Catholic University Law Review

Volume 1
Issue 2 *January 1951*

Article 9

1951

Recent Cases

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RECENT CASES

BANKRUPTCY - UNION CONTRACT - BANKRUPT EMPLOYER - PENSIONS - PAYMENT BY TRUSTEE. - A contract was in effect between the Transport Workers Union of America and the Schenectady Railway Company, a corporation furnishing bus transportation service in the city of Schenectady and over some two or three interurban routes, providing an hourly compensation rate of pay for employees, defining working conditions, including seniority rights, vacation pay, etc. Sec. 22 provided a monthly pension to retired employees at the rate of eighty dollars per month. The corporation filed a petition for reorganization under Chapter X of the Bankruptcy Act, and the court appointed a trustee to "operate the business, manage the property of the debtor and to pay . . . the expenses of operation, including the reasonable wages of all employees." The trustee complied with all provisions of the contract, including payment of pensions, but neither expressly adopted nor rejected it. A creditor brought suit to enjoin the trustee from paying the pensions. Thereupon the Union, on behalf of its members, appeared and filed an answer, contending that the contract is in full force and effect and was assumed by the trustee and that any failure to make payments constitutes a breach, since these were proper items of operation expense. Held: - 1) that the trustee, in the absence of affirmative action, had not adopted or rejected the contract, nor did he have the power to do so, 2) the trustee should pay such pensions due the retired employees under an existing contract between the Union and the debtor corporation during such period as the trustee and the Union knowingly conformed to the terms of the contract, and 3) the payment of the pensions was a part of the operating expenses, which under the terms of the contract, constituted a part of the consideration for services performed by employees. In Re Schenectady Railway Co., 93 F. Supp. 67 (N.D. N.Y. 1950).

The question whether the contract provision for pension payments was really completely executory within the meaning of the Bankruptcy Act, was not considered by the court. Since both parties apparently assumed that it was, the case went on the finding that it had not been adopted. The record is silent as to affirmative action on the trustee's part, indicating adoption of the contract inasmuch as he continued to comply fully with its terms. Chapter X of the Bankruptcy Act says nothing regarding assumption or adoption of an executory contract. (See 6 Collier on Bankruptcy 687,691 (14th Ed. 1941)), but it is settled that such a contract may be affirmatively adopted. Philadelphia Co. V. Dipple, 312 U.S. 168 (1941); In re Wil-Low Cafeterias Inc., 111 F. 2d 429 (2nd Cir., 1940). Assumption or adoption, however, requires the express approval of the judge before it becomes effective. Matter of Childs Co., 64 F. Supp. 282 (S.D. N.Y. 1944). Thus it can readily be inferred that an obligation which might seriously encumber the corporation's assets cannot be assumed by the trustee without the court's consent.

The court, however, did not rest its holding on the adoption ground alone and read into the case a liberal construction of the term "wages", in view

of the fact that here the contract's express language made the pension payments a part of the consideration for the employees' efforts. The hourly rate of pay, vacation pay, seniority rights, settlement of grievances -- all are part of the benefits received by the worker. They are a part of his wage. In re Wil-Low Cafeterias Inc., supra; In re Capital Foundry, 61 F. Supp. 332 (E.D.N.Y. 1945). The term "wages" under the Act has generally been construed liberally. See 3 Collier on Bankruptcy sec. 64.202 (14th Ed. 1941). It should be read in the light of the purpose of sec. 64 of the Act, 52 Stat. 874 (1938), U.S.C. sec. 104 (1940), which is to give priority to those who need protection because they do not rely on their employer's credit. In re Capital Foundry Corp., supra (vacation pay given priority as wages).

No judicial decision is cited which might be termed a precedent here. However, operating receivers have been authorized to allow pensions to superannuated employees and to continue the payment of pensions awarded before receivership. Seaboard Air Line Ry. Receivership Record, Vol. I, p. 153 (Va. 1930); Interborough Rapid Transit Co. Receivership Record, Vol. II, p. 157 (N. Y. 1933); Minneapolis & St. Louis Ry. Receivership Record, Vol. XIV, p. 3 (Minn. 1932).

