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 236 Chestnut Street, Philadelphia, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

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

NOTES

BANKRUPTCY—EFFECT TO BE GIVEN TO JUDGMENT OF STATE COURTS—The "full faith and credit" clause of the Constitution[1] does not apply to the judgments of a state court when pleaded in a suit before a federal court. But by Act of 1804[2] Congress requires "every court within the United States" to give such faith and credit to the records and judicial proceedings of any state, when proved in the manner specified in the act, "as they have by law or usage in the courts of the state from which they are taken." This act, unlike that forbidding the federal courts to enjoin proceedings in a state court,[3] does not specifically exempt from its provisions the federal courts of bankruptcy.

To what extent, then, is a court of bankruptcy bound to recognize, as conclusive, the judgments of a state court,—or of an inferior

[1] Article IV, §1.
[2] Rev. St. U. S., §905.
[3] Rev. St. U. S., §720 (U. S. Comp. St., 1901, p. 581).

federal court when administering state law in cases of diverse citizenship? Must it receive proof of such judgment as conclusive of the judgment creditor's right to participate in the distribution of the bankrupt's estate? And in matters of discharge, must it accept the judgment of the state court as to the *bona fides* or *mala fides* of the bankrupt's acts? It must be remembered that a district court, when sitting in bankruptcy, although of defined statutory powers,[4] is exercising a distinct jurisdiction and in doing so is essentially a court of equity.[5] Its purpose is to execute its powers in accordance with the spirit rather than with the mere letter of the Bankruptcy Act.[6] By the adjudication in bankruptcy, title to the debtor's estate is vested in the trustee; after adjudication, the bankrupt's interest in his estate is concluded, except as to any surplus. The primary and fundamental duty of the bankruptcy court is to supervise the preservation of the estate for, and the ultimate distribution thereof among, the honest, *bona fide* creditors of the bankrupt.[7]

Accordingly the determination of who are such creditors is a most important and basic duty. Under the Bankruptcy Act,[8] this duty belongs to the courts of bankruptcy. Is therefore a judgment of a state court that the bankrupt was indebted in a stated amount to a creditor, to be regarded as *res judicata* in the court of bankruptcy when the allowance of claims comes before it? It seems that in the majority of cases the affirmative view has been adopted.[9] Usually without discussion, they maintain that such a judgment, if regular upon its face, is not open to collateral attack by the parties thereto or their privies, nor by third parties except on the ground of want of jurisdiction in the court rendering the judgment or of fraud or collusion in securing the judgment. The only remedy against it is by appeal to the proper state tribunal.[10] But it is submitted that it is difficult to see how the parties in interest after adjudication—the trustee or the *bona fide* creditors—not being parties to the record, would be entitled to prosecute an appeal from a judgment entered some time prior to the adjudication.

---

[4] U. S. Bankrupt Law, Act of July 1, 1898, 30 St. at L. 544, as amended Feb. 5, 1903, 32 Stat. at L. 797; June 15, 1906, 34 Stat. at L. 367, and June 25, 1910, 36 Stat. at L. 838.

[5] Collier, Bankruptcy, §2a; Fowler v. Dillen, Fed. Cas. 5000 (1875); *In re Norris*, Fed. Cas. 10, 304 (1870); Bardes v. Hawarden Bank, 178 U. S. 150, 524 (1899); Mason v. Wolkowick, 150 Fed. 699 (1906).

[6] *In re* Kane, 127 Fed. 552 (1904).

[7] *Supra*, n. 4.

[8] §2, cl. 2.

[9] Handlon v. Walker, 200 Fed. 566 (C. C. A., 8th Cir., 1912); *In re* Ulfelder Co., 98 Fed. 409 (1899); Peters v. U. S. *ex rel.* Kelley, 177 Fed. 885 (C. C. A., 7th Cir., 1910), but see dissent of Grosscup, J.; *In re* Munro, 195 Fed. 817 (1913); Frazier v. Southern Trust *etc.* Co. (C. C. A., 4th Cir., 1900).

[10] Hellman v. Goldstone, 161 Fed. 913 (C. C. A., 3rd Cir., 1908).

The recognition of the finality of the state court's decision, when that touches matters of proof of claim or of discharge in bankruptcy, has, however, not gone unchallenged. The Bankruptcy Act [11] defining debts which may be proved, does not include all money obligations and liabilities of the bankrupt. It is apparently settled that arrears of alimony,[12] damages granted for seduction,[13] damages for malicious libel,[14] sums decreed for the support of illegitimate children, [15] fines imposed upon conviction for crime,[16] and statutory penalties for torts,[17] are neither provable nor discharged. Now it is fundamental that the rendition of a judgment, although it merges the cause of action, does not affect the nature of the original liability.[18] It is therefore essential that the court of bankruptcy look beneath the judgment for the foundation on which it rests in order to see whether it was decreed for any debt or liability that would be provable.[19] In so doing the bankruptcy court does not violate the principles of *res judicata;* for, in the first place, the state court adjudicated merely the question whether or not the one party before it was indebted to the other party and did not pass upon the question as to whether the liability asserted was one recognized by the Bankruptcy Act; and, in the second place, by Clause Two, the court of bankruptcy is intrusted with the determination of the latter question itself.[20]

But when a judgment is attacked, as a proof of claim, not upon the nature of the original liability, but upon the *bona fides* or actuality of the claim itself, we find that there is but little authority in the cases for the right of the bankruptcy court to go behind the judgment. The doctrine of *res judicata* is applied unquestioningly: has not the state court determined that the bankrupt owed the claimant so much? However, under Bankruptcy Act of 1867, a court of bankruptcy asserted a right to examine the judgment not only for

---

[11] §63.

