Recent Decisions

CONFLICT OF LAWS — STATE'S RIGHT TO ENFORCE TAX ASSESSED AGAINST NON-RESIDENT

Under an income tax statute of the State of Minnesota, the Commissioner of Taxation of that state prepared and filed a delinquent return for a non-resident alleged to have received income from business transacted within that state in the year 1940. An action was then brought in the courts of the State of Ohio, the defendant residing therein, for the amount of the tax plus interest. It was not shown that the defendant had been present in Minnesota during the year 1940 or at any time thereafter. The tax was assessed by an administrative official of the State of Minnesota without personal service, and the statute made it prima facie valid and correct. It appeared that the defendant owned no property in that state. *Held,* That part of the statute relating to non-residents was an illegal attempt by the State of Minnesota to extend its sovereignty beyond its boundaries and control and bind the defendant, and, as such, was violative of the due process clause of the Fourteenth Amendment. *Minnesota v. Karp,* 84 Ohio App. 51 (1949).

The question of the validity of state statutes fixing personal liability on non-resident individuals and corporations has been the subject of much litigation. It is well settled that a state may exercise jurisdiction by substituted service over non-resident corporations. *Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co.,* 243 U. S. 93 (1917); *St. Mary's Petroleum Co. v. West Virginia,* 203 U. S. 183 (1906). In a leading case, it was held that the activities of the non-resident corporation within the state established between the state and the corporation sufficient contacts or ties to make it reasonable and just, and in conformity to the due process clause of the Fourteenth Amendment, for the state to enforce an obligation against the corporation arising out of its activities therein, and that service of process upon one of the corporation's agents within the state, and notice sent by registered mail to the corporation at its home office satisfies the requirements of due process. *International Shoe Co. v. State of Washington,* 326 U. S. 310 (1945).

The field of such legislation pertaining to individuals would

seem to be somewhat more unsettled. The majority of the early cases held that statutes providing for jurisdiction over non-resident individuals by service on an agent in charge of the business in that state were invalid. *Brooks v. Dun,* 51 Fed. 183 (C.C.W.D. Tenn. 1892); *Aikman v. Sanderson,* 122 La. 256, 47 So. 600 (1908). The rationale of these cases was that since the state could not exclude the non-resident from doing business in the state, it could not impose any conditions on him if he chose to do business there. The leading case of *Flexner v. Farson,* 248 U. S. 289 (1919), held that the mere transaction of business in a state by a non-resident individual did not imply consent to be bound by the process of its courts through service on an agent.

It has become well settled that a state may make illegal the doing of acts by a non-resident which endanger the safety of its citizens, unless the non-resident consents to the jurisdiction of its courts as to causes of action arising out of acts done within the state. *Hess v. Pawloski,* 274 U. S. 352 (1927); *Kane v. New Jersey,* 242 U. S. 160 (1916). Statutes providing that non-resident motorists using the highways of a state are deemed to have appointed a state official as their agent to receive service of process for causes of action arising out of this use have been sustained as a valid exercise of the state's police power. *Hess v. Pawloski, supra.* A statute providing for service on an agent of a non-resident individual doing business in the state where that business was corporate securities was sustained on the same basis. *Doherty v. Goodman,* 294 U. S. 623 (1935). The principle has been extended by statute to the businesses of selling real estate and insurance by the states of Louisiana and New York, respectively. Thus it would seem that the weight of authority is in favor of the validity of such statutes, and that a statute which attempts to place residents and non-residents on a basis of equality is a reasonable exercise of the police power.

In the case of *Dewey v. Des Moines,* 173 U. S. 193 (1899), a non-resident of Iowa owned real estate therein. An Iowa statute authorized a personal judgment against such an owner after a proper assessment of a tax on the real estate. In setting aside a personal liability imposed on the non-resident by the state court, the court held that as the owner was at all times a non-resident of the State of Iowa and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of the real estate, was violative of due process. Under the rule of this case, it would seem that the principal case was correctly decided.

The rule of *Dewey v. Des Moines, supra,* was modified by the

decision in *Nickey v. Mississippi,* 292 U. S. 393 (1934). In that case the non-resident owner appeared generally to contest an in rem action brought in the courts of Mississippi to satisfy an assessment made without personal service. The court ruled that there is no constitutional command that notice of the assessment of a tax and opportunity to contest it must be given in advance of the assessment, and that the requirements of due process are satisfied if all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable. See also *Illinois v. Wilson-Car Lines, Inc.,* 369 Ill. 304, 16 N. E. 2d 757 (1938). Thus it would seem that if the courts of the State of Ohio have jurisdiction to entertain an action by a sister state to enforce against a non-resident thereof the amount of a tax levied by it, the decision in the principal case might well have gone the other way under the rule of *Nickey v. Mississippi, supra,* and the sound theory that the residents and non-residents of a state should be placed on a basis of equality. While the general rule seems to be that the courts of one state cannot assist another state in enforcing its revenue statutes and will not enter a judgment on a tax claim which has not been previously reduced to a judgment by the levying state, *Holman v. Johnson,* 98 Eng. Rep. 1120 (1775); *Henry v. Sergeant,* 13 N. H. 321 (1843); *Colorado v. Harbeck,* 232 N. Y. 71 (1921); *Moore v. Mitchell,* 30 Fed. 2d 600 (1929), the rule might well be discarded in the light of its origin and present rationale as is pointed out in a decision wherein a court declined to follow it. It is significant that the Supreme Court, although never expressly compelled to decide its validity, has refused to acknowledge its soundness. *Milwaukee County v. M. E. White Co.,* 296 U. S. 268 (1935).

William E. Rance

CONSTITUTIONAL LAW — DETERMINATION OF STATE ACTION

Stuyvesant Town Corporation was organized under the New York Redevelopment Companies Law, Mc. K. Unconsol. Laws, sec. 3401 et. seq. Pursuant to the statute a contract with the above corporation was approved by the City of New York containing a plan for the rehabilitation of a substandard area containing eighteen city blocks by the erection of thirty-five apartment houses. The Corporation was to finance the entire project. The City agreed to condemn the entire area and sell it to Stuyvesant. The contract gave tax exemption for twenty-five years upon the enhanced value created by the project, regulated rents,

prohibited sale and mortgaging of the property, and gave to the city auditing privileges. The contract also required payment to the city, upon dissolution of Stuyvesant, of any earned cash surplus after a payment of a limited return to the Corporation. This action was to enjoin Stuyvesant Town Corporation from refusing plaintiffs any apartments in the project because of race or color. *Held,* Refusal of the Corporation to consider applicants as tenants because of race or color in the housing project was not "state action" so as to violate the equal protection clause of the Fourteenth Amendment. *Dorsey v. Stuyvesant Town Corporation,* 299 N. Y. 535, 87 N. E. 2d 541 (1949).

It is a recognized principle of constitutional law that the first section of the Fourteenth Amendment prohibits only state action as distinguished from conduct of the individual no matter how discriminatory. *Civil Rights Cases,* 109 U. S. 3 (1883); *United States v. Cruikshank,* 92 U. S. 542 (1875); *James v. Bowman,* 190 U. S. 127 (1902). In one of the earliest decisions considering the matter, it was held that a state acted by its legislative, executive, and judicial authority. Ex. parte *Virginia,* 100 U. S. 339 (1880). The doctrine was extended to include state authority in the shape of laws, customs, or judicial or executive proceedings. *Civil Rights Cases,* 109 U. S. 3 (1883).

