Recent Decisions

Constitutional Law — Commerce Clause — Power of a State To Tax the Privilege of Engaging in Interstate Commerce

Petitioner, Spector Motor Service, Inc., is a Missouri corporation engaged exclusively in interstate commerce. It leases and utilizes terminals in Connecticut and employs twenty-seven workers within the state; it owns pick-up trucks which are registered and used in Connecticut, but the corporation has not been authorized by the State of Connecticut to do intrastate trucking and does not engage in it. The corporation was assessed for taxes and penalties. The tax imposed was a franchise tax for the privilege of doing business within the State of Connecticut. The tax was computed at a non-discriminatory rate on that part of the corporation's net income which was reasonably attributable to its business activities within the state. CONN. GEN. STAT. §§ 1896-1921 (1949). The petitioner sought to enjoin collection of the tax and asked for a declaratory judgment of non-liability. The federal district court, applying the state court's interpretation of the Act to the effect that it was precisely a privilege tax, held the Act unconstitutional. On appeal, the Court of Appeals reversed, holding that interstate commerce can be made to pay its way if the tax is reasonable and the revenue is used in paying its share of the costs of government. On appeal to the Supreme Court, *held,* reversed. The privilege of engaging in solely interstate commerce cannot be taxed by a state even though the tax is non-discriminatory and taxes only that part of the net income which reasonably can be attributed to business activity within the state. *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602 (1951).

The starting point in determining whether a state can tax the privilege of doing interstate commerce is the "Cooley Compromise." *Cooley v. Port Wardens,* 12 How. 299 (U. S. 1851). In effect, the "compromise" meant that where there was a relatively localized aspect of the fact situation in a particular case, the power to tax interstate commerce was *concurrent* in the state and federal governments. Where there was a national aspect of the fact situation in a particular case, the power to tax interstate commerce was *exclusive* in the federal government.

One of the patently localized situations is that of a state property tax levied on property situated in the state but used in interstate commerce. *Commonwealth of Virginia v. Imperial Coal Sales Co.,* 293 U. S. 15 (1934); *Hope Natural Gas Co. v. Hall,* 274 U. S. 284 (1927); *Pullman Co. v. Richardson,* 261 U. S. 330 (1923). Where the

situs is divided among several states, each state may tax its proportionate share of the whole property so long as in the aggregate the tax base does not appreciably exceed 100%. *Standard Oil Co. v. Peck,* 342 U. S. 382 (1952); *Western Union Telegraph Co. v. Missouri,* 190 U. S. 412 (1903).

Included in the exclusive category of the "compromise" have been taxes on gross receipts of transportation companies engaged in interstate commerce. *Galveston, H. & S.A. Ry. v. Texas,* 210 U.S. 217 (1908); *Philadelphia & So. Mail S. S. Co. v. Pennsylvania,* 122 U. S. 326 (1887). One of the outstanding inclusions has been the tax on the privilege of engaging in solely interstate commerce. *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U. S. 422 (1947); *Alpha Portland Cement Co. v. Massachussetts,* 268 U. S. 203 (1925); *Ozark Pipe Line Corp. v. Monier,* 266 U. S. 555 (1925). It is upon this line of authority that the majority based its decision.

Many of the holdings since about 1938 have shown a trend toward expanding the concurrent category by allowing states to tax interstate commerce under the "multiple burden" test. Helerstein, *State Franchise Taxation of Interstate Businesses,* 4 TAX L. REV. 95 (1948); Dunham, *Gross Receipts Taxes on Interstate Transactions,* 47 COL. L. REV. 211 (1947); Powell, *More Ado About Gross Receipts Taxes,* 60 HARV. L. REV. 501 (1947). Under the "multiple burden" test, only such state taxes on interstate business are invalid as are susceptible of being imposed with equal right by other states, so that interstate commerce is required to bear a heavier burden of taxation than is intra-state commerce. *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434 (1939); *Western Live Stock v. Bureau of Internal Revenue,* 303 U. S. 250 (1938); *J. D. Adams Mfg. Co. v. Storen,* 304 U. S. 307 (1938). Often the solution when several states possess contacts with the same interstate commerce is for the Court to select the state having the "dominant" contact, or the state possessing the majority of contacts, and to allow only that state to tax. *Interstate Oil Pipe Line Co. v. Stone,* 337 U. S. 662 (1949); *Northwest Airlines v. Minnesota,* 322 U. S. 292 (1944); *McGoldrick v. Berwind-White Co.,* 309 U. S. 33 (1939). While the Court, applying the "direct-indirect" test, has continued to hold taxes on interstate gross receipts to be within the exclusive category, an exception is made when the tax is apportioned. *Central Greyhound Lines v. Mealy,* 334 U. S. 653 (1948); *Maine v. Grand Trunk R. Co.,* 142 U. S. 217 (1891). Under this test a state tax which directly burdens interstate commerce is invalid while one which indirectly burdens such commerce is probably valid. *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U. S. 422 (1947); *Freeman v. Hewit.* 329 U. S. 249 (1946).

From these recent developments it would seem to follow that in the instant case Connecticut had constitutional power to tax. The State

shared with other jurisdictions in which the corporation operates extensive contacts that would justify the reasonably allocated tax actually imposed. But the Court, emphasizing the descriptive name of the tax, regarded the case as controlled by the earlier "privilege" cases. Mr. Justice Clark in a strongly worded dissenting opinion insisted that there was no apparent difference between an "exclusively interstate" business and a "mixed intrastate and interstate" business which would warrant different constitutional regard. Of large significance to the "label" approach taken by the majority is the fact that at the regular session of the Connecticut General Assembly, January, 1951, the statute was so altered that now the tax is paid in return for the benefits and protection afforded by the state. CONN. GEN. STAT. §§ 396b, 398b (Supp. 1951). Whether this change will bring this type of statute within the state taxing power remains unresolved.

William R. Coen

CONSTITUTIONAL LAW — DUE PROCESS — IN PERSONAM JURISDICTION OVER FOREIGN CORPORATIONS

The plaintiff sued a Massachusetts corporation for damage resulting from the defendant's negligence in repairing a roof. Service was made on the defendant under a statute which provides that if a foreign corporation commits a tort in Vermont against a resident of that state, such act shall be deemed as doing business there and shall be equivalent to an appointment of the Secretary of State as its attorney to receive process in an action arising from the tort. VT. PUB. LAWS §1562 (1947). In the trial court the constitutionality of the statute was attacked, but not ruled on. On appeal, *held,* the statute does not violate the due process clause of the Fourteeenth Amendment. *Smyth v. Twin State Improvement Corp.,* 80 A. 2d 664 (Vermont, May, 1951).

Historically, the jurisdiction of courts to render judgments in personam over nonresidents rested on their de facto power over the defendant's person. But with the advent of statutes authorizing service of process by means other than personal service, a foreign corporation has been held subject to the jurisdiction of the courts of a state if deemed to be doing business therein. *Commercial Mutual Accident Co. v. Davis,* 213 U.S. 245 (1909); *Mechanical Appliance Co. v. Castleman,* 215 U.S. 437 (1910). Jurisdiction, in the absence of actual consent to be sued, has been justified on the strength of the theories of "implied consent," *Connecticut Mutual Life Insurance Co. v. Spratley,*

172 U.S. 602 (1899), and "presence" within the jurisdiction, *International Harvester Co. v. Kentucky,* 234 U.S. 579 (1914). But under either theory the general rule has been that a continuous course of business, as opposed to single or isolated activity, is required by due process to constitute "doing business" within the state. *Rosenburg Bros. & Co. v. Curtis Brown Co.,* 260 U.S. 516 (1923); *Sasnett v. Iowa State Traveling Men's Ass'n.,* 90 F. 2d 514 (Eighth Cir. 1937), *cert. denied* 302 U.S. 711 (1937).

