South Carolina Law Review

Volume 7 | Issue 4 Article 9

Summer 1955

Recent Cases

Wallace M. Wright

Gibson Dean

John E. Johnson Jr.

Betty Jo Edens

Robert L. Hawthorne Jr.

See next page for additional authors

Recent Cases

Authors

Wallace M. Wright, Gibson Dean, John E. Johnson Jr., Betty Jo Edens, Robert L. Hawthorne Jr., Forrest J. Abbott, Eldon E. Wolfe Jr., Paul J. Foster, Winifred Wills, Lawrence M. Gressette Jr., and Frank B. Garner

RECENT CASES

CHAMPERTY – Conveyances Made While Land Is In Adverse Possession of a Third Party. The plaintiff claimed a small parcel of land and alleged that the defendant had moved a fence approximately 125 feet in order to take in the parcel. The defendant pleaded that the plaintiff's deed from his grantor was champertous and therefore void. A motion to set aside a judgment in favor of the plaintiff was overruled, and the judgment was made final. On appeal, HELD: Affirmed. The evidence did not sustain the defendant's claim that the plaintiff's deed was champertous and therefore void. *Smith v. Corum,* 268 S.W. 2d 426 (Ky. 1954).

Champerty is a bargain with a litigant for a portion of the matter sued for, in case of a successful termination of the suit, which the champertor undertakes to carry on at his own expense rather than at the expense of the original litigant, and such bargains are illegal. *Nickels v. Kane's Administrator,* 82 Va. 309 (1886). Under the Statutes of 32 Henry VIII Chapter 9, which is thought to be declaratory of the common law, a conveyance of land which at the time of the conveyance is possessed adversely by a third person is champertous and therefore void. *Palmer v. Uhl,* 112 Conn. 125, 151 Atl. 355 (1930); *Rader v. Howell,* 246 Ky. 261, 54 S.W. 2d 914 (1932). This doctrine has been adopted by statute or decision in a minority of American states. 6 THOMPSON ON REAL PROPERTY § 3043, p. 167 (2d ed. 1940); see Annotation, 35 L.R.A. (N.S.) 729, 758 (1912). A majority of American jurisdictions have refused to recognize the applicability of the common law rule or have changed it by statute. The instant case was decided in Kentucky, one of the few states which follow the common law rule.

South Carolina seems to have ruled on this question on only two occasions. In 1827 the South Carolina Court held that from the earliest times in this state where one has a good title to lands, he might convey them to a stranger, without an entry by himself, or any previous possession by his ancestor, or even having received rent. *Sims v. DeGraffenreid,* 4 McCord 253 (S.C. 1827). And some 30 years later the South Carolina Court held that a conveyance by one out of possession is not void for champerty. *Poyas v. Wilkins,* 12 Rich. 420 (S.C. 1860). South Carolina's position on the question seems clear enough until one reads the State's "Real Party in Interest"

statute. CODE OF LAWS OF SOUTH CAROLINA, 1952, § 10-207. This statute states "But an action may be maintained by a grantee of land in the name of the grantor . . . *when the grant is void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant . . .*" (Emphasis added.) This seems to indicate that such grants are void in South Carolina, a directly opposite position from that set out in the cases cited. However, this inconsistency is probably explained by the fact that the "Real Party" statute was copied from the New York code in 1870. At that time New York had a statute which embodied the common-law rule and made such conveyances void for champerty. *Hopkins v. Baker,* 140 App. Div. 460, 125 N.Y.S. 417 (1910). The New York "Real Party" statute was apparently written with the other New York statute in mind; and when the South Carolina legislature adopted the one without adopting the other, they failed to remove the language which referred back to the other statute. Incidentally, New York now follows the majority rule, having made a statutory change. NEW YORK REAL PROP. LAW § 260.

In those jurisdictions which consider these conveyances void, the burden of proving that a deed was executed when the land was held adversely to the grantor is on the one who is relying on that fact. *Wainwright v. Marbury Lumber Co.,* 206 Ala. 559, 90 So. 315 (1921). The facts necessary to render a conveyance champertous must be established by clear and convincing evidence. *Phillips v. American Association,* 259 Ky. 402, 82 S.W. 2d 456 (1935); *Fordson Coal Co. v. Wells,* 245 Ky. 291, 53 S.W. 2d 564 (1932). To render such a transaction champertous, no particular length of adverse possession is necessary, and no more is required than that the land was being adversely held at the time of the conveyance. *Robinson v. Harris,* 260 S.W. 2d 404 (Tenn. App. 1952).

Since the instant case was decided in a jurisdiction which considers these transactions void, the case was undoubtedly correct, as the defendant failed to sustain the burden of proof. He presented only weak evidence, while clear and convincing evidence was required to prove his point. The law upon which this case is based was adopted at a time when livery of seisin was used to convey land. A good title to land could not be conveyed unless the owner had possession as well as legal title to the land. However, in this country, livery of seisin has not been necessary since early colonial times. The owner of land may convey land without ever having seen it. Therefore, there seems to be little reason for making a conveyance void just

because someone else happens to be in possession. Of course if that third person had already acquired title to the land by adverse possession, the grantor would have nothing to convey, and the grantee would take nothing. It would seem that the holdings of the two South Carolina cases are preferable to the law of the instant case.

