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REPORT OF THE SPECIAL COMMITTEE ON THE JUDICIAL SYSTEM OF PHILADELPHIA COUNTY.

The movement toward judicial reform took shape at Philadelphia last spring in the appointment of a special committee by the Law Association to consider what measures should be adopted to ensure a more speedy trial of causes in local Courts. On December 3rd last the Law Association adopted a report presented by this committee whose chairman is Mr. George Wentworth Carr. The committee is to be continued with power to cause to be introduced into the next session of the General Assembly, and to take all proper measures to secure the passage of, an act adding one judge to each of the five Courts of Common Pleas of Philadelphia, and to secure an amendment to the Constitution providing for the establishment of a Municipal Court along the lines of the Chicago Municipal Court.

G. E. S.

THE RESPONSIBILITIES OF SURETIES FOR THE ACTS OF A PUBLIC OFFICER DONE COLORE OFFICII.

In the recent case of *Jersey City v. Schoppe,* 82 Atl. (N. J.), 913, where a constable was directed by a writ of attachment to

attach the goods of the defendant named therein and accepted from the defendant the amount of the plaintiff's claim and costs, paid the same to the plaintiff's attorney and thereafter the defendant in the writ succeeded upon the trial of the action, and the constable failed to return to him the money deposited, it was held in a suit upon the constable's bond for a forfeiture thereof that the acts of the constable were not performed in the furtherance of his duty as prescribed by law, but were performed unofficially, or *colore officii,* and that his sureties were therefore not subjected to liability on the bond.

The distinction between acts of an officer done *colore officii,* and *virtute officii,* is stated in *People v. Schuyler,* 4 N. Y., 187, "Acts done *virtute officii* are where they are within the authority of the officer but in doing them he exercises that authority improperly or abuses the confidence which the law reposes in him; while acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them."

The jurisdictions which support the doctrine of the principal case say that the contract of the sureties is to be strictly construed; that they are not liable for anything not within the letter of their contract.

The Court in the case of *Bank v. Zeigler,* 49 Mich., 157, states, "The obligation is *strictissimi juris,* and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent."

The sureties do not bind themselves to protect the public against every act of their principal, nor do they become his sureties to keep the peace. *State v. Conover,* 4 —— (N. Y.), 228.

The theory on which the doctrine of the principal case is based is well stated in the case of *Inman v. Sherrill,* 116 Pac., 426. The Court says, "Where an officer, while doing an act within the limits of his official authority, exercises such authority improperly or exceeds his official powers or abuses an official discretion vested in him, he becomes liable on his official bond to the person injured. But where he acts without any process and without authority of his office in doing such act, he is not considered an officer, but a personal trespasser."

The fact that the officer represents himself to be acting officially, or that he assumes to act *virtute officii,* does not stop his sureties from showing the contrary. *Governor v. Pearce,* 31 Ala., 465.

Many cases which are quoted as following the doctrine of the principal case would seem to regard certain acts as not having been done *colore officii* which in other jurisdictions might be so construed. In the case of *State v. Clausineirr,* 154 Ind., 599, it is held that a sheriff does not act officially in sending photographs of an accused person to police departments, etc., whereby the accused is held up to the world as a criminal, and his sureties are not liable on his official bond for such acts.

An official bond is not an engagement for general good behavior on the part of the principal, nor an undertaking that he shall in all things keep the peace, but rather a limited and literal contract to the effect that such officer will not violate some duty resting on him as a public officer. *Gerber v. Ackley,* 37 Wis., 43.

On the other hand, it is held by many Courts that the sureties on the bond of such an officer are liable not only for his defaults in acts done *virtute officii,* but also for his acts done *colore officii.*

It is the undertaking of the sureties that their principal will well and faithfully execute the duties of his office, and he cannot be deemed to have done so when he seizes the property of a stranger or levies upon property exempt from execution. There is, therefore, such a breach of the condition of the bond as renders the sureties liable. *Mechem on Public Officers,* Sec. 284. It is stated in *Campbell v. People,* 154 Ill., 595, that the object of requiring official bonds is to obtain indemnity against the use of an official position for the wrongful acts done under color of office.

