Notre Dame Law Review

Volume 3 | Issue 4 Article 5

3-1-1928

Notes on Recent Cases

Marc Wonderlin

H. J. Nester

Joseph P. McNamara

Edward P. McGuire

NOTES ON RECENT CASES

JOINT ADVENTURES—Guest Injured in Collission—One-Arm Driving. In this case *Kraus v. Hall* 217 N. W. 290 (Wis.) we have the question as to whether the driver of a car and his guest are joint adventurers. Here the driver and his lady friend were returning from a dance when the defendant ran his car into a freight train and caused the plaintiff serious injury. Evidence showed that the collision resulted from the defendants failure to keep proper lookout while driving at an excessive rate of speed with one arm around his friend. The plaintiff contended that she protested against the defendant driving at such a high rate of speed (45 to 55 miles per hour) with one arm around her although she did not care if he drove with one arm around her while going slow. Her testimony was that it was not unusual for the defendant to drive with one arm around her and caress her, but that never before had he driven so fast while so engaged. The appellant contends that the judgment should be reversed because the plaintiff assumed the risk that resulted in her injury.

The law is that a guest cannot acquiesce in negligent driving and recover if injury results therefrom. *Harding v. Jesse* 189 Wis. 652, 207 N. W. 706. The next question that presents itself is, how much protest is necessary to relieve the guest of contributory negligence as a matter of law? This court left it for the jury to decide whether the plaintiff was guilty of contributory negligence in remaining in the defendant's car many miles from home on a dark night. It has been held that a joint adventure is generally contractual in its nature and that it does not arise out of social relations. *Brubaker v. Iowa County* 174 Wis. 574, 18 N. W. 690.

It is plain that the plaintiff and defendant were not joint adventurers in the sense that the negligence of one will be imputed to the other.

—*Marc Wonderlin.*

DAMAGES—Instructions as to value of automobile before and after accidents. The appellee instituted his suit against the appellant in the circuit court, to recover for damages suffered to his automobile. He alleged that his car was damaged in attempting to drive across the railroad track of the appellant in

the town of Wallins Creek and that said damage was caused by reason of the negligent and defective construction of the railroad crossing and the approach thereto. He claims his automobile was damaged to the extent of two hundred dollars. *Banner Fork Railroad Co. v. Brock,* 294 S. W. 188.

The appellant failed to file an answer to the petition up to the time the case was called for trial which failure amounted to little less than negligence on the part of the attorneys representing the appellant. The court refused to permit them to file the answer and forced them to proceed to trial without answer. It is not known whether the filling of the answer would have necessitated a delay and for this reason it cannot be said that the court was in error in compelling the appellant to proceed with the trial without an answer. The evidence introduced by the appellee, although exceedingly scant, was not objected to and was sufficient to take the case to the jury, thus disposing of all alleged errors except the complaint about the instruction given by the court.

This instruction was erroneous in that it directed the jury to find as damages the difference between the value of the appellee's automobile immediately before the accident and the value thereof immediately after. This instruction is contrary to the well-founded rule laid down in *Southern Railway of Kentucky v. Kentucky Grocery Co.* 178 S. W. 1162 which was as follows "Where an injury to the personal property does not effect its destruction, the measure of damages is the difference between the reasonable market value of the property immediately before the injury at the place thereof and its reasonable market value immediately after the injury at the place thereof."

The court held that since the instruction was substantially correct the words "reasonable market value" should be substituted for the word "value" in the instruction. The appeal prayed for was granted, the judgment reversed and the cause remanded for proceedings consistent with this opinion.

—*H. J. Nester.*

ACKNOWLEDGMENTS—Valid when made over Telephone. An acknowledgment of a lease made over the telephone held valid in an action to quiet title. The plaintiff was in posses-

sion under a lease for four years when the lessor executed another lease to a third party, advocating that the lease made to the plaintiff was void because it had been acknowledged over the telephone. Since the lessee of the second lease took with notice and since the lessor had accepted rents from the plaintiff on the first lease it was held in *Logan Gas Co. v. Keith et al.,* 158 N. E. 184, that the acknowledgment was sufficient to meet the requirements of the Ohio statute.

Since the intent of the legislators in drawing up acknowledgment statutes was to prevent fraud and forgery and since acknowledgments made over the telephone would frustrate the working of the statutes to the end intended the majority holding on this proposition is contrary to the decision of the instant case. *Carnes v. Carnes,* 138 Ga. I, 74 S. E. 785; *Sullivan v. First National Bank,* 37 Tex. Civ. App. 228. If the statute specifies that the acknowledgment is to be made in the presence of a certain officer the courts have held that this means in the actual physical presence of said officer. *So. State Bank v. Sumner,* 187 N. C. 762, 122 S. E. 256.

