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RECENT CASES

CRIMINAL LAW — MURDER — INTOXICATION AS A DEFENSE — BURDEN OF PROOF: In the course of the majority opinion in *Commonwealth* v. *Chapman*[1] two statements appear which are on their faces completely contradictory. It is the purpose of this note to indicate the extent of the apparent antinomy and to suggest a method by which the phrases may be made less confusing in presentation to both legal and lay minds.

To an indictment for murder the defendant had pleaded guilty, raising the defense of intoxication. Both the trial court, sitting without jury, and the Supreme Court found the defendant guilty of first degree murder. The two statements pertinent to this discussion, both boasting a long line of judicial precedent, were:

1. THE BURDEN IS UPON THE COMMONWEALTH to establish the essential element of the higher degree of crime—a specific intent to kill.

2. The appellant has not sustained THE BURDEN UPON HIM of establishing by a fairly preponderating evidence that his intoxication prevented him from forming the requisite intent.

Similar conflicting words, used in instructing a jury in a case where "alibi" was a defense, received harsh treatment from Chief Justice Maxey speaking in *Commonwealth* v. *Barnak*.[2] Such instructions were called incongruous, "an anomaly which trial judges would do better not to repeat", and it was stated that such instructions confuse both lawyers and juries.

Immediately the questions arise as to what the "burden" is and upon whom it falls. The plea of guilty to an indictment for murder is only to the crime of second degree murder. If the Commonwealth desires to raise the degree of the crime, the BURDEN is upon it to prove facts supplying the essential elements of first degree murder including the specific intent to take life.[3] Initially and at every stage of the trial the BURDEN, or risk of non-persuasion of the trier of fact is on the Commonwealth.[4]

In interposing the defense of intoxication the defendant asserts that his mind was so clouded with liquor that he did not have the capacity to form a specific intent to take human life. By this defense he assumes the BURDEN of coming forward with evidence that the intent could not exist. This means simply that the defendant must satisfy the court that there is a sufficient quantity of evidence of intoxication to be considered by the judge. This BURDEN starts with the defendant and remains until the judge has decided as a matter of law that it has been satisfied.[5]

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1 359 Pa. 164, A. 2d (1948).
2 357 Pa. 391, 54 A. 2d 865 (1947).
3 Commonwealth v. Jones, 355 Pa. 522, 50 A. 2d 317 (1947).
4 Commonwealth v. Tiffany, 121 Pa. 165, 15 A 462 (1888).

At this point however the defendant is faced with the necessity of overcoming a presumption of mental capacity which arises in criminal cases.[6] It would be impractical to compel the Commonwealth in all cases to show the existence of a mental state which does not lend itself to proof by objective manifestations but is essentially finally determinable only by subjective tests. It is incumbent upon the defendant to show by fairly preponderating evidence that he was, because of intoxication, unable to intend death with a full and conscious knowledge, although it is not necessary that all doubt be removed.[7] This seems to be the extent of the BURDEN upon the defendant.

However the Commonwealth retains the primary BURDEN without exception or mitigating circumstance. It must show *beyond a reasonable doubt* that the intent in fact did exist and this involves producing evidence that the intoxication was not sufficient to destroy the capacity to intend.[8] This common law requirement has found collateral statutory approval in Pennsylvania.[9] Further it should be noted that the deliberation necessary to form the intent to kill is the fact that must be proved and not a deliberation upon the intent.

In the case two justices dissented but on a question of fact saying that the evidence of drunkenness was so fairly preponderating as to negative the formation of a specific intent to kill. Later upon the unanimous recommendation of the Pardons Board and "- -in view of the strong dissent" the Governor of the Commonwealth commuted the defendant's sentence to life imprisonment.[11]

In instructing a jury the mentioning of the word "BURDENS" should be and can be avoided.[12] The jury's attention should be called to the fact that intoxication does not excuse the crime and that not all drunkenness will succeed in preventing the crime from becoming that of murder of the first degree, but that the jury must determine whether the intoxication deprived the defendant of the power of judging his acts and their legitimate consequences.[13] After instructing the jury as to the duty of the prosecution, the part of the defendant can be shown substantially as follows: If the defendant has shown by fairly preponderating evidence that his intoxication prevented him from having a present capacity to intend death then that evidence must cast a reasonable doubt as to the Commonwealth's proof of intent and the defendant must be acquitted of murder in the first degree.

Robert G. Crist

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5 Commonwealth v. Woodley, 166 Pa. 463, 31 A 202 (1896); IX WIGMORE EVIDENCE 284 (3rd ed. 1940).

6 Commonwealth v. Morrison, 266 Pa. 223, 109 A 878 (1920).

7 Commonwealth v. Daley, 2 Clark 361 (Pa. 1844).

8 Commonwealth v. Turner, 86 Pa. at 74 (1878).

9 Act of February 15, 1870, PL 15, 19 PS 1187.

10 Keenan v. Commonwealth, 44 Pa. 55 (1862).

11 HARRISBURG EVENING NEWS, July 3, 1948.

12 Commonwealth v. Mills, 350 Pa. 476, 39 A. 2d 572 (1944).

13 Commonwealth v. Cleary, 135 Pa. 64, 19 A 1017; Commonwealth v. Crozier, 1 Brews. 349 (Pa. 1867).

DOMESTIC RELATIONS — CONFLICTS OF LAWS — FOREIGN DIVORCE DECREES ENTITLED TO FULL FAITH AND CREDIT: Some of the confusion regarding the status of migratory divorces has been cleared by the Supreme Court decision in *Sherrer* v. *Sherrer,* decided June 7, 1948,—U.S.—, 68 S.C.T. 1087, 92 L.Ed. 1055.

