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RECENT CASES

FEDERAL COMMON LAW

In the recent case of *Chase National Bank v. Mobile & O. R. Co.*, 30 F. Supp. 565 (S. D. Ala., 1939), the dogma that there is no federal common law was unequivocally denounced. The court implied an intention on the part of the framers of the constitution that the common law should be adopted insofar as it was necessary to effect an interpretation of words and phrases used. It was further declared that the procedure to be used, forms to be followed and rules to be applied must, of necessity, since the framers promulgated no new ones, be adopted from the common law.

It has frequently been declared that "there is no federal common law." *Erie R. Co. v. Tomkins*, 304 U. S. 64 (1938), contains one of the most recent statements to this effect. The case most frequently cited for this proposition is *Wheaton v. Peters*, 8 Pet. 591 (1834). See also *Kendall v. United States*, 12 Pet. 524 (1838); *Butcher v. Chesire R. Co.*, 125 U. S. 555 (1887).

The statement that there is no federal common law is often qualified by recognition that in interpreting the constitution it is absolutely necessary to look to common law. This substantiates the statement in the instant case. In *Murray v. Chicago & N. W. R. Co.*, 62 Fed. 24 (1894), the court stated that the adoption of the Constitution and the consequent creation of the national government did not abrogate the common law previously existing. It was held that the Supreme Court and all inferior courts were given the power to apply common law to all cases where it should be used. To the same effect, see *New Jersey Nav. Co. v. Merchants Bank*, 6 Howard 344 (1848); *Smith v. Alabama*, 124 U. S. 465 (1886); *United States v. Wong Kim Ark*, 169 U. S. 649 (1897); *Kansas v. Colorado*, 206 U. S. 46 (1907); *Ex parte Grossman*, 267 U. S. 87 (1925).

In the instant case the court enumerates several interpretive problems which can be resolved only by reference to the common law. The Constitution, in Section 9 of Article 1, provides the privilege of the writ of habeas corpus shall not be suspended and no bill of attainder or *ex post facto* law shall be passed. The court declares that neither was known except at common law, and, since they are not defined by the Constitution, it is presumed that the common law definition is to control. Sections 1 and 2 give to the courts their powers but make no mention as to what law or rules shall apply to the trials held by the courts. The court states that the framers must have intended common law rules to apply or they would have drawn up a set of new rules. Furthermore, how are "infamous crime", "grand jury" and "due process of law", to be defined, if not by reference to the common law? The court also demonstrated, by examination of the Constitution and its amendments, that if any force and effect are going to be given to many of its sections it will be necessary to utilize the common law.

Consideration of earlier authorities warrants the conclusion that there are other instances where federal common law will be applied. It has been applied to interstate transactions where no statute controls. In these cases the court purported to apply the common law of the respective states but in fact adopted their own federal common law. *Western Union Tele. Co. v. McCall Pub. Co.*, 181 U. S. 92 (1901); *Interstate Commerce Comm. v. B. & O. R. Co.*, 145 U. S. 263

(1892). *Erie R. Co. v. Tomkins, supra,* has changed this situation, and now the federal courts must apply the common law of the states as interpreted by the state courts. In *ex parte Grossman, supra,* it was held that it is necessary to look to the common law and the powers of the King of England to determine the pardon powers of the President of the United States. It has also been declared that the common law must be resorted to in defining rights in eminent domain proceedings. *Kohl v. United States,* 91 U. S. 367 (1878). And, the court states in *Moore v. United States,* 91 U. S. 270 (1878), that the Court of Claims is to be governed by the common law rules of evidence.

If, as is stated in *Erie R. Co. v. Tomkins,* there is no federal common law, then there can be no federal common law rules of conflict of laws, and state rules must determine what law should govern. This question, whether there are federal common law conflict of laws rules or only state conflict of laws rules, has arisen several times in lower federal courts and different results have been reached. The existence of federal common law conflict of laws rules was recognized in *Dorman v. John Hancock Ins. Co.,* 25 F. Supp. 889 (S. D. Calif. 1939); *N. Y. Life Ins. Co. v. Jackson,* 98 F. (2d) 950 (C. C. A. 7th, 1938); *Mutual Benefit Ass'n. v. Bowman,* 99 F. (2d) 856 (C. C. A. 8th, 1938). *Contra,* the following cases, adopting the conflict of laws rule of the state in which the court is sitting. *Panko v. Endicott Johnson Corp.,* 24 F. Supp. 678 (N. D. N. Y., 1938); *Monahan v. N. Y. Life Ins. Co.,* 26 F. Supp. 859 (W. D. Okla., 1939).

