University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at No. 8 West King St., Lancaster, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $2.50 PER ANNUM; SINGLE COPIES, 35 CENTS

NOTES

CONSTITUTIONAL LAW—TRIAL BY JURY AND THE SEVENTH AMENDMENT—Few decisions rendered in recent years by the United States Supreme Court have been more generally criticized by bench and bar than that handed down last April in the case of *Slocum* v. *New York Life Insurance Company*.[1] With four judges strongly dissenting the majority of the court held that the rendering of a judgment *non obstante veredicto* by a federal court in accordance with State practice[2] was violative of the Seventh Amendment,[3]

[1] 228 U. S. 364 (April, 1913).

[2] Penna. Laws of 1905, c. 198, p. 286, provides that when "a point requesting bending instructions has been reserved or declined" at a trial, the evidence may be made part of the record and, upon motion for judgment *non obstante veredicto*, such judgment may be entered as is warranted by the evidence.

[3] The Seventh Amendment declares "In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law.

and ordered that the case be retried before a jury; and at the same time they admitted that the evidence would not sustain a contrary finding,[4] and reiterated the familiar rule that if the evidence given at a trial does not constitute a sufficient basis for a verdict for one party, so that if so rendered it would have to be set aside, then the court may and should direct a verdict for the other party who is clearly entitled thereto. Without going into detail, the conclusion stated was reached by argument along the following lines: In the first place it was declared, correctly enough, that the power of federal courts to reëxamine issues of fact tried by a jury must, under the Seventh Amendment, be tested by the rules of the common law, and that the common law would authorize an appellate court to set aside a verdict and order a new trial for errors of law in the proceedings. The opinion then declares, however, that the entering of a judgment *non obstante veredicto* was equivalent to a setting aside of the verdict of a jury; and, under the common law, this setting aside of a jury's verdict entitled the litigant to the same right of trial by jury as he had an the first instance. Accordingly a new trial was ordered. In a word, under this decision, the federal courts cannot enter a judgment *non obstante veredicto* because such practice makes the court *give* a verdict; but they can *direct* the jury to find a given verdict under proper conditions, because then it is the jury, not the court, who technically *give* this verdict.

With the dissenting opinion particularly strong upon this point the decision further declares that the common law rules regarding non-suits and demurrers to evidence do not justify the entering of judgments *non obstante veredicto*, but that, in cases of this nature, the Seventh Amendment requires that a new trial be given. This is based on the theory that judgments *non obstante veredicto* are rendered on the sufficiency of the evidence when all finally produced and hence the court must pass on questions of fact; whereas a similar judgment entered because of insufficiency of evidence as revealed by the pleadings alone would be entirely valid. The dissenting opinion of the four justices, written by Mr. Justice Hughes, not only appears to find ample basis for sustaining such judgments in the common law rules regarding demurrers to evidence, but seems clearly to show that verdicts directed or judgments entered on questions of sufficiency of evidence rest, not upon the matter as shown by the pleadings, but upon the sufficiency of evidence revealed by its production in court. An able discussion of the principal case in the Harvard Law Review[5] clearly sustains the minority views on this point, citing *inter alia* the recent English case of *Nash* v. *Inman*[6], which bears directly on the question, and shows as well the fundamental fallacy of the majority view. The writer aptly says "If the right to a trial by jury is not

[4] On p. 375.
[5] Vol. XXVI, No. 8, June, 1903, pp. 732–737.
[6] 2 K. B. 1 (1908).

denied when the jury are directed to find a particular verdict without being allowed to consider the evidence,[7] it is difficult to see how any such right is interfered with by the entry of a judgment instead of a verdict. There is no difference in substance between the two modes of proceeding."

