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Recent Case Notes

RECENT CASE NOTES

CONSTITUTIONAL LAW—PARDON—CONTEMPT—In an original proceeding before the Supreme Court of Indiana, respondent was held in contempt of that court and sentenced. The Governor issued a pardon. The Attorney General filed an information with the Supreme Court, alleging that the Governor under the Indiana Constitution had no power to pardon respondent. *Held*: (Martin, C. J., and Gemmill, J., dissenting.) Contempt of court is not a crime, and it is not an offense subject to the Executive's pardoning power under Section 17 of Article 5 of the Indiana Constitution. *State v. Shumaker*, Sup. Ct. of Indiana, 164 N. E. 408.

The court is clearly right in saying that in the United States sovereignty resides in its citizens. At the present time the sovereign powers of the people are exercised by the various organs of government. The people may limit a department of government in the exercise of a sovereign power or may transfer its exercise to another department. They can amend the Constitution and as changed it is constitutional. *Nat. Prohibition Cases*, 253 U. S. 350; Willis, *The Doctrine of Sovereignty Under the United States Constitution*, 15 Va. Law Rev. 437.

The court is unquestionably right in saying that criminal contempt of court is not a "crime". Contempt is punished summarily by the court without the jury trial guaranteed by the Constitution in all "criminal prosecutions". But it is not a necessary result, as the Indiana Court urges, that criminal contempt is not an "offense" within the meaning of that term as used in the clause relative to executive pardon. The term "offenses" is used in the Constitution in a more comprehensive sense than are the terms "crimes" and "criminal prosecutions". *Shick v. U. S.*, 195 U. S. 65. The President of the United States has pardoned many cases of criminal contempt during the last century without the objection that criminal contempt is not an offense against the United States. The Supreme Court has recently upheld this construction of the pardon clause. *Ex Parte Grossman*, 267 U. S. 87. The state courts in passing upon similar provisions in state constitutions have construed the term "offenses" to include criminal contempt. *State v. Sauvinet*, 24 La. Ann. 119; *State v. Magee Pub. Co.*, (N. M.) 224 P. 1028.

It is difficult to see in what way the executive pardon in cases of criminal contempt is a violation of the doctrine of separation of powers. Power to punish for contempt is not one of the delegated powers of the judiciary, nor is it an exclusive judicial function, as it also resides in the legislature. And the power is not inherent in the courts to punish summarily for indirect contempt, Sir John Fox, *The History of Contempt of Court*, and III *Ind. Law Journal* 75, but the courts have long treated their power in such cases as inherent. The Supreme Court of the United States, in *Ex Parte Grossman*, 267 U. S. 87, held that executive pardon in cases of criminal contempt is not a violation of the doctrine of separation of powers. The decisions of the state courts are in accord even though the state constitutions contain distributive clauses. *In re Mullee*, 7 Blatchford 23; *Ex Parte Hickey*, 12 Miss. 751; *State v. Sauvinet*, 24 La. Ann. 119; *Sharp v. State*, 102 Tenn. 9; *State v. Magee Pub. Co.*, (N. M.) 224 P. 1028.

Contra: *State, ex rel. Rodd v. Verage*, 177 Wis. 295; *Taylor v. Goodrich*, 25 Tex. Civ. App. 109. The Indiana Court has given a decision contra to authority, and it would seem that sounder reason is on the side of the dissenting opinion of the principal case. M. R. H.

CRIMINAL LAW—INTOXICATING LIQUOR—INDICTMENT AND INFORMATION —JURY—PRESUMPTION OF INNOCENCE—Appellants were prosecuted for the unlawful transportation of intoxicating liquor, under Acts 1923, c. 34, p. 108. Plea not guilty. Verdict of guilty returned by the jury. Judgment rendered. Motion for a new trial overruled. *Held*: That refusal to give requested instruction for the presumption of innocence until verdict returned was reversible error. *Jalbert et al. v. State*, Supreme Court of Indiana, November 23, 1928, 165 N. E. 522.

