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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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ADULTERY

State v. *Allison,* Minn., 220 N. W. 563. *Right of complainant to dismiss prosecution for adultery.*

Under the Minnesota statute no prosecution for adultery can be commenced except on complaint of the husband or wife of the offending party. In the principal case, the husband had made complaint of adultery of his wife upon which the county attorney filed an information and commenced prosecution. At the beginning of the trial the husband by petition asked that the prosecution be stopped. Petition was denied. *Held,* there was no error. Although the prosecution can be commenced only upon complaint of the husband or wife, nevertheless once the prosecution has begun all control over the proceeding is taken out of the hands of complainant and put into the hands of the state. The case is noted in 27 Mich. Law Rev. 103, where the author says that the weight of authority is in accord with the principal case, citing *State* v. *Austin,* 106 Wash. 336; *State* v. *Beck,* 52 N. D. 391; *State* v. *Leek,* 152 Pa. 12; *State* v. *Athey,* 133 Iowa 382 (dictum). In Michigan, the statute has been construed as making adultery a crime only against the innocent spouse, consequently the complainant has the right to have the prosecution stopped. *People* v. *Dalrymple,* 55 Mich. 519. In Oklahoma the statute provides that a prosecution for adultery "can be commenced and *carried on*" only by the spouse of one of the parties. It seems clear that under such a statute the complainant should have the right to dismiss. *Taylor* v. *State,* (Okla. Cr. App.) 232 Pac. 963.

BIGAMY

White v. *State,* Tenn., 9 S. W. (2nd) 702. *Contracting second marriage on strength of mere rumor that former spouse had obtained a divorce.*

Defendant was prosecuted for marrying and cohabiting with a second wife, having a former wife still living. He had married wife number 1 and moved to Virginia where they separated. Defendant then returned to Tennessee and upon hearing rumors to the effect that his wife had secured a divorce in Virginia married wife number 2 within less than 5 years after the first separation. The code provided that one should not be guilty of the offense whose "husband or wife shall continually remain beyond the limits of the United States, or absent him or herself from the other, without the knowledge of the party remarrying that the other is living, for the space of five years together, or who has good reason to believe such former husband or wife to be dead." *Held,* without deciding whether a bona fide belief that other spouse had secured a divorce would be the equivalent of a bona fide belief that spouse was dead and thus under the statute negative the criminal aspect of the second marriage, that acting on mere rumor could under no circumstances be an excuse. Conviction affirmed.

BURGLARY

Harris v. *State,* Okla., 271 Pac. 957. *Meaning of "dwelling house" under first degree burglary statute.*

A building used as a garage joined to and immediately connected with the dwelling house, having one of its walls as the wall of the dwelling house, and with an opening from the garage through such common wall into the basement of the dwelling house, which basement has a stairway leading into the other part of the dwelling house, is so immediately connected with the dwelling house as to form a part thereof. A burglarious entrance into such garage in the night time is burglary in the first degree.

CONFESSIONS

People v. *Doran,* N. Y., 159 N. E. 379. *Function of court and jury in determining the admissibility of confession.*

The defendant was on trial for murder. The state offered what purported to be Doran's confession. The defense contended that it should be excluded as having been made under the influence of fear produced by threats. Upon this factual question there was a conflict in the testimony. In holding that the jury was to determine this question, the court indulged in language which, it is submitted, is misleading and practically dangerous. The court said: "By secs. 419 and 420 of our Code of Criminal Procedure questions of fact are to be decided by the jury, and the court, if requested, must inform the jury that they are the exclusive judges *of all questions of fact.* It may be that a question of fact created by Doran's testimony arose as to the voluntary nature of the confession. The jury under proper instructions, and not the court, were the ones to determine this question of fact. . . . *For the judge himself to have determined this question of fact and to have excluded the confession altogether would have been going far indeed toward usurping the functions of a jury, bordering almost upon arbitrary action.*" In the first place the court seems to accept too literally and without qualification the dangerous maxim, "Questions of law are for the court, and all questions of fact for the jury." There are many cases where, as both Thayer and Wigmore have shown, in the discharge of the judicial function questions of fact arise and when they do they should be decided by the court. The admissibility of evidence is such a judicial function and factual questions touching its admissibility as evidence as distinguished from factors touching its credibility, should be determined by the court. It must be conceded, however, that in many states the practice is in effect to resubmit the question of admissibility to the jury in doubtful cases but even when this is done, two things should be noted: (1) it should only be after the court has made a preliminary determination that the confession is admissible as evidence. It ought not to go to the length assumed by the court in the principal case in the language underscored, of sanctioning a submission to the jury of a confession where the court was convinced by its preliminary examination of the facts that it was obtained by threats or fear. To submit such a confession would do irreparable damage for it would be practically impossible for the jury to rid their minds of it even though they were convinced that it was improperly obtained, (2) even when a court, after deciding in a preliminary way that the confession is worthy of sub-

