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JUDICIAL DECISIONS OF CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER AND HAROLD SHEPHERD [EDS.]

ARREST

People v. *Miller,* Mich., 209 N. W. 81. *Irregularity of defendant's arrest no bar to subsequent proceedings regularly instituted.*

Defendant was arrested without warrant under circumstances, requiring one, but her arrest was subsequently followed by regular warrant and complaint. *Held,* defendant was rightfully held and not entitled to discharge. The court pointed out, however, that it was not shown that evidence had been secured by the unlawful arrest, and the decision is limited to cases where the mere arrest was unlawful.

ASSAULT AND BATTERY

State v. *Swanson,* 250 Pac. 216. *Assault on officer de facto.*

In prosecution for assault and battery upon police officer, it was not error to refuse to permit defendant to prove that officer was not qualified police officer, since this was collateral issue and out of place to turn trial, upon indictment, into quo warranto to determine title of officer to position, and for purpose of this case it was sufficient that he was shown to be de facto officer.

BRIBERY

People v. *Weitzel,* Calif. D. C. A., 249 Pac. 842. *Offer to receive a bribe is not an "agreement to receive."*

Conviction for bribery, under Pen. Code, Sec. 165, as amended 1905, of member of common council who allegedly offered for a consideration to vote for purchase of water system and for annexation of another city by election, under Deering's Gen. Laws, 1923, Act 5166, Sec. 3, cannot be sustained in absence of agreement by party to whom offer was made to pay such consideration, where no money was paid and indictment did not allege that defendant acted as executive or judicial officer, Pen. Code, Secs. 68, 93, being inapplicable.

BURGLARY

People v. *Jones,* Calif. D. C. A., 248 Pac. 713. *Railroad caboose not an "inhabited dwelling house or building."*

A railroad caboose not being an "inhabited dwelling house or building," within Pen. Code, Sec. 460, as amended by St. 1923, p. 747, in view of Pen. Code, Sec. 459, and evidence not showing that defendant removing articles therefrom was armed with a deadly weapon at any time, or that he assaulted any person, *held,* that conviction for first degree burglary was not sustained.

CONFESSIONS

White v. *State,* Texas, 287 S. W. 273. *Promise of sheriff as affecting voluntary character of confession.*

Where a defendant, charged with selling liquor, was told by the sheriff, "If you will go over there and make a statement about this affair, tell the truth and

come clean with us, I will do what I can towards getting a suspended sentence for you," a confession then obtained was inadmissible as not being voluntarily made.

CONSTITUTIONAL LAW

Dorchy v. *State of Kansas,* 47 Sup. Ct. Rep. 86. *Validity of Kansas Industrial Relations Act.*

Court of Industrial Relations Act, Kan., Sec. 19, authorizing criminal prosecution of labor union officers for inducing others to quit employment, *held* not in violation of Fourteenth Amendment, as applied to strike ordered to enforce claim of member of union.

State v. *Salt Lake Tribune Pub. Co.,* Utah, 247 Pac. 474. *Validity of statute prohibiting advertisements of tobacco.*

Laws, 1921, ch. 145, Sec. 2, as amended by Laws, 1923, ch. 52, prohibiting publication of advertisements relating to tobacco in any form *held* invalid as undue interference with interstate commerce, as applied to a cigarette advertisement published by state newspaper circulating in several states constituting interstate commerce, since sale of cigarettes in Utah under certain restrictions is lawful, and when shipped into state in original packages are also protected from interference by state.

CRUEL AND UNUSUAL PUNISHMENT

State ex rel. Nelson v. *Smith,* Neb., 209 N. W. 328. *Bread and water diet not cruel and unusual punishment.*

Relator who had been convicted of unlawful possession of intoxicating liquor was sentenced to the county jail for sixty days, the first and last twenty days of which were to be upon an exclusive diet of bread and water. This sentence was imposed under sec. 10169, Comp. St., 1922, which provided: "When the imprisonment is to be without labor, the sentence may require the convict to be fed on bread and water only, the whole or any part of the term of imprisonment." *Held,* that the statute did not violate the constitutional prohibition of cruel and unusual punishment, and the sentence was valid.

EVIDENCE

Barnett v. *Commonwealth,* Kent, 287 S. W. 12. *Expression of opinion of declarant in dying declaration inadmissible.*

Declarant, under circumstances rendering his statements competent as dying declarations stated that a particular person had killed him, but that "G. B. (one of the defendants) was in the lead." *Held* that so much of the declaration as related to G. B. was inadmissible as conclusion or expression of opinion.

FALSE PRETENCES

Fact that one to whom the pretences were made could have ascertained their falsity does not negative offense.

Where defendant obtained a loan by deliberately making false representations in writing as to his financial ability, *held* to violate Ky., St. 1213b, relative to false pretences regardless of whether one to whom representation was made could have ascertained falsity of such statement.

