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Recent Decisions

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RECENT DECISIONS

CONFLICTS—CONTRACTS—LAW OF PLACE OF BENEFICIAL OPERATION AND EFFECT DETERMINING OBLIGATION OF CONTRACT.

Graham v. Wilkins (Conn. 1958).

Defendant, a resident of Connecticut, leased a truck to a Pennsylvania corporation. She alleged that the contract was executed in Pennsylvania. The truck was used by the corporation in Massachusetts, New York and Connecticut, and garaged in Connecticut. Plaintiff sustained personal injuries as a result of the operation of the truck in Massachusetts by an employee of the Pennsylvania corporation. Plaintiff brought suit under a Connecticut statute which imposes on one who leases a motor vehicle to another the same liability as that of its operator. Stating as the rule of conflicts of laws that “a liability arising out of a contract depends upon the law of the place of contract unless the contract is to be performed or to have its beneficial operation and effect elsewhere” the court held such operation and effect was in Connecticut so that Connecticut law applied and imposed liability on the defendant. Graham v. Wilkins, 138 A.2d 705 (Conn. 1958). 8

Most courts use a mechanical approach to the question of what law is to govern a commercial contract which has a relation to two or more jurisdictions. 4 Under this approach the contract is broken down into questions of nature and validity of the contract, which are generally governed by the law of the place of contract; 5 questions of the manner and details of performance, which are governed by the law of the place of performance; 6 and with various splinter questions having particular rules such as capacity 7 and recission. 8 However, some courts follow a “center

1. The defendant alleged that she was domiciled in Rhode Island but the court passed over this point.
6. 2 Beale, Conflict of Laws 1268 (1935); Restatement, Conflict of Laws § 358 (1934).
8. Id. at 1275.

(556)
of gravity” or “grouping of contacts” theory by which “instead of regarding as conclusive the intention of the parties or the place of making, or performance, [emphasis is laid] . . . upon the law of the place which has the most significant contacts with the matter in dispute.” Another approach is to apply the law intended by the parties to control, whether such intention is express or implied. To confuse matters further the courts of a single jurisdiction have used at various times as many as four different methods of determining which law is to govern the validity of a contract.

The leading case interpreting the Connecticut statute in question is Levy v. Daniels’ U-Drive Auto Renting Co. in which liability was imposed upon the lessor-owner for a Massachusetts accident on the theory that, at the instant of the execution of the contract in Connecticut, the statute became a term of the contract. The thirty years of vigorous life of the Levy decision seem to answer the query of whether the Connecticut legislature intended to impose liability toward people struck in other states through contracts executed in Connecticut by Connecticut residents. At least, when the matter in issue was characterized as one of contract, the usual conflict of laws rule of applying the law of the place of contract automatically produced such a result. The rule applied in the instant case was developed in a line of Connecticut cases concerning mortgages and sales of property and was considered an exception to the general rule of applying the law of the place of contract. These cases applied the law of the situs of the property on the theory that since the alleged contract was to have its beneficial operation and effect at this situs, the parties must have intended such law to govern. Since the truck was to be operated

12. Siegelman v. Cunard White Star, 221 F.2d 189 (2d Cir. 1955). This case stated that before a court would give effect to a chosen law the court would satisfy itself that it was a bona fide choice and that it was the law of a jurisdiction having some relation to the contract. These conditions are also stated in necessary in Owens v. Hagenbeck-Wallace Shows Co., 58 R.I. 162, 174, 192 Atl. 158, 164 (1937).
15. 108 Conn. 333, 143 Atl. 163 (1928).
17. See, Irving Trust Co. v. Maryland Casualty Co., 83 F.2d 168, 171 (2d Cir. 1936).
in Massachusetts and New York as well as Connecticut, the contract in the instant case would also have a beneficial operation and effect in those states and as effective an argument could be made for the application of the laws of those jurisdictions. To consider that the parties in the instant case intended Connecticut law to apply is an obvious fiction, the use of which results in the extra-territorial application of Connecticut law to a Pennsylvania contract. It is doubtful whether the Connecticut legislature has exhibited so strong a public policy as to warrant the courts disregarding the usual conflict of laws rule and extending the Connecticut statute's reach outside the state boundaries in this way.

Paul W. Callahan.

CONSTITUTIONAL LAW—FEDERAL ASSIMILATIVE CRIMES ACT OF 1948—VALID AS A CONTINUING ADOPTION OF FUTURE STATE LAWS.


Defendant was indicted in a federal court for the commission of several sex crimes while on an air force base in Texas. The acts involved are not specifically made crimes under federal law, but are covered by the Federal Assimilative Crimes Act of 1948. That act provides that within certain federal enclaves, acts not punished by any enactment of Congress are punishable as federal crimes under the laws of the state wherein the enclave is located. The Texas Penal Code which makes these acts a crime, was enacted in 1950, two years after Congress passed the Federal Assimilative Crimes Act. The district court dismissed the indictment "for the reason that Congress may not legislatively assimilate and adopt criminal statutes of a state subsequent to the enactment of the Federal Assimilative Statute". On appeal, the Supreme Court reversing, with Justices Black and Douglas dissenting, held that the Federal Assimilative Crimes Act is constitutional as a deliberate continuing adoption by Congress for federal enclaves of such offenses and punishments as shall have been enacted by the respective states. United States v. Sharpack, 78 Sup. Ct. 291 (1958).

19. Such an argument was made by the defendant but not accepted by the court.

1. There was no contention that the acts here charged were punishable under any enactment of Congress other than by virtue of the Assimilative Crimes Act, nor that Randolph Air Force Base is not a federal enclave subject to that act.
4. United States v. Sharpack, 78 Sup. Ct. 291 (1958). Although the Court explicitly stated that, "Rather than being a delegation by Congress of its legislative authority to the states ... [the Act is an] ... adoption ... [of State laws] ...", they nevertheless went on to say, "This Court also has held that
The Constitution grants to Congress the "... Power to dispose of and make all needful rules and regulations respecting the Territories or other property belonging to the United States." 5 Except in those cases where a state retains partial jurisdiction over its property upon cession, 6 the federal government has exclusive jurisdiction over all federal enclaves. 7 Local laws respecting private rights, in existence at the time of the cession of a federal enclave, continue in force, in the absence of congressional action. 8 State statutes enacted after cession do not become a part of the body of law in the ceded area. 9 Congress alone is competent to make laws for these areas. 10 Since the task of maintaining an adequate, current criminal code which would be exhaustive and apply in all federal enclaves throughout the country seems impractical, Congress has called on the states for help. In certain cases they have worked out a system of concurrent jurisdiction, thus allowing the state in cooperation with the federal government to enforce the law in these areas. 11 In other instances they have "adopted" state laws as applicable to the enclave; this method has been the basis for all of the federal assimilative crimes acts. 12 Those acts prior to the one in question, 13 adopted the laws of the state in exist-

Congress may delegate to local legislative bodies broad jurisdiction over territories and ceded areas provided Congress retains, as it does here, ample power to revise, alter and revoke the local legislation. 14 The latter statement would seem to indicate that the majority viewed this Act as an adoption of State law and at the same time a lawful delegation of legislative authority—thus finding no inconsistency in the two concepts. It is true that Congress has in certain instances (the District of Columbia, in particular) given a local legislature power to enact a system of laws for the territory. Christianson v. King County, 239 U.S. 356 (1915), but in these cases the people within the enclave elect those representatives and thus have a voice in their laws. This delegation is analogous to the local option laws, an admitted exception to the unlawful delegation doctrine. However, under the present Act the alleged delegation is to the state legislature, a body which is not elected by the people in the federal enclaves and concerning which they have no voice. Therefore such cases would not appear to be controlling.

