Recent Decisions

Domestic Relations—Alienation of Affections—Minor Children

Two minor children, by their father and next friend, brought an action for the alleged wrongful inducement of plaintiff's mother to desert them and the family home. The case was heard on the basis of diversity of citizenship. Trial was had on a motion to dismiss on the ground, chiefly, that the alleged cause of action was not recognized in Michigan either at common law or by statute and that the so-called "heart balm" statute had abolished such civil actions in Michigan. *Held,* that the plaintiffs had a common law action for damages for invasion of their legal rights to maintenance of the family relationship and the care and support of their mother, and that the action was not barred by the statute. *Russick v. Hicks,* 85 F. Supp. 281 (W.D. Mich. 1949).

The pertinent part of the Michigan statute under consideration follows:

"Sec. 1. All civil causes of action for alienation of affections, criminal conversation, and seduction of any person of the age of 18 years or more, and all causes of action for breach of contract to marry are hereby abolished." Comp. Laws Mich. 1948, § 551.301.

The district court held that, although the above statute abolished the named causes of action with respect to husband and wife, it did not affect the rights of minor children of alienated spouses, the reasoning being that since the courts of Michigan had not yet declared such a right, the statute could not abolish it. Holding further that the novelty of such an action was not of itself grounds for failure to allow recovery, the district court concluded that the right of action for alienation of affections should now by judicial decisions be extended to children of alienated parents.

In reaching its conclusion the court followed the case of *Daily v. Parker,* 152 F. 2d 174 (7th Cir. 1945). In that case, one of first impression and the leading case permitting a child to recover damages for the alienation of a parent's affections, the United States Circuit Court of Appeals was interpreting the Illinois common law. The district court, in the *Daily* case, had denied recovery, dismissing the complaint for failure to state a cause of action. In reversing the trial court's decision, the circuit court held that modern changes in the status of children in the family made it appropriate and just to extend to them an action for alienation of a parent's affections just as the emancipation of women led

to the extension to them of a right to damages for loss of consortium formerly held only by the husband.

The reasoning of the *Daily* case may be tenable in a state where the common law actions for interference by a third person with domestic relations have not been abolished by statute. Even in such states, though the *power* of the courts to extend the right of action be undenied, there is a question of whether as a matter of policy, such an extension is *desirable*. Most states, where the issue has arisen, in construing the common law, have denied recovery to the children in alienation cases.

The leading case *contra* to the *Daily* case is *Morrow v. Yannantuono*, 152 Misc. 134, 273 N.Y. Supp. 912 (1934). This case, construing the common law of New York, denied recovery and based its decision chiefly on prevention of a multiplicity of suits. The decision has been followed in *McMillen v. Taylor*, 160 F. 2d 221 (D.C. Cir. 1946); *Taylor v. Deefe*, 134 Conn. 156, 56 A. 2d 768 (1947); and *Garza v. Garza*, 209 S.W.2d 1012 (Tex.Civ. App. 1948). Each of these decisions was based on common law tort liability. On the other hand, there have been two state court decisions following the *Daily* case and allowing children to recover under like circumstances. *Johnson v. Luhman*, 330 Ill. App. 598, 71 N.E. 2d 810 (1947); *Miller v. Monsen*, 37 N.W. 2d 543 (Minn. 1949).

In the one state court decision to date on the effect of a "heart balm" statute on the right to such an action, the California Supreme Court denied recovery to the infant children. *Rudley v. Tobias*, 84 Cal. App. 2d 454, 190 P. 2d 984 (1948). Drawing an analogy between an action by the children and one by the aggrieved spouse, the court held that the statute abolishes both rights of action.

It may thus be seen, that even under decisions based on the common law, a majority favors denial of a right of action to children under the theory of alienation of affections. And more pertinently, the only prior adjudication under a statute like the Michigan law in question here, denied such right of action. The weight of numbers would therefore seem to be against the decision of the instant case.

A consideration of the trend of legislation and commentaries by authorities in the field indicates that the weight of reason is also contra to the instant case. Here, the district court had the responsibility of deciding Michigan law in the absence of a Michigan decision on the subject. It may well be doubted that the Michigan Supreme Court would have reached the same conclusion and have allowed recovery.

