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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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ALIBI

State v. *Wagner,* Iowa, (1928) 222 N. W. 407. *Burden of proof.*

Defendant was prosecuted for stealing chickens. He offered evidence to the effect that on the night in question he was riding in his automobile some distance away but that he did not go to the prosecuting witness' ranch and did not steal the chickens. The trial court instructed the jury on the law of alibi. Defendant was convicted and appeals on the ground that the defense of alibi was not involved. *Held,* the defense of alibi was not involved since "it might be found that he (defendant) could have readily been at the Day's ranch," whereas an alibi contemplates that by reason of extraneous facts it was *impossible* that defendant could have been present. The giving of the instructions constituted prejudicial error. Case reversed. The Iowa cases have made a distinction between a defense which "controverts the state's evidence," incidentally showing that defendant was not present at the time and place charged and a defense which goes farther and attempts to prove affirmatively "not merely that he was not present but by reason of extraneous facts it was *impossible* that he could have been present." In the first case the burden of proof is on the state beyond a reasonable doubt; in the second, the defendant has the burden of proof and must sustain it by a preponderance of the evidence. Such a distinction seems unsound on principle and arises perhaps from a failure to see that alibi is not an affirmative defense at all. Defendant's presence and participation in the crime are essential elements of the state's case and any defense of being in a different place inconsistent with participation in the crime is in direct denial. Nor does it cease to be in denial because the defendant was one mile away from the scene of the crime instead of 1,000 miles. The case is noted in 27 Mich. Law Rev. 702.

ALIENS

United States v. *Kellogg, Secretary of State,* Ct. of App., D. C., (1929) 30 Fed. (2nd) 984. *Immigration Act of 1917 and 1924 not unconstitutional as denial of due process or as infliction of cruel and unusual punishment.*

After deciding that a citizen of Germany remained an alien notwithstanding her subsequent marriage to a native born American citizen (Cable Act, 2, 8 U. S. C. A. 368) and that "theft" involves "moral turpitude" within meaning of Immigration Act of 1917 providing for exclusion of persons who have been convicted of, or admit having committed a felony or other crime involving moral turpitude, *held,* that these provisions of the Immigration Act are not unconstitutional as depriving parties of liberty without due process of law or inflicting cruel and unusual punishment in violation of the eighth amendment.

BURGLARY

State v. *Bull,* Idaho, 276 Pac. 528. *Meaning of entry.*

Entry into pool room open to public during business hours and through front door, which general public was invited to use, constituted "burglary," under Crim. Sts., sec. 8400, if defendant or his accomplice made entrance for purpose of committing larceny therein, under Crim. Sts., secs. 8093, 8845; invitation to enter for lawful purpose not extending to persons entering for unlawful purposes.

COERCION

Stadia v. *State,* Ind., 166 N. E. 25. *Presumption of coercion: husband and wife.*

Common-law rule that married woman who committed a crime in presence of her husband, except treason or murder, was presumed to have acted under his direction, compulsion, and coercion, has not been changed by statute in Indiana, but such presumption is rebuttable and only prima facie.

CONCEALED WEAPONS

Pierce v. *State,* Okla., 275 Pac. 393. *Carrying concealed weapon on one's own premises.*

Under sec. 1992, Comp. Okla. Sts. (1921), providing, "It shall be unlawful for any person in the State of Oklahoma to carry upon or about his person any pistol, revolver, bowie-knife, dirk-knife, loaded cane, billy, metal knuckles, or any other offensive or defensive weapon, except as in this article provided," *held,* that a defendant may be properly convicted of carrying on or about his person a revolver, and that the fact that the revolver is carried upon his person within the curtilage of his own premises is immaterial.