The foregoing illustrations would seem to establish beyond any doubt the necessity for federal common law. As indicated, the Supreme Court has on numerous occasions drawn exceptions to the well established contrary dogma. The reiterations in the instant case and the accompanying convincing analysis of the subject are a refreshing and frank recognition of the existence of federal common law and will warrant consideration in the future.

J. O. T.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—PEACEFUL PICKETING

An Alabama Statute provided that "any person who without just cause or excuse goes near to or loiters about the premises or place of business of any other for the purpose or intent of influencing or inducing others to adopt any certain enumerated courses of action, or who pickets the place of business of any other person . . . shall be guilty of a misdemeanor." *Held,* unconstitutional as a restraint on freedom of speech and press. *Thornhill v. Alabama,* 60 S. Ct. 736 (1940).

Peaceful picketing for a lawful purpose not involving fraud, intimidation, breach of the peace, or coercion is now generally held to be lawful. 16 R. C. L. 453; *People v. Harris.* 104 Col. 386, 91 P. (2d) 989, 122 A. L. R. 1034 (1939); *Senn v. Tile Layers Union,* 301 U. S. 468 (1937); *E. M. Loew's Enterprises, Inc. v. International Alliances of Theatrical Stage Employees,* 125 Conn. 391, 6 A. (2d) 321 (1939); *United Chain Theatres v. Philadelphia Moving Picture M. O. Union,* 50 F. (2d) 189 (E. D. Pa. 1931); *Schuster v. International Assoc. M. A. M. L.,* 293 Ill. App. 177, 12 N. E. (2d) 50 (1938); *Stillwell Theatre v.*

Kaplan, 295 N. Y. 405, 182 N. E. 63 (1932). The right to picket has been based by many courts on the fact of statutory authorization. *American Furniture Co. v. I. B. of T. C. & H. of A.,* 222 Wis. 338, 268 N. W. 250 (1936); *New Negro Alliance v. Grocery Co.,* 303 U. S. 552 (1938); *Lauf v. Shumer Co.,* 303 U. S. 323 (1938). Recently there has been a tendency to treat peaceful picketing as an exercise of the privilege of freedom of speech guaranteed against state infringement by the Fourteenth Amendment. *Hague v. C. I. O.,* 307 U. S. 496 (1939); *Schneider v. State,* 308 U. S. 147 (1939); *Senn v. Tile Layers Union,* 301 U. S. 468 (1937); *People v. Harris,* 104 Colo. 386, 91 P. (2d) 989 (1939); Note [1940] WIS. L. REV. 272, note 8. This latter view has been definitely adopted by the court in the instant case. The distinction between these two views is not merely of academic interest but of practical importance in that under the latter view peaceful picketing is not subject to wide, indefinite restraint or absolute prohibition such as has recently been attempted by various state legislatures and which could lawfully be imposed if the right rested completely on the fact of statutory authorization. Note [1940] WIS. L. REV., 272.