The purpose of the "heart balm" statute in those states where it has been adopted has been to abolish actions for alienation of affections, criminal conversation, seduction, and breach of contract to

marry. It was felt that the allowance of such rights of action had been proven by practical experience to be contrary to the best interests of marriage and society generally. Therefore, though not specifically designating children of estranged spouses, the legislative intent should logically be held to have included all those who had or might have had the right to such actions under the common law. To allow children to recover in such cases would completely defeat the purpose of the acts and in fact open the door to greater multiplicity of suits, duplicity, and abuse than existed under prior decisions permitting such actions by the injured spouse. In fact, it is almost invariably the spouse who, before the enactment of "heart balm" statutes, would have brought an action in his or her own right, that would now bring an action as "next friend" of the minor children. Because such spouse would benefit, indirectly at least, by recovery by the children, the effect of the statute would be largely nullified. The increase in recognition and rights of children in the family circle is in many respects a forward step; but to hold that such change in status should now give a right to children which is being abolished with respect to adults, is an undue extension, particularly in those states which, like New York, California, and Michigan, have declared a legislative intent to restrict such rights of action in the interest of a sound public policy.

The purpose and desired effect of "heart balm" statutes is perhaps nowhere better stated than in the preamble to the New York version of the act which is as follows:

"The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction, and breach of promise to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free from any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies." N. Y. CIV. PRACT. ACT, §61-a.

This is the legislative intent which may well be read into the Michigan statute involved in the instant case. In view of the spirit expressed in the above preamble and the obvious intent of the "heart balm" statutes which have been enacted in the wake of the New York statute, the result in the principal case should be questioned. There may well be a reversal, therefore, either on appeal

in the instant case, or by legislative clarification of the Michigan statute, or by a subsequent decision of the highest Michigan court in a case which is certain to arise if this decision stands.

Samuel McMorris

NEGOTIABLE INSTRUMENTS — RATIFICATION OF A FORGERY BY MAKER

Plaintiffs purchased furniture from The Lake Music Company on an installment plan. Two weeks later the plaintiffs received notice from the defendant, a finance company, that the account had been assigned to it and that all payments should be made to the defendant. Plaintiffs made several payments to the defendant thereafter. About March 8, 1948, one of the plaintiffs became involved in an argument with the manager of the defendant, who waved a paper before the plaintiff and inquired whether the signature on the paper was the plaintiff's signature. Plaintiff replied that it was not and asked to see the paper again, but the defendant refused. On March 10, 1948, plaintiffs paid their account in full, and were given a negotiable note marked paid, which allegedly had been executed by the plaintiffs. The note was signed with the names of the plaintiffs and had been endorsed by The Lake Music Company. The plaintiffs brought an action to recover the amount paid the defendant on the ground that the defendant had wrongfully collected payment on a forged note. *Held,* that the plaintiffs could not recover. *Johnson v. Crown Finance Corp.,* 222 S.W. 2d 525 (Mo. 1949).

The court decided the case on two bases. First, it decided that even if the note was a forgery the plaintiffs could not recover because they had ratified the forgery. Secondly, it held that since the defendant was the assignee of the debt admittedly owed by the plaintiffs, they could not recover the money paid regardless of the infirmity of the note since the payment discharged a debt owed by the plaintiffs.

Ratification is the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him while purporting to act as his agent. 1 MECHEM, THE LAW OF AGENCY 260 (2nd. Ed).

One condition precedent to the operation of this doctrine is that the avowed agent must not only have intended to act for the avowed principal, but also, by the weight of authority, he must have professed to act for the ratifying principal. *Jones v. Bank of America Nat. Trust and Savings Association,* 49 Cal. App. 2d 122, 121 P. 2d 94 (1942); *Hartz v. Helsendegen,* 182 Mich. 129, 148

N.W. 433 (1914); *Allred v. Bray,* 41 Mo. 484 (1867); *Herb and Son v. Bank of Buffalo,* 66 Mo. App. 643 (1896); *Brown Realty Co. v. Myers,* 89 N.J.L. 247, 98 Atl. 310 (1915); *Johnson v. Insurance Co.,* 66 Ohio St. 6, 63 N.E. 610 (1902); *Edwards v. Heralds,* 263 Pa. 548, 107 Atl. 324 (1919).

This condition is lacking in the case at bar and in all of the forgery cases. In such cases the forger does not purport to be acting for a principal. His success depends on convincing others that this is the act of another, not that he is acting for another person. Thus the court erroneously applied the common law of ratification.

