RECENT DECISIONS

CONSTITUTIONAL LAW—EQUAL PROTECTION—GEORGIA STATUTE REQUIRING HOTEL FIRE ESCAPES DECLARED UNCONSTITUTIONAL

The Winecoff Hotel fire in Atlanta resulted in the death of many guests. The hotel operators were indicted for involuntary manslaughter for failure to provide outside fire escapes as required by law. GA. CODE, tit. 52, §§ 201, 205 (1933) imposed this requirement upon all hotels of three stories or more in height charging patrons $2 or more per day. On defendant's demurrer to the indictment, *held,* the statute is unconstitutional as denying equal protection of the laws in that the monetary classification is arbitrary, bearing no relation to the objective of protecting guests from fire hazards. *Geele* v. *State,* 43 S.E. 2d 254 (Ga. 1947) (one judge dissenting).

The court majority reached its conclusion upon the familiar basis that classification must bear some rational relation to the legislative objective, *Southern Railway Co.* v. *Green,* 216 U.S. 400 (1909); *Stewart* v. *Anderson,* 140 Ga. 31, 78 S.E. 457 (1913), which in this case was the safety of hotel patrons. From these premises they concluded that the exemption of hotels charging guests less than $2 per day constituted, as against hotels charging guests a higher rate, a discrimination amounting to denial of equal protection.

Where the objective was assumedly one of safety, as in the case at bar, statutes have been sustained that required all buildings, excepting residences, of a designated height to be provided with suitable fire escapes. *Arms* v. *Ayer,* 192 Ill. 601, 61 N.E. 851 (1901). Moreover, the courts have sanctioned classifications based upon differentiation of boarding houses from hotels, lodging houses, and apartment houses, *Huff* v. *Selber,* 10 F. 2d 236 (W.D. La. 1925); upon the number of floors in a hotel, *Rose* v. *King,* 49 Ohio St. 213, 30 N.E. 267 (1892); and upon the number of rooms in a hotel, *Miller* v. *Strahl,* 239 U.S. 426 (1915). But, considering the designated purpose of the statute, a still further classification distinguishing more expensive hotels from those charging lesser rates appears hardly tenable in the absence of any evidence of a correlation between the size of hotels and the rates charged.

If there be a reason for the $2 classification it has not elsewhere been legislatively recognized, either by neighboring southern states, FLA. STAT. §§ 511.01, 511.18 (1941); ALA. CODE, tit. 24, § 1, tit. 14, § 187 (1940); MISS. CODE § 6999 (1942), or by more industrial states,

(e.g.) MICH. STAT. §§ 5.2772, 5.3401 (1935); OHIO GEN. CODE §§ 843-1, 1002, 1028-1 (1946); N. J. STAT. §§ 29:1-1, 29:1-3 (1937).

The dissenting justice, approving the classification as reasonable, regarded the statute not as a safety measure, since there can be no absolute safety, but rather as a diligence measure, and reasoned that the greater the compensation received for an act or service the greater the degree of diligence required. The justice also declared that the legislature must have intended the attainment of a maximum of diligence without overburdening all of the hotels to an extent that would necessitate an increase in rates such as would tend to deny hotel accommodations to people of meagre means. Although the judge failed to substantiate his reasoning with decided cases, it would appear that he was on a tack parallel to that of Mr. Justice Holmes in *Keokee Consolidated Coke Co.* v. *Taylor,* 234 U.S. 224, 227 (1914), wherein the latter declared that "a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, as far as the court can see." The legislature may proceed cautiously, step by step, and the prohibition need not be couched in all-embracing terms, *Carroll* v. *Greenwich Insurance Co.,* 199 U.S. 401 (1905); *Radice* v. *New York,* 264 U.S. 292 (1924), but rather may be limited to instances where detriment is specially experienced. *Dominion Hotel* v. *Arizona,* 249 U.S. 265 (1919).

The chapter of the Georgia Code under consideration also requires those hotels charging patrons $2 or more per day to provide clean bed linens; GA. CODE, tit. 52, §§ 201, 202 (1933); to screen all openings in the kitchen and dining room; *id.* §§ 201, 203; and to keep the closets and toilet rooms in a clean and sanitary condition; *id.* §§ 201, 204. From the decision in the principal case it would seem reasonable to suppose that these remaining provisions of the chapter would also be declared unconstitutional if ever contested since the $2 classification would presumably have no more reasonable relation to sanitary than to safety objectives.

George D. Massar

EQUITY—SPECIFIC PERFORMANCE OF AUTOMOBILE SALES CONTRACT

The plaintiff contracted to purchase a new Plymouth club coupe. The terms were "list price at time of delivery, choice of color, delivery . . . as soon as possible." Down payment of a fifty dollar deposit was acknowledged. The defendant refused to deliver. *Held,* the plaintiff was entitled to specific performance. *De Moss v. Conart Motor Sales, Inc.,* 34 Ohio L. R. 535, 72 N.E. 2d 158 (1947).

It is believed that this is the first time, in Ohio or any other jurisdiction, that specific performance of a contract for the sale of a new automobile has been granted.

