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Abstracts of Recent Cases

take notes, and instructed in their proper use;[15] but it should be made clear to them that the taking of notes is optional with each one of the jurors. The notes should be kept brief, and cover points the juror will want to remember in his deliberations. They are not evidence, but an aid in refreshing memories.

If the matter is left discretionary with the trial court, there is the possibility that the court will forbid note-taking in those cases when the need is the greatest. The court in all cases should let the juror decide for himself.

ABSTRACTS OF RECENT CASES

Mandatory Death Sentence for Lifers Committing Assaults Declared Unconstitutional—In *Ex Parte Wells,* 99 F. Supp. 320 (N.D. Col. 1951), the Federal District Court declared as violative of the Fourteenth Amendment a California statute imposing a mandatory death sentence upon a "person undergoing a life sentence . . . who, with malice aforethought, commits an assault with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury." The statute had originally been sustained in *Finley* v. *California,* 222 U.S. 28 (1911), on the theory that it was reasonably designed to protect prison personnel and inmates from attack by "lifers" who might be moved to violence by their plight. Subsequent to that decision, however, the state passed an Indeterminate Sentence Act granting to a body known as the Adult Authority the power of fixing a convict's sentence between a statutory maximum and minimum. No particular time was established within which the Authority might act and so in the case of a prisoner incarcerated for a maximum sentence of life, the Authority could defer action indefinitely. Here, the petitioner Wells was committed for a crime with a maximum term of life and at the time he perpetrated his assault the Adult Authority had made no disposition of his case.

The Federal court found that the crimes carrying a possible sentence of life imprisonment were not all crimes of violence nor did they include all such crimes found in the California penal code. The court further found that there were many reasons unrelated to a prisoner's propensity for violence which might delay action by the Adult Authority in a particular case. On the basis of these findings the court concluded the statute violated the Fourteenth Amendment because the classification employed is not based upon a substantial distinction between those within the statute and those without it.

Prior to this decision by the Federal District Court, the Supreme Court of California had affirmed Wells' death sentence, holding the statute does apply to those who might receive a life sentence. Certiorari was denied, but the District Court held this action did not preclude its present ruling.

Physician Allowed to Invoke Attorney-Client Privilege—The plaintiff in *City & County of San Francisco* v. *Superior Court,* 231 P. 2d 26 (Calif. 1951),

15. This approach has not been used in any reported criminal case, but was used in a civil case, Corbin v. Cleveland, 74 Ohio App. 199, 57 N.E.2d 427 (1943). Over the objection of counsel the court had instructed the jury that as a matter of trial procedure they could take notes, and he then furnished them pencils and papers and instructed them in the proper use of notes. It was held that this was prejudicial error, and the case was reversed. The court held that a juror can take notes on his own volition, and then the court, in observing this, has discretion to permit or forbid it.

It would appear that the trial court was exercising its discretion, in instructing the jury they could take notes. A juror could still exercise his own volition. The distinction between the court exercising its discretion before a juror has taken notes, or only after the juror has taken notes on his own, is invalid.

sued to recover for brain and nerve injuries he purportedly had received as a result of the defendant's negligence. As an aid to the preparation of the case, the plaintiff's attorney requested a physician specializing in nervous and mental diseases to examine his client. At the trial the court refused the defendant's request that the physician be ordered to disclose the findings of his examination. A mandamus action was then instituted to force the trial court to obtain the desired testimony. The California court held that the physician-patient privilege could not be invoked, but the witness could properly refuse to testify on the grounds of an attorney-client privilege. The former privilege, although recognized in California, is waived whenever an individual institutes a suit to recover for personal injuries sustained; the purpose of the privilege is only to prevent humiliation attendant to publicizing one's maladies and that purpose no longer exists when suit is brought as the ailments are disclosed. The court did find the physician under the aegis of the attorney-client privilege because the examination was made solely to communicate the plaintiff's condition to the attorney and thus the doctor was in effect the plaintiff's agent for the transmittal of this information. The opinion explicitly states that any examination made either prior or subsequent to the time the physician was requested to act as an intermediary between the plaintiff and his attorney is not within the scope of the attorney-client immunity.

Accused Must Have Counsel During Lunacy Inquisition—The Criminal Code of the District of Columbia provides that if before a trial an accused appears insane, proceedings are to be stayed, and he is to be committed for psychiatric observation. If the examination indicates an unsound mind, the court is empowered to impanel a jury and hold a lunacy inquisition. In *Evans v. United States,* 20 U.S.L. Week 2166 (U.S. Oct. 30, 1951), pursuant to this statute the defendant was committed for psychiatric diagnosis and found to be suffering from paranoia. The court thereupon held the required lunacy hearing but failed to supply the accused with counsel allowing him to represent himself. The Municipal Court of Appeals for the District of Columbia reversed the proceedings because of the failure to appoint an attorney for the defendant. The court stated that if the Sixth Amendment was applicable, a defendant might waive its protection; however, one in a paranoic state because he is afflicted with systemized delusions of persecution and grandeur is incapable of properly defending himself and therefore cannot waive counsel. The court further held that in the strictest sense this proceeding was not within the ambit of the Sixth Amendment, but in substance the lunacy proceeding was but one step in the criminal process. The criminal charges were merely held in abeyance until a determination of the accused's sanity was made. It is not clear from the report whether the holding ultimately rests upon the Sixth Amendment, the supervisory power of the court or the common law.

Prosecution Must Allow Accused Time to Procure Counsel—The defendant in *Melonson v. O'Brien,* 20 U.S.L. Week 2175 (U.S. Oct. 6, 1951), requested that the prosecution postpone trial so that the defendant might obtain counsel. The prosecutor denied the request and also failed to bring the matter to the attention of the trial judge. The court ruled that failure to grant such a postponement is a denial of due process of law even if the record discloses the evidence of guilt to be overwhelming. The cases holding that an accused

is not entitled to counsel from the state in non-capital cases were distinguished because here the accused had the necessary funds and desired only an extension of time to obtain counsel.

Accused Must Be Present At Jury Impanelling—The California Supreme Court has ruled that it is a violation of its state constitution for an accused to be absent during the impanelling of the jury. Although the selection was made by stipulation of the accused's counsel and was later approved by the defendant upon his return to the courtroom, the court in *People* v. *Burns*, 20 U. S. L. Week 2042 (U. S. July 31, 1951), held that the right to "defend in person," found in Calif. Const. Article I, §13, was violated. The opinion states that the defendant might well have been better informed about the prospective jurymen than was his counsel. The decision is in accord with other state holdings. *Cf. State* v. *Smith*, 90 Mo. 37, 1 S. W. 753 (1886); *Dougherty* v. *Commonwealth*, 69 Pa. 286 (1871).