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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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AUTOMOBILES

People v. *Scofield*, Calif., 265 Pac. 914. *Statutory duty to stop and render aid.*

Held defendant can not be convicted under a statute imposing a duty to stop in case of accident and give certain information and render aid, where the other party to the accident was rendered unconscious and bystanders rendered all necessary aid before defendant could do so. Although the statute makes no exception it is to be sensibly construed. It was impossible to give information to the unconscious victim of the accident. The statute requires only "necessary" aid and a failure to aid under the above circumstances is not criminal.

BIGAMY

Davis v. *People*, Colo., 264 Pac. 658. *Bigamy following common law marriage.*

Defendant, thinking he was divorced from his first wife, entered into a marriage relationship with a second woman in 1919 and so lived with her until 1927. His first wife did not obtain a divorce until 1921. In 1927 he learned of this divorce and married a third woman.

Held, his relationship with the second woman had ripened into a common law marriage and that his third marital venture is bigamous. The case represents the better view on both points involved, on which there is some conflict in the authorities.

CONSTITUTIONAL LAW

Commonwealth v. *Loftus*, Pa., 141 Atl. 289. *Validity of statute giving jury the right to affix punishment for first degree murder.*

Where, before passage of Act May 14, 1925 (P. L. 759), on conviction of first degree murder, court was required to pronounce sentence of death, passage of such act permitting jury to say whether punishment should be death or life imprisonment did not harmfully affect one condemned to death by jury for murder so as to enable him on appeal to maintain that such statute violates Const. Art. 1, Sec. 6, requiring trial by jury to be as theretofore, and right thereof to remain inviolate.

EVIDENCE

Coverson v. *State*, Ohio, 161 N. E. 221.

Where defendant was charged with killing of a police officer while in discharge of his duty, witness having testified that deceased in going toward de-

fendant stated, "I am the law," permitting him to answer to question as to what was understood in the colored community by the expression that it meant that he was an officer of the law was not error as permitting witness to give a conclusion.

FORTUNE-TELLING

Davis v. *State,* Ohio, 160 N. E. 473. *Validity of statute forbidding fortune-telling.*

Section 13145, General Code, prohibiting and penalizing fortune-telling, does not violate either sections 1 or 2 of article 1 of the Ohio Constitution or section 1 of the federal Fourteenth Amendment.

It is not a defense to a prosecution under section 13145, General Code, that the accused is a member of a religious society and that the representation made alleged to constitute the offense was a part of the religious belief of the alleged offender.

GRAND JURY

People v. *Kempley.* Calif., App. 265 Pac. 310. *Effect of financing investigation of a particular offense by grand jury.*

An agreement on the part of grand jurors to finance an investigation of a particular offense so prejudices them as impartial and unbiased members of the grand jury as to disqualify them.

HOMICIDE

Commonwealth v. *Taylor,* Mass., 161 N. E. 245. *Drunkenness—intent.*

In prosecution for murder, instructions that, if jury found deceased was murdered in commission or attempted commission of crimes of rape or assault with intent to rape or of robbery, and that jury found that defendant's intoxication rendered defendant incapable of forming intent required, the defendant was not guilty of murder in first degree but of murder in second degree *held* properly refused, since a man, because he is intoxicated, cannot avail himself of his intoxication to exempt him from any legal responsibility which would attach to him, if sober.

People v. *Dowell,* Calif., 266 Pac. 807. *Homicide in "the perpetration" of a robbery.*

Defendant, who while fleeing from scene of robbery, carrying supposed bag of money of victim, killed policeman who was pursuing him, in order to effect his escape, committed murder in the perpetration of a robbery, the crime of robbery not having been completed at such time.

The cases are in conflict on the construction of such words as "in the perpetration of" a robbery or other crime in the homicide statutes. While the above case is to be commended for giving a broad interpretation to the words in question it should be noted that none of the conflicting cases were cited or discussed by the court, which contented itself with the technically inaccurate statement

that, "we are satisfied that the crime of robbery had not been completed in any sense at the time of the unlawful shooting . . ."