The concept of state action was expanded to include activities of private persons where their conduct was more than purely private conduct and could be called state action. *Shelley v. Kraemer,* 334 U. S. 1 (1947). The clearest examples of this expansion are those cases in which the courts use the standard tests of the agency-principal relationship to determine if certain activities can be called state action and subject to the Fourteenth Amendment. *Culver v. City of Warren,* 84 Ohio App. 373, 83 N. E. 2d 82 (1948). The case of *Nixon v. Condon,* 286 U. S. 73 (1931), is the foremost authority in this area and is followed by a majority of the courts. In that case, Mr. Justice Cardozo said, "The test is not whether the members . . . are representatives of the State in the strict sense in which an agent is a representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense, that the great restraints of the Constitution set limits to their action." He indicates that persons or associations would be classified as such representatives if they acted in matters of high public interest and were invested with some authority or power by the state, independent of their inherent authority.

Later decisions have required only that a person or association act in a matter of great public interest to be subject to

the Fourteenth Amendment. *Smith v. Allwright,* 321 U. S. 649 (1943); *Rice v. Elmore,* 165 F. 2d 387, *cert. denied,* 333 U. S. 875 (1946). Other courts have said that the use of some form of state authority by a person or association would alone be sufficient. *Shelley v. Kraemer, supra; Tucker v. Texas,* 326 U. S. 517 (1946); *Steele v. Louisville and Nashville R. R. Co.,* 323 U. S. 192 (1944). Financial aid to a library corporation was held to make it an instrumentality of the state, and its discriminatory policy violated the Fourteenth Amendment even though executive control was vested in a self-perpetuating board first named by the donor of the library. *Kerr et. al. v. Enoch Pratt Free Library of Baltimore City,* 149 F. 2d 212 (4th Cir. 1945).

A later refinement laid down by the United States Supreme Court is that when the public has an interest in the acts of private parties the constitutional and statutory rights of both would be balanced to determine if the rights of the latter were circumscribed by those of the former. *Marsh v. Alabama,* 326 U. S. 501 (1946).

The principal case sets forth the criteria for deciding whether a particular course of conduct is state action, as being whether the state has consciously exerted its power in the aid of discrimination, or if persons or associations have acted in a governmental capacity, recognized as such by the state.

The Court of Appeals of New York refused to follow *Nixon v. Condon, supra,* and the line of authority built on it and made an agency-principal relationship between a person and the state a requirement to hold the conduct of such person subject to the Fourteenth Amendment.

The latest Ohio case to treat the subject was *Culver v. City of Warren, supra.* The court, although using the tests of the agency-principal relationship to determine that there was "state action," recognized and approved the more liberal test developed by the cases following *Nixon v. Condon, supra.* The adoption by Ohio of this enlightened view would extend the great protections of the Fourteenth Amendment and is to be strongly commended.

Donald H. Hauser

CONTRACT — INSURANCE POLICY — OFFER TO SETTLE CLAIM.

Plaintiff's truck was covered by a public liability insurance policy issued by defendant company. This policy contained a bodily injury liability limit of $6,000 for each person. The truck was involved in an accident in which a young boy was injured. An offer was made to settle the matter for $1,113 but defendant refused. Two actions, personal injury and loss of services, were

brought to recover $31,000. After the trial commenced, an offer to settle for $4,000 was made and refused. The boy received a judgment for $19,400 but still offered to settle everything for $6,000. This was also refused. There was a remmittitur on appeal and judgment was affirmed for $12,000. Plaintiff settled the amount of the judgment over $6,000, the policy limit, for $3,600 and seeks to recover this amount from defendant. The verdict was for the plaintiff but the trial court sustained a judgment *non obstante veredicto. Held,* reversed and remanded. Although defendant would not be liable for negligence in refusing to settle, there was sufficient indication that defendant failed to act in good faith. *Hart v. Republic Mutual Ins. Co.,* 152 Ohio St. 185, 87 N.E. 2d 347 (1949).

At the present time nearly all public liability insurance policies provide that the indemnity insurer has absolute control of settlements and litigation of claims arising under the policy. The insured is not permitted to settle the claim without the approval of the indemnity company. This was adopted to prevent fraud and collusion between the claimant and the insured. But in return, what protection should the insured have when the insurer fails to accept an offer to compromise within the indemnity limit and the chances are likely that the claimant will have a favorable verdict in excess of the face value of the policy? Several theories have been advanced.

A large majority of the courts, as well as those of Ohio, appear to be consistent in holding that bad faith, fraud, or lack of good faith by the insurer in failing or refusing to compromise a claim subjects it to liability beyond the policy limits. *New Orleans & C. R. Co. v. Maryland Casualty Co.,* 114 La. 153, 38 So. 89 (1905); *Best Building Co. v. Employers' Liability Assur. Corp.,* 247 N.Y. 451, 160 N.E. 911 (1928); *Wisconsin Zinc Co. v. Fidelity & D. Co.,* 162 Wis. 39, 155 N.W. 1081 (1916); *Georgia Casualty Co. v. Cotton Mills Products Co.,* 159 Miss. 396, 132 So. 73 (1931).

It has been held that the contract, *per se,* determines the maximum liability of the insurer. *Rumford Falls Paper Co. v. Fidelity & C. Co.,* 92 Me. 574, 43 Atl. 503 (1893); dissent in *Hart v. Republic Mutual Ins. Co., supra.* Under this theory the parties may insert any reasonable stipulations and conditions in the contract provided they are not contrary to public policy. Thus the insurer's option either to settle or to defend on behalf of the insured is a legal right and it can not be subjected to excessive liability merely by exercising its privilege of refusing to settle. Some policies expressly provide that if the insurer had an opportunity, but refused, to settle a claim within the limits of the policy, it shall then protect the insured from any judgment for

a larger amount, also limited. *Georgia Life Ins. Co. v. Mississippi Cent. R. Co.*, 116 Miss. 114, 76 So. 646 (1917).

Quaere: must the insurer exercise reasonable care in determining whether to accept an offer of settlement under pain of subjecting itself to liability for negligence? Some of the more liberal courts would answer this in the affirmative. *Cavanaugh v. General Accident F. & L. Assur. Corp.*, 79 N.H. 186, 106 Atl. 604 (1919); *Anderson v. Southern Surety Co.*, 107 Kan. 375, 191 Pac. 583 (1920); *Hilker v. Western Auto Ins. Co.*, 204 Wis. 1, 231 N.W. 257 (1930). In the *Cavanaugh* case, *supra*, the standard of reasonable care was imposed on the insurer in determining whether or not to accept an offer to compromise before suit. The court took the view that when the insurer assumed control of the claim a duty arose to do what the average man would do in a similar situation. Under similar circumstances where the insurer had exclusive control of the suit or settlement, the agency theory was adopted by the court in *Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W. 2d 544 (Tex. Comm. App. 1929). This court said that the insurer assumed the responsibility to act as the agent of the insured and as such agent, in determining whether an offer of settlement should be accepted, "it ought to be held to that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business." 15 S.W. 2d 544, 547.

To impose a liability for negligence would appear to place an undue burden on the insurance companies. Liability for negligence in refusing to settle presupposes liability of the insured and precludes any supposition of non-liability. Therefore, every claim presented would have to be thoroughly investigated by the insurer who would have to determine whether the insured is liable to the claimant and for what amount. Every judgment adverse to the insured in excess of the policy limits would subject the insurer to excess liability for mere negligence although the insurer acted in good faith. Hindsight would necessarily be applied and what was reasonable at the time of the proffered settlement might become unreasonable in the light of the subsequent judgment. Then too, if recovery for negligence is permitted, there will undoubtedly be an increase in the cost of liability insurance. In view of these arguments it would seem that the court in the principal case reached a sound result.

