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## EFFECT OF INFANCY ON CAPACITY FOR NEGLIGENCE

"Until an infant," says Wharton Crim. Law, 9th Ed., p 92, "arrives at the age of seven he cannot be convicted of a criminal offence * * * * * cannot be judicially punished, for he cannot be guilty in such a way as involves the ordinary penalty of crime." Between the age of 7 and 14 responsibility is conditioned on capacity. If it appears that a child within those limits is capax doli, which is to be determined by the circumstances of the case, he may be convicted and condemned. The presumption that an infant is not capax doli, as to a child under 7 is irrebuttable. As to a child between 7 and 14 the presumption is rebuttable, the burden of overthrowing it being on the prosecution; the intensity of proof varying with age and other circumstances * * * * * When the age of 14 arrives full criminal responsibility at common law attaches."[1]

In analogy to this rule of the criminal law, says Fell, J.[2] "A child under 7 years of age has been conclusively presumed to be incapable of appreciating and guarding against danger; and after 7, the presumption of incapacity, although not irrebuttable and growing less

[1]Cf. 1 McClain, Crim. Law, p 119; Nagle v. R. R. 88 Pa. 35.

strong with each year, continues until 14, when the presumption of capacity arises. But these are only convenient points in the uncertain line between capacity and incapacity at which the law changes the presumption."

**Necesity of Negligence in Defendant**

It must be remembered that the absence of contributory negligence is not enough to justify a recovery against a defendant. He must be found to have been guilty of a negligence that was causal of the injury which has led to the suit. It is possible that the act of an infant, and not the act of the defendant was the sole cause of the injury. Then, innocent though the child be of negligence, there can be no recovery. "If there be no negligence on the part of the company (the defendant) (in running over the arm of a child 19 months old) then the incapacity of the child creates no liability, and its injury is its own misfortune which it must bear."[3] A child 5 years old dashes suddenly across the track in front of an advancing locomotive, so that injury of it is unescapable. The railroad company is not liable.[4] A boy 5 years old, approached a truck from behind, climbed on the side between the wheels, and in attempting to get off, placed his foot between the spokes of a hind wheel. Thus the injury arose. The operator of the truck was not responsible.[5] A boy 8 years old, without the conductor's knowledge, passed through a crowded car to the front platform. There he was found by the conductor in collecting fares. He was immediately thereafter hurt without the fault of the company's employes. It would be error to allow the jury to find the defend-

[3]Parker v. Railway Co., 207 Pa. 438.
[4]Kay v. R. R., 65 Pa. 269.
[5]R. R. v. Spearan, 47 Pa. 300.
[6]Pokras vs. Salt Manuf. Co., 234 Pa. 595; Thompson v. R. R. Co., 218 Pa. 444; MacDermott vs. Philada, 235 Pa. 62.

ant liable.[5] The mere fact that a child is injured without his fault, is not sufficient to impose a liability on the defendant, unless he is convicted of negligence."[6]

### Irrational Action of Child May Impose Duty

Sometimes the act of the child is seen by the defendant in time to adopt means to avert its injury. A duty will thus be created that otherwise would not exist, and which it would be cupable negligence not to perform. A child 5 years old walks across a street, and onto the track of a trolley. The motorman, observing this, should watch him and be ready to stop the car, in case it becomes necesary in order to prevent a collision. The maintenance of excessive speed resulting in overrunning the child, would be a violation of this duty.[7]

### Negligence of Parent

It not infrequently happens that an accident occurs to an irresponsible child in a situation, into which it should not have been allowed by its parents to get. While the child will not be prevented from recovering from the person who has caused damage to it, that is, while the negligence of its parents will not be imputed to it,[8] the parents, (since their negligence has rendered possible the accident) will not be allowed to recover for the in-

[5]Sanford v. Railway Co., 136 Pa. 84; Cf. Saar v. Specialty Co., 55 Super. 282; Cf. Gillespie v. McGowan, 100 Pa. 144, where for the drowning of a child in an uncovered well, on ground on which the child, 7 years and 10 months old, was a trespasser, the defendant was not liable.

[6]Rachmel v. Clark, 205 Pa. 314. Mestrezat, J.

[7]Drenberg v. Railway Co., 55 Super. 218.

[8]Smith v. O'Connor, 48 Pa. 218; The fact that the injury results from the act of the defendant and of a person who unskillfully attempts to save it, does not prevent recovery from the former, R. R. v. Mahoney, 57 Pa. 187.

jury to themselves in the injury to their child.[10] A child under 7 years of age is sent by its mother on an errand which involves its crosing a busy street on which pass many vehicles. The child steps in front of a street car and is killed. The parents cannot recover.[11] Not every case of escape of a child from the notice of the parents, and resulting injury to the child, indicates negligence of the parent; and whether he was negligent or not is, usually, a question for the jury.[12]

### Negligence of Custodian of Child

If the parent has put the child in the custody of another, the negligence of the latter, contributing to the death of or other injury to the child, will preclude a recovery for such injury by the parent.[13] A boy, 6 years old, was put by the parent in charge of a sister, a few days less than 14 years old. They were both run over and killed at a railroad crossing. The contributory negligence of the sister was found to exist, by the court, as a matter of law. The result was that the parent could obtain no compensation for the killing of the sister, nor for that of her brother.[14] For the injury of a child 4 years old, the father could not recover, if he negligently omitted to select a proper caretaker for it or if the person selected negligently permitted it to do what occasioned the accident.[15] A very young child, however, may

[10]Id.

[11]Sullenberger v. Traction Co., 33 Super. 12.

[12]Fineman v. Rapid T. Co., 42 Super. 379 (child between 4 and 5 years of age). See case cited. Davis v. Rwy Co., 222 Pa. 356. (child 2 years old) Safranski v. Seman, 40 Super. 219; Parrotta v. Rwy. Co., 40 Super. 138.

[13]Thompson v. R. R. Co., 41 Super. 617

[14]Gress v. R. R. Co., 228 Pa. 482.