C. CARTER BYRD.

DEFAMATION — Calling a White Person a Negro in Print. The defendant corporation published in its newspaper that the plaintiff, a white woman, was a Negro woman. The article complained of originated from a police traffic accident report, which did not designate race. The defendant appealed from a judgment awarding damages to the plaintiff for libel, contending that referring to a white person as a Negro is not libelous per se. On appeal, HELD: Judgment affirmed. This was a case of novel impression in this jurisdiction. Applying the law of other Southern states, referring to a white person as a Negro tends to degrade him in society and lessen him in public esteem, and is therefore libelous per se. *Natchez Times Pub. Co. v. Dunigan,* 72 So. 2d 681 (Miss. 1954).

Any words which falsely or maliciously charge the commission of a crime, or which distinctly assume or imply or which raise a strong suspicion in the minds of hearers or readers that one has committed a crime or which plainly and falsely charge contraction of a contagious disease, adultery, want of chastity, or unfitness in way of a profession or trade, or any written or printed words which tend to degrade, disgrace or render a person odious, contemptible or ridiculous are actionable per se. *Lesesne v. Willingham,* 83 F. Supp. 918 (E.D. S.C. 1949). *State v. Farley,* 4 McC. 317 (S.C. 1827), at page 320, states the rule that "if a man deliberately or maliciously publish anything concerning another which renders him ridiculous or tends to hinder others from associating with him or having intercourse with him an action lies." Calling a white man a mulatto is actionable per se. *Atkinson v. Hartley,* 1 McC. 203 (S.C. 1821); *King v. Wood,* 1 N. & McC. 184 (S.C. 1818); *Eden v. Legare,* 1 Bay 171 (S.C. 1791). Some jurisdictions hold that it is slander, actionable per se, to refer to a white person as a Negro orally, and that it is libelous per se to do so in print. Others maintain a distinction between the written and spoken word. Many jurisdictions have confused the terms actionable per se and libelous per se. CLARK, SUMMARY OF AMERICAN LAW, Torts § 80 (1949). Among cases

holding that it is not slander to say that a white person is a Negro are the following: *Williams v. Riddle,* 145 Ky. 459, 140 S.W. 661 (1911); *McDowell v. Bowles,* 53 N.C. 184 (1860); *Wright v. F. W. Woolworth Co.,* 281 Ill. App. 495 (1936); *Deese v. Collins,* 191 N.C. 749, 133 S.E. 92 (1926). Nor is it slander, actionable per se, to call a person a "half-breed Mexican". *Davis v. Meyer,* 115 Neb. 251, 212 N.W. 435 (1927). That it is slander, actionable per se, to call a white man a Negro, see *Morris v. State,* 109 Ark. 530, 160 S.W. 389 (1913); *O'Connor v. Dallas Cotton Exchange,* 153 S.W. 2d 266 (Tex. Civ. App. 1941); *Spotorno v. Fourichon,* 40 La. Ann. 423, 4 So. 71 (1888); *Toye v. McMahon,* 24 La. Ann. 308 (1868). But it is generally held that words not actionable per se when spoken may become so when written. *Lynch v. Lyons,* 303 Mass. 116, 20 N.E. 2d 953 (1939); *Tidmore v. Mills,* 2 Div. 756, 32 So. 2d 769 (Ala. 1947). Whether the written statement that a white person is a Negro is libelous per se seems to be controlled to a large extent by local mores and social customs. A false written statement that a white person is of one-fourth Negro blood is libelous per se in a community in which there are marked social differences between the races. *Stultz v. Cousins,* 242 Fed. 794, (6th Cir. 1917). It is libelous per se to call a white man a Negro in writing. *Hargrove v. Okla. Press Pub. Co.,* 130 Okla. 76, 265 Pac. 635 (1928); *Upton v. Times Democrat Publishing Co.,* 104 La. 141, 28 So. 970 (1910). One case, which seems to be *sui generis,* holds that whether to publish of a white woman that she is colored is libelous depends on the circumstances. *Jones v. R. L. Polk and Co.,* 190 Ala. 243, 67 So. 577 (1915). But even where it is libelous per se to refer to a white person as a Negro, the courts will not extend the defamation to include other members of plaintiff's family. In Oklahoma, it is libelous per se to write that a white woman is co-habiting with a Negro, and libelous per se to call her husband a Negro, but it is not a libel on her to call her husband a Negro. *Hargrove v. Okla. Press Pub. Co., supra.* A newspaper publication referring to a white man as a Negro is not a libel on his white parents where there was no reference, direct or indirect, to them. *Atlanta Journal Co. v. Farmer,* 48 Ga. App. 273, 172 S.E. 647 (1934). But a corporation may be libeled by referring to one employee as a Negro. Publication that a tobacco company placed a Negro foreman over white girls was held libelous per se in *Axton Fisher Tobacco Co. v. Evening Post Co.,* 169 Ky. 64, 183 S.W. 269 (1916).