There is also a statutory reason why the court's holding as to ratification was erroneous. Section 23 of the N.I.L. provides: "When a signature is forged . . . it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefore, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery." A majority of the courts, including Missouri, have held that "precluded" as used in Section 23 is synonymous with "estop." And thus a forgery of a negotiable instrument cannot be ratified under the N.I.L. *Embry v. Long et al,* 256 Ky. 266, 75 S.W. 2d 1036 (1934); *Home Credit Co. v. Fouch,* 155 Md. 384, 142 Atl. 515 (1928); *Scott v. First Nat. Bank,* 343 Mo. 77, 119 S.W. 2d 929 (1938); *State Planters' Bank and Trust Co. v. Fifth-Third Union Trust Co.,* 56 Ohio App. 309, 10 N.E. 2d 935 (1937); *First Nat. Bank v. Albright,* 111 Pa. Super. 392, 170 Atl. 370 (1934).

Setting aside the second basis of the decision which does not involve negotiable instrument law, if the court desired to solve the problem by the use of the N.I.L., it could have done so. In doing so it could have helped clarify the interpretation of the N.I.L. in regards to a situation which rarely occurs, that is, one in which a "maker" pays a note and then tries to recover on the ground that the note was a forgery.

The well known rule of *Price v. Neal* holds that a drawee of a bill or check who pays an instrument which bears the forged signature of the drawer is denied the right to recover the money so paid to a bona fide transferee of the bill or check. And likewise the acceptor of a forged bill is liable thereon to a bona fide purchaser thereof. *Price v. Neal,* 3 Burr. 1354 (1762). There is a dearth of authority on whether the doctrine of *Price v. Neal* should apply where a maker pays a forged note to a bona fide holder. To this reporter's knowledge there are but two reported American cases on the point, one holding each way. *Welch v. Goodwin,* 123 Mass. 71 (1877); *Johnson v. Commercial Bank,* 27 W. Va. 343 (1885). By logic and reason the rule should certainly apply. It would be a

reductio ad absurdum to hold that a drawee cannot recover because he is bound to know the drawer's signature, or because as a matter of policy it is felt that payment is the cutting off time; and, at the same time, to hold that a maker need not know his own signature or that as to him payment is not the cutting off time.

Section 62 of the N.I.L. reads: "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits: (1) The existence of the drawer, genuineness of his signature, and his capacity and authority to draw the instrument." This clearly means that the acceptor of a forged note must pay it and that one part of the *Price v. Neal* rule has been adopted. However, there is nothing in Section 62 or any other section of the N.I.L. specifically enacting the other part of the rule, that is, that the drawee who has paid the forged note cannot recover the money in an action for money had and received. Nevertheless the great majority of the courts have held that this part of the doctrine has been adopted by Section 62. Most of the courts merely assume that it has been so adopted without discussing the problem at all. *Nat. Bank of Commerce v. Mechanics' American Nat. Bank,* 148 Mo. App. 1, 127 S.W. 429 (1910); *United States Fidelity and Guaranty Co. v. First Nat. Bank of Omaha,* 129 Neb. 102, 260 N.W. 798 (1935); *Peoples Trust and Guaranty Co. of Hackensack v. Genden and Guaranty Trust Co. of N. Y.,* 119 N.J. Eq. 249, 182 Atl. 25 (1936); *The First Nat. Bank of Canton v. Karas,* 14 Ohio App. 147 (1920); *First Nat. Bank of Cottage Grove v. Bank of Cottage Grove,* 59 Ore. 388, 117 Pac. 293 (1911). Others, because of the anomaly it would create to say that the acceptor is bound to pay the forged note and at the same time to say that a drawee who pays a forged check could recover the money so paid, have expanded the literal meaning of the language to cover the payment aspect of the problem. *Nat. Bank of Rolla v. First Nat. Bank of Salem,* 141 Mo. App. 719, 125 S.W. 513 (1910); *First Nat. Bank of Portland v. United States Nat. Bank of Portland,* 100 Ore. 264, 197 Pac. 547 (1921); *Fidelity and Casualty Co. of N. Y. v. Planenscheck,* 200 Wis. 304, 277 N.W. 387 (1929). Still other courts hold that the N.I.L. does not deal with the payment situation because it does not involve the liability of a party to a negotiable instrument and is not a problem concerning negotiable instrument law. They hold that it is a problem concerning an affirmative right against a former holder of a negotiable instrument which has been discharged by payment and that the problem should be determined by quasi-contract law. Therefore the rule of *Price v. Neal* is applied through Section 196 which states: "In any case not provided for in this act the rules of the law merchant shall govern." *Bank of Pulaski v. Bloomfield State Bank,* 226 N.W. 119 (1929), superseded by 210 Iowa 817, 232

N.W. 124 (1930); *South Boston Trust Co. v. A. P. Levin,* 249 Mass. 45, 143 N.E. 816 (1924).

