INCOME TAX—DEDUCTIBILITY OF LEGAL EXPENSE AS A GENERAL BUSINESS EXPENSE

Petitioner was a professional dancer of noted repute. In 1949 he was engaged to perform in Greenwich, Connecticut. Following the announcement of the concert a resident of Greenwich made several statements in local newspapers alleging that the petitioner was a pro-Communist, that his performances were un-American, and that he was prone to interrupt his performances and give party line speeches. Petitioner's concert manager and lawyer advised him that unless he brought a legal action to clear himself of these charges, his professional career would be placed in jeopardy. The petitioner did commence a libel suit, but the jury was unable to reach a verdict and no further action was taken. As a result of this adverse publicity, his professional bookings ceased, and he was unable to earn a living. In determining his income for 1949, the petitioner deducted the sum of $1,200 paid as legal expenses in the libel action as a business expense. The Commissioner disallowed this deduction and assessed a deficiency. *Held:* the legal expenses so incurred were an ordinary and necessary business expense and hence deductible from gross income. *Draper v. Commissioner*, 26 T.C.—#26 (1956).

The petitioner claimed this deduction for legal expenses under Section 162 (a) of the 1954 Internal Revenue Code, the general section allowing deductions for trade and business expenses. This section provides, "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . ." This section, like the analagous provision in the 1939 Code,[1] sets forth only the general rule, with a few specific deductible expenses. The Regulations interpreting these sections merely paraphrase the code provisions with a few additional examples.[2]

It is well established that legal expenses, incurred as a direct result of the normal activities of a trade or business, constitute a justifiable business expense deduction.[3] Each case and each deduction, however, must be determined on its own particular facts as to whether it does in fact constitute an ordinary and necessary expense in carrying on a business. The facts in the instant case are striking. The petitioner was a highly successful public performer with a substantial income derived therefrom. As a result of the widespread circulation of the challenged statements, he was unable to secure further engagements and his income declined severely. He was told by his legal and theatrical advisors that legal action to clear himself was the only way he could ever regain his prior status

[1] INT. REV. CODE, of 1939, Section 23 (a) (1) 53 Stat. 12 (now INT. REV. CODE of 1954 §162a).

[2] U.S. Treas. Proposed Reg. §1.162-1 (1956); U.S. Treas. Reg. 118 §39.23 (a) (1) (1951); U.S. Treas. Reg. 111 §29.23 (a) (1) (1941); U.S. Treas. Reg. 103 §19.23 (a) (1) (1940).

[3] Heininger v. Commissioner, 320 U.S. 467 (1940); Kornhauser v. U.S., 276 U.S. 144 (1927); Salt v. Commissioner, 118 T.C. 182 (1952).

and income. Perhaps the court was overemphatic when it stated, "We conclude on the record that the petitioners concern was solely with his continued business success as a public performer." No doubt he was also concerned with his private good name and reputation. On these facts, however, it may reasonably be determined that he was primarily motivated by a desire to regain his professional standing and the resultant income. The legal action was directly connected with his business, for in the view of his advisors he would lose his business completely without it. The libel action was commenced primarily to protect and restore his business and income, and this clearly is an ordinary and necessary expense.

In any case, the determination of the validity of a deduction of legal expenses under Int. Rev. Code Section 162 (a) involves two distinct steps. In the first place, it must be ascertained what is meant by the terms "ordinary and necessary" as they modify business expense. Secondly, it must be determined whether the operative facts in any case fall within this meaning.

The courts on several occasions have been called upon to define and explain the meaning of the words "ordinary and necessary" business expenses when referring to legal expenses. An excellent discussion of this question is found in *Welch v. Commissioner*[4]. "Now, what is ordinary, though there must be a strain of consistency within it, is none the less a variable affected by time and place and circumstance. Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. *A lawsuit affecting the safety of a business may happen once a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are common and accepted means of defense against attack.*" (Emphasis added) This language was quoted with approval in *Deputy, Administratrix v. DuPont.*[5] In a later case,[6] the court makes it clear that "there is no one absolute interpretation of the words 'ordinary and necessary'" as used in Section 23 (a) (1) of the 1939 Code. The court goes on, however, to cite *Heininger v. Commissioner*[7] and *Deputy Administratrix v. DuPont*,[8] as stating the most common and preferred interpretation, that of using the words in their commonly accepted meaning.

This interpretation necessarily leads the court to view the decisive issue as one of fact. More explicitly, in any case where the taxpayer claims a deduction of legal expenses as an ordinary and necessary business expense, the court must look to the relevant facts of the situation to de-

[4] 290 U.S. 111 (1933).
[5] 308 U.S. 140 (1940).
[6] Kleinschmidt v. Commissioner, 12 T.C. 921 (1949).
[7] *supra*, Note 3.
[8] *supra*, Note 5.

termine if the expense was really ordinary and necessary, using those words in their commonly accepted meaning. In the principal case, the facts were such as to bring the deduction within the terms and meaning of the code provision. A slight deviation from the factual context of the legal expense might lead to a different judgment. This can be seen from a careful examination of the strikingly similar, but significantly different case of *Kleinschmidt v. Commissioner.*[9] In that case the taxpayer was a candidate for circuit judge. After certain allegedly libelous statements were made about him, he instituted three separate libel action against the publishers of the statements. The expenses of these actions were claimed as a business deduction.[10] The court in this case held against the taxpayer, finding that the expenses were not ordinary and necessary expenses of carrying on his business. In this case the expenses were not incurred to augment his law practice. His business, and the conduct thereof, were not involved in the libel actions. Rather, these actions and the damages sought were to recompense the taxpayer for the loss of good name and reputation. The court concluded by stating, "We can not agree that these expenditures were ordinary and necessary business expenses of practicing law under any commonly accepted meaning of the terms. The expenditures were not made as an incident to earning income in the practice of law and Section 23 confines deductible expenses solely to outlays in the effort or services . . . from which income flows." See also, *Lloyd v Commissioner.*[11]

Although instant case was properly decided, the extent to which it is authority in future cases is restricted by the fundamental fact that each case involving such a deduction must be decided on its own facts. It is the application of the operative facts of any case to the terms "ordinary and necessary" business expense used in their commonly accepted meaning which determines the validity of any deduction of legal expenses as a general business deduction.

Marc Gertner

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[9] *supra,* Note 6.
[10] *supra,* Note 1.
[11] 55 F. 2d 842 (1932).