In 1945 the Supreme Court of the United States expressly repudiated the fictional theories of "implied consent" and "presence" and established in their place the more realistic "contact" approach in determining this question of jurisdiction. *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). In that case Chief Justice Stone stated at p. 316, " . . . due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." As to what contacts are sufficient to satisfy due process the Court said at p. 317, " . . . such contacts of the corporation within the state of the forum as to make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." The Court further stated at p. 319 that " . . . the quality and nature of the activity . . . " rather than its quantity is the relevant consideration. This case advocates tests for jurisdictional power over foreign corporations not unlike those employed in deciding a question on the doctrine of *forum non conveniens.*

The principal case is evidence of the fact that the *International Shoe* decision has substantially increased the possible liability of foreign corporations, with respect to in personam suits, in states where they engage in casual or sporadic activity. The court relied heavily on that decision as overruling all previous law on the question. If it had employed the "implied consent" or "presence" theories, it is quite doubtful that the constitutionality of the statute would have been upheld. Can it be said that requiring a Massachusetts corporation to defend in Vermont an action upon a tort which it had committed there offends "fair play and substantial justice" or is "unreasonable"? It seems rather that the "contact" theory of the Supreme Court, as exemplified by the principal case, has become a realistic approach toward accomplishing justice in the individual case. The practical considerations of convenience, trial expediency, and reasonableness still serve to protect the corporation from undue hardship in defending a suit in another state.

Richard G. Ison

CRIMINAL LAW — DOUBLE JEOPARDY — CONVICTION ON TWO OFFENSES BASED UPON SAME TRANSACTION

The defendant was convicted as a principal in issuing four "no-account" checks with intent to defraud, of aiding and abetting in issuing the four checks, and of larceny by trick in using the checks to obtain automobiles. OHIO GEN. CODE §§ 710-176, 12380, 12447-1. The Court of Appeals reversed and the Supreme Court dismissed an appeal. Upon rehearing the Court of Appeals sustained the conviction on one of the three counts of each of the four indictments, holding that conviction on more than one would violate Article I, Section 10 of the Ohio Constitution which reads in part, "No person shall be twice put in jeopardy for the same offense." The court reasoned that only one conviction on each indictment was justified since the offenses charged were predicated upon the same transaction and were related to the same subject matter. *State v. Greeno,* 89 Ohio App. 241, 101 N.E. 2d 295 (1951); *appeal dismissed,* 155 Ohio St. 589, 99 N.E. 2d 613 (1951).

Logically a person could not be convicted as an aidor and abettor and as a principal in the first degree for the same act. It is difficult to see why separate counts were used since one indicted as a principal may be convicted as an aidor and abettor. *Hanoff v. State,* 37 Ohio St. 178, 41 Am. Rep. 496 (1881); *Hornsby v. State,* 29 Ohio App. 495, 163 N.E. 923 (1928). However, a person could be convicted both for being a principal or an aidor and abettor and for larceny by trick, depending upon what double jeopardy test is used by the court.

In sixteenth century England, death was the penalty for many minor offenses. The original development of the double jeopardy concept was an attempt on the part of the courts to restrict liability when the severity of punishment meted out far exceeded the gravity of the offense. Horack, *The Multiple Consequences Of A Single Criminal Act,* 21 MINN. L. REV. 805 (1937); Note, 57 YALE L. J. 132 (1947). This reason no longer exists. In fact the pendulum has swung the other way and courts are now finding means of avoiding double jeopardy to enable the state to insure and sometimes increase punishment for wrongful acts. Legislative action in defining the same criminal behavior in a slightly different manner in several statutes has aided prosecutors and the courts to avoid double jeopardy limitations.

Three main tests have developed for judging double jeopardy. These are the single intent test, the same transaction test, and the same evidence rule.

The single intent test is self explanatory. If the defendant's action is referable to a single criminal intent, he has committed only one offense. This test is not recognized in Ohio and rarely used elsewhere. Comment, 38 J. CRIM. L. 379 (1947). Applied to the principal case the single intent test would permit conviction on only one count. The

inability to conclusively determine intent is the great weakness of this test. Needless to say this test is highly favorable to the defendant.

The same transaction test, adopted in the principal case, would prevent a second prosecution when the proof shows that the second offense charged concerns the same transaction as the first even though additional elements need to be proved. This also is a defendant's rule and is followed by a steadily decreasing minority. Kirchheimer, *The Act, The Offense And Double Jeopardy,* 58 YALE L. J. 513 (1949).

The same evidence rule has been clearly stated: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other." Note, 24 MINN. L. REV. 522 (1940).

An examination of *Griffith v. State,* 93 Ohio St. 294, 112 N.E. 1017 (1915) and *Devere v. State,* 5 Ohio Cir. R. 509, 3 Ohio Cir. Dec. 249 (1890), the two cases mainly relied upon by the principal case, will show that they used the same transaction test. The results favorable to the defendant are not surprising. The same transaction test, while going into eclipse, has never been expressly repudiated in Ohio, although the leading case, *State v. Rose,* 89 Ohio St. 383, 106 N.E. 50 (1914), comes close to repudiation in holding the phrase *same offense* to mean "same offense, not the same transaction, not the same act, not the same circumstances or the same situation." The *Rose* case is cited more as indicating approval of the same evidence rule than as rejecting the same transaction test although most of the opinions citing the *Rose* case also contain the above quotation. *State v. Duvall,* 111 Ohio St. 657, 146 N.E. 90 (1924); *State v. Martin,* 154 Ohio St. 539, 96 N.E. 2d 776 (1951). The acceptance of either test in a given case usually requires rejection of the other. The principal case indicates that Ohio appellate courts desiring to reduce unjustifiably heavy sentences meted out by trial judges may find convenient precedents in some of the older cases. If predictability of results is desirable in the administration of criminal justice, it would seem that this judicial technique is somewhat questionable.

In the *Griffith* case, *supra,* the defendant claimed the third count should be barred since he was previously convicted of embezzling part of the amount he was now charged with obtaining by false pretenses. The Supreme Court held that the defendant could not be convicted of both embezzlement and obtaining by false pretenses in reference to the same money or property. This is correct since the two crimes as to the same property are mutually exclusive. Proof of one automatically eliminates the other. The *Griffith* case, *supra,* on the facts, is not analogous to the principal case since issuing a check with intent to defraud and larceny by trick are not mutually exclusive.

In the *Devere* case, *supra,* the defendant was convicted of forgery

and of uttering a forged note, both counts relating to the same note. This was held error. But *Dinsmore v. Alvis,* 88 Ohio App. 32, 96 N.E. 2d 427 (1950), holds that such an indictment charges two separate offenses. The fact that the *Dinsmore* case, *supra,* adopts the same evidence rule explains the conflict. The *Dinsmore* case, *supra,* follows the majority rule that the crimes of forgery and of uttering a forged instrument are two distinct offenses and prosecution for one is not a bar to prosecution for the other. *Beyerline v. State,* 147 Ind. 125, 45 N.E. 772 (1897); 22 C.J.S. 434.

The same evidence rule is the current general rule in Ohio, the Federal courts, and in a majority of the state courts. *State v. Rose, supra; State v. Martin, supra; Gravieres v. U.S.,* 220 U.S. 338, 31 S. Ct. 421 (1911); *Blockberger v. U.S.,* 284 U.S. 299, 52 S. Ct. 180 (1932); Kirchheimer, *The Act, The Offense And Double Jeopardy, supra.* An early Ohio case, *Price v. State,* 19 Ohio 423 (1850), providing authority for the rule predates the *Rose* case, *supra,* cited in the principal case. This rule favors the prosecution in view of the modern profusion of statutory crimes grouped around one central subject matter and varying only slightly in ingredients.

Section 710-176 of the Ohio General Code makes it a felony for any person with intent to defraud to make, draw, utter, or deliver any check not covered by deposited funds. The making, drawing, etc. is considered prima facie evidence of such intent. Section 12447-1 makes it a felony to obtain possession of anything of value with the consent of the owner when such consent is induced by fraud. Fraudulent intent is a necessary requisite of both offenses. However under the former only the issuance of a bogus check need be shown while under the latter something of value (in the principal case automobiles) must be fraudulently taken from the owner with his consent. Under the same evidence rule a conviction, as in the principal case, on counts based on the statutes would not violate double jeopardy.