In equity, one requirement for specific performance of a contract for the sale of a chattel is that such chattel be unique or, if uniqueness be absent, that the remedy at law be inadequate.

The scarcity of a new automobile, at the present time, is so well recognized that a court would perhaps take judicial notice of the fact. The courts, however, have held that a chattel is not unique merely because it is scarce. *Kirsh v. Zubalsky,* 139 N.J. Eq. 22, 49 A. 2d 773 (1946); cf. *Griscom v. Childress,* 183 Va. 42, 31 S. E. 2d 309 (1944).

In one area, that of commercial contracts, the courts of equity have granted specific performance of contracts for the sale of non-unique chattels. A breach in this area would involve the withholding of a scarce item which would necessarily entail losses of a secondary nature, such as loss of capacity to manufacture or loss of profits from resale. Secondary losses are to be distinguished from the primary loss of the chattel itself. Scarcity plus this secondary business loss seem to give the courts jurisdiction to grant specific performance on the basis of an inadequate remedy at law. Thus, where a brewing company, after the passage of the Eighteenth Amendment but prior to the time the Amendment became effective, attempted to breach its contract to supply beer to a saloon, the court decreed specific performance. At that time it was difficult to obtain quantities of the dwindling stock of beer. *Welker v. The City Brewing Co.,* 11 Ohio App. 117, 30 Ohio C.C. 445 (1919); see *The Equitable Gas Light Co. v. The Baltimore Coal Tar Co.,* 63 Md. 285, 300 (1885); cf. *Strause v. Berger,* 220 Pa. 367 (1908); *Texas Co. v. Central Fuel Oil Co.,* 194 Fed. 1 (C.C.A. 8th 1912). The fact that the buyer would be forced to pay a much higher price upon the market than the contract price is not, of itself, a sufficient ground for specific performance. See *Fox v. Fitzpatrick,* 190 N.Y. 259, 266, 82 N.E. 1103, 1106 (1907).

Ohio, along with thirty-one other states, has adopted the Uniform Sales Act. Section 68 of the Uniform Sales Act, Ohio General

Code Section 8448, deals with specific performance of contracts for the sale of personal property and seems to authorize a wider use of the remedy. Section 8448 reads as follows: "When the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be specifically performed, without giving the seller the option of retaining the goods on payment of damages. . . ."

But the courts in most of the states which have adopted the Act have construed Section 68 as a mere codification of their existing state law. *Glick v. Beer,* 263 App. Div. 1016, 33 N.Y.S. 2d 833 (1942); *Outen Grain v. Grace,* 239 Ill. App. 284 (1925). In one Ohio case, the court by way of dictum advocated interpreting Section 8448 "to extend and modify it [equity jurisdiction] where necessary or proper to provide a uniform law of sales that would be common to all states adopting the same." *Hughbanks v. Browning,* 9 Ohio App. 114, 115 (1914). The court in the principal case did not explain its grounds for granting specific performance; however, since neither uniqueness nor an inadequate remedy at law was found, this decree may well be based upon Section 8448, following the dictum enunciated in *Hughbanks v. Browning, supra.* The Court of Appeals affirmed the Court in the principal case, but only the problem of agency was discussed.

A prerequisite for specific performance, whether authorized by statute or based on general equitable principles, is certainty in the terms of the contract. Where a sales contract called for "a new 1947 Studebaker two or four door Champion automobile," a New York court said that it was for the sale of an unascertained automobile, and, hence not specifically enforcible by the buyer. *Kalinski v. Grole Motors, Inc.,* 69 N.Y.S. 2d 645 (Sup. Ct. 1946); accord, *Daub v. Henry Caplan, Inc.,* 70 N.Y.S. 2d 837 (Sup. Ct. 1947); *Goodman v. Henry Caplan, Inc.,* 188 Misc. 242, 65 N.Y.S. 2d 576 (Sup. Ct. 1946); *Cohen v. Rosenstock Motors, Inc.* 188 Misc. 426, 65 N.Y.S. 2d 481 (Sup. Ct. 1946). New York has adopted the Uniform Sales Act and the unsuccessful attempts to get specific performance in the above cited cases were based upon Section 68.

The contract in the principal case is more definitive than the contracts in these New York cases, yet one of its terms is "choice of color." However, notice the following language of a New York court, " 'One new car . . . Make Plymouth Type Sedan Year 1946 Color Open,' a description which makes clear that the subject matter of the sale was not a specific car identified and agreed upon at the time the contract to sell was made, but a sale by description of an unascertained car." *Cohen v. Rosenstock Motors, Inc., supra.*

If the automobile in the principal case were to be used by a

traveling salesman or a physician, the result might be rationalized on the secondary business loss basis. But the inferences drawn from the facts lead to the conclusion that this automobile was to be used only for the plaintiff's personal convenience and pleasure. It is not likely that the general equitable principles governing specific performance have been extended so far that scarcity alone either creates uniqueness or renders the remedy at law inadequate. The result in this case has apparently been reached through a broad interpretation of General Code Section 8448, in line with the dictum of *Hughbanks v. Browning, supra.*

Donald W. Fisher

EVIDENCE—PRESUMPTION OF LEGITIMACY—REBUTTABLE BY BLOOD TEST INVOLVING RH FACTOR

In a proceeding involving the paternity and support of a child born to a wedded mother, evidence, which showed that the husband could not be the father of the child due to incompatibility of blood when tested for the *rh* factor, was offered by defendant. Under the conventional *ab-mn* blood grouping tests the blood of the husband and the child was compatible. *Held,* the evidence was admissible and since it was unchallenged, it established that the husband was not the father of the child. *Saks* v. *Saks* 71 N.Y.S. 2d 797 (Domestic Relations Court of City of New York 1947).