By an official act is not meant a lawful act of the officer in the service of process. If so the sureties would never be liable. It means any act done by the officer in his official capacity, under color or by virtue of his office. *Turner v. Sisson,* 137 Mass., 191.

Of course, there is no doubt that if there is no connection between this wrongful act and his official capacity or line of duty, his bondsmen are not liable. *Greenberg v. the People,* 225 Ill., 174.

The Supreme Court in the case of *Lamman v. Feusier,* 111 U. S., 17, reviews the authorities and enunciates the doctrine that

the wrongful acts of a public officer *colore officii* are official acts for which the sureties upon his bond are liable.

The Courts which hold that the sureties are liable for the act of the officer if done *colore officii* are not uniform as to the liability of the surety if the officer acts under a void writ.

The proper criterion is stated to be, "That when the act of the officer is done not *virtute officii,* but *colore,* the bondsmen are liable only when the illegality is an abuse of authority as distinguished from a usurpation." *State v. Dierker,* 101 Mo. App., 636. The decision in this case was that the sureties were not liable for the reason that the arrest complained of was not *colore officii,* although the officer thought he was acting officially, the arrest having been made without a warrant for a misdemeanor not committed in his view, and his bond having been conditioned merely for the faithful performance of his duty.

But it was held in the case of *State v. Edmundson,* 70 Mo. App., 172, that where a sheriff levied on the property of another, believing a mere memorandum of costs gave him authority to do so, it amounted to an act done *colore officii,* for which his sureties were liable.

The Supreme Court in the case of *Lammon v. Feusier, supra,* which is a leading case supporting the doctrine *contra* to that of the principal case, is cited in the case of *Lee v. Charmley,* 129 N. W. (N. D.), 448, as supporting the conclusion that color of office does not imply necessarily that an officer has a valid writ, or in fact, any writ at all.

But Judge Thayer in the case of *Chandler v. Rutherford,* 101 Fed., 774, says: "To constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorizes the act to be done without process, then there is no such color of office as will enable him to impose a liability upon the sureties in his official bond."

In some of the States the matter has been made the subject of express statutory regulation. Thus in Alabama it has been enacted that the sureties are liable for acts done *colore officii* as well as acts done *virtute officii.*

The doctrine of the principal case is not only *contra* to the great preponderance of authority, but cannot be supported by the soundest reasons of policy. *Mechem,* Sec. 284.

The almost uniform doctrine of the Courts is that the sureties on the bond of a public officer are liable not only for his default in acts done *virtute officii,* but also for his acts done *colore officii.*

LIABILITY OF THE INDORSER ON A NOTE WHEN THE HOLDER FAILS TO PRESENT THE NOTE, WHEN DUE, TO THE MAKER. PRESENTMENT AND DEMAND BY TELEPHONE.

On the day a note matured, made payable at the maker's residence, the cashier of the bank called the maker up at his residence by telephone, and stated to him that the bank held his note for collection. The cashier described the note which he had in his possession at the time, and asked the maker what he would do with the note. The maker replied that he would not pay it. The note was protested without further presentment, and notice of protest mailed to the defendant, now sued as indorser. The upper court reversing the lower court held, that the demand and presentment by telephone was inadequate to hold those secondarily liable. *Gilpin v. Savage,* 201 N. Y., 167.

The plaintiff in the principal case is seeking to hold the indorser, who pleads lack of presentation and demand upon the maker. Sec. 133 of the *Neg. Inst. Law of New York,* provides that an instrument is presented at the proper place when presented at the place of payment specified therein. If due presentment is not made at the place specified in the note the indorser is discharged from all liability. The question before the court is whether from the facts and circumstances of the case, sufficient presentment and demand has been made upon the maker to satisfy the statute and render the indorser liable.

The relation between maker and indorser of a note, or negotiable paper, is a contractual relation. The effect of the statute is to make the indorsement conditional upon due presentment, demand, and notice. The indorser may waive this condition; it would be a solecism however to permit another person to waive away the rights of the indorser. Therefore if one indorser writes a waiver over his name it does not affect another, and any agreement between the maker and acceptor will not bind the indorser, unless he adopts it as his act.