FORMER JEOPARDY

Hebert v. *State of Louisiana,* 47 Sup. Ct. Rep. 103. *Double prosecution under state and federal prohibition acts.*

Under Const., U. S., Amend. 18, prosecution for same act of manufacturing intoxicating liquor in both federal and state courts does not constitute double jeopardy.

That accused were on bail pending trial for manufacture of liquor in federal court presented no obstacle to their arrest for same offense under process of state court, in absence of objection by United States thereto.

INTOXICATING LIQUORS

People v. *Conti,* N. Y., 216 N. Y. S. 442. *Jurisdiction of state to try offenses against the National Prohibition Law in absence of state enforcement act.*

The principal case raises some interesting questions about state enforcement where there is no state enforcement act, New York having repealed the Mullen Gage Act in 1923. Defendant was indicted by a state grand jury for the crime of maintaining a nuisance in violation of section 1530 of the penal law of New York. The alleged criminal act consisted of maintaining a place where liquor containing more than one half of one per cent alcohol was sold contrary to the provisions of the National Prohibitory Act. *Held,* the indictment must be dismissed. The court decided: (1) that the state courts had no jurisdiction of offenses and crimes against the United States unless the same act had been defined by the state legislature as a crime against the state. This, of course, is clearly correct in view of Federal judicial code 256 vesting exclusive jurisdiction in the federal courts of crimes and offenses cognizable under the authority of the United States, but there is much language in the principal case suggesting that the same result would be arrived at in absence of such a statute, (2) that a violation of the National Prohibition Act does not per se constitute a crime against the state of New York, the sole power of creating crimes against the state sovereign being in the state legislature. Nor is this changed by any provision of the 18th Amendment, which was merely designed to give to the Federal Government a police power which it had not hitherto had, and in providing that Congress and the several states should have concurrent power of enforcement, the constitution neither makes the prohibited acts crimes against the state, nor even imposes any obligation upon the state to make the acts criminal, (3) the fact that an act was prohibited by the federal government and contrary to its laws, did not bring it under the condemnation of sec. 1530 of the state law defining a public nuisance and prescribing the punishment therefor. The courts cites a number of cases to the effect that neither the sale of intoxicating liquors, nor the keeping and maintaining in an orderly manner of houses where such liquors are sold is a nuisance at common law. One might well agree with the first two propositions of the court, the third seems more doubtful. As pointed out in comment on the principal case in 36 Yale Law Journal, p. 262, "it does not necessarily prevent any act from being a public nuisance because it is not specifically defined as such in the statute.—A place where federal law is violated is just as likely to be the center of public disturbances as premises where a state law is violated." While the violation of federal law may not per se constitute a nuisance, there is nevertheless under the facts of the principal case, a potential source

of lawlessness, disorder and disturbance of the peace. Perhaps the New York Court would say it is sufficient to consider them when they arise.

JURY

Reversal of judgment for error in overruling challenges for cause, even though juror subsequently excused on peremptory challenge.

The trial court erroneously overruled challenges for cause of certain jurors, who by their answers showed they had formed opinions, as to the guilt or innocence of the defendant. These jurors were subsequently dismissed upon peremptory challenge, the defendant exhausting all of his peremptory challenges in the process. *Held,* that "under such circumstances appellant is not required to show that he suffered prejudice by reason of having his challenge for cause overruled and a disqualified juror left upon his jury." Prejudice in such a case, the court said, would and should be presumed.

LOTTERIES

State v. *Danz,* Wash., 250 Pac. 37.

Distribution to purchasers of admission tickets to motion picture theater on certain night of each week of tickets on which merchandise contributed by merchants for advertising purposes was distributed by lot, *held* sufficient to take case to jury on question of consideration as respects issue whether enterprise was lottery within Rem. Comp. Sts., Sec. 2464, notwithstanding free tickets to drawing were offered to others than those purchasing theater tickets.

Parker, J., Tolman, C. J., and Mackintosh, and Askren, JJ., dissenting.

NON-AGE

People v. *Day,* Calif., 248 Pac. 250. *Non-age statute refers to physical not mental age.*

That defendant's "mental and moral age" was under 14 did not affect her responsibility for crime under Pen. Code, Sec. 26, sub. 1, as statute refers to physical age and not mental or moral age of accused.

PARDON

State v. *Hazzard,* Wash., 247 Pac. 957. *Effect of pardon on restoration of civil rights.*

Unconditional pardon of defendant convicted of manslaughter, purporting to restore all rights and privileges, forfeited by reason of conviction, did not restore license to practice art of healing, revoked because of conviction.

Unlimited pardon restores customary civil rights of citizen, but not offices forfeited nor property or interests vested in others in consequence of conviction.

ROBBERY

Cole v. *State,* Texas, 286 S. W. 204. *Taking by force money obtained from defendant by false dice not robbery.*

One deprived of money by use of fraudulent dice in crap game is not guilty of robbery in retaking money by display of firearms, for the persons first taking it would be guilty of theft by false pretext and the title to the money thus acquired would not pass. The retaking in such a case may, however, constitute an assault.