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Notes on Recent Cases

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NOTES ON RECENT CASES

CRIMINAL LAW—Presence in grand jury room of stenographer held to invalidate indictments, though appointed as assistant to district attorney.

Criminal prosecution of one Goldman and nine other defendants, two of them being corporations, for conspiracy to violate the National Prohibition Act. The defendants attacked the validity of the indictment on the ground that one Roberts, who was appointed assistant to the United States attorney by the Attorney General under the Act of June 30, 1906 (5 USCA sec. 310), was present at the finding of the indictments by the grand jury and that he did not assist the district attorney but merely acted as a stenographer at the proceedings. Three of the defendants pleaded in abatement that the grand jury did not have before it any evidence whatever that was competent or material upon which to base the indictments and two of the defendants, officers of one of the defendant corporations, pleaded in bar, asserting claims of immunity under section 30, title 2 of the National Prohibition Act (27 USCA sec. 47). Pleas of defendants were held good by the court. *United States v. Goldman et al,* (Dist. Ct. D. Conn. 1928) 28 Fed. (2d.) 424.

The Act of June 30, 1906 gives authority to the Attorney General to appoint any attorney who may when specifically directed by the Attorney General, conduct any kind of legal proceeding, including grand jury proceedings, which a district attorney may conduct. It was not denied that Roberts was appointed to assist in the investigation before the grand jury but the court held that the Act did not give the Attorney General power to appoint stenographers to appear before the grand jury but power to appoint attorneys and that under the Act such attorneys must conduct the proceedings. Roberts was merely present as a stenographer and as such was an unauthorized person in the grand jury room and his presence there invalidated the indictments.

In the case of *Olmstead v. United States,* 19 F. (2d.) 842, it was said that the court will not inquire into the sufficiency of the evidence before the grand jury unless it affirmatively appears in

the plea that no competent evidence of the commission of the offense charged was presented to the grand jury. In the present case three of defendants made such an allegation in their pleas in abatement to which the government demurred, and by such demurrers admitted the allegation. The court, following the rule laid down in the Olmstead case, held the pleas good and overruled the demurrers.

Section 30, title 2 of the National Prohibition Act provides that no person shall be excused from testifying and producing books and other evidence on the ground that such testimony may tend to incriminate him; but no natural person shall be prosecuted for or on account of any matter to which he may so testify or produce evidence. Two of defendants, officers of a defendant corporation, were subpoenaed to appear and testify, producing at the time of hearing the corporate records, which they did. They claim immunity under the section of the act mentioned above. The government made two contentions in regard to the pleas in bar: that the evidence of these defendants was perfunctory and unimportant, and that the prosecution is for a conspiracy to violate the Prohibition Act and is not brought under the Act itself and that therefore the immunity section does not apply.

The court said in regard to the first contention that the extent or the applicability of the immunity given under the Act is not in any wise dependent upon the importance, quantity or materiality of the testimony procured from the witness. The second contention was answered by the court by reference to the words of the Act itself which provides that the witness may claim immunity for or on account of any transaction, matter or things as to which he may so testify or produce evidence. That language shields the witness from prosecution involving the same subject matter, regardless of the specific statute upon which the indictment is predicated since a conspiracy to divert denatured alcohol, the charge in the case at bar, would constitute no crime whatever, were it not for the provision of the National Prohibition Act and the regulations made thereunder.

The court also held that the defendants did not waive their immunity by failing before the grand jury to claim their constitutional privilege and refusing to testify since under the Act they

could not refuse to give the evidence sought. *United States v. Moore,* 15 Fed. (2d.) 594. In the case cited the court said, referring to the failure of certain witnesses to claim their privilege and refuse to testify: "That would have been a useless act on their part, because they were compelled to testify, whether they wanted to or not. It cannot be said that they waived their privilege when they appeared in obedience to the subpoena and testified for the government. They had no alternative but to comply with the subpoena."

D. M. Donahue.

CONSTITUTIONAL LAW—Zoning ordinances must find their justification in police power exerted in the interest of the public.

