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DISCUSSION OF RECENT DECISIONS

EXECUTORS AND ADMINISTRATORS—APPOINTMENT, QUALIFICATION AND TENURE—WHETHER OR NOT A TESTATOR MAY, BY WILL, DELEGATE TO ANOTHER THE POWER AND AUTHORITY OF NOMINATING HIS EXECUTOR—The Supreme Court of Montana recently had occasion to decide a relatively rare question when it considered the appeal taken in the case of *In re Effertz' Estate.*[1] The testatrix there concerned had, by her will, directed that the judge of probate should appoint the nominee of the Roman

1 — Mont. —, 207 P. (2d) 1151 (1949).

Catholic Bishop of the Diocese of Great Falls, Montana, to act as executor of her last will and testament. In accordance therewith, the Bishop nominated the appellant to act as executor. The nominee duly and regularly filed his petition for probate and requested that letters testamentary be issued to him. The trial court ordered that the documents which purported to be the last will and testament should be admitted to probate as such but, instead of appointing the appellant as the sole executor, it appointed the appellant and another as joint administrators with the will annexed and issued letters of administration accordingly. The nominee appealed, contending that the trial court had erred in its ruling that administration with the will annexed was proper because of the failure of the testatrix to name an executor in the will. When reversing that decision, the Montana Supreme Court, after a thorough discussion of the law, by holding that the appellant should have been appointed sole executor of the estate, followed what appears to be a well-settled common law doctrine on the subject.

The issue involved presents a problem of historical as well as legal significance. At least one authority considers that the issue arose for the first time during the reign of Henry VI, when wills as such were not permitted but were accepted as testaments dealing with goods and other chattel property. In his treatise on the general subject of executors and administrators, Sir Edward Vaughn Williams notes that Katherine, Queen Dowager of England, mother of Henry VI, made a last will and testament wherein she constituted the King as her sole executor. His Majesty, possibly concerned with affairs of state, thereupon appointed three noblemen to act in that capacity.[2] His right so to do, of course, would hardly be questioned by a court during that period of monarchical supremacy.

Insofar as ordinary persons are concerned, the English ecclesiastical courts have adhered to a doctrine, possibly stemming from that precedent, which permits the delegation of authority over the decedent's estate. Evidence thereof may be found in the case of *In the Goods of Cringan,*[3] a case which has been noted by some legal scholars as being the earliest authority on the present issue.[4] The testator there concerned had directed that the legatees should mutually appoint two intelligent and trustworthy persons to execute his testamentary plan. The legatees did so nominate two persons to serve as executors and, when affirming the ap-

[2] See Williams, A Treatise on the Law of Executors and Administrators (R. H. Small, Philadelphia, 1832), Vol. 1, p. 113.

[3] 1 Hag. Ecc. 548, 162 Eng. Rep. 673 (1828).

[4] Alexander, Commentaries on the Law of Wills, Vol. 3, § 1221; Schouler, Wills, Executors and Administrators, 6th Ed., Vol. 3, § 1515.

pointment, the judge said: "The provision in this will, as to the appointment of executors, I am informed, is not very unusual in Scotland . . . However, understanding from the deputy registrar that instances have frequently occurred of granting probate to persons nominated by those authorized by the testator so to nominate, I shall allow this decree to pass as prayed."[5] Since then, the rule that a testator may delegate to a person or persons named in his will the power and authority of nominating his executor for him has been uniformly followed in England.[6]

In 1875, the English rule appears to have been introduced into this country through the medium of the decision in the New York case of *Hartnett* v. *Wandell.*[7] In that case, the testator had nominated and appointed his wife as the executrix of his estate but had requested that such male friend as she might desire should be appointed with her, to act as co-executor. Upon proper compliance with this provision, the court, in a most scholarly and elaborate consideration and discussion of the law, held that the issuance of letters testamentary to the widow and her nominee was valid and proper. The doctrine thus applied has been uniformly followed whenever the question has arisen, so it may be said that the issue seems to be unanimously settled in the United States, as well.[8]

Courts have primarily based these decisions on the well-established principle that the intention of the testator should prevail unless it should be contrary to some law or public policy.[9] For that reason, they have

[5] 1 Hag. Ecc. 548 at 549, 162 Eng. Rep. 673 at 673-4.

[6] Farnum v. Administrator General, 14 App. Cas. 651 (1889); In the Matter of Ryder, 2 Sw. & Tr. 127, 164 Eng. Rep. 941 (1861); Jackson v. Paulet, 2 Rob. Ecc. 344, 163 Eng. Rep. 1340 (1851); In the Goods of Deichman, 3 Curt. 123, 163 Eng. Rep. 676 (1842). That view has also been followed in Canada: Wright v. Stackhouse, 10 N. B. R. 450 (1863).

[7] 60 N. Y. 346, 19 Am. Rep. 194 (1875).

[8] Thomas v. Field, 210 Ala. 502, 98 So. 474 (1923); Tuckerman v. Currier, 54 Colo. 25, 129 P. 210 (1912); Bishop v. Bishop, 56 Conn. 208, 14 A. 808 (1888); Kinney v. Keplinger, 172 Ill. 449, 50 N. E. 131 (1898); Wilson v. Curtis, 151 Ind. 471, 51 N. E. 913 (1898); In re Stahl's Estate, 113 Ind. App. 29, 44 N. E. (2d) 529 (1942); Brown v. Just, 118 Mich. 678, 77 N. W. 263 (1898); In re Crosby's Estate, 218 Minn. 149, 15 N. W. (2d) 501 (1944); Landon v. Huitfeldt, 41 N. J. Eq. 267, 3 A. 882 (1886); Mulford v. Mulford, 42 N. J. Eq. 68, 6 A. 609 (1886); In re Bergdorf's Will, 206 N. Y. 309, 99 N. E. 714 (1912); Hartnett v. Wandell, 60 N. Y. 346, 19 Am. Rep. 194 (1875); In re Griffin's Estate, 193 Misc. 419, 83 N. Y. S. (2d) 579 (1948); In re Walsh's Will, 147 Misc. 281, 264 N. Y. S. 72 (1933); In re Brocato's Estate, 143 Misc. 664, 258 N. Y. S. 111 (1931); State v. Superior Court, 179 Wash. 198, 37 P. (2d) 209 (1934); Cole v. City of Watertown, 119 Wis. 133, 96 N. W. 538 (1903). Textual material on the subject may be found in Alexander, Commentaries on the Law of Wills, Vol. 3, § 1221; Schouler, Wills, Executors and Administrators, 6th Ed., Vol. 3, § 1515; Williams, Executors, 12th Ed., Vol. 1, p. 132; Woerner, Administrators, 3rd Ed., § 229. Encyclopedic treatment is provided by 33 C. J. S., Executors and Administrators, § 22c; 21 Am. Jur., Executors and Administrators, § 57, and 11 R. C. L. § 18. See also 60 Alb. L. J. 141.

[9] Thomas v. Field, 210 Ala. 502, 98 So. 474 (1923); Tuckerman v. Currier, 54 Colo. 25, 129 P. 210 (1912); Bishop v. Bishop, 56 Conn. 208, 14 A. 808 (1888);

shown great liberality in the exercise of committing the execution of a will to the party therein intended by the testator to act as executor.[10] It cannot be contradicted that the testator is in the most advantageous position to know how, when and by whom his estate should be administered. To disregard the intention of the testator would, without doubt, lead to violence and disharmony with respect to the interpretation of the scheme employed by the testator, for a well-considered method of distribution could easily fail if executed by a total stranger.

Similarly, it can only be supposed that good reason would exist in the mind of a testator who makes no present designation of his executor. The person whom he might have appointed may refuse or be unable to act, or may die before the purposes set forth in the will have been properly effectuated. If he chooses to trust to the judgment of one whom he has authorized to make the selection for him, the confidence that he has reposed in such other person should not be disturbed by the courts.

In recognition of this fact, courts have consistently allowed the delegation of authority to appoint an executor even where statutory material is present which might easily have been interpreted to prohibit it. In *Thomas* v. *Field*,[11] for example, the testatrix empowered her two daughters to appoint her executor and, in compliance with such authority, the daughters nominated another person to act as such. It was urged, by those opposing the appointment, that the statutory provision which empowered the court to appoint a "named" executor[12] prevented the designation of anyone not specifically referred to by name in the will. A unanimous decision of the Supreme Court of Alabama, validating the right to such a delegated appointment, held that the common law power to delegate

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Kinney v. Keplinger, 172 Ill. 449, 50 N. E. 131 (1898); In re Crosby's Estate, 218 Minn. 149, 15 N. W. (2d) 501 (1944); In re Bergdorf's Will, 206 N. Y. 309, 99 N. E. 714 (1912). That view is also iterated in the earlier New York cases cited in note 8, ante.

[10] Kinney v. Keplinger, 172 Ill. 449, 50 N. E. 131 (1898); Hartnett v. Wandell, 60 N. Y. 346, 19 Am. Rep. 194 (1875); State v. Superior Court, 179 Wash. 198, 37 P. (2d) 209 (1934).

[11] 210 Ala. 502, 98 So. 474 (1923). See also Kinney v. Keplinger, 172 Ill. 449, 50 N. E. 131 (1898); In re Crosby's Estate, 218 Minn. 149, 15 N. W. (2d) 501 (1944); Hartnett v. Wandell, 60 N. Y. 346, 19 Am. Rep. 194 (1875). The last mentioned case overruled the holding in In re Bronson's Will, Tucker's Rep. 464 (N. Y., 1869), which appears to be the only case holding that the common law doctrine had been abrogated by a statute which required that the executor be named in the will, even though the statute did not expressly purport to nullify the common law principle.

[12] Ala. Code, 1907, § 2507, then in force, declared: "Whenever a will has been admitted to probate in this state, the judge of the court in which the will was probated may issue letters testamentary, according to the provisions of this chapter, to the persons named as the executors in such will, if they are fit persons to serve as such." See also Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 227.

had not been abrogated by the statute in the absence of an express provision so declaring.

