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NEGLIGENCE; WIDOW'S RIGHT OF ACTION FOR HUSBAND'S DEATH. *Adams* v. *N. P. R. R.*, 95 Fed. (Wash.) 938, (1899). This was an action for damages, brought in the District Court of the United States, by the widow of a man who had been killed through the negligence of the defendant company. The action was based upon the statute of the State of Washington, of which state deceased was a resident, corresponding to Lord Campbell's Act in England. At the time of his death, deceased was riding upon a "pass" which purported to release the defendant from all liability for injury. The court did not decide whether the deceased could sign away his right of action in this way, holding the plaintiff's right of action to be *entirely distinct* from that which the deceased might have had if he had survived. The plaintiff was suing for the loss of "the support, protection, society and comfort" of the deceased; the deceased's action—if he had survived—would have been for the breach of the implied contract of safe carriage. This right of the plaintiff the court held could not be signed away by the deceased; she had been no party to the contract and had not authorized the deceased to act as her agent. Accordingly, judgment was given for the plaintiff.

The view that the widow's right of action is distinct in its nature, is laid down in almost all the courts. The United States Court adopted this view, in *Martin's Administrator* v. *B. & O. R. R.*, 151 U. S. 673 (696), decided in 1893; also in *The Oregon*, 73 Fed. 850 (1896). Massachusetts, New York, Pennsylvania, *Henderson* v. *P. R. R.*, 51 Pa. 315, (1863), and the majority of the states have given this interpretation to the statutes. But there is a great conflict of decisions upon the point, whether the right of action is entirely separate; that is, can the widow proceed under a new right and secure damage whether the husband's right was or was not enforceable? The decision in this case would appear to give her that right.

The Massachusetts courts make it an entirely independent right of action, not only enforceable when the husband's right might be barred: *Doyle* v. *Fitchburg R. R.*, 162 Mass. 70 (1894); but allow an action, by the personal representative, to recover damages suffered by the deceased in his life-time, and an action, for the benefit of the widow, to proceed at the same time upon these independent grounds and for different purposes.

Bowes v. *Boston*, 155 Mass. 349 (1892). In that state, there is a statute providing that "if by reason of the negligence of a corporation operating a railroad, etc., the life of a passenger is lost, the corporation shall be punished: Pub. Stat. C. 112, § 212. Under this act, the court holds this a penalty for a penal offence, paid to the next of kin instead of to the state: and as such entirely distinct from any right accruing to the injured party.

The New York rule seems to be that the widow's statutory right is of so distinct a nature from the injured party's, that she may maintain an action under the statute after his death, although he has previously recovered for assault and battery: *Schlichting* v. *Wintjen*, 25 Hun, 626 (1881). But in a previous case, the court declared that a widow could not maintain two separate actions as she can in Massachusetts, because the New York statute did not continue the personal action after death.

The English courts seem to hold this doctrine, also: In *Leggott* v. *G. N. Ry. Co.*, 1 Q. B. D. 600 (1876), it was held that the widow who has sued under Lord Campbell's Act and recovered, could, at a later date, bring suit for the benefit of the estate. So entirely distinct did they consider the two actions that the defendant company was not estopped from denying matters of fact found in the previous case.

There is a Kansas case reported (53 Pac. R. 461, 1898), which exactly agrees with the decision in *Adams* v. *R. R.*, laying down the same doctrine of an independent action.

