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Criminal Law Case Notes and Comments: Abstracts of Recent Cases

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*in.*³⁴ For example, in a negligence action an issue arises concerning the color of a traffic light at the time of an accident. Witness *A* testifies that the light was red. Police officer *X* testifies that shortly after the accident *A* told him the light was green. If *X*'s testimony were being offered for the truth of the assertion as to the color of the light it would clearly be inadmissible as hearsay. But if *X*'s testimony is offered merely to prove that *A* is not to be believed because he has made contradictory statements outside of the court, the testimony is admissible, the hearsay rule being inapplicable. The same principle applies to the use of books on cross-examination. A witness who testifies as an expert must qualify for the title of expert, and in order to do so he must be acquainted with the literature of his field.³⁵ For that reason, when counsel uses a book upon cross-examination the issue is not whether the book states the true opinion of the author, or even whether the author was correct in his opinion, but whether an expert witness is familiar with the literature in his field and whether he has honestly and intelligently read and applied what is set down in the literature. The competent expert will be able to explain away an inconsistency between his testimony and the opinions contained in books. His prestige and value to the jury will be enhanced, not diminished, by so doing. On the other hand, the expert underserving of the title will be readily exposed and his testimony neutralized without the cost of calling other experts for "a battle of experts."³⁶

Underlying the hearsay argument there seems to be a fear on the part of the courts that once books are allowed as an aid in cross-examination a harvest of literature will follow, written with an eye to litigation. Two important factors, often overlooked, exist why such fears may be allayed. First, those states which allow the use of books do so subject to the trial judge's discretion.³⁷ It would not be too difficult for the trial judge to recognize, and exclude, a book written solely for litigation. Secondly, if books are used in cross-examination they may be used to rehabilitate the expert's opinion upon re-direct, even though such books were not originally admissible.³⁸ This latter factor will act as a deterrent against counsel making promiscuous use of books upon cross-examination.

Abstracts of Recent Cases

Habeas Corpus in the Federal Courts: *Wade v. Mayo* Overruled?—Must a person who has been denied a writ of habeas corpus by the highest state tribunal petition the United States Supreme Court for certiorari before a lower federal court can consider his application for habeas corpus on its merits? This question was before the United States Supreme Court in *Wade v. Mayo* (334 U.S. 672) and was reconsidered recently in *Darr v. Buford* (339 U.S. 200). Here the petitioner, an inmate of the Oklahoma state penitentiary, had applied to the Oklahoma Court of Criminal Appeals for habeas corpus on the grounds that he did not have sufficient funds to procure counsel

34. For an excellent discussion of hearsay see Comment, *Res Gestae and the Hearsay Rule in Illinois*, 42 Ill. L. Rev. 88 (1947).

35. *State v. Burnette*, 28 N.D. 539, 150 N.W. 271 (1917).

36. Austin, *Some Rules Governing the Examination of Witnesses in Illinois*, 19 Ill. L. Rev. 57 (1924).

37. See note 18 *supra*.

38. *Yarn v. Ft. Dodge, D. M. & S. R. Co.*, 31 F. 2d 717 (8th Cir. 1929); *Hemminghaus v. Ferguson*, — Mo. —, 215 S.W. 2d 481 (1948); *State v. Bess*, 60 Mont. 558, 199 Pac. 426 (1921); *McCourt v. Travers*, 87 N.H. 185, 175 Atl. 865 (1934). *Contra*: *New Jersey Zinc & Iron Co. v. Lehigh Zinc & Iron Co.*, 59 N.J.L. 189, 35 Atl. 915 (1896).

of his own choosing, and that he had not been given sufficient time to procure and prepare witnesses for his defense. The writ was denied by the state court on the merits. No application was made to the United States Supreme Court for certiorari. The petitioner then filed in the federal District Court for habeas corpus where the writ was denied on the grounds that application for certiorari to the Supreme Court is necessary before a lower federal court can hear such a petition. Certiorari was sought on this question and was granted by the Supreme Court.

In affirming the decision by the District Court Mr. Justice Reed, writing for the majority, emphasized the fact that the "responsibility to intervene in state criminal matters rests primarily upon this Court" and that the Court should be given the opportunity to consider any charges that state action has infringed upon the defendant's federal constitutional rights.