After it has been determined that such a power of appointment does exist, two questions will immediately arise, to-wit: (1) to whom may this power of appointment be given, and (2) what restrictions, if any, are placed upon the person exercising the power? As to the first, courts have been extremely liberal with respect to the person who may be given such a power of appointment. They have allowed the power to rest in disinterested third persons, such as the judge of probate,[13] as well as in persons directly interested in the estate, such as the legatees.[14]

Research has failed to uncover any decision which points specifically to qualifications which may be required either of the person making the appointment or of the appointee. Naturally, the power might be circumcribed by the testator, who might limit the authority to a selection between members of a designated class. If unlimited authority is conferred, it must be remembered that specific statutory provisions exist which impose qualifications on the person to be appointed as executor.[15]

Obviously, the estate should always be administered by a trustworthy and competent individual, so it would be safe to say that no nominee would secure appointment if he lacked the qualifications required by law, despite the fact that he might be the designate of the person possessing the power of appointment. Conversely, as public policy has found it necessary to enact statutes denying to certain individuals the right to act as executors, it would seem to follow therefrom that much the same restrictions might be applicable to the one empowered to appoint as apply to the appointee. Logically, a party who is personally qualified to act as an executor would, without doubt, choose a more competent person to execute the will than would a person not possessed of such acceptable moral and mental capabilities. Up to the present, however, that question has apparently never arisen. Generally, the person given the power to appoint may exercise it quite freely, subject to the only requirement that the person nominated to act as executor be a suitable person.[16] This,

[13] Bishop v. Bishop, 56 Conn. 208, 14 A. 808 (1888); Brown v. Just, 118 Mich. 678, 77 N. W. 263 (1898).

[14] Thomas v. Field, 210 Ala. 502, 98 So. 474 (1923); Wilson v. Curtis, 151 Ind. 471, 51 N. E. 913 (1898).

[15] Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 229, for illustration, specifies that a person is not qualified to act as executor of any will who is "of unsound mind or an adjudged incompetent under this Act or has been convicted of a crime rendering him infamous or is a non-resident of this State or, if a male, is less than eighteen years of age."

[16] Brown v. Just, 118 Mich. 678, 77 N. W. 263 (1898). The will there in question placed a specific limitation to that effect.

of course, allows great leeway in the making of a choice, so it is not surprising to learn that there is one decision which holds that the appointer may even exercise the authority in favor of himself.[17]

It would appear, then, that the instant case has not only been correctly decided but is sustained by such an overwhelming weight of authority, supported by such satisfactory and logical reasoning, that a contrary decision would not only have been a surprising one but would have been both unjust and impracticable.

W. E. KASKE

INFANTS—ACTIONS—WHETHER OR NOT A CAUSE OF ACTION EXISTS IN FAVOR OF A CHILD FOR PRENATAL INJURIES INFLICTED UPON IT—Two decisions, recently handed down by the highest courts of Ohio and Minnesota, revive interest in the question of the right of an infant to maintain an action for prenatal injuries. In the first, that of *Williams* v. *Marion Rapid Transit, Inc.*,[1] a complaint filed by the infant's next friend charged that the child's mother, then seven months pregnant, had been injured through the negligence of the transportation company at a time when she alighted from one of its vehicles, which injury induced a premature birth and permanent damage to the minor plaintiff. The trial court sustained a general demurrer to the complaint but, upon appeal, the intermediate appellate court reversed the judgment,[2] after which the record was certified to the Supreme Court of Ohio.[3] That tribunal held that a viable child, injured while still in the mother's womb, could maintain a subsequent action against the wrongdoer. In the second case, that of *Verkennes* v. *Corniea*,[4] a father brought an action for an alleged wrongful death of his unborn child. It appeared that the wife had entered a hospital for purpose of confinement and delivery but, due to the alleged negligence of the attending physician, both she and the child died. A demurrer based on the ground that no cause of action had accrued, since the child had, in fact, never existed as a person in being, was sustained by the trial court. Again, on appeal, the decision was reversed, the Supreme Court of Minnesota deciding that an infant which was capable of independent

17 In the Matter of Ryder, 2 Sw. & Tr. 127, 164 Eng. Rep. 941 (1861).

1 152 Ohio St. 114, 87 N. E. (2d) 334 (1949).

2 82 Ohio App. 445, 82 N. E. (2d) 423 (1948).

3 Certification occurred because the judges of the Court of Appeals, although unanimous in their opinion, noted a conflict with a judgment pronounced, on the same question, in the case of Mays v. Weingarten, 82 N. E. (2d) 421 (Ohio App., 1943).

4 — Minn. —, 38 N. W. (2d) 838 (1949).

existence, even though as yet unborn, was to be deemed a living being in contemplation of law.[5]

In both the cases cited, the defendant had rested on the theory generally relied upon by the majority of courts which deny a recovery, viz., that an unborn child is not a person in being and therefore no cause of action can accrue to it for injuries occasioned during the period when it is still being carried by its mother.[6] This proposition appears to have stemmed from the case of *Dietrich, Administrator* v. *Inhabitants of North Hampton,*[7] the initial decision in this country. In that case, a premature birth was induced when the mother slipped upon a defect in the highway of the defendant town. The child was not directly injured but, due to the fact that it was not in an advanced stage of development, the mother being only five months pregnant, it did not survive. An action for wrongful death was instituted by the administrator but the court denied recovery. Thereafter, a majority of the American jurisdictions took the position that, so long as the injury occurred at any time before the birth of the infant, no subsequent suit could be maintained, either by the child or in its behalf.[8]

It has been urged from several quarters, however, that later courts have failed to evaluate the decision in the *Dietrich* case properly.[9] The court there specifically pointed out that the child involved was, at the time of the accident, incapable of independent existence outside the body of the mother and was, therefore, not viable.[10] It might logically be argued that the decision therein stands for no more than the proposition that a foetus which is not advanced to the stage where it can survive outside the mother is not a person in being. As such, it could not claim legal rights which belong to persons nor recover for injuries suffered while

5 Right to maintain a wrongful death action, stemming from the determination that the child itself could have sued had it lived, rested upon Minn. Stat. Ann. 1947, § 573.02. That statute provides that "when death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission."

6 See, for example, Nugent v. Brooklyn Hts. R. Co., 154 App. Div. 667, 139 N. Y. S. 367 (1913), noted in 26 Harv. L. Rev. 638.

7 138 Mass. 14, 52 Am. Rep. 242 (1884).

8 See cases cited in note 11, post. Some of them rest directly on the Dietrich case: Jordan v. Magnolia Coca Cola Bottling Co., 124 Tex. 347, 78 S. W. (2d) 944 (1935); Stemmer v. Kline, 128 N. J. 455, 26 A. (2d) 489 (1942).

9 See the dissenting opinion of Boggs, J., in Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900), as well as the opinion in Bonbrest v. Kotz, 65 F. Supp. 138 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 162.

10 As to the medical basis for a distinction between an "embryo" and a "viable foetus," see Am. Illus. Med. Dict., 19th Ed., pp. 483 and 1605. An embryo is a foetus in its earliest stage of development, typically during the first three months of pregnancy; a viable foetus is one that can live outside the utera.

en ventre sa mere. Courts which have relied upon that case for support in denying recovery for all prenatal injuries, regardless of the stage of the foetal development, may well have strayed from the actual rule of the decision therein.

Despite this, a majority of jurisdictions continue to deny to the infant any right of recovery under the stated circumstances,[11] and so great is this weight of precedent that courts have accepted it as a strict rule of the common law to be followed without deviation.[12] A refusal to adopt any other position, regardless of the obvious harshness of the rule, is generally attributed to a reluctance to engage in judicial legislation. One court, at least, has stated that it is the duty of the legislature to create the right and, until such is an accomplished fact, it will not permit recovery for a prenatal injury.[13] In that regard, it is interesting to note that judicial interpretation of a California statute,[14] not too specific in character, has cleared the way for the maintenance of the action in that state,[15] which holding may be indicative of the eagerness with which courts may be likely to accept such legislation and do their utmost to construe it favorably.

Without waiting for legislation on the subject, a minority view has been developing, to which the two cases mentioned above must now be added, a view which would allow a child to recover for injuries inflicted on it while *en ventre sa mere.*[16] It is the theory of these cases that a

[11] Birmingham Baptist Hospital v. Branton, 218 Ala. 464, 118 So. 741 (1928); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900); Smith v. Luckhardt, 229 Ill. App. 100, 19 N. E. (2d) 446 (1939), noted in 27 Ill. B. J. 348, 87 U. of Pa. L. Rev. 1016: Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Newman v. City of Detroit, 281 Mich. 60, 274 N. W. 710 (1937); Buel v. United Railways Co., 248 Mo. 126, 154 S. W. 71, Ann. Cas. 1914C 613, 45 L. R. A. (N. S.) 625 (1931); Stemmer v. Kline, 128 N. J. 455, 26 A. (2d) 489 (1942); Ryan v. Public Service Co-ordinated Trans. Co., 18 N. J. Misc. 429, 14 A. (2d) 52 (1940); Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503 (1921), noted in 34 Harv. L. Rev. 549; In re Roberts Estate, 158 Misc. 698, 286 N. Y. S. 476 (1936); Mays v. Weingarten, 82 N. E. (2d) 421 (Ohio App., 1943); Berlin v. J. C. Penny Co., Inc., 339 Pa. 547, 16 A. (2d) 28 (1940); Gorman v. Budlong, 23 R. I. 169, 49 A. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629 (1901); H. P. Jordan v. Magnolia Coca Cola Bottling Co., 124 Tex. 347, 78 S. W. (2d) 944, 97 A. L. R. 1513 (1935); Nelson v. Galveston H. & S. A. Ry. Co., 78 Tex. 621, 41 S. W. 1021, 11 L. R. A. 391, 22 Am. St. Rep. 81 (1890); Lewis v. Steves Sash & Door Co., 177 S. W. (2d) 350 (Tex. Civ. App., 1943); Lipp v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N. W. 916, L. R. A. 1917B 334 (1916). See also Walker v. Great Northern Ry. Co. of Ireland, 28 L. R. Ir. 69 (1890).