The Acts 1923, c. 34, p. 108, have the proviso, "That nothing herein contained shall affect the transportation of intoxicating liquor for such purposes or uses as are not provided by existing law". Instruction defining transportation of intoxicating liquor "to be conveying of liquor from one place to another regardless of distance" was proper. Transportation means conveying from one place to another. *Hammell v. State*, 198 Indiana 45. In *Asher v. State*, 194 Indiana 553, the evidence in relation to carrying liquor for a lawful purpose under the proviso in the Act of 1923 was held a matter of defense. Appellant's main contention that the exception above quoted should have been affirmatively pleaded and proved by the state fails because when the exception or proviso is separable from the description, and is not an ingredient thereof, it need not be pleaded in the indictment; but is a matter of defense. *State v. Barrett*, 172 Indiana 169. Appellant's requested instruction, "That mere possession of liquor is not unlawful", was properly refused as not relating to the pleadings or evidence. Refusal to charge on a presumption of innocence and reasonable doubt on the defendant's timely request is reversible error, *Castle v. State*, 75 Indiana 146, although a special charge as to the presumption of innocence is not necessary where the court already had given a sufficient charge as to the doctrine of reasonable doubt, *Anderson v. State*, 147 Indiana 445. Court's instruction "That the jury should weigh instructions as they weigh evidence and disregard neither without proper reason" held not erroneous because of other instructions, "That it was the jury's duty to reconcile conflicts in the evidence, so that all the evidence might be reconciled and believed. *Schuster v. State*, 178 Indiana 320. Our constitutional provision makes the jury the judge of the law and the facts in a criminal case. And without such provision, no such question as above would arise. Since the true function of the jury is to determine questions of fact, the jury should be confined to returning verdicts on special questions. Appellant's objection to permitting women to sit on a jury in a felony case was not error. In *Palmer v. State*, (1926) 197 Indiana 625, it was held that "when women became electors in this state, those who were freeholders or householders became eligible to serve as jurors in the county where they were resident voters," *Moore v. State*, 197 Indiana 640. S. M. C.

LARCENY—BURGLARY—FELONIOUS INTENT—Appellant was found guilty of second degree burglary, under section 3, c. 201, Acts 1927, and sentenced to the Indiana State Prison for not less than one nor more than ten years.

The count of the affidavit upon which he was convicted charged that he "did . . . unlawfully in the day time, enter a meeting house and building used as a house of worship . . . known as . . . and did . . . unlawfully and feloniously attempt to commit a felony, to wit: to feloniously steal, take and carry away the personal goods and chattels of said . . . church . . ." The evidence shows that appellant, under claim of ownership, sold the pews, chairs and pulpit of an abandoned Presbyterian church in Washington township, Monroe county, for $110 to the Pentecost Church in Bloomington. He made no secret of the transaction and assisted openly, in the broad daylight, in removing the furniture from the old church, which was on a main public road on which people were passing, and in loading it into the purchaser's moving van. The ground upon which the building in question was located had been, in 1896, conveyed by warranty deed to the Cumberland Presbyterian Church of Washington township to be used for church purposes and as a burial ground, and if the church should cease to exist and should the ground not be used for burial purposes, it should revert to the grantors. Only one burial was made and the body so buried has long since been removed. There has been no church services for ten years. The building was in a state of dilapidation; the doors had been nailed up prior to the time of the alleged felony. Before selling the furniture the appellant sought the advice of his counsel as to the property rights of both the personalty and the real estate and had been advised that he might safely sell the furniture. The court overruled a motion for a new trial and this appeal was brought. *Held*: The court erred in overruling the appellant's motion for a new trial, and the judgment is reversed, with direction to sustain such motion. *Baugh v. State*, Supreme Court of Indiana, March 12, 1929, 165 N. E. 434.

The statute upon which the appellant was convicted provides: "Whoever in the night time or day time, breaks or enters into any kitchen, outhouse, shop, . . . church, . . . or other building, *with the intent to commit a felony*, shall be . . ." Sec. 3, c. 201, Acts 1927.