INDICTMENT

People v. *Plum*, Calif., App. 322. *Validity of simplified indictment.*

Information charging grand theft as defined by Pen. Code, Sec. 484, as amended by St. 1927, p. 1046, Sec. 1, substantially in language of section 952, as amended by St. 1927, p. 1043, providing that allegation of "unlawfully took" shall be sufficient to charge all acts constituting theft in form provided by section 951 as amended by St. 1927, p. 1043, together with copy of all testimony taken at preliminary examination or given before grand jury, *held* to adequately protect rights of defendant, and contention that section 952 fails to allege elements of crime of theft and alleges an act which ordinarily does not constitute crime at all, requiring information to set forth particulars, has nothing but pretext to support it.

The above case is interesting as one of the first to pass on the validity of the simplified amendment recommended by the California Crime Commission.

The following quotation from the opinion of Finch, P. J., is in refreshing contrast to the undue technicality of early decisions:

"There may be technical objections to the short form of indictment or information under discussion, but when a defendant, charged with grand theft as defined by section 484, as amended by St. 1927, p. 1046, Sec. 1, has been furnished a copy of all the testimony taken at the preliminary examination or given before the grand jury, a rule requiring the indictment or information to state more than is required by sections 951 and 952 would have 'nothing but the most flimsy pretext to support it.'

"The extreme technicalities of the old common law are no longer followed in the English practice. The English Larceny Act of 1916 provides for a short form of indictment in charging simple larceny and more particular averments in a charge of obtaining property by false pretenses. Archbold's Criminal Pleading, Evidence and Practice (25th Ed.) 491, 669. 'The distinction between larceny and obtaining by false pretenses is now little more than academic, because of the provisions of 6 and 7 Geo. V, c. 50, See. 44, subsecs. 3, 4.' Id. 507. 'On the trial of an indictment for stealing the jury may . . . find the defendant guilty of embezzlement or of fraudulent application or disposition, as the case may be. . . . If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money, or valuable security in question in any such manner as would amount in law to obtaining it by false pretenses with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretenses, and thereupon he shall be liable to be punished accordingly." Id. 488.

JURISDICTION

State v. *White*, Okla., 264 Pac. 647. *Trial of federal prisoner in state court.*

A prisoner, with the consent of the attorney general, may, while serving a sentence imposed by a District Court of the United States, be lawfully taken on a writ of habeas corpus ad prosequendum into a state court, and there put to

trial upon an accusation there pending against him, although there is no express statutory authority for the transfer of a federal prisoner to a state court for such purpose. The attorney general in such matters represents the United States, and may, on its part, practice in comity which the harmonious and effective operation of both systems of courts requires, provided it does not prevent enforcement of the sentence of the federal courts or endanger the prisoners. *Ponzi* v. *Fessenden* et al., 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879.

LARCENY

People v. *Campbell,* Calif. App., 265 Pac. 364. *"Grand theft."*

Indictment accusing defendant of a felony, to wit, grand theft in unlawfully taking property of a corporation consisting of money of value of $687.50, *held* to charge the commission of felony of "grand theft," as defined by Pen. Code, Sec. 484.

The above case is one of the first to involve the statute recommended by the California Crime Commission, combining the crimes of embezzlement, larceny and false pretenses. That the statute will receive a liberal construction to effect its purpose is foreshadowed by the opinion of the court, as shown by the following quotation:

"Much of the time of courts has been consumed in the consideration of technical objections to pleadings in criminal cases; yet it is probable that few judges are able to recall a single case in which the defendant was actually in the slightest doubt as to the crime with which he was charged. Modern legislation is endeavoring to cut the inextricable Gordian knot by which the trial of criminal cases has been so long fettered, and the courts ought not to thwart that laudable effort by an adherence to mere technical precedents which regard form rather than substance."

PARDON

Ex parte Warren, Okla., 265 Pac. 656. *Attempted revocation of commutation.*

When a commutation has been signed by the executive, properly attested, authenticated by the seal of the state, and delivered to the recipient, and by him delivered to the warden of the penitentiary who enters the same upon his record, the recipient cannot be deprived of its benefits and immunities by a subsequent revocation.

PRISONS

Ex parte Heckman, Calif. App., 266 Pac. 585. *Forfeiture of credits of paroled prisoner.*

Technical rules of pleading, to be enforced when prisoner is charged with offense and brought to trial before a jury, do not apply to proceeding before board of prison directors.

