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JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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ACCOMPLICE

State v. *Sweeney,* Minn., 231 N. W. 225. *One giving a bribe not an accomplice of one receiving bribe.*

Defendant was charged with accepting a bribe to influence his vote as an alderman of the city of Minneapolis. His conviction depended principally upon the testimony of another alderman, Mauer, from whom he was charged with accepting the bribe. Gen. St. 1923, par. 9903, prohibits conviction upon the uncorroborated testimony of an accomplice. Held, the giver of a bribe is not an accomplice of the receiver within the meaning of this statute and hence the receiver's conviction may be based on the uncorroborated testimony of the giver.

ENDEAVOR

State v *Hudon,* Vt., 151 Atlantic 562. *Statute making it a crime to endeavor to incite another to commit felony does not require physical action. "Endeavoring" distinguished from "Attempt."*

Sec. 7123 of the General Laws provides that a person who endeavors to incite, procure or hire another to commit a felony, though a felony is not actually committed, shall be imprisoned, etc. After conviction under this statute for endeavoring to incite one to burn a barn with intent to defraud an insurance company, defendant contended that the conviction was erroneous because the information did not allege that the barn was burned or that there was an attempt to burn it. The court, while freely conceding that in order to make out the crime of "attempt" there must be some act done in part execution of the design to commit another crime, sharply distinguishes the new offense created by the statute which requires neither the commission of the main crime nor any act toward it necessary to make out an attempt. The statute has created an entirely new offense.

HOMICIDE

State v. *Flatners,* S. D., 232 N. W. 51. *Conviction of murder upheld under instructions permitting verdict of guilty even though some of the jury believed intent was to kill deceased and others that intent was to kill deceased's companion.*

The first count of the information charged defendant with shooting and killing deceased with a premeditated design to effect his death; the second count charged his killing with premeditated intent to cause the death of deceased's companion, Doris Rounds. On appeal from conviction, defendant urged that instructions permitting a verdict of guilty even though some of the jurors believed the intent was to kill Doris Rounds, constituted reversible error. Held,

there was no error. Since, to constitute the crime of murder it is only necessary that there be intent to kill a human being, the finding of such intent is sufficient. That some of the jurors found the intent was to kill deceased and others that it was to kill deceased's companion is immaterial. The decision seems sound.

INSANITY

Ex parte Merwin, Cal., 290 Pac. 1076. *Under California statute providing for pleas of "not guilty" and "not guilty by reason of insanity," a verdict of guilty followed by finding "not guilty by reason of insanity," is not a "conviction" within meaning of statute providing for appeals by the state.*

Defendant, to a charge of murder, entered the two pleas allowed by Cal. P. C. 1016, "not guilty" and "not guilty by reason of insanity." Under the first he was found guilty of murder in the second degree. Under the second, he was found "not guilty by reason of insanity." After confinement in the hospital for the insane for more than a year, he was released on habeas corpus on a finding that he was then sane. Sec. 1506 of the Penal Code provides for appeals by the state in orders of habeas corpus discharging a defendant in criminal cases after a conviction. In an appeal by the state from the order discharging the defendant, held that hearings on the two pleas provided for by sec. 1016 constituted but one trial and there was therefore, no "conviction" within the meaning of sec. 1506. Appeal dismissed. The decision in the principal case is consistent with the construction formerly given to the California statutes regulating the pleas in insanity cases by the Supreme Court in *People* v. *Leong Fook,* 206 Cal. 64, 70, 273 Pac. 779, 782, and *People* v. *Troche,* 206 Cal. 35, 48, 273 Pac. 767, 772.

Jessner v. *State,* Wisc., 231 N. W. 634. *Statute providing for appointment of expert witnesses by the court and for examination and observation by them of defendants in criminal cases held constitutional.*

In a well reasoned and considered opinion, the Supreme Court of Wisconsin, in the principal case, sustained the Wisconsin statute providing in criminal cases for the appointment of expert witnesses by the court empowered to make scientific examinations and observations of the accused. The significance of the decision is well indicated by the language of the court: "The assault thus made upon this statute is highly important. Its enactment was in response to a well settled conviction, that, in criminal cases at least, where the interests of society were involved, there should be some technical evidence from unprejudiced and reliable sources. This conviction grew out of the belief that under the then existing procedure there was a striking tendency on the part of experts to accommodate their opinions to the necessities of that side of the case upon which they were testifying, and that such opinions were to a very large extent prejudicial and unreliable. To secure the reliable and unprejudiced opinions of the ablest experts in such cases, to the end that the purest degree of justice might be promoted, the board of circuit judges sponsored the enactment of this statute. If this statute must be condemned as unconstitutional, it will require retractment of most significant forward steps in judicial procedure, and bring regret to all who believe in steady progress towards the attainment of a more perfect justice."

