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Criminal Law--Pistol Toting

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ments of the court, after being admonished not to converse about the case. *Fields v. Dewitt*, 71 Kan. 676, 81 Pac. 467. Various standards of a more requiring nature are applied in criminal cases. It has been held, that the mere temporary separation of the jury is not sufficient to constitute reversible error. *People v. Douglass*, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550. A few courts place the burden on the prisoner to show that he was prejudiced. *Davis v. State*, 3 Tex. App. 91; *Gott v. People*, 187 Ill. 249, 58 N. E. 293. The rule applied in felony and capital cases by the United States Supreme Court and fifteen states including West Virginia, is, that where there has been an improper separation of the jury, and the verdict has been against the prisoner, prejudice will be presumed and must be rebutted by the state or a new trial will be granted. *Mattox v. United States*, 146 U. S. 140; *State v. Robinson*, 20 W. Va. 713; *State v. Clark*, 51 W. Va. 457, 41 S. E. 204. This presumption of prejudice may be rebutted by affidavit of members of the jury. *Commonwealth v. McCauley*, 156 Mass. 49, 30 N. E. 76. In West Virginia, the testimony of the jurors is receivable to disprove or explain the separation, but not to show the motives by which they were actuated, or that the separation had no influence on the verdict. *State v. Clark, supra*. In the principal case, the separation was explained to the satisfaction of the court by the affidavit of the juror, and was correctly ruled not to be prejudicial.

—R. J. R.

CRIMINAL LAW—PISTOL TOTING.—Accused was arrested while carrying in his hand a grip containing a 38 caliber pistol fully loaded with cartridges. *Held*, section 7 of Chapter 148 of the Code of 1913 forbidding any unlicensed person to carry about his person a pistol, etc., has been violated. *State v. Blazovitch*, 107 S. E. 291, (W. Va. 1921).

The decisions in other states upon similar facts under like or similar statutes are quite divergent, and show an irreconcilable conflict of opinion. A Virginia case held that the carriage of a pistol incased in a scabbard, in a pair of saddlebags, carried in the hands of the accused was not a violation of a statute forbidding the carrying of "concealed weapons about one's person," the court saying that such statutes must be construed most favorably for the

accused and strictly against the state and that if such an interpretation was less comprehensive than the legislature intended, it was for the legislature to change and not the court, since such would be judicial legislation. *Sutherland v. Commonwealth*, 109 Va. 834, 65 S. E. 15. The test adopted by the Alabama court to determine whether a weapon is "about one's person" is whether the locomotion of the accused will carry the weapon with him, and accessibility is immaterial. *Ladd v. State*, 92 Ala. 58, 9 So. 401. Absurd conclusions have followed the application of this test to actual cases. Thus, where the weapon was concealed under the rug in the bottom of a buggy, or in saddlebags across a horse's back, and therefore within easy and quick reach, the accused was acquitted because his locomotion would not carry the weapon with him. In *Ladd v. State, supra*, a contrary conclusion was reached where the weapon was concealed in a locked satchel strapped across the shoulder of the accused. *Warren v. State*, 94 Ala. 79, 10 So. 838. The Tennessee court says, "It is the carrying with the purpose of going armed that is the offense and what the legislature intended to prevent." Accordingly, the accused who carried a pistol under the seat of his wagon was held to have violated the statute. *Kendall v. State*, 118 Tenn. 156, 101 S. W. 189. In Texas it has been held that a pistol is "about the person" when in a basket on one's arm, when on the wagon seat, or under the buggy cushion on which accused sat; when under the rug in bottom of buggy in which defendant rode. *Johnson v. State*, 51 Tex. Cr. R. 648, 10 S. W. 902; *Garret v. State*, 25 S. W. 285 (Tex.App.); *Mayfield v. State*, 75 Tex. Cr. R. 103, 70 S. W. 308; *De Friend v. State*, 69 Tex. Cr. R. 328, 153 S. W. 881. While a few decisions in this state are apparently inconsistent with those just referred to, yet the Texas court has definitely decided that the weight of authority is in favor of a liberal interpretation, so as to effectuate the legislative purpose. *Wagner v. State*, 80 Tex. Cr. R. 66, 188 S. W. 1001. The Texas court says that the word *about* must be held to mean, within the pistol statute, "nearby, close at hand, convenient of access, and within such distance of the party so having it as that such party could without materially changing his position, get his hand upon it; otherwise every person having a vehicle would be authorized to keep prohibited weapons in his vehicle within reach of his hand ready for action." *Wagner v. State, supra*. An early case under such a statute and one much referred to by all the courts, held that *about one's person* meant "in close proximity to him so that he

could promptly use the weapon if prompted to do so." *State v. McManus*, 89 N. C. 555. The Missouri court expresses the same view by saying, "The Court owes a duty to the public to see that the object of the statute is not frittered away by a narrow construction." *State v. Conley*, 255 Mo. 185, 217 S. W. 29. Where the possession of the weapon is only momentary, and for an innocent purpose, the statute has not been violated; but otherwise where the purpose is unlawful. *Sanderson v. State*, 23 Tex. App. 220, 5 S. W. 138; *Schup v. State*, 58 Tex. Cr. R. 165, 124 S. W. 928. The West Virginia court in holding that the statute in question is broad enough to include carriage in a satchel, grip or handbag, indicates, inferentially at least, that it will carry this doctrine of liberal construction further than the facts disclosed in the principal case, for it says, "Inhibition of such a carriage of deadly weapons as makes resort to them easy and ready is clearly within its purpose and spirit." *Quaere*, Is a deadly weapon carried in the pocket of an automobile *about one's person*?

—M. H. M.

STATUTE OF FRAUDS—PERSONS TO WHOM IT IS AVAILABLE AS A DEFENSE.—A and B, real estate partners, bought land, title to which, for convenience, they took in the name of B. A, without B's knowledge, contracted verbally to sell a portion of the land to P. By the residuary clause of his will, B devised his title to his wife C, and died. P seeks specific performance against A and C. C demurred, setting up the Statute of Frauds. *Held*, C, not being a party to the contract, can not set up the Statute of Frauds as a defense. *Tanner v. McCreary*, 107 S. E. 405 (W. Va. 1921).

It is true that one not a party to a verbal contract for the sale of land, or not in privity with the parties thereto, cannot interpose the Statute of Frauds as a defense in a suit for specific performance of the contract. *General Bonding etc. Co. v. McCurdy*, 183 S. W. 796 (Tex. Civ. 1916). See 1 BROWNE, STATUTE OF FRAUDS, 152; 20 Cyc. 306. But was not C a privity to this contract? Since the property was paid for by both A and B, although the legal title was conveyed to B, yet there was a resulting trust of the land for the benefit of both A and B. *Currence v. Ward*, 43 W. Va. 368, 27 S. E. 329; *Mankin v. Jones*, 68 W. Va. 422, 69 S. E. 981. A and B, then, held the equitable title as tenants in common. That A had authority to contract for the partnership to sell the land in