[12] Ryan v. Public Service Co-ordinated Trans. Co., 18 N. J. Misc. 429, 14 A. (2d) 52 (1940).

[13] Newman v. City of Detroit, 281 Mich. 50, 274 N. W. 710 (1937).

[14] Deering, Cal. Civ. Code, § 29.

[15] Scott v. McPheeters, 33 Cal. App. (2d) 629, 93 P. (2d) 562 (1939).

[16] Bonbrest v. Kotz, 65 F. Supp. 138 (1940); Scott v. McPheeters, 33 Cal. App. (2d) 629, 93 P. (2d) 562 (1939); Cooper v. Blanck, 39 So. (2d) 352 (La. App., 1923); Kine v. Zuckerman, 4 Pa. Dist. & Co. Rep. 227, 97 A. L. R. 1525 (1924). See also Montreal Tramway v. Le Veille, 4 D. L. R. 337 (1933).

child which is capable of independent existence, although still within the body of the mother, should be considered as a person in being, hence entitled to recover for injuries which may be suffered by it at that time.[17] These opinions are quick to point out the status the unborn infant enjoys in the fields of property law and criminal law. As to the former, a child still carried by its mother, provided it is later born alive, is considered as in *esse* for every purpose which will benefit it.[18] In the contemplation of the latter, for purpose of punishing the destruction of a child, a foetus is recognized as a living being after it has quickened or stirred in the womb.[19] There then follows the logical query, "why a part of the mother under the law of negligence and a separate entity and person in that of property and crime?"[20] It has, if viable, its own bodily form and members, manifests all of the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems and is capable now of being ushered into the visible world. Why not, then, its own separate legal personality as well?

These courts, using an approach to tort law similar to that used in the branches of property and criminal law, would supply the final arc to round out the legal circle of logic. They deny that there is any common-law rule which bars recovery for prenatal injuries and, when confronted with the Dietrich decision, point to the fact that the child there concerned was not viable at the time of the accident. This emphasis on viability is strengthened by the fact that, in all of the prior minority cases, the child was eventually born alive, while three of the decisions make specific reference to this fact.[21] Only in the Minnesota case noted above has recognition been accorded to the possibility of recovery despite the fact that the child was not born alive.

To that extent, the Minnesota case pushes the limits of the minority

[17] Lamont, J., in Montreal Tramway v. Le Veille, 4 D. L. R. 337 at 344 (1933), expressed the belief that it was "but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother." In Kine v. Zuckerman, 4 Pa. Dist. & Co. Rep. 229, 97 A. L. R. 1525 (1924), the court proceeded on the novel approach that the tortfeasor had set a harmful force in motion which did not mature or have its effect until the infant was born. The time elapsing in the interim between the infliction of the harm and birth was said to have no effect on the cause of the injury, except as it might have evidential value in terms of cause and effect.

[18] Villar v. Gilbey, (1907) A. C. 139; Harper v. Archer, 4 Smedes & Marshall 99, 43 Am. Dec. 472 (Miss., 1845); Marsellis v. Thalhimer, 2 Paige Ch. 35, 21 Am. Dec. 66 (New York, 1830).

[19] State v. Cooper, 2 Zabriskie 52 (N. J., 1849).

[20] Bonbrest v. Kotz, 65 F. Supp. 138 at 140 (1940).

[21] Bonbrest v. Kotz, 65 F. Supp. 138 (1940); Kine v. Zuckerman, 4 Pa. Dist. & Co. Rep. 227, 97 A. L. R. 1525 (1924); Montreal Tramway v. Le Veille, 4 D. L. R. 337 (1933).

rule beyond the bounds of any prior decision and tends to unsettle the whole movement for it neglects the one fundamental requirement of the law of property on which the argument depends for its validity. It also poses another objection in that new and confusing problems of damage law are projected. Except as to identifiable costs of interment,[22] by what measuring rod may the jury determine damage in the case of a child never actually born as a person? A jury can determine the degree of injury to a living child and can project that degree of injury into the future to ascertain the present worth of the future harm growing from defendant's neglect. To attempt the same thing with respect that that which never existed, borders on speculation so gross as to be apt to produce an unfavorable reaction toward a developing minority view, one more in need of encouragement than discouragement.

M. J. BARAZ

LANDLORD AND TENANT—RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD—WHETHER OWNER OF A PROPRIETARY LEASE TO APARTMENT IN A CO-OPERATIVE APARTMENT BUILDING IS TO BE DEEMED A LANDLORD UNDER THE FEDERAL HOUSING AND RENT ACT OF 1947—An Illinois reviewing court has now, for the first time, been called upon to determine whether a purchaser of stock and of a proprietary lease, issued by a co-operative housing corporation, is to be deemed to be a "landlord" within the meaning and intent of the federal Housing and Rent Act of 1947.[1] That issue, presented in the case of *Kenny* v. *Thompson*,[2] grew out of a record which disclosed that one Dr. Bokman had originally owned shares of stock in a certain building corporation and occupied an apartment in the building under a proprietary lease from the corporation. He later subleased the apartment to the defendant who rented on a month to month basis. Some years later, and at a time when the federal statute aforementioned was in effect, Dr. Bokman sold his stock and assigned his proprietary lease to the plaintiff. Desiring the apartment for his personal occupancy, the plaintiff gave proper notice and brought a forcible detainer action when the defendant refused to vacate. The statute in question prohibited eviction by a landlord, even though the tenant's lease had expired, so long as the tenant continued to meet certain of the obligations of his tenancy,[3] but an exception therein authorized eviction where

22 The Illinois Injuries Act, Ill. Rev. Stat. 1947, Vol. 1, Ch. 70, § 2, now permits the recovery of certain itemized expenses, including funeral bills, where the decedent leaves no widow or next of kin.

1 50 U. S. C. A. Appendix § 1881 et seq.

2 338 Ill. App. 403, 87 N. E. (2d) 229 (1949).

3 50 U. S. C. A. Appendix § 1899(a).

the landlord sought, in good faith, to recover possession for his immediate and personal use and occupancy.[4] The trial court, apparently believing that the plaintiff did not qualify as a landlord within the exception noted, gave judgment for the defendant but that judgment was reversed on appeal to the Appellate Court for the First District of Illinois.

It is clear that, were it not for the prohibitions of the federal Housing and Rent Act of 1947, the plaintiff in the instant case would be entitled to judgment for a local statute merely requires that the plaintiff in a forcible entry and detainer proceeding be a person entitled to possession.[5] The first question, then, is to determine what additional requirements, if any, are imposed by the federal act. It should be noted that Section 1899(a) thereof prohibits eviction by a "landlord," although creating an exception in his favor where he seeks possession for his personal occupancy.[6] If the plaintiff is deemed not to be a landlord within the meaning of the federal statute, as the trial court held, then it would seem to follow that the statute would not apply to him at all, thereby leaving him free to exercise the rights he always enjoyed under state statute or by common law. Clearly, if the plaintiff did not qualify under the exception to the prohibition, then he could not come under the prohibition itself for, by sheer logical construction, the word "landlord" should be given the same meaning in one part of the section as it possesses in another.

The upper court, therefore, was faced with two alternatives. It could either rule that the plaintiff was not a landlord, that the federal act was inapplicable, and that he was free to maintain his action under the state statute; or it could hold that he was a landlord, that the act did apply, but that he was entitled to possession under the exception. In either event, the plaintiff would have to prevail, but a reversal based on the first alternative would lay down the undesirable precedent that none of the restrictive provisions of the Housing and Rent Act apply to tenants holding proprietary leases in co-operative units. The court did, in fact, follow the second course by endeavoring to show that a co-operative participant was in effect the "owner" of the apartment he occupied, hence could easily qualify as a landlord. For the purpose of this discussion, then, it is necessary to determine whether the Appellate Court was correct in holding that a co-operative member is such an owner.

4 Ibid., § 1899(a)(2).

5 Ill. Rev. Stat. 1949, Vol. 1, Ch. 57, § 2, permits "the person entitled to possession of lands or tenements" to be restored thereto, "when any lessee of the lands or tenements, or any person holding under him, holds possession without right after the determination of the lease or tenancy by its own limitation, condition, or terms, or by notice to quit or otherwise."

6 It should be noted that the term "landlord" is nowhere defined in the federal statute.

A knowledge of the basic elements of the co-operative scheme is, of course, essential to a general understanding of the problem.[7] According to the usual plan, a corporation is formed to purchase or construct an apartment building in which each member selects an apartment which he may occupy exclusively as a home. For convenience, the fee title to the property is placed in the corporation, while the corporate management is controlled by the stockholders through a board of directors. The two important instruments in the organization are the stock certificate and the proprietary lease, which are inseparable at all times. A prospective member must purchase a certificate for a specified number of shares roughly equivalent to the value of his apartment. This certificate entitles him to a proprietary lease, ordinarily of the long term or perpetual type, which is evidence of his right to occupy and control a particular apartment and sets out the respective rights and duties of lessor and lessee. Monthly assessments are paid by each member in proportion to his stock holdings. The corporation reserves the right to terminate the lease for any default or violation of any covenant by the lessee. Assignment of stock and lease may be made only with consent of the directors or by majority vote of the stockholders.

Before examining these elements in further detail, an inquiry into the real purpose behind the co-operative plan should furnish the best clue to the problem of ownership. The rapid growth of co-operative apartments in recent years must be attributed primarily to the fact that they provide an opportunity for one to own his apartment. It cannot be emphasized too strongly that the very essence of the co-operative plan lies in its design to appeal to those who desire to own, rather than merely rent, living space. It has been repeatedly held that tenant stockholders are concerned primarily in the purchase of a home, and that the permanency of the individual occupants as tenant owners is an essential element in the general plan.[8] Further advantages lie in the fact that each tenant owner has a voice in the selection of other tenants and in the management of the property so that, through the principle of co-operation, the common expenses of operation and maintenance of the property as a whole may be shared by the owners. These factors, however, are but the practical machinery for carrying on the main purpose of ownership and are designed to operate for the protection of the purchaser's investment.