WORKMEN'S COMPENSATION—INJURY CONSTRUED—OVEREXERTION NOT COMPENSABLE WHEN NO ANTECEDENT ACCIDENT CAUSES THE INJURY

Plaintiff presented a claim to the Industrial Commission of Ohio for an injury sustained while employed as a "swing line man" on a boom. The boom was operated by two lines each of which was wrapped around a steam operated spool. As plaintiff manually applied tension to the lines the resulting friction between the spools and the lines moved the boom. Nine weeks prior to the date of plaintiff's injury the boom became

twisted and unbalanced from a heavy load, and thereafter one of the lines was wrapped around two spools, requiring plaintiff to exert a greater pull to achieve the desired motion of the boom. On May 8, 1951, while applying tension to the double rigged line, plaintiff suffered an injury which is described in the stipulations as "a strain in the left arm which has been determined to be a traumatic disturbance of the brachial plexus and further described as a sensory neuritis and impaired sensation involving the median nerve." The Ohio Supreme Court affirmed the Industrial Commission's denial of the claim. *Held*, plaintiff is not entitled to compensation since there was no evidence either of any external and accidental means which caused the injury, or of a sudden mishap occasioning the increased effort or strain. *Dripps v. Industrial Commission*, 165 Ohio St. 407, 135 N.E. 2d 873 (1956).

It should be noted that not every injury occurring while an employee is within the course of his employment entitles the employee to compensation under the Ohio Workmen's Compensation Act.[1] Before compensation is obtained, it must be determined that the injury was "occasioned in the course of [the] employment"[2] and that the injury is "any injury received in the course of, and arising out of, the injured employee's employment."[3] The Workmen's Compensation Act was intended to provide compensation in a broader range of cases than merely those where the employer was at fault.[4] The Ohio Supreme Court has often stated that inasmuch as the Workmen's Compensation Law is remedial in nature, its provisions "are to be construed liberally in favor of an injured workman seeking benefits thereunder."[5]

The problem of distinguishing between compensable and noncompensable injuries originally arose in Ohio because the statutes providing compensation for occupational diseases were passed after the legislature had provided compensation for occupational injury.[6] In the case of *Industrial Commission v. Cross*[7] the employee contracted typhoid fever from drinking water in the course of his employment. Compensation was denied since there was no "injury". The court reasoned that

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[1] OHIO REV. CODE §§4123.01 *et. seq.*

[2] OHIO CONSTITUTION Art. II §35.

[3] OHIO REV. CODE §4123.01. This language was formerly part of OHIO GEN. CODE §1465-68, the remainder of which is now OHIO REV. CODE §4123.54.

[4] Industrial Commission v. Weygandt, 102 Ohio St. 1, 130 N.E. 38 (1921). The only remaining element of fault is in the event the employer has failed to adhere to the specifications of safety requirements promulgated by the Industrial Commission. OHIO CONSTITUTION Art. II §35.

[5] Bowling v. Industrial Commission 145 Ohio St. 23, 60 N.E. 2d 479 (1945); Industrial Commission v. Flynn, 129 Ohio St. 220, 194 N.E. 420 (1935); Industrial Commission v. McWhorter, 129 Ohio St. 40, 193 N.E. 620 (1935); State *ex rel.* Juergens v. Industrial Commission, 127 Ohio St. 524, 189 N.E. 445 (1934).

[6] 102 Ohio Laws 524, Act of May 31, 1911, Industrial Commission v. Brown, 92 Ohio St. 309 (1915).

[7] 104 Ohio St. 561, 136 N.E. 283 (1922).

if Art. II §35 of the Constitution separated injury and occupational disease, *no* disease was included in the word injury, except insofar as an injury may be the cause of a disease, such as bloodpoisoning. In *Renkel v. Industrial Commission,*[8] in considering whether tuberculosis contracted from inhaling iron particles was an injury, the court denied compensation using the following language: "Though the word 'accident' is not used in our statute, nor in the constitutional provision referred to, nor the word 'accidental' in connection with the word 'injury', yet it seems clear that the distinction of 'injury' from occupational disease, . . . warrants the conclusion that 'disease' is not included in the term 'injury' . . ." In *Industrial Commission v. Russell,*[9] the court denied compensation to a movie projectionist whose eyes were blinded by continued exposure to ultra-violet light, for the reason that there had been no traumatic injury nor any accident which caused the blindness.[10] By 1936 the Court had developed the rule that for a workman to recover, there must be evidence which establishes a sudden chance happening at a particular time and place causing a traumatic injury accidental in origin and cause.[11]

This restricted interpretation of the word injury apparently moved the legislature to add the following sentence to the act: "The term 'injury' as used in this section and in the Workmen's Compensation Act shall include any injury received in the course of, and arising out of, the injured employee's employment."[12] The addition of the words "any injury" and "arising out of" would liberalize the word injury as previously defined by the courts.[13]

The first case which presented the problem of defining injury under the new amendment was *Malone v. Industrial Commission.*[14] The plaintiff died from heat exhaustion incurred while performing his usual duties as a foundry pourer in a room of 113 degrees temperature. The court allowed compensation defining injury as traumatic harm which is accidental in character in the sense of being the result of a sudden mishap, holding that the injury is accidental if something unusual occurs "which

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[8] 109 Ohio St. 152, 141 N.E. 834 (1923).

[9] 111 Ohio St. 692, 146 N.E. 305 (1924).

[10] It should be noted that the absence of the word accident in the Ohio Statute is somewhat significant in that only 6 other states do not have the word accident or accident in the statutory coverage section.

[11] Matczak v. The Goodyear Tire & Rubber Co. 139 Ohio St. 181, 38 N.E. 2d 1021 (1943); Cordray v. Industrial Commission 139 Ohio St. 173, 38 N.E. 2d 1017 (1942); Gwaltney v. General Motors Corp. 137 Ohio St. 354, 30 N.E. 2d 342 (1940). Industrial Commission v. Lambert 126 Ohio St. 501, 186 N.E. 89 (1933). Cardio-vascular cases are purposely omitted since they present separate problems regarding antecedent physical condition and causal connection with the employment.

[12] 117 Ohio Laws 109, OHIO REV. CODE §4123.01(D).

