Evidence--Contracts--Custom and Usages--Contradiction of Statutory Definition by Trade Usage or Special Contract

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were held to be a provocation; and also that knowledge of the deceased's sexual intercourse with the deceased's wife was held to be a provocation even though the accused did not obtain the knowledge by seeing the act of sexual intercourse or any circumstances relating to such act. It would seem that knowledge of such act should be held to be a provocation that could reduce murder to manslaughter no matter whether that knowledge is obtained by seeing or hearing, for the effect of the knowledge would surely be the same in either case. It is the law that touching a person under such circumstances as reasonably to arouse the passions of an ordinary man is such provocation, 29 C. J. § 120, p. 1137, and such a touching may consist of tweaking the nose, filliping on the forehead, or spitting in the face, State v. Grugin, supra, citing, Kelly, Criminal Law, § 518. By analogy therefore it would follow that the circumstances of this case would be at least as likely to arouse that "hot blood" which reduces murder to manslaughter as tweaking the nose, filliping on the forehead, or spitting in the face. Hence, it is submitted that this case is one where the circumstances were such as would naturally or reasonably arouse the passions of an ordinary man beyond his power of self-control, and therefore it should be held, upon principle, that in a situation like this there is sufficient provocation to reduce the crime of murder to manslaughter.

—C. M. C.

Evidence—Contracts—Custom and Usages—Contradiction of Statutory Definition by Trade Usage or Special Contract. Chapter 59, § 27 Barnes, West Virginia Code, 1923, provides that "A ton shall contain two thousand pounds." P orally contracted to mine coal for D for a certain price per ton, nothing being said as to the weight of a ton. P mined coal for some time and then notified D of a change in price and stated that the price would be so much per gross ton. P continued to mine coal for D and D paid P on gross ton basis of 2,240 pounds. P contends that he was employed on a net ton basis of 2,000 pounds, and brought an action for the balance of the account. D offers evidence to prove custom among mines to mine coal on gross ton basis of 2,240 pounds. Judgment for P as to balance of account before notice of change in price (it being held that the coal mined after notice of change of rate to a certain price per gross ton was done under a special contract). Held, in absence of special contract, statutory definition controls and no evidence of custom will be admitted to

This is apparently the first time that this exact question has been before the West Virginia court but the precise question was before the Pennsylvania court and the same result was reached. *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354. Similar cases, but in which the element of special contract did not enter, have been before several other courts, and it is held that if a statute has given a definite meaning to any particular word no evidence of custom will be admitted to attach any other meaning to it. *Dwight & Lloyd Co. v. American Ore Co.*, 263 Fed. 315; *Green v. Moffett*, 22 Mo. 529; *Rogers v. Allen*, 47 N. H. 529. Evidence of general or universal customs applicable to the trade or business is admissible if it is shown that such customs must be used in the interpretation of the contract. Universal customs applicable to trade are binding unless there is notice that the contract is without regard to the custom. *Richardson v. Cornforth*, 118 Fed. 325; *Morris v. Supple*, 208 Pa. 257, 57 Atl. 566; *Louisiana Red Cypress Co. v. Gilmore*, 70 S. E. 379 (Ga.); it is not necessary to show that party knew of the custom, for a party is presumed to have entered into the contract with reference to any existing general usage or custom relating to such business. *Steidtman v. Joseph Lay Co.*, 234 Ill. 84, 84 N. E. 640; *U. S. Continental Coal Co. v. Birdsell*, 108 Fed. 882; *Anderson v. Lewis*, 64 W. Va. 297, 61 S. E. 160. Custom contrary to statute is invalid. *Deadwyler & Co. v. Karow & Forrer*, 131 Ga. 227, 62 S. E. 172; *Swift & Co. v. U. S.*, 105 U. S. 691; *Colgate v. Pa. Co.*, 102 N. Y. 120. It is well settled that contracts contrary to statutes are invalid. 13 C. J. 420 and cases cited. These principles of law and citation of authority lead one to ask the following question in regard to the principal case. Has the statute given a definite meaning to the word "ton," so that whenever it is used it shall mean 2,000 pounds? It, of course, depends upon the interpretation of the statute. "It is a familiar rule that a thing may be within the letter, and yet not within the statute, because not within its spirit, nor within the intention of its makers. Hence, the interpretation of the whole will control the interpretation of its parts." *Church of Holy Trinity v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. Looking at chapter 59 as a whole it would seem that it was the intention of the legislature to provide for a uniform standard of weights and measures insofar as to provide for inspecting and ascertaining if correct, all weights and
measures, and to seal those that are correct and to condemn those that are inaccurate, in order to protect the public from being defrauded by inaccurate weights and measures. So it would seem that the legislature did not intend to give the word "ton" a definite meaning so that whenever it was used it would mean 2,000 pounds. The fact that the court admits that special contract, showing that the parties contracted upon the basis of another standard, would prevail over the statute, would seem to indicate that the court thought that the legislature had not given a definite meaning to the word "ton," for a contract contrary to statute is invalid. So it is submitted that if upon a very broad construction of the statute, it is held that the statute gives a definite meaning to the word "ton," so that whenever it is used it shall mean 2,000 pounds and that evidence of usage to the contrary is inadmissible, it would seem to follow that evidence of a special contract would be inadmissible. But if, on the other hand, the statute is not so broadly construed, but with a view as to what the legislature intended, which seems to be that the legislature had not given a definite meaning to the word "ton" and which the court virtually admits on the one hand by holding that a special contract would govern, then it would seem that evidence of custom as well as of a special contract would be admissible. (Case also commented on in 39 Harvard Law Review 122).

—W. P. L.

**Evidence—Right of Presiding Judge to Ask Leading Questions or to Testify.**—In a prosecution for retailing liquor without having paid the special tax therefor, the defendant denied all the charges. The presiding judge then asked certain leading questions which elicited the fact of an extra-judicial conference with the judge in which the defendant made statements amounting to an admission. Exception. *Held,* the interrogation by the judge was in effect the same as testimony by him and was therefore reversible error. *Terrell v. United States,* 6 Fed. (d) 498.

It is generally held that a presiding judge may not testify in a case unless he descends from the bench and another is appointed in his stead to conduct the trial. *Rogers v. State,* 60 Ark. 76, 29 S. W. 894; *People v. Dohring,* 59 N. Y. 374; III Wigmore, Evidence, § 1909. But did the court in the principal case testify? His questioning achieved the same result as would his testimony from the stand, but the testimony itself all came from the witness. If the same questions had been asked by counsel the objection, if