June, 1932

ANNOUNCEMENT

The University of Pennsylvania Law Review is pleased to announce the election and induction into office of its Managing Board for the year 1932-1933, as follows:

W. Wilson White, Editor-in-Chief
George M. Neil, Managing Editor
Albert Blumberg, Note and Legislation Editor
Robert J. Callaghan, Case Editor
Paul Maloney, Book Review Editor
Henry Greenwald, Business Manager

The resignation of Saul Finestone, an Associate Editor, has been accepted.

NOTES

Some Aspects of "Imputed" Negligence—If Lord Herschell optimistically assumed that, Siegfried-like, he had forever despatched the dragon of "identification", by his decision in the case of Mills v. ArInstrong, he reckoned either without the durability of that monstrosity, or without the fact that it was hydra-headed. The recent decisions in the cases of Zuidema v. Bekkering, and of Langford Motor Co. v. McClung Construction Co., which imputed the contributory negligence of a husband to his wife and of a bailee to his bailor, respectively, so as to bar recovery by the innocent plaintiff in each case, make it imperative to reopen this oft-litigated question, in order to examine both the history and the rational foundations of what one court called "an obsolete and exploded legal heresy." The subtle refinements of legal reasoning, to which some courts have resorted, in order to justify one of the greatest anomalies of the law, have resulted in a welter and chaos which are the despair of students. Indeed, in attempting to clarify the subject, one experiences at the outset the hopelessness of the Carpenter in Alice:

"If seven maids with seven mops
Swept it for half a year,
Do you suppose,' the Walrus said,
'That they could get it clear?'
'I doubt it,' said the Carpenter,
And shed a bitter tear."

That the doctrine is obsolete is attested by the fact that the vast majority of courts have repudiated it, if they ever adhered to it at all; it is a source of wonder that it should still be the law in any enlightened jurisdiction.

At the outset, it may be best to define our terms. What is "imputed" negligence? It exists

1 The Bernina, 13 App. Cas. 1 (1888).
2 239 N. W. 333 (Mich. 1931).
4 The decision does not make it clear whether the court relied on the relationship of husband and wife, or of operator and passenger or guest, as the basis for the imputation of negligence.
5 Zarzana v. Neve Drug Co., 180 Cal. 32 at 36, 179 Pac. 203 at 204 (1919).
"... when the plaintiff, although not chargeable with personal negligence, has been, by the negligence of a person in privity with him, and with whose fault he is chargeable, exposed to the injury which he received through the negligence of the defendant." 6

The term is of proper application in only one situation, that of a suit by an innocent plaintiff (i.e., one who has concededly not been guilty of any personal negligence, and who has not voluntarily assumed any risk)7 against a negligent defendant, who is seeking to charge plaintiff with the contributory negligence of a third person, in an effort to debar him from recovery. It is perhaps best epitomized by Professor Bohlen's phrase, "contributory negligence of persons other than the plaintiff". When is a person in such privity with another that such other’s contributory negligence may be "deemed" that of the plaintiff? The tradition of the common law permits of but one answer to this question: no one should be responsible for the misconduct of another, for purposes either of being liable for injuries caused to a third person by such other’s misconduct, or for purposes of being debarred from recovery for injuries sustained by himself, as a result of the concurrent negligence of such other and the defendant, unless there existed between them the relation of master and servant, or principal and agent, so as to make the plaintiff vicariously responsible, or unless the parties were engaged in a common or joint enterprise, with its implications of mutual control and mutual responsibility.8 Can there be any other basis for vicarious responsibility? It would seem that all else is judicial legislation, and a dangerous recurrence to the semi-barbarous aspects of the doctrine of liability without fault, for the law to allow one person to be responsible for the misdeeds of another, with whom he did not sustain one of the above-mentioned relationships, and over whose actions he maintained no right or ability to control.

To state the problem more concretely, and to illustrate how very great is the anomaly which only a pluperfect refinement of legal reasoning has foisted upon the law, it is a platitude to state that no one is liable for the misconduct of another, toward whom he does not sustain the relation of principal, master, or joint entrepreneur: the law recognizes no element of vicarious liability where such relationship is absent.9 Is it possible, then, that the law recognizes responsibility for purposes of imputation, in a situation the identical facts of which disclose no responsibility for purposes of liability? Can there be responsibility for one purpose, but not for another?10 It would seem that a study of the cases must yield an affirmative answer in many instances. It will be the purpose of this note to inquire into this putative anomaly, with a view to determining whether inconsistency in fact exists, and what the rational basis of such inconsistency may be.

The thesis of the present annotation is that

"... only when the contributory negligence with which it is sought to charge a plaintiff is of such a character, and the person guilty of the same

7 If plaintiff has been guilty of personal negligence, or has voluntarily assumed the risk of the situation, he is of course precluded from recovery. Both of these topics are beyond the scope of the present note. For a valuable discussion of what constitutes personal negligence or voluntary assumption of risk, in this connection, see Mechem, The Contributory Negligence of Automobile Passengers (1930) 78 U. OF PA. L. REV. 736.
8 Knightstown v. Musgrove, 116 Ind. 121, 18 N. E. 452 (1888); Cahill v. Cincinnati, N. O. & T. P. Ry., 92 Ky. 345, 18 S. W. 2 (1891). Of course, a rule of public policy may extend the ambit of vicarious responsibility; e.g., where work or an instrumentality is inherently dangerous, one is liable for the acts of even an independent contractor. Kendall v. Johnson, 51 Wash. 477, 99 Pac. 310 (1909).
9 Laugher v. Pointer, 5 B. & C. 547 (1876); Higgins v. Western Union Tel. Co., 136 N. Y. 75, 50 N. E. 500 (1898).
10 "'It is a poor rule that won't work both ways'. And that is just the fault of the rule under discussion." Note (1893) 41 Am. L. Reg. 763, 765.
is so connected with such plaintiff, that an action might be maintained against him for damages for the consequences of such negligence, can it in contemplation of law be justly imputed to him." 11

In other words, one is liable for the misconduct of another only when the maxim *qui facit per alium facit per se* is applicable.12 By a parity of reasoning, the maxim must apply before the misconduct of such other should be imputed, so as to bar recovery. Succeeding sections will point out in what respects some courts deviate from this fundamental principle, and impute negligence on the basis of some fortuitous relationship which is in no wise one of the recognized conditions for the application of the rule of *respondeat superior*.

I. Operator of a Vehicle and His Passenger or Guest 13

The case of *Thorogood v. Bryan*,14 which enunciated the doctrine of "identification", fathered the whole "brood of folly without father bred". In that case, defendant, an omnibus driver, negligently permitted the plaintiff's decedent, a passenger, to alight without stopping the vehicle or drawing up to the curb. Defendant's omnibus, negligently operated, drove up at that moment, struck the decedent and inflicted the injuries from which he subsequently died. It was held that the decedent had, by selecting the particular conveyance, so far identified himself with the driver that the latter's negligence was his, and that he was a party to any injury resulting therefrom! The court decided the all-important question whether the deceased had control over the driver, by deciding as a matter of law that a passenger in a public conveyance has such control:

"He selects the conveyance. He enters into a contract with the owner, whom, by his servant the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it." 15

The utter absurdity of defining "control" in such terms is thus expressed by one writer:

"... it will hardly be seriously urged that the passenger in a public conveyance has any power to control the driver or manager thereof. Can a passenger who wishes to get out at a way station stop an express train at his pleasure? or can a person who wishes to go up-town stop a downward bound car and make it turn around and go back?" 16

It is in this situation that the manifest inconsistency of attributing the negligence of one person to another for one purpose, but not for all, appears most strikingly. If the reasoning of the court in the *Thorogood* case were carried to its logical conclusion, liability would be vicariously imposed upon each passenger, who would be answerable in damages to every person injured by the carelessness of the operator of the vehicle in which he happens to be riding! 17 Such a proposition is obviously too absurd to require further mention, since the fundamental legal precept that no one is liable for the fault of another militates against it. But it is just as obviously arbitrary to say *ex cathedra* that the plaintiff is to be

11 Morgan County v. Payne, 207 Ala. 674 at 676, 93 So. 628 at 629 (1922).
13 The spurious distinction between passengers for hire and social guests, for purposes of recovery, which seems to have been made only by Wisconsin, has been eliminated by the Supreme Court of that state, in the case of Reiter v. Grober, 173 Wis. 493, 181 N. W. 739 (1921), overruling Prideaux v. Mineral Point, 43 Wis. 513 (1878).
14 8 C. E. 115 (1849).
15 At 131.
16 *Supra* note 10, at 764.
charged with the negligence of someone else for one purpose, but not for an-
other. The law knows no such distinction, and no court would seriously con-
tend that an innocent fourth person has an action against the present plaintiff,
who is in no way responsible for the misdeeds of the actor.

