UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

Published October to June by the Law School of the University of Pennsylvania, 34th an Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $3.00 PER ANNUM; SINGLE COPIES, 35 CENTS

NOTES.

AGENCY—CONSTRUCTIVE KNOWLEDGE OF THE PRINCIPAL.—Knowledge acquired by an agent before the existence of the relation of agency does not constitute constructive knowledge of the principal; but it may be put in evidence to show actual knowledge on the part of the principal, under the presumption that an agent will impart to his principal, at the time of entering into the relation, what knowledge he then has of the subject-matter of the agency. But this presumption may be rebutted.[1]

There are two views as to the reason for imputing to the principal knowledge of facts of which his agent has knowledge. One theory is that the principal and agent are one and the same in the eye of the law, so far as the agency is concerned; the other is that the agent is presumed to have communicated to his principal what information he has bearing on the relation existing between them.[2] Under the first theory, namely, that the principal and agent are identical so far as relates to the subject-matter of the agency, it is clear that any information which the agent may have acquired before he became connected with the principal cannot be imputed

[1] Hall & Brown Wood Working Mach. Co. v. Haley Furniture & Mfg. Co. *et al.*, 56 So. Rep. 726 (Ala. 1911).

[2] 31 Cyc. 1593; Mechem, The Law of Agency, Sec. 719.

to the latter, for the reason that, as stated by Mr. Justice Sharswood in Houseman v. Girard Mutual Building and Loan Association,[3] "it is only during the agency that the agent represents, and stands in the shoes of, his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased, would be."

This view of the reason for holding that the principal has notice of facts within the knowledge of his agent, and which necessarily restricts the notice to that acquired during the agency, has been adopted in some other jurisdictions,[4] but the second theory mentioned represents the great weight of authority.[5] To it there are, however, certain qualifications which, with the general rule itself, are thus stated by Professor Mechem:[6] "The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency, which the agent acquires or obtains while acting as such agent and within the scope of his authority, or which he may previously have acquired, and which he then had in mind,[7] or which he had acquired so recently as to reasonably warrant the assumption that he still retained it;[8] provided, however, that such notice or knowledge will not be imputed (1) where

[3] 81 Pa. 256 (1876). Approved in Barbour v. Wiehle, 116 Pa. 308 (1887), and in Lightcap v. Nicola, 34 Pa. Super. 189 (1907).

[4] Congar v. Chic. & N. W. R. R. Co., 24 Wis. 157 (1869); Advertiser & Tribune Co. v. Detroit, 43 Mich. 116 (1880); *dictum* in Farmers and Citizens' Bank v. Payne, 25 Conn. 444 (1857).

Bank of U. S. v. Davis, 2 Hill (N. Y.) 451 (1842) is frequently cited in support of this view, and as showing that the New York courts adopt it; but this is unwarranted. It is true that in the opinion it is said, "The principal is chargeable with this knowledge for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions." But the actual decision is that knowledge acquired by a director before the meeting at which action was taken, at which time only, according to the court, was the director acting as the agent of the bank, might be charged to the bank upon proof that he was present and acted at the meeting. This case, and later decisions in the same state seem to have taken the anomalous position of holding that, while the reason that the principal is considered to have notice of facts known to his agent is that they are in law identical, yet knowledge acquired by the agent before the relation was entered into may be imputed to the principal. Craigie v. Hadley, 99 N. Y. 131 (1885); Constant *et al.* v. Univ. of Rochester, 111 N. Y. 604 (1889).

[5] Frenkel v. Hudson, 82 Ala. 158 (1886), by way of *dictum;* Day v. Wamsley, 33 Ind. 145 (1870); Pritchett and Allen v. Sessions, 10 Rich. (S. C.) 293 (1857); The Distilled Spirits, 11 Wall. (U. S.) 367 (1870); Dresser v. Norwood, 17 C. B. (N. S.) 466 (1864); Chouteau v. Allen, 70 Mo. 290 (1879); Suit v. Woodhall, 113 Mass. 391 (1873); Fairfield Savings Bank v. Chase, 72 Me. 226 (1881).

[6] The Law of Agency, Sec. 721.

