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Notes on Recent Cases

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NOTES ON RECENT CASES

POWELL V. POWELL (N. E. Advance Sheets of Oct. 22, 1929.

This cause was heard on an agreed statement of facts. It appears that one James Powell conveyed sertain premises located in Kankakee, Illinois to his son, Charles Powell. The conveyance was made subject to the payment by the grantee to the grantor during his lifetime of the sum of five-hundred dollars per annum, payments to be made in the sums of two-hundred fifty dollars in March and November respectively. It was further agreed that if grantee failed to make either of such payments, as provided for, the title to said premises should revert to the grantor. The son defaulted in the payments and the father files this bill in equity praying that the deed to his son be cancelled. The circuit court granted the relief as prayed. Defendant prosecutes this appeal.

Appellant contends that the provision in the deed from James Powell to his son prescribing the payments to be made on the first of March and November in each year is a covenant and that by the deed title to the land passed to the son irrevocably.

Appellees, on the contrary, insist that the provision constitutes a condition subsequent, and that the grantee's breach of the condition authorized the grantor to re-enter and reinvest himself with the title.

The court first differentiated the terms "condition subsequent" and "covenant" in the following language;—"A condition subsequent differs from a covenant. The legal responsibility for the nonfulfillment of a covenant is that the party violating it must respond in damages. Whereas the consequence of the nonfulfillment of a condition subsequent is a forfeiture of the estate conveyed." . . This is an elementary principal of the law and is uniformly held throughout the states.

The court held that the provision of the deed came within the definition of a condition subsequent.

The court further held that noncompliance with the condi-

tion subsequent does not of itself determine the estate, since the right to enforce forfeiture may be waived, but the estate abides in the grantee until it is defeated and determined at the election of the grantor or his heirs, and election may be signified by re-entry or by some act equivalent thereto. . . 129 Ill. 403, 21 N. E. 927; 97 U. S. 693, L. Ed. 1101.

In an interesting Illinois case, 278 Ill. 529, 116 N. E. 161, the court held that a grantor having the right to declare a deed forfeited for breach of condition subsequent who encourages the grantee to proceed with the work at great expense, waives his right to declare the estate forfeited for failure to complete work within time.

A court of equity will not lend its aid to enforce a forfeiture because of a breach of a condition subsequent. 208 Ill. 623, 70 N. E. 715; 127 Id. 101, 20 N. E. 51. . . It was in accordance with this settled principle that the court held that complainant misconceived his remedy and therfore dismissed the bill for want of jurisdiction.

Wm. Lee O'Malley

CONSTITUTIONAL LAW—First ten amendments are without application to the state government.

This was an application for a writ of mandamus compelling the respondent to approve two school warrants held by petitioner for salary as teacher in the Bonneau High School, which warrants were signed and approved by all the trustees of the High School; but the approval of the respondent, the county superintendent had been refused. The respondent interposed many objections to the granting of the mandamus one of which was based on the alleged contravention of one or other of the first ten amendments of the Federal Constitution.

Held: that it has been long settled that the first ten amendments of the Federal Constitution have no application to state governments or affairs. Walpole v. Wall, 149 S. E. 760 (N. C.).

This is the rule of construction regardng the first ten amendments of the Federal Constitution which has long been in force. 262xU. S. 731, 217 U. S. 349, 213 U. S. 138, 211 U. S. 78, 208 U. S.

481, 203 Fed. 210, 236 P. 1019 (Colo); 114 A. 82 (Conn); 200 N. W. 442 (Ia); 200 S. W. 937 (Ky); 104 N. E. 925 (N. Y.); 143 N. E. 322 (Mass); 135 N. E. 644 (Ohio); 115 P. 380 (Okla); 204 P. 958 (Ore); 191 S. W. 536 (Tenn).

This construction of the so called Ten Amendments commonly referred to as the "Bill of Rights" began with the case of Barron v. Mayor of Baltimore decided in 1833 by the Supreme court of the United States. 7 Pet. 243, 8 Law. Ed. 672. The conclusiveness and iron-clad logic of that decision of the eminent John Marshall has stood the test of time, and that case still remains the law; how well-settled the proposition has become is attested by the curt and summary manner in which the court in this North Carolina case met the issue presented.

