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Recent Case Notes

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RECENT CASE NOTES

AGENCY — HOSPITALS — NEGLIGENCE IN TREATMENT

Plaintiff was a paying patient in defendant hospital, a profit-making organization. A qualified laboratory technician, employed by the hospital, made a serological test to determine plaintiff's blood factor. The test was made in contemplation of, and preliminary to, a blood transfusion ordered for plaintiff by her physician. An error was made by the technician in designating the blood factor and plaintiff was infused with blood of the wrong factor and suffered serious consequences. *Held:* The act of the technician is medical in nature, not administrative, and therefore the hospital is immune from liability. *Berg v. New York Society for the Relief of the Ruptured and Crippled,* 286 App. Div. 783, 146 N.Y. Supp. 2d 548 (1955) (3-1 decision).

The basic agency doctrine of respondeat superior requires that a principal, as a general rule, be vicariously liable for the acts of his agent. Although the precise definition of "agent" will vary slightly depending upon which theory is used to rationalize the doctrine, as a general proposition, for purposes of application of respondeat superior, "agent" includes any person over whom the principal has control of either the person or method or manner of performance of the agency. If control is exercised over only the end result, the principal will not be vicariously liable.

The principal case followed the general rule that a hospital is immune from liability for the acts of its employees if the acts are medical and not administrative in nature. *Steinert v. Brunswick Home, Inc.* 172 Misc. 787, 20 N.Y. Supp. 2d 459 (1940). See *Volk v. City of New York,* 284 N.Y. 279, 30 N.E. 2d 596 (1940). But the court sensed an injustice in its decision and challenged the higher court to a "reappraisal of the underlying rationale." The rationale, however, seems to be merely a satisfactory application of the control concept of respondeat superior. *Hillyer v. The Governors of St. Bartholomew's Hospital,* 2 K.B. 820, 9 B.R.C. 1 (1909); *Schloendorff v. Society of New York Hospital,* 211 N.Y. 125, 105 N.E. 92 (1914); *Necolayff v. Genessee Hospital,* 270

App. Div. 648, 61 N.Y. Supp. 2d 832, aff'd, 296 N.Y.36, 73 N.E. 2d 177 (1949). The court apparently believes that where the negligent acts are medical in nature the hospital should not be considered as having control; therefore it should not be liable for such acts because they are inherently discretionary, founded upon the professional skill of the patient's physician as exercised by himself or his agents.

When applying the general rule, difficulty in making the distinction between medical and administrative acts has been a source of injustice, and the difficulties are traceable to the first New York application of the "medical-administrative" rule. That opinion stated that "acts of preparation immediately preceding the operation are necessary to its successful performance, and are really a part of the operation itself . . . [w]hatever the nurse does in those preliminary states is done not as a servant of the hospital, but in the course of treatment of the patient." *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914). The statement led subsequent decisions astray in defining "medical," as is illustrated by the definition in the prinicipal case that a medical act is any act "immediately and integrally related to the medical care and treatment prescribed for the patient . . . no matter how simple or how far removed from the common concept of a professional act." See also *Phillips v. Buffalo General Hospital*, 239 N.Y. 188, 146 N.E. 199 (1924). Such definitions are conceivably broad enough to encompass any act performed subsequent to the initiation of the treatment. Consequently, those definitions must be deemed arbitrary and unsatisfactory because they do not have as their focal point the element of discretion which is paramount in the underlying rationale of the general rule.

A reconsideration of the general rule should be directed not toward its rationale, as suggested by the court in the principal case, but toward its application, which requires determination of which acts are medical in nature and which are administrative. A redefinition of terms, promulgated with the rationale in mind, is made mandatory by the frequent injusticies in the field. Perhaps, as the principal case suggests, legislative action would be an even better step forward.

Arthur C. Flinders.

CONSTITUTIONAL LAW—EMINENT DOMAIN—COMPENSATION FOR TAKING OF PRIVATE PROPERTY

Twin City Power Company was the owner of land and water rights which it had acquired pursuant to its plan to build a dam and hydroelectric power plant in the Savannah River, a navigable stream. Congress, however, decided the United States should build the dam as part of its plan of improving the Savannah River basin, the project calling for the complete absorption of all Twin City property. Commissioners appointed by the court below valued the land of Twin City at $267 per acre considering its value in connection with water power development. The United States was overruled in its contention that the land should be valued according to its agricultural worth, $37 per acre, without regard for its riparian character. *Held:* The United States has a dominant servitude in the flow of a navigable river which value it can grant or withhold as it chooses; hence the United States can not be compelled to pay any value that the proximity of this stream added to the land. *United States v. Twin City Power Company,* 350 U.S. 222 (1956).