The important provisions of the statute challenged as violating the constitutional rights of defendants in criminal cases are as follows: "Whenever in any criminal case, expert evidence becomes necessary or desirable the judge of the trial court may after notice to the parties and a hearing, appoint one or more disinterested qualified experts, not exceeding three, to testify at the trial. . . . The fact that such expert witnesses have been appointed by the court shall be made known to the jury, but they shall be subject to cross examination by both parties, who may also summon other expert witnesses at the trial. . . . No testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine and observe the accused. . . . Whenever the existence of mental disease on the part of the accused . . . becomes the subject of inquiry, the presiding judge of the court . . . may . . . commit the accused to a . . . hospital for the insane to be detained there for a reasonable time to be fixed by the court for the purpose of observation. . . . In case of commitment to a hospital the court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for the purpose of observation." It was first contended that this statute violated the constitution prohibiting compulsory self-incrimination. In answer to this the state had argued that the question of mental responsibility was a separate and distinct issue from the question of whether the act denounced had been committed and that the constitutional guarantees in question related only to the latter. The court, however, preferred to rest its decision in favor of constitutionality upon the ground that the statute should be construed only as permitting those kinds of examination and identification sanctioned by law without attempting to set the limits for all cases. It was enough that no claim of specific violations were claimed in this case. The second assault on the statute was made on the ground that since the appointment of the experts by the court was made known to the jury this necessarily gave a weight to their testimony not accorded to other witnesses and amounted to an expression by the judge of the weight that should be given to their testimony thereby infringing on the function of the jury and violating the constitutional right to jury trial. The court's answer is highly significant. The doctrine that the trial judge cannot in any way express an opinion on the evidence or merits of the case is a doctrine of modern American jurisprudence but "neither statutes enacted nor judicial opinions rendered since the adoption of the Constitution can impute a different meaning to the constitutional provision than that obviously intended at the time the Constitution was adopted." The court then points out that the only limitation the common law knew was that the judge should make it clear to the jury that *they were not bound by his opinion.* "It is common legal knowledge that at the present time in all of the federal courts as well as many of the state courts and in the courts of England the trial judge freely discusses the evidence, pointing out the weakness and the strength thereof, and, if he feels so disposed, expresses his own opinion . . ." "Whether the sponsoring of any witness by the court is good public policy is no longer a matter of judicial opinion. The dominant opinion of the legislature upon that subject has received expression and . . . its expression . . . prevails unless it contravenes constitutional provisions" As to the contention that the statute imposed the non-judicial function of appointing experts on the court and was

therefore unconstitutional the court said: "The function of these experts is to aid in the administration of justice by furnishing reliable and unprejudiced opinions upon a technical subject. The whole purpose of their creation and appointment is to promote the accomplishment of the very purposes for which courts are established. . . . For the purposes of that particular trial they are a part of the machinery of the court. They render assistance to the court. . . . Their appointment is a most appropriate judicial function."

State v. *Burris* (1930) 125 So. (La.) 580. *Statute providing for a commission to examine defendant who pleads insanity.*

Defendant, Burris, was indicted for murder. He filed pleas that he was insane at the present time and also that he was insane at the time of the commission of the crime. He also asked for the appointment of a commission to inquire as to his sanity under the Code of Criminal Procedure of the State of Louisiana. The court appointed the superintendent of the hospital for the insane at Jackson. He was unable to act and, as authorized by statute, he appointed in his place a well-known alienist. The court also appointed the superintendent of the hospital for the insane at Pineville and the coroner of a certain parish. The commission made an examination and listened to testimony. They made a report that in their opinion the defendant was insane and irresponsible at the time of the commission of the offense charged against him, but that he was sane at the present time. One member of the commission dissented from this report.

After this report was made, the defendant asked the district court to make an order sending him to the East Louisiana Hospital for the insane at Jackson. This motion was refused. Then the defendant asked the district court to order the district attorney to show cause why the defendant should not be discharged as a sane person. The district court refused this motion and declared its intention to hold the defendant for trial by jury on the question of his guilt or innocence with permission to the defendant to urge the defense of insanity.

Thereupon the defendant, Burris, applied for a writ of certiorari, prohibition and mandamus to review the rulings of the district court. The Supreme Court of Louisiana with O'Neill, C. J., dissenting, decided that the judge of the district court must grant an order committing the defendant, Burris, to the criminal ward in the hospital for the insane at Jackson to be there kept until discharged as provided by law.