Chief Justice Vinson, in the majority opinion, held that the courts of one state cannot overturn the divorce of another state when both the husband and the wife appeared before the divorce judge. This is a move toward settlement of the confused status of persons who rely upon a migratory divorce decree. The constitutional provision that each state shall give full faith and credit to the decisions of the sister state is given as the reason for the court's decision.

The facts of the case were that the wife went to Florida, ostensibly for a vacation, (the domicile of the couple being in Massachusetts), but she remained in Florida and eventually sued her husband for divorce there. The husband appeared to question the jurisdiction of the court, on the ground that the libellant was not a resident of Florida. The court decided that she satisfied the Florida residence requirements and therefore that they had jurisdiction. The Florida court proceeded to grant the wife a divorce.

An attempted redetermination of this decision by the Massachusetts court, at the instance of the husband, was held void by the Supreme Court as a denial of full faith and credit to which the Florida decree was entitled.

In the language of the opinion, "In refusing to recognize the validity of that decree (Florida divorce decree), the Massachusetts courts have asserted a power which cannot be reconciled with the requirements of due faith and credit." Full faith and credit must be given to divorce decrees rendered in contested cases by courts in sister states no less than to other decrees.

In a dissenting opinion, Justice Frankfurter (who was joined by Justice Murphy) stated that although the majority decision could result in greater certainty as to the status of divorced persons, it may also result in reducing divorce standards of all the states to that of the few states who make an industry of granting "quickie" divorces.

He reminds the court of difficulties inherent in the Federal system whereby governmental power over domestic relations is not given to the central government. He would lend strength to the contention that the states should have the power to regulate the domestic problems of its citizens.

In his language—"The real question here is whether the full faith and credit clause can be used as a limitation on the power of a state over its citizens who do not change their domicile, who do not remove to another state, but who leave the state only long enough to escape the rigors of its laws, obtain a divorce, and then scurry back."

Frankfurter believes that the number of persons who obtain such divorces is relatively small (less than 6% of all U.S. divorces in 1940 were granted in the major divorce mills of Florida and Nevada), and he therefore asks — "is their security so important to the nation that we must safeguard it even at the price of depriving the great majority of states which do not offer bargain-counter divorces of the right to determine the laws of domestic relations applicable to their citizens?" The dissent is of the opinion that the tangled problem cannot be solved by the judiciary but that it can only be done by constitutional amendment or congressional action.

Here, it would seem, is the crux of the disagreement. Law-abiding citizens, who in good faith remarry on the strength of a foreign divorce decree, may be involved in civil or even criminal litigation, if the decree is declared invalid. The majority opinion is an attempt by the court to alleviate this situation. The dissent would leave it to the law-makers to correct.

In absence of uniform laws, throughout the land and with the apparent reluctance of our law makers to formulate such a uniform code, can the U. S. Supreme Court be deemed officious in attempting to prevent such interstate dissension? It seems to the writer that such a charge could scarcely be made, and although a vigorous dissent has been recorded in the case under discussion, the need for such a decision as in *Sherrer* v. *Sherrer* was obvious.

The legal profession and interested principals can see daylight through the tangled confusion of contrary divorce decisions, and attorneys can advise their clients, upon the authority of the Supreme Court, that, *provided the husband and wife submit to the foreign court's jurisdiction, a divorce decree handed down by the forum will be entitled to full faith and credit in the courts of other states.*

This single decision cannot cope with the enormity of the problem and so long as the divorce requirements amongst our states vary, confusion and doubt will remain. The lawmakers should heed the warnings of Justice Frankfurter, lest the divorce standards of all the states be lowered to the dubious requirements of Florida, Nevada, Wyoming, Arkansas and Idaho. The court has done its share toward resolving the stigma surrounding divorce decrees of foreign states.

As has occurred before in its history, the judiciary has shown the way for the legislative branch. The need for uniform divorce legislation is great. Perhaps the decision recorded in *Sherrer* v. *Sherrer* will provide the necessary impetus for it.

Perrin C. Hamilton

PRACTICE — NO APPEAL FROM DENIAL OF MOTION FOR JUDGMENT ON THE WHOLE RECORD AFTER JURY DISAGREEMENT — ACT OF 1911: Pennsylvania's Act of April 20, 1911, P. L. 70, 12 P. S. 684, provides that whenever upon the trial of any issue a point requesting binding instructions has been reserved or declined, and the jury have disagreed, the party who presented the point may move the court to have the evidence taken on the trial certified and filed so as to become part of the record, and for judgment in his favor upon the whole record. The trial court is then under a duty, unless it shall be of the opinion that the case should be retried, to so certify the evidence and to enter such judgment, if any, as should have been entered upon the evidence at the time of the trial. "From the judgment thus entered the party against whom it is entered may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment, if any, as should have been entered by the court below upon the evidence." The act makes no reference to appeals other than in the sentence just quoted.

