Notre Dame Law Review

Volume 3 | Issue 1 Article 6

10-1-1927

Notes on Recent Cases

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NOTES ON RECENT CASES

CONTEMPT—Criticism of court and indirect contempt. *State v. Shumaker et al,* 157 N. E. 769, Sup. Ct. of Ind. Action by the State of Indiana against Edward S. Shumaker, Superintendent of the Anti-Saloon League of Indiana, Jesse E. Martin and Ethan A. Miles, his attorneys and trustees of the Anti-Saloon League, charging the respondents with being guilty of indirect contempt.

Shumaker with Martin and Miles, collaborated, prepared, printed, published, circulated and distributed, a phamplet thru out the State containing, and later caused to be published in *"The American Issue"* a national prohibition magazine, Shumaker's report to the Anti-Saloon League. In this report he incorporated misleading, false and defamatory statements of and concerning the Supreme Court of Indiana, its judges and decisions in respect to violations of the liquor laws of the state.

Shumaker discussed and from false premises harshly and imprutently criticized the conclusions of the Court, and alleged that they were defeating justice by their hair splitting decisions, he openly charges that the Court is in control of the liquor interests, and asks the members of the league to contribute money to aid in the election of "dry" judges, thus calling the present judges "wet" and trying to intimidate them by threating them with defeat in the coming elections.

In discussing certain adjudicated liquor cases, Shumaker, by false statements of fact leads the reader to believe that the Court was acting contrary to law and justice. Also he discussed and criticized pending cases, intending and endeavoring to deter the court from the performance of its duty.

The whole report was intended and published for the purpose, of impressing on the reader, the fact, that the Court was corrupt and prejudiced, especially in regard to liquor cases.

Justice Meyers in a well reasoned opinion, stated, that six uninterested and well known members of the bar were called in to act as an "amici curiae" and they submitted a brief.

In supporting the Court's decision Meyers J., stated the court was acting by authority of (Acts Sp. Sess. 1879 pg. 112—sections 1080-1081 Burns 1926.) in finding Shumaker guilty of

contempt. Stating further; "That the court was subservient to the Federal and State Constitutions and cannot act in accordance with personal wishes or desires. Citing *Coons v. State* 20 L. R. A. 900, in which Judge Thompson said "Whatever tends to lower respect for courts and for their decisions and integrity and honor, if continued will eventually lead to anarchy and Bolshevism."

In defining contempt the court said "Any act pertaining to pending proceedings intended to deter the court from performance of its duty is contempous and within the inherent power of the court to punish. *U. S. v. Craig* 226 F. 230. *Michaelson v. U. S.* 226 U. S. 42. *Little v. State* 90, Ind. 338. *Dale v. State* 198, Ind. 110.

Speaking of criticism the court states, "Honest, fair and decent criticism may be helpful to the administration of the law, but knowlingly dishonest, false or libelous publication, impugning the motive, honesty and integrity of the court, is not a criticism in the sense of aiding the court, but tends to disgrace and destroy the faith ofthe people in the judiciary." And as said in, *In Re Fite* 76 S. E. 397, 434 "The power of the judiciary rests upon the faith of the people in its integrity and intelligence. Take away this faith, and the normal influence of the court is gone and respect for the law is destroyed. Other departments of the government may outlive unjust criticism and may still render service to the people, even when unfairly assailed but when confidence in the court is gone, respect for the law itself will speedily disappear, and society will become the prey of fraud, violence and crime. The one element in government and society which the people desire above all things alse to keep from the taint of suspicion is the administration of justice in the courts."

Basing its decision on the right to, and the necessity for, preserving the dignity and respect of the court, Shumaker was found guilty of contempt. Martin his attorney and as trustee, participated in the publication of the contemptuous article, also was deemed guilty. Miles, having nothing to do with the publication of the article was deemed not guilty.

Travis C. J. and Willoughby J. concurred with Meyers J. Gemmill J. and Martin J. dissented and Martin J. gave a well reasoned and fair opinion in support of his opinion.

—E. McC.

CRIMINAL LAW—Prejudicial misconduct of counsel. In the argument to the jury the prosecutor was displaying the pistols taken from the defendant at the time of his arrest. The attorney for the defendant asked the prosecutor not to point these weapons toward him while he was handling them. The prosecutor at once replied that he was pointing them in the direction where the least harm would be done if they were discharged. The attorney for the defence was also denounced as a low, degrated man, who had "sunk down, down, and down into the depths of degradation and had prostituted himself for gangland's smile and gangland's gold." The counsel for the defendants were referred to as men mentally depraved and mentally diseased.

The defendant's counsel made proper objections to all of the above matters, and the court generally sustained the objections but he took due care not to discourage the prosecutor in the continuation of that conduct by making it known to him that he must not persist in it. Because of the misconduct of the prosecutor, the attorneys on both sides were in a continual wrangle with each other, and as a natural consequence they were very antagonistic to each other throughout the trial.

In *People v Black,* 317 Ill. 603, the court said: 'That the conduct of a trial in a court room should be characterized by a degree of dignity and good order, and prejudices should not interfere with the proper and forceful presentation of the case to the jury.'