The action of the district judge was based upon his belief that the Louisiana statute was in violation of the constitution of Louisiana for several reasons, the most important of which was the constitutional provision guaranteeing a trial by jury. The Louisiana statute provided that if the report of the commission of lunacy be "that the accused is presently insane, or was insane at the time of the commission of the crime, he shall forthwith be committed to the criminal ward of a hospital for the insane there to remain until discharged in due course of law. But if the report be that the accused is presently sane and was sane at the time of the commission of the crime the trial of the plea of insanity shall be proceeded with . . ."

The majority of the Supreme Court of Louisiana gave the law, part of which only has been quoted, this interpretation: "The general theory of these provisions, which is carefully worked out, is that the state cannot contest the correctness of the report of the commission, while, upon the other hand

an adverse report of the commission is never binding upon the accused, but the correctness of the report is, in effect, tested before the judge sitting with or without a jury, according as to how the indictment itself is triable."

With that interpretation the problem before the court was whether the law was unconstitutional where a defendant is not denied a trial by jury but merely the prosecution is denied the privilege of insisting upon a jury to determine the question of insanity. As stated by the court: "It is true that the state is not given, when the report of the commission is adverse to it, a trial by jury, but the constitution guarantees no right of trial by jury to the state."

Then the question arose by what authority may a court commit to a hospital for the insane a person who has been reported to be presently sane. The court replied that the theory of the law was that a person who was insane at the time that he committed a homicide though now sane should be kept under observation until it appeared that there was no reasonable danger of the recurrence of his insanity.

The attitude of the dissenting judge was that under the constitution a jury alone must decide all questions of fact on which depend the guilt or innocence of the defendant and that insanity is a question upon which depends the guilt or innocence.

The decision was reviewed in 78 University of Pennsylvania Law Review 909. It seems necessary to state, however, that the review is unsatisfactory. Indeed, the author of the review did not state correctly the proposition involved in the case. He said: "Under the statute, it was for the court to decide whether such person (should) be committed to the insane asylum. *Held, inter alia,* that the action of the court in sending such person to an insane asylum was justified and that defendant could be confined for a reasonable time." It is submitted that this statement is wholly misleading.

INSURRECTION AND SEDITION

People v. *Mintz et al.,* Cal., 290 Pac. 93. *Conviction under California statute prohibiting display of a red flag as an aid to propaganda that is of seditious character, sustained.*

Sec. 403a of the Penal Code provides (inter alia) "Any person who displays a red flag, . . . in any meeting place . . . as an aid to propaganda that is of a seditious character is guilty of a felony." Defendant, who was charged in one count of the information with this offense, was a member of an organization known as the Pioneer Summer Camp Conference. The following extracts from the opinion indicate the nature of the organization and its activities. The association was, "composed of independent organizations, some of which were communistic in character, the others having members who were communists. The purpose for which the camp conference was organized was to establish a summer camp for children of the so-called "working classes." Grounds for the camp were based in the hills of San Bernardino County, and it was established with the gathering together there of a number of children under . . . the leadership . . . of the defendant. . . . In the conduct of the daily camp program, the first order was that the children, when they arose about 6:30 in the morning, stood by their cots and saluted a red flag on which was a device of sickle and hammer, and announced themselves "ready" This flag raising ceremony was under the direction of the defendant. The

flag used was shown to be the flag of the Communist Party, and of the "Third International," with which the party was affiliated, and of the "Soviet Government of Russia." The pledge which the children were instructed to take was as follows: "I pledge allegiance to the worker's red flag, and to the cause for which it stands, one aim through-out our lives, freedom for the working class." Excerpts from books and pamphlets in the camp library were admitted in evidence among which was one as follows: "Communists do not think it necessary to conceal their views and intentions. They openly declare that their goal can be achieved only by the violent overthrow of the whole of the present social system." The District Court of Appeal for the Fourth District speaking through Mr. Justice Strothers, Marks J. concurring in part and dissenting in part, held that the statute was constitutional and the evidence sustained the conviction.