[15]Kroesen v. Rwy. Co., 198 Pa. 30; R. R. v. Mahoney, 57 Pa. 187.

be put in the care of an older, but still young, child, without making the parent chargeable with negligence e. g. child 4 years old, on street in charge of boy 11 years old;[15] child 3 years old, on road in care of sister of 8.[16]

**Under 7 Years Incapable of Negligence**

Any act done by a child under 7 years of age must be treated by the jury and the court as free from negligence, although the act, in substance or mode, if done by an adult, would be adjudged negligent and an insurmountable obstacle to a recovery from the defendant. A child, 19 months old, playing on a railroad track, where it was run over,[17] another 4 years old, being borne across a track by one who is carelessly attempting to rescue it, and which is injured by the locomotive,[18] a girl 5 years old running across a track, in front of an engine, and injured by it,[19] a child 5 years old, getting on the front platform of a street car and being hurt,[20] are not precluded from recovering because of their own act. " Achild under 7 years of age," says Porter, J., "has been conclusively presumed to be incapable of appreciating and guarding against danger."[21] A child 4 years old, sitting on the pavement arose and crossed the street, and was over run by an electric car, the motorman of which was not looking ahead, as he should have been, A judgment for $4,327.90 for the child, was sustained, Fell, J., saying "The plaintiff was not of an age to be charged with contributory negligence."[22] A train of cars was left standing acros a street. A lad about 6 or 7 years of age, going on an errand, which obliged him

[15]Destasio v. Traction Co., 35 Super. 506.
[16]Murray v. Rwy., 36 Super. 576.
[17]Kay v. R. R. Co., 65 Pa. 269; Rachmel v. Clark, 205 Pa. 314.
[18]R. R. v. Maloney, 57 Pa. 187.
[19]R. R. v. Spearen, 47 Pa. 300.
[20]Rwy. Co. v. Caldwell, 74 Pa. 481.
[21]Sullenberger v. Traction Co., 33 Super. 12.

to pass the train, crept under the cars, which were started and crushed both legs, making amputation necessary. Said Woodward, J., "Considering his age and all cirumstances of the case, we see nothing that would justify the imputation of negligence or imprudence. He acted like a child, and he is not to be judged as a man."[34]

**Child Between 7 and 14**

The duty of being careful like all duties, rests on the possession of power, the power to be careful. To be careful, implies the detection of the causal relation between event A and other undesirable events, stepping on a railroad track, e. g. and, losing a leg or an arm, being crushed, or killed. These causal relations are discovered only by observations or instructions; by the increase of the imagination, the memory, the faculty of comparison, the inductive instinct. Nor is the discovery of the causal relation enough. There are in children, a capriciousness, a suddenness of decision, a want of sedate reflection, which are incompatible with the application of the knowledge of the riskfulness of certain acts, to the particular case in which the action is taken. The child starts with no knowledge of the world. It gradually learns it; makes its inductions; discovers that there are pleasant and unpleasant effects of var-

[34]Kroessen v. Rwy. Co., 198 Pa. 26. Cf. Di Meglio v. Rwy., 252 Pa. 391. A child between 9 and 10 years of age is beyond the age when it may be declared by the court that it could not be negligent. Berreski v. Traction Co., 67 Super. 215.

[35]Rauch v. Lloyd, 31 Pa. 358. The trial court submitted to the jury the question, "Has or has not a boy who is capable of performing an errand sufficient intelligence and discretion to know the hazard of creeping under a train of cars liable to be started any moment? And had or had not the plaintiff such intelligence and discretion?" The verdict was for the defendant, but possibly because the jury found no negligence in him. Cf. R. R. v. Kelly, 31 Pa. 372, a similar case.

ious contacts with objects. Its imagination grows in volume, it remembers better and better, its power of illation is strengthened; its self-control is matured. This growth of the child begins with its first contacts with the universe; begins then long before it reaches the age of 7 years. Before that age, it has learned many dangers, and things to be avoided. It has learned that if it touches a hot stove, the finger will be burned; that if it gives offence to its parents, a punishment will follow. But, its acquisition of the powers involved in care, before it reaches its eighth year, are deemed too small to justify inquiring into them, and fastening responsibility on it, for any maladroit, dangerous act or omission. It is conclusively presumed to be incapable of the care which any particular situation demands."

**Inonclusive Presumption of Incapacity**

Between the end of the seventh year, and the beginning of the fifteenth year, the faculties of the child, though they have developed are still presumed, until evidence to the contrary is presented, to be insufficiently developed to make care practicable, and therefore, to make the exercise of care a duty. In order to hold one between these ages responsible for the want of care, this evidence must be present. A boy 11 years and 4 months old, while sledding, collided with an automobile. In his action for damages, both the negligence of the defendant and that of the plaintiff were submitted to the jury whose verdict was for the defendant. Judgment for him was affirmed."

"Sullenberger v. Traction Co., 33 Super. 12; Parker v. Rwy. Co., 207 Pa. 438. Unaccountably, Sterrett, J., says of a girl 8 years old, "The question of contributory negligence does not arise in the case. The age of the plaintiff at the time of the accident precludes that." Taylor v. Canal Co., 113 Pa. 162; quoted in Parker v. Rwy. Co., 207 Pa. 438.

"Edelman v. Connell, 257 Pa. 317.

**Change of Presumption at 14**

Although the question of a youth's responsibility is always one of his possession of the power to exercise care, the particular care which the occasion demands, there is when he finishes his fourteenth year, a change of the presumption as to the existence of this power. Before that age, he is presumed to want the power, and that he possesses it must be made affirmatively to appear. After that age, he is presumed to possess it, and whoever contends that he has it not must furnish evidence that he does not have it. Says Paxson, J., "It requires no strain to hold that at 14 an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of 14 years of age."[24]

**Above Fourteen**

As the intelligenc eof the youth, his capacity to see and appreciate danger, is increasing from year to year, the increase of his responsibility is gradual. It makes no sudden leap at the age of 14. The standard continues the same, the average capacity of others in his condition; that is ,probably, of a similar age and of an environment similar, so far as influence for developing intelligence is concerned, to his own. This rule applies as well to those above as those below 14.[25] A boy between 16 and 17 years old, was runing to a fire with a fire en-

[24]Nagle v. R. R., 88 Pa. 35. The negligence here was in running over a railroad track without stopping and looking. In Kehler v. Schwenck, 144 Pa. 348, it was in detaching a mule from a dump car.

