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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER VERNIER AND HAROLD SHEPHERD

ACCOMPLICES.

Jones v. *State,* Texas, 263 S. W. 288. *Incest, who is an accomplice.*

In a prosecution for incest the prosecutrix is an accomplice and her testimony must be corroborated.

Duncan v. *State,* Alab., 101 So. 472. *Incest; Prosecutrix under age of consent not an accomplice.*

A thirteen-year-old prosecutrix, since incapable in law of giving consent, cannot be an accomplice within the rule requiring corroboration of her testimony to convict. The court fully recognizes, however, that if the prosecutrix were of age to give consent (as in the Jones case, supra) then she would be an accomplice.

State v. White, Mo., 263 S. W. 192. *Suborner and perjurer.*

Since the offenses of perjury and subornation or perjury are distinct and separate the suborner and perjurer are not accomplices, hence in a prosecution for subornation it is not necessary that the testimony of the perjurer be corroborated.

CONFESSION.

Ziang Sung Wan v. *United States,* 45 Sup. Ct. Repr. 1. *Admissibility of confession made while ill and in custody of police.*

Statements made by accused to police officers, and written statement signed by him after interrogation by police officers, at a time when accused was very ill, was in constant intense pain, and had been unable to eat for days, and after he had been in custody of police for more than a week, suffering from such disease and subjected to persistent examination, notwithstanding protestations that he was too ill to answer questions and that he wished to be left alone, *held,* not voluntary, having been obtained by compulsion.

Bingham v. *State,* Texas, 263 S. W. 747. *Admissability. Duty of trial court to make preliminary examination in absence of jury to determine whether confession "made under arrest."*

Confessions or admissions made while the accused was in jail or in the custody of an officer were excluded by statute (C. C. P. 810) unless reduced to writing and signed by the accused. A confession not complying with these formalities was offered in exidence. The accused requested the court to withdraw the jury and listen to evidence tending to show that he was under arrest at the time the alleged confession was made. The trial court declined to do this, but rather submitted all the evidence bearing on whether defendant was under arrest to the jury with an instruction that they should not consider the confession if they found that it was made while the accused was under arrest. This

was held to be error. While the court admits that the submission of controverted issues of fact upon the question of whether a confession is *voluntary* or not, has become the established rule in Texas, it nevertheless regards it as an exception to the true functions of court and jury and refuses to further extend the "exception." "If our present practice of ultimately submitting the issue of 'voluntariness' to the jury be an exception to the general rule of evidence it is of doubtful propriety to extend the exception to embrace the question of arrest."

CONTEMPT.

Michaelson et al v. *United States,* 45 Sup. Ct. Repr. 18. *Validity of Clayton Act providing for jury trial in certain contempt proceedings.*

Clayton Act, Secs. 21, 22 (Comp. St. Secs. 1245a, 1245b), providing for jury trial in contempt proceedings where act complained of is also a crime, on demand of accused, *held* not unconstitutional impairment of inherent power of courts to punish for contempt; the proceeding being an independent proceeding at law for criminal contempt, based on act constituting crime.

Strikers, who used abusive language, assembled in numbers, and were guilty of picketing and other acts for purpose of intimidating prospective employes, could be convicted of contempt in proceedings under Clayton Act, Secs. 20-22 (Comp. St. Secs. 1243d, 1245a, 1245b), requiring the contempt to constitute a crime, since such acts prima facie, at least, violate St. Wis. 1921, Sec. 4466c.

Clayton Act (Secs. 21, 22 (Comp. St. Secs. 1245a, 1245b), providing for jury trial on demand of accused in contempt proceeding, where the act constitutes a crime, is mandatory.

CONSPIRACY.

State v. *Martin,* Iowa, 200 N. W. 213. *Unmarried man may be guilty of conspiracy to aid married man to commit adultery with an unmarried woman.*

The principal case is obviously sound. While the unmarried man could never be guilty of the crime of adultery with the unmarried woman nevertheless the conspiracy to aid another who could commit the offense is itself a separate offense and complete long before the adultery occurred.

CORPUS DELICTI.

Morton v. *State,* Miss., 101 So. 379. *Confession without other proof of corpus delicti inadmissible.*

In a prosecution for having possession of more than one quart of liquor the defendant's confession that he had liquor in his possession was inadmissible since the only other evidence of the corpus delicti had been obtained by means of an invalid search warrant and was itself inadmissible.