The Act of 1911 has given rise to a number of conflicting decisions on whether a party who moves for judgment on the whole record under the authority of this act has a right to appeal where the court is of the opinion that the case should be retried, and consequently dismisses the motion rather than enter a judgment in favor of either party. This conflict has been resolved by the recent case of *De Waele* v. *Metropolitan Life Insurance Company*, 358 Pa. 574, 58 A. 2d 34, (1948) which holds that *there is no right of appeal from the refusal of the court to enter judgment on the whole record under the Act of* 1911. The opinion, written by Justice Jones, reviews all of the cases since 1911 in which appeals have been taken from refusals to enter judgment on the whole record after disagreement of the jury. The decision overrules the case of *Conley* v. *Mervis*, 324 Pa. 577, 188 A. 350 (1936), and a line of decisions beginning with *Phillips* v. *American Stores Company*, 342 Pa. 33 20 A. 2d 190 (1941). The Court relies on the early case of *Lipsky* v. *Stolzer*, 236 Pa. 151 (1912) 84 A. 688, as authority for its conclusion.

The *De Waele* decision reiterates the holding of the *Lipsky* case, that the Act of 1911 authorizes an appeal only from the "judgment thus far entered" and that an order dismissing a motion for judgment on the whole record is not itself a "judgment" within the meaning of the statute. That the *Lipsky* decision was correct the court infers from the fact that in 1925 the Pennsylvania legislature amended the "Judgment N.O.V. Act" (Act of April 22, 1905, P. L. 286, 12 P. S. 681; amended by Act of April 9, 1925, P. L. 221, 12 P. S. 681, 682), which is closely related to the Act of 1911, without making any change in the latter act. The case of *Conley* v. *Mervis*, *cit. supra*, held that an appeal could be taken from the lower court's refusal to enter judgment on the whole record if there was no conflicting evidence necessitating the determination of a question of fact by the jury. The *De Waele* decision points out that the right of appeal cannot be made to depend upon the extent or character of relief affordable under the particular facts of the case but must depend upon the power of the appellate court to enter into the inquiry in the

first place. The decisions led by the case of *Phillips* v. *American Stores Company, cit. supra,* treated the appeal from the dismissal of a motion to enter judgment on the whole record, at least where the dismissal of the motion was accompanied by an order for new trial, as an appeal from the award of a new trial, which is permissible under some circumstances at common law. The *De Waele* decision repudiates this theory. The court notes that an appeal from an order for new trial is a review for palpable abuse of discretion or plain error of controlling law in the granting of the new trial. Where the jury have disagreed, a new trial ensues without a grant thereof by the court. The court reasons that there can be no review of judicial discretion where none has been exercised and where judicial action would have been vain, so that it is unrealistic to treat the appeal as one for review of an award of a new trial.

It is regrettable that the rule of the *Lipsky* case was ever allowed to be qualified, because of the uncertainty which developed. In the eleven years since the decision of *Conley* v. *Mervis* modified the rule of *Lipsky* v. *Stolzer,* some sixteen appeals from dismissals of motions for judgment on the whole record were allowed and decided by the Supreme and Superior Courts. On the basis of established principles of law, however, the *Lipsky* and *De Waele* decisions appear to be correct. It is a familiar rule of law that no appeal may be taken from a judgment, order, or decree which is not a final disposition of the matter in controversy unless appeal is expressly provided for by statute. *American Trust Company* v. *Kaufman,* 279 Pa. 230, 123 A. 785 (1924); *Coleman* v. *Huffman,* 348 Pa. 580 (1944) 36 A. 2d 724. A judgment is not final unless, upon its affirmance, nothing remains but to execute it. *National Transit Company and J. C. McDowell* v. *United States Pipe Line Company,* 180 Pa. 224, 36 A. 724 (1897). Clearly the dismissal of a motion for judgment on the whole record is not a final judgment, since a new trial will automatically ensue. The decision is in accord also with the principle of statutory construction that statutes in derogation of the common law are to be strictly construed. Act of May 28, 1937, P. L. 1019, Art. IV, §58, 46 P. S. 558 (Statutory Construction Act); *March* v. *Philadelphia and West Chester Traction Company,* 285 Pa. 413, 415, 132 A. 355 (1926). Moreover, the decision is consistent with the court's interpretation of the similarly worded "Judgment N. O. V. Act" in *Sloan* v. *Miller,* 275 Pa. 452, 455, 119 A. 556 (1923).