[7] Wittenbrock v. Parker, 102 Cal. 93 (1894); Fairfield Savings Bank v. Chase, *supra.*

[8] Chouteau v. Allen, *supra.*

it is such as it is the agent's duty not to disclose,[9] and (2) where the agent's relations to the subject-matter, or his previous conduct, render it certain that he will not disclose it,[10] and (3) where the person claiming the benefit, or those whom he represents, colluded with the agent to cheat or defraud the principal." [11]

It will be seen that, under either view, the principal is chargeable with notice of facts coming to the knowledge of his agent during the agency. The difference arises when the agent's knowledge is acquired prior to the establishment of the relation. In the present case [12] the court adopted the first theory as to knowledge acquired by the agent during the agency, but a modification of the second as to knowledge obtained by him before the agency began. In other words, the principal is conclusively bound by notice received by the agent during the relationship, but is only presumed to know what the agent learned before it; and this presumption, which is based on the further presumption that the agent communicated to him what he had previously learned, may be rebutted by showing that such communication was not actually made. Under the second theory, as generally adopted, it will be remembered that, with the exceptions noted by Mr. Mechem, the principal is just as much bound by knowledge acquired by his agent before the agency, as by that acquired during it. The court in the case under review admitted that this view is supported by the weight of authority, but thought it wrong, and adhered to the rule, which it said is established by the Alabama cases, namely, that there is only a presumption of knowledge on the part of the principal, of facts known to the agent before the relation was established; and that this may be rebutted by showing that the principal did not in fact have the knowledge. It is interesting to note that the decisions in that state have not all taken this view of the subject,[13] and that the court in the present case found it necessary to explain several, and overrule one, which was decided but a few years earlier, and which adopted the second theory without the modification.[13]

It must be admitted that it is not desirable to have a general rule surrounded by a large number of exceptions; but where there are only a few necessary qualifications, the result may very well be better both as conforming to established legal principles, and as being more efficacious in working out justice, than in the case of a single rule which does not cover the ground. Obviously the doctrine of the case under discussion is open to the objection that it is necessarily very difficult, if not impossible, in many cases, to prove

[9] The Distilled Spirits, *supra; dictum* in Bank v. Chase, *supra.*

[10] Innerarity v. Bank, 139 Mass. 332 (1885).

[11] National Life Ins. Co. v. Minch, 53 N. Y. 144 (1873).

[12] Hall & Brown Wood Working Mach. Co. v. Haley Furniture Mfg. Co., *supra.*

[13] White v. King, 53 Ala. 162 (1875); Dunklin v. Harvey, 56 Ala. 177 (1876); Lea v. I. B. Mercantile Co., 147 Ala. 421 (1906).

that knowledge, acquired by the agent before the agency existed, has been in fact communicated to the principal; and the mere presumption that such was the case is hardly sufficient to counterbalance the opportunity afforded the principal to escape the disadvantages which may have arisen from contracts made by his agent, which turned out differently than was expected. No matter how certain it is that the agent knew of material facts while acting for his principal, the latter is not bound by such notice, if he can rebut the presumption against him; and, unless this is a strong presumption, it seems probable that it could be rather easily overthrown. On the other hand, from the nature of the case, any evidence to support the presumption is difficult to adduce in the majority of cases. Once it is established that the agent had the knowledge while he was acting for his principal, there seems to be no good reason for holding that because he acquired it before he became an agent, his principal is only presumptively bound by it, but that if he had acquired it during the agency, his principal would be absolutely bound. The fact that the notice was received by the agent at a different time should only be of weight in determining whether he had it in mind when acting for the principal; and, it is submitted, the court would have reached a sounder conclusion, had this view been adopted. *L. C. A.*

CONSTITUTIONAL LAW—EMPLOYER'S LIABILITY ACT.—The Federal Employer's Liability Act of 1908[1] and the Amendment of April 5, 1910,[2] have been declared constitutional.[3] The act in brief (1) abolishes the fellow-servant doctrine and (2) restricts the defenses of contributory negligence and assumption of risk in cases where a common carrier is sued by an employee to recover for injuries sustained while engaged in interstate commerce. It is practically a re-draft of the Act of June 11, 1906,[4] which was condemned because it assumed to regulate intrastate as well as interstate commerce, the valid and invalid portions of the act being inseparable.[5] The present act avoided this pitfall by express words.