That Congress can condemn private land and take it for the public interest is not here contested, but when Congress exercises this right and there is a taking of private property for public purposes, just compensation must be paid. U.S. CONST. AMEND. V; *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893). The one from whom the property is taken must be put in as good a position pecuniarily as if his property had not been taken. *Olson v. United States,* 292 U.S. 246 (1934). The highest and most profitable use for which the property is adaptable and needed in the reasonably near future is to be considered, and the fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect the market value. *Olson v. United States, supra.* Since the owner is to receive no more than he is being deprived of, his award can not be added to by any gain to the taker. *United States v. Miller,* 317 U.S. 369 (1943). In fixing compensation, possible, probable, or imaginary uses are not to be con-

sidered in so far as they are so speculative as to have no effect on market value. *United States v. First National Bank,* 250 F.2d 299 (1918). The inquiry in condemnation cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted. *Boom Company v. Patterson,* 98 U.S. 403 (1878).

The primary issue in the principal case would seem to be whether the suitability of this land for the erection of a dam and hydroelectric power plant is to be considered in determining the fair market value or the reasonable compensation to be awarded the landowner. The government contended that since it can grant or withhold the right to utilize the water power in the river under its power to regulate interstate commerce and improve navigation, it need not pay any value for the land based upon its suitability for use as a dam site. The majority opinion in the principal case cites the case of *United States v. Chandler-Dunbar, W. P. Co.,* 229 U.S. 53 (1913), as authority for its holding. It is conceded that there is language in that case which, applied here, could lead to the result reached. It seems, however, that there is a distinguishing point in that the underlying contention of the Chandler-Dunbar Company was that it had a vested property right in the water power of the St. Mary's River in excess of all that needed for navigational purposes. Any claim based upon such a contention would be justly disallowed. It has always been the law in this country that a riparian owner does not acquire a property right distinct from those of the general public in the waters of a navigable stream. *United States v. Commodore Park, Inc.,* 324 U.S. 386 (1945). In the *Chandler-Dunbar* case the Court in addition to denying any compensation for the actual water in the river also held that no additional value need be paid for eight acres of upland bordering on the falls and rapids of the river because of its suitability for a factory site, power for the factory to come from horsepower generated by the current of the river. The Court said these additional values were based upon the erroneous hypothesis that the company had a private property interest in the water power of the river.

Here Twin City does not claim ownership of any part of the

water in the Savannah River. All it asks is the fair market value of the land taken. That the land had a market value based upon its suitability for a dam site is evidenced by the fact that for some years private purchasers had been negotiating with Twin City for the purchase of the same land in question, and had ceased their efforts only when it was announced that the government would undertake the project. Had any of these companies been forced to condemn the land they would have had to pay the added value based upon the suitability of the land for power purposes. It would certainly seem the Government should have to pay the same fair market value when it takes the same land for the same purpose.

In applying the holding in the *Chandler-Dunbar* case to the facts of the principal case the court seems to have lost sight of "fair market value" as the test for just compensation. The authority for such an abrogation of the test is at best questionable, and the justice therein nonexistant.

Oscar Fields, Jr.

EVIDENCE—WITNESSES—PRIVILEGE AGAINST SELF INCRIMINATION

Defendant, on trial before a United States District Court, moved to quash his indictment on the ground that, prior to being questioned as a witness before the grand jury, he was not advised of his Constitutional right against self-incrimination. He alleged that he had been "marked . . . for prosecution" and that the authorities were engaged in bringing about his indictment. *Held:* The mere fact that a witness may later be indicted furnishes no basis for requiring that he be warned of his rights under the Fifth Amendment when summoned to give testimony before a grand jury. *United States v. Scully*, 225 F.2d 113 (2d Cir. 1955).

The Fifth Amendment to the United States Constitution embodied the English right against self incrimination which as late as 1789 was still new and ill-defined. MCCORMICK, EVIDENCE § 120. The privilege that "no person shall . . . be compelled in any criminal case to be a witness against himself" has also been inserted in virtually all state constitutions. The privilege is not that a person has a right to refuse to submit to questioning, but that

he has a right to refuse to answer certain questions. As Professor Wigmore says, the Constitutional provision is an "option of refusal, not a prohibition of inquiry." 8 WIGMORE, EVIDENCE § 2265 (3rd ed. 1940).

The right of a defendant to refuse to be sworn as a witness is traced not to the Constitution, but to 18 U.S.C. § 3481 (1948), which provides that in trial of persons charged with commission of offenses, the person charged shall, at his own request and not otherwise, be a competent witness. This statute is a modification of the common law rule, prevailing even in this country until the mid-1800's, that the accused was incompetent as a witness, either for or against himself. MCCORMICK, *op. cit. supra*, § 65; *In re Lemon*, 15 Cal. App.2d 82, 59 P.2d 213 (1936). Where, however, the person appears before a grand jury, without having been formally charged, he has no right to remain off the witness stand. *United States v. Price*, 163 Fed. 904 (C.C.S.D.N.Y. 1908); *Ex Parte Barnes*, 73 Tex. Cr. R. 583, 166 S.W. 728 (1914). Moreover, as to a witness other than the accused, it is not violative of Constitutional privilege for the court or grand jury to fail to warn such a witness. *People v. Smith*, 257 Mich. 319, 241 N.W. 186 (1932); WHARTON, CRIMINAL EVIDENCE § 1123 (11th ed. 1935); *Wilson v. United States*, 162 U.S. 613 (1896); *Powers v. United States*, 223 U.S. 303 (1912).

