BROWN v. STATE.

Opinion delivered May 13, 1918.

1. CRIMINAL LAW—REFUSAL OF CONTINUANCE—DISCRETION.—Where the record did not show that any testimony was introduced on accused's motion for continuance to show the extent of the illness of accused's mother and baby, alleged as ground for continuance, the appellate court can not determine whether a refusal of continuance was an abuse of discretion.
2. CRIMINAL LAW—CHANGE OF VENUE—"CREDIBLE PERSON."—Where motion for change of venue was presented, with supporting affidavits of eight persons, who on oral examination disclosed that they had no general knowledge as to the state of mind of the inhabitants of the whole country, and that their information was confined practically to one township, the court's finding that they were not "credible persons" within the statute was justified.
3. CRIMINAL LAW—HARMLESS ERROR—SELECTION OF JUROR.—Where the record failed to show that accused exhausted his peremptory challenges, assignment of error to the holding that one talesman was a competent juror is not available.
4. JURY—CHALLENGE—DISCRETION OF COURT.—It is a matter within the sound discretion of the trial court to determine whether one party, after the acceptance of ten jurors, should be permitted to exercise the right of challenge against a juror already accepted.
5. CRIMINAL LAW—HEARSAY EVIDENCE.—In prosecution for selling intoxicating liquor, testimony as to what a third person said before the whiskey in question was produced was properly excluded as hearsay, where such statement was not shown to be a part of the sale.
6. CRIMINAL LAW—HEARSAY EVIDENCE.—Declarations of third person, subsequent to offense, indicating his guilt thereof, are excluded under the hearsay rule.
7. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Refusal of instructions, fully and correctly covered by instructions given, is not error.
8. CRIMINAL LAW — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.—Where the State produced one witness, who testified that he saw accused receive the money and deliver the whiskey, refusal of instruction that the State relied upon circumstantial evidence was proper.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; affirmed.

Arthur Cobb and *Richard Ryan*, for appellant.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

McCULLOCH, C. J. Appellant was indicted, tried and convicted of the offense of selling intoxicating liquor.

The first assignment of error urged here for reversal of the judgment relates to the ruling of the court in refusing to grant a continuance. The continuance was asked on account of the absence of certain witnesses, and for the further reasons that appellant's mother was "sick and under the care of his father," and that "in addition to the above sickness, the defendant's baby, who is ten months old, is very sick and suffering with a rising in the head, and that the defendant is in no mental condition or state of mind on account of said sickness to go to trial or properly advise with his attorneys." A reversal is not urged on the ground of the absence of witnesses, but it is insisted that the court ought to have granted a continuance on account of the illness of appellant's mother and baby. It does not appear from the record that any testimony was introduced on the motion to show the extent of the illness of appellant's mother and baby, so we are unable to determine whether or not the court abused its discretion in refusing to postpone the trial on that account.

The next assignment urged is that the court erred in refusing to grant a change of venue. The motion for change of venue was presented with supporting affidavits of eight persons, all of whom were examined orally before the court. The testimony given on the examination disclosed the fact that none of the affiants had any general knowledge as to the state of mind of the inhabitants of the whole country, and their information was confined to a very limited portion of the county, practically to one township. We can not say that the court was not justified in finding that the persons who made the affidavits were not credible persons within the meaning of the statute.

It is next insisted that the court erred in holding that A. T. Moody, a talesman, was a competent juror, but it does not appear from the record that appellant exhausted the peremptory challenges allowed under the statute, and that assignment of error is not available. After ten jurors had been accepted by both sides, appellant asked that permission of the court be given to reconsider the acceptance of the jurors and to peremptorily challenge one of the jurors already accepted, but the court refused to permit it to be done. No reason was offered for the exercise of the challenge at that particular time, and it was a matter within the sound discretion of the court to determine whether or not one of the parties at that stage of the proceedings should be permitted to exercise the right of challenge. *Allen* v. *State,* 70 Ark. 337.