"If one, in good faith, takes the property of another, believing it to be legally his own, or that he has a legal right to its possession, he is not guilty of larceny, although his claim is based on a misconception of the law or of his right under it. (*People v. Grim*, 3 N. Y. Cr. 317; *State v. Huffman*, 16 Or. 15, 16 Pac. 640; *Miller v. People*, 4 Colo. 182; *Phelps v. People*, 55 Ill. 334; *Commonwealth v. Stebbins*, 8 Gray 492), for although ignorance of law and honest intentions cannot shield a man from civil liability for a trespass committed by him, yet they do protect him from criminal liability, by divesting the act of the felonious intent without which it cannot be a crime. It is necessary, however, in all cases that the claim of right be a bona fide one, and not a mere cover for a felonious taking (*Currier v. State*, 157 Ind. 114, 60 N. E. 1023), and must be something more than a vague impression; it must amount to an honest conviction (*Morrisette v. State*, 67 Ala. 71)," 36 C. J. 764, 5. ". . . nor will the plea that the act was done on advice of legal counsel avail, unless the taker was led thereby to believe that he had a valid claim to the thing taken, and took the thing pursuant to such belief (*People v. Schultz*, 71 Mich. 315, 38 N. W. 868; *Buchanan v. State*, (Miss.) 5 So. 617)," 36 C. J. 766.

". . . The publicity of taking is said to be very powerful evidence of the good faith of the claim (*Causey v. State,* 79 Ga. 564, 5 S. E. 121), and whether the claim was in good faith is ordinarily a question for the jury to determine (*Wilson v. State,* 18 Tex. App. 270, 51 Am. Rep. 309). But it has been held that the accused is not bound to satisfy the jury that he took the property in question under an honest, though mistaken, belief as to ownership, and a charge to the jury to that effect is reversible error, although it is also charged that the state must satisfy the jury of the guilt of the defendant beyond a reasonable doubt (*State v. Weckert,* 17 S. D. 202, 95 N. W. 924). The state, not the accused, in a prosecution for larceny, has the burden of proof as to whether the taking of the property is under an honest claim of right." 17 R. C. L. 26, 7.

The appellant testified, and he was not contradicted, that he believed he owned the real estate and had a legal right to the personal property which he sold. The evidence further shows that he acted in pursuance of advice of counsel. It would seem, therefore, that the court's conclusion that "one who takes property under fair color or claim of title and in the honest belief of ownership and of right to its possession is not guilty of larceny, although his claim is based on misconception of law or rights under the law, as in such a case felonious intent is lacking", is correct and is supported by the decided weight of authority; and that such conclusion applies to facts of the principal case. T. R. D.

PLEADING—ARGUMENTATIVE DENIAL—DEMURRER—Appellant, Claud Edward Hixon, a boy about ten years of age, was riding on a bicycle with another boy, the appellant being on the front part of the bicycle, with his companion sitting behind him operating said bicycle. Appellee was driving a truck along the same street to the left of the boys on the bicycle going in the same direction. When the bicycle was swerved to the left around an automobile parked on the right hand side of the street, a collision occurred between the bicycle and the appellee's truck, whereby appellant was injured. The appellant, being a minor, brought an action by his next friend, Claud Hixon, Sr., the father of said minor, for personal injuries received by the minor, consolidated with an action by the father against the same defendant, S. C. Niman, the appellee herein, for loss of services of said minor, and for amounts paid out on account of the injury to him. The appellee filed an answer in two paragraphs, the first in general denial, and a second paragraph setting out a detailed statement of facts and circumstances of the collision, and denying that the appellee was in any manner negligent; and that the collision was caused solely by the negligence of appellant and his companion. Appellant demurred to the second paragraph, and the demurrer was overruled and verdict and judgment was given for appellee. The overruling of the demurrer was the only error assigned. *Held*: Judgment affirmed, when an examination of the second paragraph of the answer showed it to be only an argumentative denial of the material facts of the complaint. *Hixon v. Niman,* App. Ct. Ind., Feb. 20, 1929, 165 N. E. 82. *Claude Hixon, Sr., v. Niman,* App. Ct. Ind., Feb. 20, 1929, also affirmed on authority of *Hixon v. Niman, supra.*

