Death Penalty for Larceny

OSCAR T. SHUCK

Editor's Note: The following article is reprinted, without alteration, from Shuck's 1901 *History of the Bench and Bar in California*.

George Tanner was tried in Marysville in April, 1852, in the then Court of Sessions, upon an indictment regularly presented, for grand larceny, by stealing fifteen hundred pounds of flour, six sacks of potatoes, five kegs of syrup, two and one-half barrels of meal, one keg of powder, and one-half barrel of mackerel, the property of Lowe & Brothers, of the value of $400. While impaneling the jury the district attorney asked one of the panel if he had any conscientious scruples against the infliction of capital punishment. The answer was: "I would hang a man found guilty of murder, but I would not hang a man for stealing." The district attorney challenged the proposed juror, the court allowed it, the man was "excused," and an exception to the ruling of the court was taken by the prisoner's counsel. The jury being formed, the case was tried, and a verdict was returned,—"Guilty of grand larceny, punishable with death." The prisoner was sentenced to be hanged. He appealed to the District Court, which affirmed the judgment, and a further appeal was had to the Supreme Court. The latter tribunal was then composed of Chief Justice Hugh C. Murray, and Associate Justices Alexander Wells and Alexander Anderson. The case of Tanner was taken before them while they were holding the April term, A. D., 1852, at San Francisco, under an act of the legislature authorizing it so to do. The cause was argued before the Supreme Court on behalf of the prisoner by no less a light than General William Walker, the "grey-eyed man of destiny," who became famous alike in law, medicine and wild adventure, and whose pursuit of the vision of empire ended in his violent death. The attorney-general, S. C. Hastings, represented the people.

The Supreme Court affirmed the judgment of death. A petition for a rehearing was filed, and an order was made commanding the sheriff of Yuba county to stay the execution of the sentence until the 23d day of July, 1852, in order that an application for rehearing might be heard by the court. The application was heard by Justices Wells and Anderson, and was overruled July 16, 1852. It was ordered that Tanner be executed on the 23d day of July in the manner prescribed by the original sentence, and he was executed accordingly.

At that day our law provided that any person found guilty of grand larceny should be punished by imprisonment in the State prison for a term of not less than one, nor more than ten years, or by death, in the discretion of the jury. In referring to this enactment, the Supreme Court said, in the case of Tanner: "We regret that our legislature have considered it necessary to thus retrograde, and in the face of the wisdom and experience of the present day, resort to a punishment for less crimes than murder which is alike disgusting and abhorrent to the common sense of every enlightened people."

Chief Justice Hugh C. Murray
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General William Walker

But the question of the constitutionality of the law, or its invalidity for any reason, seems not to have been discussed before, or considered by the Supreme Court. The arguments of counsel were not preserved or written, but the Supreme Court opinion (by Murray), is found in the second volume of the reports of that court, at page 257. The appeal turned on the question whether the Court of Sessions erred in excluding from the jury the man who declared he would not hang another for stealing. It was held that the man, William Jackson, of Marysville, was properly excluded from the jury; the validity of the act, under which Tanner was hanged, was not attacked.

It is curious to note that while the old criminal law referred to did not permit a man to be imprisoned for grand larceny for a longer term than ten years, it yet authorized the jury to decree his death on the scaffold. The jump was a long one — from ten years' imprisonment to death!

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Justice Steven Vardabedian of the 5th District Court of Appeal interviewed eight different justices, one of whom has died since making the tape.

Justice Robert F. Kane had so many rich stories about serving on the 1st District Court of Appeal and later as ambassador to Ireland for President Reagan that his interview lasted more than three hours, Verdabedian said.

Kane died in December at age 81.

The DVDs will probably become available to the public later this year, said Paula Bocciardi, a management and program analyst for the Judicial Council who staffed the project.

The courts are in the process of transcribing all the interviews. Once that is finished, the plan is to place the transcripts, the DVDs and a binder of biographical material about each judge at the Judicial Center Law Library, on Golden Gate Avenue in San Francisco.

A copy will also go to the Court of Appeal district from which the justice retired. ✯

In August 2009, Justice Gabbert returned to the bench, at the age of 100, for the inaugural event of the annual Justice John G. Gabbert Oral Argument Series, a reenactment of the Korematsu v. United States oral argument of 1944.

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Mr. George Congdon, of San Francisco, has informed the editor of this History that he was present in a concourse of three thousand people in the outskirts of Stockton, in the year 1852, and saw three men hanged at the same time for the crime of grand larceny (stealing cattle), whereof they had been regularly indicted and convicted by a jury in a legal court of justice. The sheriff of San Joaquin county, who officiated on the occasion, was the late Colonel R. P. Ashe, who left a large family and a valuable estate, and who is well remembered all over California. He was the father of Hon. R. Porter Ashe, of our own day.

The law of this State which first prescribed punishment for robbery and grand larceny, was passed, of course, at the first session of the legislature, in 1850. The penalty was alike for both offenses, namely, imprisonment for from one to ten years. It was at the second session, 1851, the draconian provision, authorizing juries in their discretion, to impose the death penalty for both robbery and grand larceny was passed, and approved by Governor John McDougal. This law remained in effect full five years. On April 19, 1856, it was amended, and at the same time a distinction made between the two crimes, so that robbery was punished by imprisonment for not less than one year, which might be extended to life, while the penalty for grand larceny was made from one to fourteen years' imprisonment, the court in all instances, and not the jury, being the sole arbiter as to the length of the term. This law of 1856 was enacted by our only Know-Nothing legislature, and approved by J. Neely Johnson, our only Know-Nothing Governor. The degree of penalty for these crimes has fluctuated, but at present, it is for robbery, imprisonment from one year to life; for grand larceny, imprisonment from one to ten years, so that the present penalty for the latter crime is just the same as was prescribed by the original statute of the State.

Many cases similar to the above might be given. Three men were hanged in Sacramento in 1851 for a not very aggravated case of highway robbery. We had occasion many years ago to make allusion to these early trials, and thereupon a well-known editor of the time made these observations:

"No doubt at this distance the infliction of capital punishment for felonies other than murder must seem to have been draconian to an extent almost inconceivable. But at the time there could hardly be said to be organized society in California. The sternest measures were necessary to keep the vicious in subjection. The condition of things was as primitive as when the death penalty was prescribed in England for robbery. But when society in California became strong enough to deal with criminals of all grades and had jails to keep them in, our code became more mild — perhaps in some cases now, too mild." ✯