guilty. *Held,* that proof that defendant was cashier of the bank, that he had received a sum of money for the bank and had accounted for only a small part of that sum was sufficient proof of the corpus delicti to make the confession admissible within the rule. The court also correctly emphasizes the fact that full proof of the corpus delicti, independent of the confession is not required, and, if there is evidence of corroborating circumstances tending to prove crime corresponding with circumstances related in the confession, both the circumstances and the confession may be considered in determining whether corpus delicti is sufficiently proved.

EMBEZZLEMENT

People v. *Kilpatrick,* Colo., 245 Pac. 719. *Contraband liquor subject of larceny and embezzlement.*

Police officers, seizing liquor and failing to account therefor to city, are chargeable with larceny and embezzlement of liquor; C. L. Sec. 3720, not preventing liquor from being subject of larceny or embezzlement.

Purpose of C. L. Sec. 3720, declaring that there shall be no property rights in liquor and devices mentioned, when used in violation of act, is to limit civil rights, not criminal liability.

Smith v. *State,* Neb., 208 N. W. 126. *Conditional Vendee as Bailee under Embezzlement Statute.*

Vendee receiving a diamond ring and gold watch under a contract to keep it for a certain time, and to become its owner then if he has paid the stipulated price, otherwise to pay for its use is not *owner* under a conditional sale contract, but a *bailee* subject to punishment under Comp. St. 9631 making bailees who convert to their own use chattels guilty of larceny in same manner as if the original taking had been felonious.

EVIDENCE

Brennan v. *State,* Md., 134 Atl. 148. *Admissibility of extrajudicial confession of third party.*

Extrajudicial declarations of third party not made under oath, that he committed crime charged against defendant, are ordinarily inadmissible, but in pros-

ecution for bastardy, declarations of third person, who associated with prosecutrix and committed suicide on day her child was born, admitting that he was father of prosecutrix's unborn child, and letter stating that suicide was caused by responsibility for pregnant condition of prosecutrix, *held* admissible to show that third person was father of child.

Urner and Offutt, JJ., dissenting.

EXTRADITION

Cardigan v. *Biddle,* U. S. C. Ct. Appeals, 10 Fed. (2) 444. *Removal of fugitive from justice from one federal district to another.*

Petitioner, a fugitive from justice, removed from federal district of Minnesota to District of Michigan for trial under indictment there pending, *held* properly there tried, without being given opportunity to leave for offenses charged in two other indictments, found after such removal.

In the state courts there is a conflict of authority whether a person who has been extradited from another state for a particular offense can be tried for any other. The Federal Courts have taken what seems to be the correct view on principle, that a fugitive from justice, surrendered by one state upon the demand of another, is not protected from prosecution for offenses other than that for which he was surrendered, but may be tried for any crimes committed in the demanding state either before or after extradition without being given an opportunity to leave the state. (Lascelles v. Georgia, 148 U. S. 537, 13 S. C. 687; Innes v. Tobin, 240 U. S. 127.) The holding in the principal case is consistent with this view.

FORGERY

Pennel v. *State,* Ark., 282 S. W. 992. *Bank, cashing forged check, is not the defrauded party, though drawer's account at time was overdrawn.*

Defendant raised a check to which the name of Pyeatte was signed as drawer. The indictment charged that the forging was done "with the fraudulent intent to obtain the possession of the money and property of the said Pyeatte." At the time the check was cashed Pyeatte's account was already overdrawn. Defendant asked for an instruction based on the theory that, as Pyeatte had no money in the bank with which the check could be cashed, it was the bank, and not Pyeatte, who was defrauded. *Held* the fact that drawer's account was overdrawn at the time forged check was cashed does not make the bank the defrauded party, since the drawer became liable to the bank for the amount of the check, though overdraft was increased.

HOMICIDE

Commonwealth v. *Heinlein,* Mass., 152 N. E. 380. *Homicide in commission of a felony: continuance of felony.*

Where all defendants were co-conspirators in robbery of car barn cashier, the robbery continued as matter of law when one defendant, in acting as lookout, killed watchman, whom he was seeking to put in fear in order that robbery might succeed, though co-defendants had secured possession of money taken by them and had left the building, as respected degree of murder under G. L. c. 265, Secs. 1, 17, 21.

INSTIGATION

State v. *Johnson,* Idaho, 246 Pac. 531. *Effect of illegal sale of cigarettes to minor, where sheriff instigates the purchase.*

Conviction for sale of cigarettes to minor under C. S. Sec. 8363, as amended by Laws 1921, c. 185, will not be set aside, as a matter of public policy because minor made purchases at direction of sheriff.

William A. Lee, C. J., and Taylor, J., dissenting.

INTOXICATING LIQUORS

United States v. *Katz,* 46 Sup. Ct. Rep. 513. *Record of sales, etc., required by Volstead Act, construed not to apply to liquor illegally made.*

National Prohibition Act, Oct. 28, 1919, tit. 2, sec. 10 (Comp. St. Ann. Supp. 1923, Sec. 10138½e), providing "no person shall manufacture," etc., "any liquor without making at the time a permanent record thereof showing in detail," etc., applies only to permittees, and failure of one unlawfully selling intoxicating liquor to keep such record is not a crime in itself, in view of title 2, Secs. 3, 34, of the National Prohibition Act (Comp. St. Ann. Supp. 1923, Secs. 10138½aa, 10138½u), Revenue Law (Comp. St. 1916, Secs. 5981-6161), Food Control Act, Oct. 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sec. 3115⅛e-3115⅛kk, 3115⅛l-3115⅛r), and Const. Amend. 18.