As to three non-union employees who were also pensioned off and received retirement benefits by virtue of the action of the board of directors, the court decided such payments were in the nature of gratuities and were not entitled to be continued by the trustee. It based this on the absence of any contract obligations for continuance of these payments plus the fact that these employees were not served and did not appear in the proceeding. This is in accord with holdings. In re Capital Foundry Corp., supra; In re Compania De Los Ferrocariles de Puerto Rico, 76 F. Supp 521 (D.C. Puerto Rico 1948). A question arises here, however, for on the surface it appears that pension payments are as much a part of a non-union man's wages as those of a union member's. It remains unanswered by this case, for the court suspended payments as to these employees pending action on their behalf to determine their status. Thus, in effect, it does not deny the validity of such claims but leaves the matter in abeyance, to be decided when the parties involved assert their respective claims in proceedings taken for this specific purpose.

The decision here is sound. Pension payments should be regarded as an obligation imposed by law which is to be added to the cost of operating expenses in order to distribute more equitably the burden of caring for superannuated employees. If they are so classified, it seems apparent that the court is correct in ordering their continuance by an operating trustee. As labor is essential to the conduct of the business, and retirement of employees occurs with statistical regularity, it may be said that pension payments are a necessary operating expense. Where, as here, the express language of the contract makes the payment of pensions a part of the consideration for the day-to-day efforts of the employees, the court would not be justified in attempting to separate or isolate the elements which go to make up the total benefits. They all come in one package and pensions are an integral part of the employees' reward for their efforts.

John G. Salatka

CONFLICT OF LAWS - STATUTE OF LIMITATIONS - FEDERAL TORT CLAIMS ACT - WRONGFUL DEATH ACT. -An action for damages for wrongful death against the United States is brought under the Federal Tort Claims Act, 60 Stat. 843, 28 U.S.C. 931(b) (1946), as amended, 63 Stat. 101 (1949), 28 U.S.C.

1346 (b) (Supp. 1950); 60 Stat. 845, 28 U.S.C. 942 (1946), as amended, 62 Stat. 971 (1948), 63 Stat. 62 (1949), 28 U.S.C. 2401 (Supp. 1950). The Act provides for the bringing of such actions within the two year period. 60 Stat. 845, 28 U.S.C. 942 (1946), as amended, 62 Stat. 971 (1948), 63 Stat. 62 (1949), 28 U.S.C. 2401 (Supp. 1950).

Ruby Young died as a result of injuries from a fall which occurred when her shoe caught in a defective tree box in front of the Munitions Building, Washington, D. C. Her administrator, appellant, alleges the defect in the box was caused by the negligence of the employees of the United States. In May of 1948, the Commissioners of the District of Columbia were notified of the death, but they denied liability. In August, 1948, the appellant presented a claim to the Department of the Interior for $50,000, but the Department refused to consider the claim, basing its rejection on its authority to consider only claims limited to $1,000. In the District Court for the District of Columbia, the United States made a motion to dismiss for lack of jurisdiction of the court over the subject matter, basing its motion on Lewis v. Reconstruction Finance Corporation, 85 U.S. App. D.C. 339, 177 F. 2d 654 (D.C. Cir. 1949). The motion was granted, and this appeal followed. It was the contention of the United States that any right which appellant may have had had died with the expiration of the one year statutory period limited by the District Code as to private parties. 16 D.C. Code Sec. 1202 (1940). The Government further contends that it was the wrongful death statute of the District of Columbia, and not the Federal Tort Claims Act, which gave appellant a claim. This contention was not upheld. Young v. United States, 184 F. 2d 587 (D.C. Cir. 1950).

The holding in the Lewis case, supra, is not applicable to the instant case. The controversy in that case arose out of conflicting statutory limitations from different jurisdictions. The principal case concerns conflicting statutory periods in the same jurisdiction, the District of Columbia.

The right to bring an action for wrongful death does not come from the common law but is of statutory origin. The Fatal Accidents Act, 9 & 10 Vict. c. 93 (1846), popularly known as "Lord Campbell's Act." By virtue of legislation, a new cause of action was created and its life was limited as provided by the statute.