[25]Kehler v. Schwenk, 144 Pa. 348; Rwy Co. v. Fielding, 48 Pa. 320.

gine, when he fell in a hole on the road, and, in consequence, lost a leg. The court told the jury that, in determining whether he was negligent in running to the fire, they should consider all the circumstances, the hour of the evening, the weight of the engine, the descending grade of the street, the age, strength, size and activity of the boy, and whether it was the habit of boys of his age and capacity to run with engines to fires. He was bound to execrcise the same degree of caution, prudence and discretion that other boys of his age and capacity ordinarily exercise. If he did this, he has exercised ordinary care and prudence; but if not, he was guilty of negligence."[29] From the age of 14 years, the presumption is that the boy has capacity to be sensible of the danger, in which he is, and to avoid it."[30]

**General Rule as to Responsibility**

Beyond the age of 7, that is, the time when there cannot be a duty to exercise care, a child must exercise ordinary care and caution reasonable for one of his age and discretion. Such prudence only is exacted of him. All the cases agree that the measure of a child's responsibility is his capacity to see and appreciate danger, and the rule is that, in the absence of clear evidence of lack of it, he will be held to such measure of discretion as is usual in those of his age and experience. This measure varies of course, with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at the age of 14. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity and puts on the infant, the burden of showing his personal want of intelligence, prudence, foresight or strength

[29]48 Pa. 320.

[30]Hunt v. Graham, 15 Super. 42; Strawbridge v. Bradford, 128 Pa. 200.

usual to those of his age. The standard remains the same, to wit, the average capacity of others in his condition.[1]

**Usual Intelligence Presumed**

One who is above 7 years old, is, in the absence of evidence, presumed to have the capacity for care of ordinary boys of his age. He should be "held to the exercise of that degree of care and discretion ordinarily to be expected of a child of his age, neither more nor less," says Mercur, J., of a boy 13 years old.[2] Agnew, C. J., thought the boy should "exercise the ordinary care that one of his age and maturity should."[3] A lad of 8 years "was held to the exercise of that degree of care and discretion ordinarily to be expected of a child of that age."[4] The trial court's instruction to the jury was approved, that a boy 16 years and 4 months old who after dark, was with others running an engine to a fire, and who on account of a hole in the street, fell, and was run over, and had to undergo the amputation of his leg, was bound to exercise the same degree of caution, prudence and discretion that other boys of his age and capacity ordinarily exercise. If he did not, he was guilty of negligence.[5]

[1]Kehler v. Schwenk, 144 Pa. 348; Rachmel v. Clark, 205 Pa. 314; Lodge v. R. R., 243 Pa. 10; Greenway v. Conroy, 160 Pa. 185. In Daltry v. Light Co., 208 Pa. 403, a boy 10 years old was held responsible for an injury from coming in contact with a live wire, only for failing to manifest the discretion usually exercised by children of his age, maturity and capacity.

[2]Crisey v. Rwy. Co., 75 Pa. 83. Boy, 13, getting off a moving car.

[3]R. R. v. Lewis, 79 Pa. 33. But he also assumes that the boy had sufficient judgment and discretion to know the danger he was running "in being on or near the track."

[4]Sandford v. R. R., 136 Pa. 84; R. R. v. Gray, 3 W. N. 421; Di Meglio v. Rwy., 252 Pa. 391.

[5]Rwy. v. Fielding, 48 Pa. 320.

A boy 11 years and 4 months old, collided, while sledding, with an automobile. In his action for the injury, the court said virtually, that the jury must ascertain what a boy of that age, of the intelligence and experience usual, at that age, would be required to do or abstain from doing. This particular boy must have done or abstained from doing the same thing, unless he is found to have less than the, at his age, usual intelligence and experience. If he is found to be of so far less intelligence and experience, that he has not sufficient intelligence and capacity to appreciate the risks of his situation, and to avoid them, he will not be guilty of negligence.[4]

**May Youth be Shown to Have Less Than the Usual Ability**

Sometimes the youth is not required, apparently, to have the average ability of youths of his age, but inquiry is made into his actual individual capacity. "A boy's capacity," said Williams, J., "is the measure of his responsibility, and if he has not the ability to forsee and avoid danger, to which he may be exposed, negligence will not be imputed to him, if he unwittingly exposes himself to it.'" "It becomes important to inquire if he (the infant) had sufficient understanding to comprehend and guard against the peril he was in.'" Probably the true rule is, that there being no evidence showing that the youth has less than that which is usual in

[4]Edelman v. Connell, 257 Pa. 317. A judgment for the defendant was affirmed.

[5]Strawbridge v. Bradford, 128 Pa. 200; Kelly v. Traction Co., 204 Pa. 623; Rwy. Co. v. Hazzard, 75 Pa. 367. Yet it is further said in 75 Pa. 367, that "if greater prudence and discretion than that exercised by the plaintiff upon this occasion, would characterize the conduct of other boys of his age under similar circumstances, then the company is not to be held responsible," i. e. the boy was negligent.