However correct the *DeWaele* v. *Metropolitan Life Insurance Company* decision may be, it leaves an anomalous situation in the law. Where a party's point for binding instructions is reserved or declined and a verdict against him is found, he may move the court for judgment *non obstante veredicto,* and he has a right of appeal from an adverse decision, whether it takes the form of a judgment for the other party or an order for new trial. Yet that same party, if the jury should happen to disagree, although he may move for judgment on the whole record and appeal if the court enters judgment for his opponent, has no right of appeal if the court refuses to enter a judgment and thus allows a new trial to take place. This inconsistency arises from the differences in the provisions of the statutes involved, and

the correction of it is not a matter for the court but for the legislature. The "Judgment N.O.V. Act," enacted in 1905, made express provision for either party to appeal from a judgment entered against him on motion for judgment *non obstante veredicto* but made no reference to a right of appeal from an order for a new trial. The Act of 1911, which was phrased in language very similar to that of the "Judgment N.O.V. Act," also made provision for appeal from a judgment entered on motion for judgment on the whole record after disagreement of the jury and did not refer to appeal from a refusal to enter any judgment. In 1923 the Supreme Court ruled that no appeal could be taken from an award of a new trial on motion for judgment n.o.v. under the Act of 1905, the court's decision being based on much the same grounds as underlie the *Lipsky* and *De Waele* decisions. *Sloan* v. *Miller, cit. supra.* The legislature created such right to appeal by amending the Act of 1905 at the 1925 session. The legislature did not at that time make, and has not subsequently made, any change in the Act of 1911.

An amendment of the Act of 1911 seems to be in order. The wording of the Act of 1905 and the Act of 1911 are almost identical, the only differences being that the first refers to a motion "for judgment non obstance veredicto upon the whole record," while the second speaks of a motion "for judgment in his favor upon the whole record" and applies to the situation where "the jury have disagreed." Both statutes were obviously designed with the same purpose, to permit a party who was entitled to a directed verdict at the trial to gain substantially the same benefit after trial. *Bond* v. *Pennsylvania Railroad Company,* 218 Pa. 34, 66 A. 983 (1907) (judgment n.o.v.); *Derrick* v. *Harwood Electric Company,* 268 Pa. 136, 111 A. 48 (1920) (judgment on the whole record.) The question for determination on each motion is the same: should the court have given binding instructions for the moving party at the trial? *O'Gara* v. *Philadelphia Electric Company,* 22 District Rep. 304 (1913), affirmed on other grounds in 244 Pa. 156 (1914). That the jury have failed to agree should make no difference, since it is the contention of the moving party that there was no issue to go to the jury, that his right to judgment was clear as a matter of law at the close of the evidence. If he has a right to appeal from an adverse determination of this question on motion for judgment n.o.v., it would seem that he should have the same right where he has moved for judgment on the whole record after disagreement of the jury. It appears to the writer that legislative action to bring the Act of 1911 into conformity with the amended "Judgment N.O.V. Act" is highly desirable.

D. Fenton Adams

CRIMINAL LAW—JUDICIAL DEFINITION OF THE CORPUS DELICTI: The definition of the *corpus delicti* in Pennsylvania has been a source of confusion and misunderstanding. Certainly to a great number of law students, and perhaps some practicing attorneys, the term '*corpus delicti*' in relation to homicide cases has meant the corpse of a murdered man, and nothing else. Support for this view might be drawn from the definition found in Black, *Law Dictionary* 443 (3rd Ed. 1933), where the *corpus delicti* is defined as:

> "The body of a crime. The body (material substance) upon which a crime has been committed, e.g., the corpse of a murdered man, the charred remains of a house burned down. In a derivative sense, the substance or foundation of a crime; the substantial fact that a crime has been committed."

Black cites numerous authorities for this definition but no Pennsylvania cases. An investigation of decisions fails to disclose any case in which the *corpus delicti* is defined as 'the body of a crime'. It appears that this state has used the term wholly in the derivative sense, and further, when used in this connection the courts of our state have not been consistent.

The most recent pronouncement of the definition of the *corpus delicti* in Pennsylvania was made by the Supreme Court in *Commonwealth* v. *Haley,* 359 Pa. 477, — A. 2d — (1948), a case involving a homicide. There the court establishes this state as being among a decided minority[1] of the states which, in defining the *corpus delicti* in a homicide case, require as an essential element the proof of the agency of the accused. In making its decision the court reiterated the definition announced in *Commonwealth* v. *Scovern,* 292 Pa. 26, 140 A. 611 (1927), where the court said:

> "Corpus delicti consists of a criminal act, a resulting death, and the agency of the accused in its commission. It must appear that the deceased died from the effects of a wound unlawfully inflicted by the person charged. See Wharton on *Homicide,* 3d. ed., p. 897 . . . . . ."

The majority of the states define the *corpus delicti* as consisting of two elements: (1) the criminal act, i.e. that an act was done under circumstances pointing to a crime, and (2) the existence of a result forming the basis of the charge, i.e., the death of someone in a homicide charge, or the fact that a house burned down in an arson charge, etc. But it is to be noted from the definition of the Pennsylvania Supreme Court quoted above that this state requires three elements: (1) the criminal act, (2) the resulting death in a homicide, *and* (3) the agency of the accused, i.e., that the person on trial was the responsible party, or one of the responsible parties. It is the wisdom of the inclusion of the third element that prompts this note.

The facts in the *Haley* case were undisputed. The defendant observed the deceased, in the company of a hostile crowd, about to strike the brother of the defendant, and thereupon, in an attempt to hold off the crowd, stabbed deceased in the chest. A hemorrhage developed and an operation failed to save his life. There

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[1] 23 Corpus Juris Secundum §916 (1940).

was no autopsy performed and the only contention of the defendant was that the death did not result from the criminal act. Thus the issue in the case was not the criminal act, nor the fact of death, nor the agency of the accused, but was one of causal connection alone. Under these circumstances whether or not the definition of the *corpus delicti* as announced by the court contained the element of the agency of the accused was immaterial, since the agency was clearly shown and was undisputed.