When Congress passed the Federal Tort Claims Act, it sought to remunerate those persons who had been injured or damaged by the wrongful acts of negligence of the employees of the United States. Congress took away the immunity of the United States to suit, and gave life to a right of action against the Government. Jefferson v. United States, 77 F. Supp. 706 (S.D. Md. 1948). The liability of the government is to be the same in manner and extent as that of a private individual. 60 Stat. 843, 28 U.S.C. 931 (a) (1946), as amended, 62 Stat. 983, 28 U.S.C. 2674 (Supp. 1950). This liability is also to be in accordance with the law of the place where the act occurred. 60 Stat. 843, 28 U.S.C. 931 (a) (1946), as amended, 63 Stat. 101 (1949), 28 U.S.C. 1346 (b) (Supp. 1950). This rule was first sustained by the higher federal courts in State of Md., to the Use of Burkhardt v. United States, 165 F.2d 869 (4th Cir. 1947). It is the contention of the Government that the Act was not meant to extend the period of liability, where the local statute provided for a one year period. Rather, the federal law was ineffective in those localities where the statutory period was one year. Meija v. United States, 152 F.2d 686 (5th Cir. 1946), cert. denied, 328 U.S. 862 (1946). This reference to the liability of the Government is intended to pertain to the substantive law and not to the adjective law of the place in which the wrongful act occurred. Capital Transit

Co. v. United States, 183 F. 2d 825 (D.C. Cir. 1950); Kohn v. United States, 75 F. Supp. 689 (S.D. Cal. 1948); Sweet v. United States, 71 F. Supp. 863 (S.D. Cal. 1948).

If the statute of limitations of the locus of the negligent act were to be adopted, it would have been futile for Congress to have inserted in the Act a period of limitation. The law of the locality is to be considered only in determination of whether or not a cause of action exists against the United States, i.e., whether or not the circumstances are such as to constitute a wrongful or negligent act for which a private individual would be liable. If these circumstances exist as against a private party, then they may exist as against the United States. This determination in no manner embraces the statutory period which would cut off the right to bring the action against the United States. It merely establishes the existence of a cause of action. State of Md., to the Use of Burkhardt v. United States, supra.

In the instant case, the court found itself on the horns of a strange dilemma in interpreting the intent of the legislature in enacting the statutes involved. Both pieces of legislation had been enacted by Congress; The Code for the District of Columbia was enacted into law by the 57th Congress, and the Federal Tort Claims Act by the 79th Congress. The provisions of the former had not been repealed when the latter was enacted. It was from this peculiar dichotomy that the present litigation arose. A close scrutiny of the case law of the District of Columbia has shown Young v. United States, supra, to be the first to present this anomaly to the Court for resolution. The Court rightly concluded that the Federal Tort Claims Act was intended to be superior to the law of the locality in the application of the statute of limitations, and leaves to the law of the locality the determination of the cause of action.

Mary A. Dolan

CONSTITUTIONAL LAW - FIRST AMENDMENT - CLEAR AND PROBABLE DANGER - BAD TENDENCY DOCTRINE - Eugene Dennis and others were convicted under a Federal Statute which defined and made the advocacy of criminal anarchy a felony. The defendants published many pamphlets teaching the doctrines of Marxism and Leninism, which advocate that the proletariat must rise and overthrow the entrenched bourgeoisie. The conviction was affirmed by the Circuit Court of Appeals, Second Circuit. United States v. Dennis, 183 F. 2d 201 (2nd Cir. 1950), cert. granted 71 Sup. Ct. 91 (1950). Judge Learned Hand stated that a conspiracy of this nature created such a clear and present danger as to justify the suppression of the danger by the statute forbidding the advocacy of the overthrow of the Government by force and that the statute as applied to such conspiracy is not an unconstitutional abridgment of freedom of speech.

In Schenck v. United States, 249 U.S. 47 (1919), the defendant was convicted under a Federal Espionage Act. Mr. Justice Holmes, delivering the opinion of the Court, made clear two points: (1) the right of free speech is not an absolute right; and (2) there is a test of liability for speech - the question in every case is whether the words are used in such circumstances and are of such a nature so as to create a clear and present danger that will bring about substantive evils against which Congress has a power to legislate.

Mr. Justice Brandeis, with the concurrence of Mr. Justice Holmes, in Whitney v. California, 274 U.S. 347 (1927), in a dissenting opinion stated that to justify suppression of free speech there must be reasonable grounds to

fear that serious evil will result if free speech is practiced. There must be reasonable grounds to believe that the evil to be prevented is a serious one. This doctrine has been cited with approval in a number of cases. Thomas v. Collins, 323 U.S. 516 (1945); Danskis et al. v. San Diego Unified School District, 28 Cal. 2d 536, 171 P. 2d 885 (1946).

Judge Hand, in the Dennis case, has extended the doctrine of clear and present danger to include clear and probable danger where the overthrow of the Government by force is more than an obscure possibility. The yardstick used by him was a comparison between the interests which are to be appraised qualitatively, and in each case the court must ask whether the gravity of the evil discounted by its improbability justifies such an invasion of free speech as is necessary to avoid the danger.

