Recent Decisions

ADMINISTRATIVE LAW—UNFAIR COMPETITION—MULTIPLE BASING POINT PRICE SYSTEM HELD ILLEGAL

The Federal Trade Commission ordered the Cement Institute, an unincorporated trade association, corporate producing members and associated individuals to cease and desist from concerted action in employing a multiple basing-point system in the sale and distribution of cement. *Held,* (6-1) order upheld; the system as used constituted an "unfair method of competition" and a "systematic price discrimination" between customers of the respondents. The former is a violation of the Federal Trade Commission Act, 38 STAT. 719, 15 U.S.C. §45 (1946); and the latter is a violation of the Clayton Act, 38 STAT. 730 (1914), 15 U.S.C. §13(f) (1946), as amended by the Robinson-Patman Act, 49 STAT. 1526 (1936), 15 U.S.C. §13 (1946). Mr. Justice Burton dissented. *Federal Trade Commission v. Cement Institute,* 68 Sup. Ct. 793 (1948).

A multiple basing formula is similar to the single-base system known as "Pittsburgh plus", restrained as a violation of the Federal Trade Commission Act. *United States Steel Corp.,* 8 F.T.C. 1 (1924). Delivered prices were quoted on steel consisting of Pittsburgh "base price" plus "all rail" freight from Pittsburgh to delivery point, regardless of the origin of shipment. "Mill net" return of the seller varied depending upon cost of shipment compared with the "all rail" freight charge in the delivered price. Excess of charge over cost was termed "phantom freight" and the converse "freight absorption." Interdiction of the single system resulted in a shift to a multiple system in many industries. THE BASING POINT PROBLEM 11, 31 (TNEC Monograph 42, 1941). Multiple systems embrace two or more geographical areas, each with a basing point. For shipments outside an area, the lower delivered price of the two areas involved is quoted. *Cement Institute,* 37 F.T.C. 87, 147-48 (1943).

Standardized product and elasticity of demand from the point of view of the individual producer characterize the cement industry. Transportation charges are important in costs, as are fixed charges. Producers are localized in few geographic areas with high concentration of purchases in few consumers. WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 126 (TNEC Monograph 21, 1940).

It is significant that in this case (1) a combination was charged, (2) competition between the sellers was considered restrained, and (3) uniform price quotation resulted, denoting use of base price plus base point freight charges.

In two leading cases, relied upon by the Court, individual use of a single basing-point system was held discriminatory with accompanying restraint of competition between purchasers. *Corn Products Co. v. Federal Trade Commission,* 324 U.S. 726 (1945); *Federal Trade Commission v. Staley Mfg. Co.,* 324 U.S. 746 (1945). During debate an amendment was proposed to the Robinson-Patman Act which would have made the word "price" as used in Section 2 of the Act mean "mill net" and thereby outlaw any system using basing-point freight. H. R. REP. No. 2287, 74th Cong., 2d Sess. (1936). This was stricken. 80 CONG. REC. 8224 (1936). At the same time the Wheeler Anti-Basing Point Bill was rejected. 80 CONG. REC. 8102, 8223-24 (1936). As a result, a basing-point system must meet the same statutory requirements as any other pricing system.

The *Corn Products* case, *supra,* left the validity of a multiple system for future scrutiny, but only in that it might meet the "good faith" provision which permits reduction in price to certain purchasers if "made in good faith to meet an equally low price of a competitor." Such sufferance applies only to the seller's "lower" price and not to an entire system of which part may be a "good faith" reduction. See *Federal Trade Commission v. Staley Mfg. Co., supra* at 753. It was considered that these rulings made further application of Section 2 a matter of detail. Wooden, *Section 2(a)—Its Application to Basing Point Delivered Price,* ROBINSON-PATMAN ACT SYMPOSIUM, CCH (1948).

Restraint or threatened restraint on either "primary" or "second line" competition, or variations thereof, violate Section 2. For differentiation of types of competition, see Haslett, *Price Discriminations and Their Justifications under the Robinson-Patman Act* 46 MICH. L. REV. 450, 454 (1948). Before amendment, also, the section applied to either. *Van Camp & Sons Co. v. American Can Co.* 278 U.S. 245 (1929); *Porto-Rican American Tobacco Co. v. American Tobacco Co.,* 30 F. 2d 234 (C.C.A. 2d 1929). "Freight equalization" whereby prices are quoted f.o.b. mill and certain purchaser were credited on invoices with differences between the freigh which such purchasers were required to pay and freight from th nearest competitor of the seller, has been restrained. *Milk & Ic Cream Can Institute v. Federal Trade Commission,* 152 F. 2d 47 (C.C.A. 7th 1946). Restraint, however, was under the Federa Trade Commission Act alone, and because of a combination. Th same Act outlawed a "uniform delivered price" system and a "zon delivered price" system. *United States Maltsters Ass'n v. Federa Trade Commission,* 152 F. 2d 161 (C.C.A. 7th 1945); *Ft. Howar Paper Co. v. Federal Trade Commission,* 156 F. 2d 899 (C.C.A. 7t 1946), *cert. denied,* 329 U.S. 795 (1946). "Concert of action" wa found in each case.

The suggestion of these cases is that "concert of action" makes a price formula illegal where there is freight absorption without direct phantom freight charges, since the cost of such a system must be borne by a "padded" base price. They would fail in the face of the Federal Trade Commission Act and could not meet the "good faith" proviso of the Robinson-Patman Act. A basic reason for this may be that concerted action in maintaining a basing-point system, coupled with the use of a uniform base price, is price fixing. Concerted price fixing, even where agreed prices thereunder are reasonable, is illegal *per se* under the Sherman Act. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-25 (1940).

It is submitted that this decision does not illegalize all "delivered price" quotation, though they may be economically unfeasible if not outlawed. To bring *individual* use of such plans within the proscription there must be a specific adoption of the "mill net" theory and reciprocal grant of a right in the purchaser to have the advantage of his geographical location. A price with "full freight added" would not be suspect unless charges were for "all rail" freight and a cheaper form of transportation was used in certain discriminatory instances. Individual use of a "zone delivered price" formula, wherein zones were drawn to conform with optimum competition points with sellers in other zones and where there was no substantial competition between purchasers interzone, would meet the requirements. Again, individual use of "freight equalization" may be justified as a method of meeting competition where the same restrictions are met. Conceivably individual adoption of a "multiple basing-point" plan might be within the permitted area where it did not tend to restrain competition among purchasers.

Whatever ill effects may be laid to the force of this decision in the way of placing heavier burdens on consumers in certain areas and forcing eventual decentralization, it is difficult to oppose a consequent cessation of the uneconomical costs of cross-hauling in an industry where transportation costs constitute one-fifth of the delivered price.

Max Harley

CONSTITUTIONAL LAW — EXECUTIVE DETERMINATION OF ELECTORAL LAWS

Appeal to the supreme court from a certification of the Secretary of State that the Ohio Wallace for President Committee was not entitled to a position on the 1948 presidential ballot. *Held*, reversed. There is no substantial evidence in the record to justify a denial of a position on the ballot to this group on the basis that its

affidavit was deficient because three of the affiants belong to the Communist Party. Without showing that they personally advocate the overthrow of the government the validity of the affidavit is not impaired. *Zahn v. Hummel,* 150 Ohio St. 127 (1948).