When presentment of a bill or note, at maturity has been dispensed with by prior agreement between the parties entitled to require it, the holder is excused for failure to make it. The waiver may be in writing, or verbally, or inferred from the words, or acts, of the parties. Sometimes the waiver is embodied in the instrument itself, in such cases the waiver is a part of the contract of every party who signs it.

The right to have the note presented for payment at the place specified therein is a personal right of the indorser and cannot be waived by another party. When not expressly or impliedly waived it is the duty of the holder to go through all the formalities in order to hold those secondarily liable. It has been well established that presentment of a bill, or note, and demand of payment should be made by the actual exhibition of the instrument either by the holder, or his authorized agent, in order to charge those secondarily liable. Presentment to the maker enables him to judge as to the genuineness of the instrument; of the right of the holder, to receive payment; and enables him to reclaim possession of it upon payment of that amount. As a general rule, if the holder does not produce the note, the maker may decline to pay it until presented. In the case of *Warning v. Belts,* 90 Va. 46, the court said that if on demand of payment, the exhibition of the instrument is not asked for, and the party to whom demand is made declines on other grounds, a formal presentment by the actual exhibition of the paper is considered as waived. This seems to be the general rule in cases where the holder has the note in his possession when he makes a personal demand for payment.

Any material alteration of the indorser's contract or non-compliance with its terms, releases him from all liability. In the case

of *Woodworth v. Bank,* 19 Johns, 391, it was held that the addition to a promissory note payable generally, of words specifying a particular place of payment, was a material alteration of the contract into which the indorser had entered which discharged him from all liability as indorser. In the case of *Parker v. Stowd,* 98 N. Y., 379, it was held that a demand of payment at the place named in the note is an essential part of the contract so far as the indorser is concerned, no right of action accruing to the holder until after demand has been made in strict compliance with the terms of the contract, and due notice of default given.

The decision of the principal case seems to be justified on principle. A valid presentment consists of something more than a mere demand. There must be an actual exhibition of the instrument itself, or the holder of the note should have it in his possession ready to deliver it upon payment. This rule implies physical presentment of the note to the maker before the indorser can be held. Were this not so, a holder in New York could demand payment of the maker in Chicago by telephone, defeating the right of indorser.

DOES MARRIAGE ALONE EMANCIPATE A MALE MINOR?

This question has been presented to the Michigan court and answered in the negative, in the case of *Austin v. Austin,* 132 N. W., 495. The defendant in this case was committed for contempt in not obeying an order of court, ordering temporary alimony to be paid by the defendant to his wife, who was bringing an action against him for absolute divorce on the ground of extreme cruelty. Both parties were still minors. They had lived since their marriage on the farm of the defendant's father. The defense set up in the lower court, but not allowed by it, was that the defendant had no property and had never been emancipated, so his father was entitled to and did receive all the defendant's wages—making it impossible for him to obey the court's order. The Circuit Court ordered him to pay, saying it was his duty to support his wife, and pay the expense of the litigation, notwithstanding his minority. From this order he appealed, and the Supreme Court reversed the decision, accepting the defense. The opinion is very brief and unsatisfactory. The judge reading the unanimous

decision of the court, said: "The defendant has not been emancipated unless the marriage of itself effected an emancipation. If this were a case of first impression, I should agree with the Circuit Judge, that the lawful marriage of minors emancipates both; but I have reluctantly come to the conclusion that such a view is foreclosed by the decision of this court in *People v. Todd,* 61 Mich., 234. That opinion can only be sustained upon the ground that marriage alone does not emancipate a male minor." This is the entire opinion; no reason is given except *stare decisis,* against their better opinions now. Nor are any cases cited in the opinion but the single Michigan case *supra.*

The case they follow so "reluctantly" in the principal case was decided in 1886, and was not a clear cut decision, nor deserving of their strict adherence, against their own impressions and the weight of authority. In this case, Todd, the minor husband, was being prosecuted criminally as a disorderly person under a statute, for not supporting his wife, although it was alleged he was able to do so. The case was decided against the state in a very scanty opinion, the court merely saying:—"Upon a careful scrutiny of the testimony we discover no legal testimony to show that respondent was emancipated or that he owned property." As this ability to support was essential for the state to prove, the case was dismissed. But in this case, the court says the marriage is being contested as void for duress in another action. So a legal valid marriage was not proven, so as to raise clearly the question of its effect. The state did not even prove Todd was earning anything, or had any property which his emancipation would affect, if there had been an emancipation. On the whole, it seems as though this case is too doubtful and vague on this point to bind the court slavishly twenty-five years later, against its own good judgment and practically the entire weight of judicial authority in this country and in England.

