Recent Decisions

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RECENT DECISIONS

CRIMINAL LAW—PARTNERSHIPS—CRIMINAL RESPONSIBILITY OF A PARTNER WHO MISAPPROPRIATES PARTNERSHIP PROPERTY.

State v. Peterson (La. 1957).

The defendant was charged with the theft of $7,000 from the Baton Rouge Millworks of which he was a partner. A motion to quash the information was filed by the defendant averring in substance that since he was a partner and no accounting had ever been made, there was no commission of a crime. The trial court sustained the motion to quash the information and the state appealed. A Louisiana statute provides that theft is the misappropriation or taking of anything of value which belongs to another without the consent of the other, by means of fraudulent conduct, practices, or representations.¹ The Supreme Court of Louisiana with two justices dissenting, affirmed the decision of the trial court. The court held that although a partnership is considered a legal entity in Louisiana, yet if a man can be held liable in solido for the entire debt of a commercial partnership of which he is a member, the commercial partnership cannot be classed "another" apart from himself. The court also held that unless an act can be brought within the meaning of the words of the statute, it is not a crime though it comes within the mischief sought to be remedied by the statute. The injured member of the partnership may still bring an action for an accounting and dissolution of the partnership and thus is not left without a remedy. State v. Peterson, 95 So. 2d 608 (La. 1957).²

Generally it has been held that a partner is not criminally liable for larceny, embezzlement, or false pretenses for misappropriation of firm property in which he has an ownership interest.³ This rule is based on the common law doctrine that a partner is the owner of an undivided interest in all the partnership property and thus cannot criminally convert his own property.⁴ Furthermore, the statutes dealing with larceny and other crim-

3. Ex parte Sanders, 23 Ariz. 20, 201 Pac. 93 (1921); State v. Quinn, 245 Iowa 846, 64 N.W.2d 323 (1954); Laine v. Commonwealth, 287 Ky. 134, 151 S.W.2d 1055 (1941); State v. Hogg, 126 La. 1053, 53 So. 225 (1910); State v. Ossendorf, 208 S.W.2d 209 (Miss. 1948); State v. Elsbury, 63 Nev. 463, 173 P.2d 430 (1946); McCray v. State, 51 Tex. Crim. 496, 103 S.W. 926 (1907). See also 2 Wharton, Criminal Law §§ 1162, 1264, 1282 (12th ed. 1932).
4. Ex parte Sanders, 23 Ariz. 20, 201 Pac. 93 (1921); State v. Quinn, 245 Iowa 846, 64 N.W.2d 323 (1954); State v. Brown, 38 Mont. 309, 99 Pac. 954 (1909); State v. Reddick, 2 S.D. 124, 48 N.W. 846 (1891); State v. Eberhart, 106 Wash. 222, 179 Pac. 853 (1919).
inal offenses require that the property taken be that of "another." Following these same principles it has been held that a statute which provides that it shall be no defense to a prosecution for larceny that the property appropriated was partly the property of another and partly the property of the accused is not applicable to a partner who has wrongfully appropriated partnership property to his own use. Statutes have been enacted in many states explicitly imposing criminal liability on a partner for the misappropriation of partnership property. However, where the agreement of partnership is executory and conditional, and one of the contracting parties converts funds contributed by the other to the proposed firm, he may be convicted of larceny or false pretenses. Also, a partner who undertakes to wind up the partnership business after dissolution may be convicted of embezzlement or larceny if he converts the firm's assets to his own use.

In order to impose criminal liability upon the partner who misappropriates partnership property, in the absence of specific statute, it would be necessary to consider the partnership as an entity apart from its members. This adoption of a "legal fiction" would be permissible if necessary to promote justice. Although the Uniform Partnership Act professedly has adopted the aggregate theory of ownership of partnership property, courts still hold the partnership to be a legal entity for certain purposes.


6. State v. Elsbury, 63 Nev. 463, 175 P.2d 430 (1946); State v. Eberhart, 106 Wash. 222, 179 Pac. 853 (1919). Contra, State v. MacGregor, 202 Minn. 579, 279 N.W. 372 (1938). This case held that under such a statute a partner may be guilty of larceny or embezzlement or misappropriation of partnership funds, since he is a person authorized by agreement to hold control of the partnership funds and it is no defense that he is part owner.

7. FLA. STAT. § 811.021 (b) (1955); N.C. GEN. STAT. § 14-97 (1951); PA. STAT. ANN. tit. 18 § 4835 (Supp. 1956); WIS. STAT. § 343.20 (2) (Supp. 1953).

"This subsection removes any doubt as to liability of a partner or tenant-in-common or co-owner of a joint bank account for stealing from the other parties who share an interest in the same property. At common law, and still in some states, convictions are prevented by the preceding that each of the joint owners has complete title to the jointly owned property, so that he cannot misappropriate what already belongs to him. Whatever the merits of such notions in the civil law, it is clear that they have no relevance to the criminal law's effort to deter deprivation of other people's economic interest." Model Penal Code § 206.1 (4).

8. Where creation of a partnership was contemplated and funds were contributed as a direct result of false representations relied on by the complaining witness, misuse of such funds was held to be sufficient for a conviction of false pretenses. State v. Foot, 100 Mont. 33, 48 P.2d 113 (1935). See also State v. Brown, 38 Mont. 309, 99 Pac. 954 (1909).


10. See Lewis, The Uniform Partnership Act—A Reply to Mr. Crane's Criticism, 29 Harv. L. Rev. 158, 162 (1915).

11. See Commissioner v. Whitney, 169 F.2d 562 (2d Cir. 1948); Rossmore v. Commissioner, 76 F.2d 320 (2d Cir. 1935); Lewis, The Uniform Partnership Act, 24 Yale L. J. 617 (1915).

has been done in cases of bankruptcy, to allow bank directors in partnership to borrow money from a bank, to determine liability under an insurance policy, to establish a partner's agency to the partnership, to prohibit a personal judgment against a partner for a debt of a going partnership, and for contribution from the partnership as a joint tort-feasor. If a partnership may be considered as a legal entity or unit for such purposes, it would not be over extending it to apply this theory to the case of a partner who has misappropriated partnership property. The statutes requiring that the goods taken be those of "another" would be satisfied and a partner could be held criminally responsible for misappropriation of the firm's assets. Furthermore, if the partnership be considered a separate legal entity, a partner may be its servant and thus be criminally liable for the theft of partnership goods. In Louisiana under the civil law, the partnership is regarded as a legal entity and it is difficult to perceive why the court did not so consider it in this case. The civil liability of the partner does not afford a sufficient reason for not applying the entity theory to criminal cases. The purpose of the statutes defining larceny, embezzlement, and other kindred offenses is for the benefit and protection of society. The civil liability is irrelevant to the social debt that a misappropriating partner owes. The larcenous partner should not escape criminal liability on a legal technicality or because of a slavish devotion to a concept.

Edward H. Feege

EVIDENCE—BEST EVIDENCE RULE—ADMISSIBILITY OF A CARBON COPY AS PRIMARY EVIDENCE.


