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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER AND HAROLD SHEPHERD, EDS.

ASSAULT AND BATTERY

Brimhall v. *State*, Ariz., 255 Pac. 165. *Assault by automobile: specific intent.*

Automobile driver who operated car in negligent manner and in violation of law with disregard to his own and others' safety, causing severe injuries to occupant of another car, *held* guilty of aggravated assault, regardless of whether defendant specifically intended to inflict bodily injuries; it being presumed that defendant intended natural and probable consequences of his conduct.

Though one is not criminally liable for consequences of ordinary negligence, where injury is result of reckless, wanton, and willful conduct, showing utter disregard for safety of others, law imputes to wrongdoer willful and malicious intention, even though he may not in fact have entertained such intention.

Lockwood, J., dissenting.

BRIBERY

People v. *Weitzel*, Calif., 255 Pac. 792. *"Agreement to receive bribe."*

Member of common council, who was charged with offering for consideration to vote for purchase of water system and for annexation of another city by election, could not be convicted for bribery under Penal Code, Sec. 165, as amended by St. 1905, p. 650, providing for punishment of members receiving, or agreeing to receive, bribe, where offers alone were shown without agreement for payment of money thereunder.

BURDEN OF PROOF

State v. *Walker*, N. C. (1927), 137 S. E. 429. *Burden of proof of insanity in criminal cases is on the defendant.*

Defendant, accused of murder, interposed a plea of insanity. *Held*, "following a long line of decisions in this jurisdiction" that the burden of proof in such cases is on the defendant, to prove insanity, not beyond a reasonable doubt, but to the satisfaction of the jury.

Maynard v. *State*, Texas (1927), 293 S. W. 1104. *Burden of proof of insanity in murder case is on the defendant.*

Defendant, an inmate of State Hospital for Epileptics, was charged with murder of a fellow inmate. Where plea of insanity was interposed, *held*, the burden was on the defendant to show that he was insane.

These two cases raise rather prominently a problem upon which there is a lack of uniformity in the decisions. Logically, and as an original proposition, it would seem that a plea of insanity is a direct denial of the requisite mental element necessary to constitute the crime of murder, and this being an essential element of the state's case, the ultimate burden of establishing sanity should be on the state. True enough, the state might be helped out by the presumption of sanity, but this would have no greater effect than to cast the burden of going forward with the evidence on the defendant. The quantum of proof, under this view, should be the same as required of the state in proving any element of a crime beyond a reasonable doubt. *Davis* v. *U. S.*, 160 U. S. 469; Wigmore, on *Evidence*, sec. 2501, and cases cited. Another group of decisions, apparently impressed with the practical abuses of insanity as a defense, and as Wigmore says, "based on judicial experience in dealing with the issue of insanity in criminal trials and adopted by an increasing number of courts," hold that the burden of proof is on the defendant and that he must establish his insanity by at least a preponderance of the evidence. It is to this group of decisions that the two principal cases belong. See also accord with this view: *People* v. *Bemmerly*, 98 Calif. 299, 303-304; *People* v. *Allender*, 117 Calif. 81; *State* v. *Clark*, 34 Wash. 485. There is at least one case holding the very extreme, and perhaps unwarranted, view that not only is the burden on the defendant but he must prove it beyond a reasonable doubt. *State* v. *Spencer*, 21 N. J. L. 196.

The placing of the burden of proof need not always accord with rules of strict logic; the really important thing after all is how well the rule works in practice, and so while as a matter of abstract reasoning the burden would seem to belong to the state, judicial experience in dealing with a much abused defense may well warrant what seems to be clearly the modern tendency, placing the burden on the defendant.