5. U.S. Const. art. IV, § 3. See U.S. Const. art. I § 8, cl. 17.
7. The term "exclusive legislation" in Article one, section eight of the United States Constitution has been interpreted to mean "exclusive jurisdiction," See Western Union Tel. Co. v. Chiles, 214 U.S. 274 (1909).
ence at the time the acts were enacted. Such adoption was not an unlawful delegation of legislative authority since in so doing "... Congress [had] acted as definitely as if it had repeated the words used by the several states—a not unfamiliar form of law." Unlike its predecessors the present act attempts to adopt future state laws; however, it is not unique in that it makes federal law dependent on future state law. The Webb-Kenyon Act made it a federal crime to ship intoxicating liquors into a state "... to be received, possessed, sold or in any manner used ... in violation of any law [present or future] of such state." In answer to those who attacked the Webb-Kenyon Act as an unlawful delegation of legislative authority to the states, the Supreme Court said:

14. There were two general methods of adoption in these earlier statutes. One method was to adopt state laws existing on the date of the enactment, allowing no subsequent changes or repeals of state law to be effective in the federal enclave. The other was to adopt state criminal laws existing on the date of adoption, but only if these laws remained in force. This latter method in effect raises the same constitutional questions of delegation to the states as the present act (since the power to repeal legislation is the power to legislate), but the question was apparently never litigated.


16. The statute provides that the question of whether an act committed in a federal enclave will be a crime, is determined by "... the laws of the state in force at the time of such act ..." 18 U.S.C. §13 (1952).

17. In the famous case of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall, speaking in reference to an act which required all harbor pilots in United States ports to continue to be regulated in conformity with state laws thereafter enacted, said: "... Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on that subject. ... But the act, it may be said, is prospective also, and the adoption of laws to be made in the future presupposes the right in the maker to legislate on the subject." Also, there was a series of federal statutes which were essentially the same as the present Assimilative Crimes Act but applied to specific national parks. Act of March 2, 1929, c. 583 §3, 45 Stat. 463; Act of April 25, 1928, c. 434 §3, 45 Stat. 459; Act of June 2, 1920, c. 218, §4, 41 Stat. 731; Act of August 21, 1916, c. 368, §3, 38 Stat. 522; Act of August 22, 1914, c. 264, §3, 38 Stat. 699; Act of April 20, 1904, c. 1406 §5, 33 Stat. 188; Act of May 7, 1894, c. 72 §3, 28 Stat. 73. One of these acts, Act of June 2, 1920, supra, was applied in Burns v. United States, 274 U.S. 328 (1927), but the question of constitutionality was not raised. See Federal Tort Claims Act, 28 U.S.C. §146 (1952), which based the liability of the United States on the "... laws of the place where the act or omission occurred."; Social Security Act, 64 Stat. 492 (1950), as amended, 42 U.S.C. §416 (h) (1952), which provides that an applicant shall be considered a husband or wife of an insured individual "... if the court of the state in which such insured individual is domiciled at the time such applicant filed an application ... would find that such applicant and such insured individual were validly married at the time such applicant files such application ..."; Bankruptcy Act, 30 Stat. 548 (1898), as amended, 11 U.S.C. §24 (1952), which provides that it shall not affect the allowance of exemptions prescribed "... by the state laws in force at the time of the filing of the petition ..."; Webb-Kenyon Act, 27 U.S.C. §122 (1952), which prohibited the shipment of intoxicating liquors into a state to be used "... in violation of any law [present or future] of such state ..."; Federal Black Bass Act, 44 Stat. 576, as amended, 16 U.S.C. §852 (1952), which prohibited the transportation of fish in interstate commerce contrary to the law of the state from which it is shipped.


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"... This argument rests upon a misconception. It is true the regulation ... permits state prohibitions to apply to movements of liquor from one state into another, but the will which caused the prohibitions would cease the instant the Act of Congress ceased to apply." 20


22. Despite the innumerable references to the rule that Congress may not delegate its legislative authority, there exist only three cases in which the Supreme Court has held federal legislation to be an unlawful delegation of legislative authority: Carter v. Carter Coal Co., 298 U.S. 238 (1936) (involving unlawful delegation to a private group of persons); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (involving unlawful delegation to the President); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (involving unlawful delegation to the President). However, in the light of such cases as United States v. Rock-Royal Co-Operatives, 307 U.S. 533 (1939); N.B.C. v. United States, 319 U.S. 190 (1943); Yakus v. United States, 321 U.S. 414 (1944); and Lichter v. United States, 334 U.S. 742 (1948), it is questionable whether the Panama case or the Schechter case would be followed today. See Davis, ADMINISTRATIVE LAW § 27 (1951), "The Panama case clearly is no longer followed. The Schechter case is probably distinguished from all others in quantity of power delegated-power to approve detailed codes to govern all business subject to federal authority."

23. The Webb-Kenyon Act was intended to cooperate with and complement the laws of those states which chose prohibition, since the commerce clause prohibited their making laws which burdened interstate commerce. The Federal Tort Claims Act was merely intended to waive federal immunity in tort actions. Thus the subject matter and scope of these laws was necessarily limited but their dependence on future state legislation is undeniable.

24. In congressional debate prior to the 1933 Assimilative Crimes Act, several Senators denounced the Act as "... a lousey way of legislating ... indolent legislation ... ;" 77 CONG. REC. 5590-92 (1933).
a logical extreme. Furthermore, it illustrates the importance of making a distinction between adoption and delegation. The dissent failed to recognize this distinction. As a result, they attempted to apply the rule of Panama Refining Co. v. Ryan, which requires Congress to set up a standard to guide the President in determining what prohibitions should be placed on the shipment of petroleum in interstate commerce. Obviously there is no need for a standard or a guide in adoption type legislation since Congress and not the state performs the only legislative act. Whether the Court will look favorably on such legislation in the future will no doubt depend upon practical necessity rather than abstract logic. Perhaps this is why the majority failed to explain the prospective adoption theory in more detail, despite obvious confusion on the part of their colleagues. At any rate, the present decision should not be thought of as over-ruling the doctrine of unlawful delegation of legislative authority but rather as offering a convenient exception to that barrier.

Gerald R. Stockman.

25. If we begin with the premise of the dissent that the essence of lawmaking is the determination of a policy, it would appear that Congress could not enact a law which said: Hereafter the several state legislatures shall make all federal criminal laws necessary for the governing of those federal enclaves within their respective states. The only policy effected in such a law is a policy of allowing the state to legislate for them. This is in direct conflict with the doctrine of unlawful delegation. In the present act, this case states Congress' policy to be that of "allowing our laws to conform with the laws of the states." The result in either case is an identical set of laws. However, the former would be unconstitutional since Congress has delegated the task of legislating to an agent (the state). The latter would not be unconstitutional because Congress, rather than delegating this function to an agent, has adopted the laws of the state.

26. The majority opinion failed to explain this distinction between delegation and adoption. Delegation necessarily implies the existence of a second party, one who will accept the legislative authority. That party is an agent for Congress. Furthermore, the act of legislating is an intentional as well as an intelligent act. When a state legislature passes a criminal law, they do not intend that their act should create a federal crime; nor have they accepted any agency from Congress. Their intent is to create a state crime only. Thus, in regard to the federal crime which results by operation of the Assimilative Crimes Act, they have not legislated at all, since they neither accepted the agency to act for Congress nor intended to legislate for the federal enclaves.

27. 293 U.S. 388 (1934).

28. There is, however, merit in the dissenting opinion of the present case, despite the fact that they erred in concluding that ". . . it is the state not the Congress that is exercising the legislative power under the Assimilative Crimes Act . . ." It points out the fact that the essence of lawmaking is the determination of a policy. The only policy Congress has promulgated under the present act is a policy of conformity between the law of the state and the law of the federal enclave. It is arguable that conformity is not the result to be achieved but rather the means to an end, i.e., the establishment of a comprehensive set of criminal laws for the enclave. This in effect leads to the conclusion that Congress has not legislated at all, or at least not to a degree commensurate with the seriousness of the laws which result. On this basis one might attack the majority's conclusion that the act was ". . . a reasonable exercise of congressional legislative power and discretion."