This extension of the clear and present danger doctrine shows that such a test is purely subjective. The court looked at the overall picture -- the writings of the defendant, the American Communist party, of which the defendant is a controlling spirit, the chaotic condition of the world due to Communism, and the probability of revolution in this country -- and concluded that in fact there did exist a clear and present danger. "The clear and present danger rule has yet to be defined in such a manner as to permit any degree of certainty in its application." Danskis et al. v. San Diego Unified School District, supra.

It is not necessary to show that there is a clear and present danger to public security in order to justify the restriction of freedom of speech and press; the bad tendency doctrine of the case of Gitlow v. New York, 269 U.S. 652 (1925), can be applied in its stead. The holding in the Gitlow case was that in order to prosecute under a statute which prohibited public utterances of a specifically defined character, such as the advocacy of the overthrow of the Government by force, it was not necessary to find that a clear and present danger did exist. In Abrams et al. v. United States, 250 U.S. 616 (1919), the majority of the court found it enough that the intent of the accused was to bring about a substantive evil. They did not consider the gravity or imminence of the evil. These two cases, while not specifically overruling the doctrine of clear and present danger, have ignored it, holding that one who publicly utters words having a tendency to incite revolution may be punished. This doctrine of bad tendency has never been repudiated by the Supreme Court of the United States, although it has never been applied since the Gitlow case.

There are, therefore, two tests which Judge Hand could have applied -- the clear and present danger test, and the bad tendency test. He has chosen to apply neither, but has instead created a new test, the test of clear and probable danger. Apparently he found it impossible to find a clear and present danger, for had he so found, it would have been unnecessary to create this new doctrine. The result he has reached could have more easily been reached by an application of the bad tendency test, which application would have made it unnecessary for him to extend the clear and present danger doctrine.

John Wasnick

CONSTITUTIONAL LAW - FIRST AMENDMENT - LABOR MANAGEMENT RELATIONS ACT - NON-COMMUNIST AFFIDAVIT - Petitioner unions alleged an unfair labor practice by Inland Steel Co. in refusing to bargain on the subject of pensions, 77 NLRB 1 (1938), which was so found by the Board,

and which did not state the effective date of its order pending the union's compliance with sec. 9 (h) of the Labor-Management Relations Act of 1947, more commonly known as the Taft-Hartley Act. 62 Stat. 136, 146 (1947), 29 U.S.C. 96 et seq. (Supp. III 1946). The appeal presented for decision the constitutionality of sec. 9 (h), which is known as the non-communist affidavit provision, and which provides in effect, that the National Labor Relations Board will make no investigation of a labor organization's complaint "unless there is on file with the Board an affidavit by each officer of the petitioning union that he is not a member of the Communist Party, or member or supporter of any other organization which advocates the overthrow of the United States Government by force or any other unconstitutional methods." 61 Stat. 136, 146 sec. 9 (h). The lower court upheld the Board's ruling as to both the constitutionality and the proper interpretation of these provisions. Certiorari was granted by the United States Supreme Court on the affidavit requirement. The decision of the lower court was affirmed on the ground that constitutional justification by the NLRB lay in the power of Congress to protect interstate commerce by removing obstructions to the free flow of commerce, N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), and that the casting of the statements required by sec. 9 (h) of the Taft-Hartley Act into the mold of an oath did not invalidate the act, otherwise constitutional. The Supreme Court's final decision was that sec. 9 (h) is compatible with the Federal Constitution and may stand. United Steelworkers of America et al v. National Labor Relations Board, 339 U.S. 382 (1950), together with C.I.O. v. N.L.R.B., 339 U.S. 382 (1950).

The union alleged that the effect of sec. 9 (h) makes it impossible for persons who cannot sign the oath to be officers of labor unions, and urged that such a statute violates the fundamental rights guaranteed by the First Amendment, such rights as union officers holding whatever political views they choose, and to associate with what political groups they will, or the right of unions to choose their officers without governmental interference. The union also contended that since it is a case involving the right to free speech the "clear and present danger" test must apply, see Schenck v. U.S., 249 U.S. 47 (1919), necessitating a showing that potential political strikes are a clear and present danger to the security of the nation, or threaten widespread industrial unrest. Some writers agree with this contention, believing that the court might well have considered more closely the degree to which the non-communist affidavit provision limits the fundamental rights of union officials, and that such a test "would be more commensurate with the necessity of safeguarding the right of political expression." 35 Va. L. Rev. 374 (1949).