The admissibility and relative weight of blood tests as evidence have been the subject of many critical articles in legal periodicals. 2 OHIO ST. L. J. 203 (1936), 32 J. CRIM. L. 458 (1941), 53 HARV. L. REV. 285 (1939), 13 U. OF CIN. L. REV. 446 (1939), 16 So. CALIF. L. REV. 177 (1943). But it is believed that this is the first court which has accepted evidence concerning the much discussed *rh* factor.

In Ohio, blood tests may be ordered upon the motion of the defendant in a bastardy proceeding, Ohio General Code Section 12122-1, or by order of the court whenever it shall be relevant in a civil or criminal action, Ohio General Code Section 12122-2.

Even where the defendant is not in fact the parent, the *ab-mn* blood grouping tests will indicate non-paternity in only one-third of such instances. The findings and result of such blood-grouping tests admitted in evidence are not conclusive of non-paternity but may be considered for whatever weight they have to prove the non-paternity of the putative father. *State v. Wright.* 59 Ohio App. 191, 17 N.E. 2d 428 (1938), *reversed on other grounds,* 135 Ohio St. 187, 20 N.E. 2d 229 (1939). It will not support a directed verdict. *State* v. *Wright, supra.* Nor will it support a motion for judgment

notwithstanding the verdict or a motion for a new trial. *Slovak* v. *Holod, Jr.*, 63 Ohio App. 16, 24 N.E. 2d 428 (1939). Every child begotten in lawful wedlock is in law presumed to be legitimate. *Powell* v. *State* ex rel. *Fowler* 84 Ohio St. 165, 95 N.E. 660 (1911). Such presumption is not conclusive and may be rebutted by evidence, which must be clear and convincing, that there was no sexual connection between husband and wife during the time in which the child must have been conceived. *State* ex rel. *Walker* v. *Clark*, 144 Ohio St. 305, 58 N.E. 2d 773 (1944).

In *Miller* v. *Anderson*, 43 Ohio St. 473, 3 N.E. 605 (1885), the husband of a woman pregnant at the time of the marriage ceremony was conclusively presumed to be the father of the child. In *State* ex rel. *Walker* v. *Clark, supra,* the plaintiff became pregnant during a marriage to *X* which terminated in divorce. In bastardy proceedings against *Y* she submitted blood tests eliminating *X*. It was held that the evidence was admissible, though not conclusive. New York, under a similar statute and analogous previous decisions, held in *Schulze* v. *Schulze,* 35 N.Y.S. 2d 218 (1942) that the results of the blood tests plus the husband's statement that there had been no intercourse with the wife during the period in which the child must have been conceived was enough to overcome the presumption of legitimacy of a child born in wedlock.

Dr. Alexander S. Wiener testified in the instant case that the use of the *rh* factor will make possible the exclusion of the putative father in almost 55% of the situations where he is in fact not the parent, in contrast to the exclusion of approximately one-third of putative fathers under the *ab-mn* blood-grouping tests. Thus, while it is still possible for a promiscuous woman through the natural sympathy aroused in a jury to attribute the paternity of her child to one who is in fact not the father, since the blood tests are not held to be conclusive evidence, the blood tests will be persuasive in nearly 55% of the cases if the *rh* factor is to be considered.

Louis E. Evans

MUNICIPAL CORPORATIONS—TORT LIABILITY

The Village of Wyoming, Ohio, a municipal corporation, built a pistol and rifle target range within the corporate limits of the village on land devoted to a public purpose. These grounds were open to the use of the general public, and the target range was used by children with the knowledge of village policemen. One child was wounded by a shot from the rifle of another child, while both were on the target range. *Held,* the municipal corporation is

liable to the parent for expenses and to the injured, minor plaintiff for damages on the ground of a nuisance created and maintained by the village. *Gaines* v. *Village of Wyoming,* and *Gaines, Jr.* v. *Village of Wyoming* (two cases), 147 Ohio St. 491, 72 N.E. 2d 369 (1947).

Ohio General Code Section 3714 provides that municipal corporations shall keep public grounds free from nuisance. This provision is in derogation of the common law, but such provision does not by implication impose liability for negligence not involving nuisance. *Selden* v. *Cuyahoga Falls,* 132 Ohio St. 223, 6 N.E. 2d 976 (1937).

Traditionally, liability of a municipal corporation for negligence of its servants or agents has been limited to cases in which the negligence occurred in the performance of proprietary functions; there was immunity in the area of governmental functions. *Aldrich* v. *City of Youngstown,* 106 Ohio St. 342, 140 N.E. 164 (1922). For examples of immunity see 6 McQuillin, *Municipal Corporations* §§ 2591, 2593 (Rev. 2d ed. 1937). But there has been liability for nuisance, without any governmental-proprietary distinction. 43 C.J. 956, § 1734 (1927). For background and criticism see Prof. Borchard's articles, "Government Liability in Tort," 34 Yale L.J. 1, 129, 229 (1924-25), 36 Yale L.J. 1, 757, 1039 (1926-27).

