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Recent Decisions

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"Free-will in making private contracts, and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected . . . Such restraints as may be placed on one may be placed on another. If the liberty of the employer to contract or refuse to contract may be denied, so may that of the employee. . . . It must not be forgotten, if, as the counsel for the state argues, the laborer is too weak to meet the employer on equal terms in the field of contract, that he will be far more subject to the latter's control and oppression in the field of politics, and that laws of the above character [making it illegal for a laborer to quit work under practically any consideration] will surely come. . ."

Joseph A. McCabe.

RECENT DECISIONS

AUTOMOBILES — EVIDENCE — ADMISSIBILITY — CROSS-EXAMINATION—QUESTION TENDING TO SHOW INEXPERIENCE OF OPERATOR OF AUTOMOBILE.—*Gibson v. McGuiness,* 192 N. E. 494 (Mass. 1934), presents an interesting question. It was an action of tort to recover for personal injuries and property damage sustained by the plaintiff as a result of a collision between her automobile, in which she was riding, and an automobile operated by the defendant. At the time of the accident, the plaintiff's car was being operated by her son, who testified at the trial. During his cross-examination by counsel for the defendant, he was asked: "You had been operating a car under Massachusetts license for about two months before this accident?" The question was excluded, subject to the defendant's exception. On appeal, it was held that the question was properly excluded, the court saying: "Whether the collision between the cars was due to negligence of this witness or that of the defendant was to be determined by the conduct of the witness. The length of time he had been licensed to run an automobile was clearly incompetent and immaterial."

The ruling seems to be in accord with the general rule in negligence cases that where the subject of inquiry is the conduct of the actors at the time of the accident, evidence as to the inexperience of the actors in the operation of the vehicles that figured in the accident is inadmissible because immaterial. In *Land v. Boston Elevated Railway Co.,* 211 Mass. 492, 98 N. E. 580 (1912), it was held to be reversible error, as prejudicial to the defendant, to admit, in an action against a street railway company, testimony as to the length of time its motorman had been in its employment. Likewise, in *Diamond v. Cowles,* 98 C. C. A. 417, 174 Fed. 571 (1909), the Circuit Court of Appeals for the Third Circuit held that the fact that the defendant was an inexperienced operator of a motor car was an *unimportant* fact in its bearing on whether the defendant had been in fact negligent.

An illuminating case on the admissibility of such testimony is *Polmatier v. Newbury,* 231 Mass. 307, 120 N. E. 850 (1918). In that case, the plaintiffs

brought two actions to recover for personal injuries received by them while riding on a motorcycle, and for damages to the motorcycle. The alleged cause of action arose out of a collision between the motorcycle and an automobile owned and operated by the defendant. One of the plaintiffs had previously testified, both on direct and cross examination, that he did not have an operator's license. He was then asked: "Did you ever have an operator's license to run a motorcycle?" This question was objected to and excluded. On appeal to the Supreme Judicial Court of Massachusetts, Crosby, J., speaking for the court, said: "The defendant contends that the evidence was competent on the ground that, if it appeared that the plaintiff had never been licensed to run a motorcycle, it would be evidence having a tendency to show that he was lacking in experience, skill, fitness properly to manage and control the machine at the time of the accident, and therefore was evidence to show that at that time he was not in the exercise of due care. We are unable to agree with this contention as the plaintiff's care could be determined only by his conduct at the time when the accident occurred. If the jury found, upon the facts as shown by the evidence, that his conduct did not contribute to his injury, his previous inexperience would be immaterial." It would seem, therefore, that the reason such evidence is held to be immaterial is because it does not tend to show that the actor was, as a matter of fact, negligent at the time of the accident, and would have a tendency to confuse the jury by raising a collateral issue. In this connection, it is important to consider the provision of Section 181 of the Restatement of the Law of Torts and the Commentary thereto.

