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Presumptions in Commercial Vehicle Negligence Cases

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CONSENT TO TRIAL WITHOUT A JURY IN CRIMINAL CASES—The Supreme Court of Pennsylvania has held that a defendant may validly consent to a trial by a jury of less than twelve in case of misdemeanors and felonies not capital; *Com. v. Egan, 281 Pa. 251;* but has held that he cannot validly consent to a trial *without* a jury. The latter decision was to some extent based upon a construction of the Pennsylvania statutes, but an attempt was also made to justify the distinction upon constitutional grounds.

In a recent case the Supreme Court of the United States has held that trial by jury in criminal cases may be entirely waived, *Patton v. U. S. 50 Sup. Ct. Rept. 253.* The court expressly repudiated the distinction made by the Pennsylvania court, saying:

"We are not unmindful of the decisions of some of the state courts holding that it is competent for the defendant to waive the continued presence of a single juror who has become unable to serve, while at the same time denying or doubting the validity of a considerable number of jurors or a jury altogether. But in none of these cases are we able to find any persuasive ground for the distinction.

A constitutional jury means twelve men as though that number had been specifically named; and it follows that, when reduced to eleven, it ceases to be such a jury quite as effectively as though the number had been reduced to a single person. This conclusion seems self evident, and no attempt has been made to overthrow it save by what amounts to little more than a suggestion that by reducing the number of the jury to eleven or ten the infraction of the Constitution is slight, and the courts may be trusted to see that the process of reduction shall not be unduly extended. But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar, but more serious infractions which might be conceived. To uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction—though it destroys the jury of the Constitution—is only a slight reduction, is not to interpret that instrument, but to disregard it. It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if, in our opinion, it is not, relatively, as bad as it might have been".

W. H. Hitchler

PRESUMPTIONS IN COMMERCIAL VEHICLE NEGLIGENCE CASES—Let us picture a trial in which the

plaintiff is attempting to recover damages from the defendant for an injury sustained from a vehicle negligently operated by the latter's servant. The plaintiff has introduced testimony to prove the driver's negligence, the resulting injury, and the relationship of master and servant between the defendant and the operator of the vehicle. The defendant moves for a non-suit, or perhaps for a directed verdict, on the ground that the plaintiff has failed to establish that the accident occurred during the course of the servant's employment. Strangely enough, the disposition of this motion and perhaps of the entire case depends upon the vital question of whether in contemplation of law, the vehicle is a commercial or private conveyance. This brief note is devoted to a discussion of the rules of evidence applicable to such situations.

It is consistently held that if the negligently operated car is a private (pleasure) vehicle, it is necessary for the plaintiff to prove, inter alia, that the vehicle was engaged in and about the master's business at the time the injury occurred.[1] This principle accords with the general rules of evidence that the burden of establishing the facts necessary to constitute a cause of action rests upon the party asserting them. When we enter the field of commercial vehicles displaying the defendant's trade name, we find that the plaintiff's task is materially mitigated by judicial aid. Our courts have repeatedly held that where the defendant's trade name is displayed on trucks, delivery wagons, and similar conveyances, a presumption arises that the vehicle in question was owned by the defendant and was being used by the person in charge thereof for defendant's business purposes.[2] A very important effect of the creation of this presumption is that it assures the plaintiff that his case will reach the jury, inasmuch as our Supreme Court has emphatically declared that when such a presumption arises, the case must go to the jury regardless of the quantity of the parol evidence to the contrary, subject

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[1]Farbo v. Caskey, 272 Pa. 573; Solomon v. Commonwealth Trust Co., 256 Pa. 55; Scheel v. Shaw, 252 Pa. 451; Luckett v. Reighard, 248 Pa. 24; Lotz v. Hanlon, 217 Pa. 339; Buck v. Quaker City Cab Co., 75 Pa. Super. Ct. 440.

[2]Hartig v. American Ice Co., 290 Pa. 21; Thatcher v. Pierce, 281 Pa. 16; Felski v. Zeidman, 281 Pa. 419; Sieber v. Russ Bros., 276 Pa. 340; Holzheimer v. Lit Bros., 262 Pa. 150; Williams v. Ludwig Co., 252 Pa. 140; Moses v. Quaker City Cab Co., 84 Pa. Super. Ct. 157.

to certain rare exceptions.[3] The Western Union cases, discussed later, well illustrate the peril of being at the mercy of the jury. In that case, the jury awarded the plaintiff substantial damages even though it was shown by uncontraticted testimony that the messenger boy was not pursuing his employment at the time of the accident.