Under Pen. Code, Sec. 1588, board of prison directors, irrespective of parole law, St. 1913, p. 1048, Sec. 1½, as added by St. 1915, p. 981, may forfeit credits of prisoner arrested on charge of violating Harrison Narcotic Act (26 USCA

Secs. 211, 691-707; U. S. Comp. St. Secs. 6287g-6287q) while on parole though acquitted in federal court because of federal officers' search of his room without warrant; commission of crime not being disproved by searching officers' want of authority.

PROHIBITION

Donnelly v. *U. S.*, 48 Sup. Ct. Repr. 400. *Effect of failure to report violation of prohibition act.*

Where prohibition director, with actual knowledge of violation of National Prohibition Act (27 USCA) intentionally failed to report such violation to the United States attorney, *held* that, in view of the intent and purpose of the National Prohibition Act as a whole, and particularly section 3 (37 USCA, Sec. 12), requiring liberal construction of act, there was a violation by prohibition director of duty imposed on him by section 2 (27 USCA, Sec. 11), covered by and punishable under, section 29 (27 USCA. Sec. 46).

Mr. Justice Sutherland and Mr. Justices Sanford dissenting.

APPEAL

State v. *Axe*, Ohio, 161 N. E. 536. *Appeal by the state from judgment based on directed verdict for defendant.*

When the evidence in a criminal case tends to sustain all the essential elements charged in the indictment, it is error for the trial court to withdraw the case from the jury and discharge the defendant.

Jones, J., dissenting, said: "This cause should never have been certified to this court; since it has been, it should now be dismissed sua sponte for lack of power in the prosecuting attorney to file a bill of exceptions to determine simply a disputed question of fact. By sustaining his exceptions we cannot 'determine the law to govern in a similar case.' Sec. 13684, Gen. Code; *State* v. *Granville*, 45 Ohio St. 264, 12 N. E. 803.

"Our decision is futile. We cannot reverse the judgment of acquittal, nor commit the defendant to further trial. All that this judgment accomplishes, all that it can accomplish, is to convey a rebuke to the trial judge; to extol the prosecutor by vindicating his view of the facts in a case he has lost; to cast a doubt upon the guilt or innocence of an accused who has been acquitted. It cannot become a polestar in our jurisprudence, pointing a definite course in other criminal cases. Cui bono?"

AUTOMOBILES

Rembrandt v. *City of Cleveland*, Ohio App., 161 N. E. 364. *Validity of city ordinance requiring driver to make full report to police of accidents.*

Ordinance of city of Cleveland requiring driver or operator of vehicle involved in accident, under penalty of fine or imprisonment, to make full report to police of accident, *held*, in views of Secs. 2516, 2788, of City Ordinances, to be unconstitutional because in violation of Const. of Ohio, art. 1, sec. 10, and Const. of U. S., Amend. 5, providing that no person shall be compelled to be a witness against himself in a criminal case.

CORPORATIONS

Rex v. *Cory Brothers,* (1927) Eng. Ct. Crim. App. *Criminal liability of a corporation for act involving personal violence.*

A corporation in one count was charged with manslaughter and in another with setting up an engine calculated to destroy human life or inflict grievous bodily harm upon a trespasser or other person coming in contact with it, contrary to statute. The English Criminal Justice Act of 1925 had provided (inter alia): "Where a corporation is charged—with an indictable offense the examining justices may, if they are of the opinion that the evidence offered—is sufficient to put the accused corporation on trial make an order empowering the prosecutor to present to the grand jury, etc.—(3) Where the grand jury at any Assizes—return a true bill against a corporation in respect of any offense, the corporation may on arraignment—enter in writing by its representative a plea of guilty or not guilty, etc."

Held, the above enactment refers to mere machinery and makes procedural changes only, abolishing the inconvenience that formerly existed of corporations not being triable at Assizes or Quarter Sessions (since in these courts the accused had to appear and plead in his own proper person). It made no change in the substantive law and under the existing law, an indictment will not lie against a corporation for felony or for misdemeanor involving personal violence. "It is always, of course, a tempting argument—to say: 'Here are enormous developments; let the common law march with the developments and let us decide that these authorities (those holding corporation not indictable for crime involving violence) are antiquated and that in 1927 they ought not to apply.' It may be that they ought not to apply; it may be that they ought still to apply. It is enough for me to say sitting here that I am bound by the authorities—" The principal case is noted and commented on with approval in 16 Calif. Law Rev. 329, on the ground that, "neither act nor intent should be attributed to the corporation unless on ordinary principles of master and servant an individual employer would be held criminally responsible in the same situation." Other arguments are more properly addressed to the legislature than to the courts.