Plaintiffs, husband and wife, brought an action against the executor of the estate of the husband's deceased father to recover on a promissory note made by the deceased in 1951, payable to plaintiffs for services rendered between 1936 and 1942. The husband testified that the note was

executed in duplicate at the suggestion of the father by the use of carbon paper, and that it was written out by the son and signed by the father who retained the original. Defendant objected to the introduction of the note on the ground that it was a carbon copy and that plaintiff failed to lay a proper foundation for its introduction under the best evidence rule. Plaintiffs contended that the instrument was a duplicate original and that its admission in evidence did not violate the best evidence rule. The trial court first admitted the note in evidence over defendant's objection. Then, at the close of all the evidence, the court granted defendant's motion for dismissal ruling that a carbon copy could not operate as a negotiable instrument 1 and that as a non-negotiable instrument it was inadmissible under the best evidence rule without first laying a foundation. The appellate court reversed and remanded the cause for a new trial, holding that although the note was not a negotiable instrument and hence not admissible as a non-negotiable instrument without first laying a foundation for its introduction, the plaintiffs had been denied the opportunity to lay that foundation by the trial court's reversal on the ruling of admissibility. Chrismar v. Chrismar, 144 N.E.2d 494 (Ohio Ct. App. 1956). 2

The question of what constitutes an original writing for the purposes of the best evidence rule has not been uniformly answered by courts. 3 In the past, reproductions of an original writing, such as letter-press copies, have not been admitted without first laying a foundation, because they were considered unreliable 4 due to the possibility of error in the copying process. With the advent of invoicing machines which produce multiple copies by a single impression, the several copies so produced were held to be originals, equally admissible. 5 Within this principle, a carbon impression produced by typewriter or hand has sometimes been admitted under the theory that it may be regarded as a duplicate original, since executed contemporaneously with the original by a single stroke of the pen. 6 Alternatively, it has been suggested that some writings, which are by nature copies and not originals at all, so reliably reproduce the content of the originals that they may safely be used interchangeably with the originals

4. Anglo-American Packing & Provision Co. v. Cannon, 31 Fed. 313 (C.C.S.D. Ga. 1887); Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381 (1885); see 4 Wigmore, Evidence § 1234 n.2 (3d ed. 1940). The letter-press process involves the recopying of the original on specially prepared paper from which additional copies are then reproduced by contact.
5. Federal Union Surety Co. v. Indiana Lumber & Manufacturing Co., 176 Ind. 328, 95 N.E. 1104 (1911).
for the purpose of proving content, without the necessity for considering them duplicate originals. If there is a sufficient reason why the writing itself cannot be produced, a copy becomes admissible. The theoretical sacrifice in reliability gives way to exigency. The view that a carbon copy may be admitted equally with the original in proving the content of a writing is premised on the reliability of a carbon copy as an accurate reproduction justifying such interchange. In determining the sufficiency of this reliability, both inherent mechanical accuracy and faithful execution need to be considered in the light of the adaptability of carbon copying to fraud and imposition, the prevention of which has been said to be one of the reasons for the best evidence rule. If the circumstances surrounding the execution of the writing present more than a remote possibility of fraud, the reliability of a carbon copy as an accurate reproduction may be impaired and in consequence may not warrant its admission as primary evidence. The facts of the present case present a cogent example of such circumstances. The action is on a note given in satisfaction for a debt incurred nine years before. The note is in the son’s handwriting except for the father’s signature. The father is dead, the plaintiff son is the only other witness, and the original cannot be found. In this situation there is at least occasion for fraud. A court’s evaluation of the reliability of carbon copies in general, shaped under the exigencies of individual cases will, in large part, determine its view on the admissibility of carbon copies as primary evidence.

John J. Cleary.


9. See 4 id. § 1192.

10. This is equally true under the theory of “duplicate originals” or “interchangeable copies.”

11. In the use of carbon copying there is a convenient opportunity for deception by the use of but little ingenuity made possible by the fact that the carbon impression is completely hidden while being executed. Thus, where an original with several purported carbon copies attached is signed, each underlying copy acquires a carbon imprint of the signature, but may not in the rush or routine be individually inspected.


13. The main reason that a foundation is required for the admission of secondary evidence is to show that the proponent is not at fault in failing to produce the original. If admitted, it will be designated secondary evidence which will presumably affect the probative weight accorded it. In addition, to require the proponent to account for not producing the original may provide some basis for a preliminary determination of the document’s genuineness before admitting it in evidence.
EVIDENCE—CORROBORATION—NECESSITY OF CORROBORATION OF PROSECUTRIX'S TESTIMONY IN PROSECUTION FOR RAPE.

Wedmore v. State (Ind. 1957).

In a prosecution for statutory rape, it was shown that the prosecutrix made a statement to the police, the day after the alleged act, that defendant had intercourse with her and that a few hours later the same day she related the incident to her sister-in-law and to two other girls who had accompanied her to the apartment where it was to have occurred. There was no evidence that a physical or mental examination had been made of the prosecutrix. Six months later, she called defendant's sister and said that she desired to change her "story." Subsequently prosecutrix went voluntarily to defense counsel's office and signed an affidavit stating that defendant had never had intercourse with her. Two years later defendant was convicted by a jury of assault and battery upon the minor prosecutrix on her testimony relating to the alleged intercourse. He appealed from a judgment entered thereon to the Supreme Court of Indiana which affirmed, holding, that the evidence on the record sustained a conviction, since the issue of whether the prosecutrix was telling the truth when she testified that defendant had intercourse with her or when she denied it in a statement made in the defense attorney's office was for the jury, and that a conviction of rape may be sustained upon the uncorroborated testimony of a prosecutrix without any psychiatric examination being made to support her credibility. Wedmore v. State, 143 N.E.2d 649 (Ind. 1957).

The rule at common law, adhered to in most jurisdictions in the absence of statute, is that a conviction of rape may be sustained upon the uncorroborated testimony of the prosecutrix, even where the defendant, under

1. "Any touching of the person [of a female child under the age of sixteen years] with the intent to have sexual intercourse with her, is in legal contemplation without her consent." Caudill v. State, 224 Ind. 531, 536, 69 N.E.2d 549, 551 (1946), setting forth the rule that a party may be found guilty of the lesser included offense of assault and battery in a prosecution for rape.

2. Emmert, J., dissented, and judicially noticed the record of the first trial wherein a conviction was reversed for want of jurisdiction of the subject matter by the court. Wedmore v. State, 223 Ind. 545, 122 N.E.2d 1 (1954). The majority expressly refused to consider the first trial. The facts outlined there are: when the prosecutrix was taken to police headquarters, she was threatened with "Reform School" and then made a statement that both defendant and his brother had relations with her. The State never called as witnesses the people to whom she allegedly "complained." Her first day on the witness stand, at the first trial, she denied seven times having had sexual intercourse with the defendant; she accused him the next day. Between the time she telephoned defendant's sister and went to defense counsel's office (about 3 months) she executed an affidavit before a deputy prosecuting attorney that she had perjured herself at the first trial when she accused defendant's brother.


oath, explicitly denies the act. A number of jurisdictions have statutory provisions requiring more than the bare testimony of the victim to carry a case to the jury, several of them requiring corroboration of the identity of the accused and of the corpus delicti, while others require corroboration of the identity of the accused. Decisions abound qualifying the common law rule. They belie the apparent rigorousness of the black-letter, which recites that the uncorroborated testimony is sufficient to sustain a conviction, and demonstrate that in practice a reviewing court will consider the peculiar circumstances of each case and will require that the prosecutrix's testimony in a sense be corroborated by bringing together a number of surrounding facts and circumstances tending to prove the truth of the testimony. It has been stated that the testimony must be of a clear and convincing nature, and not contain numerous and material contradictions and inconsistencies nor be inherently improbable or incredible. Corroboration has been required, for example, where the testimony has been elicited through fear, threats and coercion. On the other hand, some courts have been peculiarly lenient where an infant prosecutrix has made contradictory statements, or has been otherwise impeached as to truth and chastity, on grounds that it was for the jury to determine credibility and the testimony was not inherently improbable.


