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Venue in the Hauptmann Case

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such immunity is based upon the policy of preserving domestic peace and felicity and that this policy is not furthered by extending the immunity to the master.

To the argument that the presence of the husband on the record as a defendant was sufficient to bar the suit by the wife, the court points out that the suit by the wife proceeds exactly as if the husband had not been joined.

The court cites with approval the case of *Chase v. New Haven Waste Material Corp.*, 111 *Conn.* 377, 150 *Atl.* 107 (1930) in which an unemancipated minor was permitted to recover against the master for the negligence of its parent, a servant of the master.

The effect of this case is to remove several of the questions considered in this note. With the court's clear definition of the limits, within which the immunity from suit by members of a family may be asserted, it would appear to be proper for B to join Mrs. A as an additional defendant.

While there is nothing in the decision relating directly to the theory of the right of contribution between joint tortfeasors it would seem to be settled that a joint tortfeasor could not defend a demand for contribution by the assertion of a marital or parental immunity from suit as preventing the presence of the basis of the right, i. e., joint liability to the plaintiff.

It would seem that under the interpretation of the principle of *Koontz v. Messer,* 181 *Atl.* 792 (*Pa.,* 1935), as discussed in the case of *Murray v. Lavinsky,* 120 *Pa. Super.* 392 (1936), that B, in the supposed case, could allege that Mrs. A is jointly liable with him, rather then liable over to him. To hold that since Mrs. A. is not liable directly to her son, A Jr., and therefore not jointly liable with B to A Jr. and thus not within the terms of the statute, would be a gross injustice. This appears when one remembers that in the case of *Koontz v. Messer, supra,* the defendant was permitted to bring the husband of the plaintiff on the record as an additional defendant, on the theory that the husband was liable over to the original defendant. In other words, the original defendant was entitled to be indemnified by the husband of the plaintiff for any loss, while in the present case, the original defendant seeks only partial indemnification, his right of contribution.

Robert Lewis Blewitt

VENUE IN THE HAUPTMANN CASE

Although a great deal has been written and said about the *Hauptmann* case, or more exactly the case of *State v. Hauptmann,* 180 At. 809, very little has been said about the substantive points of law involved. Much has been written about the admissibility of evidence, the competency of witnesses, and the general ballyhoo which surrounded the trial. The purely legal aspects of the case have not been dealt

with extensively although there are some articles which touch on these things. It is the purpose of this note to discuss one point of the case which has received comparatively little attention and which, it seems to the author, is of primary importance. This relates to the venue of the trial. If the indictment was found and tried in the wrong county, in other words if it should have been found in Mercer instead of Hunterdon county, then all the discussion as to evidence and witnesses is immaterial, for the court was without jurisdiction and everything which was done was void. Consequently it is of primary importance to determine just where the case should have been tried.

To summarize briefly the facts in the case: On March 1, 1932, Charles A. Lindbergh, Jr., was put to bed in the Lindbergh home in Hunterdon County. He was last seen alive by his parents at about 8 o'clock that evening. On May 12 his body was discovered lying in a thicket in Mercer County. Bruno Richard Hauptmann was indicted for *murder,* and not for kidnapping as many persons believe, in Hunterdon County, and it was in this county that the trial occurred. During the course of the trial, at the end of the State's case, the defense moved for a directed verdict of acquittal on the ground that the venue was improperly laid in Hunterdon County. There was a similar motion at the end of the case and requests to charge were also made. The refusal to so charge was excepted to, and this was assigned for error on appeal to the Court of Errors and Appeals.

It was contended by the plaintiff in error, on appeal, that since the body was found in Mercer County, there is a legal presumption that the blow causing death and the death itself occurred in this county. This presumption is recognized by the State and by the court in its decision on the appeal. Hence the only question which arises is whether there was any evidence to rebut this presumption. If there was any such evidence, the trial court was right in submitting this question of venue to the jury. If there was no such evidence, however, it is a pure question of law and the trial court should have taken the case from the jury by directing an acquittal as requested by the defense.