Robert W. Phillips

CRIMINAL LAW — USE OF DIRECTED VERDICT

Defendant and his wife were separated; she was employed in another city as a waitress in a bar and grill. Defendant visited her

periodically and on one of these occasions learned of her infidelity to him. He went to his home, secured a revolver and shells, and returned the following day. Defendant sought to persuade his wife to return to him but she refused. There was some testimony that she intended to meet another man after work and revealed this to her husband. He then fired six shots from the revolver, killing her instantly. To an indictment for murder in the first degree, defendant pleaded not guilty. During the trial, before a jury, defendant admitted shooting his wife, but denied having any intent to kill her when he obtained the revolver. At the conclusion of the trial the court charged the jury that under the admissions made by the defendant the evidence showed that homicide had been committed as a matter of law and that it was for the jury to determine the degree of the crime. The court submitted to the jury forms of verdict for murder in the first degree, murder in the second degree and manslaughter. It refused to submit a form for a verdict of not guilty, and stated that its action was predicated on the authority of *Ross v. State,* 22 Ohio App. 304, 153 N.E. 865 (1926). After a short deliberation the jury asked if not guilty was a possible verdict, to which the court replied that it was not. The jury returned a verdict of guilty of manslaughter. No appeal was taken by the defendant. *State v. Clay Patterson, Common Pleas Court of Franklin County, Ohio,* No. 30181, June 23, 1949, (Unreported).

It is a general rule that in criminal cases, where the defendant pleads not guilty, the court has no power to direct a verdict of guilty, even when the incriminating evidence is conclusive and uncontradicted. *Fouts v. State,* 113 Ohio St. 450, 149 N. E. 551 (1925). It has been held reversible error for the trial court to indicate to the jury in any manner what its opinion may be on the facts or to in any way attempt to coerce the jury in arriving at a verdict. *Zimmerman v. State,* 42 Ohio App. 407, 182 N.E. 354 (1932). In a prosecution for promoting a game of chance, the court improperly directed a verdict against defendant although he in effect admitted the elements of the crime charged. *State v. Spivak,* 28 Ohio L. Abs. 446 (1938).

The accepted reason for this rule is that in a criminal trial the court cannot set aside a verdict of acquittal. Hence, to permit it to direct a verdict of guilty, would be to allow it to do indirectly what it has no power to do directly. Therefore, the jury can not be directed to render a verdict of guilty, no matter how convincing the evidence may be, even where the facts are admitted or settled beyond any possibility of dispute. UNDERHILL, CRIMINAL EVIDENCE §483 (4th ed. 1935).

Should the court attempt to set aside a verdict of acquittal in a criminal case and order the case retried its action would be in

violation of the double jeopardy provision of Article I, Section 10 of the Ohio Constitution. *State v. Budd,* 65 Ohio St. 1, 60 N.E., 988 (1901).

The submission of forms of verdict to the jury by the court in criminal cases has been a long accepted practice in Ohio. *Mimms v. State,* 16 Ohio St. 221 (1865). Two issues involved in the instant case are whether the trial court's action constituted a directed verdict of guilty in a criminal case, and if so, whether or not such practice is justifiable.

Failure to submit a form of not guilty was held not error in a prosecution for first degree murder in which the defendant pleaded not guilty. *State v. Wells,* 134 Ohio St. 404, 17 N.E. 2d 658 (1938). In that case, however, counsel for the defendant in his argument to the jury entered, for the purpose of the record, a plea of guilty. The Supreme Court of Ohio held that the trial court's action did not constitute a direction of a verdict of guilty since, under the unusual circumstances of the case, the plea of guilty was made during the trial thus eliminating the necessity for the court to submit a not guilty form.

Despite the general rule, the action of the court in the principal case is not without precedent in Ohio. The case of *Ross v. State, supra,* on which the court relied in the principal case, arose out of an indictment for murder in the first degree while attempting to perpetrate a robbery. In the *Ross* case, the trial court refused to submit to the jury a form of verdict of not guilty. On appeal the court of appeals said, "The written confessions clearly show, and the testimony of the defendant himself bears out, a conclusion beyond a reasonable doubt that an unlawful homicide was committed by this defendant, and the court, in the form of a verdict given by the jury, covered the essentials necessary for the rendition of a verdict in accordance with the law and the evidence."

Another Ohio court of appeals reached a similar result in a case involving the manufacture of intoxicants contrary to law. Defendant having voluntarily testified and admitted every material element of the crime charged in the indictment, the court directed the jury to return a verdict of guilty. *Lightfritz v. State,* 7 Ohio L. Abs. 197 (1929).

The prevailing federal rule is that in a criminal case the court cannot direct a verdict of guilty even where the facts are admitted beyond dispute, and the question of guilt or innocence depends wholly upon a question of law which the court must determine. *United States v. Taylor,* 11 Fed. 470 (C. C. D. Kan. 1882). [In another case, the court disapproved of the directed verdict of guilty against Susan B. Anthony who was charged with a violation of the suffrage laws. *United States v. Anthony,* 11 Blatchf. 200, 24 Fed. Cas. 829, No. 14459 (N.D.N.Y. 1873).] The judge is without power

to charge as matter of law that any allegation is proved, even where the evidence is clear and uncontradicted. *Konda v. United States*, 166 Fed. 91 (7th Cir. 1908); *Blair et al v. United States*, 241 Fed. 217 (9th Cir. 1917). See also the exhaustive historical background in *Sparf and Hansen v. United States*, 156 U.S. 51 (1895).

It would seem that the limit to which the court can go is expressed in a 5-4 majority opinion of Mr. Justice Holmes in which it is said that in a criminal case, when undisputed facts, including testimony of the defendant, clearly establish the offense charged, the judge may say so to the jury, tell them there is no issue of fact for their determination and instruct them that, while they cannot be constrained to return a verdict of guilty, it is their duty to do so under their obligations as jurors. *Horning v. District of Columbia*, 254 U.S. 135 (1920).

The states as a whole may be said to take the position that it is error for the court to direct a verdict of guilty in a criminal case in which the defendant pleads not guilty. The cases are discussed in 72 A.L.R. 899 (1930); 53 AM. JUR. Trial § 407; 22 L.R.A. (n.s.) 305. To this general rule there are, however, exceptions which must be noted.

The Michigan courts distinguish between an instruction that the defendant is to be found guilty and the direction of a verdict of guilty. When the facts are undisputed the cases hold that the trial court may instruct the jury that it is their *duty* to bring in a verdict of guilty against the defendant. *People v. Newman*, 85 Mich. 98, 48 N.W. 290 (1891); *People v. Lathers*, 228 Mich. 332, 197 N.W. 366 (1924). Nevertheless the court cannot coerce the jury into returning a verdict of guilty. *People v. Warren*, 122 Mich. 504, 81 N.W. 360 (1899); *People v. Remus*, 135 Mich. 629, 98 N.W. 397 (1904); *People v. Curry*, 163 Mich. 180, 128 N.W. 213 (1910). A more recent case seems to develop a rule consisting of a combination of these two groups of cases. *People v. Clark*, 295 Mich. 704, 295 N.W. 370 (1940).

In a case involving a liquor law violation, an Arkansas court has stated that the trial court may direct the jury to return a verdict of guilty where the evidence is consistent and reasonable, the witnesses unimpeached, and the evidence such that it would be unreasonable for the jury to find the defendant not guilty. *Paxton v. State*, 114 Ark. 393, 170 S.W. 80 (1914). One explanation for a directed verdict of guilty under a charge of a misdemeanor is that in cases where the punishment is by fine only, the court, having the power to set aside a verdict of acquittal, also has the power to direct a verdict of guilty where the facts are undisputed and guilt is the only inference that can be legally drawn from them. *Huff v. State*, 164 Ark. 211, 261 S.W. 654 (1924); *Rhodes v. Hope*, 171 Ark.

754, 286 S.W. 877 (1926). These cases rest on the proposition that where the offense is a misdemeanor punishable by fine only, a second trial after a verdict of acquittal by a jury does not violate the double jeopardy provisions of the Arkansas Constitution. *Jones v. State,* 15 Ark. 261 (1854); *Taylor v. State,* 36 Ark. 84 (1880).