14. See People v. Rabbit, 64 Cal. App. 264, 221 Pac. 391 (1923); People v. Wademan, 38 Cal. App. 116, 175 Pac. 791 (1918); People v. Slaughter, 33 Cal. App. 365, 165 Pac. 44 (1917); State v. Thomas, 318 Mo. 843, 1 S.W.2d 157 (1927).
"The grave danger to the innocent in permitting a sex conviction to stand on the uncorroborated testimony of a prosecutrix is conceded by all the experienced medical authorities in the field." 15 They are unanimous in holding that "the complainant in a sex offense should always be examined by competent experts to ascertain whether she suffers from some mental or moral delusions or tendency, 16 frequently found especially in young girls, causing distortion of the imagination in sex cases." 17 The instant case overruled Burton v. State, 18 decided in 1953, "insofar as . . . [it] purports to require that in any sex case the complaining witness be required to be examined, before testifying, by a psychiatrist. . . ." 19 However, the Burton case did "not hold that in every case where a sexual offense is charged there should be a psychiatric examination of the prosecutrix. [For, as was noted therein:] There are many cases where the facts and circumstances leave no doubt of the guilt of the accused. . . ." 20 What that case did require was that a prosecutrix's testimony be either corroborated by other facts and circumstances or else that she be examined to assure against the danger of fantasy which psychiatrists regard as a common occurrence. The several cases decided in Indiana subsequent to the Burton case demonstrate the application of the rule; 21 the instant case, a prosecution based entirely upon the uncorroborated testimony of an admitted perjurer, called for it.

John Thaddeus Grablewski.

FEDERAL JURISDICTION—COUNTERCLAIM—WAIVER OF STATUTE BARRING COUNTERCLAIM IN CONTRACT ACTION INSTITUTED BY THE UNITED STATES.


The defendant placed a deposit and submitted a bid with the United States for certain chemicals which the United States had placed on sale.


16. "Psuedologia phantasticia is a mixture of lies with imagination. Not infrequently, this is the basis of alleged sexual assault. Girls assert they have been raped, sometimes recounting as true a story they have heard, falsely naming individuals or describing them." 1 GRAY'S ATTORNEYS' TEXTBOOK OF MEDICINE § 96.16 (3d ed. 1950).


18. 232 Ind. 246, 111 N.E.2d 892 (1953).


The bid was accepted and the goods tendered to the defendant, who refused to accept delivery on the ground that a portion thereof did not conform to the sample shown him prior to the submission of his bid. He then made a demand for the deposit which the United States refused. More than six years after this refusal, the United States instituted an action for breach of contract to recover the difference between the contract price and the selling price less the deposit. The defendant filed a counterclaim to recover his deposit. The United States moved to strike this counterclaim on the ground that it was barred by the six year statute of limitations. The federal district court denied the motion and held that where the United States delayed filing suit until the statute of limitations had run, it waived that statute as a defense against defendant's counterclaim. United States v. Shainfine, 151 F. Supp. 586 (E.D. Pa. 1957).1

The United States is not bound by a statute of limitations when it brings an action in the federal or state courts.2 Generally, in filing suit a plaintiff subjects himself to the jurisdiction of the court and to any cause of action which the defendant may use by way of counterclaim against him.3 However, this rule has generally not been applied in a case wherein the United States is the party plaintiff.4 It has been held in United States v. The Thebka5 that the United States takes the position of a private litigant when it comes into court to assert a claim in admiralty but this doctrine has not been generally applied to civil actions instituted by the United States.6 However, a party whose direct remedy for a tax refund is barred by the statute of limitations may assert this cause of action in a counterclaim to an action brought by the United States.7 The federal district courts have been granted original jurisdiction concurrent with the United States Court of Claims in certain actions.8 This jurisdiction, according to the weight of authority, does not give the courts power to allow recovery on counterclaims.9 However, to avoid a multiplicity of suits, the federal

3. Restatement, Conflict of Laws § 83 (1934); Restatement, Judgments § 21 (1942).
5. 266 U.S. 328 (1924).
8. The district courts have original jurisdiction in civil actions, not sounding in tort, against the United States where the claim does not exceed ten thousand dollars. 28 U.S.C. § 1346 (a) (2) (1952). The district courts have exclusive jurisdiction in tort claims against the United States wherein the United States, if a private person, would be liable to the claimant. 28 U.S.C. § 1346 (b) (1952).
9. United States v. Sherwood, 312 U.S. 584 (1941) (since the court in which the United States brings an action is not sitting as a court of claims); United States v.
courts have permitted counterclaims arising from the same circumstances as the government's claim where such claim could be asserted against the United States as a direct claim under the Federal Torts Claims Act (FTCA). Although it is clear that an affirmative judgment on a counterclaim will not be rendered in favor of the defendant when the United States brings the action, there is authority holding that the United States takes the status of a private litigant in suits under the FTCA. In United States v. Capital Transit Co., the United States, by filing an action more than two years after the cause of action arose, was precluded from objecting to a counterclaim arising from the same transaction on which it based its suit. The court was of the opinion that it would be contrary to the policy of the FTCA to permit the United States to avoid a counterclaim by allowing two years to pass before it instituted an action. There is no prior authority holding that the aforementioned principles apply to contract actions by the United States. In a contract action involving private litigants, a counterclaim arising from the same transaction as plaintiff's claim may reduce plaintiff's recovery notwithstanding the bar of the statute of limitations. Contract actions against the United States must be filed within six years after the cause of action accrues.

The present case is one of first impression and extends the rule of the Capital Transit Co. case to contract actions wherein the United States is the party plaintiff. Although the result of the instant case is desirable it broadens the scope of the use of counterclaims against the United States. Yet, it appears to be in harmony with the spirit and purpose of the Federal Rules of Civil Procedure. However, the scope of the present holding should be limited to defensive actions and an affirmative recovery should not be allowed since this would permit a counterclaim barred by the statute


14. FED. R. CIV. P. 13(a) which defines compulsory counterclaims as those arising out of the same transaction upon which the opposing party bases his action.

15. See note 13 supra.


18. See FED. R. CIV. P. 13(d) which states that the rules of counterclaims should not be construed to extend counterclaims against the United States.

to have the full effect of the original cause of action. Such an application
of the rule of the instant case might discourage direct claims against the
government in the federal district courts and induce claimants to withhold
their cause of action until suit was commenced by the United States.20 Conversely, if the defendant is to be bound by the statute of limitations, the
United States could well delay its action long enough to bar defendant's
compulsory counterclaim.21 It would seem that in fairness, the government
should either bring its action within the period of the statute or waive it
as a defense to defendant's counterclaim. The principle of United States
v. Capital Transit Co.22 should be extended to contract actions since the
difference between the types of action should not create a conflicting policy
in regard to counterclaims against the United States by limiting waiver of
the statute of limitations to actions sounding in tort.

Leon A. Mankowski

INSURANCE—Vendor and Purchaser—Right to Proceeds
of Fire Insurance Policy Required
by Agreement of Sale.


In 1949, Raplee entered an executory contract to purchase a farm from
Piper and in the agreement assumed the burden of paying the premiums on
a fire insurance policy covering the premises. The policy named only Piper
as the insured. Five years later, while the buyer was in possession, fire
destroyed a barn on the property, and the insurance company paid $4,650
to Piper to compensate for the loss. At this time $5,200 of the purchase
money remained outstanding, and Raplee tendered $550 to Piper in full
satisfaction of the purchase money debt claiming credit thereon for the
indemnity paid to Piper. Piper refused the tender on the grounds that she
was entitled to the proceeds of the insurance by virtue of her insurable in-
terest in the realty and that the buyer had no interest in the proceeds since
she was the only insured named in the policy. Raplee filed a bill for specific
performance, tendering the $550 into court. The Supreme Court of New
York granted specific performance. This decision was unanimously affirmed
by the appellate division.1 Both the trial and the appellate courts relied on
the Uniform Vendor and Purchaser Risk Act 2 which places the risk of loss

20. The instant decision does not discuss why the present defendant did not file
suit to recover his deposit before the lapse of the statutory period. It may well have
been because of the relatively small amount involved since the amount of his deposit
was $408.00.

on a purchaser in possession, and consequently concluded that he who must bear the loss is in equity entitled to the benefits of the insurance. The Court of Appeals of New York, with three justices dissenting, affirmed this decision, but specifically disavowed reliance on the statute, stating that even at common law the purchaser was entitled to credit the insurance proceeds against the purchase money.  