So far the question of equality under the United States Constitu-

tion has been given no weight by the courts. To call a white person a Negro is defamatory and actionable, notwithstanding the 13th, 14th and 15th amendments to the Federal Constitution, the court said in *Spencer v. Looney,* 116 Va. 767, 82 S.E. 745 (1914). The 14th amendment, to the effect that no state shall abridge the privileges or deny equal protection of the laws "has not destroyed the law of this state making publication of a white man as a Negro anything but libel." *Flood v. News and Courier Co.,* 71 S.C. 112, 50 S.E. 637 (1905); *Flood v. Evening Post Publishing Co.,* 71 S.C. 122, 50 S.E. 641 (1905). As authority for a *de facto* social distinction and the inferiority of Negroes, the South Carolina court in the *Flood* cases quotes the language of Justice Strong in *Strauder v. W. Va.,* 100 U. S. 303 (1880), "The colored race as a race was abject and ignorant, and that condition was unfit to command the respect of those who had superior intelligence." To the effect that equality extends only to equal protection of law, and not to society, the court cites *Plessy v. Ferguson,* 163 U.S. 537 (1896), the father of the "separate but equal" doctrine. But the *Plessy* case was overruled in so far as it applied to public schools on May 17, 1954, in *Brown v. Board of Education,* 74 S. Ct. 686, 98 L.Ed. (Advance p. 583), raising the question of whether constitutional equality might now constitute a valid defense. *Grant v. Reader's Digest Ass'n., Inc.,* 151 F. 2d 733 (2nd Cir. 1945), does not squarely answer the question, but may be indicative. In that case Judge Learned Hand, speaking for the court, held that it is libelous per se to write of a man that he is a Communist sympathizer, even though this might not cause intelligent or "right thinking" people to harbor ill feelings toward him. "It is enough if there be some, as there certainly are, who would feel so, even though they would be 'wrong thinking' people if they did." And, in addition, a litigant not directly affected by a constitutional question may not raise it. *Premier-Pabst Sales Co. v. Grosscup et al.,* 298 U.S. 226 (1936).

The principal case, decided one week after the momentous segregation cases, was on all fours with authority up to that time. The question is whether the courts could stand in the same position now that the foundation stone has been overturned. It appears doubtful that the segregation cases have changed the law in this respect. Although the courts previously have based their decisions in such cases on the *Plessy* case, they might reach the same conclusion on the basis of the *Grant* case. Even if the Supreme Court were successful in completely abolishing segregation and enforcing social equality, if a

substantial portion of the community still believed Negroes to be inferior, even if they were "wrong-thinking" people for doing so, the plaintiff's reputation and standing in the community would be damaged by writing of him that he was a Negro, and this would constitute libel per se. But the *Grant* case, of course, applied only to Communist sympathizers and the Supreme Court has not exerted itself so strenuously in their behalf. A Communist sympathizer would be likely to be held in disrepute by a substantial portion of the population on a nationwide basis, whereas Negroes might be considered inferior only in certain sections, and whether calling a person a Negro would stand on the same footing as calling him a Communist sympathizer is open. Under the authority of the *Stultz v. Cousins* case, *supra,* however, the feelings of the community would appear to govern and this case read with the *Grant* case leave little doubt that the law is unchanged. The courts might obtain the same result by the shortcut of ruling that the defendant in a libel case, whose civil rights are not in issue, is not of a class of persons to whom the segregation cases are available as a defense.

J. REESE DANIEL.

INHERITANCE – Unintentional Killing of Wife As a Bar to Right of Inheritance. This was an action seeking a declaratory judgment that defendant was not entitled to inherit from the estate of the deceased. During an alleged unlawful assault upon a third person, defendant killed his wife against whom he held no malice or intention to kill. For this homicide he had been tried and acquitted. In his answer to the complaint, defendant interposed as a defense Sec. 19-5, CODE OF LAWS OF SOUTH CAROLINA, 1952, which provides that "No person who shall be convicted in any court of competent jurisdiction of unlawfully killing another person shall receive any benefit from the death of the person unlawfully killed, except in cases of involuntary manslaughter, whether by way of intestate succession, will, vested or contingent remainder, or insurance or otherwise . . . ." The jury found for defendant, but the court granted plaintiffs' motion for judgment non obstante veredicto on the ground that the only reasonable inference from the evidence was that defendant had unlawfully killed his wife and was therefore barred of his inheritance from her. Defendant appealed. HELD: Reversed. The statute interposed as a defense had no application since the defendant had been acquitted. One who, in the course of an unlawful assault upon

one person, kills another to whom he bears no malice and to whom his criminal intent is not directed, is not barred of his right to inherit from the latter. *Legette, et al. v. Smith,* 85 S.E. 2d 576 (S.C. 1955).