Restrictions on the privilege of free speech in political and conscientious activities have been permitted only in the interest of the safety of the state. *Schenck v. U. S.,* 249 U. S. 47 (1919); *Frohwerk v. U. S.,* 249 U. S. 204 (1919); *Debs v. U. S.,* 249 U. S. 211 (1919); *Herndon v. Lowry,* 301 U. S. 242 (1937). It has been suggested that where private rights are threatened a restraint might be countenanced even though there was no threat to the safety of the state. Note [1940] WIS. L. REV. 272; *Abrams v. U. S.,* 250 U. S. 616 (1919). The opinion in the instant case does not constitute a denial of this but does indicate that peaceful picketing without more does not fall within the situation contemplated by this proposition, in that it holds that there is no "clear and present" danger to private rights inherent in peaceful picketing and that any restriction by the state on this right must be aimed "specifically at an encroachment of such rights." Just what type of conduct may be said to encroach upon private rights and therefore be enjoined is not indicated since the court was careful to base its decision on the fact that the statute in question prohibited every conceivable type of conduct. Neither does it appear from this opinion to what extent this right is to be limited by the purpose for which it is exercised. The Court says that "dissemination of information concerning the facts of a *labor union dispute*" is within the privilege of freedom of speech. The resulting problem as to when a dispute exists remains unanswered. Can it be implied from this that picketing is lawful only when there is an actual issue as to wages or working conditions, which was the case before the court, or may it be indulged in merely for the purpose of acquiring and maintaining a bargaining position? With regard to this question a recent Pennsylvania decision should be noted. The picketing there involved was for the purpose of forcing an employer to induce his one employee to join the union. The Court held that this purpose was unlawful. The fact that the equities of the case were in favor of the employer apparently did not influence the Court. *Flashner v. Amalgamated Meat Cutters and Butcher Workmen of North America, Local* 195, 37 Pa. D. & C. 337 (1939). See *Erdman v. Mitchell,* 207 Pa. 79, 56 Atl. 327 (1903). Even where a dispute does exist it seems that picketing should be lawful only if directed at a settlement of the dispute.

L. G.

CRIMINAL LAW—INVOLUNTARY MANSLAUGHTER—CAUSATION—UNLAWFUL ACT RESULTING IN DEATH

On trial on indictment charging defendant with involuntary manslaughter by automobile, the court charged the jury, in substance, that guilt could be found if the death occurred during the commission of the alleged unlawful act by defendant (which consisted of a violation of the provisions of the Motor Vehicle Code as to the aim and intensity of lighting beams and speed of operation), whether or not the death was the probable consequence of that act. *Held*, the jury should have been instructed that such unlawful acts would not support a conviction unless death was the natural result or probable consequence thereof. *Commonwealth v. Aurick*, 138 Pa. Super. 180, 10 Atl. 22 (1939).

There has never been in Pennsylvania a complete statutory definition of "involuntary manslaughter." The earliest statute, Act of April 22, 1794 (3 Sm. L. 186), as well as the Criminal Code of March 31, 1860, P. L. 382, section 79, as amended by the Act of April 11, 1929, P. L. 513, section 1, 18 PURD. STATS. (Pa.) § 2226, merely refers to "involuntary manslaughter, happening in consequence of an unlawful act." The courts, however, have clarified the meaning of this term. Involuntary manslaughter consists of "the killing of another without malice and unintentionally but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty." *Commonwealth v. Williams*, 133 Pa. Super. 104, 1 A. (2d) 812 (1938); *Commonwealth v. Mayberry*, 290 Pa. 195, 138 Atl. 686 (1927); *Commonwealth v. Micuso*, 273 Pa. 474, 117 Atl. 211 (1922); *Commonwealth v. Gable*, 7 S. & R. 422 (Pa. 1821).

The substantive connotation of the "unlawfulness" of the act upon which the culpability for the unintentional homicide is predicated as well as the method by which it may be determined are by no means settled. In some cases a distinction is made between acts which are *malum in se* and those which are merely *malum prohibitum*. The former are regarded as supplying a criminal intent, and as rendering the accused guilty, even though the killing was not the natural or probable result of the act. *Keller v. State*, 155 Tenn. 633, 299 S. W. 803 (1927); *American Jurisprudence*, Vol. 5, page 928; 99 A. L. R. 775. Although this distinction has been made in some lower court cases in Pennsylvania (*Commonwealth v. Lowans*, 21 Pa. D. & C. 66, 1934), it has been said that there is no case in Pennsylvania which holds, unqualifiedly, that to constitute involuntary manslaughter the unlawful act must be *malum in se* and not merely *malum prohibitum*. *Commonwealth v. Samson*, 130 Pa. Super. 65, 196 Atl. 564 (1938). In the latest edition of Wharton on *Criminal Law* (1932) Vol. 1, section 157, note 10, the difference adhered to in the earlier edition is discredited. There it is said that the distinction taken in the old books between *malum in se* and *malum prohibitum* in this relation is now exploded.