While it would be most difficult to expand the language of Section 62 to cover the maker situation since Section 62 reads in terms of acceptors and relates to bills of exchange, the court, in the case at bar, could easily have held that the problem is not one concerning negotiable instrument law which the N.I.L. attempted to cover, but rather that it concerns the existence or non-existence of a right against a former transferee of a note which has been discharged. And under Section 196 the law merchant is to govern.

To summarize, the court's decision on the second basis was sound for the debt paid was owed to the defendant, the assignee of the debt. But in regards to the alternative basis of ratification, the holding seems erroneous for there was no avowal which is necessary for ratification at common law; and the Missouri Supreme Court, along with the majority of the courts, has held that under Section 23 of the N.I.L. there can be no ratification of a forged negotiable instrument.

If the court desired to have an alternative basis for its decision, and to help clear up and make certain the interpretation of the N.I.L. it could easily have done so by holding that the problem was one concerning quasi-contracts and that under Section 196 of the N.I.L. the law merchant governs the case. *Robert J. Leaver*

TRUSTS — PRIVATE CHARITABLE CORPORATIONS — TORT LIABILITY

Plaintiff, a member of defendant church, sued to recover damages for injuries sustained in a fall on ice which had formed on the public sidewalk as a result of the alleged negligent construction and maintenance of the premises by the defendant church. The trial court overruled plaintiff's demurrer to the first count of the defendant's answer which claimed immunity from liability on the ground that defendant was a private corporation organized solely for charitable and religious purposes. *Held,* reversed and remanded. The defendant was entitled to no immunity for negligent acts merely because it was a private charitable corporation. *Foster v. Roman Catholic Diocese of Vermont,* 70 A. 2d 230 (Vt. 1950).

Thus Vermont, in its first decision on the question, lent its weight to the modern rule imposing full liability on charitable corporations for injuries resulting from their negligence. Voluminous are the decisions and opinions dealing with this problem. Conflict in decision and reason runs rampant. From full immunity one may follow a legal maze to complete responsibility. Such judicial uncertainty indicated to Rutledge, J. in *Georgetown College v. Hughes,* 130 F. 2d 810 (D.C. Cir. 1942) "something wrong at the beginning or that something has become wrong since then."

Briefly, there are three classifications of the state decisions; the non-liability cases which deny any liability whatever, the total liability cases which hold the charity to the regular rules of negligence, and the partial liability cases which grant liability for certain classes of plaintiffs or for certain acts of negligence. Numerically, the latter class represents the weight of authority with the non-liability cases and the total liability cases following in that order.

There is a noticeable trend towards full liability. The non-liability rule has become pockmarked with exceptions. In those jurisdictions which grant partial liability a charitable corporation may be liable to a stranger, that is, one not a recipient of any benefits from the institution. *Cohen v. General Hospital Society of Connecticut,* 113 Conn. 188, 154 Atl. 435 (1931). Liability may also be found where the injured party is an employee of the charity. *Cowan v. North Carolina Baptist Hospital, Inc.,* 197 N.C. 41, 147 S.E. 672 (1929). If the beneficiary is a paying patient a few states allow a recovery for negligent injury. *Tucker v. Mobile Infirmary Ass'n.* 191 Ala. 572, 68 So. 4 (1915). In some cases liability hinges on the nature of the negligent act. Thus while negligent operation of an ambulance affords grounds for recovery, *Daniels v. Rahway Hospital,* 10 N.J. Misc. 585, 160 Atl. 644 (1932); Carelessly pushing a cart in the corridors of a hospital does not. *Boeckel v. Orange Memorial Hospital,* 108 N.J.L. 453, 158 Atl. 832 (1932). If the charity is covered by liability insurance, liability may be imposed. *O'Connor v. Boulder Colorado Sanitarium Ass'n.,* 105 Colo. 259, 96 P. 2d 835 (1939). In other states this fact has no effect. *Mississippi Baptist Hospital v. Moore,* 156 Miss. 676, 126 So. 465 (1930). Liability may be found to the extent of property owned for income, not charitable, purposes. *Morton v. Savannah Hospital,* 148 Ga. 438, 96 S.E. 887 (1918). Exception is the rule. The weight of authority apparently allowing all but the beneficiary to recover for negligent injury.