State v. *McCumber*, Iowa, 212 N. W. 137 (1927). *Burden of proof where alibi relied on is on defendant.*

Defendant was accused of breaking and entering a warehouse with intent to commit larceny. Defendant and his wife testified that accused was in his own house at the time of the alleged offense. *Held*, "This was an affirmative defense, as to which the burden was on appellant." While it is not clear from this language just what burden the court is talking about, if it really means that the primary burden is on the defendant, then the rule seems logically unsound and contrary to the weight of authority. See Wigmore, Sec. 2512c, and cases cited. Wigmore in the section cited says: "It is generally conceded that the accused does not have the burden of proving an alibi."

CONSTITUTIONAL LAW

Thomas, Warden, v. *Mills*, Ohio, 157 N. E. 488. *Right of convict to confer with attorney.*

In a case where a convict in the Ohio penitentiary, who has been convicted of the offense of first degree murder and sentenced to the Ohio penitentiary for life, has prosecuted error proceedings in the Court of Appeals seeking to set aside his conviction, and where the attorney of such convict in the error proceedings in question has applied for a private interview with his client, and

where the convict has been confined in the Ohio penitentiary for a period of over two months and during such time his attorney has not been permitted to see or confer with such client, on account of the refusal of the warden of the penitentiary to permit such interview, it is unreasonable and constitutes an abuse of official discretion on the part of the warden of the penitentiary to deny to the attorney the right to privately confer and consult with his client.

State v. *Kavanaugh,* N. M., 258 Pac. 209. *Changed grand jury not ex post facto.*

The Constitution of New Mexico (section 14 of article 2) provided that "No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the militia when in actual service in time of war or public danger." The statutes of New Mexico prior to the adoption of the Constitution and for a time thereafter provided that a grand jury should be composed of 21 persons, and that 12 must concur in finding an indictment. *Held,* that the amendment to section 14, art. 2, of the Constitution, which took effect January 1, 1925 (see Laws, 1923, p. 351), providing among other things, that a grand jury should, unless otherwise provided by law, consist of 12 in number, and that of such number at least 8 must concur in finding an indictment, does not disparage any substantial or constitutional guaranty and is not ex post facto, therefore, in applying to offenses committed prior to its adoption.

Whitney v. *People of State of California,* Calif., 47 Sup. Ct. Rep. 641. *Criminal Syndicalism: freedom of speech.*

California Criminal Syndicalism Act (St. 1919, p. 281), particularly section 2, sub. 4, is not repugnant to due process clause by reason of vagueness or uncertainty of definition.

California Criminal Syndicalism Act (St. 1919, p. 281) is not violative of equal protection clause (Const. U. S., Amend. 14), on ground that its penalties are confined to those who advocate resort to violent and unlawful methods as a means of changing industrial and political conditions, and exempts those who may advocate resort to like methods as a means of maintaining such conditions.

California Criminal Syndicalism Act (St. 1919, p. 281) *held* not violative of due process clause (Const. U. S., Amend. 14), as a restraint on the rights of free speech, assembly, and association.

Freedom of speech secured by Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license, giving immunity for every possible use of language, and preventing punishment of those abusing this freedom; hence state, in exercise of police power, may punish utterances inimical to public welfare.

CONSTITUTIONAL LAW

Kelley v. *State of Oregon,* 47 Sup. Ct. Rep. 504. *Right of prisoner to serve unexpired sentence before being executed for subsequent murder.*

Ellsworth Kelley and two others, while escaping from the Oregon State Penitentiary, killed John Sweeney, one of the guards.

Kelley was found guilty and sentenced to pay the penalty of death. He appealed to the Supreme Court of Oregon, which affirmed the trial court (*State* v. *Kelley,* 247 Pac. 146). The case then went to the United States Supreme Court upon a writ of error allowed by the Chief Justice of the state Supreme Court. See *Kelley* v. *State of Oregon,* 47 Sup. Ct. Rep. 504.

Kelley was under a sentence to confinement in the penitentiary for twenty years which had not expired when he committed this murder, and he contended that he could not be executed until he had served his full term, basing his claim upon sec. 1576, Ore. Laws, which reads as follows:

"If the defendant is convicted of two or more crimes, before judgment on either, the judgment must be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of such crimes; and if the defendant be in imprisonment upon a previous judgment on a conviction for a crime, the judgment must be that the imprisonment must commence at the expiration of the term limited by such previous judgment."