The Board, on the other hand, urged that sec. 9 (h) presents no First Amendment problem because its sole sanction is the withdrawal from non-complying unions of the "privilege" of using the Board's facilities. The Supreme Court agreed, stating that the affidavit requirement does not abridge rights guaranteed by the First Amendment. Inland Steel Co. v. N.L.R.B., 170 F. 2d 247 (1948).

To support its contention that sec. 9 (h) is unconstitutional the union cited U.S. v. Lovett, 328 U.S. 303 (1946), which involved a proscription of certain occupations to a group, classified according to belief and loyalty, and which was held illegal as a violation of the bill of attainder provision of Art I, sec. 9, cl. 3 of the United States Constitution. Freedom to think is absolute of its own nature, and cannot be controlled even by the most tyrannical government, Jones v. Opelika, 319 U.S. 103 (1943), thus the disclaimer, whereby the union officer must swear that "he does not believe in ... the overthrow of the United

States Government by unconstitutional methods" is a violation of this constitutional guarantee of free thought. The Supreme Court admits, even today, that "beliefs are inviolate." Cantwell v. Conneticut, 310 U.S. 96 (1940). Guilt should not be imputed from the association or affiliation with organizations no matter how repugnant we find the ideas expounded by them. Schneiderman v. U.S., 320 U.S. 118 (1943). Courts have even invalidated state statutes that made it a crime to participate in a meeting conducted by communists. De Jonge v. Oregon, 249 U.S. 353 (1939). The Court there stated the very foundation of constitutional government lay in preserving inviolate the rights of free speech, free press, and free assembly for purposes of free political discussion.

To uphold the constitutionality of sec. 9 (h), it is shown that failure to file a non-communist affidavit bears a reasonable relation to the objective of removing obstructions to interstate commerce. National Maritime Union v. Herzog, 334 U.S. 854 (1948). First Amendment rights have been sacrificed in the face of public interest in children's health, Prince v. Mass, 321 U.S. 158 (1944); aliens have been barred from certain occupations because of a reasonable relation between that classification and the apprehended evil, Pearl Assurance Co. v. Harrington, 313 U.S. 549 (1941); distinctions based solely on ancestry have been upheld under the unusual circumstances of wartime, Hirabayashi v. United States, 320 U.S. 81 (1943); and federal employees must give up participation in partisan political activities to provide efficient public service, United Public Workers v. Mitchell, 330 U.S. 75 (1947).

In refuting the union's contention that the "clear and present danger" doctrine was involved, the Supreme Court determined that since the effect of the statute in question upon the exercise of First Amendment freedoms is relatively small, and the public interest to be protected is substantial, it would be absurd to adhere to a rigid test under such a doctrine, and consequently the "clear and present danger" test was not applicable in determining the constitutionality of sec. 9 (h).

A further question which presented difficulty to the court was the "belief" section identified in sec. 9 (h). Mr. Justice Jackson and Mr. Justice Frankfurter, who concurred on the constitutionality of sec. 9 (h), wrote dissenting views on the interpretation of the "belief" section of the act. The court held that this belief is a belief in the objective of the overthrow of the United States Government by unconstitutional methods, and that the effect of this section upon one who holds such a belief is that he may be forced to relinquish his position as a union leader if his union is to receive privileges from the National Labor Relations Board. American Communications Assn. v. Douds, 339 U.S. 382, 419-20 (1950). Mr. Justice Frankfurter expressed his concern when he stated, "To ask avowal that one 'does not believe in the overthrow ... by unconstitutional methods' is to ask assurances from men regarding matters that open the door too wide to mere speculation or uncertainty," while Mr. Justice Jackson warned that the Government should not tamper in the realm of thought and penalize belief on the ground that it might lead to illegal conduct, since individual freedom and governmental thought-probing cannot live together.

The Constitution permits the requirement of oaths by officeholders to uphold the Constitution, a specific oath being set forth in the Constitution itself for the President, Art. II, sec. 1; and Congress, too, has detailed oaths for other federal officers. Surely the oath required of union officers by sec. 9 (h) would not be such a deprivation of individual freedom as to render this act unconstitutional. This act does not outlaw the Communist Party, nor does it prevent members of the Communist Party from engaging

in normal party struggles; it does require labor union officers to declare their affiliations with the Communist Party if the union seeks to gain certain privileges from the National Labor Relations Board. To insure the free flow of interstate commerce, and to protect the channels of interstate commerce from the disruption of political strikes, Congress should have, and should exercise, this power.