While dissension rages in the courts' decisions it is remarkable that the legal scholars stand so unanimous. PROSSER ON TORTS 1079 (1941), HARPER ON TORTS § 294 (1933), BOGERT, TRUSTS AND TRUSTEES §§ 731-35 (1935), SCOTT ON TRUSTS § 402 (1939), Feezer, *The Tort Liability of Charities,* 77 U. PA. L. REV. 191 (1928). All agree that the charitable corporation should be held accountable for its negligence on a par with all other persons and private corporations.

No more than a cursory examination of the various theories advanced as a basis for non-liability will be attempted here. Principally, there are three: the trust fund theory; the theory that the doctrine of *respondeat superior* does not apply to charitable trusts; and the theory of implied waiver. All of these theories have been vigorously attacked. Zollman, *Damage Liability of Charitable*

Institutions, 19 MICH. L. REV. 395 (1921); Feezer, *supra.*

The trust fund theory, perhaps the most widely followed yet most susceptible to attack, owes its origin to the dictum of Lord Cottenham in the *Feoffees of Heriot's Hospital v. Ross,* 12 Clark and Fin. 507, 8 Eng. Rep. 1508 (1846). This theory is founded upon the reasoning that the fund donated creates a trust fund to be used for a particular charitable purpose and that a payment of tort claims would be a deviation from the intended purpose of the donor. This doctrine was shortlived in England. It was expressly repudiated in *Mersey Docks v. Gibbs,* 11 H.L. Cas. 443, 11 Eng. Rep. 1405 (1866). Today both England and Canada hold a charity to the universal standard of care. *Hillyer v. St. Bartholomew Hospital,* 2 K.B. 820 (1909); *Donaldson v. General Public Hospital,* 35 Ont. L. R. 98, 26 D.L.R. 346 (1915).

Ten years after the English repudiation of the doctrine it was reborn in America in *McDonald v. Masschusetts General Hospital,* 120 Mass. 432 (1876), the court apparently unaware of the English reversal. Since the Massachusetts case the rule has found its way into the decisions of a great many courts. Basically, the rule is unsound. It must stand, if at all, unqualified, for the deviation from the trust purpose is as great in a payment of damages to a stranger or employee, who may recover, as payment would be to a beneficiary who can not.

Non-liability may also be founded on the doctrine that the rule of *respondeat superior* does not apply to charitable institutions. Ohio apparently follows this view. *Taylor v. The Protestant Hospital Ass'n.,* 85 Ohio St. 90, 96 N.E. 1089 (1911). This view may be criticized in that it, too, is all inclusive. If it is to be followed then the charity should be no more liable for the negligence of its officers and managers than it is for the negligence of its employees. Similarly, status of the claimant, whether stranger, employee, or beneficiary, would not affect the charity's immunity. The partial liability cases have seemingly exceptioned this rule to absurdity.

Another basis for non-liability is the implied-waiver theory based upon an implied contract that the beneficiary of the charity waives the right to sue for negligent injury. It is pure fiction, and having been severely criticized as such, has been for the most part completely discarded by the courts.

In principle it may be said that all of the offered theories are grounded in public policy, that society's interest in the charity requires that the rights of the injured individual should be subordinated for the public good. However sound this argument may have been in the past, under modern conditions it appears tenuous. Charitable corporations still flourish in the jurisdictions which have imposed full tort liability. Today's charity has acquired size along

with business methods. Liability insurance at low cost has appeared on the scene. Every charitable dollar does not go to the mark. Salaries, overhead, and current expenses are accepted as legitimate deviations. Why not liability insurance?

The individual has always been held accountable for negligent injury regardless of his charitable intent. Does public policy find something sacred in negligence committed by the corporate form? Though the trend is shifting towards full liability, in most jurisdictions today the beneficiary is still denied recovery. Ironically, he is the very person the donor to the charity intended to aid. When benevolence has injured the beneficiary, does public policy favor denying him remedy? The contrary appears shockingly evident. Society would seem better served by imposing full liability where good intentions have done wrong.

It is settled, Ohio is a partial liability jurisdiction. The charity is liable to third parties but not to a beneficiary unless the authorities of the institution failed to exercise due care in selection or retention of its employees. *Taylor Adm. v. The Protestant Hospital Association,* 85 Ohio St. 90, 96 N.E. 1089 (1911); *Taylor v. Flower Deaconess Home and Hospital,* 104 Ohio St. 61, 135 N.E. 287 (1922); *Duvelius v. Sisters of Charity of Cincinnati,* 37 Ohio App. 17, 174 N.E. 256 (1930); *The City Hospital of Akron v. Lewis,* 47 Ohio App. 465, 192 N.E. 140 (1934); *Cullen v. Schnit,* 139 Ohio St. 194, 39 N.E. 2d 146 (1942); *Newman v. Cleveland Museum,* 143 Ohio St. 369, 55 N.E. 2d 575 (1944).