Counsel for the village in the principal case contended that the construction and maintenance of a target range could not create, per se, an absolute nuisance, and further that only the failure of the police department to prevent shooting by children could produce a nuisance in these circumstances, and that municipal corporations are immune from liability for negligence in the performance of governmental functions. The village prevailed in the Court of Appeals. 77 Ohio App. 373, 66 N.E. 2d 162 (1946).

The argument of the defendant village was met in a recent Pennsylvania case, cited with approval in the principal case. The facts were similar. There the court said that the breach of duty was not a failure properly to police, but rather a failure in a proprietary capacity to abate a dangerous condition existing on its property. And this is true, said the court, even though it could be abated only by the exercise of a governmental power by city police, wherein they failed. *Stevens* v. *Pittsburgh,* 329 Pa. 496, 198 Atl. 655 (1938), affirming the opinion of Superior Court, 129 Pa. Sup. 5, 194 Atl. 563 (1936). The *Gaines* case holds the village liable ". . .even though in the proper exercise of police power such violation should have been suppressed or offenders apprehended and punished." *Supra,* Syllabus 2, page 491.

Thus it appears in these cases that negligence in the area of governmental functions may create the basis of liability when, as

here, that negligence is a *sine qua non* of a nuisance. Query: do these cases manifest an attempt to avoid the immunity rule, while maintaining it in form?

Cases which seem to circumvent the rule of immunity by putting liability on the ground of nuisance are not uncommon. Prisoners escaping from a workhouse so terrorized and annoyed the plaintiff in adjacent property that the municipality was liable in damages for a nuisance. *District of Columbia* v. *Totten,* 5 F. 2d 374 (App. D.C. 1925). Operating under a city building permit, a building contractor obstructed unreasonably a city street. When the city failed to take action, held (on demurrer), city liable with the contractor for nuisance. *George Washington Inn, Inc.* v. *Consolidated Engineering Co.,* 75 F. 2d 657 (App. D.C. 1935). A city failed adequately to block or to secure corrugated pipe piled in a public park. A child was killed when other children caused sections of the pipe to roll about. Held, city liable on ground of nuisance. *Gottesman, Adm'r.* v. *City of Cleveland,* 142 Ohio St. 410, 52 N.E. 2d 644 (1944). The plaintiff was injured by water when a fire hose was improperly connected at the hydrant, while firemen were actually engaged in fighting a fire. Held, a nuisance; city liable. *Swindal* v. *City of Jacksonville,* 119 Fla. 338, 161 So. 383 (1935). These are considered judicial expressions of dissatisfaction with the rule of immunity.

The Ohio court has considered the nuisance cases as attacks upon the citadel of governmental immunity. Of the statute which requires a municipal corporation to keep streets and public grounds free from nuisance, Ohio General Code Section 3714, the court has said that the duty there imposed "is an exception to the rule of common law that no liability attaches to a municipality for negligence in the discharge of a governmental function." *City of Hamilton* v. *Dilley,* 120 Ohio St. 127, 165 N.E. 713 (1929).

In 1919, the Ohio court abandoned the governmental-proprietary formula, holding a city liable under respondeat superior for the negligence of a fireman, who was driving a fire truck at the time of an accident. *Fowler, Adm'x.* v. *City of Cleveland,* 100 Ohio St. 158, 126 N.E. 72 (1919). But this assault was perhaps too bold, and the case was expressly overruled in another collision case, this time involving a police patrol wagon, negligently operated. *Aldrich* v. *City of Youngstown,* 106 Ohio St. 342, 140 N.E. 164 (1922).

It is believed that the result in the principal case is a wholesome one, but also that the law should be settled. The nuisance cases seem to sabotage clarity in the law, of which there is a paucity in this area.

It is submitted that change by legislation is more desirable. See Fordham and Pegues, *Local Government Responsibility in*

Tort in Louisiana, 3 LA. L. REV. 720 (1941). The Federal Government has furnished an example in the Federal Tort Claims Act, 60 STAT. 843, 28 U.S.C.A. §§921-946 (Supp. 1946). Ohio has taken one step. Ohio General Code Section 3714-1 removed the immunity in negligence cases involving the use of motor vehicles in governmental functions other than police and fire protection.

Charles W. Davidson, Jr.

TAXATION—REAL AND PERSONAL PROPERTY OF MUNICIPAL TRANSIT SYSTEM NOT EXEMPT—NOT USED EXCLUSIVELY FOR PUBLIC PURPOSE

The city of Shaker Heights owns and operates the transit system between that city and Cleveland. In June, 1945, the city filed an application for exemption from taxation for the tax year 1945. The exemption was claimed for all real and personal property of the transit system upon the ground that it was public property used for a public purpose within the meaning of Ohio General Code Section 5351. *Held,* that both the real and personal property of the transit system were taxable. *City of Shaker Heights* v. *Zangerle, Auditor,* 148 Ohio St. 361, 74 N.E. 2d 318 (1947).