In determining the constitutionality of this act the question before the court was obviously one of fact. The act, if valid, is an exercise by Congress of the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[6] Does the abrogation of certain common-law defences in

---

[1] 35 Stat. at Large, 65, ch. 149.
[2] 36 Stat. at Large, 65 ch. 143.
[3] Mondon v. N. Y., N. H. & H. R. R, 32 Sup. Ct. Rep. 169 (1911).
[4] 34 Stat. 232.
[5] Employers' Liability Cases, 207 U. S. 463 (1907).
[6] Constitution, Art. I, § 8.

the class of actions mentioned amount to a "regulation of commerce?"

Commerce has been defined as "commercial intercourse in all its branches." [7] To regulate means "to prescribe the rules by which such commerce is to be governed."[8] This power extends not only to the subjects and substance of foreign and interstate commerce, but also to the persons engaged in it and the instrumentalities by which it is carried on.[9] A railroad is such an instrumentality.[10] But the end to be accomplished by the regulation must bear some real or substantial relation to interstate commerce and the means adopted must be calculated to further the end sought. The famous words of Chief Justice Marshall give the test to be applied: "Let the end be legitimate, let it be within the scope of the constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the spirit and letter of the constitution, are constitutional." [11]

Applying this test to the act in question it would seem that the end sought was the facilitation of transportation by promoting the safety of those engaged in it. That this is a "legitimate end" has been established in cases [12] upholding the Safety Appliance Act.[13] But that Act bore directly on the problem of providing safe modes of conveyance; the end was legitimate and the "means plainly adapted to that end." An act regulating the hours of labor for employees engaged in interstate commerce is also obviously within the range of federal power.[14] But do the privileges of the Employer's Liability Act actually contribute to the convenience or safety of passengers, of owners of freight, or of the employee? Is the means plainly adapted to the end?

It has been said several times that Congress may change the common law rules of liability between master and servant in respect to common carriers engaged in interstate commerce.[15] But the only substantial reason ever advanced to sustain the position is given

---

[7] Gibbons v. Ogden, 9 Wheat. 1 (1824); Swift & Co. v. U. S., 196 U. S. 325 (1904).

[8] Marshall, C. J., Gibbons v. Ogden, *supra.*

[9] Sherlock v. Alling, 93 U. S. 99 (1876); Gloucester Ferry Co. v. Pa., 114 U. S. 196 (1884); Lottery Cases, 188 U. S. 321 (1902); Northern Securities Co. v. U. S., 193 U. S. 197 (1903).

[10] Interstate Com. Com. v. G. H. & M. R. Co., 167 U. S. 633 (1896); Ill. Cent. v. Ill., 163 U. S. 142 (1895); U. S. v. Geddes, 131 Fed. 452 (1904).

[11] McCullough v. Md., 4 Wheat. 316, 421 (1819).

[12] Johnson v. Southern Pac. Co., 196 U. S. 1 (1904); Schleumer v. Buffalo, Rochester, etc., Ry., 205 U. S. 1 (1906).

[13] 27 Stat. 531, c. 196.

[14] Balto. & Ohio R. R. v. Interstate Com. Com., 221 U. S. 612 (1910), upholding the Act of March 4, 1907, 34 Stat. at L. 1415, ch. 2939; U. S. Comp. Stat., Supp. 1909, p. 1170.

[15] Johnson v. Southern Pac. Co., *supra;* Harlan, J., in Peirce v. Van Dusen, 47 U. S. App. 339 (1897).

by the court in the principal case. It is this: that the tendency of the changes prescribed is to impel carriers to take greater care, thus promoting the safety of the employees and advancing the commerce in which they are engaged. But does not the carrier take every reasonable precaution to avoid any event tending to interrupt transportation? Every accident occurring in the business of transportation directly injures that business. The same thing cannot be said of accidents in the business of an employer not operating a railroad. Carriers prescribe rules and adopt devices calculated to protect the commerce in which they engage, and those engaged in it. In the typical case the master has taken every precaution. The fellow-servant has disobeyed orders or disregarded devices which the self-interest of the master prompted him to make. It is difficult to see how this added liability tends to increase the care taken by the employer. On the other hand in regarding its effect on the conduct of the employee, can it be said that members of a class, influenced by the considerations of class sympathy, will be impelled to take greater care in their movements in a common occupation in its nature dangerous, in cases where the liability for injuries sustained by one member through the negligence of another, is borne by a second class, than where such liability is borne by the class injured, *i. e.*, each individual member of it. The fellow servant rule as originally adopted proceeded on the theory that the servant has better opportunities than his master of watching and controlling the conduct of his fellow-servants, and that a contrary doctrine would encourage negligence.[16] The later view taken by Chief Justice Shaw was that the servant had assumed the risk of all dangers inherent in the employment, among them that of negligence of a fellow-servant.[17] But both of these theories only justify the result growing out of the idea that a master "cannot be expected to take more care of the servant than he may reasonably be expected to do of himself."[18] That an Employer's Liability Act has the tendency to impel employees to use greater care toward each other in their common employments is a proposition not supported by human experience. The arguments against the proposition that the abolition of the absolute defence of contributory negligence tends to increase the degree of care exercised by the employer are obvious.