mission to the jury, permits the jury to disregard it entirely if they find it was improperly obtained, it is doing something not *required* by the rules of the common law relating to functions of court and jury. It is perhaps but another illustration of judicial tenderness toward defendants in criminal cases, the desire to give him a second chance, together with the natural inclination to shift the responsibility of a difficult task from the shoulders of the court, where it legitimately belongs, to that convenient institution, the jury. The principal case is criticized and commented on in 23 Ill. Law Rev. 400. The author of that note says, "This dictum (the one cited in this review) seems to take a new position as to the admissibility of confessions."

CONSTITUTIONAL LAW

Rembrandt v. *City of Cleveland,* Ohio, 161 N. E. 364. *Constitutionality of ordinance making it criminal offense to fail to make police report of automobile accident.*

Sec. 2516 of the ordinances of the city of Cleveland provided, "Every person driving or operating a vehicle within the city involved in an accident which caused injury to any person . . . shall give immediate notice and make full report to the police department of the city of Cleveland," etc. The report was to be made on blanks furnished by the police department and was to be signed. Defendant was convicted for failure to comply with this ordinance. *Held,* the conviction should be set aside as the ordinance was in violation of Federal and state constitutional provisions providing that no person shall be compelled in any criminal cause to be a witness against himself. The court points out that many criminal actions might grow out of an automobile accident and if a defendant in such accidents were compelled to make a formal, signed statement of all the details surrounding it, he has lost the protection of the constitutional provision. The case is noted in 28 Col. Law Rev. 971.

CONTEMPT

State v. *Shumaker,* Ind., 164 N. E. 408. *Power to pardon for contempt.*

Contempt of court is not an "offense" within Const., Art. 5, sec. 17, granting Governor power to pardon, in view of Constitutional Bill of Rights, sec. 13, guaranteeing right to jury trial in all "criminal prosecutions," which means prosecution of offenses, and sec. 19, authorizing jury to determine both law and facts in all criminal cases.

Proceedings for contempt of court are not criminal proceedings within constitutional or statutory definition, but are summary in character, though presented by information, and incidental to administration of justice.

Each department of state government, unless otherwise hindered by Constitution, exercises such inherent powers as will protect it in its performance of its major duty.

Martin, C. J., and Gemmill, J., dissenting.

The Shumaker case has provoked widespread comment of varying nature. See notes in 25 Mich. Law Rev. 440; 22 Ill. Law Rev. 768; 20 Ill. Law Rev. 165; 21 Ill. Law Rev. 379.

COURTS

State v. *Frey*, Iowa, 221 N. W. 445. *Power of court to correct nunc pro tunc evident mistake.*

Where a court entered judgment reciting that defendant's motion for a new trial and motion in arrest of judgment is sustained, and committing defendant to reformatory at hard labor for ten years, mistake in using word "sustained" instead of "overruled" was an "evident mistake," within Code (1927), sec. 10803, authorizing entries made and filed at previous term to be altered by court to correct evident mistake. The court may, therefore, at a subsequent term make an order nunc pro tunc modifying its record.