Thus, to determine double jeopardy, the courts have developed three distinct tests: the single intent test, the same transaction test, and the same evidence rule. As indicated, the single intent test and the same transacion test favor the defendant while the same evidence rule helps the prosecution. It appears that the courts use whichever test will best rationalize their desired decision. This decision in turn depends a great deal upon the amount of punishment the offender deserves in the light of his background as a suspected or known criminal, and the surrounding circumstances of the instant crime. Generally appellate courts are not permitted to regulate sentences imposed by trial courts if within statutory maxima. See Hall, *Reduction Of Criminal Sentences On Appeal,* 37 COL. L. REV. 521. Resort is thus made to the above tests. Perhaps the real problem is whether the appellate courts should regulate sentences or whether some over-

seeing agency, equipped with expert and experienced penologists, should have the power to equalize sentences according to uniform policy.

James D. Oglevee

INJUNCTIONS — ALIMONY ACTION — PERSONAL RIGHTS

Plaintiff brought an alimony action and requested in addition to the usual relief that during the pendency of the action a temporary restraining order be issued restraining the defendant third party from associating in any manner with the defendant husband or interfering with the marriage relationship. The plaintiff claimed that the defendant third party had enticed the defendant husband to leave the plaintiff and transfer his affections to her. The Court of Common Pleas held that since the pertinent allegations of the complaint were conceded, the temporary order should issue to restrain the third party defendant from interfering with the marriage relation and to restrain both defendants from contacting each other. *Pashko v. Pashko,* 45 Ohio Op. 498, 101 N.E. 2d 804 (1951).

Historically Equity refused to take jurisdiction in any case unless property rights were involved. *Mead v. Stirling,* 62 Conn. 586, 27 Atl. 591 (1892); see 14 A.L.R. 295 (1921). The modern trend, however, is to extend the jurisdiction of Equity to the protection of rights in personality in proper cases. *Henley v. Rockett,* 243 Ala. 172, 8 So. 2d 852 (1942); *Hawke v. Yancy,* 265 S.W. 233 (Tex. Civ. App. 1923); see 175 A.L.R. 438 (1948). In the field of domestic relations this trend has taken several forms. Some courts, while voicing adherence to the older doctrine of protecting only property rights, actually protect rights of a purely personal nature by finding some tenuous property right on which to base jurisdiction. For instance, in *Stark v. Hamilton,* 149 Ga. 227, 99 S.E. 861 (1919), the court granted an injunction to restrain a man from associating with the plaintiff's minor daughter whom the man had debauched. Jurisdiction was based on the father's property right in the services of his daughter. Other courts have based jurisdiction on property rights while indicating that they probably would have taken jurisdiction to protect the purely personal rights even in the absence of a property right. *Vanderbilt v. Mitchell,* 72 N.J.Eq. 910, 67 Atl. 97 (1907) *Reed v. Carter,* 268 Ky. 1, 103 S.W. 2d 633 (1937). A third group of courts protect purely personal rights without discussing the jurisdictional question. *Smith v. Womack,* 271 S.W. 209 (Tex. Civ. App. 1925); *Witte v. Brauderer,* 255 S.W. 1015

(Tex. Civ. App. 1923). Finally, the more progressive courts have completely repudiated the "property right" doctrine and assert jurisdiction to protect purely personal rights in proper cases. *Henley v. Rockett, supra; Hawke v. Yancy, supra.* For example, in the *Hawke* case, *supra,* an injunction was granted to protect a woman from a man with whom she had had an illicit relationship and who was attempting to prevent her marriage to another.

Although the strict "property right" doctrine has been somewhat repudiated in Ohio, the general question still remains unsettled. 16 O. Jur., Equity §85 (1931); 21 O. Jur., Injunctions §112 (1937). In 1924 the Supreme Court refused an injunction in an alienation of affections case, and stated that the jurisdiction of equity did not extend to the regulation and control of domestic relations. *Snedaker v. King.* 111 Ohio St. 225, 145 N.E. 15 (1924). The principal case was distinguished on the ground that it was an alimony action in a court of domestic relations in which the plaintiff sought only a temporary injunction, whereas the *Snedaker* case, *supra,* was an original action in a court of equity in which the plaintiff sought a permanent injunction. Superficially, this distinction seems invalid. A temporary injunction will issue only where the party seeking it would be entitled to a permanent injunction, or where it appears that the defendant is doing or is about to do some act respecting the subject of the action which would render the final judgment ineffectual. 21 O. Jur., Injunctions §§49 and 51 (1932). In the principal case neither condition was satisfied. If, however, the distinction is considered in connection with *In Re Cattell,* 146 Ohio St. 112, 64 N.E. 2d 416 (1946), cited in the principal case, it takes on a new perspective. In that case the court granted a temporary order restraining the defendant husband in a divorce action from interfering with his wife's exclusive use and occupancy of the home. Its purpose was to prevent the husband from subjecting his wife to continued physical violence. The Court relied on Section 11876 of the General Code which authorizes the issuance of a temporary restraining order or injunction when it appears by the petition that the plaintiff is entitled to the relief demanded and such relief or any part of it consists in restraining the commission or continuance of some act, the commission or continuance of which would produce great or irreparable injury to the plaintiff. This is significant in that Section 11876 is not a part of the Domestic Relations Code.

Considered together with the *Cattell* case, *supra,* the principal case thus indicates that Section 11876 of the General Code applies in the courts of domestic relations. Unless these two cases are overruled or limited by the Supreme Court, the principal case is a step forward and the yoke of the *Snedaker* case, *supra,* has been partially removed.

Thomas E. Jenks

Injunctions — Negative Covenants Not To Compete

The defendant was a barber employed in his father's shop. He had no interest in the business as a partner or otherwise. Ancillary to a sale of the shop to the plaintiffs, the defendant was required, along with his father, to sign an agreement that he would not engage in the trade of barbering within a certain radius for a fixed period of time. After the defendant accepted temporary employment in another barber shop plaintiffs sought an injunction, which was denied. From a decree for the defendant, the plaintiff appealed. On appeal, *held,* affirmed. "In no event could the covenant be valid," said the Court, "unless it was reasonably necessary for the fair and just protection of the good will of the business sold, and no such necessity had been shown." *Domurat et al. v. Mazzaccoli,* 138 Conn. 327, 84 A. 2d 271 (1951).

It is a settled rule that where, upon the sale of a business, an agreement is entered into restricting the right of one of the parties to compete in a similar business, such agreements, if valid within the rules governing contracts in restraint of trade, will be enforced in equity by enjoining its breach. *Morgan v. Perhamus,* 36 Ohio St. 517, 38 Am. St. Rep. 607 (1881). The contract must be founded on valuable consideration and be reasonable and not oppressive. *Toledo Breweries Co. v. Zevnick,* 4 Ohio N. P. N. S. 193, 16 Ohio Dec. 493 (1906).

It is generally held that even in the absence of an express agreement a seller of a business or trade and its good will is precluded from interfering with the purchaser in his right to enjoy all the advantages that inhere to the premises used as the place of business. *Fine v. Lawless,* 139 Tenn. 160, 201 S. W. 160 (1918).

The problem raised by the principal case is the enforceability of negative covenants not to compete made by a signer who had no interest in the business sold. Two main issues have been raised in these cases. Is it necessary for the covenantor to have an interest in the property sold? Assuming such an interest is not necessary, may the restraint be validly imposed?

