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RECENT CASES

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FEDERAL PROCEDURE—REMOVAL OF CAUSES—PARTIAL TRANSFER TO PREVENT REMOVAL.—An action for damages to real and personal property brought by the plaintiffs, a South Carolina corporation, in a South Carolina court against the defendant, a Maine corporation, was dismissed without prejudice, by a federal district court in South Carolina to which the case had been removed, upon motion by the plaintiff. Thereafter the plaintiff corporation transferred and assigned a 1/100th interest of the realty and personalty together with the claim for damages to an individual who was a resident and citizen of Maine. The plaintiff corporation then brought a second action in a South Carolina court joining with it this Maine assignee as a plaintiff. The defendant removed the case to a federal district court in South Carolina upon the ground of diversity of citizenship. The plaintiffs moved to remand to the state court, contending there was not diversity of citizenship since one of the plaintiffs was a citizen and resident of the same state as the defendant. *Held,* that removal for diversity of citizenship may be prevented even though the purpose of the South Carolina corporation, in dismissing the first action and in assigning a portion of the claim to a person of the same residence as the defendant, was to defeat removal, provided that additional plaintiff is a proper party with legitimate standing before the court. Motion granted. *Ridgeland Box Manufacturing Co. v. Sinclair Refining Co.*, 82 F. Supp. 274 (E.D. S. C. 1949).

Federal courts will look through a mere sham, created for the sole purpose of defeating federal jurisdiction, to discover the true situation both as to parties and causes of action and will determine the matter of jurisdiction accordingly, but the holder of bare legal title, by the weight of authority, is a real party in interest. *E.g., Bernblum v. Traveler's Insurance Co.*, 9 Supp. 34 (W.D. Mo. 1934). Hence, since all of the parties on one side of the suit must be citizens of different states from all of the parties on the other side, *Hyde v. Ruble,* 104 U. S. 407 (1882), it is not surprising that circumvention of the right to remove has been successful by the use of the assignment device. Even though an attempt to *invoke* federal jurisdiction by means of a colorable assignment is ineffective by reason of 28 U. S. C. A. Sec. 1359, yet federal jurisdiction may be *prevented* where a colorable assignment is made to avoid removal. *Oakley v. Goodnow,* 118 U. S. 43 (1886). The motive of such assignment is wholly immaterial. *Mecom v. Fitzsimmons Drilling Co.*, 284 U. S. 183 (1931). And, the validity of an assignment is governed by the local law under the holding of *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1938), which requires a federal court to follow the substantive law of the state, unless a federal constitutional or statutory question is involved. In South Carolina injuries to real and personal property are assignable. Sections 397 and 419, S. C. Code

of Laws 1942; *Evans v. Watkins*, 112 S. C. 419, 100 S. E. 153 (1919). And where only a partial assignment is made the partial assignee is a real party in interest and may sue jointly with his assignor. *Bultman v. A. C. L. R. R.*, 103 S. C. 512, 88 S. E. 279 (1916).

The decision establishes for the first time the principle that the citizenship of a partial assignee as co-plaintiff will prevent removal. This result, although a substantial encroachment upon the right to remove, appears inevitable when viewed in the light of existing legal principles, and is certainly in keeping with the policy of restricting federal jurisdiction based on diversity of citizenship. A defendant, as has been suggested, might plead the colorable assignment as a defense to the state court action, but the success of this seems unlikely; therefore, if relief be desired for a defendant in a situation like the present one, it appears to be solely by way of legislative enactment.

JAMES L. GIBBS

PERSONAL PROPERTY—BAILMENTS—DUTY OF CARE REQUIRED OF A GRATUITOUS BAILEE.—The deceased contracted to finance the development of an invention on which the claimant was working, and pursuant to this agreement claimant moved his machinery to the deceased's shop. Subsequently, the deceased withdrew from the agreement and the machinery was never returned. Upon the death of the deceased, the machinery could not be found, and the claimant filed a claim for its value against the receivers of the estate of the deceased. The trial court entered judgment for the defendant, holding that no bailment was ever created. On appeal, *held*, reversed. Upon termination of the agreement, the deceased became a gratuitous bailee and as such, became liable for gross negligence. Gross negligence is the failure to exercise reasonable care. *Wilson v. Etheridge*, 214 S. C. 396, 52 S. E. (2d) 812 (1949).