[13] In this regard, see the dissent of Judge Zimmerman in Dripps v. Industrial Commission, note 1, *supra.*

[14] 140 Ohio St. 292, 43 N.E. 2d 266 (1942).

produces the injury or from which the injury results."[15] The opinion explains that accident and trauma are necessary ingredients of injury in order to differentiate disease, but that "accidental and traumatic injuries . . . are compensable whether they are the result of accidental means or the result of the mishap itself proximately causing the damage or harm."[16] The necessary causal connection[17] between the employment and the injury was defined by the court in terms of the greater hazards of the employment compared to those general hazards which the public encounters.[18] Thus the *Malone* case accomplished the desired result of expanding the definition of injury, but reached the objective by bending earlier terminology and by changing "accidental in origin and cause" to "accidental in character and result."[19]

The first effects of the *Malone* case were felt in *Maynard v. The B. F. Goodrich Co.*[20] where the plaintiff was awarded compensation after unfavorable action by the Industrial Commission. Plaintiff, whose job was to lift heavy objects, injured his back while helping to lift a heavy roll of fabric. The court stated in the syllabus that no causal connection exists to satisfy the requirement "arose out of" unless the injury is "accidental in character and result". In the opinion, in which the entire court concurred, it was explained that *Industrial Commission v. Franken*[21]

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[15] Malone v. Industrial Commission, note 14 *supra,* syllabus, paragraphs 1 and 2. See 1 Larson's Workman's Compensation Law §37.20 for a detailed analysis of the concept of accident.

[16] Malone v. Industrial Commission, 140 Ohio St. 292, 300, 43 N.E. 2d 266, 271 (1942) Query whether the word "any" qualifying "injury" obviates the need for trauma as a distinction between "injury" and "disease" (other than occupational). The qualification "arising out of the employment" appears to be sufficient to separate the compensable from the non-compensable. See Bollinger v. Wagaraw Bldg. and Supply Co., 122 N.J.L. 512, 6 A. 2d 396, note 31 infra, and Renkel v. Industrial Commission, note 9 *supra.*

[17] "Causal connection" as used here is only a second cousin of '"proximate cause" in tort. There is no element of foreseeability in the term, "arise out of the employment." See 1 LARSON'S WORKMEN'S COMPENSATION LAW §6.50.

[18] This aspect of "arising out of" probably serves as a basis for the questionable distinction between "usual" and "unusual" exertion in determining whether an injury is compensable. Matczak v. Goodyear Tire and Rubber Co., note 12 *supra.*

[19] In a short concurring opinion in the Malone case, 140 Ohio St. 292, 304, 43 N.E. 2d 266, 272 (1942) Judge Mathias states that under the new legislative definition "inquiry is . . . limited to determining that the physical disability in question was caused by trauma and did not result from disease, and whether it occurred in the course of and arose out of the employment". Although this is a somewhat oversimplified approach, it reflects an appreciation of the overlooked opportunity for a "let's-begin-again" approach to defining injury. See comment by Stephen D. Hadley, *When Is An Injury Not an Injury,* 25 Ohio Op. 485.

[20] 144 Ohio St. 22, 56 N.E. 2d 195 (1944).

[21] 126 Ohio St. 299, 185 N.E. 199 (1933). Compensation denied for heart failure occasioned by lifting heavy dies.

and *Matczak v. Goodyear Tire & Rubber Co.*[22] were not followed inasmuch as the Malone case and the statute had removed the requirement that the injury be "accidental in origin and cause."

In *Nelson v. Industrial Commission*[23] compensation was denied a 62 year old millwright who died of a cerebral hemorrhage while tightening some bolts in a normal manner because there was "an absence of evidence showing that an *accidental injury caused or contributed to* the death" (emphasis supplied). Although the opinion indicates that a person need not be struck by an outside agency, and that death on the job does not of itself show a compensable injury, the concluding paragraph states "the record . . . is absolutely devoid of any evidence of accident . . . which directly caused or contributed to the decedent's death." On the proven facts in this case, recovery was properly denied, not because there was no antecedent accident, but because it was not shown that the hemorrhage "arose out of the employment."

The *Dripps* case defines injury as "a physical or traumatic damage or harm accidental in character and as a result of external and accidental means in the sense of being the result of a sudden mishap, occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place."[24] The second paragraph of the syllabus indicated that injury resulting from overexertion is not compensable unless it appears that "such increased effort o rstrain was occasioned by some sudden mishap or unusual event."[25] It is clear from the phrases "a result of external and accidental means" and "occasioned by some sudden mishap", that this holding has in effect overruled *Malone v. Industrial Commission*[26] insofar as injuries which are only the accidental, sudden, or unexpected result of the employment are now excluded. *Maynard v. B. F. Goodrich Co.*[27] is clearly no longer of any effect, since its facts are nearly identical with the *Dripps* case.[28]

It should be pointed out that the "type" of injury sustained by Dripps and Malone is the same. There was no accident, no specific unexpected event which "caused" the injury. Both injuries were the unexpected result of the employment. Malone worked in a torridly hot room—Dripps worked pulling lines to run a boom. The Ohio Court

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[22] Note 12 *supra*. Compensation denied for back injury sustained while lifting reroll liners in usual manner.

[23] 150 Ohio St. 1, 80 N.E. 2d 430 (1948).

[24] Dripps v. Industrial Commission, note 1 *supra*, paragraph 1 of the syllabus.

[25] See also Artis v. Goodyear Tire and Rubber Co., 165 Ohio St. 412, 135 N.E. 2d 877 (1956).

[26] Note 15, *supra*.

[27] Note 18, *supra*.

[28] In the Dripps case the court cited only Toth v. Standard Oil Co., 193 Ohio St. 463, 92 N.E. 2d 393 (1950) (paralysis resulting from anxiety over investigation of fatal auto accident) and Nelson v. Industrial Commission, note 24 *supra*.

has again made an accident as a *cause* of the injury a prerequisite to compensation, while the Ohio Statute has never used the word accident in discussing the coverage of the law.[29]

It is submitted that the intent of the legislature would be better implemented if the courts were to center their analysis on "arising out of the employment" rather than on "accident" as cause or effect of the injury.

J. Donald Cairns

[29] A position completely contrary to the *Dripps* case has been taken by New Jersey. In Bollinger v. Wagaraw Bldg. & Supply Co., 122 N.J.L. 512, 6 A. 2d 396 (1939) the New Jersey court virtually read the requirement "by accident" out of the statute, which required "injury by accident arising out of and in the course of his employment". NEW JERSEY STAT. ANN. 34:15-7. Also see Williams v. Industrial Commission, 95 Ohio App. 275, 119 N.E. 2d 126 (1953).

