1956

Bills and Notes - Stolen Government Bonds Applicable Law - Burden of Proof

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RECENT DECISIONS

BILLS AND NOTES—STOLEN GOVERNMENT BONDS
APPLICABLE LAW—BURDEN
OF PROOF.

Bank of America Nat'l Trust and Sav. Ass'n v. Rocco (3d Cir. 1955).

An action was brought to recover the value of bearer bonds of the Home Owners' Loan Corporation, which were guaranteed as to principal and interest by the United States Government. The bonds were allegedly stolen by the defendant Rocco from the plaintiff bank, presented by the defendant Parnell to the defendant First National Bank of Indiana, Indiana, Pennsylvania, and by it forwarded to the Federal Reserve Bank of Cleveland. The bonds had been issued in 1934, called for redemption in 1944, and were negotiated by the defendants in 1948. The Federal Reserve Bank cashed the bonds, paid First National Bank of Indiana, and it in turn paid Parnell who turned the money over to Rocco. At the end of the plaintiff's case, the action as to the Federal Reserve Bank was dismissed. The trial was conducted on the theory that the rights of the parties and the burden of proof were governed by state rather than federal law. Judgment was entered against the First National Bank of Indiana and Parnell. On appeal the court of appeals reversed and held that the giving of instructions that the burden of proving lack of notice and want of good faith was on defendants was reversible error. Bank of America Nat'l Trust and Sav. Ass'n v. Rocco, 226 F. 2d 297 (3d Cir. 1955).¹

The calling of United States Government bonds operates only to stop the running of interest; it does not mature them so as to make them overdue thereafter.² A bona fide purchaser of bonds before due will be protected in his ownership of them notwithstanding want of title in the seller.³ However, when the bonds have been shown to be stolen the applicable state law, in this case the Negotiable Instruments Law,⁴ would place on the holder the burden of showing a bona fide purchase.⁵ The federal law, on the other

¹ Bank of America Nat'l Trust and Sav. Ass'n v. Rocco, 226 F.2d 297 (3d Cir. 1955).
⁴ The operative facts in the case occurred prior to the enactment by Pennsylvania of the Uniform Commercial Code.
⁵ "Every holder is deemed, prima facie, to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." Act of 1901, May 16, P.L. 194, ch.1, art. I, § 139.
hand, would put the burden of proving notice and bad faith of a holder of a
negotiable instrument on the claimant. Since the decision in *Erie R. R. v. Tompkins*
the federal courts apply the substantive law of the state wherein they are sitting where diversity is the basis of federal jurisdiction. But when necessary or appropriate in dealing with essentially federal matters, the federal judicial power to deal with common-law problems remains unimpaired. Therefore, the *Erie* decision did not bring within state law questions of federal power and relations requiring uniform national disposition rather than diversified state rulings. Thus, there remains an area of federal common law untouched by the *Erie* decision. In choosing the applicable federal rule the state law has sometimes been applied. In the absence of an overriding federal policy state law may be applied, especially where it furnishes "convenient solutions in no way inconsistent with adequate protection of the federal interest." But when the rights of the transferee constitute the only issue, they are determined by reference to the place where the transaction occurred.

The decision in the instant case turns on whether federal or state law is to be applied; the choice of law is the choice of outcome. Believing that the rights of a transferee of government bonds flow from the nature and character of those bonds the court of appeals has chosen to apply the federal standard of burden of proof on the strength of the *Clearfield* case, bolstered by the decision in *National Metropolitan Bank v. United States*. While the basis of jurisdiction appears to be diversity of citizenship, the mandate of the *Erie* case is presumably avoided by viewing the situation as one requiring uniformity under the rule of *Clearfield*. To do so ignores the fact that we are not concerned with the terms of the contract but rather with the defense of the First National Bank in Indiana that it

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7. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). None of the opinions examined the pertinent question of whether the burden of proof is really a matter of substance rather than procedure.


9. Clearfield Trust Co. v. United States, 318 U.S. 363, 366-368 (1943), (when dealing with the rights and duties on United States' commercial paper the need for uniformity of treatment requires the application of federal law to the nature of the obligation and to the transactions involving such commercial paper.)


13. See note 8, supra.


15. See note 11, supra.

is a holder in due course. Since this defense grows out of the circumstances of the transfer it is to be determined by the law of the place of the transfer. When the only question is the rights of a transferee of a negotiable instrument it is immaterial that the instrument is a government bond. When the rights of the United States are not involved, the application of federal law to insure uniformity of decision respecting the obligations of the United States is not required.

Joseph R. McDonald

CONSTITUTIONAL LAW—UNREASONABLE SEARCHES AND SEIZURES—INJUNCTIVE RELIEF PROHIBITING TESTIMONY OF FEDERAL OFFICERS IN STATE COURTS.

Rea v. United States (U.S. 1956).

The petitioner was indicted under a federal statute for the unlawful acquisition of marihuana based on evidence obtained by a federal narcotics agent acting under a search warrant issued by a United States Commissioner. On a motion by the petitioner, the district court suppressed the evidence on the grounds that the warrant was insufficient on its face and dismissed the indictment. Subsequently, the federal agent swore to a complaint in New Mexico and the petitioner was charged with violation of the state narcotics law. Petitioner sought to enjoin the federal agent from testifying in the state court with respect to the narcotics obtained by virtue of the improper search warrant and to direct the agent to destroy the evidence or to transfer it to another agent. The District Court for the District of New Mexico denied the motion and on appeal the Circuit Court for the Tenth Circuit affirmed. The Supreme Court of the United States reversed holding that injunctive relief could be granted on the basis of the supervisory power of the federal courts over federal law enforcement agencies. Rea v. United States, 76 Sup. Ct. 292 (1956). 1

The Constitution expressly protects the right to be free from unreasonable searches and seizures; however, the fourth amendment does not preclude the use, in either federal or state courts, of evidence so obtained. The danger resulting from such a construction was early noted by way of dictum in the Supreme Court 3 and, twenty-eight years later, the Court,

17. RESTATEMENT, CONFLICT OF LAWS §349, comment c (1934).


2. U.S. Const. amend. IV. (A similar provision is found in the constitution of New Mexico, the state in which the incidents giving rise to this litigation occurred. See N.M. Const. art. 2, §10).

in *Weeks v. United States*,4 adopted an exclusionary rule prohibiting the use of such evidence in federal courts. However, in the case of *Wolf v. Colorado*,6 it was said that the Constitution does not preclude the use of illegally obtained evidence in state courts, nor are these courts bound by the exclusionary rule, although some states have chosen to adopt it.6 In federal courts, state officers are considered strangers in so far as the use of evidence procured by an unreasonable search and seizure is concerned. Even though the search is illegal, the evidence is admissible in federal courts,7 unless a federal officer participated in the search.8 Moreover, participation by a federal agent in an illegal search does not prevent the use of the evidence in state courts not adhering to the exclusionary rule.9 Congress has authorized the issuance of search warrants and has prescribed the conditions under which they may be used.10 It has been held that the fourth amendment and legislation regulating search warrants should be liberally construed in the individual's favor.11 Pursuant to the statute, an injured party may move to suppress evidence obtained from such a search and seizure,12 providing such motion is timely,13 and the district court, in the exercise of its inherent power to discipline its officers, may grant relief.14 The lower federal courts have expressly held that retention of property under a defective warrant violates constitutional rights,15 and the person is prima facie entitled to restoration.16 Fact determination rests with the judge17 whose findings will not be reversed unless clearly erroneous.18