The State Supreme Court construed this section just quoted to refer only to imprisonment, and not to the penalty of death or fine, and Mr. Chief Justice Taft, of the United States Supreme Court, said in passing upon this question:

"It is contended that this construction of the statute in permitting one who has committed a murder while a convict in the penitentiary to be executed before his term has expired deprives him of a right secured by the Fourteenth Amendment. in that due process of law secures to him as a privilege the serving out of his sentence before he shall be executed.

"It is doubtful whether this exception and assignment can be said to be directed to a ruling of the Supreme Court of Oregon such as to draw in question the validity of a statute of Oregon on the ground of its repugnancy to the Constitution, treaties, or laws of the United States and sustain it, as required in sec. 237a of the Judicial Code as amended, ch. 229, 43 St., 936, 937 (Comp. Sts., sec. 1214), permitting a writ of error. But, assuming that it does, or, if not, treating the writ of error as an application for certiorari, there is not the slightest ground for sustaining the assignment.

"A prisoner may certainly be tried, convicted, and sentenced for another crime, committed either prior to or during his imprisonment, and may suffer capital punishment and be executed during the term. The penitentiary is no sanctuary, and life in it does not confer immunity from capital punishment provided by law. He has no vested constitutional right to serve out his unexpired sentence."

Tumey v. *State of Ohio,* 47 Sup. Ct. Rep. 437. *Disqualification of judicial officer by interest in fees dependent on conviction.*

In the above case the Supreme Court of the United States was confronted with the question whether certain statutes of Ohio, providing for trial, by the mayor of a village, of one accused of violating the state Prohibition Act, violated the Fourteenth Amendment to the Federal Constitution because of the pecuniary interest given the mayor in the result of the trial. The statute among other things, provided for a certain fee in addition to his regular salary as mayor if the accused was convicted.

Tumey was arrested and brought before Mayor Pugh, of the village of North College Hill, charged with unlawfully possessing intoxicating liquor. He

moved for dismissal because of the disqualification of the mayor to try him under the Fourteenth Amendment. The motion was denied and the case proceeded to trial. He was convicted, and fined $100, and ordered to be imprisoned until the fine was paid.

Mr. Chief Justice Taft, who delivered the opinion of the court, said:

"That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule. . . .

"All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. *Wheeling* v. *Black,* 25 W. Va. 266, 270. But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case. . . .

"The mayor received for his fees and costs in the present case $12, and from such costs under the Prohibition Act for seven months he made about $100 a month in addition to his salary. We cannot regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling, or insignificant interest. It is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his acquittal. . . .

"It is finally argued that the evidence shows clearly that the defendant was guilty, and that he was only fined $100, which was the minimum amount, and therefore that he cannot complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge."

Buck v. *Bell, Superintendent of State Colony for Epileptics and Feeble Minded,* 47 Sup. Ct. Rep. 584. *Sterilization of mental defectives.*

The Virginia statute authorizing sterilization of mental defectives under careful safeguards, *held* not void, under Fourteenth Amendment of the Constitution, as denying due process and equal protection of the law.

Butler, J., dissented, without opinion.

Mr. Justice Holmes, speaking for the court, said:

". . . We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson* v. *Massachusetts,* 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. Three generations of imbeciles are enough."

CRIMINAL SYNDICALISM

Burns v. *United States*, 47 Sup. Ct. Rep. 650. *"Sabotage."*

In prosecution under California Criminal Syndicalism Act (St. 1919, p. 281), applicable under Act Cong., June 2, 1920, Sec. 4 (Comp. Sts., Sec. 5207d), instruction: "Now, there has been presented to you evidence . . . to the effect that this organization, amongst other things, advocated what is known as slowing down on the job, slack or scamped work, such as loading of a ship in such a way that it took a list to port or starboard, and therefore had to limp back to port, and things of that kind. I instruct you that, under the definition as laid down by the Legislature of California, any deliberate attempt to reduce the profits in the manner that I have described would constitute sabotage," *held* warranted by the evidence and not erroneous.