"Any party, or group, desiring to have a place on the ballot shall file with the Secretary of State of Ohio . . . an affidavit . . . under oath stating that it does not advocate . . . the overthrow, . . . of our local, state, or national government. . . ." OHIO GEN. CODE §4785-100 (a) (1939). The statute is phrased in terms of "party" or "group" and not in terms of the political tenets of the individual affiants. The personal political affiliations of individuals of a group would not necessarily establish a connection between the group and the activities prohibited by the statute. The court straddles this interpretation of the statute by stating ". . . the statute we are considering provides that the *group* must not advocate . . . overthrow . . . of our government. . .", and "The fact that three members of the group belong to the Communist Party . . . without any showing . . . *they personally* advocate overthrow of our government . . . does not destroy or impair . . . the affidavit. . . ." (Emphasis supplied.) *Zahn v. Hummel, supra* 136, 137.

The constitutionality of the statute might have been attacked as violative of the Fourteenth Amendment of the Constitution of the United States. The elective franchise is embodied in the Ohio Constitution, Article V, Section 1. This creates a substantive right comparable to other basic liberties guaranteed by the constitution and therefore, entitled to due process. The Fourteenth Amendment demands adequate notice and a fair and impartial hearing. *Powell v. Alabama,* 287 U.S. 45 (1932); *Blackmer v. United States,* 284 U.S 421 (1932). There must be a notice and a hearing, however summary, at some stage in the proceeding. *Hager v. Reclamation District,* 111 U.S. 701 (1884). A hearing carries with it an opportunity to present evidence. *Sanders v. Shaw,* 244 U.S. 317 (1917). This right extends to all tribunals and officers empowered to perform the judicial function. *State* ex rel. *Oregon R.R. v. Fairchild,* 22 U.S. 510 (1912); *Baltimore and Ohio R.R. v. United States,* 298 U.S 349 (1936). The limitation would apply to a secretary of state.

On the affidavit in question, an appeal is provided from the finding of the secretary of state. OHIO GEN. CODE §4785-100 (a) (1939) There is no provision for a hearing of the controversy concerning the affidavit at any stage. Under the wording of the statute, a final determination of the question could be made without an opportunity to call a witness or present evidence. Such a determination would seem to deny due process of law as guaranteed by the Fourteenth Amendment, but the court rejected this approach stating "We do not hold in the present case the secretary was obligated t

have a hearing or to give opportunity . . . to answer any charges . . . or to cross examine any witnesses. . . ." *Zahn v. Hummel, supra* 139.

"An order [of an executive or administrative agency] based upon a finding made without evidence . . . or upon a finding made upon evidence which clearly does not support it, . . . is an arbitrary act against which courts afford relief." *Northern Pacific R.R. v. Washington Department of Public Works*, 268 U.S. 39 (1925). Executive or administrative action cannot be constitutionally freed from the basic requirement that it be supported by a reasonable foundation in fact. *Helfrick v. Dahlstrom Metallic Door Co.*, 256 N.Y. 199, 176 N.E. 141 (1932), *aff'd per curiam*, 284 U.S. 594 (1932). An administrative determination not supported by a reasonable foundation in fact is void. *Kessler v. Strecker*, 307 U.S. 22 (1939).

It would seem that the Ohio court accepted this approach when it stated ". . . but we do hold that there must be in the record of investigation by the secretary substantial facts or evidence to overcome the presumption of the good faith or honesty of an affiant whose affidavit fully complies upon its face with the provision of section 4785-100 (a) General Code. . . ." *Zahn v. Hummel, supra*, 139.

There exists in our jurisprudence a constitutional guaranty of minimal requisites essential to fair executive hearings and the executive determination which follows such hearing must have a demonstrable basis in evidentiary fact.

On theory it may be argued that these two constitutional requisites are in fact components of a single guaranty. On this rationale, rejection of the first component and the acceptance of the second, as was done in this case, would be acceptance of but half of the guaranty.

It may also be said that the requisites are in fact two separate guaranties. It would seem that the court based its decision on the less important of the two.

On either analysis an equitable result was reached.

Robert L. Perdue

CONSTITUTIONAL LAW — RIGHT TO COUNSEL IN A STATE, NONCAPITAL, CRIMINAL CASE

Bute pleaded guilty to the noncapital crime of "taking indecent liberties with children" and was sentenced to one to twenty years in the state penitentiary. Eight years later, by proper procedure, Bute perfected his appeal to the United States Supreme Court, maintaining that there was a denial of due process of law in his trial in that he was not represented by counsel, that the court did not inquire into his desire to have counsel or his ability to procure

counsel, and that the court did not offer or assign counsel to assist him. *Held,* (5-4) the due process clause of the Fourteenth Amendment does not require the state court to make inquiries or to offer or to assign counsel in this case. *Bute v. Illinois,* 333 U.S. 640 (1948).

About two months later the Supreme Court held (6-3) that there had been a denial of due process under the Fourteenth Amendment in the sentencing by a state court of the accused upon a plea of guilty to burglary and robbery, a noncapital case, because the petitioner was without counsel (although he did not request counsel, he did not waive counsel, nor did the court make any inquiries as to his desire for counsel), and because of gross carelessness in the court's sentence which was based on materially untrue assumptions concerning the petitioner's criminal record. *Townsend v. Burke,* 68 Sup. Ct. 1252 (1948). And in another decision handed down the same day as the latter case, the Supreme Court decided (5-4) that there had been a denial of due process under the Fourteenth Amendment where the accused, who was found guilty in a jury trial of breaking and entering, a noncapital crime, had been denied appointment of counsel which he had requested. The accused was a youth 18 years old and incapable of adequately representing himself. *Wade v. Mayo,* 68 Sup. Ct. 1270 (1948).

The Sixth Amendment gives the right to counsel in criminal cases in federal courts whether the accused requests it or not. *Johnson v. Zerbst,* 304 U.S. 458 (1938). There is no such specific amendment applicable to criminal cases in state courts. The due process clause of the Fourteenth Amendment has been invoked to give this right of counsel in state criminal cases where the offense is a capital one. *Powell v. Alabama,* 287 U.S. 45 (1932); *Williams v. Kaiser,* 323 U.S. 471 (1945). But the due process clause of the Fourteenth Amendment does not incorporate the Sixth Amendment. *Betts v. Brady,* 316 U.S. 455 (1942); see *Palko v. Connecticut,* 302 U.S. 319 (1937).

The concept of due process has not been set in a rigid pattern but has been kept fluid so as to permit the rendition of justice in varying circumstances. Embodied in the concept of due process is the right to a fair trial of which there are several aspects, right to counsel in certain instances being one. It is generally conceded that the right to retain private counsel is present in all cases; the problem arises as to the right to have counsel appointed to assist an indigent accused.

Although the right to appointed counsel in state courts has been limited to capital cases, the way is open to recognize this right in noncapital cases as evidenced by the following language, "That which may in one setting constitute a denial of fundamental fair-

ness, shocking to the universal sense of justice may, in other circumstances, and in the light of other considerations, fall short of such denial." *Betts v. Brady, supra.* In the *Townsend* case the fact that the accused was not represented by counsel plus the fact of gross carelessness by the trial court constituted denial of due process of law in a noncapital case. And in the *Wade* case the fact that it was a noncapital case did not automaticlly close the court's mind to the need for counsel. The court held that the accused's youth and inability adequately to represent himself, made the right to appointed counsel prerequisite to a fair trial.