The argumentative denial consists of affirmative allegations stated as though they confessed and avoided the plaintiff's cause of action, but which

in reality aver no new matter and set out simply the evidence which can be offered in support of a denial. The defense altogether is therefore the same as a denial. Pomeroy's Code Remedies, 5th ed., Par. 516; 31 Cyc. 194; Clark on Code Pleading, p. 401. At common law, the pleading corresponding to the argumentative denial was generally bad on demurrer. The objection was, not that the facts thus set up constituted no defense at all, but the external forms of the system were considered to be of such importance, and this faulty pleading so completely violated them all, that it was held to be worthless for any purpose. Pomeroy's Code Remedies, 5th ed., par. 517. The same rules of order and classification are violated by such answers today, but as the new procedure looks rather to the substance than to the form, and as a demurrer to the answer is only allowed on the ground of insufficiency—that is, when the facts stated do not constitute *any* defense, the argumentative denial is not considered bad on code demurrer. Pomeroy's Code Remedies, 5th ed., par. 517. *Clauser v. Jones*, 100 Ind. 123; *Oren v. Board of Commissioners*, 157 Ind. 158, 60 N. E. 1019; *Hiatt v. Town of Darlington*, 152 Ind. 570, 53 N. E. 825; *Boos v. Morgan*, 146 Ind. 111, 43 N. E. 947; *State ex rel. v. Osborne*, 143 Ind. 671, 42 N. E. 921; *Rich v. Fry*, 196 Ind. 303, 146 N. E. 393. The plaintiff's remedy is by motion to make the defense more certain and definite, and to strike out redundant and superfluous matter. *Oren v. Board of Commissioners, supra.* The case of *Sovereign Bank of Canada v. Stanley*, 176 F. 743 (C. C. N. Y. 1910), is directly contra, but it is significant that the court in that case advances no reason for its holding.

Where, as here, the answer contains two paragraphs, viz., first, a general denial, and, second, an argumentative denial which is equivalent to the general denial, such second defense is irregular and will be overruled and expunged from the record, upon motion to strike out as redundant and superfluous. If, however, a plaintiff, instead of moving to strike out, should demur to the vicious defenses, and that demurrer should happen to be sustained by the lower court, no material error would have been committed, for the same result would have been reached which would be attained by a motion; the record would be cleansed of its redundancy, and the general denial would remain, under which all the facts constituting the defense, and which had been set forth at large in the rejected paragraphs, could be given in evidence at the trial. *Adams Express Co. v. Darnell*, 31 Ind. 20; *Indianapolis, etc., R. Co. v. Rutherford*, 29 Ind. 82; *Rhode v. Green*, 26 Ind. 83; *Bondurant v. Bladen*, 19 Ind. 160; *Butler v. Edgerton*, 15 Ind. 15; *Port v. Russell*, 36 Ind. 60; *Garrison v. Clark*, 11 Ind. 368. (For other cases in point, see note 74 to paragraph 523, Pomeroy's Code Remedies, 5th ed.) This rule appears to be sound on principle.

K. J. M.

PRINCIPAL AND SURETY—CONTRACTOR'S BOND—RULE OF CONSTRUCTION—One F. entered into a contract to erect a stucco building. The contractors were to have power to alter the plans of the building without abrogating the contract. When the building was partially completed, the contractors wishing to secure payment to them of the balance of the contract price, gave bond executed by selves as principals with the appellant company as surety. This bond was given as a full indemnity in favor of F. for faith-

ful performance by the contractors. Action was brought against the sureties when the building was not completed on time. Appellants claimed a defense by way of discharge arising out of a change in the specifications for the building after the bond was given, brick being used instead of stucco in the construction. *Held*: The surety is not discharged by any change of building plans. *Detroit Fidelity Co. v. Richey*, February 23, 1924, 165 N. E. 64.

The appellant is held liable as a compensated surety apparently on the basis of an insurance liability, the court following the rule that a surety bond executed for profit which is open to two constructions, will be construed most favorably to the one intended to be protected. *Everley v. Equitable Surety Co.*, 190 Ind. 274. In construing surety contracts, and especially contractor's bonds, Indiana has generally followed the rule that any slight change in the primary obligation will not affect the surety's obligation. *Hahn v. Shidler*, 164 Ind. 242; *State ex rel. Public Service Co. v. Lund*, 80 Ind. App. 349. These decisions seem to indicate that a material departure would discharge the surety, the surety contract being construed as any other contract, giving a consideration to the intent of the parties. This theory of common construction is apparently the general rule being followed by the Federal courts also. *Gilmore & Pa. Ry. Co. v. U. S. Fidelity Co.*, 208 Fed. 277; *American Bonding Co. v. Pueblo Investment Co.*, 150 Fed. 17. The determination of material departures is, however, a difficult question under such theory. See 16 H. L. R. 314.