The unfortunate consequence of this decision, as well as its apparent error in law and logic, are well stated by Mr. Justice Hughes in the dissenting opinion, in which Justices Lurton, Pitney and Holmes concurred. Justice Hughes says:[8] "The serious and far-reaching consequences of this decision are manifest. Not only does it overturn the established practice of the federal courts in Pennsylvania, * * * but it erects an impassable barrier—unless the Constitution be amended—to action by Congress along the same line for the purpose of remedying the mischief of repeated trials and of thus diminishing * * * the delays and expense of litigation." It is worth noting that a petition for a review of this case presented by the American Bar Association was ineffectual, the Supreme Court refusing a rehearing of the case. However the article in the Harvard Law Review already referred to *ante*[9] suggests a way to overcome the effect of the case. The article suggests that "the Pennsylvania statute provides only for recording the evidence when the judge is asked to direct a verdict. Therefore, if some words were added, authorizing also the recording of such alternative or other findings as the judge may think proper to take, then the court on subsequent motion or on appeal could enter the proper judgment as the alternative finding * * * as if * * * the jury itself were to give an alternative verdict for the defendant if the court should be of the opinion that the evidence did not justify a verdict for the plaintiff. The alternative verdict would then be as good as if it had been the only verdict,[10] and nobody could say that the Constitution was infringed by entering judgment upon it."

That this, or some similar solution to the problem, will soon be devised is undoubtedly true; but the decision in the principal case seems to show a deplorable lack of sympathy with the universal demand on all sides for the simplification of legal procedure and the abolition of obsolete technicalities. It is upon this indication of lack of sympathy of the court that the decision is especially to be deplored, though its practical effect is also of great weight.

P. C. M., Jr.

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[7] This is, of course, universal practice, i. e., where the evidence adduced will not sustain a verdict for one litigant the court will direct the jury to give a verdict for the other party.

[8] P. 400.

[9] Note 5, *supra*.

[10] Walher v. New Mexico & So. Pac. R. R. Co., 165 U. S. 593 (1897).

DAMAGES—TROVER—ADDED VALUE AND LABOR—In trover the measure of damages is ordinarily the value of the property at the time of conversion, but when the converter has by his labor added in value to the property between the time of taking and the bringing of the action, a majority of courts have adopted a rule of alternative damages, based upon the moral guilt or innocence of the trespasser. If the trespass was wilful, the measure of damages is the increased value; but if it was inadvertent or by mistake, an allowance is made to the trespasser for improvements he has made.[1] This rule of alternative damages is followed in the recent case of *Strickland* v. *Miller*,[2] although neither the theory of the rule nor the amount of compensation to be received by the unintentional converter are there discussed.

The rule has been supported on the ground that the damages are *prima facie*, merely to compensate the plaintiff for his loss, but that when the conversion has been wilful, there is awarded in addition, punitive damages to the extent of the increased value of the goods.[3] This explanation is not entirely satisfactory, because the so-called punitive damages are only awarded in trover when the wilful converter has added value to the property, whereas had he burned or destroyed it, though his moral guilt and the loss to the owner would be equally great, yet no exemplary damages would be recoverable.

A more logical explanation of the two measures of damages is to be found, as is suggested by Lowell, J., in *Trustees of Dartmouth College* v. *Paper Co.*,[4] in the basis of the law of trover. In this form of action the plaintiff may select any moment during which the wrongful dominion continued, consider this as the moment of conversion, and recover full damages for the value of the property at that time. Thus in every case, by this theory, the plaintiff has a *prima facie* right to the increased value, but when the conversion has been in good faith and the converter has expended time and money on the chattel, he acquires a limited right of property in it, of a quasi-contractual nature, on the ground of unjust enrichment, so that the full damages are reduced to the extent of the property rights he has acquired.

On the question of the extent of this right and the consequent reduction of damages the cases are in hopeless conflict. It will readily be seen that the value of the goods after improvement will consist of three elements, viz., the value before taking, the value of the labor of the converter, and an increase in value due to this labor. It is on the allotment of this latter that the courts are

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[1] Woodenware Co. v. United States, 106 U. S. 432 (1882); Texas Ry. Co. v. Jones, 34 Tex. Civ. Ap. 94 (1903); Eaton v. Langley, 65 Ark. 448 (1898); Silsbury v. McCoon, 3 N. Y. 379 (1847); Hilton v. Woods, L. R. 4 Eq. 432 (1867).

[2] 78 S. E. Rep. 48 (Ga., 1913).

[3] Single v. Schneider, 30 Wis. 570 (1872); Pine River Co. v. United States, 186 U. S. 295 (1901).