It is to be kept in mind all through this discussion that in the principal case the emancipation was only considered as to its effect against the father—as to his rights to the earnings of his son. As to its effects as to third parties, in removing the disabilities of a minor, in respect to contracts, deeds, etc., courts have not gone so far, nor have they agreed. Texas says it emancipates either a male or female minor from parental control—as it did

under both Spanish and Mexican law—but does not remove disabilities of a minor as to contracts and real property. *Burr v. Wilson,* 18 Tex., 367; *Grayson v. Lofland,* 21 Tex., Civ. App. 503; *Trammel v. Trammel,* 20 Tex., 406. By a Texas statute of 1848, a minor female who marries is thereby made of full age, but this statute does not cover males. *Burr v. Wilson, supra.* Nor does marriage give a male minor "political or municipal rights" of an adult. *Inhabitants of Taunton v. Inhabitants of Plymouth,* 15 Mass., 203. But this line of cases does not support the principal one, where question was only as to the son's right to his earnings as against his father.

There is no question but at common law the father was entitled absolutely to all the earnings of his minor children, unless emancipated. 1 *Blackstone* 453; 2 *Kent Com.,* 193. And as little question that after a legal emancipation the father had no pecuniary interest in his child's earnings. *Morse v. Welton,* 6 Conn., 547; *Lyon v. Bolling,* 14 Ala., 753; *Jenison v. Craves,* 2 Blackf., (Ind.) 440; *Bell v. Bumpus,* 63 Mich., 375; *Corey v. Corey,* 19 Pick., (Mass.), 29.

Nor does there seem to have been any question as to the emancipation of a female minor by marriage alone. *Rex v. Wilmington,* 5 B. & Ald., 525; *Charlestown v. Boston,* 13 Mass., 469; *State v. Lowell,* 78 Minn., 166; *Porch v. Pries,* 18 N. J., Eq., 204; *Aldrich v. Bennett,* 63 N. H., 415. This distinction as to the effect of marriage of a male and female minor is probably due to the fact that at common law the wife came under the dominion of her husband, and it is clear that any control by her father after marriage would be impossible and against public policy.

The courts are practically unanimous in giving like effect to the marriage of a male minor, contrary to the principal case. Schouler says:—"Marriage of an infant with his parent's consent removes him from parental control and, we may presume, gives him a right as against the father to apply all his earnings to the support of his family. Marriage without the consent of the parent ought to confer the same right upon an infant, inasmuch as the claims of wife and child in either case are paramount." *Schouler, Domestic Relations,* Sec. 267.. *Long, Domestic Relations,* Sec. 167, says "the marriage of an infant son with his parent's consent" eman-

cipates him. These authorities draw the distinction as to the effect of parent's consent, relying on the decision in *White v. Henry,* 24 Me. 531 (1845). In this case it was held clearly that the marriage of a minor son against his father's consent—he had run away to Connecticut to get married—did not take away the father's right to his son's earnings, although they were living apart. The court said such a marriage was against an express Maine statute and against public policy, for it would encourage escape from parental control and encourage improvident, early marriages. But they admit in this case, that marriage with consent would emancipate the son as to his earnings. Only one other State has been found drawing this distinction—Louisiana, which drew it in the case of a minor daughter even as late as 1901-2 in *Guillebert v. Grenier,* 107 La., 614; in the case of a minor son; *Maillefer v. Saillet,* 4 La. Ann., 375; *Balin v. LeBlanc,* 12 La. Ann., 367; *Clement v. Wafer,* 12 La. Ann., 602. This court assigns the same reasons for it as does the Maine court. But this court is clear on the point that marriage with the consent of parents emancipates both a minor son and daughter, as to parental control of earnings. *Wilcox v. Henderson,* 7 Robin (La.), 338.