The next ground urged for reversal is that the court erred in refusing to allow testimony to be adduced tending to show declarations or statements made by a certain person, Williams by name, alleged to have been made "immediately prior" to the sale of whiskey charged to have been made by appellant. The circumstances under which the sale of whiskey was made by appellant, according to the testimony adduced by the State, are these: A party of boys or young men, including Charlie Robbins and Will McGrew, the State's witnesses, were working at a stave mill in Garland County, and gathered together in a public road near the mill, and a conversation came up about getting something to drink, two or three of the boys stating that they would like to have something to drink. Appellant was one of the party gathered there on this occasion, and was accompanied by his father-in-law, one Williams, who had recently come to Arkansas from the State of Oklahoma. Robbins testified that during the conversation either appellant or Williams (he was not sure which of them it was) left the crowd immediately after the remark made by the boys about wanting something to drink, and came back in a short while and placed on the ground "some white looking stuff," which they all drank, and that he (witness) threw down $2. The

witness did not state what became of the money that he placed on the ground. The other witness, McGrew, testified, however, that he did not hear what was said before the whiskey was brought, but that he saw Robbins "lay down a two-dollar bill and saw Ed Brown pick it up and disappear and then came back and put down a quart of whiskey," which the members of the party drank. Appellant testified that he did not sell any liquor to Robbins, but admitted that he was present on the occasion described with his father-in-law, and that he saw Robbins "go to a tree top and bring back some liquor." Appellant offered to prove by the witness who was present on this occasion that "immediately prior to the alleged transaction of the sale of the quart of whiskey to Chas. Robbins that the man Williams, who was in company with the defendant Ed Brown told him that he had come to Arkansas for the purpose of looking out a location and had brought some whiskey with him." It does not appear how long before the whiskey was produced that this statement of Williams was made, nor is it shown that Williams offered whiskey for sale. The offered testimony does not make the alleged statement of Williams a part of the sale so as to render the testimony competent on that account. The offered testimony was, therefore, purely hearsay and the trial court was correct in excluding it. Appellant also offered to prove by certain witnesses that subsequent to the alleged sale of whiskey on the occasion mentioned Williams admitted that he had brought the whiskey from Oklahoma. This was offered as an admission on the part of Williams that he, and not appellant, had committed the offense set forth in the indictment. This question was thoroughly discussed in the case of *Tillman* v. *State,* 112 Ark. 236, where we held that "declarations or confessions of guilt by third parties fall within the rule against hearsay testimony and are not admissible."

Two of the instructions requested by appellant related to the question of burden of proof, and that question was fully and correctly covered by other portions of

the court's charge, and there was no error in refusing to give those particular instructions on the subject. The third instruction, which the court refused to give, was erroneous in telling the jury that the State relied upon circumstantial evidence to prove the guilt of the accused. The State did not depend upon circumstantial evidence, but produced a witness who testified that he saw appellant receive the money and deliver the whiskey.

There is no error in the proceedings, and the judgment is, therefore, affirmed.

worked court; yet but few men upon it have labored so diligently as he. None has sought more earnestly and with a purer zeal to do even-handed justice. As he had long been active in politics, it was feared that when he took his seat in this court he would remain a politician, permitting his judgments to be swayed by popular clamor; but we soon found that when he assumed the judicial ermine it was with the determination that it should be worn without a stain. In all his decisions there was no shadow of turning from the true path, no matter how unpopular it might be. He sought only the law and the facts, and no other consideration ever moved his judgment. His opinions are characterized by a brevity which now finds more favor than when he became a member of this court; and they are clear and direct. They are not long treatises upon the law such as appellate judges used to write in days of greater leisure; but they set forth the essential facts, and they lay down the law so plainly that he who runs may read.

His absolute integrity of purpose, and the stainless purity of his life, account for the universal respect in which Judge Hughes was held; but they do not account for his wide popularity. It is doubtful whether there has ever been among us a man more universally beloved. He merited this warm affection; for he was one of the kindest of men, one of the truest of friends. There was no malice in his nature. While he loved the men who loved him; while he was grateful to them for their support and willing to strive mightily in their behalf, he bore no ill-will toward his opponents. If they were honorable men, he honored them, and recognized their right to differ. If they were knaves, he pitied them; but in his heart there was no bitterness as there was no guile. A long life with its deceptions, its disillusions, its disappointments, too often leaves us soured and uncharitable; but with Judge Hughes it only brought each year a broader charity, a kindlier outlook; and I feel justified in saying that when in the fullness of years and honors he was called before his Maker, few cleaner souls have stood up for judgment.

Therefore, it is with peculiar satisfaction that I present to Your Honors the resolutions of the Little Rock Bar on his decease. They are as follows:

"*Resolved,* That in the death of Judge Simon P. Hughes, the State of Arkansas has lost one of its noblest citizens, a man of a singularly pure and blameless life, who was an upright and enlightened Governor, a just and capable judge, and who in all human relations so bore himself as to win the respect and good will of the people and the devoted love of his family and friends.

"*Resolved, further,* That the bar cherishes especially the memory of his long, faithful and efficient services upon our Supreme Bench, and that we extend to his bereaved family our warmest sympathy."