The court cited a decision under the Carmack Amendment[19] to the Hepburn Act[20] as sustaining the proposition advanced. Under that amendment the initial carrier is made liable for goods lost in interstate commerce, though lost on connecting lines.[21] But this,

[16] Priestly v. Fowler, 3 M. & W. 1 (1837).
[17] Farwell v. Boston & Worcester R. R. Co., 4 Metc. 49 (Mass. 1842).
[18] Priestly v. Fowler, *supra*.
[19] June 29, 1906; 34 Stat. at L. 584, 595.
[20] January 4, 1887; 24 Stat. at L. 379.
[21] Atlantic Coast Line R. R. Co. v. Riverside Mills, 219 U. S. 186 (1911).

under the methods in vogue among the carriers, as pointed out in that decision, was clearly a regulation to protect the shipper and secure unity of transportation with unity of responsibility. It is clearly not analogous to the case under discussion. The regulation bears a substantial relation to interstate commerce, but the case does not stand for the proposition that any absolute liability imposed on a common carrier for the negligence of its employees is necessarily so related. On the other hand it has been decided that a statute making it a crime for a common carrier engaged in interstate commerce to discharge an employee because of his membership in a labor union is not a "regulation of commerce." [22] It would seem that "a provision of law which will prevent or tend to prevent the stoppage of every wheel in every car of an entire railroad system certainly has as direct an influence on interstate commerce as the way in which one car may be coupled to another or the rule of liability for personal injuries to an employee." [23] Perhaps there exist excellent economic reasons for condemning this latter act, and approving the Liability Act, but it is submitted that this question being one of policy is not for the court in passing on the question of the constitutionality of the act.

It is not doubted that if Congress could impose the liability in question, it has the power to prohibit any contract in evasion of it, and the provision of the act declaring such contract void is not repugnant to the Fifth Amendment as an interference with the liberty of contract.[24] *E. H. B., Jr.*

CONSTITUTIONAL LAW—VALIDITY OF A STATUTE REGULATING THE ASSIGNMENT OF WAGES.—Moved by the dishonest and oppressive tactics of persons who made a business of lending money on the security of wages and salaries, the Massachusetts legislature passed an act,[1] which makes invalid as against the employer of the assignor, any assignment of, or order for, wages to be earned in the future, given to secure a loan of less than two hundred dollars, until the assignment or order be accepted in writing by the employer and filed, together with the acceptance, with the clerk of the city or town in the place of residence of the employee. If the person so assigning his wages is married, the written consent of his wife must be appended to the assignment.

The state Supreme Court upheld the constitutionality of this statute.[2] The "loan sharks" whose occupation was thus taken away

[22] Adair v. U. S., 208 U. S. 161 (1907).

[23] Adair v. U. S., *supra*, dissenting opinion, McKenna, J., p. 189.

[24] Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549 (1910); Eddystone Pipe & Steel Co. v. U. S., 175 U. S. 228 (1899); B. & O. R. Co. v. Interstate Commerce Com., 221 U. S. 612 (1910).

[1] Mass. Laws, 1908, Chap. 605, secs. 7, 8.

[2] Mutual Loan Co. v. Martell, 200 Mass. 482 (1909).

from them, appealed the case to the Supreme Court of the United States, where the decision of the Massachusetts court was sustained.[3]

The protection of the wage-earner in his relations with his employer has been a fruitful subject of legislative enactment and judicial decision. The early attitude of the courts seems to have been that the liberty to contract, impliedly protected by the Constitution, could not be infringed even by legislation looking to the welfare of the laborer. The question has frequently come up under statutes regulating the hours of work, and the manner of paying wages earned. Different states have reached opposite conclusions on the same questions. A requirement that wages be paid in money and not in company store orders, was held unconstitutional in Illinois[4] and in Pennsylvania;[5] but in Indiana[6] and West Virginia[7] such a regulation was declared valid. The same diversity of opinion is found on the constitutionality of a requirement that wages be paid semi-monthly.[8] Other conflicts on similar questions might be mentioned.