An indirect interest, such as being a stockholder in the business sold, has been held as sufficient to bind the covenantor. *Bloom v. Home Ins. Agency,* 91 Ark. 367, 121 S. W. 293 (1909). In California it has been intimated that a vendible interest on the part of the covenantor is necessary to the validity of the covenant as against him. *California Linoleum & Shade Supplies v. Schultz,* 105 Cal. App. 471, 287 Pac. 980 (1930). Some courts have enforced negative covenants on a mere showing of consideration, where the interest of the covenantor wasn't urged. *Durham v. Lewis,* 231 Ky. 601, 21 S. W. 2d 1004 (1929); *Schneiderman v. Stern,* 93 N. J. Eq. 626, 117 Atl. 631 (1922). A case decided under a Michigan statute, making certain contracts in re-

straint of trade valid, is regarded as a distinct authority for the view that it is not necessary to the validity of the covenant as against a particular covenantor, that he should have an interest in the property sold. The purchase price given to the defendants' father and uncle for the sale of a dairy business was held as sufficient consideration to bind the defendants and to enjoin them from carrying on a corporation in competition with the plaintiff's business. The defendants had taken an active part in the management and contacts of the business sold. *Arctic Dairy Co. v. Winans,* 267 Mich. 80, 255 N. W. 290 (1934). The consideration necessary to bind the covenantor need not move to him if the buyer can show he parted with something at the covenantor's request and benefited a third party. 1 WILLISTON, CONTRACTS 384.

If the answer to the first problem is that an interest in the business is not necessary to bind the covenantor, may such a restraint be validly imposed? It has been regarded as sufficient to enforcement if the covenantor was prominent in the business at the place in question. *Arctic Dairy Co. v. Winans, supra.* However, even where the covenantor is manager of the business, the covenantee must still show irreparable harm. *Menter v. Brock,* 147 Minn. 407, 180 N. W. 553 (1920). The position the covenantor must hold in the business sold, before the courts will enjoin him from competing, is difficult to define. The test used by most courts is that the restraint imposed should be no greater than is necessary for the fair and just protection of the business sold and does not impose unnecessary hardship on the covenantor. *Gates - McDonald Co. v. McQuilkin,* 33 Ohio L. Abs. 481, 34 N. E. 2d 443 (1941).

The principal case relied solely on the fact that the plaintiff could show no harm done to the good will of his business by the defendant's employment in another shop. The court said further that the plaintiff must show not only that the defendant will take away customers from the barber shop, but that the customers must have been followers of the shop, rather than personal followers of the defendant. It would seem that such a line would be difficult to draw, and that the court is attempting to put a greater burden on the plaintiff of showing irreparable harm, when the covenant is made by one who has no interest in the business sold. The problems concerning necessary interest in the business, and consideration for the covenant were not discussed.

Most courts would agree that covenants in restraint of trade are to be strictly construed. *Schroeder v. Schultz,* 160 Ohio C. C. N. S. 193, 36 Ohio C. D. 570 (1913). However, without the signatures of close relatives who work in the business, oftimes the sale would not take place. Without their signatures an attempt of an effective transfer and protection of goodwill would be mere idle gesture. No hard and fast rule can be employed by the courts to decide these cases. The present

problem is the same that arises in those cases involving unfair competition. The court should balance the rights of both parties so that each may carry on his business or calling with the greatest freedom consistant with a similar right in the other. This same standard should apply whether the covenantor has an interest in the business sold or not.

Harold Talisman

NEGLIGENCE — CHARITIES — LIABILITY FOR TORTS

While transporting the plaintiff, a nonpaying patient in defendant charitable hospital, a nurse's aide, although she realized assistance was needed, nevertheless attempted to wheel the plaintiff down a ramp unassisted. The employee lost control of the stretcher, and as a result the plaintiff was injured. In a suit against the hospital, the trial court directed a verdict for the defendant on the ground that it was a charitable institution. *Held,* reversed and remanded. The trial court committed error by withdrawing from the jury the question of whether the defendant exercised due care in employing the nurse's aide. The Supreme Court also expressly overruled its prior holding and now imposes complete liability on charitable institutions for the negligence of their servants. *Ray v. Tucson Medical Center,* 72 Ariz. 22, 230 P. 2d 220 (1951).

Several reasons or theories have been advanced by the courts in limiting or denying the liability of corporate charitable institutions. These theories have been criticized severely by most legal writers as being unsound and contradictory. PROSSER, TORTS, 1079 (1941); HARPER, TORTS §294 (1933); SCOTT, TRUSTS §402 (1939); BOGERT, TRUST AND TRUSTEES §731-35 (1935); Feezer, *The Tort Liability of Charities,* 77 U. PA. L. REV. 191 (1928).

The trust fund theory is grounded in the reasoning that the funds and property of these institutions are held in trust and cannot be diverted to purposes other than those designated in the trust. 10 Am. Jur. 695; SCOTT, TRUSTS §402. This theory in practice has proven extremely illogical, for many of the states that follow it impose liability in favor of strangers or paying beneficiaries. *Bruce v. Central Methodist Episcopal Church,* 147 Mich. 230, 110 N.W. 951 (1907). If the reasoning in the rule is analyzed it must apply to all classes without exception.

The doctrine of respondeat superior is another theory advanced

by several courts in denying the liability of corporate charitable institutions, the theory being that since these institutions are not operated for profit respondeat superior does not apply. *Emory v. Jewish Hosp. Ass'n.,* 193 Ky. 400, 236 S.W. 577 (1921). Again the courts in an all-exclusive doctrine fall into inconsistency by making the charity liable if its officers are negligent in hiring, or if the injured person is not a beneficiary. *Cullen v. Schmidt,* 139 Ohio St. 194, 39 N.E. 2d 146 (1942); RESTATEMENT, TRUSTS §402.

The implied waiver theory advanced by few courts is based on implied contract, in that the patient who accepts the services rendered him waives all rights to claim damages for injuries sustained by the negligence of the hospital. *Duncan v. Nebraska Sanitarium and Benevolent Ass'n.,* 92 Neb. 162, 137 N.W. 1120 (1912). This theory has received extreme criticism. 10 Am. Jur. 694; SCOTT, TRUSTS §402.

Several courts base the doctrine of immunity on public policy. They are of the opinion that to allow recovery would be against society's best interests in that it would militate against charitable gifts. *Weston's Adm'x. v. Hospital of St. Vincent of Paul,* 131 Va. 587, 107 S.E. 785 (1921). This theory is the most persuasive and probably is influential in those courts which base their decisions on the other theories.

The conflict among the courts is discussed by Justice Rutledge in *President and Directors of Georgetown College v. Hughes,* 130 F. 2d 810, 812 (D.C. Cir. 1942).

> Paradoxes of principle, fictional assumptions of fact and consequence, and confused results characterize judical disposition of these claims. From full immunity, through varied but inconsistent qualifications to general responsibility is the gamut of decision. The cases are almost riotous with dissent. Reasons are even more varied than results. These are earmarks of law in flux. They indicate something wrong at the beginning or that something has become wrong since then. They also show that correction though in process, is incomplete.

The principle that charities are not liable for torts of their servants has so many exceptions and qualifications that it is doubtful to say it is the general rule. Many of the courts differentiate their holdings depending upon whether the injured party be a stranger, beneficiary, nonpaying beneficiary or an employee. In many states beneficiaries are denied recovery but a stranger may recover. *Cullen v. Schmidt, supra; Cohen v. General Hospital Soc. of Connecticut,* 113 Conn. 188, 154 Atl. 435 (1931). In several states paying beneficiaries may recover. *Tucker v. Mobile Infirmary Ass'n.,* 191 Ala. 572, 68 So. 4

(1915); *Robertson v. Executive Committee of Baptist Convention,* 55 Ga. App. 469, 190 S.E. 432 (1937). The majority of states deny recovery to nonpaying patients but the few jurisdictions that have allowed recovery have adopted the full liability rule. *Geiger v. Simpson Methodist-Episcopal Church,* 174 Minn. 389, 219 N.W. 463, 62 A.L.R. 716 (1928); *Foster v. Roman Catholic Diocese of Vermont,* 116 Vt. 124, 70 A. 2d 230 (1950). Liability has also been imposed when the injured person is an employee of the charity. *Cowans v. North Carolina Baptist Hospitals, Inc.,* 197 N.C. 41, 147 S.E. 672 (1929). A few jurisdictions hold the corporation liable to the extent of property owned for income and not used directly in carrying on the charitable enterprise. *Morton v. Savannah Hospital,* 148 Ga. 438, 96 S.E. 887 (1918); *Baptist Memorial Hospital v. Couillens,* 176 Tenn. 300, 140 S.W. 2d 1088 (1940). Liability may also be imposed if the charity is covered by insurance. *O'Connor v. Boulder Colorado Sanitarium Ass'n.,* 105 Colo. 259, 96 P. 2d 835, 133 A.L.R. 819 (1939); *Vanderbilt University v. Henderson,* 23 Tenn. App. 135, 127 S.W. 2d 284 (1938). With all the conflict and exceptions to immunity several states still adhere to the full immunity doctrine. *Arkansas Valley Co-op Rural Electric Co. v. Elkins,* 200 Ark. 883, 141 S.W. 2d 538 (1940); *Webb v. Vought,* 127 Kan. 779, 275 P. 170 (1929).

