Indiana Law Journal

Volume 3 | Issue 2 Article 11

11-1927

Recent Case Notes

RECENT CASE NOTES

CONTEMPT OF COURT—PENDING CASE.—October 18, 1924, D published a criticism of a decision in *Batts v. State*, 194 Ind. 609, and on January 19, 1926, a report criticising decisions of three other cases, *Adonia Dumas v. State*, 197 Ind. 123; *Callender v. State*, 193 Ind. 91; *Flum v. State*, 193 Ind. 585. The Dumas case was pending, subject to a petition for rehearing, at time of publication; but the report merely compared that case with the Federal case, *United States v. Borkowski*, 268 F. 408, under the heading "Federal and State Supreme Courts Differ," and a statement in the report that the state court "takes the opposite view." Proceedings in the other three cases had ended at the time of publication. In its opinion, the court states that "others (cases of like nature) were still pending," "still others would be filed in the regular course of events," and that such criticisms would "influence his (a timid judge's) decision improperly in like cases which were pending or which might be later filed." Held: D guilty of contempt. *State v. Shumaker*, August 5, 1927, Supreme Court of Indiana, 157 N. E. 769. Gemmill and Martin, J. J. dissent.

"Where there is no case pending, by the great weight of authority, there is no contempt." Willis: *Punishment for Contempt of Court*, 2 Ind. Law Jour. 310. A case is pending in a court until there has been a final disposition of it by that court. 13 C. J. 36; *Ex parte Nelson*, 251 Mo. 63; *State v. Ingwell*, 13 Wash. 238; *In re Chadwick*, 109 Mich. 588; *Ex parte Turner*, 3 Mont. D. & DeG. 523; *People v. News-Times Co.*, 35 Colo. 253. Publications as to past proceedings do not constitute contempt. *Cheadle v. State*, 110 Ind. 300; *Zuver v. State*, 188 Ind. 60. A publication is a contempt when it refers "to a matter then pending in court" and tends "to the injury of pending proceedings upon it and of subsequent proceedings." *Cheadle v. State, supra;* Burns' Ann. St. 1926, Sec. 1080; 13 C. J. 34. The comparison of the Dumas case with the Federal case, *United States v. Borkowski, supra*, though the Dumas case was pending, can in no wise, be held contemptuous. Hence that comment should be disregarded. The other three cases had been finally disposed of at the time the report was published. If the court adopted the obsolete English rule, that there can be contempt though no case is pending, *McLeod v. St. Aubyn*, L. R. A. C. 549, Willis: *Punishment for Contempt of Court*, 2 Ind. Law Jour. 310, then it reversed its own rule as stated in *Cheadle v. State, supra; Zuver v. State, supra.* But the court cites *Cheadle v. State* in support of its power to punish for contempt; so evidently no such change was intended. Thus, it seems the court has adopted a rule that it can punish for contempt when any like case is pending or may later be filed. If this rule obtains, does it not follow that there can never be criticism of any case? No murder case can be criticised because other murder cases are pending or may be filed next week. No property case can be criticised because there will always be other property cases before the court. No case, finally disposed of, can be discussed because another case, not mentioned in the discussion, but of like nature, is pending or is to be filed next year. Under such a rule, there would always be cases "pending," and no case would ever be subject to criticism.

B. B. C.

JUDGMENT—TAX DEED.—Complaint by appellant to enjoin the sale of realty to satisfy an assessment lien for sewer and street improvement alleged: that the realty was sold to appellant for delinquent taxes; that the

property was not redeemed within two years of the date of sale; that subsequently appellant received a tax sale deed to the property from the county auditor; that appellant quieted her title to the property against all the world, having made certain named persons, not including the bondholder or contractor, defendants to that suit; and that the county treasurer now threatens to sell the realty to satisfy the assessment lien. Appellee, bondholder's demurrer was sustained, and appellant refusing to plead further, judgment was taken against her. Appellant assigned error. Held: Allegation that appellant quieted her title against all the world was of no avail where defendant had not been made a party defendant in the suit to quiet title. Judgment affirmed. *Grieger v. Carlson, County Treasurer et al.* Appellate Court of Indiana, July 1, 1927, 157 N. E. 443.