In keeping with the above it has been uniformly held that acknowledgments made over the telephone are void and that the instruments to which they are attached are thereby affected in the same manner. *Roach v. Francisco,* 138 Tenn. 357, 197, S. W. 1099. *Myers v. Eby,* 33 Idaho 266, 193 Pac. 77

There is one doctrine, however, which allows the holding of validity of such acknowledgments and that is based upon the ground that titles should not be disturbed; especially when there has been no fraud or misrepresentation. *Banning v. Banning,* 80 Calif. 271, 22 Pac. 210. In that case the doctrine was so strong that the court held that way despite the fact that the statute actually called for the acknowledgment to be made in the presence of the officer. But it is well to note that Banning case had been criticised in *LeMesnager v. Hamilton,* 101 Cal. 532, 35 Pac. 1054.

CONSTITUTIONAL LAW—Police Power—Drug Stores and Public Welfare. A statute forbidding anyone other a licensed pharmacist, or a partnership or corporation all of whose members or shareholders are licensed pharmacists, to own a retail drug store, was passed and the plaintiff in the instant case

sought an injunction to restrain the enforcement of the statute. The grounds upon which such injunction was prayed was that the statute was unconstitutional. The question regarding persons now owning drug stores was not presented as this was cared for by a saving clause. The court held that this was a proper exercise of the police power and that there was a direct relation between the public welfare and such regulation and that therefore the statute was constitutional. *Liggett Co. v. Baldridge,* 22 F. (2nd) 993 (D. Pa. 1927).

Since it appears that the state of Pennsylvania has a statute requiring that there be a registered pharmacist in charge of each drug store it would appear that the protection to the public at large has been adequately provided for (Pa. Stat. 1920, 9315) and that the relationship between the ownership of the stores and the public welfare is, at best, a very distant call. One can readily concur with *State v. Heinemann,* 80 Wis. 253, 49 N. W. 818 (1891), in that such a relationship can be said to exist where the law requires merely that registered pharmacists be in charge of the retail portion of a drug store and so are constitutional; but in the present instance the statute applies to the ownership, in whole or in part, of such a store without making it appear that the general welfare would be seriously endangered by the fact that the money making the store possible would be so tainted had it been advanced to the enterprise by one not of the dzan.

As early as 1887 the Supreme Court held that statutes forbidding or regulating occupations otherwise lawful must be actuated by the interests of the public and must be reasonably related to the public welfare, safety, morals, or comfort. *Powell v. Pennsylvania,* 127 U. S. 678, 8 Sup. Ct. 992; *Mugler v. Kansas,* 123 U. S. 623, 8 Sup. Ct. 273.

But it has been frequently held that the legislatures have overstepped the bounds of the police power. This has also been the case in some instances where the motive was to promote the public health as in *Weaver v. Palmer Bros. Co.,* 270 U. S. 402, 46 Sup. Ct. 320 (1926) where the manufacture of comfortables made of "shoddy" was to be regulated; or in *People v. Wilson,* 249 Ill. 195, 94 N. E. 141: or conferring on registered pharmacists the exclusive right to sell patent medicines, *Noel v. State,* 187 Ill. 587, 58 N. E. 616. See also *Burns Baking Co. v. Bryan,* 264 U. S. 504,

444 Sup. Ct. 412; *Chicago v. Netcher,* 183 Ill. 104, 55 N. E. 707.

—*J. P. McN.*

CRIMINAL LAW—Convicted party cannot by habeas corpus attack validity of a conviction. Jack Golding, the appellant was convicted of a crime in Lee County, Mississippi, from which conviction he appealed to this court where the judgment was affirmed. See *Jack Golding v. State,* 109 So. 731. He then filed a petition for writ of habeas corpus, praying that he be discharged for the reason that his imprisonment was illegal, for the minutes of the circuit court containing the proceedings in which he was sentenced were not signed by the trial judge. The record of the appeal to this court contained a copy of the judgment of the court below as being a judgment rendered in that court. No question was raised in that appeal as to the sufficiency of the judgment appealed from, but it was treated by the appellant during said appeal as a valid judgment and as having been rendered in the court below. Therefore this court had jurisdiction of the cause and affirmed the judgment. The appellant, having failed to raise the question he now raises in that suit, is precluded and estopped by the judgment therein from doing so at this time, and especially in a habeas corpus proceeding.