In the United States there is a three-way split of authority as to whether or not the statutory right of inheritance, to which there are no express exclusions, is barred from one who has murdered his ancestor. The majority view is that under such circumstances the murderer is not barred. *Hagan v. Cone,* 21 Ga. App. 416, 94 S.E. 602 (1917); *Eversole v. Eversole,* 169 Ky. 793, 185 S.W. 487, L.R.A. 1916E 593 (1916); *In re Duncan's Estates,* 40 Wash. 2d 850, 246 P. 2d 445 (1952). Justification for this result has been expressed thusly: "A statutory right cannot be defeated by the application of a common law principle." *Eversole v. Eversole, supra.* The minority rule bars the murderer of his statutory right of inheritance and is based on the common law principle that one should not be allowed to profit by his own wrong. *Price v. Hitaffer,* 164 Md. 505, 165 Atl. 470 (1933); *Weaver v. Hollis,* 247 Ala. 57, 22 So. 2d 525 (1945). These jurisdictions hold that the common law maxims are to be applied when statutes are construed. A third view holds that common law allows the property of the deceased to descend to the murderer and that equity compels him to hold it as constructive trustee for the person or persons who would have been heirs or next of kin if the murderer had predeceased the intestate. *Bryant v. Bryant,* 193 N.C. 372, 137 S.E. 188 (1927); RESTATEMENT, RESTITUTION Sec. 187 (2) (1937). In states which have statutes that bar the right of inheritance under specified circumstances, the conditions of the statute generally must be met. For example, Virginia has held that under a statute which bars the right of inheritance from one who has been convicted of killing the ancestor in order to obtain his estate or an interest therein, that proof of unlawful homicide alone is not sufficient to bar the right. *Ward v. Ward,* 174 Va. 331, 65 S.E. 2d 664 (1940). Lack of a conviction, in jurisdictions which bar the right of inheritance if the heir has been convicted of murdering the intestate, will allow the heir to inherit. *Peeple v. Corbett,* 117 Fla. 213, 157 So. 510 (1934); *Oberst v. Mooney,* 135 Kan. 433, 10 P. 2d 846 (1932). In a case concerning the right of a beneficiary of an insurance policy to the proceeds thereof, South Carolina committed itself to the common law principle that one should not be allowed to profit by his own wrong, and in the absence of Sec. 19-5, *supra,* falls within the minority view set out above. *Smith v. Todd,* 155 S.C. 323, 152 S.E. 506, 70 A.L.R. 1579 (1930). At the same

sitting the court construed Sec. 19-5, *supra,* to be a rule of evidence in that a conviction which came within the statute was a determination in and of itself that the killer was barred from receiving any benefit from the person killed. Thus, in a later case a conviction of involuntary manslaughter rendered Sec. 19-5, *supra,* inapplicable, and the common law principle was applied. *Keels v. Atlantic Coast Line R. Co.,* 159 S.C. 520, 157 S.E. 834 (1931). So, in the two preceding cases the South Carolina court was not called upon to determine the rights of a statutory heir to the estate of the ancestor whom he had murdered. However, Massachusetts had applied the test, which South Carolina in the instant case adopted, to an analogous situation. That jurisdiction held that a beneficiary of a life insurance policy who unintentionally killed the insured is entitled to the proceeds of the policy. *Minasian v. Aetna Life Ins. Co.,* 295 Mass. 1, 3 N.E. 2d 17 (1936).

The instant case was of first impression in South Carolina and was decided on a nice factual distinction. The result is commendable for the reason pointed out by the court — that commission of a crime does not in itself work a forfeiture of the criminal's right to inherit and that the intention of the criminal to kill the deceased should be the controlling point. The common law principle that one should not be allowed to profit from his own wrong is good, and the constructive trustee rule is only a deviation from this principle which ultimately reaches the same result. Both can be carried logically to absurdities. Therefore, it appears that the South Carolina court recognized a need for and drew the line of demarcation at a proper place. However, the present decision can bring about inequities unless the legislature acts to cure the defects. An illustration or two will suffice: If *A* intending to kill *B,* kills *C* instead but is acquitted, *A* can inherit from *C;* on the other hand if *A* is convicted, he cannot inherit since Sec. 19-5, CODE OF LAWS OF SOUTH CAROLINA, 1952, is applicable. Likewise, it appears that one convicted of reckless homicide cannot inherit even though there is a total lack of intention to kill the deceased.

Our court is further justified in the ultimate decision of the case on another ground. The trial court instructed the jury that if they found that the death of the deceased was *not* by an unlawful act, that they should find for the defendant. This the jury did. There being evidence to support the verdict as indicated by the Supreme Court and the issues being essentially legal, the jury's verdict was conclusive.