Trustee owned and maintained a philanthropic home for aged poor in Seattle. Home was a structure formerly used as a private dwelling. Trustee proposed to remove old building and erect a large house in its place to be used for the same purpose. Seattle's zoning ordinance was amended in 1925 so that a philanthropic home for children or aged people could be built in the district where the trustee's home was, provided that the written consent be obtained of the owners of two-thirds of the property within four hundred feet of proposed building. The trustee applied for permit to erect the new home without obtaining the required consent. The Superintendent of Building, who had power to grant application, denied it because of the failure to obtain the required consent. Trustee petitioned for writ of mandamus, maintaining that the ordinance was repugnant to the due process and equal protection clauses of the 14th Amendment. The court held the ordinance valid and its judgment was affirmed by the Washington Supreme Court. The Supreme Court of the United States reversed the judgment in an opinion delivered by Mr. Justice Butler. *State of Washington ex rel. Seattle Title Trust Company, as Trustee v. George W. Roberge, Superintendent of Building,* 73 L. Ed. 39.

The court said that legislatures may not, under the guise of the police power impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. *Weaver v. Palmer Bros. Co.,* 270 U. S. 402.

The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. The section of the ordinance requiring the consent of adjacent property owners gave such owners authority uncontrolled by any standard or rule prescribed by legislative action, to prevent trustee from using its land for the proposed home. The Superintendent was bound by the decision or inaction of such owners and no provision for review was had under the ordinance; their failure to give consent being final. They could withhold consent for selfish reasons or arbitrarily, and could subject the trustee to their will or caprice. The delegation of power so attempted was repugnant to the due process clause of the 14th Amendment. *Browning v. Hooper,* 269 U. S. 396.

In *Euclid v. Ambler Realty Co.,* 272 U. S. 365, it was said that the governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his uses, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare. There was here no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare and the trustee is entitled to have the permit applied for.

D. M. Donahue.

INTOXICATING LIQUORS—Evidence obtained by search of automobile without warrant held inadmissible.

The Supreme Court of Mississippi, in the case of *King v. State,* 118 So. 413, was recently concerned with the question whether a sheriff halting an automobile, not believing, nor having any reason to believe defendant was transporting liquor, had probable cause to search the car without a warrant.

The evidence produced shows that at the time the sheriff halted King, he had no information that defendant had liquor in his possession. His suspicions were aroused by the fact that one McClarehan accompanied King. As a result of the search a ten gallon keg of whiskey was found in the car.

The court rightfully held that under these facts there was no probable cause for the search of defendant's car and the evi-

dence procured by the unlawful search of the car was inadmissible in evidence.

The Supreme Court of Mississippi is to be commended for its decision. It has blazed the trail for convictions based on evidence obtained through the medium of warranted search, a principle which has often been ignored by our dry courts.

A. J. DeDario.

VENDOR AND PURCHASER—Vendor need not furnish abstract, in absence of specific agreement.

Plaintiff agreed to sell land owned by defendants for a five per cent commission and defendants agreed to deliver a good and merchantable title upon his finding a bona fide purchaser for said property. Plaintiff alleges he found prospective purchaser and sale was not consummated because defendants declined to furnish an abstract of title to the land.

Plaintiff brings this action for commission which defendants agreed to pay him for producing such purchaser.

Court held that, "In the absence of a specific agreement therefor, vendor is not required to furnish an abstract showing the condition of the title", 29 Cyc. 1516, 27 R. C. L. 238.

The promise of defendants "To deliver a good and merchantable title" refers not to an abstract thereof, but to the character of the title itself, which they were to convey to the purchaser. *Waller v. Draughn,* 118 So. 418.

A. J. DeDario.

CRIMINAL LAW—Court believing man innocent compelled to sentence him to hang.

The case of *State v. Bailey,* reported in 144 S. E. Reporter 574, (W. Va.) is an original proceeding in mandamus by the State of West Virginia against Hon. R. D. Bailey, Judge, to compel the judge to pronounce sentence of death on one who had been convicted of murder in the first degree.

At the trial of Clyde Beale presided over by Judge Bailey, the jury returned a verdict finding the defendant guilty of murder in the first degree. The jury did not fix the punishment at life imprisonment, and under the laws of West Virginia the court was then obliged to pronounce the sentence of death, which it did, designating September 7, 1926, as the date of execution.