The rule is different in other states. In Indiana, the court holds that the statue merely continues the common law action; and a recovery by the injured party is a bar to any subsequent proceeding: *Hecht* v. *O. & M.*, 132 Ind. 508 (1892). In Pennsylvania the court adopts the idea that the cause of action is separate, but the right never accrues unless (1) the party dies of his injuries, and (2) the deceased never commenced any action during his life-time: *Taylor's Estate*, 179 Pa. 254 (1897). The doctrine is that the cause of action merges entirely in the survivor. If he compounds it or brings a suit to a finish, no further remedy can be had under the statute. If he commences the suit, and dies before any conclusion, the statute prevents the suit from abating. If he dies and has made no attempt to sue, then an entirely "new remedy" springs into existence by section 19 of the Act of 1851. But, as Green, J., said in *Hill* v. *P. R. R.*, 178 Pa. 223 (1896), "it cannot be argued that it was the intention to give one right of action to the party injured, and another and *independent* right of action for the same injury to the widow." The Act of 1855 does not create any new and independent right, either. It merely extends the number of persons who may sue. The idea that no separate action accrues is laid down in *Taylor's Estate* (*supra*). There, a guardian was prevented from suing under the statute, because the deceased had commenced suit and, after her death, her administrators had made a compromise with the railroad who were the defendant. But there can be no doubt that the death of the party gives the widow under the 19th section of the Act of 1851, a new cause of action. In *Gross* v. *Traction Co.*, 180 Pa. 99 (1887), the plaintiff married the deceased after his injury was sustained: at the trial, she was allowed to recover because the cause of action was the death of her husband, not the injury. In conclusion, it may be said, that this doctrine of a separate cause of action is only important in Pennsylvania as giving a new measure for damages, the reasonable expectation of pecuniary advantage: *Shuatz* v. *R. R.*, 160 Pa. 602 (1894); but we feel sure that no widow can recover where her husband, had he survived, could not have recovered.

CORPORATIONS; ULTRA VIRES; POWER OF A CORPORATION TO HOLD STOCK IN ANOTHER CORPORATION. It has been recently decided in the case of the *First National Bank of Concord, N. H.*, v. *Hawkins* (May 15, 1899), 19 Supreme Court Reporter (U. S.), 739, that a national bank which purchased and held as an investment certain shares of stock in a second national bank, and received dividends thereon, is not thereby estopped to plead the unlawfulness of its action in defence to a suit by the receiver of the second bank after its insolvency to collect an assessment made on the shareholders by the comptroller. The questions which seem to be presented by this case are twofold: 1. Can a corporation acquire and hold the stock of another corporation as an investment? 2. Supposing that it cannot, the question presents itself, can a corporation, having purchased such stock of another corporation, be estopped to deny its liability as an apparent stockholder after it has received the benefits accruing from such holding?

The modern English and American doctrines on the first question may be briefly stated, as follows: That a corporation has no power to acquire and hold stock in another corporation unless such power is expressly conferred, or unless the investing in the stock of another corporation is contrary to the nature of the business for which it was created. This rule is well settled and admits of little or no discussion. In the opinion by Mr. Justice Shiras in this case he refers briefly to Section 5136 of the Revised Statutes, in which the powers of a national bank are set forth and among which the power to hold stock in another national bank, or, in fact, any other corporation of any description is not included. In construing this section he refers to the case of the *First National Bank of Charlotte* v. *National Exchange Bank of Baltimore*, 92 U. S. 122 (1875), in which it was said that "dealing in stocks is not expressly prohibited, but such prohibition is implied from the failure to grant the power." This interpretation had been previously decided in this court: *Pearce* v. *Mad. & Ind. R. R.*, 21 How. 442 (1858); *Bank of Augusta* v. *Earle*, 13 Pet. 587 (1839); *Perrine* v. *Ches. & Del. Canal Co.*, 9 How. 184 (1850).

It being admitted, and it is undoubtedly true, that this construction is correct, it naturally follows that the subscription by the plaintiff bank to the stock of the insolvent bank was prohibited by the act of incorporation, if not expressly, at least by implication, and was void. The argument advanced by Boynton, J., in *Franklin Bank* v. *Commercial Bank*, 36 Ohio St. 355 (1881), seems conclusive. He continues, after stating the general rule, as follows: "Were this not so, one corporation by buying up the majority of the shares of another corporation could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry one. A banking corporation could become the operator of a railroad or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining control of the bank's stock." Thus it might be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. It might destroy all competition by destroying its rivals and wiping them out of existence. On this question the court was certainly correct in deciding such purchase *ultra vires*.

The second part of the decision is that a corporation, having committed such unlawful act and reaped its rewards, can, when asked to assume a liability which it is only fair it should be presumed to have accepted as indispensable to its holding, set up as a defence to a suit to enforce such liability the *ultra vires* of its acquisition.

