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Appeal and Error - Municipal Annexation Proceedings - Scope of Appellate Review

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RECENT DECISIONS

APPEAL AND ERROR—MUNICIPAL ANNEXATION PROCEEDINGS—SCOPE OF APPELLATE REVIEW.

Appeal of the Township of Plum (Pa. 1955).

In an annexation proceeding under "The General Borough Act" [1] The Borough of Oakmont, by ordinance, annexed an adjacent portion of a second class township pursuant to a petition by the majority of freeholders in the annexed territory. The Court of Quarter Sessions of Allegheny County held that the borough ordinance was valid. The township appealed. The Superior Court in a 4-3 decision *held* that where a statute provides that court determination of the legality of ordinances shall be conclusive,[2] appellate review is narrowly limited to questions of jurisdiction and of regularity and broad certiorari could not be granted. The court found that the lower court had jurisdiction and the proceedings were regular. *Appeal of Township of Plum,* 116 A.2d 260 (Pa. 1955).[3]

Traditionally the scope of the writ of certiorari was limited to a review of the jurisdiction of the lower court and the regularity of the proceedings.[4] However, there has been a gradual tendency to expand the scope of review on certiorari. In Pennsylvania this expansion has given rise to a distinction between a narrow and broad certiorari.[5] While the tendency to allow broad certiorari appears to have had its inception in a series of election cases [6] it has been extended to cover other situations.[7] Narrow certiorari is similar to the traditional limited certiorari while broad certiorari includes an examination of the record, which, by statute,[8] includes testimony taken

1. PA. STAT. ANN. tit. 53 §§ 12461, 12462 (Supp. 1954).

2. PA. STAT. ANN. tit. 53 § 12900 (Supp. 1954).

3. Appeal of the Township of Plum, 116 A.2d 260 (Pa. 1955).

4. *In re* License to Carlson, 127 Pa. 330, 18 Atl. 8 (1889); Holland v. White, 120 Pa. 228, 13 Atl. 782 (1888).

5. East Side Democratic Club License Liquor Case, 160 Pa. Super. 36, 50 A.2d 514 (1947); Blair Liquor License Case, 158 Pa. Super. 365, 45 A.2d 421 (1946); Market Street National Bank of Shamokin v. Coal Township, 156 Pa. Super. 182, 39 A.2d 744 (1944); Askounes Liquor License Case, 144 Pa. Super. 293, 19 A.2d 846 (1941).

6. Krickbaums Contested Election, 221 Pa. 521, 70 Atl. 852 (1908); Independence Party Nomination, 208 Pa. 108, 57 Atl. 344 (1904); Nomination Certificate of John S. Robb, Sr., 188 Pa. 212, 41 Atl. 477 (1898).

7. Commonwealth v. Cronin, 336 Pa. 469, 9 A.2d 408 (1939) (conviction for driving in excess of speed limit); Mami's Liquor License Case, 144 Pa. Super. 285, 19 A.2d 549 (1941) (revocation of liquor license for the purchase of unlicensed liquor).

8. "In any proceeding heretofore or hereafter had in any court of record of this Commonwealth where the testimony has been or shall be taken by witnesses, depositions, or otherwise, and where an appeal has been or shall hereafter be taken from the order, sentence, decree, or judgment, entered in said proceedings, to the

from witnesses or by deposition. The superior court in *Kaufman Const. Co. v. Holcomb,*[9] recognized a distinction between the scope of certiorari under a statute which merely fails to provide for a right of appeal and under a statute which expressly denies an appeal. Where a statute merely fails to provide for an appeal certiorari may be granted in the broad sense.[10] If the statute expressly denies an appeal then review beyond determining questions of jurisdiction and regularity of proceedings is prohibited.[11] The real problem in this area is illustrated vividly in the principal case when the majority and minority of the court differ as to whether the statute expressly denies an appeal by use of the words, "The determination and order of the court thereon shall be conclusive. In cases of ordinances effecting annexation of territory or laying out streets over private lands, the court shall have jurisdiction to review the propriety as well as the legality of the ordinance." [12] The majority construe these words as constituting an express denial of the right of appeal and thus limit themselves to a review of questions of jurisdiction and regularity of the proceedings below. The minority rejects this interpretation and cites many superior court cases in which broad certiorari was granted on an appeal in an annexation proceeding.[13]

It is interesting to note that the court states, "A thorough examination of the entire record convinces us that there was ample evidence to justify the lower court's action and we find no abuse of discretion." [14] Thus the court while purporting to restrict itself to a narrow certiorari, does in fact examine the "entire record" and says that even if the examination were through a broad certiorari they would affirm the findings of the lower court. Conceding the possible use of this technique as a means of preventing further appellate procedure, it is also apparently an indication of the uncer-

Superior or Supreme Court, such testimony shall be filed in said proceedings, and the effect of said appeal shall be to remove, for the consideration of the appellate court, the testimony taken in the court from which the appeal is taken, and the same shall be reviewed by the appellate court as a part of the record, with like effect as upon an appeal from a judgment entered upon the verdict of a jury in an action at law, and the appeal so taken shall not have the effect only of a certiorari to review the regulartiy of the proceedings in the court below." PA. STAT. ANN. tit. 12 § 1165 (Supp. 1954).

9. 357 Pa. 514, 55 A.2d 534 (1947).

10. Commonwealth v. Cronin, 336 Pa. 469, 9 A.2d 408 (1939); Grime v. Dept. of Public Instruction, 324 Pa. 371, 188 Atl. 337 (1936); Warner Bros. Theatres, Inc. v. Pottstown Borough, 164 Pa. Super. 91, 63 A.2d 101 (1949).

11. First Baptist Church v. Pittsburgh, 341 Pa. 568, 20 A.2d 209 (1941); State Board of Undertakers v. Joseph T. Sekula Funeral Home, Inc., 339 Pa. 309, 14 A.2d 308 (1940); Saxony Construction Co. Appeal, 178 Pa. Super. 132, 113 A.2d 342 (1955); Kimmell Liquor License Case, 157 Pa. Super. 59, 41 A.2d 436 (1945).

12. PA. STAT. ANN. tit. 53 § 12900 (Supp. 1954).

13. Lemoyne Borough Annexation Case, 176 Pa. Super. 38, 107 A.2d 149 (1954); Salisbury Township Annexation Case, 172 Pa. Super. 262, 94 A.2d 143 (1953); Ontelaunee Township Annexation Case, 172 Pa. Super. 71, 92 A.2d 262 (1952); Dallas Borough Annexation Case, 169 Pa. Super. 129, 82 A.2d 676 (1951); Irwin Borough Annexation Case (No. 1), 165 Pa. Super. 119, 67 A.2d 757 (1949); *In re* Appeal of Bender from Ordinance of Borough of Akron, 106 Pa. Super. 376, 163 Atl. 47 (1932).

14. Appeal of the Township of Plum, 116 A.2d 260, 263 (Pa. 1955).

tainty of the court's position. It seems incongruous for a court to so readily submit its power of appellate review to the equivocal language of this statute in view of the general reluctance of the judiciary to surrender such powers. Perhaps, however, there is no genuine reluctance on the part of the courts to forego the power of review in cases such as this. In fact, courts may be only too willing to avoid the onerous review of the numerous cases involving appeals from administrative boards. The right of appeal is precious to every litigant. It is the duty of the courts to preserve this right and to surrender it only in the face of clear and unequivocal statutory language.

Francis R. O'Hara

CONFLICT OF LAWS—FULL FAITH AND CREDIT—CONFLICTING STATE WORKMEN'S COMPENSATION ACTS.

Carroll v. Lanza (U. S. 1955).

The Missouri Workmen's Compensation Act provides that the remedy given by the act is exclusive.[1] Plaintiff, a Missouri resident, was working in Arkansas for a subcontractor under a Missouri employment contract. He was injured while fulfilling the subcontractor's obligation to the defendant, the general contractor. Immediate payment was made by the subcontractor under the Missouri statute for a period of thirty-four weeks. While receiving these payments, plaintiff sued defendant for common-law damages in the Arkansas courts. Defendant had the case removed to the Federal District Court for the Western District of Arkansas, where judgment was rendered for the plaintiff.[2] On appeal to the Circuit Court for the Eighth Circuit, judgment was reversed [3] on the basis that the full faith and credit clause of the Federal Constitution [4] prohibited recovery. The Supreme Court of the United States granted certiorari and reversed the court of appeals on the grounds that in personal injury cases, the state of the forum and locus of the tort has an interest to serve and protect, and its courts need not recognize the exclusive remedy of the state of domicile. *Carroll v. Lanza,* 75 Sup. Ct. 804 (1955).[5]

This case is principally concerned with the provisions of the various workmen's compensation acts as applied to the exclusiveness of the remedy.[6]

1. This chapter shall apply to all injuries received in this state, regardless of where the contract of employment was made, and also to all injuries received outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide. MO. ANN. STAT. § 287.110 (Vernon 1954).
2. 116 F. Supp. 491 (W.D. Ark. 1953).
3. 216 F.2d 808 (8th Cir. 1954).
4. U.S. CONST. art. IV, § 1.
5. Carroll v. Lanza, 75 Sup. Ct. 804 (1955).
6. For example, in Tennessee the act states, "Rights and remedies herein granted to an employee subject to this chapter on account of personal injury or death by

Workmen's compensation acts are public acts within the meaning of the full faith and credit clause.[7] They must be given effect by the forum of a sister state when they provide exclusive remedies.[8] It is true also that they should be liberally construed in furtherance of the purpose for which they were enacted.[9] A balance has been struck among the interests of the several states in granting awards under their respective statutes, whereby a limiting interpretation has been given to the scope of the full faith and credit clause.[10] Some rational basis must be shown for holding a conflicting statute superior to the law of the forum.[11] This rational basis is readily found in cases involving support orders [12] or the possibility of injustice to the injured party.[13] Although a state need not contravene its own public policy to enforce conflicting statutes of another state,[14] nevertheless, public policy cannot be extended so far as to cause the full faith and credit clause to lose

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accident shall exclude all other rights and remedies of such employee, his personal representative, dependents or next of kin, at common-law or otherwise, on account of such injury or death." TENN. CODE §§ 6859, 6870 (1932). However, as construed by the Supreme Court of Tennessee, this statute does not preclude recovery under the laws of another state, whereas the Missouri act applies "to all injuries received in this state, regardless of where the contract of employment was made, and also to all injuries received outside of the state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide." Missouri, then, bars a common-law action by the employee of a subcontractor against a prime contractor when the Missouri act is applicable. New Amsterdam Casualty Co. v. Boaz Kiel Construction Co., 115 F.2d 950 (8th Cir. 1940); Bunner v. Pattie, 343 Mo. 274, 121 S.W.2d 153 (1938). The Arkansas act provides that the making of a claim "shall not affect the rights of an employee or his dependents to make claim or maintain an action in tort against any third party for such injury." Baldwin Co. v. Maner, 273 S.W.2d 28 (Ark. 1954).

7. Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932).

8. *Ibid.* (New Hampshire, which gave the option of suing at common-law was required to give effect to the Vermont act which was the exclusive remedy. Dictum in that case suggests, however, that there is room for some play of conflicting policies of the acts.); *Accord,* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936).

9. Baltimore and Philadelphia Steamboat Co. v. Norton, 284 U.S. 408 (1932).

10. Pacific Employers Ins. Co. v. Industrial Accident Comm. of Cal., 306 U.S. 493 (1939); Alaskan Packers Ass'n v. Industrial Accident Comm. of Cal., 294 U.S. 532 (1935) ("the conflict is to be resolved, not by giving automatic effect to the Full Faith and Credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interest of each jurisdiction and turning the scale of decision according to their weight."); *Accord,* Estin v. Estin, 334 U.S. 541 (1948) ("The Full Faith and Credit clause is not to be applied, accordian-like to accomodate our personal predilections."); Pink v. A.A.A. Highway Express, 314 U.S. 343 (1941). *Contra,* Sherrer v. Sherrer, 334 U.S. 343 (1948) ("The Full Faith and Credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent sovereign states into a nation, and, if in its application, local policy must at times be required to give way, the result is part of the price of our federal system.").