CONSTITUTIONAL LAW—RIGHT TO SPEEDY TRIAL—NECESSITY OF REQUEST FOR TRIAL.


In May, 1929, the defendant was indicted by a grand jury along with five others for murder. In December, 1934, he was arraigned; and after a plea of not guilty, he was released on bail. The case lay dormant until January, 1957, when the open indictment was discovered, and the defendant was again arrested. The trial started in March, 1957. During the entire delay, the defendant made no attempt to have his case tried. Before trial, a motion was made to dismiss the indictment upon the ground that the unusual delay had prejudiced the defendant. The motion was denied and the defendant was convicted of second-degree murder. On appeal, the Supreme Court of New Jersey, affirmed, holding, inter alia, that since the defendant had made no attempt to have a trial date fixed and since there was no evidence of prejudice to his defense, the mere fact that his trial was long delayed would not allow him to go free under the constitutional guarantee of a speedy trial. State v. O'Leary, 135 A. 2d 321 (N.J. 1957).

The right to a speedy trial is one of the fundamental safeguards of the individual against the abuse of the police power of the state. The right was recognized at common law and has been afforded protection by the Federal Constitution and by the constitutions of many of the states. Numerous states have supplemented the constitutional guaranty with statutes prescribing a time limit upon delay of trial. These statutes dictate what is to be regarded as a speedy trial within the meaning of the constitutional requirement. Some states hold these laws to be mandatory and impose on the state the affirmative duty to bring the accused to trial

1. The court also reviewed the trial court's rulings as to the admissibility of certain evidence, certain charges to the jury, and a denial of a motion for mistrial.
4. "At common law—even at very ancient common law—a prisoner's right to a speedy trial was secured to him by the commission of jail delivery, whereby the jails were cleared, and the prisoners therein confined either convicted and punished, or delivered from custody, twice every year." In re Begerow, 136 Cal. 293, 68 Pac. 773, 774 (1902) (dictum).
5. U.S. Const. amend. VI. Of course, this amendment has no application to proceedings in state courts. State v. Swain, 147 Ore. 207, 31 P.2d 745 (1934). Whether denial of a speedy trial is denial of due process under the Fourteenth Amendment to the United States Constitution seems to be an open question. See People v. Den Uyl, 320 Mich. 477, 31 N.W.2d 699 (1948).
6. E.g., Iowa Const. art. 1, § 10; La. Const. art. 1, § 9; Mo. Const. art. 1, § 18a; N.J. Const. art. 1, § 10; Pa. Const. art. 1, § 9.
7. Usually, the time limit prescribed is from sixty days to three terms of court after indictment. See People v. Foster, 261 Mich. 247, 246 N.W. 60 (1933).
within the prescribed time. 9 Most jurisdictions interpret the statutes as only offering the accused a right which he must demand or such will be deemed waived. 10 The right may be waived not only by a consensual delay, 11 but also by failure to resist postponement. 12 Some decisions indicate that although there is an absence of the necessary demand, the indictment may still be dismissed if the accused can show prejudice to his defense caused by the delay. 18 Certain circumstances have been held to constitute good cause for delay, 14 thus altering the time period laid down by the state. 16 Generally, the protection of the constitutional guaranty and the statutory supplement are held to extend not only to one in prison 16 but also to an accused admitted to bail. 17 Some statutes provide ex-

9. State v. Carrillo, 41 Ariz. 170, 16 P.2d 965 (1932); Ex parte Trull, 133 Kan. 165, 298 Pac. 775 (1931); State v. Rosenberg, 71 Ore. 389, 142 Pac. 624 (1914); Ex parte Chalfant, 81 W. Va. 93, 93 S.E. 1032 (1917).
11. Ex parte Baxter, 121 Kan. 636, 249 Pac. 610 (1926); State v. Pierson, 343 Mo. 841, 123 S.W.2d 149 (1938); Glebe v. State, 106 Neb. 251, 183 N.W. 295 (1921).
13. See State v. Dandridge, 37 N.J. Super. 144, 117 A.2d 153 (1955) where there was a delay of nine years before the defendant was brought to trial. The court upheld the conviction because there was no proof of a request for trial nor of any prejudice to the defendant as a result of the delay, saying at page 155: "[The defendant does not] enlighten us with respect to who his witnesses were, the nature of their expected testimony, or how such witnesses might have aided him in his defense."
14. The court in the instant case expressly stated: "...the slightest proof of embarassment occasioned by the delinquency of the prosecution might well... have tilted our decision in O'Leary's favor." State v. O'Leary, 135 A.2d 321, 325 (N.J. 1957).
15. Speedy trial statutes are of two general categories. One type provides that if the accused is not brought to trial within a stated period of time, he is discharged unless good cause for delay is shown. E.g., CAL. PEN. CODE § 1382 (Deering 1949). The other type differs in that it does not contain an express qualifying clause concerning good cause. E.g., FLA. STAT. ANN. § 915.01 (1943). However, it is held that good cause is an implied excuse for delay in these latter statutes. See U.C.L.A. INTRA. L. REV. 76 (1952-53).
17. Ex parte Munger, 29 Okla. Crim. 407, 234 Pac. 219 (1925). One serving a sentence under a prior conviction is entitled to a speedy trial of other crimes with which he is charged. Harris v. State, 194 Md. 288, 71 A.2d 36 (1950).
pressly for both situations, usually prescribing a shorter period with respect to one in actual custody. 18

The rule of the instant case concerning the need of a demand for trial in order to gain protection under the constitutional provision which guarantees the right to a speedy trial, is in conformity with the weight of authority. 19 While this general rule may be a sound one, the unusually long delay in the instant case makes the decision vulnerable to attack on a far more basic point. The decision seems to ignore one of the principal goals of society in punishing a breach of its laws, that of rehabilitation. The purpose of the state in inflicting a deserved penalty is not vengeance, 20 but is for the reformation of the convicted offender, and as a deterrent to others who might be disposed to commit such a crime. 21 In the light of these accepted theories for the justification of criminal punishment, the decision in the instant case seems to be questionable. The prescribed penalty is valueless to society from the standpoint of rehabilitation, and appears to be solely a measure of retribution for a violation of the law. If the conviction were reversed, the decision would be more consistent with the accepted goals of criminal jurisprudence in that it would avoid the implication that the penalty was founded on vengeance alone. This result would leave the deterrence theory unaffected because of the uniqueness of the circumstances. Perhaps, the total elimination of the need for a trial demand would be the solution to future injustices under similar fact situations.

Donald G. Jewitt.

CRIMINAL LAW—MURDER—EVIDENCE
SUFFICIENT TO INFER DELIBERATION
AND PREMEDITATION.


Defendant lived with her three small children and a woman companion, Mrs. Hosford, with whom she had many differences. Defendant and Mrs.

18. E.g., Mo. Stat. Ann. §§ 545.890, 545.900 (1953). (If accused is confined, he must be tried before end of second term; if he is on bail, before end of third term.)