Section 59 of the Criminal Procedure Act (2 Comp. St. 1910, p. 1839) of the State of New Jersey provides that if there is a felonious striking in one county and death results therefrom in another county, the indictment for murder may be found in either. Hence the State to rebut the presumption, that the blows were struck and death occurred in Mercer County, which arose from the finding of the child's body in that county, had to show at least *some* evidence that there was a "felonious striking" in Hunterdon County. Unless some evidence to that effect was produced, the indictment was found in the wrong county and Hauptmann was illegally convicted because the court of Hunterdon County had no jurisdiction in this case.

At the trial a Doctor Mitchell testified that he had examined the body and that, in his opinion, death had resulted instantaneously from a fractured skull. From this testimony it follows that the "felonious striking" was a blow on the head; and con-

sequently the State was compelled to show at least some evidence that said blow or blows were inflicted in Hunterdon County.

The State contended in its brief submitted on the appeal that such evidence had been introduced. On page 35 of the State's brief before the Court of Errors and Appeals it is set forth:

> "The evidence in the present case clearly shows the kidnapping of the baby, the larceny of its clothing and the commission of the battery, all in the Lindbergh home. The ladder marks on the wall of the Lindbergh home, indicating where the ladder broke. The finding of the strange and broken ladder on the Lindbergh premises. The statement in one of the ransom notes, 'why did you ignore the letter we left in the room?' The disrobing of the infant on the Lindbergh premises and the removal of the thumb-guard which was tied and taped to the baby's wrist. The finding of the thumb-guard approximately three thousand feet from the Lindbergh home, the medical testimony establishing that the child was alive prior to the skull fractures and that the nature and extent of the fractures was the cause of instant death. The presumption, therefore, ceased to be a factor and is overcome by the affirmative evidence produced on the part of the State and the question was properly submitted to the jury."

In support of its connection the State relied on the case of *Keith v. State,* 61 N. E. 716 (*Ind.*) which will be discussed later.

In the decision of the Court of Errors and Appeals, *State v. Hauptmann,* 180 *At.* 809, Mr. Justice Parker, on p. 818, held:

> "The gist of the argument, both orally and in the brief, was and is that there was no evidence to justify the jury in a finding that there was any felonious striking in Hunterdon County. *****Clearly the jury were entitled, in view of the evidence, to find that some sort of battery was committed in Hunterdon when the child was taken from its bed; and from that evidence might also find that the blows on the head, causing death, were inflicted in Hunterdon. It was not necessary to show death in Hunterdon; proof of a felonious striking in that county, causing death where that occurred, was sufficient; and we consider that of such striking there was sufficient proof, even though of a circumstantial character."

Relative to this point the court cited three cases: *State v. James,* 96 *N. J. Law* 132, 114 *At.* 553; *State v. Lang,* 108 *N. J. Law* 98, 154 *At.* 864; and *State v. Frazer,* 108 *N. J. Law* 504, 158 *At.* 401.

From these quotations above it is evident that both the State and the Court of Errors and Appeals believed that there was at least some evidence of a felonious striking in Hunterdon County which could go to the jury to rebut the presumption that death occurred in Mercer County.

In analyzing this evidence and the cases cited by the court and by the State it must be remembered that to justify submitting this issue to the jury there must be some evidence of a *felonious striking* or of death itself in Hunterdon County. (Since the doctor testified that death instantly resulted from the blows, it can be assumed that the blows were struck and death resulted in the same county.)

It should be stated here that the author of this note is not expressing in the following discussion any opinion as to the guilt or innocence of Hauptmann, but is rather pointing out what he believes is an erroneous application of the law as it relates to the venue of the indictment and the trial, and not to the merits of the case.

The Court's argument is that since some sort of a battery was committed in Hunterdon County, the jury could find that the blows on the head, or the felonious striking, also was committed there. This argument seems illogical. It is true that a battery was committed in Hunterdon. The acts of touching the baby, picking him up, and carrying him away, each constituted a battery. But to say that because the baby was touched and picked up in Hunterdon County, there was evidence tending to show that it was struck on the head there, is certainly a great stretch of the imagination. To remove the baby from the house there must have been a battery in the technical sense, but this mere touching and taking is in no way connected with the felonious striking of the child on the head. What connection is there between a blow on the head and the act of carrying the baby from the house? How can it be said that because there was evidence to prove that the baby was picked up and carried away, that that set of facts is also evidence that a blow on the head sufficiently powerful to kill the child was administered at the same place?