[12] Audubon v. Shufeldt, 181 U. S. 575 (1900); Wetmore v. Markoe, 196 U. S. 68 (1904); Turner v. Turner, 108 Fed. 785 (1901); *In re* Lachemeyer, Fed. Cas. No. 7,966 (1878).

[13] *In re* Cotton, Fed. Cas. No. 3269 (1843); *In re* Maples, 105 Fed. 919 (1901).

[14] Thompson v. Judy, 169 Fed. 553 (C. C. A., 6th Cir., 1909).

[15] *In re* Cotten, Fed. Cas. No. 3, 269 (1843).

[16] *In re* Moore, 111 Fed. 145 (1901); *contra, In re* Aldersen, 98 Fed. 588 (1899).

[17] *In re* Southern Steel Co., 183 Fed. 498 (1910).

[18] Wetmere v. Markoe, 196 U. S. 68, 74 (1904); Thompson v. Judy, *supra*; Boynton v. Ball, 121 U. S. 457, 466 (1887).

[19] Wetmore v. Markoe, *supra; In re* Cotton, *supra;* Thompson v. Judy, *supra;* Turner v. Turner, *supra;* Knott v. Putnam, 107 Fed. 907 (1901). See Loveland Bankruptcy (4th Ed.), 613.

[20] Knott v. Putnam, *supra.*

fraud but also for irregularity.[21] Another bankruptcy court allowed a claim only of the amount which it found was actually owed by the bankrupt and not of the full amount of the judgment rendered by the state court.[22] And in one case under Act of 1898, a Circuit Court of Appeals has upheld the right of the court of bankruptcy to review a judgment which had been affirmed by the highest court of a state by "placing itself in the substantial position of a court in equity asked to enforce the decree of another court sitting in equity.[23] It is submitted that this position is correct. For the final allowance of a claim establishes the claimant's right to participate; the allowance or disallowance of claims is, by the term of the Bankruptcy Act, a matter for the bankruptcy court; and the spirit, if not the letter, of the act requires the recognition of actual, *bona fide* debts and liabilities only. The determination of who are creditors, entitled to participate, is a question of fact for the bankruptcy court alone; it may accept the findings of the state court as its own, but the prior adjudication by the state court cannot be held to have ousted the bankruptcy court of its right, or relieved it of its duty, to inquire into the foundation of the claim asserted, if it be assailed.

The English Bankruptcy Act seeks to procure the same definite ends as our own. But in England the courts of bankruptcy have an acknowledged right "to go behind" a judgment, even though it has been affirmed by the court of appeals.[24] The judgment is *prima*

---

[21] *Ex parte* O'Neil, Fed. Cas. No. 10,527, 1 Lowell 163 (1867). See Collier Bankruptcy, §63, III, C. (2) p. 707 (7th Ed.).

[22] Fowler v. Dillon, Fed. Cas. No. 5000 (1875), affirmed, *per* note at end of case, by C. C. A., 4th Cir.

[23] Hobbs v. Head & Dowst Co., 184 Fed. 409 (C. C. A., 1st Cir., 1911). *Cf., In re* Wentachee-Stratford Co., 205 Fed. 964 (1913), where bankruptcy court held a judgment obtained in a state court, under peculiar circumstances, to be presumptively fraudulent. *Cf.,* New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881 (C. C. A., 4th Cir., 1908), where on application in bankruptcy court for stay of proceedings looking to the establishment of a preference in state court, it was held that the prior denial by the state court of a petition to stay the proceedings because of the adjudication in bankruptcy of one of the parties, was not final or binding upon the bankruptcy court, because "the prime object of the B. A. is to secure an equal distribution of the bankrupt's estate among his creditors." It is submitted that this is already correct; the question was one within the peculiar jurisdiction of the bankruptcy court from which it could not be ousted by any prior adjudication by any other tribunal. Yet the denial of the petition by the state court, in the first place, was clearly "a judicial act" within the doctrine of *res judicata.* See *In re* Benwood Brewing Co., 202 Fed. 326 (1913). *Cf.,* Opinion by Hotchkiss, Referee, in *In re* Phelps, 3 Am. B. R. 434 (1900), wherein of court of bankruptcy to re-examine facts upon which the judgment of a statement was rendered, is asserted.

[24] *Ex parte* Kibble, L. R. 10 Ch. 373 (Eng. 1875); *Ex parte* Revell, 13 Q. B. D. 720 (Eng. 1884); *Ex parte* Anderson, 14 Q. B. D. 606 (Eng. 1885); *Ex parte* Lennox, 16 Q. B. D. 315 (Eng. 1885); *In re* Fraser (Eng. 1892), 2 Q. B. 633; *In re* Hawkins (Eng. 1895), 1 Q. B. 404.

facie evidence of a debt; but *prima facie* only.[25] It can be attacked, when offered as proof of debt in bankruptcy, upon the ground that it is fraudulent, collusive, unreasonable,[26] unfair or merely erroneous.[27] And if any facts are shown to the court which lead to a suspicion that the judgment was obtained upon a technicality without any foundation in actual or legal liability, the burden is at once cast upon the claimant to prove his claim as any simple debt must be be proved.[28] Having no appellate powers over the proceedings of the court which has rendered the judgment, the allowance or disallowance of the claim founded on the judgment in no way affects the existence or binding effect of the judgment itself.[29] In refusing proof the bankruptcy court is acting on behalf of the true creditors.

