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NOTES

HEARSAY EVIDENCE IN LABOR BOARD HEARINGS.—The large number of cases involving the admissibility of various evidence before the National Labor Relations Board have refocused attention to the *hearsay* rule. One of the oldest rules of evidence is that hearsay evidence is not admissible. To this rule have been added nine exceptions.

Upon the advent of administrative boards which exercise a quasi-judicial function the problem arose as to the applicability of regular rules of evidence to these administrative hearings. Simultaneously with this arose the problem of whether administrative boards could relax their rules of procedure and evidence without violating the *due process* clause of the fifth amendment, and the *due process* clause and the *equal protection of laws* clause of the fourteenth amendment.

It has long been accepted that it is within the power of a state, without denial of equal protection of the laws, to regulate and determine either through the legislature or through the courts, not only questions relating to the burden of proof [1] but also as to admissibility of evidence.[2]

In *Andrus v. Fidelity Mutual life Ins. Asso.*[3] the court stated that the constitutional provision pertaining to *equal protection* was not

1 People v. Morrison, 125 Cal. App. 283, 13 Pac. (2d) 800 (1932); Appeal dismissed, 288 U. S. 591, 77 L. Ed. 970 (1933).

2 Ill. Cent. R. Co. v. Paducah Brewery Co., 288 U. S. 591, 77 L. Ed. 970 (1914).

3 168 Mo. 151, 67 S. W. 582 (1902).

intended to control mere matters of practice in the state courts, but was intended to secure the same protection to every person or company in a *class* that is accorded to every other person or company in the same class.

As regards due process it was stated in *York v. Texas* [4] that a state has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. In *National Labor Relations Board v. Mackay Radio and Telegraph Co.*[5] it was held that the due process clause of the fifth amendment guarantees no particular form of procedure but merely guarantees substantial rights.

With the more favorable acceptance of administrative boards it has been seen that the majority of these boards have now set up their own rules for the admission of evidence. Upon the passage of Industrial Accident Laws by the various states, laws were passed providing that in hearings before Industrial Accident boards the regular rules of evidence need not be applied.[6] The *National Labor Relations Act*[7] states that in hearings before this board the rules of evidence prevailing in courts of law or equity shall not be controlling.

Early attempts to admit hearsay evidence under this type of provisions, however, met the argument that hearsay was more than a technical rule of evidence but was based on common sense. *Carroll v. Knickerbocker Ice Co.*,[8] the leading case to arise under the New York statute, held that, while hearsay evidence could be admitted, the finding of fact made by the commission must be based on a residuum of legal evidence.

In a dissenting opinion, however, Judge Seabury stated that hearsay is of probative value and that the distinction made by the majority between receiving hearsay in evidence and basing a finding on such hearsay is unreasonable. Judge Pound also dissented on the ground that the hearsay rule with its arbitrary exceptions and its technical application was a product of the jury system, and not of any value in a proceeding such as one before a commission composed of experts with a detailed knowledge of the particular kinds of problem which they were handling.

Most courts now recognize that hearsay may be material and relevant, and the general rule is that hearsay evidence admitted without objection may properly be considered and given its natural probative

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4 137 U. S. 20, 11 S. Ct. 9, 34 L. Ed. 604 (1890).

5 304 U. S. 333, 58 S. Ct. 904 (1938).

6 36 Harvard Law Rev. 263.

7 29 U. S. C. A. § 160B.

8 218 N. Y. 435, 113 N. E. 507 (1916).

effect.[9] In trials without a jury courts have been more liberal in the admission of hearsay.[10]

It can thus be said that admission of hearsay evidence is not in conflict with due process or equal protection of laws clauses of the constitution. It can be further said that hearsay evidence has been held to be admissible before administrative boards but that decisions cannot be rendered solely on hearsay evidence.

In considering the *National Labor Relations Board* the problem immediately arises as to how far the Board may deviate from regular rules as regards to hearsay evidence and just what weight can be given to such evidence.

An investigation of the cases shows that the test for admissibility is whether or not the evidence is substantial. Thus in *Appalachian Electric Power Co. v. National Labor Relations Board*[11] it was held that courts are bound by the Board's findings of fact as to matters within its jurisdiction, where the findings are supported by substantial evidence. This immediately suggests the problem of what constitutes substantial evidence.

In *Consolidated Edison Co. v. National Labor Relations Board*[12] the court stated that: "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In this case the court went on to say that "mere uncorroborated hearsay or rumor does not constitute substantial evidence."

In *National Labor Relations Board v. Remington-Rand Co.*[13] the court held that mere rumor will not serve to support a finding, but hearsay may do so, at least if more is not conveniently available and if, in the end, the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.

In *Martel Mills Corp. v. National Labor Relations Board,*[14] however, it was stated that while hearsay may under certain circumstances be sufficient, where it is both specifically denied and is substituted for direct evidence which is conveniently available it is not sufficient.

From an examination of the cases it can thus be seen that the *National Labor Board* has been allowed considerable latitude in the ad-

9 Spiller v. Atchison, T. & S. F. R. Co., 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466 (1920); Barlow v. Verrilr, 88 N. H. 25, 183 A. 857, 104 A. L. R. 1126 (1936).

10 Shira v. State, 187 Ind. 441, 119 N. E. 833 (1918).

11 93 F. (2d) 985 (1938).

12 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126 (1938).

13 94 F. (2d) 862 (1938); Certiorari denied, 58 S. Ct. 1046, 304 U. S. 576, 82 L. Ed. 1540 (1938).

14 114 F. (2d) 624 (1940).

mission of hearsay evidence. It cannot, however, be said that it has deviated to any great extent from the practice of other administrative boards.

While, at first blush, this liberal trend in the admission of evidence may seem somewhat dangerous, when viewed with the fact that these rules were chiefly for protection against juries, and when one considers that the courts themselves, in cases tried without a jury, have been somewhat more liberal in their rules on evidence it loses much of this dangerous aspect. This situation is well stated by J. Warren Madden, Chairman of the National Labor Relations Board, who said: [15] "So when the statute speaks of the rules of evidence prevailing in courts of law and equity, it is speaking of a somewhat indefinite thing. That provision, by the way, is almost universal in all statutes, both State and Federal, setting up administrative bodies. The general aim, I suppose, is that the proceeding shall not be technical; lose sight of what the proceeding is about. After all, most of the rules of evidence have been invented for the purpose of keeping untrustworthy kinds of evidence from juries, because jurors are untrained people who are just brought in for one occasion of hearing one case, do not know anything about the law, do not know anything about the chemistry or physiology, or psychology or what not that may be involved in that case, and are likely to be misled by things which might seem to an untrained person to tend to prove something, but which in fact are so untrustworthy that they are likely to do more harm than good.

"These administrative boards are not lay jurors. They are people who, either by former training or by experience on the job and especially in the field in which they work, have gained the knowledge, or should if they are of the average capacity, enabling them to see through the situations that are presented to them better than anyone else can see through them. . . ."

With the number of administrative boards increasing almost daily and with this non-technical system of procedure now firmly implanted, it seems hardly possible that there will be a return by administrative boards to the technical rules of courts. In fact, with the increasing percentage of non-jury trials, the more likely result is that the courts may follow the precedent set by administrative boards, and may themselves moderate many of their technical rules of procedure and evidence.

Bernard F. Grainey.

15 Hearing before sub-committee of committee on Judiciary U. S. Senate, 75th Congress, 3rd Session.

INTER VIVOS OR TESTAMENTARY DISPOSITION—WHICH?—How near death must a person be in making an absolute conveyance before the courts will declare such disposition testamentary and void for failing to comply with the statute of wills? In other words does the apprehension of the approach of death by reason, for example, of old age, sickness, or surgical operation, thwart an absolute conveyance by making it testamentary? The answer to this question is of especial importance to the law of trusts, not to mention other fields of law. The cases are most interesting on this subject, but before turning to them it is best to note several important distinctions.