11. Williams v. North Carolina, 317 U.S. 287 (1942).

12. Estin v. Estin, 334 U.S. 541 (1948).

13. Alaskan Packers Ass'n v. Industrial Accident Comm. of Cal., 294 U.S. 532 (1935).

14. Pacific Employers Ins. Co. v. Industrial Accident Comm. of Cal., 306 U.S. 493 (1939).

its effectiveness.[15] A more concrete answer to the problem was suggested by the Supreme Court of the United States in the case of *Magnolia Petroleum Co. v. Hunt* [16] where it was held that if a compensation award is res judicata in one state, the claimant is precluded from recovery in a foreign state. This decision has been limited on several occasions. For example, an employee received two awards in a case in which he reserved in his first settlement contract the right to seek recovery in the forum notwithstanding the fact that the first award was res judicata.[17] Moreover, the federal courts have asserted jurisdiction to rule on the sufficiency of the grounds for the denial of full faith and credit.[18] It has also been noted that neither the constitutional provision [19] nor the act of Congress implementing it [20] say anything with respect to the need of a final judgment.[21] The Supreme Court of the United States has declared in a more recent case that a state's interest in the welfare of its citizens will be a factor in determining jurisdiction where two conflicting statutes are involved.[22]

It appears the Court in the present case has further advanced the proposition that particular interests of each state will be weighed in reaching an amicable solution where two state statutes are in conflict. However, in this case there is an evident difference from the majority of its predecessors. In other cases where valid state interests were recognized, those interests seem to have been ascertained from the facts of each particular case. In this case the interests of Arkansas, the state of the forum, do not seem to be of paramount importance. Missouri is the state to be burdened if one of its citizens should become a public charge due to inadequate workmen's compensation. True the state where the tort occurs has interests to serve and protect. The problems of medical care and dependents usually follow in the wake of the injury. But in this case all the medical care had been undertaken in Missouri, and there is nothing to indicate the presence of any dependents in Arkansas. Hence, the only connection with Arkansas is the forum and the locus of the injury. Though they are important connections they have not been deemed sufficient, in and of themselves, in the past to outweigh the considerations of full faith and credit. It seems, therefore, that the Supreme Court intends to extend the scope of the valid interest doctrine, at least in workmen's compensation cases.

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15. Broderick v. Rosner, 294 U.S. 629 (1935).

16. 320 U.S. 430 (1943).

17. Industrial Comm. of Wis. v. McCartin, 330 U.S. 622 (1947) (Illinois payments said to be, in legal effect, a final award.).

18. Barber v. Barber, 323 U.S. 77 (1944).

19. U.S. CONST. art. IV, § 1.

20. 1 STAT. 122 (1790) (later amended by 62 STAT. 947 (1948), 28 U.S.C. § 1738 (1952)).

21. Barber v. Barber, 323 U.S. 77, 87 (1944) (concurring opinion).

22. Cardille v. Liberty Mutual Ins. Co., 330 U.S. 469 (1947) (Court asserted the interest of the District of Columbia in an injury which occured in Virginia).

CONSTITUTIONAL LAW—EMINENT DOMAIN—JUST COMPENSATION —PROSPECTIVE POWER USE.

United States v. Twin City Power Co. (5th Cir. 1955).

Twin City had acquired and held land as a prospective power site. The land borders on a stream upon which navigation has been eliminated by a solid dam, and a power house has been built by the government in order to devote the entire flow of the Savannah River to the production of hydroelectric power. The federal government condemned the lands for use as a government-owned power site. It was *held,* that in the light of these facts, the compensation figure should include the power potential of the site involved. *United States v. Twin City Power Co.,* 221 F.2d 299 (5th Cir. 1955).[1]

While just compensation is based on the value of the property at the time of the requisition,[2] the Constitution contains no definite rules or standards indicating when compensation is to be given and in what amounts.[3] Just compensation includes all elements of value, and the highest and most profitable use for which the land is adaptable. The fact that the most valuable use can only be made in combination with other lands does not exclude that use from consideration, if such combination is probable.[4] The right to compensation in eminent domain proceedings, is found in the fifth amendment. In addition, this right rests on equitable principles and attempts to put the owner in as good a position financially as he would be if his property were not taken.[5] The existing or immediately expected business wants of the community are a standard of fair market value.[6] This includes situations in which an owner of land could reasonably be expected to make use of the peculiar adaptability of the land by developing it in a manner similar to that intended by the condemning agency.[7] However, the situation differs when the property borders on a navigable stream. Title to such land is held subject to the public easement for purposes of navigation.[8] In the case of *United States v. Chandler-Dunbar Co.*[9] a power company, under a revocable permit from the Secretary of War, had built dams, dykes and forebays along the sides of the St. Mary's River in order to create power for commercial purposes. The federal government

1. United States v. Twin City Power Co., 221 F.2d 299 (5th Cir. 1955), Petition for *certiorari* filed July 6, 1955, by the Solicitor General on question is landowner entitled to receive, as an element of just compensation, special increment based upon land's adaptability to use as site for hydroelectric power operation, 24 U.S.L. WEEK 3029 (U.S. July 19, 1955) No. 209).

2. Phelps v. United States, 274 U.S. 341 (1927).

3. United States v. Cors, 337 U.S. 325, 332 (1949) (dictum).

4. Olson v. United States, 292 U.S. 246 (1934).

5. United States v. Miller, 317 U.S. 369 (1942).

6. Boom Company v. Patterson, 98 U.S. 403 (1878).

7. Olson v. United States, 292 U.S. 246 (1934).

8. United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913).

9. 229 U.S. 53 (1912).

condemned the land in order to improve the waterway for navigation purposes, and also to utilize the power potential of the river. The Supreme Court held that water power rights are not private property, and, hence, compensation was not required for the removal of the development works which were in the river since they were there by sufferance. The court made it clear that in taking the land bordering on the river the government did not take the water power which potentially existed in the river since that was always held subject to the superior right of the public under the commerce clause.[10] Chief Judge Hutcheson, in the *Twin City* case, distinguishes the *Dunbar* case on the ground that the taking here was not for purposes of navigation since the dam blocked such a use, and that the real purpose was for the erection of power plants.[11] However, the commerce clause has been given the broadest possible definition,[12] and as a result the powers flowing from this direct grant have become so numerous that the courts today speak of them as if they were virtually direct grants.[13] In this respect the Supreme Court has said:

> "In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control." [14]

The fact that navigability is prevented by the presence of a dam is of no import insofar as the presence of a navigable waterway is concerned.[15] To distinguish the *Dunbar* case on the ground that in that case the court dealt only with the "bed" of the river [16] appears rather specious. In con-

10. *Id.* at 62, 66, 69-72. "The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or nonuse. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion." United States v. Appalachian Electric Power Co., 311 U.S. 377, 424 (1940).

11. United States v. Twin City Power Co., 221 F.2d 299, 300 (5th Cir. 1955).

12. "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 83 (1824).

13. Courts habitually speak of the powers flowing from the power of congress over *navigation,* rather than from the powers under the *commerce clause.* See United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359 (1948); United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). *Compare with* Ashwander v. TVA, 297 U.S. 288 (1936).

14. United States v. Appalachian Electric Power Co., 311 U.S. 377, 426 (1940).

15. "When once found to be navigable, a waterway remains so." It does not lose that character because its use for navigation in interstate commerce has lessened or ceased. *Id.* at 408, 409.

16. "This difference is that, in the Chandler-Dunbar case, the United States took the *bed* and adjoining fast lands of a navigable stream. . . ." United States v. Twin City Power Co., 221 F.2d 299, 300 (5th Cir. 1955) (Emphasis added).

stitutional law the high water mark bounds the bed of the river, and the lands above it are called fast lands.[17] In the *Dunbar* case the court did not include the value of the power potential in the bed or the fast lands. Hence, if the value of power rights in lands which are already being used for such purposes are not included, it seems logical that potential rights in undeveloped land can be taken wthout compensation. Consequently, it is difficult to distinguish the *Dunbar* case even on a factual basis. The cases cited by the court in the *Twin City* case as rejecting the application of the *Dunbar* doctrine in this situation fail to bear out that contention.[18]

The circuit courts are split on the matter under consideration.[19] Since the refusal to include the power potential is based on the principle that the owner took with notice of the public easement, it is imperative that the matter be settled by a final decision. If the courts cannot agree upon the elements to be included in the compensation figure, the property owner improves his land at his peril. The problem goes beyond reasonable compensation. Involved is the whole issue of a conservative interpretation of the commerce clause, as well as the issue of federal power interests as opposed to state and private power interests. If the federal government can control any navigable stream for any power purpose, it follows that the government can develop all the hydroelectric power output of the country. The lower federal courts, especially those in the south,[20] include as an element of compensation the potential use of the land as a power site. This in turn presents a serious economic obstacle to the construction of govern-

17. United States v. Kansas City Life Ins. Co., 339 U.S. 799, 805 (1950).

18. In Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359 (1948), it was simply held that when an agency of the state exercised the right of condemnation granted by the *state*, the value of the land for use as a power site could be taken into consideration. But: "If either the United States, or its licensee as such, were seeking to acquire this land under the Federal Power Act, it might face different considerations from those stated above. The United States enjoys special rights and power in relationship to navigable streams and also to streams which affect interstate commerce. The United States, however, is not a party to the present case." *Id.* at 373; in United States v. Gerlach Live Stock Co., 339 U.S. 725, 736-739 (1950), it was held that Congress under the Reclamation Act did not intend to invoke its navigation servitude as to each and every one of this group of coordinated projects and has not attempted to take, or authorized the taking, without compensation, of rights valid under state law. In United States v. Kansas City Ins. Co., 339 U.S. 799 (1950) the court held that by maintaining the water at the high water mark on a navigable stream, the percolating of water above the high water mark on a non-navigable tributary is a taking. The court reaffirmed its position as to damages resulting to private property within the bed of a navigable stream; and in Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954), the court stated: "We conclude, as did the Court of Appeals, that, even though respondent's water rights are of a kind that is within the scope of the Government's dominant servitude, the Government (in passing the Federal Water Power Act of 1920) has not exercised its power to abolish them." Hence, the problem was not in issue. *Id.* at 248.

19. Continental Land Co. v. United States, 88 F.2d 104 (9th Cir. 1937) and Washington Water Power Co. v. United States, 135 F.2d 541 (9th Cir. 1943) (No compensation); United States v. Twin City Power Co., 215 F.2d 592 (4th Cir. 1954), *cert. granted*, 75 Sup. Ct. 298 (1955).

20. United States v. Twin City Power Co., 215 F.2d 592 (4th Cir. 1954), *cert. granted*, 75 Sup. Ct. 298 (1955); United States v. Appalachian Electric Power Co., 107 F.2d 769 (4th Cir. 1939), *rev'd*, 311 U.S. 377 (1940), *rehearing denied*, 312 U.S. 712 (1941).

ment-owned facilities. With *certiorari* having been granted in a similar case from the fourth circuit,[21] the Supreme Court may take this opportunity to decide the extent to which the federal government's utilization and control of power, insofar as the obligation to compensate is concerned, should prevail over private and state interests, thus ending the uncertainty caused by the conflicting views of the federal courts.

Thomas F. Burns

CONSTITUTIONAL LAW—HABEAS CORPUS—SUPPRESSION OF EVIDENCE.

United States ex rel. Thompson v. Dye (3d Cir. 1955).

The accused was charged with first degree murder. At the trial the defense contended that the accused, as a result of the use of alcohol and drugs, was in such a mental state that he could not have formulated the necessary intent for first degree murder, and that in any event, because of his drunken condition, his offense did not warrant the death penalty. After the jury found the accused guilty of murder in the first degree, he was sentenced to death. A petition for habeas corpus was filed in the district court alleging the withholding and suppressing by the Commonwealth of vital testimony favorable to the relator. One of the two arresting officers had informed the prosecutor before trial that the accused had been under the influence of liquor at the time of his arrest four hours *after* the killing. This testimony was not introduced although the other arresting officer was permitted to testify that the accused was in full possession of his faculties when arrested. Denial of habeas corpus was reversed by the court of appeals which *held* that the testimony suppressed was substantial evidence and should have been submitted to the jury. *United States ex rel. Thompson v. Dye,* 221 F.2d 763 (3d Cir. 1955).[1]

An unconstitutional conviction will result if a prosecuting officer withholds vital evidence favorable to the defendant;[2] such conduct is viewed as being fundamentally unfair and, hence, due process[3] is violated.[4] A court handing down a verdict, judgment, and sentence in violation of constitu-

21. United States v. Twin City Power Co., 215 F.2d 592 (4th Cir. 1954), *cert. granted,* 75 Sup. Ct. 298 (1955).

1. United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955).

2. United States *ex rel.* Almeida v. Baldi, 104 F. Supp. 321, 325 (E.D. Pa. 1951), *aff'd,* 195 F.2d 815 (3d Cir. 1952).