P. N. S.

EVIDENCE—PHYSICAL EXAMINATION OF PLAINTIFF—As the amount of litigation in tort claims for damages for injury to the person increases, the question as to whether the court, on application of the defendant, and in advance of trial, has the legal right to order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for, becomes more practical and more important, especially in view of the fraudulent character of many such claims. The question arose recently in *Atchison Ry. Co.* v. *Melson*,[1] and was answered in the negative.

The question has been a much-mooted one; but in the majority of jurisdictions, it has been resolved in the affirmative.

Research has failed to discover an instance at common law where, in a civil suit for personal injuries, the court, at the instance of the defendant, ordered a physical examination of the plaintiff. This failure is made much of by courts which refuse to order such an examination. The courts which uphold the power reach their conclusion solely by reasoning from analogy. The cases in which a similar power was exercised at common law were those involving the infancy or identity of a party; also in appeals of mayhem. In determining questions of impotence as affecting the validity of a marriage, courts of divorce might order an inspection by surgeons of the person of either party. A similar inspection might also be

---

[25] Cases under notes 16 and 21, *supra*.

[26] *In re* Hawkins, *supra*. "Although the judgment is apparently founded upon the compromise of a doubtful claim, yet it is clearly an unreasonable, foolish and absurd compromise such as should not bind all of Hawkins' creditors," *per* Lord Ecker, M. R.

[27] *Ex parte* Kibble, *supra*.

[28] *Ex parte* Anderson, *supra*.

[29] *Ex parte* Lennox, *supra*.

[1] 134 Pac. Rep. 389 (Okl. 1913).

made where a woman, convicted of capital crime, was alleged to be quick with child, it being purposed to avoid the possibility of taking the life of an unborn child for the crime of its mother. In other cases, as mentioned by Coke,[2] "when a man having lands in fee dieth, and his wife soon after marrieth againe, and faines herself with child by her former husband, the writ *de ventre inspeciendo* doth lie for the heire," the purpose being to protect the proper succession to the property of a decedent. The power of courts to subject parties to physical examination in suits for injury to the person, is simply an extension and application of these principles which have been long recognized. Analogy is also drawn from the power which courts of equity have long exercised of compelling a party to produce books, papers and documents in his possession or control and constituting evidence material to a cause, for inspection by his adversary. The courts have disagreed as to whether the extension is legitimate, but the division of opinion is an unequal one. The weight of authority is clearly in favor of the power.

In the leading case of *Union Pacific Ry. Co.* v. *Botsford,*[3] the Supreme Court of United States, speaking through Mr. Justice Gray, said: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law. . . . The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow." The respect which is ordinarily due a decision by that learned tribunal is, in this case,[4] much discounted by the dissenting opinion of Mr. Justice Brewer, the reasoning of which is very cogent and forcible. He says: "The silence of common law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages in early days, was, compared with later times, limited. . . . The end of litigation is justice. Knowledge of the truth is essential thereto. . . . It is said there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration." And, with like reasoning, Mr. Justice Mitchell said:[5] "Any other rule in these personal injury cases, would often result in an entire denial of justice to the defendant, and leave him wholly at the mercy of the plaintiff's witnesses. In very many cases, the actual nature and extent of the injuries can only be ascertained by a physical examination of the person of the injured party. Such actions were formerly very infrequent, but of late years they constitute one of the largest branches of legal industry, and are not

[2] Co. Litt. 8b.

[3] 141 U. S. 250 (1890).

[4] Union Pac. Ry. Co. v. Botsford, n. 3 *supra.*

[5] Wanek v. Wenona, 78 Minn. 98 (1899).

infrequently attempted to be sustained by malingering on the part of the plaintiff, false testimony, or the very unreliable speculations of so called 'medical experts.'" Following such reasoning, the great majority of our courts recognize the power of trial courts, in the absence of conferring statutes, to require plaintiffs, in actions for personal injuries, to submit themselves to surgical examination in respect thereto.[6] The harmony of courts upon the subject is broken by the dissent of Montana,[7] Oklahoma,[8] and the United States courts,[9] and possibly Indiana [10] and Illinois.[11]

In *Union Pacific Ry. Co.* v. *Botsford, supra,* Mr. Justice Gray refers to the writ *de ventre inspeciendo* as an "ancient practice coming down from ruder ages." But the significance of the writ *de ventre* is this, that in an epoch and a country where landed rights were a paramount and constant concern in litigation, the courts were not deterred by a false delicacy from taking such measures as common sense required for determining the truth. Therefore, in our modern community, where the various mechanical applications of natural force have added a thousand dangers to life and limb, and where actions for personal injuries now fill the prominent place once occupied by *formedon in reverter* and *ejecto firmae,* the same common sense should be invoked to apply the same expedients amid our changed conditions. There is the added consideration that corporal injuries are today notoriously a subject of frequent fraud and misrepresentation.[12] The argument that it involves a violation of the right to personal liberty and privacy, that its application to sensibilities of refined and delicate women will be shocked and their dignity trespassed upon, has little force, and is based upon considerations which are purely sentimental. Much may safely be intrusted to the discretion of the courts, and in their hands these rights and sensibilities will be properly safeguarded, and will yet, as they should, be subordinate in importance and sacredness to the interests of justice.