7. United States v. Haywood, 208 F.2d 156 (7th Cir. 1953).
8. Lustig v. United States, 338 U.S. 74 (1949); Byars v. United States, 273 U.S. 28 (1927); United States v. Haywood, 208 F.2d 156 (7th Cir. 1953); Thompson v. United States, 22 F.2d 134 (4th Cir. 1927); In re Schuetze, 299 Fed. 827 (W.D.N.Y. 1924).
14. Centracchio v. Garrity, 198 F.2d 382 (1st Cir. 1952), cert. denied, 344 U.S. 866 (1952); In re Behrens, 39 F.2d 561 (2d Cir. 1930); cf. In re Meader, 60 F. Supp. 80 (E.D.N.Y. 1945) (jurisdiction is based on property being in the custody of an officer of the court in which the proceeding was brought).
15. Freeman v. United States, 160 F.2d 69 (9th Cir. 1946); Honeycutt v. United States, 277 Fed. 939 (4th Cir. 1921).
16. Fabri v. United States, 24 F.2d 185 (9th Cir. 1928).
17. Simmons v. United States, 206 F.2d 427 (D.C. Cir. 1953); Burris v. United States, 192 F.2d 253 (5th Cir. 1951).
18. Roberson v. United States, 165 F.2d 752 (6th Cir. 1948).
Federal legislation, which is controlling in the instant case, does not permit the return of property seized under any revenue law of the United States.\(^{19}\) Property seized by state officers will not be subject to a motion to suppress, though the evidence is subsequently given to federal officers.\(^ {20}\) In addition, the Supreme Court has denied injunctive relief to a criminal defendant seeking to prevent the fruit of an unlawful search by state officers from being used in a state trial on the ground that the search deprived him of rights, privileges, or immunities secured by the federal Constitution in violation of the federal Civil Rights Act.\(^ {21}\) However, federal criminal proceedings are subject to scrutiny under the rule of McNabb v. United States.\(^ {22}\)

The court in the case under consideration has ruled on an interesting and novel question. Heretofore the outcome of search and seizure cases was dependent on the evidentiary rule adopted by the particular state. It is now possible to prevent the use of evidence illegally seized by a federal agent in a state court. Though not directly opposed, this case violates the spirit of Wolf v. Colorado.\(^ {23}\) It appears to be a recognition of the Holmes-Brandeis view that law enforcement is a gentlemanly game, wherein the commission of a foul invalidates all succeeding play.\(^ {24}\) However, there is an inherent practical limitation on this doctrine, the fact the relief is accorded through the injunctive process. A defendant, suddenly faced with the presence of a federal agent on the stand with illegally obtained evidence will hardly have sufficient time to obtain injunctive relief. Unquestionably, some restraint on the use of such evidence by federal law enforcement officers outside of the federal system is needed. However, short of Congressional action or the overruling of Wolf v. Colorado a more desirable solution might be found in an executive prohibition on testimony by federal officers based on illegally obtained evidence. Since it is the function of the executive branch of the Government to supervise law enforcement activities as such,\(^ {25}\) this would appear to be a more desirable approach. While accomplishing the same result as the injunction it would avoid a direct clash between the jurisdiction of the federal and state courts—at present a highly sensitive area.

*James A. Matthews, Jr.*

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19. 28 U.S.C. § 2463 (1952), "All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

20. Losieau v. United States, 177 F.2d 919 (8th Cir. 1949). This might be the next area to which the principal of the Rea case will be applied.


22. 318 U.S. 332 (1943).


CRIMINAL LAW—EVIDENCE—Fornication and Bastardy—Degree of Proof—Gestation Period.


In a prosecution for fornication and bastardy, the prosecutrix testified that her last intercourse with the defendant took place in September, 1953, at least 310 days before the birth of the child. The prosecutrix also testified that she had no relations with anyone else during September, October or November of 1953. The only medical testimony introduced at the trial was to the effect that the normal gestation period is 282 days, with two weeks leeway in either direction. The court, in its charge to the jury, quoted from a medical volume that pregnancy has been found to vary from 220 days to 330 days, the average being 270 days. The conviction of the defendant was affirmed by the Pennsylvania Superior Court. Commonwealth v. Watts, 116 A.2d 844 (Pa. 1955).

The offenses of fornication and bastardy were not crimes at common law, both being regarded as private wrongs (Ecclesiastical offenses), but were punishable under the early statutes of Pennsylvania. Some states consider the proceedings to be civil, and a conviction may be based on a fair preponderance of the evidence. Other states consider the proceedings to be quasi-criminal, requiring a much greater amount of evidence to support a conviction. Other states consider the proceedings to be criminal. The Pennsylvania statute is in this last category, and the defendant must be shown by positive evidence to be guilty beyond a reasonable doubt. In addition, a verdict of not guilty cannot be set aside nor appealed in Pennsylvania. In an early case, the defendant was convicted where the gestation period was established at 313 days. However, in that case it was stated that the evidence should be clear and free from doubt, and that the

1. Delee-Greenhill, Principles and Practice of Obstetrics (8th ed. 1943). This volume was also quoted in Commonwealth v. Young, 163 Pa. Super. 279, 283, 60 A.2d 831, 833 (1948).
5. See, e.g., Copes v. Malcarne, 118 Conn. 304, 172 Atl. 89 (1934); People v. Dile, 347 Ill. 23, 179 N.E. 93 (1931); State v. Reigel, 194 Minn. 308, 260 N.W. 293 (1935); Calaway v. Town of Belleville, 116 N.J.L. 377, 184 Atl. 819 (Sup. Ct. 1936).
prosecutrix should possess a character beyond reproach, and her testimony should be consistent and uncontradicted in all material facts. In a later case, the decision was left to the jury to believe either the prosecutrix or the defendant and the precautions of the early case as to the prosecutrix's testimony were not noted. In the instant case the trial court did not feel bound by the medical testimony concerning the gestation period, but in its charge to the jury preferred to take judicial notice of a medical text used in another case, stating:

"The Young case authorized the court to take judicial notice of accepted medical opinions in respect to duration of pregnancy, and the court below in this case used the same time span in its charge as that approved in Commonwealth v. Young, supra."  

It is not evident from the Young case that the court was so authorized, the medical authority in question being one of several texts used by the court in reaching its decision.

Judicial notice should not be taken of an arbitrarily selected medical authority, without at least an opportunity for the defense to refute the authority. This is especially true when the fact noticed is a material part of the case needed to convict the defendant, and not merely a collateral issue. Since both fornication and bastardy are criminal offenses in Pennsylvania, the alleged relationship by the defendant must be proved beyond a reasonable doubt. In the present case, the extreme rarity of such a long gestation period of itself raises a reasonable doubt as to the defendant's guilt. This doubt can be overcome only by giving to the testimony of the prosecutrix the highest degree of credibility. The court cannot infer that the jury in this case looked with such favor on her testimony unless the jury was explicitly made aware of the highly improbable nature of such a protracted period of gestation. An accusation of paternity is relatively easy to make, but often very difficult to refute. The Pennsylvania Superior Court seems to be adding to that difficulty.

Thomas F. Burns

16. Judge Woodside, dissenting in the instant case, cites many authorities as substantiating the conclusion that the chance of a birth being caused by intercourse 312 days earlier is less than one in a million.
CRIMINAL LAW—FELONY MURDER—HOMICIDE OF CO-FELON.