[6]Strawbridge v. Bradford, 128 Pa. 200; Kelly v. Traction Co., 204 Pa. 623.

boys of his age, he will be assumed to have the capacity usual at that age. Generalizing the rule, Fell, J., says "The standard of responsibility is the average capacity of others of the same age and experience, and to this standard a child should be held, in the absence of evidence on the subject."[9] An unfortunate variation occurs in the per curiam opinion in Mulligan v. Homestead[10] where it is said "the standard is the average capacity of others of his age and intelligence." A boy about 10 years old, playing on a box car, is injured. Mestrezat, J., says he is chargeable with negligence only if he had sufficient discretion and intelligence to appreciate the danger and to avoid it. This is the doctrine of all our cases. A child's capacity is the measure of his responsibility, and if he has not the ability to foresee and avoid danger to which he may be exposed, negligence will not be imputed to him, if he unwittingly exposes himself to it. But, after saying that the child, in his particular circumstances must have the ability to see and avoid danger, he perplexingly adds, "The degree of care and discretion required to be exercised by him is such as is ordinarily to be expected of a child of his age and experience, and if so found to exist, it imposes on him responsibility for his negligent acts." If the plaintiff appreciated his danger, and knew how to leave the car and get to a place of safety before the collision occurred, he would be guilty of negligence.[11] The infant says Fell, J., will be held to possess the average capacity of others of the same age, in the absence of evidence on the subject. His responsibility (where he is injured by machinery) depends on his knowledge and experience and upon the character of

[9]Parker v. Rwy., 207 Pa. 438; Kehler v. Schwenk, 144 Pa. 348.
[10]243 Pa. 361.
[11]Di Meglio v. Rwy., 252 Pa. 391.
[12]Dynes v. Bromley, 208 Pa. 633. Boy 13 years, 4 month old.

the danger to which he is exposed."[12] In a suit by a boy, 15 years old, who was hurt while riding on the platform of an electric car, the trial court entered a non-suit. The supreme court affirmed the judgment below, saying that the presumption that a boy over 14 years of age can be sensible of danger, can be overcome only by clear and positive evidence of want of the capacity usual in persons of his age."[13]

**Judicial Notice**

In none of the cases in which the average or usual inteligence of boys of a certain age is assumed, in the absence of evidence, to be posessed by the boy whose injury is undergoing investigation, is evidence given of what this average intelligence is. The jury and court are asumed to know what the ordinary intelligence of a youth of 8, of 9, of 10, of 11, etc., is.

**Decision by Court**

There are cases in which the court may decide that a minor has been guilty of contributory negligence. "In clear cases where the facts are settled and there can be no reasonable doubt as to the inference to be drawn, the question may be determined by the court as matter of law."[14] A girl 10 days less than 14 years old attempted to cross a railroad, when she and a younger brother in her charge, were killed. Says Stewart, J., "The legal presumption of her incapacity to appreciate and avoid injury had reached that point in the diminishing scale when it was almost a negligible quantity. * * * * * Against this feeblest presumption in her case is the testimony as to her years of experience in connection with the very danger which she here risked and her

[12]Kirchner v. Rwy. Co., 210 Pa. 45. The parents sought to minify the capacity of the boy.

[13]Parker v. Rwy., 207 Pa. 438.

unusual capacity in general affairs."[14] A boy 12 years and 7 months old in crossing a track in a wagon, without stopping, looking and listening, was killed by a train. The Superior Court said, since he was under 14 years of age, he could not be said as a matter of law, to be guilty of such contributory negligence as would prevent his parents from recovering.[15] The question of his capacity to be sensible of danger and to avoid it, was for the jury.[16] A girl 14 years old, was engaged in the jewelery business. She was hunting for a button, under a table, when she came in contact with the shafting ,and was injured. The trial court refused to take off a non-suit, entered on the double ground that the defendant was not shown to have been negligent and that the girl was shown to have been negligent.[17] Says Elkin, J., "When she did hunt for it (the button) she was required to use her senses as to open and obvious dangers, which she might encounter, but it is evident (i. e. to the judges; not to the jurors) she did not do so * * * * * the learned trial judge was clearly warranted in holding that she had voluntarily crawled under the table in the face of an open and obvious danger (was it obvious to her?) and was precluded thereby from recovering damages for injuries resulting from her own carelessness." Whether it was negligence for a boy of 6 or 7 years,[18] or of 9 years,[19] to crawl under a train of

[14]Gress v. Rwy., 228 Pa. 482.

[15]Any such negligence, conducing to the accident, would have prevented recovery.

[16]Bracken v. R. R., 32 Super. 22; Crissey v. Rwy., 75 Pa. 83. (Boy 13 years old, getting off the car, from the front platform).

[17]Devine v. Simmons, 235 Pa. 336; Cf. Kirchner v. Rwy., 210 Pa. 45, where a boy, 15 years old, was hurt in riding on the platform of an electric car.

[18]Rauch v. Lloyd, 31 Pa. 358.

[19]R. R. v. Kelly, 31 Pa. 372.

cars standing at a street crossing, was decided, negatively, by juries.

**Decision by the Jury**

Ordinarily the jury must decide whether the youth was able to exercise adequate care, but omitted to do so, under the particular cirumstances. This is true, whether the infant was between 7 and 14,[21] or above 14. But when the burden is on the person alleging the negligence, if the evidence is insufficient to justify a finding of it, the court preperly refuses to submit the question.[22] The act, if done by an adult might be negligent per se., but, if done by one under 14 years of age, the jury must decide whether there was sufficient mental development to comprehend the danger.[23] A boy 11 years old was run over by a trolley car. The court says, whether he was guilty of contributory negligence "was clearly for the jury." "Considering the age of the injured lad, the issue as to his contributory negligence could not properly be decided by the court as one of law, even though at the trial, which occurred about three years subsequent to the accident, the boy gave evidence of maturity and an apparent due apreciation of the risk of the situation at the time the accident occurred."[24] A girl about 7 or 8 years old was overrun on a Pittsburgh street by a horse and wagon, and injured. In her action for damages, the trial court told the jury, that, if she

[21]Strawbridge v. Bradford, 128 Pa. 200; Parker v. R. R., 207 Pa. 438; Lonabaugh v. Rwys., 250 Pa. 42. A few days under 14 years. Byron v. R. R., 215 Pa. 82; 12 years old, injured at a crossing. Dynes v. Bromley, 208 Pa. 633, boy, 13 years 4 months old, injured by machinery; Lodge v. R. R., 242 Pa. 10.

[22]Parker v. Rwy., 207 Pa. 438. Boy 7 years 8 months old, standing on front platform of car.