E. WINDELL MCCRACKIN.

LABOR LAW – State's Power to Enjoin Unfair Labor Practices. Union workers on a building project called a strike and picketed the job. No violence occurred. The general contractor sought an injunction in the state court, alleging that the union was trying to force him to compel the employees to join the union. The conduct complained of was an unfair labor practice under the National Labor Relations Act, as amended (Taft-Hartley Act). The entire project was located in the state of Pennsylvania, but several sub-contractors on the job were from other states, and a great deal of the material on the job came from other states. The defendants, the union, moved for dismissal on the grounds that the state court had no jurisdiction. The plaintiff took the position that publicly-announced National Labor Relations Board jurisdictional "yardsticks" show that the Board would refuse jurisdiction of the dispute, and that therefore the state courts should grant relief. HELD: preliminary injunction refused. The court believed that the Taft-Hartley Act placed exclusive jurisdiction in the N.L.R.B. over activities designated in the Act as unfair labor practices. No state court or state labor board can enjoin these activities unless the Board cedes jurisdiction according to the procedure outlined in the Act, regardless of the Board's announced jurisdictional "yardsticks." *Adelphia Construction Co. v. Bldg. & Const. Trades Council of Philadelphia,* 29 Bucks County L. J. 143, 27 C.C.H. Labor Cases Par. 68,843, (Bucks County, Penn., Court of Common Pleas, Nov. 3, 1954).

The Taft-Hartley Act gives to the N.L.R.B. the power to prevent, through cease and desist orders of its own and through injunctions in federal courts where necessary, activities which are designated by the Act as "unfair labor practices", provided these activities are affecting interstate commerce. The same section of the Act which gives this power to the Board provides a method by which the Board can cede some of its power to state labor boards, unless the state law under which the state board operates is inconsistent with the federal law. 29 U.S.C. § 160 (a). No other provision is made in the statute for cession of Board power over unfair labor practices to the states. In order for the N.L.R.B. to assume jurisdiction of a case, no particular volume of interstate commerce need be affected, so long as the volume is greater than that to which the courts would apply the maxim *de minimis. N.L.R.B. v. Denver Bldg. & C.T.C.,* 341 U.S. 681, 684 (1951); *N.L.R.B. v. Fainblatt,* 306 U.S. 601, 607 (1939). Furthermore, it now seems to be settled that where the unfair labor practice is one which the Board is empowered to

prevent, a state court is without jurisdiction, unless the practice is accompanied by violence, mass picketing, destruction of property, or some similar threat to the peace of the community. *Garner v. Teamsters Union,* 346 U.S. 485 (1953). If the Board would take jurisdiction of every case which it has the power to decide, there would be no problem, other than the Board's own problem as to how it would have time to do its work. Under present law, however, the Board has the right to determine for itself whether or not it will accept jurisdiction over a particular case. *Haleston Drug Stores v. N.L.R.B.,* 187 F. 2d 418, 421 (9th cir. 1951), *cert. denied,* 342 U.S. 815 (1951). And the Board frequently refuses cases which it considers to be of such a local nature that the national welfare is not appreciably affected by them. This decision is purely a matter of opinion, and there is often a great deal of disagreement among the Board members on this question. See *Breeding Transfer Co.,* 110 N.L.R.B. No. 64 (1954). Rather than decide its jurisdiction on a case-by-case basis, the Board last July announced its latest set of so-called jurisdictional "yardsticks." The yardsticks state a minimum dollar volume of interstate commerce that various types of business concerns must conduct annually in order for the N.L.R.B. to take jurisdiction. But the yardsticks are not binding on the Board, and they may be disregarded by it at any time. N.L.R.B. RELEASE OF JULY 15, 1954. Therefore, the yardsticks are not an announcement of what the Board *will* do, but rather what it will *probably* do. The U. S. Supreme Court has expressly withheld its opinion on the question of whether a state can exercise jurisdiction when the Board refuses to do so through the application of its yardsticks; but the Court has indicated that it recognizes that the question exists and will rule on it in a proper case. *Bldg. Trades Council v. Kinard Construction Co.,* 346 U.S. 933 (1954). The instant case holds that the state courts cannot take jurisdiction in such a situation. It is interesting to note that a federal district court has held the other way on the same question, deciding that when the Board refuses jurisdiction of a case for yardstick reasons, the complainant may proceed in the state courts. The federal case was decided in October 1954, about a month earlier than the instant case. *Your Food Stores v. Retail Clerks Local,* 124 F. Supp. 697 (D. N. M. 1954).

The principal question here is one of statutory interpretation. Clearly, the N.L.R.B. has the discretionary power to refuse to exercise its jurisdiction. But, did Congress intend that a complainant, on being turned down by the Board for "yardstick" reasons, should

be without a forum which could hear his complaint? This is very unlikely, since the purpose of the Act is the settlement of labor disputes rather than the prolongation of them. However, the court in the instant case believes that the law as it exists at present excludes the complainant from the state courts. On the other hand, the court in *Your Food Stores v. Retail Clerks Local, supra,* holds to the maxim that "for every wrong there is a remedy," and if the Board refuses to act for yardstick reasons, the state courts are free to apply their own laws to the dispute.