The court relied upon the case of *Zangerle, Auditor v. City of Cleveland,* 145 Ohio St. 347, 61 N.E. 2d 720 (1945). In that case the court argued that property of the transit system was not public property used exclusively for a public purpose because a transit system is a business operated primarily for profit. Since the Ohio Constitution, Article XII, Section 2, reads, ". . .General laws may be passed to exempt public property used exclusively for a public purpose,". it follows that the General Assembly has no power to exempt property not so used. It has been decided that Article XII, Section 2, applies only to real property and not to personal property. *State* ex rel. *Struble* v. *Davis,* 132 Ohio St. 555, 9 N.E. 2d 684 (1937). Therefore, the court in the principal case could have upheld exemption of the personal property, even though the legislature lacked power to exempt the real property. However, the court declined to sustain exemption of either class of property. Ohio General Code Section 5351, reads, "public property used for a public purpose shall be exempt from taxation," and the court thought that the personal property of the transit system did not fall within the statute.

This case assumes particular importance in view of previous decisions of the same court. In 1896, a municipal gas works was held exempt from taxation and the court said that the statute which per-

mitted the exemption, Section 2732, Revised Statutes, (now Ohio General Code Section 5367), did not violate Article XII of the constitution because the property was used exclusively for a public purpose. *Toledo* v. *Hosler, Treasurer,* 54 Ohio St. 418, 43 N.E. 583 (1896). Since private homes and businesses were furnished with gas from the municipal gas plant, it appears that the court construed the phrase, "exclusively for a public purpose," to mean, "substantially all, or for the greater part used for a public purpose." This view is affirmed by *Toledo* v. *Jenkins,* 143 Ohio St. 141, 54 N.E. 2d 656 (1944).

It was necessary, in order to justify exemption from taxation, that the real property of the transit system in the principal case be used exclusively for a public purpose. Otherwise, Article XII, Section 2, would have been contravened. The court said that the use of the property was not exclusively public. But it would seem that the use of the property for furnishing gas to both public and private outlets should, by the same criterion, have been held not an exclusively public use. The court stated that operating a transit system is a proprietary and not a governmental function. According to the court, an activity is proprietary if it involves a business usually operated for profit. There is some doubt, however, whether a transit system is a business usually operated primarily for profit while a gas plant is not.

This distinction between proprietary and governmental functions drawn by the court should not have altered the decision in the principal case. The court was dealing with a constitutional provision. The provision states, "public property used exclusively for a *public* purpose shall be exempt" (italics supplied). This language makes no distinction between activities which are governmental and those which are proprietary. Since no differentiation is made, it would seem to be irrelevant that the activity can be classed as proprietary because it is making a profit. The constitution requires only that the use be public; if it be a public use then the question of profit does not affect the constitutionality of the exemption.

The principal case then, does not seem to be reconcilable with the earlier decisions, although the earlier decisions are not expressly overruled. It has cast some doubt on the constitutionality of Ohio General Code Section 5367, which exempts municipally owned gas and water works from taxation. If the court meant to overrule *Toledo* v. *Hosler, supra,* then Section 5367 would be unconstitutional because it gives exemption to property not used exclusively for a public purpose. If it did not, then we must find a substantial difference between the municipal operation of gas works and the municipal operation of transit systems.

An examination of the constitutions of the other states reveals

that in fifteen states the exemption of municipal property is not covered. In eighteen states all municipally owned property is exempt, while in only nine states, (Ark., Fla., Kan., Ky., Minn., Ohio, Pa., Tenn., Tex.), do the constitutions provide that the property used exclusively for a public purpose is exempt.

There have been many cases involving the exemption of municipal utilities from taxation in these nine states. Waterworks have generally been held exempt, *City of Harlan* v. *Blair,* 251 Ky. 51, 64 S.W. 2d 434 (1933); *City of Abilene* v. *State,* 113 S.W. 2d 631 (Tex. Civ. App. 1937); *Anoka Co.* v. *City of St. Paul,* 194 Minn. 554, 261 N.W. 588, 99 A.L.R. 1137 (1935); *City of Easton* v. *Koch,* 152 Pa. Super. 327, 31 A. 2d 747 (1944), but not, according to two states, that part of the waterworks supplying water to other districts. *City of Knoxville* v. *Park City,* 130 Tenn. 626, 172 S.W. 286 (1914); *City of Covington* v. *Commonwealth,* 107 Ky. 680, 39 S.W. 836 (1897). Municipal light plants have been held exempt, *Saunders* v. *City of Jacksonville,* 157 Fla. 240, 25 So. 2d 648 (1946); *A. & M. Cons. School District* v. *City of Bryan,* 143 Tex. 348, 184 S.W. 2d 914 (1945); *State* ex rel. *Becker* v. *Smith,* 144 Kan. 570, 61 P. 2d 898 (1936), but there has been a split on the question of public housing. Ohio will not exempt it, *Columbus Metropolitan Housing Authority* v. *Thatcher,* 140 Ohio St. 38, 42 N.E. 2d 437 (1943), while Florida will. *State* ex rel. *Burbridge* v. *St. John,* 143 Fla. 876, 197 So. 549 (1941). It can be seen that there is a marked similarity in the holdings of the courts of these nine states. Ohio is apparently the first to decide the question of tax exemption for municipal transit systems. It will be interesting to see whether the other states arrive at the same conclusion.