Considering the superficiality and the speciosity of its justice, it is not sur-
prising that the rule of Thorogood v. Bryan should have died a swift and sudden
death in England, and in almost all of the few states which adopted it in this
country. In the United States, the case of Little v. Hackett 19 blazed the trail
for what is today the overwhelming weight of American authority, by holding as
a matter of law that a passenger or guest is not, without more, the master of the
operator of the vehicle in which he is riding, that there is no ground upon which
to identify them, and that in consequence there can be no imputation of the
driver’s neglect to the passenger or guest, qua passenger or guest.

“The truth is, the decision in Thorogood v. Bryan rests upon indefen-
sible ground. The identification of the passenger with the negligent driver
or the owner, without his personal co-operation or encouragement, is a
gratuitous assumption. There is no such identity. The parties are not in the
same position. The owner of a public conveyance is a carrier, and the driver
or the person managing it is his servant. Neither of them is the servant of
the passenger, and his asserted identity with them is contradicted by the daily
experience of the world.” 20

If Little v. Hackett did not succeed in thoroughly discrediting the doctrine
of “identification”, the decision in the case of Mills v. Armstrong, 21 which over-
ruled Thorogood v. Bryan on its native heath, put the finishing touches to the
process. One by one, jurisdictions which had adopted this fallacious tenet aban-
don it in favor of the more enlightened rule that there can be no imputation for
purposes of barring a recovery where there can be none for purposes of liability. 22
Michigan alone clings tenaciously to the outworn distinction, 23 and lacks the
courage to overrule it, although its courts seek to circumvent what they acknowl-
dge to be a legal bête noire upon the slightest pretext. 24

Needless to say, if there exists between the driver and his passenger or guest
the genuine relation of master and servant, or of principal and agent, or if the
facts disclose that they are engaged in a joint enterprise, so that the maxim qui
facit per alium facit per se is applicable, the negligence of the former is, and

18 Ibid.
note 17.
21 Supra note 1.
22 Bunting v. Hogsett, 139 Pa. 363, 21 Atl. 31 (1890); Reiter v. Grober, supra note 13.
23 Mullen v. City of Owosso, 100 Mich. 103, 58 N. W. 663 (1894); Keeshaw v. De-
troit United Ry., 169 Mich. 697, 135 N. W. 903 (1912); Granger v. Farrant, 179 Mich. 19,
146 N. W. 218 (1914); Jewell v. Rogers, 208 Mich. 318, 175 N. W. 151 (1919); Geeck v.
W. 723 (1921); Wilson v. Coe Township, 233 Mich. 75, 206 N. W. 355 (1925); Steinberg
v. Builders Lumber Co., 238 Mich. 181, 212 N. W. 950 (1927); Brady v. Pere Marquette
24 Thus, in Donlin v. Detroit United Ry., 198 Mich. 327, 164 N. W. 447 (1917), the
court allowed plaintiff to recover, on the ground that being a minor, he was incapable of
entering into a contract of agency. In order to bar him from a recovery, said the court,
it must be shown that plaintiff was a member of a joint enterprise. Quo.
care: If plaintiff lacked the capacity to employ an agent, how could he have the capacity to enter into a joint
enterprise, which is merely another phase of the doctrine of vicarious responsibility? Ac-
should be, imputed to the latter, whether for the purpose of barring a recovery by him, or of holding him liable to a third person injured thereby.\(^\text{25}\)

**II. Suits Between Joint Entrepreneurs**\(^\text{26}\)

Conceding that a participant in a joint enterprise is, and should be, responsible for the misconduct of those engaged with him in the common scheme, for the purposes both of being liable to a third person injured by such misconduct, and of being barred from recovery against a person who has been concurrently negligent, should such participant be precluded, by virtue of his co-membership, from maintaining a suit *inter sese* against his negligent fellow-participant? The answer should be an emphatic negative,\(^\text{27}\) but some courts, relying upon what seems to them to be a parity of reasoning with barring a joint *entrepreneur* from recovering against a third person, hold that mere participation in a common enterprise is a ground for imputing the negligence of one member to all those engaged therein, even for the purpose of maintaining a suit against the miscenary member. Thus, where the plaintiff, defendant and others agreed to take a trip in the defendant's automobile, and to divide the expenses of the trip, the court held that the plaintiff could not recover for injuries sustained as a result of the defendant's negligence, on the ground that they were engaged in a joint enterprise, thus refusing to distinguish between cases in which the defendant is a third party, and those in which he is a joint *entrepreneur*.\(^\text{28}\)

The analogy upon which this line of reasoning proceeds is entirely a false one, as a comparison of the two types of cases cannot help but prove. On the one hand, it shocks one's conscience that a person who, by hypothesis, has control over another, and is therefore in a sense one with him, should be so highly ungracious as to expect to recover from a third person for the consequences of his own failure to exercise the right, and the presumed ability, to control, which vested in him as a member of the common scheme. It is as if he were himself negligent: the situation delineated is one of the few in which true identification exists. On the other hand, we have to deal with the legal duty, which is imposed upon every member of society who is *sui juris*, so to act as not to injure another by wrongful conduct. In this respect, it cannot make the slightest difference whether the parties are engaged in a joint enterprise or not: the duty not to injure another by a wrongful act is common to all. To impute the negligence of one joint *entrepreneur* to another, in an action *inter sese*, so as to bar recovery by the innocent party, is to permit a wrongdoer to take refuge behind his own wrong.\(^\text{29}\) It is not the law that one person is disqualified from suing another, merely by virtue of some legal relationship subsisting between them. Thus, one partner may sue another for wrongful conversion of firm property; a principal may maintain an action against his agent; a customer may bring an action against the common carrier for negligence; a patient may sue his surgeon for medical malpractice; a companion may sue his fellow passenger for negligence in an automobile accident. The list is endless. The analogy upon which this line of reasoning proceeds is entirely a false one, as a comparison of the two types of cases cannot help but prove. On the one hand, it shocks one's conscience that a person who, by hypothesis, has control over another, and is therefore in a sense one with him, should be so highly ungracious as to expect to recover from a third person for the consequences of his own failure to exercise the right, and the presumed ability, to control, which vested in him as a member of the common scheme. It is as if he were himself negligent: the situation delineated is one of the few in which true identification exists. On the other hand, we have to deal with the legal duty, which is imposed upon every member of society who is *sui juris*, so to act as not to injure another by wrongful conduct. In this respect, it cannot make the slightest difference whether the parties are engaged in a joint enterprise or not: the duty not to injure another by a wrongful act is common to all. To impute the negligence of one joint *entrepreneur* to another, in an action *inter sese*, so as to bar recovery by the innocent party, is to permit a wrongdoer to take refuge behind his own wrong.\(^\text{29}\)


Space limitations forbid a discussion of what constitutes a joint enterprise, or of the propriety of imputing the negligence of one joint *entrepreneur* to another, in suits against third parties. Both of these extremely interesting and important topics are amply discussed in Note (1920) 77 U. of PA. L. Rev. 676; Note (1929) 38 YALE L. J. 81; Note (1929) 63 A. L. R. 909; (1929) 78 U. of PA. L. Rev. 270. See Rollison, The "Joint Enterprise" in the Law of Imputed Negligence (1931) NOTRE DAME LAWYER 172.


O'Brien v. Woldson, 149 Wash. 192, 270 Pac. 304 (1928).
action against an agent for breach of duty or disloyalty; a \textit{cestui que trust} may recover from a trustee for breach of trust.\footnote{20} It would indeed be a strange situation if the law should constitute a person \textit{caput lupinum}, for no other reason than that he has seen fit to associate himself with others in mutual business or other dealings.

