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JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER AND HAROLD SHEPHERD

State of Louisiana v. *Louis Gomez, et al.*, No. 25,766. *Appeal from the Twenty-ninth District Court, Parish of St. Bernard; Hon. L. H. Perez, Judge.*

Dawkins, J.:

Defendant, Gomez, was tried for murder, convicted of manslaughter, and prosecutes this appeal from a sentence of from eighteen to twenty years at hard labor.

Several bills of exception appear in the record, but the only two questions which were mentioned in oral argument or have been considered in appellant's brief are, that the jury was improperly exposed to outside influence, and the trial judge ignored the recommendation of the jury for leniency. On the other hand, the brief for the state discusses all the bills in the record, but says nothing about the recommendation of the jury or the action of the judge thereon. We find no assignment of error or bill of exception dealing with the sentence of the court.

Exposure of the Jury

There is some evidence in the record to the point that at one time, for about ten minutes during the trial, the jury was left in the jury room without a deputy sheriff, either in the room or in the hallway outside. However, the three deputies who were in charge of the jury during the trial were sworn, and each testified that he never left his station outside the jury room door, until the other came on. The jury room was on the second floor of the court house, and the only access thereto was through the door, except the glass-enclosed and screened windows overlooking the court yard. There was not the slightest suggestion that any one communicated with or influenced the jury in any way, but merely that the deputy sheriff was away from his post of duty for about ten minutes; and this was overcome by the weight of the evidence. It was not necessary that he should remain in the jury room, provided he was situated where he could see that they were not exposed. In fact, it would have been improper for him to remain in the jury room while they were deliberating on their verdict.

We find no error in the ruling on the motion for new trial.

The Sentence

We know of no law which compels the judge, in the exercise of his discretion within the limits of the statute under which an accused is convicted, to give heed to the recommendation of a jury for leniency. It is true that the Act 74 of 1914 provides for the submission to the jury of evidence of the prior good character of an accused and as to whether he has previously been convicted, to guide them in determining whether to recommend a suspension of sentence, or that they may so recommend "in any case"; but even that statute uses the word "may" in the matter of the suspension. We are not called upon, however, to construe it in this case, because there was no recomendation for suspended sen-

tence. We cannot legislate or substitute our own discretion for that which appears to have been left exclusively in the trial court.

While we shall not discuss the other bills in detail, we find no merit in any of them.

The conviction and sentence are affirmed.

O'Neill, C. J., concurs in the decree.

City of New Orleans v. *Thomas Vinci, Sr.,* No. 25,430. *On Rehearing.*

Overton, J.:

The defendant in this case took two appeals from judgments of the recorder's court against him, one to this court, from a judgment overruling his demurrer to the charge preferred against him, and the other to the Criminal District Court of the Parish of Orleans from the judgment of conviction and the sentence imposed, based on the conviction.

Since the rendition of the original judgment of this court in the demurrer, it has been admitted by counsel for the city and for the defendant, that the appeal on the merits to the Criminal District Court has been tried, and that the trial has resulted in the acquittal of defendant.

As defendant has been acquitted, he has lost all interest to prosecute this appeal further. Whatever judgment this court might render on the demurrer could not affect him since there is no longer a charge against him. Hence the question brought here has become a moot one, and there remains nothing to do but to dismiss the appeal, as this court will not pass on moot questions, and, moreover, is without right or power to do so.

For the reasons assigned, it is ordered, adjudged and decreed that the appeal herein be dismissed at appellant's cost.

City of Shreveport v. *Frank Capolo,* No. 25,844. *Appeal from the City Court of Shreveport, David B. Samuel, Judge.*

Overton, J.:

Defendant was charged with having had unlawfully in his possession on January 12, 1923, intoxicating liquor, to-wit: whisky, for beverage purposes, and it was further charged against him that he was convicted of a similar offense on July 20, 1922, and if convicted of the present charge that the conviction would make the second offense of which he would be gcilty. A second conviction would authorize an increased penalty.

Defendant filed a plea of autrefois convict to this charge, in which he alleged that on or about July 17, 1922, he was charged under Act 39 of 1921, and under Ordinance 180 of the same year, of the City of Shreveport, with having had intoxicating liquor in his possession for beverage purposes, and that he plead guilty to that charge, on July 20, 1922, and was duly sentenced; that the intoxicating liquor found in his possession, on which the present charge is based, was possessed by him in the same place, and in the same containers, in which found on July 15, 1922, and for the possession of which he plead guilty and was sentenced.

Defendant testified, on the trial of the plea, that the whisky found in his possession on January 12, 1923, was possessed by him on July 15, 1922, in the same place and containers in which it was found on January 12, 1923, and for the possession of which he plead guilty and was sentenced on July 20, 1922.

Two of the police officers of the city testified that they were of the raiding party that searched defendant's premises on July 15, 1922, and on that occasion removed therefrom and destroyed some six or eight gallons of corn whisky, which was all that they could find.

It is manifest that, according to defendant's own evidence, the plea is wholly without merit. If defendant had the whisky on July 15, 1922, he should have surrendered it to the officers. His keeping it, thereafter, for beverage purposes constituted another offense for which he had never been convicted, and with which he had never been even charged.

The judgment appealed from is therefore affirmed at appellant's cost.

Tutorship of the Minor, Louise Rhymes, No. 25,646. *Appeal from the Seventh Judicial District Court, Parish of Richland; Hon. John R. McIntosh, Judge.*

St. Paul, J.:

The minor, Louise Rhymes, was the daughter of Richard C. Rhymes and Florence Kronjager. After the death of the father, the mother remarried. Thereafter one of the paternal uncles of minor applied for and obtained a family meeting to recommend a tutor for said minor. The family meeting recommended another paternal uncle for tutor, and thereupon the mother opposed the appointment and applied to the court to be recognized as natural tutrix. Her prayer was granted, and the uncle who provoked the family meeting appeals.