The United States Supreme Court has shown a remarkable uniformity in holding constitutional state laws regulating the manner of earning, and the mode of paying and receiving wages. In Holden v. Hardy,[9] and in Muller v. Oregon,[10] the regulation of the hours of labor for men and women was upheld. In Knoxville Iron Co. v. Harbeson,[11] a requirement that wages be paid in money was held valid. In McLean v. Arkansas,[12] the court, in passing on the constitutionality of a law requiring that wages paid to miners be determined by the weight of the coal at the mouth of the pit, took a position adverse to the decisions of the courts of Illinois.[13]

In recent years the legislatures of various states have extended their regulation of wages and salaries so as to protect their receipt. The pernicious and improper activities of men who, having lent money at usurious rates, have taken assignments of future wages as security, have been so extensive as to require some restrictive regulation. Acting under the police power to promote the welfare and happiness of their citizens, the legislatures have declared such

---

[3] Mutual Loan Co. v. Martell, 32 Sup. Ct. Rep. 74 (1911).

[4] Frorer v. People, 141 Ill. 171 (1892).

[5] Godcharles v. Wigiman, 113 Pa. 431 (1886).

[6] Handcock v. Yaden, 121 Ind. 366 (1889).

[7] State v. Coal Co., 36 W. Va. 802 (1892), reversing State v. Goodwill, 33 W. Va. 179 (1889).

[8] Lawrence v. Rutland R. R. Co., 80 Vt. 370 (1907); Republic I. & S. Co. v. State, 160 Ind. 379 (1902).

[9] 169 U. S. 366 (1898).

[10] 208 U. S. 412 (1908).

[11] 183 U. S. 13 (1901).

[12] 211 U. S. 539 (1909).

[13] Ramsey v. People, 142 Ill. 380 (1892).

assignments void, unless executed with formalities somewhat similar to those required by the Massachusetts statute in question in the principal case.

Whether or not such acts of legislatures are a permissible infringement of the free right to contract, is a question which must be decided with due regard to the magnitude of the evil to be corrected and the reasonableness of the means used for that purpose,[14] The courts have long since receded from the position which the Supreme Court of Pennsylvania took in 1886,[15] when it held that an act to compel the payment of wages in cash was "an insulting attempt to put the laborer under legislative tutelage, which is not only disgracing to his manhood, but subversive of his rights as a citizen of the United States." In fact, the same court, only one year later, held,[16] even without legislative enactment, that an assignment of future earnings by one not under contract is so opposed to public policy as to be void. The court shows that if such assignments were held good, necessity or inclination for present comforts would induce the wage-earner into an improvident mortgage of his future. The effect of this upon society would be worse than if the man had sold himself into slavery, for the slave has at least the incentive of the driver's whip to keep him at work, while the man, whose wages are sure to be taken before he receives them, has no incentive to labor at all.

The courts of other states have held constitutional legislative acts declaring assignments made without certain formalities void for similar reasons, without referring very strongly to the elements of dishonesty and oppression inherent in the transactions of the persons lending money on such assignments.[17] On the other hand, the courts of Illinois have consistently held that the free right to contract may not be infringed even when the legislature has thought that freedom to make certain contracts was detrimental to the individual contracting, and to society as a whole. This attitude is seen in Massie v. Cessna,[18] where an act similar to the Massachusetts statute was held unconstitutional. The act applied to all assignments of wages and salaries, and the opinion of the court intimated that an act limited to wages and low salaries, which are most in need of protection, might be enforced. From this concession to the weight of authority two judges dissented, but their position is hardly tenable after the decision by the United States Supreme Court.

L. P. S.

---

[14] Engel v. O'Malley, 219 U. S. 128 (1910).
[15] Godcharles v. Wigiman, 113 Pa. 431 (1886).
[16] L. V. R. R. v. Woodring, 116 Pa. 513 (1887).
[17] International Text Book Co. v. Weislinger, 160 Ind. 349 (1902).
[18] 239 Ill. 352 (1909).