It has been recently decided that, as incidental to the power to loan money on personal security, a bank may, in the usual course of its business, accept stock of another corporation as collateral security, and by an enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders: *Bank* v. *Kennedy*, 167 U. S. 362 (1896). Now if this case be correctly decided it is hard to distinguish between it and the case under discussion. If, as has been said, a corporation may be held liable when it acquires stock in the usual course of its business, why should it not be held liable when it acquires it by a voluntary act on its part? There seems to be no doubt as to the *ultra vires* of such act, but should it be allowed to set this up as a defence when it has reaped for years the fruits of such illegal act? May a person accept all the profits and escape all the liabilities for loss? It would seem that such ought not to be the rule, and this view was taken by Mr. Justice Strong in *National Bank* v. *Case*, 99 U. S. 628. (1878), in which case he says: "There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the National Banking Act that prohibits it. But even if there were, the lendor could not set up its own violation of the law to escape the responsibility resulting from its illegal action." This, though a dictum, was followed in effect in the case of the *Citizens' State Bank* v. *Hawkins*, 71 Fed. 369 (1896).

In *Steam Nav. Co.* v. *Weed*, 17 Barb. (N. Y.) 378 (1855), the court, after examining a number of authorities, concludes the opinion thus: "It ill becomes the defendant to borrow from the plaintiff for a single day a sum of money to relieve their immediate necessities and then to turn around and say: 'I will not return this money because you had no power by your charter to loan it.'"

So, also, was it held in *Wright* v. *Antwerp Pipe Line*, 101 Pa. 204 (1884), where a corporation, although prohibited by its charter, entered into a contract for the purchase of stock in another corporation, and the contract was executed by the delivery of the stock that it may not plead in defence to a suit on a promissory note given in payment for the price of the stock, and in the hands of a purchaser for value, that the contract was *ultra vires*.

The cases above cited are only a few of many which hold that the defence of *ultra vires* by a corporation, which has recovered the profits of the transaction, is insufficient and will not be supported. And this view is certainly the more equitable and, in common justice, the only just conclusion which can be reached, and it is submitted that the decision of the Supreme Court in this case reversing the judgment of the Circuit Court of Appeals in favor of the receiver of the insolvent bank was erroneous.

EVIDENCE; ORAL AGREEMENT VARYING CONTRACT OF ENDORSEMENT: *Bank of Washington* v. *Ferguson*, 59 N.Y. Suppl. This case is the latest of a long series of decisions upon this question. In spite of some conflict, the general principle seems to be that the contract of endorsement may not be varied by parol. Here Ferguson was the last endorser upon two promissory notes, drawn by the Arkell Company, and by it endorsed. The notes were also endorsed by W. J. & J. Arkell. Defendant had the notes discounted by the plaintiff bank, of which he was vice-president: The proceeds were credited to his use and were utilized by him, part only being handed to Arkell Company. Ferguson's main defence to the action was that he was accommodation endorser, and that, at the time of the endorsement, it was orally agreed that he should be liable only for the balance of the amount named in the notes after certain collaterals had been applied and all remedies against the maker exhausted. In refusing to allow the defence, the court said: "The defence pleaded is inherently bad. The defendant's accommodation endorsement was a written contract to which the law has given a definite character. . . . He now pleads that the written agreement was not the real agreement. . . . Thus he distinctly seeks to qualify his written obligation. Parol evidence, tending in this direction, is as clearly inadmissible in a contract of endorsement, accommodation or otherwise, as in the case of any other written agreement."

The decision in the *Susquehanna Bridge Company* v. *Evans*, 4 Wash. (U. S. C. C.), 480 (1829), went the other way in a similar state of facts. Mr. Justice Washington allowed an endorser to show a parol agreement that the endorsees should charge the maker, on the ground that "the reasons which forbid the admission of parol evidence to alter or explain written instruments do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the endorsement of a note." In *Dale* v. *Gear*, 38 Conn. 486, on the other hand, it was said "the contract of endorsement is implied by law as clearly and as perfectly from the blank endorsement of a negotiable note as if written out in full when endorsed. And if, as between the original parties, there is any equity existing dehors the instrument, which should prevent the endorsee from enforcing the contract, it must be set up as an equity, provable in equity, to bar an apparent legal liability. . . . And it *cannot* be shown because the rule of evidence to which we allude is not applicable."