The case is in accord with the general rule that extra judicial admissions or confessions are not alone sufficient to establish the corpus delicti and without such other proof, a conviction cannot be sustained. (16 C. J. tit. Crim. Law 1577, 7 R. C. L. 777.) This rule does not, however, preclude proof of the corpus delicti by circumstantial evidence. (*Cohoe* v. *State,* 82 Neb. 744; *Shires* v. *State,* 2 Okla. Crim. Rep. 89, both larceny cases.) Nor does it preclude its proof by the same evidence that connects the defendant with the perpetration of the crime. (*George* v. *United States,* 97 Pac. 1052), but means that where the *entire* evi-

dence proves merely defendant's connection with the perpetration of the crime and there is no evidence either direct or circumstantial to show that the crime was actually committed, the conviction cannot stand.

EVIDENCE.

State v. *Coleman,* W. Va., 123 S. E. 580. *Evidence of physical and mental examination of accused during trial not violative of defendant's constitutional privilege not to be a witness against himself.*

Defendant was indicted for murder. The defense offered evidence tending to show that defendant had been mentally deranged since childhood by reason of blows on the head from which fractures were alleged to have resulted. Accused was brought handcuffed without his consent and without notice to his attorneys to a medical doctor who made an X-Ray examination of the skull. *Held,* that the evidence obtained from such examination was admissible, and did not violate the constitutional privilege not to be a witness against one's self.

State v. *Griffin,* So. Car., 124 S. E. 81. *Constitutional protection against self-incrimination.*

The sheriff's testimony, in an action against the defendant for an attempt to administer poison, that he compared defendant's shoe with certain tracks and that it fitted, *held* not violative of defendant's constitutional privilege of immunity from testimonial compulsion. The court, after approving the language of the U. S. Supreme Court in *Counselman* v. *Hitchcock,* 42 U. S. 547, to the effect that the object of the rule of evidence that one shall not be compelled to give testimony which may tend to incriminate him, was to insure that a person should not be compelled *when acting as a witness* to give such testimony, applied that principle to the instant case thus: "The defendant was not being treated as a witness; the shoe and the comparison of the shoe with the track were not the testimony of the defendant, but of the sheriff distinct from anything she may have said or done; the shoe was obtained from her control without use of any process against her as a witness; she was not necessary to establish its authenticity, identity or origin . . ."

FALSE PRETENSES.

Palotta v. *State,* Wisc., 199 N. W. 72. *Defrauded person's failure to exercise ordinary care and prudence to investigate truth of the representations, no defense.*

Defendant represented that he could cure prosecutor who was suffering from nervousness; that he was a doctor, the ruler of the Magi and a spiritual healer; that he was as smart as Christ, a chiropractor, and a spiritualist. The mode of treatment was this: "defendant prayed, and put a collar having gold tassels on them and spoke magic words over them; gave them a couple of nuts to put in their pockets; told them to get two silk shirts of the best quality, made hypnotic passes over them," etc. The court properly held defendant's contention that the representations were too absurd and incredible to deceive any reasonable person to be untenable for the real test is not whether the representations are such as might receive persons of ordinary care, but whether they are such as are adapted to receive and do deceive the persons to whom they

are made. [See note to *Corscott* v. *State* (178 Wisc. 661), Vol. 14, p. 120, this journal, reviewing the authorities.]

Palotta v. *State* (supra). *Nature of Representations.*

Where, with false representations as to past or existing facts, there are mingled representations promissory in nature, the former will not be rendered innocuous.

King v. *Commonwealth,* Kent., 261 S. W. 1096. *Issuing check without sufficient funds where payee has knowledge of insufficiency.*

Where the drawer of a check informed the payee before delivery that funds were not on hand to meet it and the payee promised to hold it for a few days, and where the check when finally presented for payment was dishonored, no offense was committed under Ky. St. 1213A, providing, "That any person who shall, with intent to defraud, draw any check—knowing at the time of such drawing that the drawer has not sufficient funds for the payment of such check in full upon its presentation, shall be guilty, etc."

FINES.