3. United States Supreme Court Justice Harold H. Burton who, incidentally, on June 18, 1953 denied the accused a stay of execution, has said that: "Due process has reference to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Bute v. People of Illinois, 333 U.S. 640, 649 (1948).

4. Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935); United States v. Rutkin, 212 F.2d 641 (3d Cir. 1954).

tional rights acts without jurisdiction and thus the entire proceeding is null and void.[5] The prosecutor is a state official,[6] a quasi-judicial officer,[7] and not a vindictive seeker of vengeance,[8] and he may be required not only to refrain from actively suppressing evidence vital to the accused,[9] but he may even be compelled to disclose such evidence to the court.[10] He is not required to disclose evidence which has no probative value or is merely cumulative,[11] or evidence which is equally available to the accused.[12] To determine whether or not there has been suppression of evidence it is necessary to consider the facts and circumstances in each case.[13] The instant case is not lacking in special circumstances. Usually evidence of sobriety or drunkenness *after* a crime has been committed is inadmissable,[14] but here testimony was introduced as to the former but withheld as to the latter. Defense counsel was not aware that an arresting officer if put on the stand would have stated accused was under the influence of liquor when arrested.[15] The prosecutor had this knowledge but the officer was not called to the stand,[16] nor was his name indorsed on the indictment.[17] Indeed, at the close of a night session, the prosecutor, after presenting testimony as to the sobriety of the accused, stated in open court that he "could call a few other police officers who would corroborate what has already been testified to."[18] However, he refrained from doing so in order to save time. "Thus the wrong of nondisclosure of obviously significant testimony was compounded by a misleading affirmative statement as to the nature of the available but unused testimony."[19]

5. United States *ex rel.* Almeida v. Baldi, 104 F. Supp. 321 (E.D. Pa. 1951), *aff'd,* 195 F.2d 815 (3d Cir. 1952).

6. Commonwealth v. Karamarkovic, 218 Pa. 405, 408, 67 Atl. 650, 651 (1907).

7. Commonwealth v. Neill, 362 Pa. 507, 520, 67 A.2d 276, 282 (1949).

8. McFarland v. United States, 150 F.2d 593, 594 (D.C. Cir. 1945); Commonwealth v. Palermo, 368 Pa. 28, 33, 81 A.2d 540, 542 (1951); Commonwealth v. Karamarkovic, 218 Pa. 405, 408, 67 Atl. 650, 651 (1907).

9. United States v. Rutkin, 212 F.2d 641 (3d Cir. 1954); State v. Guilfoyle, 109 Conn. 124, 145 Atl. 761 (1929); State v. Searles, 108 Vt. 236, 184 Atl. 701 (1936).

10. Jordon v. Bondy, 114 F.2d 599 (D.C. Cir. 1940); People v. Walsh, 262 N.Y. 140, 150, 186 N.E. 422, 425 (1933); Commonwealth v. Neill, 362 Pa. 507, 520, 67 A.2d 276, 282 (1949).

11. Cumulative evidence has been defined as "Additional or corroborative evidence to the same point. That which goes to prove what has already been established by other evidence." See BLACK, LAW DICTIONARY 455 (4th ed. 1951).

12. *In re* Curtis, 36 F. Supp. 408, 410 (D.C. 1941), *aff'd,* Curtis v. Rives, 123 F.2d 936 (D.C. Cir. 1941).

13. *Ibid.*

14. Goodman v. State, 20 Ala. App. 392, 102 So. 486 (1924); Raynor v. Wilmington Ry., 129 N.C. 195, 39 S.E. 821 (1901); Jordan v. Commonwealth, 181 Va. 490, 25 S.E.2d 249 (1943); Pollock v. State, 136 Wis. 136, 116 N.W. 851 (1908).

15. United States *ex rel.* Thompson v. Dye, 113 F. Supp. 807, 810 (W.D. Pa. 1953).

16. United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 765 (3d Cir. 1955).

17. See note 15 *supra.* The court said that the officer's name was not indorsed on the indictment, but it was not deliberately omitted to conceal his identity.

18. United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 768 (3d Cir. 1955).

19. *Id.* at 769 (concurring opinion).

While not as clear cut as *United States ex rel. Almeida v. Baldi,*[20] the instant case does present a factual picture justifying habeas corpus.[21] While courts move with caution in labeling actions as suppression of evidence, they will not hesitate to do so when convinced that fundamental unfairness is involved. The case also illustrates the proposition that evidence ordinarily irrelevant (here sobriety or drunkenness *after* a crime) may be of the utmost importance in assuring the court's notion of a fair trial to the criminal defendant when such evidence may have been used to counteract similar damaging evidence introduced by opposing counsel.

Joseph F. Monaghan

CONSTITUTIONAL LAW—ILLEGAL SEARCH AND SEIZURE—SEARCH INCIDENT TO A LAWFUL ARREST.

Rhodes v. United States (5th Cir. 1955).

The defendant was observed by federal officers who saw him drive an automobile to a wooded area, park, and walk about a hundred yards into a field. The officers investigated and arrested the defendant for operating a still. They then took the automobile keys from the defendant's pocket and searched the car. Inside they found a half-pint bottle of untaxed whiskey which was used as evidence to convict the defendant of possessing untaxed liquor. Defendant appealed on the grounds that the evidence used against him was obtained by an unlawful search and seizure. The circuit court affirmed the conviction and *held* that the area which can be rightfully searched pursuant to a lawful arrest must be reasonable under the circumstances and is not confined to a fixed radius. *Rhodes v. United States,* 224 F.2d 348 (5th Cir. 1955).[1]

Constitutional provisions respecting search and seizure are concerned with *unreasonable* searches and seizures.[2] There is no formula to determine reasonableness contained in the Constitution and each case must be

20. 362 Pa. 596, 68 A.2d 595 (1949), *habeas corpus granted,* 104 F. Supp. 321 (E.D. Pa. 1951), *aff'd,* 195 F.2d 815 (3d Cir. 1952). In the *Almeida* case the prosecution withheld evidence that the fatal bullet was fired from a police revolver and not that of the accused. It is noteworthy that the district court said in comparing the *Almeida* case with the instant one that: "The difference between the *Almeida* case and this one is that in the former the court found active suppression of evidence, here the most that can be said is that prosecuting officers did not actively assist relator in preparing his defense." United States *ex rel.* Thompson v. Dye, 113 F. Supp. 807, 811 (W.D. Pa. 1953).

21. "The only practical standard for habeas corpus is the presence or absence of judicial character in the proceeding as a whole." Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945), *cert. denied,* 325 U.S. 889 (1945).

1. Rhodes v. United States, 224 F.2d 348 (5th Cir. 1955).

2. U.S. CONST. amend. IV; United States v. Rabinowitz, 339 U.S. 56 (1950).

decided on its own facts.[3] Obviously, a search pursuant to a valid warrant is not unreasonable.[4] Protection from unreasonable searches and seizures under the fourth amendment extends to both federal and state action.[5] Such illegally obtained evidence is inadmissible in the federal courts.[6] In the federal courts the evidence will be suppressed even if it is obtained in violation of the rights of someone other than the defendant.[7] However, in a prosecution in a state court for a state crime, the 14th amendment does not prohibit the admission of evidence obtained by an unreasonable search and seizure [8] unless the evidence is acquired in such an unreasonable manner that it violates fundamental notions of fairness and decency.[9] A person does not have to prove that his possession was lawful in order to assert the constitutional protection.[10] Furthermore, an illegal search cannot be made legal by what it reveals,[11] and general exploratory searches for purposes of uncovering evidence of crime, either with or without a search warrant, are unreasonable and, therefore, within the constitutional ban.[12] The search is limited to the time and place of the arrest [13] and originally the search was confined to the person of the accused.[14] The area of allowable search has been extended in recent years. It includes those objects which are in the immediate control of the person arrested and which may be used to prove the offense in the prosecution against him.[15] The rule is more liberal in a mobile situation. A search without a warrant is permitted if there is a reasonable basis for belief that a crime has been committed, based

3. United States v. Rabinowitz, 339 U.S. 56 (1950).

4. Boyd v. United States, 116 U.S. 616 (1886).

5. *Ibid.*

6. Weeks v. United States, 232 U.S. 383 (1914). But such evidence may be introduced to impeach the credibility of a witness. Walder v. United States, 347 U.S. 62 (1954).

7. United States v. Jeffers, 342 U.S. 48 (1951).

8. Wolf v. Colorado, 338 U.S. 25 (1949).

9. Rochin v. California, 342 U.S. 165 (1952) (The principal evidence was obtained by applying a stomach pump to the defendant).

10. United States v. Descy, 284 Fed. 724 (D.C.R.I. 1922).

11. United States v. Di Re, 332 U.S. 581 (1948).

12. United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 341 (1931); Harris v. United States, 151 F.2d 837 (10th Cir. 1945).

13. In United States v. Coffman, 50 F. Supp. 823 (S.D. Cal. 1943), the defendant was arrested in a field one-quarter mile from his house on a lawful warrant. It was held illegal to take him to his house and search it; but, search of a person's house differs from search of his automobile if, for no other reason, because an automobile is so easily moved. Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925). In Kelley v. United States, 61 F.2d 843 (8th Cir. 1932), a liquor law violator fled from his barn and was arrested one hundred feet away. Officers were held authorized to search the barn. The defendant was arrested inside a store for a liquor law violation and it was held legal for officers to walk outside to the curb and search his automobile. United States v. Young, 45 F.2d 80 (E.D.N.Y. 1931).

14. United States v. Rabinowitz, 339 U.S. 56, 66 (1950) (dissenting opinion).

15. United States v. Rabinowitz, 339 U.S. 56 (1950); Marion v. United States, 275 U.S. 192 (1927); Agnello v. United States, 269 U.S. 20 (1925); Carroll v. United States, 267 U.S. 132 (1925).

on facts existing at the time of the search and known to the officer, and where there is a possibility of escape because of the factor of mobility.[16] In a static situation, the furthest extension by the Supreme Court up to the present time was to sanction the search of a desk, safe, and file cabinet of a one-room place of business incident to a lawful arrest.[17] The *Rhodes* case goes one step farther. The court reasons that the proximity in time of the defendant's acts in going to the field from the car, the arrest in the field, and the subsequent search of the car were all part of one transaction. A combination of this factor and "the observed connection between the acts of defendants at the car and at the still site, made the search reasonable, and the fact that the car was situated somewhat farther away than in the reported cases is not a significant distinction."[18]

Obviously, the instant case is an extension of the original doctrine which permitted a search without a warrant pursuant to a lawful arrest in order to protect the arresting officer and to prevent the prisoner from escaping. Considering the proximity of the car to the place of arrest, the factor of mobility, and the virtually certain knowledge that illegal liquor would be found in the car, the result is reasonable. However, the courts should be cautious in extending the concept of reasonableness of a search without a warrant. Although each individual deviation may seem warranted, nevertheless, the cumulative effect of this steady erosion may have a decided effect on a jealously guarded constitutional right.

Thomas F. Burns.

EVIDENCE—ADMIRALTY—SURVIVOR COMPETENT WITNESS AGAINST DECEDENT'S INTEREST.

Taylor v. Crain (3d Cir. 1955).