T. J. O'Neal

DIVORCE—Alimony due under a decree of a Louisiana court could not be recovered in a Mississippi court under the full faith and credit clause of the Federal Constitution, where the decree could be modified. (Constit. U. S. art. 4, sec. 1).

The appellant obtained a decree of divorce form the apellee in Louisiana, and was awarded alimony to the amount of $100 a month, which amount was later changed to $75 a month by the Supreme Court of that state. Later the appellee moved to the state of Mississippi and refused to pay the alimony to the appellant, who then brought suit for it in Mississippi. The Louisiana Code, art. 160, provided that the decree of alimony could be annuled, varied or modified by the court rendering it.

Held: A judgment for future alimony and maintenance which under the law of the state may at any time be annulled, varied or modified by the court rendering it, is not, as to such alimony, a final judgment enforceable in another state, under the full faith and credit clause of the Federal Constitution. Gallant v. Gallant, 123 So. 883 (Miss).

Where the judgment for alimony is a fixed and certain sum such judgment is entitled to full faith and credit in the other states, but where the decree is for a sum payable at stated intervals which sum may be increased, decreased or annulled by the

court granting the judgment, then such a judgment not being a final one is not entitled to full faith and credit in the other states. 184 Ill. 375, 148 Fed. 576, 75 N. E. 92 (Mass); 117 N. W. 890 (Mich); 93 P. 670 (Wash); 65 S. E. 65 (Ga); 82 S. E. 522 (W. Va); 94 N. E. 421 (Ohio); 195 Ill. App. 350, 190 N. Y. S. 369, 7 Ohio App. 53, 222 S. W. 193 (Tex); 177 Fed. 994, 110 P. 756 (Okla); 91 P. 269 (Utah).

Some states have held that a decree of the court of another state for the payment of future alimony is final as to all installments past due though such judgment is subject to change by the laws of the state granting the judgment and such past due installments as parts of the judgment must be given full faith and credit in the other states. 47 App. D. C. 384, 217 P. 597 (Idaho); 263 S. W. 22 (Ky); 190 N. W. 542 (Minn); 190 N. W. 542 (Minn); 190 N. Y. S. 369, 202 P. 211 (Utah); 218 U. S. 1, 95 N. E. 845 (Mass); 92 A. 389 (N. J.).

Some courts have qualified the above rule to the extent that the installments past due must give the party who obtained the judgment a vested right in the state in which the judgment is granted before such past due installments could be recovered in another state under the full faith and credit clause. 168 N. W. 929 (Mich); 187 P. 609 (Ore); 116 A. 883 (R. I.); 122 P. 390 (Colo).

Judgment for alimony entered in the court of another state having general jurisdiction is to be given the same faith and credit as in the state where rendered. 196 N. W. 541 (Wis). In this case the Wisconsin court apparently holds that the judgment of alimony whether for a fixed sum or for installments will be given full faith in Wisconsin.

T. J. O'Neil

PARDON—One convicted of robbery and sentenced for from ten years to life not eligible to parole before expiration of ten years, notwithstanding subsequent statute which reduced minimum term for robbery to one year. People ex rel Carlstrom, Att'y General v. David, Judge (Ill.) 168 N. E. 264.

The people, on the relation of the attorney, filed a petition

for writ of mandamus to require the defendant to expunge from the records of his court an order by which one Jennings was discharged from the penitentiary.

Jennings was convicted of the crime of robbery while armed with a gun and was sentenced to serve a term of from ten years to life as fixed by statute. The board of pardons entered an order for his release but the warden refused to comply because he had not served the minimum period of his sentence. A supplemental petition for habeas corpus resulted in Judge David entering the order that is here complained of.

The statute in effect at the time Jennings was convicted provided that the punishment for the crime of which he was convicted should be imprisonment for ten years to life. The proper construction of that statute is that Jennings was not eligible to parole until he had served the minimum term provided by law for the crime of which he was convicted. People v. Jenkins (ILL.) 152 N. E. 549; People v. Doras (ILL) 125 N. E. 2.

In 1927 the criminal code was revised and the minimum punishment for the crime of robbery with a deadly weapon was placed at one year instead of ten as was formerly provided. Notwithstanding that Jennings' conviction was under the former statute it is claimed that he has served the minimum sentence of one year and is therefore eligibl to parole.