A will "is a disposition of an interest in property, made by the owner thereof in the form and manner prescribed by law, which disposition is to take effect at the death of the owner." [1] By testamentary is meant that no title whatever is to vest in the donee until the donor's death.[2] If a testamentary disposition is intended, this can only be done by a validly executed will. A deed is "an instrument in writing, duly executed and delivered, conveying real estate." [3] "Deeds take effect by delivery and are operative and binding during the life of the grantor.[4] Wills are ambulatory during the life of the testator, and have no effect until his death." [5] It matters not to the validity of a deed if the enjoyment of the property is postponed until the death of the grantor.[6] Another important distinction is that between a *causa mortis* and *inter vivos* disposition. The fundamental difference is that a disposition *causa mortis* is conditional and effectual only in the event the grantor dies from the disease gripping him when he disposed of his property. His recovery invalidates the conveyance.[7] However, in an *inter vivos* disposition the grantor divests himself of title presently and immediately regardless of death or recovery.[8] We shall not consider cases involving the superior rights of third persons or creditors because fraud of their rights vitiates the entire disposition, and obliterates the distinction we are seeking.[9]

The leading case on this subject appears to be *Bromley v. Mitchell.*[10] Just two days before death, Mary Horton, joined by her husband, deed

1 Rollison on Wills, (1939 Ed.) 79.

2 Johnson v. Colley, 101 Va. 414, 44 S. E. 721, 99 Am. S. R. 884 (1903).

3 26 C. J. S. § 1, 173.

4 See also: Thorp v. Daniel, 339 Mo. 763, 99 S. W. (2) 42 (1936).

5 Sharp v. Hall, 86 Ala. 110, 5 So. 497 (1889); see also: Thorp v. Daniel, 339 Mo. 763, 99 S. W. (2) 42 (1936); Dixon v. Dameron's Adm'r., 256 Ky. 722, 77 S. W. (2) 6 (1934).

6 Patterson v. McClenathan, 296 Ill. 475, 129 N. E. 767 (1921); 16 Am. J. § 5, 439.

7 In re Elliott's Estate, 113 Pa. Sup. 350, 173 A. 880 (1934).

8 Thomas v. First National Bank, 166 Va. 497, 186 S. E. 77 (1936).

9 Merz v. Tower Grove Bank and Trust Co., ... Mo. ....., 130 S. W. (2) 611 (1939); Newman v. Dore, 275 N. Y. 371, 9 N. E. (2) 966 (1937); Bromley v. Mitchell, 155 Mass. 509, 30 N. E. 83 (1892).

10 155 Mass. 509, 30 N. E. 83 (1892).

absolutely to the plaintiff, Bromley, all of her personal estate of every kind in trust. Some of the trust purposes were: Bromley was to take possession of the property and do with it as he deemed best, either to hold it or to sell it. He was to apply the income of it, or the proceeds of its sale, according to oral instructions previously given him by Mrs. Horton. Her previous instructions, summarized, were: to apply the proceeds to pay for her burial; to satisfy her debts; and to maintain her husband properly during his life. Any balance was to go to Bromley. The court found a valid delivery from the evidence and that the parties understood and intended an immediate conveyance. Justice Holmes disagreed with the contention that this was a defective testamentary endeavor, saying: "These instructions and trusts . . . certainly have a testamentary look, and as the deed was executed only two days before the grantor died, we appreciate the strength of the argument that the parties must have understood that the testament was to take effect only in case the grantor died, and that it is not a deed, but an ineffectual will. But on the face of the deed it is a conveyance operating at once and irrevocably, and there is nothing in the parol trusts which is not reconcilable with the same interpretation."

The facts in *Deifendorf v. Deifendorf*,[11] are analogous. Suffering from a dangerous illness and just twelve days before he died, John Deifendorf requested his physician to draw up a deed. He instructed that the deed was to embody a provision that it was given in consideration of the three thousand dollars paid to him by his wife (for which she held his notes), and also that she should expend three thousand dollars for the purchase of a cemetery lot and its beautification. The deed was prepared and acknowledged the same day. Deifendorf then handed the deed to the physician requesting him to "retain it until after my death for my wife, and then place it on record." Immediately after his death the physician recorded the deed pursuant to the request. Mrs. Deifendorf complied with the condition in the deed and remained in possession of the property. The court said: "Although this deed was probably made in view of the approaching death of the grantor, yet it was not a testamentary disposition of his property. A testamentary disposition of property is one which is not to take effect unless the grantor dies, nor until that event. But in the present case there is complete evidence that the deed was to take effect at once, and that it was not contingent on the death of the grantor. The delivery was complete and absolute. . . . The time of recording had nothing to do with the time of taking effect." As an additional indication that the conveyance was *inter vivos* the court examined the matter of consideration and mentioned that it tended to support its decision of the case.

In the case of *Ellis v. Funk*,[12] George Ellis was over seventy-one years of age, feeble and suffering from an illness which subsequently

11 132 N. Y. 100, 30 N. E. 375 (1892).
12 32 Cal. App. 426, 163 Pac. 332 (1917).

caused his death. He was adverse to the expense and litigation attendant to the administration of his estate by the probate court; thus ten days before he died he executed a grant deed, absolute in form, conveying to the defendants all of his real estate. Then five days before his death he gave them a bill of sale of all his personal property. The court remarked: "That these transfers were made in contemplation of the apprehended near approach of death admits of little doubt." But the court was satisfied from the evidence that there was a present conveyance and not a testamentary disposition. Funk had taken care of the grantor and this was held to be consideration for the bill of sale of the personal property. Ellis had charged his deed with a condition that Funk should satisfy Ellis' debts, which Funk discharged in due time. The court seemed to rely heavily upon the concept of consideration as reenforcing the evidence of an *inter vivos* conveyance. Other cases using consideration as a helpful touchstone are *Lockwood v. Rhode Island Hospital Trust Co.*,[13] and *Oldenburg v. Baird.*[14] Of course, the presence of consideration is of fundamental import in distinguishing an *inter vivos* contract from a testamentary instrument.[15]

On the other hand, *Rypka v. Field,*[16] is a recent case not relying on the element of consideration or even intimating that it would add force as a test of the nature of the transaction. On April 21, 1938, Edna Rypka conveyed Flower Court Apartments to one Field. Two days later she died. Execution of the deed was prompted by the fact that she was to leave for the hospital. Delivery of the deed was witnessed by two nieces and the grantor said: "This is your property from now on," as she handed him the deed. Field paid no consideration for the deed. The court felt that the evidence was sufficient to negate any inference that the action of Edna Rypka was a testamentary disposition. "The character of this disposition was anything but testamentary. It was an unequivocal, absolute, disposition effective immediately. . . . It was a gift, if we will, upon fondness but nevertheless a voluntary disposition of her property, and in such a manner as she had a right to make." It should be apparent that where the circumstances are clear no consideration is required to support a warranty deed properly executed and delivered.[17]

Other interesting facts and a significant principle are presented in a fairly recent case.[18] Minnie McMillan was seized of certain realty and, as she and her invalid husband had no children, she feared that her property would go to his heirs upon her decease. On advice of counsel she executed a deed and trust agreement. In a hospital the night before

13 R. I. ....., 6 A. (2) 707 (1939).
14 26 Ind. App. 379, 58 N. E. 1073 (1900).
15 Bergman v. Ornbaun, 33 Cal. App. (2) 680, 92 Pac. (2) 654 (1939).
16 Cal. App. ....., 115 Pac. (2) 521 (1941).
17 Cohn v. Klein, ... Cal. ....., 287 Pac. 459 (1930); 26 C. J. S. § 21, 195.
18 Patterson v. McClenathan, 296 Ill. 475, 129 N. E. 767 (1921).

she was to undergo an operation, her attorney explained the necessity for proper delivery and passing of control from her during her lifetime. She then handed the deed to McClenathan stating that she wanted him to have the deed recorded. She handed the trust agreement to the doctor. She died a week later. "Because this deed was made in lieu of a will does not render it a testamentary instrument," [19] the court declared. "The fact that the time when the beneficiaries under the trust agreement were to come into the actual enjoyment and possession of the land was postponed until after the death of the grantor would not make the deed testamentary in character."