These statements, though not made with reference to the Susquehanna Bridge case (which was not noticed), are quite applicable, and clearly show the weakness of Mr. Justice Washington's decision. But that even the Connecticut courts themselves have not always been consistent on the subject is evident from the early case of *Smith* v. *Barber*, 1 Rort. 207, where the court distinctly held an opinion contrary to the decision in *Dale* v. *Gear*.

It seems quite a favorite statement with the text-book writers to declare that the law of Pennsylvania especially is anomalous and out of accord with that of the rest of the country upon this question. They cite various cases in support of their propositions, but there are three in particular upon which nearly all unite: *Hill* v. *Ely*, 5 S. & R. 363; *Patterson* v. *Todd*, 18 Pa. 426, and *Ross* v. *Espey*, 66 Pa. 481. Upon a close examination of these cases, however, they do not lend that degree of support to the statement which one might reasonably expect from their popularity with those who cite them.

In *Hill* v. *Ely* the defendant purchased coffee of the plaintiff, giving in payment the notes of a third person upon express agreement that no liability should attach to the defendant. The notes were handed to plaintiff without endorsement, but he was afterwards induced to endorse the notes, the plaintiff saying he wished it merely for convenience in collection. The court admitted evidence of this agreement, but only upon the ground that the plaintiff was guilty of fraud in obtaining or using the endorsement. It was said that, as this parol evidence would be received in chancery to reach the fraud, it would also (on account of the constitution of the Pennsylvania courts) be received in their courts of law. It was expressly stated that the evidence was not received to contradict the written agreement.

In *Patterson* v. *Todd* a note was endorsed by the payee when overdue, and the main question was whether there should have been subsequent demand and notice. The court decided that demand and notice, within a reasonable time, were necessary. Incidentally, it not being necessary for the decision of the case, the court said that the defendant might show, by parol evidence, that he said he would not warrant the notes. But this was a mere dictum, possibly thrown off by the court in an unguarded moment. The question was not directly raised by the facts, nor was it argued by counsel. And whatever respect we may feel for the court, it is important not to attach too much weight to chance sayings such as this.

In the third Pennsylvania case, *Ross* v. *Espey*, the court allowed the second endorser in an action against him for the full amount of the note, by the third endorser, who had paid the note, to show that there was an agreement between the two endorsers, that in case of failure by the maker to pay they should be jointly liable. The facts were almost identical with those in *Philipps* v. *Preston*, 5 Howard, 278, and the decision was the same. But neither of these cases affirms the proposition that parol evidence is admissible to vary the endorsement. There was no pretense of grounding the suit upon the notes or the endorsements upon them. Both actions were grounded upon the collateral agreement, *i. e.*, that they should be jointly liable. This was a good parol contract, the consideration upon each side being the promise emanating from the other side. The evidence, being offered only to prove this separate parol contract, was of as high a character as the law demands in such cases and was rightly admitted.

A few of the principal dissenting cases have been briefly discussed. In affirmance of the principle there are very many cases, all embodying facts and decisions so nearly identical, that the mention of a few will suffice for all.

Wright v. *Morse*, 9 Gray, 337. Parol evidence is inadmissible even between the original parties to a note to show that a person, whose name is signed upon the back of a note, signed it as guarantor or upon a condition not performed.

Bigelow v. *Coton*, 13 Gray, 309. One who puts his name before delivery on the back of a promissory note, payable to maker or order and endorsed by maker, is an endorser and not a joint maker, and his liability cannot be varied by parol evidence.

Bank of U. S. v. *Dunn*, 6 Peters, 51. The defendant was not allowed to show an agreement that he should not be liable upon his endorsement.

Specht v. *Howard*, 16 Wallace, 564. The court would not allow evidence of an agreement that payment should be demanded in a certain place. It was only through accident that the agreement was not written. But it could not be shown, because it tended to vary the absolute terms of the written contract.

These are typical of the great number of cases again and again affirming the point until Parsons feels justified in saying . . . "it is a firmly-established principle that parol evidence of an oral agreement alleged to have been made at the time of drawing, making or endorsing a bill or note cannot be permitted to vary, qualify, contradict, add to or subtract from the absolute terms of the written contract."