The determination of the question of who will benefit from insurance proceeds from a policy covering property destroyed after the making of a contract of sale but before a transfer of the deed when the policy is in the vendor's name only and the rules of law applicable to that determination were amply discussed in the English case of *Rayner v. Preston*. In that case the policy of insurance was deemed an indemnity contract collateral to the agreement of sale and not related to the property interest. Hence the policy was payable only to those in privity with respect to the insurance contract without reference to privity of estate. The development of New York law on this question both before and after *Rayner* supports this view with few exceptions. In *Cromwell v. Brooklyn Fire Ins. Co.*, 8 decided before *Rayner*, although the court allowed the purchaser an equitable lien on the insurance proceeds, it did so only because the agreement of sale showed that the vendor had agreed as part of the consideration to insure the purchaser's interest, and dicta restate very clearly the personal character of the insurance contract.  

The later case of *Turner v. Bryant*, in a complex fact situation, seems to support the trust theory of determining the right to the insurance proceeds. Under the trust theory, the trust relation between vendor and purchaser in respect to property transferred under an executory contract is enlarged so that it includes the proceeds of the insurance policy. Therefore, the proceeds are applied to the benefit of all persons interested in the property. The party who paid the premiums is reimbursed by the beneficiaries on a pro rata basis. A number of American jurisdictions have adopted this view because under it the benefit of the insurance follows

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3. "Section 240-a of the Real Property Law, Consol. Laws, c. 50, has nothing to do with the present case... Thus either at common law or under section 240-a this vendee would be in the same position. He must take the damaged property and pay the full purchase price, but he is entitled to credit for the insurance proceeds since he and the vendor have so agreed." *Raplee v. Piper*, 3 N.Y.2d 179, 180, 164 N.Y.S.2d 732, 734 (1957). Despite the text, there was no specific agreement that the vendee would have credit for the proceeds; there was only the express agreement that the vendee should pay the premiums.


5. 1881 18 Ch. 1.


7. "A contract of insurance against fire, as a general rule, is a mere personal contract between the assured and the underwriter to indemnify the former against the loss he may sustain; and in case a mortgagor effects an insurance upon a mortgaged premises, the mortgagee can claim no benefit from it, unless he can base his claim upon some agreement." *Id.* at 47, 4 Am. Rep. at 646.

the risk of loss.\textsuperscript{9} Notwithstanding this interpretation of the law by other
states, New York, in Brownell v. Board of Education,\textsuperscript{10} clarified the status
of its law, and adhered to the minority position of Rayner v. Preston.\textsuperscript{11} The principles of Brownell have been generally followed.\textsuperscript{12} Defense of the
position has often been found in the insurance statutes\textsuperscript{13} which provide the
vendor with an insurable interest despite the existence of a contract of sale and
the passing of equitable title to the property.

The instant case is unquestionably a basic departure from the rule
of law applied in Brownell v. Board of Education.\textsuperscript{14} In that case, the risk
of loss was on the purchaser, the insurance policy was in the name of the
vendor only, and the fire occurred before the executory contract was per-
formed. The court held that only the vendor was entitled to the proceeds.
In this case, the same elements as above are present, yet the court holds
the purchaser is entitled to credit the insurance proceeds paid the vendor
against the purchase money still owed. In other words, the court adopts
in Raplee v. Piper what it rejected in Brownell v. Board of Education, the
principle that in equity one man's loss cannot be another man's gain. In
this case, New York has shifted from its minority position, which was based
on the Rayner case, to the position of the majority of the states which gives
the person holding the risk of loss an equitable right in the insurance pro-
ceeds. Such a shift is noteworthy because it allies New York with the
majority and is desirable because it accomplishes in practical result the
original intent of the parties. The seller receives his full consideration and
has no just cause for complaint. The buyer receives title to the property
for which he bargained in the contract. The depreciation in value which
the damage has caused is placed on the insurance company which calculated
that risk when establishing the premiums. Finally, the buyer, who pays
the insurance premiums, is permitted to recoup the amount of the depre-
ciation out of the indemnity paid the seller by deducting that amount from his
contract purchase money obligation.

\textit{John M. Regan.}

\textsuperscript{9} See, \textit{e.g.}, Kaufman v. All Persons, 16 Cal. App. 388, 117 Pac. 586 (1911); Brady v. Welsh, 200 Iowa 44, 204 N.W. 235 (1925); Skinner & Sons Co. v. Houghton, 92 Md. 68, 48 Atl. 85 (1900); Decorative Utilities Co. v. National Motors Co., 123 N.J. Eq. 48, 196 Atl. 381 (1938); Gilbert v. Port, 28 Ohio St. 276 (1876); Insurance Company v. Alberstadt, 383 Pa. 556, 119 A.2d 83 (1956); Brakhage v. Tracey, 13 S.D. 343, 83 N.W. 363 (1900).

\textsuperscript{10} 239 N.Y. 369, 146 N.E. 630 (1925).

\textsuperscript{11} [1881] 18 Ch. 1.


\textsuperscript{13} N.Y. \textbf{INSURANCE LAW} § 170.

\textsuperscript{14} See 239 N.Y. 369, 374, 146 N.E. 630, 634 (1925).
JURISDICTION—FOREIGN CORPORATIONS—
STATUTORY SERVICE OF PROCESS.

Berkman v. Ann Lewis Shops (2d Cir. 1957).

Plaintiff brought suit in a New York federal district court as assignee of three Florida state court judgments obtained by the assignor, the Cuesta Rey & Co., against the defendant. The defendant is a parent corporation retailing women's apparel through various subsidiaries organized for this purpose. The Ann Lewis Shops of Tampa, one such subsidiary, entered into a lease with Cuesta Rey & Co. which was negotiated and guaranteed by the parent corporation. There was a default and Cuesta Rey & Co. sued both the subsidiary and the parent corporation. Substituted service of process was made in accordance with Florida law and a default judgment was entered when neither appeared to defend the action. The court of appeals, with one judge dissenting, affirmed the district court's decision, holding that the Florida court was without jurisdiction to render the judgment here sued upon against the defendant, because the fact of having a subsidiary in Florida did not constitute "doing business" in Florida on the defendant's part. Berkman v. Ann Lewis Shops, 246 F.2d 44 (2d Cir. 1957).

The landmark case of Pennoyer v. Neff laid down the inflexible rule that personal service within the jurisdiction is absolutely necessary for an in personam judgment against a nonresident. This rule proved unworkable in an era of expanding interstate commercial activity with respect to foreign corporations doing business within a state and resulted in the decision of the International Shoe Co. v. Washington case. There the court qualified the rule of the Pennoyer case by allowing substituted service to subject a foreign corporation to personal jurisdiction when the corporation had sufficient contact or ties with the forum to make it reasonable and just according to our traditional concepts of fair play and substantial justice to do so. In the case of French v. Gibbs Corp., Judge Learned Hand laid down the principle that the minimum contact necessary for due process is

1. FLA. STAT. ANN. §§ 47.16, 47.30 (1954). The pertinent parts of the statute are as follows: § 47.16 "The acceptance by ... all foreign corporations ... of the privilege extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business or business venture, in the state ... shall be deemed equivalent to an appointment by such persons and foreign corporations of the secretary of state of the state as the agent of such persons or foreign corporations upon whom may be served all lawful process in any action, suit, or proceeding against them, or either of them, arising out of any transaction or operation connected with or incidental to such business or business venture ... ." (emphasis added). § 47.30 sets out the method of service upon nonresidents, and contains the usual provisions for registered mail, method of serving the secretary of state, usual fees, etc.
3. 95 U.S. 714 (1877).
5. Id. at 320.
6. 189 F.2d 787 (2d Cir. 1951).
satisfied by any continuous activity, regardless of its quality or extent, and
advanced the idea of balancing the inconvenience to the corporation to stand
suit in the foreign jurisdiction against the kind of contact. Later state
court cases have held, under statutes similar to the one in the instant case,
that jurisdiction can be based on a single act\(^7\) as is done in the nonresident
motorist statutes.\(^8\) In *Schutt v. Commercial Traveler's Mut. Accident Ass'n*,\(^9\) under a Tennessee statute making any act by an insurer “doing
business,” the Court of Appeals for the Second Circuit held that the mail-
ing of premium notices into the state was sufficient to subject the insurer
to the state's jurisdiction. In keeping with the current trend of authority
it is apparent that the Florida statute, in using the words “business venture,”
requires less than “doing business” to subject a corporation to its jurisdic-
tion.\(^10\) In the case of *Parmalee v. Iowa State Traveling Men's Ass'n*,\(^11\)
the federal court held a non-resident insurer subject to the court's jurisdic-
tion although all its business was transacted in Florida by mail, finding
this to be sufficient contact for validly asserting jurisdiction.