The majority of courts refuse to countenance what is obviously a false analogy,\footnote{21} based upon the \textit{parti pris} that when one person engages in mutual dealings with another, he surrenders all his legal rights to such other. Thus, where the plaintiff and defendant, among others, made up a party to go hunting in defendant's automobile, and the plaintiff was injured as a result of the defendant's negligence in driving, the court, in allowing recovery, said:

"A joint enterprise . . . is not for the purpose of permitting one of the parties thereto to commit a tort upon his associates. Suppose this hunting party had reached its destination and a member of the party had carelessly shot one of his associates. Would the fact that they, to some extent, were engaged in a common enterprise render the defendant sued for the shooting immune? I think not."\footnote{22}

\textbf{III. Husband and Wife}

\textit{(A). Suit by One Spouse for Personal Injury Sustained as a Result of the Concurrent Negligence of the Other and the Defendant}

Should the contributory negligence of one spouse be imputed to the other, who has suffered personal injury? Upon principle, it is difficult to find any meritorious reason why the mere fact of marital relationship should give rise to such imputation. Of course, in this situation, as in every other, there may subsist between husband and wife the true relation of master-servant, principal-agent, or co-participation in a joint enterprise.\footnote{23} But we are concerned in this annotation with cases in which courts will impute negligence even in the absence of one of these essentials, and purely on the basis of some relationship which for this purpose is both fortuitous and extra-legal. Husband and wife are today separate legal entities: the husband is no longer liable for the torts of his \textit{et ux.}, and purely on the basis of some relationship which for this purpose is both fortuitous and extra-legal. Husband and wife are today separate legal entities: the husband is no longer liable for the torts of his \textit{et ux.}, and purely on the basis of some relationship which for this purpose is both fortuitous and extra-legal.

\footnote{22} Wilmes v. Fournier, \textit{supra} note 31, at 12, 180 N. Y. Supp. at 862.
\footnote{23} E. g., in Standard Oil Co. v. Thompson, 189 Ky. 830, 226 S. W. 368 (1920), plaintiff, who was an invalid, was injured while riding in an automobile negligently operated by his wife. In denying recovery against the negligent defendant, the court properly based its decision upon the agency relationship.

\footnote{24} 1 \textit{SCHOUER, DOMESTIC RELATIONS} (6th ed. 1921) §§ 122 ff.; 1 \textit{SHEARMAN AND REDFIELD, NEGLIGENCE} (6th ed. 1913) § 67.
\footnote{25} Stilson v. Ellis \textit{et ux.}, 208 Iowa 1137, 225 N. W. 346 (1929); Beeson v. Perry, 123 Kan. 164, 253 Pac. 1097 (1927); Cox's Admr's. v. Cincinnati, \textit{etc.} Ry., 238 Ky. 312, 37 S. W. (2d) 859 (1931); Vitale v. Checker Cab Co., 166 La. 527, 117 So. 579 (1928); Kokele v. Price, 136 Minn. 304, 151 N. W. 715 (1917); Fitzgerald v. Village of Bovey, 174 Minn. 450, 219 N. W. 774 (1928); Laird v. Berthelote, 63 Mont. 122, 206 Pac. 445 (1922); Stevens v. Luther, 105 Neb. 184, 180 N. W. 87 (1920); Simrell \textit{et ux.} v. Eschenbach, 303 Pa. 136, 145 Atl. 369 (1931); Jackson v. Utah Rapid Transit Co., 290 Pac. 970 (Utah 1930); Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690 (1921).
relationship, by blood or marriage, were to furnish a legal basis for exempting a negligent defendant from liability, where should courts draw a line of demarcation? Why should not the negligence of cousins be imputed to each other? Should blood tests be admissible in evidence, to prove that perhaps the parties had a common ancestor? The proposition falls by the sheer weight of its own absurdity, yet a few courts have stultified themselves by arbitrarily setting up the marital relation as a basis for imputation, as a bar to recovery. 36

Two reasons are assigned, in justification of the minority rule: (1) If a recovery were allowed, the benefit thereof would accrue indirectly to the contributorily negligent husband, who would thus profit by his own wrong. This reason is entirely invalid, at least in jurisdictions in which the proceeds of the recovery would be the wife's separate property. 37 If the wife desires to contribute the proceeds to the family exchequer, it is certainly her right to do so, since they are her absolute property, and it is not the function of courts of law to supervise or criticize their ultimate disposition. (2) The husband is at common law the agent or servant of the wife. The folly and falsity of this reasoning becomes apparent immediately, when one considers that at common law the husband was the master or principal, and the wife the servant or agent. It has never been the law that the servant or agent is responsible for the torts of the master, for purposes of either liability or of imputation. Moreover, whatever their legal relation at the common law may have been, the wife has been universally emancipated by the Married Women's Acts, and almost the last vestige of her identification with her husband has disappeared. She is today a distinct, independent legal entity, capable of suing and being sued, and cognizable as such in courts of law. Cessante ratione legis, cessat ipsa lex.

In a jurisdiction which has a joint interest statute, which requires that suit be brought in the name of both husband and wife, and that the proceeds of the recovery become their joint property, there is more reason for denying recovery, on the ethical ground that the wrongdoer would otherwise be sharing in the fruits of his wrong. But even here, it is unjust to make an innocent wife suffer, merely because she has the misfortune to be married to a wrongdoer. This is indeed punishing a wife for her folly in marrying this man! There is nothing in the law which requires that the sins of one person be visited upon another, who is in no way responsible for those sins: the modern spirit rebels at the thought of making an exception in the case of husband and wife. The injustice of a joint interest statute is obvious, in cases where one of the joint parties is innocent, and there is sometimes judicial hesitancy to interpret such a law strictly in order to do what appears to be justice. Thus, in a suit under a death statute which gives a joint cause of action to the father and mother of an unmarried minor, the contributory negligence of the father was held no bar to a recovery by the community of the father and mother, on the ground that the community as such was a legal entity, and as such had not been guilty of contributory negligence. 40

The majority view takes the position that the husband and wife are such completely distinct legal entities, that the wife's suit for personal injury may not


37 I Schouler, op. cit. supra note 34, § 332.

38 For the political and legal effects of the Married Women's Acts, see 1 Schouler, §§ 286-287; Gilmore, Imputed Negligence (1921) 1 Wts. L. Rev. 193, 204, 205.


even be joined in the same action with the husband’s suit for loss of services, and that a recovery in one right is not res adjudicata in an action on the other.

(B) Suit by a Husband for Loss of His Contributorily Negligent Wife’s Services

Suppose the wife is injured, as a result partly of her own contributory negligence, so that her husband is deprived of her society and services, to which he is entitled as an incident of the marriage relation. If she had brought an action for damages for her personal injuries, she could concededly not have recovered, since she was contributorily negligent. Should the innocent husband also be debarred from recovery, in an action for the loss of her society and services? It would seem that the husband should be allowed to recover, since he is suing in an entirely independent right, and has done nothing, qua that right, to put himself under a disability. As stated above, the right of the husband to compensation for the loss of his wife’s services is so distinct from the right of the wife to damages for personal injury, that the two may not even be joined in one suit. The former is a property right, existing in an independent capacity, and one should not be divested of property rights by the act of another. Nevertheless, the court in the case of Chicago, B. & Q. Ry. v. Honey, with true fin de siècle reasoning, barred the husband from a recovery, and in doing so, delivered itself of peculiarly naive language to the effect that the wife was capable of exercising her own faculties; by letting her go abroad unattended, the husband relied on her ability to exercise those faculties; ergo, he must take the consequences of impliedly asserting that she was capable of going abroad alone, and her negligence must be imputed to him!

IV. Parent and Child

(A) Suit by a Parent for Compensation for Services Lost as a Result of the Injury of a Contributorily Negligent Minor Child

It is well established that a parent is not liable, qua parent, for the torts of his minor child, since he has no control over the actions of the child by virtue of the family relationship alone. It would therefore seem, by analogy, that the contributory negligence of such child should not be imputable to him, in an action by him for the loss of the child’s services. Here again, two distinct interests are involved: the child’s interest in bodily security, and the parent’s interest in the child’s labor, which is a necessary complement to his duty to protect, support, and educate the child. The leading case of Warren v. Manchester Street Ry., which represents the majority view upon the subject, so held, in allowing recovery to the father.

But not all courts are in accord with the reasoning of the Warren case. The contrary view may be illustrated by the case of Callies v. Reliance Laundry Co.,...