RECENT DECISIONS TORTS—LIABILITY OF CHARITABLE HOSPITAL—REPUDIATION OF IMMUNITY RULE

Plaintiff was a paying patient for surgery in the defendant corporation which maintained and operated a public charitable hospital. Plaintiff alleged that as a result of negligence of defendant's employees, he was permitted to fall from a hospital bed twice, whereby he was injured. The defendant denied the allegation of negligence, and as a separate defense pleaded non-liability as a matter of law because it was a charitable institution. Plaintiff's demurrer to this separate defense was overruled by the trial court, and this decision was affirmed by the court of appeals. The Supreme Court of Ohio reversed, holding that defendant's claim of immunity from liability for negligence as a public charitable hospital, ". . . does not state a defense and is subject to demurrer." *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N.E. 2d 410 (1956).

The Court cited and followed the reasoning of *President and Directors of Georgetown College v. Hughes*,[1] the landmark case in this area, which started the movement for the repudiation of the rule exempting charitable institutions from tort liability. The Ohio Court based the repudiation of that rule on the changing social and economic conditions of charitable hospitals and on the general trend of ". . legislative and judicial policy in distribution losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than in leaving them wholly to be borne by those who sustain them."[2] The present availability of liability insurance to such institutions was also cited as an important factor which made the immunity rule obsolete.[3]

[1] 130 F. 2d 810 (D.C. Cir. 1942).

[2] 165 Ohio St. at 477.

[3] But See Hines. *Hospital Malpractice Liability Insurance,* 23 Chi. Bar Record 135 (1953).

The history of that rule may be traced to three early English cases.[4] These decisions were repudiated in England,[5] but were thereafter adopted by two American courts,[6] apparently without knowledge of the English reversal. The doctrine exempting charitable institutions from liability gained an early foothold in Ohio in two lower court decisions.[7] When the Supreme Court of Ohio considered and adopted the rule,[8] it did so with full knowledge of its repudiation in England, and based its decision on the proposition that charitable institutions should not be subject to the rule of *respondeat superior* because of the public policy favoring the development of such institutions free from the dangers of vicarious liability. Through the next forty-five years the rule was often modified,[9] and subjected to keen criticism.[10]

The dissent in the *Avellone* case suggests that abandonment of the immunity doctrine should be effected by the legislature, not by the courts. In a Washington case[11] it was held on similar facts that since the rule of non-liability of charitable institutions was a judicially established one, it should be possible for courts to abrogate it. "We closed our court room doors without legislative help, and we can likewise open them."[12]

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[4] Duncan v. Findlater, 7 Clark & Fin. 894, 7 Eng. Rep. 934 (H. L. 1839); The Feofees of Heriot's Hospital v. Ross, 12 Clark & Fin. 507, 8 Eng. Rep. 1508 (H.L. 1846); Holliday v. St. Leonard, 11 C.B., N.S. 192 (C.P. 1861).

[5] Mersey Docks Trustees v. Gibbs, L.R. 1 H.L. 93 (1866); Foreman v. Mayor of Canterbury, L.R. 6 Q.B. 214 (1871).

[6] McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876); Perry v. House of Refuge, 63 Md. 20 (1885).

[7] Connor v. The Sisters of the Poor of St. Francis, 7 Ohio N.P. 514 (1900); Johnson v. Hospital, 12 Ohio Dec. N.P. 802 (1902).

[8] Taylor v. Protestant Hospital Ass'n., 85 Ohio St. 90, 96 N.E. 1089 (1911).

[9] Charitable hospital held liable where it was negligent in selection and retention of its employees and injury resulted from the negligence of such persons. Taylor v. Flower Deaconess Home, 104 Ohio St. 61, 135 N.E. 287 (1922). Rule of non-liability held applicable to injuries to a patient's property. Rudy v. Hospital, 115 Ohio St. 539, 155 N.E. 126 (1926). Charitable hospital held liable for negligent injury to a stranger to the charity. Sisters of Charity v. Duvelius, 123 Ohio St. 52, 173 N.E. 737 (1930). Immunity held not lost because the tort was committed during non-charitable activities. Cullen v. Schmit, 139 Ohio St. 194, 39 N.E. 2d 146 (1942); Emrick v. Penn. R.R. Y.M.C.A., 69 Ohio App. 353, 43 N.E. 2d 733 (1942). Tort doctrine of *res ipsa loquitur* was not available to a plaintiff suing a charitable institution. Lakeside Hospital v. Kovar, 131 Ohio St. 333, 2 N.E. 2d 857 (1936); Waddell v. Y.W.C.A., 133 Ohio St. 601, 15 N.E. 2d 140 (1938). For a comprehensive review of Ohio cases, see Note, 4 WESTERN RES. L. REV. 348 (1953); Note, 15 OHIO ST. L.J. 390 (1954).

[10] President and Directors of Georgetown College v. Hughes, 130 F. 2d 810 (D.C. Cir. 1942); Ball, The Liability of Charitable Institutions for Torts or Agents and Servants, 38 KY. L.U. 105 (1950); Note, 11 OHIO ST. L.J. 497 (1950); Note, 15 OHIO ST. L.J. 390 (1954); Note, 4 WESTERN RES. L. REV. 348 (1953); for further references see PROSSER, HANDBOOK OF THE LAW OF TORTS, page 784, n. 40 (2d ed. 1955).

[11] Pierce v. Yakima Valley Etc. Ass'n., 43 Wash. 2d 162, 260 P. 2d 765 (1953).

[12] *Id.* at 178. See also STATE OF NEW YORK, REPORT OF THE LAW REVISION COM-

Similarly the Ohio Supreme Court in *Williams v. Transit Inc.*,[13] construing the Ohio Constitution[14] recently held that a plaintiff could maintain an action for pre-natal injuries, even though no such remedy had heretofore been recognized in Ohio. "No legislative action is required to authorize recovery for personal injuries caused by the negligence of another. Such right was one existing at common law."[15] The instant case expresses the same philosophy as the *Williams* case with respect to the power of courts to adapt the common law to modern concepts of justice.

Thus the instant case discarded a rule of law which had set the policy of Ohio decisions for forty-five years, and replaced it with a modern rule of law geared to the realities and necessities of the times. Although the case at bar concerned a hospital, it cannot be doubted that all charitable institutions will be affected.[16] The majority opinion, moreover, suggests, though not explicitly, that the same rule would apply to a non-paying patient of a charitable hospital.[17] The instant decision is not so startling as it might appear because it does not overrule the fundamental doctrine of *respondeat superior*, but rather, eliminates an exception to that doctrine. To say that this should be left for the legislature is to misconceive the role of the courts under the common law system.