EXTRADITION

Ex parte *Nabors,* N. M., 267 Pac. 58. *May one be "fugitive from justice" if he is required to go to another state by the condition of his parole?*

The facts are not in dispute. From the documents presented to the Governor, it appears that petitioner had been convicted upon his plea of guilty of the crime mentioned in the warrant. After serving some time in the penitentiary, he had been granted a parole, by the conditions of which, accepted by him in writing, he was to proceed directly to his place of employment at San Ysidro, N. M., to report to one Sandoval, his employer, and who, it appears, was his father-in-law, and there to remain until he might receive permission to go elsewhere; that, should he desire to change his employment or residence, or to leave the county in which employed, he must first obtain the written consent of the parole officer; that while on parole, and until the expiration of sentence, he should continue to be in the legal custody and control of said board of prison directors, and that, if he should fail to live up to the requirements of the board or of the

parole officer, he should be returned to prison, and that he should make written report to the parole officer on the 1st day of each month. Pursuant to the conditions of this parole, petitioner, on the very day of his release, departed for, and came directly to, San Ysidro, N. M. After some time the prison board saw fit to revoke this parole; the assigned causes being that, without permission of the board, petitioner had left his employment in Sandoval county and had gone to Bernalillo county, and also to Santa Fe county, and that he had had certain firearms in his possession in New Mexico which, while not contrary to any express provision of his parole, is said to be contrary to a statute of California.

Held petitioner is subject to extradition. The novel point in the present case arises from the fact that this parole petitioner was required to "flee" from California and could only have remained there in violation of his parole Because of the novelty of the case the following extracts from the opinion of Watson, J., may be of interest.

"Under some of the earlier decisions, the words of the Constitution, 'flee from justice,' were thought to carry an implication of a voluntary and conscious attempt by leaving the state to escape an apprehended prosecution; but such is no longer the accepted doctrine. In Ex parte *Reggel,* 114 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. Ed. 250, it was held that, if the person demanded had committed a crime in the demanding state, and when sought to answer for it had left that state and was found in another, he was a fugitive. In *Appleyard* v. *Mass.,* 203 U. S. 222, 27 Sup. Ct. Rep. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073, it was said that one was a fugitive who left the state after commission of a crime, "no matter for what purpose or with what motive, nor under what belief." In *McNichols* v. *Pease,* 207 U. S. 100, 28 Sup. Ct. Rep. 58, 52 L. Ed. 121, it was held that leaving the state 'in whatever way or for whatever reason' constituted one a fugitive. In *Drew* v. *Thaw,* 235 U. S. 432, 35 Sup. Ct. Rep. 137, 59 L. Ed. 302, it was said, 'It does not matter what motive induced the departure.' It is immaterial that the departure was with the consent of the complaining or prosecuting witness. *Leonard* v. *Zweifel,* 171 Iowa 522, 151 N. W. 1054; Matter of *Galbreath,* 24 N. D. 582, 139 N. W. 1050. It is immaterial that the leaving was with the knowledge or without objection of the prosecuting authorities. *Bassing* v. *Cady,* 208 U. S. 386, 28 Sup. Ct. Rep. 392, 52 L. Ed. 540, 13 Ann. Cas. 905. In *Van Walden* v. *Geddes,* 105 Conn. 374, 135 Atl. 396, it was held that one who was in Connecticut pursuant to parole from confinement in California should be surrendered on the requisition of Michigan, though the latter state had knowledge of and consented to the purpose of California so to parole him.