A writ of error was awarded by the Supreme Court and judgment and sentence was affirmed by that court November 22, 1927. The date set for the execution of the judgment having passed, the case was remanded to the Circuit Court with instructions to take proper action to carry its judgment into effect. Respondent, instead of setting a new date for the execution of Beale, sentenced him to life imprisonment, as a result of which sentence this action was brought.

Respondent in his answer contends that since he had already sentenced Beale to hang on July 28, 1926, it was not necessary to impose a death sentence again. The reasons assigned by respondent for refusing to carry out the death sentence formerly imposed, by fixing a new date, and for entering the sentence of life impisonment, were that he was convinced that Beale did not have a fair trial, and that witnesses upon whose testimony Beale was convicted had admitted that their evidence was false and had pleaded that Beale's life be spared.

The Supreme Court of West Virginia awarded the writ prayed for. President Lively, who wrote the opinion of the court said: "To allow a trial judge, after pronouncing the punishment prescribed by law upon conviction, to change the sentence, and impose one not authorized by law, would set a dangerous precedent, and place upon the trial judges power and discretion not authorized or contemplated by law. If the trial judge could set aside the former sentence and enter a new one, upon the ground of after discovered evidence, or upon the grounds stated in the return to the alternative writ, namely, perjured testimony, and belief in the prisoner's innocence, it would enable the trial judge to pass upon questions of fact, and to annul in a sense the jury system, which has been firmly fixed in our criminal jurisprudence.

"To meet the conditions which have arisen in this case, the constitution and laws have given the Governor authority to reprieve, commute and pardon. We feel that the respondent has conscientiously acted, being convinced of the innocence of the prisoner, but his actions and procedure, however conscientious, are not warranted by law and the peremptory writ of mandamus will issue."

J. S. Angelino.

BANKS AND BANKING—Liability of directors of bank for deposits received with knowledge that bank was in an insolvent condition—Right of depositors to sue directors.

Action was brought by Sarah E. Akin, as administratrix of the estate of Frank J. Akin, against the directors of the Bank of Dearborn to recover deposits made by her at a time in which the bank was alleged to have been in an insolvent condition, of which the defendants were alleged to have had knowledge. *Akin v. Hull et al,* Kansas City Court of Appeals, 1928. 9 S. W. (2nd) 688.

The evidence showed that the Bank of Dearborn had been taken in charge by the state finance commissioner on March 9, 1922, and reorganized, at which time several thousand dollars was charged out by the state finance department and replaced by what was considered solvent live assets. In the reorganization, defendants were elected as a board of directors and operated the bank until October 1, 1923, when withdrawals by depositors reduced its reserve below that required by law; the defendants decided that the bank should suspend operations, and it was again placed in the hands of the state finance commissioner.

It was contended by the defendants that the finance commissioner was the only person who could institute this action. The court disposed of this contention by citing *White v. Poole,* 220 Mo. App. 973, and *Ivie v. Bailey,* 5 S. W. (2nd) 50, as authorities establishing the right of a depositor to maintain an action such as this.

To prove that the bank was in an insolvent condition, plaintiff introduced evidence to show that certain notes held by the bank were uncollectable. This evidence, however, merely established the fact that the notes were uncollectable at the time of the closing of the bank, and did not show their uncollectability at the time the deposits were received from the plaintiff, which had to be shown in order to prove the insolvency of the bank at that time. (*State v. Sanford,* 297 S. W. (Mo.) 73.)

Insolvency, as applied to banks, was defined to be "inability to pay debts in the usual and ordinary course of business" (*State v. Burlingame,* 146 Mo. 207; *State v. Darrah,* 152 Mo. 522.), and a bank was said to be in failing circumstances "when in a state of uncertainty whether it will be able to sustain itself, depending

on favorable or unfavorable contingencies which in the course of business may occur, and over which its officers have no control". (2 Morse on Banks and Banking, p. 1034.) Although Sec. 11764 of the Revised Statutes made the going into the hands of the finance commissioner prima facie evidence of insolvency, and made this prima facie evidence of knowledge of such condition on the part of the directors, this was not conclusive of either insolvency or knowledge, but only raised this presumption. (*Swoboda v. Nowak,* 213 Mo. App. 452.) The knowledge of the directors concerning the solvency of the bank at the time deposits were received from the plaintiff must be measured by what they knew or reasonably should have known at that time; they could not be chargeable with knowledge of the financial condition of the bank as it appeared in the light of later events and subsequent investigation. The defendants, as directors, could not be considered as insurers of deposits.