The party who appeals a cause to this court is charged with the duty of getting a true and correct record before the court, and of raising all points available in that proceeding. After taking his chances on securing a reversal on the record then before the court, and the record, on its face, containing a valid judgment, the appellant is estopped from subsequently raising the question. See *Ex parte Golding* (114 So. 384). This case very clearly annunciates the well settled principal that where a court has jurisdiction and renders what appears to be a valid judgment it cannot be attacked by a writ of habeas corpus.

—*Edward P. McGuire.*

CRIMINAL LAW—Double Jeopardy. *Hebert et al. v. State of Louisiana,* 47 Supreme Court Reporter 103.

Doras Hebert and others were convicted of manufacturing intoxicating liquor for beverage purposes, which was affirmed by the Supreme Court of Louisiana (103 So. 742). The State of Louisiana, like the United States, has a statute making it a criminal offense to manufacture intoxicating liquor for beverage

purposes. A judgment for review is presented by this writ of error.

When the accusation was preferred in the state court, and when the accused were arrested thereon, they already were under indictment in the Federal District Court for the same acts as an offense against the federal statute and were on bail awaiting trial in that court. When taken before the State court they interposed a plea, first, that it was without authortiy to entertain the accusation, because the acts charged constituted an offense against the United States of which the federal district court was given exclusive jurisdiction. Second, that their arrest under State process, while they were on bail awaiting trial in the federal court was in derogation of the authority of the latter, and therefore did not give jurisdiction of their persons. The plea was overruled and is assigned as error.

The Supreme Court of the United States affirmed this decision of the lower court. In affirming the decision Mr. Justice Van Devanter said, "The Eighteenth Amendment to the Constitution contemplates that the manufacture of intoxicating liquor for beverages purposes may be denounced as a criminal offense both by the federal law and by the state law, and that these laws may not only coexist, but be given full operation, each independently of the other. Where such manufacture is thus doubly denounced, one who engages therein commits two distinct crimes, one against the United States and one against the state, and may be subjected to prosecution and punishment in the federal courts for one, and in the state courts for the other, without any infraction of the constitutional rule against double jeopardy; it being limited to repeated prosecutions for the same offense." *United States v. Lanza* (260 U. S. 377), (43 S. Ct. 141), (67 L. Ed. 314).

Perhaps the original precedent for such a decision is based upon the leading case of *United States v. Cruikshank* (92 U. S. 542), which defines the general scope of Federal Powers. However, an examination of that authority will disclose that the above reported case is somewhat contrary in principle to the leading case. In the Cruikshank case Chief Justice Waite laid down the principle that the people of the United States resident within any state are subject to two governments, one state, and the other national; but there need be no conflict between the two. The

powers which one possesses, the other does not. They are established for different purposes and have different jurisdictions. True, it may sometimes happen that a person is amenable to both the jurisdictions for one and the same act. Thus, if a Marshal of the United States is unlawfully resisted while executing the process of the courts within a state, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by resistance, and that of the state by the breach of peace, in the assault. So too if one passes counterfeited coin of the United States within a state, it may be an offense against the United States and the State: The United States, because it discredits the coin; and the state, because of the fraud upon him to whom it is passed.

A violation of the Eighteenth Amendment however, cannot strictly be divided into two distinct acts, the one against the state and the other against the federal government. Such a construction of the amendment works an apparent conflict between the powers of our government. One which was not intended by the framers of the constitution and one which may be the death knell to our political system of government, if followed in the prosecution of other crimes. Other cases which have followed this principle are: *Gray v. U. S.* (14 Fed. 2nd-366), *People v. Jones* (248 Pac. 964), *Roark v. People* (244 Pac. 909), *State v. Mounse* (279 S. W. 199).