The district court, in denying Scully's motion, based its decision on the distinction between a party and a mere witness. 119 F. Supp. 225 (S.D.N.Y. 1955). A witness, before a court of law or a grand jury, has a constitutional right to refuse to answer a question which may tend to incriminate him. *Blair v. United States*, 250 U.S. 273 (1919). He may not refuse to be sworn, and need not be warned of his privilege, but to avail himself of it the witness must plead it to each incriminating question. *United States v. Benjamin*, 120 F.2d 520 (2d Cir. 1941). A person becomes a party, however, when formal charge is made against him, by indictment presented or information filed in court or by complaint before a magistrate, and it would be error in a criminal case to call a party defendant as a witness unless he waives his right to remain

off the stand. *United States v. Housing Foundation of America, Inc.*, 176 F.2d 665 (3rd Cir. 1949). In the present case, no formal charge having been brought against the defendant, the district court ruled that Scully's rights were merely those of a witness and that no warning was necessary.

Judge Medina, speaking for the majority of the Court of Appeals, came to the same conclusion, but criticized the rationale of the district court. His opinion was based on the position that the grand jury, not being charged with the duty of deciding innocence or guilt, should not be required to conduct its proceedings with the "assiduous regard for the preservation of procedural safeguards which normally attend the ultimate trial of the issues."

The concurring opinion of Judge Frank expressed a diametrically opposing concept of the grand jury. He asserted that every witness should be warned of his rights when a question plainly calls for an incriminating answer, *especially* if the interrogation occurs before a grand jury, where the witness does not have the aid of counsel. Judge Frank grudgingly concurs in the result because of earlier Supreme Court rulings which he feels constrained to follow, "absent . . . decisions indicating clearly a new doctrinal trend."

The great weight of authority in this country seems to be in accord with the holding of the lower court that the witness-party distinction is the prime consideration in determining both the right to receive a warning and the right to refuse to testify. A number of decisions have expressed the same conclusion as Judge Frank in the instant case, but such is still a minority rule. The opinion by Judge Medina is certainly a shift to the other side of the scale. Though it be true that a grand jury does not convict, nor does it punish, nevertheless the grand jury is an integral part of our criminal law procedure. The grand jury indictment is the starting gun which signals the beginning of criminal proceedings, and it would thus seem that the rights of one before a grand jury are as much a part of our procedural safeguards as those pertaining to the actual trial of the accused.

Robert H. Thomas.

FEDERAL COURTS—INJUNCTION—EFFECT ON STATE CRIMINAL PROCEEDINGS

After indictment by federal grand jury for illegal acquisition of marihuana, petitioner successfully moved to suppress evidence obtained by an improperly issued search warrant, and the United States District Court dismissed the indictment. A federal narcotics agent then swore to a complaint before a New Mexico judge, and petitioner was charged with possession of marihuana in violation of New Mexico law. Petitioner brought an action in the United States District Court to enjoin the agent from testifying with respect to the narcotics obtained in the illegal search. *Held:* The federal agent should be enjoined from testifying in the state case. *Rea v. United States,* 350 U.S. 214 (1956) (5-4 decision).

Federal courts have traditionally exercised reluctance in interfering with the prosecution of criminal actions in state courts. *Douglas v. City of Jeanette,* 319 U.S. 157 (1943). The relationship between federal and state jurisdiction has been described by Mr. Justice Holmes as a "very delicate matter," 5 *The Sacco-Venzetti Case, Transcript of the Record* 5516, and the Supreme Court has emphasized numerous times the regard which must be had for the independence of state governments in the administration of criminal justice. *Beal v. Missouri Pacific RR,* 312 U.S. (1941); *McNabb v. United States,* 318 U.S. 332 (1943). Federal district courts have jurisdiction to prevent trials of persons whose constitutional rights would be invaded by such actions. *United States ex rel Buchalter v. Lowenthal,* 108 F.2d 863 (2nd Cir. 1940). However, the fact of unconstitutional action will not, of itself, invoke federal equity powers. *Spillman Motor Sales Co. v. Dodge,* 295 U.S. 89 (1935). Exhaustion of state remedies is usually required, *Wade v. Mayo,* 334 U.S. 672 (1948), unless circumstances are extraordinary and danger of irreparable loss is great and immediate. *Fenner v. Boykin,* 271 U.S. 240 (1926). Apart from the injunction power in unconstitutional activity, federal courts are authorized to stay state proceedings when necessary "in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. Sec. 2283 (1948).