Davenport, J., dissenting, said: "This seems to be the first time in the history of the criminal courts that any one has ever been arrested for carrying a weapon in his own home or within his yard, the curtilage of his home under a statute regulating the wearing or carrying of a pistol. Many cases are found where the defendant has been arrested for carrying weapons in violation of the statutes of his state, yet I fail to find any where a man has been arrested and convicted for carrying a weapon that he had a right to own and possess in his house or in his yard, the curtilage of his home, nor does the majority opinion cite any case from any court in this or any other state where the defendant has ever been convicted for carrying a pistol in his home or his yard."

CONFESSIONS

Rex v. *Booher,* Alberta, Can., (1928) 50 Can. Cr. Cas. 271. *Confession which may have been, and which the Crown cannot show was not, induced by mental suggestion exercised on accused, not admissible.*

Defendant was accused of murder. Dr. Langsner who claimed to be able to exercise hypnotic effects upon a subject by feeling his thoughts, visited the defendant in the guard room. His declared purpose was to get evidence of the location of the rifle with which the killing was done. The next day Dr. Langsner was able to locate the rifle easily although others had searched in vain. Dr. Langsner made subsequent visits to the defendant for the admitted purpose of

getting a confession. Dr. Langsner testified, however, that on these visits there were no conversations with defendant. After one of them, Dr. Langsner told the guards they might expect a confession in a few minutes, and shortly thereafter defendant called a guard and made the confession, the admissibility of which is now in question. *Held,* the evidence raised a doubt as to the methods used by Dr. Langsner and that the Crown having failed to discharge the burden of establishing that defendant was not under the influence of mental suggestion, the confession would not be admitted.

CONTEMPT

United States v. *Karns,* Dist. Ct., N. Dist., Okla., (1928) 27 Fed. (2nd) 453. *Offering false and fraudulent instrument in evidence and testifying falsely constitutes contempt. Fact that perjury is also substantive crime does not bar punishment for contempt.*

Defendant was charged with violation of an injunction order prohibiting the maintenance of a public nuisance. She interposed the defense that the premises in question had been leased by her to one Rush and offered in evidence what purported to be a lease of the premises to him. There was no such person as Rush, the lease was false and fraudulent, and defendant not only herself gave perjured testimony in connection with the alleged transaction but also got others to do so. *Held,* such conduct was punishable as a contempt. "Perjury, while it may not of itself be punishable as a contempt apart from its obstructive tendency, yet where it is attended with other circumstances of an obstructive tendency inherently affecting and impeding the administration of justice, such is punishable as a contempt." The principal case is noted in 38 Yale Law Jour. 543.

ENTRAPMENT

Jones v. *Dental Commission of Connecticut,* Conn., 145 Atl. 570.

Private detective's conduct in going to dentist's office, with knowledge that unlicensed assistant was alone therein, to get him to do work on her teeth, with view to affording means for proceedings to cancel his registration, under Gen. Sts. (1918), sec. 2901, for practicing dentistry without license, in violation of sec. 2899, without presence and supervision of licensed dentist, as required by sec. 2906, *held* not so repugnant to good morals and sound policy as to require dismissal of proceedings on ground of entrapment.

INDICTMENT

People v. *Balalas,* Ill., 166 N. E. 47. *Knowledge of insufficient funds: intent to defraud.*

Indictment under Crim. Code, par. 164 (Cahill, *"Revised Statutes"* [1921], ch. 38), for obtaining waiver of lien by means of check which defendant did not have sufficient funds to meet was insufficient, where it did not allege defendant's knowledge that he had insufficient funds, as such knowledge could not be inferred from averment that act was committed with intent to defraud.

Farmer, J., dissenting.

People v. *Hirschler,* Calif. D. C. A., 277 Pac. 170. *Simplified short form of indictment.*

Under Penal Code, sec. 951, as amended by Sts. (1927), p. 1043, prescribing form of pleading in criminal cases, information charging that defendants robbed

certain person *held* not objectionable because omitting elements of force and fear and use of dangerous and deadly weapon nor for uncertainty in not alleging that taking was from the possession or immediate presence of victims.