Commonwealth v. Thomas (Pa. 1955)

The defendant and Henry Jackson, the deceased, held up a grocery store. Jackson was armed but there was no evidence that the defendant was carrying a weapon. While fleeing the scene of the robbery with the grocer in pursuit, the defendant ran in one direction and Jackson ran in another. After an exchange of shots, the grocer killed Jackson and, after his capture, the defendant was indicted for first-degree murder under the Pennsylvania felony-murder statute.1 Defendant's demurrer to the commonwealth's evidence, sustained by the trial court, was reversed by the Pennsylvania Supreme Court (4 to 3) which held that a co-felon may be tried for first-degree murder under the felony-murder statute where the victim of the felony kills the other felon. Commonwealth v. Thomas, 117 A.2d 204 (Pa. 1955).2

Under the felony-murder doctrine, a murder committed in the course of certain felonies is murder as defined by the degree-of-murder statutes or as defined by common law in the absence of such statutory definition.3 All of the states except three have enacted felony-murder statutes,4 but these statutes have been construed as merely determinative of the degree and not determinative of the elements of the offense.5 Thus, "murder" as it appears in the felony-murder statutes is given its common-law meaning unless the particular state has defined the term by statute. Since "murder" has not been statutorily defined in Pennsylvania, except for a specific instance not pertinent here,6 the Pennsylvania courts have relied on the common law in determining liability under the felony-murder statute.7 Murder has been defined by the courts in Pennsylvania as the "unlawful killing of another with malice aforethought, express or implied."8 Where the killing occurs during the commission of certain felonies, malice is implied and the felony-murder doctrine applies. In order for the felon to be found guilty

4. Kentucky, Maine, and South Carolina do not have specific felony-murder statutes.
under this common-law felony-murder doctrine, the killing must be done by the defendant or by one acting in furtherance of the felonious undertaking. However, in Commonwealth v. Moyer, the Pennsylvania Supreme Court stated that it was immaterial whether the felon or the victim of the robbery fired the fatal bullet which killed a police officer. This statement was not necessary to the decision in that case since it had already been proved that the bullet actually came from the felon’s gun. Nevertheless, the supreme court in Commonwealth v. Almeida relied on the tort concept of proximate cause and on this statement in the Moyer case in finding a felon guilty of felony-murder during a robbery when an intervening police officer was shot down by police bullets.

The Almeida case stands in a unique position in its application of proximate cause to the felony-murder doctrine. Courts have solidly withstood the inroads of this tort principle due to the strict construction demanded by criminal statutes which may deprive the accused of life and liberty. Perhaps this policy of strict construction was outweighed in the Almeida case by the court’s sense of responsibility for the protection of innocent third parties. Thus, the desired result was obtained by using a portion of the tort liability concept, namely, proximate cause, without considering another major facet of the tort doctrine, the supervening cause. In the present case, there was no pressing need for the result arrived at except the court’s avowed declaration that

“For the protection and welfare of the people of this Commonwealth, the public and the Courts must stop coddling criminals, young as well as old, otherwise the terrible brutal crime wave which is sweeping our State and Country will never be halted.”

The court’s purpose is laudatory, but should not be the basis for exceeding the judicial function of interpreting existing law, particularly where such an extension renders a person subject to a penal statute by implication. Not only has the court usurped a function of the legislature in this case, but, by a perversion of the concepts of tort liability, has ventured on the thin ice of substantive due process of law.

Joseph R. Glancey

11. Id. at 184-186, 53 A.2d 736, 738, 739 (1947).
EVIDENCE—Hearsay—Inadmissibility of Hospital Records

—Recital of Cause of Injury.

Williams v. Alexander (N.Y. 1955)

Plaintiff, a pedestrian, was struck by an automobile driven by the defendant as the plaintiff was crossing a street with the traffic light in his favor. At the trial, the plaintiff contended that the defendant drove through a red light and ran into him. The defendant claimed his car was at a complete standstill and was propelled into the plaintiff when it was struck from behind by another vehicle. The plaintiff offered in evidence that portion of the hospital record pertaining to the extent of his injuries. The defendant, thereupon, over the plaintiff's objection, introduced the balance of the record, part of which contained a statement, allegedly made by the plaintiff, describing the occurrence in the manner testified to by the defendant. Plaintiff's objection that the statement was inadmissible hearsay was overruled and a verdict was returned in favor of the defendant. The appellate division affirmed, but the New York Court of Appeals by a 4-3 decision held that the admission of the plaintiff's statement was reversible error since it was not made in the regular course of the hospital's business and hence was inadmissible under § 374-a of the Civil Practice Act.¹ Williams v. Alexander, 309 N.Y. 283, 129 N.E.2d 417 (1955).²

Records and reports prepared in the course of business, profession, occupation, or avocation, if offered to prove the truth of the matter asserted therein, are excludable under the hearsay rule unless admissible under some exception created by practice or statute.³ In 1936,⁴ and again in 1953,⁵ the National Conference of Commissioners on Uniform State Laws proposed such statutes. The forerunner in this particular field, however, was New York State, whose "business entry" statute⁶ was enacted in 1928. Many jurisdictions have enacted similar legislation⁷ and are unanimous in holding hospital records to be within their scope.⁸ These statutes afford a more

¹ "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind." N.Y. Civ. Prac. Act § 374-a.


³ 5 Wigmore, Evidence § 1520 (3d ed. 1940); 4 Utah L. Rev. 327, 329 (1955).

⁴ Uniform Business Records as Evidence Act.

⁵ Uniform Rules of Evidence, Rule 63 (13).


⁷ Variations of the New York statute or the Uniform Business Records as Evidence Act have been adopted in twenty-eight states and in the federal courts.

workable rule of evidence and avoid the strict common-law rules concerning business records, further, they bring the rules of evidence nearer to the standards of responsible action outside the courts and avoid the necessity of calling countless entrants of business records as witnesses. Many courts, however, refuse to construe these statutes liberally. Particularly troublesome is the phrase “course of business.” The New York Court of Appeals in the instant case took its initial stand on the matter and followed the majority view that a strict interpretation is to be given “course of business”. Specifically, the court held that it was not the hospital’s business to inquire into the history of an injury unless such inquiry would aid in treatment or in understanding the medical aspects of the case. The dissent, on the other hand, would permit the statement in evidence as an admission against interest or would give a liberal interpretation to “course of business.”

The decision in this case is particularly striking in that it permits one who offers in evidence parts of a hospital record to object to the introduction of other parts of the same record. The plaintiff, by initially offering the record into evidence vouched for its accuracy, and yet later was permitted to successfully object to that portion of the same record which contained an admission against his interest. The majority opinion did not deal with the adverse admission problem at all, but placed its decision on a narrow interpretation of the New York statute. Exceptions to the hearsay rule (including admissions) are generally measured by the trustworthiness

10. Melton v. St. Louis Public Service Co., 363 Mo. 474, 251 S.W.2d 663 (1952); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947).

In jurisdictions other than New York, cases supporting the instant one include: Palmer v. Hoffman, 318 U.S. 109 (1943); Sadjak v. Parker-Wolfer Co., 281 Mich. 84, 274 N.W. 719 (1937); Green v. Cleveland, 150 Ohio St. 441, 83 N.E.2d 63 (1948); Commonwealth v. Harris, 351 Pa. 325, 41 A.2d 688 (1945). Business entry statutes were given a more liberal interpretation, with respect to hospital records, in Schaffer v. Seas Shipping Co., 218 F.2d 442 (3d Cir. 1955), cert. denied, 348 U.S. 973 (1955); Tucker v. Loew’s Theatre, 149 F.2d 677 (2d Cir. 1945); Bethlehem-Sparrows Point Shipyard, Inc. v. Scherpenisse, 187 Md. 375, 50 A.2d 256 (1946).

15. Watts v. Delaware Coach Co., 44 Del. 283, 58 A.2d 689 (1948); Melton v. St. Louis Public Service Co., 363 Mo. 474, 251 S.W.2d 663 (1952); Green v. Cleveland, 150 Ohio St. 441, 83 N.E.2d 63 (1948).