Mr. Justice Brandeis, dissenting.

Fiske v. *State of Kansas*, 47 Sup. Ct. Rep. 655. *Conviction under Kansas statute held denial of due process.*

Where information charged that defendant violated Kansas Criminal Syndicalism Act (Laws Sp. Sess. 1920, c. 37) by inducing certain persons to apply for membership in Workers' Industrial Union, a branch of the Industrial Workers of the World, defendant then knowing that such organization unlawfully teaches "that the working class and the employing class have nothing in common . . .," that "between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system," and "by organizing industrially we are forming the structure of the new society within the shell of the old," and where there was no evidence that Industrial Workers of the World advocated unlawful methods other than a copy of the preamble of its constitution containing the language quoted in the information, *held*, there was no charge or evidence that defendant, in securing members, advocated crime, violence, or other unlawful acts, and hence conviction amounted to denial of due process, in violation of Const. U. S., Amend. 14.

EVIDENCE

Sherow v. *State*, Texas (1927), 290 S. W. 754. *Admission of evidence obtained by unlawful search.*

Officers unlawfully searched defendant's premises in February, 1924. The legislature by an act effective in June, 1925, made it a penal offense for any officer to thus unlawfully search and further provided that evidence thus obtained should be inadmissable against the accused in any criminal case. Defendant was tried in July, 1925, for violation of the prohibition law, and evidence obtained by the unlawful search was offered. *Held*, the evidence was inadmissable. Lattimore, J., dissenting. Prior to the act of 1925 evidence obtained by unlawful search was admissable in Texas. *Welchek* v. *State*, 93 Tex. Crim. Rep. 271, 247 S. W. 524, so the real question in the principal case was whether the statute made inadmissable evidence secured by a search made prior to the statute becoming effective. The Court held that the statute was a mere rule of

procedure, and, being in force at the time of the trial excluded evidence, which when secured might have been used.

Elliott v. *State,* Ala. (1927), 111 So. 762. *Admissability, as an admission, of evidence that defendant offered to buy release from arrest.*

Where a defendant charged with crime (manufacturing intoxicating liquors) offered to buy release from arrest from officer having him in custody, such fact is admissable in evidence as an admission.

Brown v. *Commonwealth,* Va. (1927), 137 S. E. 492. *Established status presumed to continue until contrary shown.*

Defendant was convicted of manufacturing intoxicating liquors and on appeal assigns as error admission of evidence to effect that accused had a general reputation as a violator of the prohibition law seven or eight years previous. *Held,* the admissability of such evidence rested in sound discretion of the trial court, and no abuse was shown here. While the court in determining its admissability uses the language of presumption, "It is certainly true, however, that a status once established is generally presumed to continue unchanged until the contrary is shown," it is probably not a true presumption at all in the sense of necessitating a directed verdict where uncontradicted but rather evidence, from which the trier of fact may make an inference as to the truth of the ultimate fact.

FORMER JEOPARDY

Commercial Credit Co. v. *United States,* (1927), 17 Fed. (2nd) 902. *Conviction for possession of liquor no bar to proceedings for forfeiture of automobile for conccaling therein tax unpaid liquor.*

Conviction of unlawful possession of liquor under National Prohibition Act, tit. 2, sec. 3 (Comp. Sts., sec. 10138½aa), is not a bar to proceedings for forfeiture, under Rev. Sts., sec. 3450 (Comp. Sts., sec. 6352), for concealing tax unpaid liquor in automobile with intent to evade payment of tax. The decision in this case differs from the recent decision of the U. S. Supreme Court in *Port Gardner Investment Co.* v. *U. S.,* 47 Sup. Ct. Rep. 165, in which it was held that where a driver of an automobile was charged with possession and transportation of intoxicating liquor and pleaded guilty to both charges proceedings could not thereafter be instituted for a forfeiture of the car under the revenue act because in such case the disposition of the automobile prescribed in Sec. 26 of title 2 of the National Prohibition Act became mandatory after the driver's conviction and such disposition was inconsistent with the disposition provided for under sec. 3450, Rev. Sts. But in the principal case defendant had been previously convicted of unlawful possession only and this offense is punishable only under sec. 29, tit. 2, and does not entail disposition of automobile provided by section 26, tit. 2.