Stephen Opsasnick

DAMAGES - TRADE REGULATIONS - NOMINAL, ACTUAL AND PUNITIVE DAMAGES. - In Sterling Drug Co. v. Benatar, 221 P. 2d 965 (Cal. app. 1950) the California District Court of Appeals extended the protection of the California Fair Trade Act, Business and Professions Code sec. 16900 et seq., to "war surplus" goods, and awarded exemplary damages for its violation even though actual damages were fixed at a nominal figure.

The defendant, a California cut-rate seller, bought war surplus goods from the War Assets Administration and, over repeated protests of the complainant, was selling these commodities at prices substantially less than prices stipulated in contracts existing between the complainant and a great number of California retail dealers. The complainant alleged that the seller's price cutting violated the Fair Trade Act, and his continued selling was malicious and intended to cause injury and damage to his business. Injunctive relief and one dollar nominal damages plus two-hundred dollars punitive damages were awarded.

The defendant claimed "war surplus" goods were not subject to the Fair Trade Act because they were a kind of commodity separate and distinct from regular merchandise and were unknown when the act was passed; that his sales were "close-out sales" within the exception of the act; that exemplary damages must be based on actual damages; and that where one dollar damages are allowed, punitive damages or at least punitive damages disproportionate to that one dollar cannot be granted.

The court held: 1. Where a statute deals with "commodities", and a kind of commodity, "war surplus" goods, comes into existence thereafter, the language of the statute extends to this new species even though unknown when the act was passed.

2. The exception under the act permitting deviations from fair trade prices for "close-out sales" does not apply to goods bought at a previous "close-out sale", even if the seller does not intend to further carry the same commodity.

3. A finding that the defendant's conduct was oppressive, malicious, and causing injury and damage to complainant's business is sufficient to sustain a recovery of exemplary damages based on a showing of actual damage, the extent of which was unascertainable, but which entitled complainant to a nominal recovery, one dollar.

This court sustains the majority view that actual damage must be found as a predicate for, or at least must be shown to have been done, to sustain an award of exemplary damages, Limehouse v. Southern Ry Co., et al., 216 S.C. 424, 58 S.E. 2d 685 (1950); Kroger Grocery & Baking Co. v. Reeves, 210 Ark. 181, 194 S.W. 2d 876 (1946); and adopts the weight of authority view that exemplary damages may be recovered although the actual damages found are only nominal in amount. Richard v. Hunter, et al., 151 Ohio St. 185, 85 N.E. 2d 109 (1949); Brink v. Kennedy, 286 Ky. 566, 151S.W. 2d 58 (1941).

Three problems are presented upon which the decisions are in hopeless conflict:

1. Whether the money extent of actual damages must be found to sustain a finding of punitive damages;

2. Whether an award of nominal damages will support punitive damages;

3. Whether punitive damages must be in proportion to actual damages.

Concerning the first problem, in Gilham v. Devereaux, 67 Mont. 75, 214 P. 606 (1923), it was held that the foundation for recovery of punitive damages rests upon the fact that substantial damages have been sustained; that punitive damages cannot be made the basis of recovery independent of a showing which will entitle the plaintiff to an award of actual damage. The contrary rule finds expression in McConathy v. Deck, 34 Colo. 461, 83 P. 135 (1905), wherein it was declared: "After actual damage is shown, it is unnecessary to show its money extent to sustain a judgment for exemplary damages." The federal rule and rule in the District of Columbia is announced in Wardman-Justice Motors, Inc., et al. v. Petrie, 39 F. 2d 512 (App. D.C. 1930), wherein it was held that actual damage need not be established as a basis for assessment of punitive damages; proof of actual loss is sufficient to sustain a judgment for punitive damages. Therein the court cites the case of Washington Post Co. v. O'Donnell, 43 App. D.C. 215,240 (1915), wherein it was stated that "punitive damages depend not on the amount of actual damage, but upon the intent with which the wrong was done."

The second problem has its conflicting decisions. "The right to nominal damages arising from violation of plaintiff's legal right is a sufficient basis for recovery of punitive damages without proving actual damages." Crystal Dome Oil & Gas Co. v. Savic, 51 Idaho 409, 6 P. 2d 155, 156 (1931). But in Anderson v. Alcus, 42 S.W. 2d 294, 296 (Tex. 1931), the court reversed an award for exemplary damages based on nominal damages holding that "nominal damages are not actual damages and will not support award of exemplary damages as will actual damages."