---

43 Brickner v. Kopmeier, 133 Wis. 582, 113 N. W. 414 (1907).
44 Selleck v. Janesville, 104 Wis. 570, 80 N. W. 944 (1899).
“The plaintiff in the one case can not release or discharge the right of action belonging to the plaintiff in the other. The payment of damages in the one case has no legal effect upon the damages to be awarded in the other. The admission or statements of the wife, not forming part of the “res gestae,” are not admissible as evidence against the plaintiff in the suit by the husband, although they are evidence against the plaintiff in the suit brought by the wife; and so also the admissions of the husband, though provable against him, are not admissible in the suit of the wife. In all particulars the right of action accruing to the wife and that accruing to the husband are separate and distinct.”
46 Also see Gilmore, op. cit. supra note 38, at 213 et seq.
48 50 N. E. 225, 47 Atl. 735 (1900).
49 67 I88 Wis. 376, 206 N. W. 198 (1925).
NOTES

in which the court was compelled to indulge in some weird ratiocination, in order to reach an opposite conclusion. When a minor child has been injured, says the court, the right of action which accrues is divided into two parts: the parent acquires one part, which is analogous to a partial assignment. An assignee stands in the shoes of his assignor. Since the whole right of action was tainted with contributory negligence, the part acquired by the parent must also be, and he may therefore not recover! Is not this flying in the very face of the well-established principle that the parent's interest in the child's services is a distinct property right? An obvious example of the correctness of this statement is furnished by the rule that the parent's right to the services of a daughter who has been seduced, is not barred by the fact that the daughter participated in the seduction. If a vested property right may not be divested by the willful act of another, it is obvious that it may not be by the mere negligence of such other.48

(B) Suit by a Child for Injuries Sustained as a Result of the Concurrent Negligence of Defendant and the Child's Parent or Custodian

It seems to be the general rule that "due care" in the case of a child "is only such care as the great mass of children of his age, intelligence and experience ordinarily exercise under the same or similar circumstances."49 In other words, the great majority of courts do not hold an infant to the same degree of care required of an adult. And if the child is of such tender years as not to understand at all the nature of his actions, almost all courts will hold him incapable of being negligent or contributorily negligent, as a matter of law. What constitutes such tender age must of course vary with the circumstances of each case.

Suppose the plaintiff to be an infant of such tender years as not to be sui juris, and therefore incapable, as a matter of law, of being guilty of either negligence or contributory negligence. It is obviously negligent on the part of the parents, in such a case, to allow so young a child to stray. If the child is injured as a result of defendant's negligence, should the contributory negligence of the parents be attributed to it, in an action by the child itself for damages for the injuries sustained? Upon the plainest legal and common-sense principles, it would seem that there should be no imputation in such case: if the infant is legally incapable of being negligent or contributorily negligent, as a matter of law, it is equally incapable of being chargeable with the negligence of another.50

Nevertheless, the feeling obtains in some quarters that to allow such an infant to recover would be equivalent, in practical effect, to allowing the contributorily negligent parent to profit by his own wrong, since the parent would in any case use the proceeds of the recovery for the maintenance of the child, a duty which he is already legally bound to perform. But such a feeling is unjustified, since a court of equity would, upon proper petition, decree that money so recovered be held in trust for the infant until he reached his majority. Moreover, the child should not be deprived of his due, merely because the negligent parent will indirectly be money in pocket as a result.

Where recovery is denied, one of two theories is usually advanced: (1) The theory that

48 In support of the majority rule: Jacksonville Elec. Co. v. Adams, 50 Fla. 429, 39 So. 133 (1905); Ferguson v. Columbus, etc. Ry., 77 Ga. 102 (1886); Mattson v. Minnesota, etc. Ry., 95 Minn. 477, 104 N. W. 443 (1905); Union Trac. Co. v. Gaunt, 193 Ind. 109, 135 N. E. 486 (1923).


50 Gulessarian v. Madison Rys., 172 Wis. 400, 179 N. W. 573 (1920); Clover Creamery Co. v. Diehl, 183 Ala. 429, 63 So. 196 (1913); Brennan v. Minnesota, etc. Ry., 130 Minn. 314, 153 N. W. 611 (1915).
"An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is *keeper and agent* for this purpose; and in respect to third persons, his act must be deemed that of the infant; his neglect the infant's neglect." 51

The absurdity of applying the rule of *respondeat superior* in such a case is manifest: no court would allow the putative agency to serve its other legitimate function, *i. e.*, to hold the infant liable to one injured by the parent. There is no agency, there can be no voluntary relationship, depending for its creation, control, and dissolution upon the will of its creator, in a case where the alleged creator has, by legal assumption, no will. (2) The theory that the infant is so identified with its parent or custodian that the latter's negligence is that of the infant. Thus, "If a father drives a carriage, in which his infant child is, in such a way that he incurs an accident which by the exercise of reasonable care he might have avoided, it would be strange to say that though he himself could not maintain action, the child could." 52

The court which was so indignant at the prospect of allowing a recovery to one who was concededly incapable of contributory negligence must indeed have been uncommonly naive. The deep-seated injustice of imputing the negligence of the parent to a child of tender years, thus requiring of him the same degree of care as that required of an adult, has been deservedly anathematized by courts and writers alike. 53 But the doctrine of imputation still flourishes in several jurisdictions. 54

Fortunately, the majority of courts have repudiated the specious reasoning of both the above lines of legal thought, and refuse to impute the negligence of a parent or a custodian to a child, whatever the age of the child, and whether the parent was present at the time of the accident or not. 55 These courts, beginning with the case of Robinson v. Cone, 56 proceed upon the consistent theory that all that is required of an infant is that he exercise the prudence equal to his capacity. Thus, a child *non sui juris*, since it has no capacity, by operation of law, can be guilty of no personal negligence, and can therefore certainly not be charged with

51 Hartfield v. Roper, supra note 46, at 619.
53 "The rule of imputed negligence, as applied to persons *non sui juris*, is an anomaly. The English law of this point presents an extraordinary illustration. On the one hand, it is held that the negligence of a person having charge of a child is the negligence of the child, and imputable to it, when the child comes into a court of justice and asks damages for an injury negligently inflicted upon it by the defendant. But, *per contra*, where a donkey is carelessly run down in the highway . . . the defendant is held liable, and though oysters are negligently placed in a river-bed, it is an injury redressible at law in damages for a vessel negligently to disturb them. It appears, therefore, that the child, were he an ass or an oyster, would secure a protection which is denied him as a human being of tender years, in such jurisdictions as enforce the English or New York rule in this respect." Beach, CONTRIBUTORY NEGLIGENCE (3d ed. 1899) §127.
55 Jones v. Strickland, 201 Ala. 138, 77 So. 562 (1917); Clark v. Chicago, 174 Ill. App. 145 (1912); Terre Haute, etc. Traction Co. v. Stevenson, 73 Ind. App. 294, 126 N. E. 34 (1920); Raskin v. Sioux City, 198 Iowa 865, 200 N. W. 333 (1924); Gregg v. King County, 80 Wash. 196, 141 Pac. 340 (1914); Gullesserian v. Madison Rys., supra note 50; Mullinax v. Hord, 174 N. C. 607, 94 S. E. 426 (1917).
56 California, which for many years imputed the negligence of a parent to a child, expressly overruled its previous holding in Zarzana v. Neve Drug Co., supra note 5.
57 22 Vt. 213 (1850).
the negligence of another. A child of rational age, suing in its own name and right, is chargeable with personal negligence or contributory negligence according to its lights, and is under no circumstances to be held responsible for the negligence of its parent or guardian, since this would be exacting from it that degree of care which is required of an adult. It is not too much to say that this is the only legal position consonant with common sense and natural justice; any other course would be incorporating

"... into the law of the land, as legal precepts, the sayings that the sins of fathers are visited upon their children, and that the child's teeth must be set on edge because the father has eaten sour grapes." 37

Conclusion

The doctrine of "imputed" negligence is an anomaly. Like many another "weasel" term and "weasel" doctrine, it has been employed by some courts, following the lead of Thorogood v. Bryan, to introduce a juridical element foreign to the law, i.e., responsibility for one purpose (imputation), but not for another (liability). Such an inconsistency is indefensible upon any ground, and merely serves to stultify a common law which is already suffering from too many insecurely founded rules.

To be sure, there are situations in which even a rudimentary sense of natural justice and of the social contract rebels at allowing a recovery, e.g., in actions brought by, or in behalf of, contributorily negligent beneficiaries of a decedent killed partly as a consequence of such contributorily negligence. But the obstacle is not insurmountable: such situations should be the subjects of legislative enactments, and a start has already been made in the case of statutes which constitute persons operating automobiles, with the consent or permission of the owner thereof, the servants or agents of such owner. It lies only within the sovereign power of the legislative body to change legal relationships: it is not the province of the courts to declare, as a matter of law, that one person is the agent or servant of another, or is associated with him in a common or joint enterprise, when upon the plainest legal principles no such relationship exists.