The Supreme Judical Court of Massachusetts has said that in a case submitted on agreed facts, where no question of law was involved, it was not error for the court to direct a verdict of guilty. *Commonwealth v. Gardner,* 241 Mass. 86, 134 N.E. 638 (1924); *Commonwealth v. Ross,* 248 Mass. 15, 142 N.E. 791 (1924).

Despite these considered exceptions to the majority rule, it would appear to be established that in the final analysis of a criminal case, in which the plea is not guilty, it is within the province of the jury to determine the guilt or innocence of the accused, and this is particularly true where the accused is charged with a capital offense. Whether or not such a rule insures a logical result is open to question. Assuming a case in which a defendant is charged with first degree murder, he will in all probability plead not guilty, although he may himself concede he is guilty of manslaughter. In such a case, even though the evidence is clear and uncontradicted, the jury, acting from mere whim or caprice in disregard of its moral duty, may return a verdict of not guilty and enable the defendant to escape unpunished. Surely this is not a desirable result and it is fortunate that such cases are admittedly rare. In the principal case there is no suggestion that in the final result justice was not done. The action taken there, however, apparently stems from a determination to guard against the escape of the guilty. In Ohio we have no recent final determination of this question, but where a choice must be made between protecting against the conviction of the innocent and guarding against the escape of the guilty it seems likely that most courts in other jurisdictions will choose the former in preference to the latter.

Allen H. Bechtel

Domestic Relations — Jurisdiction to Grant Custody When Divorce is Denied

Plaintiff, in the prayer of her petition for divorce, asked for custody of her children, divorce, and *general equitable relief.* The defendant filed a cross petition praying also for divorce, the custody of the children and *such other and further equitable relief as seemed just and proper.* The court denied both prayers for divorce, granted the plaintiff custody of the children and ordered the defendant to contribute to the support of the children. No appeal was taken from this decision but in certiorari proceedings prosecuted by the defendant as petitioner, his sole contention was that the court was

without jurisdiction to make a decree concerning custody of the children because a divorce was denied both parties. The Supreme Court of Iowa sustained defendant's writ in a 5-3 decision, one justice not sitting. *Johnson v. Levis,* 38 N.W. 2d 115 (Iowa 1949).

It has been held many times in the past that a court cannot issue a decree awarding custody of children if it does not in the same action grant a divorce. The argument supporting this view is that the jurisdiction of the court is purely statutory, and such relief cannot be given unless so provided in the statute. Courts so holding, however, do not deny their jurisdiction to fix custody in a subsequent proceeding by habeas corpus or in a subsequent suit in equity. 2 NELSON, DIVORCE AND ANNULMENT § 15.34 (2d ed. 1945). Thus two separate actions are required, usually before the same tribunal which could just as easily have settled all of the issues in the first instance. As a consequence, the modern trend is to grant the custody of the children to one of the parties even though a *divorce is denied.* These decisions rest, however, upon a statute expressly conferring such power, or where the statute does not so provide, upon general equity powers of the court. 2 SCHOULER, MARRIAGE AND DIVORCE § 1882 (6th ed. 1921). One author finds this changing viewpoint exemplified by statutes relating to the care, custody and maintenance of children of parents living in a state of separation without divorce. His research discloses that about 36 states have such express statutes. 2 VERNIER, DIVORCE AND SEPARATION § 142 (1932).

In the principal case the majority found that "the conclusion is inescapable" that the legislature intended no adjudication of custodial rights in a divorce proceeding in the absence of a legal separation, relying on Iowa Code Section 598.14 (1946) which provides: "When a divorce is decreed, the court may make such order in relation to children, property, parties, and the maintenance of the parties as shall be right." They found the implication to be certain when read in connection with Iowa Code Section 668.1 (1946) which says: "Parents are the natural guardians of the persons of their minor children and equally entitled to their care and custody."

The court's conclusions in the principal case do not seem to follow necessarily; nor do previous decisions of the Iowa Supreme Court necessarily dictate this result. *Goecker v. Goecker,* 227 Iowa 697, 288 N.W. 884 (1939); *Mollring v. Mollring,* 184 Iowa 464, 167 N. W. 524 (1918); *Porter v. Porter,* 190 Iowa 1126, 181 N.W. 393 (1921); *Garrett v. Garrett,* 114 Iowa 439, 87 N.W. 282 (1901); *State v. Kirkpatrick,* 54 Iowa 373, 6 N.W. 588 (1880); nor have other jurisdictions found this holding to be the sounder one: *Davis v. Davis,* 194 Miss. 343, 12 So. 2d 435 (1943); *Power v. Power,* 65 N.J. Eq. 93, 55 Atl. 111 (1903).

Justice Garfield, dissenting in the principal case, queried what possible difference it could make in the maintenance of the home or family whether the issue of custody was determined by respondent as it was here, in a proceeding in which divorce was asked but denied, or in habeas corpus where no divorce was asked. It was his opinion that, at best, the question involved was merely one of procedure and not, as the majority held, one of power or jurisdiction in the court.

The majority, in distinguishing an earlier decision, *Mollring v. Mollring, supra,* seem to take the interesting position that if the issue of custody had been raised independently and not incidentally to the divorce suit, then there would have been no objection to the district court's jurisdiction. However, in *Mollring v. Mollring* the court said that plaintiff's paraphrasing of this statute, now Iowa Code Section 598.14 (1946), to mean that such orders may be made only if a divorce is decreed cannot be sustained. The court, in this case, correctly refused to indulge in the useless act of declaring that it would not pass upon the matter, knowing full well that it would still have the same controversy to settle after the litigants had worked their way back into the court through other channels! It then went on to point out that though the district court while entertaining a divorce suit may thus be limited, it does not follow that the court had no inherent equitable power to deal with the custody of infants.

The applicable Mississippi code provision, Miss. Code Section 1421 (1930), is quite similar to that of the Iowa code. The Mississippi Supreme Court, rather than construing this statute to be a restriction on the divorce courts, in fact considers it as enlarging the jurisdiction of the chancery court. *Davis v. Davis, supra.*

The Ohio code provision, Ohio General Code Section 8032 provides in part, "When husband and wife are *living separate and apart from each other* or are divorced and the question as to care, custody, and control of the offspring of their marriage is brought before a court of competent jurisdiction in this state, they shall stand upon an equality as to care, custody, and control of such offspring, so far as it relates to their being either father or mother thereof." This section has been the basis for decisions in Ohio Courts of Appeal which follow the more consonant view of allowing the divorce courts jurisdiction to settle questions of custody of children once they have been brought before the tribunal and fully litigated. *Mathews v. Mathews,* 37 Ohio L. Abs. 283, 46 N.E. 2d 833 (1940); *South v. South,* 5 Ohio L. Abs. 594 (1927); *Patterson v. Patterson,* 12 Ohio N.P. (N.S.) 601, (1912); *Cadwell v. Cadwell,* 32 Ohio C.D. 266 (1911).

In a code state such as Iowa, where technical forms of action

have been abolished, Iowa Rules of Civil Procedure, Division IV, section 67, and where "A single plaintiff may join in the same petition as many causes of action, legal or equitable, independent or alternative, as he may have against a single defendant.", Iowa Rules of Civil Procedure, Division II C. Rule 22, there seems to be slight justification for a result which causes circuity of action, needless additional expense to the parties, and inconvenience to the courts, without at the same time safeguarding any substantial rights.

James H. Tilberry

HABEAS CORPUS — FEDERAL TERRITORIAL JURISDICTION

Petitioner, a citizen of the United States, arrested in Tokyo, Japan, on a criminal charge, tried in that country by an American general provost court, and sentenced to imprisonment, seeks a writ of habeas corpus to be directed to the Secretary of Defense, et al. *Held,* Motion to dismiss for lack of jurisdiction denied. In re *Bush,* 84 F. Supp. 873 (D.C. 1949).