Bruno E. Voltolini

MISSION, 803-850 (1953) which after reviewing the law in every state made no recommendation to the New York Legislature concerning the abolishment of the rule.

13 152 Ohio St. 114, 87 N.E. 2d 334 (1949).

14 OHIO CONST. art. I, Sec. 16.

15 152 Ohio St. at 128.

16 165 Ohio St. at 479 (dissent).

17 *Id.* at 476, third paragraph.

CONSTITUTIONAL LAW—DUE PROCESS AND EQUAL PROTECTION—GUARANTEE TO INDIGENTS OF ADEQUATE APPELLATE REVIEW IN CRIMINAL CASES

Petitioners, raising the issue under the Illinois Post Conviction Hearing Act, alleged that the trial court's denial of their motion for a free transcript on which to prosecute an immediate appeal from a conviction of armed robbery, violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Illinois Supreme Court affirmed the trial court's dismissal of the petition on the ground that no substantial constitutional questions were raised. The United States Supreme Court granted certiorari. *Held*, 5-4 vacated and remanded: a constitutional question had been raised, for, when a state grants the right to appellate review in criminal cases, the Due Process and Equal Protection Clauses of the Fourteenth Amendment require that indigent

defendants be afforded some means of raising any alleged error in the trial court which could have been raised under the same circumstances by a person of sufficient means. *Griffin v. Illinois*, 351 U.S. 12 (1956).

Review by an appellate court of the final judgment in a criminal case, however grave the offense for which the accused is convicted, is not a necessary element of due process of law.[1] The Supreme Court has often, however, taken the position that once the right of appeal is afforded by a state, it becomes but an additional step in one proceeding to determine finally the guilt or innocence of the accused.[2] Thus, as the principal case clearly underlines, appellate procedure is subject to scrutiny in determining whether or not a defendant has been afforded due process.

The Supreme Court has also emphasized that the states are to have considerable latitude in laying down conditions on the exercise of appeal.[3] These conditions must, of course, meet the minimum requirements of the Equal Protection Clause.[4] However, conditions requiring payment of court fees or posting bonds have seldom been viewed as imposing invidious or unreasonable classifications.[5]

Under Illinois appellate procedure, indigent defendants have been entitled to a bare common law record[6] without cost, but review on such record has been limited to errors appearing on the face thereof.[7] In addition, indigents are entitled to a free transcript on appeal of a death sentence.[8] In the principal case, as no capital sentence was involved, petitioners were not entitled to a free transcript and could not raise the alleged errors of the trial court with a common law record, although an appellant with funds could have secured a transcript and raised these issues.

A legislature may classify litigation, and equal protection does not require uniformity of procedure.[9] The majority of the court, however, branded this scheme of legislation as arbitrary and unreasonable, pointing out that the ability to pay costs in advance bears no rational relationship

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1 McKane v. Durston, 153 U.S. 684 (1894); Murphy v. Massachusetts, 177 U.S. 155 (1900); Andrews v. Swartz, 156 U.S. 272 (1895); Kahl v. Lehlback, 160 U.S. 293 (1895).

2 Cole v. Arkansas, 333 U.S. 196, 201 (1948); Dowd v. United States *ex rel.* Cook, 340 U.S. 206, 208 (1951); Cockran v. Kansas, 316 U.S. 255, 257 (1942); Frank v. Mangum, 237 U.S. 309, 327 (1915).

3 See cases cited in note 1, *supra.*

4 See, *e.g.*, Boykin v. Huff, 121 F. 2d 865 (1941); Vernon v. State, 245 Ala. 633, 18 So. 2d 388 (1944); State v. Janiec, 6 N.J. 608, 80 A. 2d 94 (1951), *cert. denied* 341 U.S. 955 (1951).

5 Ownbey v. Morgan, 256 U.S. 94 (1921); Carr v. Lanagan, 50 F. Supp. 41 (1943); But *cf.* Jeffries v. State, 9 Okla. Cr. 573, 132 P. 823 (1913).

6 The common law record in Illinois consists of the indictment, arraignment, plea, verdict and sentence. People v. Loftus, 400 Ill. 432, 81 N.E. 2d 495 (1948).

7 *Ibid.*

8 ILL. REV. STAT., 1955, s. 38, §769a. See also ILL. REV. STAT., 1955, 3. 37, §163 f. Indigents may also obtain a free transcript under some circumstances under the Illinois Post Conviction Hearing Act.

to a defendant's *guilt or innocence.* They held that the operation of the statute results in discrimination against indigents by denying them adequate appellate review.

The dissent, on the other hand, views any resulting classification as reasonable in extending the full benefit of appeal to those convicted of capital offenses as opposed to limits on the exercise of appeal by those convicted of lesser offenses. "A policy of economy may be unenlightened, but it is certainly not capricious."[10] They see no duty imposed on the states by the Constitution to remove the natural disabilities of indigents.

The direct effect of the decision on state legislation and court rules in a number of states is obvious.[11] However, its future effect in two other areas may be even more significant:

First: does the decision open the way to collateral attack on a possibly large number of convictions where the right to "adequate" appellate review of trial court errors, now afforded recognition by the Fourteenth Amendment, has been previously ignored?[12] Justice Frankfurter, in a separate concurring opinion, suggested that it does give grounds for collateral attack and urged that the construction given the Fourteenth Amendment by the Court be limited to prospective application, except in the case of the present appellant.

Second: does this decision justify a re-examination of the requirements of due process for the appointment of counsel in criminal cases at both appellate and trial levels? At present, the state must appoint trial counsel for indigent defendants in all capital cases[13] and certain non-capital cases when special circumstances exist.[14] The Supreme Court held in *Betts v. Brady* that in the usual non-capital case, it is not necessary to provide counsel for the indigent,[15] and, by the same token, an indigent has been held not to be entitled as a matter of right to the assistance of counsel to prosecute an appeal in criminal cases.[16]

The principal case holds that due process guarantees adequate appellate review to indigents in non-capital cases to the point of providing a free transcript if needed. This statement raises a logical query as to

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[9] Dohany v. Rogers, 281 U.S. 362 (1930).

[10] Mr. Justice Harlan, *dissenting.*

[11] A dissenting opinion points out that the laws of nineteen states will be affected by the holding of the court. Ohio does not fall in this category. OHIO REV. CODE, §2301.24 provides, "The compensation for transcripts made in criminal cases, by request of the prosecuting attorney or the defendant, * * * shall be paid from the county treasury and taxed and collected as other costs."