The court has broken away from the test which required that there must be a capital case before the right to appointed counsel arises. Mr. Justice Douglas, dissenting in the *Bute* case, would look to the nature of the charge and the ability of the *average* man to defend himself, unaided by the expert at law, to determine the *need* for counsel, upon that need would base the right. But the court has not adopted Mr. Justice Douglas' test; rather it has eliminated as an independent criterion, the requirement of a capital offense and it now looks to the facts of each case to determine whether there is a circumstance which aggravates the disadvantage arising from absence of counsel. The death penalty alone is still sufficient to create the right to counsel; there may be that right in cases of much less serious crimes. The court now applies a subjective test, looking at the facts and circumstances of each individual case. State courts must now enforce a rule more difficult to apply. Federal courts may have more litigation on this question than formerly. The cases do, however, recognize an important need and a vital civil right. This could have been accomplished and the law could have been more settled by a decision that the due process clause of the Fourteenth Amendment embraces the Sixth Amendment. Perhaps state courts will react to these cases so as to accomplish substantially that result.

Jack W. Folkerth

DESCENT AND DISTRIBUTION — DESIGNATED HEIR

An illegitimate child was acknowledged in the natural father's will. The natural father also designated the child as his heir at law under the provisions of Ohio General Code Section 10503-12. Plaintiff as guardian of the child brought an action to contest the will of the brother of the natural father, which brother died subsequent to the decease of the natural father. The trial court was of the opinion that the child could inherit from the natural father's brother as from a blood uncle. The court of appeals affirmed the judgment of the trial court, but on the ground that a designated heir is entitled to inherit through as well as from the declarant. *Held,* the child was not a proper party to contest the will since

acknowledgment by the natural father without marriage to the mother does not enable the child under the statute of descent and distribution to inherit either from or through the natural father, and because a designated heir under the statute of descent and distribution can inherit only from, not through, the designator. *Blackwell v. Bowman*, 150 Ohio St. 34 (1948).

In derogation of common law, at which an illegitimate child is *nullius filius* and cannot inherit from anyone, in Ohio an illegitimate child can inherit both from and through his mother, either directly or collaterally. OHIO GEN. CODE §10503-14 (1938). No Ohio law provides for an illegitimate child's inheriting from his natural father under the statute of descent and distribution. *Lewis v. Eutsler*, 4 Ohio St. 355 (1854). However, the child may be legitimated by the subsequent marriage of his parents and the father's acknowledgment of paternity. OHIO GEN. CODE §10503-15 (1938). Being unable to inherit from the acknowledged father, clearly the child cannot inherit through him on the ground of blood relationship. The court pointed out that if this is too harsh a doctrine, the remedy is a legislative problem.

In Ohio adoption after majority is invalid and confers no right of inheritance. *Steele v. Schwartz*, 55 Ohio St. 685, 48 N.E. 1118 (1896). Ohio General Code Section 10503-12 provides, without age restrictions and without consent or knowledge on the part of the designee, for the designation of any individual by the designator as his heir at law. The statute states that when this is properly done, "the person thus designated will stand in the same relation for all purposes, to such declarant as he or she could, if a child born in lawful wedlock. The rules of inheritance will be the same, between him and the relations by blood of the declarant, as if so born." This statute was first enacted in 1854 and has been carried into every revision and codification since then with no substantial change. It is believed that there has never been another statute similar to this in any other state or country basing its jurisprudence on common law. *Southern Ohio Savings Bank & Trust Co. v. Boyer*, 66 Ohio App. 136, 31 N.E. 2d 161 (1940). Notwithstanding the broad language of the designated heir statute and the provision of Ohio General Code Section 10214 that the rule of common law to the effect that statutes in derogation thereof must be strictly construed has no application to the third or remedial part of the code, the courts have consistently held that the effect of the designated heir statute was merely to give the designated heir a share in the declarant's estate upon his death. *Southern Ohio Savings Bank & Trust Co. v. Boyer, supra; Rogers v. Cromer*, 24 Ohio L. Abs. 508, 37 N.E. 2d 407 (Ct. of App. 1937).

Prior to 1946, the Ohio courts uniformly held that the most that

was conferred upon the adopted child was the right to inherit from, never through, the adopting parent. *Upson v. Noble*, 35 Ohio St. 655 (1880); *Quigley v. Mitchell*, 41 Ohio St. 375 (1884); *Phillips v. McConica*, 59 Ohio St. 1, 51 N.E. 445 (1898); *Albright v. Albright*, 116 Ohio St. 668, 157 N.E. 760 (1927). These cases followed the weight of authority in the United States. 15 CIN. L. REV. 347 (1941). In interpreting the designated heir statute, the court followed the doctrine of *pari materia* and the adopted child ruling was used along with the argument that the designated heir statute could not confer greater rights on the designated heir. *Southern Ohio Savings Bank & Trust Co. v. Boyer, supra; Rogers v. Cromer, supra.* In 1946 the supreme court decided that under Ohio General Code Section 10512-19 an adopted child could inherit through as well as from the adopting parent. *Flynn v. Bredbeck*, 147 Ohio St. 49, 68 N.E. 2d 75 (1946). This decision was based on the addition to the statute on January 1, 1932, of the words: "[The adopted child] . . . shall be capable of inheriting property expressly limited by will or by operation of law to the child or children, heir or heirs at law, or next of kin of the adopting parent or parents or to a class including any of the foregoing." While *Flynn v. Bredbeck, supra,* did not overrule the former decisions as to the adopted child, being based on the change in the statute, it nevertheless removed the limitation on the adopted child's inheritance that had been used by analogy to prevent the designated heir from inheriting through the designator.

In the principal case the court decided that the sentence, "The rules of inheritance will be the same, between him and the relations by blood of the declarant, as if so born," referred to the manner in which the designee will stand *as to the property of the declarant.* This interpretation completely nullifies that sentence as part of the statute, as it then does nothing but add emphasis to the provisions of the sentence preceding it. In the construction of statutes useless repetitions of meaning are not to be supposed if they can be fairly avoided. 37 OHIO JUR. 616 (1934).

The court then posed the question, "If the designee inherited from and through the declarant as a child of declarant born in lawful wedlock, would it not follow that the designee would transmit inheritance to the declarant?" An affirmative answer to that question would be a complete *non sequitur.* It would seem clear that this statute could not have been intended to permit an individual by the *ex parte* proceeding therein provided to become the heir of another by self-declaration. No cases have been found claiming such an interpretation. If no rights are created in the declarant as a result of the designee inheriting from the declarant, it would appear that similarly no rights need be created in the de-

clarant by an interpretation that the designee may inherit from persons other than the declarant.

Will the reasoning of the principal case affect inheritance from the adopted child? It has been held that the personal estate of an adopted child who died intestate passed to the natural mother to the exclusion of the adopting parents. *Upson v. Noble, supra.* If the reasoning of the court has any validity, it would seem now to open the question whether an adopted child transmits inheritance to the adopting parents beyond the specific provisions of the adoption statute.

While the case is significant in that it settles an existing conflict among the courts of appeals, it is submitted that the court's reasoning fails completely to reconcile differences between inheritance under the adoption code and inheritance under the designated heir statute.