Some of the arguments of the State as cited above are even more ridiculous. The State contends that the facts of finding the child's thumb-guard, the broken ladder, and the ladder marks on the house are evidence that a felonious striking took place there. True, to remove the thumb-guard there must necessarily have been a battery, but to say that the fact that it was removed from the baby's hand is evidence that the child was hit on the head is absurd. There is no connection between the two at all. Likewise the fact of finding the broken ladder does not bear any relation to the blow on the head which caused the death. There was nothing to show that the child was thrown to the ground by the breaking of the ladder, or that at the time it broke, the kidnapper with the child was on the ladder. It seems just as far-fetched to say that if there had been a mossy rock under the window, which had some of the moss scratched off, that the rock was evidence to show a felonious striking because the baby might have been dropped on it and

hence suffered the blow causing death. In other words it does not seem that there is any connection between the blow on the head and the broken ladder.

The argument of the State is that since the ladder was used in the kidnapping, because it was not on the premises before that time, and since ladder marks were left on the wall of the Lindbergh home, and hence since it can therefore be assumed that the child was carried down the ladder, the fact that the ladder was broken is enough evidence to go to the jury that the blows causing death resulted from the break in the ladder hurling the kidnapper and the child to the ground. As stated above, however, this argument seems to be very weak and in the opinion of the writer is too far-fetched to count for anything at all. For one thing it was brought out that there were no marks on the ground which would show where the baby had fallen if such had been the case when the ladder broke, and hence instead of evidence tending to rebut the presumption, the evidence tended to show that the child was not killed in this way. The same question arises to each of these facts on which the State relies to rebut the presumption of death in Mercer County. Is there any connection between the fact and the blow which caused the death? The answer is that without something more than that which was produced at the trial to connect the two things—the fact in question and the blow on the head—these facts standing alone are not evidence that the blows were struck in Hunterdon County.

The State also speaks of "the disrobing of the infant on the Lindbergh premises." There is absolutely no evidence to show that the sleeping suit was removed from the child in Hunterdon. Hence this point is immaterial in the present discussion.

The State has set forth a group of facts which would justify the jury in finding that the child had been taken in Hunterdon County, that a battery had been committed there, that there had in fact been a burglary—which element had to be proved in this case—but there is absolutely no evidence that the blows on the head which killed the baby were struck in Hunterdon. Hence it follows that since the State did not introduce any evidence of a felonious striking in Hunterdon County, the presumption that the blow was struck and death occurred in Mercer County was not rebutted, and the trial judge should have directed an acquittal.

It is interesting to examine briefly the cases cited by counsel and the appellate court supposedly sustaining the decision.

The Court first cited *State v. James,* (*supra*). In that case the body of the deceased was found in Burlington County and the defendant was tried in Camden County. It was held that the indictment was well founded under section 59 of the Criminal Procedure Act, and that there was evidence that the fatal blow had been struck in Camden County. The evidence was that the defendant had confessed that the deceased was feloniously stricken in Camden County.

Certainly in that case there was evidence to go to the jury and the difference between that and the Hauptmann case is too obvious to require further discussion.

In *State v. Frazer, (supra)* the defendant also confessed that he killed the deceased in Union County, where the trial was had, even though the body was found in Virginia. This case and the next one to be taken up dealt with section 60 of the Criminal Procedure Act which covers cases where the felonious striking is without the state and death occurred in it (and vice versa), but the principles are the same as those involved under section 59.

In *State v. Lang, (supra)* the body of the deceased was found in New Jersey, but it was contended that he had been wounded and died in New York and hence the case was not within the jurisdiction of the New Jersey court. However there was evidence that a doctor had examined the body where it lay (in New Jersey); the body was still warm: there was a great deal of blood on the ground showing the bleeding had been done while he was lying there and while blood was still circulating; there was no blood on his neck, shoulders, or chest. It was held that there was an inference that the deceased was struck where he lay and died there. The court said:

> "We thing it inferable from circumstances testified to * * * * * that the wound in the head must reasonably have been inflicted when the man was on the ground or at most within a very few moments before he was placed there."

In this case as in the previous two discussed it is also obvious that there was some evidence of a felonious striking in the county where the indictment was found. All the evidence cited above tended to show that the blow must have been struck where the body was found. The mere fact of so much blood on the ground and none on his neck and shoulders is enough evidence to justify a jury in finding that the deceased had not been moved very far from the point where he was struck. All these facts were certainly enough to justify submission of the issue to the jury.