Section 181, on Skill, provides as follows: "The skill which the actor is required to exercise in the doing of an act is that which the actor as a reasonable man should recognize as necessary to prevent the act from creating an unreasonable risk." In the Commentary it is said: "There are some activities which are dangerous to others unless the actor is skilled or experienced, but which are of great social value or are customarily regarded as part of the acquired necessities of modern life. Since men are not born either skilled or experienced, skill and experience can only be attained by practice. It is therefore impossible to require from the beginner the skill and experience of an adept, although special precautions may be required to minimize the danger involved in his training. Automobile traffic is now an essential of modern life. . . A competent driver is not born ready made. . . . An error of a beginner, which would be inexcusable in a practiced driver, may not be negligence, if the beginner selects a lonely road and is accompanied by a competent instructor. On the other hand, it undoubtedly would be negligence for a beginner to make his first attempt to learn to drive in a crowded street, even though accompanied by a competent instructor, or, perhaps, to practice alone on a country road." Likewise, Professor Harper, classifies as a type of negligent conduct "a failure to employ appropriate skill to perform acts undertaken." HARPER, LAW OF TORTS (1933) § 75, citing section 181 of the Restatement of the Law of Torts. Finally, in *Hughey v. Lennox*, 142 Ark. 593, 219 S. W. 323 (1920), the court approved an instruction of the trial court reading as follows: "It is the duty of a person operating an automobile upon the highways to use due care . . . to keep his automobile under control, and he must possess reasonable skill in operating an automobile before he undertakes to operate said automobile upon the public thoroughfares or highways; if he fails to possess reasonable skill in operating the car or fails to exercise due care in operation of the car, that constitutes negligence."

In view of these authorities, it is submitted that the question asked the operator of the car in the principal case might have been held proper had a proper foundation been laid. That is, by first offering evidence as to the congested nature

of the traffic at the place constituting the *locus in quo* of the accident. Then, it would seem, that evidence tending to show that the operator of the car was inexperienced, and, therefore, lacking in *skill,* would be material because tending to prove that the conduct of the actor was, under the circumstances, as a matter of fact, negligent.

John L. Towne.

BANKRUPTCY—COMPUTING NUMBER OF CREDITORS—SMALL CLAIM CREDITORS. —In the recent case of *Grigsby-Grunow Co. v. Hieb Radio Supply Co.,* 71 Fed. (2d) 113 (C. C. A. 8th, 1934), the interesting and important question of who shall be considered a creditor when computing the number of creditors necessary in involuntary bankruptcy proceedings is presented. More concretely the question is, who is a "creditor" under the Bankruptcy Act, Section 59b, which section of the Act reads: "Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to $500 or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt." 11 U. S. C. A. § 95 (b).

In this case the petitioner had a provable claim of $50,000 against the defendant. The other obligations of the defendant were some ten small claims for current expenses which were usually paid monthly, and taxes due two counties. The small claimants refused to sign as petitioning creditors. After an unsuccessful attempt to qualify the treasurers of the two counties as petitioning creditors, the petitioner contended that the small claim creditors should be disregarded and consequently since there were less than twelve creditors *who should be counted,* he as the sole signing petitioner could put the defendant in involuntary bankruptcy under Section 59b of the Bankruptcy Act. The Circuit Court of Appeals, in affirming the decision of the District Court, held that the small claim creditors were properly counted. Thus there were more than twelve creditors, in which case the petitioner being a single petitioning creditor, could not put the defendant in involuntary bankruptcy.

Not all the Circuit Courts of Appeal, or District Courts, however, agree in this conclusion. The majority of courts hold that small claims of nominal amounts should not be allowed to prevent a creditor of a large amount from putting a debtor in bankruptcy. It was said in the case of *In re Branche,* 275 Fed. 555 (N. D. N. Y. 1921), that small current debts contracted to be paid monthly or on demand, and which have been previously so paid, such as claims for rent, groceries, drugs, club dues, etc., cannot be resorted to by an insolvent debtor for the purpose of increasing the number of his creditors to twelve or more to defeat an involuntary petition of a large creditor. Similar to this case is *In re Burg,* 245 Fed. 173 (N. D. Tex. 1917), which held, relative to there being less than twelve creditors, so that one for $500 could, under the Bankruptcy Act, file a petition in involuntary bankruptcy, holders of small claims for household supplies payable monthly may be disregarded, under the maxim *de minimis non curat lex.* A late case, also in line with these set out, is *Security Bank & Trust Co. v. Tarlton,* 294 Fed. 698 (W. D. Tenn. 1923), which case held that small current amounts should not be considered in determining whether the number of creditors exceed twelve to defeat the involuntary petition by a single creditor, when the indebtedness alleged in the petition is nearly $50,000. *Vide: In re Blount,* 142 Fed. 263, (E. D. Ark. 1906); *W. A. Gage & Co. v. Bell,* 124 Fed. 371, (W. D. Tenn. 1903); 1 REMINGTON, BANKRUPTCY (3rd Ed) § 218; 2 COL-

LIER ON BANKRUPTCY (13th ed.) 1228 (d). For discussion of this subject, see Recent Case (1930) 43 HARV. L. REV. 954. The reasoning in these cases is similar to that of Trieber, J., in the case of *In re Blount, supra,* in which opinion he remarks that such conduct by the courts would defeat the spirit if not the letter of the act and cannot be tolerated. This justice also cites the maxim *de minimis non curat lex.*