"If the expressions above quoted are to be given full effect, they would determine petitioner's case. He has left the state in which he stands convicted of felony, is absent therefrom when wanted to answer for his offense, and is found in this state. The cases above cited do not include one like this, but, in our judgment, the principles there established are applicable here. The tendency of decision is plain, and, if it were to be held that one who departs involuntarily or constructively in custody of the law is not a fugitive, such a holding would, in our judgment, constitute a check in that tendency, if not a departure from established principles. Moreover, it may be questioned whether petitioner's departure is properly termed 'involuntary.' He made application for this parole, and made request that he be allowed to come to New Mexico to be in the charge of his father-in-law. . . .

"There is little, if any, authority that can be said to be directly in point. Respondent places reliance on Ex parte *Williams,* 10 Okla. Cr. 344, 136 Pac. 597, 51 L. R. A. (N. S.) 668. We have been unable to gather, however, from the statement of facts, that the Oklahoma court had before it a parallel case. The case most nearly in point is *People* ex rel. *Hutchings* v. *Mallon,* decided at a Special Term of the New York Supreme Court, and reported 126 Misc. Rep. 591, 214 N. Y. Supp. 211, and reversed on appeal to the Appellate Division, reported 218 App. Div. 461, 218 N. Y. Supp. 432; the latter decision being affirmed by the Court of Appeals, reported 245 N. Y. 521, 157 N. E. 842.

"The decision of the Special Term was entirely favorable to petitioner's present condition. It was held that the distinction between 'voluntary departing' and 'leaving in custody of the law' was controlling, and that Hutchings departed 'under escort of California' and neither 'fled' nor 'left.' So it was held he was not a fugitive. The Appellate Division reversed the decision, thus stating the question we are now concerned with:

" 'Can the relator be deemed a fugitive from justice, when he originally left the state of California with the consent of the proper authorities, under parole, and his return thereto is demanded, when his parole has been lawfully revoked?'

"This question was affirmatively answered. Many of the above-mentioned cases were cited, and In re *Whittington,* 34 Calif. App. 344, 167 Pac. 407, upon which the Special Term relied, and upon which petitioner places great reliance here, was disapproved. The affirmance of this decision by the Court of Appeals was without opinion.

"In the *Hutchings* case, the claim was made on behalf of California that the parole was granted originally as a result of fraud on Hutchings' part in suppressing facts as to his former criminal record, etc. Petitioner seeks to distinguish the case in that respect. The fact is mentioned in the opinion of the Appellate Division, but only as one to be noted additionally. It does not seem to have been considered decisive. It appears to have been clearly laid down that the voluntary or involuntary character of Hutchings' leaving, and that he left in custody of the law, are immaterial facts. The presence of fraud in obtaining the parole would make but one difference; namely, that the conduct for which the parole was revoked was prior to the 'flight.' But, having accepted the doctrine as the New York court did, and as we do, that it is the original crime and not the violation of parole for which extradition was demanded, it would seem to be immaterial what misconduct has led to the revocation of the parole, or when it occurred."

EMBEZZLEMENT

Alvarez v. *State,* (1928) Texas, 2 S. W. (2nd) 849. *What constitutes theft by bailee.*

Defendant represented to complaining witness that if witness would bring her thirteen $20 bills she would bury them in a flower pot for thirty days during which time the money and the dirt would absorb her disease and cure her. Witness brought the bills, gave them to the defendant with the understanding that at the end of the thirty days burial, the pot would be opened up and the bills returned to her. Defendant, "after apparently sewing the money up in a bag and placing it in the pot—had the witness turn her back and pray and told wit-

ness that she would have to go in a closet and do her work. While witness' back was turned and her eyes were closed in a fervent prayer—defendant apparently swapped bags, and traded witness a bunch of old newspapers for her bills."

Defendant was charged with the crime of theft by bailee under Pen. Code, sec. 1429, providing that any person who shall fraudulently convert personal property of which he has possession by virtue of contract of hiring or borrowing or other bailment, shall be guilty, etc. It was contended by the defense that conviction under this statute could not be sustained because the evidence showed that the fraudulent intent existed at the very time the property was acquired and, therefore, the offense was theft by false pretenses. *Held,* the facts supported a finding of a bailment (the length of holding by the defendant is immaterial, the important thing being that witness did never intend to part with title to the money and the defendant had agreed to surrender the identical bills at the end of thirty days) and conviction under this section of the statute can be supported even though the defendant might also be held under sec. 1413 (obtaining money by false pretenses).