People v. *Wickersham,* Calif. D. C. A., 277 Pac. 121. *Sufficiency of indictment under statute combining the crimes of larceny, embezzlement and false pretenses.*

Where indictment charging that defendant did "take, steal, and carry away" certain property was sufficient, defendant had all information contemplated by law as to nature of charge, under Penal Code, sec. 484, as amended by Sts. (1927), p. 1046, and could not object to proof of any species of theft named in sec. 484 as insufficient to sustain charge, on ground that indictment did not advise him whether he was accused of stealing, embezzling, or obtaining by false pretenses property of another.

JURISDICTION

Tillitson v. *Milmore,* Dist. Ct., Dist. of Mass., (1929) 30 Fed. (2nd) 559. *Federal District Court has no jurisdiction over criminal proceeding under state law.*

Plaintiff, a citizen of Illinois, brought a bill in equity to enjoin the chief of police of Watertown, Mass., from taking proceedings to confiscate the plaintiff's coin-controlled vending apparatus as a gambling device. Notwithstanding the suit involved the jurisdictional amount of the Federal Courts and that there was diversity of citizenship, *held* that the action was in essence a proceeding under the criminal laws of the state of Massachusetts to test the question whether plaintiff's apparatus is a gambling device and over such cases the Federal Court has no jurisdiction.

JURY

People v. *Barrett,* Calif., 276 Pac. 1003. *Collective examination of jury.*

Judge's action of collectively examining entire jury panel before drawing names and then restricting counsel's examination to matters not covered by him *held* sufficient to warrant reversal of conviction and order denying new trial under Const., art. 6, sec. 4½, and as denying right secured to defendant by Penal Code, sec. 1078, as amended by Sts. (1927), p. 1039, requiring trial when facts are denied, and reasonable examination of jurors, where defendant's denial of guilt and statements of wife as state's witness raised conflict.

KIDNAPPING

State v. *Miller,* Mo., (1929 14 S. W. (2nd) 621. *Forcible taking of child under age of 12 for short period, during which indecent liberties are taken with the person constitute offense.*

The evidence showed that defendant forcibly took a little girl in an automobile to an abandoned spot and took indecent liberties with her person but short of the crime of rape. He then abandoned her. *Held,* conviction under Rev. Sts. (1919), 3270, for forcibly taking and carrying away child under the age of twelve, with intent to detain and conceal the child from its parents, sustained. Blair, P. J., dissented: "Of course there was temporary detention and concealment such as would be necessary before appellant could accomplish his lascivious

purpose; but such detention—was purely incidental and did not characterize the intention with which appellant took the child. Such detention and concealment were directed against all the world and not particularly against the custody of the parent. Sec. 3270 denounces an offense against the custody of the parent or guardian and not an offense against the person of the child."

LARCENY

People v. *Canadian Fur Trappers' Corporation*, N. Y., (1928) 161 N. E. 455. *Liability of Corporation for larceny.*

The defendant corporation was found guilty of larceny and fined $5,000, and appeals. Defendant was engaged in the business of selling fur coats and the evidence showed that it had sold one to the complaining witness who made a cash deposit. The coat was to be stored for her and delivered when she called. When she returned for it her coat was gone and the salesman attempted to substitute another of entirely different quality. At the trial the prosecution attempted to introduce evidence that the officers of the corporation had not only acquiesced in the practice, but had expressly instructed the sales force to re-sell articles which had already been once sold in case it was necessary in order to satisfy the second customer. This evidence the trial court largely excluded. *Held,* a corporation may not only be liable criminally for acts of its agents in doing things prohibited by statute (where no intent is required) but may also be guilty of larceny where the intent to steal is essential. In such a case, however, the intent to steal must be the intent of the corporation and not merely that of an agent and can be established only by proving authorization of the act by the corporation's officers or acquiescence by them in the practice. It was error, therefore, for the trial court to exclude the evidence offered by the prosecution but although erroneous, the evidence stricken out could not be considered as evidence in the case and without it the evidence was insufficient to sustain conviction. Reversed and new trial ordered. The principal case is noted in 23 Ill. Law Rev. 718.