The principal case is distinguished from those above in that the

injunction did not operate to enjoin directly the state officials from prosecuting the petitioner; this is emphasized by the majority opinion. The dissent looked beyond the form to the effect of barring the evidence on which the State's case wholly depended, and found the state proceeding quite effectively stultified, even though the appearance of the agent would have been voluntary and no subpoena had been issued. The court has earlier refused to enjoin the use of evidence illegally obtained by *state* officials, saying that the "balance is against the wisdom" of using such power. *Stefanelli v. Minard*, 342 U.S. 117 (1951). A lower federal court has held the criteria for federal intervention to be the same whether the action be designed to enjoin *or impair* the effective state prosecution. *McGuire v. Amrein*, 101 F. Supp. 414 (D.C. Md. 1951).

It is now well-established that although evidence obtained by federal officials in an illegal search is inadmissible in a federal court as being violative of the 4th and 5th amendments, *Weeks v. United States*, 232 U.S. 383 (1914), state use of illegally obtained evidence does not violate due process of law within the meaning of the 14th amendment. *Wolf v. Colorado*, 338 U.S. 25 (1949). See Ray, *Restrictions on the Use of Illegally Obtained Evidence*, 9 Sw. L.J. 434. The majority in the principal case discounted any constitutional issues, however, and rested the result on the court's "supervisory powers over federal law enforcement agencies." Had there been a federal rule barring participation by federal agencies with illegally obtained evidence in state trials, it would seem the injunction should clearly be issued. *Booke v. Comingore*, 177 U.S. 459 (1900); *US ex rel Touhy*, 340 U.S. 462 (1951). In the absence of such a rule, the suggestion of a general supervisory power over law enforcement within the judicial branch seems to be a new approach, as emphasized by the dissent, in the delicate area of federal-state relations. We are not told what effect, if any, the fact that proceedings were first commenced in the federal court had on the opinion, or what result would have emerged if the federal indictment had never been found.

Prosecution on the basis of illegally seized evidence may seem a gross injustice, but the doctrine of the *Wolf* case, *supra*, must be kept in mind. Although the appearance of the federal agent in the state proceeding might have violated the spirit of the federal rules,

it is submitted that enjoining the testimony must be viewed as a federal impairment of state prosecution, heretofore justified only in exceptional circumstances where denial of basic liberties is clear. The *Wolf* case having held use of illegally seized evidence to be no such denial, to allow an injunction to issue here seems inconsistent.

William D. Powell, Jr.

HUSBAND AND WIFE—COMMUNITY PROPERTY—LIFE INSURANCE PROCEEDS

H and *W* were killed in an automobile accident, *H* surviving *W* some fifteen or thirty minutes. *H*'s life was insured under three policies, premiums for two of which were paid out of community funds. *W* was beneficiary under each policy, and if she should predecease *H* then the proceeds were to be paid to his estate. *W*'s heirs by a former marriage brought an action against the heirs of *H*, and sought to have the proceeds declared part of the community estate, and hence divided between the separate estates of *H* and *W*. *Held:* Where the husband is insured with *W* named as beneficiary and *W* predeceases him, the proceeds of the policy belong to the separate estate of *H*, even though the premiums were paid out of community funds. *Warthan v. Haynes*, ...Tex....., 288 S.W.2d 481 (1956) (6-3 decision).

The historical path of insurance as related to the community property laws of Texas has been a winding one. One of the most troublesome problems has been whether or not an insurance policy is to be considered property. In 1943, the Supreme Court of Texas, in a frequently cited case, held that an insurance policy was a chose in action, declaring flatly that the policy was property. *Womack v. Womack*, 141 Tex. 299, 172 S.W.2d 307. A decade later, the Fifth Circuit Court of Appeals was confident enough of the proposition and its authority to say, "It is now well settled that a policy of life insurance is regarded in Texas as property." *Kemp v. Metropolitan Life Ins. Co.*, 205 F.2d 857 (5th Cir. 1953). Only a few months later, however, the Supreme Court of Texas referred

to the rationale of the *Womack* case as erroneous dictum. *Sherman v. Roe,* .....Tex....., 262 S.W.2d 393 (1953).

In the majority of community property jurisdictions, the husband is not allowed to change the beneficiary of an insurance policy on his life so as to divest the wife's claim to it without her consent. *Occidental Life Ins. Co. v. Powers,* 192 Wash. 475, 74 P.2d 27 (1937). Cases in some of the other community property jurisdictions hold that the proceeds of an insurance policy are community assets regardless of who may be named as beneficiary in the policy. Thus, where the husband takes out a policy on his life, payable to a third party, and pays the premiums out of community funds, the wife may upon death of the husband demand one-half of the proceeds and the named beneficiary take the remaining half as a gift from the husband out of his share of the proceeds. *Travelers Ins. Co. v. Fancher,* 219 Cal. 351, 26 P.2d 482 (1933). In the situation where the policy is on the life of the husband payable to the wife, however, it is reasoned that the husband has made a gift of his share of the proceeds to the wife, and the entire proceeds are thus her separate property. *Nulsen v. Herndon,* 176 La. 1097, 147 So. 359 (1933). Texas not only is in accord with the latter rule, but carries it much further, allowing the husband, as manager of the community estate, to make a gift of community property to a third person without express consent of the wife, *Moody v. Smoot,* 78 Tex. 119, 14 S.W. 285 (1890); Huie, COMMUNITY PROPERTY LAWS AS APPLIED TO LIFE INSURANCE, 18 TEX. L. REV. 121 (1940), and accordingly allowing a third party to be named as beneficiary of an insurance policy on the husband's life. *Martin v. McAllister,* 94 Tex. 567, 63 S.W. 624 (1901).