Richard O. Gantz

TORTS—DEFAMATION BROADCAST BY RADIO—LIBEL OR SLANDER

Defendant broadcast defamatory remarks by reading from a script into a radio microphone. *Held,* defamatory remarks published in such a manner is libel and not slander. *Hartman* v. *Winchell,* 296 N.Y. 296, 73 N.E. 2d 30 (1947).

This case raises an important problem because here no special damages were alleged, nor were the words concerning the plaintiff slanderous per se since they did not defame his professional character. Libel is usually held to be actionable per se and proof of special damages is unnecessary; but slander is, except in special cases, actionable only on proof of actual damage. These differences between libel and slander are the result of the historical origins

of the two actions. The rules relating to slander derive from the common law action on the case, the rules relating to libel, from criminal proceedings in the Star Chamber. SALMOND, TORTS 371 (10th ed. 1945).

In distinguishing libel from slander the rule has been stated that false defamatory words, if spoken, constitute a slander; if written and published, a libel. This method of differentia has also been expressed in another manner, that libel comes to the eyes, slander to the ears. Most cases recognize these distinctions as being too general and declare other differentia to be decisive. In *Ostrowe* v. *Lee,* 256 N.Y. 36, 175 N.E. 505 (1931) it was held that in libel the defamatory matter is in some permanent form, while in slander it is conveyed by some transient method of expression. Another court stated the underlying distinction was the extent of the diffusion of the defamatory matter. *Thorley* v. *Kerry,* 4 Taunt. 355, 128 Eng. Rep. 367, 371 (1812). One writer is of the opinion that the present tendency is to make the distinction on the basis of the potentiality of harm. PROSSER, TORTS 793. The Restatement of Torts §568 (3), suggests that in new and novel situations the deciding factors in each case should be the area of dissemination, the deliberate and premeditated character of its publication, and the persistence of the defamatory conduct.

The instant case seems to be in accord with the slight majority of the jurisdictions in holding the method of publishing defamatory remarks as a libel. The rationale of the decision is based upon an analogy to cases that have held the reading of a defamatory letter in the presence of others to be a sufficient publication to sustain an action for libel. *De Libellis Famosis,* 5 Coke's Rep. 125, 77 Eng. Rp. 250 (1610); *Snyder v. Andrews,* 6 Barb. 43 (1849); *Forrester v. Tyrrell,* 9 Times L. R. 257 (1893). This distinction has been criticized on the ground that the radio listener does not know whether the matter he hears is read or impromptu and if the latter then the analogy of reading matter aloud from a paper would not apply. Davis, "Libel and Slander by Radio," 34 Case and Comment 67. Other jurisdictions have placed their decisions of libel upon the ground that there is a close analogy between words spoken over a radio and libelous words contained in a newspaper. *Sorensen v. Wood,* 123 Neb. 348, 243 N.W. 82, A.L.R. 1098 (1932); *Coffey v. Midland Broadcasting Co.,* 8 F. Supp. 889 (W.D. Missouri 1934).

In *Meldrum v. Australian Broadcasting Co. Ltd.,* (1932) V.L.R. 425, an Australian court dealt with the problem and decided definitely that defamatory material broadcast over the radio is slander, whether read from a script or not, because the publication is by word of mouth. Although *Locke v. Gibbons,* 164 Misc. 877, 299

N.Y. Supp. 188 (1937) was a case of an impromptu interpolation the court felt that it was not within their province to eradicate the long established distinction between libel and slander. "Libel," said the court, "has always been considered as written, and slander as spoken, defamation." *Locke v. Gibbons, supra,* at 880, 299 N.Y. Supp. at 192. Any change, the court suggested, should be accomplished by appropriate legislation.

In some states the problem has been settled by legislation, but the statutes are not in accord. In Oregon (Laws 1931, c. 366, p. 681) and Washington (Laws 1935, c. 117, p. 329), defamation over the radio has been defined as libelous; while in California (Stats. 1929, c. 682, p. 1174), Illinois (Smith-Hurd Ill. Stats. c. 126, §§4-6), and North Dakota (Laws 1929, c. 117) radio defamation is declared to be slander.

The court in the instant case did not determine what the basis of liability would have been had the defamatory matter been spoken extemporaneously. Field, J., in a concurring opinion stated that even extemporaneous remarks made over a radio should be libel because of the harm inherent in radio broadcasting with its potentially vast area of dissemination. If the permanency of form were used as the criterion of distinction, on this problem of impromptu remarks, then the courts could easily conclude that such a publication results only in a slander. Also, jurisdictions which recognize only written defamation as constituting a libel would hold such a publication to be slander. However, if the area of dissemination or the potentiality of harm should be decisive in the differentia, then the courts might hold that extemporaneous radio remarks constitute a libel. If it be conceded that the tort of libel was created to meet the greater damage caused by the wider dissemination of the printed word over the spoken word, then (since the area of service for some radio stations far exceeds that of many newspapers) it would seem that there could be no satisfactory logic to support the assignment of a lesser remedy than libel to radio defamation.