The opinion of the case reviewed does not discuss the interest appellant gained in the land by the tax deed. "A tax deed . . . vests in the grantee an absolute estate in fee simple, subject, however, to all the claims which the state may have thereon for taxes or liens or encumbrances." Sec. 14325 Burns' 1926. Many cases tend to show that the interest conveyed is subject to other encumbrances. "The lien of assessment was not destroyed by the tax sale. The section of the statute which declares that a tax deed 'shall vest in the grantee an absolute estate in fee simple' defines the quality of the estate, and does not release it from valid encumbrances." *City of Indianapolis v. City Bond Co.*, 42 Ind. App. 470. The case of *McCollum et al v. Uhl*, 128 Ind. 304, and *Justice v. City of Logansport*, 101 Ind. 326, hold that tax deeds do not divest liens for special assessments and municipal taxes. The more recent decision of *Ellison v. Branstrattor*, 45 Ind. App. 307, while not repudiating the former decisions, seems flatly contra, holding that a tax lien was superior to a ditch assessment lien, and that the tax deed vested in the grantee an absolute fee simple, subject only to state claims extinguishing the assessment lien which was not a lien of the state. The case is not cited on this point as authority in later cases, and the opinion of the case reviewed, while not discussing the point, reaches the result found in the case of *Indianapolis v. City Bond Co.* cited above.

The remaining point to be considered is the effect of the judgment, in appellant's suit to quiet title, upon persons not made parties to the suit. The statute is explicit that all parties who appear of record in any of the public officers of the county where the realty is situated shall be made defendants. Sec. 14340, Burns' 1926. The cases are unanimous in holding that failure to make such interested persons defendants to the suit is fatal to the decree "against all the world." *Bastin v. Myers*, 144 N. E. 425; *Hutchinson v. Wood*, 59 Ind. App. 537. Such persons have the same right subsequent to the suit that they had prior to it.

M. R. H.

RAILROADS—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.—Appellant operated an electric train which collided with an auto truck driven by appellee's decedent. The appellee gave evidence showing that the train was being operated at a high and dangerous rate of speed under the circumstances. Appellant gave evidence showing that the decedent's own negligence contributed to his injury and death; that the immediate collision did not injure either the truck nor the decedent, but did cause the brake mechanism on the train to become inoperative; that the truck was pushed some distance ahead of the train before it overturned causing the injury and death of the decedent. The lower court gave instructions authorizing recovery for the

death of the decedent if the defendant was first negligent in driving the train at a high rate of speed and if decedent was not negligent after the collision and before the injury. Held: Instructions erroneous and case reversed. *Union Traction Co. v. Ringer*, Supreme Court of Indiana, April 7, 1927. 155 N. E. 826.

Contributory negligence in an action for damages brought on account of negligence of another for personal injuries is a matter of defense. *Burns' Ann St.*, Sec. 380. *Indianapolis Street Ry. Co. v. Taylor*, 158 Ind. 274. But contributory negligence will not bar recovery if the other party being negligent fails to use care to avoid injury after discovering the peril. *Terre Haute Traction Co. v. Stevenson*, 189 Ind. 100. *Southern R. R. v. Wahl*, 196 Ind. 581.

The instructions of lower court did not consider that the collision caused partly by the decedent's own negligence so disabled the car as to make further care on the part of the motorman to no avail. Where there is mutual negligence one cannot recover if the other after discovering the peril cannot by reasonable care and skill avoid injury. *Indianapolis and Cincinnati R. R. Co. v. Wright*, 22 Ind. 376. Contributory negligence to be a defense must also proximately contribute to the injury. *Cromer v. City of Logansport*, 38 Ind. App. 661; *Abney v. Indiana Union Traction Co.*, 41 Ind. 53. While the defendant's negligence was contemporaneous with that of decedent, both negligent acts ceased at the same time though the effect of one may have persisted longer than the other. Hence this is not within the doctrine of antecedent and subsequent negligence as declared in *Indianapolis Traction Co. v. Croly*, 54 Ind. App. 566. If one party is negligent, he can recover from the other only if the other's negligence is the proximate cause and his own negligence is not the proximate cause because it has ceased entirely before the injury. *Union Traction Co. v. Vatchet*, 191 Ind. 324.