[7] See MacChesney, The Principles of Real Estate Law (The Macmillan Co., New York, 1928), Ch. 8. See also Castle, "Legal Phases of Co-operative Buildings," 2 So. Cal. L. Rev. 1 (1928), and notes in 23 N. Y. U. L. Q. 532 and 3 Int. L. Rev. 131.

[8] Penthouse Properties v. 1158 Fifth Avenue, 256 App. Div. 685, 11 N. Y. S. (2d) 854 (1939), followed in 1165 Fifth Avenue Corporation v. Alger, 261 App. Div. 608, 26 N. Y. S. (2d) 671 (1941), and in Tompkins v. Hale, 172 Misc. 1071, 15 N. Y. S. (2d) 854 (1939).

Perhaps most often cited as being inconsistent with the thought of ownership is the fact that legal title to the premises rests in the corporation. A realistic approach should reveal that this seeming inconsistency is a matter of form rather than one of substance. Such an approach requires first a consideration of the alternatives that might have been adopted. If separate deeds to each apartment were used, the objectives of co-operation would be almost impossible to attain, evils of speculation would be apt to arise, and there would be practical difficulties of separate insurance and tax assessment. If, on the other hand, the entire building were to be held by the owners as joint tenants, the four unities of time, title, interest, and possession would be impossible of achievement, and the operation of the principle of survivorship would lead to undesirable results. Tenancy in common would be open to even more objections. Therefore, as a California case once stated, "in order to effect a co-operative plan whereby each member might in effect own his own apartment, and yet be subject to such rules and regulations as a majority should deem wise and expedient, and also be subject to a sale of the property when two-thirds of the members should so vote, it was apparently deemed necessary to lodge title in an artificial person, the corporation."[9] That court concluded that, while the corporation held legal title, yet to all intents and purposes, the entire equitable estate was distributed proportionately among the owner-tenants. Thus it is apparent that the corporation, serving as a convenient repository agency in this respect, is merely the best available means of accomplishing desired objectives and is not truly inconsistent with the prime object of tenant ownership.

In addition, the large initial outlay made by each member for his stock has been properly termed the "capital investment"[10] of an amount which is the ordinary equivalent of the market value of the apartment. Use of that term is hardly to be explained unless the purchaser is to gain "ownership" of an apartment thereby, particularly when it is recalled that co-operative apartment corporations are essentially non-profit in character so the stockholder cannot expect that any dividends would be paid on his investment.

It has been urged that the proprietary lease is similar to an ordinary lease, one which creates a relationship of landlord and tenant in no way different from that created by any standard lease for a residential apartment.[11] The advocates for this position point out first that the monthly

[9] In re Estate of Pitts, 218 Cal. 185 at 188, 22 P. (2d) 694 at 696 (1933).

[10] See Tudor Arms Apartments v. Shaffer, 62 A. (2d) 346 (Md. Ct. of App., 1947).

[11] Marks, "Coercive Aspects of Housing Cooperatives," 42 Ill. L. Ev. 728 (1948), particularly p. 736. See also Braislin, Porter & Baldwin v. Sawdon, 68 N. Y. S. (2d) 774 (1946). But see contra: Curtis v. LeMay, 186 Misc. 853, 60 N. Y. S. (2d) 768 (1945).

assessments paid by each member are actually a form of "rent." In the ordinary and legal sense of the word, "rent" signifies a profit or reasonable return to the landlord for the use of property.[12] Assessments under a proprietary lease, however, are made for the sole purpose of covering the operating expenses, maintenance, taxes, insurance, and payments on corporate indebtedness,[13] without thought of any general profit to the corporation. It has also been urged, as an indication that the holder of the proprietary lease is nothing more than a tenant, that certain house rules which govern his conduct and the cleanliness, safety, and care of the apartment are appended to his lease with attendant penalties for the violation thereof. Such rules simply round out the principle of co-operation and cannot seriously be said to conflict with ownership. A large residential building is plainly not adaptable to the unrestricted use of each apartment for, without some type of regulation, few would care to live therein. To the same end are limitations against structural change, against transfer of the tenant's interest and against sub-letting; all of which usually require the securing of approval from the board of directors or at least from a majority of the stockholders. These provisions, while restrictive in a sense, really serve to increase the value of the tenant's connection with the corporation by giving him a voice in matters of vital interest, particularly when the failure of any tenant to sustain his share of the common burden would increase the burden of the others. The option given to the corporation to terminate the tenancy upon default or for other violation of the lease is the only logical and practical method for enforcing its terms.

Aside from the foregoing restraints, the co-operative participant is accorded privileges which place the proprietary lease beyond the scope of an ordinary lease. Some of these were pointed out in *Hicks* v. *Bigelow*,[14] one of the few leading cases in this field. That opinion stated, in definite terms, that the purchaser of a co-operative apartment is more than a mere tenant or lessee for he enjoys certain proprietary rights which a mere tenant lacks, rights which have most of the attributes of ownership. These rights include a voice in the management and operation of the building, in the selection or approval of other tenants, in the vital matter of any proposed sale or mortgage of the property, but above all in the exclusive, personal right to occupy a particular apartment. The

12 Black, Law Dict., 3d Ed., p. 1529.

13 The co-operative principle, treating the shareholder as the essential owner, is recognized by 26 U. S. C. A. § 23(z), which permits the tenant to deduct his proportionate share of the real estate taxes and interest on indebtedness, chargeable to the corporation, from his personal income tax return.

14 55 A. (2d) 924 (Mun. Ct. of App., D. C., 1947).

court might well have added that these rights normally extend over a period of time far longer than that of the usual apartment lease, often for the life of the corporation itself. Conversely, even in a long-term lease of standard character, the lessor grants few covenants beyond the one of quiet enjoyment whereas the corporation, under the proprietary lease, in addition to the matters already mentioned, customarily covenants to maintain a first class apartment building, to furnish services, to execute all repairs with diligence, to keep books of account, to render annual statements to the tenant, and to keep the building properly insured. Finally, in the event of a sale of the property or of a termination of an individual lease, the corporate lessor is obliged to account to the lessee for his proportionate share of the proceeds in the first instance, or the full proceeds upon resale of his apartment in the second instance.[15] Clearly, then, these features distinguish the proprietary lease from the standard arrangement between the average landlord and tenant.

In surveying all these incidents, not only of the proprietary lease, but of the co-operative organization as a whole, two thoughts suggest themselves. First, those incidents which do restrict the tenant's rights of ownership were placed there by the tenant owners themselves, who control the government of the enterprise. Secondly, while there may be seeming inconsistencies in the matter of tenant ownership, they are not truly inconsistent when focused in the light of the overall plan, a plan that is not perfectly adapted to its ends but is none the less a remarkable combination of available legal devices. The conclusion to be drawn from this analysis of the problem seems to be a fairly justifiable one that a purchaser of stock and of a proprietary lease from a co-operative housing corporation should be treated as a landlord within the meaning of the federal Housing and Rent Act of 1947, so as to be able to evict a holdover tenant. The ruling in the instant case, then, appears to be in line with what small weight of authority there is on the subject.

H. M. Ross, Jr.

Master and Servant—Services and Compensation—Whether Non-striking Union Office Workers are Entitled to Unemployment Compensation Benefits when an Affiliated Factory Workers' Union Calls a Strike in the Same Establishment—In the recent Illinois case of *Outboard, Marine & Manufacturing Company* v. *Gordon*,[1] the

[15] The by-laws of the corporation may provide for the deduction of expenses involved in reselling the apartment and of any indebtedness owed by the lessee to the corporation. See McCullough, "Co-operative Apartments in Illinois," 26 Chicago-Kent Law Review 303 (1948), particularly pp. 313-4.

[1] 403 Ill. 523, 87 N. E. (2d) 610 (1949).

Supreme Court of Illinois, under a set of facts novel to this state, has clarified the rights of employees to unemployment compensation when they become unemployed because of a labor dispute. The claimants in that case were members of an office workers' union which was an affiliate of a union of factory workers in the same plant. The affiliation agreement provided that the office union could not enter into contract negotiations without the approval of the factory union and required the former union to contribute one-fourth of its dues to the latter. Both groups of workers entered into contract negotiations with the employer, the office employees being represented therein by officers of the factory union, and a satisfactory agreement was reached as to the office workers. The employer failed to come to terms as to the factory employees and a strike of the latter followed, resulting in a picket line through which only a few maintenance men were permitted to pass. There was testimony that the employer, desiring to avoid violence, kept the plant gates locked thereby preventing the office workers from entering or attempting to enter the premises had they so desired. Claims advanced by the office workers for unemployment compensation benefits during the period of the strike were denied by a deputy examiner on the theory that such workers were participating in or at least were interested in the strike, but the claims were granted on appeal to the Director. The allowance of compensation was affirmed by both the circuit court and by the Illinois Supreme Court.

Legislation calling for unemployment compensation originated in England, but the first English statute provided that all employees whose unemployment was the product of a labor dispute were to be disqualified from receiving unemployment benefits.[2] The unfairness of this disqualification, at least as it bore on those who had no interest in the dispute and had not participated therein, became soon apparent and, four years later, the English statute was amended.[3] As amended, it permitted those who became unemployed as a result of a labor dispute to draw unemployment compensation benefits provided they neither participated in, were directly interested in, nor financed the dispute and were not of the same grade or class of workers as those who were directly concerned.

Following congressional enactment of the Social Security Act,[4] all of the American states, as well as the territories, adopted unemployment compensation laws.[5] Nine states have enacted blanket disqualification

[2] 10-11 Geo. V, c. 30, § 8(1).

[3] See 14-15 Geo. V, c. 30, § 4(1).

[4] 49 Stat. 635, 42 U. S. C. A. § 1102.