18. The dissenting judges in the appellate division believed the statement in question could not be admitted as an admission against interest since the transcribing physician was not called to testify. 285 App. Div. 819, 136 N.Y.S.2d 546, 548 (2d Dep’t 1955). But see 6 Wigmore, Evidence §1707 (3d ed. 1940) “... they themselves (the physicians and nurses) rely upon the record of their own actions; hence to call them to the stand would ordinarily add little or nothing to the information furnished by the memo alone.”
of the evidence offered. The admissions exception is based on the adversary theory that a party may not complain when his own assertions are introduced in evidence without cross-examination. Further, an admission by a party when offered against him is substantive evidence of the matter admitted, and the party against whom a part of a document is introduced, may, in turn, complement it by putting into evidence the remainder so that the court will have a complete understanding of the entire document. It is to be noted that the admissions exception to the hearsay rule is not limited to facts against the interest of the declarant at the time the admission is made; it is not limited to those situations involving the absence of the declarant; nor does the statement have to be made to the other party to the cause. Under the circumstances present in this case the court could have admitted the entire record by giving the statute a broader interpretation. In any event the portion of the record objected to should have been admitted as an admission against interest.

Joseph F. Monaghan

FEDERAL COURTS—DIVERSITY JURISDICTION—VENUE OF PLAINIF RFID ORPONS "DOING BUSINESS."


Plaintiff, an Indiana corporation leasing terminal facilities in Philadelphia, owned a tractor-trailer which collided with a vehicle owned by defendant, Pennsylvania Turnpike Commission, and operated by decedent Penrose Espenshade, an employee of the Commission. Frances Espenshade, his widow, was appointed administratrix of his estate and named co-defendant in this action. While both defendants would have been amenable to suit in the Western District of Pennsylvania, plaintiff, under its interpretation of section 1391 (c) of the Judicial Code, brought this action in the eastern district to recover damages allegedly sustained to its tractor-trailer as a result of the collision. Defendants moved to dismiss claiming: (1) Lack of jurisdiction, (2) failure to state a cause of action, and (3) improper venue. After determining that the commission was not an agency of the commonwealth but a separate legal entity, and that the decedent's act was being performed for the benefit of the commission, the court held that venue was proper as to both defendants on the alternate grounds that (a) where defendants reside in different districts suit may be brought in either

19. 5 Wigmore, Evidence § 1420 (3d ed. 1940).
21. 4 Wigmore, Evidence § 1048 (3d ed. 1940); Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L. J. 355 (1921).
22. 7 Wigmore, Evidence §§ 2102, 2113 (3d ed. 1940).
23. 4 Wigmore, Evidence §§ 1049, 1057a (3d ed. 1940).

district \(^3\) and (b) that Section 1391(c) of the Judicial Code \(^4\) allows a plaintiff corporation to sue in a judicial district where it is doing business. *Eastern Motor Express, Inc. v. Espenshade* (E.D. Pa. 1956). \(^5\)

Venue is the place where a court's jurisdiction may be exercised. It relates to the convenience of the parties and, as such, is often subject to their disposition. \(^6\) Venue is a personal privilege in the defendant to compel suit only in those forums provided for in the applicable venue statute. \(^7\) The privilege may be asserted or waived at the defendant's election. \(^8\) Being a privilege, it may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. \(^9\) "Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference." \(^10\) Where jurisdiction is based solely on diversity of citizenship venue is limited by Section 1391(a) of the Judicial Code \(^11\) to the district where all plaintiffs or all defendants reside. \(^12\) The residence of a corporation has traditionally been the state and district wherein it is incorporated. \(^13\) This strict notion of corporate residence has been followed in an unbroken line of decisions. \(^14\) "But the fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the

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\(^3\) 28 U.S.C. § 1392(a) (1950). Though the court stated that this section was controlling, it stated that in any event it had already found that the plaintiff corporation was "doing business" under section 1391(a). Thus the holding under section 1392(a) might very well be dictum. However, unless it is dictum the court is by implication overruling *Hawks v. Maryland & Pa. R.R.*, 90 F. Supp. 284 (E.D. Pa. 1950), which clearly stated that section 1392 is to be invoked only in those intrastate situations when the general venue statute would force the plaintiff to bring two or more suits.

\(^4\) See note 2, supra.


\(^13\) "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." *Shaw v. Quincy Mining Co.*, 145 U.S. 444 (1892), quoting Chief Justice Taney in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839).

states of their activities." 15 The legislatures, therefore, required the corporations to appoint agents for the service of process in exchange for the privilege of doing local business. Such appointment of an agent was subsequently construed as consent to be sued in the federal courts of the state as well as in the state courts.16

But under this so-called Neirbo doctrine, a corporation doing business within the state without having complied with the state law had not surrendered its immunity to suit in that state.17 This placed a premium on non-compliance with the state law. Still another difficulty was pointed up by the case of Suttle v. Reich Bros. Constr. Co.18 in which a Texas corporation and a Louisiana partnership were sued jointly by a citizen of Mississippi in the Eastern District of Louisiana. The court held that the Texas corporation was not a "resident" of the eastern district even though it had made itself amenable to suit in either district of Louisiana by complying with the law of that state requiring nomination of an agent to receive service of process. We are thus brought to the situation where a non-resident plaintiff, suing a foreign corporation doing business in the state where the cause of action arose, may be forced to sue in the state of his residence 19 or in the state of incorporation even though the logical and convenient place to sue is the district where the witnesses and evidence are available. To remedy this situation, it is submitted, Section 1391(c) of the Judicial Code was enacted.20 "Doing business" now imposes upon a defendant corporation the status of "resident," whether or not it has complied with state law. Considered thus, the section need not apply to plaintiff corporations; by definition venue applies to defendants. Rather, Congress has seen fit to accomplish legislatively what Neirbo Co. v. Bethlehem Shipbuilding Corp.21 began judicially. In other words, "... 1391(c) has merely clarified by legislation what the courts have been declaring by interpretation as to venue for corporate defendants only, broadened to eliminate any necessity or resort to waiver." 22 In construing section 1391(c) as giving a plaintiff cor-

17. Moss v. Atlantic Coast Line R.R., 149 F.2d 701 (2d Cir. 1945).
18. 333 U.S. 163 (1948). The critical issue of the case was whether the Texas corporation could be regarded as a "resident" of the eastern district within the meaning of subsection 52 of the Judicial Code which stated that if there are two or more defendants residing in different districts of the state, suit may be brought in either district. 36 Stat. 1101 (1911), 28 U.S.C. § 113 (1940) later replaced by 62 Stat. 935 (1948), 28 U.S.C. § 1391 (1952).
20. "... (A) corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." 28 U.S.C. § 1391(c) (1952).
poration the right to sue in a judicial district where it is doing business\textsuperscript{23} the court in the instant case has departed from the traditional notion of venue. And, in apparently departing from the congressional intent,\textsuperscript{24} it has done violence to the settled principle that a defendant is entitled to be sued in his own vicinage.

\textit{Joseph R. McDonald}

**REAL PROPERTY—JOINT TENANTS—RIGHT OF SURVIVORSHIP—RIGHT OF MURDERER TO ENFORCE.**

\textit{Bradley v. Fox (Ill. 1955).}

Defendant, a joint tenant with the right of survivorship in certain real estate, was convicted of the murder of his wife, his co-tenant. Action was brought by the administrator and daughter of the deceased to impose a constructive trust on one-half of the property. The complaint was dismissed by the lower court. On appeal to the Supreme Court of Illinois the court overruled the case of \textit{Welsh v. James} \textsuperscript{1} and \textit{held} that the defendant's felonious act destroyed his right of survivorship. As a result, a constructive trust was imposed on the estate so that the defendant held it as a tenant in common with the decedent's heirs at law. \textit{Bradley v. Fox}, 7 Ill.2d 106, 129 N.E.2d 699 (1955).\textsuperscript{2}

While there are certain distinguishing features between a joint tenancy and a tenancy by the entireties, their incidents as to survivorship appear to be exactly the same.\textsuperscript{3} Therefore, it is unnecessary to distinguish between the two in dealing with the problem presented in the instant decision. The general rule concerning survivorship in these forms of concurrent estates is that the survivor takes the whole estate upon the death of his co-tenant.\textsuperscript{4} However, a contrary result has been reached by many courts in those cases in which the surviving tenant has murdered his co-tenant. Thus, some courts have held that the entire estate vests in the heirs at law of the de-


\textsuperscript{24} In his appearance before the House Sub-Committee Number One, Professor Moore testified as to venue as follows: "Venue provisions have not been altered by the revision." 28 U.S.C.A., Legis. History Supp., p. 405. Also, see Moore, Commentary on the U.S. Judicial Code § 0.03 (28) pp. 193, 194 (1949); 1-a Ohlinger, Federal Practice 297 (rev. ed.).