The minority, those cases that concur with the principal case, seem to realize it would be better to disregard small claims also, but they believe that in no way could such a holding be reconciled with the language of the Bankruptcy Act. Lowell, J., in the case of *In re Alden,* 2 Fed. (2d) 61 (D. Mass. 1924), says: "Doubtless it would be convenient to disregard the bills of the butcher, the baker, and the candlestick maker as beneath the dignity of a bankruptcy court, but I find in the act no authority for such a course." He says the minority view is untenable because the Bankruptcy Act, Section 59b, makes no discrimination as to the amount the creditor may hold. Accord: *In re Brown* (C. C. Mo. 1901) 111 F. 979. In the latter case the court said: "It is true that most of the claims of the creditors are for mere nominal sums, but Bankr. Law, § § 59b, 59d, make no discrimination as to the amounts which creditors may hold. If the creditors are more than twelve, there must be three petitioning creditors, whose claims amount, in the aggregate, to $500 or over, and this without reference to what the amounts of the claims of the other creditors may be." Judge Lowell says that *In re Blount, supra,* was supported on the ground that the bankrupt fraudulently kept claims alive for the purpose of preventing a single creditor from bringing a petition against him, and that *In re Burg, supra,* and *In re Branche, supra,* follow *In re Blount,* without noting the element of fraud therein.

The writer agrees that the minority rule laid down in the principal case and in *In re Alden, supra,* though not the more desirable rule, is the rule that was intended to be set out in the Bankruptcy Act. Particularly apropos is the comment of Wyman, J., in the principal case. He says (in answering argument of counsel, contending that such a holding would operate to defeat the real spirit and intent of the bankruptcy law): "However persuasive this argument may be, it is one which might more properly be addressed to the Congress than to the court. The entire procedure is regulated by statute, and is covered by section 59b of the Bankruptcy Act. The language of this statute is plain and free from ambiguity, and to read into it that which is contended for by the appellant would be nothing less than judicial legislation."

Maurice W. Lee.

CRIMINAL LAW—HOMICIDE—CO-DEFENDANTS—ACTS AND DECLARATIONS IN GENERAL.—The defendants, Wysocki and Sams, were indicted for the death of Wysocki's wife, the result of a conspiracy between the two, in which the latter killed Wysocki's wife for the consideration of $500. The motive as pointed out by the prosecuting attorney, was the alleged infatuation of Wysocki for another woman who had been in his employ. In the conspiracy, it was arranged that Wysocki would take his wife in an automobile, and Sams in another automobile would overtake and crowd Wysocki to the curb, consummating a holdup and, incident thereto, would shoot Mrs. Wysocki. The killing was carried out on May 28th, 1932. The defendants were arrested in August. Sams, after arrest, made two alleged confessions, each of them being practically in accord with the foregoing statement. Later Sams disavowed the confessions and, along with Wysocki, entered a plea of not guilty. They were jointly tried and convicted of murder in the first degree. An appeal, made by Wysocki, assigned error: First,

upon the admission of Sams' confession as evidence not only of Sams' guilt, but also tending to prove his guilt. Secondly, the admitting of a statement of testimony of the prosecution over objection, that it was too remote, not relevant, not connected with the crime charged, prejudicial, and that it tended "to show an entirely different offense." Thirdly, that a statement by Sams, made weeks after the alleged conspiracy was fully consummated, was not admissible against the co-conspirator. *Held,* Reversed and new trial granted. *People v. Wysocki,* 255 N. W. 160 (Mich. 1934).

"Confessions and admissions of one conspirator or co-defendant are not admissible in evidence against another, unless they were made in his presence and assented to by him, or unless he admitted their truth, in which cases they are admissible, although made after the termination of the conspiracy, upon the theory that they are in the nature of admissions of the defendant." CRIMINAL LAW, 16 C. J. 659, 660.

In *People v. Turner,* 256 Ill. App. 493 (1930), it was held, that accomplice's confession charging the defendant with commission of a crime is not admissible against the defendant who then and there denied the charge.

In the principal case when Sams' confession was completed Wysocki was asked if it was true, and he most emphatically and unequivocally denied the statement. It must be noted, that this denial was made *at the time,* proving that it was made at the first opporunity to do so. Regardless of this, the evidence was admitted. "Where a defendant denies the truth of a statement incriminating him, made by a co-conspirator or a co-defendant after the termination of the conspiracy, it is not, according to American authority, admissible against him." CRIMINAL LAW, 16 C. J. 660.