Finally, the whole problem is desperately in need of immediate restatement, for the benefit of a confused legal world, and in order to define accurately and definitively an important class of human rights.

A. R-C.

AMBIT OF DOUBLE LIABILITY OF NATIONAL BANK STOCKHOLDERS—Double liability statutes for the purpose of protecting depositors in unsuccessful banks have been widely enacted.1 With the recent increase in the number of bank failures interest has revived in the determination of the individuals subject under these statutes to personal liability. Allowing for the inevitable statutory and interpretational variations, an excellent delineation of the scope of double liability is afforded by a consideration of the National Banking Act's provisions 2 and their application.

37 Neff v. City of Cameron, 213 Mo. 359, 111 S. W. 1139 (1908).

1 Statutes have been enacted by the federal government and all states except Alabama, Connecticut, Delaware, Louisiana, Massachusetts. Missouri, New Jersey, Rhode Island, Vermont and Virginia.

2 For comparative purposes the statutes as amended and now in force are given below in full.

"The stockholders of every National Banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount
The primary class of persons liable, in accordance with this act, are shareholders, i.e., real owners of stock, as of the date of failure. They are the persons who stand to profit if the bank is successful; and it is only fair that they, rather than the depositors, should bear the burden of loss in the event of failure. Unfortunately for the receivers of national banks there is no rule of thumb method for the ascertainment of the real owners. This is essentially a factual question dependent on infinitely varied circumstances. The bank's list of shareholders, of course, is only for protective purposes, and registration thereon is not necessary for the acquisition of title to stock. Such subterfuges as the nominal purchase of stock by an irresponsible straw man thus afford the real owner no easy avenue for escaping liability. *National Bank v. Case* is an excellent illustration in point. Case contended that a transfer prior to the bank's failure relieved him of responsibility. The evidence disclosed that the stock was registered in the transferee's name but that Case retained a power of attorney for its disposition. A few minor facts also indicated the dummy character of the alleged transferee. The court held that the true relation between the parties was that of principal and agent and that Case as the true owner was subject to assessment.

If the stock has been pledged, the pledgor ordinarily remains the real owner subject to liability. A mere default in the payment of the debt does not transfer title *ipso facto* to the pledgee. Nor does the registration of the stock on the bank's list of shareholders in the pledgee's name, as "pledgee," or in that of an irresponsible third party, conclusively indicate a shift in responsibility. Such nominal transfers are usually made for protection only. The pledgee must have sold and repurchased the stock or done other positive acts, such as crediting the

of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any National Banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. *First National Bank v. Harris*.

"Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name." *First National Bank v. Harris*.

---


"Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name." *First National Bank v. Harris*, 12 U. S. C. A. §66 (1929).


2 *Morse, Banks and Banking* (6th ed. 1928) §§710-713.


The purpose of so signing is to escape liability by reason of apparent ownership. See cases *infra* notes 52 and 53.

pledgor with the value of the stock,\footnote{Ohio Valley National Bank v. Hulitt, 204 U. S. 162, 27 Sup. Ct. 179 (1907), aff'd 137 Fed. 461 (C. C. A. 6th, 1905), commented on (1905) 53 U. of PA. L. Rev. 707. But cf. Pufahl v. Fidelity National Bank, supra note 6. In doubtful cases a question is presented for the jury. Rankin v. Fidelity Insurance, etc. Co., 189 U. S. 212, 23 Sup. Ct. 533 (1903).} to effect a transfer of title. In the case of a gift of stock the donee's assent to ownership is a requisite to his subjection to liability.\footnote{See First National Bank of Charlotte v. National Exchange Bank, 92 U. S. 122, 128 (1879). Concord First National Bank v. Hawkins, 171 U. S. 364, 19 Sup. Ct. 739 (1899); California Bank v. Kenney, 167 U. S. 362, 17 Sup. Ct. 831 (1897).} This is so obviously just that the courts have bothered very little with theoretical considerations. Actually the situation raises the debated problem as to the time when title to a gift passes. If the decisions are to be logically supported it must be upon the theory that title does not pass until such assent.\footnote{See Early v. Richardson, 280 U. S. 496, 499, 50 Sup. Ct. 176, 177 (1930); commented on (1930) 43 Harv. L. Rev. 1159; Foster v. Chase, 75 Fed. 797 (C. C. D. Vt. 1896); Aldrich v. Bingham, 131 Fed. 363 (W. D. N. Y. 1904).} Assuming this to be the true explanation the donor prior to acceptance would not be responsible.

Thus, the infant purchaser problem also involves incapacity and is somewhat analogous. Under a similar statute evidently they are applicable to corporations generally. Principles have been applied to determine the liability of a state bank chartered under a similar statute. Evidently they are applicable to corporations generally. Applying the same theory of absence of consent the courts have relieved an infant when title to a gift passes. If the decisions are to be logically supported they have bothered very little with theoretical considerations. Actually the situation raises the debated problem as to the time when title to a gift passes. If the decisions are to be logically supported it must be upon the theory that title does not pass until such assent.\footnote{See Early v. Richardson, supra note 20, at 499, 50 Sup. Ct. at 177. The court in this case suggests that it will exercise the power of avoidance and attach a retroactive effect thereto.} On the basis of absence of consent by the stockholders the purchasing bank escapes liability.\footnote{See Early v. Richardson, supra note 20, at 499, 50 Sup. Ct. at 177. The court in this case suggests that it will exercise the power of avoidance and attach a retroactive effect thereto.} This is well settled in spite of a dictum\footnote{Ibid.} to the effect that the bank should not be permitted to set up its officers' wrongful acts as a defense. If, on the contrary, the stock has not been acquired directly but in the regular course of business, as by taking over the stock on the default of a loan, the bank is liable since such acquisition is not ultra vires and unconsented to. These principles have been applied to determine the liability of a state bank chartered under a similar statute. Evidently they are applicable to corporations generally. Applying the same theory of absence of consent the courts have relieved an infant of liability\footnote{See National Bank v. Case, supra note 5; First National Bank of Charlotte v. National Exchange Bank, supra note 15.} and held the transferor to a minor responsible.\footnote{For a general discussion and cases see THORNTON, GIFTS AND ADVANCEMENTS (1893) 228.} Viewed from the title aspect the national bank situation is not without merit since the bank is totally incapable of taking any title whatsoever by a direct purchase.\footnote{See Early v. Richardson, supra note 17, at 417; see Early v. Richardson, supra note 20, at 499, 50 Sup. Ct. at 177. The court in this case suggests that it will exercise the power of avoidance and attach a retroactive effect thereto.} This is not true of an infant who can hold title to stock although he retains a power of avoidance.\footnote{For a general discussion and cases see THORNTON, GIFTS AND ADVANCEMENTS (1893) 228.} If, however, the power is not exercised prior to the bank's failure there seems no logical reason why he as an owner should not be responsible.\footnote{For a general discussion and cases see THORNTON, GIFTS AND ADVANCEMENTS (1893) 228.} Whatever the theoretical difficulties may be, the desire to protect infants has definitely settled their immunity.

Unless infancy is regarded as an exception the attempts of admittedly real owners at the time of failure to escape liability have met with uniform disfavor. Of these the most interesting is the coverture defense. In Christopher v. Nor-
voll 25 a married woman held title to stock but contended that she was not liable because in Florida, where she was domiciled, her contracts were void. The case raises squarely the question of the nature of the liability. Some support 26 is given to the theory that it is contractual and dependent on an implied obligation arising from the acquisition of title to stock. This is a patent fiction. The court discarded it and held that the statute operated directly upon the real owner so that the married woman was liable. Applying this theory, which is now generally accepted as correct, 27 the other attempts to evade liability must clearly fail. The defense that fraud on the part of the bank induced the purchase of stock is a valid ground for the rescission of the contract but until avoidance the purchaser is a real owner upon whom the statute operates. 28 Similarly, wrongful issuance of stock by officers of a national bank does not relieve a purchaser. 29 The statutory restrictions upon issuance do not render void but merely voidable an issuance contrary thereto, and the reasoning adopted in the fraud cases is applicable. A reconciliation of these holdings with those exempting a national bank from liability on a direct purchase is possible by distinguishing between two types of ultra vires acts—voidable and void. 30

Trustees, executors, and other fiduciaries, while holding legal title to stock, are expressly exempted 31 from personal liability for obvious reasons. In their stead the trust estate is responsible to the extent of the funds therein. 32 It is, of course, essential that the trust estate contain an equitable interest in the stock at the time of failure. 33 Thus where the evidence showed 34 that an executor prior to the bank's failure had transferred the bank stock to himself as trustee for a