State v. *Sharp,* La., 100 So. 454. *Sentence imposing fine and imprisonment and additional imprisonment for failure to pay fine held proper.*

Defendant was indicted for unlawfully transporting intoxicating liquors and upon conviction was sentenced to 60 days in jail and to pay a fine of $500.00 (the maximum fine and imprisonment for the offense under the statute). In addition, the sentence provided that in default of paying the fine, accused should be imprisoned for an additional year. (Revised statutes 980 provided: "Every person being adjudged to pay a fine shall in default of payment be sentenced to be imprisoned for a period not exceeding one year." (Since the additional year's imprisonment was clearly the penalty for failure to pay the fine and not directly for the original offense, the principal case is correct in holding without merit defendant's contention that his sentence was in excess of the maximum allowed by law for his offense.

That this statute providing for an additional year's imprisonment in default of payment of the fine is not violative of the constitutional prohibition against cruel or unusual punishment was held subsequently in *State* v. *Sharp* (La.), 100 So. 707.

Postelwait v. *State,* Okla., 228 Pac. 788. *Validity of disposition of fine for benefit of abandoned wife and children.*

In the absence of any constitutional restriction, the Legislature may provide for such disposition of fines in criminal cases as it may deem advisable, and may in an abandonment case provide that the fine shall be for the use and benefit of the abandoned wife or children.

A fine, when paid, becomes "public funds," and only the state would have a right to interfere to prevent the fine from being diverted illegally.

"This statute, enacted here in 1915, seems to have been borrowed from the statutes of Texas. The Court of Criminal Appeals of Texas in 1909 (by a divided opinion) declared the Texas statute void, as being in conflict with the Texas Constitution, forbidding the appropriation of state funds for the use of private individuals; also because it gave the court an option of substituting

other punishment in lieu of the punishment assessed by the jury, thus in that emergency denying the right of trial by jury; and further because it empowered a court to suspend the operation of a criminal statute. *Ex parte Smythe,* 56 Tex. Cr. R. 375, 120 S. W. 200, 23 L. R. A. (N. S.) 854, 133 Am. St. Rep. 976, and Texas cases following."

HOMICIDE.

People v. *Jones,* Mich., 200 N. W. 158. *Intoxication as a defense to crime requiring a specific intent.*

In a prosecution for an assault with intent to kill, instructions leaving it to the jury to determine defendant's intent from his acts, without sufficiently instructing them of effect of alleged intoxication, and that it might be such as to preclude inferring specific intent from his acts, *held* ground for reversal.

People v. *Tokoly,* Ill., 144 N. E. 808. *Homicide resulting from sale of poisonous liquor.*

Laws 1923, p. 317. providing that one who knowingly sells wood alcohol or other poisonous liquor to be used as a beverage and death results shall be guilty of murder, is not amendatory of previous law in sense intended by Const. Art. 4, Sec. 13, and is not invalid because not setting out act or section amended.

In prosecution under Laws 1923, p. 317, for murder resulting from sale of wood alcohol for use as beverage, there was no error in instruction defining manslaughter, even though no lesser offense than murder was provided by the act, where there was evidence that defendant knew the sales were unlawful but did not know that the alcohol he was selling was good alcohol.

People v. *Pavlic,* Mich., 199 N. W. 373. *When unlawful sale of intoxicating liquor causing buyer's death neither murder nor manslaughter.*

Defendant unlawfully sold moonshine whisky, the drinking of which followed by exposure caused the death of the deceased. The evidence showed that the whisky was not of a greater potency or possessed any more poisonous ingredients than ordinary intoxicating liquor used for beverage purposes. *Held,* defendant was guilty of neither murder nor manslaughter.

The malice aforethought necessary to constitute murder at common law existed where the act was one done with knowledge that it might cause death or serious bodily harm, or it might arise from the commission of any felony malum in se. It is obvious that the facts of the principal case fall under neither head, for the seller of ordinary intoxicating liquor could anticipate only the normal results of intoxication to follow its sale and its sale is clearly not malum in se but only wrong—by force of statutory enactment. The manslaughter charge likewise must fail, for although death resulting from an unlawful act not amounting to felony was involuntary manslaughter it was also necessary that the unlawful act be malum in se.

It is easy to conceive of circumstances, however, where such unlawful sale resulting in death would make the seller guilty of manslaughter. If the liquor were distilled by defendant himself and contained poisonous ingredients not possessed by ordinary liquor, the sale under such circumstances would show such a reckless disregard for human life as to supply the necessary mental element of that crime.

INDICTMENT AND INFORMATION.