[12] See note 11, supra. That code provision has been in effect since 1904. 97 Ohio Laws 178, 111 Ohio Laws 112, 120 Ohio Laws 448, 123 Ohio Laws 319, 126 Ohio Laws 37.

[13] Powell v. Alabama, 287 U.S. 45 (1932).

[14] Gibbs v. Burke, 337 U.S. 773 (1949); Palmer v. Ashe, 342 U.S. 134 (1951).

[15] 316 U.S. 455 (1942).

[16] Errington v. Hudspeth, 110 F. 2d 384, 127 A.L.R. 1467 (1940), *cert. denied* 310 U.S. 638 (1940).

the effectiveness of appellate review without the assistance of counsel. Is the Court now prepared to hold that he too must be provided if essential, and would counsel not be essential in most cases?

So, too, if due process may now possibly require the assistance of counsel to prosecute an appeal in both capital and non-capital cases, under the court's premise that appeal is but a stage of one proceeding, a basis for the abandonment of *Betts v. Brady*[17] may have been established and due process may soon require assistance of counsel at the trial level in criminal actions generally as well as in capital and exceptional cases.

William W. Wehr

[17] Note 15, *supra.*

ADOPTION—INHERITANCE FROM ADOPTIVE PARENTS—EFFECT OF READOPTION PRIOR TO THEIR DEATH

In proceedings in Probate Court to determine the heirs at law of the decedent, complainant adopted child filed objections to a finding that decedent had left no natural or adopted children upon her death intestate in 1952. He was adopted by decedent and her husband in 1918, returned by them to his natural parents two weeks later, and was readopted by the natural parents in 1920. On appeal, the Circuit Court of Cook County held that the readoption of complainant by his natural parents did not alter his right to inherit from his first adopting parents. Certain blood relatives of decedent appealed to the Supreme Court of Illinois. *Held*, a child, having been readopted prior to the death of his first adopting parents, may not share, in their estate. *In re Estate of Lichtenberg*, 131 N.E. 2d 487 (Ill. 1956).

This case represents the adoption by Illinois of the minority view which denies a child the right of inheritance from his first adopting parents when readopted prior to their death. The jurisdictions in which this problem has arisen have had statutory provisions allowing a child to inherit from his adoptive parents. The typical provision states in effect that the adopting parents shall be deemed to stand in the place of the child's natural parents for purposes of inheritance.[1]

Those jurisdictions which recognize the right of inheritance point out that by statutory provision, an adopted child has, with respect to his adoptive parents, the same rights as a child born in lawful wedlock, and according to previous decisions, retains the right to inherit from his natural parents. They conclude by analogy that an adopted child after a second adoption retains the right to inherit from his first adoptive parents.[2]

[1] ILL. REV. STAT., chap. 3, par. 165 (1955).

[2] Villier v. Watson, 168 Ky. 631, 182 S.W. 869, L.R.A. 1918A, 820 (1916); Dreyer v. Schrick, 105 Kan. 495, 185 P. 30 (1919); Holmes v. Curl, 189 Iowa 246, 178 N.W. 406 (1920); In re Sutton's Estate, 161 Minn. 426, 201 N.W. 925 (1925); In re Estate of Egley, 16 Wash. 2d 681, 134 P. 2d 943, 132 A.L.R. 773 (1943);

Illinois had also recognized the right of an adopted child to inherit from his natural parents.[3] The principal case attempts to distinguish these cases. In fact, the controversy found in the cases passing on this question arises mainly from opposing efforts to distinguish and reconcile the two situations. The following excerpts are examples.

The first case denying the right to inherit held that the second adoption proceeding "'ipso facto had the effect of revoking or superseding the order made in the first proceeding * * *.'"[4]

> The defect in that reasoning is that while a new domestic relation is created, the first proceeding is not affected in any particular by the second. The first proceeding stands for all time * * * attended by the same legal consequences as the birth of a child to the adopting parents.[5]
>
> By what process of reasoning can the conclusion be reached that a new order will put an end to all the rights, duties and incidents of the contract (*e.g.* the duty to support and educate) except the right to inherit?[6]
>
> [The view which denies inheritance] is contrary to the well established rule that an adopted child does inherit from its natural parents * * * because a natural parent likewise is not legally obligated to support and educate a child which has been adopted.[7]
>
> One situation depends on blood and birth, the other upon consent and contract.[8]

The Michigan Supreme Court, in reconsidering their holding in *In re Klapp's Estate*[9] which denied inheritance, refused to overrule on the ground that the *Klapp* case had stated a rule of property, but invited legislative re-examination.[10] *In re Meyer's Estate*[11] points out the hesitancy with which this position was affirmed.

The principal case emphasizes that the first recognition of the right to inherit in *Villier v. Watson*,[12] was an extension, without distinguishing, of *Russell's Adm'r v. Russell's Guardian*,[13] which held that a child re-adopted *after* the death of his first adopting parents could inherit from

noted 18 WASH. L. REV. 215 (1943); Coondradt v. Sailors, 186 Tenn. 294, 209 S.W. 2d 859, 2 A.L.R.. 2d 880 (1948); Hawkins v. Hawkins, 218 Ark. 423, 236 S.W. 2d 733 (1951); In re Meyer's Estate, 205 Misc. 880, 129 N.Y.S. 2d 531 (1954).

3 In re Estate of Tilliski, 390 Ill. 273, 61 N.E. 2d 24 (1945).

4 In re Klapp's Estate, 197 Mich. 615, 164 N.W. 381, L.R.A. 1918A, 818 (1917).

5 Dreyer v. Schrick, note 2 *supra.*

6 In re Talley's Estate, 188 Okla. 338, 109 P. 2d 495, 132 A.L.R. 773 (1941), noted 26 MINN. L. REV. 114 (1941), 16 NOTRE DAME LAW. 240 (1941).

7 Hawkins v. Hawkins, note 2 *supra.*

8 In re Talley's Estate, note 6 *supra.*

9 Note 4, *supra.*

10 In re Carpenter's Estate, 327 Mich. 195, 41 N.W. 2d 349 (1950), noted 3 U. FLA. L. REV. 237 (1950).

11 Note 2, *supra.*

12 *Ibid.*

13 14 Ky. Law Rep. 236 (1892).

their estate. In the latter case there is no doubt that the child's interest in the estate of his first adopting parents had vested prior to the readoption.