It would seem incorrect, however, to allow the husband to make a gift to himself or his separate estate such as occurred in the *McAllister* case. There, the policy insured *W*'s life and *H* was beneficiary. The case held, upon the decease of *W*, that there was no property until after *W*'s death, thus no property until after termination of the community, and hence the proceeds were the separate property of *H*. *H*, as manager of the community assets, had augmented his personal estate at the expense of the community estate.

The *McAllister* case was cited with approval in *Volunteer State Life Ins. Co. v. Hardin,* 145 Tex. 245, 197 S.W.2d 105 (1946), which held that the proceeds of the policy on the life of the husband do not vest in the beneficiary named by him until his death. The majority of the court in the principal case relied heavily on the *Volunteer* case, and reasoned that since the policy and its proceeds never vested in the wife, and vested in the husband's estate only after termination of the community by death of the parties, then the policy proceeds were the separate property of the husband. A very convincing dissent by Justice Garwood is based upon the premise that the policy is property, and the chose in action purchased with community funds becomes the property of the community estate immediately upon the inception of the contract.

At least one far reaching result may occur from this case. As the dissenting opinion points out, the Internal Revenue Code of 1954 seems to assume that life insurance proceeds are community property to the extent that the policy is paid for with community premiums. Thus, only one-half of the proceeds of a policy paid for with community funds is included in the taxable estate of the decedent for estate tax purposes. INT. REV. CODE OF 1954, § 2056(c)(2). In the instant case, the Commissioner might require *all* the proceeds to be accounted for in the estate of the insured deceased spouse since they are the husband's separate property. If, however, the wife had survived and received all the proceeds as beneficiary, it could be argued that there should be no inclusion in the deceased husband's estate tax return.

At any rate, the winding path referred to above has not been materially straightened by this case. The question as to whether an insurance contract is property remains unsettled, and in view of the strong dissent, the case would be a weak foundation upon which to build and argue.

Robert H. Thomas

LABOR LAW — SECONDARY BOYCOTT — THE "ALLY DOCTRINE"

Defendant labor union struck against Royal Typewriter Company. During the strike, Royal instructed customers with whom it had repair contracts to select any independent repair company, have the repairs made, and send the bill to Royal for reimbursement. The union, admittedly for the purpose of exerting greater pressure on Royal, picketed four independent repair companies which, at the request of Royal's customers, were performing a large part of the work covered by Royal repair contracts. The only contact which Royal had with the independents was the payment of repair bills. *Held:* Picketing of an independent is lawful, even though it has no contract with the primary employer, when the independent performs work which might break a strike of which it had notice. *National Labor Relations Board v. Business Machines Union*, 228 F.2d 553 (2nd Cir. 1955).

The common law was inclined to hold secondary boycotts unlawful, *Iron Moulders Union v. Allis Chalmers*, 166 Fed. 45 (7th Cir. 1908), while the Taft-Hartley Act makes illegal any attempt to induce employees to engage in a concerted refusal to perform services where the object of the refusal is to force their employer to cease doing business with another employer. 29 U.S.C. 158-(b)(4). Both approaches limit the use of secondary boycotts, but neither attempts to proscribe all types of secondary activity. *Rabouin v. N.L.R.B.*, 195 F.2d 906 (2nd Cir. 1952). The question arises as to where the line should be drawn. Inasmuch as the provisions of the statute relating to secondary boycotts are very general, the courts have employed common law principles in their construction. *N.L.R.B. v. Electrical Worker's Union*, 225 F.2d 17 (7th Cir. 1955).

Under the general rule, known as the "ally doctrine," where there is a contract by the primary employer to farm-out work to an independent, picketing of the independent is not a proscribed secondary activity because by the contract the independent has willingly become a party to the disagreement. *International Brotherhood of Electrical Workers v. N.L.R.B.*, 341 U.S. 694 (1950). The doctrine is basically contractual in nature and has not been applied to cases which do not involve a contract between the pri-

mary employer and the independent. But the doctrine has not always been applied, even where contracts existed, the result being that the picketing was illegal. *International Brotherhood of Electrical Workers v. N.L.R.B., supra.* The National Labor Relations Board acknowledges that the dividing line between legal and illegal boycotting is not susceptible to the application of a rigid formula, and has, therefore, based its decisions on a balance between the intent of Congress to outlaw secondary boycotts and the intent to preserve the lawful primary means traditionally used. *Re United Brotherhood of Carpenters,* 81 N.L.R.B. 802 (1949).

Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672 (S.D.N.Y. 1948), held that a farm-out agreement was a proper basis for the application of the "ally doctrine" where by the agreement the secondary employer was doing seventy-five per cent of the primary employer's work during the strike. The *Douds* decision was used as authority for the decision in the principal case, the court reasoning that there was a contractual relationship by virtue of the independent's receipt of payment from Royal.

It is submitted that the principal case does not present the type of contract situation that is contemplated by the "ally doctrine." In fact, it is even questionable whether a contract situation existed. There was no showing that the independents sided with either participant in the strike, or that any had done so in the past. The facts stated do not indicate that any independent intended to help break the strike, or that any independent was performing work in an amount sufficient to break the strike. Neither was it shown that any independent knew of the others' work. It seems that the independents merely accepted business at the request of the customers. To say that the independents, by such acceptance, are thereby parties to the primary conflict merely because the payment by Royal put the independents on constructive notice of the strike, is to say that the independent can be limited in the scope of the business which he may accept from customers by the mere existence of a strike against another employer, even though the independent remains neutral. That is the very result which the secondary boycott provision seems designed to prohibit.

Arthur C. Flinders

PHYSICIANS AND SURGEONS — AIDING UNLICENSED PERSONS TO PRACTICE — FORFEITURE OF LICENSE

Appellant, a licensed medical doctor, was employed by a clinic at a stated monthly salary. The clinic was owned by one who was not a medical doctor and no medical doctor owned any interest in the clinic. Appellant performed medical services and fees for those services were collected by the clinic. The Texas State Board of Medial Examiners revoked appellant's license to practice medicine for such conduct. *Held:* Appellant allowed another to make use of his license to practice medicine in Texas, and the cancellation of his license is justified. *Rockett v. State Board of Medical Examiners,* 287 S.W.2d 190 (Tex. Civ. App. 1956) *error ref., n.r.e.*

The police power of the state includes the power to enact comprehensive and rigid regulations for the practice of medicine and dentistry. *Douglas v. Noble,* 261 U.S. 165 (1923). TEX. REV. CIV. STAT. (1925) art. 4505 sec. 12 allows the State Board of Medical Examiners to refuse to issue a license to anyone permitting another to use his license to practice medicine in this state for the purpose of treating or offering to treat sick or otherwise afflicted human beings. TEX. REV. CIV. STAT. (1925) art. 4506 allows revocation of a medical doctor's license to practice medicine for the same reason. In view of this legislation it would seem that the primary issue in the principal case would be whether or not the activities of the above mentioned clinic constitute "the practice of medicine" by its owner within the purview of art. 4505.

Courts have occasionally made a distinction between unlicensed individuals or corporations actually practicing medicine, and those merely employing licensed medical doctors and offering their services to the public. *State Electra Medical Institute v. State,* 74 Neb. 40, 103 N.W. 1078 (1905). In approving the latter activity the court said that the making of contracts for rendering medical services was not practicing medicine, nor was the collection of fees for performance of those services by qualified physicians in their employ. The same distinction, however, was rejected in *People Ex Rel State Board of Medical Examiners v. Pacific Health Corp.,* 12 Cal.2d 156, 82 P.2d 429 (1930). There the court asserted that the policy of the law should not be circumvented by

technical distinctions. The evils of divided loyalty and impaired confidence which the law attempts to avoid seem to be present in either approach. The majority rule, therefore, seems to be that an individual or corporation who employs a physician to perform medical services, paying the physician a salary and itself collecting the fee, thereby engages in the practice of medicine. *Pacific Employers Insurance Co. v. Carpenter*, 10 Cal. App.2d 592, 52 P.2d 992 (1935); *McMurdo v. Getter*, 298 Mass. 363, 10 N.E. 139 (1937); *State Ex Rel Indiana State Board of Dental Examiners v. Boston System Dentists*, 215 Ind. 485, 19 N.E. 949 (1939).

The Texas statutes expressly define who is regarded as practicing medicine. TEX. REV. CIV. STAT. (1925) art. 4510. A literal reading of the statute would not seem to include an unlicensed individual who merely employs and offers the services of a licensed physician, paying him a salary and collecting the fees. Only by applying agency principles, i.e., what one does through employees he does himself, can we say that the owner of the clinic in the principal case is engaged in the practice of medicine. It seems, therefore, that the appellant could have been proceeded against more properly under Sec. 4 of Art. 4505, which, together with Art. 4506, make grossly unprofessional conduct of a character which, in the opinion of the Board of Medical Examiners, is likely to deceive or defraud the public a ground for revocation of a physician's license. In *State Board of Dental Examiners v. Savelle*, 90 Colo. 177, 8 P.2d 693 (1932), the court held that the conduct of a dentist in working for a corporation on a salary basis, the corporation collecting the fees, was grossly unprofessional conduct of a type constituting a fraud and misrepresentation on the public. Apparently the Texas State Board of Medical Examiners, with whom the proceeding in the principal case was begun, did not think the conduct of appellant was any deceit on the public.