EVIDENCE—PRESUMPTION AS TO FOREIGN LAWS.—In the case of Cuba Ry. Co. v. Crosby,[1] the United States Supreme Court lays down the rule that no presumption will be indulged as to foreign laws which would govern the case before the court. Foreign laws must be proved in the forum. The court refused to entertain any presumption as to the law of Cuba regarding the effect of a promise by the master to repair defective machinery, upon the assumption of risk by the servant. There seems to be no precedent in the Supreme Court upon the exact point, and in view of the existing law of the former in disregard of the foreign law.[4]
much beyond its facts.

It is well settled that a court cannot take judicial notice of a foreign law,[2] though it may recognize the general system upon which the laws of that country are based.[3] When, therefore, an act that is governed by foreign law is tried in another court, that court has three alternatives. It may (1) indulge in a presumtion as to the foreign law; (2) refuse any such presumption; or (3) apply the law of the forum in disregard of the foreign law.[4]

(1). In adopting some presumption the courts have several courses open to them. They may, because of the inherent justice of the particular right asserted, assume that it exists in the foreign country because of the strong probability that it is recognized in all civilized communities.[5] For instance, it would be absurd to hold that a man could not recover for an aggravated assault under any system of jurisprudence. The court may, in the absence of proof, presume that the common law is in force in the foreign country.[6] It will be noticed that this presumption can only be adopted in certain cases where the court has already taken judicial notice that the common law is in force in that foreign country, and hence the presumption is merely that the common law of that foreign country has not been changed by statute. Many courts indulge the presumption that the foreign law is the same as the law of the forum, whether it be common law[7] or statutory,[8] and irrespective of

---

[1] 32 Sup. Ct. Rep. 132 (1912).

[2] Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S. 397 (1888).

[3] Banco de Sonora v. Bankers' Mutual Casualty Co., 95 N. W. 232 (Iowa, 1903).

[4] See note to Parrot v. Mexican Ry., 34 L. R. A. (N. S.) 261.

[5] Denio, J., in Whitford v. Panama Ry., 23 N. Y. 465 (1861): "In the absence of positive evidence as to the laws of another country, our laws indulge in certain presumptions. *Prima facie* a man is entitled to personal freedom and the absence of bodily restraint, and to be exempt from physical violence to his person everywhere."

[6] Dempster v. Stephen, 63 Ill. App. 126 (1895).

[7] Whidden v. Seelye, 40 Me. 247 (1855).

[8] Prince de Bearn v. Winans, 111 Md. 434 (1909).

whether the system of law of the foreign country be common law [9] or otherwise.[10]

(2). If the court refuses to make any presumption whatever as to the substantive law of the foreign country, the question becomes a purely procedural one, it being part of the burden upon the party having the affirmative to prove the foreign laws. This was the course pursued in our principle case, the court justifying itself on the ground that the injury was not one for which recovery could surely be had as a fundamental principle of justice. The law involving the effect of a master's promise to repair is at all times a complicated and difficult question. The court further says: "The only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is a reason for doubt he must allege and prove it." [11]

(3). Many courts in refusing to make any presumption simply apply the law of the forum, as the only law before the court, on the theory that the parties by failing to prove the foreign law, have tacitly agreed to abide by the law of the forum.[12] This theory has perhaps a broader application than any of the others since under it, it is unnecessary to consider what system of law is in vogue in the foreign country. Although the practical result in many cases is the same under this theory as where the court raises the presumption that the foreign law is the same as the law of the forum, yet the two must not be confused, as they are founded on distinct lines of reasoning.

It is exceedingly difficult, owing to the confusion in the cases, to formulate any majority rule. It would seem, however, that where the foreign country is a common law jurisdiction, the presumption that it is in force there is usually the rule of the court; and where the jurisdiction is not common law, opinion is equally divided among the other alternatives. In our principle case the court, having recognized that Cuba was a civil law country, could not presume that the case would be governed by common law principles. Having further decided that the act complained of was not one inherently the subject of relief, they were compelled to choose between two rules. They took the position that it was a procedural necessity that the plaintiff prove the foreign law. Whether correct or not, there is abundant authority in support of the decision and the case seems to definitely settle the position of the Supreme Court on the subject. *C. H. S. Jr.*

---

[9] Wickersham v. Johnston, 104 Cal. 407 (1894).

[10] Prince de Bearn v. Winans, 111 Md. 434 (1909).

[11] Mr. Justice Holmes, p. 133.

[12] Panska v. Davis, 31 Tex. 67 (1868).