According to a federal jurisdictional statute, the judges of the federal courts have power, within their respective jurisdictions, to grant writs of habeas corpus. Rev. Stat. 752 (1875), 28 U.S.C. § 452 (1946), now 28 U.S.C. § 2241 (1948). "Within their respective jurisdiction" has reference to the territorial jurisdiction, Ex parte *Kenyon,* 5 Dill. 385, 14 Fed. Cas 452, No. 7,720 (C.C. Ark. 1878), and the power to issue writs of habeas corpus is expressly restricted to the territorial jurisdiction of the court to which the application is made. Ex parte *Gouyet,* 175 Fed. 230 (D.C. Mont. 1909). In the federal courts a prisoner must be detained within the territorial jurisdiction of the court from which he asks relief by habeas corpus. *Ahrens v. Clark,* 335 U.S. 188 (1947). To what forum, then, if any, could Americans residing or stationed outside the United States or its organized territories present petitions for habeas corpus? Not to the Supreme Court, for it has denied that it has jurisdiction to issue a writ upon petition of a person confined outside the United States. Ex parte *Betz,* 329 U.S. 672 (1946).

This statutory jurisdictional omission had been a topic of little discussion prior to World War II. A flood of litigation over official action by the Federal Government in areas outside of the United States has, however, focused attention upon the problem of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights. This question is reserved in *Ahrens v. Clark,* 335 U.S. 188, 192 (1947).

That federal jurisdiction be co-extensive with governmental

action by United State officials cannot be denied, for otherwise, such action beyond the jurisdictional limitation would be immune from judical power and obviate the necessity for compliance with the Constitution.

A statutory defect led to the problem; one cure may well have been by appropriate legislation. Congress failed to act, but not the judiciary. When a person is deprived of his liberty by the act of an official of the United States outside the territorial jurisdiction of any district court of the United States, that person's petition for a writ of habeas corpus will lie in the district court which has territorial jurisdiction over the officials who have directive power over the immediate jailer. *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949). To be distinguished are those cases wherein the court determined it had no jurisdiction, not for the reason that original jurisdiction was lacking, but for the reason that a foreign tribunal could not be reviewed. *Flick v. Johnson*, 174 F.2d 283 (D.C. Cir. 1949).

In the principal case, after deciding that the American general provost court is a tribunal of the United States to which an international commission has ceded criminal jurisdiction, the court was bound by the ruling in the *Eisentrager* case, which ruling, based not on statutes and cases, but instead on fundamental principles, seems to be the practical way out of this jurisdictional difficulty.

Richard M. Christiansen

MANDAMUS — CONTROL OF JUDICIAL DISCRETION

Relator was the unsuccessful defendant in a partition suit instituted by her husband to sell a house which they owned jointly. The decision against the wife was affirmed by the court of appeals. One month after the affirmance of the trial court's order of sale the wife began an action for divorce and alimony in which she asked that the court issue a temporary restraining order under Ohio General Code Section 11996 (1938) to prevent the husband from selling the house. Upon the court's refusal to enjoin the husband, the wife filed a petition in the Ohio Supreme Court for a writ of mandamus praying that the trial judge be compelled to issue the temporary restraining order, and also praying for general relief. *Held*, (4-3) writ denied. The entire court agreed that to compel the issuance of the temporary restraining order would be to control the discretion of the respondent judge in violation of Ohio General Code Section 12285 (1938) and counter to the accepted rule. *State* ex rel. *Shively v. Nicholas*, 151 Ohio St. 179, 84 N.E. 2d 918 (1949).

Ohio General Code Section 12285 (1938) declares: "The writ may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion." This is a restatement of the settled common law rule. Where the issue of the writ of mandamus would result in the control of judicial discretion it is everywhere denied. It is equally well settled that the writ may be used to compel the judge of an inferior court to exercise the discretion with which he is endowed. *Matter of Samuel Kazer,* 5 Ohio 545 (1832); *State* ex rel. *Smith v. Smith,* 69 Ohio St. 196; 68 N.E. 1044 (1903).

The writ of mandamus properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought to do so, or where, having obtained jurisdiction in a cause, it refuses to proceed in due exercise thereof. Ex parte *Parker,* 120 U.S. 737 (1887).

The respondent, in the principal case, denied the temporary restraining order partly on the ground that the court of appeals had "already passed upon the merits of the case and disposed of the issues before said parties." The dissenting judges took the view that the respondent had thus refused to exercise his discretion on the basis of a mistaken legal assumption that he had no power to hear the supposedly already-adjudicated matters. Actually, the issues which the relator sought to raise in the divorce action as grounds for her request for a temporary restraining order under Ohio General Code Section 11996 (1938) had been offered by her as defendant in the partition suit, but had been struck from the pleadings as "irrelevant, immaterial, and not any defense," and accordingly had not been passed upon. The dissenting opinion urged that mandamus should issue under respondent's prayer for general relief, not to compel the issuance of the temporary restraining order, but to order the respondent judge to pass on the issues which he erroneously believed he was without power to hear.

If an inferior tribunal has erroneously decided that it is without jurisdiction to hear a case properly before it most courts will issue mandamus ordering the inferior tribunal to proceed with the action. *Matter of W. P. Connaway,* 178 U. S. 421 (1900); *Taylor v. Montcalm,* 122 Mich. 692, 81 N.W. 965 (1900); *State* ex rel. *Smith v Smith, supra; Runk v. Thomas,* 200 N. Y. 447, 94 N.E. 363 (1911). A few jurisdictions will not compel a lower court to proceed when it has decided, although erroneously, that it has no jurisdiction over the case before it, and others hold that, if the question of jurisdiction before the inferior court is one of fact, mandamus will not lie, *Speckert v. Ray,* 166 Ky. 622,

179 S.W. 592 (1915); but if it is one of law, erroneously decided, mandamus will be issued. *Gilbert v. Shaver,* 91 Ark. 231, 120 S.W. 833 (1900). Although the writ may issue to compel the lower court to exercise its discretion, the usual statement is that it will not be used to compel the exercise of discretion in a specific manner, nor to revise a judicial act once it has been taken. *State* ex rel. *Keller v. Waite,* 70 Ohio St. 149, 71 N.E. 286 (1904). Accordingly the writ has been denied where the relator asked that the respondent judge be ordered to sustain a motion, *State* ex rel. *Mann v. Floyd,* 138 Ohio St. 253, 34 N.E. 2d 196 (1941); or to change the date on an order of probate, *State* ex rel. *Frye v. Mac Conkey,* 136 Ohio St. 462, 26 N.E. 2d 457 (1940). However, mandamus has been used to compel a court to act in a particular way when its refusal so to act was based on the assumption that it lacked jurisdiction and that assumption was erroneous. Thus, mandamus has issued to compel a lower court to hear a motion for a new trial, *State* ex rel. *Hiett v. Com. Pl. Court,* 102 Ohio St. 40, 130 N.E. 36 (1921); to sign a bill of exceptions, *State* ex rel. *Otenburger v. Hawes,* 43 Ohio St. 16, 1 N.E. 1 (1885); and to "accept surety," *State* ex rel. *Tod v. Com. Pl. Court,* 15 Ohio St. 377 (1864).

The use of mandamus is limited to circumstances in which there is no specific and adequate remedy by appeal or error proceedings. *State* ex rel. *v. Village of Botkin,* 141 Ohio St. 437, 48 N.E. 2d 865 (1943); In re *Morrison,* 147 U.S. 14, (1892); *Hitchcock v. Wayne,* 144 Mich. 362, 107 N.W. 1123 (1906). However, mandamus has been allowed even though review or appeal was available, where prompt action was necessary to avoid hardship and appeal was not sufficiently speedy. *Matter of Skinner,* 265 U.S. 86 (1924); *Hill v. Superior Court,* 15 Cal. App. 307, 114 Pac. 805 (1911).