[5] The state acts have followed, to a great extent, a bill drawn by the Social Security Board.

clauses similar to the original English statute[6] but the remaining forty-two states and territories imposed disqualification clauses substantially similar to the amended English provision.[7] Typical of the latter is the Illinois enactment which, in substance, requires the claimant to show absence of participation, of financing, of direct interest in the labor dispute as well as membership in a different grade or class in order to be eligible for benefits.[8] As the claimants in the instant case admittedly were unemployed because of a labor dispute,[9] it became necessary for them to show that they came within the noted exception to the disqualification clause in order to receive payment of the benefit provided by law.

The issue of participation was decided on the basis that since the claimants were prevented from obtaining entrance to the plant by virtue of the locked gates, their failure to work did not constitute a participation in the strike.[10] This reasoning may be said to be in line with holdings from the majority of jurisdictions which have passed on the question. Whether the particular act could be said to be voluntary or in-

6 Ala. Code Ann. 1945, Tit. 26, § 214(A); Cal. Gen. Laws, Cum. Supp. 1945, Act 8780(d), § 56A; Del. Laws 1937, Ch. 258, § 5(d); Ky. Rev. Stat. 1948, § 341.360(1); Minn. Stat. Ann. 1947, § 268.09(1)(6); New York, Labor Law, § 592(1); Ohio Gen. Code Ann. 1948, § 1345-6d; Utah Code Ann., Cum. Supp. 1949, § 42-2a-5d; Wis. Stats. 1947, § 108.04(10).

7 Alaska, Comp. Laws Ann. 1949, § 51-5-4(d); Ariz. Code Ann. 1947, § 56-1005(d); Ark. Dig. Stat., 1944 Cum. Supp., § 1089; Colo. Stat. Ann. 1947, Ch. 167A, § 5d; Conn. Gen. Stat. 1949, § 7508(3); D. C. Code, Cum. Supp. 1948, Ch. 46, § 310(f); Fla. Stats. 1945, § 443.06(4); Ga. Code Ann., 1947 Cum. Supp., § 54-610(d); Hawaii Rev. Laws 1945, Ch. 74, § 4231(d); Ida. Code Ann. 1949, § 72-1366(j); Iowa Code 1946, § 96.5(4); Kans. Gen. Stat. Ann. 1947, § 44-706(d); La. Gen. Stat. Ann., Cum. Supp. 1949, § 4434.4(d); Me. Rev. Stat. 1944, Ch. 24, § 5(d); Md. Ann. Code 1947, Art. 95A, § 5(e); Mass. Ann. Laws 1942, Ch. 151A, § 25(b); Mich. Stat. Ann. 1947, § 17.531(b); Miss. Code Ann. 1943, § 7379(d); Mo. Rev. Stat. Ann., Cum. Supp. 1948, § 9431(II)(a); Mont. Rev. Code 1941, Tit. 87-106(d); Neb. Rev. Stat. 1947, § 48-628(d); Nev. Comp. Laws Ann. 1945, § 2825.05(d); N. H. Rev. Laws 1942, Ch. 218, § 4D; N. J. Stat. Ann. 1949, § 43:21-5(d); N. Mex. Stat. Ann. 1941, § 57-805(d); N. C. Gen. Stat. Ann. 1947, § 96-14(d); N. D. Rev. Code 1943, § 52-0602; Okla. Stat. 1949, Tit. 40, § 215(d); Ore. Comp. Laws Ann. 1947, § 126-705(d); Pa. Stat. Ann., Cum. Supp. 1948, Tit. 43, § 802(d); R. I. Gen. Laws 1938, Ch. 284, § 7(4); S. C. Code Ann. 1942, § 7035-82(d); S. D. Code 1939, § 17-0830(4); Tenn. Code Ann., Cum. Supp. 1948, § 6901.29E; Tex. Rev. Civ. Stat. Ann. 1949, Art. 5221, sub. b-3(d); Vt. Rev. Stat. 1947, § 5379-IV; Va. Code Ann. 1942, § 1887(97)(d); Wash. Rev. Stat. Ann., 1945 supp., § 9998-215; W. Va. Code Ann. 1943, § 2366(78); Wyo. Comp. Stat. Ann. 1945, § 54-105(B)(II).

8 Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 223(d).

9 As to whether or not a labor dispute exists, see Am. Steel Foundries v. Gordon, 404 Ill. 174, 88 N. E. (2d) 465 (1949); Bankston Creek Collieries, Inc. v. Gordon, 399 Ill. 291, 77 N. E. (2d) 670 (1948); Fash v. Gordon, 398 Ill. 210, 75 N. E. (2d) 294 (1947); Adkins v. Indiana Employment Security Division, 117 Ind. App. 132, 70 N. E. (2d) 31 (1946); Westinghouse Electric Co. v. Unemployment Comp. Board of Review, 165 Pa. Super. 385, 68 A. (2d) 393 (1949); In re Deep River Timber Co., 8 Wash. (2d) 580, 110 P. (2d) 877 (1941). See also notes in 26 CHICAGO-KENT LAW REVIEW 180 and 36 Ill. B. J. 364.

10 Where blanket disqualification does not exist, proof of absence of participation is necessary: see statutes cited in note 7, ante.

voluntary has, in general, been made the criterion of determining whether the employees participated in the dispute. An outright refusal to work would obviously constitute participation. Similarly, a sympathy strike, wherein one union refuses to work in order to support another striking union, produces voluntary unemployment.[11] A failure to cross a picket line established by the striking employees has been productive of much dispute but has generally led to the result that a voluntary failure to cross has been held to constitute participation in the dispute.[12] Where "fear of physical violence" has been found present, however, the failure to cross the picket line has been deemed to be involuntary in character with the result that such employees have been classed as non-participants in the strike.[13] There must be more than a mere "theatrical threat" of violence so the fear of "being photographed,"[14] and the fear of "union consequences"[15] have been held insufficient to render the refusal to cross involuntary.

The issue of participation because of affiliation has also arisen prior to the present case but, unlike the holding therein, it has been held, on slightly different circumstances, that the close relationship between the two groups was sufficient to make the one a participant in the labor dispute of the other. In the case of *Burns* v. *Unemployment Compensation Board of Review*,[16] two local unions, whose members worked in the same establishment, were affiliates of the same national union but only one of the locals had called the strike. The members of the other local were

[11] Aitken v. Board of Review of Unemployment Comp. Comm'n, 136 N. J. L. 372, 56 A. (2d) 587 (1948); Drylie v. Unemployment Comp. Board of Review, 152 Pa. Super. 211, 56 A. (2d) 272 (1948); Barnas v. Unemployment Comp. Board of Review, 152 Pa. Super. 429, 33 A. (2d) 258 (1943).

[12] The result in California may be attributable to the blanket disqualification adopted by the state: McKinley v. Calif. Employment Stabilization Comm'n, — Cal. (2d) —, 209 P. (2d) 602 (1949); Bunny's Waffle Shop v. Same, 24 Cal. (2d) 735, 151 P. (2d) 224 (1944); Matson Terminals, Inc. v. Same, 24 Cal. (2d) 695, 151 P. (2d) 202 (1944); Bodinson Mfg. Co. v. Same, 17 Cal. (2d) 321, 109 P. (2d) 595 (1941). No such blanket disqualification is involved in Baldassarius v. Egan, 135 Conn. 695, 68 A. (2d) 120 (1949); Brown v. Maryland Unemp. Comp. Bd., 189 Md. 250, 55 A. (2d) 696 (1947); Meyer v. Indus. Comm'n of Mo. — Mo. —, 223 S. W. (2d) 835 (1949); McGann v. Unemp. Comp. Bd. of Review, 163 Pa. Super. 379, 62 A. (2d) 90 (1948); Phillips v. Unemp. Comp. Bd. of Review, 163 Pa. Super. 374, 62 A. (2d) 84 (1948); Appeal of Employees of Pac. Tel. & Tel. Co., 31 Wash. (2d) 659, 198 P. (2d) 675 (1948); Andreas v. Bates, 14 Wash. (2d) 322, 128 P. (2d) 300 (1942); In re Deep River Timber Co., 8 Wash. (2d) 179, 111 P. (2d) 575 (1941); In re St. Paul & Tacoma Lumber Co., 7 Wash. (2d) 580, 110 P. (2d) 877 (1941). Only one case has reached a contrary result: State v. Ruth Coal Co., — W. Va. —, 56 S. E. (2d) 549 (1949).

[13] Steamship Trade Assoc. of Baltimore, Inc. v. Davis, — Md. —, 57 A. (2d) 818 (1948).

[14] Appeal of Employees of Pac. Tel. & Tel. Co., 31 Wash. (2d) 659, 198 P. (2d) 675 (1948).

[15] Stillman Unempl. Comp. Case, 161 Pa. Super. 569, 56 A. (2d) 380 (1948).

[16] 164 Pa. Super. 470, 65 A. (2d) 445 (1949).

denied benefits on the basis of the reasoning that the suspension was voluntary in that (1) the national union had approved the strike, and (2) there was some basis for inferring that the action of the national was assented to by the non-striking local. Such reasoning would appear to be an extension of the sphere of voluntary action beyond its natural orbit, so it is not surprising that it was not followed by the Illinois court in the instant case. Absence of participation, however, would not be enough to escape disqualification for other requirements must also be met.

When faced with the problem of determining whether the office workers' union in the instant case was disqualified because it had financed the factory union, the Illinois court declared that the fact that a portion of the dues collected had reached the treasury of the factory union was, in itself, insufficient to constitute financing. The office union received supplies and stationery in return for the small amount of money so paid and no additional or special assistance was rendered to the striking union. Again, most jurisdictions which have passed upon the question have reached the conclusion that the payment of dues alone does not amount to a financing of the labor dispute. Three state legislatures have specifically so provided,[17] and at least one court has required other active financial aid in addition to the payment of dues before disqualification may be found present.[18] The membership of a local in a national organization has, however, been held sufficient in and of itself to constitute a financing of any striking local within the national organization on the theory that the non-striking local may be said to have a proprietary interest in the dues which it has contributed to the national, particularly if those funds have been used to aid the striking local.[19] Reasoning of that type is not generally followed, was not discussed by the Illinois Supreme Court in the instant case, and would appear to be contrary to the present trend on the point. The presence of a combination of statutes providing that the payment of dues is not to be considered financing, together with ten other statutes which have eliminated the necessity of proving an absence of financing to support a claim of eligibility for benefits,[20] indicates a trend away from that view.[21]

[17] Fla. Stat. 1945, § 443.06(4); Mass. Ann. Laws 1942, Ch. 151A, § 25(b); Mich. Stat. Ann. 1947, § 17.531(b).

