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Evidence

Clinton DeWitt

that where proper bond has not been given a court is without jurisdiction to punish for contempt. However, the court's power to punish is "inherent" and, although subject to such legislative restriction as may be imposed, "no statute requires the giving of a new, additional or supplemental bond upon modification of an injunction." The original injunction remained as modified and the bond remained in full force and effect. The opinion gives no clear basis for distinguishing between a "modified" injunction and a "new" one.

The ancient equitable doctrine of "clean hands" was a part of the decision in *Hasselschwert v. Hasselschwert.*[9] The plaintiff alleged that her husband, the defendant, persuaded her that she was about to be sued and should turn over to him certain real and personal property. Later, the defendant threatened to kill her if she contested his divorce action or sought to recover her property. Now she seeks that recovery. The court of appeals held that the case presented an exception to the general rule that a grantor who disposes of property with the intent to defraud creditors cannot recover it. Because undue influence was exercised on the plaintiff and because of the confidential relationship existing between the parties (the court cited Ohio General Code Section 7999) the plaintiff-grantor may recover. The defendant cannot use the plaintiff's intent to defraud creditors to establish "unclean hands" as a defense in order to permit him "to retain property which, in good conscience, belongs to the plaintiff."

EDGAR I. KING

EVIDENCE

Appeal and Error: Sufficiency of Evidence to Justify Conviction

In *State v. Urbaytis*[1] the defendant was convicted for embezzlement of funds of his ward. The defendant had waived a jury and was tried by the court. The supreme court reaffirmed its previous decision to the effect that it is not required to, and will not ordinarily, weigh the evidence, but it will examine the entire record to ascertain whether the rule requiring proof of guilt beyond a reasonable doubt has been followed. Admitting that a reviewing court should not substitute its judgment for that of the jury, or for that of the trial court when it is also the trier of fact (as in this case), a majority of the court nevertheless were of the opinion that an examination of the entire record showed that the evidence against the accused did not reach "that high degree of probative force and certainty" which the law requires to justify conviction. Judgment reversed and the cause remanded to the trial court with instruction to discharge the accused.

[1] 156 Ohio St. 271, 102 N.E.2d 248 (1951).

Appeal and Error: Two-Issue Rule

In *Plas v. Holmes Construction Co.*[2] the court held that the Two-Issue Rule is not applicable where the errors committed by the trial court are of such a nature that they affect *all* the issues involved.

Blood-Grouping Tests

In *State* ex rel. *Freeman v. Morris*[3] the question of the admissibility of evidence of the results of blood-grouping tests to establish the paternity of the defendant in a bastardy proceeding was considered for the first time by the court. The complainant charged the defendant with being the father of her child. Evidence of the results of blood-grouping tests of the complainant, child and the defendant were admitted in evidence over the objection of the defendant. These tests tended to show that the defendant could be the father of the child. A qualified pathologist, over objection of the defendant, also was permitted to testify at length as to the results of these tests. The jury found the defendant to be the father. The court of appeals affirmed. In reversing the judgment of the court of appeals, the supreme court held that the results of blood-grouping tests which do not establish non-paternity of the defendant, but which disclose a mere possibility of his paternity, are not admissible in evidence in a bastardy proceeding. Sections 12122-1 and 12122-2 of the Ohio General Code authorize such evidence only when the results of the blood-grouping tests establish non-paternity.[4] For like reasons, the testimony of the pathologist should have been excluded.

In *State v. Snyder*[5] the cause originated in the Juvenile Court of Summit County as a prosecution for non-support of minor children. The accused filed a motion seeking an order requiring the prosecuting witness, the two children and the accused to submit to blood-grouping tests. The motion was overruled. The accused was thereupon tried and found guilty.

In the trial of the case, over objection of the accused, the state introduced in evidence the record of a judgment previously entered in action in which the plaintiff was the present complainant and the defendant was the accused herein and in which the court granted the plaintiff a divorce from the defendant. This record contained a finding that the two children were

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[2] 157 Ohio St. 95, 104 N.E.2d 689 (1952).