EMBEZZLEMENT

Hampston v. *State*, Ariz., 271 Pac. 872. *Degrees—General verdict.*

Defendant was prosecuted under information charging embezzlement of $100. *Held* a general verdict of "guilty" does not include a finding of amount embezzled and is insufficient to sustain judgment of conviction based thereon under Penal Code (1913), sec. 1090, requiring jury, when crime is distinguished into degrees, to find degree thereof, and secs. 12, 511, and in view of secs. 484-487, 1092, notwithstanding sec. 1084, providing that verdict of "guilty" imports conviction of offense charged.

FORMER JEOPARDY

Miller v. *Commonwealth*, Ky., 9 S. W. (2nd) 706. *Father, prosecuted for deserting child and acquitted is not put twice in jeopardy if subsequently charged with the same offense. The duty to support the child is a continuing one.*

Defendant was tried in October, 1925, on a charge of deserting his child and was acquitted. He was subsequently indicted for the same offense and the trial court instructed the jury that they were to consider nothing which had occurred prior to the first trial. *Held*, that under such instructions, defendant had not been twice put in jeopardy for the duty to the child being a continuing one, the failure to discharge it after the first acquittal constituted a distinct offense.

GRAND JURY

People ex rel. *Battista* v. *Christian*, N. Y., 164 N. E. 111. *Validity of statute authorizing information.*

Code of Crim. Proc., sec. 222, providing for plea of guilty to capital or otherwise infamous crime on information, *held* void as in conflict with Const., Art. 1, sec. 6, requiring presentment or indictment of grand jury in such cases.

Provision of Const., Art. 1, sec. 6, to effect that no person shall be held to answer for a capital or otherwise infamous crime without presentment or indictment of the grand jury, cannot be waived.

Andrews, J., dissenting.

O'Brien, J., for the majority said: "If the Legislature and the electors of this state vote to delete the words of Art. 1, sec. 6, from the Constitution, the

historic if not venerable institution of the grand jury may be abolished. Not by indirection can it be subverted or overthrown. Citizens of other states have decided by their Constitutions to allow the prosecution of infamous crime without intervention by grand juries, and their action has been held not to impede due process of law."

HABITUAL CRIMINALS

Ex Parte *Rosencrantz,* Calif., 271 Pac. 902. *Validity of habitual criminal statute.*

Held that Penal Code, sec. 644, as amended by Sts. (1927), p. 1066, providing for life imprisonment without eligibility to parole, on conviction of any felony after three previous convictions is not invalid as ex post facto legislation by reason of application to crimes committed prior to its enactment nor is it violative of the provision against cruel and unusual punishment in the California and Federal constitutions.

State v. *Smith,* Ore., 273 Pac. 323. *Necessity of charging previous convictions in indictment.*

Under Habitual Criminal Act (Laws [1927], p. 432), providing for increased punishment on second and third convictions of felony, and life imprisonment for fourth conviction of felony, indictment charging offense for which conviction is sought need not allege prior convictions, proceeding on information charging previous felony convictions under sec. 4, being not for purpose of determining defendant's guilt or innocense but to identify him as person alleged to have been convicted of felonies.

Prior to the act of 1927 it was necessary to allege the prior convictions in the indictment. The change was made because it was believed to be fairer to the defendant. This point of view is well stated in 1 Bishop, *"Criminal Law"* (9th ed.), sec. 961.

"Under the ordinary forms of the statutory provision, if the offense is the second or third, and by reason thereof the punishment is to be made heavier, this fact must appear in the indictment; because by the rules of criminal pleading, every particular which makes heavier the punishment to be inflicted must be set out. Still there is no reason why the law should not, as in some localities it does, permit this matter to be withheld from the jury, or even omitted from the indictment, until the prisoner has been convicted of the offense itself and then brought forward in some proper manner in aggravation of the punishment. A course like this is specially fair to the prisoner as preventing a prejudice against him by the jury from the former conviction, which is not legal evidence."

INDICTMENT

Neusbaum v. *State,* Md., 143 Atl. 872. *Validity of statutory short form of indictment.*

Code of Pub., Gen. Laws (1924), Art. 27, sec. 563, prescribing short form of indictment for manslaughter, is valid; form prescribed being sufficient to inform defendant of accusation against him, as required by Constitution of Maryland,

Declaration of Rights, Art. 21, and hence not repugnant to due process clause of Const., U. S., Amend. 14.