To Illustrate the third problem, in Stephens v. Lever Bros. Co., 155 S.W. 2d 540 (Mo. 1941, it was stated that "verdicts for punitive damages must not be entirely disporportionate to the actual damages." It was held in Jones v. West Side Buick Auto Co., 231 Mo. 187,93 S.W. 2d 1083, 1089 (1936):

> "While the punitive damages allowed in given case should bear some reasonable proportion to the actual damages sustained by plaintiff, it is not so much a mathematical proportion which the jury must have in mind as it is due regard for the character of the injury which has been inflicted."

But in State ex rel. St. Joseph Belt Ry. Co. v. Shain, 341 Mo. 733, 108 S.W. 2d 351, 356 (1937), the court stressed that, "There is no fixed relation between the amount of actual damages and the amount of punitive damages that may be awarded. Generally, punitive damages must bear some relation to injury inflicted and cause thereof, though they need not bear any relation to damages allowed by way of compensation."

In regard to these problems the instant case avoids the difficulty of finding the exact extent of actual damages and by-passes the conflict whether nominal damages support an award of exemplary damages. The court accepts the principle that the amount of actual damages furnishes no guide to the amount of punitive damages assessed. The court sets the amount at one dollar actual damages because of the inability to prove the amount of damages actually suffered.

The one dollar nominal figure meant to this court "actual damages, small or incapable of measurement" and in this sense the operation of the general

rule, that actual damages shall be shown before exemplary damages are recoverable, is preserved. Richard v. Hunter, et. al., supra.

In summation, where it is not necessary to the recovery of exemplary damages that actual damages should be susceptible of measurement by a money standard, Long et al. v. Davis, 68 Mont. 85, 217 P. 667 (1923), and by nominal damages is meant "actual damages, small or incapable of ascertainment" Richard v. Hunter, et al., supra, actual damages set at nominal figure one dollar will support an award for punitive damages.

The decision in the principal case is sound and strengthens the weight of authority view that punitive damages may be recovered although actual damages are only nominal in amount.

William B. Kamenjar

EVIDENCE - SEARCH AND SEIZURE - INTERNAL REVENUE CODE - FORFEITURE PROCEEDINGS. - Defendant, on probation as a result of previous convictions under the Internal Revenue Code, for having in his possession whiskey, on which the tax had not been paid, was observed by the probation officer to have resumed activities with suspected violators of the same laws. The probation officer, after diligent investigation, entered Martin's garage, without a warrant, and found him unloading his car of illegally possessed whiskey. The officer seized the car and the whiskey, and ordered defendant to appear the next day. After a hearing, in which Martin's probation was revoked, an action for forfeiture of the automobile was commenced. United States v. One Ford Coupe, 1940 Model, Motor No. 18-5497068, etc., (D.C.W.D. Va., Feb. 27, 1950). After forfeiture was ordered, Martin challenged the order on the ground that the search made by the probation officer was unlawful, and therefore in violation of the Fourth Amendment of the United States Constitution. On appeal, the decision was affirmed. Martin v. United States, 183 F. 2d 436 (4th Cir. 1950) cert. denied - U.S. - (Dec. 11, 1950). The Circuit Court of Appeals, Fourth Circuit, based its holding on the case of United States v. Rabinowitz, 339 U.S. 56 (1950), which held that reasonableness of search and seizure depended on the facts and circumstances of each case, and also that a search without a warrant, but incident to a valid arrest, is reasonable even though a warrant might have been procured in time.

The fact that Martin was a probationer is a distinguishing factor in the case. "At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant." 18 U.S.C.A. sec. 3653. There was good reason to believe that Martin was engaging in illegal traffic in whiskey, so the arrest was clearly valid.

"Every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses and other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited." 26 U.S.C.A. sec. 3321 (b) (3). "All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized, and shall be forfeited to the United States." 26 U.S.C.A. sec. 3720 (a) (1). "All tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized, and shall be forfeited as aforesaid." 26 U.S.C.A.

sec. 3720 (a) (3). The automobile was being used in the traffic of the illegally possessed whiskey, and was clearly forfeitable under these provisions of the Internal Revenue Code.