1. 408 Ill. 18, 95 N.E.2d 872 (1950).
ceased since equity will not allow a person to profit from his own wrong.\(^5\) Practically speaking, the same result is reached in those cases which impose a constructive trust on the entire estate held by the murderer for the benefit of the heirs of the deceased.\(^6\) This doctrine has been modified by permitting the surviving co-tenant to enjoy the use of the property during his lifetime, holding the remainder as a constructive trustee for the benefit of his victim's heirs.\(^7\) On the other hand, many jurisdictions allow the whole estate to pass to the survivor, notwithstanding his felonious act, on the theory that he was possessed of the complete estate from the time of the original grant.\(^8\) Most courts, however, prefer a middle ground. Therefore, it has been held that the survivor of the concurrent estate becomes a tenant in common with the heirs of the deceased,\(^9\) or, a constructive trustee of one-half of the estate for the benefit of such heirs.\(^10\) A somewhat novel solution was reached in Sherman v. Weber.\(^11\) In that case the court reasoned that while the husband had the fee as survivor, the heirs of the murdered wife should receive the income from one-half of the estate for the length of the wife's life expectancy which was shorter than that of her husband. Conversely, some jurisdictions merely permit the malefactor to receive one-half of the net income of the property for life, the complete estate going to the heirs of the victim upon the murderer's death.\(^12\) Substantially the same result is reached in Pennsylvania by virtue of the Slayer's Act.\(^13\)

The difficulty lies in the conflict between the equitable maxim refusing to permit a person to profit from his own wrong and those provisions of the various state constitutions which forbid forfeiture of estate for a criminal act.\(^14\) Those courts which permit the felon to take the entire interest in the estate rely on the fiction that the whole estate is vested in the co-tenant at the time of the grant and therefore the survivor takes nothing new. On the other hand those jurisdictions which completely divest the survivor of his interest disregard the fiction and rely solely on equitable principles. Neither of these positions is as persuasive as those cases which

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5. Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y. Supp. 176 (4th Dep't 1935); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y. Supp. 173 (Sup. Ct. 1918); In re King's Estate, 261 Wis. 266, 52 N.W.2d 885 (1952). Some significance might be attached to the fact that in these cases the slayer took his own life immediately after the murder of his spouse.


9. Ashwood v. Patterson, 49 So. 2d 848 (Fla. 1951); Buduit v. Herr, 339 Mich. 265, 63 N.W.2d 841 (1954); Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948).


11. 113 N.J. Eq. 431, 167 Atl. 517 (Ch. 1933).

12. Colton v. Wade, 32 Del. Ch. 122, 80 A.2d 923 (Ch. 1951); Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927).


strike a middle ground by creating a tenancy in common. Under such holdings the survivor is permitted to retain an interest in the property which closely approximates that which he had before his felonious act and yet prevents him from profiting by his own misdeed. This is the conclusion reached by the Illinois court and it is the most desirable.

John C. Voss


Gagnon v. Speback (Pa. 1955)

The defendants entered into a contract with the plaintiff for the purchase of potatoes, one-half of the purchase price being paid in cash. A judgment note was executed for the balance. During the course of the negotiations, the parties went to the place of storage where the defendants were given the opportunity to examine the potatoes which were stored in a bin twelve feet deep. The plaintiff’s offer was to grade and bag the potatoes or to sell them “in place” at a lower price. The defendants accepted the latter proposal. The bill of sale provided in part that the sale was made with “the express understanding that there is no warranty of quality or quantity whatsoever.” On taking possession of the goods, the defendants discovered that seventy-five per cent of the potatoes were rotten. Judgment was entered by confession on the note, and the defendants brought a rule to show cause why the judgment should not be opened. The Court of Common Pleas, Indiana County, discharged the rule. On appeal to the Supreme Court of Pennsylvania, the order was affirmed on the grounds that no representation of merchantability had been made; and had one been made at all, its omission from the written contract was not shown to have been by fraud, accident, or mistake. Gagnon v. Speback, 118 A.2d 744 (Pa. 1955).1

The Uniform Sales Act provides that “any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods relying thereon.” 2 This is true even though one exam-

1. Gagnon v. Speback, 118 A.2d 744 (Pa. 1955). There were subsidiary issues involved in this case which will not be discussed, namely, the parol evidence rule and the authority of a partner to execute notes on behalf of the partnership. The Uniform Commercial Code, which is now in effect in Pennsylvania, was not applicable since the present transaction took place before the enactment of the Code.

ines the goods himself, yet indicating reasonable reliance on the seller’s judgment. A seller of goods may, by disclaimer, refuse to warrant goods. However, such a clause does not absolve the seller from his obligation to furnish goods of the character contracted for. Implied warranties arise by operation of law under the circumstances of each particular case and are taken to be a part of the contract based on the presumed intention of the parties. As in express warranties, a disclaimer may also negate any implied warranty in the agreement, although a few cases have held the contrary. It is well settled that where an article is sold by a descriptive name and the buyer relies thereon, a warranty arises that the goods will conform to the description. The Sales Act provides that where goods are bought by description from a seller who deals in goods of that description, there is an implied warranty that the goods are of merchantable quality. This rule has been applied in instances where the article is sold by a generic term, and one court has held that there is an implied contract that potatoes which one agrees to sell are merchantable and not frozen. It should be noted, however, that where the buyer inspects, or has an opportunity to inspect, the warranty of merchantability does not arise unless the defect

11. UNIFORM COMMERCIAL CODE §§ 2-313, 2-316.
13. Keown & McEvoy v. Verlin, 253 Mass. 374, 149 N.E. 115 (1925). (No disclaimer in this case; however, the right of inspection was at the risk of the seller.)
could not have been discovered.\textsuperscript{15} The fact that an examination would be inconvenient does not avoid the rule; to avoid the rule inspection must be wholly impracticable.\textsuperscript{16} In the case of express warranties it is no defense to the seller that the buyer, had he inspected, would have discovered the falsity of the seller's statements.\textsuperscript{17} In the instant case, because of the method of storage, a question of practicability might be raised and an argument of sale by sample made. The Sales Act in recognizing such sales raises an implied warranty that the bulk shall correspond to the sample in quality.\textsuperscript{18} Nevertheless, in a sale where the term "as is" or similar language is used, it is the general rule that there are no warranties, express or implied.\textsuperscript{19} However, such a provision does not affect the seller's obligation to deliver goods which comply with the description.\textsuperscript{20}