Y. L. S.

---

[6] King v. State, 100 Ala. 85 (1893); St. Louis R. R. Co. v. Dobbins, 60 Ark. 481 (1895); Richmond Ry. Co. v. Childress, 82 Ga. 719 (1889); Schroeder v. Chicago R. R. Co., 47 Iowa 375 (1877); Ottawa v. Gilliland, 63 Kan. 165 (1901); Belt Co. v. Allen, 102 Ky. 551 (1898); Graves v. Battle Creek, 95 Mich. 266 (1893); Wanek v. Wenona, 78 Minn. 98 (1899); Brown v. Chicago R. R. Co., 95 N. W. Rep. 153 (N. Dak. 1903); Miami & Co. v. Bailey, 37 Oh. St. 104 (1881); Hess v. R. R. Co., Pa. C. C. 565 (1882); Lane v. R. R. Co. 21 Wash. 119 (1899); White v. M. Ry. Co., 61 Wis. 536 (1884).

[7] May v. N. Pac. Ry. Co., 32 Mont. 522 (1905).

[8] City v. Altizer, 13 Okl. 121 (1903).

[9] Union Pac. Ry. Co. v. Botsford, n. 3, *supra.*

[10] Pa. Co. v. Newmeyer, 129 Ind. 401 (1891).

[11] St. Louis Bridge Co. v. Miller, 138 Ill. 465 (1891).

[12] See, Wigmore, Evidence §2220.

INSURANCE—PROHIBITED ARTICLES—SUSPENSION AND REVIVAL OF POLICY—The rule that the insured must strictly comply with the terms of the warranties of his contract of insurance had its rise and formulation in the law of marine insurance at a time when the contract was comparatively simple, and when the underwriter was largely at the mercy of the insured in determining the nature, quality, and degree of the risk. This rule was transplanted in its entirety into the early English common law, and descended as an inheritance not altogether deserved, to the life and fire insurers whose policies are drawn less favorably to the insured than the usual marine policy, and who, by vast economic, commercial and legal experience stand in a far more advantageous position with regard to the comprehension and interpretation of the contract than the insured generally.[1] The warranties customarily found in an insurance contract have been divided by some courts and writers into (1) affirmative warranties, *i. e.,* those conditions which were to be performed or to exist precedent to the consummation of the contract, and (2) promissory warranties, or those conditions the performance or existence of which was to be subsequent to the consummation of the contract, but precedent to the attaching of the risk. It is doubtful whether this distinction has any merit other than convenience of classification, since the real question turns always on the construction and effect of the warranty as such.[2]

The cases to be considered form one group under the so-called promissory warranties, *viz,* those cases adjudicating upon the effect of the violation of a condition or warranty in a policy of fire insurance, where that violation was either temporary or at least had ceased prior to the loss, and was in no wise contributory thereto. Many of the courts have applied the strict general rule mentioned above, and ruled that the violation worked an absolute forfeiture of the policy,[3] and that it was immaterial whether the breach did or did not affect or contribute to the loss,[4] or whether the prohibited act had ceased or not;[5] and that there could be no revival of the contract without the consent of both parties, or without a waiver by the insurer.[6]

Mr. Justice Elkin, speaking for the Supreme Court of Pennsylvania, has recently considered the question and endorsed and

---

[1] Richards, Insurance Law (3rd Ed.), 151; Joyce, Treatise on Ins., 1777, 2200 *et seq.*

[2] Richards, Ins. Law, §§107, 109, 114.

[3] Williams v. Ins. Co., 57 N. Y. 277 (1874); Wheeler v. Ins. Co., 62 N. H. 450 (1883).

[4] Turnbull v. Ins. Co., 83 Md. 312 (1896); Glen v. Lewis, 8 Exch. 607 (Eng. 1853); Mead v. Ins. Co., 7 N. Y. 530 (1852).

[5] Mead v. Ins. Co., *supra,* n. 4; Wainer v. Ins. Co., 153 Mass. 339 (1891).

[6] Mead v. N. W. Ins. Co., *supra* n. 4; and cases cited above.

applied the contrary rule;[7] and in so doing has placed the court in accord with the weight of authority and the more equitable rule. A store building had been covered by insurance for a period of eighteen years by a policy which contained a provision against the keeping of gasoline, illuminating oil, and gunpowder on the premises. A tenant, in the conduct of a general store business, had carried these prohibited articles as a part of his stock, until two years prior to the fire, at which time another business was installed. The question turned squarely upon whether this breach could now be declared to have worked a forfeiture, or a suspension merely, during the breach, and it was ruled "that the sounder and more equitable rule is against absolute forfeiture and in favor of the doctrine that the policy although suspended during the time the prohibited articles are kept on the premises may be revived by a discontinuance of the keeping or use of such prohibited articles."[8] A reargument had been ordered in this case "for the purpose of giving a hearing before the full bench in order that the proper rule in this class of cases should be finally settled," and after declaring the above rule, the court added: "We deem it wise to settle as far as possible this much mooted question by adopting the rule of the reasonable enforcement of contracts of insurance rather than to declare a forfeiture thereof, if this can be done without doing violence to the intention of the contracting parties."

It is suggested that the decision, in view of the breadth of statement and the authorities relied on,[9] is intended to cover not only prohibited articles but the entire class of "promissory" warranties, the breach of which had ceased before and was in no wise contributory to the loss, and during the continuance of which no forfeiture had been claimed by the insurer. If such is to be the application of "the rule of reasonable enforcement," the decisions

---

[7] McClure v. Mutual Fire Ins. Co. of Chester County, 242 Pa. 59 (1913).