Howard Crown

DIVORCE—CONFLICTS—FULL FAITH AND CREDIT FOR DIVORCE DECREES—SURVIVAL OF SEPARATION DECREES

Margaret Sherrer left Massachusetts, the state of matrimonial domicile, went to Florida where she rented living quarters, found a job, and placed her eldest daughter in school. At the end of the ninety-day Florida residence requirement, she filed a bill of complaint for divorce, alleging that she was a bona fide resident of the state of Florida. Respondent received notice by mail and entered a general appearance by Florida counsel, denying the allegation of Florida residence. The petitioner presented evidence tending to establish her Florida residence. Although respondent appeared personally he offered no evidence in rebuttal. An absolute divorce was granted the petitioner on November 29, 1944. Three days later she remarried and returned to Massachusetts. In June, 1945, respondent instituted suit in Massachusetts alleging that he was petitioner's lawful husband and that the petitioner's subsequent marriage was void. He sought a declaration that he was living apart for justifiable cause and that he be permitted to convey his real property as though he were single. The Massachusetts probate court found for the respondent and the Supreme Judicial Court of Massachusetts affirmed. On writ of certiorari from the Supreme Court of the United States, *held,* reversed. A decree in a divorce proceeding of one state wherein the question of jurisdiction has been litigated by the parties is entitled to full faith and credit and may not later be attacked collaterally in the courts of another state. *Sherrer v. Sherrer,* 68 Sup. Ct. 1087 (1948).

In a companion case to *Sherrer v. Sherrer* the facts differed in three material respects. The wife brought an action to enforce a

decree for separate maintenance entered by a Massachusetts court *prior* to the Nevada divorce decree. The wife admitted as true the allegations in husband's divorce petition that he was a bona fide resident of Nevada, and the divorce in controversy was granted to the wife on her cross-petition. *Held,* that these differences did not militate against the result reached in the *Sherrer* case. The Nevada divorce is entitled to full faith and credit in the courts of Massachusetts. *Coe v. Coe,* 68 Sup. Ct. 1094 (1948).

Two other cases have modified the concept of full faith and credit to be accorded divorce decrees. A husband and wife were married in New York and maintained a marital domicile there. The wife obtained a New York separation decree and was awarded alimony, the husband appearing personally in the action. The husband subsequently went to Nevada and obtained a final divorce after satisfying the residence requirements. No provision was made for alimony although the Nevada court was cognizant of the New York decree. The wife was served constructively, and did not appear in the Nevada proceedings. No further alimony was paid under the New York decree and the wife brought a suit for arrears in a New York court. At no time has she contested the Nevada residence of her husband. The New York courts gave judgment for the wife. On writ of certiorari from the United States Supreme Court, *held,* affirmed. The Nevada divorce is entitled to full faith and credit in New York but the New York judgment survives the decree. *Estin v. Estin,* 68 Sup. Ct. 1213 (1948); *Kreiger v. Kreiger,* 68 Sup. Ct. 1221 (1948).

The Constitution requires that the judgment of a state court be given the same effect and validity in the courts of a sister state as it would be given in the courts of the state where rendered. The full faith and credit clause has been uniformly construed to extend to divorce decrees. *Barber v. Barber,* 21 How. 582 (U.S. 1858); *Haddock v. Haddock,* 201 U.S. 562 (1906); *Williams v. North Carolina,* 317 U.S. 287 (1942), 325 U.S. 226 (1945), *rehearing denied,* 325 U.S. 895 (1945). But if the court has no jurisdiction, the proceedings are *coram non judice* and neither courts of that state, nor courts of any other state need recognize the judgment. A judgment in personam is not entitled to full faith and credit unless the court has jurisdiction of the defendant. *Pennoyer v. Neff,* 95 U.S. 714 (1877). However, a divorce decree is not a judgment in personam. It has been said to be a judgment in rem. For a criticism of this characterization see Radin, *The Authenticated Full Faith and Credit Clause; Its History,* 39 ILL. L. REV. 1, 24 (1944). Marriage is a status out of which arise duties to society and to the other spouse, and an action to dissolve a marriage can properly be called an action quasi in rem. Therefore, a court can enter a valid decree although

it does not have personal jurisdiction of the defendant. *Maynard v. Hill,* 125 U.S. 190 (1888); *Atherton v. Atherton,* 181 U.S. 155 (1901). Such a decree is entitled to full faith and credit although there was constructive service upon the defendant. *Cheely v. Clayton,* 110 U.S. 701, 705 (1884). The essential requirement for jurisdiction to grant a divorce is domicile. The Supreme Court first decided that a state could grant a valid divorce only if the *marital* domicile of the parties was in that state. Further, contrary to the general rule, the marital domicile did not follow the husband when he was the party at fault, but remained with the wife. *Haddock v. Haddock, supra.* Domicile followed the innocent party. *Davis v. Davis,* 305 U.S. 32 (1938). The present view is that fault of the party suing is immaterial. It is sufficient to satisfy the requirement of domicile that he be a bona fide resident of the state where suit is brought. *Williams v. North Carolina,* 325 U.S. 226 (1945).

In view of divergent requirements prescribed by the states, the question of the bona fides of the residence of the petitioner is of paramount importance. If a divorce is secured from a defendant not personally served who did not appear in the proceedings, he may collaterally attack the decree in another state by showing that the petitioner was not a bona fide resident of the state granting the divorce, and since jurisdiction did not exist, the decree is not entitled to full faith and credit. *Bell v. Bell,* 181 U.S. 175 (1901). It was formerly held that if the defendant appeared personally and denied that the plaintiff was a resident, but later withdrew the answer that this did *not* preclude a finding by a court of another state that plaintiff was not in fact a bona fide resident. *Andrews v. Andrews,* 188 U.S. 14 (1903). The *Sherrer* case expressly overrules the *Andrews* case and establishes that litigation of the jurisdictional issue prevents a later inquiry in another state into the facts upon which jurisdiction was based. This does not mean that a court of another state must recognize a divorce based upon collusion or fraud.

The decision raises two questions. First, are there minimum residence requirements for divorce so that a divorce granted on less may be disregarded by a sister state? Bona fide residence has a definite meaning, and when states characterize as bona fide residence a transiency that cannot logically be so classified, sister states may disregard decrees based on that type of residence. Second, what will be the decision where the defendant appears but does not contest the allegation of residence? Mr. Justice Frankfurter in his dissenting opinion in the *Sherrer* case discerned this problem but offered no solution. It is doubtful that a mock, or pre-arranged contest of jurisdiction would be binding on the courts of another state. The essence of the dissenting opinions in the *Sherrer* and

Coe cases is that the public policy of states with strict residence requirements is being defeated by states with more liberal standards.

Finally, a divorce decree does not necessarily affect the obligations imposed by a separation decree rendered in another state. This result had been anticipated. *Russo v. Russo,* 62 N.Y.S. 2d 514 (N. Y. City Ct. 1946); Holt, *The Bones of Haddock v. Haddock,* 41 MICH. L. REV. 1013, 1036 (1943). The decision seems correct, but as Mr. Justice Frankfurter remarks in his dissenting opinion, a state may hold that a valid foreign decree does not terminate obligations under a local separation decree *only* if it reaches the same result as would have been reached had the divorce been granted by the home state. Failure so to limit the decision is a weakness in the majority opinion. The *Coe* and *Estin* cases both involved this point. The *Coe* case held the payments under the prior decree terminated while the *Estin* case did not. Comparison of the langauge in the two opinions indicates that the Court, without expressly so declaring, had in mind the limitation enunciated by Mr. Justice Frankfurter.

Richard O. Gantz

EQUITY—INJUNCTION DENIED—PRIVATE AIRPORT AFFECTED WITH PUBLIC INTEREST

The defendant planned to build and operate a private, light-plane airport on land about one-fourth mile from the corporation limits of the city of Akron. Adjacent land owners in this unrestricted, unzoned area sought an injunction to restrain defendant from so using his property. The trial court granted the injunction and the case was appealed on questions of law and fact. *Held,* that balanced against the defendant's establishment of a legitimate and necessary business, the threatened damages to the plaintiffs were insufficient for an anticipatory injunction. *Antonik v. Chamberlain,* 81 Ohio App. 465, 78 N.E. 2d 752 (1947).