SEDUCTION

Burney v. *State*, Texas, (1929) 13 S. W. (2nd) 375. *Marriage of defendant to prosecutrix before pleading to indictment a defense.*

Prior to the institution of the prosecution for seduction, the defendant after being threatened with death unless he did so, married the prosecutrix. A few weeks thereafter he secured an annulment of the marriage on grounds of force and duress. Immediately thereafter this prosecution was commenced. Art. 506, Penal Code, provides: "If the parties marry each other at any time before the defendant pleads to the indictment—the prosecution shall be dismissed." The trial court was of the opinion that there had been no marriage within the meaning of this section and hence defendant was without a defense. *Held,* error. Even though subsequently annulled for duress, the marriage of the parties is a complete defense under the code.

SENTENCE

Fels v. *Snook, Warden*, Dist. Ct., N. Dist., Ga., (1929) 30 Fed. (2nd) 187. *Predating commencement of sentence to imprisonment to time before offense committed, unauthorized.*

Prisoner committed an offense against Penal Code, 195 (18th U. S. Const. Amend., 318), on June 22, 1928. He was tried, convicted and on July 20, sen-

tenced to imprisonment in the United States Penitentiary at Atlanta for a year and a day, "the said sentence to date from the 1st day of February, 1928." *Held,* on habeas corpus, that the trial court was without power to make the sentence begin at a date prior to the commission of the offense. The court speaks of the common practice, where there has been actual imprisonment of the accused before trial in default of bond, of making the sentence date from the beginning of such imprisonment. The principal case, however, goes far beyond this and attempts to give credit for time that was never in any manner served, hence lacks the practical justification of that practice. The decision seems sound.

SENTENCE

Ex Parte *Gilbert,* Calif. D. C. A., 275 Pac. 982. *Ignoring statutory provision which is impossible in its application.*

Defendant was convicted of attempted burglary and of a prior conviction of burglary. Under Penal Code, sec. 664, he is subject to one-half the maximum imprisonment for a first offense—which is life imprisonment. It is conceded that a sentence of one half of a life is void. *Held* therefore that the prior conviction may be ignored and sentence may be imposed for the attempted burglary alone.

STERILIZATION

Davis, Warden, v. *Walton,* Utah, 276 Pac. 921. *Validity of sterilization law.*

Laws (1925), ch. 82, authorizing sterilization of mental defectives under prescribed conditions, *held* not to provide for cruel and unusual punishment, contrary to Const., art. 1, sec. 9.

Laws (1925), ch. 82, authorizing sterilization of mental defectives confined in asylums or penal institutions, and prohibiting the performance of any operation destroying power of procreation, except as authorized, unless as medical necessity, *held* not class legislation, denying equal protection of laws, contrary to Const. of U. S., Amend. 14.

SUNDAY LAWS

State v. *Stout,* Okla., 276 Pac. 795. *Operating a dance hall as "servile labor."*

The words "servile labor," as used in sec. 1825, Comp. Sts. (1921), do not have the same meaning as the words "common labor," "secular labor," "labor," or "work," but mean physical labor of a menial nature performed with the hands. *Held,* that the acts done as alleged in the complaint are not "servile labor" within the meaning of said section.

SUNDAY LAWS

Williams v. *State,* Ga., (1928) 144 S. E. 745. *Sale of gasoline on Sabbath is a "work of necessity."*

In the light of modern day methods of traveling by automobile, the motor power of which is derived from the use of gasoline, and in the light of present day use to which automobiles are put, the sale of gasoline on the Sabbath is a "work of necessity" within the contemplation of Penal Code (1910), 416, and hence not a misdemeanor. The case is commented on in 2 S. Calif. Law Rev. 395.