19. See note 10 supra.


Other objectives of punishment which have been advanced: Ex parte France, 38 Idaho 627, 224 Pac. 433 (1924) (protection of society); People v. Smith, 163 Misc. 469, 297 N.Y.S. 489 (1937) (deter one convicted from future crime); State v. Meyer, 163 Ohio St. 279, 126 N.E.2d 585 (1955) (punish the accused); Simone v. State, 157 Tex. Crim. 393, 248 S.W.2d 938 (1952) (suppress crime); Wilborn v. Saunders, 170 Va. 153, 195 S.E. 723 (1938) (preservation of peace and good order).
Hosford frequented various barrooms in which they were often seen to argue. Defendant was usually the aggressor and on one occasion had threatened to kill her companion. On the night of the murder defendant had been drinking and returned to the house with two sailors and a bottle of vodka. She awoke Mrs. Hosford and opened the vodka. Then she awoke her two and one-half year old daughter, forced her to puff a cigarette, and accused Mrs. Hosford of teaching the child to smoke. Whereupon defendant seized a knife and attacked Mrs. Hosford, saying she was going to kill her. Mrs. Hosford was cut about the head and body but managed to escape and fled the house as had the two sailors. The following morning the child's dead body was found in bed with 38 stab wounds. An attempt had been made to clean the body and clothing. At the trial, defendant's testimony was largely unintelligible. The jury found her guilty of first degree murder and she appealed. The appellate court held that from all the circumstances there was substantial evidence to support the jury's verdict and the conviction was affirmed. People v. Steward, 318 P.2d 806 (Cal. Dist. Ct. App. 1957).\(^1\)

In California, first degree murder is "all murder which is perpetrated by means of poison, or lying in wait, torture, or any other kind of wilful, deliberate, and premeditated killing. . . ."\(^2\) The terms "wilful, deliberate, and premeditated" have been judicially defined on numerous occasions.\(^3\) In People v. Caldwell,\(^4\) "wilful, deliberate and premeditated" were said to require "considerably more reflection than the amount of thought necessary to form the intention." In People v. Bender,\(^5\) the court stated that "'deliberate' means 'formed, arrived at, or determined upon as a result of careful thought and weighing of considerations.'" In this view some appreciable time lapse sufficient to make value judgments and calculate risks is a prerequisite to sustain a verdict of first degree murder for a wilful, deliberate and premeditated killing.\(^6\) On the other hand, there is another line of authority which holds that murder may be deliberate and premeditated no matter how short the time between the first contemplation of the matter and the crime.\(^7\) Typical of this view is that of Pennsylvania\(^8\) with a statute almost identical to that of California.\(^9\) In Commonwealth v.  

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2. CAL. PEN. CODE § 189 (Deering 1949).
3. People v. Caldwell, 43 Cal. 2d 864, 279 P.2d 539 (1955); People v. Cornett, 33 Cal. 2d 33, 198 P.2d 877 (1948); People v. Bender, 27 Cal. 2d 164, 163 P.2d 8 (1945); People v. Griggs, 17 Cal. 2d 621, 110 P.2d 1031 (1941).
5. 27 Cal. 2d 164, 163 P.2d 8, 19 (1945).
7. Aldridge v. United States, 47 F.2d 407 (D.C. Cir. 1931); Wooten v. State, 104 Fla. 597, 140 So. 474 (1932); State v. Hall, 54 Nev. 213, 13 P.2d 624 (1932); Commonwealth v. Drum, 58 Pa. 9 (1868).
Drum, the court said, "[t]he law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury from all the facts and circumstances in the evidence." While in essence, the two views represent only a difference in emphasis, this difference would be sufficient to sustain a conviction of first degree murder in Pennsylvania where reduction to second degree murder would be required in California.

In the instant case the court rejected the doctrine of transferred intent, and reasoned that because the jury would be justified in believing that the defendant had deliberately formed an intent to kill Mrs. Hosford, it could find that this murderous assault was then turned upon the defendant's child immediately after Mrs. Hosford fled. Admittedly, there is evidence upon which a jury could find that defendant deliberated and premeditated before attacking Mrs. Hosford. However, measured by the judicial interpretation of the terms "deliberation and premeditation" in California, there is hardly sufficient evidence upon which a jury could infer that defendant carefully considered and reflected after turning upon Mrs. Hosford. Considering what took place after she returned to the house, it is better argued that defendant's tempestuous and precipitous conduct negatives an inference that she was possessed of the presence of mind necessary for deliberation and premeditation. There would be no opportunity for deliberation and premeditation between the time her attention had first centered upon Mrs. Hosford and the time she turned upon the child. To find evidence of the requisite mental state in these circumstances is to call upon something akin to "transferred deliberation and premeditation." The other evidence upon which the jury might have based its verdict was the infliction of multiple wounds upon the victim. However, in People v. Caldwell, decided by the California supreme court, it was

10. 58 Pa. 9, 16 (1868).
11. The difference would be an evidentiary one in that in Pennsylvania no evidence of a specific time lapse would seem to be necessary in order to sustain a finding that defendant deliberated and premeditated, while in California evidence of some definite time lapse would appear to be necessary.
12. 318 P.2d at 810. It pointed out that the doctrine of transferred intent would only apply had defendant lunged at Mrs. Hosford and stabbed the child inadvertently when Mrs. Hosford stepped aside.
13. See People v. Cartwright, 305 P.2d 93 (Cal. Dist. Ct. App. 1956), where the court said "... the existence of these elements is logically derived by inference from defendant's words and conduct prior to the shooting." In the principal case the evidence of defendant's past bad relations with Mrs. Hosford would warrant a finding that defendant had deliberated and premeditated killing Mrs. Hosford before the night of the murder.
14. See note 3 supra.
15. In finding support for the verdict, the court said that the jury could have found that after Mrs. Hosford's escape the defendant directed her murderous assault against the child. Such a finding would negative any inference of a delay before the child was killed. Since there was no other evidence of defendant's prior attitude towards the child which would warrant the inference that defendant had premeditated the child's death, the jury could not have inferred that defendant had premeditated and deliberated after turning from Mrs. Hosford.
16. 279 P.2d at 539.
said that "if the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations." It may be said that the evidence here is more than sufficient to support the jury's determination that the defendant intended to take the life of her victim, but there is no evidence upon which to support an inference that defendant deliberated and premeditated before taking that life. To say that there is, goes further than to hold that deliberation and premeditation may be instantaneous, and seems to depart from the requirements for finding those elements heretofore obtaining in California.

John J. Cleary.

EVIDENCE—GRUESOME PHOTOGRAPHS—ADMISSION IN MURDER TRIAL.


The defendant was indicted for first degree murder for the shooting of his wife and was convicted in the trial court of second degree murder. The fact of the shooting was admitted, defendant claiming it was done accidentally while he was trying to frighten his wife; the state contended that it was deliberate and premeditated. The defendant appealed, contending that it was prejudicial error for the state to introduce photographs of the deceased in the morgue during and after the autopsy. The photograph in question showed the torso of the deceased where incisions had been made allowing the flesh to be retracted and exposing the abdominal organs and the inner structure of the chest. The state introduced this photograph to show the path of the bullet through the body. The supreme court held that the photograph was gruesome and sound judicial discretion dictated its exclusion but that it was not substantially prejudicial so as to require a reversal under the plain error rule. The court applied the plain error rule because it found defendant's objection in the trial court insufficient to raise the issue of the inflammatory and prejudicial nature of the photographs. State v. Bucanis, 138 A.2d 739 (N.J. 1958).1

Photographic evidence is an item of real proof allegedly used analogously to the employment of the victim's bloody clothing to show position of the wounds but which is in reality introduced primarily for its effect upon

17. The court said that much more appears than the isolated fact that deceased was unlawfully killed to warrant the jury's verdict. 318 P.2d at 811.


the jury. However, there is ample authority for the proposition that photographs, even those depicting gruesome scenes, may be exhibited to the jury if they are relevant to some material issue. This rule applies where the facts shown by the photographs have already been established by other proof, and the effect of the photographs is merely cumulative, so long as they pass the test of relevancy. The most common use of such photographs is to show the position of the body or the direction of the infliction of wounds, to rebut the defendant’s claim of self-defense, to prove that the death was not suicide or to clarify the circumstances of a killing. No cases have been found where a purely prejudicial photograph has been admitted. Authorities are generally in accord that the admission of photographs is a matter of discretion for the trial judge which will not be overruled except in a clear case of abuse. The modern trend in this area of the law is to recognize that when a photograph has some relevance, but its value is outweighed by its prejudicial effect on the jury, it should be excluded. Evidence of this trend is State v. Edwards where the South Carolina court held that photographs which are calculated to arouse the sympathy of the jury are properly excluded if they are irrelevant or not substantially necessary to show material facts or conditions. In an Alabama case, McKee v. State, it was relevant to the state’s case to prove that the deceased died from a ruptured spleen caused by the defendant’s blow. In reversing the trial court, the supreme court held that it was error to exhibit photographs taken in the morgue showing the vital organs of the deceased. The court held that only so much of the organs as was necessary should be exposed. Other jurisdictions, while not going as far as these courts, have weighed the probative value of the photograph against its prejudicial


5. See West v. State, 218 Miss. 326, 331, 67 So. 2d 366, 370 (1953), where the court said, “We adhere to the rule that if photographs which disclose the gruesome aspect of a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused they should not be admitted into evidence.”