Two other theories have been adopted in similar cases in different jurisdictions. The old *strictisimi juris* theory, construing a surety's contract most strongly in favor of the surety, is no longer applied to compensated sureties except perhaps in one state. *Lonergan v. San Antonio Loan and Trust Co.*, (Texas) 101 S. W. 1061. Some other jurisdictions apply it without exception to voluntary sureties. The third theory imposing insurance liability does not release the surety on account of any deviations if they are such as might reasonably occur under the circumstances. Even material alterations will not release unless the surety is also materially injured, and then the release is only protanto, to extent of the injury caused by the deviation. *Burr v. Gardella*, (Cal.) 200 Pac. 493; *State v. Hudson Contraction Co.*, (W. Va.) 113 S. E. 251. See also 14 Cal. L. R. 395 and 29 H. L. R. 314. This rule has been adopted by many jurisdictions, although it is usually limited by the restrictions that the sureties' liability should not be extended beyond that assumed in the contract, and that there should be no construction contrary to the terms of the contract. 12 A. L. R. with cases in note. Such limitations make the insurance theory practically only a counterpart of the ordinary construction rule but avoids the difficulty of determining materiality of changes in the primary obligation. The insurance theory as applied to contractors' bonds seems desirable and convenient in the light of present conditions requiring certainty of security, yet it must be interpreted with limitations to prevent wholly inequitable results especially where the contract involves little or no real ambiguity. While the result in the present case could be no different even by construing the surety's contract under the same principles of law as would be applied to any other contract, the decision indicates a desirable tendency to hold compensated sureties to a liability similar to that of insurers.

C. W. D.

WILLS—WHO MAY CONTEST—ELECTION—ESTOPPEL—The testator's will gave plaintiff, testator's widow, one-third of testator's property "in lieu of her statutory rights". Plaintiff renounced the provision made for her in the will, and elected to take by the laws of descent. Later, plaintiff began this action to contest the will because of testator's alleged unsoundness of mind. It was agreed by the parties for the purposes of this action that the value of the estate is in excess of $10,000 and, under the laws of descent, had the husband died intestate, plaintiff would have received one-half of the estate, while if the will stands, the widow having elected to renounce the provisions therein made for her, she will receive only one-third of the estate and $500. The defendant (the executor of the will) demurred to the complaint for want of facts and the plaintiff appeals from the sustaining of this demurrer. *Held*: Judgment reversed. Plaintiff had such interest in the estate as to enable her to contest the will, her share being greater if the will were held invalid, and her election to renounce the provision made for her in the will did not estop her to contest the will on the theory that by such election she recognized the will and thereby irrevocably fixed the amount she would receive. *Herbert v. National City Bank et al.*, Appellate Court of Indiana, February 20, 1929, 165 N. E. 80.

Of course, only those who have an interest in the subject-matter of the will may contest its validity. *Crawfordsville Trust Co. v. Ramsey*, 178 Ind. 258; *Kinnaman v. Kinnaman*, 71 Ind. 417; *Campbell v. Fichter*, 168 Ind. 643. But when such interest appears, the right to contest is absolute.

A widow's dissent to a will can not estop her to contest a will. All the widow did by her election was to recognize or acknowledge the fact that the instrument probated purported to be the will of her late husband, without in any way obligating herself as to its validity, and she did not thereby affirm the will against fraud or undue execution and thereby recognize the instrument as a valid will. *Miller v. Miller*, 5 Heisk. (Tenn.) 723.

It seems that, to estop a person from contesting a will, it must appear that he in some way has recognized and accepted the will as valid as, for example, accepting a legacy under the will. *Keys v. Wright*, 156 Ind. 521; *Eissler v. Hopple*, 158 Ind. 82; *Sharkey v. Sharkey*, 166 Ind. 140.

The case seems sound and in accord with the reported decisions.

R. C. H.