[23]Davis v. R. R., 34 Super. 388; Kelly v. Traction Co., 204 Pa. 623.

[24]Bradican v. Rwy. Co., 260 Pa. 555.

was "guilty of some imprudence or negligence in crossing the street," yet, if the defendant, "could by the exercise of ordinary care on his part, have avoided the injury, the plaintiff may recover." This was not disapproved by the supreme court. The negligence of the plaintiff, was not for the court but for the jury, to determine, "even if negligence of the plaintiff was a bar to the action."[25] It is always for the jury to decide whether the infant has been negligent, when there is doubt as to the facts or as to the inferences to be drawn from them.[26] Of a youth 12 years old, the court said "Being under the age of 14 years, the general rule is that his contributory negligence is a matter to be passed upon by the jury."[27]

**Question for Jury. Improper Submision**

While the decision of the question whether the infant has been contributorily negligent, is usually for the jury, it may not be distinctly enough submitted to them. A boy over 14 years ascended a ladder for the purpose of putting a belt on a pulley. In attempting to put it on, his hand was caught and two fingers were cut off. Before he went up the ladder, there was evidence, that he was warned of the danger. The court did not emphasize in its instruction, the importance of ascertaining whether the boy was negligent. The supreme court, reversing the judgment for the boy, said, "We cannot assume that a boy over 14 years of age, with six months' experience in a machine shop, is incapable of forming a judgment of the danger of such an act, especially when he has the aid of the warnings of an older and more experienced person."[28]

[25]Smith v. O'Connor. 48 Pa. 218. The presumption of incapacity to exercise care had but recently ceased. In Rachmel v. Clark, 205 Pa. 314, the court improperly entered a non-suit against the infant plaintiff.

[26]Dynes v. Bromley, 208 Pa. 633; Kehler v. Schwenk, 144 Pa. 348; Parker v. Rwy., 207 Pa. 438.

[27]Kelly v. Traction Co., 204 Pa. 623.

[28]Greenway v. Conroy, 160 Pa. 185.

# MOOT COURT

## EMERSON vs. BROWN

**Contract of Wife to Sell Her Separate Real Property—Quit Claim to Her by Husband in Lieu of Joinder —Good and Marketable Title.**

### STATEMENT OF FACTS,

In 1915 the Emerson Land Company conveyed a tract of land to Mary Emerson, wife of Daniel Emerson. Ten days later Daniel Emerson, for a valuable consideration executed and delivered a deed conveying all of his estate, right, title and interest in the premises, under the operation of any past, present or future law or laws of Pennsylvania, and whether as tenant by the courtesy or otherwise, and also renounced and quit-claimed all of his estate and interest in and to said premises, unto Mary Emerson, her heirs and assigns. Mary Emerson in 1919 contracted to sell the premises to William Brown and tendered a deed therefor in the usual Pennsylvania form, which he declines to accept on the ground that her husband should have joined in the instrument. Mary Emerson brings this action for the purchase money.

Weaver, J. K., for Plaintiff.
Flannery, F. J., for Defendant.

### OPINION OF THE COURT.

KUNKEL, J.—The facts of this case present as the main question for determination whether a married woman can convey her real estate without the joinder of her husband. The common law regarded the husband and wife as one person. The very legal existence of the woman was merged into that of her husband, and her condition during marriage was called her coverture. Under this view of the early law a married woman was not even capable of holding any separate property; and it is, therefore, clear that there could be no conveyance of property unless both husband and wife executed the deed jointly. But the disabilities of a married woman have been removed in most respects by various Acts of Assembly in this state. And it is

therefore necessary to determine to what extent the statutes have removed her disabilities as far as the use, control, and disposal of her property is concerned.

The first Act of Assembly on this subject is that of February 24, 1770, P. L. 307. It recognized the right of a married woman to hold property separate and apart from her husband and prescribed a method for the conveyance of the wife's separate property. According to the provisions of this act the "husband and wife" must execute the deed, and the wife must make a separate acknowledgment. Section 6 of the Act of April 11, 1848, further established the rights of a married woman. By its terms a married woman was secured in the use and enjoyment of her separate property, and the husband was prevented from conveying or disposing of her property without her written consent voluntarily given, in the absence of any coercion on his part. This act does not expressly declare that a husband must join in a conveyance by the wife of her separate property, but clearly implies that the separate property of the wife cannot be conveyed except by the joint act of both. The next Act of Assembly bearing on this question is that of June 3, 1887, P. L. 332, known as "the married persons property act." The effect of this act is to give a married woman the same power to control, use, and dispose of her property whether acquired before or after marriage as if she were a feme sole. But this proviso is expressly added: "that a married woman shall have no power to mortgage or convey her real estate unless her husband join in such conveyance." The Act of June 8, 1893, is the latest Act of Asembly that concerns the point here in question. The first section of this act again affirms the right of a married woman to acquire, own, possess, control, use, and dispose of any of her property, real, personal, or mixed in the same manner and to the same extent as an unmarried person. But at the same time it clearly states " * * * * * she may not mortgage or convey her real property unless her husband join in such mortgage or conveyance." Sections 3 and 4 of this act have been amended by the Act of March 2, 1913, but the first section of the act the substance of which is above given remains unchanged.)

The Act of 1770 recognizes the necessity of the husband joining in a conveyance by a wife of her separate property. The Act of 1848 impliedly recognizes the same rule. The Acts of 1887 and 1893 expressly provide for the joinder of the husband in a conveyance by a wife. These acts, although passed for the purpose of removing the comon law disabilities of a married

woman, have expressly limited her capacity to convey her separate property, and plainly declare that in a conveyance or mortgage of her real estate her husband must join. This common law disability has not been removed, but on the other hand has been expressly retained by statute. Bingler vs. Bowman, 194 Pa. 210; McCoy vs. Niblick, 221 Pa. 123, and 228 Pa. 342.

