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Comments on Decisions

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COMMENTS ON DECISIONS

It has been suggested that no criticism of a court decision in this state should appear while the case in which that decision was written is still pending. If we followed this suggestion we could not have any professional criticism of many cases until several years after the decisions were rendered inasmuch as this time not infrequently elapses before all the rights of rehearing and transfer in the Appellate and Supreme Courts have been finally decided. Such a practice also would run contrary to the practice of other legal periodicals of the country and we would be in the embarrassing position of finding comments on an Indiana case in other journals a year or so before our own comment on the same case appeared. It is often the most important cases from a professional point of view that are thus kept pending in the courts for a long time. Our members will recognize at once that a court decision is a precedent and an authority from the time it is rendered; it may be quoted by counsel in other cases, in our courts or in other jurisdictions. This is true even though that decision is subject to appeal and reversal later. Until it is reversed it must be considered as the pronouncement of the court on the law involved. In keeping with the interests of the bar all the leading law journals of the country comment upon court decisions even though they are subject to appeal. For instance, when *In re daugherty*, 299 Fed. 620, was decided in the United States District Court in 1925 a large number of adverse comments immediately appeared in legal periodicals although the case involved political questions and was then pending before the Supreme Court of the United States. If our comments on cases are to be of the fullest professional service to the members of the bar they should occur as soon after the rendering of the decisions as possible, since the particular decision in turn will be used by the courts in deciding other cases.

In the December issue of the *Journal* the first *Recent Case Note* dealt with the problem of the use of illegally obtained evidence in a case arising under the State prohibition laws (*Tongut v. State*, 151 N. E. 427). In the course of this note the writer took occasion to express his disapprobation of the decision in this case in so far as it related to the law of illegally obtained evidence. The writer cited his references to authorities and gave his reasons for disapproving the decision. There is no question but that the writer was solely interested in the correct decision of the legal point involved as a question of law. Certainly the wording of his note may be read as applying solely to the discussion of the legal principle, apart from any application to a political or social issue.

Where legal questions arise in cases that involve political

or social issues, it is inevitable for there to be a possible inference that the writer entertains his view of the law because he entertains a certain view of the political or social issue. If the comment on the decision, however, proceeds in a professional manner and gives other decisions and authorities for its conclusions, it is difficult to see how such a comment can be condemned. For instance, the great Chief Justice Shaw of Massachusetts argued that the fugitive slave law was constitutional as a matter of his professional opinion, although personally he abhorred the law and did all he could to secure its repeal. There is no reflection on either the honor or the ability of a court where the writer reaches a different conclusion as a matter of law from that reached by the court in a particular case.

In other jurisdictions where the State University law journal is published under the authority of the State Bar Association, it is the universal practice for lawyers to comment on any recent decisions of the state courts which seem to them of especial professional interest. These comments are taken as a matter of course and both the bench and bar regard critical comments upon recent decisions with no more displeasure than they regard the decisions of courts in other jurisdictions which seem to conflict with their own. All a commentator purports to do is to present his conclusions based on authorities for the judgment of those trained in the law. It may be that the commentator is wrong; or that his view may be followed in other jurisdictions while it is not followed in Indiana; or that the Indiana courts may later reach a similar result without qualifying the principle of *stare decisis*. In the usual case we will have one of these three results, and any one of them is entirely compatible with the honor and professional ability of our own courts, the courts of other jurisdictions, and the commentator.

This view of the matter is in keeping with the practice of other legal periodicals which have followed the custom of commenting upon decisions of the courts for the past thirty years. For instance, the majority of the Supreme Court of the United States at present are judges who wrote notes on cases of this nature when they were in law school. Mr. Chief Justice Taft, together with other members of the United States Supreme Court, have repeatedly praised the efforts of legal periodicals in criticising recent decisions even though these criticisms involved unfavorable comments upon their own decisions. The judges of our courts of last resort in Indiana have been most gracious and cordial in encouraging the efforts made by writers in our *Journal*.

On the editorial page of the *Journal* it is stated that the

Indiana State Bar Association assumes no responsibility for the opinions expressed in the *Journal*. In keeping with professional propriety it would be unconscionable for the editor to print only conclusions with which he personally agreed. No doubt members of the Advisory Board of Editors and other members of our Association will occasionally find themselves in disagreement with conclusions in the *Journal*. This is as it should be. The test of material to be printed in the *Journal* is whether or not it presents in a professional spirit an attempt to find what the law is or what the law should be on a given point, with due citation to authorities and reasons legally substantiated. If it meets this test and if it is a better piece of work and a more helpful and timely contribution than anything else we can get, then it is appropriate for publication.

We take comfort in knowing that the vast majority of our members feel pride in a journal that is published with this singleness of purpose and this professional aim. There is no doubt but that all the editors of the *Journal*, and we hope all the members of the Association, entertain the highest respect for the courts. It would be humiliating to the judges of our courts as well as to all the members of the legal profession in this state if the Indiana decisions were commented upon in the other legal periodicals of the country while our own *Law Journal* said nothing about them. It would be equally unfortunate if we did not comment upon decisions that involved legal principles of the first importance because the legal questions arose in cases which contained political and social elements.

It has been suggested that this particular *Case Note* was needlessly abrupt and offensive in the statement of its conclusions. If this is true, it is most reprehensible. Our readers may be sure that the editor will do everything in his power to prevent the use of any language which is not courteous and deferential to the courts. In this instance it may be suggested that the writer's language is very similar to that of Mr. Wigmore in his *Treatise on Evidence*, section 2183, in which he comments upon the same legal point. It will be recalled that the writer of this *Note* referred to *Wigmore on Evidence* and the decisions of other courts in support of his conclusions. It cannot be said too strongly, however, that especially in a case which involves political issues, it is of the first importance to make it clear that the commentator's conclusion refers only to the legal point involved and implies nothing but the greatest respect for the honor and ability of the judges. This respect is sincerely felt by the members of the bar in Indiana; it will be the function of the *Law Journal* to insure that this respect is clearly shown in writings that appear in its columns.