After drawing further distinctions between the incidents of natural and adoptive parenthood, the court points out that the Illinois Probate Act makes no provision for inheriting from *former* adopting parents. The enumeration of certain things in a statute implies the exclusion of all others. The court concludes that recognition of a right of inheritance in this situation would add confusion to a tranquil field of law.

In so far as the argument which supports inheritance by a child from his first adopting parents when readopted prior to their death depends on the analogy to inheritance by an adopted child from his natural parents, Ohio Rev. Code §3107.13 precludes its assertion in Ohio. "* * * a legally adopted child * * * shall cease to be treated as the child of his natural parents for the purpose of intestate succession." Under this section an adopted child ceases to be the child of his natural parents for the purpose of each and every possibility of inheritance.[14]

If the issue were to be raised in Ohio, the argument would probably center around inferences to be drawn from legislative silence on inheritance from successive sets of adopting parents. It is submitted that the clear import of the statute is that a child has but one set of parents from whom to inherit.

William W. Wehr

[14] Frantz v. Florence, Adm'r, 72 Ohio L. Abs. 222, 13 N.E. 2d 630 (1954).

ADOPTION—EFFECT ON INHERITANCE RIGHTS FROM NATURAL PARENTS

Plaintiff brought an action for declaratory judgment to determine his rights to decedent's estate, claiming under the Ohio Statute of Descent and Distribution. The facts were undisputed. Decedent was the father of two sons, John and William. William, father of the plaintiff, died in 1945 survived by Alice his widow and the plaintiff. In 1950 Alice married Dr. Frantz. In 1953 Dr. Frantz adopted the plaintiff and in 1954 decedent died intestate. Plaintiff claimed an interest in decedents estate under Ohio Rev. Code, Section 2105.06, as a "descendant" of decedent's son William. The estate claimed that plaintiff's right to inherit through William, as his descendant, was abrogated by Ohio Rev. Code, §3107.13—a statute relating to adoption. *Held:* for the estate . . . as an adopted child ceases to be the child of his natural parents for the purpose of each and every possibility of inheritance. *Frantz v. Florence, Admr.* 72 Ohio L. Abs. 222, 131 N.E. 2d 630 (1954).

Prior to 1951 the inheritance rights of adopted children were governed in Ohio by General Code, section 10512-23 which provided, ". . . nothing in this act shall be construed as debarring a legally adopted

child from inheriting property of its natural parents or kin. . . ." But Ohio Rev. Code, §3107.13, the successor of General Code, section 8004-13, not only omitted the above quoted provision but provides, "For the purpose of inheritance to . . . a legally adopted child, such child shall be treated the same as if he were the natural child of his adopting parents, and shall cease to be treated as the child of his natural parents for the purposes of intestate succession."

Plaintiff argued that although the new section forbade his succession to the property of his natural parents, it did not forbid his succession to the property of his natural grandparents. The force of this argument is considerable in view of the history of adoption statutes.

"The right of adoption . . . was unknown to the common law of England, and exists in this country . . . only by virtue of statute."[1] Adoption statutes originated during the latter half of the nineteenth century. Although initially they had few provisions with respect to inheritance rights, such provisions became common.[2] Those provisions which purported to take away the right of an adopted child to succeed to the property of his blood kin the courts construed strictly so as to protect the child's rights.[3] For example, in *In Re Darling*[4] the Court held that although the statute as there construed prohibited a child from succeeding to the property of his natural parents, it did not expressly deny him the right to succeed to the property of other blood kin and therefore that such right still existed. The reasons usually assigned for such a construction are (1) that the statutes were enacted for the benefit of adopted children[5] and (2) that the statutes are in derogation of the common law.[6] The "sacredness" of blood lines has also often been given as a reason,[7] but this idea was severly criticized in *White v. Meyer.*[8]

Plaintiff's justifications for a construction which would allow him to inherit from his grandfather's estate seem inadequate, however, for several reasons. Assuming that the statute should be strictly construed, it seems difficult to imagine how the legislature could have been more explicit in denying the plaintiff succession rights. Moreover, there is doubt that the rule of strict construction is applicable.[9] Ohio Rev. Code, §1.11 provides that remedial statutes are to be liberally construed.

In *Campbell v. Musart*[10] decedent bequeathed property to a charity and died within one year after making his will. The question was

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1 AM. JUR. 622.
2 28 WASH. U. LAW Q. 237 (1943).
3 *Ibid.,* 80 A.L.R. 1398.
4 137 Cal. 221, 159 Pac. 606 (1916).
5 Delano v. Brueston 148 Mass. 619, 20 N.E. 308 (1889).
6 Upson Admr., v. Noble 35 Ohio St. 655 (1880).
7 Phillip v. McConica, 59 Ohio St. 1, 51 N.E. 445 (1898).
8 66 O. App. 549, 37 N.E. (2d) 546 (1940).
9 Frame v. Shaffer 27 O.O. 346, 13 O. Supp. 72 (1943).
10 131 N.E. 2d 279 (1956).

whether plaintiff, decedent's natural grandson, was to be considered a lineal descendant within the meaning of Ohio's Mortmain Statute after plaintiff's adoption. Plaintiff could invalidate the bequest only if he were a lineal descendant. The court relied on the broad language of the *Frantz* case and held the bequest valid.

In both the *Campbell* and *Frantz* cases the courts indicated that equities of the parties or hardships resulting from the strict application of the statute were irrelevant; and that, consequently, there would no court—engraphed exceptions to the rule that an adopted child is to be treated as a stranger with respect to inheritance from his natural relatives.

The Ohio statute cannot be considered as indicative of any strong trend to restrict the inheritance rights of an adopted child to the property of his natural parents or relatives.[12] In 1943 there were five jurisdictions which denied this right and now there are seven.[13] But of these seven, two expressly preserve the rights of an adopted child to inherit from relatives of a deceased parent where the surviving parent has remarried and the step parent adopted the child.[14]

John F. Ramser

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[11] OHIO REV. CODE §2107.06.

[12] 28 WASH. U. LAW. Q. 229 (1943).

[13] The six in addition to Ohio are: CAL. PROBATE CODE, Section 257 (1955); Supp. to CONN. GEN. STAT., Tit. 55, Chap. 335, §2905 d (1955); DISTRICT OF COLUMBIA CODE, §16-222 (1954); DEL. CODE ANN. TIT. 13, §919 (1951); ANN. MO. STAT., §453.090 (1947); PENNSYLVANIA STAT. ANN. Tit. 20, §102.

[14] Supp. to CONN. GEN. STAT., Tit. 55, Chap. 335, §2905 d (1955); DISTRICT OF COLUMBIA CODE, §16-222 (1954).