It would seem that the court in the instant case is standing on firm ground, legally, in view of the statute itself and the cases which interpret it. The Taft-Hartley Act specifically provides that the Board may cede jurisdiction to state agencies only when the state labor law is consistent with Taft-Hartley. But if the Board can cede jurisdiction by the simple step of narrowing its own jurisdiction at will, then the statutory conditions for cession of power can be by-passed. The instant decision would prevent such a by-pass. However, the decision is rather difficult to justify on practical grounds. If it is correct, a disconcerting situation is presented to the employer or union which wants to complain of an unfair labor practice. He is told, in effect, that unless the business concern involved in the dispute is large enough to get him before the N.L.R.B. or unless the dispute is marked with violence, mass picketing, threatened disorder, etc., so as to get him before the state court, there is no judicial or quasi-judicial body of any description which can grant him relief. He is in a "no-man's land" where there is no remedy available. The only answer to this unusual problem seems to be legislation. Congress should set out yardsticks by statute, or it should require the N.L.R.B. to set its own yardsticks and then to adhere to them rigorously; in either event there should be a specific statutory provision that unfair labor practices in industries falling outside the yardstick would be left to the jurisdiction of the states.

WALTER A. REISER.

TORTS — Doctrine of Res Ipsa Loquitur and Circumstantial Evidence in Establishment of Liability Under Guest Passenger Statute. This was an action by a father for the wrongful death of his child, who was killed in an automobile collision while riding as guest passenger of defendant. Defendant's car, while being driven 50 to

55 M.P.H. on paved highway, went to the left side of the highway and collided with oncoming auto resulting in decedent's death. The trial failed to reveal why the automobile got on the wrong side of the highway. The lower court directed verdict for the defendant on the ground that reckless operation of the vehicle was not proved. On appeal, HELD: Reversed on other grounds. The Supreme Court of Iowa sustained the holding that a finding of recklessness in a case of this character cannot be based on the doctrine of *res ipsa loquitur,* although recklessness may be shown by circumstantial evidence. *Nehring v. Smith,* 243 Iowa 225, 49 N.W. 2d 831 (1951).

Guest passenger statutes, which have been passed by most of the states, are intended to relieve owners and operators of liability to guest passengers for mere simple or ordinary negligence in the operation of a motor vehicle. In *Phillips v. Briggs,* 215 Iowa 461, 245 N.W. 720 (1932), the Iowa Court in deciding a "guest passenger case" said that they could find no case where any court had gone so far as to invoke the doctrine of *res ipsa loquitur* and, therefore, create a presumption or inference of recklessness, and the inapplicability of the doctrine in actions under the guest passenger statute has been upheld in subsequent decisions. *Harvey v. Clark,* 232 Iowa 729, 6 N.W. 2d 144 (1942); *Herbert v. Allen,* 241 Iowa 684, 41 N.W. 2d 240 (1950). Iowa does recognize the doctrine of *res ipsa loquitur* — where the plaintiff is injured by instrumentalities within the *exclusive control and management of the defendant* and the happening of such injury was such as in the ordinary course of events would not occur *without a lack of due care* on the part of the defendant; the happening of the injury itself permits, but does not compel, a finding that the defendant was in fact negligent. Slife, *The Iowa Doctrine of Res Ipsa Loquitur,* 35 IOWA L. REV. 393 (1950). The failure to apply the doctrine in the present decisions can apparently be firmly supported on either of two grounds. First, although the doctrine has been held to apply where one vehicle collides with another moving in the same direction, *Harvey v. Borg,* 218 Iowa 1228, 257 N.W. 190 (1934); *Crochet v. A. & P. Truck Line,* 52 So. 2d 265 (La. App. 1951), by far the majority view is that the doctrine is inapplicable to a collision between two oncoming vehicles because of the lack of exclusive control and management of all the instrumentalities in the driver of one of them. 9B BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, § 5983 (1954). The Iowa courts are in accord with this view. *Schroeder v. Kinds-*

chuh, 221 Iowa 590, 294 N.W. 784 (1940); *Welch v. Greenberg,* 235 Iowa 159, 14 N.W. 2d 266 (1944).

Second, even where driver is in exclusive control of the only automobile involved, the doctrine of *res ipsa loquitur* may give rise to presumption of negligence, but it does not create an inference of that misconduct necessary for liability under the guest statute. *Minkovitz v. Fine,* 67 Ga. App. 176, 19 S.E. 2d 561 (1942). The Iowa statute limits the liability of the owner or operator of a motor vehicle to a guest to instances where the damage is the "result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle." Iowa Code § 321.494. Conduct arising from mere inadvertence, thoughtlessness or error of judgment, is not recklessness within the meaning of the statute. *Harvey v. Clark, supra.* To be reckless one must be more than negligent, but conduct may be reckless without being willful or wanton. *Herbert v. Allen, supra; Schneider v. Parish,* 242 Iowa 1147, 49 N.W. 2d 535 (1950). To permit recovery it must appear that the driver was proceeding without heed of or concern for consequences, with no care, coupled with a disregard for the safety of his guest. *Tomasek v. Lynch,* 233 Iowa 662, 10 N.W. 2d (1943); *Siesseger v. Puth,* 213 Iowa 164, 239 N.W. 46 (1931). The happening of an accident, in itself, does not establish recklessness. *Duncan v. Lowe,* 221 Iowa 1278, 268 N.W. 10 (1936).