INDETERMINATE SENTENCE

State v. *Sorrentino,* Wyo., 253 Pac. 14. *Effect of fixing minimum and maximum sentence at substantially the same number of years.*

Minimum of 16 and maximum of 17 years for manslaughter *held* not such abuse of discretion of trial court as to authorize interference by reviewing court.

INDICTMENT

People v. *Fronk,* Calif. D. C. A., 255 Pac. 777.

Alleging that two persons committed embezzlement by felonious conversion of moneys held by one in trust for his principal is tantamount to alleging that one converted the money and the other "aided and abetted" him under Pen. Code, sec. 971, abolishing distinction between accessories before the fact and principals.

INSANITY

Clark v. *State,* Ohio, 156 N. E. 219. *Use of intelligence tests to rebut defense of mental incapacity.*

In prosecution of 19 year old defendant for murder, state, seeking to rebut claim that defendant lacked mental capacity to commit crime, was properly permitted to show intelligence of defendant disclosed by intelligence tests known as Stanford revision of Binet-Simon scale, Ohio literacy, and Parteus-Maze.

JURISDICTION

Ford et al. v. *United States,* 47 Sup. Ct. Rep. 531. *Jurisdiction over crew and liquor-laden British vessel seized on high seas.*

Seizure of liquor-laden British vessel lying 5.7 miles from the Farallon Islands, territory of the United States, 25 miles west from San Francisco, *held* not unlawful, under treaty between Great Britain and the United States.

Treaty with Great Britain, authorizing the seizure under stated circumstances of liquor-laden vessels and the taking of them into court "for adjudication in accordance with [United States] laws," intends that not only vessel, but all and everything on board, are to be adjudicated, hence crew and officers of British vessel lawfully seized are not immune from prosecution under Crim. Code, sec. 37 (Comp. Sts., sec. 10201), for conspiracy to violate Prohibition and Tariff Acts.

Officers and crew of liquor-laden British vessel lawfully seized under treaty with England *held* subject to prosecution under Crim. Code, sec. 37 (Comp. Sts., sec. 10201), for conspiracy "at the Bay of San Francisco" to violate Prohibition and Tariff Acts, though they were at all times corporeally out of the jurisdiction of the United States; it being shown that they had confederates within the jurisdiction of the court for whose acts they were chargeable.

JUVENILE COURT

Ex parte *Bastiani,* Calif. D. C. A., 253 Pac. 951.

Conviction of grand larceny of accused, who did not disclose that he was under 18 years at hearing in justice court or in superior court, but represented himself as 20 years old to judge of superior court, is valid, though case was not

referred to juvenile court, under Juvenile Court Act (Sts. 1915, p. 1228), sec. 4 (d), and (Sts. 1913, p. 1298), sec. 19, and accused is not entitled to discharge on habeas corpus.

Ex parte *Tassey,* Calif. D. C. A., 253 Pac. 948.

Where defendant under 18 years, prosecuted in superior court, asserted right to have case first submitted to juvenile court by suggestion to superior court as to his age, violation of Juvenile Court Act (Sts. 1915, pp. 1228, 1229), secs. 4 (d), 6, by conviction, without first determining whether case should be sent to juvenile court, was jurisdictional error and entitled minor to writ of habeas corpus discharging him from custody of prison warden.