Indictment for manslaughter in form prescribed by Code of Pub., Gen. Laws (1924), Art. 27, sec. 563, except for addition of word "negligently" to word "feloniously," *held* sufficient under Constitution of Maryland, Declaration of Rights, Art. 21; and Const., U. S., Amend. 14; added word not being inconsistent with statutory form nor lessening information afforded by indictment.

It is gratifying to add another state to the list of those upholding the validity of the short form of indictment. See note in 19 Journal of Criminal Law and Criminology, p. 413 (Nov., 1928), for comment on a recent California case: In the Maryland case Offutt, J., at p. 876, says: "Statutes similar in character to that now under consideration have been enacted in many of the American states as well as in England in an effort to escape the excessive formalism of the common law which formerly made the conviction or acquittal of one charged with crime so often turn upon some technical quibble rather than upon the guilt or innocence of the accused, and the uniform tendency of the courts has been to uphold them wherever that could be done without infringing the right of the accused to the protection of such constitutional guaranties, as the right to be informed of the charge against him. So that, while there have been cases in which such statutes have been held bad, they were nearly always cases where the statute failed to require such a statement of the offense as would certainly identify it."

People v. *Berg*. Calif. D. C. A., 274 Pac. 433. *Murder—short form of indictment.*

Penal Code, secs. 951, 952, as amended by Sts. (1927), p. 1043, prescribing the form of indictments and informations, and providing that the same are sufficient, if containing in substance a statement that accused has committed some public offense, therein specified in ordinary and concise language, *held* not in violation of Const., U. S., Amend. 14, as depriving any one of his liberty without due process of law.

Information charging defendant with having killed a named person on a certain date *held* to have sufficiently charged murder, under Penal Code, secs. 951, 952, as amended by Sts. (1927), p. 1043, rather than manslaughter, though it failed to allege that the killing was with malice aforethought.

People v. *Coen*, Calif., 271 Pac. 1074. *Murders—short form of indictment.*

Information charging the offense of murder, alleging that defendant did, on a certain date in named county, murder particular decedent, *held* sufficient, under Penal Code, secs. 950, 951, 952, as following substantially the language of sec. 951, as amended by Sts. (1927), p. 1043, prescribing the form of information for various felonies.

INFANTS

State v. *Oberst*, Kan., 273 Pac. 490.

It was material error to permit a 17 year old boy, without an attorney to consult with and advise him, to plead guilty to seven charges of murder in the

first degree and to impose seven life sentences of penal servitude against him thereon; and it was material error to refuse to set aside such sentences and judgment and to permit him to withdraw his plea of guilty when counsel for the youth, belatedly employed, presented a motion to that effect in his behalf.

Hopkins and Marshall, JJ., and Johnston, C. J., dissenting.

In his vigorous dissenting opinion Hopkins, J., said:

"Much stress is laid in the majority opinion on the tender years of the defendant, and the trial court is criticized because it appointed the commission to confer with him and report their findings. The court, in my opinion, should be commended for its careful action. Practically it amounted to appointment of four of the leading lawyers of the Butler county bar, in connection with four other prominent citizens of the community, to represent the defendant. The object of trials is to deduce the truth. Any lawyer, if he performs his sworn duty, will bring out the truth, and not suppress it. These four lawyers, supported by the four other prominent citizens (whose integrity and high standing is not denied), conferred with the defendant and reported to the court, among other things, that 'he still maintains that the facts recited in that confession are true.' If the court, instead of appointing a so-called commission of eight, had appointed one or two lawyers, who, having conferred with the defendant, had reported to the court the same as they did report, in what material way would the procedure have been affected, or what conceivable benefit would have resulted to the defendant?

"Technical form should not preclude substance. Would the appointment of a single attorney, or many, as counsel for the defendant, have aided him one iota in telling the truth?"