[18] Aitken v. Bd. of Review of Unemp. Comp. Comm'n, 136 N. J. L. 372, 56 A. (2d) 587 (1948).

[19] See Copen v. Hix, 130 W. Va. 343, 43 S. E. (2d) 382 (1947).

[20] See the statutes of Alaska, Dist. of Columbia, Hawaii, Louisiana, Mississippi, New Mexico, North Dakota, Oklahoma, and Pennsylvania. References thereto are set forth in note 7, ante.

[21] See note in 49 Col. L. Rev. 550.

In passing upon the issue of direct interest,[22] the Illinois court decided that the members of the office union were not directly interested in the dispute as no wage increase or other benefit could accrue to them, regardless of the result of the dispute between the factory workers and the company, for their contract had already been negotiated. That conclusion is also in conformity with the view followed in a majority of the other jurisdictions for they require that the working conditions of the employee must be subject to an adverse or favorable outcome before he can be said to be directly interested in the dispute.[23] Thus it has been held that interest is present where the employee's wages,[24] his hours,[25] the steward or the seniority system[26] will be affected by the result of the strike, even though the employee may be personally opposed to the strike and may have voted against it.[27] Following this reasoning, at least two jurisdictions have held that where a single union is the bargaining agency which represents all employees, all are disqualified if the union calls a strike despite the fact that the claimants themselves are not union members.[28] An implied assent to the strike on behalf of the non-union minority has been found present on the theory that, as the union is the

22 Each of the forty-two states and territories which provide any exception to the principle of disqualification require proof of the absence of direct interest: note 7, ante.

23 Huiet v. Boyd, 64 Ga. App. 564, 13 S. E. (2d) 863 (1941); Auker v. Review Board, 117 Ind. App. 486, 71 N. E. (2d) 629 (1947); Kemiel v. Review Board, 117 Ind. App. 357, 72 N. E. (2d) 238 (1947); Chrysler Corp. v. Appeal Bd. of Mich. Unemp. Comp. Comm'n, 301 Mich. 351, 3 N. W. (2d) 302 (1942); Chrysler Corp. v. Smith, 297 Mich. 438, 298 N. W. 87 (1941); Unemp. Comp. Comm'n v. Lunceford, 229 N. C. 570, 50 S. E. (2d) 497 (1948).

24 Huiet v. Boyd, 64 Ga. App. 564, 13 S. E. (2d) 863 (1941).

25 Chrysler Corp. v. Appeal Bd. of Mich. Unemp. Comp. Comm'n, 301 Mich. 351, 3 N. W. (2d) 302 (1942); Chrysler Corp. v. Smith, 297 Mich. 438, 298 N. W. 87 (1941).

26 Nobes v. Unemp. Comp. Comm'n, 313 Mich. 472, 21 N. W. (2d) 820 (1946).

27 The recent case of Local No. 658 v. Brown Shoe Co., 403 Ill. 484, 87 N. E. (2d) 625 (1949), seems to have adopted this line of reasoning. Eighteen key workers there went on a "wildcat" strike against the wishes of their union which had been made the certified bargaining agent for all of the employees. Eventually, all workers were laid off when the entire plant had to be closed down because of the resulting bottleneck. All employees, except the striking eighteen, filed claims for unemployment compensation but were denied benefits. The court held that as the employer was subjected to economic pressure from the entire group, without being able to negotiate with the few who were dissatisfied and who constituted an essential link in the whole operation, all were ineligible even though they may personally have opposed the strike. The logic dictating such a decision is obvious. If the result were otherwise, it would be possible for a union to pull out a key group of employees and tie up the plant yet have the remaining employees draw unemployment compensation and relieve the union of the considerable financial strain of a strike. The enhancement thus afforded to its bargaining position would be obvious.

28 Auker v. Review Board, 117 Ind. App. 486, 71 N. E. (2d) 629 (1947); Kemiel v. Review Board, 117 Ind. App. 357, 72 N. E. (2d) 238 (1947); Appeals of Employees of Polson Lumber Co., 19 Wash. (2d) 467, 143 P. (2d) 316 (1943).

sole bargaining agency for all employees, all will benefit if the strike should be successful. Narrow interpretation of the phrase "directly interested" has been given in three jurisdictions which would limit disqualification only to those "creating the dispute or participating therein in order to enforce their demands."[29] So narrow an interpretation is obviously open to criticism on the ground of a confusion between the phrase "directly interested" on the one hand and the phrase "participating in" on the other. They are not synonymous and the legislature, by enacting two different requirements for exemption, obviously intended they should be different and mutually exclusive.

On the last point, the Illinois Supreme Court decided that the office workers were of a different grade or class than the factory workers not only because of the difference in their duties but also because of the fact that each group had a separate union contract with the employer. The phrase "grade or class" has been made the subject of widely conflicting interpretations.[30] At one extreme, may be found cases which have held that all workers in the plant are of the same group or class, either because one bargaining agency represented all[31] or because all were engaged in a "continuous integrated process, as semi-skilled workers with similar wages."[32] Other cases divide workers into "cohesive groups acting in concert," thereby serving to place all non-union workers into one group and union workers in a different class.[33] Perhaps the most logical division is one which distinguishes production workers from maintenance workers or permits of separation by departments.[34] Under this view, the type of work done becomes the determining factor,[35] so the separation of office workers from factory workers affords a sound foundation for the Illinois holding.

While it may be said that the case under discussion presents nothing

[29] Dept. of Indus. Relations v. Drummond, 30 Ala. App. 78, 1 So. (2d) 395 (1941); Kieckhefer Container Co. v. Unemployment Comp. Comm'n, 125 N. J. L. 155, 13 A. (2d) 648 (1940); Wickland v. Commissioners, 18 Wash. (2d) 206, 138 P. (2d) 876 (1943).

[30] Only three states possessing an exceptions clause do not require the petitioning workers to prove that they are not of the same grade or class as those who have participated in the labor dispute. They are Louisiana, Rhode Island and Vermont.

[31] Members of Iron Workers Union of Provo v. Indus. Comm'n, 104 Utah 242, 139 P. (2d) 208 (1943).

[32] Johnson v. Pratt, 200 S. C. 315, 20 S. E. (2d) 865 (1942).

[33] Queener v. Magnet Mills, Inc., 179 Tenn. 416, 167 S. W. (2d) 1 (1946); Copen v. Hix, 130 W. Va. 343, 43 S. E. (2d) 382 (1947).

[34] See Nordling v. Ford Motors Co., — Minn. —, 42 N. W. (2d) 576 (1950), as to what constitutes a "department" of the employer for this purpose.

[35] Kieckhefer Container Co. v. Unemployment Comp. Comm'n, 125 N. J. L. 155, 13 A. (2d) 648 (1940); Unemployment Comp. Comm'n v. Marlen, 228 N. C. 277, 45 S. E. (2d) 385 (1947).

of novel significance when it is evaluated in the light of decisions from other jurisdictions, and has not resulted in any new or different interpretation of a commonly found statute, yet the decision possesses noteworthy interest because of the way in which it does pin-point the features which should control the right to unemployment compensation benefits.

K. J. DOUGLAS

OBSCENITY — OBSCENE PUBLICATIONS, PICTURES, AND ARTICLES — WHETHER OR NOT A PHONOGRAPH RECORD, CONTAINING OBSCENE, LEWD, AND LASCIVIOUS WORDS, SONGS, OR OTHER MATTER IS AN ARTICLE OR INSTRUMENT OF INDECENT OR IMMORAL USE OR PURPOSE WITHIN THE PROHIBITION OF OBSCENITY STATUTES—In *People* v. *Strassner*,[1] the Court of Appeals of New York was called upon to deal with a problem of statutory construction which, as yet, has been undetermined by the highest court of any other state having analogous statutory provisions. The problem presented was whether or not a phonograph record came within a statutory prohibition against the sale or possession of obscene, lewd, lascivious, filthy or indecent matter. The defendant was convicted on an information which charged a violation of a state statute[2] in that he possessed a filthy, indecent and disgusting phonograph record. His conviction was reversed by the Court of Appeals on the ground that the specific enumeration of obscene articles in the first clause of the statute,[3] articles whose obscenity could be communicated by visual representation, as well as any general phraseology therein,[4] was inadequate to condemn the instrumentality which formed the basis of defendant's prosecution since his material called for auditory representation accomplished by mechanical means.

The case under discussion accurately points up a problem dealing with the interpretation to be given to various state statutes relating to obscenity, which interpretation may determine whether or not said statutes are sufficient to embody phonograph records as articles or instruments of indecent or immoral use or purpose, so as to punish the possession thereof. The magnitude of the problem is made the more evident by the fact that only two states have, by express provision, made the trafficking

[1] 299 N. Y. 325, 87 N. E. (2d) 280 (1949).

[2] McKinney, Consol. Laws Ann., Vol. 39, Part 1, Art. 106, § 1141.

[3] See note 2, ante. Specific reference is there made to "any obscene, lewd, lascivious, filthy, indecent, or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image."

[4] The statute concluded with the words ". . . or any written or printed matter of an indecent character."

in obscene phonograph records specifically punishable.[5] A number of other statutes, by confining their language to specific enumerations of species,[6] none of which can be said to include phonograph records, will obviously require legislative amendment before the ills of obscene phonograph records can be adequately coped with. The balance, because they contain general phrases of ambiguous terminology, will require judicial interpretation as a preface to any determination of whether or not they possess the means of inhibiting the exploitation of smut accomplished by the production and sale of obscene phonograph records. A reading thereof discloses certain common similarities which will admit them to categorical analysis. For the purpose of this study, such method will be employed.