The fact that the collision occurs on the left hand side of the road, without more, will not support a finding of recklessness under the guest statute. *Wilson v. Oxborrow,* 220 Iowa 1135, 264 N.W. 1 (1935); *Brown v. Martin,* 216 Iowa 1272, 248 N.W. 368 (1933); nor will the fact that the driver falls asleep or permits himself to be overcome by sleep. *Paulson v. Hanson,* 226 Iowa 858, 285 N.W. 189 (1939); *Kaplan v. Kaplan,* 213 Iowa 646, 239 N.W. 682 (1931). Failure to exercise sufficient care to see and appreciate the danger is not of itself reckless disregard of consequences. *Peter v. Thomas,* 231 Iowa 985, 2 N.W. 2d 643 (1942). In order to take the question of recklessness under the guest statute to the jury it must be shown that the danger to the guest was known to the driver and he acted in entire disregard of it, *Peter v. Thomas, supra,* or that the danger was so obvious and apparent that the driver must have used no care at all in failing to observe it. *Russell v. Turner,* 56 F. Supp. 455 (N.D. Iowa 1944).

The South Carolina Guest Passenger Statute limits liability to

accidents which "shall have been intentional on the part of the owner or operator or caused by his heedlessness or his reckless disregard of the rights of others." CODE OF LAWS OF SOUTH CAROLINA, 1952 § 46-801. The purpose of the statute was to deny a guest a right of action for simple or ordinary negligence. *Oswald v. Weiner,* 218 S.C. 206, 62 S.E. 2d 311 (1950). Heedlessness alone has been held not sufficient to establish liability; conduct in "reckless disregard of the rights of others" has been interpreted as improper or wrongful conduct evincing reckless indifference of consequences. *Fulghum v. Bleakley,* 177 S.C. 286, 181 S.E. 30 (1935); *Cummings v. Tweed,* 195 S.C. 173, 10 S.E. 2d 322 (1940).

The South Carolina Supreme Court has repeatedly refused to recognize the doctrine of *res ipsa loquitur,* although holding that negligence or recklessness may be established by circumstantial evidence. *Gantt v. Columbia Coca-Cola Bottling Co.,* 193 S.C. 51, 7 S.E. 2d 641 (1940); *Eickhoff v. Beard-Laney, Inc.,* 199 S.C. 500, 20 S.E. 2d 153 (1942). A person being on the wrong side of the road and injuring another is not as a matter of law absolutely liable; the circumstances of the situation at that particular time must be considered. *Sims v. Eleazer,* 116 S.C. 41, 106 S.E. 854 (1920). In the absence of direct evidence the plaintiff must show such circumstances as would justify the inference that the injury which caused the death was due to the wrongful act of the defendant and not leave the question to mere speculation or conjecture; but every other reasonable conclusion need not be excluded, as long as proof of circumstances warranting a given inference is sufficient. *Peak v. Fripp,* 195 S.C. 324, 11 S.E. 2d 383 (1940); *Morrow v. Evans,* 223 S.C. 288, 75 S.E. 2d 598 (1953). Causative violation of an applicable statute constitutes actionable negligence and warrants an inference of recklessness, willfulness, and wantonness sufficient to carry this issue to the jury. *Ralls v. Saleeby,* 178 S.C. 431, 182 S.E. 750 (1935); *Morrow v. Evans, supra.* In the recent case of *Morrow v. Evans, supra,* the violation of the statute against traveling on the wrong side of the highway was proved by circumstantial evidence, and although no guest passenger was involved, recklessness and wantonness were found, and the plaintiff was awarded punitive damages.

The guest passenger statute, which most of the states have adopted, is intended to relieve owners or operators of liability to guests for accidents resulting from simple negligence. Although it is difficult to define with precision the degree of negligence or misconduct for which the operator is liable, it is clear that the guest is not to recover

where the driver's mere inadvertence or lack of diligence causes the injury. The Latin phrase *res ipsa loquitur* has generally come to mean that negligence can be inferred from the accident itself in connection with its bare physical cause, without the aid of any other evidence, when the accident is of a kind which according to the common experiences of mankind does not occur in the absence of negligence. It would seem to be sound legal reasoning to hold that this doctrine is insufficient to prove lack of that degree of care required by the Guest Statute. The unexplained accident is just as likely to have happened because of the driver's simple negligence, lack of attention or even because of his attempt to avoid a collision, and the operator should not be held liable in any of these events.

On the other hand, where the happening of the accident coupled with other circumstances such as skid marks, position of vehicles after collision and distance travelled after impact is sufficient to raise the inference of recklessness, the question should properly be submitted to the jury.

W. BRANTLEY HARVEY, JR.

TORTS — Liability of Voluntary Unincorporated Non-Profit Association to a Member for Negligence. Plaintiff was a member of defendant club, which was a voluntary unincorporated association not operated for profit. The club was conducted by employees of the association. Plaintiff brought action to recover damages from said club for personal injuries allegedly sustained by him on unlighted club premises negligently maintained. In the lower court judgment was for the plaintiff. HELD: Reversed. The members of a voluntary unincorporated association are engaged in a common enterprise and one is not liable to another for negligence of common agent within the scope of his employment. *Oneil v. Sea Bee Club,* 118 N.E. 2d 175 (Ohio 1954).