7. 194 S.C. 410, 10 S.E.2d 587 (1940).


9. When the instant case is compared with this holding the prejudicial effect of the photograph becomes more apparent. While it might have been relevant to show the path of the bullet through the body it was not necessary to do so with a photograph that the court describes as: “The picture under discussion here was gruesome and horrifying. It portrayed the disemboweled body of the victim after an autopsy and was repulsive beyond description.” State v. Bucanis, 138 A.2d 739, 743 (N.J. 1958).
effect.\textsuperscript{10} The California courts have adopted this view in two recent cases. In \textit{People v. Burns}\textsuperscript{11} the defendant's conviction was reversed because the trial judge had abused his discretion in admitting photographs which were gruesome. These photographs depicted the head and body of the deceased after an autopsy had been performed showing the head shaved and the incisions made during the autopsy. The decision was reversed even though the issue was whether the deceased had fallen or was beaten to death. In \textit{People v. Redstone}\textsuperscript{12} the court held that to admit photographs showing surgical incisions upon the shaved, severed head of the deceased in a prosecution for murder arising from an altercation was error.

The decision in the instant case indicates that the New Jersey court is not willing to follow the recent trend and adopt the rule followed in the California courts. The facts of the case seem to present a perfect opportunity for a reversal. Nor does it appear that society would be substantially harmed if the defendant were granted a second trial. Here the court, while admitting that sound judicial discretion dictated the photograph's exclusion,\textsuperscript{13} was able to avoid a reversal by invoking the plain error rule.\textsuperscript{14} Although the decision is technically correct under the but-for test\textsuperscript{15} of the plain error rule, it disregards the effect this photograph had on the jury. It would be difficult to find that the repulsive nature of the photograph did not have an underlying prejudicial effect on the jury while they were deciding the issues. The New Jersey court will eventually have to decide the admissibility, on the proper objection, of a substantially similar photograph.\textsuperscript{16} It is submitted that the court should apply the test of the California courts and balance the probative value of the photograph against its prejudicial effect upon the jury (both objectively and subjectively), and reverse where necessary without regard to procedural rules.

\textit{Edward J. Carney, Jr.}

\begin{footnotesize}
\footnotesuperscript{10} Craft v. Commonwealth, 312 Ky. 700, 229 S.W.2d 465 (1950); State v. Morgan, 211 La. 572, 30 So. 2d 434 (1947); Lee v. State, 147 Neb. 333, 23 N.W.2d 316 (1946); State v. Upton, 60 N.M. 205, 290 P.2d 440 (1955); Commonwealth v. Simmons, 361 Pa. 391, 65 A.2d 353 (1949).

\footnotesuperscript{11} 109 Cal. 2d 524, 241 P.2d 308 (1952).

\footnotesuperscript{12} 139 Cal. App. 2d 485, 293 P.2d 880 (1956).

\footnotesuperscript{13} 138 A.2d at 743.

\footnotesuperscript{14} The New Jersey Plain Error Rule, R.R. 1:5-1, provides, "The court may, however, notice plain errors affecting substantial rights of the defendant, although they were not brought to the attention of the trial court. If it shall appear, after challenge interposed by the defendant in the appellate court, that the verdict was against the weight of the evidence, the judgment shall be reversed and a new trial ordered."

\footnotesuperscript{15} The test required under the plain error rule appears to be: but for this photograph, would the defendant have been convicted?

\footnotesuperscript{16} It is arguable that the same result could be reached as in the instant case since the plain error rule further provides: "Error in the admission or rejection of testimony . . . shall be cause for reversal if specific objection thereto was made and it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury." (emphasis added). R.R. 1:5-1.
\end{footnotesize}

Noel v. Linea Aeropostal Venezolana (2d Cir. 1957).

Marshal Noel was a passenger aboard an airliner operated by defendant corporation which is owned by the United States of Venezuela. He was killed 30 miles off the coast of New Jersey. Noel's executors brought a civil action in the United States District Court alleging that because of the defendant's "wrongful acts, neglect, default and misconduct" Noel was killed when the plane plunged into the sea. While basing the action both on the Warsaw Convention 1 and the Federal Death on the High Seas Act, 2 the plaintiff demanded a jury trial. The action was dismissed for lack of jurisdiction. Plaintiff amended his complaint alleging death in the airspace over the sea. The district court adhered to its original decision, saying that there was no material difference between death on or above the sea. On appeal the court of appeals affirmed, holding that the Warsaw Convention provides for no independent right of action, whether or not the party has any other remedy, and further, that any rights under the Federal Death on the High Seas Act are cognizable only in admiralty; hence the action was properly dismissed. The court gave no opinion on whether the Federal Death on the High Seas Act grants a right of action for wrongful death in airspace over the sea. Dismissal was without prejudice to plaintiff's right to transfer the case to the admiralty side. 3

In interpreting Article 17 of the Warsaw Convention, concerning passenger injury 4 the decisions have split on the question of whether it has created an independent right of action for wrongful deaths occurring in international aerial flights. 5 Some courts in interpreting the phrase, "shall be liable," hold that the Convention is self-executing and creates a right of action for injury or death of a passenger. 6 In support of this position, courts point to later sections which develop the cause of action by provisions

1. 49 Stat. 3000 (1934).
4. "Article 17. Injury to passenger. The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3000, 3018 (1934).
relating to limitation of liability,\(^7\) contributory negligence\(^8\) and statute of limitations.\(^9\) The other view is that the *lex loci delicti* creates the cause of action and the Convention merely affixed conditions to that right of action, or more specifically, that the Convention creates only a presumption of liability where there is already a *lex loci* cause of action.\(^10\) In *Komlos v. Compagnie Nationale Air France*,\(^11\) upon which the authority for the present holding is based,\(^12\) it was said by way of dictum that the Convention creates no right of action where the *lex loci* does, but if the *lex loci* does not provide such, the forum could apply Article 17 and it might be said that then the Convention creates the right of action for the wrongful death.\(^13\) The instant case specifically rejects this proposition and follows the view that the *lex loci* creates the only cause of action although the Warsaw Convention also applies.\(^14\) The decision also states that the plaintiff's alleged cause of action under the Federal Death on the High Seas Act,\(^15\) if any, must be brought in admiralty court.\(^16\) In so holding, the court follows the majority view which interprets the first section of the Act\(^17\) as giving admiralty exclusive jurisdiction as to all causes of action arising under the Act.\(^18\) However, a contrary view is held by the state courts,\(^19\) *i.e.*, that the admiralty jurisdiction provision is merely permissive; therefore, under the saving clause of the Judiciary Act,\(^20\) the party has a choice of forums in which to bring his action unless he is asking exclusively for an admiralty remedy.\(^21\)
The instant case illustrates the problems and uncertainties involved in attempts to expand the rights provided by aged legislative acts to contemporaneous situations not contemplated by the legislature. When the High Seas Act became law, the airplane was in its infancy, and trans-oceanic air travel was unknown. Yet today, we find that an action for wrongful death of an airline passenger which occurs in the air over the sea may be brought, if at all, only under this Act, and hence only in the admiralty courts. In such courts there is no right to a jury trial. Thus, a plaintiff may lose his normal right to a jury trial on the facts merely because the plane has gone more than a marine league from shore and where very possibly the negligent act or wrongful conduct may have occurred on the ground. The evidence necessary and the remedies sought would be much the same as in any tort action, and no special expertise would be required of the court. It would seem that the denial of a jury trial, solely on the basis of such a dubious interpretation of legislative language, is rightly questioned. If however, no cause of action is allowed under the High Seas Act in a case of death occurring over the sea, we are left with a vacuum which can be eliminated only by an even greater distortion of other unrelated principles, such as the distortion of the Warsaw Convention in the instant case. In view of the great quantitative increase in trans-oceanic air travel and freight carriage, the obvious solution would be specific air law legislation on the point; but in the absence of such, the courts should follow that interpretation of the Federal Death on the High Seas Act which would open the civil side to such causes of action, thus providing a trial by jury.