The distinction between *malum in se* and *malum prohibitum* was not discussed in the instant case. Under the view taken by the court, "if the act is unlawful,—that is, is forbidden by law, illegal, contrary to law,—and the death of another results as a consequence of it, it constitutes involuntary manslaughter." Also see *Commonwealth v. Williams*, 133 Pa. Super. 104, 108, 1 A. (2d) 812, 814 (1938); *Commonwealth v. Ushka*, 130 Pa. Super. 600, 604, 198 Atl. 465, 467 (1938); *Commonwealth v. Gill*, 120 Pa. Super. 22, 35, 182 Atl. 103, 108

(1935). The mere violation of a statute will not sustain an involuntary manslaughter conviction where it appears that the death was not the natural result or probable consequence of the unlawful act. *Commonwealth v. Aurick, supra.*

In the instant case the defendant argued that, because the Act of 1929, *supra,* amending the Act of 1860, *supra,* merely increased the penalty for the offense although the entire section was reenacted, the court must consider the crime of involuntary manslaughter as it existed in 1860, and that it could not be predicated upon an act which was not unlawful at that time. The court said that the "unlawful act" element in the crime of involuntary manslaughter connotes no particular offense known to the common law or created by statute. It is merely what it says, an act contrary to law. There is nothing inherent in this term, the court said, which would require it to hold that the legislature had in mind only acts which were unlawful at that time. Although this point was not raised in such cases as *Commonwealth v. Ernesto et al,* 93 Pa. Super. 339 (1928) and *Commonwealth v. Mango,* 101 Pa. Super. 385 (1930), they involved conviction for involuntary manslaughter where the death was in consequence of an act made unlawful by statute after 1860. See, also, *Commonwealth v. Godshalk,* 76 Pa. Super. 500 (1921); *Commonwealth v. Ochs,* 91 Pa. Super. 528 (1927); *Commonwealth v. Samson,* 130 Pa. Super. 65, 196 Atl. 564 (1938); *Commonwealth v. Matteo,* 130 Pa. Super. 524, 197 Atl. 787 (1938).

F. H.

CONSTITUTIONAL LAW—PRIVATE ACT REOPENING CASE BEFORE ADMINISTRATIVE TRIBUNAL—SEPARATION OF POWERS—DUE PROCESS

A private act of Congress directing the review of an order for compensation under the Longshoremen's and Harbor Workers' Compensation Act after there had been a final award and after the time for review had expired was passed in consequence of the fact that the testimony forming the basis for the finding that the injured employee had fully recovered and had been completely compensated turned out to be mistaken. The testimony originally taken was that of the company doctor. *Held,* the private act was valid, and not violative of due process under the Fifth Amendment. *Paramino Lumber Co. v. Marshall,* 60 S. Ct. 600, 84 L. Ed. 545 (1940).

The court had presented to it the issues of separation of powers, equal protection of law, and due process in the matter of retroactive legislation.

From the lack of discussion of the retroactive feature of legislation of this type in previously decided cases as well as in this case, we conclude that the question presented little difficulty to the Court.

The Court in its opinion resolved the questions of equal protection of laws and the separation of powers doctrine in favor of the constitutionality of the act.

This is a case of first impression. Four state decisions on problems similar to the one at hand have indicated rather clearly a contrary spirit. In *Decker v. Pouvailsmith Corp.,* 252 N. Y. 1, 168 N. E. 442 (1929) it was held that a private act of a similar type for the relief of one whose claim was barred by the New York Compensation Act was invalid as denying the equal protection of the laws.

In *State v. Industrial Accident Commission,* 94 Mont. 386, 23 P. (2d) 253 (1933) a private act of legislature ordering the board to hear a particular case barred under the Workmen's Compensation Act was declared void. See also *Casieri's Case,* 286 Mass. 50, 190 N. E. 118 (1934), a case concurring under the Workmen's Compensation Act, similar on its facts, in which the statute was held invalid as a violation of the Fourteenth Amendment. See also *Roles Shingle Co. v. Bergerson,* 142 Ore. 131, 19 P. (2d) 94 (1933). The due process clause of the Fourteenth Amendment is construed in the same manner as that of the Fifth. *Hurtado v. California,* 110 U. S. 516 (1884).