Charles Deitle

TRUSTS—CHARITABLE TRUST—CY PRES DOCTRINE—DOCTRINE OF DEVIATION

Testatrix left her entire estate to establish a "strictly private home" for full orphans of the United Lutheran Church of Miami County. Several provisions in the will seemed to point to the fact that the testatrix definitely contemplated that the house she had lived in should be used as an orphan's home. It was admitted that

it was impracticable and inexpedient to carry out the specific terms of the trust, and the question is should the corpus of the trust be paid over to a Home near Springfield which is supported by the United Lutheran Church and admits children from Ohio and five other states? *Held,* the doctrine of *cy pres* could not be applied to this case because there was no general charitable intent to aid orphans, but by the doctrine of deviation from the terms of the trust the court required the trustees to expend the trust funds for the care, maintenance and support of Miami County orphans during their residence at the Home near Springfield. *Craft v. Shroyer,* 74 N.E. 2d 589 (Ohio App. 1947).

When, in the case of a charitable trust, it becomes impossible or impractical to carry out the testator's purpose, there is a question of whether the trust fails or whether the trust funds are to be applied to a similar charitable purpose. "The principle under which the courts attempt to save a charitable trust from failure by carrying out the more general purpose of the testator and carrying out approximately though not exactly his more specific intent is called the doctrine of *cy pres.*" SCOTT TRUSTS, §399. The theory underlying the application of the doctrine of *cy pres* is that the court is carrying out the general intent of the testator. *Craft v. Shroyer, supra.*

In *Allen, Admr. v. City of Bellefontaine,* 47 Ohio App. 359, 191 N.E. 896 (1934), the testatrix had left her home to the city for the exclusive use of reputable physicians and surgeons of Bellefontaine and Logan County. The house was to be used as a place to conduct meetings, carry on research, and as a private hospital. It became inexpedient to carry out the terms of the trust and the court held that the trust failed. The *cy pres* doctrine was not applied because the testatrix indicated no general charitable intent. In another case where the testatrix left the residue of her real and personal estate for the purpose of establishing a home for deaf children on her estate, and it later became impracticable to carry out the trust, the court applied the *cy pres* doctrine and directed that the property be delivered to an already-established home for the deaf. *Ely v. Malone, Atty. Gen.,* 202 Mass. 545, 89 N.E. 166 (1909). Apparently the *Allen* decision was based on the fact that the testatrix desired to benefit the doctors but only according to a specific plan. She wanted her home set up as a memorial to her late husband. In the *Ely* case, on the other hand, the court felt that the testatrix intended to benefit deaf children in any event and not merely if it were practicable to establish a home on her estate.

"A great exactness and strictness of construction is the rule in private trusts, while liberality and a broad general application

of the principles of equity are called in vogue in construing a will creating a charitable trust." *Gearhart v. Richardson,* 109 Ohio St. 418, 436, 142 N.E. 890, 895 (1924). It would seem that the court in the principal case was not so liberal when it held that *cy pres* would not save the trust. However, the finding that there was no general charitable intent precluded the application of the *cy pres* doctrine. *Allen, Admr. v. City of Bellefontaine, supra.*

The court may direct or permit the trustee of a charitable trust to deviate from the terms of a trust to accomplish the purposes of the trust. RESTATEMENT, TRUSTS, §381. Deviation, however, will only be permitted to prevent failure of the purpose of a charitable trust. *Findley v. Conneaut,* 145 Ohio St. 480, 62 N.E. 2d 318 (1945). A charitable trust capable of being enforced will not be terminated because of the necessity for a small administrative change which does not alter the purpose or object of the trust. *Gearhart v. Richardson, supra.* On the basis of cases involving charitable trusts which have been decided in the past, it is possible that in a fact situation like that of the principal case, many courts would have allowed the trust to fail when the finding of no general charitable intent precluded the application of the *cy pres* doctrine. However, in the principal case the court permitted a deviation from the terms of a trust to prevent its failure, *Findley v. Conneaut, supra,* and directed the trustees to expend the trust funds for the care of the orphans living in an already-established home. Thus by the application of the doctrine of deviation the trust was sustained and the orphans benefited in a case where the court could not apply the *cy pres* doctrine to carry out the intent of the testatrix. The instant case can be differentiated from the *Union Savings Bank and Trust Co. v. Alter,* 103 Ohio St. 188, 132 N.E. 834 (1921) where the court refused to permit deviation from the terms of the trust. The basis of the distinction is that the principal case involved a charitable trust while the *Alter* case involved a private trust. Chief Justice Marshall, dissenting in the *Alter* case, *supra* at 216, 132 N.E. at 842, thought that the majority's decision reached a result, "unfortunate indeed if it is to become settled law of Ohio that trust estates are to be administered according to their strict letter, and no deviation is to be permitted even in cases where it is admitted that exigencies have arisen which are likely to be destructive of the very purpose of the trust."