William E. Mowatt.

NEGLIGENCE—MERCHANT MARINE ACT, 1920 (JONES ACT)—LIABILITY IN WRONGFUL DEATH ACTIONS UNDER SECTION 33.


A seaman lost his life in a fire while serving on a tug on the Schuylkill River in Philadelphia. The trial court found that the cause of the fire was

22. United States v. La Vengeance, 3 U.S. (3 Dall.) 297 (1796).
24. See note 19 supra.
25. See note 21 supra.
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the maintaining of an open-flame kerosene lamp at a height below the minimum height required by the Commandant of the United States Coast Guard. The lamp ignited highly inflammable vapors lying above an extensive accumulation of petroleum products spread over the surface of the river. It was found that if the lamp had been in conformity with the regulation no fire would have resulted. The Supreme Court held that the Jones Act permits recovery for the death of a seaman resulting from a violation of a statutory duty without any showing of negligence. Kernan v. American Dredging Co., 78 Sup. Ct. 394 (1958).

The Jones Act by reference incorporates into maritime law a system of statutes enacted to protect the railroad worker. This incorporation serves to bring into the Jones Act all that is fairly covered by that reference. The Supreme Court has maintained that this reference incorporates into maritime law new standards of liability. These new standards are to

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1. See 33 C.F.R. § 80.16 (h) (1949). "Scows not otherwise provided for in this section on waters described in paragraph (a) of this section shall carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scow in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an unbroken light all around the horizon and shall be of such character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles." The Commandant is empowered to establish rules "as to the lights to be carried . . . as he may deem necessary for safety. . . ." 30 STAT. 102 (1897), as amended, 33 U.S.C. § 157 (1952).

2. Merchant Marine Act, 1920 (Jones Act), 41 STAT. 1007, 46 U.S.C. § 668 (1952), which provides: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such actions all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such actions all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable [i.e., Federal Employers' Liability Act, 35 STAT. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952)]. Jurisdiction in such actions shall be in the court of the district in which the defendant employer resides or in which his principal office is located."


4. See note 2 supra.


6. Panama R.R. v. Johnson, 264 U.S. 375, 392 (1924). This was the pioneer case in which the constitutionality and effect of the Jones Act was considered and dealt with at length.

7. "Section 1 of the Federal Employers' Liability Act, 35 STAT. 65, 45 U.S.C. § 51 . . ., thus incorporated in the Jones Act by reference, gives a right of recovery for the injury or death of an employee of a common carrier by rail, in interstate or foreign commerce, resulting in whole or in part from the negligence of any of the
be mined from the words of the act by giving them a meaning consonant with the attitude of Congress toward this favored class. The Court itself has on occasion expressed a desire, on its own part, to treat seamen as members of a class to be dealt with most considerately. It has displayed this consideration by maintaining that, "the act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used . . . ." To allow for this liberal interpretive policy the Court has broken with old traditions and shaken off all the restrictions which would limit this policy. In an effort to bring the beneficial purposes of this welfare legislation to as large a group as possible, the Court has included a rather extensive list of employees within the term seamen.

officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . appliances, machinery . . . or other equipment. By section 3 of the Act, contributory negligence does not bar recovery, but is ground for apportionment of the damages between employer and employee, and by sections 3 and 4, it is provided that no employee shall be held to have been guilty of contributory negligence or 'to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'


8. "The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class. . . . In the light of and to effectuate that policy, statutes enacted for their benefit should be liberally construed . . . ." Bainbridge v. Merchants' & Miners' Transp. Co., 287 U.S. 278, 282 (1932).

9. " . . . [S]eamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. . . ." Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431 (1939); Bainbridge v. Merchants' & Miners' Transp. Co., 287 U.S. 278, 282 (1932).


11. "The statutory cause of action to recover damages for death ushered in a new policy and broke with old traditions. Its meaning is likely to be misread if shreds of the discarded policy are treated as still clinging to it and narrowing its scope . . . ." Van Beeck v. Sabine Towing Co., 300 U.S. 342, 344 (1937). . . . An ancient evil was to be uprooted, and uprooted altogether. It was not to be left with fibers still clinging to the soil." Warner v. Goltra, 293 U.S. 155, 159 (1934).


13. Butler v. Whiteman, 26 U.S.L. WEEK 3297 (U.S. Apr. 14, 1958) (No. 40) (Whether an odd job man on a barge that had not been in service for over a year was a seaman, held to be a jury question); Grimes v. Raymond Concrete Pile Co., 26 U.S.L. WEEK 4246 (U.S. Apr. 7, 1958) (No. 39) (Whether a worker on a "Texas Tower" which was to be attached to the ocean floor was a seaman, held to be a jury question); Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957) (an employee hired to care for a dredge which he never boarded unless it was tied up); Norton v. Warner Co., 321 U.S. 565 (1944) (a bargeman injured while pushing an engineless barge); Beadle v. Spencer, 298 U.S. 124 (1936) (a seaman on a coastal vessel who did not sign articles); Warner v. Goltra, 293 U.S. 155 (1934) (a master of a ship); Urvie v. F. Jarka Co., 282 U.S. 234 (1931) (a stevedore unloading a German ship); John Baizley Iron Works v. Span, 281 U.S. 222 (1930) (a land based blacksmith working on a ship under repair but afloat in navigable waters); Northern Coal &
It has also extended the terms of the act to include seamen injured while on land,\textsuperscript{14} and to give to all seamen injured through the negligence of a fellow servant the benefit of the doctrine of \textit{res ipsa loquitur}.\textsuperscript{15} The judicial history of the act indicates without doubt that the old maritime law has been completely abrogated.\textsuperscript{16} Time and again the Court has manifested an intent to apply the act to as broad a class as is imaginable,\textsuperscript{17} and to give to this class as wide a range of remedies\textsuperscript{18} for its injuries\textsuperscript{19}.

Dock Co. v. Strand, 278 U.S. 142 (1928) (a shore worker unloading coal); Buzynski v. Luckenbach S.S. Co., 277 U.S. 226 (1928) (a stevedore struck by a negligently dropped chain); Messel v. Foundation Co., 274 U.S. 427 (1927) (a shore worker, boilermaker, injured by scalding steam).


14. "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters. On the contrary it seems plain that in taking over the principles of recovery already established for railroad employees and extending them in the new admiralty setting to any seaman injured 'in the course of his employment', Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit, and to have given to them the full support of all the constitutional power it possessed. Hence the Act allows the recovery sought unless the Constitution forbids it." O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 39 (1943).


16. The general maritime law prior to the Merchant Marine Act of 1915, 38 Stat. 1185 (later amended by 41 Stat. 1007 (1920), 46 U.S.C. §688 (1952)), allowed a seaman no recovery of compensatory damages for injuries resulting from negligence, in this case his recovery was limited to care and maintenance for as long as the voyage should last. However, he was allowed to recover compensatory damages for injuries which resulted from the unseaworthiness of the vessel. The Osceola, 189 U.S. 158, 175 (1903). The compensatory damages which he could recover were lessened to the extent that the seaman himself was guilty of contributory negligence. The Arizona v. Anelich, 298 U.S. 110, 122 (1936). There was no recovery of damages or indemnity for the death of a seaman, whether his death was occasioned by the negligence of the owner or other members of the crew or whether the death was caused by the unseaworthiness of the vessel. Lindgren v. United States, 281 U.S. 38, 43 (1930).