[8] In N. B. M. I. Co. v. Union Stock Yards Co., 27 Ky. Law Rep. 852 (1905), the rule was stated: "The right of the matter seems to us to be that, while the forbidden condition is permitted by the assured to exist, the contract will be suspended. If the loss then occurs the insurer will not be liable. But, if before the loss and during the term covered by the policy, the original condition is restored, the liability of the insurer is also. This gives the assured all that he bargained for. It exacts nothing from the insurer beyond what it has assumed and taken pay for. Consequently the use of the leased premises for even forbidden purposes, but which had been discontinued long before the fire, was not an obstacle to the right of the insured to recover upon the policy. Strict forfeitures are repugnant to the law." See also Joyce, "Treatise on Insurance," §§2239, *et seq.*

[9] *Inter alia* citing Ins. Co. v. Lawrence, 81 Am. Dec. 521 (Ky. 1862); Ins. Co. v. Union Stock Yards Co., 27 Ky. Law Rep. 852 (1905); Williams v. Ins. Co., 31 Me. 219 (1850); Port Blak. Mill Co. v. Ins. Co., 110 Pac. Rep. 36 (Wash. 1910); Ins. Co. v. Coatesville Shoe Factory, 80 Pa. 407 (1876); Mears v. Humboldt Ins. Co., 92 Pa. 15 (1879); Traders Ins. Co. v. Catlin, 163 Ill. 256 (1896).

of this court will have the unquestioned merit of harmony of principle, and equity and consistency of application. The value of such uniform application of the rule is seen to be inestimable when it is observed that there is an apparently hopeless discord existing in several instances in the rulings of the same jurisdiction,[10] as well as in those of different jurisdictions in declaring whether the breach constituted an absolute forfeiture or a suspension, often stating the rule arbitrarily or basing it upon *dicta* of earlier cases. The most frequent instances in which the question is presented are under prohibitive warranties against increase of risk,[11] transfer of title,[12] vacancy,[13] hazardous articles,[14] and other insurance.[15] The decision in *McClure* v. *Mutual Fire Insurance Company*,[16] seems to have unified the rulings.

J. C. A.

MINES—NATURAL USE—LIMITATION OF THE SANDERSON CASE—The Supreme Court of Pennsylvania has once more considered, distinguished and limited the authority of *Pennsylvania Coal Co.* v. *Sanderson*.[1] In this recent[2] case the plaintiff and the defendant owned adjoining properties; the latter a large tract of coal land, the former a farm. For many years the defendant had been mining and removing coal on its land; and prior to 1908 the mine water collected and pumped to the surface, was discharged into a different water shed than that in which the plaintiff's farm was situated.

---

[10] For instance, two Ohio decisions handed down the same day, Ohio Far. Ins. Co. v. Burget, 65 Ohio St. 119 (1901) declaring a suspension in case of a temporary transfer of goods; and Ohio F. I. Co. v. Waters, 65 Ohio St. 157 (1901) declaring a transfer of title worked a forfeiture, even though at the time of the loss the insured was again owner.

[11] Forfeiture declared in Kyte v. Ins. Co., 149 Mass. 116 (1889); Suspension merely, Trad. Ins. Co. v. Catlin, 163 Ill. 256 (1896); N. B. M. I. Co. v. Union S. Y. Co., *supra*, n. 9.

[12] Suspension: Schloss v. Ins. Co., 141 Ala. 566 (1904); Worthington v. Bearse, 94 Mass. 3829 (1866). Forfeiture: Bemis v. Ins. Co., 200 Pa. 340 (1901); Ins. Co. v. Waters, *supra*, n. 10.

[13] Suspension: Ins. Co. v. Garland, 108 Ill. 220 (1884); Ring v. Ins. Co., 145 Mass. 426 (1888). Forfeiture: Moore v. Ins. Co., 62 N. H. 240 (1882); Wainer v. Ins. Co., *supra*, n. 5; Kentucky, *etc.*, Co. v. Ins. Co., 146 Fed. Rep. 695 (C. C. 1906).

[14] Suspension: Phoenix Ins. Co. v. Lawrence, 4 Met. 9 (Ky. 1862); Williams v. Ins. Co., *supra*, n. 9. Forfeiture: Mead v. Ins. Co.; Turnbull v. Ins. Co., *supra*, n. 4.

[15] Suspension: Ins. Co. v. Klewer, 129 Ill. 509 (1889); Obermeyer v. Ins. Co., 43 Mo. 573 (1869). Forfeiture: Replogle v. Ins. Co., 132 Ind. 360 (1892); Ins. Co. v. Rosenfeld, 37 C. C. A. 96 (1899).

[16] N. 7, *supra*.

[1] 113 Pa. 126 (1886).

[2] McCune v. Pittsburg & B. C. Co., 238 Pa. 83 (1913).

After 1908, however, the water thus discharged to the surface flowed naturally into a tributary of the stream which ran through farm; and, as a consequence, the stream was rendered useless for domestic or farm purposes. A bill for an injunction was granted against the defendant, who was allowed six months to enable it to arrange for some other disposition of the water. The opinion of the lower court was affirmed in a *per curiam* decision of the Supreme Court.