The last case and the one which the State relied in its brief is that of *Keith v. State, (supra)*. Here the defendant sent a note to the deceased to meet him at a certain place in Warrick County. She was seen there at the appointed time. Her body was later found in Vanderburgh County. Later her slippers were found in Warrick County and also a hammer of defendant's was found in a well along with some human hairs of the color, length and quality the deceased had when last seen. The court held that there was a presumption that the murder had been committed in Vanderburgh County from the fact that the body was found there.

> "But the probative force of the circumstances in evidence was to the effect that appellant slew deceased in Warrick County***"

Here too the difference between that and the *Hauptmann* case is fairly obvious. In the former the fact that the hammer and the hair were found together connected the hammer with the murder. These facts were enough evidence to submit the issue to the jury. The fact of finding the hammer, the supposed instrument which caused the death, alone was not evidence that death had occurred there. But that

fact coupled with the fact that deceased's hair, or hair similar to hers, was found in the same place is enough to connect the hammer with the murder.

In the *Hauptmann* case the finding of the broken ladder is comparable to the finding of the hammer in the *Keith* case. Alone, neither is evidence of a felonious striking, but coupled with some fact connecting the implements with the death of the deceased there is evidence which would justify the submission to a jury of the question of where the felonious striking occurred. In the *Keith* case the additional fact is the finding of the hair with the hammer; in the *Hauptmann* case the additional fact is absent.

Hence from a survey of all these cases it can be seen that in each there is some circumstance which connects the evidence relied on with the death of the deceased, while in the *Hauptmann* case there is nothing.

Therefore it would seem that in the absence of any evidence at all that there was a felonious striking in Hunterdon County, the trial judge should have directed a verdict of acquittal as requested by the defense.

It is interesting to note that the Pennsylvania Legislature recently passed a statute covering the situation presented by the *Hauptmann* case. Presumably this act was passed because of the uncertainty of the venue in the *Hauptmann* case. The Act is that of April 24, 1935 P. L. 54. It is as follows:

AN ACT

To establish jurisdiction in cases of kidnapping and murder perpetrated in kidnapping.

Section 1. Be it enacted, etc., That in order to obviate the difficulty of proof of the place where an offense of kidnapping or murder in the perpetration of kidnapping was committed, it shall be sufficient to allege, in any information or indictment for kidnapping or murder in the perpetration of kidnapping, that the offense was committed in any county in, through, or into which, the defendant carried or conveyed or brought the kidnapped person, and every such offense may be inquired of, tried, and punished in the county within which the same shall be so alleged to have been committed, in the same manner as if it had actually been committed therein.

Section 2. This Act shall become effective immediately upon its final enactment.

Needless to say, if the *Haptmann* case had arisen today in Pennsylvania, this Act would settle the question of venue, and there is no doubt that the indictment would have been properly found in the county where the child was taken.

Spencer Gilbert Hall

WANT AND FAILURE OF CONSIDERATION

"In the instant case both want and failure of consideration were clearly shown."[1] "There is, however, a distinction between want and failure of consideration: want of consideration embraces transactions or instances where none was intended to pass, while failure of consideration implies that a valuable consideration, moving from obligee to obligor, was contemplated."[2]

The distinction between want and failure of consideration is hard to draw.[3] The test of Chief Justice Kephart in *Killeen's Estate*[4] is as fine a criterion as can be found. Can there, however, be both want and failure of consideration in the same situation?

It would seem that the two terms are mutually exclusive. No contract came into existence where there is want of consideration; while a contract was formed but the thing bargained for was not effected, totally or partially, where there is failure of consideration.[5]

The *Mellier* case,[6] which found that there was both want and failure of consideration in the same situation dealt with a check. At common law before the Act 3 & 4 Anne, c. 9 (1705) a negotiable promissory note did not presumptively bear consideration but was treated as a simple contract.[7] The Act 3 & 4 Anne, c. 9 (1705) provided a promissory negotiable note "shall be taken and construed to be by Virtue thereof due and payable . . . . to whom the same is made payable." By this statute, the characteristic of bills of exchange that the instrument itself is presumptive evidence of consideration was given to negotiable promissory notes.[8]

The early American rule is well stated in *Livingston v. Hastie*,[9] by Livingston, J.,

> "Whether the mere want of consideration, even between the original parties, can be alleged against a promissory note, or bill of exchange, may well be doubted. It is not necessary, as in other simple contracts, to state a consideration in the declaration; the instrument itself imports one, and in this respect partakes of the quality of a specialty. Nor is the plaintiff bound to prove his giving any value for such paper, unless when he sues as bearer of a bill, transferrable by delivery, and

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[1]Maxey, J., in In re Mellier's Estate, 320 Pa. 150, 182 At. 388 (1936).