In *Commonwealth* v. *Scovern, supra,* the issue in the case was the sanity of the defendant, and the court by way of dicta announced the definition of the *corpus delicti* which was later relied upon in the *Haley* case.

Thus in both the *Scovern* and the *Haley* cases, the definition of the *corpus delicti* was merely dicta. But where an accurate definition of the *corpus delicti* is essential to a proper decision, the use of the third element in the Pennsylvania definition, i.e., the agency of the accused, causes some poor results.

The authority relied upon in the *Scovern case,* and the source of the Pennsylvania definition of the *corpus delicti,* is Wharton, *Homicide* 897 (3rd ed. 1907). But in the same volume and on the preceding page the author says:

> "Before presumptive evidence, tending to connect the defendant with the crime, can be invoked, the corpus delicti must be established beyond reasonable doubt."

In a great number of homicide cases the only type of evidence available to show the connection of the defendant with the crime (the agency of the accused) is presumptive evidence. And if the agency of the accused is an essential element of the *corpus delicti,* as is asserted, then we have the incongruous result of requiring proof of the *corpus delicti,* i.e., (1) the criminal act, (2) the resulting death, and (3) the agency of the accused, beyond a reasonable doubt, before evidence showing (3) the agency of the accused can be admitted. Such a result is certainly undesirable.

The inclusion of the agency of the accused as a requisite for the proof of the *corpus delicti* in a homicide case will produce another undesirable result. It is well established that there are three elements to the charge of criminal homicide and, if these are established beyond a reasonable doubt, the Commonwealth's case is proved. These elements are, (1) the death, or the result, (2) the criminal act, and (3) that the defendant is the responsible party.[3] Thus if the agency of the accused is an element of the corpus delicti, when the corpus delicti is proved, there is nothing more to be shown, for it would be synonymous with the whole of the charge. There would then, of course, be no necessity for the admission of further evidence of any type, for the Commonwealth would have met its burden. Commenting upon this situation, Wigmore,[4] in discussing the view that would include the agency of the accused as an element of the corpus delicti, says:

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[2] Ibid.
[3] Commonwealth v. Turza, 340 Pa. 128, 16 A. 2nd 401 (1940).
[4] Wigmore, EVIDENCE §2072 (3rd ed. (1940).

> "A third view, indeed, too absurd to be argued with, has occasionally been advanced, at least by counsel, namely, that the 'corpus delicti' includes the third element also, i.e., the *accused's identity* or agency as the criminal. By this view the term 'corpus delicti' would be synonomous with the whole of the charge, and the rule (that the corpus delicti must be proven before the admission into evidence of a confession of the accused) would require that the whole be evidenced independently of the confession which would be absurd." (Parenthetical matter supplied.)

This brings up the question as to whether or not the courts of Pennsylvania would adhere to the definition of the *corpus delicti* announced in the *Haley* case when the question in the case is whether the *corpus delicti* has been established before allowing the admission of the confession of the accused into evidence. A review of the cases indicates that it would not.

It is a well established rule of evidence in this state that the *corpus delicti* must be proved before the confession of the accused will be admitted.[5] In *Commonwealth* v. *Gardner,* 282 Pa. 458, 128 A. 87 (1925), the court explained the purpose of the rule as being to avoid the injustice of a conviction when no crime exists. Thus it is essential that the crime be shown by sufficient evidence, and this is done by showing (1) the fact of the death, and (2) that the death resulted under circumstances pointing to the commission of a crime. "In this manner," the court said, "the corpus delicti is shown." The court then cited *Gray* v. *Commonwealth,* 101 Pa. 380 (1882), in reiterating the general rule to the effect that when the fact that a crime has been committed by *someone* is shown, the confession will be received into evidence, to show the agency of the accused. In this connection the Court did not include the agency of the accused as an element of the *corpus delicti.*

In *Commonwealth* v. *Turza,* 340 Pa. 128, 16 A. 2d 401 (1940), the question was whether the lower court was correct in admitting the defendant's confession to a homicide into evidence, before the *corpus delicti* had been established. The defendant contended that the Commonwealth had to prove (1) the death of the person, and (2) somebody's criminality, and (3) the agency of the accused, *as the corpus delicti,* before his confession should have been admitted. It is to be observed that the defendant argued for such a definition of the *corpus delicti* as was laid down by the *Haley* case. But the court here disposed of his argument saying:

> "Thus, wherever, as here, the Commonwealth, in a homicide case, has established that the person for whose death the prosecution was instituted is in fact dead and that the death occurred under circumstances indicating that it was criminally caused by *someone*, the rule is satisfied and admissions or confessions of the accused may then always be received as proof of the guilty agent . . . . ."

Again the agency of the accused is not included as an element of the *corpus delicti.*

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[5] Gray v. Commonwealth, 101 Pa. 380 (1882); Commonwealth v. Gardner, 282 Pa. 458, 128 A. 87 (1925); Commonwealth v. Bishop, 285 Pa. 49, 131 A. 657 (1926); Commonwealth v. Lettrich, 346 Pa. 497, 31 A. 2d 710 (1943).