The appointment was made under the provisions of Act 34 of 1921, by which women are given "the same rights, authority, privileges and immunities, and are required to perform the same obligations and duties, under the law, as men possess and are required to perform, in the holding of office, including the civil functions of tutor, undertutor, administrator, executor, notary public and member of family meeting."

Now one of the rights, privileges and immunities which a father enjoys in connection with the tutorship of his minor children is that he is not deprived of their tutorship, given to him by nature and by law, by the fact of his remarrying after the death of his wife. But the statute provides that in the matter of tutorships women shall have the same right to retain the tutorship of her children upon remarrying, would be to deny her a privilege and immunity enjoyed by the husband.

Hence, we think that the act supersedes the provisions of Article 254 of the Civil Code by which a mother forfeits her right to the tutorship of her children if she remarries without calling a family meeting to retain her therein.

We are therefore of opinion that the judge did not err in appointing the mother natural tutrix of her minor child notwithstanding her remarriage.

The judgment appealed from is therefore affirmed.

State of Louisiana v. *Leroy Boice,* No. 25,665. *Appeal from the Ninth Judicial District Court, Parish of East Carroll; F. X. Ransdell, Judge.*

C. J. O'Neill, J.:

Appellant stands convicted of murder and condemned to hang.

The most important bill of exception in the record was taken to the overruling of a plea of insanity. The plea was not that defendant was insane when the homicide was committed, but that he was insane when called for arraignment.

The plea was heard and decided by the judge. That is how it should have been disposed of, according to our ruling in *State* v. *McIntosh,* 136 La. 1000, 68 South. 104.

The testimony on the question of insanity was taken down stenographically and transcribed, and is annexed to the bill of exception, for our consideration, all in compliance with the Act 113 of 1896. A plea of *present insanity* does not pertain directly to the question of guilt or innocence of the party accused. Therefore, it presents one of those questions of fact to be decided by the judges, not the jury.

An examination of the testimony convinces us that appellant was insane when his plea was filed. The only dispute was in the diverse opinions of the three doctors who testified on the subject. Two of them thought the man was sane; the other thought he was insane. All of the laymen who testified expressed the opinion that the man was insane, and some of them gave substantial reasons for the opinion. Our own opinion is founded upon the undisputed facts of the case. Appellant is a colored man who was always of very low order of mentality, not far above idiocy. He is now 22 years of age, and has syphilis in its third stage, characterized by an eruption all over the body, with the ordinary by-products, tabes dorsalis, or locomotor ataxia, and paresis. The reaction on a Wasserman test was "four plus," which, we judge from the expert testimony, shows that the disease has already destroyed much of the brain tissue. Besides, the man is an onanist and was unashamed of it in the presence of his comrades in jail. The disgusting facts of the case convince us that the defendant is insane. The two phyicians who believed that he was sane prefaced their testimony with the frank admission that they had had only one interview with the defendant in this case.

The verdict and sentence are annulled, and it is ordered that this case be remanded to the district court with instructions that the defendant be committed to the insane asylum to await retrial if he becomes sane.

Vicksburg, Shreveport and Pacific Railway Co. v. *Ned Bradley, et al.,* No. 24,587. *Appeal from the Seventh Judicial District Court, Parish of Richland, John R. McIntosh, Judge.*

C. J. O'Neill, J.:

This is an appeal from an ex parte order granting a preliminary injunction on bond. The allegation on which the writ was issued was that plaintiff had been disturbed in the actual and real possession which plaintiff had had of a tract of land for more than a year. Under the fifth paragraph of Article 298 of the Code of Practice, plaintiff was entitled to the writ of injunction on the face of the petition as a matter of right, on furnishing the required bond. The judge had no discretion in the matter.

There was no motion to dissolve the injunction, on bond or otherwise. The appeal was asked for four days after the writ had been issued; and the appeal was granted without notice to the plaintiff. The order was for either a suspensive or a devolutive appeal; and, from the fact that the appeal bond was fixed at $3,001 for the so-called suspensive appeal and at only $100 for a devolutive appeal, we assume that the judge intended that the so-called suspensive appeal, on a bond of $3,001, should have the effect of dissolving the injunction and allowing the alleged trespass to go on while the case would be pending on

appeal. The appellant also construed the order of appeal that way, and gave bond for $3,001, calling it a suspensive appeal bond.

Appellant was not entitled to an appeal from the order of injunction, because it could not have caused irreparable injury. There is no right of appeal from an interlocutory order that cannot cause irreparable injury. The judge should not have dissolved the injunction by his indirect method of granting a so-called suspensive appeal. A suspensive appeal, as its name implies, only maintains the status quo. It does not undo what has been rightfully done in execution of the judgment or order appealed from. When a preliminary injunction has been issued and is in force, a devolutive appeal from the order granting the writ does not afford appropriate relief, and is not a proper substitute for a motion to dissolve the writ.

Appellee has moved to dismiss this appeal on the ground that there is no right of appeal from an order of injunction granted under authority of Article 298 of the Code of Practice. We doubt that a motion to dismiss the appeal was necessary; for a dismissal of the appeal is a more appropriate way of disposing of the case that an affirmance of the order appealed from would be.

The appeal is dismissed at appellant's cost.—From *Louisiana Legal News,* April 10, 1923.