

Kentucky, Court of Appeals.

REPORTS

OF SELECTED

CIVIL AND CRIMINAL CASES

DECIDED IN THE

COURT OF APPEALS

OF KENTUCKY.

By W. P. D. BUSH, REPORTER.

VOLUME III.

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AND AT SUMMER TERM, 1868.

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 Hopkins vs. Commonwealth.

CASE 6—INDICTMENT—JUNE 3.

Hopkins vs. Commonwealth.

APPEAL FROM GALLATIN CIRCUIT COURT.

1. On motion for a new trial, the grounds relied on must be specified in writing. (See Civil Code, sec. 372.) Errors not so specified can not be noticed by the circuit court, and can not be considered by the Court of Appeals.
2. On the trial, on an indictment for carrying a concealed pistol, exculpatory proof, that the defendant had been shot by strangers more than two years before, and that, for present personal security of self-defense against a like attack, he had carried a pistol ever since, was irrelevant.
3. "If the jury believe, from the evidence, that the defendant, within one year before the finding of the indictment, carried a pistol, concealed on or about his person, and that he had reasonable ground to believe, and did not believe, that his person was in danger of great bodily harm, they should punish him by a fine not less than fifty dollars nor more than one hundred dollars." Held—That the superfluous words, "and did not believe," in the above instruction, makes it more favorable to the defendant than he had a right to demand or expect.

J. J. LANDRAM,

For Appellant.

CITED—

Revised Statutes, secs. 1, 2, Stanton, p. 414.

Criminal Code, secs. 342, 226.

1 Met., 378; Payne vs. Commonwealth.

Bouvier's Law Dictionary, "*Res Gestae*."

1 Greenleaf's Ev., sec. 108.

2 Hill, N. Y., 248, 257; Bartholemy vs. The People.

JOHN RODMAN, Attorney General,

For Appellee.

CITED—

Criminal Code, sec. 267, subsec. 4.

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JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The appellant complains that the circuit court erred in overruling his motion for a new trial on an indictment for carrying a concealed pistol, which was "a deadly weapon;" on the trial of which the jury assessed, and the court adjudged, a fine of fifty dollars.

The motion was made on two grounds, stated in writing; and, in addition to these, the appellant urges in this court another error, not assigned in that motion—and that is, that the judge gave an oral instruction contrary to the provision in the Criminal Code, which requires all instructions in criminal prosecutions, including constructively such as are merely penal, to be addressed to the jury in writing; but if, as presented by the record, this might have been made an available error by a proper presentation of it for revision, the failure to suggest it as a ground for a new trial excludes it from the judicial consideration of this court. The Code requires all the grounds relied on for a new trial to be specified in writing; consequently, no error not so stated could be noticed by the circuit court, but all such pretermitted objection must be treated as waived in that court, and is, necessarily, beyond the sphere of this court's revisory jurisdiction, which is only to decide whether, on the grounds properly before it, the circuit court erred in its judgment. (Section 372, Civil Code.)

There having been sufficient proof that the appellant, on a certain day, carried a pistol concealed about his person, he attempted exculpation by proving that he had been shot at by strangers more than two years before and that, for precautionary security of self-defense against a like attack, he had carried a pistol ever since. These facts were wholly irrelevant, as there was

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neither proof nor apparent cause of apprehension of any such impending danger; and, therefore, there was no error in refusing to admit another witness to the same facts.

This disposes of the first ground for a new trial cognizable by this court.

The next and only remaining ground is, that the circuit court erred in giving the following instruction: "If the jury believe, from the evidence, that the defendant, within one year before the finding the indictment, carried a pistol concealed on or about his person, and that he had no reasonable ground to believe, and did not believe, that his person was in danger of great bodily harm, they should punish him by a fine, not less than fifty dollars nor more than one hundred dollars."

The appellant's counsel, assuming that the appellant himself was rightfully the best judge of the necessity and prudence of carrying a concealed pistol for self-defense, and the only person who could know whether he, in fact, apprehended danger, objects to so much of the instruction as requires reasonable ground for apprehension. Were this erroneous, the salutary law against the perpetuance and alarming prevalent habit among all classes, and especially among young men, and even boys, of wearing concealed arms, through false and cowardly pride, and for mock chivalry, might soon become practically a dead letter. A statute so beneficent and so often and so easily evaded, should be vigilantly upheld, and stringently enforced by the judiciary for repressing a dishonorable and mischievous practice, which, licensed or unlicensed, leads, almost daily, to causeless homicides and disturbances, which would otherwise never be perpetrated; and to that end, the accused should always be required to prove that he carried a concealed weapon

only for the purpose of property against a person, and which was in danger," Russell's criticism, and appellant than he had a

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CASE 7-

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APPEAL

1. Proceedings under § 86 of the Revised Statutes, land held for infants are the same whether the infant is a ward of the court or a ward by guardian.
2. When infants' real estate is sold under the Revised Statutes, the requirements of the Statute in relation to the rights of the infant and the purpose of relieving the infant to be placed in the requirements of art

T. F. HALLAM,

Revised Statu

Paul vs. Paul and wife.

only for the purpose of defending himself or family or property against an impending attack, reasonably apprehended, and which, if attempted, would justify the use of some such means of defense. But the superfluous addition of the words, "and did not believe that his person was in danger," relieved the instruction from the counsel's criticism, and makes it more favorable to the appellant than he had a right to demand or expect.

Wherefore, the judgment is affirmed.

CASE 7—PETITION EQUITY—JUNE 4.

Paul vs. Paul and wife.

APPEAL FROM CAMPBELL CIRCUIT COURT.

1. Proceedings under the act of February 16, 1858, to amend chapter 86 of the Revised Statutes (2 Stanton, 314), to sell, and reinvest, land held for life, with remainder over to children, &c., are the same whether the remainder-men are infants or adults; but if infants are entitled to the remainder, they should defend by guardian *ad litem*.
2. When infants' real estate is sold under article 3, chapter 86, Revised Statutes (2 Stanton, 304), a strict observance of the requirements of the statute is eminently proper for the protection of the rights of infants. But when the sale is made for the purpose of reinvesting the proceeds in other real estate, and not to be placed in the hands of guardians, the reasons for the requirements of article 3, chapter 86, cease.

T. F. HALLAM,

For Appellant,

CITED—

Revised Statutes, chap. 86; Civil Code, sec. 543.