INSANITY

People v. *Hart,* Ill., 164 N. E. 156. *Raising question of sanity after verdict.*

Accused cannot submit to trial on question of his guilt or innocence of crime, invite verdict of jury on question, and after verdict is returned then claim he was insane at time of trial, and should not have been tried for crime under Crim. Code, div. 2, sec. 13 (Cahill, *"Revised Statutes"* [1927], ch. 38, par. 622).

The above statement is such familiar law that few lawyers recognize its inherent injustice. Under our present judicial machinery it would doubtless interfere with justice to permit this question to be raised after verdict. But if defendant is insane, he is incapable of protecting himself and his counsel may not be able to do so by reason of inability to diagnose the case. It is ridiculous for the law to expect the insane person to act for himself or to expect a lawyer to be a trained alienist. Is it not therefore the duty of the state to safeguard the insane defendant by a preliminary routine examination as done in Massachusetts? For a development of this point of view see two articles by Winfred Overholzer in 19 Journal of Criminal Law and Criminology, p. 75 (May, 1928); and 13 Mass. Law Quar. (Aug., 1928).

People v. *Troche,* Calif., 273 Pac. 767. *People* v. *Fook,* Calif., 273 Pac. 779. *Constitutionality of California statute providing for two trials where defendant pleads "not guilty" and "not guilty by reason of insanity."*

The two cases above raise anew the question of the validity of the 1927 California statute creating a new and novel method of trying a defendant who relies

on insanity as a defense. The statute had previously been declared valid in the case of *People* v. *Hickman,* 268 Pac. 909, reported in the Journal of Criminal Law and Criminology for November, 1928 (Vol. IX, pp. 420-22). In the *Hickman* case only the plea "not guilty by reason of insanity" was used. In the *Troche* and *Fook* cases defendant pleaded both "not guilty" and "not guilty by reason of insanity." In these two recent cases the statute is again declared valid, but there are vigorous dissenting opinions by Preston, J., who had concurred in the *Hickman* case.

Extracts from the dissenting opinion follow:

"As I understand the main opinion, it concludes that the steps inserted in the statutes by the amendments of 1927 were merely procedural, involving no invasion of the substantial rights of a defendant. It is my view that no legal basis can be found upon which to rest these provisions, and, moreover, that no beneficial results can flow from their practical operation. The conscience immediately rebels when the effect of these provisions is contemplated. They are no more nor less than provisions intended to hamper the free, full, and fair consideration of the cause by the jury, a cause, too, which involves the life or liberty of the citizen. The state, representing the whole people, can least afford to be cruel or unjust. These provisions savor of oppression. The rights of the state and the accused are not equal upon entering the temple of justice. The scales of justice are out of balance. A man may not be both guilty and innocent at the same time of a single charge. If the defendant, though insane or an idiot, must first be convicted, and then inquiry by the same jury is made as to his innocence, something is radically wrong. Such a law seems, on its face, clearly to be a step toward a return to the dark ages. . . .

"But the legal infirmities of these provisions are easily discerned. They undertake to subdivide an indivisible integer, and therein lies their chief infirmity. In other words, the plea of not guilty necessarily includes within it the element of insanity. This is true not because of any legislative fiat, but because sanity is a fundamental element of all amenableness to punishment and is the prime ingredient of the criminal legislation of all civilized countries. . . .

"It has been said, however, that these changes are procedural because the verdict on the first trial is but a conditional verdict. Is it possible that motive or criminal intent exists or can exist conditionally or hypothetically? They are either present or absent. The admixture making up the compound of criminal intent is not capable of a hypothetical or conditional or presumed existence. It may not be presumed to exist, then reach a conclusion of guilty based on such presumption, and, while still holding to this conclusion, undertake to determine the existence of intent. This is 'boot strap' lifting, petitio principii. . . .

"This court should be quick and decisive in its action to declare anew our Bill of Rights and to preserve the essential attributes of a jury trial as known to the common law and as preserved by our Constitution. Art. 1, secs. 7 and 13, Const. These provisions are so obnoxious to the spirit of our institutions that the blood of Abel 'crieth from the ground' for vindication."