It is therefore unnecessary to determine from what source the wife acquired her property. Neither the Act of of 1887 nor the Act of 1893 makes any exception to the rule that a wife cannot convey without her husband joining. The fact here that the husband released by deed for a valuable consideration any interest he might have in the land can have no effect on this decision. Whether such conveyance by the husband to the wife was valid is wholly immaterial. We are, however, inclined to regard it as a valid conveyance. It was nothing more than a conveyance by the husband of an expectancy and such an interest can be conveyed, Fritz's Estate 160 Pa. 15 . It is also well established that a husband can convey property directly to his wife. Reagle vs. Reagle, 179 Pa. 89, and cases therein cited. The decision of this case, however, in no way depends upon these questions, but rests solely on statutory requirement.

The conclusion reached in this case is that the plaintiff cannot convey a valid title without the joinder of her husband as statute expressly requires, and for that reason cannot recover in this action. It is accordingly directed that judgment be rendered for the defendant.

OPINION OF THE SUPERIOR COURT.

While we are well satisfied that the conclusion arrived at by the court below is correct, and that its determination should be affirmed, yet it may be suggested in addition to the cases cited by Judge Kunkel, in support of the view entertained by him, the following may be also considered:

In the early case of Trimmer vs. Heagy, 16 Pa. 484, Justice Rodgers held that "where the wife had executed a deed, with the assent and under the direction of her husband, it was not admissible to show the same by parol, and that the only legitimate evidence of such consent would be the execution of the deed in the manner and form directed by the Act of 1770."

"A release of dower by a feme covert where a husband does not join in the deed is void, though the deed was separately acknowledged in due form." Willing vs. Peters, 7 Pa. 287.

"A wife may not make a valid conveyance unless her husband join in the deed." Jackson vs. R. R. Co., 210 Pa. 136.

"That the deed of the wife is absolutely void is well settled by the law of this state to divest her title." Elder vs. Elder, 256 Pa. 140.

A wife may now do anything in a contractual way, except that she may not mortgage or convey her real property, unless her husband join in such mortgage or conveyance." Bartholomew vs. Bank, 260 Pa. 572. (1918)

"A wife cannot make a valid deed of her real estate as grantor to her husband, although he may join in the deed with her as grantor." Alexander vs. Shalala, 228 Pa. 300.

"In Wicker vs. Duer, 225 Pa. 308, it was held that "where the wife conveyed land to her husband, and signed, sealed and acknowledged the deed, and he accepted it and put it on record, and she afterwards died, the land descended to her heirs at law."

Again, the defendant was entitled to have a marketable title, and a purchaser is under no legal obligation to take the same if it be doubtful. It was held in Speakman vs. Forepaugh, 44 Pa. 371, that "every title is doubtful which invites or exposes the party holding it to litigation. If there be a color of an outstanding title which may prove substantial, though there is not evidence to enable a chancellor to say it is so, a purchaser will not be compelled to take it and encounter the hazards of litigation."

"It would be against good conscience to force a title not marketable upon a purchaser, although his contract seems to have contemplated it." Freetly vs. Barnhart, 51 Pa. 249.

"The title must be beyond a reasonable doubt." Mitchell vs. Steinmetz, 97 Pa. 251.

"A contract in favor of a vendor of real estate will not be enforced if he cannot give a marketable title beyond a reasonable doubt." Swain and Able vs. Trust Co., 54 Pa. 450.

"The husband is not before the court in this case, and is not a party to the suit, and no decree can be made in the case that would be binding upon him." Ferguson's App., 56 Pa. 487.

"Where the title to the land is doubtful and not marketable the vendor cannot recover the purchase money." Hershey vs. Irwin, 92 Pa. 48.

"A vendee has the right, not merely to have conveyed to him, a good, but as well, an indubitable title." Estate of Reighard vs. Clouse, et al., 192 Pa. 111.

"Only such a title is a marketable one." Swayne vs. Lyon, 67 Pa. 436.

Again, it may be noted that the conveyance in the present case to the wife was made by the husband in the year 1915, and that the present action for the recovery of the purchase money of the property was not brought until 1919, and that in the meantime the Act of June 7, 1917, was passed, which makes the husband an heir at law instead of having a mere curtesy in the real estate of his wife. While the husband in this case, by his deed, purported to convey all his present and prospective interets, right and title, to the farm in question, in most comprehensive terms, yet it will be noted that the grantee was "Mary Emerson," who was his wife, "her heirs or assigns."

It may be added that if the deed in the present case was void, then under the act of 1917, he would become entitled, at the death of his wife, as an heir.

Judgment in this case is affirmed.

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## SALTER vs. BOON, ET AL.

**Strikes—Labor Unions—Right of Discharged Employe Against Fellow Employes—Trespass—Damages—Unlawful Combinations.**

### STATEMENT OF FACTS.

Salter and his co-defendants were employed by X corporation. Salter had reported as inefficient, an employe of the corporation, and he had been discharged. The report was true, and fidelity to his employer required the report made.

All of the other employes, 11 in number, agreed that they would simultaneously quit their work if Salter were not discharged within 48 hours. They communicated their agreement to the corporation and Salter was discharged. This is an action of trespass by Salter against the 11 defendants.

Cohen for Plaintiff.

Lawton for Defendant.

### OPINION OF THE COURT.

CALDWELL, J.—The questions presented in this case are of particular interest in these days of seeming interminable strikes and lockouts. Numerous acts have been passed dealing with unfair combinations of capital to force other capital, out of business, as for instance the Sherman anti-trust act, but as to prohibiting the oppression of a workman by fellow employes, the statute books are seemingly silent.

There seems to be no doubt that had each of the defendants chosen to leave X's service at any time, individually, they

were at perfect liberty to do so. The reason for their leaving might be immaterial. The thirteenth amendment to the national constitution guarantees this right to all citizens. (The right to choose their own manner and place of employment).

Whether or not a good cause of action has been set forth, apparently depends upon whether or not the element of conspiracy is present. If the defendants chose to quit work without the assignment of any reason, such was their privilege.

In this case, however, their manifest purpose was to work an injury to Salter. They served notice that Salter must be discharged, or that they would in effect cripple the business of the corporation by exercising their undoubted right to quit work. Thus the element of malice toward Salter is obviously present.