It also appeared from the evidence that defendants bought stock in the bank and had their own money in it; all their acts showed good faith on their part. In view of these facts, the court held that the plaintiff was not entitled to go to the jury on the question of insolvency of the bank at the time the deposits were received, or on the question of knowledge on the part of the defendants of the insolvency, if the bank actually was insolvent, and since the plaintiff's case depended on the establishment of these facts, she could not recover.

J. J. Canty.

SEARCHES AND SEIZURES—Right to complain of illegal search and seizure is available only to person injured thereby.

E. D. Bevers was indicted for the unlawful manufacture of spiritous and intoxicating liquor, and upon conviction, appealed. *Bevers v. State,* Court of Criminal Appeals of Texas, 1928. 9 S. W. (2nd) 1040.

On a farm near Fort Worth, officers found two stills and fifteen whisky vats, with whisky running out of one of the stills at the time it was found. Bevers was present, and apparently operating the still. It developed that the search warrant with which the officers were armed was defective in certain respects,

and that the search was therefore made without proper authority of law, this being admitted by the State. Bevers testified that he had leased the farm, consisting of about two hundred and twenty acres, from a tenant of the owner, and had thereafter subleased the portion on which the still and whisky were found to one Haynes for the purpose of raising chickens, but claimed that he had charge of all the premises. In his testimony, the defendant admitted the presence of the still and mash, but contended that it belonged to Haynes. Because the officers had not been armed with a legal search warrant, the defendant objected to the introduction of evidence by them as to what they had found on the premises.

The court, however, refused to recognize this objection as valid, stating that if Bevers had subleased the premises searched, he was not in a position to object to their search by the officers. "The right to complain because of an illegal search and seizure", said the court, "is a privilege personal to the wronged or injured party, and is not available to any one else", citing *Purswell v. State,* 107 Tex. Cr. R. 121; Cornelius on Search and Seizure, p. 62. Since the premises searched were under the actual possession and control of the defendant's tenant, he could not object to the defects in the search warrant.

The court was probably further influenced in so holding because of the fact that the defendant took the witness stand and admitted the presence of the still on the premises; in this regard, it held that even if there had been error in the admission of the testimony of the officers, it was rendered harmless by the admissions of the defendant himself to the same effect. (*Gurski v. State,* 93 Tex. Cr. R. 612; *Osborne v. State,* 106 Tex. Cr. R. 310.)

J. J. Canty.

ASSAULT—Baseball pitcher resents "ragging" and assaults spectator.

The case of *Atlanta Baseball Co. v. Lawrence,* reported in 144 S. E. 351, arose out of an assault on the plaintiff by one McLaughlin, a baseball pitcher employed by defendant. Several of the spectators, in a game in which McLaughlin was pitching, began to "rag" him for his pitching. In so doing, the plaintiff was really following the common custom indulged in by the patrons

of defendant at the baseball games played by defendant's employees.

McLaughlin did not receive plaintiff's "ragging" in the same "good nature" with which it is alleged to have been given, and plaintiff was surprised a moment later to see McLaughlin and several other players standing over him in a threatening manner. The petition alleges that without further provocation McLaughlin proceeded to "attack, beat, bruise, and wound plaintiff, inflicting several blows upon plaintiff, and battering and bruising plaintiff's face and body."

The plaintiff brought this suit against McLaughlin's employer, contending among other things, that this assault came within the scope of his employment. The lower court overruled defendant's general demurrer, and from that order defendant appealed.

In reversing the judgment of the lower court Mr. Justice Bell, of the Court of Appeals of Georgia, said: "The conduct of McLaughlin, the pitcher, in leaving his place upon the ground and coming into the grandstand, and assaulting the plaintiff, was not within the scope of his employment, nor in the prosecution of his master's business, but was his own personal affair. 'If a servant steps aside from his master's business, for however short a time, to do an act entirely disconnected with it, and injury results to another from such independent voluntary act, the servant may be liable, but the master is not liable'."

F. Earl Lamboley.

EXCLUDING — Exclusion of negroes from Democratic state primary election.