Right of minor under 18 years to have prosecution first submitted to juvenile court, as provided by Juvenile Court Act (Sts. 1915, pp. 1228, 1229), secs. 4 (d), 6, related to jurisdiction of person and not subject-matter and may be waived.

LARCENY

State v. *Koontz,* Kan., 257 Pac. 944. *Larceny by wife from husband.*

The evidence tended to show that appellant and A. A. Koontz were married in August, 1925; that they lived together in Kansas City, Kan., about half the time between that date and September 20, 1926; that at supper on that date appellant gave her husband sleeping powders in his coffee. He became drowsy, retired early, and slept soundly. That night appellant left, and took with her a Dodge touring car, her husband's trunk, with practically all of his clothing, two revolvers, his watch, a diamond ring, and $66 in cash from his pocket. . . . She was charged with the larceny of all the property taken. Appellant contended the ring had been given to her by her husband, and the automobile had been paid for in part since their marriage. The taking of the property and the disposition made of it was not denied.

Appellant was found guilty of petty larceny. It is evident that the jury did not find appellant guilty of the larceny of the automobile, nor the diamond, nor the money taken, but did find her guilty of the larceny of her husband's watch, wearing apparel, and personal effects—and as to these they were kind enough to appellant to place a low value upon them. She appealed, and contends that a married woman, by reason of the marriage relation, has such an interest in the property of her husband that she cannot commit the crime of larceny concerning it.

Held, the marriage relation does not make it impossible for a married woman to be prosecuted for the larceny of the separate property of her husband.

LARCENY

State v. *Vandewater,* Iowa (1927), 212 N. W. 339. *When separate asportations constitute a single larceny.*

Defendant was charged with a single act of larceny, the stealing of four spools of barbed wire and 50 steel posts. The evidence showed at least two separate asportations at least a day apart. *Held,* that there was but one larceny. That there may be but one larceny, although there are several acts of carrying

away, is clear. The test is whether the several acts of carrying away were accompanied by one or several distinct intents. This is essentially a question for the jury and the principal case seems sound in view of the facts.

LARCENY

People v. *Noblett*, N. Y., 155 N. E. 670.

Where defendant was tried and convicted of larceny under Sec. 1290 of the Penal Law (Consol. Laws, ch. 40), combining common law larceny and false pretenses, the indictment containing two counts, one charging larceny, and the other false pretenses, held judgment of conviction should be reversed, when trial was held on the larceny count and it appears that complaining witness in subleasing apartment from defendant, parted with title to money under contract requiring payment in advance for rental.

Crane, J., wrote a vigorous dissenting opinion, in which Andrews, J., concurred.

NEW TRIAL

Commonwealth v. *Sacco* et al., Mass., 156 N. E. 57.

On motion for new trial, findings of trial judge that no reliance could be placed on the alleged confession of third person to commission of murder charged, that truth thereof was not substantiated, and that other grounds were not made out, being on matters of fact, are final.

Rule that it is not imperative that new trial be granted, even though evidence is newly discovered which if presented to a jury would justify a different verdict, applies even though the case be capital.

No agreement of counsel on truth of occurrences at trial is binding on trial judge on motion for new trial, if not in accord with his knowledge, and refusal to be so bound is not abuse of discretion nor proof of prejudice.

PARDON

Biddle, Warden, v. *Perovich*, 47 Sup. Ct. Rep. 664. *Effect of commutation of sentence without consent of prisoner.*

Under Const., Art. 2, Sec. 2, giving President power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," President has power to commute death sentence of one convicted of murder, under Crim. Code Alaska (Act, March 3, 1899, c. 429, 30 St. 1253), Sec. 4, to sentence of life imprisonment, without the consent and against the will of such person.

A pardon is not an act of grace from an individual happening to possess power, but a determination of the ultimate authority that the public welfare will be better served by inflicting a less punishment than fixed by judgment; hence public welfare, and not consent of person convicted, determines what shall be done.