It is submitted that the majority was unwise in basing their decision
on the rule of the *Cannon* case which states that service on a wholly owned
subsidiary is not service on the parent.\(^12\) There is conflicting authority
on this point which tends to question its present application.\(^13\) In applying
this rule to the instant case the court overlooked the fact that service was
made upon the defendant in strict compliance with the applicable Florida

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9. 229 F.2d 158, 159 (2d Cir. 1956) "Where the defendant received notice [as in
the instant case] and is afforded an opportunity to defend, substituted service is good
for in personam judgments if minimum contacts are present.
10. Cf. *State ex rel. Weber v. Register*, 67 So.2d 619, 620 (Fla. 1953), where the
court said: "There is a vast difference between the words ‘business’ and the words
‘business venture’ as used in section 47.16 supra. One may engage in a 'business venture'
without operating, conducting, engaging in or carrying on a business."
11. 206 F.2d 518 (5th Cir. 1953).
defendant conducted its operation in North Carolina by means of a wholly owned
subsidiary corporation, the subsidiary did not act as the defendant's agent but existed
as a separate corporate entity in all respects. All the transactions between the two
corporations were represented by appropriate entries in their respective books in the
same way as if the two were wholly independent corporations. Plaintiff sued for breach
of contract to purchase cotton sheeting for defendant's use in packing meat. The only
service of process in the action was made upon an agent of the subsidiary corporation.
The defendant was not otherwise served. The court held that the defendant was not
"doing business" within the state so as to warrant an assumption of jurisdiction on the
basis of service upon the subsidiary.
13. See Harris v. Dreere & Co., 223 F.2d 161 (4th Cir. 1955) and the cases cited
therein approving the *Cannon* doctrine. But see Wanamaker v. Lewis, 153 F. Supp.
195 (D. Md. 1957) where the Mutual Broadcasting Co. was held to have been validly
served by service on the State Tax Commissioner since the Mutual Broadcasting Co.
had purchased the right to use, and had used, locally owned facilities of affiliated
stations in Maryland. This constituted "doing business" in Maryland according to this
court. See also *State ex rel. Grinnell Co. v. MacPherson*, 309 P.2d 981 (N.M. 1957)
where three corporations, although technically separate in a parent-subsidiary organiza-
tion, were held to be one enterprise since they held themselves out as one by their use
of the same basic name and overlapping advertising. It is submitted that if counsel
for the plaintiff had put in evidence the advertising of Ann Lewis garments by the
statute\textsuperscript{14} based upon the defendant's own contacts with the state of Florida. The issue in this case should have been whether the Florida court was correct in asserting its jurisdiction on the basis of the defendant's guarantee of the subsidiary's lease and other activities in Florida, not whether the presence of a subsidiary in Florida constituted "doing business" there. For all practical purposes we could completely disregard the subsidiary's existence and still find the guaranteeing of the lease and the organization of the subsidiary by the parent to be a "business venture" within the Florida statute. The defendant actively established its subsidiary in Florida. It is difficult to conceive of a court holding this not to be a "business venture" if any claims resulted from the defendant's activities in setting up the subsidiary. The defendant continued its contact with Florida subsequent to the establishment of the subsidiary by guaranteeing the subsidiary's lease for a period of twenty-five years. This is sufficient to supply the continuance activity required in Learned Hand's formulation of the rule\textsuperscript{15} and a balancing of the interests would show that it would not be inequitable to subject the corporation to a suit in Florida where the subject of the action arose.\textsuperscript{16} As a result of this decision the court has substantially impaired the value of the defendant's guarantee to the plaintiff's assignor by increasing the cost of collecting it.\textsuperscript{17} The state has a right to protect its citizens from such a result, and this is the very evil the statute in question, and other typical statutes,\textsuperscript{18} were designed to correct.

Edward J. Carney, Jr.

LABOR LAW—RAILWAY LABOR ACT—UNION SHOP PROVISION.


The petitioners, railroad employees, were notified that if they did not become members of a labor union within sixty days, their employment would be terminated. This notification was given pursuant to an employ-

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\textsuperscript{14} It is interesting and very important to note that in both the Cannon and the Harris cases noted supra, the service was made only on the subsidiary and not the parent corporation as was done in the instant case.

\textsuperscript{15} See French v. Gibbs Corp., 189 F.2d 787 (2d Cir. 1951); see text at note 6.

\textsuperscript{16} However, an argument could be made that since the defendant was willing to be present in Florida to set up the subsidiary corporation it would not be inconvenient to require it to defend an action from the establishment of the subsidiary.

\textsuperscript{17} It is submitted that it will cost substantially more to prove the plaintiff's claim in New York than it will to prove the claim in Florida where the cause of action arose and subsequently sue on the Florida judgment in New York.

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tment contract, drawn pursuant to provisions of the Railway Labor Act,\(^1\) between the defendants, comprising a number of railroads and various labor organizations. The action was for injunctive relief to prevent the enforcement of the union shop agreement. It was alleged, inter alia, that part of the fees, dues, and assessments which the petitioners would be required to pay as members of the union would be used to support ideological and political doctrines and candidates which the petitioners were not willing to support, and that to enforce the contract would violate the petitioners' right of freedom of association, thought, liberty, and property. It was further alleged that the contract, and the Railway Labor Act to the extent that it authorizes such agreements, are violative of the first, fifth, and ninth amendments of the Federal Constitution. The case was brought to the Supreme Court of Georgia to review a Georgia superior court judgment dissolving the injunction and dismissing the case on the grounds that no cause of action was stated. The supreme court held that one cannot constitutionally be compelled to contribute money to support ideas, politics, and candidates which he opposes, and that the trial court erred in dismissing the amended petition which alleged that such uses would be made of the money which, as members of the union, the petitioners would be required to contribute. *Looper v. Georgia, So. & Fla. Ry.*, 99 S.E.2d 101, (Ga. 1957).\(^2\)

It has long been recognized that the Congress has power to regulate interstate carriers under the commerce clause of the Constitution.\(^3\) In the field of labor relations between carriers and their employees the congressional power "extends to the provisions which are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders."\(^4\) In 1934 the Railway Labor Act\(^5\) was passed with the intent to promote peaceful labor relations in that industry.\(^6\) This act prohibited union shop agreements which at the time were used to maintain company unions.\(^7\) By 1950 a great majority of the railroad employees were members of unions and the nonunion employees were receiving the benefits of collective bargaining without sharing its costs.\(^8\) Because of this the 1951 amendment to the Railway Labor Act was passed allowing union

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1. 64 Stat. 1238 (1951), 45 U.S.C. § 152 (11) (1952). The pertinent parts are: "Notwithstanding any other provisions of this Act, or of any other statute or law . . . of any state, any carrier or carriers . . . and a labor organization or labor organizations duly designated and authorized to represent employees . . . shall be permitted—

   (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class . . . ."


shop agreements, state statutes to the contrary notwithstanding. The constitutionality of this amendment was upheld in the case of Railway Employee's Dept v. Hanson. The Supreme Court of the United States in that case limited its decision narrowly in that it held only "that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the commerce clause and does not violate either the First or the Fifth Amendments." The court in the Hanson case also expressly reserved judgment on contracts which might be made with conditions which would force ideological or political conformity or other action in contravention of the first amendment. It is this reservation about which the decision in the instant case revolves.