If, in the principal case, the respondent judge's denial of the relator's request for a temporary restraining order was for erroneous reasons, it is not unlike a dismissal for erroneous reasons. Each appears to be a judicial act; each is done on a mistaken assumption that the court is without jurisdiction to hear the cause. True, the dismissal for erroneously assumed want of jurisdiction is said to be a preliminary matter, while the respondent's refusal in the instant case occurred after the court had assumed jurisdiction over the divorce action; yet in each instance the purpose of the mandate would be to compel the inferior court to exercise its discretion and to take jurisdiction which it believes itself not to have.

The federal courts have adopted the view that mandamus will not lie unless the inferior court refused *ab initio* to take juris-

diction, but there is a weighty contention that the federal decisions on this issue are induced by statutes. See collection of cases in 4 A. L. R. 592 (1919).

The dissenters were of the opinion that an adequate remedy in the ordinary course of the law was not available in the principal case. No final order had been given in the divorce action from which the relator could have appealed, and to maintain the status quo during the divorce action would appear necessary if the relator's rights in her home were to be protected.

The rule stated by the majority opinion in the principal case cannot be controverted. Mandamus will not be used to control the discretion of an inferior court. It would appear, however, that when the facts indicate that a tribunal has refused some course of action solely because that court mistakenly believes that it has no jurisdiction to hear the reasons supporting a request for that action, it should be compelled by a writ of mandamus to hear those reasons.

Joseph S. Wise

NEGOTIABLE INSTRUMENTS — RIGHTS OF HOLDER-PAYEE AGAINST THE DRAWEE.

An agent of the payee received from the drawer six checks drawn on the defendant-bank. He indorsed the checks without authority, presented them to defendant-bank, received payment, and absconded. Plaintiff-payee sued the drawee-bank alleging conversion of the checks by the drawee-bank. *Held,* Payee has no cause of action in conversion. *Strickland Transportation Company v. First State Bank of Memphis,* 147 Tex. 193, 214 S.W. 2d 934 (1948).

Prior to the adoption of the Negotiable Instruments Law, the payment of a check on an unauthorized or forged indorsement, and the charging of the drawer's account did not constitute an acceptance which would make the drawee bank liable to the payee. *First National Bank v. Whitman,* 94 U. S. 343 (1876); *Houston Grocer Co. v. Farmer's Bank,* 71 Mo. App. 132 (1897); *Sims v. Bank,* 98 Ark. 1, 135 S. W. 356 (1911); *Rauch v. Bank,* 143 Ill. App. 625 (1908). *Contra: Pickle v. Muse,* 88 Tenn. 380, 12 S.W. 919 (1890); *McFadden v. Follrath,* 114 Minn. 85, 130 N.W. 542 (1911).

Whatever doubt there may be left as to the soundness of the conclusion reached in the cases last cited would seem to be removed by the Uniform Negotiable Instruments Law, Section 132, which is applicable to bills, and Section 185, which applies to checks, provide that an acceptance "must be in writing and

signed by the drawee." Accordingly, when these operative facts have not been existent (principal case), the payee has failed to recover on an acceptance theory. *Blacker & Shepard Co. v. Granite Trust Co.,* 284 Mass. 9, 187 N.E. 53 (1933); *Lone Star Trucking Co. v. City National Bank of Commerce,* 240 S.W. 1000 (Tex. Civ. App. 1922); *State Bank of Chicago v. Mid City Trust & Savings Bank,* 296 Ill. 599, 129 N.E. 498 (1920). *Contra: Chamberlin Co. v. Bank of Pleasantown,* 98 Kan. 611, 160 Pac. 1138 (1916) (decided under the Negotiable Instruments Law by applying Section 137.) The case last cited is commented on adversely in Note, 38 YALE L. J. 1143 (1928), and there seem to be no other decisions which hold that mere payment and charge-off can be a "constructive" acceptance under the Negotiable Instruments Law. *But see, Bull v. Novice State Bank,* 250 S.W. 232, 235 (Tex. Civ. App. 1923). There is, of course, a possibility of an acceptance under Section 137 in cases of actual destruction or detention.

Some courts have permitted recovery on the theory that the holder was an assignee of the claim of the drawer against the drawee. This is sound under Section 189 provided there is evidence of an intention of the drawer to assign other than the fact that the check was drawn and delivered, because under Section 189 the drawing of a check is not "of itself" an assignment. *Dolph v. Cross,* 153 Iowa 289, 133 N.W. 669 (1911); *Greunther v. Bank of Monroe,* 90 Neb. 280, 133 N.W. 902 (1911).

Sometimes it is claimed that the payee can recover from the drawee bank, after the improper payment, on the theory of money had and received to the use of the holder. There was a dictum to this effect in *Bank of the Republic v. Millard,* 10 Wall. 152 (U. S. 1869), and this dictum has been applied and followed. *Seventh National Bank v. Cook,* 73 Pa. St. 483 (1873); *Van Libber v. Louisiana Bank,* 14 La. Ann. 481 (1859), since overruled by In re *M. Feitel House Wrecking Co.,* 159 La. 752, 106 So. 292 (1925). But the majority of cases are opposed to recovery on this ground. *Lonier v. State Savings Bank,* 149 Mich. 483, 112 N.W. 1119 (1907); *Baltimore & Ohio Railroad v. First National Bank,* 102 Va. 753, 47 S.E. 837 (1904); *Clark & Co. v. Savings Bank,* 31 Pa. Super. 647 (1906). See BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES § 146 (1943), where the soundness of this theory is questioned.

While it is well settled that in these cases of wrongful payment the holder-payee has no remedy against the drawee as upon a contract in fact, it is equally well settled that the holder may have a remedy *ex delicto.* The action is one in the nature of trover for conversion of the instrument. *Blacker &*

Shephard Co. v. Granite Trust Co., supra; Louisville & N. R. Co. v. Citizens' & People's National Bank of Pensacola, 74 Fla. 385, 77 So. 104 (1917); *Kentucky Title Savings Bank & Trust Co. v. Dunavan,* 205 Ky. 801, 266 S.W. 667 (1924); *Hartford Accident & Indemnity Co. v. Bear Butte Valley Bank,* 63 S.D. 262, 257 N.W. 642 (1934); *Yarborough v. People's National Bank,* 162 S.C. 332, 160 S.E. 844 (1931). See Aigler, *Rights of Holder of Bill of Exchange Against the Drawee,* 38 HARV. L. REV. 857 (1925); Notes, 69 A. L. R. 1076 (1930), 137 A. L. R. 874 (1942). *Contra: Gordon Fireworks Co. v. Capital National Bank,* 236 Mich. 271, 210 N.W. 263 (1926). Disapproved in Note, 25 MICH. L. REV. 454 (1926). As was stated in *State v. First National Bank of Albuquerque,* 38 N.M. 225, 30 P. 2d 728, 732 (1934), "Recovery on facts amounting to a conversion may not correctly be hypothesized on the idea that the bank has misappropriated any *moneys or funds* belonging to the payee. Were such a condition of recovery, properly, he should fail. It is the conversion by the bank of the payee's property, *the check,* which gives rise to the action." (Emphasis supplied). In the *Gordon* case, *supra,* the court replied to the plaintiff's argument that the declaration had a count for conversion by stating, "The bank did not convert *funds* of plaintiff." (Emphasis supplied.)

The measure of damages is prima facie the face value of the instrument. *Bentley, Murray & Co. v. La Salle Trust & Savings Bank,* 197 Ill. App. 322 (1916); BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 189 (7th ed. Beutel, 1948). And in a number of cases, the payee has been permitted to waive the tort and sue in assumpsit. *James v. Union National Bank,* 238 Ill. App. 159 (1925); *Farmers & People's Bank,* 100 Tenn. 187, 47 S.W. 234 (1897).