In granting the bill, Doty, P. J., said:[3] "Unless this case be clearly an exception, the maxim *sic utere tuo ut alienum non laedam* . . . must apply and control. And this principle, as all the authorities declare, always applies whenever in the use of one's own property any substantial and avoidable injury is done to the property of another." He then proceeds to distinguish Sanderson's case which, he states, holds that[4] "an owner of coal lands can mine his coal in the usual and ordinary way; and in such operation allow the water as it comes from the mine to flow naturally into a stream of pure water without liability to a lower riparian owner for the pollution of the stream; and such operator can in a shaft operation pump mine water to the surface and allow it to seek its natural outlet, without liability for damage if the water of the stream be already polluted." He further states that Sanderson's case, as a result of the modifications and qualifications of it by later cases, is, at most, an authority only on its exact facts.

The rule of Sanderson's case was decided by the Pennsylvania Supreme Court after the case had been before the court for the fourth time; and on that occasion, all the previous decisions concerning the case were overruled. In that case the plaintiff in the coal lands, on which he erected a handsome residence and made valuable improvements in order that he might be supplied with water for culinary, bathing and other purposes from a stream of pure water which flowed through his land. Shortly afterwards the defendant opened a mine on the stream about two miles above the plaintiff's land. The water, pumped therefrom in the operation of the mine, flowed naturally into the stream, and so polluted it as to render the water unfit for the uses to which it had been adapted. In a suit for damages the plaintiff was nonsuited at the first trial. On appeal,[5] the Supreme Court held that the case should have been submitted to the jury; and Woodward, J., in delivering the opinion of the court said,[6] "Undoubtedly the defendants were engaged in a perfectly lawful business, in which large expenditures had been made, and with which widespread interests were connected. But,

---

[3] At p. 90.
[4] At p. 91.
[5] 86 Pa. 401 (1878).
[6] At p. 405.

however laudable an industry may be, its managers are still subject to the rule that their property cannot be so used as to inflict injury on the property of their neighbors."

At the second trial there was a verdict for the plaintiff. But both litigants took writs of error from the rulings of the trial judge. In the two arguments thereon before the court,[7] it affirmed its previous decision and ruled in favor of the plaintiff in his appeal, ordering a new trial. At the third trial, a larger verdict for the plaintiff was returned, and defendant appealed. On this fourth appeal,[8] the Supreme Court overruled its three previous decisions as to the plaintiff's cause of action and laid down the rule which has been so much criticized. In this decision, Clark, J., delivered the opinion of the court, from which three of the seven judges dissented. He said, *inter alia*,[9] "It may be stated as a general proposition that every man has the right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria;* for the rightful use of one's own land may cause damage to another, without any legal wrong. . . . It will be observed that the defendants have done nothing to change the character of the water, or to diminish its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing upon the land artificially.[10] . . . In the first place, then, we do not regard the rule in *Rylands* v. *Fletcher* as having any application to a case of this kind; and if it had, we are unwilling to recognize the arbitrary and absolute rule of responsibility it declares, to the full extent, at least, to which its general statement would necessarily lead."[11] The opinion also laid great stress on the fact that great industrial interests would be affected by any other decision than that given; and also noted that there was evidence that the stream might have been polluted from other causes, and, accordingly, there should be no liability.

This final judgment, decided by a divided court, must be taken to have gone to the extreme of considering the term "natural use" to mean "any act tending to the most profitable use of the land."[12] It was not very long, therefore, before the case began to be discussed, distinguished and modified in later cases, until its authority was finally limited to the exact facts involved.

Three years after its decision, the Supreme Court, in discussing it, stated[13] that "the use which inflicts the damage must be natural,

---

[7] 94 Pa. 302 (1880); 102 Pa. 370 (1883).

[8] 113 Pa. 126 (1886).

[9] At p. 146.

[10] At p. 145.

[11] At p. 154.

[12] *Vide* Prof. Bohlen's article "The Rule in Rylands v. Fletcher," 59

proper and free from negligence, and the damage unavoidable." *Robb* v. *Carnegie,*[14] was distinguished from it on the ground that in the Sanderson case the use of the land by the Coal Company was the only practical one; and if it had been denied this use because of some unavoidable injury to others "the result would be practical confiscation of the coal lands for the benefit of householders, living in lower lands"; whereas in *Robb* v. *Carnegie,*[15] the defendants were not developing the minerals of their own land, but were using it in manufacturing coal mined from other land.

The tendency to limit the case to its own facts continued through all subsequent cases. In *Hindson* v. *Markle,*[16] Sanderson's case was distinguished as being a case in which "the mere flowage of natural water which was discharged by natural and irresistible forces, necessarily developed in the act of mining prosecuted in a perfectly lawful manner. While the mine water thus discharged polluted the water of the stream in which it necessarily flowed it caused no deposit of any foreign substance on the land of the plaintiff and did not deprive her of its use"[17] as was the case in *Hindson* v. *Markle.* The court in this way found the distinction which it sought and was thus able to decide the case without overruling the Sanderson case. That the celebrated case does not control when public rights are involved is intimated in some decisions: "Does a great municipality stand on the same ground, when the water supply for its multitude of people is under consideration, as a single property owner must stand under Sanderson's case?"[18]

UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 298, 373, 423; note 71 at p. 380.

[13] Collins v. Charters Co., 131 Pa. 143 (1889), at p. 157; B bored for gas and an injury resulted to A's neighboring water-well, arising from the commingling by B's well, of the salt and fresh waters percolating under ground. *Held:* B liable; the injury could be anticipated and was preventable by the exercise of reasonable care at a reasonable cost. Followed in Pfeiffer v. Brown, 165 Pa. 267 (1895).