In reference to other offenses, "The general rule is that, on a prosecution for a particular crime, evidence which in any manner shows or tends to show that accused has committed another crime wholly independent of that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible." CRIMINAL LAW, 16 C. J. 586. There are several exceptions to this rule. Where it appears that evidence of the commission of such other crime has a direct and logical bearing upon the question of the guilt of the accused as to the crime with which he is charged, evidence of the commission of such other offense is admissible. *People v. Argentos,* 156 Cal. 720, 106 Pac. 65 (1909).

"Proof of the commission of another crime may be given where it tends to show motive for the homicide in question." WHARTON ON HOMICIDE § 596. In *Commonwealth v. Ferrigan,* 44 Pa. 386 (1863), the court held that where the facts and circumstances offered in evidence amount to proof of a crime other than that charged in the indictment, and there is ground to believe that the crime charged grew out of it or was caused by it, or was in any way caused by it, such facts and circumstances may be admitted to show the *quo animo* of the accused. In *State v. Phelps,* 5 S. D. 480, 59 N. W. 471 (1894), on a trial of an indictment for murder charged to have been committed by procuring another person to shoot members of a family, the court held that "Evidence directly tending to establish guilt of a person charged with a felony, is ... incompetent, for the sole reason that it tends to prove the commission of another offense, when it goes to question of motive, or appears to be a part of a plan or scheme through which the accused procured a crime to be committed, and for which he is being tried as a principal."

When it is necessary to show a particular intent, to establish the offense charged, proof of previous acts of the same kind is admissible for the purpose

of proving the defendant's guilty knowledge or intent. *People v. Bullock,* 173 Mich. 397, 139 N. W. 43 (1912); *People v. Wakely,* 62 Mich. 297, 28 N. W. 871 (1886).

In *People v. Molineux,* 168 N. Y. 297, 61 N. E. 286, 294, 62 L. R. A. 193, 240 (1901), the court said: ". . . evidence of other crimes is competent to prove the specific crime charged in the indictment when it tends to establish (1) Motive; (2) Intent; (3) the absence of mistake or accident; (4) a common scheme or plan, embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; (5) the identity of the person charged with the commission of the crime in trial."

In *State v. Hyde,* 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191 (1911), it was adjudged that evidence of other crimes is admissible in a prosecution for a particular one, when relevant to the issues and showing either motive or intent, absence of mistake or an accident, a common scheme or plan, or the identity of the persons charged with the crime but where defendant is on trial for one crime, evidence of unrelated crimes is not admissible to prove his guilt in the particular instance.

A very interesting case occurred in New York for arson, in which the defendant is alleged to have consented to procure insurance on buildings, burn them, and collect the insurance. It was held that *evidence is not admissible* of a *fire* in the defendant's own building *before the conspiracy existed,* and which was *not started* by the one *who started* those *under* the alleged conspiracy, or shown to have been connected with the one for which the indictment was found. *People v. Grutz,* 212 N. Y. 72, 105 N. E. 843, L. R. A. 1915D, 229 (1914).

Wigmore says: ". . . the intent to kill is in homicide practically always in issue, and is to be proved by the prosecution, and the recurrence of other acts of the sort tends to negative inadvertence, defensive purpose, or any other form of innocent intent. 1 WIGMORE ON EVIDENCE (2nd ed.) 670.

In *People v. Macgregor,* 144 N. W. 869 882, 178 Mich. 436 (1914), the real question was put by Judge Stone in the following words: "The real test should be: Do the facts constituting the other crime actually tend to establish one or several elements of the crime charged? If so, they may be proved."

"The proper practice in cases of this kind was well-stated by Mr. Justice Brewer (afterward a distinguished associate justice of the Supreme Court of the United States) in *State v. Adams,* 20 Kan. 311, 319 [1878], where he said: 'It is clear that the commission of one offense cannot be proven on the trial of a party for another, merely for the purpose of inducing the jury to believe that he is guilty of the latter, because he committed the former. You cannot prejudice a defendant before a jury by proof of general bad character, or particular acts of crime other than the one for which he is being tried. And, on the other hand, it is equally clear that whatever testimony tends directly to show the defendant guilty of the crime charged is competent, although it also tends to show him guilty of another and distinct offense. . . . A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him. A man may commit half a dozen distinct crimes, and the same facts, or some of them, may tend directly to prove his guilt of all, and on the trial as testimony, that they also tend to prove his guilt of the others.'" *People v.* for any one of such crimes it is no objection to the competency of such facts, *Thau,* 113 N. E. 556, 557 (N. Y. 1916).

William J. Klima.