II.

OPINIONS NOT REPORTED.

Brunson *v.* Cromwell; appeal from Crawford Circuit Court; Jas. Cochran, Judge; affirmed June 17, 1918, *per* McCulloch, C. J.

Raybourn *v.* Kirk; appeal from Crawford Chancery Court; W. A. Falconer, Chancellor; affirmed June 24, 1918, *per* Smith, J.

Cravens & Boren *v.* Barr; appeal from Sebastian Circuit Court, Greenwood District; Paul Little Judge; reversed June 24, 1918, *per* Hart, J.

Moore *v.* State; appeal from Jefferson Circuit Court; W. B. Sorrels, Judge; affirmed May 20, 1918, *per* Smith, J.

Jonesboro, Lake City & E. R. Co. *v.* Kirksey; appeal from Craighead Circuit Court, Jonesboro District; W. J. Driver, Judge; *per* Smith, J.

Lancaster *v.* Kaler; appeal from Miller Circuit Court; George R. Haynie, Judge; affirmed June 17, 1918, *per* Wood, J.

Farrell *v.* Steward; appeal from Crawford Circuit Court; Jas. Cochran, Judge; affirmed June 17, 1918, *per* Hart, J.

Lee *v.* Bandimere; appeal from Craighead Circuit Court, Jonesboro District; W. J. Driver, Judge; appeal dismissed, *per* McCulloch, C. J.

Shelby *v.* Leavy; appeal from Jefferson Chancery Court; John M. Elliott, Chancellor; affirmed June 17, 1918, *per* Humphreys, J.

Blumenthal *v.* State; appeal from St. Francis Circuit Court; J. M. Jackson, Judge; affirmed July 1, 1918, *per* Hart, J.

Edgar *v.* Brown; appeal from Craighead Circuit Court; W. J. Driver, Judge; affirmed July 1, 1918; *per* Humphreys, J.

III.

CASES DISPOSED OF ON MOTION.

W. M. Hope *et al. v.* H. C. McElroy and G. M. Taylor; Yell Circuit Court, Dardanelle District; A. B. Priddy, Judge; settled and appeal dismissed on appellants' motion, June 3, 1918; *per curiam.*

E. C. Thompson *v.* W. C. Butcher; Arkansas Chancery Court, Southern District; John M. Elliott, Chancellor; appeal dismissed June 10, 1918, for noncompliance with Rule 9; *per curiam.*

Sam Steel, Special Administrator, *v.* St. Louis, Iron Mountain & Southern Railway Company; Saline Circuit Court; W. H. Evans, Judge; settled, and appeal dismissed on appellant's motion, June 17, 1918; *per curiam.*

Gainer & Garvey *v.* L. S. Caudell; Cross Circuit Court; W. J. Driver, Judge; affirmed, on appellee's motion, for noncompliance with Rule 9, June 17, 1918; *per curiam.*

U. S. Hartsell *et al. v.* Dr. H. A. Longino; Columbia Chancery Court; J. M. Barker, Chancellor; appeal dismissed on appellant's motion, June 24, 1918; *per curiam.*

Mel Combs *v.* The State of Arkansas; Greene Circuit Court, Second Division; W. J. Driver, Judge; appeal dismissed on motion of the Attorney General, September 16, 1918; *per curiam.*

Mel Combs *v.* The State of Arkansas; Greene Circuit Court, Second Division; W. J. Driver, Judge; appeal dismissed on motion of the Attorney General, September 16, 1918; *per curiam.*

W. D. Polk *v.* United States Fidelity & Guaranty Company and J. L. Taylor as Guardian *ad litem* for Edgar Whitehead *et al.* Minors, *v.* D. G. Langdon, former guardian, and W. D. Polk and United States Fidelity & Guaranty Company; Clay Chancery Court, Western District; Archer Wheatley, Chancellor; appeals dismissed by agreement, September 23, 1918; *per curiam.*

A. A. Smith and F. M. Farley *v.* G. L. Wright; Lawrence Chancery Court, Eastern District; Geo. T. Humphries, Chancellor; appeal dismissed September 30, 1918, for noncompliance with Rule 9; *per curiam.*

A. A. Smith and F. M. Farley *v.* William Headrick; Lawrence Chancery Court, Eastern District; Geo. T. Humphries, Chancellor; appeal dismissed September 30, 1918, for noncompliance with Rule 9; *per curiam.*

Swift & Company *v.* A. Bernard; Pope Circuit Court; A. B. Priddy, Judge; appeal dismissed, September 30, 1918, for noncompliance with Rule 9; *per curiam.*

