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Abstracts of Recent Cases

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However, this analogy cannot successfully be asserted because an animal can be chained or fenced in, whereas a human is not amenable to such measures. Parents cannot be held to the degree of liability of one harboring a vicious dog after notice of its viciousness. Norton v. Payne, 154 Wash. 241, 281 Pac. 991 (1929) (dictum). Therefore, the ultimate issue will resolve itself into the question of whether the parent exercised reasonable care under the circumstances.

West Virginia has not been confronted with the issue presented in the principal case. However, due to the enactment of the parental liability statute dealing with the malicious destruction of property by minors, it appears that the trend in West Virginia is toward placing more responsibility upon the parent. W. Va. Code ch. 55, art. 7A, §§ 1, 2 (Michie 1961). Therefore, a complaint similar to the one in the case at bar would probably be upheld as stating a cause of action. As a practical matter, proving that the parent took no reasonable measures to restrain the child, knowing of his dangerous or vicious propensities, would present a difficult evidentiary problem. Cases seem to indicate that admonishment by the parent would relieve him of liability if such were a reasonable means of parental authority. Acts of incorrigible children are not subject to the rule propounded by the principal case, for no amount of parental discipline would be effective.

David Mayer Katz

ABSTRACTS

Federal Courts—Three Judge Court and Pre-emption

The Georgia legislature enacted a statute requiring that tobacco sold at auction within that state be identified by tag according to type. Operators of the tobacco warehouses brought action in the federal district court to restrain state officials from enforcing the act, on the basis that federal legislation had pre-empted the field. A three-judge court was convened and granted the requested relief. On direct appeal to the United State Supreme Court, held, affirmed on the merits with no discussion of the propriety of the use of a three-judge court. Campbell v. Hussy, 82 Sup. Ct. 327 (1961).

It is surprising that neither the Court nor the parties questioned the convening of a three-judge court on the matter. In Ex Parte
Young, 209 U.S. 123 (1908), the Supreme Court held that a federal court might enjoin a state officer from enforcing a state statute which was unconstitutional, in spite of the eleventh amendment. Immediately, steps were taken to limit the decision by both case decisions and statutory enactment. Section 2281 of the Judicial Code, 28 U.S.C. § 2281 (1958), enacted shortly after the Young decision, provided that where an injunction against enforcement of a state statute was sought on federal constitutional grounds three judges would be convened to determine on the matter before a final decree would be rendered, and allowed appeal directly to the Supreme Court. After the decision in the Young case and the enactment of the three-judge act, there followed a long line of cases in which the three-judge court convened to determine on questions involving constitutionality of state statutes. However, the Court clearly distinguished between constitutional question and pre-emption, and though it expressly indicated that a claim of pre-emption which it regarded as nonconstitutional could properly be joined with a constitutional question; it invariably decided on the basis of the constitutional question. Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960); Parker v. Brown, 317 U.S. 341 (1943); Shafer v. Farmers Grain Co., 268 U.S. 189 (1925); Lemke v. Farmers Grain Co., 258 U.S. 65 (1922). The distinction the Court had made between pre-emption and constitutional question as basis for convening a three-judge court was commented upon in 74 Harv. L. Rev. 137 (1960), as precipitated by the dissenting opinion in Florida Lime & Avocado Growers, Inc. v. Jacobsen, supra. In Ex parte Bruder, 271 U.S. 461 (1926), wherein a single district judge had issued a permanent injunction restraining the enforcement of a state statute as pre-empted by federal legislation, the Court held a claim of federal pre-emption was not a constitutional claim requiring the convening of a three-judge court. In view of the purposes of the three-judge act, a considered and deliberate determination of the propriety of interference by the federal judiciary with state government, it is not surprising to note the extension of the three-judge court into the area of pre-emption. It is unusual though, that the step is taken with no note of prior precedent.

Procedure—First Case on New West Virginia Civil Rules

In February of 1960 an action of trespass on the case was brought in the Circuit Court of Ohio County against the county court.
D demurred asserting governmental immunity. Pending hearing on the demurrer, the court requested P to file written answer to certain questions. The court then sustained the demurrer and P filed an amended declaration. On July 6, 1960, after the effectuation of the new rules of civil procedure, D filed a motion to dismiss the action on the ground that the amended declaration failed to state a claim upon which relief could be granted—a motion under rule 12 (b) (6) of the West Virginia Rules of Civil Procedure. At the hearing on the motion, the circuit court considered the original declaration, the demurrer, the written answers of P to question propounded by the court and the amended declaration, and treated the motion to dismiss as a motion for summary judgment under rule 56, W. Va. R.C.P. 56, and thereupon rendered summary judgment for D. P assigned error to the sustaining of D's motion. Held, where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, a summary judgment shall be rendered. Petros v. Kellas, 122 S.E.2d 177 (W. Va. 1961).