[14] 145 Pa. 338 (1891), B was engaged in manufacturing coke from coal not mined by himself but purchased at the mines of others, remote from his land. *Held:* B liable for substantial injuries to the crops and soil of A's adjoining farm, caused by the smoke and vapors emitted from B's ovens as necessary incident thereto. *Accord:* Hauck v. Line Co., 153 Pa. 366 (1893); Welliver v. Irondale Co., 38 Super. Ct. 26 (1909).

[15] *Supra,* n. 14.

[16] 171 Pa. 138 (1895), B, the owner of coal mines, deposited the refuse and culm on his own land but in a position where ordinary storms could wash it into the stream; damage resulted to A, a lower owner. *Held:* B liable. *Accord:* Elder v. Coal Co., 157 Pa. 490 (1893) *semble.*

[17] At pp. 144, 145.

[18] Com. v. Russel, 172 Pa. 506 (1896); Com. v. Emmers, 221 Pa. 298 (1908); 33 Super. Ct. 151 (1909). The A. Co., a private corporation supply a city with water, brought bill for an injunction against B for polluting its supply of water resulting from B's pumping salt water therein from his wells. Lower court held that Sanderson's case ruled, this was reversed and the case sent back for trial. *Vide* 172 Pa. 519, 520, 521.

The court in one case[19] suggested that the decision of the Sanderson case should be modified, as to apply it under all circumstances would result in a practical confiscation of the lower proprietor for the benefit of the upper; but it refuses to do so on the ground that the case which it is deciding does not necessitate any consideration of that case. In another case,[20] it is said, "The changed conditions brought about by the appellee have not resulted from the development and natural use and enjoyment of its own property, as was the case in *Pa. Coal Co.* v. *Sanderson*,[21] the doctrine of which case has never been and never ought to be extended beyond the limitations put upon it by its own facts." Somewhat to the same effect is the Superior Court[22] in its statement, "This case (Sanderson's case) is exceptional and rests entirely upon its own facts, and has been distinguished by the court which rendered it, from cases such as this in *Hindson* v. *Markle*."[23]

Not only have the later Pennsylvania cases thus taken away all authority from the Sanderson case beyond its own facts, but the courts of other States have criticized it and considered it to be weak as an authority even on its exact facts.[24] It can, therefore, be said with this most recent expression of our Supreme Court, that the decision no longer states any peculiar Pennsylvania rule as was intimated in an English case.[25]

N. I. S. G.

NEGLIGENCE—UNREGISTERED AUTOMOBILE ON A HIGHWAY—In a recent Massachusetts case[1] the plaintiff, whose automobile was damaged by collision with defendant's on a public highway, was not permitted to recover, since he was operating his automobile in violation of a statute prohibiting the operation of unregistered automobiles.

This decision simply follows the rule already established in that State, the courts of which have uniformly assumed that the plaintiff's unlawful act contributed to his injury; while on the other hand, the courts of New York and some other States have just as consistently held that the plaintiff in such cases may recover, always

---

[19] Robertson v. Coal Co., 172 Pa. 566 (1896).

[20] Sullivan v. Steel Co., 208 Pa. 540 (1904), at p. 549.

[21] *Supra*, n. 1.

[22] Bricker v. Stone Co., 32 Super. Ct. 283 (1906). Residuum of B's quarrying and stone-crushing operations, cast into a stream on which B's works were situated, caused sediment to settle on A's lower mill dam and damaged A's mill. *Held:* B liable.

[23] *Supra*, n. 16.

[24] Straight v. Hover, 79 Ohio 263 (1909); Parker v. Woolen Co., 195 Mass. 591 (1907).

[25] Young v. Distilling Co. (Eng. 1893), A. C. 691.

[1] Holden v. McGillicuddy, 102 N. E. Rep. 923 (Mass. 1913).

giving as among the controlling reasons that the illegal act did not contribute to the injury. Since such opposite results have been reached while proceeding upon the same premises, there must be a fallacy somewhere in the reasoning. It seems to be in the Massachusetts rule, in the assumption that a mere concurrence of the illegal act with the accident in point of time is to be treated as a concurring cause of the injury, which it is not, but rather merely a condition or incident.[2] This distinction is clearly brought out in cases where the violation of the Sunday law has been urged as a defence to actions for personal injuries. The rule established by preponderance of authority and the trend of later decisions is, that it is not a defence, for such violation is not the efficient or proximate cause of the injury nor is it an essential element of the cause of action, the time of the injury not being the foundation of the action, but only an incident to the efficient cause of the injury.[3] Lord Mansfield is quoted[4] as saying: *"Ex dolo malo non oritur actio"* —no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. In such a case as the one in question the plaintiff does not base his cause of action upon his illegal act, but upon an injury caused by the negligent act of another. It is true plaintiff's illegal act was an incident or condition existing at the time, but it did not contribute directly to his injury.