Libellant, a seaman, brought an action in the federal district court to recover damages for injuries sustained in an accident aboard the defendant's vessel. One defendant died between the time of the alleged accident and the filing of the suit and his executrix was substituted as defendant. At the trial the seaman attempted to testify as to the accident and also as to an alleged contract whereby the deceased defendant promised to employ the seaman for life. The trial judge excluded this testimony under the

16. Brinegar v. United States, 338 U.S. 160 (1949).

17. "We think the District Court's conclusion that here the search and seizure were reasonable should be sustained because: (1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime; just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money." United States v. Rabinowitz, 339 U. S. 56, 63 (1950).

18. Rhodes v. United States, 224 F.2d 348, 351 (5th Cir. 1955).

Pennsylvania "dead man" statute of 1887.[1] The court of appeals *held* that the trial court when hearing an admiralty case was no longer bound by the Pennsylvania "dead man" statute and should have permitted libellant to introduce the testimony. *Taylor v. Crain,* 224 F.2d 237 (1955).[2]

Admiralty courts in the United States had their own rules of evidence beginning with the Process Act of 1789.[3] In 1862 Congress passed an act relating to the competency of witnesses which provided that:

> "The laws of the State in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and admiralty." [4]

Thus, state rules governing competency of witnesses were to be applied in admiralty. The various statutes concerning competency of witnesses and testimony of survivors were consolidated in 1878 becoming Revised Statutes, section 858.[5] Pennsylvania enacted its "dead man" statute [6] in 1887 as a result of which a survivor was incompetent to testify at any trial in admiralty held in Pennsylvania. However, in 1948 Congress repealed section 858 of the Revised Statutes [7] and at the same time gave broader power to the Supreme Court to prescribe the admiralty rules for district courts.[8] The repealed section 858 pertained to the competency of witnesses and not to the admissibility of evidence.[9] However, as stated in the *Taylor* case:

> "The Supreme Court has promulgated no rule to provide for the repealed section 858. Nevertheless, the rule tying the admiralty court to the local rules of competence has been put in the legislative wastebasket." [10]

The problem thus becomes one of determining a rule of competency, in the absence of a pronouncement from the Supreme Court, in trials before an admiralty court which is no longer bound by the state rule pertaining to such competency. This in turn depends on whether the lower federal court may make its own rule regarding competency of witnesses or whether it must revert to the admiralty standard in use prior to section 858. Judge McLaughlin, dissenting in the principal case, would follow this latter course on the theory that section 858 merely embodied the old admiralty rule and upon its repeal "resort must be had to the previously established sur-

1. PA. STAT. ANN. tit. 28, § 322 (1930).
2. Taylor v. Crain, 224 F.2d 237 (3d Cir. 1955).
3. 1 STAT. 93 (1789).
4. 12 STAT. 588, c. 189 § 1 (1862).
5. REV. STAT. § 858 (1878).
6. PA. STAT. ANN. tit. 28, § 322 (1930).
7. 62 STAT. 993 (1948).
8. 28 U.S.C. 2073 (1948).
9. Downes v. Wall, 176 Fed. 657 (5th Cir. 1910).
10. Taylor v. Crain, 224 F.2d 237, 239 (3d Cir. 1955).

vivor principle." [11] While this is the general rule at common law,[12] courts of admiralty are not bound by common law rules. Furthermore, the simultaneous grant of broader power to the Supreme Court by Congress in repealing section 858 indicates an intent to free admiralty courts from the old traditional rules. In a case decided subsequent to this grant of broader power, the third circuit held that the section giving the Supreme Court the power to regulate the practice in admiralty courts was not an attempt to circumscribe the power of the lower federal courts to follow the traditional rules embodied in former statutes.[13] But this does not mean that they *must* follow the former statutes. In the absence of a compelling statute (as that repealed in this case) or rules laid down by the Supreme Court, the lower federal courts may make their own rules of procedure.[14] This is just what the court in the instant case has done. Rather than go back to the "dead man" rule they have taken a stride forward in refusing to be bound by it.

"The rule excluding a survivor's testimony seems to stand in the almost unique situation of being condemned by all of the modern writers on the law of evidence." [15] Little is gained and much is lost by adhering to the "dead man" rule. Little difficulty has been experienced by those states having statutes which allow the testimony of the interested survivor to come in freely and protect the estates of deceased persons by also admitting in evidence the relevant entries, memoranda, and declarations of the deceased.[16] In the light of the many opportunities for introducing rebutting evidence most of the reasons for the rule disappear. The propriety of doing away with the rule in the instant case is even more pronounced. Being a non-jury trial the problem of taking precautions against the inexperience of lay jurors is nonexistent.

Joseph R. McDonald

MANDAMUS—PUBLIC RIGHTS—RIGHT OF PRIVATE CITIZEN TO ENFORCE.

State ex rel. Skilton v. Miller (Ohio 1955).

In a proceeding for a writ of mandamus relator sought to compel the judge and clerk of a city police court to issue a warrant against one Miether for a violation of a Sunday closing law. The respondents demurred on the

11. *Ibid.* at 241.
12. Parr v. Paynter, 78 Ind. App. 639, 137 N.E. 70 (1922); Stone v. Independent Linen Service Co., 212 Miss. 580, 55 So. 2d 165 (1951).
13. Dowling v. Isthmian S.S. Corp., 184 F.2d 758, 764 (3d Cir. 1950).
14. 28 U.S.C. § 2071 (1950); The Hudson, 15 Fed. 162 (E.D.N.Y. 1883); The St. Lawrence, 66 U.S. (1 Black.) 180 (1862).
15. Wright v. Wilson, 154 F.2d 616, 620 (3d Cir. 1946) citing in note 23 thereto criticisms by Wigmore, Model Code of Evidence of the American Law Institute, Bentham, and Chamberlayne.
16. Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 47 YALE L.J. 194, 200 (1937).

ground that the petition did not state a good cause of action. The demurrer was sustained by the Ohio Court of Appeals. On appeal to the Supreme Court of Ohio, *held,* affirmed. In the absence of a showing of injury to the relator in a manner different from that of the general public he is not a party beneficially interested as required by the Ohio statute.[1] *State ex rel. Skilton v. Miller,* 128 N.E.2d 47 (Ohio 1955).[2]

Generally mandamus can be defined as a writ from a common law court commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.[3] It is necessary that there be a clear and unequivocal duty to perform the act before the writ can be maintained.[4] Therefore, it must be established that the duty is ministerial rather than discretionary.[5] There is a correlative right that must be present in the relator, and that also must be clear.[6] However, there is a direct conflict as to the basis and extent of this right. On the one hand it has been held that the relator's interest must be personal and direct.[7] Under such a rule it would follow that an individual cannot bring mandamus to enforce a public duty unless he can show a right independent of that which he holds with the public at large.[8] Many statutes deal with the problem by stating that the relator must have "a beneficial interest."[9] Such statutes add little to the solution of the problem since the question of defining "a beneficial interest" remains open. In fact, it has been held that such language should be liberally construed to promote the ends of justice.[10] The opposing view is that the relator need not show any special interest

1. OHIO REV. CODE § 2731.02 (1953).

2. State *ex rel.* Skilton v. Miller, 128 N.E.2d 47 (Ohio 1955).

3. IOWA CODE ANN. § 661 (Supp. 1954); OHIO REV. CODE § 2731.01 (1953); PA. STAT. ANN. tit. 12, § 1911 (Supp. 1954); HIGH, EXTRAORDINARY LEGAL REMEDIES § 1 (2d ed. 1884).

4. People *ex rel.* Albright v. Board of Trustees of Firemen's Pension Fund, 103 Colo. 1, 82 P.2d 765 (1938); State *ex rel.* Indian Hill Acres, Inc. v. Kellogg, 149 Ohio St. 461, 79 N.E.2d 319 (1948); State *ex rel.* Stanley v. Cook, 146 Ohio St. 348, 66 N.E.2d 207 (1946).

5. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); City of Whittier v. Dixon, 24 Cal.2d 664, 151 P.2d 5 (1944); Kaufman Const. Co. v. Halcomb, 357 Pa. 514, 55 A.2d 534 (1947).

6. State *ex rel.* Jacobsmeyer v. Thatcher, 338 Mo. 622, 92 S.W.2d 640 (1936); see Zielinski v. Harding, 177 Misc. 773, 31 N.Y.S.2d 925 (Sup. Ct. 1941).

7. United States *ex rel.* New York Warehouse, Wharf & Terminal Ass'n, Inc. v. Dern, 63 App. D.C. 28, 68 F.2d 773 (1934), *cert. denied,* 292 U.S. 642 (1934).

8. Mentzer Bush & Co. v. Schoolbook Commission, 142 Kan. 442, 49 P.2d 969 (1935) (Publisher can compel state schoolbook commission to perform on contract for purchase of books); Siegemund v. Building Commissioner, 259 Mass. 329, 156 N.E. 852 (1927) (Next door neighbor sufficiently aggrieved by violation of zoning laws to compel their enforcement); State *ex rel.* Vastine v. Cincinnati, 56 Ohio App. 526, 11 N.E.2d 188 (1937) (The niece of a deceased city employee had right to mandamus to compel payment of benefits by trustees of city retirement system). See 43 COLUM. L. REV. 124 (1943).

9. *E.g.,* IOWA CODE ANN. § 661.9 (Supp. 1954); OHIO REV. CODE § 2731.02 (1953); PA. STAT. ANN. tit. 12, § 1913 (Supp. 1954).

10. State *ex rel.* Byers v. Bailey, 7 Iowa 390 (1858).

other than that of a citizen.[11] The reason assigned for the rule is that the general public should be considered as the real party in interest.[12] Nevertheless, the relator must show that his interests *as a citizen* were injuriously affected by the wrong of which he complains.[13] Under this view it has been held that a private citizen suffers the required injury if a judicial officer refuses to perform a duty imposed by statute.[14]

The cases embracing this latter view appear to have disregarded the vital function of public officers in the judicial process. The discretion exercised by these officials in determining the cases which should ultimately be decided in a court of law is an invaluable primary duty of our present judicial system.[15] The courts depend on the judgment of these officials and therefore are required to hear only those cases which present a true controversy. However, if there is an apparent disregard or dereliction of the duty to exercise discretion there should be some remedy for the one adversely affected. This is the function of mandamus. It appears as an exception to the general rule and serves as a check on the abuse of official discretion. Therefore, since the writ permits the indirect exercise of a public function by a private individual, the relator should be required to show a personal interest in the writ. This is the position of the court in the instant case and it is founded on policy considerations. Since the relator could only show the general interest of a citizen he was not so beneficially interested in the law so as to be entitled to mandamus.

John C. Voss

NEGLIGENCE—ASSUMPTION OF RISK—PRESENCE OF PLAINTIFF'S ENGINEER—EFFECT ON MANUFACTURER'S LIABILITY FOR DEFECT IN DESIGN.

Northwest Airlines, Inc. v. Glenn L. Martin Co. (6th Cir. 1955).

The airline brought this action against an aircraft manufacturer to recover damages for alleged negligence by the manufacturer in the design

11. Union Pacific R.R. v. Hall, 91 U.S. 343 (1876) (Mandamus to require a railroad to operate as required by law); *In re* Whitney, 3 N.Y. Supp. 838 (Sup. Ct. 1889) (Mandamus by private citizen to compel police commissioners to prohibit the after hours sale of intoxicating liquors); State *ex rel.* Williams v. Glander, 80 Ohio App. 527, 69 N.E.2d 226 (1946), *cert. denied,* 332 U.S. 817 (1947) (Citizen brings mandamus to compel tax commissioner to levy personal property tax against Department of Liquor Control); State *ex rel.* Trauger v. Nash, 66 Ohio St. 612, 64 N.E. 558 (1902) (Citizen has sufficient beneficial interest to compel governor to provide for election of public official).

12. State *ex rel.* Williams v. Glander, 80 Ohio App. 527, 69 N.E.2d 226 (1946), *cert. denied,* 332 U.S. 817 (1947), State *ex rel.* Johnson v. Sevier, 339 Mo. 483, 485, 98 S.W.2d 677, 678 (1936) (dictum).

13. People *ex rel.* Van Dyke v. Colorado Cent. R.R., 42 Fed. 638 (C.C.D. Colo. 1890).

14. *In re* Whitney, 3 N.Y. Supp. 838 (Sup. Ct. 1889); Benners v. State *ex rel.* Heflin, 124 Ala. 97, 26 So. 942 (1899).