The Texas case of *Hexter Title and Abstract Co. v. Grievance Committee of the Texas State Bar Association*, 142 Tex. 506, 179 S.W.2d 946 (1944), holds that a title and abstract company which employed attorneys on a salary basis to provide interested persons with advice on the legal effect of instruments of conveyance, the company collecting the fees therefor, was engaged in the practice

of law. It would not seem, however, that this case should be considered too strong an authority for the holding in the principal case, in view of the statute expressly defining who is engaged in the practice of medicine and the absence of such a statute dealing with who is engaged in the practice of law.

The opinion in the principal case seems clearly supported by authority from other jurisdictions, and also in line with Texas law, subject to the one criticism herein previously mentioned. The case strikes a double blow at this type of arrangement between employer and doctor, because not only will the physician be subject to having his license revoked, but probably also the employer who hired him will be subject to criminal prosecution for practicing medicine without a license. TEX. PENAL CODE (1925) art. 730.

Oscar Fields, Jr.

TAXATION — OIL AND GAS — DEPLETABLE ECONOMIC INTEREST

In California where wells drilled into off-shore oil lands must be slanted from the adjacent upland shores, Huntington Beach Co. was an upland owner. Southwest Exploration Co. was an oil drilling company which acquired an easement from Huntington to use its lands to drill wells into the off-shore oil deposits; in consideration for the easement, Southwest agreed to pay Huntington a percentage of net profits on the income derived from these wells. Southwest computed its depletion deduction without excluding from gross income the percentage of net profits paid to Huntington. Huntington, however, in computing its depletion included the payments it received from Southwest. The two lower courts, in upholding both deductions, allowed double depletion on the same income. *Held:* Huntington Beach Co. is entitled to the depletion deduction, because by contributing the easement which was indispensable to the recovery of oil, it obtained an economic interest. *Commissioner v. Southwest Exploration Co.*, 350 U.S. 308 (1956).

Allowance for depletion is a deduction equal to 27½% of gross income not to exceed 50% of the net income. I.R.C. Sec. 611 (1954), Sec. 23(m) (1939). A taxpayer is entitled to depletion

if he has (1) "acquired by investment any interest in the oil in place," and (2) "secured by . . . legal relationship income derived from the extraction of the oil, to which he must look for the return of his capital." *Palmer v. Bender*, 287 U.S. 551, 557 (1933).

The issue in the principal case was whether the easement conveyed by Huntington in exchange for the net profit payment constituted an investment within the rule of *Palmer v. Bender, supra.* The nature of the interest acquired by investment, not the cost, is the important element. *Burton-Sutton Co. v. Com'r.*, 328 U.S. 25 (1946). Legal title to the land is not necessary. *Kirby Petroleum Co. v. Com'r.*, 326 U.S. 599 (1946). The landowner or lessee who reserves a royalty, oil payment, or a percentage payment from net profits is generally entitled to take depletion; *Thomas v. Perkins*, 301 U.S. 655 (1937); *Kirby Petroleum Co. v. Com'r, supra;* but, in *Helvering v. Elbe Oil Co.* 303 U.S. 372 (1938), where the taxpayer conveyed his interest in producing wells for 2/3 cash and reserved a net profits payment for the other 1/3, the court held the conveyance to be a sale, and no depletion was allowed on the reserved interest. It seems that the *effect* of the *Elbe Oil* case has been tempered by the subsequent *Burton-Sutton* and *Kirby* cases, but in deciding *Huntington Beach* without overruling the *Elbe Oil* decision, the court left unanswered the question whether depletion would be allowed in a situation similar to the *Elbe Oil* case, if the interest conveyed were indispensable to exploitation.

Another problem, still unanswered, is that of the vendee who purchases a net profits interest. It would seem that he would have the same depletable interest as his vendor, but the court left this conclusion uncertain by failing to overrule or distinguish the case of *Helvering v. O'Donnell*, 303 U.S. 370, (1938). In the *O'Donnell* case the taxpayer exchanged stock in a corporation for a net profits payment from producing wells, and depletion was not allowed. The indispensable nature of the investment distinguishes the principal case from *O'Donnel* but, if *O'Donnell* is still the law, the court has left a new problem of deciding what constitutes an indispensable investment.

Huntington Beach might be equated to a line of cases in which the operator, whether designated a contractor or a lessee, is entitled

to take depletion. *Spalding v. U.S.*, 97 F.2d 697 (9th Cir. 1938). In *James Ruston*, 19 T.C. 284 (1952), the taxpayer was held to have an economic interest where he had an exclusive right to remove coal until the mine was exhausted. In *Usibelli v. Com'r.*, 229 F.2d 539 (9th Cir. 1955), where the mining contractor was subject to the army's control in determining the amount of coal removed, depletion was not allowed. It seems that the important element in these cases is largely, though not exclusively, one of agency, depletion being allowed if the contractor is independent, but not if he is merely an employee. Although Huntington Beach clearly does not have the same control over extraction as the independent contractor, the nature of its upland position which made Huntington indispensable, gave it effective control over the mineral's exploitation. The distinction between *Usibelli* and *Huntington Beach*, therefore, would be that Huntington Beach, being an essential party, had control of the exploitation, and that Usibelli, being neither an independent contractor nor an essential party, had no control.