Probably no other decision could have been reached by the Court in this case because of the specific written disclaimer; but the case is a good example of a common problem which seldom reaches the appellate level. The fact that the "as is" sale is a necessity of business can not be questioned. A seller must be able to rid himself of goods which no longer serve their primary purpose. Therefore, it is important that there be a sale in which all types of warranties are excluded. Moreover, the parties have freedom of contract enabling them to enter such an agreement affected only by the court's discretion in refusing specific performance of an unconscionable bargain.\textsuperscript{21} The crux of the problem in such sales is brought to light by Justice Musmanno, dissenting in the instant case. Although such sales are justifiable, we must not lose sight of the fact that the seller is obligated to deliver the same \textit{kind} of goods as those contracted for. Specifically then, the question is: Could the inferior goods found in the lower level of the storage bin still be fairly considered potatoes? The difficulty lies in determining what constitutes a change in kind. Perhaps this was best expressed by Justice Frank who once observed, "that a wag once inquired whether the difference between a difference of kind and a difference of degree is itself a difference of kind or a difference of degree. The answer is that it is a difference of degree. A difference of kind is merely a violent difference of degree." \textsuperscript{22}

\textit{James A. Matthews, Jr.}

\begin{itemize}
  \item \textit{Uniform Sales Act} § 15(3); C.I.T. Corporation v. Shogren, 176 Okla. 388, 55 P.2d 956 (1936); Libke v. Craig, 35 Wash. 2d 870, 216 P.2d 189 (1950).
  \item \textit{Uniform Sales Act} § 16(1); Readex Microprint Corp. v. General Aniline & Film Corp., 191 Misc. 414, 74 N.Y.S.2d 613 (Sup. Ct. 1947).
\end{itemize}
TORTS—LIBEL AND SLANDER—SLANDER PER SE

—CALLING A PERSON A "COMMUNIST."


Plaintiff brought an action of trespass for slander against the defendant who, he alleges, stated on three separate occasions, and in the presence of others, that the plaintiff, a doctor, was a "Communist." Neither special damages nor harm to the plaintiff's professional reputation were alleged. Nevertheless, the jury returned a verdict in favor of the plaintiff and fixed the amount of damage at $10,000; the trial court reduced the damages to $3500. The Supreme Court of Pennsylvania in affirming the opinion of the lower court held that the accusation in question constituted slander per se. Solosko v. Paxton, 119 A.2d 230 (Pa. 1956).1

Historically there are two forms of action for a defamatory publication—libel, where the words are written,2 and slander, where the words are spoken.3 The law has always made a distinction between the two actions when considering the essential allegations for maintaining the separate action.4 In order to properly allege a cause of action for slander, it is necessary in most instances to allege and prove special damages.5 This is not an essential element of a cause of action for libel. There are a few well-defined exceptions to the slander rule. When the words spoken tend to injure the trade, occupation, business or profession of another, if they charge him with having a loathsome disease, or if they charge him with having committed a punishable crime involving moral turpitude, an action for slander may be maintained without allegation or proof of special damages.6 In the instant case the defendant accused the plaintiff of being a "Communist."7 There are many holdings that such an allegation, if published, constitutes libel per se.8 In reaching this conclusion some courts take judicial notice of the current climate of opinion,9 while others base their decision on statutes making party membership a crime.10 However, in the present case slander, and not libel, is under consideration. There are decisions stating that to call another a "Communist" is not slander per se.11 However, present in the instant case is a statute making membership in

8. E.g., Wright v. Farm Journal, 158 F.2d 976 (2d Cir. 1947).
the Communist Party a felony.\textsuperscript{12} Such a statute defines a crime involving moral turpitude.\textsuperscript{13} Whether or not the language used actually connoted that the plaintiff was a member of the Communist Party is arguable. However, by ruling that the term "Communist" implies the term "Communist Party Member" the court has not gone far afield from the usual Pennsylvania construction.\textsuperscript{14} Hence, the Pennsylvania statute\textsuperscript{15} being applicable, the words are actionable as slander per se.\textsuperscript{16}

This is the first time the Pennsylvania Supreme Court has spoken on the question of whether or not the oral charge of "Communist" is slander per se,\textsuperscript{17} but presuming the statute in question\textsuperscript{18} constitutional, the decision is unquestionably correct. The defendant might have raised the issue of the constitutionality of the statute\textsuperscript{19} since the Supreme Court of Pennsylvania had recently declared a similar statute\textsuperscript{20} unconstitutional due to occupancy of the field by the federal government.\textsuperscript{21} However, the interesting question of finding slander per se on the basis of a statute which is subsequently declared unconstitutional was not presented. If it had been presented, the court would have had to decide whether the inherent invalidity of an unconstitutional statute rendering it technically void ab initio is to be extended to collateral matters such as the basis for a finding of slander per se. It would appear that the policy behind the exemption would be as strong even in the face of the subsequent declaration of invalidity. The injury to the reputation is no less because the statute creating the felony is subsequently declared unconstitutional. On the other hand, the plaintiff might have sustained his argument on other grounds. In addition to the


\textsuperscript{13} \textit{Prosser, The Law of Torts} 589, 590 (2d Ed. 1955) ("major social disgrace").

\textsuperscript{14} "The words must be given by judicial juries the same signification that other people are likely to attribute to them. It is for the court to determine whether a publication is fairly and reasonably capable of the meaning imputed to it by the innuendo leaving it to the jury to say whether it actually conveys the meaning ascribed to it." Boyer v. Pittsburgh Publishing Co., 324 Pa. 154, 157 (1936).


\textsuperscript{17} In McAndrew v. Scranton Publishing Co., 364 Pa. 504, 72 A.2d 780 (1950), it was stated that to say a man is a "Communist" is not to defame him. However, this was dicta and the case was based on a publication. In ADA v. Meade, 72 Pa. D. & C. 306 (C.P., Phila. 1950), it was said that special damages did not have to be alleged in an action against one who said that the organization was communist infiltrated. However, in the case the defendant admitted that to say a man is a communist or a communist sympathizer is to defame him, and furthermore, the action once again was based on a writing (libel). In Matson v. Margiotti, 371 Pa. 188, 88 A.2d 892 (1952) the court said that judicial notice had been taken of the fact that communism is a political movement which is dedicated to the overthrow of the government of the United States and incidentally of each state by force and violence, and, therefore, libel was committed by statements that the plaintiff engaged in communist activities, was a member of a communist organization, and hence was unfit to hold his public office and dangerous to public security, are libelous per se. Notice that once again the issue was based on published statements.


\textsuperscript{19} \textit{Ibid}.


Pennsylvania statute the plaintiff could have introduced all the federal legislation on the subject. In so doing the court would be faced with the question of whether the federal statutes would be grounds for calling into operation the doctrine of slander per se in a state court. In this case of first impression, it is regrettable that these other significant questions were not confronted.

Regina M. Ward

TORTS—PARENT and CHILD—RIGHT OF CHILD TO SUE PARENT FOR WILFUL MISCONDUCT.


Plaintiffs, unemancipated minors, were injured while riding in an automobile owned by their father and operated by their minor brother, both of whom were joined as defendants. The complaint alleged that their injuries were sustained through the wilful misconduct of the defendants. A general demurrer to the complaint was filed by the defendants, and was sustained. On appeal to the Supreme Court of California it was held that the father's immunity from suit by his unemancipated children does not extend to those cases in which wilful misconduct is alleged.1 Emery v. Emery, 289 P.2d 218 (Cal. 1955).2

Although the courts have never questioned a parent's liability for criminal acts committed against the unemancipated child,3 there was little or no litigation on the question of a parent's immunity in a tort action until the leading case of Hewellette v. George4 in 1891. In that case the court, while citing no authority, held that there is an absolute, mutual immunity in tort actions involving parent and child. Notwithstanding this lack of historical precedent, the rule was quickly adopted in other jurisdictions.5 As a further extension of the principle it was held that an emancipated child cannot successfully bring suit for a tort committed before such emancipation.6 However, the fact of minority is not conclusive as to unemancipation