[4] 132 Fed. Rep. 92 (1904).

divided: some give it to the defendant, by allowing to the plaintiff only the original value as damages;[5] others give it to the plaintiff, by allowing him as damages the value after improvement, less only the value of the defendant's labor.[6] Since either of these rules can only be rough adjustments of conflicting equities, it would seem the more equitable to allow the plaintiff as damages the highest market value of the goods in their original condition between the original taking and the time of bringing the action. This would give him adequate compensation for his loss, but would not take from the defendant the profit arising from the labor innocently and in good faith put upon the property.

If the defendant, instead of being the original trespasser, is a purchaser from him, the case becomes even more complex. If the purchaser knew at the time of purchase of the true ownership, clearly he is in no better position than the wilful trespasser, and should pay as damages the increased value of the property. If he is an innocent purchaser without notice of the true ownership, the overwhelming weight of authority is that he stands in the shoes of his vendor, that the doctrine of *caveat emptor* applies, and the measure of damages payable by him must depend on the good faith of his vendor: if the original trespass was unintentional, the true owner can recover from the purchaser only the original value; if it was intentional, the value at the time of purchase from the trespasser.[7]

There can be little doubt as to the former of the above conclusions; but the latter, that the innocent purchaser from a wilful trespasser should be answerable to a greater amount than the innocent purchaser from an innocent trespasser, appears, on broad principles of justice at least, to be open to serious question. Whether the original trespass be wilful or inadvertent, the injury to the plaintiff, and the technical conversion and moral innocence of the defendant are identical, and it would seem more just that the amount of damages payable by the defendant should depend on his own moral guilt or innocence, rather than on that of his vendor. If the trespasser himself is entitled to a reduction in damages when his trespass was innocent, by analogy it would seem that the purchaser should be allowed the same reduction when his purchase was innocent, irrespective of the good faith of his vendor.

This view of the rights of an innocent purchaser from a wilful trespasser, though not accepted by most courts, is adopted in *Railway* v. *Hutchins*,[8] a case in which trees had been wilfully cut

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[5] United States v. Homestake Co., 117 Fed. Rep. 481 (1902).

[6] Herdic v. Young, 55 Pa. 176 (1867).

[7] Woodenware Co. v. United States, 106 U. S. 432 (1882); Strubble v. Trustees Cincinnati Ry., 78 Ky. 481 (1880); Powers v. Tilley, 87 Me. 34 (1894); Central Coal Co. v. Shoe Co., 69 Ark. 302 (1901); Nesbit v. Lumber Co., 21 Minn. 491 (1875).

[8] 32 Ohio St. 571; 37 Ohio St., 282 (1881).

by trespassers, converted into railroad ties and sold to the defendant without notice of the true ownership. Held by McIlvaine, J., "The plaintiff's loss is no greater than it would have been if the trespasser had been innocent of all intentional wrong; nor is the guilt of the defendant greater. Hence, it seems to a majority of the court, that exact justice would be done, as between these parties, by limiting the plaintiff's damages to the amount of his actual loss, to wit: the value of the trees when they were first taken as personal property."[9] This theory can be supported by an application and extension of the principle laid down in *Trustees Dartmouth College* v. *Paper Co.*[10] The trespasser, whether wilful or unintentional, has by his labor acquired a certain quasi-contractional right in the property taken and improved. Although the wilful trespasser is estopped from asserting this right, because to allow him to do so would require him to prove and enable him to profit by his own wrong, yet the right still exists, and passes with the property to the purchaser. He, if innocent, is not estopped from asserting the right acquired, but by asserting it, becomes entitled to whatever reduction in damages an unintentional trespasser would have been entitled. Thus the *mala fide* trespasser is not allowed to profit by his wrong, and the innocent purchaser is not mulcted in damages to a greater extent than necessary to give ample compensation to the true owner.

T. R., Jr.

LEGAL ETHICS—QUESTIONS AND ANSWERS

QUESTION:

Recently, as a Notary Public, I administered an oath to a party in a matter pending in the United States Land Office. Now that party has been indicted for perjury, alleging that the matters sworn to were false. The party admits the oath, but intends to plead the truth of the statements, and can easily do so. Of course I will be a material witness for the Government, although there will be no dispute over my testimony. He will admit the oath. This party desires that I represent him in his defense on the perjury charge. Can I ethically do so?