By the terms of the statute under which he was convicted Jennings was eligible to parole at the end of ten years. There is nothing in the amendment of 1927 which would lead one to believe that the Legislature intended it to apply to persons already convicted or sentenced. If it were so construed its constitutionality might well be doubted. Since there is nothing in the new statute to indicate that it was meant to be retroactive it must be held to be prospective. It follows that the board of pardons was without power to order the release of Jennings and their order attemptinge to do so was void and afforded no basis for the order entered by defendant in this case.

James A. Allan

CRIMINAL LAW—Confession of an insane person is null.

People v. Shroyer (Ill.) 168 N. E. 336.

On February 5, 1929, the plaintiff in error was convicted in the circuit court of Winnebago County for buglary committed on January 17, 1928 and was sentenced to the penitentiary. He had been previously tried upon another charge of burglary committed on February 3, 1928 and was acquitted on the grounds of insanity. The principle evidence offered on behalf of the prosecution was a confession alleged to have been made on February 4, 1928 and this testimony was objected to on the ground that at the time alleged confession was made he was insane, as shown by the record of the former trial. The objection was overruled and the testimony was admitted.

The verdict and the sentence on the former trial amount to an adjudication that he was insane at the time the confession was made. A confession, to be admissable, must be voluntary. A voluntary confession necessarily involves a waiver of the constitutional right against self incrimination. A waiver is an intentional relinquishment of a known right. 45 N. E. 145; 38 N. E. 1072; 18 N. E. 747. An insane person can commit no rational, voluntary act. He can do nothing intentionally. Neither can he know of his constitutional right. His confession is therefore a nullity. This ruling is in acord with People v. Wreden 59 Cal. 396 where it was said: "It is quite obvious that the utterances of an insane man ought not to be treated as evidence against himself." Likewise in State v. Campbell (Mo.) 257 S. W. 131 it was held that a "confession of an insane person is no confesion at all." The testimony as to the alleged confession was improperly admitted and is held to be prejudicial error.

James A. Allan

EVIDENCE—Promise by owner of automobile driven by son, damaging plaintiff's car, to take care of damages, was admission of liability. Epperson vs Rostatter (Ind.) 168 N. E. 126.

Action by Rosa Rostatter against William A. Epperson and his son Raymond Epperson to recover damages to plaintiff's automobile, alleged to have been caused by the negligence of

Raymond Epperson, the 15 year old son of William A. Epperson, in the operation of the latter's car; it being the theory of the complaint that the automobile of William A. Epperson was, at the time, being operated by the boy in the business of his father and with his father's knowledge and consent.

The testimony of the plaintiff, who took the stand in her own behalf, was that when William A. Epperson was called by telephone and questioned with reference to the accident, and as to the payment of the damages which had resulted to plaintiff's automobile, he responded to the call, admitting that he was William A. Epperson, but denied that his son was at fault. At the close of the telephone conversation, after he had heard what plaintiff had to say, and when he was speaking in reference to the damage to the car, he said that he would "call later", and that he would "take care of it."

The court held, that in absence of any testimony by defendants disproving plaintiff's claim that in driving of the car Raymond Epperson was the agent of his father, or that he was driving it with the knowledge and consent of his father, the promise of William A. Epperson that he would take care of the damages to plaintiff's car was in the nature of an admission of his liability, from which the trial court might infer that the son was, at the time of the collision, operating the car, either as agent of his father or with his knowledge and consent.

L. A. O'Connor

EVIDENCE—Expert parol testimony to prove foreign law, requiring lessor in breach of lease to exercise diligence in re-renting premises, held admissible. Smith vs Smith (IND.) 168 N. E. 462.

This case, involving the breach of a lease contract on property situated in Danville, Illinois, offers a good discussion of the various methods of introducing statutes and decisions of foreign states into evidence in Indiana courts.

During the course of the trial it became necessary to show the law of Illinois in respect to the duty of the lessor, on a breach of lease, to exercise diligence in re-renting the vacated premises.

The appellant, lessee, introduced in evidence what purported to be certified copies of certain opinions of the Supreme Court of Illinois; to meet this evidence appellee placed upon the stand, as an expert, a member of the bar of that state, who testified that the Supreme Court opinions which had been introduced in evidence by appellant had been in part overruled by later written decisions of that court, which later decisions the witness read as part of his testimony.