30 See cases supra note 16. These cases were so distinguished in Scott v. Deweese, supra note 28, at 216, 21 Sup. Ct. at 590.
31 Supra note 2. The lack of trust funds or their derivation from the trustee do not shift responsibility. Fowler v. Gowing, 165 Fed. 891 (C. C. A. 2d, 1908); cf. McNair v. Darragh, 31 F. (2d) 906 (C. C. A. 8th, 1929). An interesting problem is presented as to whether a trustee who knowing of a possible assessment should be liable in tort on the principle of desecraliz if he thereafter distributes the estate. The case of Rankin v. Miller, 207 Fed. 602 (D. C. Del. 1913), adversely criticized in Note (1914) 62 U. of Pa. L. Rev. 369, so held, but was finally decided adversely to the receiver on other issues involving the Statute of Limitations in 269 Fed. 891 (C. C. A. 3d, 1920).
33 This is not strictly true in the case of decedent's estates. If stock is owned by the decedent at the time of bank failure the estate is liable as for his other debts. Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788 (1887); cf. Mattheson v. Dent, supra note 26. The ability to trace trust funds if the estate is distributed is dependent on state law. Witter v. Cowles, 32 Fed. 130 (C. C. D. Va. 1887); Luce v. Thomson, 32 F. (2d) 183 (C. C. A. 8th, 1929).
NOTES 1137

particular trust the general funds of the decedent's estate were not subject to assessment.

A real or beneficial interest in bank stock at the time of failure is not the sole basis of liability. In order to effectually protect the depositors, evasions of liability by out and out transfers to irresponsible parties just prior to a failure had to be prevented. The National Banking Act of 1864 contained no express provisions concerning transferors. The courts filled the gap and held transfers made with reasonable grounds for a belief in the bank's impending failure were fraudulent as to the depositors. The receiver was thus enabled not only to look to the real owner but also treat the transfer as avoided and hold the transferor responsible. The National Banking Act of 1864 contained no express provisions concerning transferors. The courts filled the gap and held transfers made with reasonable grounds for a belief in the bank's impending failure were fraudulent as to the depositors. The receiver was thus enabled not only to look to the real owner but also treat the transfer as avoided and hold the transferor responsible.

The transferee's insolvency, the bank's insolvency at the time of transfer, or the transferor's knowledge of depleted reserves were relevant only as evidence to establish the fraud. An important limitation was then placed on the extent of the liability. The transferor was held responsible only to the creditors of the bank at the time of transfer. The fraudulent transferor could also apparently escape liability by clearly proving that the assessment could be obtained by an action against the transferee. With the law in this stage of development an amendment was passed in 1913 dealing with transferors. Two definite changes are made. If the transfer or registration of transfer have been effected within sixty days of failure the transferor is made automatically liable. This avoids a vast amount of litigation; and, since the transferors were undoubtedly participating as stockholders at the time the losses were accruing, works no grave injustice. The other effect of the statute is to abolish the limitations on liability. The statute provides that transferors shall be liable—to the extent that the subsequent transferee fails to meet such liability. They are, as a recent case held, thus in the position of absolute guarantors.

The final class of persons subject to liability are the so-called apparent owners. It will be recalled that a real owner's name may never be registered on the bank's list of shareholders. As a result it is possible for a person who is not the real owner to appear as such upon the bank's books. Provided this appearance of ownership is due to a deliberate or careless act or omission of the apparent owner he is treated as a shareholder and responsible along with the real owner. The courts admit that the strict provisions of the statute do not cover the situation but base their holdings on an estoppel. Since no reliance by the bank's creditors or

26 Supra note 2.
31 Earle v. Carson, supra note 38.
32 Infancy should apparently be included in this category, but a transferrer to an infant is liable regardless of fraud. See cases supra note 20.
33 McDonald v. Dewey, supra note 37. There was a vigorous dissenting opinion by Justices White, McKenna, and Day, ibid. at 530, 26 Sup. Ct. at 737.
34 Ibid. at 527, 26 Sup. Ct. at 736.
35 Supra note 2.
36 Karraker v. Ernest, 4 F. (2d) 404 (E. D. Ill. 1925); Farrel v. Fletcher, 14 F. (2d) 204 (D. Mass. 1926).
37 Supra note 2.
38 Karraker v. Ernest, supra note 45.
40 See National Bank v. Case, supra note 5, at 631.
resultant loss need be proved. The theoretical justification is clearly weak. It is evidently a practical measure directed at preventing fraudulent attempts to evade liability subsequent to the bank's failure. The burden imposed on the apparent owner is in the nature of a penalty for carelessness. Overlooking the possibility of the punishment being greatly disproportionate, the courts have broadly applied the rule. Even the trustee's exemption provision has been held inapplicable. To relieve himself of liability a trustee must, like any other individual, avoid a representation of ownership. This is accomplished by a clear indication of his trust capacity on the bank's books. A pledgee confronted with the desire to register stock in his own name for protection must follow the same procedure. Ordinarily they should sign as "trustee" or "pledgee," although in one extreme case a signature as "cashier" was held sufficient. In accordance with the general principle of non-representation it is also true that a person who uses reasonable care to have his name removed from the bank's list is not liable. Reasonable care is primarily a factual question. In general it is required that a transferor bring home notice to the bank of the change in ownership. He cannot depend on the transferee doing this unless the latter happens to be an officer of the bank. Once having given notice, however, the transferor is not required to check up on the bank and see that the transfer is actually made.

Even with these limitations this extension of liability is the one most likely to be challenged. The subjection of real owners and transferors within the limits described could only be attacked by objecting to the soundness of the general principle of double liability. This has rarely been disputed. The apparent ownership doctrine presents greater difficulties. Its practical necessity for the prevention of fraud, particularly in view of the possible hardship, is open to question. Yet even admitting the desirability of some such measure the present principle seems unduly broad. Under the doctrine as enunciated the receiver is given an option and may look to either the real or apparent owner. There is nothing to prevent his recoupment from the latter although the real owner is perfectly capable of paying. This seems unfair and could readily be avoided by requiring the receiver to prove a loss as a condition precedent to recovery. Such a modification would also be in harmony with the theory of estoppel asserted to underlie the decisions.


---

50 At least no cases have clearly so held and in reviewing the decisions the courts have never intimated the possibility of any such limitation. See Pullman v. Upton, 96 U. S. 328, 329 (1877); Rankin v. Fidelity Trust Co., 189 U. S. 242, 246, 23 Sup. Ct. 553, 554 (1903). This view is adopted in Note (1932) 41 YALE L. J. 583, 584.


58 But see interesting comment Note (1932) 41 YALE L. J. 583, 591.

59 The unfairness of this would be somewhat mitigated if the apparent owner is able to recover over from the real owner. No cases involving this issue seem to have arisen.
NOTES

Contractual Extraterritoriality of Workmen's Compensation Statutes—An intelligent approach to the problem involved requires a brief exposition of the three prevalent theories ¹ which have been developed to eliminate the infinite complications arising from the conflict of the various state Compensation Acts.² The problem arises simply from the practice, under modern conditions of widespread business enterprise, of sending a company's employees into foreign states to do work in the course of their employment. It was early felt that some uniformity of recovery of compensation was imperative in order to furnish some secure basis upon which the employer might take out insurance against such claims.³ Resort to common law analogies ⁴ gave rise to the first two of the three outstanding conflict of laws doctrines.

The first, originally sponsored by Massachusetts,⁵ goes upon the reasoning that the statute is merely a legislative substitute for the common law rules of tort liability ⁶ with the result that the statutes have no effect upon injuries inflicted outside of the jurisdiction of their enactment.⁷ Although this theory has been criticised,⁸ chiefly upon the theoretical ground that the vicarious nature of liability under compensation statutes contradicts any consideration of them as delictual,⁹ enough of the characteristics of tort liability remain to amply justify the analogy.