Clingan v. *State,* Miss., 100 Sp. 185. *Indictment not concluding with words, "Against the peace and dignity of the state," is void.*

Sec. 169 of the state constitution requires that all indictments for crimes shall conclude "against the peace and dignity of the state." *Held,* that an indictment charging possession of intoxicating liquors but omitting the conclusion, charged no offense. "It is true . . . the provision appears to us to be idle and meaningless, but we find it in the fundamental law and we cannot disregard it." "Nor," said the court, "can we apply the doctrine of harmless error to the extent of overturning the constitution."

INFANTS.

Ridge v. *State,* Okla., 229 Pac. 649. *Imposition of death penalty for a child under fourteen.*

To warrant the death penalty for a juvenile offender convicted of murder, the offense must be reprehensible in a superlative degree, coupled with the fact that the perpetrator was a person having an ordinary comprehension of the enormity of the offense and its consequences.

In this state, under the general provisions of criminal law and procedure construed in connection with the law relating to juvenile offenders, the death penalty should not be imposed against a boy under the age of 14 years convicted of murder, unless it clearly appears that the juvenile offender was a person with a sense of responsibility, intelligence, and understanding equal to that of an ordinary person of the age of 16 years.

INTOXICATING LIQUORS.

Ex parte Gounis, Mo., 263 S. W. 988. *Cognizance by state courts of actions arising under National Prohibition Law.*

For the first time in Missouri there was presented by the principal case the problem of the extent to which the state courts could take cognizance of cases arising under the National Prohibition Act. That Act (Secs. 21, 22 and 24), after declaring any place where intoxicating liquor is manufactured, sold or kept, to be a common nuisance, provided that an action to enjoin such nuisances could be brought in the name of the United States by . . . "any prosecuting attorney of any state or subdivision thereof." An action to abate such a nuisance was brought by the prosecuting attorney of St. Louis Co. and Gounis, for failure to comply with the order of abatement was committed to jail for contempt. On habeas corpus, *held* that while the state courts could not take cognizance of criminal offenses against the United States or of suits for penalties under Federal laws, nevertheless in absence of an exclusive jurisdiction havin been given to the Federal courts in the matter, the state courts may take cognizance of all civil cases arising under the Constitution, laws and treaties of the United States. The principal case is obviously of the latter type, and the Missouri court being a court of general equitable jurisdiction, had jurisdiction over the subject matter and full power as an incidence of that jurisdiction, if it chose to exercise it, to enjoin the maintenance of the nuisance.

Strickland v. *State,* Miss., 100 Sp. 184. *Unlawful Transportation. "To any person."*

Where a taxicab driver in the course of a trip from Laurel to Blodgett, Miss., purchased liquor, took it into his car and with a passenger drank it, no offense of illegally transporting intoxicating liquors was made out under the Mississippi statute, Chap. 189, Laws of 1918 providing that "it shall be unlawful for any person to ship or transport any intoxicating liquor from place to place within the state to any person, firm or corporation," since, in the opinion of the court, the liquor was not obtained for the purpose of being carried from one point to "any person" at another point.

JUDICIAL NOTICE.

Wilson v. *State,* Alab., 100 So. 914. *No judicial notice taken that alleged stills are commonly or generally used for manufacture of prohibited liquors.*

Sec. 2 of the Acts of 1919 (p. 1086), made defendant's unexplained possession of articles used in manufacture of prohibited liquors primae facie evidence of a violation of the act. Under such a statutory rule of evidence, however, it was held necessary for the state to prove not only that the defendant had unexplained possession of a still, but also that such still or apparatus was commonly or generally used or that it was suitable for use in the manufacture of prohibited liquors, for "Courts cannot take judicial knowledge of matters of this kind."

LARCENY.

Davis v. *Government of the Canal Zone,* 299 Fed. 256. *Effect of subsequent ratification by the owner and restitution of stolen property.*

Where D stole a bond from O, evidence that O subsequently acquiesced in the taking and that D subsequently restored the bond, was inadmissible. Such evidence, if true, would not destroy the criminality of the once completed offense nor prevent its prosecution by the public.

RAPE.

Weaver v. *United States,* Dist. of Columbia, 299 Fed. 893. *Subsequent marriage of parties in statutory rape.*

Evidence of subsequent marriage of parties held, admissible in view of Code 808 authorizing jury to include death penalty in the verdict. While recognizing that the subsequent marriage could not constitute a defense to the crime, the court rightly holds that "the subsequent conduct of the defendant would weigh heavily with the jury in determining whether the extreme penalty should be imposed."

TRIAL.

