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Abstracts of Recent Cases

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party tort-feasor would be distributed according to the law of distribution of personal property left by the employee dying intestate, while the award from the workmen's compensation fund would be paid to the dependents of the deceased. It follows that if a remittitur had been allowed, as in *Brewer v. Appalachian Constructors, Inc., supra,* either the amount recovered through workmen's compensation by the dependents would be denied as a result of the distributees recovery from third parties or the distributees of the employee would be denied full recovery of the judgment entered in their behalf, as a result of the dependent's claim through workmen's compensation.

The conclusion in the principal case solves the dilemma regarding who may recover, and the limit of the negligent third party's liability can no longer be gauged by the statutory, *ex contractu,* insurance feature of an award from workmen's compensation. The rule thus established, although appearing to be against the weight of authority in the United States, is supportable by sound reasoning and pages of historic record, the common law.

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ABSTRACTS

Criminal Law—Witnesses—Compulsion of Spouse to Testify

D was tried and convicted of knowingly transporting a woman in interestate commerce for the purpose of prostitution, in violation of the Mann Act. In the District Court, the woman, who had since the date of the offense married *D,* was ordered, over her objection and that of *D,* to testify on behalf of the prosecution.

The Court of Appeals affirmed the ruling of the District Court. *Held,* judgment affirmed. Prosecution under the Mann Act constituted exception to the common law rule ordinarily permitting a party to exclude adverse testimony of his or her spouse, and in such a prosecution, witness who was victim of offense as well as *D's* wife, could be compelled to testify against him. *Wyatt v. United States,* 80 Sup. Ct. 901 (1960).

The United States Supreme Court, in upholding the continued validity of the common-law rule of evidence ordinarily permitting a party to exclude the adverse testimony of his or her spouse,

expressly acknowledged that this rule does not apply in certain kinds of offenses committed by the party against his spouse. *Hawkins v. United States,* 358 U.S. 74, 79 Sup. Ct. 136 (1958).

The common law exception that the spouse is a competent witness where she is the victim of the crime charged against the other spouse is recognized in *State v. Woodrow,* 58 W. Va. 527, 52 S.E. 545 (1905). W. VA. CODE ch. 57, art. 3 § 3 (Michie 1955), presently provides for the common law exception as stated in *State v. Woodrow, supra.*

W. VA. CODE ch. 61, art. 8 § 7 (Michie 1955), provides that a person who procures a woman for the purpose of becoming a prostitute is a panderer and further provides that in prosecutions for such offenses the wife is a competent witness against her spouse. The statute does not limit its express provisions as to competency to those where the spouse is the victim of the crime. Since West Virginia allows the wife to be a competent witness against her husband where she is the victim of the crime charged against him, and as she may also be a competent witness in a case involving prosecutions for offenses involving prostitution even where she was not a victim of the crime, it appears that in the absence of any other individual right protecting the spouse against compulsion to testify, i.e. self-incrimination, under West Virginia law, the wife may be compelled to testify against her husband in prosecutions involving the subject matter of the principal case.

Labor—Redress Against Arbitrary Expulsion

Ps allege that prior to enactment of the Labor-Management Reporting and Disclosure Act of 1959 they were expelled from union membership without being advised of the charges against them and without a full fair hearing. They seek redress against the union in the Federal District Court.

Held, D's motion to dismiss granted. There being no pre-existing right under state or federal law granting expelled union members redress against arbitrary expulsion itself, the "bill of rights" provision of the Labor Management Disclosure Act of 1959 gave not only a new remedy but new substantive rights to members of labor organizations. *Robertson v. Banana Handlers Int'l Ass'n,* 183 F. Supp. 423 (E.D. La. 1960).

The courts that have passed upon the issue appear to hold that one who has been arbitrarily expelled from union membership was prejudiced in his rights and should be afforded an opportunity to make his defense. *Cason v. Glass Bottle Blowers Ass'n,* 37 C. 2d 134, 231 P.2d 6 (1951), *Dragwa v. Federal Labor Union,* 136 N.J.Eq. 172, 41 A.2d 32 (1945). The West Virginia Supreme Court has ruled in accordance with this view, for in *Gleason v. Thomas,* 121 W. Va. 619, 5 S.E.2d 791 (1939), it held that a union ruling against its members may be set aside on appeal if there is a showing that said members had no opportunity to present their claims or where there was arbitrary action on the part of the union tribunal.

The holding of the District Court is subject to question in Louisiana itself for in *Elfer v. Marine Engineers Beneficial Ass'n,* 179 La. 383, 154 So. 32 (1934), the court provides for judicial review of union proceedings which "are violate of the law of the society or the law of the land." We may conclude from the foregoing that the Labor Management Disclosure Act did not establish new substantive rights but that the District Court did not wish to make itself a forum for litigation and application of possible remedies which union members may have had under state law prior to enactment of the aforementioned act.