Burton v. Burton,[20] is another case wherein a hospital is the background for the surrounding transactions. Seventeen days before death but seriously ill, Burton made transfers of his property to his children by his first wife. The plaintiff, his second wife, brings suit to have these transfers set aside. The court said: "This is simply the case of an elderly, ill, but mentally competent man, still hoping and expecting recovery, concluding to finally dispose of his property, and deliberately choosing between a wife in name only, of some twenty months, whom he did not greatly trust, and adult children by a former marriage, whom he loved and trusted, and making such disposition definite and irrevocable. . . . We know of no legal impediment to such action."

The grantor in the case of *Greenfield's Estate,*[21] was suffering from the infirmities of old age when she executed the deed in question. December 15, 1834, for a consideration of one hundred dollars she conveyed all of her estate real and personal absolutely. It was valued in the neighborhood of two hundred thousand dollars. This deed was recorded December 31, 1834. On the same day that the deed was executed, the grantees executed a declaration of trust. This declaration was not recorded until after Elizabeth Greenfield's death in July, 1845. The trust declared that the trustees held the property in trust to apply the proceeds and profits of the estate as Elizabeth Greenfield should direct and for the want of such direction the trustees were to invest the profits in securities and stocks. After the death of Elizabeth Greenfield the sum was to be paid for the following purposes: to pay all of her debts; to pay the expenses of the trust; to pay each trustee ten thousand dollars for services; and to pay various other persons. Since "she was generous to a fault," she wanted to make an irrevocable "will" so she wouldn't be harassed by the importunities of relatives, and as insurance against her own weaknesses which were growing more severe. Furthermore she did not want argument over her estate upon her decease. The court declared that the two instruments were to be construed together.

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19 See also: Young v. Payne, 283 Ill. 649, 119 N. E. 612 (1918); Bowen v. Morgillo, 14 A. (2d) 724 (Conn., 1940).

20 100 Colo. 567, 69 Pac. (2) 307 (1937).

21 14 Pa. (2 Harris) 489 (1850).

Outside of the provision to the trustees, which was void for constructive fraud, the court upheld the deed as an *inter vivos* conveyance. More detailed evidence is interesting in view of the court's ruling. She constantly referred to the instrument as her "will." The court explained this away by saying that she had no knowledge of technical terms. The fact that she later wished to change the terms of the instrument and chafed at the realization that she had made an irrevocable conveyance was deemed further proof of an *inter vivos* transaction. Therefore the mere matter of old age has no bearing on whether the instrument is testamentary or *inter vivos*. And, the fact that the settlor wished to avoid administration of her estate does not make her endeavor testamentary.[22]

Another important case is *Brown v. Atwater*.[23] On April 30, 1875, Eliza Brown executed and delivered to her daughters, the plaintiffs, for no valuable consideration a deed in fee of certain lots. At the same time she made and executed her will devising all of the property she might own at her death. She was "seriously and dangerously ill, but in full possession of her mental faculties. She died on the following day." The court had no doubt that the grantor divested herself of the estate during her lifetime. "That she preferred to divide her estate by deed before her death, rather than do it by will to take effect at her death, and that the deed was executed for that purpose, is shown. But there is nothing to show that she did not intend the deed to take effect at once upon its execution, and without reference to the time she might die. The mere fact that she executed a will at the same time as the deed, does not show it." [24]

Millican v. Millican,[25] is an early case of significance because of the statement of the court. The facts in brief are that Nancy Millican was advanced in years and resided with her son, one of the donees. She conveyed her property absolutely to some of her children. It was held that this did not warrant the conclusion that an absolute deed was not intended as a present disposition. The court declared that the absolute deed to the donee could not be set aside as a fraud of the statute of wills of 1840, although the purpose and object of the donor in making the deed was to prevent some of her heirs from inheriting the property. "That motive, of itself, would not be a ground for setting aside the conveyance." This case implies, then, that there is a distinction between the grantor's intention and his motive, and that the intention of the grantor determines whether the disposition is testamentary or *inter vivos*, regardless of his motive. Apparently this is the only case in point

22 See also: Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089 (1895).

23 25 Minn. 520 (1879).

24 See also: Longley v. Brooks, 13 Cal. (2) 754, 92 Pac. (2) 394 (1939); Spence v. Huckins, 208 Ill. 304, 70 N. E. 289 (1904); contra: (instrument not absolute on its face) Hydrick v. Hydrick, 142 S. C. 531, 141 S. E. 156 (1927).

25 24 Tex. 426 (1859).

suggesting such a distinction involving the statute of wills. However, in cases involving a widow's statutory rights in her husband's estate, where it is charged the husband has fraudulently intended to deprive her of such rights, some jurisdictions do hold motive determinative.[26] But the vast majority of cases hold motive to be an unsatisfactory test of the nature of the disposition. They declare the test to be whether the disposition is real, that is, an absolute divestiture of title and control, or whether merely colorable or illusory, meaning that the grantor enjoys all or most of the rights of ownership after the "disposition." For after all, it is the intent of the grantor to divest control and title presently, and not some *other* purpose, that determines the nature of the disposition.[27]

To show more graphically the dividing line between *inter vivos* and testamentary dispositions the following are cases which have been declared testamentary.

In *Wareham v. Sellers*,[28] Philip Sellers made an assignment of all his personal property absolutely to G. Warehouse. The court said the paper contained intrinsic evidence that it was a testamentary instrument because it was of *all* his personal property. Other evidence corroborated this interpretation; thus the instrument passed as a will. (This was before certain statutory requirements were enacted.) This case suggests a matter which other cases previously cited have failed to mention or consider significant;[29] that is, when the grantor attempts to dispose of all his property, this raises at least a doubt favoring a testamentary intent. Since the greater number of cases do not consider such fact influential it may be disregarded.

A recent case is illustrative of the present issue.[30] The testator three days before his death executed trust agreements by which, in form at least, he transferred all of his real and personal property to trustees. He reserved the enjoyment of the entire income as long as he should live, and a right to revoke the trust at his will. The powers granted to the trustees were made "subject to the settlor's control during his life," and could be exercised in such manner only as the settlor should direct in

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26 Dunnett v. Shields, 97 Vt. 419, 123 A. 626 (1924); see anno: 64 A. L. R. 484, 112 A. L. R. 643.

27 Newman v. Dore, 275 N. Y. 371, 9 N. E. (2) 966, 112 A. L. R. 643 (1937); Van Orman v. Van Orman, ... Ind. App. ....., 41 N. E. (2) 693 (1942); Montgomery v. Varley, 104 N. J. Eq. 83, 144 A. 183 (1929); Knoll v. Hart, 308 Pa. 223, 162 A. 228 (1932); McCarthy v. Pieret, 281 N. Y. 407, 24 N. E. (2) 102 (1939); Jordan v. Jordan, 65 Ala. 301 (1880); Phifer v. Mullis, 167 N. C. 405, 83 S. E. 582 (1914); Low v. Low, Tex. Civ. App. ....., 172 S. W. 590 (1915); Faulk v. Faulk, 23 Tex. 653 (1859).

28 9 Gill & J. 98 (1837).