The court in affirming the decision of the lower court, to the effect that the lessor might recover the unpaid rent, held that both methods of introducing the law of a foreign state in evidence were proper. The method used by appelant being recognized by Section 497, Burns Annotated Statutes of 1926; and the parol testimony of the expert summoned by appelle is authorized by Sections 506 and 507, Burns Annotated Statutes of 1926.

L. A. O'Connor.

MASTER AND SERVANT—An accident occurs in the course of employment if occurring while one is doing what a man may reasonably do, within the course of his employment; and, an injury to an employee when he slipped on the floor while leaving a fellow employee whom he had asked for tobaccao, arose out of and in the course of employment.

Plaintiff was employed in the defendant's factory as a helper in the spinning department. One of his duties was to carry spools from the spinning room to the card room. On the day of the accident, he made a trip to the card room with spools and on the way back to the spinning room, he stepped a few feet off his direct course and asked a fellow employee for a chew of tobacco. After receiving the tobacco, he started back again but slipped on a greasy floor and as a result of the fall his right hand caught in a machine and had to be amputated. The lower court awarded the plaintiff damages. Defendant appealed alleging that the accident did not arise out of and during the course of his employment.

Defendant in his appeal based his argument on the decision

of Di Salvio v. Menihan Co. (N. Y.) 121 N. E. 766. There an employee engaged in marking shoes, while waiting for more work crossed the room to bid good-by to a fellow employee who had been drafted, and while leaning on the fellow employee's bench caught his fingers in an unguarded cog-wheel. The court held that "the accident did not arise out of or in the course of the employment." This case failed to support the defendant, however, because it was decided on the grounds that the personal errand which took the claimant from a place of safety to one of danger was not naturally or reasonably incident to the work. The court affirmed the lower court's decision. Wickham v. Glenside Woolen Mills et al. (N. Y.) 168 Ne. 446.

The majority of decisions clearly support this court's decision. In **McLauchlan v. Anderson (N. Y.) 48 Sc. L. R. 349,** the court held that an employee was injured in the course of employment, when he, a teamster, dropped his pipe and was injured while getting down from his wagon to pick it up. Again in **Springer v. North 200 N. Y. S. 248**; a driver stopped at a store to purchase tobacco and as it was being handed to him the horses started, throwing him to the ground. A workman's incidental acts do not take him out of the scope of his employment. Stopping to get a drink, a trip to the washroom, the borrowing of a cigarette or match, the getting of a chew of tobacco from another employee during the hours of employment, are all natural things for a workman to do, and acts which an employer reasonably expects to be done and would ordinarily not object to.

In **Moore v. Manchester Liners** (1910) A. C. 498, 500, it was stated "an accident befalls a man in the course of his employment if it occurs while he is doing what a man may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing." 39 C. J. p. 276 and 280 lays down the general rule that a master is liable for injuries to his servant resulting within the scope of employment, and a mere pause for rest, to warm oneself, to take a drink of water, or to exchange a few words with a fellow employee will not take an employee outside the scope of his employment. Nearly every state in the Union has decided one or more cases which follow this New York decision which is the general rule.

The determination of whether or not the departure from regular work was reasonable is a matter of fact for the jury to determine from the evidence.

Kenneth Konop

MASTER AND SERVANT—Death of a driver falling from a wagon while returning from delivering coal, held compensable though the driver was an intoxicated employee.

Plaintiff, the widow of the deceased sued and recovered compensation in the lower court for the death of her husband. The defendant was a coal and ice dealer and the plaintiff's husband was employed by him to deliver coal. On the day of the accident, the husband had delivered a load of coal and was returning through the streets of Cleveland when the front wheel of his wagon hit a hole, and he was thrown head foremost to the pavement, death following. Defendant offered evidence to prove that at the time of the accident the deceased employee was intoxicated.

The court held for the plaintiff. The question arose, as to whether or not the accident occurred within the course of employment. It was argued that his intoxication took the deceased out of the scope of employment for a time. Such an argument however, was held absurd by the court. Under such reasoning a company could avoid all acts done by an intoxicated employee and they would not have to be on their guard to see that innocent people were not injured by employees they had hired knowing them to be neligent workmen. **City Ice and Fuel Co. v. Karlinsky** (Ohio) 168 N. E. 475.