[2]Kephart, J., in Killeen's Estate, 310 Pa. 182 (1932); quoted and followed in Homer Building & Loan Assoc. v. Noble, 120 Pa. Super. 153 (1935).

[3]1 Elliott on Contracts 444, sec. 254 (1913); 25 Col. L. Rev. 83 (1925).

[4]310 Pa. 182 (1932), supra note 2.

[5]Conmey v. Macfarlane, 97 Pa. 361 (1881); Conway, Outline of Contracts, 308 (1935).

[6]182 At. 388 (Pa., 1936), supra note 1.

[7]Clerk v. Martin, 1 Salk. 129, 91 Eng. Rep. 122; Pottet v. Pearson, 1 Salk. 129, 91 Eng. Rep. 122.

[8]Brown v. Marsh, Gilb. Eq. Rep. 154, 25 Eng. Rep. 108 (1721). The opinion in this case is couched in loose language for the court speaks of "no consideration" when in fact it is dealing with failure of consideration. 1 Williston on Contracts 227n. (1927).

[9]2 Caines (N. Y.) 246 (1804).

> that under suspicious circumstances. Grant v. Vaughan, 3 Burr. 1516. No case can be found where the want of consideration alone has been admitted as a good defense. As against the payee, the maker, it is true, has been permitted to show, not a want, but a failure of consideration, and in all cases he may insist on the illegality of it. Chitty, in his treatise on bills, says, that the want of consideration may be relied on, but not one of the decisions which he cites will bear him out."[10]

In Pennsylvania, however, this distinction was not followed and an original want of consideration as well as a subsequent failure of consideration could be shown.[11] The Negotiable Instruments Law adopted what was the Pennsylvania rule. Section 28 provides,

> "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise."[12]

Professor Brannan states that thus the framers of the act have placed absence of consideration on the same footing as failure of consideration.[13]

The difference between want and failure of consideration is exemplified in Pennsylvania by actions on sealed instruments. Agreements under seal need no consideration.[14] Therefore, want of consideration is no defense to an instrument under seal while failure of consideration is.[15]

It is submitted that want and failure of consideration still are mutually exclusive concepts and should be so considered. The distinction pointed out by Chief Justice Kephart should be assiduously applied.

Richard R. Wolfrom

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[10]See also Bowers v. Hurd, 10 Mass. 427 (1813).

[11]Knight v. Pugh, 4 W. & S. 445 (1842); Conmey v. Macfarlane, 97 Pa. 361 (1881); First Nat. Bank v. Paff, 240 Pa. 513 (1913).

[12]Act of May 16, 1901, P. L. 194, 199.

[13]Brannan's Negotiable Instrument Law (5th ed.) 320 (1932).

[14]Cock v. Richards, 10 Ves. 429, 32 Eng. Rep. 911 (1805). The Pennsylvania courts persist in stating that "a seal imports consideration". Yard v. Patton, 13 Pa. 278 (1850); Homer Building & Loan Assoc. v. Noble, 120 Pa. Super. 153 (1935). The historical absurdity of this statement is educed by Professor Williston. 1 Williston on Contracts 228, 428; Secs. 109, 217 (1927).

[15]Burkholder v. Plank, 69 Pa. 225 (1871); Meek v. Frantz, 171 Pa. 632 (1895); Anderson v. Best, 176 Pa. 498 (1896); Cosgrove v. Cummings, 195 Pa. 497 (1900); Clymer v. Groff, 220 Pa. 580 (1908); Dominion Trust Co. v. Ridall, 249 Pa. 122 (1915); Killeen's Estate, 310 Pa. 182 (1932); Homer Building & Loan Assoc. v. Noble, 120 Pa. Super. 153 (1935).