Dick Jeter *v.* The State of Arkansas; Johnson Circuit Court; A. B. Priddy, Judge; affirmed orally, October 7, 1918, it appearing that the bill of exceptions was not filed within the time limited by the trial court, and no error appearing in the face of the record; *per curiam.*

Dennis Downey *v.* R. E. L. Johnson, Judge; prohibition to Cross Circuit Court; petition denied October 7, 1918; *per curiam.*

E. G. Shoffner, Trustee, *v.* Mrs. M. J. Vann *et al.;* Pulaski Chancery Court; John E. Martineau, Chancellor; appellant's motion for additional time denied, and appeal dismissed for noncompliance with Rule 9, October 14, 1918; *per curiam.*

J. H. Evans *et al. v.* Claud Ragsdale by his next friend, James Duncan *et al.;* Van Buren Chancery Court; B. F. McMahan, Chancellor; appeal dismissed October 14, 1918, for noncompliance with Rule 9; *per curiam.*

read, and the opinions of the court pronounced, but at no other time, unless in cases of necessity, or in relation to a cause when called in course.

RULE 7. The Clerk shall not suffer the papers, in any case, to be taken from his office, at any time, by counsel, nor, during term, from the court-room, but by the judges.

RULE 8. More than two Attorneys shall not be permitted to speak on the same side of any cause, without special permission of the court.

RULE 9. In every cause brought to this court by appeal or writ of error, it shall be the duty of the counsel of the respective parties, in addition to the statement of the case, and points intended to be insisted upon in argument, as prescribed by the 14th section of the act of the Legislature, approved October, 1836, to make out, in writing, a reference to the authorities upon which they rely, which shall be submitted to the court at or before the calling of the cause; and no cause standing for argument, will be heard by the court, until such statement of the case, containing the substance of all the material pleadings, facts, and documents on which the parties rely; and the points of law, and the facts intended to be presented in the argument, with reference to the authorities, as aforesaid, shall have been furnished to the court. The party failing to comply with this Rule, shall be considered as making default; and if such failure be on the part of the appellee or defendant in error, the opposite party shall be permitted to proceed alone in the argument.

RULE 10. The Clerk shall set the causes for hearing, in the order in which they come into his office, except those hereinafter provided for.

RULE 11. Causes which require oral testimony shall be set for trial by the Clerk, on such days of the term as may appear to him proper; having regard to the time such causes came into his office, and to the number of suits in the court.

RULE 12. The court will not permit a cause to be continued by the consent of the parties only; the consent of the court must be obtained.

RULE 13. Re-hearings must be applied for by petition in writing, setting forth the cause or causes for which the decision or judgment is supposed to be erroneous. The court will consider the petition without argument; and if a re-hearing is granted, direct it as to one or more points, as the case shall, in their opinion, require; but no ap-

plication for a re-hearing will be heard after leave has been given to take out a copy of the decision or judgment; and all petitions for a re-hearing must be presented during the term at which the decision is made or judgment pronounced; otherwise the court will not regard them.

RULE 14. No transcript of any judgment or decision of this court shall be given, or mandate issued by the Clerk, during the term at which the judgment is rendered or the decision made, without the special leave of the court; which shall not be granted without special cause shown.

RULE 15. The proceeding on a writ of error, shall be by notice as prescribed in the 8th section of the act entitled "An act to regulate the practice of the Supreme Court in appeals and writs of error in civil cases," or by a subpœna directed to the Sheriff of the proper county, (or, in case the Sheriff be interested in the suit, to the Coroner,) commanding him to summon the defendant in error to appear in court, to show cause, if any he can, why the judgment or decree mentioned in the said writ of error, should not be reversed; If the notice or subpœna be returned not executed, an *alias* and *pluries* may issue at any time, on the application of the party, without a special order therefor; which, being returned not executed, in due form, shall be deemed equivalent to a service on the defendant, and the cause shall proceed; or when it shall appear to the court, by satisfactory proof, that any defendant is not an inhabitant of this State, the court shall, in its discretion, fix a day for such defendant to appear, and make an order to advertise, which order shall be published once a week for three weeks successively, in some one of the newspapers published in Little Rock, the last of which publications shall be four weeks at least preceding the appearance day fixed as aforesaid, after publication as aforesaid, and an affidavit thereof shall be filed with the Clerk. The cause shall stand for hearing in the same manner as if a subpœna against such defendant had been returned executed. Such order to advertise may be made at any time after the writ of error, and first subpœna directed to the county where the venue is laid, shall be returned.