The rule is repeated in the comparatively recent case involving homicide, of *Commonwealth* v. *Lettrich,* 346 Pa. 497, 31 A. 2d 155 (1943). There the court said:

> "The question . . . . is not whether defendant committed the murder, but whether the evidence should go to the jury, ... to determine that the child was dead and that it came to its death by felonious act; in other words, that there was sufficient evidence of the corpus delicti to go to the jury."

The most comprehensive opinion on the subject was handed down by Judge Keller in the case of *Commonwealth* v. *Chuing,* 150 Pa. Super. 445, 282 A. 2d 710 (1942). This case did not involve a homicide, but was concerned with the defendant's guilt to the charge of possessing and selling opium. The defendant contended that his admissions to police officers could not be admitted into evidence until after the *corpus delicti* had been proved, and that the agency of the accused had not been proved before the confessions made by the defendant had been admitted into the evidence. The court quoted extensively from Wigmore,[6] and the *Turza* and *Gardner* cases, *supra,* and concluded by holding to the effect that although the agency of the defendant was an essential and necessary element of the offenses charged in the indictment, it was not an element or constituent of the *corpus delicti.*

In conclusion it appears that Pennsylvania continues to give lip service to the definition of the *corpus delicti* as announced in the *Haley* case, i.e., that it consists of three elements, namely, (1) a criminal act, (2) a resulting death, *and* (3) the agency of the accused in its commission. However, since in each instance that this definition was used it was employed as dicta, it appears that the true rule which will be followed by the courts of this state, when the corpus delicti is the matter in issue, is that of the majority of states, i.e., that the *corpus delicti* consists of (1) the criminal act, and (2) the resulting death. It is the "loose usage"[7] of the definition of the *corpus delicti* by the courts that causes them to be constantly plagued with cases where counsel for the defendant contend that the agency of the accused was not shown and thus the *corpus delicti* was not proved, so that admissions or confessions of the defendant could not therefore be admitted against him. Such an argument can be completely eliminated by strict adherence to the definition of *corpus delicti* which does not include the agency of the accused.

Joseph H. Jones, Jr.

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[6] *Supra,* note 4.

[7] State v. Joy, 315 Mo. 7, 285 S. W. 489 (1926), where Justice Blair in a concurring opinion said that the agency of the accused was not an element of the corpus delicti and described statements of the courts to the contrary as "loose expressions", and suggested that the inclusion of the criminal agency of the person on trial as an element of the corpus delicti has "doubtless crept into the decisions in those cases where it happened to be necessary to show the criminal agency of the accused in order to establish the very fact of the crime."

DOMESTIC RELATIONS—CONFLICTS OF LAWS—EFFECT OF FOREIGN DIVORCE ON DOMESTIC SUPPORT ORDER—"THE NEW DOCTRINE OF HALF-FULL FAITH AND CREDIT": In June of 1948, the Supreme Court of the United States decided two companion cases that may have a profound effect on the volume of migratory divorces. In *Estin* v. *Estin*[1] and *Kreiger* v. *Kreiger*[2] it was held that a support order given to a wife in one state will survive an absolute divorce based on constructive service granted the husband in another state. At first glance the proposition appears sound and the basic reasoning behind it is in accord with sound legal logic. But an examination of the cases reveals an unfortunate application of the full faith and credit clause of the Federal Constitution in such a manner as to operate as a denial of due process of law. In those states where an absolute divorce ends the duty of the husband to support the wife it also ends the right of the wife to such support, but in certain other states the right of support continues after divorce.[3] The decisions in the principal cases are from New York, a jurisdiction which does not recognize the wife's right to support after the husband has secured an absolute divorce.[4] The net result of the cases is to give support to a wife whom the husband is not legally required to support. The husband finds himself in this extraordinary situation because he obtained his divorce in a foreign jurisdiction and the practical result may well be a slowing down of the migratory divorce rate.

Since both cases involve important considerations under the full faith and credit clause of the Constitution[5] as well as important principles of domestic relations and conflicts of laws, the factual backgrounds become extremely important. In the *Estin* case, the wife had been awarded $180 monthly for her maintenance and support in a separation proceeding brought by her in New York. Subsequently, the husband obtained an absolute divorce in Nevada based on constructive service but the decree said nothing on the issue of alimony. Thereupon the wife sued in New York for the arrears due on the support order, since the husband had stopped payment upon obtaining his divorce. The New York court following the rule of *Williams* v. *North Carolina*[6], and *Esenwein* v. *Pennsylvania*[7], found in accord with the Nevada Court that Mr. Estin was a bonafide resident of Nevada and that his divorce was therefore entitled to full faith and credit. However, judgment was given for the wife on the theory that the Nevada Court lacked jurisdiction to terminate the New York support order. The facts of the *Kreiger* case are very much the same except that the previous support order included a provision for the support of children. The following discussion does not dwell on the latter aspect because the status

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[1] —U. S. —, 68 S. Ct. 1213, — L. Ed. —, (1948).
[2] — U. S. —, 68 S. Ct. 1221, — L. Ed. —, (1948).
[3] 27 Corpus Juris Secundum § 229.
[4] Davies v. Davies, 62 N. Y. S. 2nd. 790, (1946).
[5] Estin v. Estin, note 1 supra, at 1215 n.
[6] 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273, (1942) 325 U. S. 226, 65 S. Ct. 1092, 89 L. ED. 1577, 157 A.L.R. 1366, (1945).
[7] 325 U. S. 279, 65 S. Ct. 1118, 89 L. Ed. 1608, 157 A.L.R. 1273, (1945).

of New York law is such that children are entitled to support from the father in any event and he is legally bound to support them after he obtains a divorce[8].