TRIAL—REASSEMBLY OF JURY AFTER DISCHARGE

Two defendants charged with causing a miscarriage were found not guilty by the jury which was then discharged and left the court room. In the corridor, some of the jurors made known their disagreement with the verdict and within approximately ten minutes of their discharge, the trial judge had reassembled and directed them to deliberate further. Unable to reach a verdict, the jury was finally discharged. On defendant's motion to delete the trial book entry reflecting the jury's inability to agree upon a verdict, the Law Division (Criminal) of the Hudson County Court held that when the jury rendered their verdict of not guilty, were discharged and left the court room, the existence of the jury had terminated and they could not be recalled to alter their verdict of not guilty. The crucial element was the fact that the jury had been out of the presence of the court. *State v. Brandenburg*, 38 N.J. Super. 561, 120 A. 2d 59 (1956).

The general rule is that once a jury has been permanently discharged from a case, it cannot be reassembled to amend or correct the substance of its verdict, but may be reassembled to correct or amend its verdict

when the defect is one of form.[1] Since it is impossible to ascertain definitely whether circumstances have so affected any jury as to render them incompetent to deliberate further, courts have usually selected rules of thumb to determine their continued independence and objectivity. Thus when a verdict is returned and the jury is told it is discharged, reassembly of that jury may depend on whether the jurors have left the presence of the court, whether the case is civil or criminal, or whether the defect is one of form or substance.[2] The problem of whether a jury may or may not be reassembled after discharge, should not be confused with the question of whether the court may take cognizance of facts which would warrant such action.[3]

Before the passage of legislation on this subject in Ohio, the courts sharply distinguished between criminal and civil cases, and form and substance when considering the problem of reassembling the jury.[4] Ohio had adopted the strict rule in criminal cases that once the jury is discharged it may be recalled.[5] In 1853 Ohio adopted the Civil Code which provided that a jury had to be sent out to deliberate further if the verdict was defective in substance, and that if a verdict was defective in form only, the court could correct it with the assent of the jury before its discharge.[6] In *Boyer v. Maloney*,[7] a leading case decided pursuant to the

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[1] 66 A.L.R. 536 (1930).

[2] *Ibid.*

[3] The case of Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785) established the rule which held that the verdict of a jury may not be impeached by the evidence of a member of the jury unless a foundation for the introduction of such evidence is first laid by evidence *aliunde*, i.e. evidence from some other source. This rule is based on public policy which favors an end to litigation. Vaise v. Delaval, *supra*. Ohio follows the English rule. Schwindt v. Graeff, 109 Ohio St. 404, 142 N.E. 736 (1924); Steiner v. Custer, 63 Ohio App. 440, 27 N.E. 2d 160 (1939), *reversed on other grounds*, 137 Ohio St. 448; Hutchinson, Admx. v. Laughlin, 90 Ohio App. 5, 102 N.E. 2d 875 (1951); State v. Andlauer, 71 Ohio L. Abs. 449, 131 N.E. 2d 672 (1955). But see Boyer v. Maloney, 27 Ohio App. 52, 160 N.E. 740 (1927) which indicated but did not decide that the rule would not apply to mistakes by the jury in the nature of a clerical error. *Cf.* The Cady-Iveson Shoe Co. v. Chicowicz, 24 Ohio C.C.R. (n.s.) 53 (1905) which held the verdict self impeached and admitted affidavits of the jurors.

[4] In a civil case the trial judge could correct a clerical error in the verdict after the jury had been discharged. Hammer v. McConnel, 2 Ohio 31 (1825). Such verdicts could not be altered by courts of review. Hanley v. Levin, 5 Ohio 228 (1831). In a criminal case, the strict rule was applied forbidding the reassembly of the jury after discharge. Sargent v. State, 11 Ohio 472 (1842); Helmerhing v. State, 10 Ohio Dec. Repring 444 (1852). But where a jury in a civil case reached a verdict, which awarded interest but omitted its amount, put it under seal and separated, it was said not to be error to reassemble the jury to compute the interest. Sutliff v. Gilbert, 8 Ohio 405 (1838).

[5] Sargent v. State, 11 Ohio 472 (1842).

[6] Sections 273 and 274, 51 Ohio Laws 102 (now OHIO REV. CODE 2315.10 and 2315.11 respectively). For a discussion of these statutes see Lehrer v. Cleveland Ry. Co., 20 Ohio N.P. (n.s.) 481 (1918).

[7] 27 Ohio App. 52, 160 N.E. 740 (1927).

statute, it was held error to recall the jury to poll it to determine whether the verdict rendered was really its verdict. In that case the jury had filled out the verdict form for the wrong party and rather than allowing the jury to amend it, the court held that the proper procedure was to set such verdict aside and grant a new trial.[8] The *Boyer* case seems to hold that the statute impliedly prohibits reassembling of the jury after discharge. However, a pre-*Boyer* case[9] decided pursuant to the statute held that the court could reconvene the jury to continue their deliberations even though some of the jurors had left the court room.

If the modern judicial trend is toward trial convenience and toward ending litigation, it is difficult to see how the Ohio rule, as embodied in the *Boyer* case fulfills these aims. A new trial required by a defect in form is neither convenient nor consistent with a policy of ending litigation. Not only are expenses increased, but the winning party is forced to risk his verdict for correction of a mere error in form. The instant case recognizes the desirability of allowing courts to use discretion to decide this question. "This court is of the opinion that the words 'the jury is discharged' do not in themselves terminate the case . . . a court should not be so impotent to act after those words are uttered as to do an injustice to the accused or the State."[10]

Bruno E. Voltolini

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[8] See also American Express Co. v. Catlin, 2 Ohio L. Abs. 746 (1924); Crawford v. Kellermier, 123 Ohio St. 404, 175 N.E. 600 (1931); Ekleberry v. Sanford, 73 Ohio App. 571, 57 N.E. 2d 270 (1943); *cf.* Guarantee & Finance Co. v. Zenker, 20 Ohio Op. 312, 34 N.E. 2d 287 (1940) where it was held error for a judge, sitting without a jury, to hear evidence on the value of an auto after entry of final judgment. See also Bernhardt v. United States, 169 F. 2d 983 (6th Cir. 1948).

[9] The Cady-Iveson Shoe Co. v. Chicowicz, 24 Ohio C.C.R. (n.s.) 53 (1905).

[10] State v. Brandenburg, 38 N.J. Super. 561 (563), 120 A. 2d 59 (61) (1956).