Prior to the decision laid down in the principal case Arizona had held that charitable institutions were not liable for the torts of their servants where due care had been exercised in the selection of the employee. *Southern Methodist Hospital and Sanatorium of Tucson v. Wilson,* 45 Ariz. 507, 46 P. 2d 118 (1935). The Arizona court, in overruling the doctrine of limited liability, expressed doubt that any valid reasons had ever existed for holding charitable institutions immune and stated that if such reasons existed in the past they are today outweighed by such considerations as the size of charities, the injustice to the injured, insurance programs, and the obvious legal inconsistency underlying the reasons in limiting liability.

Ohio has not yet adopted full liability for charitable institutions. It adheres to the view that a stranger may recover but a paying or non-paying beneficiary is denied recovery unless the hospital was negligent in hiring the responsible employee. *Taylor v. Flower Deaconess Home and Hospital,* 104 Ohio St. 61, 135 N.E. 287 (1922); *Cullen v. Schmidt, supra; Newman v. Cleveland Museum,* 143 Ohio St. 369, 55 N. E. 2d 575 (1944). The more logical view, as expressed in the principal case, is to hold charitable institutions liable for negligent acts. This is evidenced by a growing tendency in the courts to revoke the historical immunity of charities.

Thomas E. Cavendish

NEGOTIABLE INSTRUMENTS — HOLDER IN DUE COURSE — COMPLETE AND REGULAR ON ITS FACE

The defendant auto agency sold a car to Lynch, receiving a note for a portion of the purchase price. Lynch signed the form note, and the auto agency took it to a discount company, where the proper figures were inserted, and the note was then indorsed by the auto agency to the discount company. When no payment was made on the note, the discount company brought suit against Lynch, only then discovering that Lynch, who had represented his age as 21, was in fact an infant and not bound. The discount company thereupon sued the auto agency as indorser. The defendant contends the plaintiff is not a holder in due course, since the blanks in the instrument were not filled completely at the time of its negotiation to the plaintiff. On appeal by defendant, *held,* affirmed. The plaintiff is a holder in due course, under the provisions of the Uniform Negotiable Instruments Law. *First Discount Corp. v. Hatcher,* 156 Ohio St. 191, 102 N.E. 2d 4 (1951).

Section 8157 of the Ohio General Code (NEGOTIABLE INSTRUMENTS LAW §52) reads: "One is a holder in due course who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face . . . . (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Section 8119 of the Ohio General Code (NEGOTIABLE INSTRUMENTS LAW §14) reads: ". . . In order, however, that such an instrument (i.e. an incomplete instrument) when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if such an instrument after completion is negotiated to a holder in due course, it is valid and effectual . . . ."

Section 8119, by implication, and Section 8157, more affirmatively, thus declare the rule that a purchaser of an instrument prior to completion, or contemporaneously with the act of completion, cannot be a holder in due course. *Dumbrow v. Gelb,* 72 Misc. 400, 130 N.Y.S. 182 (1911); *Bronson v. Stetson,* 252 Mich. 6, 232 N.W. 741 (1930); BRITTON, BILLS AND NOTES §86 (1943). But it may be seen that the statute does not specifically refer to the taking of a completed instrument with knowledge that it has been filled in by a person not the maker.

In an early English case, an indorsee taking an instrument containing blank spaces was not charged with notice, Lord Mansfield stating, "The indorsement on a blank note is a letter of credit for an

indefinite sum. The defendant said, 'Trust Galley to any amount and I will be his security.' It does not lie in his mouth to say the indorsements were not regular." *Russell v. Langstaffe*, 2 Doug. 514 (1781). This was the view of the American common law cases. *Fullerton v. Sturges*, 4 Ohio St. 530 (1855); *Orrich v. Colston*, 7 Gratt. (Va.) 189 (1850).

The Negotiable Instruments Law codifies a later English rule to the effect that an indorsee accepting an instrument containing blanks is taking in bad faith, and of course cannot be a holder in due course. See I DANIEL, NEGOTIABLE INSTRUMENTS §114 (7th ed. 1933). This provision seems to have been applied by the courts at times with reluctance, *Bronson v. Stetson, supra*, and at other times with confusion. See BRITTON, BILLS AND NOTES §114 (1943). Courts prefer to look to the circumstances of the case, and then base their decisions upon whether the holder was in good faith. The New Jersey Superior Court has stated that if the indorsee does not have actual notice of fraud, but merely notice of suspicious circumstances, he will be a holder in due course, even though the blank instrument was filled in the indorsee's presence by a third person. *First National Bank of Springfield v. Di Taranto*, 9 N.J. Sup. Ct. Rep. 246, 75 A. 2d 907 (1950). A District of Columbia court, on similar facts, stated that "the endorsee of an instrument containing a blank as to any material part is not a holder in due course. . . ." *Zier v. Eastern Acceptance Corporation*, 61 A. 2d 106 (1948). In the former case, the indorsee had no knowledge of any fraud on the part of the indorser; the latter case involved a "detached" or "perforated" note situation, and the court viewed the indorsee's claim of innocence with a skeptical eye.

With this background, then, it may more easily be seen why, in the instant case, Chief Justice Weygandt states, "Clearly the plaintiff is a holder in due course," while Judge Taft in the concurring opinion can not see how the instrument was complete and regular upon its face at the time the plaintiff took it.

It is interesting to note that the proposed Uniform Commercial Code would change Section 8157 of the Ohio General Code to read as follows: "(1) A holder in due course is a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." UNIFORM COMMERCIAL CODE (Proposed Final Draft, Spring 1950) 336. In defining notice, the proposed code on page 342 states: "(5) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim (d) that an incomplete instrument has been completed, unless the purchaser has notice of any improper completion." The comment to Section 5 (d) of the proposed Uniform Commercial Code states, "It is intended to mean that the holder may take in due course even though a blank is

filled in his presence, if he is without notice that the filling is improper." UNIFORM COMMERCIAL CODE (Proposed Final Draft, Spring 1950) 345. Passage of the Uniform Commercial Code would resolve the uncertainty of Sections 8119 and 8157 of the Ohio General Code and prevent controversies such as are presented in the instant case.

Victor F. Greenslade

THE SIGNIFICANCE OF AN OHIO CERTIFICATE OF TITLE

Plaintiff sold an automobile to a buyer in California and reserved title under a conditional sale contract. The buyer removed the automobile to Vermont and there secured a certificate of title on which there was no notation of any liens. Subsequently the buyer procured an Ohio certificate of title as a replacement for the one obtained in Vermont. There was no notation of any lien on this certificate. Buyer then sold the automobile to defendant, a bona fide purchaser, to whom the certificate of title was transferred. This certificate also had no liens noted upon it. Plaintiff brought replevin against defendant based on his reserved title under the conditional sale. *Held,* the Certificate of Title Act does not permit an Ohio court to recognize any interest in a motor vehicle unless it is evidenced by a certificate of title issued in accordance with the provisions of the Certificate of Title Act. Since plaintiff had no certificate, and there was no notation of plaintiff's interest on defendant's certificate of title, plaintiff cannot recover. *The Kelley Kar Co. v. Finkler,* 155 Ohio St. 541, 99 N. E. (2d) 665 (1951).