EVIDENCE

State v. *Nicholson,* (1928) Mo., 7 S. W. (2nd) 375. *Admissibility of evidence obtained by officer gaining admission by ruse.*

Defendants were attempting to destroy liquor which the officers were trying to get as evidence. The deputy sheriff obtained entrance to the porch which was screened in and the screen door hooked by representing to defendant that he was looking for a girl. When informed that she was not there the officer asked to be let in so that he could look for her. Thus gaining admission, he seized defendant and obtained the liquor as evidence. The search warrant was not read to the defendant until after the liquor was seized, nor did the defendant know at the time the deputy gained admission that he had a search warrant. *Held,* the evidence was nevertheless admissible. "While the proper procedure would have been to have read the search warrant to defendant before the search began unless, they by their conduct made it impossible to do so, yet we are not prepared to say that the conduct of the officers amounted to such a serious disregard of the rights of the defendants to make it necessary—to suppress the evidence."

White v. *Commonwealth,* (1927) Ky., 299 S. W. 168. *Where facts used as the basis for a search warrant were discovered by illegal search, evidence secured under that search warrant is inadmissible.*

Policeman entered the defendant's store for the alleged purpose of borrowing a hatchet. After procuring it, he went into back vacant rooms of the store without defendant's knowledge or consent and there discovered home brew. Upon the basis of the information thus acquired he made affidavit for a search warrant which was issued and the liquor discovered, seized under it. *Held,* the defendant could go behind the search warrant for the purpose of showing the method by which affiant obtained information of the facts, that such method was illegal and the evidence obtained on the basis of it, inadmissible. It has been consistently held in Kentucky that evidence obtained by illegal search and seizure is inadmissible *(Neal* v. *Commonw.,* 203 Ky. 353). The decision in the principal case is regarded as necessary by the court in order to prevent indirect abrogation of this rule. "If it were the rule that an officer could make an illegal

search of one's premises and then use the information thus obtained as the basis for a search warrant authorizing him to search the premises, then the whole purpose of the constitutional provision against unreasonable search and seizure would be defeated." The principal case is commented on in 16 Ky. Law Jour. 350. The author of the note favors from the standpoint of logic and law enforcement the majority rule in this country holding that evidence illegally obtained is nevertheless admissible as evidence. He naturally, therefore, regards the decision of the principal case as "an unnecessary extension of an already doubtful rule." Aside from the merits of the general question of admissibility of evidence obtained through illegal search, it would seem that once being committed to the doctrine that such evidence is inadmissible, the decision in the principal case is justified. Otherwise the rule would furnish no substantive protection and could be very easily evaded.

INSANITY

People v. *Hickman,* Calif., 268 Pac. 909. *Constitutionality of 1927 statute establishing new procedure where plea of insanity is entered.*

In the above case the 1927 California statute establishing new procedure where plea of insanity is relied on was unanimously declared valid against all attacks. Some extracts from the opinion of Waste, C. J., follow.

"Prior to 1927, there were four kinds of pleas open to a defendant, to-wit: A plea of (1) guilty; (2) not guilty; (3) a former judgment of conviction or acquittal; and (4) once in jeopardy. Pen. Code, 1016. The Legislature, in 1927, added another, viz., '(5) not guilty by reason of insanity,' and further amended the Code section by providing that—

"'A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged, provided that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged.'"

Section 1017 of the Code was amended to provide that if the defendant pleads "not guilty by reason of insanity," such plea shall be entered upon the minutes of the trial court substantially in the following form:

"The defendant pleads that he is not guilty of the offense charged because he was insane at the time that he is alleged to have committed the unlawful act."

At the same time, there was added a new section (Sec. 1026) to the Penal Code, in part reading as follows:

"When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the

offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law. . . ."

The present statute was passed by the Legislature on the recommendation of the commission for the reform of criminal procedure, created by the Legislature in 1925 to make a study of the methods of criminal procedure, and to recommend such new system, or such amendments to the then existing system, as would in its opinion tend to provide for this state the most efficient system for the swift and certain administration of criminal justice. The purpose of the statute is to overcome some of the abuses which have crept into the administration of justice by reason of the frequent interposition of the defense of insanity in criminal prosecutions. Its provisions are plain, and we deem it unnecessary to enter into a critical analysis or restatement of its various features to show that every essential right of one charged with crime by indictment or information has been safeguarded, and that a defendant, by availing himself of its various provisions, and entering the proper plea or pleas, may interpose and submit to the consideration of the jury every issue and every defense that has heretofore been open to him. Under proper pleas he may still submit all the evidence he could submit before the effective date of the amended statute.