It is argued in the cases not allowing recovery that such person, if he had not been so traveling or laboring in violation of the law, would not have received the injury, and he therefore contributes to the injury by such act. The validity of this reasoning depends on the validity of the assumption that the acts constituting the violation of the statute are a contributory or concurring cause of the injury.[5] The text-writers seem to be agreed, it is true, that the general rule is that, if the person injured was at the time he received the injury doing some act in violation of a statute or ordinance, he cannot recover, if such violation contributed to his injury.[6] But before the illegal act or omission can be held contributory negligence, it must appear that such act or omission was a proximate cause of the injury. The mere collateral wrong-doing of the plaintiff should not, of itself, defeat his recovery, unless it has some causal connection with it and is in some way a concurrent cause of the accident.[7]

---

[2] Tackett v. Taylor Co., 123 Iowa 149 (1904); Magar v. Hammond, 54 N. Y. App. Div. 532 (1900).

[3] See note to Hughes v. Atlantic Steel Co., 36 L. R. A. (N. S.) 547.

[4] Roller v. Murray, 112 Va. 780, 783 (1911).

[5] Baldwin v. Barney, 12 R. I. 392 (1879).

[6] Cooley's Torts (3d Ed.) Vol. 1, p. 274; Shearman & Redfield's Negli- must have been such as to have caused, or helped to cause the injury gence (5th Ed.) Vol. 1, §104.

[7] Beach's Contributory Neg., §47; Hoffman v. Union Ferry Co., 68 N. Y.

To make good the defence it must appear that a relation existed between the act or violation of law on the part of the plaintiff, and the injury or accident of which he complains. And that relation or accident, not in any remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another.[8] The ingenuous argument advanced, where plaintiff was exceeding speed limit, that inasmuch as it was the excessive speed which brought the car to the place of the accident at the moment of the accident, that speed was the immediate cause of the plaintiff's injury, is somewhat sophistical. It was the merest chance and a thing which no foresight could have predicted.[9]

In Massachusetts the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. In using the highway the machine is an outlaw. The operator is guilty of conduct which is permeated in every part by his disobedience of the law and which directly contributes to the injury.[10] In *Dudley* v. *Northampton Street R. Co.*,[11] it was said that if the plaintiff simply was driving his vehicle on a public way in a manner forbidden by law or without appliances required by law and received injuries which resulted solely from the negligence of another, he should not be barred of recovery by the mere fact of his own violation of the law. But where the statute expressly provides that no automobile shall be operated upon any public highway unless registered, that shows, the court said, that the legislation intended to outlaw them, and to give them as to persons lawfully using the highway, no other rights than that of being exempt from reckless, wanton, or wilful injury.

The same distinction was recognized in a Connecticut case,[12] where the statute imposed an obligation upon plaintiff to register his automobile and for its violation prescribed a penalty, but contained no prohibition against using an unregistered machine upon the highways. The court held that the plaintiff's right of action is not taken away because at the time his injuries were sustained, he was disobeying a statute law, which in no way contributed to the accident. That this distinction is not sound it shown by *Atlantic Coast Line R. Co.* v. *Weir*,[13] where the court, in dealing with a statute similar

385 (1877); Lockbridge v. Minneapolis & St. L. R. R. Co., 140 N. W. Rep. (Ia. 1913).

[8] Sutton v. Town of Wauwatosa, 29 Wis. 21 (1871).

[9] Berry v. Sugar Notch Borough, 191 Pa. 345 (1899).

[10] Chase v. N. Y., *etc.*, R. Co., 208 Mass. 137 (1911); this language was quoted and rule reaffirmed in Bourne v. Whitman, 209 Mass. 155 (1911). In Feley v. City of Melrose, 205 Mass. 329 (1910), it was held that the passengers riding in such a car were trespassers, even though they were not aware of the fact that the car was unregistered.

[11] 202 Mass. 443 (1909).

[12] Hemming v. New Haven, 74 Atl. Rep. 892 (Conn. 1910).

[13] 58 So. Rep. 641 (Fla. 1912).

to the one in our principal case, said that since it did not expressly or impliedly provide that there shall be no recovery for a negligent injury to an unlicensed motor vehicle being operated on the public highway, a recovery may be had under the principles of common law. In doing an unlawful act a person is not denied the rights and protection accorded by the law; he is never thrown by the law upon the mercy of others.[14]

However, the court in the last-mentioned case said the license feature of the statute was a revenue measure only, since there was no provision for examination to test the vehicles' efficiency. On the other hand, the Massachusetts statute contains such provisions manifestly intended as precautions to be observed for the safety of other persons upon the highway, and, perhaps, upon this ground the results there reached may be justified.

The New York court [15] sets forth that the Sunday law exhausts itself in the penalty prescribed, and that to give it further effect by forfeiting the plaintiff's right of action would be in effect adding to the penalty. To a certain extent this is true, namely, where the plaintiff has not contributed to his injury. It is only upon the assumption that the plaintiff's illegal act does not contribute to his injury that you can add to the penalty by denying a right of action for the injury. Surely one must have a right of action before he can forfeit it. He cannot lose what he never had in fact or in right. Where his illegal act does contribute to his injury, he has no right of action whatever, and by so holding nothing whatever is added to the prescribed penalty. Probably it is for this reason the Massachusetts statute does not expressly provide that a right of action shall be denied the violator thereof.

S. L. M.

---

[14] Cooley's Torts (3d Ed.), p. 273; In Ches., *etc.*, R. Co. v. Jennings, 98 Va. 70 (1900), it is said not to be contributory negligence *per se* for the injured party at the time of the injury to be engaged in a violation of law. Such violation does not put him out of the protection of the law, nor at the mercy of others. But if such violation contributed to his injury, he cannot recover therefor.

[15] Platz v. City of Cohoes, 89 N. Y. 219 (1882).