The Ohio Certificate of Title Act became effective January 1, 1938. OHIO GEN. CODE §§6290-2 *et seq.* (1938). Prior to that time the settled law of Ohio was clearly expressed in the cases of *Kanaga v. Taylor,* 7 Ohio St. 134 (1856), and *Reising v. Universal Credit Co.,* 50 Ohio App. 289, 198 N. E. 52 (1935). These cases supplied the rule, based on comity, that the interest of a conditional vendor or mortgagee in a foreign state would prevail over a subsequent bona fide purchaser in Ohio.

It was contended, however, that the Certificate of Title Act changed this rule. The pertinent part of the Certificate of Title Act is found in Section 6290-4 of the Ohio General Code. It reads: "... No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle, hereafter sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued, in accordance with the provisions of this chapter."

The Certificate of Title law constitutes an authorized exercise of the police power on the part of the General Assembly and does not violate any of the provisions of the state or federal Constitution. *The State, ex rel. The City Loan and Savings Co. v. Taggart, Recorder,* 134 Ohio St. 374, 17 N. E. 2d 758 (1938).

Before December 31, 1940, four Ohio Courts of Appeals had occasion to consider cases that had some relation to the Certificate of Title Act. A holder of a chattel mortgage and manufacturer's certificate of title had a lien superior to that of a buyer without a certificate of title in *Crawford Finance Co. v. Derby,* 63 Ohio App. 50, 25 N. E. 2d 306 (1939). In *Union Commercial Corp. v. R. J. Schmuck Co.,* 30 Ohio L. Abs. 116 (1939), a foreign mortgagee could not succeed in his replevin action against an Ohio bona fide purchaser holding a certificate of title with no notation of the foreign mortgagee's lien upon it. In another replevin action, a buyer of an automobile whose certificate of title was obtained by the forgery of the dealer who had sold him the automobile, was successful against the assignee of a forged note. *Lazerick v. Associate Investment Co.,* 30 Ohio L. Abs. 112 (1939). Likewise, in a personal injury action, an automobile dealer and not the purchaser was deemed to be the owner of the car because the purchaser did not have a certificate of title. *Fredericks v. Birkett L. William's Co.,* 68 Ohio App. 217, 40 N. E. 2d 162 (1940).

Later in a case where the plaintiff, a holder of a note and mortgage, was attempting to rely on a certificate of title procured by fraud in order to replevin an automobile from the defendant who had purchased it from a dealer, the Ohio Supreme Court held the certificate of title was void ab initio because of the fraud and plaintiff must therefore fail in his replevin action since he must produce a valid certificate to prove his ownership. *Automobile Finance Co. v. Munday,* 137 Ohio St. 504, 30 N. E. 2d 1002 (1940).

This decision has served as a guide for some Ohio courts as to the status of the certificate of title in other situations. Thus, in *Associates Investment Co. v. LeBoutillier, Jr.,* 69 Ohio App. 62, 42 N. E. 2d 1011 (1941), a local mortgagee having a manufacturer's certificate of title was allowed to replevin an automobile from a purchaser who did not have a certificate of title issued. An Indiana plaintiff could not foreclose his lien on an automobile brought to Ohio and sold to a bona fide purchaser who received a certificate of title with no notation of plaintiff's lien thereon. *Schiefer v. Schnaufer, et al.,* 71 Ohio App. 43, 50 N. E. 2d 365 (1943).

Others have felt that the decision did not provide an iron-clad rule for all situations in which the certificate of title may be involved. In *Workman and Sayles v. Republic Mutual Insurance Co.,* 40 Ohio L. Abs. 450, 53 N. E. 2d 833 (1943), the plaintiff automobile dealer was held not to have an interest in an automobile sold to a purchaser

notwithstanding the fact that the purchaser did not have any property interest because of his lack of a certificate of title.

Still later, two Ohio Courts of Appeals having before them out of state equities as opposed to a local bona fide purchaser with a certificate of title clear on its face, decided to follow the *Munday* case, *supra.* In one, the owner from Pennsylvania was permitted to replevin an automobile stolen in Pennsylvania and later sold in Ohio, even though the bona fide purchaser in Ohio had a certificate clear on its face. The court held that the bona fide purchaser's title emanated from one procured by fraud and thus was void ab initio as was stated in the *Munday* case. *Mock v. Kaffits, Chief of Police, et al.,* 75 Ohio App. 305, 62 N. E. 2d 172 (1944). In the other case, the conditional vendor from New York was permitted to foreclose on his conditional sales contract in spite of the fact that the defendant bona fide purchaser in Ohio had a clear certificate of title. This defendant's chain of title had likewise originated in a fraudulent procurement of a certificate of title in Ohio. *Associates Discount Corp. v. Colonial Finance Co., et al.,* 88 Ohio App. 250, 98 N. E. 2d 848 (1950).

This latter decision was rendered in view of the express words of Ohio General Code 6290-4 to the effect that no court shall recognize any interest in a motor vehicle unless evidenced by a certificate of title issued in accordance with the provisions of the Certificate of Title Act. It was also rendered in the light of another Ohio Supreme Court decision bearing upon motor vehicle title. *Mielke, et al. v. Leeberson,* 150 Ohio St. 528 (1948). In this decision, a plaintiff was not permitted to maintain an action for damages to the car he was driving unless he put in evidence the certificate of title showing that he owned the car. The Court cast further light upon its attitude toward the Act by holding that, "When the statute says 'no court in any case at law or equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle, . . . unless evidenced by a certificate of title . . . ,' such language cannot possibly be restricted to only cases involving transfer of title."

In the instant case, the Ohio Supreme Court continued to follow the plain meaning of the words in Ohio General Code 6290-4 and protected, in a replevin action, the bona fide purchaser in Ohio even though his clear certificate of title emanated from a fraudulently procured certificate of title in Ohio. But the court clearly stated that its decision was not to be construed as being contrary to any principle announced in the *Munday* case, *supra.* It thus would seem that the court will not permit a plaintiff to rely on a fraudulently procured certificate of title to establish his ownership in a replevin action. However, it will permit a bona fide defendant having a certificate of title running from one procured by fraud, to retain possession because the plaintiff, not having complied with the Certificate of Title Act (but

who has evidenced his interest by a certificate of title issued in accordance with the provisions of the Act) cannot sustain his burden of proving ownership. Thus, the court does not rely on the validity of the defendant bona fide purchaser's certificate of title, but rather holds that his possession will not be disturbed.

From the standpoint of the Ohio lawyer, these cases should tend to indicate that the Certificate of Title Act is to be given a literal interpretation. In the light of this, a lawyer, in any situation where ownership of a motor vehicle is a factor, should, as a part of the proof of his case, make certain that he produces a certificate of title.

Cornelius W. Dillon

TORTS — RIGHT OF PRIVACY — UNAUTHORIZED PUBLICATION OF PHOTOGRAPH OF ACCIDENT VICTIM

Plaintiff, a minor, was photographed as she lay in the street immediately after being struck by a negligent motorist. The picture was published by a local newspaper the following day and republished in one of defendant's magazines twenty months later as an illustration for an article dealing with the subject of pedestrian carelessness and traffic accidents. Plaintiff brought an action for invasion of privacy in the Federal District Court in Pennsylvania and received judgement. *Levertton v. Curtis Publishing Co.,* 97 F. Supp. 181 (E. D. Penn. 1951). On appeal, *Held,* affirmed. Publication of the photograph of an accident victim as an illustration for a magazine article dealing not with victim's accident but with the general subject of pedestrian carelessness and traffic accidents is an actionable invasion of victim's right of privacy. *Leverton v. Curtis Publishing Co.,* 192 F. 2d 974 (3rd Cir. 1951).