Mr. Justice Brandeis, dissenting.

JUDICIAL NOTICE

Keen v. *United States,* U. S. C. C., 11 Fed. (2) 260. *No judicial knowledge that "Home Brew" is intoxicating.*

While courts may judicially know that whiskey, alcohol, brandy, gin and other well known intoxicants are "intoxicating liquors" within meaning of the National Prohibition Act, they do not know that "home brew" is "intoxicating liquor" within the meaning of the Act, in absence of proof of alcoholic content.

PROBATION

Archer v. *Snook,* Dist. Ct. Ga., 10 Fed. (2) 567. *Federal Probation Act of March 4, 1925, K Comp. St. Supp. 1925. 10564¾-10564¾c.)*

Two interesting questions were raised in the principal case relative to the recent Federal Probation Act. The facts were briefly these: Archer was found guilty of violating the Narcotic Laws and was sentenced by the federal court for the District of Georgia to serve two years in the penitentiary at Atlanta, but after serving six months thereof to be released on probation under the act of March 4, 1925. After the expiration of six months' confinement, Archer sought his release on habeas corpus. It was contended (1) that the act was unconstitutional, as conflicting with the pardoning power, (2) that the suspension provided in the sentence was, under the statute, beyond the power of the court. As to the first point it was rightly *held* that there could be no possible conflict with the pardoning power: "The power again is not absolute, but the suspension must be accompanied by the establishment of a condition of probation. The probation described in the act is not pardon. It is not

complete liberty, and may be far from it. It is really a new mode of punishment, to be applied by the judge in a proper case, in substitution of the imprisonment and fine prescribed by the criminal laws. For this reason its application is as purely a judicial act as any other sentence carrying out the law deemed applicable to the offense. The executive act of pardon, on the contrary, is against the criminal law, which binds and directs the judges, or rather is outside of and above it. There is thus no conflict with the pardoning power, and no possible unconstitutionality of the Probation Act for this cause."

The second point turns solely on a proper construction of the statute. "Succeeding sentences of the law mention a variety of things which may be required of the probationer, but imprisonment is not among them. It may come only on revoking the probation. The court, therefore, after ascertainment of guilt, must, with no other delays than have heretofore been permissible, either suspend sentence and establish probation, which may, if unsuccessful, be revoked and sentence then pronounced, or may pronounce the sentence ordinarily appropriate to the offense, but before it goes into execution may suspend it, and establish in lieu of it probation, subject to revocation and execution of the sentence later. It may, by express provision of the act, in any probation, make the payment of a fine a condition of it, but in none may it make imprisonment under the sentence such. It cannot, therefore, impose an imprisonment sentence, and provide for its suspension and for probation after it is partly executed. This applicant, therefore, cannot have his discharge on the attempt to provide therefor in this sentence, but must place his case before the parole board."

RAPE

Gaither v. *Meacham,* Ala., 108 S. 2. *Illicit intercourse with girl under age of consent as civil tort.*

Illicit intercourse with a girl under 16 years, in violation of Code 1923, Secs. 5410, 5411, is a civil tort to which she is incapable of giving consent, and as to which she cannot be in pari delicto, so that her consent vel non is immaterial in civil action for damages.

SENTENCE

City of Union v. *Strickland,* S. C., 132 S. E. 45. *When jail sentences run concurrently.*

Prisoner was found guilty of selling and transporting whiskey and was sentenced to pay a fine of $100 or serve 30 days on each charge. *Held* "Under the well settled rule that where several sentences are imposed for separate and distinct offenses they run concurrently, unless the intention that one should begin at the expiration of the other is expressed" and that therefore, defendant had the option of paying the two fines of $100 each or of serving 30 days imprisonment.

SELF-INCRIMINATION—FINGER PRINTS

People v. *Hevern,* N. Y., 215 N. Y. S. 412. *Statute providing for fingerprinting of persons arrested for felony and other offenses, violates constitu-*

tional guarantees of due process and prohibition against compulsory self-incrimination.

The legislature of New York State in response to asserted necessity for more stringent penal laws in 1926 amended in certain important respects the Code of Criminal Procedure, providing inter alia:

"No person charged with a felony, or with any of the misdemeanors or offenses specified in the preceding section shall be admitted to bail until his finger prints shall be taken to ascertain whether he has previously been convicted of crime. Upon the arrest of a person so charged, it shall be the duty of the peace officer having him in custody, to forthwith ascertain his previous record, if any, from the files and records kept in the place in which he is arrested, and report immediately thereon, nor shall he be admitted to bail until his previous record, if any, shall be submitted to the judge, justice, magistrate or other person empowered to admit to bail."

The purpose of the act was primarily to enable the court to fix the amount of bail in proper relationship, not only to the crime charged, but to the defendant's previous criminal career. The court in the principal case, however, decided that the act violated the due process clauses of both the Federal and State constitutions and was also violative of Const., Art 1, Sec. 6, prohibiting compulsory self-incrimination.

TRIAL

Durbin v. *State,* Ohio, 152 N. E. 194. *Sufficiency of verdict in embezzlement.*

On an indictment for embezzlement charging the amount embezzled to be $2,000, a judgment rendered on a general verdict of "guilty as charged in the indictment," without stating the amount embezzled, will be reversed for the insufficiency of the verdict under section 13691, General Code (Dick v. State, 3 Ohio St. 89; Parks v. State, 3 Ohio St. 101, and Armstrong v. State, 21 Ohio St. 357, followed. Schoonover v. State, 17 Ohio St. 294, distinguished).