29 Bromley v. Mitchell, 155 Mass. 509, 30 N. E. 83 (1892); Ellis v. Funk, 32 Cal. App. 426, 163 Pac. 332 (1917); Greenfield's Estate, 14 Pa. (2 Harris) 489 (1850).

30 Newman v. Dore, 275 N. Y. 371, 9 N. E. (2) 966, 112 A. L. R. 643 (1937).

writing from time to time. The court declared: "Thus by the trust agreement which transferred to the trustees the settlor's entire property, the settlor reserved substantially the same rights to enjoy and control the disposition of the property as he previously had possessed. . . . The only sound test of the validity of a challenged transfer is whether it is real or illusory. . . . Judged by the substance, not by the form, the testator's conveyance is illusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed. . . . In this case it is clear that the settlor never intended to divest himself of his property. He was unwilling to do so even when death was near." Therefore, there must be a clear severance of control over the property granted.

In *Chaplin v. Chaplin,*[31] the grantor executed a warranty deed with a clause that stated that it should be void in the event the grantee died before the grantor. This indicated, the court decided, that the title should pass only in the event the grantee should survive the grantor and thus the deed was testamentary in character and inoperative because of the statute of wills. The fact that the deed was executed shortly after the grantor had suffered a paralytic stroke and probably would be a burden on his brother for some time and that the deed was executed in consideration therefor, does rather "confirm rather than to overthrow this interpretation," i. e., that it was testamentary. In *Hackensack Trust Co. v. Nowacki,*[32] the principle is similar. Antonina Nowacki executed certain assignments of bank deposits to Stephen Nowacki on her death bed. The court said: "The assignments leave no doubt that the decedent donor intended to transfer title in anticipation of her death. The last paragraph of the assignments . . . so declare: it being my intention that Stephen Nowacki shall have all of said moneys upon my death. The gifts so intended are therefore void because they fail to comply with the statute of wills." These two latter cases are not strictly in point but they well illustrate that the instrument must be in clear absolute terms divesting title and severing the control of the grantor presently. Otherwise as is shown, the courts will construe in view of impending death and surrounding circumstances that the grantor's intent is testamentary.

Another point to be made here is that a prime requisite for an *inter vivos* conveyance is the valid delivery of the instrument within the lifetime of the grantor.[32] Delivery of itself in many cases shows the intent of the parties so clearly that the courts are able to declare with relative certainty that the transaction is either *inter vivos* or testamen-

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31 105 Kan. 481, 184 Pac. 984 (1919).

32 Bryan v. Bradley, 16 Conn. 373 (1844); Montgomery v. Varley, 104 N. J. Eq. 83, 144 A. 183 (1929); Tewksbury v. Tewksbury, 22 Mass. 595, 111 N. E. 394 (1916); In re Beffa's Estate, 54 Cal. App. 186 201 Pac. 616 (1921); McCartin v. Devine, ... R. I. ....., 17 A. (2) 864 (1941); Blackman v. Preston, 123 Ill. 381, 15 N. E. 42 (1888); Clay v. Layton, 134 Mich. 338, 96 N. W. 458 (1903); doctrine of relation back: Owen v. Williams, 114 Ind. 179, 15 N. E. 678 (1888).

tary.[33] The courts closely examine the facts to see that there has been a divestiture of control from the grantor during his lifetime. If the instrument remains within his control, courts declare his intention testamentary; that is, from his acts it is apparent that he intended to keep the property until his death.[34] Delivery of the instrument may be also validly made to a third party for the actual grantee to be delivered at the death of the grantor, and this will not make the conveyance testamentary.[35]

Recapitulation of salient facts and principles will bring within view the answer sought here. We have seen that a conveyance made within one day of death was upheld as an *inter vivos* disposition. So long as the grantor clearly intends to make an *inter vivos* disposition and validly delivers the instrument, his motives seem of little consequence, providing they are legitimate. Even when the grantor makes a will and a deed on the same day this does not destroy the *inter vivos* nature of the absolute conveyance. Presence of valuable consideration given in exchange for the property is a helpful test in support of an *inter vivos* disposition, although it is not an essential element thereto. Consequently so long as the grantor executes an absolute deed and shows by his acts and words unequivocally that it is his intention to pass the title presently and immediately however near to death he is, seems of little consequence. Nor does it matter who the grantee is. In more graphic terms, in the last few minutes of life a grantor may execute an absolute deed and deliver it, so long as he is mentally competent, and it will be given effect as an *inter vivos* disposition.

Warren A. Deahl.

MILITARY ACTION IN LABOR DISPUTES.—Historians of labor in the United States place the beginning of American labor movements in the year 1827 when at Philadelphia American wage earners for the first time joined together as a class, regardless of class lines, in a contest with employers. As early as 1786 the printers "turned out" demanding a minimum wage of six dollars a week; still, it was not until the Philadelphia meeting that the first union of trade associations organized. A swift century of machine development and mass production has knit these original strands of organized effort into a vast pattern of labor federations and unions. Notions of collective bargaining, employer obligations and strikes quickly followed the wake of progressive organization. Where meditation failed strikes were employed.

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33 Rypka v. Field, ... Cal. App. ....., 115 Pac. (2) 521 (1941).

34 Oswald v. Caldwell, 225 Ill. 224, 80 N. E. 131 (1906); but see: Szymczak v. Szymczak, 306 Ill. 541, 138 N. E. 218 (1923).

35 Southern v. Southern, ... Mo. ....., 52 S. W. (2) 868 (1932).

The great railway strike of 1877 paralyzed almost all the lines between the Atlantic and the Mississippi. Pitched battles took place between strikers and scabs. So great was the danger to the disinterested citizenry that the five governors of Maryland, Ohio, Pennsylvania, Illinois and New York called out their respective militias and ordered *martial* law. In Pittsburgh alone scores of lives were lost and $2,000,000 worth of property burned to the ground. Finally, the strike was broken with the aid of Federal troops.

Interference by state authority in this violence warned labor that strike violence would not be tolerated. Then, as now, almost complete uniformity existed in the constitutional and statutory provisions of the various states on the relationship of the executive and the militia. In every state constitution except New York it is provided that the militia shall be subordinate to the civil authority. Provisions prohibiting the suspension of the writ of habeas corpus are found in all of the states. Likewise, forty-seven of the states provide in their constitutions that the governor be commander-in-chief of the military forces while Maryland designates it by statute. When the several governors declared a state of martial law to exist at the time of the great railway strike, they relied upon the words of Chief Justice Taney in *Luther v. Borden.*[1] He upheld the right of the Rhode Island legislature to declare a state of martial law because of Dorrs rebellion. He stated: "If the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the state, as to require the use of military force and the declaration of martial law, we see no ground on which this court can question its authority." This decision, however, dealt more with the power of the legislature than that of the governor. It was not until 1909 that the question of the governor's power to call out the militia as a protection against strike violence came squarely before the high tribunal.