15. Wyzanski, *Process and Pattern: The Search for Standards in the Law,* 30 IND. L.J. 133, 135 (1955).

and manufacture of the Martin "202" airplane. The airline claimed that the manufacturer was negligent in the design and construction of certain wing joints, which proved to be the cause of an accident, in that he had used an aluminum alloy in the construction of these wing joints which was known to be subject to greater metal fatigue than alloys previously used. Martin contended that even if there was a finding of negligence, Northwest had assumed the risk of danger. It based this defense on the fact that the airline was represented at the Martin plant by its own resident engineer, two or three inspectors, and a group of pilots and various other personnel during the time that the airplanes in question were being built. It appears from the record that these people did recommend various changes in design and manufacture of these airplanes. The District Court for the Northern District of Ohio instructed the jury that it could consider the issue of assumption of the risk. The jury returned a verdict for the manufacturer. On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgment for the manufacturer was reversed on the grounds that the evidence did not warrant submitting this issue to the jury. *Northwest Airlines v. Glenn L. Martin Co.*, 224 F.2d 120 (6th Cir. 1955).[1]

There have been but a few cases dealing specifically with the liability of aircraft manufacturers to airlines or third parties.[2] Some third parties have recovered from the manufacturer for error in design;[3] although one such case was argued on the basis of negligent design it was actually decided on other grounds.[4] The doctrine of assumption of the risk has been stated as applicable where the plaintiff, with knowledge of the risk, has entered into a relationship with the defendant which involves this risk and in so doing has been regarded as tacitly or impliedly agreeing to take his chances.[5] In addition there are many risks which are not, in any real sense, voluntarily assumed by the plaintiff, but which he assumes as a matter of law.[6] The doctrine had its inception in cases dealing with the master-servant relationship[7] but it is not necessarily confined to this type situation.[8] Its effect is not to absolve the wrongdoer of all blame, but to

1. Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955). There were subsidiary issues involved in the case which will not be discussed in this Recent Decision, namely, contributory negligence with respect to the wing inspection as well as with the use of radar, and the question of the district court's rulings on admissibility of evidence.

2. Comment, 1953 WIS. L. REV. 109 (author presents analysis of cases and also notes that, up to that time, the assumption of the risk doctrine had never been invoked in an aviation case of the type involved here.).

3. De Vito v. United Air Lines, 98 F. Supp. 88 (E.D.N.Y. 1951); Chapman Chemical Co. v. Taylor, 215 Ark. 630, 222 S.W.2d 820 (1949) (dealt with aviation only in that it was a suit for damages caused by crop dusting).

4. American Airways v. Ford Motor Co., 258 App. Div. 957, 17 N.Y.S.2d 998 (1st Dep't 1940), *aff'd*, 284 N.Y. 807, 31 N.E.2d 925 (1940) (manufacturer's inspector should have noticed crack in metal which caused engine to rip off).

5. PROSSER, THE LAW OF TORTS (2d ed. 1955).

6. Fleming, *Assumption of Risk*, 61 YALE L.J. 141 (1952).

7. *E.g.*, Duffey v. Consolidated Block Co., 147 Iowa 225, 124 N.W. 609 (1910); Clairmont v. Cilley, 85 N.H. 1, 153 Atl. 465 (1931); Maher v. Wagner, 62 S.D. 227, 252 N.W. 647 (1934); Faulkner v. Mammoth Mining Co., 23 Utah 437, 66 Pac. 799 (1901).

8. Adams' Adm'r v. Callis & Hughes, 253 Ky. 382, 69 S.W.2d 711 (1934).

reduce the duty owed to the injured party insofar as this duty is encompassed by the risk assumed.[9] The doctrine is generally founded on a consensual or policy basis and is not always easily distinguished from the somewhat similar doctrine of contributory negligence.[10] In order to invoke the doctrine of assumed risk, it must be shown that the plaintiff knew of the risk [11] or that he should have known of it.[12] Knowledge of the risk is the watchword [13] and it is settled that a plaintiff cannot assume a risk of which he is ignorant.[14] Age or a lack of information and experience have been held sufficient to negate consent on the part of the plaintiff.[15] It is apparent that an objective standard must be applied so that the plaintiff cannot be heard to say he was unaware of a risk which must have been obvious to him.[16] Some courts have held that it is possible for a plaintiff to assume risks the specific existence of which he was unaware.[17] However, this does not mean that he assumes obscure and completely unknown risks, which are not naturally incident to the situation in which he has placed himself; [18] and of course one need not anticipate that he will be exposed to a hazard not naturally incidental to his position.[19] Usually, his knowledge and appreciation of the danger will be a question for the jury.[20] In the instant case, the

9. Schleif v. Grigsly, 88 Cal. App. 174, 263 Pac. 255 (1928).

10. *E.g.*, St. Louis Cordage Co. v. Miller, 126 Fed. 495 (8th Cir. 1903); City of Linton v. Maddox, 75 Ind. App. 449, 130 N.E. 810 (1921); United Railways & Electric Co. v. Riley, 109 Md. 327, 71 Atl. 970 (1909); Cobia v. Atlantic Coast Line R.R., 188 N.C. 487, 125 S.E. 18 (1924); Louisiana & T. Lumber Co. v. Brown, 50 Tex. Civ. App. 482, 109 S.W. 950 (1908). Yet there are cases in which it is essential that the distinction be made. This is particularly true in jurisdictions adhering to the rule of comparative negligence or in cases hinging on the degree of negligence involved (wanton, gross, wilful).

11. *E.g.*, Fred Harvey Corp. v. Mateas, 170 F.2d 612 (9th Cir. 1948); Lunsford v. Standard Oil of Cal., 84 Cal. App. 2d 459, 191 P.2d 82 (1948); Perroni v. Savings Bank of Tolland, 128 Conn. 679, 25 A.2d 45 (1942); McEvoy v. City of New York, 266 App. Div. 445, 42 N.Y.S.2d 746 (2d Dep't 1943), *aff'd*, 292 N.Y. 654, 55 N.E.2d 517 (1944); Flynn v. Sharon Steel Corp., 142 Ohio St. 145, 50 N.E.2d 319 (1943).

12. Huestis v. Laphams' Estate, 113 Vt. 191, 32 A.2d 115 (1943).

13. Cincinnati, N.O. & TP. Ry. v. Thompson, 236 Fed. 1 (6th Cir. 1916).

14. Calanchine v. Bliss, 88 F.2d 82 (9th Cir. 1937); Baltimore & O. S.W. R.R. v. Carroll, 200 Ind. 589, 163 N.E. 99 (1928); Shanney v. Boston Madison Square Garden Co., 296 Mass. 168, 5 N.E.2d 1 (1936); Campbell v. Pure Oil Co., 15 N.J. Misc. 723, 194 Atl. 873 (Sup. Ct. 1937).

15. Hanley v. California Bridge & Construction Co., 127 Cal. 232, 59 Pac. 577 (1899); Moore v. City of Bloomington, 51 Ind. App. 283, 95 N.E. 374 (1912); Ciriach v. Merchants' Woolen Co, 151 Mass. 152, 23 N.E. 829 (1890); Gill v. Homrighausen, 79 Wis. 634, 48 N.W. 862 (1891).

16. Lemoine v. Springfield Hockey Ass'n., 307 Mass. 122, 29 N.E.2d 716 (1940); Moder v. City of Elizabeth, 224 Minn. 556, 29 N.W.2d 453 (1947); Tite v. Omaha Coliseum Co., 144 Neb. 22, 12 N.W.2d 90 (1943); Morris v. Cleveland Hockey Club, 157 Ohio St. 225, 105 N.E.2d 419 (1952).

17. Duke v. Gray, 69 N.H. 670, 46 Atl. 1049 (1899); Peterson v. American Ice Co., 83 N.J.L. 570, 83 Atl. 872 (Err. & App. 1912); Miller v. Moran Bros. Co., 39 Wash. 631, 81 Pac. 1089 (1905)

18. Campbell v. Pure Oil Co., 15 N.J. Misc. 723, 194 Atl. 873 (Sup. Ct. 1937).

19. Peoples Drug Stores v. Windham, 178 Md. 172, 12 A.2d 532 (1940).

20. Union Pacific R.R. v. Blank, 167 F.2d 291 (8th Cir. 1948) (assumption of risk is for jury); Worcester v. Pure Torpedo Co., 140 F.2d 358 (7th Cir. 1944). See also PROSSER, THE LAW OF TORTS (2d ed. 1955).

defect in design centered about the type material used in a specific wing splice. More than five hundred Martin engineers had worked on the airplane project, whereas the airline had one resident engineer and two or three inspectors in the manufacturer's plant during the design and manufacturing phases of the construction. There was disputed testimony concerning the obviousness of the defect. On these facts, the circuit court ruled as a matter of law that the issue of assumption of the risk should not have been submitted to the jury.

It has become common practice for large industrial buyers to place resident engineers in the plants of their suppliers to insure the desired design and construction of the purchased product. The presence of these employees may have a decided effect on the defense of assumption of the risk when the purchaser brings an action against the supplier for negligent design. It is doubtful that this decision of the circuit court will affect the availability of this defense to manufacturers in general. The design of an airplane is highly involved and it is very improbable that one resident engineer should be charged with knowledge of the defective design of a single wing splice. Nevertheless, the assignment of engineers and other airline personnel to supervise the design and construction of aircraft, although commendable from a safety standpoint, places a certain degree of responsibility on the airline. The inspecting personnel should be charged with knowledge of the subject matter in the fields in which they are qualified. Provided these employees have a reasonable opportunity to inspect, and in the absence of unanticipated technological advances, the issue of assumption of the risk should be submitted to the jury.

James A. Matthews, Jr.

TORTS—NEGLIGENCE—ATTRACTIVE NUISANCE—LUMBER PILE.

Kahn v. James Burton Co. (Ill. 1955).

Lumber had been delivered by the defendant lumber company to a lot on which the defendant was erecting a house. Suit was brought against the lumber company and the contractor for injuries sustained by an eleven year old boy when the lumber pile collapsed while he was playing on it. There was a verdict and judgment against the lumber company and the contractor for $20,000. The appellate court reversed and held as a matter of law that the pile of lumber was not a dangerous instrumentality and that the lumber company and the contractor were not negligent. The Supreme Court of Illinois reversed and *held* that whether the lumber had been piled so as to create an unreasonable danger to children playing thereon and whether it had been so attractive to children as to suggest the probability

that children would climb onto it were questions for the jury. *Kahn v. James Burton Co.*, 126 N.E.2d 836 (Ill. 1955).[1]

Formerly, a landowner was not liable for harm to trespassers, adult or infant, caused by his failure to exercise reasonable care in making his land safe for them.[2] However, late in the nineteenth century an exception to this rule was recognized in the United States.[3] This was the "turntable", or as it is now more commonly known, the "attractive nuisance" doctrine. While the doctrine had its inception in a case involving a railroad turntable it has been extended to cover a variety of situations.[4] The effect of the doctrine is to hold liable any landowner who maintains on his premises a condition which is attractive and dangerous to children of tender years who come upon the premises and are injured by this condition.[5] While the purpose of the doctrine is clear, such confusion has resulted in its application that one authority has observed that "some courts are very humane, almost foolishly so; while others seem to be constituted of unmarried or childless men—courts of barons so to speak." [6] Some courts have completely rejected the doctrine as a piece of sentimental humanitarianism [7] while others have accepted it with varying degrees of enthusiasm.[8] Most of those accepting the doctrine have limited its application by requiring that one or more of the following conditions be met before the doctrine can be invoked: the instrumentality must be "inherently dangerous"; [9] the person sought to be held liable must have control or the right

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1. Kahn v. James Burton Co., 126 N.E.2d 836 (Ill. 1955).

2. Laidlaw v. Perrozzi, 278 P.2d 523 (Cal. 1955); RESTATEMENT, TORTS § 333 (1934); PROSSER, TORTS § 76 (2d ed. 1955).

3. Sioux City and Pacific Ry. v. Stout, 84 U.S. 657 (1874); the decision in this case was apparently rooted in the earlier English case of Lynch v. Nurdin, 1 Q.B. 29, 113 Eng. Rep. 1041 (1841).