[3] 156 Ohio St. 333, 102 N.E.2d 450 (1951).

[4] In State *ex rel.* Walker v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1944), the court held that the results of blood-grouping tests which exclude paternity are not conclusive, but are merely further evidence to be considered by the jury. The highest court of Maryland has taken judicial notice that such tests are scientifically accurate. Shanks v. State, 185 Md. 437, 45 A.2d 85 (1945). Courts in two recent cases regard them as conclusive. Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949); C. v. C., 200 Misc. 351, 109 N.Y.S.2d 276 (1951).

[5] 157 Ohio St. 15, 104 N.E.2d 169 (1952).

born as the issue of the marriage and an order that the defendant pay $15 per week for their support. The accused testified as a witness in his own behalf in the present action and offered evidence tending to show his non-paternity. The trial court rejected such evidence for the reason that his paternity had been established in the divorce action and that the judgment in that action "... was in effect *res judicata* of the question of the obligation to support the children; .."[6]

The supreme court, however, following the well-established rule that the record of a judgment in a civil action is not admissible in a criminal prosecution to prove the facts essential to a conviction, held that the state was required to show that the accused came within the class of persons charged by statute with the duty to support and, further, that it was the right of the accused to offer evidence to prove that he did not come within that class by showing that he was in fact not the father of the children, in spite of the judgment in the earlier action for divorce. It was, therefore, prejudicial error for the trial court to refuse to permit the accused to present evidence tending to show he was not the father, and particularly in overruling his motion for an order of the court requiring blood-grouping tests in accordance with the provisions of Section 1639-46 of the Ohio General Code.[7]

Competency of Child Witness

In *State v. Wilson*[8] the defendant was charged with sexual offenses against two girls each nine years of age. The defendant pleaded not guilty, waived trial by jury and elected to be tried by the court. The prosecuting attorney procured a commission authorizing the taking of the deposition of one of the children since she was about to leave the country with her parents. Before taking her testimony, the child was sworn by the commissioner in the usual way. The prosecuting attorney and counsel for the defendant then questioned the child as to her understanding of the meaning and significance of an oath. Her answers were recorded as part of her testimony. While this examination was in progress, the proceedings were adjourned to allow the prosecuting attorney to request the presiding judge of the court, in which the case was pending, to determine the child's competency as a witness. The presiding judge ruled that he had no authority to pass on the question, and that the trial judge would have to determine it from the answers contained in the deposition. At the trial, the deposition was admitted in evidence over the objection of the defendant. He was convicted. On appeal, judgment was reversed and the case remanded.

It should be noted that the trial judge, who in this case was also the

[6] *Id.* at 19, 104 N.E.2d at 171.

[7] See note 2 *supra.*

[8] 156 Ohio St. 525, 103 N.E.2d 552 (1952).

trier of fact, had no opportunity to observe the child's appearance, her fear or composure, her demeanor and manner of answering. The supreme court held that these important observations are indispensable to a proper determination of the competency of the child and that the answers given by the child[9] and reported in the deposition did not satisfy the requirements of Section 11493 of the Ohio General Code.

It is not clear what the supreme court meant when it said: " it is the duty of the trial judge to immediately examine the child, without participation or interference of counsel. "[10] It is universally held that the competency of a witness is a question for the court alone, but it does not follow that the preliminary examination of his qualifications may be conducted by the trial judge himself, if he wishes, to the exclusion of the counsel for the parties. Although there have been some general statements to this effect by courts and text writers,[11] the better, and modern, view is opposed to this restriction upon counsel.[12] Undoubtedly the trial judge has the right and perhaps the duty to examine the witness, but he cannot deny the right of counsel also to interrogate the witness.[13]