An airport is not a nuisance *per se,* although its manner of operation or construction may make it a nuisance. *Thrasher v. Atlanta,* 178 Ga. 514, 173 S.E. 817 (1934); *Warren Township School District v. Detroit,* 308 Mich. 460, 14 N.W. 2d 134 (1944); *Vanderslice v. Shawn,* 27 A. 2d 87 (Del. Ch. 1942). In considering the airport problem, as in other cases for injunctive relief from nuisance, the courts have had to "balance the equities" of the parties in the light of the public policy involved.

In the clash between the private land owner and the expanding aeronautic industry, the courts and legislature have recognized the municipally owned airport as a public utility. OHIO GEN. CODE §§3677, 3939; *State* ex rel. *Hile v. Cleveland,* 26 Ohio App. 265, 160

N.E. 241 (1927); *Wichita v. Clapp*, 125 Kan. 100, 263 Pac. 12 (1928); *Dysart v. St. Louis*, 321 Mo. 514, 11 S.W. 2d 1045 (1928). The public interest has at least been considered in most of the cases involving this type of airfield. One court took judicial notice of the airplane as a "well nigh indispensable" public utility and refused to enjoin an existing airport unless the acts were improper and unnecessary to orderly conduct of the business. *Thrasher v. Atlanta, supra;* for a similar holding see *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E. 2d 245 (1942). When the University of Virginia applied to a state commission for permission to build an airport, the court viewed the public interest in aviation instruction as outweighing the opposition of the owners of historic shrines in the area. *Batcheller v. Virginia*, 176 Va. 109, 10 S.E. 2d 529 (1940).

The present Ohio case seems to be one of the first to view the enjoining of a private airport as a public hardship. Other suits concerning such airfields have usually ignored any public interest therein or said that none was involved. *Gay v. Taylor*, 19 Pa. D. & C. 31, 1934 U.S. Av. R. 146 (1932); *Vanderslice v. Shawn, supra; Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930); *Burnham v. Beverly Airways Inc.*, 311 Mass. 628, 42 N.E. 2d 575 (1942). However, the Massachusetts cases are based on a trespass theory which was rejected in the Ohio case.

Although the instant case seemingly lays greater stress on public interest and comparative injury, it is reconcilable with a comparable Ohio case decided in the federal courts. *Swetland v. Curtiss Airports Corp.*, 41 F. 2d 929 (N.D. Ohio 1930), *modified* 55 F. 2d 201 (C.C.A. 6th 1931). In that case the court said that the "balance of conveniences" was against the airport owner because of the availability of an alternative site equally convenient to the community.

The actual result of the case under discussion follows the usual rule of denying injunctive relief where a threatened project is not a nuisance *per se* and its subsequent use or operation will determine whether a nuisance will arise. This rule has been applied to both public and private airports. *Warren Township School District v. Detroit, supra; Crew v. Gallagher*, 358 Pa. 542, 58 A. 2d 179 (1948).

Since the decision in the principal case could have been reached on a more traditional basis, the court's opinion may show a trend in Ohio toward recognition of the private airport as a private enterprise affected with a public interest.

Lloyd E. Fisher, Jr.

JURISDICTION—RES JUDICATA—ERRONEOUS DECISION UPHOLDING JURISDICTION IMMUNE FROM COLLATERAL ATTACK

An action for a partnership accounting was brought in the Federal District Court for the Territory of Hawaii by Menashe, a resident of Hawaii, against Sutton, a resident of New York, and a receiver was appointed. Menashe then brought an action in the district court in New York to have an ancillary receiver appointed. A temporary appointment was made. Six months later this appointment was made permanent after the court had overruled a motion to vacate the appointment for lack of jurisdiction. After Sutton refused to disclose the location of the partnership assets alleged to be in New York, he was committed for contempt of court and sued out a writ of habeas corpus. *Held,* although the district court had no jurisdiction of the ancillary receivership suit (because the 1940 amendment to 28 U.S.C. §41 (1), which allows citizens of territories to sue citizens of a state in federal courts, is unconstitutional), the collateral attack on the district court's decision must fail. Since the orders appointing the temporary and permanent receivers were appealable, and since Sutton did not appeal from either order, the issue of jurisdiction is immune from collateral attack. *United States* ex rel. *Sutton v. Mulcahy,* 169 F. 2d 94 (C.C.A. 2d 1948).

The case is a logical extension of the principle that a court has authority to pass upon its own jurisdiction, and that its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action. This principle was first applied to jurisdiction of the person. *Baldwin v. Iowa Traveling Men's Ass'n,* 283 U.S. 522 (1931). In 1938 it was decided that a determination of jurisdiction of the subject matter was res judicata. *Stoll v. Gottlieb,* 305 U.S. 165 (1938). In 1940 the principle was further extended so that res judicata might be pleaded as a bar not only as to matters presented, but also as to any other available matter which might have been litigated. *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940). The rule is effective to bar a second action upon the same claim between the same parties or those in privity with them. *Sunshine Coal Co. v. Adkins,* 310 U.S. 381 (1940). In 1941 it was decided that the principle would apply where an interlocutory order had been issued after the question of jurisdiction had been litigated. *United States v. Jaeger,* 117 F. 2d 483 (C.C.A. 2d 1941). The Supreme Court failed to cite this line of cases in deciding that an interlocutory order must be obeyed until set aside by appropriate proceedings, appellate or otherwise. *United States v. United Mine Workers of America,* 330 U.S. 258 (1947). The decision could very well have extended to interlocutory orders the principle that determination of jurisdiction is res

judicata and immune from collateral attack. The principal case would seem to indicate that the Circuit Court of Appeals for the Second Circuit believes that the Supreme Court did not disapprove of such an extension by their failure to state it in the *Mine Workers* case.

Judge Clark, concurring in the principal case, wrote, "My law school teachings were that a judgment showing on its face lack of jurisdiction of the subject matter was void for all purposes." But he concluded that the trend established in the recent cases has led to this decision.

In a dissenting opinion Judge Frank calls the application of the principle of res judicata in this case a "silly adherence to technicalities." He also points out that if the court had no jurisdiction of the subject matter, then Sutton could not waive the deficiency by his inaction.

It does seem extraordinary that the court should hold that Congress was *unable* to confer jurisdiction to decide cases between a citizen of Hawaii and a citizen of a state, but that a party is precluded from attacking an erroneous assumption of jurisdiction, if he fails to appeal. The central theme of the current view is that a party should have one, and only one chance to have a review of a matter decided.

Myron E. Reinman

NEGOTIABLE INSTRUMENTS — CONVERSION BY DRAWEE BANK — BOOK CREDIT TO PAYEES BY DRAWEE BANK DOES NOT CONSTITUTE PAYMENT

Plaintiff received two drafts drawn by Tyson Produce Company on the defendant bank. The drafts were deposited at the Pioneer Bank and thereafter forwarded to the defendant bank for collection. These two banks had a written contract covering the handling of accounts between them to the effect that all items received by either bank were to be credited conditionally, subject to final payment, and might be charged back at any time until the proceeds thereof in money have been actually received. Such was also the customary way of handling accounts between banks in this area. Following their usual course of dealing, the defendant bank upon receipt of the drafts notified Tyson Produce which brought to the bank a check to cover the total amount of both drafts, and other items, and the bank then surrendered the drafts. Appropriate book entries crediting the Pioneer Bank and debiting Tyson Produce were made. A few hours later the defendant bank discovered that the Tyson Produce credit account had been obtained by the use of fraudulent drafts. The bank immediately returned to Tyson Produce its check and received in return the drafts which were then sent to the Pioneer Bank for "insufficient funds." *Held,* the defendant bank is not liable for conversion of the drafts nor did the book credit given to the Pioneer Bank amount to an irrevocable payment. *Goeman v. Live Stock National Bank,* 29 N.W. 2d 528 (Iowa 1947).