PRESUMPTIONS

State v. *Barnes,* S. D. (1927), 213 N. W. 504. *Presumption of intent to violate the law from possession of intoxicating liquors.*

Defendant was charged with keeping intoxicating liquors for sale. Trial Court instructed to effect that: "The keeping or having possession of intoxicating liquors is deemed presumptive evidence of an intent to violate the law." Defendant excepts on the ground that it throws upon the accused the burden of establishing his innocence. *Held,* there was no error. The giving of such an instruction is fully warranted in South Dakota, *State* v. *Humphery,* 42 S. E. 512. The Court said, however, in the principal case, "But the instruction should not go so far as to throw the burden of proof on the defendant." If the so-called presumption is a mere inference of fact which the jury might, in view of the evidence make, or even if it is a genuine presumption, the principal case is correct in holding that the burden has not been shifted. The most that such an instruction could do would be to shift the burden of going forward and of this the defendant cannot object.

PUNISHMENT AND PREVENTION OF CRIME

State v. *Colcord,* Minn., 212 N. W. 894. *Statute, providing life imprisonment for bank robbery, held constitutional.*

Gen. Sts. 1923, sec. 10106, made conviction for bank robbery or an attempt thereat punishable by life imprisonment. Defendant, convicted under this statute contends that the punishment transcends constitutional limitations and constituted "cruel and unusual punishment." *Held,* the statute was valid. "The statute in question puts bank robbery and attempts thereat in a class by themselves. The purpose was to meet the situation resulting from the increasing prevalence of bank robberies. The statute recognizes the obvious fact that, so far as purpose is concerned, the unsuccessful attempt is as vicious as complete success. . . . The fact that the punishment is now the severest known to our law, imprisonment for life, does not alter the case."

PROBATION

Ex parte *Fink,* Calif. D. C. A., 250 Pac. 714.

Where defendant was convicted of felony and placed on probation, order requiring defendant to be placed and kept in psychopathic ward of county farm *held* illegal.

Pen. Code, sec. 1203, *held* to mean that defendant, while on probation and conforming to terms thereof, shall be at large, and not in confinement.

RAPE

State v. *Atkins,* Mo., 292 S. W. 422. *Penetration accomplished by surprise sufficient "Force" to make out rape.*

Improper sexual connection with a woman by a physician making vaginal examination, accomplishing penetration by surprise when the woman is awake,

but utterly unaware of his intention, is "forcible ravishing" within Rev. Sts. 1919, sec. 3247, as amended by Laws 1921, p. 284a, defining rape.

SENTENCE

State v. *Taylor,* Wash., 253 Pac. 796.

Imposition of sentence to term in state penitentiary for offense of possessing narcotics *held* not abuse of discretion, notwithstanding prior punishment of defendant for same offense imposed by federal court.

The mere fact that the defendant has been punished for an offense in federal court does not entitle him, as a matter of law, to suspension of sentence for same offense in state court.

Court, in pronouncing sentence for offense of possessing narcotic drugs, should take into consideration sentence previously imposed on defendant in federal court for same offense.

TRIAL

People v. *Gowasky* et al., N. Y., 155 N. E. 737. *Waiver of jury trial, leading to life imprisonment for fourth conviction under Baumes Law.*

Prisoners, whose counsel pleaded guilty for them to charges of previous convictions, and insisted only that amendments of Penal Law, secs. 1941-1943, by Laws 1926, ch. 457, were unconstitutional, and that court had no right to sentence them to life imprisonment as fourth offenders, because indictments contained no statement of previous convictions, waived right to be told by judge that, if they denied that they were persons previously convicted, they could have jury trial of question.

Lehman, J., dissenting.

VERDICT

State v. *Merra,* N. J., 137 Atl. 575. *Construction of verdict.*

Under verdict reciting, "We find Salvatore Merra guilty of murder in the first degree. We find Salvatore Rannelli guilty in first degree and recommend life imprisonment"—recommendation of life imprisonment referred only to defendant last named and authorized death penalty for defendant first named.

Kalisch and Campbell, JJ., dissenting.