The Massachusetts court in *Commonwealth v. Graham,* 157 Mass., 73, distinctly repudiated any such distinction, discussing *White v. Henry, supra,* and repudiating it. They place it on the broad, logical grounds that by the valid marriage the son becomes the head of a new family, and "his new relations to his wife and children create obligations and duties which require him to be master of himself, his time, his labor, earnings and conduct. These considerations make it necessary to hold that an infant husband is entitled to his own wages so far as they are necessary for his own support and that of his wife and children, even if married without his father's consent."

The principal case cannot seek to come under the Maine and Louisiana cases as to consent, for in the principal case there is no question of consent raised at all. The minor husband and wife lived with the son's father continually, so it seems as though the father must have consented. At least the question was not raised, nor were these cases cited.

Unquestionably the authorities are solidly against the principal case when reduced to its simplest terms, namely, that marriage

of a male minor with consent does not entitle him to his earnings. The English authorities are settled that marriage alone emancipates a male minor, since 1789 at least, when Lord Kenyon in two pauper settlement cases laid down the four ways in which emancipation might be brought about—"(1) He must have obtained a settlement for himself, (2) or become the head of a family, (3) or at most he must have arrived at the age when he may set up in the world for himself"; (*King v. Inhabitants of Offchurch,* 3 Term Rep., 114); or (4) "having contracted a relation which was inconsistent with the idea of his being in a subordinate situation in his father's family." *King v. Inhabitants of Wilton,* 7 Term Rep., 355. Marriage was surely meant by (2) and perhaps would come under (4) also. If there was any doubt as to the English rule, it was settled in the case of *King v. Inhabitants of Wilmington,* 5 B. & Ald., 525, where the court said: "It is of importance to lay down a general rule for the guidance of magistrates on this subject of emancipation and the best which I can suggest is that during the minority of a child there can be no emancipation *unless he marries,* and so becomes himself the head of a family, or contracts some other relation so as wholly and permanently to exclude the parental control." *King v. Inhabitants of Etherton,* 1 East 525, lays down the same principle as to marriages.

One of the best and most logical opinions of the American courts, directly contrary to the principal case, and illustrating the reasoning on which the better rule is founded, is by the Mississippi court in *Dick v. Grissom,* 1 Freem. Chan., 428. The action was to set aside a deed between defendant and his son as fraudulent against creditors. It was alleged to have been given for services performed by the son for the father. The court said:—"It is in evidence, however, that during the period of the services, he was a married man; this was of itself a legal emancipation, and entitled him to the proceeds of his labor independent of any act of emancipation on the part of the father. When a man marries he necessarily takes upon himself the care and support of his family, and it is essential to the very structure and independence of civil society that he should, notwithstanding his minority, have control over his own actions and be entitled to apply the proceeds of his labor to the support of his family; and so I understand the law to have been settled." In *Holland v. Beard,* 59 Miss., 161,

the court reasserted its views strongly in the same direction. "From the moment of marriage the husband and wife assume towards each other, duties in the performance of which society is vitally interested, and which it will not permit to be hampered or obstructed by the assertion of conflicting rights by others."

This majority rule is laid down in the following cases also—*Vanatta v. Carr,* 229 Ill., 47 (1907); *Town of Sherburne v. Town of Hartland,* 37 Vt., 529. The latter case was approved of and followed in *Town of Northfield v. Town of Brookfield,* 50 Vt., 62, and even more clearly in *Town of Craftsbury v. Town of Greensboro,* 66 Vt., 585. New Hampshire laid down the majority rule in one settlement case; *Fremont v. Sandown,* 56 N. H., 300; and in *Aldrich v. Bennett,* 63 N. H., 415, where they said the same result followed whether parent consented or not. *Roach & McLean v. Quick,* 9 Wend., (N. Y.), 238, lays down the same rule in holding a minor husband liable for the debts contracted by his wife before the marriage, as does also the case of *State ex rel. Scott v. Lowell,* 78 Minn., 166.

It thus seems as though the Supreme Court of Michigan in the principal case followed out the rule of *stare decisis* too rigidly, following a case which it could seemingly have explained differently. It is clearly contrary to the weight of authority, reason and logic, against public policy, and decidedly against the better judgment of the court.