A. J. Conkle

WORKMEN'S COMPENSATION—COURSE OF AND ARISING OUT OF EMPLOYMENT A DUAL REQUIREMENT

The plaintiff, an inside employee of the defendant company, rode to work daily with a fellow employee, the car being customarily left on a company-owned parking lot near the plant. On one occasion, the plaintiff fell on the snow and ice covering the lot, was injured, and sought compensation. The Industrial Commission denied the claim; Common Pleas Court, on appeal, granted compensation; and Court of Appeals affirmed. *Held,* reversed. The injury was not incurred, "in the course of and arising out of the employment." *Walborn* v. *General Fireproofing Co.,* 147 Ohio St. 507, 72 N.E. 2d 95 (1947).

Ohio Constitution, Article II, Section 35 provides, "compensation. . .for injuries. . .occasioned in course of employment." Ohio General Code Section 1465-68, provides, "Employee. . .injured. . .in course of employment. . .shall be entitled. . .to compensation. 'Injury' as used in this section. . .shall include any injury received in the course of, and arising out of the employment." Ohio Laws 1937, 117 v. 109, in defining "injury", incorporated for the first time in statutory form the requirement that a compensable injury must arise out of the employment as well as be incurred in the course of employment.

Originally, Ohio's statute and constitution required only that the injury be incurred in course of employment; however, the courts early read into the statute the requirement of "arising out of." "It was. . .the intention of the framers of the amendment, and of the statute, to provide for compensation only to one whose injury was the result of or connected with the employment." *Fassig* v. *State,* 95 Ohio St. 232, 247, 116 N.E. 104, 108 (1917). "The test. . .is whether the employment had some causal connection with the injury." *Ind. Comm.* v. *Weigandt,* 102 Ohio St. 1, 130 N.E. 38 (1921). It is clear in Ohio by settled judicial determination and now by legislative enactment that an injury to be compensable must meet this dual requirement: first, the employee at the time of his injury must be in the course of his employment; and second, the injury must arise out of the employment.

While it is obvious that an employee is not in the course of employment before he leaves home for work, courts have felt that there is some indefinite point prior to entering the employer's premises at which the employee should be considered in the course of employment for purposes of compensation. This nebulous area is termed "zone of employment." In Ohio it is not clear what is meant when the courts use zone; but it includes, at least, any area subject to the employer's control, even though such area is outside the enclosure of the employer, if the employee has no option but

to pursue a given course when entering or leaving his employer's premises. *Ind. Comm.* v. *Barber,* 117 Ohio St. 373, 159 N.E. 363 (1927). The facts there involved an injury on a public street which terminated in a dead end at the plant entrance. Since this street was the only means of ingress and egress maintained by the employer, the employee was considered to be within the zone subject to the employer's control. But see, *Fike* v. *Goodyear Tire & Rubber Co.,* 56 Ohio App. 197, 9 Ohio Op. 312, 10 N.E. 2d 242 (1937). For a discussion of "zone" cases, see note, 5 OHIO ST. L.J. 139 (1938).

An injury arises out of the employment when there is a causal connection between the employment and the injury. *Ind. Comm.* v. *Weigandt, supra.* The employment must be responsible in some way for the injury. The causative danger must be peculiar to the employment and not common to the neighborhood. *Mobile and O. R. R.* v. *Ind. Comm. of Ill.,* 28 F. 2d 228 (E.D. Cal. 1928). Thus, a delivery man admittedly in the course of his employment while driving on a public highway was injured when a tornado felled a telephone pole which landed on top of his automobile. The court held that the injury did not arise from the employment, because the employment subjected him to no greater danger of such an injury than the general public in using the highway. *Slanina* v. *Ind. Comm.,* 117 Ohio St. 329, 158 N.E. 829 (1927). But a worker employed in the woods during the hunting season, who is accidentally shot by a hunter, is entitled to compensation since his employment reasonably increases the danger of such an injury. *O. L. Shafter Co.* v. *Ind. Acc. Comm.,* 175 Cal. 522, 166 Pac. 24 (1917).

In the principal case, plaintiff contended that the only prerequisite for recovery of compensation was to show that he was in the zone of his employment when injured. This was clearly incorrect and the Supreme Court so held. An employee enters upon his employment upon reaching the zone under his employer's control, but he is entitled to compensation only if there is a causal connection between his injury and the employment. *Ind. Comm.* v. *Barber, supra.* The Supreme Court in the principal case said, "Clearly the plaintiff did not suffer an injury in the course of and arising out of his employment." As has been seen, an employee within the zone subject to the employer's control is considered, in Ohio, to be in the course of employment. *Ind. Comm.* v. *Barber, supra.* The court took no notice of the distinction between "course of" and "arising out of" the employment, and should have held that plaintiff was in the course of his employment. However, even though the injury occurred in the course of employment, it has already been seen that to receive compensation, plaintiff must also establish some causal relation between the employment and the injury. The entire city was covered with snow, and the public at

large was subject to the same danger of slipping and falling. Plaintiff was an inside employee, so the employment in no way increased the hazard of falling; therefore, the injury did not arise out of the employment, and on this ground, rather than the dual reason given by the court, it would seem that the plaintiff is not entitled to receive compensation.

William B. Devaney