In Erdman vs. Mitchell, 207 Pa. 79, Justice Dean says, "A conspiracy is the combination of two or more persons by some concerted action to acomplish an unlawful purpose. It is unlawful to deprive a mechanic or workman of work by force, threats or intimidation of any kind; a combination of two or more to do the same thing is conspiracy. The courts are bound to protect the humblest mechanic or laborer in his right to acquire property." It has been held that the right of a person to work at a particular spot, or trade, is a property right.

In Morris Run Coal Co. vs. Coal Co., 68 Pa. 173, it was said: "There is a potency in numbers when combined, which the law cannot overlook, where injury is the consequence. * * * * * If the motives of the confederates be to oppress, the means they use unlawful, or the consequences to others injurious their confederation will become a conspiracy."

There can be no doubt in this case that the motive of the confederation of the 11 defendants was to oppress Salter by securing his discharge, or that the consequence to Salter was injurious, since he lost his position and was forced to seek other work. Therefore, we hold that the confederation in this case was a conspiracy, and that the conspirators are liable.

A case exactly in point is that of Bausbach vs. Reiff, 237 Pa. 482, in which the facts are identical with those in the case at bar, with the exception that the defendants numbered 28, as against 11 in this case. That fact, however, is immaterial. In the above case, the plaintiff was awarded such damages as he was able to show he had suffered by reason of the wrongful acts of the defendants. Judgment in this case will be awarded on the same basis.

Judgment for plaintiff.

OPINION OF THE SUPERIOR COURT

"The right to the free use of his hands is the workman's property, as much as the rich man's right to the undisturbed income from his factory, houses and lands," says Dean, J., in Erdman vs. Mitchell, 207 Pa. 79.

But A has no right to use his hands on B's machinery or materials, for manufacture without B's consent. The will of B is necessary to concur with that of A to create a right in the latter.

If A has a right to the use of his hands, so have M, N, O, P, X, Y. Z. They can underbid A, and so cause B's discharge of him, and the substitution of themselves for him in B's employment.

We are not disposed to say that were six men working for B, at $3 per day, six other men might not agree among themselves to jointly offer to work for $2.50 per day, and thus bring about the supersedure of the other six. Would the inducing of B, the employer by M to put him in the place of S, by offering to work for less, be an actionable wrong to S? Probably not. Would the joint offering of M and five others to work for less than S and five others, followed by B's acceptance and his discharge of S and the others, be a legal wrong to S and his five associates? We are not aware that any court has so held. That it would so hold we think extremely improbable.

Then, it would seem, the so-called "right" of a particular workman to the "free use of his hands," is not a right at all, if his "right" includes the right not to be superseded by a competitor who uses means to induce the employer to dismiss him, to the advantage of the competitor.

Then the question would be whether the inducements for the dismissal of some, and the employ in their place, of others, must be classified, and whether it is the use of only some of the classes that the courts forbid.

If the workman has the right to the "free use of his hands," he probably has to the free use of his brain; to the free use of his associative powers, to the use therefore of his powers of concerting with others, to do, simultaneously a similar act, for the purpose of enlarging his ability to influence the employer's decision.

X is a man of incomparable skill. He has discovered that he is indispensable to his employer. He, then does not need to resort to "collective bargaining." He, alone, is important enough to coerce his master into concessions in the form of wages, or

the dismissal of obnoxious fellow employes. But N. M, O, P, are severally not able to exert this degree of coercion. By joint action they can. The power of association is a natural power. Why then, are they forbidden by combination to gain the same influence over the master, as has X, as an isolated person? Why should the use of one set of powers, for constraining the employer, be permitted, and not that of the other, although the effect on the master, and through the master on the fate of other workmen is the same? Nature has put into some single men the power of constraint, which she has given to others only when unified into groups of five or ten, or twenty or fifty. Why are these men artificially forbidden to supplement the deficiences of their individual abilities, by the ability which springs from confederation?

The question is really one of influence on the capitalist. On his will depends the workmen's right to work and earn. That will can be influenced in sundry ways. The necessity of having the skill and ability of one man, will give that man a large power over him. Why the necessity of not losing simultaneously the services of others, should not also give to the combined workers the right to use this necessity, is not apparent.

The dismissal of one workman, at the behest of another, is not a pleasant fact to contemplate. But the law does not profess to prevent rivalries of the sort, having kindred results. A is offering a thing for sale at a certain price. B, learning of the offer, offers a similar thing at a lesser price, or a better thing at the same price. A is defeated. But the law does not reprehend B's act.

The truth is that while debaters and newspaper articles, and some lawyers and judges affect to condemn the strike, because of the hardships to the superseded workers, the real gravamen of the supposed wrong, is the interference with the freedom of the employer. He can be influenced by workmen's threats to abandon him, unless he complies with their wishes, and to limit the area of this influence, he is not to be coerced by the more formidable simultaneous act of several, or many. The "conspiracy," so-called, is deemed bad, because it makes posible this "simultaneous action."

It would be possible to distinguish combinations from eachother; to regard the particular object to be accomplished, and to make the legal quality of the combination depend upon the nature of the object. In the case before us, the object was to punish a workman for his fidelity to his employer, an unworthy one. Suppose however, wages paid in a certain business are

excessively low, and the only way to secure an increase (which the business could well support) is to prevent the work being done, unless higher wages are paid. Why should the threat of a combined cessation be prevented by the state? And, if such combined cessation would be made ineffectual by the offer of the poverty oppressed classes to do the work at the old wage, why should not certain forms of dissuasion from their offering to do the work be tolerated? Tolerating some is not tolerating all; and with a sympathetic frame of mind toward the working classes (as they were until a year or two ago) discovery of a means of distinguishing between the tolerable and the intolerable methods of preventing the defeat of the "strike" would probably not prove impossible.