Conversion is any act of dominion or control, wrongfully exerted over the chattels of another in denial of his right thereto. *Talich v. Marvel,* 115 Neb. 255, 212 N.W. 540 (1927); *Ben Cooper Motor Co. v. Amey,* 143 Okla. 75, 287 Pac. 1017 (1930). "Negotiable instruments" are chattels, and as such are subject to conversion. *State v. First National Bank,* 38 N.M. 225, 30 P. 2d 728 (1934). The court in the instant case thought that it would be difficult to find dominion or control wrongfully exerted in denial of the plaintiff's rights, since there did not exist in the Tyson Produce account sufficient funds to satisfy the drafts.

The other problem in the case, whether a book credit is an irrevocable payment, is more difficult. When a bank has paid in cash a check in misreliance upon the state of the drawer's account, the great majority of cases at common law and under the N.I.L. hold that it is a completed transaction which cannot be rescinded except for fraud, or for mutual mistake. Just what is meant by a mutual mistake is not always clear. In the following cases, in accord with the majority view, it was held that there was no mutuality of mistake when the drawee bank made a mistake as to the state of the drawer's account, even though the payee did not know

that the drawer had insufficient funds. *American National Bank v. Miller,* 229 U.S. 517 (1913); *Riverside Bank v. First National Bank,* 74 Fed. 276 (C.C.A. 2d 1896). The minority view is that under such conditions there is a mutual mistake. *Grand Lodge v. Towne,* 136 Minn. 72, 161 N.W. 403 (1917); *National Bank of California v. Miner,* 167 Cal. 532, 140 Pac. 27 (1914). The majority cases also hold that the act of crediting the depositing customer will be considered equivalent to an act of paying cash, and if thereafter, even on the same day, the bank ascertains that they have made a mistake it will not affect the rights of the depositing customer. *First National Bank of Philadelphia v. National Park Bank & Trust Co.,* 165 N.Y. Supp. 15, 100 Misc. 31 (1917); *Union State Bank v. Hibernia Bank & Trust Co.,* 224 Mo. App. 375, 18 S.W. 2d 93 (1929). There are conflicting cases on the sufficiency of a credit entry constituting payment. *National Gold Bank v. McDonald,* 51 Cal. 64 (1875); *Pollack v. Bank of Commerce,* 168 Mo. App. 268, 151 S.W. 774 (1912); *Akron Scrap Iron v. Guardian Savings and Trust Co.,* 120 Ohio St. 120, 165 N.E. 2d 715 (1929).

Two cases have given full effect to a contract, similar to the one in the instant case, whereby credit is given conditionally subject to a charge back upon the discovery of an insufficiency of funds. *Seaboard National Bank v. Central Trust & Savings Bank,* 253 Pa. 412, 98 Atl. 607 (1916); *Stephens v. First National Bank,* 271 S.W. 395 (Tex. Civ. App. 1925). One reported case is contra. *Hay v. First National Bank,* 244 Ill. App. 286 (1927).

In many states the legislatures have met the problem. The majority of the statutes have followed the Bank Collection Code Section 3 which provides that a book credit shall be provisional, subject to revocation at or before the end of the day on which the item is deposited if the item is found not payable for any reason. When a credit is given after banking hours revocation may be exercised during the following business day. These states are Idaho, Kentucky, Missouri, New Jersey, New Mexico, New York, Oregon, Pennsylvania, South Carolina, Washington, West Virginia, Wisconsin and Wyoming. Two states, Michigan and Oklahoma, go further and permit a charge back at or before the end of the next business day.

Charles M. Deitle

NEGOTIABLE INSTRUMENTS — STOP PAYMENT ORDERS — VALIDITY OF STIPULATIONS — NEGLIGENCE AS BASIS OF BANK'S LIABILITY

Plaintiff depositor ordered the defendant bank to stop payment on a check. Defendant required plaintiff to sign a stipulation releasing defendant from liability for payment through inadvertency or oversight. Subsequently, defendant paid the check. *Held,* the purported release was void for want of consideration and as against public policy. Case remanded to common pleas to try the issue of defendant's negligence. *Speroff v. First-Central Trust Co.,* 149 Ohio St. 415, 79 N.E. 2d 119 (1948).

That a drawer of a bank check can order the drawee bank to stop payment before it has been accepted, certified or presented for payment is a proposition firmly anchored in the law. *Kahn, Jr. v. Walton,* 46 Ohio St. 195, 20 N.E. 203 (1889); *Hynicka v. Life Ins. Co.,* 4 Ohio N.P. (N.S.) 297, 310 (1906); *Mahon Co. v. Huntington National Bank,* 62 Ohio App. 261, 23 N.E. 2d 638 (1939); *Ozburn v. Corn Exchange National Bank of Chicago,* 208 Ill. App. 155 (1917); *Raynor v. Scandinavian-American Bank,* 122 Wash. 150, 210 Pac. 499 (1922); *Guild v. Eastern Trust and Banking Co.,* 122 Me. 514, 121 Atl. 13 (1923); *Citizens Bank of Gans v. Mabray,* 90 Okla. 63, 215 Pac. 1067 (1923); *Laura Baker School v. Pflaum,* 30 N.W. 2d 290 (Minn. 1947); 5 MICHIE, BANKS AND BANKING 354 (1932); MORSE, BANKS AND BANKING 882 (1928).

That a drawee after receiving the stop payment order pays at his peril is equally well established. *Pease and Owyer v. State National Bank,* 114 Tenn. 693, 88 S.W. 172 (1905); *American Defense Society v. Sherman National Bank,* 225 N.Y. 506, 122 N.E. 695 (1919); *Bank of Hamilton v. Williams,* 147 Ga. 96, 90 S.E. 718 (1916); *Hewitt v. First National Bank,* 113 Tex. 100, 252 S.W. 161 (1923); *Wall v. Franklin Trust Co.,* 84 *Pa. Super. Ct.* 392 (1925); *Gaita v. Windsor Bank,* 251 N.Y. 152, 167 N.E. 203, *reversing* 232 N.Y. Supp. 748, 225 App. Div. 750 (1929); *American National Bank v. Reed,* 134 S.W. 2d 782 (Tex. Civ. App. 1939); *Carroll v. South Carolina National Bank,* 45 S.E. 2d 729 (1947); BRANNAN, NEGOTIABLE INSTRUMENTS LAW 1157 (6th ed. 1938); 5 MICHIE, BANKS AND BANKING 359 (1932).

For an analysis of the bank's position if it fails to obey the order, see 39 YALE L.J. 542, 543 (1929). The risk to the bank that a wrongful payment will be made is substantial and the burden is onerous. BRITTON, BILLS AND NOTES 839 (1943); 39 YALE L.J. 542, 547 (1929).