The proposition is well established that the right of privacy does not prevent the publication of a person's name, likeness or history when there is a legitimate public interest in disclosure. *Berg v. Minneapolis Star and Tribune Co.,* 79 F. Supp. 957 (D.C. Minn. 1948); See *Themo v. New England Publishing Co.,* 306 Mass. 54, 58, 27 N.E. 2d 753, 755 (1940); 138 A.L.R. 49 (1942); 168 A.L.R. 452 (1947); 14 A.L.R. 2d 759 (1950). This limitation includes disclosures respecting persons who have voluntarily embarked upon a public career and are considered as having waived their right of privacy, *Corliss v. F. W. Walker Co.,* 64 Fed. 280 (C.C. Mass. 1894); *Cohen v. Marx,* 94 Cal. App. 704, 211 P. 2d 320 (1949), and disclosures respecting persons who involuntarily become newsworthy through involvement in or associa-

tion with an event or occurrence in which the public has an interest in being informed. *Jones v. Herald Post Co.,* 230 Ky. 227, 18 S.W. 2d 972 (1929); *Elmhurst v. Pearson,* 80 App. D. C. 372, 153 F. 2d 467 (D.C. Cir. 1946); RESTATEMENT, TORTS, §867, comment c (1934). It has been further suggested, however, that whether the plaintiff "waives" or loses his right of privacy, he is not deprived of his right to be free from undesired publicity for all time and for all purposes but only to the extent that disclosure is necessary in satisfying the legitimate public desire for information concerning the activity or occurrence in which the plaintiff is or has been involved. *Pavesich v. New England Mutual Life Insurance Co.,* 122 Ga. 190, 50 S.E. 68 (1905); RESTATEMENT, TORTS, *supra;* 138 A.L.R. 61 (1942); 168 A.L.R. 455 (1947); 14 A.L.R. 2d 765 (1950).

It is in applying the latter standard that the greatest difficulty has arisen, since the courts, in treating these cases, are faced with the immediate problem of choosing between the sharply conflicting interests of the individual in a maximum of seclusion and the interest of society in unrestricted dissemination of information. For an excellent presentation of the problem see Nizer, *The Right of Privacy,* 39 MICH. L. REV. 526, 528 (1941). Most courts would now agree that where the disclosure takes the form of an advertisement, the plaintiff's status as a public figure does not protect the defendant since advertisements represent the clearest instances of appropriational harms. *Flake v. Greensboro News Co.,* 212 N.C. 780, 195 S.E. 55 (1938); *Pallas v. Crowley, Milner and Co.,* 322 Mich. 411, 33 N.W. 2d 911 (1948); 138 A.L.R. 72 (1942); 168 A.L.R. 457 (1947); 14 A.L.R. 2d 766 (1950). *Contra, Martin v. FIY Theatre Co.,* 26 Ohio L. Abs. 67, 10 Ohio Op. 338 (1938); *O'brien v. Pabst Sales Co.,* 124 F. 2d 167 (5th Cir. 1941) (alternative holding). On the other hand, disclosures appearing in newspaper accounts of recent events of general interest are clearly informational in character and have been consistently held non-actionable. *Jones v. Herald Post Co., supra; Berg v. Minneapolis Tribune Co., supra; cf. Elmhurst v. Pearson, supra.* Cases arising under the New York civil rights statute, NEW YORK CIVIL RIGHTS LAW, §§50, 51 (1948), which provides for injuntive relief and damages for unauthorized use of a person's name or likeness for "advertising purposes, or for the purposes of trade," have received similar treatment. Disclosures appearing in newspapers have been read out of the statute, *Jeffries v. New York Evening Journal Publishing Co.,* 67 Misc. 570, 124 N.Y.S. 780 (1910); *Sarat Lahiri v. Daily Mirror,* 162 Misc. 776, 295 N.Y.S. 382 (1937), while disclosures appearing in advertisements are clearly within the statutory standard. *Sinclair v. Postal Telegraph Co.,* 72 N.Y.S. 2d 841 (1935); *Fisher v. Murray Rosenberg, Inc.,* 175 Misc. 370, 23 N.Y.S. 2d 677 (1940).

Between these two extremes the disclosure may take any number

of forms which are neither wholly informational nor wholly commercial in nature. Radio programs, works of fiction, book biographies, motion pictures, comic books and most magazines fall into this category and relief often depends upon whether or not the public interest concept is held to be controlling. See Nizer, *supra* at 540 *et seq*. Representative cases in which application of the public interest limitation resulted in a denial of relief are: *Cohen v. Marx, supra,* (use of the name of a retired prizefighter by a radio comedian); *Smith v. Doss,* 251 Ala. 250, 37 So. 2d 118 (1948) (disclosure of mysterious disappearance of plaintiff's father on a local radio program called "Town Talk"); *Stryker v. Republic Pictures Corp.,* 238 P. 2d 670 (1951) (use of a former serviceman's name in a motion picture dramatization of a famous World War II battle). Under the New York statute, *supra*: *Coyler v. Richard K. Fox Publishing Co.,* 162 App. Div. 297, 146 N.Y.S. 999 (1914) (picture of a professional diver printed, together with four burlesque performers, on the cover of the "Police Gazette"); *Koussevitzky v. Allen, Towne and Heathe, Inc.,* 188 Misc. 479, 68 N.Y.S. 2d 779 (1947), *aff'd per curiam,* 69 N.Y.S. 2d 432 (1947) (book biography of famous musical conductor); *Sidis v. F-R Publishing Co.,* 113 F. 2d 806 (2d Cir. 1940) (biographical sketch of a former child prodigy in the "New Yorker" magazine); *Wallach v. Bacharach,* 192 Misc. 979, 80 N.Y.S. 2d 37, *aff'd without opinion,* 274 App. Div. 919, 84 N.Y.S. 2d 894 (1948) (use of a news article, in which plaintiff's name appeared, in an advertisement). Representative cases in which the public interest concept did not defeat recovery are: *Melvin v. Reid,* 112 Cal. App. 285, 297 P. 2d 291 (1931) (motion picture dramatization of life of former prostitute and criminal defendant); *Mau v. Rio Grande Oil, Inc.,* 28 F. Supp. 845 (N.D. Calif. 1939) (radio dramatization of holdup in which plaintiff was victim); *Reed v. Real Detective Publishing Co.,* 63 Ariz. 294, 162 P. 2d 133 (1945) (publication of plaintiff's photograph in crime story magazine); *Barber v. Time, Inc.,* 348 Mo. 1199, 159 S.W. 2d 291 (1942) (picture of plaintiff, suffering from a peculiar ailment causing an enormous increase in appetite, published in weekly news magazine). Under the New York statute, *supra*: *Kreiger v. Popular Publications, Inc.,* 167 Misc. 5, 3 N.Y.S. 2d 480 (1938) (publication of prizefighter's name in a fictional story); *Moloney v. Boy Comics Publishers, Inc.,* 188 Misc. 450, 65 N.Y.S. 2d 173 (1946) (Portrayal in a comic book of a living boy's experiences); *Binns v. Vitagraph Corporation of America,* 210 N.Y. 51, 103 N.E. 1108 (1913) (use of plaintiff's name and picture in motion picture dramatization of newsworthy event in which plaintiff was involved.)

A recent law review writer, in commenting on some of these cases, has observed that the courts, in determining when a commercial use has occurred, have indulged in a "judicial evaluation of the information value of each type of publication," relief being granted where the

publication medium is judicially considered inferior but denied by application of the public interest limitation where considered desirable. Feinberg, *Recent Developments In The Law Of Privacy,* 48 COL. L. REV. 713, 720 (1948). This analysis obviously fails to account for a case like *Barber v. Time, Inc., supra,* which can probably best be explained on the basis of the extreme offensiveness of disclosures of peculiar illnesses. See PROSSER, TORTS, 1060 *et seq.* (1941). A better approach, based upon neither the distinction between private and public characters nor upon the type of publication medium involved, is that suggested by Feinberg, *supra* at 720, and Nizer, *supra* at 556, which would consist of a judicial appraisal of the information value of the particular publication in issue.