Mr. Justice Jackson in his dissenting opinion terms this decision as a "Solomon-like conclusion" that the Nevada decree is half good and half bad under the full faith and credit clause[9]. Absurd as this may sound, it would be a pěrfectly logical result in any state where the wife's right to support is not terminated by divorce.

Speaking through Mr. Justice Douglas, the court employed the following steps in reaching its conclusion:

> *First*: The New York separation judgment, granting the wife permanent alimony, was a "property interest" of the wife. Since this is an intangible, jurisdiction over it could only be exerted through control of the physical being, i.e., the wife. The latter was served by publication and any attempt by the court to adjudicate her rights in said "property interest" would be void.[10]
>
> *Second*: The full faith and credit clause (which requires a foreign divorce based on constuctive service and valid domicile to be given the same effect as a domestic divorce[11]) is not violated here because that clause demands full faith and credit only for that part of the foreign judgment which is based on valid jurisdiction.
>
> *Third*: Since the Nevada court had no jurisdiction to litigate the wife's right in her support order and since the Nevada divorce is an attempt by Nevada to restrain the wife from asserting her claim,[12] it is an attempt to exercise jurisdiction in personam over a person not before the court. Hence it is not entitled to full faith and credit.[13]
>
> *Fourth*: The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interest of both Nevada and New York in this broken marriage by restricting each state to matters of its dominant concern.

Note that the foregoing reasoning is based on the assumption that the Nevada decree was a deliberate attempt on the part of the Nevada Court to litigate rights over which it had no jurisdiction. The facts as stated in the beginning of the majority opinion are, "The Nevada decree made no provision for alimony, although the Nevada court had been advised of the New York court decree." Mr. Justice Frankfurter points out that the Nevada decree did not purport to rule on the survival of the New York support order. The former merely established a change in status and it was for New York to determine the effect of that changed status. If New

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[8] New York Civil Practice Act, Art. 68, § 1155 & 1170, 1920. Thompson's Laws of New York, 1939, Part II, pps. 1771 & 1773.

[9] Estin v. Estin, Op. cit., at 1221.

[10] Bassett v. Bassett, 323 U. S. 718, 89 L. Ed. 577, 65 S. Ct. 47, 141 F. 2nd. 954, 51 F. S. 545, (1944).

[11] Note 6, supra.

[12] Estin v. Estin, Op. cit., at 1219.

[13] Hansburg v. Lee, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741, (1940).

York law is to the effect that divorce put an end to a separate maintenance decree, then the support order would have been terminated by the consequences of a change in status, the change coming as a result of the Nevada decree but the consequences stemming from New York law.[14]

An examination of previous New York cases and statutes reveals without a shadow of doubt that an absolude divorce obtained by the husband terminates the duty to support the wife. The court admits that counsel for the husband presented a detailed analysis of New York law to show that the New York courts have no power either by statute or common law to compel a man to support his ex-wife, that alimony is payable only so long as the relation of husband and wife exists, and that in New York a support order does not survive divorce. All this is completely negatived by the statement, " . . . that the highest court in New York has held in this case that a support order can survive divorce and that this one has survived petitioner's divorce."[15] Then the United States Supreme Court points out that such a conclusion is binding on them except so far as it conflicts with the full faith and credit clause. It is quite true that the Federal Supreme Court in exercising appellate jurisdiction over a case arising from the highest court of a state involving state matters, where the revisory powers are limited to Constitutional questions, knows as law what was so known to the state court.[16] It has even been held that a federal court must follow the latest dicta of the highest court of the state[17] but not that of the lower courts.[18] This is the same familiar rule that appears in federal courts when jurisdiction is based on diversity of citizenship. Because of this well-reasoned rule, the Supreme Court is bound by the New York Court's detemination in this very case that an ex-parte divorce does not terminate a prior support order.

The amazing result of the decision is not at all supported by prior New York law. The Civil Practice Act[19] is very explicit in reciting that the court must make provision for the support of the wife when she is the one who obtains the divorce. But it makes no provision at all for her right to support when the husband secures the divorce. Further, it provides for a mandatory support order for children, regardless of who gets the divorce, thus strengthening the exclusion of the wife's right to support when the husband gets the divorce. *Expressio Unius Est Exclusio Alterius.*[20]

In *Davies* v. *Davies* it was held that an order requiring a person to contribute to the support of one with whose support he is not chargeable, such as a divorced wife, is void. This was a 1946 case decided in the Domestic Relations Court of New York

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14 Estin v. Estin, Op. cit., at 1219.