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1. The court also held that there was no immunity of an unemancipated brother from a suit by an unemancipated sister.
3. E.g., Hinkle v. State, 127 Ind. 490, 26 N.E. 777 (1891); Powell v. State, 67 Miss. 119, 6 So. 646 (1889); Richardson v. State Board of Control, 98 N.J.L. 690, 121 Atl. 457 (Sup. Ct. 1923), aff'd, 99 N.J.L. 516, 123 Atl. 720 (1924).
4. 68 Miss. 703, 9 So. 885 (1891).
5. E.g., Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).
and therefore such determination is left to the jury.\textsuperscript{7} It has been stated that the rationale for the rule laid down in the \textit{Hewellette} case is the preservation of domestic harmony.\textsuperscript{8} Some courts have therefore modified the principle by holding that the immunity is inoperative when the reason for the rule fails.\textsuperscript{9} Thus, some jurisdictions will allow recovery by the child if the tort was committed while the parent was engaged in a business activity,\textsuperscript{10} or if the parent abandons his parental duty.\textsuperscript{11} Further, it has been held, under some wrongful death statutes, that a child has a right of action against one parent whose negligence caused the death of the other parent.\textsuperscript{12} Analogously, the recent case of \textit{Davis v. Smith} \textsuperscript{13} held that there was no immunity in an action for negligence by an unemancipated minor against the estate of his deceased father. However, a contrary result has been reached by the majority of jurisdictions.\textsuperscript{14} While most courts hold that the fact that one of the parties was insured will not change the result because of the danger of fraud,\textsuperscript{15} some jurisdictions reach an opposite conclusion if there is, in addition to the fact of insurance, an additional relationship between the parent and child such as master and servant.\textsuperscript{16} Finally the courts have added one more exception to the general rule by holding that a child can bring suit for an intentional tort\textsuperscript{17} or wilful misconduct\textsuperscript{18} by his parent.

While the majority of jurisdictions adhere to the rule of absolute immunity, many courts have recognized the propriety of liberalizing the principle by allowing the many exceptions to it. The statement that the rule

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  \item \textsuperscript{7} Taubert \textit{v.} Taubert, 103 Minn. 247, 114 N.W. 763 (1908) ; Martena \textit{v.} Martena, 11 N.J. Misc. 705, 167 Atl. 227 (Sup. Ct. 1933).
  \item \textsuperscript{8} Trudell \textit{v.} Leatherby, 212 Cal. 678, 300 Pac. 7 (1931) ; Luster \textit{v.} Luster, 299 Mass. 480, 13 N.E.2d 438 (1938).
  \item \textsuperscript{9} Lusk \textit{v.} Lusk, 113 W.Va. 17, 166 S.E. 538 (1932) ; See McCurdy, \textit{Torts Between Persons in Domestic Relation}, 43 Harv. L. Rev. 1030, 1056-1082 (1930).
  \item \textsuperscript{10} Signs \textit{v.} Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952), \textit{modified on rehearing}, 161 Ohio St. 241, 118 N.E.2d 411 (1954) ; Borst \textit{v.} Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952). \textit{Contra}, Luster \textit{v.} Luster, 299 Mass. 480, 13 N.E.2d 438 (1938) ; Epstein \textit{v.} Epstein, 124 N.Y.S.2d 867 (Sup. Ct. 1953) held no immunity if no parental relationship. This was reversed, however, in 283 App. Div. 855, 129 N.Y.S.2d 54 (1st Dep't 1954), which decision was affirmed by 308 N.Y. 935, 127 N.E.2d 87 (1955).
  \item \textsuperscript{11} Manke \textit{v.} Moore, 197 Md. 61, 77 A.2d 923 (1951).
  \item \textsuperscript{12} Oliveria \textit{v.} Oliveria, 305 Mass. 297, 25 N.E.2d 766 (1940) ; Minkin \textit{v.} Minkin, 336 Pa. 49, 7 A.2d 461 (1939), 44 Dick. L. Rev. 143.
  \item \textsuperscript{13} 126 F. Supp. 497 (E.D. Pa. 1954), 00 Vill. L. Rev. 99 (Preliminary ed. 1955).
  \item \textsuperscript{14} Lasecki \textit{v.} Karbara, 235 Wis. 645, 294 N.W. 33 (1940) ; accord, Harraison \textit{v.} Thomas, 269 S.W.2d 276 (Ky. 1954).
  \item \textsuperscript{15} E.g., Villaret \textit{v.} Villaret, 169 F.2d 677 (D.C. Cir. 1948) ; Shaker \textit{v.} Shaker, 129 Conn. 518, 29 A.2d 765 (1942) ; Silverstein \textit{v.} Kostner, 342 Pa. 207, 20 A.2d 205 (1941) ; Levesque \textit{v.} Levesque, 99 N.H. 147, 106 A.2d 563 (1954).
  \item \textsuperscript{16} Dunlap \textit{v.} Dunlap, 84 N.H. 352, 150 Atl. 905 (1930) ; Worrell \textit{v.} Worrell, 174 Va. 11, 4 S.E.2d 343 (1939) ; Lusk \textit{v.} Lusk, 113 W.Va. 17, 166 S.E. 538 (1932), 13 B.U.L. Rev. 357 (1933).
  \item \textsuperscript{17} See Brown \textit{v.} Cole, 198 Ark. 417, 129 S.W.2d 245 (1939) ; Manke \textit{v.} Moore, 197 Md. 61, 77 A.2d 923 (1951).
should not be observed when the reason for it fails is indicative of the rationale of the courts in creating such exceptions. The court in the instant case utilized such reasoning in reaching its decision. It recognized that the wilful misconduct of a parent, which results in injury to the unemancipated child, has so disrupted the tranquility of the family circle that the consequent litigation would not aggravate the already existing breach of domestic harmony. Although this opinion represents the minority view it is increasingly apparent that the courts are dissatisfied with a rule of absolute immunity. It will not be surprising to find future litigation producing further exceptions to the rule and to find some legislatures deeming it advisable to completely abolish the principle.  

John C. Voss

TRUSTS—PENNSYLVANIA ESTATES ACT OF 1947—ELECTION OF SURVIVING SPOUSE TO TAKE AGAINST THE TRUST.

In re Brown's Estate (Pa. 1956)

The testator set up an unfunded insurance trust, and reserved to himself the right to revoke, change the beneficiaries, receive the income during his lifetime, and withdraw any or all of the policies from the operation of the agreement. The widow elected to take against this trust, contending that the trustee was merely an agent and thus the trust was testamentary. She also contended that the right of election was conferred upon her by the Estates Act of 1947. On the basis of the opinion of the lower court judgment for the widow was affirmed on appeal in a per curiam decision. In re Brown's Estate, 119 A.2d 513 (Pa. 1956).

In the past, it was comparatively simple in Pennsylvania for the decedent to defeat the spouse's right to share in the decedent's assets. Where the trust instrument vested a present interest in the beneficiaries, it was a valid inter vivos trust, and was not rendered testamentary because the settlor reserved a beneficial life interest and a power to revoke or modify in whole or in part. However, the courts were sympathetic to the plight of the surviving spouse, and generally sought a way in which to label the trust


1. Pa. Stat. Ann. tit. 20, § 301.11 (Supp. 1954) : "A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, . . . ."


as testamentary, thereby giving the survivor the right of election. Where the settlor, in addition to the reservations above mentioned, reserved the power to control the trustee as to the details of administration of the trust, the trustee was held to be the agent of the settlor and the trust testamentary as to dispositions intended to take effect after death.\(^5\) However, the difficulty was in the interpretation of "control of the trustee."\(^6\) In New York, the control of the trustee was treated as making the trust illusory insofar as it concerned the surviving spouse,\(^7\) but valid as to all other parties.\(^8\) The settlor's motive in creating the trust is not important,\(^9\) and fraudulent intent relates only to the question of the failure of the donor to divest himself of ownership.\(^10\) Such fraud would exist if the transfer were colorable, with the donor retaining a concealed interest in the property.\(^11\) The Estates Act of 1947 is not retrospective in application,\(^12\) but does reflect the public policy of the commonwealth,\(^13\) and the courts resolve any doubt as to the effectiveness of the trust in favor of the surviving spouse.\(^14\) The scope of the act is extremely broad, and while the instant case held that the unfunded insurance trust was testamentary in character,\(^15\) it also held that it was within the scope of the statute.\(^16\) This wide scope is due to the broad definition of "conveyance" given in this act.\(^17\)


\(^6\) Bullock Estate, 79 Pa. D. & C. 389 (O.C., Dauph. 1951). The court held that where the settlor has the power to deal with the property as she likes, it is the power to control and results in a testamentary trust. But see Sheasley Trust, 366 Pa. 316, 77 A.2d 448 (1950), where it was held that the right to manage, lease, sell or otherwise dispose of the property was merely the right to revoke and not such control as to make the trust testamentary. However, in this case some weight was given to the formality of the transfer. See Restatement, Trusts § 57, comment g (1935).