In **American Ice Co. v. Fitzhugh** (Md.) 97 A. 999, the right to compensation is cut off by intoxication only if the intoxication was the sole cause of the injury. **Hahnemann Hospital v. Industrial Board of Illinois** (Ill.) N. E. 767 Intoxication which does not incapacitate the employee from following his occupation does not defeat recovery of compensation, although the intoxication may be a contributing cause of the injury. In a Texas Case, **Hartford Accident and Indemnity Co. v. Durham** (Tex) 222 S. W. 275, it at first appeared that we had a contrary decision to the

general rule which began thus, "Intoxication to be available as a defense, must have contributed to the happening of the accident or the disability resulting therefrom," but later in the same case it hints that the intoxication must be the proximate cause of the injury or death, and this clearly brings it within the general rule.

Other jurisdictions in which the same conclusion has been reached as in the principal case are California, Indiana, New York and Wisconsin. To briefly state the rules in these decisions we might say that if the proximate cause of the employee's injury or death was his intoxication, there can be no recovery from the employer; but if something else was the proximate cause, the employee is entitled to a compensation. In the case at bar the court found that the bump or hile in the street was the proximate cause of the injury and hence gave judgment for the plaintiff.

Kenneth Konop

The fact that a woman otherwise capable of contracting marriage entered into a marriage ceremony with a man who to her knowledge, had a living wife from whom he was not divorced would not render her incapable of later contracting marriage with another man, and this she could do without any judgment or decree annulling the previous marriage. ATLANTIC BITULITHIC CO. v. MAXWELL 150 S. E. 110. MAXWELL v. ATLANTIC BITULITHIC CO.

Two women, Alice Jackson Maxwell and Johnnie Mae Maxwell, both claiming to be the widow of one Maxwell killed in an industrial accident appeared before the Industrial Commision of Georgia and asked for compensation. Their requests were denied and they appealed to the lower court which granted compensation as to Alice Jackson Maxwell and denied it as to Johnnie Mae Maxwell. In 1918, Alice Jackson contracted a marriage relation with one Jackson who to her knowledge had a living undivorced wife. After about eight months of living together, they parted. Jackson went his way returning to his wife, and Alice went her way. In 1924, she met and married Maxwell who lived with her until he learned of her former affair and then deserted and abandoned her. Maxwell then married Johnnie

Mae who now attempts to show Maxwell's first marriage was invalid and that she is his rightful widow. The decree of the lower court is affirmed.

In finding for Alice Jackson Maxwell, the court of Georgia upheld the doctrine as set forth in some of the western states some time ago: "Mariage of man and woman where one of them has a living wife or husband—by prior marriage who is undivorced is void and not merely voidable. Being a nullity no decree is necessary to avoid same." 35 Indiana 904; 54 Ill., 332; 207) nor can52 Iowa, 41 (2 NW622). In New York, a common law husband has no power to contract a valid marriage with anyone other than the common law wife during the existence of the relation (198 N Y S 207) nor can a wife marry during the life of a common law husband (180 N Y S 635). These rules are more confining than the one applied to determine this case. In Texas in 1929, the court went further in determining this question than did the present court; for, in the case of **Cunningham v. Cunningham** (210 SW 242), it was held: where a woman who entered into marriage with a man by means of ceremony in good faith and according to statute did not become his wife if he had a common law wife and no valid marriage was created by the ceremony. In the present case the woman did not enter into her marriage in good faith: she knew Jackson had a wife; therefore, the court did not determine this phase of the question. The next year the Texas court again took up this question in **Clover v. Clover** (224 SW 916) and held: Where a married man deceived a girl into a belief that they were man and wife and she lived with him as a lawful wife until she learned that he had a wife living; she was not his wife at all and her relations with him were not such a bar to her future marriage as would have to be removed by a decree. Washington holds that under the code of 1915 prohibiting marriages when either party has a spouse living, a marriage to a man while he has a wife living is void notwithstanding a section of the same code authorizing a decree of nullity for such a marriage. **Beyerle v. Bartsch** (190 Pac. 239).

From this brief resume of the subject, the conclusion is drawn that practically all jurisdictions agree that no decree is

necessary to dissolve the relationship or restore the status of either of the parties whether entering it wrongfully or being wrongfully deceived into it.

Austin Gildea