In the case of *Grigsby et al v. Harris et al,* reported in 27 Fed., 2nd Series 942, equitable relief was sought against the Democratic state executive committee for excluding negroes from participation in the Democratic primary election, pursuant to Rev. St. Tex. 1925, Art. 3107, providing that a political party through its state executive committee has power to prescribe qualificatons of its own members and determine who shall be qualified to vote in such party.

The plaintiffs in their complaint alleged that such rule would deprive them of a constitutional right and privilege guaranteed

to them by the Fourteenth and Fifteenth Amendments to the Federal Constitution.

The court held that the action complained of was a purely party action, as to which like other voluntary associations, the party has a complete deletus personarum and may select or reject as members whom it will. Relief was denied.

F. Earl Lamboley.

INSURANCE—In the case of *Tracy v. Palmetto Fire Ins. Co.*, 222 N. W. 447, the insured brought action to recover damages caused to his automobile which was insured against direct loss or damage from fire. While the insured's car was being driven by a friend of the owner, the owner also being seated in the front seat, an explosion occurred in the front of the car and set it on fire, the flames coming upward in the vicinity of the occupants' feet. The driver immediately applied the brakes and at that time for some unknown reason the car swerved off the road and turned over in the ditch.

The defendants claim that they are liable only for the damage done by the fire and that the remainder of the damage was by reason of breakage for which they are not liable. They contend that the fire was not the proximate or responsible cause for the breakage to the car by reason of its landing in the ditch, but that the cause of said damage was the application of the brakes by the operator of the car.

The court instructed the jury that if the fire was the direct and proximate cause of the car going into and overturning in the ditch then the plaintiff would be entitled to damages for any breakage or injury to the car as a result of its going into the ditch, and the court also left the question of the cause of the car going into the ditch up to the jury.

On the appeal to the Supreme Court, Justice Wagner's opinion was to the effect that (1) An insurance policy should be construed most favorably to the insured and against the insurer. *Githens v. Great American Ins. Co.*, 201 Iowa 266, 207 N. W. 243. (2) That the word "direct" in the policy means merely "immediate" or "proximate" as distinguished from "remote". *Ermentrout v. Girard Fire and Marine Ins. Co.*, 63 Minn. 305, 65 N. W. 635. (3) That proximate cause includes not only losses which

are directly caused by the fire itself, but also losses of which the fire is the efficient cause by setting in motion other agencies. 26 C. J. 341 and *Ermentrout v. Girard, supra.*

The conclusion arrived at was that when a fire can be said to be the primary, the real, producing, predominant or responsible cause of the loss then it may properly be said to be the proximate cause of the same. The jury was warranted in finding that the fire was the cause of the act which landed the car in the ditch, and the resulting damage. Judgment was affirmed.

Marc Wonderlin.

COURTS—Waiver of rights conferred by venue statute.

The Consolidated Stone Co., an Indiana corporation, brought an action in the Federal District Court of Ohio against the Commercial Casualty Insurance Co., a New Jersey corporation doing business in Ohio. Service was had on the defendant's Ohio agent. The defendant neither appeared nor answered within the limited period, and judgment was taken against it by default. Later in the same term the defendant moved that the judgment be vacated and the action dismissed because the action was brought in a district in which neither party resided. The motion was denied. The case comes up on a writ of error from the Circuit Court of Appeals.

Mr. Justice Van Devanter delivered the opinion of the court. He referred to the statute pertinent to the question, which was section 112, title 28, United States Code (28 USCA 112), providing that "where the jurisdiction of the Federal court is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It was held that this statute merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert or waive at his election. It was further held that such privilege must be seasonably asserted; that is, it must be asserted at least before the expiration of the period alloted for entering a general appearance and challenging the merits. Justice Van Devanter said, "To hold that such a privilege may be retained until after the suit has reached the stage for dealing with the merits and then be asserted would be in our opinion subver-

sive of orderly procedure and make for harmful delay and confusion." This privilege, not having been seasonably asserted, is deemed to have been waived, and the defendant may not now assert it. *Commercial Casualty Insurance Co. v. Consolidated Stone Co.*, 49 S. Ct. 98.

Albion M. Griffin.

DUDLEY G. WOOTEN

1860-1929