4. Harrison v. Chicago, 308 Ill. App. 263, 31 N.E.2d 359 (1941) (newsstand); Smith v. Mason Fruit Jar and Bottle Co., 84 Kan. 551, 144 Pac. 845 (1911) (ventilator fan in factory); Rachmel v. Clark, 205 Pa. 314, 54 Atl. 1027 (1903) (slab of slate); Hayes v. Southern Power Co., 95 S.C. 230, 78 S.E. 956 (1913) (electric wires).

5. See United Zinc and Chemical Co. v. Britt, 258 U.S. 268, 277 (1922) (dissenting opinion); McDermott v. Burke, 256 Ill. 401, 100 N.E. 168 (1912); Twist v. Winona and St. Peter R.R., 39 Minn. 164, 39 N.W. 402 (1888).

6. Browne, *The Allurement of Infants*, 31 AM. L. REV. 891, 892 (1897).

7. Lewis v. Mains, 104 A.2d 432 (Me. 1954); State v. Baltimore Fidelity Warehouse Co., 176 Md. 341, 4 A.2d 739 (1939); Lefler v. Pennsylvania R.R., 203 Misc. 887, 118 N.Y.S.2d 389 (Sup. Ct. 1952); Ware v. Cincinnati, 93 Ohio App. 431, 111 N.E.2d 401 (1952); Previte v. Wanskuck Co., 90 A.2d 769 (R.I. 1952); Trudo v. Lazarus, 116 Vt. 221, 73 A.2d 306 (1950).

8. Gimmestead v. Rose Bros., 194 Minn. 531, 261 N.W. 194 (1935) (the court held that whether a lumber pile was an attractive nuisance was a jury question); Slattery v. Drake, 130 Ore. 693, 281 Pac. 846 (1929) (court in refusing to apply the attractive nuisance doctrine to a pile of timber said whether a thing is an attractive nuisance is a matter of law for the court to decide).

9. State *ex rel.* W. E. Callahan Const. Co. v. Hughes, 348 Mo. 1209, 159 S.W.2d 1209 (1941); Boyette v. Atlantic Coast Line, 227 N.C. 406, 42 S.E.2d 468 (1947).

to control the premises on which the condition is maintained;[10] and the condition which attracted the child, or something inseparably connected with it, must be the proximate cause of the injury.[11] The court in the *Kahn* case stated: "The naming or labeling of a certain set of facts as being an 'attractive nuisance' case or a 'turntable' case has often led to undesirable conclusions. . . . the only proper bases for decisions in such cases dealing with personal injuries to children are the customary rules of ordinary negligence."[12] It then proceeded to examine closely the facts of the case, particularly, the condition of the lumber pile, its proximity to the intersection of two public alleys, and the fact that it was delivered during summer vacation in a populous community. From this examination the court concluded that the jury could properly find that the defendants did not exercise reasonable care under the circumstances.[13]

It is apparent that whether or not an injured party is a trespasser, whether he is an adult or a child; whether or not he was "induced" to come on the premises by the instrument which injured him, are not factors which, of themselves, will determine the outcome of negligence cases in Illinois. It is the cumulative effect of all these circumstances which will be weighed by the Illinois court in arriving at its decision. This is presently the approach in a few states.[14] Insofar as infants are involved, it is also the view of the American Law Institute. The Institute advocates the imposition of liability only if: (1) the owner knows or has reason to know that children are likely to be present; (2) the condition involves an unreasonable risk of serious harm to children; (3) the condition is such that children are not likely to appreciate the danger; and (4) the utility of the condition is slight compared to the risk to the child involved.[15] Reasonable men can differ as to the conclusion reached in this case since it is simply a matter of weighing the circumstances. What is important to note, however, is that the Illinois courts will not look for the presence or absence of an "attractive nuisance," but will consider the circumstances surrounding each individual case in order to determine a defendant's standard of care toward trespassing children. Such an approach to the problem is desirable and should put an end to the many sophistications which arose under the mechanical rule.

Francis R. O'Hara

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10. Constantin Refining Co. v. Martin, 155 Ark. 193, 244 S.W. 37 (1922); Tavis v. Kansas City, 89 Kan. 547, 132 Pac. 185 (1913).

11. Denver Tramway Corporation v. Callahan, 112 Colo. 460, 150 P.2d 798 (1944); McDermott v. Burke, 256 Ill. 401, 100 N.E. 168 (1912).

12. Kahn v. James Burton Co., 126 N.E.2d 836, 841 (Ill. 1955).

13. *Id.* at 840, 841.

14. Wolfe v. Rehbein, 123 Conn. 111, 193 Atl. 608 (1937); Wagner v. Kepler, 411 Ill. 368, 104 N.E.2d 231 (1951); Drew v. Lett, 95 Ind. App. 89, 182 N.E. 547 (1932); Larson v. Equity Cooperative Elevator Co., 248 Wis. 132, 21 N.W.2d 253 (1946).

15. RESTATEMENT, TORTS § 339 (1934).

TORTS—NEGLIGENCE—GUEST STATUTES—PASSENGER FOR HIRE.

In re Dikeman's Estate (Kan. 1955).

Husband and wife brought an action against the executrixes of the automobile owner for loss of services and for personal injuries suffered by the wife while riding as a passenger in the deceased's automobile. She and the car owner were returning from a convention of a fraternal organization to which they were delegates. The petition alleged ordinary negligence. The trial court sustained a demurrer to the petition and the wife appealed, thereby putting in issue her status as an occupant of the car. The Supreme Court of Kansas *held* that despite the passenger's agreement with the owner of the automobile that she would pay a reasonable sum for transportation to a fraternal convention upon return from the convention, the passenger was a guest within the meaning of the Kansas guest statute [1] and could not recover without alleging gross negligence. *In re Dikeman's Estate,* 284 P.2d 622 (Kan. 1955).[2]

Guest statutes are intended to protect the owner or operator of an automobile from liability to a gratuitous occupant for injuries resulting from ordinary negligence.[3] Generally, to remove the passenger from the scope of the guest statute the owner or operator must receive compensation for the transportation.[4] This compensation need not be in money.[5] It need not pass from the passenger to the driver but may come from a third person.[6] But it must be a tangible benefit accruing to the driver.[7] If the

1. "That no person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or damage, unless such injury, death or damage shall have resulted from the gross and wanton negligence of the operator of such motor vehicle." KAN. GEN. STAT. § 8-122b (1949).

2. *In re* Dikeman's Estate, 284 P.2d 622 (Kan. 1955).

3. "The Ohio Guest Act and similar acts in other states were undoubtedly enacted to carry out a policy of social equity to the effect that the owner or operator of an automobile should not be made liable to a guest riding therein to whom the owner or operator is doing a favor or is extending a courtesy, except for wilful or wanton misconduct on his part, and that a guest should assume the risk of ordinary negligence or acts which are less culpable than wilful or wanton misconduct." Hasbrook v. Wingate, 152 Ohio St. 50, 87 N.E.2d 87 (1949).

4. Thompson v. Lacey, 42 Cal.2d 443, 267 P.2d 1 (1954); Kroiss v. Butler, 277 P.2d 873 (Cal. App. 1954); Miller v. Miller, 395 Ill. 273, 69 N.E.2d 878 (1946); Drea v. Drea, 292 Mass. 477, 198 N.E. 743 (1935); RESTATEMENT, TORTS, § 490, comment *a* (1934).

5. Duncan v. Hutchinson, 139 Ohio St. 185, 39 N.E.2d 140 (1942).

6. Thompson v. Lacey, 42 Cal.2d 443, 267 P.2d 1 (1954); Elliott v. Behner, 146 Kan. 827, 73 P.2d 1116 (1937); McGuire v. Armstrong, 268 Mich. 152, 255 N.W. 745 (1934); Blanchette v. Sargent, 87 N.H. 15, 173 Atl. 383 (1934); Sprenger v. Braker, 71 Ohio App. 349, 49 N.E.2d 958 (1942).

7. Thompson v. Lacey, 742 Cal.2d 443, 267 P.2d 1 (1954); Miller v. Miller, 395 Ill. 273, 69 N.E.2d 878 (1946); Drea v. Drea, 292 Mass. 477, 198 N.E. 743 (1935).

payment is only incidental to the requirements of hospitality or gratitude the guest does not become a passenger for hire.[8] However, most jurisdictions agree that a prior arrangement to share expenses makes the guest a paying passenger, and that any contribution given after this agreement is not a gratuity but actual payment.[9] This is so even where the purpose of the trip is only social.[10]

The court concedes that the precise question has not been decided by it before.[11] It therefore relies for authority on a prior decision [12] which it considers similar. In doing so it does not fully distinguish the cases. In the prior case the purpose of the trip was purely social [13] and the payment of all expenses by one couple was clearly reciprocal hospitality.[14] In the present case the parties were delegates to a convention of a fraternal organization; the organization had authorized payment of plaintiff's travel expenses; and an agreement to pay for her transportation was entered into before the owner agreed to drive the plaintiff.[15] While the court does not accept the prevailing view that a prearrangement to pay for the transportation prevents application of the guest statute, it admitted that the agreement in the instant case was a tangible benefit accruing to the driver.[16] On this ground alone it could have found that the plaintiff was not a "guest" within the meaning of the guest statute.[17] By equating "social" with "fraternal" the court has seemingly distorted the guest statute

> ". . . to the extent that whenever the driver is a friend of the party riding with him there is a community of interest which may be in part social or pleasure and the rider is a 'guest' irrespective of compensation to or benefit derived by the driver as a result of the transportation." [18]

Joseph R. McDonald

8. Lee Bros. v. Jones, 114 Ind. App. 688, 54 N.E.2d 108 (1944); Pilcher v. Erny, 155 Kan. 257, 124 P.2d 461 (1942); Olefsky v. Ludwig, 242 App. Div. 637, 272 N.Y. Supp. 158 (2d Dep't 1934); Master v. Horowitz, 237 App. Div. 237, 261 N.Y. Supp. 722 (3d Dep't, *aff'd*, 262 N.Y. 609, 188 N.E. 86 (1932).

9. Whitmore v. French, 37 Cal. 2d 739, 235 P.2d 3 (1951); Smith v. Clute, 277 N.Y. 407, 14 N.E.2d 455 (1938); Campbell v. Campbell, 104 Vt. 468, 162 Atl. 379 (1932); RESTATEMENT, TORTS, § 490, comment *a* (1934).

10. Whitmore v. French, 37 Cal. 2d 739, 235 P.2d 3 (1951); Smith v. Clute, 277 N.Y. 407, 14 N.E.2d 455 (1938).

11. *In re* Dikeman's Estate, 284 P.2d 622, 629 (Kan. 1955).

12. Bedenbender v. Walls, 177 Kan. 531, 280 P.2d 630 (1955).

13. "The record presented supports only the conclusion that the sole purpose of the trip was the joint pleasure of the parties. Friendship and sociability were the basis of plaintiff's being in the car." *Id.* at 636.

14. "In fact, we have no doubt but that at the time in question the parties would have resented any suggestion that their relationship was anything other than social and for mutual pleasure." *Ibid.*

15. The decision being upon demurrer these facts properly alleged in the petition must be taken as true. Hoffman v. Cudahy Packing Co., 161 Kan. 345, 167 P.2d 613 (1946); Betts v. Easely, 161 Kan. 459, 169 P.2d 831 (1946).

16. ". . . we are quite certain Dikeman upon his return to Pratt, if he had lived, could have maintained an action and recovered from appellant on the contract as pleaded." *In re* Dikeman's Estate, 284 P.2d 622, 628 (Kan. 1955).

17. KAN. GEN. STAT. § 8-122b (1949).

18. *In re* Dikeman's Estate, 284 P.2d 622, 632 (Kan. 1955) (dissenting opinion).

TRADE-MARKS—UNFAIR COMPETITION—USE OF MANUFACTURER'S GOOD WILL BY IMPLICATION.

Schwegmann Bros. v. Hoffman-La Roche, Inc. (5th Cir. 1955).