RULE 16. All transcripts shall commence with the style of the court in which the controversy was decided, and the name of the judge or justices presiding when the decree, judgment, or order in the cause, was rendered, to reverse which the appeal is prayed, or writ of error

intended to be prosecuted, and its date; as —— pleas before A. B., judge of the —— Circuit Court, on the —— day of ——, 18—, or C. D. E. F. and G. H., justices of the county court, &c.; the names of all the parties litigant, as they stood when the controversy was decided, with the nature of the suit or motion, as

J. K., Plaintiff,
against
L. M., Defendant, } *In Covenant.*

In cases at law, the declaration, capias, endorsement, and return, and the orders of the court, with the pleas, demurrers, replications, &c. referred to in the orders, in immediate succession, up to, and including the final judgment, will follow in the order they are named; orders for attachments against witnesses need not be copied; then the bills of exceptions and papers referred to therein; no other paper, not even a bond declared on, or deposition that may have been used on the trial, are to be copied, unless made part of the record by oyer, special verdict, agreed case, or demurrer to evidence, or by reference to it in some other paper, which is a part of the record. In ejectment, neither the title papers or Surveyor's Report is a part of the record, unless made so by bill of exceptions.

In Chancery causes, after the statement of the court, judge, and the parties, (as in a suit of law,) the bill should be copied, unless an order of the court properly precedes it; then the exhibits as referred to, and the subpœnas and returns thereon; the orders of court previous to the filing of the answer; then the answer and the exhibits referred to therein; and the remainder of the orders up to, and including, the final decree; introducing reports of commissioners, and certificates of printers where publication has been made against absent defendants, and the like, after the orders under which they were respectively made; then the depositions taken on the part of the complainant, either in the order they are taken, or those on which he most relies, first; then those taken on the part of the defendant, in the same order. The notices to take depositions, the caption of depositions, and the certificates of the officer before whom they were taken, will, in most cases, be omitted (but the time of taking it must be inserted) unless introduced by exceptions. They will be introduced by the Clerk in this manner: "Depostions read on the part of the complainant." The deposition of J. L., taken on the —— day of ——, 18—, who deposeth that, &c. [Here the deposition.] "Depositions read

on the part of the defendant." And the same course will be pursued in relation to them. No paper should be copied, that was not filed and used on the trial, except where the paper referred to is on file in the same court.

The following Rules will be observed in all transcripts made out, whether at law or in chancery:

The date of every order of Court must be distinctly stated, and not by reference to the day and year aforesaid, or the like, as is usual; mere orders of continuance not to be copied; depositions and other papers, offered as evidence and rejected by the court, not to be inserted, unless by exceptions; no paper to be more than once copied; when it occurs a second time, let it be referred to by the page in the preceding part of the record; when a cause has been once before the Court of Appeals, and a transcript is again called for, to have errors which occurred after its return corrected, the second transcript should begin where the former ended; omitting the opinion of the appellate court; the appeal or supersedeas bond to be the last paper copied; and at the end of the transcript (except when it is so small as to render it unnecessary) there should be added an index or table of contents, referring to the pages of the record where the papers are incorporated, as

Bill, - - - - -	page 1
B's. bond, - - - - -	" 5
Subpœna and return, - - -	" 6
Answer, - - - - -	" 7
Decree, - - - -	" 10
C. K's. Deposition, - - -	" 11

and so on, referring to the material parts of the whole record. The index will greatly facilitate the labors of the court and bar; and the clerks may with propriety add it in their fee for the transcript. The fee for the transcript, in all cases, must be certified, to enable the clerk of this court to tax it in the bill of costs.

It is desired, and the law requires, that the transcripts should be made out in a plain hand writing, on paper of ordinary size, (letter paper is too small) a half sheet forming one page, and stitched at the top of the page; by this plan transcripts are more convenient for examination than when stitched through the side. The margin ought to be large and the notes full. When surveys form a part of the record, it would be preferable to send up a copy returned by the Sur-

veyor without stitching it to the record at all, with a certificate thereon that it forms a part of the record, when it can be examined with much more convenience.

In every case the official certificate should state, that the preceding —— pages, (stating the number) contain a full and complete transcript of the record and proceedings in the cause therein mentioned.

When an application is made for a partial transcript for the purpose of having an appeal, which has been prayed and not prosecuted, dismissed, the clerk will copy the decree or judgment appealed from, the order praying the appeal, and the appeal bond; the day of the month, and year of each must be distinctly stated. The fee, therefore, should always be certified.