—*Edward P. McGuire.*

UNFAIR COMPETITION—Competitor's goods not attacked in such a manner as to be libelous per se. The publication here complained of praised the defendant's gasoline in fine phrases and then charged that a particular kind of motor fuel manufactured and sold by the plaintiff was injurious to the automobiles using it, in that it was an inferior product and that as such it damaged motors. The plaintiff brought an action of libel based upon this statement or publication of the defendants, but did not allege nor prove special damages. The defendant demurred to the evidence. The question then became one of whether or not the statement was libelous *per se*. *National Refining Company v. Benzo-Gas Motor Fuel Company* (*C. C. A. 8th Cir.*) *20 Fed. 763.*

The court held in the instant case that while it thought that

the imputations clearly meant the plaintiff in this case that there was no imputation of fraud and that the words were not libelous as they did not *per se* impute fraud, deceit, or reprehensiable business practices to the plaintiff. This followed authority to the same effect to be found in *Bowman Remedy Co. v. Jensen Salsbury Laboratories,* (C. C. A. 8th Cir. 1926), 17 Fed. (2 nd) 255; *Boynton v. Shaw Stocking Co.,* 146 Mass. 219, 15 N. E. 507; *Boynton v. Remington,* 3 Allen (Mass.) 397; *General Market Co. v. Post-Intelligencer Co.,* 96 Wash. 575, 165 Pac. 482.

Merchants must be vigilant in their advertising lest in their zeal to secure business by the use of extravagant praise of their own goods and disparagement of that of their competitor, they will bring down a suit for libel upon their heads. Merely imputing general inferiority by comparison is permissiable, but should occassion be taken to enumerate specific defects such is certainly actionable; conditioned however, on the showing of damages as the result of the publication. 13 Columbia Law Review 121 (and cases cited). Also *Victor Safe and Lock Co. v. Deright,* (C. C. A. 8th Cir. 1906) 147 Fed. 211; *Nonpariel Cork Co. v. Keasbey and Mattison Co.,* (C. C. A. E. D. Pa. 1901), 108 Fed. 721; *Dooling v. Budget Publishing Co.,* 114 Mass. 258; 10 N. E. 809.

Should the statement impute improper business customs or conduct, imputations of fraud or dishonesty to the competitor the cases are uniform in holding that in such a case the publication will be libelous *per se.* In *Vitagraph Co., of America v. Ford,* (D. C. S. D., N. Y. 1917), 241 Fed. 681, this was clearly shown and an imputation that the competitor had used dishonest methods in dealing with the public at large was held to have been libelous in itself. *Inland Printer Co. v. Economical Half-Tome Supply Co.,* 99 Ill. App. 8.

There is an exception to the rule holding that words not imputing some corruption not, libelous without the proof of special damages. Usually the cases in this group are those in which the statement specifically brings out some feature which of itself is repulsive or which on its very face admits that the plaintiff's business would be injured. Thus a statement that a child had died after eating some of plaintiff's ice cream was held libelous *per se* in *Larsen v. Brooklyn Daily Eagle,* 150 N. Y. Supp. 464, 165 App. Div. 4, a statement that half of the ties in a railroad road bed were rotten was held to be in the same category in *Ohio and M. Ry.*

Co. v. Press Publishing Co., (C. C. S. D., N. Y. 1891) 48 Fed. 206. The same would be true where a statement was made that the plaintiff's meat was diseased. *Panster v. Wasserman,* 180 N. Y. Supp. 718, 190 App. Div. 822. However these seem clearly to be exceptional cases and it would appear that in the particular case at hand the courst was justified in following the rule that it did.

—*J. P. McN.*

WILLS—Adopted Children of Beneficiaries. The testator J. C. Russel made his will in February 1916, in 1921 he was declared incompetent by the probate court and his son Guy Russel was appointed his guardian. This son was the testator's sole heir. *Russel v. Musson,* 216 N. W. 428.

The second provision of the will is a bequest of the testator's property to Guy Russel and wife with a remainder over, to their children surviving. At the time of the execution of the will the beneficiaries Guy Russel and wife had no children; but subsequent to the making of the will, and after testator had been declared incompetent, the beneficiaries adopted two children. The question is: Do these adopted children take under the will?

Supreme Court of Michigan held that the adopted children of the beneficiaries could not take under the will, under the circumstances of this case and cite the following cases involving the same question. 197 N. Y. 193; 103 Me. 214; 139 Wis. 481; 43 Tex. Civil App. 259; 281 Penn. 178.

The court in summing up the reasons for its holding quotes from *Smith v. Thomas,* 317 Ill. 150; "When a will provides for a child or some person other than the testator, an adopted child is not included unless the will makes it clear that the adopted child was intended to be included. The rule relating to adopted children does not appear to be applicable where the testator has himself adopted a child.

The general rule as stated in 40 Cyc. 1452 is as follows: "The word, 'children' does not usually include an adopted child, nothwithstanding as statutory provision investing an adopted child with a right of inheritance from the adoptng parents, unless it is manifest from the language of the will and the surrounding circumstances, as in connecton with such a statute that the testator intended to include such child."

—*Ivan J. Leblanc.*