While the Constitution of the state of California provides that the right of trial by jury shall be secured to all persons and shall remain inviolate (Const., art. 1, sec. 7), the only right which it guarantees is that the citizens of the state shall have an opportunity to be tried by a jury, in cases in which it is exercised in the administration of justice according to the common law, as that law is understood in the several states of the Union. *People* v. *King,* 28 Calif. 265, 271; *People* v. *Powell,* 87 Calif. 348, 356, 25 Pac. 481, 11 L. R. A. 75. It does not purport to direct what procedure is to be followed in the exercise of the right. The authorities in this and in other jurisdictions bear out the proposition that the making of a reasonable regulation of the mode of enjoyment of the right of trial by jury is not a denial or an impairment of that right. *Conneau* v. *Geis,* 73 Calif. 176, 178, 14 Pac. 580, 2 Amer. St. Rep. 785; *Frank* v. *Mangum,* 237 U. S. 309, 339, 340, 35 Sup. Ct. Rep. 582, 59 L. Ed. 969.

The court also held there was no violation of the "due process" and "equal protection clauses" of the 14th amendment of the U. S. Constitution, saying:

"A state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal Constitution. It is not tied down by any provision of the federal Constitution to the practice and procedure which existed at common law. Subject to the limitations noted, it may avail itself of the wisdom gathered by experience to make such changes as may be necessary. *Brown* v. *New Jersey,* 175 U. S. 172, 175, 20 Sup. Ct. Rep. 77, 44 L. Ed. 119. There is nothing in the Fourteenth Amendment to prevent a state from adopting a reasonable regulation of procedure in relation to jury trials. . . .

"The fact that the new law and procedure of the state of California may appear to mark a departure from the law and procedure relating to the same subject in other states has no place in this consideration. The 'equal protection' provision of the federal Constitution does not secure to all persons in the

United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in states separated only by imaginary lines. On one side of the line there may be a right to trial by jury, and on the other side, under like circumstances, there may be no such right. *Missouri* v. *Lewis,* 101 U. S. 22, 31, 25 L. Ed. 989. A state may make different procedure for trials of even the same class of offenses. The Fourteenth Amendment merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. *Hayes* v. *Missouri,* 120 U. S. 68, 7 Sup. Ct. Rep. 350, 30 L. Ed. 578; *Brown* v. *New Jersey,* supra, p. 177 (20 Sup. Ct. Rep. 79)."

JUVENILE COURTS

Givardi v. *Juvenile Court,* R. I., 142 Atl. 542. *Right of appeal where Juvenile Court Act is silent.*

All proceedings under Juvenile Court Act (Gen. Laws, 1923, secs. 6260-6284) being inconsistent with statutory provisions as to criminal proceedings in superior court, though such proceedings may be brought, under Sec. 6269, against delinquent or wayward child committing offense against state laws after reaching age of sixteen, no appeal lies under Gen. Laws, 1923, sec. 5096, from juvenile court's adjudication that child is wayward. Sweetland, C. J., said:

"There is no provision in the act for appeal to the superior court. This petitioner claims, however, that he is within the general provisions of Sec. 1, ch. 346, Gen. Laws, 1923, providing that every person aggrieved by the sentence of any district court for any offense may appeal therefrom to the superior court. It may be said that the General Assembly has provided with great care that a child adjudged to be delinquent or wayward is not one charged with an 'offense,' and that he has not been 'sentenced.' Furthermore, it appears to us conclusively that all proceedings provided for in this elaborate plan relate solely to cases in the juvenile courts of the various districts, and are inconsistent with statutory provisions as to criminal proceedings in the superior court. It would be in conflict with the purpose of the act if, after guarding the child in all the proceedings in the juvenile court, such protection should be cast aside upon appeal taken to the superior court, and the case be there treated as an ordinary criminal appeal."