This situation has caused the banks, as a matter of practice and protection, to insist that the drawer sign a stipulation, the nature of which varies with different banks, releasing the drawee from liability. 15 CALIF. L. REV. 235 (1926); 40 HARV. L. REV. 110 (1926). It is

around these stipulations that the currents of conflict swirl. 39 YALE L. J. 542 (1929); 42 YALE L. J. 817, 840 (1932); 15 CORN. L. Q. 256 (1929); 14 MINN. L. REV. 172 (1929); 29 COL. L. REV. 1150 (1929); 35 MICH. L. REV. 1167 (1936); 15 CALIF. L. REV. 46 (1926).

Some jurisdictions permit the bank to extract these signed stipulations from the drawer thereby making the stop payment order conditional. *Gaita v. Windsor Bank, supra,* approved 15 CORN. L. Q. 256 (1929); 14 MINN. L. REV. 172 (1929); disapproved 29 COL. L. REV. 1150 (1929); see notes, 15 CALIF. L. REV. 235 (1926); 35 MICH. L. REV. 1167 (1936); 39 YALE L. J. 542 (1929). *Tremont Trust Co. v. Burack,* 235 Mass. 398, 126 N.E. 782 (1920); *Hodnick v. Fidelity Trust Co.,* 96 Ind. App. 342, 183 N.E. 488 (1932); *Edwards v. National City Bank of New York,* 150 Misc. 80, 269 N.Y. Supp. 637 (Mun. Ct. 1934); *Pyramid Musical Corp. v. Floral Park Bank,* 268 App. Div. 783, 48 N.Y.S. 2d 866 (1944); *Chase National Bank of City of New York v. Battat,* 78 N.E. 2d 465 (N.Y. 1948). See *Mahon Co. v. Huntington National Bank, supra* at 265.

Other jurisdictions void these agreements on grounds of public policy, but see 39 YALE L. J. 542, 544 (1929); or lack of consideration, or both. *Hiroshima v. Bank of Italy,* 78 Cal. App. 362, 248 Pac. 947 (1926); *Grisinger v. Golden State Bank of Long Beach,* 92 Cal. App. 443, 268 Pac. 425 (1928); *Elder v. Franklin National Bank,* 25 Misc. 716, 55 N.Y. Supp. 576 (Sup. Ct. 1899); *Levine v. Bank of United States,* 132 Misc. 130, 229 N.Y. Supp. 108 (Mun. Ct. 1928).

It is interesting to note that originally these stipulations were invalid in New York and valid in Ohio. *Elder v. Franklin National Bank, supra; Mahon Co. v. Huntington National Bank, supra.* Today the converse is true. *Gaita v. Windsor Bank, supra; Speroff v. First-Central Trust Co., supra.*

To prohibit the stipulations places an unconditional obligation upon the bank to stop payment. To permit the stipulations releases the bank of all liability except wanton misconduct. *Gaita v. Windsor Bank, supra.* It is submitted that the middle ground approach, applied by the court in the instant case, is the best view. 23 COL. L. REV. 780 (1923).

However, the test of negligence has been soundly criticized as being too nebulous for the banking business. 39 YALE L. J. 542, 546 (1929). Nevertheless, the courts when faced with equally difficult problems in other fields of human endeavor have managed to etch some well defined lines in the sandy law of negligence.

Norman W. Shibley

TORTS—SLANDER—WILLFUL VERBAL ABUSE NOT ACTIONABLE

Plaintiff's pleading alleged that the defendant in a loud voice falsely and maliciously slandered plaintiff in a public place for the purpose of causing her physical injury and that the remarks did cause her physical injury because they were made at a time when she was in advanced pregnancy. The trial court directed a verdict on the grounds that the spoken words were not slander *per se* and that an action for slander *per quod* does not lie unless special damages are pleaded. The court of appeals reversed, saying that defendant must have anticipated that his conduct would result in emotional disturbance and bodily injury, which would give the plaintiff the right to go to the jury on the facts. *Held,* (4-3) profane and obnoxious epithets not amounting to slander, where such epithets are unaccompanied by actions constituting an assault, are at most *damnum absque injuria* and do not give rise to a cause of action. *Bartow v. Smith,* 149 Ohio St. 301, 78 N.E. 2d 735 (1948).

It has long been the rule in Ohio that there is no liability for acts which cause fright or shock unaccompanied by physical injury where the acts complained of are neither willful nor malicious. *Miller v. Baltimore & Ohio R.R.,* 78 Ohio St. 309, 85 N.E. 499 (1908); *Morton v. Western Union Telegraph Co.,* 53 Ohio St. 431, 41 N.E. 689 (1895). The qualification in the rule of the *Miller* case would seem to imply that the court did not intend to deny recovery where the acts complained of were either willful or malicious and physical injury followed. That is the position taken by Judge Zimmerman in his dissent. This view has been followed heretofore in Ohio. *Cincinnati Traction Co. v. Rosnagle,* 84 Ohio St. 310, 95 N.E. 884 (1911) (infant plaintiff suffered injury from fright after being wrongfully ejected from a street car on a dark night); *Brownlee v. Pratt,* 77 Ohio App. 533, 68 N.E. 2d 798 (1946) (defendant interfered with the interment of plaintiff's parents). Indeed, the court has allowed recovery for physical injuries resulting from mental suffering where the defendant's act was merely negligent. *Wolfe v. The Atlantic and Pacific Tea Co.,* 143 Ohio St. 643, 56 N.E. 2d 230 (1944); *Morton v. Stack,* 122 Ohio St. 115, 170 N.E. 869 (1930).

The majority opinion requires a traditional, technical tort on which to hang damages, and holds that since the defendant's acts were neither slander nor assault, the plaintiff has no cause of action. This view has often been discredited. The majority cited a line of Kentucky cases which denied recovery. But these were negligence cases, and in 1943 the Kentucky court said that where the wrong is willful there may be recovery for mental pain and suffering as well as physical pain and suffering. *Brown v. Crawford,* 296 Ky. 249, 177 S.W. 2d 1 (1943). The technical tort used as a peg on which to hang parasitic damages is often very slender. *Stockwell*

v. Gee, 121 Okla. 207, 249 Pac. 389 (1926) (trespass on the property of plaintiff's husband); *Bouillon v. Laclede Gas Light Co.,* 148 Mo. App. 462, 129 S.W. 401 (1910) (a hand on the doorknob of plaintiff's apartment); *Kirby v. Jules Chain Stores Corp.,* 210 N.C. 808, 188 S.E. 625 (1936) (threats by a bill collector from his car); *Whitsel v. Watts,* 98 Kan. 508, 159 Pac. 401 (1916) (running toward the plaintiff shaking his fist); *Jeppsen v. Jensen,* 47 Utah 536, 155 Pac. 429 (1916) (a threat to shoot plaintiff's husband in her presence). Included in the list of cases cited and supposedly distinguished by the majority are cases in which it is hard to find a technical trespass or assault. It was held that false charges of unchastity against a schoolgirl accompanied by threats of reform school stated a cause of action although the court said that it was doubtful if the facts constituted an assault. *Johnson v. Sampson,* 167 Minn. 203, 208 N.W. 814 (1926). Threatening collection letters sent willfully and intentionally to produce mental pain and anguish have been held actionable. *LaSalle Extension University v. Fogarty,* 126 Neb. 457, 253 N.W. 424 (1934). The same result was reached where the letters accused plaintiff of adultery and threatened arrest. *Grimes v. Gates,* 47 Vt. 594 (1873).