Pleading—Amended Complaint Changing Cause of Action

P brought an action for damages. After the expiration of the statute of limitations *P* moved the court to amend the complaint to allege willful and wanton acts claiming exemplary damages. *D* contended that the amended complaint asserted a new cause of action which is barred under the statute of limitations.

Held, the District Court allowed the amended complaint. In view of notice pleading concept of federal rules, where proposed amendment to complaint to allege wanton misconduct was aimed squarely at conduct which was subject of original complaint and amendment would insert no new cause of action but merely define with greater particularity alleged negligence for which *P* claimed additional damages, amendment would be allowed after expiration of limitation period. *Cavanaugh v. Trans World Airlines,* 183 F. Supp. 370 (W.D. Pa. 1960).

The ruling of the court does not clarify its position in relation to the problem of amending a complaint and thereby presenting a new cause of action. The court apparently feels that an amendment to a complaint should be allowed only if such amendment does not present a new cause of action. There appears to be a two-fold problem involving changes in causes of action. First, FED. R. CIV. P. 15, contains no limitation that an amendment shall not change a cause of action. However, FED. R. CIV. P. 15(c), states that such change giving rise to a new cause of action shall not relate back to the date of the original pleading unless the "claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

An amendment giving rise to an entirely new cause of action was allowed in *International Ladies' Garment Workers Union v. Donnelly Garment Co.,* 121 F.2d 561 (8th Cir. 1941), where plaintiff, whose cause of action was based solely on the Sherman Act, was permitted to file an amendment dismissing the resident defendant and restating the claim as a civil action based on diversity of citizenship. The problem of relation back to the original pleadings did not arise in this case.

That plaintiff might introduce a completely new cause of action by an amendment, but that such amendment would not relate back to the commencement of his action so as to toll the statute of limitations, was upheld in *Union Pac. R.R. v. Wyler,* 158 U.S. 285, 15 Sup. Ct. 877 (1895), where plaintiff, a railroad company employee, instead of bringing an action against the company based on the general law of master and servant, amended his petition, after the expiration of the statute of limitations, changing the nature of his claim and basing it upon a statute of Kansas giving the employee rights in derogation of the general law.

Green v. Walsh, 21 F.R.D. 15 (E.D. Wis. 1957), substantiates the position that if a change in a cause of action arises out of the same occurrence or transaction as stated in the original pleadings, it shall relate back to those pleadings and be permitted even though the statute of limitations had apparently run during the period between filing of the original and amended complaints.

With the adoption of the new West Virginia Rules of Civil Procedure, the limitation in W. VA. CODE ch. 56, art. 4, § 24 (Michie

1955), on allowing amended complaints introducing new causes of action will be void. Under W. VA. R.C.P. 15, it will be permissible for an amendment to state a new cause of action, one which can be based on a different transaction or occurrence. Such an amendment will not, however, under W. VA. R.C.P. 15(c), be allowed to relate back to the date of the original pleadings, and the running of the statute of limitations prior to the filing of the amendment will be a bar to its introduction.

Property—Federal Tax Lien—Divestiture By State Foreclosure Proceedings

In two similar cases, mortgagees, after obtaining a judgment against the mortgagors, had the mortgaged property sold. In both instances the United States held a tax lien, concededly junior, on the mortgaged property. The United States was not a party to the proceedings in either instance nor was it required, under state law, to be a party to such proceedings. In a suit by the United States to enforce the tax lien against Pennsylvania mortgagees and in a second suit by the California mortgagees who had bought the property in, against the United States to quiet title, the Pennsylvania and California District Courts rendered judgment for the mortgagees.

The Pennsylvania case was affirmed on appeal while the California case was reversed. *Held,* Pennsylvania case affirmed, California case reversed. State law governing divestiture of federal tax liens was to be adopted as federal law, except to the extent that Congress might have entered the field. In both instances, a junior federal lien was effectively extinguished, though the United States was not, and was not required to be, a party to the proceedings under state law *United States v. Brosnan; Bank of America v. United States,* 80 Sup. Ct. 1108 (1960).

A pre-existing mortgage will be superior in priority to a federal lien. *Conrad v. Atlantic Insurance Co.,* 26 U.S. 386 (1828). The United States does not have to be named a party to foreclosure proceedings so as to extinguish its junior lien unless state law entitles or requires junior lienors to be joined with other parties to the suit. *United States v. Cless,* 254 F.2d 590 (3d Cir. 1958). In the *Cless*

case, the United States held a second mortgage rather than a tax lien. 62 Stat. 869 (1948), 28 U.S.C. § 2410 (1952), does not require such joinder as far as federal law is concerned but does consent to such joinder where state law provides for it. Hence, it appears that in West Virginia, by following state laws regarding the sale of property under trust deeds, one can extinguish a junior federal tax lien.

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