The court, in arriving at a test to determine the basis for dismissal under summary judgment, went to prior West Virginia cases dealing with directed verdicts, and then to interpretation of the like rule in federal courts. Petros v. Kellas, supra at 185. In closing, the court stated that a judgment of dismissal under rule 12 (b), or final summary judgment under rule 56, is not reviewable upon certificate, but only upon appeal. Petros v. Kellas, supra at 186.

Procedure—Questions to Determine Use of Peremptory Challenges

Counsel for P during the voir dire examination requested the court to inquire of the jurors whether upon proof that D's negligence caused pecuniary damages to P of 20,000 dollars, they would be willing to return a verdict in that amount. The court refused to allow the question. P assigned error. Held, the court in the exercise of its discretion may limit the extent of the interrogatories propounded the jurors. This was clearly a proper exercise of discretion. The court then ignored the prior civil precedent of Dimmack v. Wheeling Traction Co., 58 W. Va. 226, 52 S.E. 101 (1905), which stated it is not error for the court to refuse questions when the sole purpose thereof is to aid in the exercise of peremptory challenges, and adopted the view of a prior criminal case, State v. Stonestreet, 112 W. Va. 668, 166 S.E. 378 (1932), which held that
jurors might be questioned on voir dire examination within reasonable limits in order for the parties to intelligently exercise their peremptory challenges. *Henthorn v. Long*, 122 S.E.2d 186 (W. Va. 1961).

The *Stonestreet* decision was preceded in its variation from the *Dimmack* decision, at least in dicta, by *State v. Lohm*, 97 W. Va. 652, 658, 125 S.E. 758, 760 (1924), which indicated the accused was entitled to propose questions to the jurors which might furnish him with information of value in exercising his peremptory challenge where it did not actually provide grounds for disqualifying the juror for cause. Prior to the principal case, a distinction might have been attempted, though none is suggested, on the basis of whether the case was on the criminal or civil docket. The adoption of the decision in *Stonestreet* in *Henthorn v. Long*, supra, though unnecessary to the decision has negated that possibility, while increasing the import of the *Stonestreet* case as precedent and bringing West Virginia more in line with the procedure in other jurisdictions. In most jurisdictions the jurors may be questioned within reasonable limits to allow the counsel to elicit facts which will enable them to intelligently exercise their peremptory challenges. As to whether the proffered questions are within the confines of reasonable limits—therein lies the discretion of the court. 50 C.J.S. *Juries* § 279 (1947).

Property—Liability of Attorney to Beneficiary in Preparing a Will

An attorney preparing the will of his client fell into the trap of the California statutory provisions relating to the rule against perpetuities. Upon admission of the will to probate, a trust provision of the will was determined invalid as in violation of rules relating to perpetuities and restraint on alienation. Thereupon, a beneficiary under the invalid provision brought an action against the attorney for loss suffered through the attorney's negligence. *Held*, on these particular facts the attorney was not negligent. The court, however, went on to overrule a long standing and well established decision in holding that a beneficiary suffering loss of testamentary rights through negligence of an attorney employed by the testator may recover either in tort or contract as a third-party beneficiary. *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961).

The general rule as stated in *7 C.J.S. Attorney and Client* § 140 (1953); *5 Am. Jur. Attorneys at Law* § 147 (1936), is that
though an attorney is liable for negligence to his client, he is not liable to third parties who through his negligence have been deprived of their testamentary shares under the will. The leading decision in this area was *Buckly v. Gray*, 110 Cal. 339, 42 Pac. 900 (1895), which the present case expressly overruled. In the *Buckly* case, the court, presented with similar facts, had held that the losing beneficiary could not maintain an action as a third-party beneficiary because of lack of privity with the contracting parties.

The *Buckly* decision reigned for some sixty years before it was even challenged. Then, in *Biakanja v. Irving*, 49 Cal.2d 647, 320 P.2d 16 (1958), the court in holding a notary public liable to an intended beneficiary deprived of his testamentary share through the notary's negligent preparation of a will, pointed out that the stringent requirements for privity of the *Buckly v. Gray* era had been greatly relaxed. Though this decision may have portended a change in view, the circumstances of the case were such that the court's decision could possibly have been regarded as a morally justified deviation rather than a reversal of precedent. Now, with the *Lucas v. Hamm* decision, the jurisdiction which had established the general law on the subject has conclusively reversed itself. There is little law in point in other jurisdictions of the country, none in West Virginia. Though a division of authority between the two decisions is more probable than a general acceptance of the law in *Lucas v. Hamm*, the reasoning of the justices in that case in liberalizing recovery to a third-party beneficiary is parallel to that development in the contractual and tort fields of law.

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