PAROLE

Morton v. *Thomas, Warden,* Ohio, 161 N. E. 358. *Revocation of conditional release where prisoner permitted to leave state.*

A convict in Ohio released by conditional release to a Michigan officer, taken to the state of Michigan, and held for trial in the state of Michigan, may be returned by the state of Michigan to the state of Ohio, and there be retaken and retained as a convict in Ohio under a revocation of a conditional release.

The right of the Michigan authorities to return the convict to the state of Ohio cannot be questioned after the convict has been returned to the state of Ohio.

PLEAS

Browsky v. *Perdue, Jailer* (1928) W. Va., 143 S. E. 304. *Judgment of conviction rendered on plea of guilty is, ordinarily, not appealable.*

Defendant, charged with operating an automobile while intoxicated, pleaded guilty but was given a period of time in which to arrange his affairs before passing sentence. He later appeared and asked permission to withdraw his plea and to be afforded a trial. Request denied and sentence of imprisonment pronounced. On appeal, judgment affirmed. When a plea of guilty has been entered, its subsequent withdrawal prior to judgment is within the sound discretion of the court, but in the absence of an abuse of discretion (no abuse shown in the principal case) a judgment rendered thereon is not appealable.

SEARCHES AND SEIZURES

State ex rel. *Kuhr* v. *Dist. Court,* Mont., 268 Pac. 501.

Where postmaster suspected that package contained narcotics, and called federal officer into office, and they unwrapped package, and found it contained morphine, and federal officer informed sheriff, who without warrant arrested party carrying package, under Rev. Codes, 1921, sec. 11753, under belief she was committing felony under Sec. 3200 and Sec. 3202, as amended by Laws, 1925, ch. 38, and seized package for use in evidence, such acts did not render evidence inadmissible, and did not constitute violation of Const., art. 3, sec. 7, prohibiting unreasonable searches and seizures.

Galen, J., dissenting.

SENTENCE

Dodd, Dist. Atty., v. *Martin, County Judge,* N. Y., 162 N. E. 293. *Sentence of second offender: effect of the Baumes Laws.*

Sentence of defendant after court accepted plea of guilty to crime of burglary in third degree as a first offense, after court was informed by defendant that he had been previously convicted of a felony, *held* not to bar a further sentence as a second offender under Penal Law (Cons. Laws, ch. 40), secs. 1941, 1942, and sec. 1943, as added by Laws, 1926, ch. 457, in view of Code of Crim. Proc., secs. 332, 334, and sec. 334, par. 2, it being immaterial that former conviction was known when sentence was imposed.

Cardozo, C. J., and Lehman and Kellogg, JJ., dissenting. Pound, J., said:

"The Baumes Laws were carefully considered in great detail in *People* v. *Gowasky,* 244 N. Y. 451, 155 N. E. 737. Previous convictions need no longer, as previously, be alleged in the indictment. Penal Law, sec. 1942. When the defendant is convicted, he may be for the first time confronted with his record. If it then appears that he is a second offender he is sentenced to the severer punishment.

"The Legislature has provided a mechanistic rule to take the place of the discretionary powers of the judge in passing sentence on second offenders. The Executive may relieve from the hardship of a particular case. We cannot."

People v. *Paradiso*, N. Y., 161 N. E. 443. *Sentence in robbery where some of defendants armed and others not armed.*

Unarmed defendant associated in commission of robbery with another who was armed with a pistol *held* not subject to additional sentence of five to ten years imposed under Penal Law (Cons. Laws, ch. 40), sec. 1944. for carrying dangerous weapon, in addition to sentence for first degree robbery under secs. 2120, 2124, 2125, regardless of punishment of accomplice, since sentence for conviction of same crime may vary as in case of habitual offenders, within Sec. 1942.

TRIAL

Commonwealth v. *Cero*, Mass., 162 N. E. 349. *Interrogation of jurors by the police.*

Because jurors, after they were qualified, under Sts., 1924, ch. 311, sec. 2, were interrogated by police officers, either in person or through their immediate relations, as to their fitness for jury duty, which questions were innocent of offense in themselves, there being no evidence of coercion or improper influence in obtaining the answers, or any accompanying misconduct, *held* not an attempt to influence the jurors in favor of the commonwealth so as to require a new trial.