Plaintiff,[1] a manufacturer and distributor of pharmaceutical products, owned registered trade names of certain products which could be dispensed only by prescription. These products were not sold to the public but were advertised and sold directly to physicians, pharmacists, and hospitals. Defendant, a retail supermarket, was a non-signer of plaintiff's retail price-fixing contracts. The defendant filled a customer's prescription for the trade-marked products at less than the fair trade price after replacing the manufacturer's label with number-bearing prescription labels. The court held that by presenting a prescription calling for one of the trade-marked drugs, the customer impliedly adopted the prescription, whether or not he knew what was in it. Thus, defendant was held to have violated Louisiana's Fair Trade Law even though the manufacturer's trade-marks were removed. *Schwegmann Bros. v. Hoffman-La Roche, Inc.*, 221 F.2d 326 (5th Cir. 1955).[2]

It was held in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[3] that restraints on alienation of chattels by way of resale price-fixing agreements were invalid under common law and the Sherman Act.[4] In the *Eli Lilly* case,[5] Judge Wright stated that "after trying unsuccessfully for twenty years to have Congress pass legislation overcoming the effect of the *Dr. Miles* decision, the proponents of fair trade legislation turned their attention to the state legislatures, before which they have been phenomenally successful." [6] One of the alleged purposes of such fair trade acts, in permitting price agreements,[7] is to protect the manufacturer's property right

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1. For the sake of clarity the court refers to Hoffman-La Roche, Inc., as plaintiff and Schwegmann Bros. as defendant. Both sides appealed; plaintiff from an order denying its petition to punish defendant for contempt, defendant from an order amending a prior injunction entered against it.

2. Schwegmann Bros. v. Hoffman-La Roche, Inc., 221 F.2d 326 (5th Cir. 1955), *cert. denied,* 24 U.S.L. WEEK 3056 (U.S. Oct. 18, 1955) (No. 243).

3. 220 U.S. 373 (1911).

4. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1952).

5. Eli Lilly & Co. v. Schwegmann Bros., 109 F. Supp. 269 (E.D. La. 1953), *aff'd,* 205 F.2d 788 (5th Cir. 1953), *cert. denied,* 346 U.S. 856 (1953). Fair trade legislation exists today in all states except Texas, Missouri, and Vermont. Fair trade laws have been enacted in Hawaii and Puerto Rico, but not in the District of Columbia.

6. *Id.* at 270.

7. While state fair trade acts have generally been held to be a valid exercise of the state's police power, the Supreme Courts of Florida and Michigan have held their respective fair trade laws unconstitutional as applied to non-signers, since, as applied to the facts of each case, they bore no reasonable relationship to public health, safety, and welfare. Liquor Store Inc. v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949); Shakespeare Co. v. Lippmann's Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952).

in good will.[8] Non-signers [9] are bound by price-fixing agreements upon notice of their existence.[10] Commodities bearing the manufacturer's trade-mark cannot be sold below fixed prices either by signers or by non-signers.[11] The language of the Louisiana Fair Trade Law [12] would indicate that it is grounded on the usual economic policy behind such laws of protecting the good will and trade-mark of a vendor from exploitation. The Supreme Court has made it clear that such acts interfere only when the non-signer sells with the aid of the vendor's good will and not when he removes "the mark or brand from the commodity . . . provided he can do so without utilizing the good will of the latter as an aid to that end." [13] The circuit court has adopted this requirement as a *sine-qua-non* to the constitutionality of the Louisiana act.[14] But the court points out that the non-signer cannot fit into this exception "when a customer comes in with a prescription that designates a trade-marked product." [15] The decision is well-reasoned since the good will established in prescription drug trade-marks is inseparably bound with prescriptions which physicians write for their

8. Eli Lilly & Co. v. Schwegmann Bros., 109 F. Supp. 269 (E.D. La. 1953), *aff'd*, 205 F.2d 788 (5th Cir. 1953), *cert. denied*, 346 U.S. 856 (1953); Calvert Distillers Corp. v. Stockman, 26 F. Supp. 73 (E.D.N.Y. 1939); Houbigant Sales Corp. v. Woods Cut Rate Store, 123 N.J. Eq. 40, 196 Atl. 683 (Ch. 1937); Port Chester Wine & Liquor Shop, Inc. v. Miller Bros., 253 App. Div. 188, 1 N.Y.S.2d 802 (2d Dep't 1938), *aff'd*, 281 N.Y. 101, 22 N.E.2d 253 (1939); Guerlain Inc. v. F. W. Woolworth Co., 170 Misc. 150, 9 N.Y.S.2d 886 (Sup. Ct. 1939).

9. The Federal Fair Trade Act (McGuire Act), 66 STAT. 631, 15 U.S.C. § 45 (1952), *inter alia*, amends the Federal Trade Commission Act, 38 STAT. 717 (1914), 15 U.S.C. § 41 (1952). The former provides that the "unfair competition" provisions of state fair trade acts may be used against non-signers without violating the Federal Trade Commission Act or any of the federal anti-trust laws. The McGuire Act was passed immediately following the decision in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) which held that the Miller-Tydings Amendment, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952), to the Sherman Anti-Trust Act, did not exempt from the Sherman Act that part of the state fair trade laws relating to non-signers.

10. Calvert Distillers Corp. v. Stockman, 26 F. Supp. 73 (E.D.N.Y. 1939); Calvert Distillers Corp. v. Nussbaum Liquor Store Inc., 166 Misc. 342, 2 N.Y.S.2d 320 (Sup. Ct. 1938).

11. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936); Johnson & Johnson v. Weissbard, 121 N.J. Eq. 585, 191 Atl. 873 (Err. & App. 1937).

12. "No contract, relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer of the commodity and which is in fair and open competition with commodities of the same general class produced by others, shall violate any law of this state by reason of any of the following provisions which may be contained in the contract: (1) That the vendee shall not resell the commodity at less than the minimum price stipulated by the vendor; . . . ." LA. REV. STAT. ANN. § 51:392 (Supp. 1953).

13. Old Dearborn Distributing Co. v. Seagrams-Distillers Corp., 299 U.S. 183, 195 (1936). See The Pep Boys v. Pyroil Sales Co., 299 U.S. 198 (1936); Schwegmann Bros. v. Hoffman-La Roche, Inc., 221 F.2d 326, 328 (5th Cir. 1955). The *Old Dearborn* case is often cited to uphold the validity of fair trade laws.

14. Schwegmann Bros. v. Hoffman-La Roche, Inc., 221 F.2d 326, 328 (5th Cir. 1955).

15. *Ibid.*

patients.[16] The manufacturer's market is intentionally limited to hospitals, pharmacists, and doctors. Hence, any exploitation of good will by a non-signer must be geared to the prescribing physician. It is apparent that the good will of the manufacturer was utilized in making the sale since the physician prescribed the drug by its trade name.

The decision is in conformity with both the spirit and policy of the act as well as its judicial interpretations. As the court stated, the answer to the non-signers problem lies with the legislature, and up to this time the proponents of fair-trade agreements have carried the day in this respect.

Joseph F. Monaghan

TRADE UNIONS—INTERNAL DISCIPLINE—EXPULSION FOR LIFE.

Sanders v. International Association of Bridge Workers, AFL (W.D. Ky. 1955).

Plaintiff was the president of the local affiliate of the defendant union. He was charged with a violation of the union constitution by causing a strike contrary to the union's no-strike agreement with the employer and refusing to obey defendant's orders to terminate the illegal strike. The finding of the General Executive Board of the defendant union, after a hearing, resulted in the plaintiff being forever barred from membership in the union or any of its local affiliates. The plaintiff appealed from the board ruling. The district court *held* that the sentence imposed by the governing body of the union was unlawful and void in view of its effect upon a member's means of obtaining a livelihood. *Sanders v. International Association of Bridge Workers, AFL,* 130 F. Supp. 253 (W.D. Ky. 1955).[1]

A labor union is a voluntary unincorporated association whose constitution and bylaws are a contract and an agreement with each individual member as to rights, privileges, and duties among the members.[2] The association, being purely voluntary, is free to fix the qualifications for membership and to provide for termination of membership (on a breach of contract theory) for those who do not meet the standards fixed by the

16. See Warner & Co. v. Eli Lilly Co., 265 U.S. 526 (1924); Ross-Whitney Corp. v. Smith, Kline & French Laboratories, 207 F.2d 190 (9th Cir. 1953).

1. Sanders v. International Association of Bridge Workers, AFL, 130 F. Supp. 253 (W.D. Ky. 1955).

2. Talton v. Behncke, 199 F.2d 471 (7th Cir. 1952); North Dakota v. North Central Ass'n of Colleges and Secondary Schools, 99 F.2d 697 (7th Cir. 1938); Preveden v. Croatian Fraternal Union, 120 F. Supp. 33 (W.D. Pa. 1954); Local 1104, United Electrical Workers, UE, v. Wagner Electrical Corp., 109 F. Supp. 675 (E.D. Mo. 1951).

association.[3] If there is not a violation of a statute or public policy, the courts will uphold and respect the enforcement of the constitution and by-laws.[4] These principles are substantially recognized by the court in the *Sanders* case. However, in addition to these basic principles, Judge Swinford apparently took judicial notice of the fact that to be employed as an iron construction worker membership in a union is almost a necessity and "is no longer voluntary." He then concluded that the expulsion of a union member for life, or for such an unreasonable term of years as would have the effect of a life expulsion, is an unlawful use of authority. Under the National Labor Relations Act it is clear that union membership is not a *legal* requisite to employment, although some union security contracts are valid.[5] With the exception of non-payment of dues or initiation fees, a union member expelled for life can be employed even though a union security agreement exists.[6] This also applies where one has been denied membership.[7] Should the expelled member be dismissed from his employment for legitimate reasons all he need do when seeking another position, is to tender dues and initiation fees.[8] Judge Swinford does not rely on the Na-

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3. An association was allowed to expel one of its member schools for violation of a rule that no member school shall summarily dismiss staff members and that no appointee shall be removed before the expiration of his term of service without a fair hearing. North Dakota v. North Central Ass'n of Colleges and Secondary Schools, 99 F.2d 697 (7th Cir. 1938). An injunction against the union was denied a member because the court held a union could punish a member by fine, suspension, or expulsion for infraction of union rules. Barker Painting Co. v. Brotherhood of Painters, 23 F.2d 743 (D.C. Cir. 1927); Expulsion of a union business agent from membership was deemed justified where charges of conduct unbecoming a member based on an assault and battery committed on another member were found to be supported by sufficient evidence. Walsh v. International Alliance of Theatrical Operators, 22 N.J. Misc. 161, 37 A.2d 667 (1944), *aff'd*, 136 N.J. Eq. 115 (Err. & App.), 40 A.2d 623 (1945); The court recognized that if unions are to achieve the purposes for which they are organized they must free themselves of members whose misconduct may be violative of their constitution. The members were reinstated because of improper procedures in the expulsion proceedings. Barnhart v. United Automobile Workers, CIO, 12 N.J. Super. 147, 79 A.2d 88 (1951).

4. Talton v. Behncke, 199 F.2d 471 (7th Cir. 1952); Jennings v. Lee, 295 Fed. 561 (W.D.N.Y. 1923).

5. The Supreme Court has held that § 8(a)(3) of the National Labor Relations Act authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts unless there is a failure to tender dues or initiation fees. Radio Officers' Union, AFL v. NLRB, 347 U.S. 17 (1954).

6. It is considered an unfair labor practice for a union to ask an employer to discharge an employee who has been expelled from the union for any reason other than failure to pay dues or initiation fees. 61 STAT. 141, as amended, 29 U.S.C. § 158(b)(1)(A), (b)(2) (1952), NLRB v. Local 3, Retail Store Union, CIO, 216 F.2d 286 (2d Cir. 1954).