For this purpose the final adjudication of the employee's rights is not treated as a judgment, as that term is used by the courts. *Paramino Lumber Co. v. Marshall,* 84 L. ed. 545, at p. 549. The Court there distinguishes a large number of cases declaring invalid private acts which set aside judgments, granted new trials, re-hearings, etc., on the ground that they affected judicial judgments and not administrative orders. See for example, *Dorsey v. Dorsey,* 37 Md. 64 (1872); *De Chastellux v. Fairchild,* 15 Pa. 18 (1850); *Taylor v. Place,* 4 R. I. 324 (1856). Dicta in one or two of the very numerous cases on this point hint that such an act would be held valid in the presence of special equities. This is especially true of the Maryland decisions. *Dorsey v. Dorsey, supra.*

Mr. Justice Reed says in the instant case that this legislation is not "an excursion by the Congress into the judicial function". An interesting dictum is presented in the opinion in this statement: "The state cases cited by the appellants on the question of the invasion of judicial authority involve statutes affecting judicial judgments rather than administrative orders and are therefore inapplicable" citing cases. This statement gives rise to the question of whether this distinction is based upon the tribunal in which the order was made. If so, it would seem that the finality of administrative orders is subject to another qualification tending ultimately to remove all finality. Together with the case of *Crowell v. Benson,* 285 U. S. 22 (1931), which held that an administrative order is always subject to review by the courts on "constitutional facts," whatever they may be, the *Paramino* case further emasculates this aspect of an administrative order under the Longshoremen's and Harbor Workers' Compensation Act.

C. W. G.

TAXATION—ESTATE TAX—LIFE INSURANCE—THIRD BAILEY CASE

Between 1925 and 1929 decedent took out policies of insurance on his own life. In 1932 he assigned the policies to his wife and son as life owners, the survivor to be entitled to the proceeds at decedent's death. The assignment provided, however, that should both assignees predecease decedent, latter would become life owner and the proceeds payable to his executors, administrators, and assigns. Both assignees survived decedent. *Held,* proceeds of the policies so assigned are properly included in decedent's gross estate for purposes of taxation under § 302 (g) of the Revenue Act of 1924 (Now § 811 of the Revenue Code of 1939, 53 Stat. 120, 26 U. S. C. A. 811). *Bailey v. U. S.,* 31 F. Supp. 778 (Ct. Cl., 1940).

In the search for means of conferring benefits to take effect after the death of a donor but without subjecting the gift to the incidents of testamentary disposition, many benefactors have resorted to *inter vivos* transfers of life insurance policies. The plan works thus: *A*, wanting to make provision for his son, *B*, takes out a policy of insurance on his own life. Thereafter he makes an assignment of the policy to *B*, who becomes the owner and entitled to the proceeds upon *A's* death.

Use of this scheme is founded upon the belief that an irrevocable assignment of the type outlined will be effective to avoid inclusion of the proceeds in insured's gross estate for estate tax purposes, and to take advantage of the substantial difference between the estate tax and the gift tax. See Note (1939) 49 *Yale L. J.* 126 (Discussing such savings in detail). This belief is the result of a sizeable body of authority to the effect that if no incidents of ownership are retained by decedent no estate tax levy can be made. This is the interpretation of the Commissioner of Internal Revenue. Regulations 80, Article 25 (1934) (incidents of ownership include right of insured or his estate to economic benefits of the policy, to assign it, revoke an assignment, pledge it for a loan, or to obtain a loan from the insurer against the surrender value, etc.).

An earlier interpretation by the Commissioner made payment of premiums by the insured an important element of taxability under § 302 (g). A line of cases adopted the same view. *Lang v. Comm'r,* 304 U. S. 264 (1938); *Wilson v. Crooks,* 52 F. (2d) 692 (W. D., Md., 1931); *Helvering v. Reybine,* 83 F. (2d) 215 (C. C. A. 2nd, 1936); *Nelson v. Comm'r,* 101 F. (2d) 568 (C. C. A. 8th, 1939). See also Note (1937) 32 *Ill. L. Rev.* 223.