Commonwealth v. *Stallone,* Pa., 126 Atl. 56.

Remarks of court in murder prosecution to defendant's counsel that he (counsel) had no right to lecture court, and to "cut it out," and that court had taken all he was going to from him in connection with other displays of feeling, went beyond court's discretion in the conduct of trial, and possibly deprived defendant of the fair and impartial trial to which he was constitutionally entitled.

Hardin v. *State,* Okla., 229 Pac. 654. *Justice for the poor.*

Where, in an application to appeal as a poor person, the trial court finds that as a matter of fact the defendant is a pauper and that there were 21 wit-

nesses examined in the trial for the state and 11 witnesses for the defendant, and the uncontroverted showing is to the effect that counsel for the defendant could not make a statement of the evidence from memory, and that no adequate and accurate "bill of exceptions" could be had without a transcript of the evidence adduced at the trial, together with all the rulings of the trial court made during the progress thereof, it is a manifest abuse of judicial discretion for the trial court to deny to the defendant a transcript of the proceedings of the trial without cost to him.

WITNESSES.

State v. *Price,* W. Va., 123 S. E. 283. *Competency of a child nine years old in a murder case.*

The witness was a child of nine years, a daughter of the deceased and an eye witness of the homicide. She could read and write, attended a public school and was in the third grade; she attended Sunday school and stated that if she did not tell the truth she would be sent to the reform school and at death would go to hell. Her general intelligence and general powers of observation were examined by counsel and the court in the presence of the jury. The trial court allowed the child to testify. *Held,* that the competency of witnesses of tender years resting in the discretion of the trial court, permitting her evidence to go to the jury, would not be disturbed.

People v. *Mendez,* Calif., 223 Pac. 65. *Effect of interposition of trial judge.*

It is not only the right but the duty of a trial judge to so supervise and regulate the course of a trial that the truth shall be revealed in so far as it may be within the established rules of evidence.

It was not misconduct for the judge, when the district attorney was about to hand to the jurors for their inspection certain photographs which had been fully identified, but had not been formally offered in evidence, to interrupt and advise the district attorney to first offer them in evidence.

Where counsel read isolated portions of testimony at coroner's inquest which apparently conflicted with the testimony at the trial, it was not error for the trial judge to intervene of his own motion and compel the reading of other portions of the context which revealed that the apparent conflict was not a real conflict; the circumstances that in so doing he may have incidentally aided the prosecution being of no consequence.

State v. *Adamo,* Wash., 223 Pac. 9. *Effect of newspaper report of former trial found in jury room.*

A new trial was not required in a homicide case because a newspaper report of a former trial and conviction was found in the jury room; the article expressing no opinion concerning defendant's guilt, and only reporting the result of the trial.

. . . "If the article had been an attack upon the appellant or had expressed opinions concerning his guilt or if it had been a grossly unfair statement of the former trial, then the court might presume prejudice. Such was the situation in *People* v. *Stokes,* 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102, and *Capps* v. *State,* 109 Ark. 193, 159 S. W. 193. Even if all the members of the jury had read the whole of this newspaper article, we do not see how it could have

influenced their verdict, unless we are to assume that jurors are unfit for the important duties imposed on them."

Commonwealth v. *Johnson,* Pa., 123 Atl. 638. *Harmless error.*

In affirming a judgment of conviction of murder in the above case, Moschzisker, C. J., makes the following refreshing statement:

"So far as the reasonable doubt rule is concerned, although the trial judge's instructions were not phrased entirely in previously approved words, this portion of the charge was fairly within our authorities. See *Com.* v. *Brayson,* 276 Pa. 566, 573, 120 Atl. 552. *It is time to understand that the privilege of having a criminal conviction reviewed is not granted to afford the complainant opportunity, by ingenious argument, to magnify mere departures from traditional trial methods into harmful errors.* On the contrary, the purpose of review is to enable the appellate tribunal to see that the accused has been given a fair trial within the law and established rules of practice, and, if material departures in either of these respects, which it is reasonable to believe probably affected the jurors in reaching their decision, are shown to have occurred, then, but not otherwise, to order a new trial. Such departures do not appear on the present record."

VERDICT.

Commonwealth v. *Valotta,* Pa., 123 Atl. 681.

The simultaneous trial on two indictments charging murder is warranted, and the finding of guilt in the second degree on one indictment does not affect the first degree conviction on the other, although both convictions are founded on identical evidence.