17. See note 13 \textit{supra}. The Court has refused to extend the protection of the act to foreign seamen on foreign ships injured in foreign ports. Lauritzen v. Larsen, 345 U.S. 571 (1953).

18. Cox v. Roth, 348 U.S. 207, 209 (1955). A seaman drowned when his ship founded. The surviving owner died some months later of independent causes. In deciding the Jones Act allowed survival of claims against the estate of a tortfeasor the Court said, "... The Jones Act, in providing that a seaman should have the same rights of action as would a railroad employee, does not mean that the very words of the F.E.L.A. must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting ... ."

Van Breeck v. Sabine Towing Co., 300 U.S. 342 (1937), allowed the estate of a deceased seaman's mother to recover all sums due to her while she lived.

19. Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783 (1949), allowed recovery by a seaman who contracted poliomyelitis while serving in Chinese waters, on the grounds that proper precautions were not taken to prevent such injury to his person during an epidemic.
as is possible. At the same time the Court has exhibited an intent to limit to a narrow range the defenses available against the class.20

Once the issue as to liability without fault had been settled in cases involving railroad employees,21 it was only a matter of time until this same protection would be afforded seamen. The holding that a safety statute of the United States Coast Guard Commandant will be given equal effect with regard to seamen as Interstate Commerce Commission safety statutes are given with regard to railroad employees, is certainly no greater a strain on judicial reasoning than the holding that a handyman, who never went aboard a dredge except when it was tied up, never saw the dredge move, and was ashore cleaning lanterns when he was injured, may be called a seaman.22 Unless Congress indicates a contrary intent in the most clear language it appears that the Supreme Court will extend to seamen every benefit which Congress sees fit to allow to the railroad worker.

Edward J. McLaughlin.

TORTS—PARENT AND CHILD—PARENTAL IMMUNITY FROM LIABILITY FOR NEGLIGENCE.


Plaintiff, a six month old minor, sustained personal injuries in an accident which occurred while riding as a passenger in a car owned by her father and operated by her mother. The mother was insured under a liability insurance policy issued to the father. In a suit against the mother, a preliminary objection was filed by the defendant asking judgment in her favor on the grounds that a parent is immune from tort actions by an unemancipated minor child. This was sustained, and on appeal the Pennsylvania Supreme Court held that public policy precluded an un-

20. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 432 (1939) (Assumption of the risk is no defense under the Jones Act); The Arizona v. Anelich, 298 U.S. 110 1936) (Contributory negligence does not bar recovery, but it is grounds for apportionment of the damages); Uravic v. F. Jarka Co., 282 U.S. 234 (1913) (fellow-servant doctrine held not a valid defense under the Jones Act). The Supreme Court has established a policy of favoring jury verdicts under the Jones Act. "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 523 (1957). Vicarious liability for a battery has been attributed to the employer where a supervisor has struck a fellow servant. Alpha S.S. Corp. v. Cain, 281 U.S. 642 (1930); Jamison v. Encarnacion, 281 U.S. 635 (1930). Acceptance of medical care and wages until the end of the voyage has been held not to be an election of remedies and the seaman may still recover compensatory damages for negligence. Pacific S.S. Co. v. Peterson, 278 U.S. 130 (1928).


22. See note 1 supra.

emancipated minor from maintaining an action in tort for damages against its parent because of the negligent conduct of the parent even where the injuries did not arise out of the exercise of parental discipline and control, and where any judgment against the parent would be covered by liability insurance. Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957).\(^1\)

From the leading case of Hewlett v. George\(^2\) in 1891 there has been a steady stream of authority supporting the rule of parental immunity from personal tort actions by an emancipated minor child.\(^8\) The usual reasons advanced for the rule are preservation of domestic peace and obedience and the prevention of fraud and collusion.\(^4\) However, these reasons do not completely satisfy the objections that a tort for which there is no compensation would, if anything, promote domestic discord,\(^6\) and that in an adversary system it should not be assumed that the allegations of a complaint arise from fraud and thus cause dismissal of the complaint.\(^6\)

While the majority of jurisdictions adhere to the rule of absolute immunity of the parent for personal torts against the child,\(^7\) recently there has been a judicial inclination to repudiate or modify the doctrine by following the principle that when the reason for the rule ceases, the rule itself ceases.\(^8\) Thus, there is a growing trend to allow actions by an emancipated child for wilful or wanton misconduct of the parent.\(^9\) The absolute immunity rule has been held inapplicable where there was a master-servant\(^10\) or carrier-passerger\(^11\) relationship between the parent and child, or where the negligent act was committed while the parent alone was engaged in a business activity.\(^12\) A minor has been permitted to maintain an action against his parent's employer for injuries received as a result of the par-

\(^1\) Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957). It was also held that the father could not maintain an action against the wife in his own right for damages because of injuries to the child.

\(^2\) 68 Miss. 703, 9 So. 885 (1891).


\(^5\) See 1 Harper and James, Torts § 8.11 (1956); Prosser, Torts § 101 (2d ed. 1955).

\(^6\) See Garcia v. Fantauzi, 20 F.2d 524, 529 (1st Cir. 1927).

\(^7\) See note 3 supra.

\(^8\) See, e.g., Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932).


\(^11\) Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

\(^12\) Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).
parent's negligence while acting in the course of his employment, even though the employer had a right of indemnity or contribution from the parent whom the child could not sue. 13 Most jurisdictions have refused to allow an action under wrongful death statutes against a parent or his estate for negligence resulting in the death of the minor child, 14 or against the parent's estate for injuries to the child, 15 but it has been held that an action may be maintained under such a statute where the death of the child resulted from willful misconduct of the parent. 16 The fact that the parent has liability insurance is generally considered to be immaterial, 17 but some courts have held the parental immunity rule inapplicable where insurance was present and an additional non-family relationship existed. 18 In such a situation it has been stated that liability in fact has been transferred from parent to the insurer. 19

The facts of the instant case do not fit precisely within any of the above exceptions to parental immunity, and the court has refused to add another exception to the rule. The exceptions already made indicate that the courts are dissatisfied with a strict application of the rule, and it is submitted that this case should mark another such exception. Injustice results from a broad application of the doctrine of parental immunity as a bar to all suits by a child against his parent for personal injuries. Courts have recognized this, but, confronted with a large body of case law, they have been reluctant to overrule an established doctrine, and thus exceptions have been created. Where right and equity compel, a court should not assist in perpetrating a broad application of a doctrine which is in large part unjust.