7. Union Starch & Refining Co. v. NLRB, 186 F.2d 1008 (7th Cir. 1951).

8. In Union Starch & Refining Co. v. NLRB, *supra*, note 7, at 1012, Judge Kerner resorted to legislative history to help determine the meaning of the Labor Management Relations Act. In so doing, he cited the following words spoken by Senator Taft on the Senate floor while the act was under discussion: "The union could refuse the man admission to the union, or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him." 93 CONG. REC. 4272 (1947).

tional Labor Relations Act, but bases his opinion on public policy. He states that union membership is virtually mandatory in getting a job in this particular industry. Assuming that this is justified by the record, it is certainly a very important factor to be considered. His position is that the union does have power to discipline members, but that power must be limited to the necessities of the situation, and the law will provide relief where the union action goes beyond this limitation. However, the conduct in question is very serious. Even in an industry in which union membership is a practical requisite to employment, an election must be made between giving a union the power to expel its members for grevious matters, thus subjecting the expelled member to the practical effect mentioned, or allowing the union to merely suspend its members, thereby taking away its only effective means of ridding itself of discordant elements. This opens the door for other members to violate the constitution and bylaws knowing that the maximum punishment will be suspension for a limited period of time.

A union must have authority to discipline its members, otherwise it will have no power to bargain effectively. Expulsion of an offending member is not so much a matter of discipline as it is a matter of protection of the union. The preservation of an organization whose constitution and bylaws are lawful, by allowing it to expel those who seek to undermine it, is a stronger basis for a public policy than the possible inability of the resurgent member to subsequently gain employment in his present occupation.

Henry A. Giuliani

TRADE UNIONS—PEACEFUL PICKETING—POST-CERTIFICATION.

Douds v. Local 50, Bakery Workers, AFL (2d Cir. 1955).

Pending an adjudication of an alleged union violation of § 8(b)(4)(C) of the National Labor Relations Act, an employer brought suit to enjoin the union, which was not the certified bargaining agent of the employees, from picketing his premises with signs stating that the working conditions in the employer's bakery were below that of other bakeries and urging the readers not to buy the employer's products. The picketing commenced the day after another union was certified as bargaining agent and had continued up to the time of the action. The United States Court of Appeals for the Second Circuit affirmed the district court's denial of the injunction under § 10(*l*) of the National Labor Relations Act and *held* that the evidence was not sufficient to conclude that there was reasonable cause for believing that the union was engaged in an unfair labor practice. *Douds v. Local 50, Bakery Workers, AFL,* 224 F.2d 49 (2d Cir. 1955).[1]

1. Douds v. Local 50, Bakery Workers, AFL, 224 F.2d 49 (2d Cir. 1955).

Before granting a preliminary injunction under § 10(*l*), the court must find that there is reasonable cause to believe that an unfair labor practice was committed.[2] For the defendant in this case to be found guilty of an unfair labor practice under § 8(b)(4)(C), three conditions must be satisfied: (1) the union must have induced or encouraged the employees to engage in a strike or a concerted refusal to perform services; (2) such action must have been for the purpose of forcing or requiring the employer to recognize or bargain with a union other than the one certified; and (3) another labor organization must have been certified under the act.[3] In circumstances similar to the *Douds* case, it has been held that peaceful picketing by a union was only an exercise of its rights of free speech.[4] The Supreme Court has agreed with this in principle.[5] However, peaceful picketing will be restrained if its objectives are unlawful.[6] Picketing, in order to be peaceful, must be free of any unlawful act.[7] Some of the established unlawful acts are: intimidation of customers, physical obstructions or interference with business, threats and false representations.[8] However, organizational picketing does not have an unlawful purpose merely because it exerts economic pressure on an employer or is carried on without success for an extended period of time.[9]

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2. "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A),(B),(C) of § 158(b) of this title, the preliminary investigation of such charge should be made. . . . If after such investigation, the officer . . . to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint shall issue, he shall, on behalf of the board, petition any district court . . . within any district where the unfair labor practice in question has occurred. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or restraining order as it deems just and proper. . . ." 61 STAT. 149 (1947), 29 U.S.C. § 160(*l*) (1952).

3. "§ 158 Unfair Labor Practice . . . (b) it shall be an unfair labor practice for a labor organization or its agents . . . (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: . . . (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title." 61 STAT. 141 (1947), 29 U.S.C. § 158(b)(4)(C) (1952).

4. Brown v. Retail Shoe Union, Local 410, AFL, 89 F. Supp. 207 (N.D. Cal. 1950).

5. Thornhill v. Alabama, 310 U.S. 88 (1940).

6. Local 10, United Ass'n of Journeymen Plumbers, AFL v. Graham, 345 U.S. 192 (1952); Building Service Employees Union, Local 262 v. Gazzam, 339 U.S. 532 (1950); International Brotherhood of Teamsters, Local 309, AFL v. Hanke, 339 U.S. 470 (1950).

7. International Brotherhood of Teamsters, Local 309, AFL v. Hanke, 339 U.S. 470 (1950); Senn v. Tile Layers Union, Local 5, 301 U.S. 468 (1937).

8. *Ibid.*

9. Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, AFL, 346 U.S. 485 (1953); Building Service Employees Union, Local 262 v. Gazzam, 339 U.S. 532 (1950); AFL v. Swing, 312 U.S. 321 (1941); Wood v. O'Grady, 307 N.Y. 532, 122 N.E.2d 386 (1954). *But see,* Pappas v. Stacey, 116 A.2d 497 (Me. 1955), *appeal filed* August 20, 1955, (Question presented: Does Maine statute, as construed and applied, abridge Federal Constitution's free speech guarantees?)

Since § 10(*l*) requires that the court find reasonable cause to believe that an unfair labor practice was committed, great weight must be placed upon the findings of fact in each particular case. In the *Douds* case, no employee refused to cross the picket line; the drivers of the trucking companies with which the plaintiff dealt were members of AFL unions affiliated with the defendant, but the picketing had no effect on their activities; and in addition, there was no evidence that the picketing had an adverse effect on the employer's business. In those cases where an injunction against picketing has been sustained under § 8(b)(4)(C), there has been more than mere presence of picketing from which the court could reasonably conclude that an attempt had been made to induce the employees to engage in some type of concerted activity.[10] Judge Swan, in the principal case, suggests that the intent and possible result of the picketing is to diminish the membership in the certified union so that eventually the defendant would get a majority when another election should be held. This he states, is not an unlawful objective. By thus making a factual inquiry into actual motives, a just result is reached in maintaining the delicate balance between the employer's property rights and the labor organization's right to free speech.

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WORKMEN'S COMPENSATION—STATUTE OF LIMITATIONS EXTENSION—ADVANCE PAYMENT OF MEDICAL EXPENSES.

Cook v. Buffalo General Hospital (N.Y. 1955).

In an action for workmen's compensation it was found that plaintiff was a student nurse who was sent for special training by her general employer to defendant hospital where she contracted pulmonary tuberculosis. The disease was not discovered until she returned to her general employer who then provided her with medical treatment. Plaintiff instituted suit after the two year statute of limitations would normally expire. The Workmen's Compensation Board found against the defendant—special employer on the theory that under the Workmen's Compensation Act [1] the

24 U.S.L. WEEK 3062 (Sept. 20, 1955) (No. 336). In that case the court stated: "In our view peaceful picketing for organizational purposes is unlawful under our law, and may be enjoined." Pappas v. Stacey, 116 A.2d 497, 500 (Me. 1955). Also see, Meltex, Inc. v. Livingston, 28 LABOR CASES ¶ 69,416 (N.Y. Oct. 10, 1955); Boca Raton Club v. Hotel Union, 24 U.S.L. WEEK 2192 (Fla. Nov. 1, 1955).

10. International Brotherhood of Electrical Workers, Local 501, AFL v. NLRB, 341 U.S. 694 (1951); NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951); Hoover Co. v. NLRB, 191 F.2d 380 (6th Cir. 1951); Humphrey v. Local 138, International Brotherhood of Teamsters, AFL, 85 F. Supp. 473 (S.D.N.Y. 1949).

1. N.Y. WORK. COMP. LAW § 28.

grant of medical treatment by the general employer was an advance payment sufficient to toll the statute of limitations as against the special employer. On appeal to the Court of Appeals of New York, *held,* affirmed. The defendant special employer was bound by the acts of the general employer. *Cook v. Buffalo General Hospital,* 308 N.Y. 480, 127 N.E.2d 66 (1955).[2]

It is clear that under the Workmen's Compensation Act advance payment will serve to toll the statute of limitations.[3] Furthermore, most states hold that part payment in the form of medical expenses is sufficient as an advance payment.[4] As a refinement of this general principle it has been held that these advance payments should be effective to toll the statute only if made in recognition of the employer's liability.[5] This naturally implies knowledge of the payment on the part of the employer. It therefore becomes necessary to define the relationship between a general and a special employer in order to determine whether an advance payment by one would bind the other. The courts seem to agree that if there is any legal relationship between the two it is at most that of independent contractor.[6] It is basic to such a relationship that neither the knowledge of nor acts done by one will be imputed to the other.[7] An analogous situation can be found in the case of a part payment of a stale contract claim. There, as in the case of advanced payment of medical expenses, it is essential that the part payment be made in acknowledgment of the obligation.[8] In addition the part payment or new promise must be made by the person liable for the debt or someone authorized by him.[9]

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2. Cook v. Buffalo General Hospital, 308 N.Y. 480, 127 N.E.2d 66 (1955).

3. "No case in which an advance payment is made to an employee . . . shall be barred by the failure of the employee . . . to file a claim. . . ." N.Y. WORK. COMP. LAW § 28, Piechocki v. Sattlers, Inc., 268 App. Div. 807, 48 N.Y.S.2d 473 (3d Dep't 1944).

4. United States Fidelity & Guaranty Co. v. Industrial Accident Commission, 195 Cal. 577, 234 Pac. 369 (1925); J. F. Imbs Milling Co. v. Industrial Commission, 324 Ill. 416, 155 N.E. 380 (1927); Wood v. Queen City Neon Co., 282 App. Div. 106, 121 N.Y.S.2d 888 (3d Dep't 1953), *appeal denied,* 306 N.Y. 985, 115 N.E.2d 440 (1953); Glowney v. Statler's Restaurant, 267 App. Div. 1020, 48 N.Y.S.2d 147 (3d Dep't 1944), *appeal dismissed,* 293 N.Y. 854, 59 N.E.2d 442 (1944). For cases contra see 20 MISS. L.J. 236 (1949).

5. Urboniak v. Bell Aircraft Corp., 279 App. Div. 813, 109 N.Y.S.2d 133 (3d Dep't 1952); Lombardo v. Endicott Johnson Corp., 275 App. Div. 18, 87 N.Y.S.2d 362 (3d Dep't 1949); see Wood v. Queen City Neon Sign Co., 282 App. Div. 106, 121 N.Y.S.2d 888 (3d Dep't 1953), *appeal denied,* 306 N.Y. 985, 115 N.E.2d 440 (1953).

6. See American Express Co. v. O'Connor, 279 Fed. 997 (D.C. Cir. 1922); Hartell v. Simonsen & Son Co., 218 N.Y. 345, 113 N.E. 255 (1916); Benjamin v. Pennsylvania R.R., 112 N.Y.S.2d 824 (Sup. Ct. 1952).

7. Clement v. Young-McShea Amusement Co., 70 N.J.Eq. 677, 67 Atl. 82 (Err. & App. 1906).

8. Trans America Development Corp. v. Leon, 279 App. Div. 189, 108 N.Y.S.2d 769 (1st Dep't 1951), *aff'd,* 305 N.Y. 590, 111 N.E.2d 646 (1953); Carlos Land Co. v. Root, 282 App. Div. 349, 122 N.Y.S.2d 650 (4th Dep't 1953).

9. People's Trust Co. v. O'Neil, 273 N.Y. 312, 7 N.E.2d 244 (1937).

Notwithstanding the rule that a statute of limitations should be liberally construed in favor of the injured employee,[10] it appears that the decision of the court in the instant case is contrary to the spirit of the law and the cases interpreting it. There was no showing that the defendant had any knowledge of the advance payment. The very essence of the advance payment's tolling the statute of limitations is that these payments must be the intentional act of the employer. Further there appears to be no rule of agency which would allow the court to impute the acts of the general employer to the defendant. The giving of medical treatment by the general employer would therefore be comparable to advance payments by a mere volunteer. As in the tolling of the statute of limitations in a contract claim through part payment, advance payments in a workmen's compensation litigation should be made by the one to be so bound or his authorized agent.

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10. Colonial Ins. Co. v. Industrial Accident Commission, 277 Cal.2d 437, 164 P.2d 490 (1945).