In September, 1903, the Western Federation of Mines struck for an eight-hour day. Violence predominated until troops arrived in November. When a purported peace agreement was arranged in the following March, the militia withdrew. A few days later a mob of "Citizen Alliance Members" (vigilantes of the time) searched the towns in San Miguel county, broke into residences and collected about sixty miners who were too friendly with the strikers. The group was escorted from the county with orders never to return. When they attempted to come back in mass, the civil authorities requested the governor to proclaim martial law. The governor complied. On the same day one Moyer, President of the Federation, was arrested and imprisoned by the militia. When the governor concluded his term of office, Moyer sued on grounds that he had been denied due process of law by the imprisonment. The

1 Luther v. Borden, 7 How. 1 (U. S.) (1848).

case [2] came before the Supreme Court. A unanimous decision supported the action of the governor and Mr. Justice Holmes stated the principle: "So long as such arrests are made in good faith and in the honest belief that they are needed to head the insurrection off, the governor is the final judge. . . . When it comes to a decision by the head of the state on a matter involving its life, the ordinary rights of the individual must yield to what he deems the necessities of the moment. *Public danger warrants the substitution of the executive process for judicial process.*" The last sentence of this extract from the opinion neatly summarizes one of the greatest points in favor of executive interference in labor disputes — expediency. By granting the governor power to enforce his own proclamations, he is capable of subduing mob violence and widespread damage. The principle is not undisputed, however. Professor Charles Fariman labels this emergency, delegation of judicial process:[3] "A defective method likely to degenerate into a grim class struggle. One cannot deny that the state militia has on some occasions served as the champion of employers against striking workmen." This view has been strengthened by the findings of the Colorado Strike Investigation [4] where state militiamen seemed to be on the side of the mine operators. Despite the minority view as expressed by Professor Fariman, both reason and authority dictate that when in pursuance of law, an executive proclaims a condition of insurrection or of martial law, that decision is final.[5]

From the case rulings we have seen that the executive power of the state, the governor, may at his discretion call out the militia and proclaim a state of martial law. This conclusion, however, develops another problem. In time of a violent strike what are the limits upon the governor's delegated power of judicial interpretation? Admittedly there is discord between the Federal District Courts in defining the governor's scope of constitutional power. As in similar problems the courts express negative limits rather than positive powers. While it is impossible to draw definite axioms, we may at least examine the limitations. The early and much quoted, *Ex Parte Mulligan,*[6] stated: "Martial law can never exist where the courts are open and in proper and unobstructed exercise of their jurisdiction." Yet, the states have not followed this pattern of procedure. Often the state executive proclaims martial law but neither closes the courts nor supplants them with military court martials governing with the Articles of War. *In Re Boyle,*[7] *In Re Moyer,*[8] and *Ex*

2 Moyer v. Peabody, 212 U. S. 78, 29 Sup. Ct. 235 (1909).

3 See 19 Cornell L. Q. 20.

4 House Docket, No. 1630, 63rd Congress, 3rd Sess. at p. 16.

5 Vanderheyden v. Young, 11 Johns (N. Y.) 150 (1814); Martin v. Mott, 12 (Wheat.) U. S. 19 (1827); Luther v. Borden, 7 How. 1 (U. S.) (1848); Ex Parte Moore, 64 N. C. 802 (1870); In Re Boyle, 6 Idaho 609 (1899); Frank v. Smith, 142 Ky. 232, 134 S. W. 484 (1911).

6 Ex Parte Milligan, 4 Wall 2 (U. S.) (1866).

7 In Re Boyle, 6 Idaho 609, 57 Pac. 706 (1899).

Parte McDonald [9] applications for writs of habeas corpus were brought and denied on grounds that the governor's declaration was conclusive of insurrection and that preventive detention during the emergency was a lawful means of accomplishing his duty to suppress the insurrection.

A problem of serious nature arose in West Virginia when an acute labor dispute broke out in the coal fields. The governor proclaimed that "a state of war" existed. The Court of Appeals held this declaration to be conclusive and thereupon conceded to the governor powers appropriate to a commander on the field of battle. The Court refused to intervene when a military commission sentenced civilians to the penitentiary for terms of years. This exercise of punitive martial law in West Virginia gave rise to the setting up of military tribunals for the trial of civilians during the longshoremans strike at Galveston in 1920 and again in the packers strike at Nebraska City in 1922. In each case the military custody was challenged in a Federal District court and in each case habeas corpus was denied while the exercise of the "war-power" was expressly upheld.[10] *Smith v. Whitney* [11] ruled that the acts of a court martial within the scope of its jurisdiction could not be controlled or reviewed in the civil courts by writ of prohibition or otherwise. This would lead us to reason that an aroused striker causing a physical injury or death to his fellow might enjoy his privileges under the fourteenth amendment before a military court if the governor had proclaimed martial law in the strict sense. Military tribunals have a reputation for their expeditious process, a reputation which might be well impressed upon the perpetrators of mob violence.

It is vital to note that in all the cases where the executive proclamation of martial law is questioned on constitutional grounds, the courts are careful to investigate the grounds on which the state executive made his declaration. The circumstances of the insurrection, the good-faith of the governor and the suppression of any right in its relation to restoring law and order are all considered. For example: *In Stirling v. Constantin* [12] the Governor of Texas desirous of limiting the production of oil declared a state of martial law to exist, fixed by proclamation the amount of oil to be shipped and claimed that since martial law existed he and his adjutant-general were not amendable to court action. The Supreme court took jurisdiction in this case to prevent the denial of due process of law and condemned the governor for calling out the troops to act as civil officers. Although this decision did not involve a state of martial law proclaimed in time of labor violence, it shows that

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8 In Re Moyer, 35 Col. 154, 85 Pac. 190 (1905).

9 Ex Parte McDonald, 49 Mont. 454, 143 Pac. 947, 952 (1914).

10 U. S. ex rel. Seymour v. Fischer, 280 Fed. 208 (1922); U. S. ex rel. McMasters v. Walters, 268 Fed. 69 (1920).

11 Smith v. Whitney, 116 U. S. 167, 29 Law ed. 601, 6 Sup. Ct. (1886).

12 Stirling v. Constantin, 287 U. S. 378, 53 Sup. Ct. 190 (1932).

the governors discretion is subject and amendable to review. There seems to be no valid reason why this doctrine of judicial review would be inapplicable where the governor acted in bad faith.

This problem of military action in labor disputes has been widely heralded throughout the last decade. In the year ending June 30, 1934, 7000 guardsmen were called out in 28 states to restore law and order to districts overcome by strike and riot. In the next year the national guard was called 84 times in 31 states. Each subsequent year shows increasing number of calls until 1940.[13] Of these, two cases are especially worth noting. On July 26, 1934 Governor Olson of Minnesota declared martial law for the city of Minneapolis. The Adjutant-General of the state militia conducted troops to the city where he promulgated certain rules and regulations in order to prevent injury and quell strike violence. Only certain trucks were permitted to use the highways under the restrictions. One Powers Mercantile Company refused to obey on grounds that the regulation was discriminatory and that the power of the governor was unconstitutional. The court ruled:[14] "The means and methods he has adopted for restoring law and order are not subject to review by the courts, since such matters must necessarily rest entirely in his discretion as chief executive of the state of Minnesota." . . . Despite that decision, the same Federal District Court ruled two years afterwards that:[15] "A rule (as expounded in the Powers case) which would permit an official, whose duty it was to enforce the law, to disregard the very law which it was his duty to enforce, in order to pacify a mob or suppress an insurrection, would deprive all citizens of any security in the enjoyment of their lives, liberty or property. The churches, the stores, the newspapers, the channels of communication and the homes of the people could be closed under such a rule. Carried to its logical conclusion, under such a rule the banks could be closed and emptied of their cash to prevent bank robberies; the post-offices locked to prevent mail being robbed and the citizens kept off the street to prevent hold-ups. A state government should not suppress rights which it is the duty of the state to defend . . . in order to suppress disorder." These two Minnesota cases represent diametrically opposed judicial opinions as to the executive power. When we consider that the court here changed its opinion from one extreme to the opposite in a period less than two years, we better realize the discord, although the greater weight of authority supports a broad scope of executive power when an emergency arises from labor violence.

When Governor McNutt declared martial law to protect private property from damage in 1935, Otis Cox brought an action for an injunction against McNutt and by bill of complaint alleged the declara-

13 See 13 Wisconsin L. R. 314.

14 Powers Mercantile Co. v. Olson, 7 F. Supp. 865 (1934).

15 Strutwear Knitting Co. v. Olson, 13 F. Supp. 384 (1936).

tion null and void. The court held:[16] "The power of the governor and his subsequent acts are justified in that they are to be exercised upon certain emergencies, upon great occasions of state and under circumstances which may be vital to the existence of the union. The nature of the power necessarily implies a great range of honest judgment falling within the executive exercise to maintain peace. Constitutional rights must give way in time of insurrection. The Governor may order arrests to prevent hostility."