It is interesting to note the results of this new California procedure as shown by the report of the California Crime Commission for 1929 at pp. 36-9 in detail. The following is the commission's summary:

"During the year following the enactment of the law providing for the new plea of insanity, that plea was entered 98 times in 8,336 cases or in slightly more

than 1% of the cases. The plea was successfully urged in only 13 cases or in slightly more than $\frac{1}{10}$ of 1% of the total number of felony cases. Of the 98 times the plea was entered it was successful in only 13 cases or approximately 13%. In the majority of cases where the plea was successful the district attorney either stipulated that the defendant was insane or the experts called by the people testified that the defendant was insane."

On the basis of this experience the commission declares that it "is of the opinion that these laws have eliminated one glaring evil in the trial of criminal cases, particularly capital cases."

The theory of the California statute is criticized by Winfred Overholzer, M. D., in an article entitled *"Psychiatry and the Courts of Massachusetts,"* 19 Journal of Criminal Law and Criminology (May, 1928), at pp. 77-8.

INTOXICATING LIQUOR

People v. *Vandewater,* N. Y., 164 N. E. 864. *Maintaining a place for sale of intoxicating liquor in state having no prohibition law.*

One maintaining room as "speak-easy," with bar at which intoxicating liquors were sold, *held* guilty of maintaining ill-governed and disorderly house and public nuisance, under Penal Law (Cons. Laws, ch. 40), sec. 1530, defining public nuisance as acts injuring health or offending public decency, though business was conducted in clandestine manner without general invitation to public, and state had not enacted prohibition law concurrent with Const. of U. S., Amend. 18, and National Prohibition Act (27 U. S. C. A.).

LARCENY

Driggers v. *State,* Fla., 118 So. 20. *What constitutes the necessary asportation to make out the crime of larceny?*

Defendant entered the field of Brown and shot down a heifer. The animal fell in its tracks and the other defendant struck the heifer in the throat to bleed it "just as a butcher would bleed one." At this point they were discovered and fled. The only question was whether there was sufficient asportation to constitute the crime of larceny. *Held,* there was. Technically, the court points out, the defendants did cause the animal to fall from a standing position to a prone position upon its side. But the slightest asportation is sufficient and, according to this case, is important merely because it shows the complete termination of the owner's possession and the actual possession of the property by the wrongdoer. Certainly in this case the facts did show a complete exercise of dominion by the defendants over the calf. This is the essence of the offense. The asportation is largely a technicality. The case is noted in 27 Mich. Law Rev. 102.

RAPE

Noonan v. *State,* Neb., 221 N. W. 435. *Rule requiring corroboration of prosecutrix does not apply to question of identity of assailant.*

Defendant was accused of assault with intent to commit rape. That an assault had been made on the prosecutrix was admitted. The only dispute was

as to the identity of her assailant. It was contended by the defense that the prosecutrix must be corroborated in her testimony identifying the defendant as her assailant in the same way and to the same extent that corroboration is necessary to establish the corpus delicti. *Held,* there need be no corroboration on the matter of identity to carry the case to the jury. In the absence of statute the general rule seems to be that the uncorroborated testimony of the prosecutrix in either a rape or assault with intent to commit rape case, is sufficient to carry the case to the jury. In *Matthews* v. *State,* 19 Neb. 330, 27 N. W. 234, the Nebraska court, however, required corroboration to establish the existence of the offense. In the principal case, however, the court refused to extend the principle laid down in the *Matthews* case any farther. "The theory of the Nebraska rule is that the nature of rape is such that evidence to establish the same may be easily fabricated and hard to disprove and therefore a technical corroboration, as a matter of law is required. Where, however, the offense charged has been . . . established beyond a reasonable doubt, the dangers which the Nebraska rule seeks to avoid are past, no occasion for fabrication then arises, and no reason, therefore, exists for the extension of the principle involved."