Because it was a review of judgment on the pleadings, the instant decision leaves open or undetermined many questions as to what extent and in what ways the reservation by the Supreme Court in the Hanson case might be interpreted. The tenor of the Georgia Supreme Court's opinion indicates that the reservation might be effectively used as a means of evading the union shop provision of the Railway Labor Act. This might be done by the courts by requiring that if a union wishes to effect a union shop agreement it must refrain from financially supporting any political or ideological organizations whatsoever. In view of the inherent interest unions in such activities this could be quite effective in defeating the union shop provision. Thus the intention of Congress to allow unions to force the "free riders" to pay their share of the costs of collective bargaining would also be defeated. However, in the only other case to be decided involving this reservation of the Hanson rule, it was held, in a fact situation similar to that in the instant case, that the union shop agreement was to be enforced notwithstanding union financial support of political activities. The Texas Supreme Court said: "Surely the United States Supreme Court in consideration of the Hanson case, if not otherwise, judicially knew of union political activity and that funds to carry on that activity are essential." This latter interpretation acknowledges the intended purpose of the union shop provision and does not attempt, in effect, to rehabilitate that state's "right to work" laws which were expressly pre-empted by the federal legislation. Therefore it seems that this reservation by the United States Supreme Court has various possible implications which, of course, will only be delineated by future decisions, but it is important to keep in

9. See note 1 supra.
11. Id. at 238.
12. "If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." Id. at 238.
15. See note 1 supra.
mind the effect which the strong feelings of some of the "right to work" law states will have in these decisions. 16

William E. Mowatt

PROPERTY—EASEMENT BY PRESCRIPTION—SPORADIC USE OF LAKE NO BASIS FOR LEGAL PRESCRIPTIVE TITLE.


Plaintiff, legal owner of an interest in a piece of land bordering on defendant's lake, instituted suit in the form of an action to quiet title to establish her claim of a prescriptive right to use the waters of the lake. Plaintiff's land had been primarily used for farming purposes and was improved with a dwelling house in which the plaintiff and her husband resided. There had been continuous occupancy of the land by some member or members of plaintiff's family for twenty-one or more years to the date of commencement of suit. During the years of occupancy, the residents of the plaintiff's premises swam in the lake during the summer season when they desired, and fished there upon occasion. They used small row boats on the lake which were sometimes rented to visitors, ice skated and ice sleighed on it, and cut lake ice during the winter. It also appears that a stone wall or dock extending out into the water and a bath house was maintained by plaintiff for several years. At times, the farm cattle were watered in the lake. Upon these facts the jury returned a verdict for the plaintiff. In granting the defendant's motion for judgment notwithstanding the verdict, the common pleas court held that no prescriptive right was acquired since the plaintiff's use of the lake was occasional and sporadic and merely for personal pleasure and convenience. Shaffer v. Baylor's Lake Association, Inc., 137 Legal Intelligencer No. 26, p. 1, col. 3 (Pa. C.P. Lack. June 17, 1957).1

The law is well settled in Pennsylvania that a prescriptive right to an easement may be acquired by the continuous, uninterrupted and adverse use of land under a claim of right for twenty-one years.2 These same elements of prescription apply to acquiring easements for the use of unnavigable waters.

16 The present case affords a good example. The Supreme Court of Georgia attacks the "invasion" of the right to work area by the federal government when it states: "... Congress, with the sanction of the Supreme Court has projected the jurisdiction of the general government into every precinct of the states and assumes Federal jurisdiction over countless matters, including the right to work, which are remotely if at all related to interstate commerce." Then, after reluctantly acknowledging its duty to follow the United States Supreme Court rulings, the judge states: "We go now to the single point raised which the Supreme Court has, we believe clearly indicated is still open for decision." Looper v. Georgia So. & Fl. Ry., 99 S.E.2d 101, 104 (Ga. 1957).


gable ponds or lakes. The authorities are at variance on the subject of the continuity of user required for the acquisition of a prescriptive right, but it seems that the necessary continuity is present if there are such repeated acts of use, of such character and at such intervals, as afford sufficient indication to the owner of the land that a right is being asserted against him. The requirement of continuity does not involve any necessity that the user be exercised constantly and without intermission. The use will be continuous if there is an exercise of the right at the pleasure of the claimant, though at infrequent intervals. There can only be such continuity of user as the right claimed will permit, and the continuity must be judged by the nature and character of the use. A failure to use an easement when not needed does not disprove a continuity of use shown by using it when needed. Yet, mere occasional acts of trespass do not satisfy the rule that the user be continuous. In the case of Matthews v. Bagnik, the court found that the defendant’s use of a lake for watering stock, cutting ice, fishing, swimming, boating and other uses without permission, was insufficient to establish an easement by prescription. In Loughran v. Matylewicz, the court denied a prescriptive right in the appellants who had used the lake for swimming purposes and sporadic rental of boats for fishing on the grounds that occasional and sporadic use of the lake could never ripen into a prescriptive right.

Title by prescription has its foundation in the presumption of a grant arising from the long continued use of the easement. Courts enforce such grants not because the court or jury believe the presumed grant to have been actually made, but because public policy and convenience require that long continued possession shall not be disturbed. But, prescriptive easements are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons. The law is reluctant to recognize a claim to an easement and the burden of proof is on the party


asserting a claim to prove it clearly.\textsuperscript{14} Therefore, the one claiming the easement must prove such user from which a grant may be presumed. The court in the principle case rightly found that the user of the plaintiff did not suffice to establish an easement by prescription. Of course, evidence sufficient to create the presumption of a grant must vary according to the nature of the right asserted and the manner of its use, but the use must be such as to indicate that it is claimed as a right and is not the effect of indulgence or anything short of a grant. Casual or sporadic use does not give such notice. One cannot be permitted to acquire an easement who occasionally visits the land or lake of another. "The owner thereof does not have to become amphibious and dwell part of the time in the lake in order to retain his title thereto."\textsuperscript{15} However, this is not to say that one could never acquire an easement through occasional and sporadic use. Such sporadic utilization in a systematic year-round commercial manner will ripen into a prescriptive right.\textsuperscript{16} Although this principle was recognized by the court in the instant case, the opinion fails to disclose the exact basis for its decision. It is not certain whether the court denied the easement because the facts of this case did not warrant a finding for the plaintiff or whether a non-commercial occasional and sporadic use for pleasure can never result in an easement by prescription. This point is obscure in Pennsylvania law. However, it should be feasible to allow acquisition of an easement if the occasional use, although non-commercial, be systematic, definitive, open and notorious.

\textit{James W. Schwartz}

\textbf{TORTS—CONTRIBUTORY NEGLIGENCE—Plaintiff Cannot Recover if His Negligence Contributed in Any Degree to the Resulting Injury.}


Plaintiffs were each driving a motorcycle along a highway on a dark and rainy night when one motorcycle developed trouble, forcing it to stop. Due to intervening muddy flats adjacent to the highway, plaintiffs did not attempt to remove their halted cycles from the paved portion of the highway onto a nearby slag driveway. Both motorcycles were mounted with lights visible for 500 feet. Just as they succeeded in starting the stalled motor, they were struck from behind by the defendant's auto. In plaintiffs' action in trespass defendant alleged contributory negligence in plaintiffs' failure to remove their motorcycles from the highway, predicking this duty, \textit{inter alia}, on common law principles. The trial court instructed the jury

\textsuperscript{14} Becker v. Rittenhouse, 297 Pa. 317, 147 Atl. 51 (1929).
\textsuperscript{15} Camp Chicopee v. Eden, 303 Pa. 150, 155, 154 Atl. 305, 307 (1931).
\textsuperscript{16} Miller v. Lutheran Conference & Camp Ass'n., 331 Pa. 241, 200 Atl. 646 (1938).