\(^8\) President and Directors of Manhattan Co. v. Janowitz, 172 Misc. 320, 14 N.Y.S. 2d 34 (Sup. Ct. 1939).


\(^12\) Pa. Stat. Ann. tit. 20, § 301.21 (Supp. 1954): "This act shall take effect on the first day of January, one thousand nine hundred forty-eight and except as set forth in section 3 hereof, shall apply only to conveyances effective on or after that day. As to conveyances effective before that day the existing laws shall remain in full force and effect." See also McKean Estate, 366 Pa. 192, 77 A.2d 447 (1951).

\(^13\) In re Pengelly's Estate, 374 Pa. 358, 97 A.2d 844 (1953).

\(^14\) In re Pengelly's Estate, 374 Pa. 358, 97 A.2d 844 (1953); Vederman Estate, 78 Pa. D. & C. 207 (O.C., Phila. 1951). But see McKean Estate, 366 Pa. 358, 97 A.2d 844 (1953), where it was held that it is not within the power of the legislature to take property of one person and give it to another.

\(^15\) But see Fidelity Trust Company v. Union National Bank of Pittsburgh, 313 Pa. 467, 169 Atl. 209 (1933). (Unfunded life insurance trust with proceeds to be paid to trustee for benefit of wife and children, but reserving complete control in donor during his life, held non-testamentary).


\(^17\) Pa. Stat. Ann. tit. 20 § 301.1 (Supp. 1954): "(2) 'Conveyance' means an act by which it is intended to create an interest in real or personal property whether the act is intended to have inter vivos or testamentary operation."
The common law countries, as distinguished from those of the civil law, where a system of forced heirship prevails, have wrestled continuously with the problem of protection of the wife's interest in the husband's property. The problem exists because in the division of labor which the family implies, the husband is the nominal breadwinner, but the wife who normally contributes to the economic success of the family enterprise is largely excluded from participation in the rewards. When the wealth of the community consisted principally of land the widow was protected by dower; and there was no need for a similar interest in the personal property. When more and more of the wealth of the community came to be invested in personal property, the problem became acute. The right to take against the will was devised for this purpose and the right to take against death-bed gifts to charity is in pari materia. However, the law has developed that the husband could too easily defeat both statutes by an inter vivos gift, even one "where he retained almost as much as he gave away." If the family is to be preserved as a favored institution, legislation of this sort seems necessary, and the supreme court, in extending the rule beyond the letter of the law into cases within its spirit, has in our opinion served the interest of society. The subsequent amendment 18 of the statute after this decision seems regressive in that it may 19 open up to the husband a convenient way to evade his wife's interest by purchasing life insurance.

Thomas F. Burns

WORKMEN'S COMPENSATION—Federal Employer's Liability Act—Denial of Recovery by File Clerk.

Reed v. Pennsylvania R. R.
(3d Cir. 1955).

The plaintiff employee was custodian of the files from which blueprints were made for the defendant employer. These blueprints were tracings of parts of locomotives, freight cars and other equipment used in the railroad business. When an order came from some point on the railroad's system asking for a blueprint, plaintiff would find the tracing and have

Conveyances to Defeat Marital Rights
(a) In general A conveyance of assets by a person who retains a power of appointment by will or a power of revocation or consumption over the principal thereof shall at the election of his surviving spouse be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor. The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent whether payable in trust or otherwise." See legislation section this issue, supra.

19. The other ground for the decision in the Brown case, namely, that the unfunded insurance trust was testamentary, might still be available in spite of the statute.
blueprints made. The plaintiff was injured when a window in the defendant's office building blew in during a storm. The Circuit Court affirmed the district court ruling and held that the plaintiff was not covered by the Federal Employers Liability Act since she was neither engaged in the furtherance of commerce nor did her work directly or closely and substantially affect interstate commerce. Reed v. Pennsylvania R. R., 227 F.2d 810 (3d Cir. 1955).1

The FELA was designed to encompass only the area of railroad common carriers,2 but the Act does not cover all railroad employees.3 However, it is established that the employee of the carrier need not be a "railroader" to be within the purview of the act.4 The determining test under the FELA of 1908 was enunciated in the case of Shanks v. Delaware, L. & W. R. R. as "... Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it to be practically a part of it?"5 The emphasis here was whether the employee at the time of the injury was actually working in interstate transportation. In 1939 the act was amended,6 and the inquiry was then whether any part of the duties of the employee was in the furtherance of interstate commerce or whether they in any way directly or closely and substantially affected such commerce.7 Generally, courts in interpreting this amendment have given it a broad and liberal construction.8 Thus, recovery was allowed a brakeman on a shifting crew,9 an employee of a roundhouse,10 a section laborer helping to maintain and repair tracks,11 a car repairman12 and a telegraph operator.13 However recovery was denied an employee of a railroad's freight claim depart-

4. Erickson v. Southern Pacific Co., 39 Cal. 2d 374, 246 P.2d 642 (1952), cert. denied, 344 U.S. 897 (1952). Employee was a lumber inspector for the railroad and was inspecting railroad ties. He was held to be under the act.
6. "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth, shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act." 53 Stat. 1404 (1908), 45 U.S.C. § 51 (1952).
7. See note 4 supra.
ment, a watchman protecting the premises from trespassers, and an employee who was injured while cutting weeds along a roadbed.

In the principal case, the majority of the court decided that the legislative intent was to give the word “furtherance” in the first clause of the amendment a limited interpretation since a liberal reading would make the “directly or closely and substantially” clause useless. The majority decision is based on this latter clause while the dissent contends that the plaintiff is covered by the “furtherance” clause. For an effective application of the statute, the term “commerce” must be defined. In Shanks v. Delaware L. & W. R. R. the court said that “commerce” was to be used in a limited sense to mean “transportation”. The committee report on the amendment stated:

“This amendment is intended to broaden the scope of the Employers’ Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.” (Emphasis supplied)

The legislative intent therefore was not to change the idea that “commerce” was “transportation”. The amendment was evidently intended to include those employees who at some time or other were engaged in “transportation” but who at the time of injury might be engaged in other operations. Further proof that this was to be the continued interpretation was also set forth by those advocating the amendments. Thus, in those cases which have allowed recovery, it was found that the employee in some way or other was closely and substantially connected with “transportation”. To allow the plaintiff to recover in this case would open the door to recovery for all railroad employees regardless of the nature of their work. The court, by examining the legislative intent, has reached a sound result. Of course, plaintiff’s recovery is provided for under state workmen’s compensation statutes.

Henry A. Giuliani

18. Mr. T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, said in advocating its adoption, “Its application will be confined of course, to the character of employees now covered by the present act...” Hearings Before the Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 1st Sess., S. 1708, at 8 (1939).