ANSWER:

As a general principle, a lawyer should not act as *trial* counsel in a criminal cause in which he knows or has reason to believe that he is to be a material witness *for the prosecution*. The question imports that in the given case the testimony of the inquirer is not in dispute, is against his client, and would be only formal. If the nature of his testimony could be assuredly so limited, the Committee would not disapprove the retainer. Except in a case where such limitations may be confidently predicated, the retainer should, in the opinion of the Committee, be refused.

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[9] 37 Ohio St., 295.
[10] 132 Fed. Rep. 92 (1904).

QUESTION:

Is it proper for a lawyer to advise a client, in reply to a query seeking his advice, that in his opinion it would be better for the client to pay a fine prescribed by a certain penal Statute than to obey its directions?

ANSWER:

In the opinion of the Committee, the question should be answered in the negative.

It is the lawyer's duty, when asked to advise, to instruct the client as to the measure of the penalty prescribed by the law; but he should stop there. For the lawyer, as an officer of the law, owes a peculiar duty to the State and a duty to the profession. He violates his duty to the State when he deliberately becomes party to a crime; and violates his duty to the profession, because deliberate participation in crime by a lawyer tends to bring both the law and the legal profession into contempt.

We are not considering those cases where there is a bona fide intention to test the validity of a law.

QUESTION:

John Doe, a lawyer, and Richard Roe, a layman, are executors of a Will, the amount of the estate being about $180,000. Doe, the lawyer, is the active executor; Roe, the layman, being passive. Both are to be allowed full commission as executors. The usual proceedings in the settlement of the estate are taken. There is no litigation. The transfer tax proceedings and the executors' accounting are conducted in the name of Jacob Fen, as attorney of report. Doe and Fen are personal friends of long standing, having had offices together for many years. Each has entire confidence in the other as a man of excellent standing at the Bar. The sum of $3,000 for counsel fees is charged in the accounts and, in view of the work done and to be done, is a reasonable compensation for settling the estate. The papers are all drawn by Doe, on the theory that in so doing he is merely acting for Fen, the attorney of record, and not as executor. Fen appears in Court whenever necessary. Doe pays to Fen, the attorney of record, $1,000, and presents to him for his signature a voucher for $3,000, as if it had been in fact paid to him. This is evidently on the theory that as Doe did much of the work as a lawyer, Fen is to be considered as having received $3,000 and paid to Doe $2,000 for doing much of the work.

Query No. 1: Can Fen properly sign a receipt for $3,000 when in fact he only gets $1,000, the remaining $2,000 being really retained by Doe?

Query No. 2: Would there be any difference in the fact of the transaction, so far as the question of ethics is concerned, if Doe were to draw an executor's check to the order of Fen for $3,000, and Fen were then to draw his check to the individual order of Doe for $2,000?

Query No. 3: According to the correct ethical standards, is it or is it not proper for an executor, who is a lawyer and who does legal work for the estate, which he is not bound to do and which he may properly pay another lawyer to do, to do it in the name of the other lawyer and be paid by that other lawyer?

ANSWER:

In the opinion of the Committee, all three queries should be answered in the negative. Except where a will provides for payment to one named as executor of extra compensation for legal services, our courts uniformly refuse to allow any such compensation, for the obvious reason that a trustee or executor must have no pecuniary interest in the legal fees he has to pay out of the trust estate. The exception above noted is based on the testator's express authority: therefore it is not professional to accomplish by indirection what would be set aside if disclosed to the court. The concealment of the facts from the court is highly improper.

The Committee does not pass either way upon the statement that $3,000 is a reasonable charge for an unlitigated administration.

WILLS—CONDITIONS NOT TO CONTEST—Conditions, both precedent and subsequent, have given rise to a wide diversity of judicial opinion. The student, after he has groped through the numerous cases indulging in presumptions and distinctions which tend to confuse rather than to clarify, finds himself in such a confused state of mind that orderly arrangement seems impossible. A class of cases of this genus, rather rare but typical in their confusion, includes those involving bequests on penalty of forfeiture if the donee contests the will. To add to the distinctions already given authority in various jurisdictions a New York surrogate offers another. *In re Kathan's Will*, 14 N. Y. S., 705 (1913), it is suggested that there is a vast difference between a condition not to dispute a larger bequest to another, or not to harass the executors, which the court says are "valid and meritorious," and those conditions which bar the donee from enforcing the law of the land.