These incidents of past experience point the way for definite conclusions. First, the executive proclamation that insurrection exists is decisive. This power is expressly granted in either the state constitution or in the statutes. Second, the executive authority may institute a qualified degree of martial rule and the court will uphold all measures which are shown to have seemed necessary and proper at the moment of actual or threatened strike violence. Generally, we may say that the executive power to initiate military action is comensurate with the emergency. If the situation is grave, the civil courts may be closed and a military commission appointed by the governor to substitute for the judiciary. In all events the power is potentially a vast one. Discriminately applied it bargains a temporary suspension of rights for a restoration of law and order. We realize the conflict between the decision of the state and the personal liberty of the individual but justify such military action on the maxim: *"Salus populi est suprema lex."*

William B. Lawless, Jr.

PRESUMPTION OF SURVIVORSHIP WHERE TWO PERSONS DIE IN COMMON DISASTER — GENERALLY — AND IN PENNA. IN PARTICULAR.— This is a problem which deserves a great amount of consideration. It has been heatedly discussed from its inception and is even yet undetermined in some jurisdictions in the absence of statute. In spite of the disagreement among legal minds over a period of years, we can safely say that now a general rule has been formulated on the proposition.

The common law rule is commonly stated to be that where two or more persons perish in the same disaster and there is no fact or circumstance to prove which survived, the law will no more presume that all died at the same instant than it will presume that one survived the other.[1] In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment, not because that fact is presumed, but because, since those asserting the contrary have failed to prove it, property rights must necessarily be

16 Cox v. McNutt, 13 F. Supp. 355 (1935).

1 Carpenter v. Severin, 201 Iowa 969, 204 N. W. 448 (1925).

settled on that theory.[2] According to some of the cases, however, it is not correct to say that at common law there is, in such cases, no presumption whatever, for while there is no presumption of survivorship, there is a presumption, recognized for certain purposes, that the ones so perishing together die simultaneously — that is, a presumption against the survivorship of either or any of them.[3] Going further we observe that in England and also in the United States, with the exception of those states which have codes embodying certain presumptions of survivorship, the common law doctrine applies that where two or more persons perish in the same disaster and there is no fact or circumstance to prove which survived, there is no presumption of survivorship.[4] It is quite generally held that no presumption arises from consideration of age, sex,[5] or physical strength. The case is treated as one to be established by evidence, and the burden of proof is placed on him who claims survivorship,[6] so that, if there is no proof offered by the person bearing the burden of proof, the result is his failure to meet a condition precedent to his success.[7]

Tracing it from its earliest days, we see that by the Roman law (*Civil Law Rule*) there was no presumption that those who perished in the same disaster all died at once.[8] When in battle or shipwreck a father and son died together, it was presumed that the son, if above the age of puberty, outlived the father, and that he died first if he had not come to puberty. If all the dead were over sixty years of age, the youngest was presumed to have survived. If all were under fifteen, then the eldest was deemed to have lived the longest. As between the sexes in the same class the presumption of survivorship was in favor of the male.[9] The Napoleonic Code substantially adopted the rule of the civil law.[10] Some of the countries of Northern Europe, notably Holland and Germany, have declared by statute that two persons perishing in a common disaster are presumed to have died at the same moment, and the same rule is stated to prevail according to the Mohamaten law of India. The states of southern Europe, Italy and Spain, have followed the rules of the Roman law.[11]

A clause in a will, whereby a testator provides that in case both he and his wife shall perish in a common disaster and there is no evidence as to who died first, it shall be presumed that he predeceased his wife,

2 Newell v. Nichols, 75 N. Y. 78, 31 Am. Rep. 424 (1879).
3 Note 43 A. L. R. 1348.
4 Young Women's Christian Home v. French, 187 U. S. 401, 23 S. Ct. 184 (1903).
5 Colovos v. Gouvas, 108 S. W. (2d) 820 (Ky., 1937).
6 Watkins v. Home Life Ins. Co., 137 Ark. 207, 208 S. W. 587 (1919).
7 McGowan v. Menken, 233 N. Y. 509, 135 N. E. 896 (1922).
8 Ruling Case Law, Sec. 11, P. 716.
9 Cowan v. Rogers, 73 Md. 403, 21 Atl. 64 (1891).
10 41 Am. Dec. 518 and Note.
11 Coyle v. Leach, 8 Metcalf 371 (Mass., 1844); 51 L. R. A. 864 Note.

has been sustained.[12] The rule of the Roman law, as modified by the French and Spanish codes, with regard to the question of survivorship has been adopted, in a few instances, to govern cases where two persons perish in the same calamity or event, where it is not shown who died first and where there are no particular circumstances from which the fact can be inferred.[13] A "calamity" within the meaning of such statute, includes an earthquake [14] and a murder of a husband and wife committed at the same time.[15] It has been held that the arbitrary presumptions prescribed by these codes apply only where the persons are respectively entitled to inherit from one another and where there are no circumstances tending to prove survivorship. The expression "circumstances from which the fact may be inferred" refers to inferences which are rational conclusions from such facts as are proved.

The fact of survivorship does not require any higher degree of proof than any other fact in a civil case.[16] Where the party bearing the burden of proof establishes the fact of survivorship by a preponderance of the evidence which is competent and sufficient when tested by the general rules of evidence in civil cases, the verdict should be in his favor. The verdict of a coroner's jury has been held inadmissible in regard to the question of survivorship.

Today's manifold modes of life and transportation have caused numerous cases of death in common disaster but are not sufficient to show a trend in the development of a certain field of law. It is only as numerous cases occur that theories evolve, rules formulate and rules diverge. Cases may be found as far back as the 18th century in England wherein common disaster pertained to the phenomenon of fire. But the development of civilization has resulted in a more comprehensive meaning of the phrase "common disaster." In addition to the natural phenomena of earthquakes, storms, tornadoes, fires, and floods, transportation has added fire and gas (asphyxiation); and man himself has added wrongful death (murder) and war (bombing — no cases as yet, but it is expected that the present war will produce some law on this point.) Rules governing death in common disaster have resulted both from the common law or legislation wherein some states have set arbitrary presumptions and other states have rejected any presumptions.

Scanning the law in my own jurisdiction, we notice that Pennsylvania has enacted a statute [17] recently to govern cases arising out of

12 Re Fowles, 229 N. Y. 222, 128 N. E. 185 (1920).

13 Re Loucks, 150 Cal. 551, 117 Pac. 673 (1911).

14 14 Ann. Cas. 718.

15 18 A. L. R. 106, 106 Neb. 575, 184 N. W. 84 (1921).

16 Policemen's Benevolent Assoc. v. Ryce, 213 Ill. 9, 72 N. E. 764, 104 Am. St. Rep. 190 & Note.

17 Penna. Simultaneous Death Act; Act of June 19, 1941; P. L. 138; Penna. Stat. Ann. (Purdon Supp.) Tit. 68, Sec. 521.

such situations. The Pennsylvania cases on death in a common disaster do not afford sufficient scope for a definite conclusion as to the status of the common law rules as compared with the Pennsylvania holdings. The earliest case on the records is *Clymer's Estate* [18] which was decided in 1885. There, in an action *sur audit,* two surviving children claimed as heirs in the estate of their deceased mother who along with two other children was drowned in a shipwreck. The holding stated that there is no presumption of survivorship and the party so claiming has the burden of proof; but here the burden was met and the petitioners were awarded the estate. Another case [19] concerned an insurance policy payable to the wife of the insured "if living; if not to his executors." Both the insured and the wife drowned in a flood and there was no evidence as to survivorship. The court said that as it could not be shown which died first, the money should go to the legal representatives of the insured, the substance of the opinion being that although the interest of the beneficiary was in a sense vested, it was nevertheless contingent on her surviving the insured so that the burden was not on the legal representatives of the insured to prove that the wife died during the lifetime of the husband but it was upon the next of kin of the wife to show that she was living at the death of the husband.