The procedure recommended by the court in a case where the deposition of a child is taken seems questionable. The court said that if the deposition of a child is to be taken in the usual way before a notary public or commissioner outside the presence of the court, the child should first be taken before any one of the several judges of the court in which the case is pending and there be examined as to her competency. It would seem to be reversible error for any judge, in a criminal case, to conduct such a hearing in the absence of the triers of fact (in the principal case, the judge who tried the case) or of the accused. The evidence of the child should be given in the presence of the triers of fact because it is most important that they should hear the answers which the child gives and see her demeanor when she is questioned by the court or by the counsel, for that enables them to come to a conclusion as to what weight they should attach to her evidence. In England, it has been held that it is reversible error for the court in a criminal case to conduct the preliminary examination of a child, for the purpose of testing her competency as a witness, in the absence of the jury or the accused.[14]

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[9] An interesting discussion of this problem is found in McCray v. Shapiro, 116 N.Y.S.2d 436 (City Ct. New York City 1952)

[10] 156 Ohio St. 525, 529, 103 N.E.2d 552, 555 (1952).

[11] Carter v. State, 63 Ala. 52 (1879); Hughes v. G.H.&M. Ry., 65 Mich. 10, 31 N.W 603 (1887); State v. Michael, 37 W Va. 565, 16 S.E. 803 (1893). See 1 RICE, LAW OF EVIDENCE § 263h (1894)

[12] See 6 WIGMORE, EVIDENCE 299 (3d ed. 1940) and cases cited in note 2 therein.

[13] Muncie v. Commonwealth, 308 Ky. 155, 213 S.W.2d 1019 (1948).

Discovery

In *Banks v. Canton Hardware Co.*[15] the plaintiff sought an accounting for commissions allegedly earned by him while employed by the defendant as a traveling salesman. The plaintiff filed an affidavit under the authority of Ohio General Code Section 11552 in which he stated that the defendant had refused to permit him to inspect and copy certain documents and records pertaining to the plaintiff's sales, and further stating, but without any supporting facts or data whatever, that on the sales actually made by him he was entitled to commissions in the total sum of $2500. At the trial, over objection of the defendant, the affidavit was admitted in evidence and the court charged the jury that if it found that the plaintiff was entitled to recover, it was to presume that his commissions amounted to $2500. The supreme court held this was reversible error. The affidavit was insufficient in that it alleged only a general conclusion to which the documents might lead, with no allegation as to the contents of the documents themselves. If the plaintiff had stated in his affidavit a résumé of what orders he took, what type of merchandise was involved, what was the price, or other information showing his sales from which the new profits to the defendant could be calculcated, such affidavit would be admissible in evidence and presumed to be correct even though it would not have stated the exact contents of the destroyed documents. Stewart, J., said: "It would seem a fantastically foolish thing to allow a jury to presume an estimate of damages to be correct where no facts are given to support that estimate. In such a case the one making the affidavit could name any figure, however ridiculous, as his estimate of the amount due him and the jury would have to return a verdict for that amount. The mere statement of this proposition demonstrates its absurdity."[16]

Impeachment of the Jury's Verdict

In *Hutchinson v. Laughlin*,[17] an action for damages for the wrongful death of the plaintiff's decedent resulting from the alleged malpractice of the defendant, a surgeon, a verdict was rendered for the defendant by nine of the twelve jurors. At the hearing of the plaintiff's motion for a new trial, the foreman, who had signed the verdict, and two of the three jurors who had failed to sign, appeared as witnesses, at the instance of the plaintiff, for the purpose of establishing misconduct of the jury and irregularity in the proceedings. Their testimony showed that the foreman had investigated

[14] R. v. Reynolds, [1950] 1 K.B. 606; R. v. Dunne, 99 L.J.K.B. 117 (Ct. Cr. App. 1930).

[15] 156 Ohio St. 453, 103 N.E.2d 568 (1952).

[16] *Id.* at 461, 103 N.E.2d at 573.

[17] 90 Ohio App. 5, 102 N.E.2d 875 (1951).