The second theory arose ¹⁰ from the other plausible common law analogue, the contract, and has properly been denominated as quasi ex contractu ¹¹ at the most. Under this fictitious doctrine,¹² the provisions of the statute at the locus contractus are unceremoniously incorporated into the terms of the contract of employment ¹³ in order that the employer may be assured of uniform liability in any forum.¹⁴ Such practical advantages may be questioned in the light of the

¹ See authorities supra note 1.
² For discussions of these theories, see Dwan, Workmen's Compensation and the Conflict of Laws (1927) 11 Minn. L. Rev. 329, 332; Goodrich, Conflict of Laws (1927) 201; Note (1930) 16 Va. L. Rev. 701.
³ For the fullest discussion of the statutes in the different states, see Bradbury, Workmen's Compensation Law (3d ed. 1917), especially at 82 et seq.
⁴ See Note (1931) 6 Wis. L. Rev. 243, 245; Note (1930) 16 Va. L. Rev. 701; Bradbury, supra note 2, at 85.
⁵ See authorities supra note 1.
⁶ The expression that "such laws have no extra-territorial effect" is a misnomer when it means that the lex locus delicti should not be applied in a foreign forum. But when it is meant that, with regard to the local matter of tort liability only the Workmen's Compensation Act in force at the place of injury should control, the conclusion is reasonable.
⁷ Bradbury, op. cit. supra note 1, at 85.
⁸ Note (1930) 16 Va. L. Rev. 701, 702.
⁹ See Note (1931) 6 Va. L. Rev. 701, 703, where it is pointed out that this theory probably arose as a subterfuge to avoid constitutional difficulty; cf. Ives v. South Buffalo R. R. 201 N. Y. 271, 94 N. E. 431 (1911).
¹⁰ Reading into the contract of employment the provisions of the statute, we held that a liability quasi lex contractus was imposed on the employer. Contractual in a strict sense, of course, the liability is not . . ." Cardozo, J., Smith v. Heine Boiler Co., 224 N. Y. 9, 11, 119 N. E. 878 (1918).
¹¹ See authorities supra note 1, and note that the claim for compensation has been held not to be contractual within the Statute of Limitations. Davidson v. Payne, 281 Fed. 544 (D. Kan. 1925).
¹³ Supra note 4.
confusion among the states as to when and whether the law of the place of performance should be applied rather than the law of the place of contracting.\textsuperscript{15} But aside from this, the theoretical objections are obviously numerous,\textsuperscript{16} arising chiefly from a lack of express mutual intent, even under so-called "elective" statutes,\textsuperscript{17} and from the fact that a statutory amendment will change the obligation of the parties without their consent.\textsuperscript{18}

It is probable that the third theory was evolved with a view to accomplishing the practical result achieved by the contract theory, but without its logical inconsistencies. Under this view, the obligation is neither a delictual nor a contractual one, but is rather a "statutory regulation of the relation of employer and employee\textsuperscript{19} based upon the theory that the industry should bear the burden of accidents incident to its operation, and that the fulfillment of this policy requires that the statute should control whether the injury occurs within or without the state where the contract of employment was made."\textsuperscript{20}

This view has the advantage of freedom from the restraints of analogy. But in spite of this and the overwhelming logical obstacles to the development of the contractive theory it has prevailed in a majority of jurisdictions,\textsuperscript{21} at least in jurisdictions having elective statutes.

This note does not encompass a discussion of conflicts between different types of elective and compulsory statutes, and the probably more acute procedural problems arising out of the locally specialized forms of administrative bodies authorized by the legislatures to carry out the provisions of compensation acts.\textsuperscript{22} It is sufficient to note that it is out of this contest of competing analogies and the theories arising therefrom that the more specific problem involved in the present discussion arises, \ie, the matter of restraints imposed by the compensation act at the place of hiring upon the employee's right to sue at common law in a foreign state.

The cause of action illustrated by the principal case of \textit{Bradford Electric Co. v. Clapper},\textsuperscript{23} is simple enough in itself. A Vermont resident's administratrix

\begin{itemize}
  \item \textsuperscript{25} See \textit{GOODRICH, op. cit. supra} note 1, at 228 \textit{et seq.} But note that where contract in state \textit{A} for performance solely within state \textit{B}, the \textit{lex loci contractus} has been held to apply. Pettiti \textit{v. Pardy Constr. Co.}, 103 Conn. 101, 130 Atl. 70 (1925); \textit{Hall v. Ind. Comm.}, 77 Colo. 338, 235 Pac. 1073 (1925); \textit{Penderzoli's Case, supra} note 5.
  \item \textsuperscript{26} See authorities \textit{supra} note 1, and \textit{Jeremiah Smith, \textit{Sequel to Workmen's Compensation Acts} (1914)} 27 \textit{Harv. L. Rev.} 335, 348-349; \textit{Dwan, op. cit. supra} note 1, at 341; (1923) 37 \textit{Harv. L. Rev.} 371, 376; (1922) 21 \textit{Mich. L. Rev.} 449.
  \item \textsuperscript{27} The failure to give notice under these elective statutes is usually held to raise an "irrebuttable presumption" of assent. \textit{American Radiator Co. v. Rogge}, 86 N. J. L. 436, 92 Atl. 85 (1914).
  \item \textsuperscript{28} See \textit{GOODRICH, op. cit. supra} note 1, at 203, where it is suggested that constitutional difficulties would arise from an attempt to amend such acts if a strict contract theory should be adhered to. See \textit{Anderson v. Miller Scrap Iron Co.}, 169 Wis. 166, 170 N. W. 275 (1919).
  \item \textsuperscript{29} See \textit{POUND, THE SPIRIT OF THE COMMON LAW}, 29-31.
  \item \textsuperscript{30} This view has been favored in applications of compulsory compensation acts, \textit{Bradbury, op. cit. supra} note 2, at 85, but has been adopted chiefly in cases under elective statutes. \textit{Anderson v. Miller, supra} note 18 (but notice the language used at 115, "Our act enters into and becomes a part of every contract").
  \item \textsuperscript{31} Goodrich, \textit{op. cit. supra} note 1, at 204; \textit{Moody v. Industrial Accident Comm.}, 260 Pac. 967 (Cal. 1927); \textit{Ocean Accident Guaranty Co. v. Industrial Comm.}, 32 Ariz. 275, 257 Pac. 644 (1927); \textit{Anderson v. Miller Scrap Iron Co.}, \textit{supra} note 18; see \textit{Smith v. Heine Boiler Co.}, \textit{supra} note 11.
  \item \textsuperscript{32} See authorities \textit{supra} note 1.\textsuperscript{22}
  \item \textsuperscript{22} Goodrich, \textit{op. cit. supra} note 1, \textit{at 204 \textit{et seq.} ; Bradbury, op. cit. supra} note 2, \textit{at 95 \textit{et seq.}}
  \item \textsuperscript{34} \textit{R. F. (2d) 992} (C. C. A. 1st, 1931). On May 16, 1932, the United States Supreme Court reversed this decision on the ground that it violated the "full faith and credit" clause. \textit{U. S. Daily}, May 18, 1932, \textit{at 525}.\textsuperscript{35}
\end{itemize}
NOTES

brings an action in New Hampshire against a Vermont public utility corporation for “death by wrongful act” caused by the defendant’s negligence in New Hampshire, the simple case of a local injury for which the local statutes provide a remedy. But the problem arises when the defendant electric company interposes the extraterritorial defense that the Vermont contract and statute bar the common law action for negligence.

The Vermont elective Compensation Act, in order to induce acceptance thereof by the employer and employee, provides that a failure to assent to its terms will deprive the employer of his common law defenses and make it necessary for the employee to meet those defenses and prove negligence. Such assent, it is provided, will be “irrebuttably presumed” from a failure to give notice of nonacceptance. It is obvious that the plaintiff was discarding the remedy under this act, which would have yielded burial expenses alone, for that under the New Hampshire Lord Campbell’s Act which provided recovery for pain and suffering in addition to the pecuniary loss allowed under the Vermont Act. New Hampshire had an elective Compensation Act which, similarly to the Vermont Act, provided that such statutory recovery should be exclusive of all other remedies in case of injury, but only the defendant had accepted the former act and it did not require election by the plaintiff until after injury. Plaintiff’s action was removed from the state to the federal court and a majority

---

Death by Wrongful Act Statutes must be distinguished from survival statutes. In the case of the latter, the right of action, having been availed of by the injured party during his life, is continued by his personal representatives after his death. The right of recovery for the death arises from the wrong inflicted upon the deceased and the amount of recovery is determined from the standpoint of the deceased, being measured by the value of his life without reference to the interests of the beneficiaries. See the recent case of Brown v. Perry, 156 Atl. 910 (Vt. 1931).