A later case [20] involved the death of a father and daughter from gas where no evidence was produced to indicate survivorship. The court said there is no presumption as to survivorship and it held that the claimant had not met the burden of proof. Another case [21] decided the same year held that in case of the death of husband and wife from asphyxiation by gas, where the wife is in bed and the husband outside partly clothed, the general doctrine of no presumption may be overcome by evidence and inferences may be drawn from the differences of the bodies' physical conditions and the places where the bodies are found. The opinion in *Hornberger's Estate* [22] states that where husband and wife die in a common disaster (asphyxiation) and there is no evidence as to which died first, the court will dispose of the property rights as though death had occurred at the same time. Another case [23] corroborates the principle that in an action on an insurance policy where the beneficiary was the wife, if she were living, the burden of proof must be met in order to allow the wife's administration to recover after the husband and wife were both killed in a fire. The burden was not met. And still another case [24] involves a husband and wife who were "Morro Castle" victims.

18 Clymer's Estate, 16 W. N. C. 35 Pa. (1885).

19 Gillespie's Estate, 24 Pa. Dist. 376 (1914).

20 Sweeney's Estate, 78 Pa. Super. 417 (1922).

21 Cordes' Estate, 3 D&C. 551, Pa. (1922).

22 Hornberger's Estate, 19 Berks. 104 Pa. (1926).

23 Baldus v. Jeremias, 296 Pa. 313, 145 At. 820 (1929).

24 Strauch Estate, 16 Wash. 145 Pa. (1936).

There are a few jurisdictions where presumptions as to survivorship are fixed by statute, and sex, age, and conditions of health are made the basis. These states which read presumptions into their statutes are making a dangerous gesture. Such presumptions are hardly enough to support a decision. Examples of this are Louisiana and California who follow the Roman law as modified by the French and Spanish Codes. The latter state had a 1911 case [25] decided on its statute,[26] making a distinction as to the ages of the parties to ascertain survivorship in a train wreck disaster.

The reasonablesness of these statutes is another question. Experience has proven that two people injured in an automobile crash are seldom injured in the same way or to the same degree. True, the crash may be fatal to both but the type of injury sustained and resulting in death may be vastly different. In the case of a shipwreck where two people are cast adrift an entirely different situation arises. Both are involved in a similar "hazard." Here the stronger should normally outlive the weaker. But to say the man should outlive the woman (in case of husband and wife) is absurd. Many women are far more competent swimmers than men and would outlast them in such a case. In the automobile case it is even more rash to attempt to ascertain whom died first. Therefore any attempt to presume survivorship in an effort to conclusively arrive at a hard and fast rule is out of place in our modern system of jurisprudence. Each case should be considered on its facts sans *any* statutory presumptions. It seems contrary to our ideas of justice to permit an estate to be taken from one set of heirs or creditors and given to another on such weak and arbitrary distinction. Obviously, the just rule is that followed in England and in most of the states in this country.

One of the more recent Pennsylvania cases [27] places the *onus* on the claimant asserting survivorship in the case of a husband and wife who were both killed when their car plunged into a body of water.

From these cases, it can be seen that Pennsylvania follows the general common law rules of no presumption as to survivorship, burden of proof on the claimant, simultaneous death, devolution of property accordingly, and survival of beneficiary by the insured. Accordingly we might conclude that the Pennsylvania adoption of the Uniform Law [28] will add no different interpretation to future cases of death in a common disaster and will standardize all further decisions. It is submitted

25 Re Loucks, 150 Cal. 551, 117 Pac. 673 (1911).

26 Cal. Code Civ. Proc. Sec. 1963, subd. 40.

27 Kimmey's Estate, 326 Pa. 33, 191 At. 47 (1937).

28 9 Uniform Laws Annotated, Supp. 5.

that the Pennsylvania adoption of the Uniform Simultaneous Death Act is an extremely favorable indication that the other common law states whose views are similar to Pennsylvania's, will legislate likewise. The Act puts an end to any differences of presumption or non-presumption and affords a desirable standard for all future cases.

James F. McVay.

THE LIABILITY OF BOWLING ALLEY OWNERS FOR INJURIES TO THEIR PATRONS AND EMPLOYEES.—Since the turn of the present century, bowling has gone ahead with great strides. This great indoor game originated in Germany and the Low Countries. Having been introduced to New England first, it remained in the rear of the American sport's parade, for back in the years that followed the "gay nineties" period, the bar at bowling alleys was far more important than the game itself. However, through the unrelenting efforts of the pioneers of this game, it has flourished forth in the past two decades. Now, with everyone from grand-child to grand-mother bowling, there are approximately ten million participants of the game.

With this increased number of patrons and employees at large and luxurious bowling establishments, accidents have become more frequent than in the past. Thus it brings forth the issue of the liability of the owners of these modern palaces of amusement, when a bowler is injured by his own or the management's negligence, and likewise his employee's injury due to his or the owner's negligence.

The general rule as to the duty of the bowling alley owner toward the patron is that he is bound to keep the premises in a reasonably safe condition.[1] Moreover, if any dangerous condition should arise, he must correct it in a reasonable length of time. But the owner must have notice of this hazard, or he will not be adjudged liable. The condition of the premises must be in reasonably fair condition with no loose fixtures, poor equipment, or faulty construction.[2]

The bowler assumes a certain amount of risk when bowling. This is a general rule. He must exercise the care a reasonably prudent man would, or he may not recover. Bowling, in itself, is not a dangerous sport, but certain hazards will arise through the negligence of the owner, bowler, or a spectator. If these hazards are not seen by the bowler, or owner, and the bowler is injured, he may not recover.

About fifteen years ago, the first modern case of a bowler being injured while bowling occurred. The bowler was participating with some friends, after the league had finished, when he was injured. He based

1 Regent Realty Co. v. Ford, 157 Md. 514, 146 Atl. 457 (1929).
2 Wilson & Son v. Blaustein, 144 Md. 289, 124 Atl. 886 (1924).

his claim on the fact that the run-ways or approach to the alley was sticky due to markings left on the approach by his fellow bowlers. Also he claimed that it was a damp, sticky night and that the atmospheric conditions made the floor impossible to slide on. The court decided that the owner of the alleys did not commit an act of negligence by failing to clean off the approach with steel wool, also that the owner was not bound to use steel wool to lessen the sticky condition due to atmospheric conditions. The court, furthermore, said that it was the duty of the bowler to watch for these conditions, and to take care of it himself or call the management's attention to it, which he has failed to do. There were no damages awarded the bowler for the injuries he received by falling violently forward in the case of *Regent Realty Co. v. Ford.*[3]

In 1939 a Wisconsin Supreme Court decision opinioned that "the owner of a bowling alley would not be liable for injuries to bowlers who fell after stepping in water on runway unless owner has actual or constructive notice of presence of water, and constructive notice would be chargeable only if the condition had existed for an appreciable length of time."[4] The plaintiff in this case tripped and fell while bowling and thus sustained injuries. The water came from a cuspidor. These are usually found in bowling alleys at the base of the newel post. Where crowded conditions exist, it is an easy matter for a spectator or bowler to accidently kick a cuspidor thus throwing water on the approach. However, in this case, it was charged that too much water was placed in the said cuspidor by the defendant's servant, the janitor. The amount of water was in conflicting evidence and the case was referred to a new trial, with the alley owner held to be not liable because he received neither actual or constructive notice of the water on the approach.