Whether we say that Huntington had control of the exploitation, or that its investment was indispensable to the extraction, the issue is merely one of terminology, and the problem in future cases will be defining the term used. The principal case will probably be confined to its peculiar set of facts, but it does limit the import of the *O'Donnell* and *Elbe Oil* decisions, and indicates a lenient tendency of the court in defining what constitutes an interest acquired by investment.

Neil J. O'Brien.

TORTS — MUNICIPAL CORPORATIONS — DEFECTS IN PUBLIC WAYS

Plaintiff, a pedestrian, was injured when a defective metal cover embedded in a sidewalk gave way. The cover was on a box containing plumbing equipment installed for the benefit of the adjoining premises. This equipment, although installed in accordance with the defendant municipal board's regulations, was for the convenience of the owner and was paid for by him. In an action for damages, plaintiff dismissed her action against the owners and

tenants of the abutting premises, and the trial court dismissed the action against the defendant board. *Held:* Equipment embedded in the sidewalk for the benefit of the adjoining premises imposes no duty upon a municipal board to maintain that equipment, and therefore the board has no duty to discover its defective condition. *Johnson v. Sewerage and Water Board of New Orleans.* 84 So.2d 229 (La. App. 1956).

The tort liability of a municipal corporation arising out of its negligent acts is a curious mixture of the sovereign's immunity and the private corporation's responsibility. The most frequently used test holds that municipalities are immune for their torts arising out of so-called "governmental" functions but are responsible for their "corporate" functions. *Prunty v. City of Shreveport,* 61 So. 2d 548 (La.App. 1952); *Dilley v. City of Houston,* 148 Tex. 191, 222 S.W. 2d 992 (1949). Although it is perhaps a distortion of fact to classify the maintenance of public ways as a corporate act, it is quite generally held that a municipality is liable for injuries resulting from the defective condition of sidewalks. *Thomason v. Dan Cohen Co.,* 7 So. 2d 396, (La.App. 1942); *City of Wichita Falls v. Crummer,* 71 S.W. 2d 583 (Tex.Civ.App. 1934), *error dismissed.*

In the absence of a statute to the contrary, the owner or tenant of the adjoining property is under no duty to keep the sidewalk in repair. *Arata v. Orleans Capital Store,* 55 So. 2d 239 (La.App. 1951); *Latimer v. Walgreen Drug Co.,* 233 S.W. 2d 209 (Tex. Civ. App. 1950). However, where the abutting owner or tenant uses the sidewalk for his own benefit or convenience, he is obligated to use reasonable care in maintaining the sidewalk in safe repair. *Hebert v. Boadon,* 167 So. 862 (La.App. 1936); *Derichs v. O.K. Auto Parts and Sales Co.,* 92 S.W. 2d 465 (Tex.Civ.App. 1936) *error dismissed.* This exception to the general rule includes the liability attaching to an adjacent property owner maintaining for his own benefit a covered opening on the sidewalk for injuries caused by his failure to maintain the cover in a reasonably safe condition. See cases collected in 63 C.J.S. 863 (b).

The mere fact that the person causing the defect is liable does not of itself relieve the municipality from liability for defective sidewalks. *City of San Angelo v. Sitas,* 143 Tex. 154, 183 S.W.

2d 417 (1944). As the city is generally not involved in creating the defect, the basis of its liability in this situation is found in the failure to correct the defect. Therefore, the municipality is not held in such cases unless it not only had notice of the defect, but also had reasonable opportunity to remove it. Such notice may be either express or implied, actual or constructive. *Hudgens v. City of New Orleans*, 54 So.2d 536 (La.App. 1951); *Hanks v. City of Port Arthur*, 121 Tex. 202, 48 S.W. 2d 944 (1932).

In the principal case, the court does not rely on lack of notice, but seems to extend the "benefit" test to relieve the municipality from all liability rather than merely to charge the benefited owner of the abutting premises with joint liability. Although the result could be reconciled on the basis that the Sewerage and Water Board's duties do not include the municipality's responsibility to maintain safe sidewalks, the court does not rely on this distinction. In addition, there is reference to the general rule that the city is obligated to maintain the sidewalks in safe condition. Such an omission might be interpreted as lessening the city's duties in this respect.

Although it would clearly be just to hold the owner liable for defective covered openings located in the sidewalk for his benefit, it is submitted that sufficient reason exists for preserving the general rule. The continued liability of the city for injuries arising from unsafe sidewalks of which it has notice retains the incentive to protect the public in an authoritative and solvent obligor who is well-equipped for discharging the duty involved. In the event a loss is incurred, the municipality will generally be able to recover from the guilty property owner. In those cases where a judgment for indemnity is but an empty victory for the city, the loss will fall upon the innocent party who was best able to have prevented the injury. Continuation of municipal liability for defective sidewalks will thus serve to protect the public way.

Granville Dutton