WILLS—THE RULE IN SHELLEY'S CASE.—The Supreme Court of the United States recently held [1] that, where the testator, after directing that the proceeds of the sale of the residue of his real estate should be divided among his heirs share and share alike, directed that the share of one son should be paid to trustees and by them invested, "the income therefrom to be paid the son, the principal to be paid to his heirs after his death," the rule in Shelley's Case [2] did not apply.

The rule in Shelley's Case provides that "when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs in fee or in tail, always in such cases 'the heirs' are words describing the extent or quality of the estate conveyed, and not designating the persons who are to take it." [3] In order that the rule may apply, the ancestor must take an estate of freehold by the same assurance which contains the limitation to his heirs; the word "heirs" must be used in its full legal sense; the interest limited to the ancestor and that to his heirs must be of the same quality; and the estate of the heirs must be by way of remainder. If the rule is applicable it is not one to be used by the courts simply as an aid in ascertaining the intention of the testator, but is a rule of property and prevails in spite of any contrary intention.[4]

The great confusion in the cases in which the rule in Shelley's Case has been discussed, is due to the difficulty in determining whether the situation is one to which the rule should be applied, and not to any misconception of what the rule or its effect is. There are always several preliminary questions to be decided before applying the rule. In the principal case [5] the problem was whether the word "heirs" was used in its technical sense as designating those who were to take from generation to generation, or descriptive of a class taking from the testator directly. If the testator uses the word "heirs" without any qualifying words, it will be presumed that he intended to use it in its strict technical meaning as a word of limitation, and the rule will apply.[6] The burden is on those who contend that the word "heirs" is used as a word of purchase.[7] There is no definite rule of law to govern the interpretation of the

---

[1] Vogt v. Graff, 32 Sup. Ct. Rep. 134 (1911).

[2] Coke, *94 (1581).

[3] Note 29 L. R. A. (N. S.) 963, at page 971.

[4] Shapley v. Diehl, 203 Pa. 566 (1902). There a few cases in which this rule is treated as one of construction. Smith v. Hastings, 29 Vt. 240 (1857); Zavitz v. Preston, 96 Iowa, 52 (1895).

[5] Vogt v. Graff, 32 Sup. Ct. Rep. 134 (1911).

[6] Hileman v. Bauslaugh, 13 Pa. 344 (1850); Duffy v. Jarvis, 84 Fed. 731 (1898).

[7] Appeal of Guthrie, 37 Pa. 9 (1860); Jesson v. Wright, 2 Bligh 57 (Eng. 1820); Daniel v. Whartenby, 17 Wall. 639 (1873).

intention of the testator. Each case must necessarily stand on its own facts and the language of the whole will must be taken into consideration. There is no uniformity of opinion as to the effect of the use of certain qualifying words or clauses. Some courts have held that the words "at his death" show an intention to limit the time of distribution to a definite time rather than to permit the property to descend in the regular course from generation to generation.[8] In other cases they have been considered as of no significance.[9] If from the whole will it appears that the word "heirs" was used to designate a particular individual or a particular class of objects, the rule does not apply.[10]

The decision of the court in Vogt v. Graff [11] was based on the finding that the testator had manifested an intention, by the express wording of his will, to use the word "heirs" as descriptive of a particular class of individuals who were to take as purchasers from him. Even if the court had decided that the word "heirs" was used in its technical sense, the rule in Shelley's Case could not have been applied. The remainder and the prior estate of freehold can coalesce in the ancestor and give him a fee, only when the two estates are of the same quality: either both must be legal or both equitable.[12] If the estate of the ancestor is equitable and that of the heir legal, the rule cannot be applied.[13] *R. B. W.*

---

[8] Foxwell v. Craddock, 1 Patton & H. 250 (Va. 1855); Smith v. Smith, 8 Ont. Rep. 677 (1885).

[9] Pierce v. Pierce, 14 R. I. 514 (1885).

[10] Belcher's Estate, 211 Pa. 615 (1905); Kemp v. Reinhard, 228 Pa. 143 (1910); Hall v. Gradwohl, 113 Md. 293 (1910).

[11] 32 Sup. Ct. Rep. 134 (1911).

[12] Van Grutten v. Foxwell, 77 L. T., N. S. 170 (1892).

[13] Rife v. Geyer, 59 Pa. 393 (1868); Green v. Green, 23 Wall. 486 (1874); Eshback's Est., 197 Pa. 153 (1900).