From the previous case, we can draw the inference that in case of a spectator or bowler depositing water on the approach, so as to cause an accident, the alley owner will not be liable unless he knows of this existing condition. Many times someone will enter a bowling alley when it is damp and sloppy out of doors and carry in on their feet snow or wet and deposit it on the approaches while they are looking for a bowling ball or talking to a friend. If the management fails to see this condition in a reasonable length of time, he will be liable. Furthermore, bowlers have a habit of accidentally spilling beverages that they bring to their seats immediately behind the alleys. If someone should carelessly step in it and then attempt to slide as they deliver their ball, a serious fall would result. In this instance it would be even more difficult for the owner to see this potential danger, because of the congestion of bowlers behind the alleys and the seats themselves obstructing his view. So we can infer that the rule laid down in the Wisconsin "cuspidor" case would apply here.

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3 157 Md. 514, 146 Atl. 457 (1929).

4 Reiher v. Mandernack, 234 Wis. 568, 291 N. W. 758 (1940).

About ten years ago, a Massachusetts case held that the bowling alley owner was liable for an injury sustained by a bowler. In this case, the bowler, competing with several friends, was in the act of delivering the ball, when a long sliver from the approach entered his middle finger underneath the nail. He immediately went to the manager and with his help removed, most of the splinter. However, a piece remained imbedded beneath his nail that required three separate operations to remove. An examination of the approach to the alley revealed it to be old and unkept. There was a rut where the bowler's foot slides up to the foul line, and various narrow strips were missing denoting that a dozen slivers had come out at different times. These alleys were approximately four or five years old. It was proven that the flooring will splinter where the ball is dropped in delivery. Also it was a proven fact that the plaintiff's manner of delivering the ball was orthodox, and he used the care in his bowling that a reasonably prudent man would use.

From these facts, it was concluded that the owner did not maintain his establishment in the proper manner. The court said, "A bowling alley owner owed a duty to patron to exercise reasonable care to keep premises in a reasonably safe condition for the use for which they were intended." [5]

Another recent case involved the Bensinger Recreation Corporation with Brunswick-Balke-Collender Company as a co-defendant in the state of Wisconsin. The facts were rather rare. The plaintiff, bowling alongside a ball return next to his alley, was about to deliver the ball when his foot slipped and caught underneath the return trough. He was unable to release his foot, and his body turned over and as a result, he broke his leg. The trial court returned a verdict for the plaintiff with damages of $14,165. They decided there was a violation of the Wisconsin Safe Place statute by the defendant. This statute provides that the employer shall provide a safe place for employees to work and for patrons to frequent. Further, they said it was an unsafe condition that could have been eliminated by putting in a "mop board" strip, and that the defendant knew of this condition and should have anticipated this occurrence.

When this case went to the Circuit Court of Appeals, they reversed the lower court's decision in favor of the defendant. From the evidence presented, the space beneath the ball return trough was two inches in height. Furthermore, there have been millions of games played on alleys like these and with similar equipment as found here, without any accident of this kind occurring. No such accident as this had ever been reported to the National Bowling Congress. With this evidence in mind the court said "To hold that such a structure as here would be violative of the statute would make the owner an insurer. He would be liable for accidents which neither he nor anyone else could forsee and which had

5 McGillvray v. Eramian, 309 Mass. 430, 35 N. E. (2d) 209 (1941).

never before occurred and apparently the like of which has never since occurred. Such a rule would require the owner to anticipate every possibility, a construction of the statute which the Wisconsin Court has refused to give." [6]

Employers owe a duty to their employees to assure them of a safe place in which to work and if injured, the employer must pay damages to the injured party. State statutes and the Workman's Compensation Act have brought this about.

Most states regard pin setting as quite a hazardous occupation. Because of the danger arising from flying pins or a swiftly thrown bowling ball, it is deemed to be a hazardous occupation. Non-hazardous work at bowling alleys includes managers, maintenance men, janitors, and the like.

The only direct case concerning this question is *Perry v. Woodward Bowling Alley.*[7] In this case the deceased was setting pins for the defendant when he was struck on the thigh by a flying pin. It broke his leg above the knee. He then went to visit his mother, the plaintiff in this case, at Rochester, N. Y. Here he returned to the hospital and in attempting to get out of bed fell and struck his head, from which he died 24 hours later. The court had demanded that his employer, the defendant, pay $5.00 per week to deceased. Now his mother brings action for his death.

The evidence showed that defendant was not liable for the death, but merely the injury. But we can conclude from this that a pin-setter can recover compensation from the alley owner when he is injured.

From a Louisiana case we find an interesting situation laid out. Here a telegraph messenger boy was injured during the course of his employment, and the court laid down the following rules, which if interpreted the correct way place a good deal of liability on bowling alley owners as to their employees. The first rule is: "That the principal business of employer is hazardous does not *per se* bring all employees under the protection of the Employee's Liability Act, and an employee whose duties are non-hazardous, if injured while performing such duties cannot recover compensation." [8] A perfect example of this in the bowling field would be the employment of the manager and the pin setter. The manager has a non-hazardous position and may not recover if he slips and breaks an arm in the course of his employment, due to his own negligence. While a pinsetter if struck by a pin or ball in his hazardous employment may recover compensation.

A majority of states have held that a "hazardous occupation" is one that will endanger the worker while he is carrying out his duties of em-

6 Sykes v. Bensinger Corp., 117 F. (2d) 965 (1941).
7 196 Mich. 742, 163 N. W. 52, (1917).
8 Horton v. Western Union Telegraph Co., 200 So. 44 (La.) (1941).

ployment. Any position that will bring injury or death through the course of employment or carrying out his duties can be termed as dangerous employment.[9] A "non-hazardous occupation" is one that presents no risk of injury or danger to the employee while he is in the course of employment, under ordinary circumstances.[10]

The court stated a second rule thus: "Where an employer's business consists of hazardous and non-hazardous lines or departments, injuries to an employee whose duties require him to perform duties in both departments are compensable notwithstanding that, when injured, services were being rendered in the non-hazardous part of the business." [11] This rule is a 1941 decision. At present with labor shortages hitting the bowling alley owner very hard, it is often necessary to employ pin-setters who are older, more stable and reliable men. These men have dual positions to fill. They set pins and do janitor work when not required to set pins. In this way the alley owner manages to keep four or five such men around at all times, and accomplishes a second purpose by having them clean up the establishment, as well as set pins. These two jobs usually offer enough compensation in wages to induce the men to work steady. Now, if this man with the dual position is injured while performing janitor work, a non-hazardous position, by slipping or falling when he is sweeping or dusting, he may recover compensation from the alley owner, the same as if he was setting pins, a hazardous occupation.

So we can infer from the rules and instances illustrated in the preceding paragraphs, that a great deal of liability will rest with the bowling alley owner. To remedy this situation and the possible damages that he might have to pay out, insurance has offered a solution to this problem. Most owners carry employee liability insurance policies to guard against costly law-suits due to an unfortunate accident. Employee's insurance covers injuries from a broken finger to death received while working. Also patron policies cover every injury from a broken fingernail or smashed finger to death as a result of a negligent accident.

However, as bowling, as a national indoor game progresses, the law will go forward with it. As injuries become more prevalent, laws will be set up to render justice to both employee and employer.

Thomas F. Halligan.

9 Byas v. Hotel Bentley, 157 La. 1030, 103 So. 303 (1922).
10 Mitcham v. Urania Lumber Co., 185 So. 707 (La.) (1939).
11 Horton v. Western Union Telegraph Co., 200 So. 44 (La.) (1941).