It is a well established rule, since *Brown v. Kendall,* 6 Cush. 292 (Mass. 1850), that every person legally responsible is liable for his personal negligence when such negligence is the proximate cause of an injury to another. *Steinman v. Penn. R. R. Co.,* 54 F. 2d 1052, (3rd Cir. 1932), *cert. denied,* 285 U.S. 552 (1932); *Ottman v. Incorporated Village of Rockville Centre,* 275 N.Y. 270, 9 N.E. 2d 862 (1937). At common law an unincorporated association cannot sue or be sued in the association's name as it is not a legal person. This doctrine was clearly upheld by the United States Supreme Court

in *Moffat Tunnel League v. United States,* 289 U.S. 113 (1933); *Brown v. United States,* 276 U.S. 134 (1928). This rule, however, has been changed or modified in most jurisdictions by statutes that allow unincorporated associations to sue and/or be sued in the name of the association. *Davison v. Holden,* 55 Conn. 103, 10 Atl. 515 (1887); *Bruns v. Milk Wagon Drivers Union,* 242 S.W. 419 (Mo. App. 1922). "All unincorporated associations may be sued and proceeded against under the name and style by which they are usually known without naming the individual members of the association." CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-15. An unincorporated association is in no sense a legal entity, and is not made so by this statute. *Medlin v. Ebenezer Methodist Church,* 132 S.C. 498, 129 S.E. 830 (1925). Statutes permitting an unincorporated association to sue and be sued in the association's name do not establish the substantive liability of the association to one of its members for tort. *Huth v. Humboldt,* 61 Conn. 227, 23 Atl. 1084 (1891); *Koogler v. Koogler,* 127 Ohio St. 57, 186 N.E. 725 (1933). Voluntary unincorporated associations organized for social purposes on a non-profit basis are not partnerships, *South Shore Club v. People,* 228 Ill. 75, 81 N.E. 805 (1907); *Merriwether v. Atkin,* 137 Mo. App. 32, 119 S.W. 36 (1909); and when such an organization is principally created by the members for their convenience and amusement, it is not a public charity which is relieved from tort liability under the "Eleemosynary Doctrine." *Langheim v. Denison Fire Dept. Swimming Association,* 237 Iowa 386, 21 N.W. 2d 295 (1946); *Dunn v. Brown Co. Agricultural Society,* 46 Ohio St. 93, 18 N.E. 496 (1888). An association has no legal existence separate from its members, *Chicago Grain Trimmers Association v. Murphy,* 389 Ill. 102, 58 N.E. 2d 906 (1945); *Gillette v. Allen,* 56 N.Y.S. 2d 307, 269 App. Div. 441 (1945); therefore, when suit is brought against an unincorporated association for tort, it is against the members generally. *Sperry Products v. Association of American Railroads,* 132 F. 2d 408, 145 A.L.R. 694 (2d Cir. 1942); *Pandolfo v. Bank of Benson,* 273 Fed. 48 (9th Cir. 1921). Members of a voluntary unincorporated association which was created for their pleasure are engaged in a joint or common enterprise. *Roach v. Harding,* 348 Ill. 454, 181 N.E. 331 (1932); *Clark v. Grand Lodge Brotherhood of Railroad Trainmen,* 328 Mo. 1084, 43 S.W. 2d 404 (1931); *Koogler v. Koogler, supra.* Members engaged in a common enterprise or the members of an unincorporated association are co-principals as to the agents of the association. *Martin v. Northern P.*

Beneficial Association, 68 Minn. 521, 71 N.W. 701 (1897); *Marchitto v. Central R. R. Co. of New Jersey,* 9 N. J. 456, 88 A. 2d 858 (1952). Co-principals are not allowed to sue each other for the dereliction of a common agent within scope of agency. *Murphy v. Keating,* 204 Minn. 269, 283 N.W. 389 (1939); *Brotherhood of R. R. Trainmen v. Allen,* 230 S.W. 2d 327 (Texas 1950); *Hromek v. Gemeinde,* 238 Wis. 204, 298 N.W. 587 (1941).

The doctrine of common or joint enterprise is a creature of the American courts. It is generally held that the principal distinction between partnerships and joint enterprises is that the former is for a general purpose while the latter is created for a specific purpose. The basic essential of a joint enterprise is that the parties intended to enter into a community of interest. The facts of the principal case indicate that the parties were participants in a joint enterprise and the court's holding would be sound in most jurisdictions. The logic of the non-liability of one co-principal to the other for the dereliction of a common agent within the scope of his employment is one of sound reasoning. The agent being hired to promote the community of interest of the co-principals, it therefore seems just that any negligence committed by the agent within the scope of his employment should be imputed to both principals. Plaintiff's only cause of action would lie against those employees of the association who were negligent.

ISADORE E. LOURIE.