The first great distinction in this type of cases is that between legacies and devises, a distinction based simply on the difference between the two systems of law involved in the administration of English estates and without any foundation in reason. In respect to personalty in compliance with the civil law it is held that such conditions are purely *in terrorem* and are void, subject to exceptions mentioned later.[1] In realty, following the common law, they are enforced.[2] Free from the dual system of administration, the American courts have no excuse for following the English in this respect.[3]

The first exception to be noted is this that where there is a gift over in case of a breach this conditional limitation will be carried out. The exception need be applied only to gifts of personalty.[4] In devises they only serve to reassure the courts in their conclusion.[5] In one court in our country where the distinction between gifts of realty and personalty has been denied the forfeiture was enforced regardless of whether there was or was not

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[1] *In re* Dickson, 1 Sim. N. S. (Eng., 1850); Powell v. Morgan, 2 Vern. 90 (1688, Eng.); Loyd v. Spillet, 3 P. Wms. 344 (Eng., 1734); 2 Jarman, 582 (ed. 1880); 2 Redfield 299 (ed., 1870); 2 Williams, Executors, 585–587 (ed., 1895).

[2] Cook v. Turner, 14 Sim. 492 (1845); Holt v. Holt, 42 N. J. Eq. 388 (1886); Jarman, *supra*; apparently *contra* Chew's Appeal, 45 Pa. 228 (1863).

[3] Bradford v. Bradford, 19 Ohio 546 (1869); Thompson v. Gaut, 82 Tenn. 310 (1884); Chew's Appeal, *supra;* Bryant v. Thompson, 59 Hun. 445 (N. Y., 1891).

[4] Williams, Executors, *supra;* Fifield v. Van Wyck, 94 Va. 557 (1897); Chew's Appeal, *supra;* Cleaver v. Sperling, 2 P. Wms. 528 (Eng., 1729).

[5] Chew's Appeal, *supra;* Anon., 2 Mod. 7 (1675, Eng.). The latter intimates that without the limitation over it would be bad as a condition, although the subject-matter was realty.

[6] Thompson v. Gaut, *supra.*

a gift over.[6] Just what will amount to a sufficient gift over has occasioned not a little difference of opinion.[7]

If a probable cause for contesting the will, a *probalis causa litigandi*, as the courts fondly express it, exists, then the condition will not be enforced.[8] This exception is applied indiscriminately to devises and legacies. Whether or not there is probable cause is for the auditing judge to determine. When it is doubtful as to the sufficiency of the cause the will of the testator should prevail. The distinction applied *in re Kathan's Will* would seem to be but an elaboration of this exception.

The third and last exception to be noted is one that is apparently confined to New York courts, although it is deserving of a more general application. The circumstances, however, are comparatively unusual. In case of such a bequest on condition to a minor an action brought by his guardian does not entail a forfeiture. To enforce such a condition would, it is said, interfere with the paramount duty of the court to act in behalf of its wards.[10]

J. S. B.

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[7] For discussion see Lloyd. v Braunton, 1 Mer. 109 (Eng., 1817); a provision that the legacy shall fall in the residue seems sufficient, Cleaver v. Sperling, but a provision that it shall revert to the estate of the testator was held insufficient, Fifield v. Van Wyck, and a discretionary power in the executors to distribute the forfeited legacy as they see fit is not such a gift over as will require forfeiture, Mallet v. Smith, 6 Rich. Eq. 12 (S. C., 1853); *in re* Friend, 209 Pa. 442 (1904), the court apparently overlooked the conditional limitation.

[8] Powell v. Morgan, *supra;* Adams v. Adams, 1 Ch. 369 (Eng., 1892); *re* Friend, *supra; re* Lynn, 31 Pitts. L. J. N. S. 258 (1900); Page, Wills, Sec 683.

[9] *Re* Friend, *supra;* Chew's Appeal, *supra;* Bryant v. Thompson, *supra.*