It is commendable that the Ohio court has gone so far towards total abolition of the non-liability rule; it is regretted that the court still refuses to take the last step by allowing the beneficiary, too, the right to recover. This is law founded on precedent, not reason. If the court feels committed, the legislature should act. It is desired that the law be settled, it is fundamental that the law be just.

Jay M. Terbush

STATUTORY CONSTRUCTION — APPLICATION OF EJUSDEM GENERIS

By a five to three decision, Justice Douglas not sitting, the United States Supreme Court held that phonograph records were included within the proscribed matter of 18 U.S.C. § 1462. The pertinent provisions of the act are as follows: "Whoever*** knowingly deposits with any express company or other common carrier, for carriage in interstate *** commerce any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character * * *. Shall be fined not more than $5,000 or imprisoned not more than

five years, or both." *United States v. Alpers,* 70 S. Ct. 352 (1949).

Since phonograph records were not mentioned in the statute, the court was faced with the problem of whether or not they were intended to be included within the general words, "or other matter of indecent character." If the interpretation is confined to the items specified, the general words would be rendered meaningless, but on the other hand, to give the general words their fullest meaning would make the enumeration meaningless. To avoid the horns of this dilemma courts often apply the rule of construction known as *ejusdem generis.* 2 SUTHERLAND, STATUTORY CONSTRUCTION 398 (3rd ed. 1943). This rule says that the general words include only those things which are of the same class as those specifically enumerated. In reversing the court of appeals the majority refused to apply the rule, saying that to do so as the court of appeals had done would defeat the obvious intent of the statute, which the majority declared to be the passage in interstate commerce of obscene ideas no matter how communicated.

The dissenters were not convinced that phonograph records were within the obvious intent of Congress as expressed by the words of the statute. They also dissented upon the basis that such a construction, especially of a criminal statute, made it difficult to know in advance of court determination just what acts would constitute an offense within the meaning of the words used in a statute. They thought that the court of appeals had committed no error in employing the rule of *ejusdem generis* and that since the specific enumeration was confined to those things which would convey obscene ideas by visible means, the general words were also confined to the matter which conveyed obscene ideas through the sense of sight.

The divergence between the majority and the minority seems to center around the problem of how the intent of Congress is to be ascertained. The majority apparently took intent to mean the object of the legislation, that is, just what problem was Congress dealing with when it enacted the legislation. In this case the object was the prohibition from interstate commerce of anything which conveyed obscene ideas. The minority contended that the intent should be drawn only from the words of the statute.

In the cases decided before 1900 the court adhered rather closely to the notion that the intent should only be drawn from the words used. *United States v. Lawrence,* 13 Blatchf. 211, Fed. Case No. 15,572 (1875); *United States v. Chase,* 135 U.S. 255 (1890); *United States v. Wiltberger,* 5 Wheat. 76 (U.S. 1820). While in the more recent cases, those decided since 1900, the court has not consistently followed either mode of construction.

These more recent cases indicate that if the defendant's act

falls within the object of the legislation he will not escape conviction under a narrow application of *ejusdem generis*. There are several ways in which its application may be avoided. The enumeration may be said to exhaust the class so that the general words refer to another class. *United States v. Mescall,* 215 U.S. 26 (1909). It will not be applied when to do so would make the general words meaningless. *Mason v. United States,* 260 U.S. 545 (1923). Then it might be avoided as it was in the principal case upon the view that to apply it would defeat the obvious intent of the legislation. *United States v. Raynor,* 302 U. S. 540 (1938).

On the other hand, the fact that the defendant's act was not one of those falling within the object of the statute will not prevent his conviction if his acts can fairly be said to fall within the words of the statute. *Cleveland v. United States,* 329 U.S. 14 (1946); *Gooch v. United States,* 297 U.S. 124 (1936); *Caminetti v. United States,* 242 U.S. 470 (1917).

If the above analysis is valid, this case can fairly be said to fall within the general tenor of the more recent cases. Any dispute over its validity would probably resolve itself as it was in the dissent and in the majority opinion over whether the intent of Congress should be drawn solely from the words of the statute or whether the intent should be drawn from the object of the legislation.

Jesse Jennings