Aside from this element, however, it has been consistently held that unless some incident of ownership is retained by the insured, there is no transfer at death to justify imposition of the estate tax. *Tyler v. U. S.,* 281 U. S. 497 (1930); *Bingham v. U. S.,* 296 U. S. 211 (1935); *Industrial Tr. Co. v. U. S.,* 296 U. S. 220 (1935); *Heiner v. Grandin* (C. C. A. 3rd, 1930) 44 F. (2d) 141, *cert. denied* 286 U. S. 561 (1932); *Anthracite Tr. Co. v. Phillips,* 49 F. (2d) 910 (M. D. Pa. 1931); *Levy v. Comm'r,* 65 F. (2d) 412 (C. C. A. 3rd, 1933); *McKelvy v. Comm'r,* 82 F. (2d) 395 (C. C. A. 3rd, 1936). See also Note (1938) 118 A. L. R. 325, 326, and Paul, "Life Insurance and the Federal Estate Tax", 52 *Harv. L. Rev.* 1037 (1939).

Under these cases an irrevocable assignment was deemed to divest all the so-called incidents of ownership sufficiently to prevent a taxable transfer at death even though a reversionary interest remained in the insured by virtue of a provision that he or his estate get the benefits of the policy should the assignee predecease him. *Industrial Tr. Co. v. U. S., supra.*

So far as the assignements here discussed are concerned the same exemptions have been granted whether the transfer was completed before or after promulgation of § 302 (g). *Ballard v. Helburn,* 85 F. (2d) 613 (C. C. A. 8th, 1936); *Walker v. U. S.,* 83 F. (2d) 103 (C. C. A. 8th, 1936); *Boswell v. Comm'r,* 37 B. T. A. 970 (1938).

First Bailey case, 27 F. Supp. 617 (Ct. Cl., 1939). On a finding that *insured* paid the premiums after the assignment, the Court held that the proceeds were subject to the estate tax, though admitting that its holding was not in accord with *Walker v. U. S., Helburn v. Ballard,* and *Boswell v. Comm'r.,* all *supra.* Under prior cases the irrevocable transfer would have been sufficient to exempt the proceeds under § 302 (g). See Friedland, "The Bailey Case" (1939) 17 *Tax*

Magazine 512; Foosaner, "Some of the Tax Problems in Life Insurance", 63 *N. J. L. J.* 21; Note (1939) 49 *Yale L. J.* 126; (1939) 13 *Temple L. Q.* 538.

Second Bailey case. Upon a showing that *assignee* rather than insured paid the premiums subsequent to the assignment, the former opinion was modified and tax refunded. 30 F. Supp. 184 (Ct. Cl., 1939). The Court pointed out, however, that its prior decision was not reversed but merely modified to exclude cases in which the assignee paid the premiums. As to other cases, the proceeds of irrevocably assigned policies were apparently still regarded as includible in gross estate. See Foosaner, "Some of the Tax Problems in Life Insurance", *supra;* C. C. H., 401 *Fed. Tax Service* § 0373 (Note).

Then came *Helvering v. Hallock,* 308 U. S. (1940), 8 *U. S. L. Week* 192, in which it was held there was a sufficient transfer at death to justify a levy under § 302 (c), even though decedent's interest had been irrevocably transferred, where he had retained a possibility of reverter. See Surrey, "Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes" (1940) 88 *U. of Pa. L. Rev.* 556, 579 *et seq.*

Third Bailey case. In its last decision the Court reaches the result of its first opinion, but this time on the authority of *Helvering v. Hallock,* taxability being deemed to arise out of the extinguishment at insured's death of the possibility of reverter retained after assignment.

Obviously, these cases are not the last word as regards the application of § 302 (g) to assignments of life insurance policies. Generalization based upon *inter vivos* assignment will not escape the estate tax if (1) assignor continues to pay premiums thereafter, or (2) there is a possibility of reverter to assignor upon the prior death of assignee. There would seem to be no authority saying that an irrevocable assignment, the beneficiary paying the premiums thereafter, and with no possibility of reverter to the assignor, will not be exempt.

R. H. G.