JURY

Patton et al v. *U. S.* (1929) 50 Sup. Ct. Rep. 253. *Under federal procedure trial by jury of eleven.*

A conviction of felony was rendered in the case by a jury of eleven men. A jury of twelve was duly impaneled but before the trial was concluded one juror, because of severe illness, could serve no longer. Thereupon, it was stipulated by counsel for the government and for the defendants, and by the defendants in person, that the trial should proceed with the remaining eleven jurors. Upon a conviction being obtained, the defendants, as might have been expected, immediately complained that they had been denied their constitutional right of trial by jury under article III, section 2, clause 3, and under the sixth amendment of the federal constitution. The Supreme Court of the United States in an opinion rendered by Mr. Justice Sutherland, with Mr. Justice Holmes, Mr. Justice Brandeis, and Mr. Justice Stone concurring in the result, and with the Chief Justice taking no part in the decision, held that the conviction was proper, and that the accused could waive trial by jury. The court said that the problem was the same as if there had been a trial before the court without any jury whatsoever. This is important because it settles what was doubtful in the federal law and because it is contrary to a number of state decisions which have taken the view that the constitutional right of trial by jury is so important from the viewpoint of the public interest in defendants that it could not be waived. The decision has been reviewed in 44 Harvard Law Review 124. See Hall's *Cases on Constitutional Law,* p. 196; 24 Ill. L. Rev. 339.

People ex rel Swanson v. *Fisher* (1930) 172 N. E. (Ill.) 722. *Waiver of jury trial.*

The decision in *Patton et al* v. *U. S.* formed the basis of the decision in this case. The Supreme Court of Illinois in an unanimous opinion held that under the constitution of Illinois a jury could be waived and a trial in the case of a felony properly could be had before a trial judge with the consent of the defendant. The opinion is a well considered one, and is particularly important in that it overrules expressly a number of previous Illinois decisions to the contrary.

MOTOR VEHICLES

McBoyle v *U. S.* (1930) 43 Fed. (2d) 273. *National Motor Vehicle Theft Act.*

The Circuit Court of Appeals for the 10th Circuit has held that an airplane is included in the National Motor Vehicle Theft Act which provides as follows: "The term 'motor vehicle' when used in this section shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails." The majority of the court resorted to dictionaries and determined that the term "vehicle" included a ship, and thus concluded that an airplane was within the statutory definition. Cotteral, C. J., dissented. He relied upon the rule that: "A penal statute is to be construed strictly against an offender. . . . ." It would seem that this rule would be better expressed if the wording was that a penal statute is to be construed strictly in *favor* of an offender. In any event, the rule has been overworked and it is doubtful whether a court should approach a criminal statute from any other viewpoint than an honest attempt to ascertain the meaning of the legislature. Judge Cotteral also relied upon the rule of ejusdem generis and it seems fair to concede that he made a good argument on this point. However, no rule of statutory construction seems to be more than a guide post toward the end of ascertaining the legislative intention. Accordingly, it would seem as if the majority opinion is a more useful one and probably expressed the legislative intent, if indeed Congress had any thought upon the particular subject matter.

PLEADING

Pepple v. *State* (1930) 172 N. E. (Ind.) 902. *Formal requirements of affidavit.*

The Supreme Court of Indiana, Martin, J., dissenting, has rendered a decision with reference to the formal requirements of an affidavit by which a prosecution was instituted. A statute in Indiana forbade anyone to feloniously take an automobile which was operated by electricity, or steam, or explosive power. The affidavit merely alleged that the appellant "unlawfully and feloniously took and drove away an automobile, the property of another, without the owner's consent." The affidavit failed to allege that the automobile so taken was operated by electricity, or steam, or explosive power. This was held to be a fatal defect and conviction was reversed. The court refused to take judicial notice that there is no such thing as an automobile that is not operated by means of one of the three mentioned methods. This seems unnecessarily rigid and the result is unfortunate.

People v. *Bogdanoff et al* (1930) 171 N. E. (N. Y.) 891. *New York Indictment Law.*

A grand jury indicted the defendants for "murder in the first degree contrary to Penal Law, section 1044" The indictment in this form complied with section 295d of the Code of Criminal Procedure, chapter 176 of the Laws of 1929. Such an indictment is startlingly simple, and marks probably the extreme limit of reform in this direction. The district attorney filed a bill of particulars which stated merely that the defendants by name "on the 27th day of July,

1929, at the City of Buffalo in this county killed Ferdinand Fechter by shooting him." The conviction of first degree murder was affirmed by the New York Court of Appeals by a four to three opinion. The majority opinion was written by Lehman, J., and concurred in by Cardozo, C. J., Pound and O'Brien, JJ. Crane, J., dissented in an opinion in which Kellogg and Hubbs, JJ., concurred. The result places New York in a most progressive position. This should be contrasted with the recent decision in Indiana in *Pepple* v. *State,* supra. The majority of the court was careful to say that such a brief indictment might not be sufficient in all cases. The minority objected that the New York law was even more advanced than the procedure in England which has received so many praises.