First, a majority of these states possess statutes which, after specifically enumerating certain species of obscene articles, follow such specific enumeration with a general phrase.[7] Although the wording of the general phrases found in this group of statutes does differ, they do possess similarity in that each is introduced by words such as "or any," "or other," or "or any other," and then follows some generic term which might be claimed to be sufficiently broad to include a phonograph record within its definition. No fair and reasonable meaning given to the items in the specifically enumerated species could include a phonograph record therein. If such records are to be classified as punishable obscenity thereunder it must be because such objects are found to lie within the generic terms contained in the general clauses. The issue, then, becomes one as to just how far a court may go, when subjecting these general phrases to interpretation.

5 Deering Cal. Penal Code 1949, Tit. 9, Ch. 8, § 311; Mass. Ann. Laws 1933, Vol. 9, Ch. 272, § 28, as amended.

6 Ala. Code 1940, Tit. 14, Ch. 64, §§ 372-4; Ariz. Code Ann. 1939, Ch. 43, § 3002; Ark. Stat. Ann. 1947, Tit. 41, § 2704; Ga. Code 1933, Ch. 26, § 6301, as amended by Laws 1941, p. 358; Hawaii Rev. Laws 1945, Tit. 30, Ch. 242, § 11107; Ida. Code 1947, Vol. 4, Tit. 18, § 4101; Mo. Rev. Stat. Ann. 1939, Vol. 13, Ch. 31, Art. 8, § 4660; Mont. Rev. Code 1947, Vol. 8, Tit. 94, Ch. 36, § 94-3603; N. H. Rev. Laws 1942, Vol. 2, Ch. 441, § 14; N. Mex. Stats. Ann. 1941, Vol. 1, Ch. 14, § 1812; Okla. Stats. Ann. 1936, Tit. 21, Ch. 36, § 1021; S. D. Code 1939, Vol. 1, Tit. 13, Ch. 13.17, § 13.1722; Williams' Tenn. Code Ann. 1934, Vol. 7, Tit. 1, Ch. 9, § 11190; Vernon's Tex. Penal Code Ann. 1925, Vol. 1, Tit. 10, Ch. 7, Arts. 526-7, as amended; Utah Code Ann. 1943, Vol. 1, Tit. 15, Ch. 8, § 41.

7 Fla. Stats. 1941, Tit. 44, Ch. 847, § 847.01; Iowa Code 1946, Vol. 2, Ch. 725, § 725.5; Dart's La. Crim. Law and Pro. Code 1943, Ch. 3, § 740-106; Me. Rev. Stat. 1944, Vol. 2, Ch. 121, § 24; Md. Ann. Code 1939, Vol. 1, Art. 27, § 495; Mich. Stats. Ann. 1936, Vol. 25, Ch. 286(a), § 28.575; Minn. Stats. Ann. 1945, Vol. 40, Ch. 617, § 617.24(i); Miss. Code Ann. 1942, Vol. 2, Ch. 1, § 2288; Neb. Rev. Stats. 1943, Vol. 2, Ch. 28, Art. 9, § 28-921; Nev. Comp. Laws 1929, Vol. 5, Ch. 14, § 10144; N. J. Stats. Ann. (Perm. Ed.) 1937, Tit. 2, Ch. 140, § 2; N. C. Gen. Stats. 1943, Vol. 1, Ch. 14, § 14-189; Ore. Comp. Laws 1940, Vol. 3, Tit. 23, Ch. 9, § 23-924; R. I. Gen. Laws 1938, Ch. 610, § 13; S. C. Code 1942, Vol. 1, Ch. 73, § 1443; Vt. Stats. 1947, Ch. 70, Tit. 41, § 8490; Va. Code 1942, Ch. 183, § 2459; W. Va. Code Ann. 1943, Ch. 61, § 6066; Wis. Stats. 1947, Vol. 2, Tit. 32, Ch. 351, § 351.38.

The production of obscene phonograph records being a matter of rather recent innovation in the field of lewd practices, it is not surprising that there exists a minimum of judicial decisions dealing with the point. Two cases do serve to underscore the basic problem. In the reported case, the New York Court of Appeals, faced with interpreting the general phrase "or any written or printed matter," was not content to rest its decision solely upon the obvious ground that the adjectives "printed" and "written," by themselves, operated to exclude from the general phrase an instrumentality which could hardly be contended to be either a "writing" or a "printing" as those terms are currently understood. Instead, the court also pointed out that the several items in the specifically enumerated species all served to address their obscenity to the mind through the sense of sight. It is this latter observation which indicates the feature which is common to all the varied items specifically enumerated in the statutes here under consideration. This common characteristic should be kept in mind, as attention shifts from one category of statutes to another, in order that the resultant effect thereof upon the general phrases therein contained may be best appreciated.

Citing as authority for the position taken by them, the New York Court of Appeals referred to the holding in *Alpers* v. *United States*.[8] That case concerned an appeal taken from a conviction on two counts of an information charging the appellant with knowingly depositing with a carrier, for transportation in interstate commerce, certain lewd and indecent phonograph records. It was the theory of the government's case that such acts constituted a violation of a federal code provision on the subject.[9] Judge Orr, writing an opinion which reversed the conviction, there stated that, as penal statutes must be strictly construed, the rule *ejusdem generis* became particularly applicable when the phrase presented was a general one which followed a specifically enumerated class of persons or things. He was of the opinion that a search of the legislative history of the code provision justified the restriction of the general phrase "or other matter of an indecent character," as found therein, to species of articles like those enumerated and whose obscenity is communicated to the mind by the sense of sight. This decision serves to supply another observation which will be particularly pertinent to those concerned with the problem of interpretation and that is the rule *ejusdem generis* may prove helpful.

That rule, although variously defined, is generally accepted to be that where, in a statute, general words follow a particular designation of

[8] 175 F. (2d) 137 (1949).

[9] 18 U. S. C. A. § 396. The section is now numbered § 1462.

persons or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designation and as including only persons or things of the same kind, class, character or nature as those specifically designated.[10] It is said to be based upon the obvious reason that if the legislature had intended the general words to be used in an unrestricted sense, no mention would have been made of the particular classes.[11] Under that rule, as applied to statutes falling in the first class, obscene phonograph records could not be found to lie within the general phrases because not within the genus whose enumerated species have the common characteristic of communicating their obscenity by the sense of sight alone.

At this point, it is significant to note that the decision in the case of *Alpers* v. *United States*,[12] cited as authoritative basis for the decision in the instant case, was later reversed by the Supreme Court of the United States[13] in an opinion rendered subsequent to that filed in the New York case. The majority of that court arrived at a different conclusion both as to the application of the rule *ejusdem generis* and also as to the legislative intention which might be gathered from the context of the act. Justice Minton, writing the majority decision which reinstated the conviction of the defendant, declared that the obvious purpose of the legislation under consideration was "to prevent the channels of interstate commerce from being used to disseminate any matter that, in its essential nature, communicates obscene, lewd, lascivious, or filthy ideas." He noted that Congress had legislated "with respect to a number of evils in addition to those

[10] The widespread acceptance of that definition may be noted in such holdings as Goode v. Tylor, 237 Ala. 106, 186 So. 129 (1939); Bell v. Vaughn, 46 Ariz. 515, 53 P. (2d) 61 (1936); People v. Thomas, 25 Cal. (2d) 880, 156 P. (2d) 7 (1945); Martinez v. People, 111 Colo. 52, 137 P. (2d) 690 (1943); State v. Certain Contraceptive Materials, 126 Conn. 428, 11 A. (2d) 863 (1940); Dunham v. State, 140 Fla. 754, 192 So. 324 (1940); Beavers v. LeSeuer, 188 Ga. 393, 3 S. E. (2d) 667 (1939); State v. Gardner, 174 Iowa 748, 156 N. W. 747 (1916); Bullman v. City of Chicago, 367 Ill. 217, 10 N. E. (2d) 961 (1937); Dowd v. Sullivan, 217 Ind. 196, 27 N. E. (2d) 82 (1940); State v. Miller, 90 Kans. 230, 133 P. 878 (1913); Federal Chemical Co. v. Paddock, 244 Ky. 338, 94 S. W. (2d) 645 (1936); State v. Texas Co., 205 La. 217, 17 So. (2d) 569 (1944); American Ice Co. v. Fitshugh, 128 Md. 382, 97 A. 999 (1916); People v. Powell, 280 Mich. 699, 274 N. W. 372 (1937); School Dist. No. 30 v. Consol. School Dist. No. 30, 151 Minn. 52, 185 N. W. 961 (1921); State v. Russell, 185 Miss. 13, 187 So. 540 (1939); Zinn v. City of Steelville, 351 Mo. 413, 173 S. W. (2d) 398 (1943); Mancuso v. State, 123 Neb. 204, 242 N. W. 430 (1932); State v. Craig, 176 N. C. 740, 97 S. E. 400 (1918); Ganstad v. Nygaard, Sheriff, 64 N. D. 785, 256 N. W. 230 (1934); In re Frietag's Estate, 165 Ore. 427, 107 P. (2d) 978 (1941); In re Fredirick's Estate, 333 Pa. 327, 5 A. (2d) 91 (1939); State v. Hollock, 114 Vt. 292, 44 A. (2d) 326 (1945); State v. Eberhart, 106 Wash. 222, 179 P. 853 (1919). These cases do not necessarily deal with the subject of obscenity.

[11] See State v. Campbell, 76 Iowa 122, 40 N. W. 100 (1888).

[12] 175 F. (2d) 137 (1949).