What we have said is not intended to convey the impression that the decision of the learned court below is incorrect law. It is sustained by the cases cited by the court. But the last word has not been uttered on the right to bring results by combined action. The legislature has deleted the criminal quality from some workmen's combinations; combinations to induce the non-employment of certain persons, by a simultaneous refusal of the persons in the combination to continue to work. The next step will be, before long, to do the same thing with regard to the civil liability of those who combine. When that step is taken, it is not unlikely that the courts will find some interpretation of the constitution which will permit them to abstain from denouncing the law as void.

The judgment of the learned court below is affirmed.

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## RICE v. BUCKMAN

**Sale for money "to be paid at once"—Dishonor of Check Given in Part Payment — Sale by Fraudulent Vendee — Innocent Purchaser—Replevin**

### STATEMENT OF FACTS

Rice sold for $250 a horse to Jacobs, the money to be paid at once. Jacobs delivered $50 in silver and agreed for the balance to give a check on X Bank in which he usually kept his deposit. The horse was delivered at once. 10 days later Rice was told at the Bank that the check would not be paid, since Jacobs had no funds in the Bank. Meantime Jacobs had sold for $300 the horse to Buckman, who paid cash. This is replevin for the horse.

OPINION OF THE COURT

EDE, J. It appeared from the foregoing that the plaintiff intended that the transfer of the horse to the defendant should not only transfer possession, but likewise title. There is nothing to refute this with the exception of the argument of the plaintiff—that the dishonoring of the check did not complete the sale, but made it a conditional sale. If the owner intended to transfer the property in goods as well as the possession, the transaction is a sale and the property passes, however fraudulent the device may have been; but if he intended to part with nothing more than the bare possession, there is no sale and no property passes. (Levy v. Cooke, 143 Pa. 607). The Law regarding checks is that they must be presented for payment without unreasonable delay. What is a reasonable delay depends upon the facts and conditions of each case. In Nt. Newark Bank v. 2nd Nt. Bank of Erie, 63 Pa. 404, 11 days were held to be a reasonable delay, while in Muncy Borough School District v. Commonwealth, 84 Pa. 464, 7 days were held reasonable. Where there are no circumstances preventing the presentment for payment, reasonable means within the next Banking Day. Are there any reasons in this case why Rice should not have made presentment the next day? We can find no indications for delay and naturally conclude that Rice was negligent. Notwithstanding his negligence, we are of the opinion that Jacobs must have known that he had no money in the bank at the time of making the check or he accidently overdrew his account. In either case he should, as an ordinary and prudent business man would, have honored the check, upon presentment by making a sufficient deposit.

Was there any fraud upon the part of Jacobs? To constitute fraud these facts must be evident: (1) the purchaser must have been insolvent or in failing circumstances; (2) he must have had at the time a preconceived intention not to pay for the goods or no reasonable expectation of being able to do so; (3) there must have been on his part an intentional concealment of these facts or a fraudulent representation in reference to them. There is a question whether these conditions existed in the present case, but in our opinion we are inclined to think that they do. Even though the intention of Jacobs at the time of purchasing the horse was not to pay, together with his insolvency if any, and he did not communicate his knowledge to the vendor, the sale can not be avoided when delivery has been made. To avoid the sale there must be artifice, intended to deceive, practised upon the vendor in procuring the property.

(Smith v. Smith, Murphy and Co., 21 Pa. 367; Bughman v. Central Bank, 159 Pa. 94).

In this case the horse has been sold by Jacobs to Buckman who claims to be an innocent purchaser for value. An innocent purchaser for value is one who buys property without notice that another party is interested therein and pays a full and fair price for the same. (Meyer v. Pittsburg Safe Deposit Co., 230 Pa. 106). If Buchman is not an innocent purchaser for value, the burden rests upon the plaintiff to prove otherwise, which he has not attempted to do. The title that Buchman holds depends upon the title held by Jacobs. In our opinion, as stated, Jacobs was guilty of fraud and thereby had a voidable title which had not been avoided. Buckman, an innocent purchaser for value, purchased the horse for a valuable consideration and without notice from the fraudulent vendee. This title, acquired, was one clear of fraud, whether it be actual or legal, and is indefeasible (Sinclair v. Healy, 40 Pa. 417; Levy v. Cooke, 143 Pa. 607).

The only question remaining for our consideration is whether this action of replevin can be brought. In order to bring an action of replevin against an innocent third person, the plaintiff must return the $50 and make the demand for the return of the horse upon Buckman. (Schwarz v. McCloskey, 156 Pa. 258). The plaintiff did neither one of these. In this case Rice can follow and identify the property and his natural remedy is an action of assumpsit for money had and received. (3 Walker 203).

From the foregoing the plaintiff's action cannot be sustained.

## OPINION OF SUPERIOR COURT

The sale of the horse was for money, $250, "to be paid at once." Of it $50 was paid in silver. A check for $200 was given. The check was accepted as the means of obtaining the money at any time, by the vendor. The horse was delivered. Jacobs, the vendee, either did not have the money equivalent to the check in the bank, or, before the presentation of the check, he withdrew the money, knowing that his check was outstanding. We think these facts warrant an annulment of the sale and a recovery of the horse from Jacobs. Cf. Werley v. Dunn, 56 Super. 254.

But Jacobs has sold the horse for $300, $50 more than the price at which Rice sold to him, to Buckman, and Buckman has

paid the money. He is a purchaser for value. The price he paid negatives the suspicion that he was aware of any facts that might expose him to being deprived of the horse by Rice or anybody. The $300 were apparently a good price for an indefeasible title. We think Buckman's bona fides in making the purchase may be assumed. This being so, Rice cannot recover the horse from him. Defective though Jacobs' title was, his has become unassailable. That a sale by a fraudulent vendee, to a bona fide purchaser for value, gives to the latter an indefeasible title is assumed in Green vs. Humphrey, 50 Pa. 212. Cf. Levy v. Cooke, 143 Pa. 607; Sinclair v. Healy, 40 Pa. 417.

The ownership of the horse and the right to possession of it being in the defendant, there can be no recovery in this action of replevin.

The judgment of the learned court below is therefore affirmed.