The state's attorney should never resort to unfair and improper methods in order to secure a conviction, even if it is his duty, if he believes a conviction is warranted, to secure a verdict of guilty. This fair and impartial trial is guaranteed to all defendants, whether they be good or bad, guilty or innocent *People v. Bimbo* 145 N. E. 651, *People v. Saylor* 319 Ill. 205.

The court for neglecting and refusing to discipline the prosecutor and to compel him to give the defendants' counsel due con-

sideration, committed a grievous error, which was a justification for the reversal of *People v. McGeoghegan,* 325 Ill. 337, 156 N. E. 378.

—S. J. W.

CRIMINAL LAW—In the case of *State v. Blair* 157 N. E. 801 the question of whether or not the state had authority to file a petition in error and this court power to review the judgment complained of, is a question that has apparently not been settled since the constitutional Court of Appeals has succeeded the statutory, Circuit Court.

The defendant in this action had been indicted, and had demurred to the indictment. The demurrer was sustained and the defendant was discharged. A discharge of a defendant on a demurrer to an indictment is final judgment, which supports a proceeding in error. State may bring error to review the judgment discharging the accused, on demurrer to indictment and on reversal a trial on merits may be had.

If the indictment was sufficient and the trial judge was in error in discharging the defendant, it would be denying the state the right to vindicate its laws if proceedings to review judgment were not allowed.

—J. P. B.

DOMESTIC RELATIONS—Validity of Marriage. Frank F. Miller and Kate A. Miller, first cousins and residents of the state of Michigan went to Kentucky to be married because of the obstacle presented by the Michigan statute against such marriages. Thet returned to Michigan and lived together as man and wife until the husbands death. After his death his widow sought administration of his estate. His collateral heirs raised the question that Kate Miller was not his Widow and had not been his wife, because the marriage was void as it was prohibited by statute. Sections 11364 and 11365 of the *Comp. Laws of 1915—No man and no woman shall marry a cousin of the first degree.*

HELD. The statute does not declare such marriages void it merely prohibits them. In re Miller's Estate, 214 N. W. 428.

The general rule is that a marriage is valid where contracted is valid everywhere. *Medway v. Medham,* 16 Mass. 157, 8 Amer. Dec. 131. There are two exceptions. Those contrary to the law of nature and those declared so by a law of the legislature. *Commonwealth v. Lane,* 113 Mass. The first class includes those

void because of polagamy or incest. This case does not fall under this class. *Wightman v. Wightman,* 4 John, ch. N. Y. 343. As the statutes of Michigan merely prohibit the marriage of first cousins and do not deny validity to those solemnized in and according to the laws of sister states, it follows that this marriage was valid.

—M. W.

EVIDENCE—Privileged Communication Between Physician and Client. This was an action by a physician for fees for services rendered. There was an action pending against the physician for malpractice in which the present Defendant was named Plaintiff. The present Defendant denied that she employed the Plaintiff to render services and perform an operation, and evidence as to what the physician did and said with reference to the case was admitted by the court. The defendant alleged error claiming that this was privileged communication between patient and client. The Ohio Court of Appeals, in reviewing the case, cited 2 Mechem on Agency (2nd Ed.) section 2313, which refers to confidential communications between Attorney and Client, which communications are in the same catagory as those between Physician and Patient:—"But the attorney may disclose information received from the client when it becomes necessary for his own protection, as if the client should bring an action for negligence or misconduct, and it became necessary to show what his instructions were, or what was the nature of the duty which the client expected of him. So if it became necessary for the attorney to bring an action against the client, the client's privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his rights." Applying these principles the court held the evidence properly admitted.

Petrucelli v. Steinharter, Ohio, 1926, 157 N. E. 803.

—E. P. McG.

MALICIOUS PROSECUTION—Incarceration in Institution. The plaintiff brought an action for malicious prosecution against the defendant and his wife, for incarceration in the county jail for inquiry before the insanity board. The plaintiff alleged that this was a malicious act and she asks damages to the amount of $7,500. The defendants on trial objected to the

introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. HELD: Complaint must allege want of probable cause but not necessarily in so many words; it being sufficient to state facts. *McCullough v. Rupp* et ux 215 N. W. 78.

Falsity of charge is not the same thing as want of probable cause *Scotten v. Longfellow,* 40 Ind. 23. Malice, however great, is not sufficient to sustain an action for malicious prosecution without want of probable cause. *Kolka v. Jones,* 6 N. D. 461, 71 N. W. 558.

—M. W.

WILLS—Court interprets the language of the will. In the case of *Holbrook v. Shepard,* 157 N. E. 882, the trial court interpreted the language of the testator W. W. Greene.

The testator by his will gave his property to his son for life. On death of the son the property was to pass to the testator's grandchildren or child. The word child was construed to mean grandchild. There were two children of a deceased grandchild and a grandchild alive at the time of the testator's son's death. The court held that the grandchild should receive the whole estate to the exclusion of the other legal heirs.