With the exception of this case and in view of the \textit{Matthews} case and the \textit{Loughran} case, it appears after analysis that it would be most difficult to acquire a prescriptive easement in the lake of another under the present Pennsylvania law.
that "the contributory negligence of the party must be a proximate cause of the accident involved . . ." to bar recovery. On the basis of this instruction the jury returned a verdict for the plaintiffs. On appeal the Supreme Court of Pennsylvania reversed and remanded, holding with one judge dissenting, that the test for contributory negligence in Pennsylvania is whether the plaintiffs' negligence "contributed in any degree, however slight, to the injury," and furthermore that it was error to instruct the jury that the plaintiffs' negligence must be a proximate cause of the resulting injury to bar his recovery. *Crane v. Neal*, 389 Pa. 329, 132 A.2d 675 (1957).

The effect of the doctrine that contributory negligence is a complete bar to recovery has made it perhaps the most important defense in negligence cases. In order to bar recovery plaintiff's negligence must have some causal connection with the resulting injury. Just what that connection must be is in dispute. The general rule requires that plaintiff's negligence be a proximate cause of the resulting injury. Pennsylvania courts alone have expressed the test of contributory negligence as "whether the plaintiff's negligent act contributed in any degree, however slight, to the resulting injury." In at least one Pennsylvania case this test has been interpreted as excluding the need for a proximate causal relationship and has further stated that the law in this state recognizes a distinction between the causal connection needed in negligence and that needed in contributory negligence. Such a distinction has been expressly repudiated by other jurisdictions.

If there was any doubt prior to the instant case as to what constituted the test of contributory negligence in Pennsylvania, the present case makes it unmistakably clear that if the plaintiff's negligence contributes in any degree whatsoever to the resulting injury he is barred from recovery. Thus the consideration of a proximate causal relationship between plaintiff's

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2. See *PROSSER*, TORTS § 51 (2d ed. 1955).
4. See note 22 M.I.N.L. REV. 410 (1938) and cases cited therein.
5. *Id.* at 410, 412 & n.11 (1938).
9. The majority opinion cites only one case (*Cardelli v. Simon*, 149 Pa. Super 364, 27 A.2d 250 (1942)) which denies the need for a proximate causal relationship in finding contributory negligence, and it relies chiefly on a number of cases which simply reiterate the test as being "whether the plaintiff's negligence contributed in any degree to the resulting injury," but makes it clear that, whatever these cases meant, proximate cause is no longer an element of contributory negligence.
negligence and his injury is excluded. Actual causation then becomes the only pertinent area of causal inquiry, and whether this is desirable is questionable.\textsuperscript{10} There appears to be no sound basis for a distinction between the causal relation needed in the defense of contributory negligence and that needed to establish a defendant’s negligence.\textsuperscript{11} To hold in the same case that the defendant is not liable unless his negligence was a proximate cause and that the plaintiff cannot recover if his negligence contributed in any degree, however slight, appears to be an unjustified difference in treatment.\textsuperscript{12} Proximate cause, although a subject of much confusion,\textsuperscript{13} is basically a limiting principle which removes from consideration those remote causes which are of no legal consequences. It follows that to remove this limiting element of proximate causality in contributory negligence implies an intent to expand the meaning of contributory negligence so as to more often bar recovery. The harsh results which might logically follow have been avoided by two practices. First, the courts have been reluctant to rule as a matter of law that a sufficient causal connection does exist.\textsuperscript{14} Second, as a result juries have been left to interpret and apply this test, and as a practical matter refuse to carry refined notions of causality so far as to bar a plaintiff’s recovery.\textsuperscript{15} The present decision may effect these two practices since it makes unmistakably clear the slight causal connection needed for a jury to find contributory negligence, and thus exerts added pressure on trial courts to rule as a matter of law on the sufficiency of the causal connection. At the same time the instant decision precludes any consideration by the jury of reasonable limitations on causality. It cannot be denied that the result of the instant case will strengthen the defense of contributory negligence in Pennsylvania. Whether the extension of the defense is desirable is certainly questionable.\textsuperscript{16}

\textit{Gerald R. Stockman}

\textsuperscript{10} The Pennsylvania test contains the confusing phrase, “contributes in any degree,” which obviously refers to actual causation while proximate cause is not, strictly speaking, a test of causation at all but rather a test of legal liability. A better statement of the rule appears in the case of Oil City Fuel Supply Co. v. Boudry, 122 Pa. 449, 15 Atl. 865 (1888) which the majority opinion itself cites. The court in that case states the rule to be, “any degree of negligence on the part of the plaintiff contributing to his injury destroys his right of recovery.” Here the emphasis is put on the degree of negligence rather than on the causal element.

\textsuperscript{11} Smerdoff v. McNervey, 112 Conn. 421, 152 Atl. 399 (1930); See also Harper and James, The Law of Torts § 22.2, at 1199-200 (1956).

\textsuperscript{12} The only justification would be a policy favoring the extension of the doctrine of contributory negligence and the desirability of this is far from obvious. See O'Toole, Comparative Negligence: The Pennsylvania Proposal, 2 Vill. L. Rev. 474 (1957).

\textsuperscript{13} Mahoney v. Beatman, 110 Conn. 184, 147 Atl. 762 (1929); Harper and James, The Law of Torts § 22.10.

\textsuperscript{14} See Prosser, Torts § 50 (2d ed. 1955); Green, Rationale of Proximate Cause § 5 (1927). The present case is an example of this reluctance. Assuming that the plaintiffs were negligent in leaving their motorcycles on the paved portion of the highway, it does not appear that reasonable men could find that it did not “contribute in any degree to the resulting injury.”

\textsuperscript{15} Harper and James, The Law of Torts § 22.10 n. 8, 9 (1956).

\textsuperscript{16} See note 12 supra.
TORTS—IMMUNITY OF CHARITABLE HOSPITALS FOR NEGLIGENCE OF EMPLOYEES—RESPONDEAT SUPERIOR.

_Bing v. Thunig_ (N. Y. 1957).

Plaintiff was burned during an operation performed by her own physician at St. John's Episcopal Hospital, a non-profit institution. Prior to the operation, nurses employed by the hospital applied antiseptic to the plaintiff's back and were instructed to remove any of the sheets underneath plaintiff upon which the antiseptic spilled. The nurses did not inspect the sheets though aware of the inflammable nature of the antiseptic and plaintiff was burned during the operation when the sheets ignited while the physician was applying a heated electric cautery. Plaintiff brought this action against the physician and the hospital and received judgment against both, the supreme court charging that plaintiff could recover against the hospital only if the injury occurred through the negligence of one of its employees while performing an administrative and not a medical act. Upon appeal, the appellate division reversed, the majority reasoning that because the application of the antiseptic was in preparation for the operation and, therefore, part of the operation itself, the injury occurred during performance of a medical act. The court of appeals in reversing the decision of the appellate division _held_ that the doctrine according to the hospital an immunity for the negligence of its professional employees while performing medical acts, should be abandoned, and granted a new trial. _Bing v. Thunig_, 2 N.Y.2d 656, 163 N.Y.S.2d 3 (1957).1

The general doctrine of immunity of hospitals from liability for injury due to the negligence of doctors, nurses, and other members of the medical profession in their general employ has recently been the subject of critical review in jurisdictions already committed to its enforcement and by courts being asked to adopt the rule for the first time.2 In New York, prior to this case, the doctrine applied to both public charitable hospitals and private hospitals, whether profit-making or not.3 The question of the application of the doctrine has arisen primarily in those cases where the negligent act was performed by a doctor, nurse, or intern, and the party plaintiff was the beneficiary of the medical services and facilities of the hospital.4 It was well settled in New York prior to this case,