In several cases, the courts, without indicating the theory or discussing the form of action, have held that the drawee-bank is liable to the true payee. *Robinson v. Bank of Winslow,* 42 Ind. App. 350, 85 N.E. 793 (1908); *Deering & Co. v. Kelso,* 74 Minn. 41, 76 N.W. 792 (1898), and cases cited Note, 14 A. L. R. 764, 768 (1921).

In the principal case the court felt bound by *Fidelity Deposit Co. v. Fort Worth National Bank,* 65 S.W. 2d 276 (Tex. Com. of App., 1933), an earlier Texas case denying recovery to the payee on a conversion theory. Prior to the *Fidelity Deposit Co.* case, *supra,* the law in Texas gave the payee a cause of action on this theory. *City National Bank & Trust Co. v. Pyramid Asbestos & Roofing Co.,* 39 S.W. 2d 1101 (Tex. Civ. App., 1931); *Pierce Petroleum Co. v. Guaranty Bond State Bank,* 22 S.W. 2d 520 (Tex. Civ. App., 1929). The *Fidelity Deposit Co.* case, *supra,* was based

on Section 189 of the Negotiable Instruments Law. Since the bank has not accepted the check, there is no assignment of the funds of the drawer, and therefore the payee has no right or interest in the funds on which to base a cause of action against the drawee bank in conversion.

But it is submitted that the handling of the instrument itself in a manner inconsistent with the payee's title thereto, is a conversion on which to base the recovery. *Blacker & Shephard Co. v. Granite Trust Co., supra; State v. First National Bank of Albuquerque, supra.*

It also has been pointed out that the result in the principal case has the effect of causing a circuity of action, since the drawer of the check may require the bank to restore its credit, BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES § 142 (1943), and the payee still has his right of action on the check against the drawer, Note, 26 COL. L. REV. 113 (1926). It would seem desirable, then, to allow the payee to recover directly against the bank.

In Ohio, it appears likely, that an attempted recovery in conversion would be denied. The Supreme Court in *The Elyria Savings & Banking Co. v. Walker Bin Co.*, 92 Ohio St. 406, 111 N.E. 147 (1915) said, "We are of the opinion that when the legislature enacted Section 8294 [Section 189, Uniform Negotiable Instruments Law] it intended to cover the subject of the liability of a bank to the holder of a check. It prescribed when and when only there is liability to the holder. In absence of the conditions therein prescribed no right of action exists in favor of the holder." Although the right of recovery in conversion was not discussed, the language of the opinion is sufficiently sweeping, as indicated above, to be taken as precluding a recovery on that ground. Until the Ohio Supreme Court is called upon to render a decision in a case wherein there is found an allegation for conversion of the instrument, the law in Ohio will remain in some doubt.

George W. Stuhldreher

TAXES, INHERITANCE — ADOPTED CHILD.

Testator died survived by a daughter and a son, which son had an adopted son who is the present plaintiff. The testator's will left the estate to the Cleveland Trust Company as trustee of a trust *inter vivos*, the corpus to be treated as if composed of two equal shares, one for the benefit of each child in his respective lifetime. The trust agreement further provided that upon the death of the children the trust should pass to the then living

lineal descendants of the children, including adopted children specifically. The probate court found that both children would die without issue, and that both would be survived by the adopted child. The court then held the plaintiff did not come under the second classification of Ohio General Code Section 5334 (tax statute) as a lineal descendant and taxed the estate in its entirety. *Held,* reversed. The plaintiff is a "lineal descendant" of the testator, capable of inheriting through, as well as from, the adopting parent, and entitled to $3500 exemption of class two of Ohio General Code Section 5334. In re *Estate of Friedman: Cleveland Trust Co. v State,* 55 Ohio L. Abs. 22 (1949).

In reaching this conclusion the court stated the tax statute and the adoption statute, Ohio General Code Section 10512-23, are in *pari materia.* Laws *pari materia,* or concerning the same subject matter, are to be construed in reference to each other. BOUVIER'S LAW DICTIONARY 2454 (1946). The court further stated that the effect of Ohio General Code Section 10512-19 (now Code Section 10512-23), passed in 1932, was to give an adopted child a status not held prior to the enactment of the amendment. *Flynn v. Bredbeck,* 147 Ohio St. 49, 68 N.E. 2d 75 (1946); *White v. Meyer,* 66 Ohio App. 549, 37 N.E. 2d 546 (1940).

The rights of inheritance of an adopted child have been the subject of much legislation as well as litigation in this jurisdiction. Numerous decisions have been handed down during the years and whenever the courts have limited or restricted the rights which an adopted child acquires by reason of the adoption, the legislature has promptly spoken to enlarge or clarify such rights. In this particular instance it is clear that the old rule of construction, that statutes in derogation of the common law shall be strictly construed, has no application to the third or remedial part of the Ohio General Code. OHIO GEN. CODE, § 10214 (1938). After the courts held that a child could inherit from, but not through, the adoptive parents, construing former Ohio General Code Section 8030, the legislature passed Ohio General Code Section 10512-19. It is presumed that a statutory amendment is intended to effect some change. *Lytle v. Baldinger,* 84 Ohio St. 1, 95 N.E. 389 (1911); *Ohio Valley Electric Ry. Co. v. Hagerty,* 14 Ohio App. 398 (1921). Also, when the legislature repeals a law soon after its construction by the courts, a presumption arises that the legislature intended to override that construction. *State v. Brown,* 108 Ohio St. 454, 141 N.E. 69 (1923). It would seem that the ultimate effect of all this would be to clothe the adopted child with the same rights that a natural child enjoys, save as to inheritance expressly limited to heirs of the blood of the adoptive parent. *Frame v. Shaffer,* 39 Ohio Abs. 617 (C.P. 1943).

However the courts have strenuously resisted this change in Ohio. "We are not of the opinion that the legislature by that section intended to make an adopted child an heir of the entire blood stream coursing through the veins of the adopting parent and all of its tributaries." *Central Trust Co. v. Hart,* 82 Ohio App. 450, 80 N.E. 2d 920 (1948). "We do not find in any Ohio statute, either present or past, provision that the adopted child shall inherit through its adoptive parent from such adoptive parent's collateral relations. We do not so construe the present statute, Section 10512-19, General Code." *Southern Ohio Savings Bank and Trust Co. v. Boyer,* 66 Ohio App. 136, 31 N.E. 2d 161 (1940). In a case exactly like the *Friedman* case, *supra,* with the same statutes in force, the court came to the opposite conclusion saying, "The court is unable to agree with the contention that the present adoption law, regardless of its enlargement of the scope of inheritance, places the adopted daughter of a natural daughter on the same footing as a granddaughter in respect to the exemption provided for in this respect." In re *Estate of Harriet C. Griffin,* 19 Ohio Ops. 377 (1935). See also to the same effect, *Reinhard v. Reinhard,* 23 Ohio Abs. 306 (1936).

It is not strange that the courts have taken the strict view in construing the inheritance statutes regarding adopted children. At the present time a majority of jurisdictions follow the rule that an adopted child can inherit from, but not through, the adopting parent. 38 A. L. R. 8 (1925); 120 A. L. R. 837 (1939); 1 AM. JUR. 837; ATKINSON, HANDBOOK OF THE LAW OF WILLS 68 (1937); MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS 362 (1931). There is, however, a sizeable minority opposed to that position. *Id.* In view of the fact that "this variation is due to the diverse interpretations given to the different adoption statutes, based to a large extent upon the wording of these statutes," 120 A. L. R. 839 (1939), it would seem that any comparison based on the majority or minority rule is of little value. Behind the rigidness of strict construction lies the principle that consanguinity is favored in a determination of heirship. To allow an adopted child, an artificial relationship created by statute, to share equally with a blood relative when inheriting from collateral relatives of adoptive parents is not consonant with the general rules of inheritance. But there are signs that this tendency is decreasing to some extent, "The trend of recent decisions has been to extend rather than to restrict the right of inheritance of an adopted child." In re *Hecker's Estate,* 33 N.Y.S. 2d 365 (1942).