Wade v. Mayo had passed upon a similar question with a contrary result. While the Court in the present case did not expressly overrule that decision, it did state that "whatever deviation [the *Wade* case] may imply from the established rule [as indicated in the instant case] will be corrected by this decision." It is interesting to note that the Court did not make this rule too rigid, stating that special circumstances may exist which would justify a departure. Whether such special circumstances exist and create an urgent situation wherein a petition for habeas corpus should be heard without prior certiorari to the Supreme Court is a question for the District Court to decide.

Mr. Justice Frankfurter, writing the dissent, attacked the majority opinion on several grounds. The principal question before the Court, claimed the dissent, was simply whether *Wade v. Mayo* should be overruled. That case was given the utmost consideration, and should be adhered to unless the rule established therein proved itself to be "mischievous in practice." According to the dissenting opinion, the rule laid down by the majority must mean one of two things: (1) that a denial of certiorari would serve as an adjudication on the merits (unlike other denials) and thus act to limit the discretion of the District Courts when hearing the petition for habeas corpus, or (2) such denial would have no legal significance. If the former alternative is correct it would behoove the Supreme Court to give full consideration to every petition in this type of case, casting a new burden on the Court. The second alternative would simply "announce that a meaningless step in this Court is an indispensable preliminary to going to the local District Court." (For a discussion of the exhaustion of state remedies as affecting habeas corpus writs in the Federal Courts, see Vol. 39, page 357 of this *Journal*.)

Privileged Communications Between Attorney and Client—Defendant was charged with conspiring to stuff ballot boxes in a national election. On conviction, he appealed on the grounds that the District Court erred in permitting testimony regarding a confession made by him to one Judge Ardery, claiming that his conversation with the judge was a privileged communication. It appeared that Judge Ardery (of the Judicial Circuit of Kentucky), who had been a life long friend of the defendant, had decided to call a grand jury investigation regarding election frauds in the county. The evening before the investigation was launched the defendant called upon the judge for advice, and during the course of their conversation confessed to stuffing the ballot box. The District Court, in permitting the judge to testify as to the confession, held that one who

seeks the advice of the judge of the court in which his case is to be tried is not entitled to the privilege given confidential communications between attorney and client. The Circuit Court of Appeals, in affirming the decision of the lower court, pointed out that the witness was the presiding circuit judge of the county and as such was bound by ethical standards, if not legal, not to enter into an attorney-client relationship with a person whose conduct was about to be investigated by a grand jury. Citing Canon 24 of the American Bar Association, the court quoted: "A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions." Coming to the conclusion that the witness did not stand in the relationship of an attorney with the defendant, the Court found that the privilege did not exist, and the witness could testify as to the confession made to him. (*Prichard v. U.S.*, 181 F. 2d 326.)

State Control of Gambling as an Exercise of the Police Power—The legislature of the state of Florida enacted a statute which made it unlawful for any public utility knowingly to furnish any private wire to be used in the dissemination of information in the furtherance of gambling. Complainants sought a declaratory judgment in the Supreme Court of the state asking that such law be declared unconstitutional because it infringed upon federal power to regulate interstate commerce. In holding that the statute was valid the court pointed out that although the transmission of the results of baseball games, prize fights, horse races and other sporting events from other states was of interstate character, "it does not follow that when the information conveyed is used to bet on a horse race it becomes an article of interstate commerce as contemplated by the Federal Constitution. In fact, when the information is released for the purpose of wagering, it may then be like the articles in a package when broken, they forfeit their interstate character and are subject to state regulation." The court noted that speed of transmission was the essential difference between relaying sporting results by newspaper and by wire, and that transmission by wire was an important element in modern organized gambling. Certainly the state, through its inherent police power, could take steps to cope with this menace to the welfare and morals of its people. The use of the police power in this type of situation would not be curtailed by the commerce clause unless it is "shown to disrupt lines of communication essential to uniformity," and that dissemination of betting information "does not reach this dignity." Such control of gambling information is essentially a domestic regulation and will not be interfered with unless it is shown to be "arbitrary and unreasonable." (*McInerney v. Ervin*, 46 So. 2d 458.) (For an excellent discussion on the suppression of bookie operations by denial of telegraph and telephone services, see Vol. 40, page 176 of this *Journal*.)