[13] — U. S. —, 70 S. Ct. 352, 94 L. Ed. (adv.) 353 (1950).

prescribed by the portion of the statute under which respondent was charged." As statutes were to be construed with their entire context in mind, he believed that a comprehensive statute should not be "constricted by a mechanical rule of construction."[14]

What then is the conclusion to be drawn from the reviewed decisions? It is believed by this writer that the general phrases in the first category of statutes will be subjected to interpretation pursuant to the rule of *ejusdem generis,* and the general words "or any," "or other," or "or any other," will be read as if stated in the form of "other such like."[15] The reasons for this conclusion are several. First, the rule has been universally employed in ascertaining legislative intention where general words follow the specific enumeration of classes of persons or things. Second, almost all of the states here concerned recognize and admit the existence of the rule, either applying or denying it application as the facts of each case dictate.[16] Third, the rule is the most consistent one which might be applied when the statute is one requiring strict construction.[17] Finally, the United States Supreme Court decision in the Alpers case, although stating a limitation often expressed to exist,[18] is distinguishable from the situation presented by statutes in this first category for the federal code provision, unlike the state provisions, enumerate articles whose obscenity is not confined to communication or transmission by the sense of sight. As it enumerates other articles whose obscenity comes into existence only when employed for a particular use or purpose, not being obscene *per se* merely by presentation to one's sight, the problems are not identical. The conclusion, therefore, most consistent with well established principles of statutory construction when bearing in mind the strict interpretation usually given to penal statutes, is that phonograph records of the type in

14 — U. S. — at —, 70 S. Ct. 352 at 354, 94 L. Ed. (adv.) 353 at 355.

15 Hodgson v. Mountain & Gulf Oil Co., 297 F. 269 (1924); State v. Campbell, 76 Iowa 122, 40 N. W. 100 (1888); Commonwealth v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652 (1878); Rhone v. Loomis, 74 Minn. 200, 77 N. W. 31 (1898).

16 See cases cited in note 10, ante.

17 First National Bank v. United States, 206 F. 374 (1913); People v. Thomas, 25 Cal. (2d) 880, 156 P. (2d) 7 (1945); Martinez v. People, 111 Colo. 52, 137 P. (2d) 690 (1943); Ex parte Muckenfuss, 52 Tex. Cr. 467, 107 S. W. 1131 (1908); State v. Goodrich, 84 Wis. 359, 54 N. W. 577 (1893).

18 Helvering v. Stockholme Enskilda Bank, 293 U. S. 84, 55 S. Ct. 50, 79 L. Ed. 211 (1934); Martin v. State, 156 Ala. 89, 47 So. 104 (1908); State v. Gallagher, 101 Ark. 593, 143 S. W. 98 (1912); Gibson v. People, 44 Colo. 600, 99 P. 333 (1900); City of Chicago v. N. & M. Hotel Co., 248 Ill. 264, 93 N. E. 753 (1910); State v. Miller, 90 Kan. 230, 133 P. 878 (1913); Brown v. Corbin, 40 Minn. 508, 42 N. W. 481 (1889); State v. Smith, 233 Mo. 242, 135 S. W. 465 (1911); Burk v. Montana Power Co., 79 Mont. 52, 255 P. 337 (1927); Dillard v. State, 104 Neb. 209, 175 N. W. 668 (1920); People v. Kaye, 212 N. Y. 407, 106 N. E. 122 (1914); Klingensmith v. Siegal, 57 N. D. 768, 224 N. W. 680 (1929); Vassey v. Spake, 83 S. C. 566, 65 S. E. 825 (1909); State v. Bridges, 19 Wash. 431, 53 P. 545 (1898).

question are to be excluded from things regarded as punishable obscenity, at least until statutory modification occurs.

Passing now to a consideration of those statutes which fall within the second category,[19] it will be noticed that these statutes similarly contain a specific enumeration of obscene articles which address their obscenity to the mind through the sense of sight but, following this specific enumeration, are two general phrases. The first is similar to that involved in the reported New York case. It is followed by another which describes "or any article or instrument of indecent or immoral use or purpose." Too close identity between the last mentioned phrase and that frequently appearing in the first category of statutes might erroneously lead a court to apply the decision of the New York case. If this second phrase were missing, statutes in this category would be directly analogous to the one treated there and it would be proper to assume that the general phrase "or other engraved, printed, or written matter" would exhaust all other species not specifically enumerated and falling within the genus of engraved, printed, or written matter.

But, with the exhaustion of that genus, *i.e.* things appealing to sight, the second phrase, found in this group of statutes, would be rendered useless if it were afforded the same interpretation. To obviate this undesirable result, it is believed the courts would clothe the second phrase with a general meaning different from that attaching to the specifically enumerated articles. In *Mason* v. *United States*,[20] the court stated that the rule of *ejusdem generis* would not be employed to "render general words meaningless, since that would be to disregard the primary rule that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning."[21] If then, the specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate, there would be no room for application of the doctrine.[22]

[19] See Colo. Stats. Ann. 1935, Vol. 2, Ch. 48, § 217; Conn. Gen. Stats, 1949, Vol. 3, Ch. 423, § 8567; Dela. Laws 1941, Ch. 239, p. 1018, amending Rev. Code 1935, Ch. 153, § 32; Kans. Gen. Stats. 1935, Ch. 21, § 2110; Purdon's Pa. Stats. Ann. 1939, Tit. 18, Ch. 2, § 4524.

[20] 260 U. S. 545, 43 S. Ct. 200, 67 L. Ed. 396 (1923).

[21] 260 U. S. 545 at 554, 43 S. Ct. 200 at 202, 67 L. Ed. 396 at 399.

[22] See also United States v. Mescall, 215 U. S. 26, 30 S. Ct. 19, 54 L. Ed. 77 (1909); Arizona Sulphur Mining Co. v. Anderson, 33 Ariz. 64, 262 P. 489 (1927); Schleman v. Guaranty Title Co., 153 Fla. 379, 15 So. (2d) 754 (1944); Phelps v. Commonwealth, 209 Ky. 318, 272 S. W. 743 (1925); Utica State Sav. Bank v. Village of Oak Park, 279 Mich. 568, 273 N. W. 271 (1937); Stall v. Frank Electric Co., 289 Mo. 25, 240 S. W. 245 (1922); Gates v. Chandler, 174 Miss. 815, 165 So. 442 (1936); State v. Wells, 146 Ohio St. 131, 64 N. E. (2d) 593 (1946); Kansas City Southern Ry. Co. v. Wallace, 38 Okla. 233, 132 P. 908 (1913); Knoxtenn Theatres v. McConless, 177 Tenn. 497, 151 S. W. (2d) 164 (1941); State v. Savidge, 144 Wash. 302, 258 P. 1 (1927).

Does it follow, however, that under statutes in this category obscene phonograph records can be said to lie within the broad generic terms of "article" or "instrument." The New York court, in the instant case, disposing of a contention by the state that the information had been drawn under a second clause in the New York statute identical to the phrase hereunder consideration, indicated that a phonograph record could become an "article of indecent or immoral use" when it served to reproduce an indecent song or conversation. It did, however, properly refuse to rule on the point after it reached the conclusion that the information had not been framed under this clause of the statute. The dictum displays a judicial attitude favorable toward the inclusion of phonograph records within the term "article," and there is a magistrate's decision in New York which does so hold.[23] A similar holding would seem proper under the sectional provision of the Kentucky statute,[24] where reference is specifically made to articles and instruments of indecent or immoral use or purpose, as well as to such generic terms as "article" and "instrument."

In the final category of statutes,[25] while there is a specific enumeration given to articles falling within the genus of obscene articles which serve to communicate their obscenity to the mind by the sense of sight, reference is also made to an "instrument or article of immoral use or purpose," but the connecting phrase such as "any," "or any," or "or any other" is conspicuous by its absence. As the presence of such linking terms appears to be a condition precedent to the operation of the rule *ejusdem generis,* it may be argued that the general phrase so found therein could be construed to include articles whose obscenity exists more in their use than in the presentation of the offensive matter to one's sight. It is believed that the absence of the general words reflects an intention on the part of the legislature to make this phrase refer to one of an enumerated class of obscene articles but to leave its meaning unencumbered, that is to possess a general meaning not to be drawn into assimilation with the other specifically enumerated species. Only the Illinois statute, one of this class, appears to have been subjected to an interpretative decision. In *Lanteen Laboratories, Inc.* v. *Clark,*[26] the Illinois Appellate Court of its own motion took notice that the contract submitted to it for specific performance was tainted with illegality in that it called for the indiscriminate sale of contraceptives through drug stores, thereby involving the

[23] People ex rel. Kahan v. Jaffe, 178 Misc. 523, 35 N. Y. S. (2d) 104 (1942).

[24] Ky. Rev. Stat. 1948, Ch. 436, § 436.090.

[25] D. C. Code 1940, Tit. 22, § 2001; Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 468; Burns' Ind. Stats. Ann. 1933, Vol. 4, Ch. 28, § 10-2803; Wyo. Comp. Stats. Ann. 1945, Vol. 1, Ch. 9, § 9-513.

[26] 294 Ill. App. 81, 13 N. E. (2d) 678 (1938).

sale of an "article of indecent or immoral use." It can hardly be contended that contraceptives are articles wherein the obscenity is communicated to the mind merely by the presentation of the article to sight. Rather, it is the use thereof which becomes offensive to public morality. While interpretation of statutes in this category remains a matter of question because of lack of sufficient judicial construction on which to base an adequate opinion, it is believed that such interpretation should include articles which are not of the same kind as those specifically enumerated. Decisions of that character would attribute sense and meaning to the added language. While judicial legislation should always be guarded against, judicial throttling of legislative intention is equally undesirable.

It would appear, then, that many states, because of narrow statutory language, are ill-equipped to punish persons who mock at public morality by the production and sale of obscene phonograph records. Others, by sufficiently comprehensive statutory terminology, at least when aided by proper judicial interpretation, have made it possible to punish those who would produce and traffic in illicit instrumentalities of the type here considered. Against the possibility of doubt arising in such cases, close scrutiny of existing legislation would seem desirable and some revision appears essential.

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