PRESUMPTIONS

State v. *Gardner,* Conn., 151 Atl. 349. *Presumption of innocence in criminal trials has no weight as evidence and is adequately covered by instructions dealing with the burden of proof.*

In a criminal prosecution for libel, the defendant assigned as error the failure of the trial judge to charge the jury on the presumption of innocence. The court had, however, repeatedly charged that the burden was upon the state to prove the material and essential elements of the crime charged. The court said: "An explanation of the presumption of innocence has a proper place in a charge in a criminal case and should ordinarily be given, but, in the absence of requests to charge, and where the court charges the jury that the burden is upon the state to prove the guilt of the accused beyond a reasonable doubt, the failure of the court to charge upon the presumption of innocence is not reversible error." That the so-called "presumption of innocence" is not evidentiary in character seems clear. See discussion of this problem in a note to *Barker* v. *State,* Ala., 103 So. 911 in 16 Journal of Criminal Law 457, and that it is properly covered by adequate instructions on the burden of proof seems equally clear. See note to *Barker* v. *State,* supra.

PROBATION

People v. *Baum,* Mich., 231 N. W. 95. *Sentence banishing accused from state for period of probation held void as unauthorized and contrary to public policy.*

Defendant was convicted of a violation of the liquor laws and sentenced to pay a fine of $500 and costs. In addition a five years probationary period was imposed and "defendant must leave the state of Michigan within 30 days and not return for the period of probation." The court held that banishment from the state was not cruel and unusual punishment within the constitutional prohibitions, citing the common instances of such practice both in England and the United States where the nationals of foreign countries are deported as a method of punishment for crimes against the United States. But, "to permit one state to dump its convict criminals into another would . . . tend to incite dissension, provoke retaliation and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself. Such a method of punishment. . . .is impliedly prohibited by public policy." See comment on the principal case in 30 Col. Law Review 1057.

SENTENCE

Hickman v. *Fenton,* Neb., 231 N. W. 510. *Effect of penitentiary sentence for less than minimum term prescribed by statute.*

Defendant pleaded guilty to a charge of incest and was sentenced to the penitientiary for a term of not less than three nor more than five years. The minimum sentence for the offence prescribed by statute was twenty years. After some days imprisonment under the sentence imposed, prisoner was again taken before the trial court, the original sentence was vacated and he was re-sentenced to a term of twenty-five years. He was then taken to the penitentiary, held under the original sentence until that term expired and then was detained under the mittimus issued pursuant to the second sentence. He now seeks his liberty on habeas corpus. Held, the prisoner should be discharged. The court concedes the power to vacate a sentence in two cases, where the original sentence was void and where the defendant himself has invoked appellate jurisdiction for the correction of errors. Neither was present here. The trial court, having jurisdiction of the person and the subject matter may have acted erroneously but its judgment was not void, citing *In re Ream,* 54 Neb. 667, 75 N. W. 24. "While there are decisions to the contrary, the weight of authority and the better reasoning support the Nebraska rule."

VENUE

State v *Shimman et al* 172 N. E. (Ohio) 367. *Double jeopardy.*

Defendants had transported liquor from Huron County to the adjoining county of Sandusky. Later they were sentenced for the offense of transporting liquor in Sandusky County. After the sentence, they were indicted for the transportation in Huron County. A plea of double jeopardy was sustained by the trial judge. Exceptions to the action of the trial judge were overruled by the Supreme Court of Ohio. Jones, Robinson, Matthias and Allen, JJ., concurred. Marshall, C. J., Kinkade and Day, JJ., dissented. The dissenting opinion states that the effect of the majority decision is that a "crime once committed justifies the culprit in continuing his criminal processes indefinitely so long as there is no interruption."

State v. *Chalikis* (1930) 122 Ohio State 35, 170 N. E. 653. *Crime committed near county boundary line.*

Defendant was convicted in Medina County, Ohio, for violation of a liquor law in Summit County within one hundred rods of the line between the counties. The conviction was obtained in Medina County under a statutory provision permitting trial in either county, where the offense was committed on the boundary line or within one hundred rods of the dividing line between the two counties. The conviction was reversed and the statute was held invalid as in contravention of the constitutional privilege of a trial "by an impartial jury of the county in which the offense is alleged to have been committed". The decision has been reviewed in the February number, 1931, of the Illinois Law Review. The decision seems to condemn section 254 of chapter 10 of the Code of Criminal Procedure (proposed final draft) of the American Law Institute.