That a gratuitous bailee is liable only for gross negligence was first set out in the celebrated case of *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Reprint 107 (K. B. 1703). Since that early English case, the degree of care owing from a gratuitous bailee has been in a state of great obscurity and confusion, with the courts of this country giving various interpretations to the expression "gross negligence". See, *e.g.*, *Kegan v. Park*, 320 Mo. 623, 8 S. W. (2d) 858, 869 (1927). The courts are practically unanimous in holding that the fact that the bailee is acting without reward, must be considered in determining whether he exercised the degree of care required of him. *E.g.*, *Midgett v. Eastern Carolina Transp. Co.*, 180 N. C. 71, 104 S. E. 32; *Maddock v. Riggs*, 106 Kan. 808, 190 P. 12 (1920). Gross negligence has been defined generally as the failure to exercise slight care, while ordinary negligence is failure to exercise due care. *Anderson v. Ballenger*, 166 S. C. 44, 164 S. E. 313 (1932). Some courts, however, have conceded that gross negligence has no precise meaning and it is doubted whether any intelligible distinction exists between gross negligence and ordinary negligence. *See, e.g.*, *Jenkins v. Motlow*, 1 Sneed 248, 253

(Tenn. 1853). In a general discussion of gross negligence, the West Virginia Supreme Court has said that "simple" and "gross" negligence are useful and convenient classifications when used to indicate the degree of care owed to a party, but actionable negligence is the failure to bestow the care which the situation demands, regardless of the epithet it is given. *See Wood v. Shrewsbury*, 117 W. Va. 569, 572, 186 S. E. 294, 296 (1936). In an increasing number of recent decisions, the courts have recognized the impracticability of the application of the view that a gratuitous bailee is liable only for gross negligence, and hold him liable for loss to the bailed property if he was guilty of actionable negligence under the circumstances. *E.g., Kubli v. First Nat. Bank of Pleasantville*, 199 Iowa 194, 200 N. W. 434 (1924); *Brown on Personal Property*, §83 Page 294. In following this modern view, the Illinois Court said that a bailee without reward is bound to take reasonable care of the bailed goods, and the test in such a case is the care which a prudent man takes of his own goods under all of the circumstances, no mention being made of gross negligence. *Oscar Heyman & Bros., Inc. v. Marshall Field & Co.*, 301 Ill. App. 340, 22 N. E. 2d 776 (1939). The courts for the most part, however, still employ the language of *Coggs v. Bernard, supra*, and hold that a gratuitous bailee can be held responsible only for bad faith or gross negligence. *E.g., Spencer v. First Carolinas Joint Stock Land Bank*, 167 S. C. 36, 165 S. E. 731 (1932). But the cases which follow this view define gross negligence, as applied to gratuitous bailments, as nothing more than the failure to bestow that care which the property in its situation demands. *E.g., Preston v. Prather*, 137 U. S. 604 (1891). The South Carolina court has held that a gratuitous bailee is liable only for gross negligence, but in every such case has required a bailee without reward to exercise reasonable care; and has stated that reasonable care depends upon the nature of the thing bailed, its liability to loss and injury, and the circumstances under which it was deposited. *McLaughlin v. Sears Roebuck & Co.*, 188 S. C. 358, 199 S. E. 413 (1938).

The result reached in the instant case is undoubtedly correct as the deceased was guilty of actionable negligence and should be held liable for the loss resulting therefrom. However, the terminology of the court in defining gross negligence is questionable. South Carolina is in accord with the overwhelming majority of courts in recognizing degrees of negligence as an aid in determining whether the defendant is guilty of actionable negligence. But by applying the "gross negligence test" in determining the degree of care owed by a gratuitous bailee, and then defining gross negligence as the failure to exercise reasonable care, the courts have completely changed the recognized definition of gross negligence, so that it is impossible to distinguish between gross negligence and ordinary negligence. If the degree of care classification is to be followed, it is necessary that they be given consistent definitions in order to avoid confusion. While paying lip service to the rule that the gratuitous bailee is liable only for gross negligence, the courts have nevertheless rejected that doctrine by defining gross negligence as the lack of ordinary care under the circumstances. It is submitted that a more practical solution to the confusion which has arisen

in determining a gratuitous bailee's liability for loss, would be to disregard the confusing expression "gross negligence", and taking all of the facts into consideration, with particular emphasis on the manner in which the goods were deposited, determine whether the bailee exercised that degree of care which a reasonable and prudent man would have taken in preventing loss of the goods.