People v. *Corder,* Mich., 221 N. W. 309. *Admissibility of physician's testimony in rape trial as to result of examination of defendant, in jail, for gonorrhea. Effect of constitutional prohibition against compelling person in criminal case to be a witness against himself.*

Defendant was in jail charged with statutory rape on a girl who was subsequently found to be suffering from gonorrhea. Shortly before defendant's release on bail, a physician came to the jail and notified him that he had come to make an examination. Defendant did not resist nor by words or conduct object. *Held,* the physician's testimony as to the results of his examination, was inadmissible in view of Const., Art. 2, par. 16, providing, "No person shall be compelled in any criminal case to be a witness against himself," etc. (Fead, C. J., North and Sharpe, JJ., dissenting.) The court distinguishes cases involving rape where there is an examination of the private parts of the defendant from cases involving measuring the foot of accused, exhibiting a wound on the arm, tattoo marks, etc., and says that there is only one case involving rape and venereal disease where a court of last resort under a similar constitutional provision sanctioned an examination of the accused without his consent *(Angeloff* v. *State,* 91 Ohio St. 361), and with this case the court sharply disagrees. As to what constitutes consent of the defendant in such cases the court says, "Consent cannot be predicated upon failure to protest or resist. Ignorance of right to resist . . . may lead a prisoner to be passive or even to comply with a request to exhibit his person to medical examination without loss of the protective provision in the Constitution. To constitute the result of the examination lawful evidence, it was necessary to show that he voluntarily exposed his person, or at least, was willing to be examined."

SEARCHES AND SEIZURES

Booth v. *State,* Tex., 9 S. W. (2nd) 1032. *Defendant cannot complain of illegal search of another's premises, nor can he object to introduction of evidence thus illegally obtained.*

Defendant was accused of unlawful manufacture of intoxicating liquor. An illegal search was made of premises in the possession and control of W and evi-

dence thus obtained. *Held,* that a defendant cannot complain because of the illegal search of premises of another.

SENTENCE

Orabona v. *Linscott,* R. I., 144 Atl. 53. *Suspended sentence made effective four years later.*

Trial court's acceptance of plea of nolo contendere and consent to agreement between defendant and Attorney General, whereby sentence was deferred under indictment during defendant's good behavior, *held* within trial court's discretion, under Gen. Laws (1923), sec. 4638, rendering sentence four years later under the old indictment, after arrest of defendant on another criminal charge, legal; effect of agreement being not to suspend operation of sentence, but to defer imposition of any sentence.

"The validity of such agreements has recently been expressly recognized by the Legislature by the enactment of ch. 1063, Pub. Laws (Jan., 1927), whereby a limitation of time has now been set, after which sentence may not be imposed upon a defendant who has entered into such an agreement."

SUNDAY LAW

Ewing v. *Halsey,* Kan., 272 Pac. 187. *Sunday labor—flying circus.*

A contract for a public performance, designated as a flying circus, to be given at a pleasure resort on a Sunday afternoon, and which contemplated an exhibition of the defendant aviator's skill and daring in the operation of airplanes, and which provided for the collection of an admission charge from the public, and for a division of the gate receipts between the contracting parties, was made in disregard of the statute (Rev. Sts. 21-952), forbidding unnecessary labor on Sunday, and the breach of such contract left the parties without judicial redress.

Though the above case is a civil one it involves a novel breach of a well known type of criminal statute.

TRIAL

State v. *Mellor,* Utah, 272 Pac. 635. *Sleeping juror.*

In prosecution for larceny of sheep, that juror fell asleep several times in course of trial *held* not to require a new trial, where it did not appear that he did not hear and fully understand substance of testimony.

Said the court: "Counsel for the defendant naively remarks that the only intelligent juror in the box fell asleep several times in the course of the trial, and thus urges that the trial court erred in not granting a new trial on that ground. It was made to appear that the juror had several times dozed off at short or brief intervals. The trial court found that the juror to all outward appearances at several different times had gone to sleep, but only for two or three minutes, just a short time. . . . Granting or refusing a new trial upon such ground as this is something so peculiarly within the observation, province, and discretion of the trial court that we should not interfere with the ruling, except upon a clear abuse of discretion, which is not here shown."