The Death Statutes, commonly known as Lord Campbell’s Acts, create a right of action upon the death of the deceased which has come to be considered a common law right of action. Aside from the fact that the right of action arises only after the death of the injured party, a difference from the former type of statutes in theory, quality and object is found in the fact that recovery is based upon loss sustained by deceased’s beneficiaries as generally designated by the statute in question rather than upon any loss to deceased’s estate. For further discussion, see Note (1932) 80 U. OF PA. L. REV. 993.

It is at once apparent that the right of action for death by wrongful act is delictual in nature, the creature of the statute at the place where the wrong was inflicted, and hence recovery should be allowed or denied solely in accordance with the lex loci delictum.


See supra note 23, at 997, where the court accounts for this unusual provision on the ground that the New Hampshire legislature was exercising unusual caution due to contemporaneous arguments that such acts were unconstitutional. The case further points out, at 994, that such elective statutes have never been held invalid on grounds of unconstitutionality.
of the latter sustained the defendant’s theory. On rehearing, however, the court reversed itself on the grounds that (1) the defendant’s acceptance of the New Hampshire act bound him to allow the plaintiff’s choice of an action at law for death caused by negligence, and (2) a Vermont contract purporting to release an employer from liability for future negligence cannot bar an action brought in New Hampshire for an injury there sustained, “and thus change the public policy of New Hampshire.”

That the first ground for the decision of the majority is unsound is clearly demonstrated in the opinion of the dissenting circuit judge. It is there pointed out that acceptance of the New Hampshire Act by the company was solely with a view to protecting itself against suits by its employees under New Hampshire contracts, without regard to such Vermont employees as it should have occasion to send into New Hampshire for temporary employment. By rejection of the Compensation Act and suit under the Lord Campbell’s Act, the plaintiff brought her action just as if no Compensation Act existed. But the dissenting judge adds that the defenses now available to the defendant, as at common law, include those that the defendant might have by conflict of laws rules, i.e., the exclusive remedy under the Vermont Act as a defense at the forum.

The second ground for the decision appears to be equally without force. Without the fictitious contract theory the public policy of New Hampshire need not have been, it seems improperly, referred to, and without either of these incoherent elements, the decision is unquestionably the correct one. Certainly the application of New Hampshire law to negligent injuries inflicted within its territory should not be refused by reason of a fiction. It may be assumed that such a quasi ex contractu doctrine of liability might justify its existence when employed to prevent recovery on the contract of employment under the compensation statute at the place of injury. Here it may be said in its favor that it prevents an undesirable “shopping” for compensation. Yet the principal case presents a strong argument against carrying it to its logical extremes. The chief argument in favor of the contract theory, as indicated above, consists in the fact that wrong need not be proved under Compensation Acts. But when there is an actual wrong, as in the principal case, which is local in nature and for which the local law allows recovery, and when the question of Workmen’s Compensation is so utterly foreign to the case, a stronger case for disregarding the contract fiction could hardly be devised.

In reversing the decision of the Circuit Court, the Supreme Court held that the Vermont Act is not contrary to the public policy of New Hampshire and therefore must be given full faith and credit by the courts of New Hampshire. The view of the dissenting opinion of the Circuit Court that the contract theory should be employed to bar remedies outside the state of employment finds some support in the decided cases. Thus the New York Supreme Court, in Schweitzer v. Hamburg-Amerikanische, held that liability under the German Workmen’s Compensation Act was a bar to recovery at common law for a negligent injury to an employee in New York harbor. Likewise, in Barnhart v. Steel Co., the Court of Appeals of the same state refused the court’s aid to a plaintiff

See comment on this point in dissenting opinion of Wilson, J., principal case supra note 23, at 1002.

Supra note 23, at 1000.

Ibid. at 1001.

Supra note 23.

It is to be noted that the majority opinion admits the general applicability of this theory, although finding grounds for an exception in the instant case.

78 Misc. 448, 138 N. Y. Supp. 944 (1913); see Note (1932) 18 Va. L. Rev. 432, 434 (excellent discussion of the New York cases in regard to the present problem).

suing under the New York death statute for the wrongful death of a New Jersey 
employee caused while he was working in New York. The decision of the court 
in the latter case is necessarily tantamount to a holding that the existence of the 
New Jersey statute deprived the plaintiff of his common law remedy for a New 
York tort.41 The court spoke of public policy, and, having concluded that the 
New Jersey statute was a part of the contract of employment, specifically held 
that such a contract was enforceable in New York. Upon this premise, it can be 
seen that a court wishing to uphold tort liability at the place of injury is driven 
irresistibly to overcome the effect of the foreign bar to the action by a resort to 
public policy.42 On this latter analysis, a New York court, accustomed to enforc-
ing the New York compulsory Compensation Statute, could not in conscience 
object to an elective statute even of the "presumed election" type. If New York 
will deny its common law remedy to employees under local contracts, against 
their will, then it is a trifling matter to deny such relief to employees of another 
state as against a purely public policy objection. But, aside from the matter of 
policy, no court appears to have questioned the view taken by the New York 
court,43 with the exception of the North Carolina courts.44

It is clear that this new problem in the law created by the universal enact-
ment of compensation statutes may not be solved by means of analogies drawn 
from common law rules. The error in the majority contract view arises from 
the attempt to mould the legal incidents of the relationship between employer and 
employee to fit the conflict of laws rules that will be most conducive to stabilizing 
the employer's liability. It may well be asked whether this theory should be 
applied to a case where an employer with a nation-wide business is in the practice 
of negotiating all his contracts of employment in the state where liability for 
compensation is slightest. Could it then be said that an injury in a state where 
the compensation act was peculiarly adapted to the local industrial hazards should 
not at least be redressed as at common law?

It has been suggested that the remedy lies in uniform legislation,45 or in legis-
lation that by its terms applies to all injuries suffered while within the enacting 
state irrespective of where the contract of employment was entered into.46 But

41 This follows from the provision of the New York Lord Campbell's Act that action 
thereunder would only lie where the decedent would have had a common law action for 
damages had he lived. N. Y. CONS. LAWS (Cahill 1930) c. 13, § 130.
42 This appears to have been the situation of the majority of the court in the principal 
case.43 The New York view (see supra notes 39 and 40) has been adopted by the Circuit 
Court of Appeals for the Second Circuit in Fu re Spencer Kellogg, 53 F. (2d) 129 
(C. C. A. 2d, 1931); see The Linseed King, 48 F. (2d) 311 (S. D. N. Y. 1930). Also 
note the decision under the Missouri Compensation Act, in Scott v. White Eagle Oil and 
44 Farr v. Babcock Lumber Co., 182 N. C. 725, 109 S. E. 833 (1921) (the court's 
reasons for so holding are not fully discussed); cf. Johnson v. Carolina Ry., 191 N. C. 75, 
131 S. E. 390 (1926); (1926) 40 HARv. L. Rev. 130; (1925) 21 ILL. L. Rev. 181; Lee v. 
Chemical Construction Co., 200 N. C. 319, 156 S. E. 859 (1931) and see the comment on 
this last case in Note (1931) 18 VA. L. Rev. 432, 436, in which the author comments on 
the distinction from the principal case in that North Carolina had enacted its first Com-
penation Act in 1929. N. C. PUB. LAWS (1929) c. 120.
45 Dwan, op. cit. supra note 1, at 352 (where the author points out that some steps 
have been taken by the National Conference of Commissioners on Uniform State Laws).
46 The definiteness and clarity of the original Pennsylvania Act has been commended. 
Dwan, ibid. "This Act shall . . . . apply to all accidents occurring within this Common-
wealth, irrespective of the place where the contract of hiring was made, renewed, or ex-
tended, and shall not apply to any accident occurring outside of the Commonwealth." PA. 
STAT. (West, 1920) $ 21016, P. L. 736, art. 1, § 1. But cf. Amendment of April 29, 
1929, P. L. 853, " . . . except accidents occurring to Pennsylvania employees whose duties 
require them to go temporarily beyond the territorial limits of the Commonwealth, not 
over ninety days, when such employees are performing services for employers whose place 
of business is within the Commonwealth."
where the act provides recovery for injuries to local employees while engaged in the employer's business outside the state, the application of the act to injuries outside the state should not be exclusive.

It may be conceded that the mere enforcement at the forum of a foreign act that conflicts with local laws does not give extraterritorial effect to that act. Yet if the foreign act is applied to a local matter which is completely covered as such by a local law, then certainly the subversion of the local laws to such foreign act is strictly an extraterritorial extension of the provisions of the foreign law that should find no justification in conflict of laws theories.

A. F. B.

*See, for example, the Pennsylvania Act, ibid.*