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2. For cases in jurisdictions committed to the enforcement of the doctrine see, _e.g._, Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); Wheat v. Idaho Falls Latter Day Saints Hospital, 297 P.2d 1041 (Idaho 1956); Haynes v. Presbyterian Hospital Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); Pierce v. Yakima Valley Memorial Hospital Ass'n, 43 Wash. 2d 162, 260 P.2d 765 (1953).
3. For cases in jurisdictions asked to adopt the doctrine for the first time see, _e.g._, Durney v. St. Francis Hospital, 46 Del. 350, 83 A.2d 753 (1951); Waynick v. Reardon, 236 N.C. 116, 72 S.E.2d 4 (1952); Rickbeil v. Grafton Deaconess Hospital, 74 N.D. 525, 23 N.W.2d 247 (1946); Hansch v. Hackett, 190 Wash. 97, 66 P.2d 1129 (1937).
that hospitals, charitable or not, were liable to a stranger for injuries incurred due to the negligence of the hospital or those in its general employ. The hospital was also liable if it was negligent in the performance of a duty owing to its employees. The general rule in New York exempting hospitals from liability to beneficiaries for injuries caused by the negligent acts of its general employees was first enunciated in Schloendorff v. New York Hospital, which held that hospitals when maintained as charitable institutions were not liable to patients for the injuries caused by the negligence of physicians and nurses. The rule was qualified to exempt the hospital from liability only where the negligent act performed was in the course of medical treatment and not during an administrative act. The nature of the act thus became controlling, rather than the skill of the person performing it. Expressly excluded from the purview of the doctrine, however, were all non-professional employees of the hospital, no matter what the nature of the act they performed which caused the injury. The scope of the application of the doctrine was thus limited to cases where the nature of the act which caused the injury was part of the medical treatment of the beneficiary-patient, and the act was performed by a doctor, nurse, intern, or other professional employee of the hospital. The Schloendorff case also settled the question in the affirmative as to whether acts of preparation immediately preceding the operation and necessary to its successful performance, were acts of medical treatment. Most jurisdictions which have chosen to adopt the doctrine have not seen fit to extend its application to private non-charitable hospitals as was done in New York. In those jurisdictions, in which a narrow view of the doctrine of respondeat superior is


7. 211 N.Y. 125, 105 N.E. 92 (1914).


9. Ibid.


12. Adams v. University Hospital, 122 Mo. App. 675, 99 S.W. 453 (1907). In jurisdictions where the doctrine is limited in its application to charitable hospitals only, the fact that the beneficiary has paid for the services usually has no bearing on the determination of the application of the doctrine. A fortiori, the paying status of the beneficiary was not determining in New York. It should also be noted that no distinction was made between visiting physicians and house physicians, or interns working under them.


the only basis for immunity, hospitals are held liable for acts of their profes-
claims arising from the negligence of its agents, though supported by some jurisdic-
tions in granting total immunity to all charitable institutions, professional employees no matter what the nature of the act they performed, if it is shown that the hospital was negligent in selecting the employees.

The theory that the public and private donations received by the charita-
table hospital constitute a trust fund which can not be despoiled by tort has been expressly rejected in New York, as has the doctrine of implied waiver. In New York, the immunity of hospitals from tort claims for negligence of their professional employees while performing medical acts was predicated on the theory that as between the hospital and its professional employees, the doctrine of respondeat superior did not apply when the professional employee was engaged in a medical act because of the hospital's inability of controlling the actions of one performing such an operation. The instant case, in finally disposing of the Schloendorff rule, expressly rejects this theory. Though defendant here was a charitable hospital, this decision more than likely will be controlling in disposing of the doctrine as it is applied to private non-charitable hospitals in New York.

Not so clear, however, is the impact which the abandonment of the Schloen-
dorff rule will have on other charitable institutions in New York. The

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15. See Bryant v. Presbyterian Hospital, 304 N.Y. 538, 110 N.E.2d 391 (1953). The burden of showing such negligence is on the plaintiff, the standard of care being an appropriate investigation by the hospital into the background of the employee.

16. Downes v. Harper Hospital, 101 Mich. 555, 559, 60 N.W. 42, 43 (1894). The court said: "By permitting a recovery, the trust fund might be entirely destroyed and diverted from the purpose for which the donor gave it. Charitable bequests cannot be thus thwarted by the negligence for which the donor is in no way responsible. Those voluntarily accepting the benefit of a charity accept it upon this condition." In Pennsylvania, because of the application of this theory, only charitable hospitals are exempted from liability, and the doctrine of respondeat superior has been found to be applicable as between the hospital and its employees even while performing a medical act. See Brown v. Moore, 247 F.2d 711 (3d Cir. 1957); Gable v. Sisters of St. Francis, 227 Pa. 254, 75 A. 1087 (1910). The fact that the trust fund theory also supports the tort immunity of other charitable institutions in Pennsylvania would seem to preclude the abandonment of the tort immunity of charitable hospitals in the near future, except by legislation. See Bond v. Pittsburgh, 368 Pa. 404, 407, 408, 84 A.2d 328 (1951).

17. "The doctrine that the will of an individual shall exempt either person or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people." Hordern v. Salvation Army, 199 N.Y. 233, 239, 92 N.E. 626, 628 (1910) referring to the trust fund theory.

18. Sheehan v. North Country Community Hospital, 273 N.Y. 163, 166, 7 N.E.2d 28, 29 (1937). The court rejected the doctrine which was based on the hypothesis that a recipient of the benefit impliedly waives any claim for damages for torts arising from the administration of a charity.


20. The same theory is applied in New York in granting immunity from tort claims to private non-charitable hospitals, as is applied in granting immunity to charitable hospitals. See Bakal v. University Heights Sanitarium, 277 App. Div. 572, 101 N.Y.S.2d 385 (1st Dep't 1950), aff'd without opinion, 302 N.Y. 870, 100 N.E.2d 51 (1951).
spirit of the *Schloendorff* rule was clearly to protect a necessary charity, and while the court in the instant case rejects the method presently used in accomplishing that protection, it leaves the efficacy of the motivating spirit unimpaired. The majority opinion indicates that a primary reason for the abandonment of the rule is that the reason for the motivating spirit behind it no longer exists, since hospitals today are a stable part of the community and have the means to protect themselves against such tort claims. The effect of the instant case on other charitable institutions will most likely depend on how closely the motive in keeping them immune from liability parallels the motive for the adoption of the *Schloendorff* rule. The remaining tort immunity of private charitable universities, which is based on the same theory as the tort immunity of hospitals, is, in all probability, at an end. Other jurisdictions which base the rule of immunity of charitable hospitals from tort liability on the same theory as the *Schloendorff* rule, have found more difficulty in abandoning the doctrine because of its application to other charitable institutions. Those jurisdictions, however, have taken a more practical view of the reason for the non-applicability of *respondeat superior*.

In place of the discarded doctrine, the courts in New York might be expected to apply a test similar to the one applied in England, which would predicate liability of the hospital on whether the negligent employees were performing their duties under a contract for service, or of service.

_Peter P. Smith III._


23. For a discussion of hospital liability insurance, see, *Reuschlein, The Hospital as Insured*, in *PAPERS PRESENTED AT INSTITUTE ON HOSPITAL LAW IN PENNSYLVANIA* 28 (1956).


25. *McDermott v. St. Mary's Hospital Corp.*, 133 A.2d 608 (Conn. 1957); *Dille v. St. Luke's Hospital*, 355 Mo. 436, 196 S.W.2d 615 (1946). In the latter case, the theory of the non-applicability of *respondeat superior* as between the hospital and its employees while performing medical acts is encompassed in the court's conception of "public policy." See also *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116, 117 S.W. 1189, 1190 (1909). In the *McDermott* case, the Connecticut court expressly refused to follow the instant case because it would involve the tort immunity of other charitable institutions.

26. Commenting on the basis for the exemption of charitable hospitals from tort immunity, the Connecticut court said: "It is perhaps immaterial whether we say the public policy which supports the doctrine of *respondeat superior* does not justify such extension of the rule, or say that the public policy which encourages enterprises for charitable purposes requires an exemption from the operation of the rule based on legal fiction, and which as applied to owners of such enterprises, is clearly opposed to substantial justice." *Hearns v. Waterbury Hospital*, 66 Conn. 68, 33 A. 595, 604 (1885).