15 Ibid, at 1216.

16 Goodrich, CONFLICTS OF LAWS (Hornbook), p. 195: See also 322 U. S. 232, 64 S. Ct. 1015, 88 L. Ed. 1246, (1944).

17 279 U. S. 717, 80 L. Ed. 1002, 56 S. Ct. 592, 138 A.L.R. 136, (1929).

18 107 F. 2nd. 738, 25 F. S. 35, 137 A.L. R. 793, (1939).

19 Note 8, supra.

20 Co. Litt. 210 a: See also 98 Mass. 29, (1867), and 5 Watts (Pa.) 156, (1836).

City. The basis of a woman's right to support by a man is the conventional relationship of husband and wife and when such a relation does not exist the Domestic Relations Court has no power to order such support.[21]

Hoops v. *Hoops*[22] and *Bogert* v. *Watts*[23] are examples of when a wife is entitled to support in New York after an absolute divorce, that situation arising only when the wife is the libellant in the divorce action.

The fundamenal proposition underlying the cases which provoked this article is whether or not the New York court must give the same effect to a foreign ex-parte divorce as they would give to a domestic ex-parte divorce. Since the U. S. Supreme Court adopts the view that it is the policy of New York, as declared in the instant case, to refuse to set aside a prior support order after any ex-parte divorce, the New York court is free to give the same effect to a foreign as they would a domestic ex-parte divorce. The only quarrel with this result is that New York law is strictly to the contrary. Mr. Justice Jackson, a New York attorney for many years, points this out in his dissent and Mr. Justice Frankfurter would remand the cases for clarification by the New York court. His point in doing this is that the state court opinion does not make entirely clear the exact status of the New York law. Such an ambiguity should not be permitted to stand as a barrier to a determination of the validity of state action under the Federal Constitution.[24]

The suggestion by Mr. Justice Frankfurter to remand the case would have been the wisest course here. Even though the court felt bound to honor the state's latest interpretation of its own law, would it not be better justice for the husband to require the state court to reconsider its action in flying in the face of the known law? If the highest court in the state is free to interpret the law in firm contradiction of the existing statutory law, the citizen is left without recourse. Is it due process of law to allow the court to decide that the law is not what it has been unequivocally declared to be? Since the Supreme Court of the United States is powerless to help the citizen in such a case by overruling the interpretation as given by the state court, it should consider the possibilities of remanding the case for an express declaration by the state court that the law is not as written. If the state court still felt inclined to baldly assert itself in spite of conscience, the citizen would be forced to surrender his rights or vacate the jurisdiction in favor of a more agreeable legal climate.

In light of these decisions, in spite of the fact that it is well settled in Pennsylvania that an absolute divorce terminates a separate maintenance decree,[25] the Supreme Court of Pennsylvania would be free to refuse to set aside a prior support order when the husband secured a divorce. This determination, when appealed to

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[21] Domestic Relations Court Act for the City of New York, Laws 1933 Ch. 482, § 91; Thompson's Laws of New York, 1939, Part II, p. 1571.

[22] 292 N. Y. 428, 42 N. Y. S. 2nd. 635, 58 N. Y. S. 2nd. 151, (1943).

[23] 32 N. Y. S. 2nd. 750, (1942).

[24] Minn. v. National Tea Co., 309 U. S. 551, 60 S. Ct. 676, 84 L. Ed. 920, (1940).

[25] Esenwein v. Comm., note 7, supra.

the United States Supreme Court, would be binding as the latest interpretation of Pennsylvania law, even though in disregard of many previous cases[26] as well as the Divorce Law.[27] Historically, alimony has never been an incident of absolute divorce in Pennsylvania as a matter of right except from 1854-1895. From the latter year until 1925 it was a right solely contingent upon the discretion of the court, and since then it has not existed except in case of insanity.[28]

It is indeed a presumption based on ignorance to assume that the Pennsylvania Supreme Court would make such a decision. And yet that is exactly what the New York Court has done in the *Estin* and *Kreiger* cases. They have literally wiped out the statutes, overruled the cases, and mocked the rights of the citizens who placed them in a judicial position. If they are to be permitted to do this, the words of Charles Dickens, spoken through the mouth of Mr. Bumble become exceedingly important, "If the law supposes that, the law is a ass, a idiot."[29]

Before closing, it may be well to point out that if the ex-Mrs. Estin had elected to sue on her support order in any other state than New York, the forum would have been compelled to give judgment for the husband on the ground that New York law gives the wife no right to support when the husband obtains an absolute divorce. Every other state in the union would be forced to interpret New York law as it actually is but when the New York court makes an interpretation it is free to act as it sees fit. The resulting clash between the Constitution of the United States, New York's public policy on providing support for wives, Nevada's divorce decree, and the husband's right not to have to support a divorced wife, finds New York's public policy coming out on top. From the legal point of view, it would seem that it is for the legislature to effect such drastic changes in the law and until that is done it should be the province of the courts to interpret the law as it is written.

Guy B. Mayo

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26 Moore v. Moore, 192 Pa. 193, (1899): 17 D. & C. (Pa.) 236, (1933): 156 Pa. Superior 136, (1944).

27 Act of May 2, 1929 PL 1237: 23 P.S. 1 et seq.

28 Myers v. Myers, 17 D. & C. (Pa.) 236, Clinton County, (1933).

29 Charles Dickens; OLIVER TWIST, Ch. 51.