We have, then, the two divergent rules, one referring to pleasure vehicles, the other to commercial ones. There is, moreover, a "No-Man's Land" between these two fields—a territory upon which our state courts have not yet been required to tread. The Federal Court, however, has been trapped in this middle locality and probably has failed to comprehend its exact bearings. In a recent case, *Western Union Telegraph Company v. Kirby, 37 Fed. (2nd) 480,* the plaintiff was injured by the negligent operation of a bicycle from which was suspended a plate displaying the words "Western Union". The plaintiff relied upon the presumption applicable to commercial vehicles and the defendant, after introducing testimony tending to establish that the bicycle belonged to the messenger boy and that he was on his way home at the time of the accident, made a motion for binding instructions. The court overruled the motion and submitted the case to the jury, which returned a verdict for the plaintiff. On appeal to the Circuit Court of Appeals, the trial court was sustained on the theory that such a marked bicycle is a "commercial" vehicle within the meaning of the Pennsylvania cases. The court was partially influenced by the fact that the boy was wearing his uniform but it rested its decision primarily upon its conclusion that the bicycle was a "commercial" vehicle. If the Court had decided that it was a pleasure vehicle, binding instructions for the defendant would have been not only proper, but mandatory.[4]

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[3]The exceptions are :"(a) unless plaintiff himself shows in the presentation of his case, that, as a matter of fact, the car did not belong to defendant or was not being used in his business, or (b) unless, in the testimony produced, defendant is able to point to evidence of indisputable physical conditions, or facts, or to show in the evidence some indisputable basis for mathematical tests which demonstratively overcome the presumptions in plaintiff's favor, or (c) where, in addition to the uncontradicted oral evidence on the side of the defendant, showing no liability there is admittedly genuine or unattacked documentary evidence which relieves defendant from (the possibility of) liability". Talarico v. Baker Office Furniture Co., 298 Pa. 211; Hartig v. American Ice Co., supra.

[4]Scheel v. Shaw, supra; Lotz v. Hanlon, supra.

It is submitted that the federal case exhibits an unwarranted extension of the rule relating to business conveyances. A presumption is an inference as to the existence of a fact not known, arising from its logical connection or association with other facts which are known or proved.[5] "The law raises (a presumption) . . . . from a known state of facts and a known course of dealing".[6] In the typical truck cases, a presumption of ownership and use for the owner is justifiable because it is based upon facts derived from human experience. Trucks are in most cases used for commercial pursuits and are usually owned by the persons whose names appear thereon. A presumption of such use and ownership, therefore, is in accordance with established facts.

On the contrary, it is a fact well-known to anyone familiar with the conduct of the telegraph business, that the delivery bicycles are owned by the messenger boys and not by the company. A contrary presumption, therefore, conflicts with the stability of known facts. It is true that ownership by the boys does not preclude liability on the part of the company,[7] but it is likewise true that one is quite apt to use his own bicycle for private purposes. A bicycle, moreover, is used so commonly for pleasure purposes that there can be no justifiable basis for a contrary presumption. It seems a perversion of legal principles to presume that the mere attaching of a name plate on a bicycle immediately converts it into a perpetual commercial conveyance. We must not forget that this presumption is exceptional and should be applied only in those cases consonant with knowledge derived from overwhelming human experience. When our experiences teach us that such bicycles are owned by the messenger boys, that they are pleasure vehicles, and that they are very often used for the owner's individual purposes, a presumption of ownership by the company and use in its business, is spurious. In such a case, there can be no substantial justification for a departure from the general rule requiring the plaintiff to establish every phase of his cause of action.

It will be interesting to observe the reaction of the courts when other "doubtful" vehicles are involved. Suppose a dealer has his trade name painted on the spare-tire cover of a touring car; suppose the defendant's trade name

[5]Gilbraith's Estate, 270 Pa. 288; Cambria Iron Co. v. Tomb, 48 Pa. 387.

[6]McConnell's Appeal, 97 Pa. 31.

[7]Burns v. Joseph Flaherty Co., 278 Pa. 579.

and insignia are painted on the side windows of a friend's pleasure vehicle, a custom which is becoming increasingly popular—will our courts arbitrarily denominate such vehicles "commercial" ones and penalize the shrewd merchants who seek advertisement by such methods? Suppose an indulgent employer has permitted his employees to use his truck to convey their families to a picnic on a Sunday, or to conduct a night "straw-ride"—will our judges search for a trade name on the panels of the truck and raise the presumption of ownership and use in the employer's business as an inexorable rule of law? If they do, employers will undoubtedly curb their generosity when they discover that their altruism is a costly virtue.

Gilbert Nurick

MISREPRESENTATION OF INTENTION TO PAY —Commerce and efficient business methods have always necessitated the giving of credit. Ordinarily where the debtor has failed to fulfill his promise to pay at the date stipulated, the creditor's action is in contract.[1] Too often it appears that the debtor is insolvent or had the preconceived intention not to pay for the goods received or both. In such a case an action of trespass in trover or replevin is the most efficient action since the recovery is a judgment for the full value of the goods or the restoration thereof.

In dealing with this subject we must distinguish false representations from concealment of an intention not to pay. False representations justifying the recission of a contract of sale and a concealment of an intention not to pay are separate and distinct wrongs. The first is complete without an intention not to pay and no such intention need be shown, while the second is complete without false representations other than such as are implied from the purchase or may expressly be made directly concerning the intention. Both may be present in a given case, but each is complete without the other.[2]

Generally in the United States it is found that one who purchases goods with a preconceived intention not to pay, is guilty of fraud.[3] One of the earliest Pennsylvania cases[4]

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[1]12 R. C. L. 266 and cases therein cited. See Williston on Sales p. 1071. The purchase of goods implies a representation that the buyer intends to pay for them.

[2]12 R. C. L. 266.

[3]12 R. C. L. 263; 35 Cyc. 80.

[4]McKinley v. McGregor, 3 Whart. (Pa.) 369 (1838).