While the passage of time between the occurrence of the newsworthy event or retirement of the public character from public life is negatively suggested by the Restatement, *supra,* as eventually working a restoration of the plaintiff's right to seclusion, this factor has been either ignored or rejected by the courts. *Sidis v. F-R Publishing Co., supra; Cohen v. Marx, supra; Smith v. Doss, supra.* In the *Sidis* case, where the publication occurred thirty years after the plaintiff, once a much publicized child prodigy, had withdrawn from public life, the court rationalized the disclosure on the basis of a present interest in the current status of a public figure who once held great promise of success. *Smith v. Doss* cannot be disposed of on like grounds. There the mysterious disappearance of plaintiff's father some years earlier had led to the indictment and acquittal of a local citizen for murder. Subsequently it was discovered that the father had not been murdered at all but had intentionally deserted his family and had been living in another state. Sixteen years after the mystery had been cleared up the defendant retold the story on a local radio program and the court refused to hold the disclosure actionable. This decision can hardly be justified on the basis of a legitimate current interest. In *Cohen v. Marx* the court expressly rejected the claim of a former prize-fighter, nine years retired, holding that upon entering the ring the plaintiff had waived his right of privacy and could not, by withdrawing, subsequently reassert it. Although the passage of time is inadequate in itself as a basis for relief, it may sometime be important when combined with other circumstances. This is indicated by *Melvin v. Reid, supra,* where the court expressly reacted to the fact that the plaintiff, a former prostitute and criminal defendant, had for eight years prior to publication been leading a rehabilitated life.

In the instant decision both the passage of twenty months between the plaintiff's accident and the publication, and the "commercial character" of the magazine in which the disclosure appeared are rejected as reasons for permitting the plaintiff to recover. Emphasized instead is the fact that the article illustrated by the plaintiff's photo-

graph did not deal at all with the plaintiff's accident but covered the general subject of traffic accidents resulting from pedestrian carelessness. A standard thus formulated can obviously be of only limited utility since in the great majority of these cases the disclosure appears in a context which *does* specifically concern the plaintiff. At the same time, reliance upon *Mau v. Rio Grande Oil, Inc., supra,* a case in which the disclosure took place in a context primarily directed towards public entertainment, suggests strongly that the court regarded the article in question as something less than informational. In this view of the case, the disclosure was held actionable both because it failed to deal specifically with the plaintiff's accident and because an evaluation of the article itself disclosed it to be primarily in the nature of entertainment. This would indicate an approach very similar to that urged by Feinberg, *supra,* and Nizer, *supra.*

Irrespective of the view taken of the reasoning of the instant decision, the correctness of the result can not be seriously questioned. In many of these cases the courts have been too quick to apply the public interest concept when a more intensive analysis would have demonstrated the disclosure to be wholly unjustified. The result has been a tendency on the part of some publishers to invade ruthlessly the private lives of others on the basis of a public interest which is often lacking in substance. To the extent that the principal case serves to restrain the more flagrant violations by reminding contemporary publishers that the public interest qualification is not unlimited, it represents a helpful contribution to the law of privacy.

Anthony R. DeSanto

UNFAIR COMPETITION — SECONDARY MEANING OF TRADE NAMES — INJUNCTIVE RELIEF

Defendants J. C. and Peter Tarantino transferred their interests in a proposed restaurant, including the use of the name "Tarantino's", to plaintiff corporation. Later, the defendants, who were engaged in packing and distributing fish and allied products under the name "Tara Bell", marketed a cocktail sauce labeled "Tarantino's". The script was identical to that used by the restaurant, but at the bottom of the label appeared defendant company's name. Plaintiff brought this suit against J. C. Tarantino and others, individually and doing business as Bell Smoked Fish Company, for an injunction from using the name "Tarantino's" on labels of a cocktail sauce and for damages. The lower court granted the injunction. On appeal, *Held,* affirmed. Defendants could not use the name "Tarantino's" in connection with

the marketing of a cocktail sauce for seafood. *MacSweeney Enterprises, Inc. v. Tarantino*, —Cal. App.—, 235 P. 2d 266 (1951).

It has long been established that every person has a right to use his own name in his trade or business. *Turton v. Turton*, 42 Ch. Div. 128, 58 L. J. Ch. 677 (1889); *Burgess v. Burgess*, 3 De G. M. & G. 896, 22 L. J. Ch. 675, 43 Eng Reprints, Full Report 351 (1853). See NIMS, 1 UNFAIR COMPETITION AND TRADE MARKS 198 (1947). What was originally an absolute right in one's name, irrespective of the manner of use, was, however, subsequently modified to the extent that one would be protected in the use of his own name only against another, who also using his own name, indulged in artifice. *Meneely v. Meneely*, 62 N. Y. 427 (1875).

Somewhat later the doctrine of secondary meaning has come into use and it operates concurrently with the right to use one's own name. If a name has become associated in the public mind with a particular manufacturer or source, and a second comer uses the same name in such a manner that there is a likelihood of deceiving the public into buying his goods in the belief that they are really those of the first user of the name, the courts will protect the first user whose name has acquired the "secondary meaning". *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 Fed. 299 (2nd Cir. 1917); *Merriam v. Saalfield*, 198 Fed. 369 (6th Cir. 1912); 38 WORDS AND PHRASES 428. Formerly, when a trade name had acquired a secondary meaning, the user would only be protected against a later user who was a competitor. *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510 (7th Cir. 1912). It has now become the practice to provide protection against those who are not in competing businesses, if the buyer associates the product with the company whose name has acquired the secondary meaning. *Tiffany & Co. v. Tiffany Productions Inc.*, 147 Misc. 679, 264 N. Y. S. 459 (1932), *aff'd without opinion*, 262 N. Y. 482, 182 N. E. 30 (1933).

The extent of the injunctive relief granted to one whose name has taken on a secondary meaning has varied. The courts will order the defendant to place a statement on his product, advertising and stationery to the effect that the article is not made by the person whose name has acquired the secondary meaning. *Waterman Co. v. Modern Pen Co.*, 235 U. S. 88 (1914); *National Distillers Products Corp. v. K. Taylor Distilling Co.*, 31 F. Supp. 611 (E. D. Ky. 1940). See Wigmore, *Justice, Commercial Morality, and the Federal Supreme Court; The Waterman Pen Case*, 10 ILL. L. REV. 178 (1915). A defendant may be required to subordinate the use of his name on the article so that it does not maintain a prominent position, but rather is overshadowed by the design or other wording. *Tanqueray Gordon & Co. v. Gordon*, 10 F. Supp. 852 (N. J. 1935), *appeal dismissed*, 77 F. 2d 998 (1935); *R. B. Davis Co. v. Davis*, 11 F. Supp. 269 (E. D. N. Y. 1935). Another

approach has been to prohibit the use of the questioned name entirely. *Westphal v. Westphal,* 216 App. Div. 53, 215 N. Y. S. 2d 4 (1926), *aff'd,* 243 N. Y. 639, 154 N. E. 638 (1926). See 39 MICH. L. REV. 1046; 59 HARV. L. REV. 140.

Whatever the scope of the injunctive relief given, it must be kept in mind that its purpose is to prevent unfair competition. *Hanover Star Milling Co. v. Metcalf,* 240 U. S. 403, 413 (1915); *United Drug Co. V. Rectanus,* 248 U. S. 90, 97 (1913). One has the right to the use of his own name provided he uses it properly. When a person's name has acquired a secondary meaning, that person should be protected, but only to the extent that it prevents unfair competition. The injunctive relief should be no broader than necessary to protect the person whose name has become known to the public. *Wisconsin Electric Co. v. Dumore Co.,* 35 F. 2d 555 (6th Cir. 1928), *cert. denied,* 282 U. S. 813 (1931); *Kellogg Toasted Corn Flake Co. v. Quaker Oats Co.,* 235 Fed. 657, 663, 667-8 (6th Cir. 1916). See 150 A. L. R. 1056, 1129 (1940).

The injunction in the principal case enjoins the defendants absolutely from using the name "Tarantino's" on a cocktail sauce for seafood. The injunction could be narrower and still protect the plaintiff. For example, defendants could be enjoined from simulating plaintiff's script and be compelled to place the disputed name in a subordinate position on their product's label and on their advertising. Inasmuch as it is the purpose of courts to protect against unfair competition, nothing can be gained by denying defendants the use of the name "Tarantino's" when it does not mislead the consumer into believing that he is purchasing an article prepared by the plaintiff.

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