It was held that the right to recover for bodily pain and suffering resulting from fright which is caused by a willful wrong may be regarded as established in Arkansas. *Rogers v. Willard,* 144 Ark. 587, 223 S.W. 15 (1920). The Georgia Court of Appeals indicated that plaintiff would have been given a cause of action merely on the basis of mental suffering, but they relied on a technical battery, *viz.,* that the defendant's agent threw a coin on plaintiff's bed. *Interstate Life & Accident Co. v. Brewer,* 56 Ga. App. 569, 193 S.E. 458 (1937). The Kansas Supreme Court said, ". . . defendant's liability does not depend on whether his wrongful onset constituted an assault. Plaintiff seeks to enforce a civil liability for the consequences of the wrong and the general rule is that a wrongdoer is liable in damages for injuries which are the natural and reasonable consequences of his wrongful act whatever name may be fittingly applied to the wrong." *Whitsel v. Watts, supra* at 509.

Judge Hart in an able dissent faces the problem squarely and traces the historical background of the cases which have allowed recovery for physical damage as a result of intentionally inflicted mental suffering without attempting classification according to the traditional pattern of torts. The doctrine contended for in this dissent had its source in parasitic damages allowed for mental suffering. See, *e.g., Smith v. Pittsburgh, Ft. Wayne & Chicago Ry.,* 23 Ohio St. 10 (1872). Such damages have been allowed in Ohio where the defendant's tort was willful or negligent. *Rose Co. v. Lowery,* 33 Ohio App. 488, 169 N.E. 716 (1929); *Ward Baking Co. v. Trizzino,*

27 Ohio App. 475, 161 N.E. 557 (1928). But this practice does not include the plaintiff in an action for wrongful death. *Steel v. Kurtz,* 28 Ohio St. 191 (1876).

A leading English case held a practical joker liable for damages to a woman whom he falsely told that her husband was injured. *Wilkinson v. Downton,* L.R. 2 Q.B. 57, 76 L.T. 493 (1897). This case has been followed in similar situations. *Bielitski v. Obadiak,* 61 Dom. L. Rep. 494 (1921) (false report of a relative's suicide); *Atlantic & Pacific Tea Co. v. Roch,* 160 Md. 189, 153 Atl. 22 (1930) (delivering a dead rat in a grocery package); *Nickerson v. Hodges,* 146 La. 735, 84 So. 37 (1920) (having plaintiff dig up a "pot of gold" under extremely humiliating circumstances).

Usually the injured parties who recover are children or pregnant women, since it has only been in recent years that medical science has been able to connect the mental injury with the physical damages in other than such obvious cases. But the administrator of a male adult recovered where the connection between the act complained of and the death was plain enough. *Rasmussen v. Benson,* 135 Neb. 232, 280 N.W. 290 (1938).

Bill collectors, undertakers, private detectives, and insurance adjusters have been the first defendants to feel the impact of this doctrine. *Barnett v. Collection Co.,* 214 Iowa 1303, 242 N.W. 25 (1932); *Clark v. Credit Men's Association,* 105 F. 2d 62 (App. D.C. 1939) (overbearing bill collectors); *Gadbury v. Blietz,* 133 Wash. 134, 233 Pac. 299 (1925) (undertaker withheld body from burial); *Fitzsimmons v. Olinger Mortuary Ass'n,* 91 Colo. 544, 17 P. 2d 535 (1932) (unduly publicizing a funeral); *Janvier v. Sweeny,* 2 K. B. 316, 88 L.J.K.B. 1231 (1919) (threats by private detectives); *Continental Casualty Co. v. Garrett,* 173 Miss. 676, 161 So. 753 (1935) (insurance adjuster).

It is possible that the doctrine supported by the two dissenting opinions may yet become the law of Ohio, and that the court will recognize the qualification of the rule of the *Miller* case that where the actions complained of are willful and malicious, as distinguished from negligent, recovery will be allowed for damages resulting from mental suffering. "It is time to recognize that the courts have created a new tort." Prosser, *Intentional Infliction of Mental Suffering: A New Tort,* 37 MICH. L. REV. 874 (1939).

Louis E. Evans

WILLS — EVIDENCE — ADMISSIBILITY OF WRITTEN INSTRUMENT AVERRING TESTAMENTARY CAPACITY

The evidence disclosed that the testator "was uneducated, had the mind of a . . . child, enjoyed trading in live stock . . .[and] invested all of his income in farm lands which he was able to successfully manage with the assistance of others." Shortly before he made his will, his interests in realty were increased by devise. Relatives of the testator filed suits to partition lands in which he had interests. The country was in the midst of the depression, and the testator bitterly resented a forced sale of his holdings. Under these conditions, he executed his will, giving a life estate in all his properties to his sister and her husband, the remainder to be reduced to money and the proceeds to be divided between two churches. Anticipating that his will would be contested, the testator had prepared an instrument, signed by thirty-four of his acquaintances and friends, consisting of bankers, business men, and farmers. They certified that they knew the testator and had associated with him for years, that they were certain he was capable of transacting ordinary business, that he knew his relatives and his obligations to them, and the nature and extent of his property, and that he was of sound mind and was fully capable of making a will. This instrument, antedating the will by four days, was offered in evidence when the will was attacked on the grounds of mental incapacity and undue influence. The evidence was rejected by the trial court. *Held*, on appeal to the court of appeals, judgment reversed. "[The] evidence . . . should have been admitted under proper instruction to the jury, not as substantive proof of the facts therein contained, but as possibly throwing some light upon his state of mind at that time." *Spidel v. Warrick*, 50 Ohio L. Abs. 413 (Ct. of App. 1948).

In Ohio, testamentary capacity exists when the testator has sufficient mind and memory (1) to understand the nature of the business in which he is engaged, (2) to comprehend generally the nature and extent of his property, (3) to hold in his mind the names and identity of those who have natural claims upon his bounty, and (4) to be able to appreciate his relation to the members of his family. *Niemes v. Niemes*, 97 Ohio St. 145, 119 N.E. 503 (1917). Testamentary capacity is determined as of the date of execution of the will. See *Vrooman v. Powers*, 47 Ohio St. 191, 195, 24 N.E. 267, 268 (1890). Evidence of the state of mind of the testator within a reasonable time before the execution of the will is admissible as throwing light on his testamentary capacity at the time of execution. *Kennedy v. Walcutt*, 118 Ohio St. 442, 161 N.E. 336 (1928). It is not competent, in a will contest, for a nonattesting, nonexpert witness to give an opinion as to the capacity of the testator to make a will. *Runyan v. Price*, 15 Ohio St. 1 (1864). This is

the usual rule. 7 WIGMORE, EVIDENCE §1958 (3d ed. 1940). But such a witness may *testify* as to the capacity of the testator to transact ordinary business. *Niemes v. Niemes, supra,* or to form a purpose and intention of disposing of his property by will. *Dunlap v. Dunlap,* 89 Ohio St. 28, 104 N.E. 1006 (1913); *Weis v. Weis,* 147 Ohio St. 416, 72 N.E. 2d 245 (1947).

In the instant case, the evidence was in the form of a written instrument. The hearsay rule rejects assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination. 5 WIGMORE, EVIDENCE §1362 (3d ed. 1940). However, a wide range of inquiry is permitted to bring before the jury facts and influences bearing on the preparation of a will. *Board of Education v. Phillips,* 103 Ohio St. 622, 626, 134 N.E. 646, 648 (1921). Therefore, the admission of the evidence is defensible. From a practical standpoint, procuring the preparation of such a written instrument would seem to be an eminently sensible method of demonstrating testamentary capacity.

Robert J. Lynn