In Ohio, the issue now should be well fixed. The case of *Flynn v. Bredbeck, supra,* is the most authoritative direct hold-

ing since the passage of the statute. There the court, through Judge Zimmerman, stated, "By the terms of former Section 10512-19, General Code (114 Ohio Laws 474), reciting that an adopted child shall be capable of inheriting property expressly limited by will or by operation of law to the child, heir or next of kin of the adopting parent, an adopted child was enabled to inherit property *through* as well as *from* his adopting parent whether such property passed by will or by operation of law." See also to the same effect, McClelland, Adams & Hosford — Ohio Probate Practice 1222; Diebel, Ohio Probate Law 602 (4th Ed. 1948); Lamneck, Ohio Probate Digest & Practice Manual § 794 (3rd Ed. 1937); 8 Ohio St. L. J. 113 (1941); 7 Ohio St. L. J. 441 (1941). *But cf.* 4 Ohio St. L. J. 97 (1937). It would seem that the principal case carries the principle to its logical conclusion, in holding that an adopted child is on the same footing as a natural one, except where specifically stated, as regards the sovereign as well as competing heirs. "The statute must be interpreted with the degree of liberality essential to the attainment of the intent of the legislature." In re *Friedman, supra,* at p. 27.

John A. Brown

Administrative Law — Res Judicata

The Securities and Exchange Commission (herein referred to as SEC) conducted extensive hearings in investigating alleged fraud of an investment firm. In order to secure testimony of the firm's attorneys, the SEC brought a subpoena enforcement action in federal district court seeking to prove fraud so as to pierce the attorney-client privilege. The SEC filed the record of its investigation. The court held that the evidence did not make the requisite prima facie showing of fraud to pierce the privilege. After this decision the SEC gave the firm notice of a hearing to determine, (1) suspension or revocation of broker-dealer registration, and (2) suspension or explusion from the National Association of Securities Dealers, on the basis of its investigation of the fraud. The firm then sought to enjoin the hearing, alleging that the judgment in the subpoena enforcement action was res judicata as to any further action by the SEC on the investigation record. The district court dismissed the bill. The circuit court reversed, holding that res judicata applied. The SEC appealed to the Supreme Court. *Held,* judgment reversed. Res judicata will not be applied to prevent the operation of the rule that the administrative remedy must be exhausted before one is entitled to review by the courts. *SEC, Hanrahan et al v. Otis & Co.,* 70 S. Ct. 89 (1949).

Rules governing the relationship of courts to administrative agencies are not well settled and the decisions concerning the general problem of reviewability, of which res judicata is a part, reflect this confusion. On the one hand, it is necessary to allow administrative agencies freedom to carry on their complex functions, and on the other hand, it is imperative that individuals be protected from arbitrary orders. Prior to the Administrative Procedure Act of 1946, 60 STAT. 237, 5 U.S.C. §1001 *et seq.*, there was little statutory guidance and the courts were left to develop the rules for reviewability. Certain limitations were established. Findings of fact by administrative agencies based on substantial evidence are non-reviewable. *Nat'l Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292 (1939); *Consolidated Edison Co. v. Nat'l Labor Relations Board*, 301 U. S. 229 (1936); *Applachian Electric Power Co. v. Nat'l Labor Relations Board*, 93 F. 2d 985 (4th Cir. 1938); *Nat'l Labor Relations Board v. Thompson Products*, 97 F. 2d 13 (6th Cir. 1938). No one is entitled to judicial relief until the administrative remedy is exhausted. *Porter v. Investors Syndicate*, 286 U. S. 461 (1931); *United States v. Illinois Central R.R.*, 291 U. S. 457 (1933); *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163 (1934); *Farncomb v. Denver*, 252 U. S. 7 (1919); *Milheim v. Moffat Tunnel District*, 262 U. S. 710 (1922).

In passing the Administrative Procedure Act, Congress attempted to set out definite rules governing reviewability. 5 U.S.C. § 1009. Section 10 (c) provides that every agency action made reviewable by statute and every final agency action for which there is no adequate remedy in any court shall be subject to judicial review. This broad provision is subject to important limitations, however, for the Act reads that Section 10 (c) applies, "Except in so far as (1) Statutes preclude judicial review, and (2) Agency action is by law committed to administrative discretion."

The question of whether the courts will apply the res judicata doctrine to protect the determinations of their review, by halting a subsequent administrative proceeding, has not frequently arisen. "Ordinarily a court decision will be res judicata in a later administrative proceeding in the same circumstances in which it would be res judicata in a later judicial proceeding." Davis, *Res Judicata In Administrative Law*, 25 TEXAS L. REV. 199, 246 (1947). The view that res judicata should so apply has found some support. *Safeway Stores v. Porter*, 154 F. 2d 656 (Em. Ct. App. 1946); *Lee v. Federal Trade Commission*, 113 F. 2d 583 (8th Cir. 1940).

The headnote of *Safeway Stores v. Porter*, *supra*, reads, "Un-

der principles of res judicata, a chain retail food store operator seeking to review and set aside a maximum price regulation promulgated by the Federal Price Administrator was estopped from raising a second time in the same court a ground of objection which such court had previously decided against the store operator."

The decision in *Lee v. Federal Trade Commission, supra,* is very similar. In the first action, the government brought libel for condemnation of a quantity of product on the ground that it was misbranded. Judgment was for the manufacturer. Later the FTC instituted proceedings charging the same party with use of unfair methods of competition by soliciting the sale of its product by false and misleading statements. The court found that the underlying issue was the same in both suits and held that judgment for the manufacturer in the first action was res judicata as to the falsity of the representations and could not be collaterally attacked in the second action.

The instant case may be distinguished from the above cited cases on the ground that the plaintiff is seeking to raise the issue of res judicata affirmatively, by injunction, rather than defensively. In judicial proceedings a court will refuse to enjoin an action on the ground that the plaintiff has a defense of res judicata. *Plews v. Burrage,* 266 Fed. 347 (1st Cir. 1920). This is on the ground that the plaintiff will have an adequate remedy by raising the defense in the second action. However, in this case, since the second action by the SEC which the plaintiff seeks to enjoin is an administrative proceeding rather than a law action, there may be some question regarding the adequacy of his remedy so as to preclude operation of the rule of *Plews v. Burrage, supra.*

In the instant case the Circuit Court granted the injunction. Facing the issue squarely the Court said, at page 37, "The applicability of the doctrine of res judicata is therefore the determining factor in the case." *Otis & Co. v. SEC,* 176 F. 2d 34 (D.C. Cir. 1949). The SEC contended that res judicata did not apply as the rule governing the relation of courts and administrative agencies is different from the traditional rule that governs the relation of courts to each other. *Myers v. Bethlehem Shipbuilding Co.,* 303 U. S. 41 (1937). The Court distinguished the *Myers* case, *supra,* contending that while it stood for the principle that the administrative process must be complete before there is recourse to a reviewing court, the case did not hold that a "court cannot protect its decrees by enjoining the relitigation of the same issues between the same parties before an administrative agency." *Otis & Co. v. SEC, supra,* at 39.

In reversing, the Supreme Court did not discuss the issue of res judicata. However, they cited as authority for their decision, *Myers v. Bethlehem Shipbuilding Co., supra; Macauley v. Waterman Steamship Corp.*, 327 U. S. 540 (1945); *Federal Power Commission v. Arkansas Light and Power Co.*, 330 U. S. 802 (1946). As these cases stand for the principle that the administrative remedy must be exhausted before one is entitled to review by the courts, it would appear that the doctrine of res judicata will not operate to alter that principle.

Elinor Porter

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