ROBERT W. FOSTER

LABOR LAW—Right to Bargain Collectively on Company Property.—The only available meeting hall in a company-owned town was occupied by a fraternal organization which had been licensed by the defendant company to use the hall for its activities. It had been the practice of the fraternal organization to permit various societies to use the hall for community purposes. The property, though owned by the defendant, was not a part of the premises used in their business, nor was it open to employees because of their employment. Upon application for use of the building by a union representative for the purpose of union organization, the defendant intervened and prevented the use of the hall by the union. Upon complaint by the union, the National Labor Relations Board found discrimination against the union by denying it the use of the only available meeting hall and that the sole purpose of the denial was to impede, prevent, and discourage self-organization and collective bargaining. Upon appeal, the N. L. R. B. order to cease and desist from refusing to permit the use of the hall by the company employees or a labor organization for the purpose of self-organization was dissolved by the Circuit Court of Appeals. On further appeal to the United States Supreme Court, *Held,* the decree should be modified to order dafendants to refrain from any activity which would cause a union's application to be treated on a different basis from those of others similarly situated. *National Labor Relations Board v. Stowe Spinning Co.,* 336 U. S. 226 (1949).

Section 7 of the National Labor Relations Act (Wagner Act) provides that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . " Section 8 states, "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 49 Stat. 452; 29 U. S. C. A. §§157, 158 (1935). These sections have been construed by the courts in a manner as might inevitably lead to the conclusion reached in the instant case. It has been held that an employer must preserve the utmost of neutrality so far as his employees' right to organize and designate their bargaining agents are concerned. *N. L. R. B. v. Aluminum Products Co.,* 120 F. 2d 567 (C.C.A. 7th 1941). Time outside working hours has been deemed employees' time to use as they wish for union solicitation without unreasonable restraint and under reasonable regulations on company property, where the circumstances are such that union organization must proceed upon the employer's premises or be seriously handicapped. *N. L. R. B. v. Illinois Tool Works,* 153 F. 2d 811 (C.C.A. 7th 1946); *N. L. R. B. v.*

Lake Superior Lumber Corp., 167 F. 2d 147 (C.C.A. 6th 1947). Following the above decisions it was stated that it is not, "every interference with property rights that is within the Fifth Amendment . . . . Inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining." *N. L. R. B. v Cities Service Oil Co.*, 122 F. 2d 149 (C.C.A. 2d 1941); *Republic Aviation Corp. v. N. L. R. B.* and *N. L. R. B. v. LeTourneau Co.*, 324 U. S. 739 (1945). This type of dislocation of property is apparently justified on the grounds of necessity to effectuate the policy of the Wagner Act and any incidental property deprivation is *damnum abseque injuria. See, N. L. R. B. v. Cities Service Oil Co.*, 25 N. L. R. B. 36 (1940), *aff'd*, 122 F. 149 (C.C.A. 2d 1941).

Although the decision in the instant case was made pursuant to the Wagner Act, the corresponding provisions of that act have not been materially changed under the Labor-Management Relations Act of 1947 (Taft-Hartley Act). It is interesting to note that from the inception of the Wagner Act the courts have almost unanimously endorsed the decisions of the N. L. R. B. What the board requires is that any company rule against solicitation on company property be applied reasonably; and, in good faith and if discriminatory intent is found, as in the instant case, the company rules will be set aside and union solicitation on company property permitted. Thus arises a conflict between property rights, under the Fifth Amendment which prohibits the taking of property without due process of law, and rights guaranteed through the enactment of the above statute. The courts have developed the rule permitting solicitation for the purpose of self-organization, where necessary to preserve the right to collective bargaining, under reasonable regulations and in such a manner as not to interfere with the routine of business. In the instant case, the rule has been extended to include property not a part of the premises of the employer used in his business.

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