C. W. D.

SEARCH WARRANT—AFFIDAVIT THEREFOR—PROBABLE CAUSE.—D. appeals from a conviction for possessing a still for the purpose of unlawfully manufacturing intoxicating liquors. The desk sergeant of the police department, who was the affiant, testified that there had been much complaint about D.'s running a still in the basement of his bakery, that he, the affiant, walked past the bakery and smelled an odor like "swill," that he had never smelled liquor being made but that the odor was the same as that of fermented bran used to feed hogs. He thereupon made affidavit stating that he "has reason to believe and does believe that James Wallace has in his possession intoxicating liquor," etc. No facts were set forth in the affidavit. The search warrant was issued, and a great lot of intoxicating liquor, mash, and equipment for making liquor was found. D.'s motion to quash the search warrant, the return thereon, the affidavit for the warrant, and all the evidence of the finding and seizure was overruled, and D. was convicted. The case comes up on error. Held (Martin and Gemmill, JJ., dissenting): The existence of probable cause for a search warrant is for judicial and not ministerial determination. A search warrant issued on mere belief or information and belief is insufficient for finding of probable cause. *Wallace v. State*, Supreme Court of Indiana, June 30, 1927, 157 N. E. 657.

The court obviously thinks that the legislature usurped judicial powers in enacting the statute regulating issuance of search warrants, Burns' (1926) 2746, and affidavit therefor, Burns' (1926) 2086, in that the statute

stops short of probable cause in allowing the affidavit to state only that affiant "believes, and has good cause to believe." The opinion says: "It is not within its (the legislature's) province to say to any judicial officer that, when he has heard proof of certain facts, the evidence thus adduced before him shall constitute conclusive proof of the fact in issue in the trial before him." Concerning statutes providing for issuance of warrants upon affidavits that affiant "has cause to believe and does believe," etc., a recent text writer says: "By the great weight of authority all such legislation has been held to be unconstitutional as violative of the Fourth Amendment to the Federal Constitution and similar state constitutional provisions." Cornelius: *Search and Seizure*, page 81. A statutory provision which authorized the issuance of a warrant upon an affidavit which stated that the affiant "has reason to believe, and does believe," etc., was held unconstitutional because it required nothing except the belief of the affiant, and not the setting forth of facts to satisfy the magistrate that there was probable cause. *People v. De La Mater*, 213 Mich. 167; *Lippman v. People*, 175 Ill. 101; *Ripper v. United States*, 178 Fed. 24. California and New York require written depositions of facts before a warrant can be issued, *Ex parte Demmig*, 74 Cal. 164, *People v. Maniscalco*, 199 N. Y. S. 444; but in those states the setting forth of facts is required by statute, Deering Penal Code of California (1923), sections 1526, 1527, 1528, and N. Y. Code of Crim. Proc., section 8026. One of the principal cases relied on by the dissenting opinion in *Wallace v. State* is *Rose v. State*, 171 Ind. 662, which has never been overruled and which held that an affidavit for a search warrant upon information and belief was within the constitution. The majority opinion attempts to distinguish the two cases by saying that *Rose v. State* was a proceeding *in rem*, but does not explain why a citizen requires less protection against search and seizure in a proceeding *in rem* than he does in any other proceeding. The whole question seems to be: Against what kind of search and seizure were the makers of the State Constitution and of the Federal Constitution trying to protect citizens? The decision of *Wallace v. State* holds that it was against search and seizure without previous judicial determination of probable cause from *facts* shown. Query, if it is not also judicial determination for the magistrate to issue the warrant upon consideration of the character and integrity of the officer making affidavit? The dissenting opinion says the constitutional provision was aimed to protect against general warrants and writs of assistance, and cites a great amount of authority in support of that position.

D. J.