14. Owens v. Auto Mut. Ins. Co., 235 Ala. 9, 177 So. 133 (1937); Cronin v. Cronin, 244 Wis. 372, 12 N.W.2d 677 (1944). In a similar situation, where no personal injury to the minor child was involved, it was held that under a wrongful death statute a minor had a cause of action against one parent to recover for the wrongful death of the other. Minkin v. Minkin, 336 Pa. 49, 7 A.2d 461 (1939).
18. E.g., a carrier-passenger relationship. See note 11 supra.
19. Dunlap v. Dunlap, 84 N.H. 352, 372, 150 Atl. 905, 915 (1930) (master and servant relationship). But see Levesque v. Levesque, 99 N.H. 147, 106 A.2d 563 (1954). The Dunlap case enunciated broad principles to the effect that if the parent was insured against liability, there would be no immunity, even without a special relationship existing between the parent and child. But the Levesque case held that a minor child could not maintain an action against his parent for injuries caused by the parent's negligent operation of an automobile, even though the parent carried liability insurance. In Worral v. Moran, 132 A.2d 438 (N.H. 1957), which held that a child could not sue his father's estate, the court noted that the state legislature had recently considered two separate bills which would have allowed suits by a child against his parent for negligence, neither of which had been approved.
It has been suggested that the doctrine should be narrowed to provide for parental immunity only where the injuries occur while the parent is exercising (in a narrow sense) his parental duty. This would appear to be desirable especially in cases where liability insurance exists. Where liability insurance is present in auto negligence cases, as here, the court is faced with the policy question of whether such a loss will be borne by the injured party, who happens to be a minor child of the negligent person, or whether the loss will be distributed to the motoring public. It appears that the just result would be to allow the injured child to recover. Where the parent has insured himself to protect people whom he may negligently injure, and where the person so injured happens to be his minor child and the injury does not arise out of parental control or discipline, it would seem that the reason for the rule has ceased. Even though the injured is in a certain relationship with the negligent party, real injury would be compensated by insurance and not by the economic family unit. Such compensation would more readily promote family happiness. The opportunity for collusion would be present, but this is so even in a suit by an unrelated plaintiff against the insured, or in a suit by a minor nephew against his insured uncle. Sound or not, the decision in the instant case brings out the need for a close judicial and legislative inspection of the problem in light of the prevalence of liability insurance.

Vincent P. Haley.

TORTS—RIGHT OF PRIVACY—NEWSWORTHY ITEMS INTRINSICALLY PRIVILEGED.

Jenkins v. Dell Publishing Co. (3d Cir. 1958)

In September, 1953, David Jenkins was brutally murdered by a group of teen-age criminals when he went to the defense of Frank Stevens,

20. See McCurdy, Torts Between Persons in Domestic Relation, 43 HARV. L. REV. 1030, 1079-81 (1930). Another suggestion is that the parental immunity doctrine should not be applicable in cases where it is reasonably clear that domestic peace has already been disturbed beyond repair, or where by reason of the circumstances it is not imperiled, and where reasonableness of family discipline is not involved. See 1 HARPER AND JAMES, TORTS § 8.11 (1956).

21. In discussing the presence of insurance in the instant case, the court stated that the law imposed no liability upon the insured parents for their negligence resulting in damages to their child, and that such post-contractual liability would not be created. "We refuse to impose a liability where none existed when the contract of insurance was issued." 390 Pa. 287, 300, 135 A.2d 65, 73 (1957). Thus, if the court is ever to change its position in this type of case, judgment would be against the insured, but the insurer would not be liable, because in any case reaching the court the insurance will have been issued at a time when the parental immunity rule was operative. The court's apparent stand on the insurer's liability will militate heavily against the use of insurance coverage as an important factor in discarding the doctrine in the future.

22. Of course, it may be possible to get insurance with the consent of the insurer. But it would be of dubious value if the courts were to adhere to the parental immunity rule and say that the insurer is only liable where the insured incurs legal liability. If the coverage were contracted for, it would still appear that the insurer's contractual liability would only arise upon existence of legal tort liability of the insured.
a rooher in the Jenkins household. His family cooperated with reporters and photographers and permitted a family photograph to be taken for use in local newspapers. In January, 1954, the defendant published this photograph in Front Page Detective, a crime magazine, and briefly documented it with a factual summary of events. The Jenkins family brought suit to recover damages for this invasion of their private lives, alleging that defendant's publication was neither privileged nor authorized. The district court granted defendant's motion for summary judgment. The court of appeals affirmed, holding that publication of an intrinsically newsworthy item was privileged, and that, as a matter of law, a jury should not be permitted to find that the character of this magazine vitiated the privilege. Three judges dissentetd, emphasizing plaintiffs' right to limit interference with their privacy, and emphasizing Pennsylvania's recognition of this right to privacy. Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d Cir. 1958).

Invasion of privacy is a relatively novel concept to the law of torts. In some states, courts have decided that no such right of privacy exists; in other states, legislatures have provided for the right by statute. In the remaining states where the question has been raised, there has been limited recognition of the right, or, at least, a refusal to deny its existence. A few early cases attempted to obviate a decision on the right of privacy by finding liability for unauthorized publications through breach of an implied contract, but the weight of authority has approached privacy law as a development of the law of torts. The right of privacy has been uniformly held to be subject to certain privileged interferences, principally, interferences by publicity in which the public has a general interest.

1. The defendant purchased the photograph from World Wide Photos, Inc., to whom the Pittsburgh newspapers had sold it.
2. Paragraph four of the complaint states: "The defendant is sued for damaging and injuring the plaintiffs by invading the privacy of the plaintiffs by publishing or causing to be published and circulated a picture of the plaintiffs without their permission and without privilege as hereinafter set forth." The insufficiency of these allegations was an alternative ground for the decision.

7. McCreery v. Miller's Grocery, 99 Colo. 499, 64 P.2d 803 (1936); Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912). Both cases give the plaintiff a property interest in his personal photograph so that publication without consent produces a cause of action in general assumpst for breach of an implied contract to pay for an interference with plaintiff's property right.
of the right to privacy in Pennsylvania began with *Waring v. WDAS Broadcasting Co.*,\(^\text{10}\) where Justice Maxey wrote a concurring opinion in which he declared that Waring’s privacy, and not his property, had been invaded. The reasoning of this concurring opinion was particularly applied in *Mack’s Appeal*,\(^\text{11}\) a decision which the dissenting justices in the instant case proclaim as firmly establishing the existence of this right in Pennsylvania.\(^\text{12}\) The Pennsylvania bar appears to agree with this interpretation.\(^\text{13}\) The importance of the instant decision is the treatment of privileged interferences with privacy. The opinion focuses attention on the character of the item published, and urges that as soon as that character has been established as newsworthy, the issue of privilege is affirmatively resolved.\(^\text{14}\) The court rejects the argument that the character of the medium can affect the question of privilege,\(^\text{15}\) and strengthens the basic holding by deciding alternatively, that even if the character of the medium could affect the privilege, such a novel issue must be raised specially in the pleadings; and failure to raise it was a fatal omission in plaintiffs’ complaint.\(^\text{16}\) The court then concludes that, as a matter of law, the item here is newsworthy and the medium here is not of such a character as would affect its privileged nature, even if that issue were specially raised.

It is difficult to see how the court can define *news* as the current interest of all kinds of people in all kinds of events,\(^\text{17}\) (a definition suggesting the classic description of an issue which the jury should determine) and then assert that *newsworthiness* is an issue which a jury need not decide. It is equally difficult to see how the court can emphasize the newsworthy character of an item to the exclusion of all factual inquiries into the character of the medium through which the item is published; for if the privileged publication of newsworthy items is to have any limits at all, these limits should be found in the manner in which the item is published.

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12. Chief Judge Biggs, who wrote the dissenting opinion, stated: “In the *Appeal of Mack*, . . . the Supreme Court of Pennsylvania made it clear that there is a right to privacy in the law of Pennsylvania, and that the Courts of Pennsylvania should protect it.”
14. The court said: “Once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged.” *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 451 (3d Cir. 1957).
15. The court very simply said: “For the purpose of the law of privacy we cannot see how the character of an item can be affected by the journal in which it appears.” *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 452 (3d Cir. 1957).
16. “The mere charge here that the publication was unprivileged is in our view wholly insufficient to put in issue such a special type of wrong as this.” *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 453 (3d Cir. 1957).
17. *Id.* at 451.
Where unbridled curiosity\(^{18}\) or extreme morbidity\(^{19}\) is the appetite the publication satisfies, there should be no privilege, because there is no social benefit in the satisfaction of such appetites. Proof of these and similar non-privileged publications can be made only by demonstrating the environment which the medium itself creates. Policywise, therefore, the court has proffered an unfortunate rule of law; by precluding inquiry into the character of the medium, it has, in effect, decided that the privilege to publish newsworthy items is without limitation.

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\(^{19}\) Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930).