"Such property may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner for that purpose." 26 U.S.C.A. sec. 3720 (b) (1). "If the property was seized by one having no authority to do so, the United States may adopt the seizure with the same effect as though it had been originally made by one duly authorized." United States v. One Ford Coupe, 272 U.S. 321, 325 (1926). The search, therefore, although unauthorized by the Bureau of Internal Revenue, can be adopted by the Collector, regardless of the fact that it may have been unlawfully made.

The action against the automobile is an action in rem, and is not, therefore, a criminal action. "This section (sec. 3116, Internal Revenue Code) is wholly preventive and remedial, and is not a criminal statute, and therefore it should not be construed with great strictness in favor of one seeking to avoid forfeiture of property thereunder." United States v. Windle, 158 F. 2d 196 (8th Cir. 1946). "Although the indictment against the owner of this car, and the forfeiture proceeding, arose from the same transaction, they are completely independent of each other, and should not be confused." United States v. Ganey, 183 F. 2d 273, 274 (5th Cir. 1950). The instant case is not analogous to the Rabinowitz case, supra, since that was a criminal action, whereas this is not.

"The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search." Husty v. United States, 282 U.S. 694, 700 (1931).

The decision of the Circuit Court of Appeals, Fourth Circuit could have been easily reached through an application of the several appropriate statutes cited above. It was altogether unnecessary for the Court to base its decision on the Rabinowitz case, supra, which can be easily distinguished from the instant case. The Court could have completely avoided a needless application of an already extended doctrine.

Anne Carlisle Rozier
John Patrick Bradshaw

FEDERAL PROCEDURE - DEPOSITIONS - ABSENT PARTY - EXCEPTIONAL CIRCUMSTANCES. - The plaintiff sued for the unpaid balance on a promissory note. The defendants denied liability on the ground that the amount sued upon was included in the principal amount of a subsequent promissory note given by them to the plaintiff and upon which the plaintiff had sued and recovered in a prior action.

One of the defendants took his own deposition. This deposition was taken in South Bend, Indiana, because if the deponent returned to Michigan, the place of the trial, he would have been arrested under a warrant or attachment against him in a state-court suit. The plaintiff objected to the admission of this deposition and moved for its suppression on the ground that the defendant procured his own absence by voluntarily placing himself 100 miles from the place of trial. The Court held that "such exceptional circumstances were shown as to make it desirable, in the interest of justice, to allow the deposition to be used in the trial." Fed. R. Civ. P. 26 (d) (3)5. The plaintiff's

motion to suppress the deposition was denied. Odell v. Miller, 14 F.R.S. 26d. 44, Case 2 (W.D. Mich. 1950).

The case of Odell v. Miller, supra, is the first to apply the "exceptional circumstances" clause of Fed. R. Civ. P. 26 (d) (3), the chief exceptional circumstance in this case being the deponent's apprehension of arrest, for the denial of the deposition would create an injustice.

The federal rules governing depositions are broad and Rule 26 is particularly liberal. These broad deposition provisions were designed to achieve the goals attained in jurisdictions employing similar rules. 59 Yale L.J. 117,120 (1949). A search of Canadian and state statutes providing for the manner of taking and admitting depositions reveals no express statutory provision covering the use of a deposition of one outside the jurisdiction in apprehension of arrest. While none of these jurisdictions has an "exceptional circumstances" provision, the composite of the deposition statutes of most of the jurisdictions allows a deposition where the witness goes or is residing at a distance, varying from twenty to 100 miles, from the place of trial or outside the county. The statutes are usually silent as to the use of depositions where the party offering procured the deponent's absence but the general rule is that such depositions are inadmissible. Pike and Willis, the New Federal Deposition - Discovery Procedure II, 38 Col. L. Rev. 1436, 1447 (1938). The English law, by statute, allows the use of depositions in any cause or matter and the judge may order the deposition to be taken and admitted where it shall appear necessary for the purposes of justice. R.S.C. Ord. 37, r. 5. The Equity Rules of 1912 allowed depositions for good and exceptional cause for departing from the general rule of "no depositions." Equity Rule 47. The exceptions became so broad, however, that the general rule ceased to be one of "no depositions" and became one of extensive depositions.

Rule 26 (d) furnishes assurance that the testimony of all witnesses will be available regardless of any unavailability of witnesses which may occur before the time of trial. Pike, New Federal Deposition-Discovery Procedure and the Rules of Evidence, 34 Ill. L. Rev. 1 (1939). Clause two of Rule 26 (d) (3), which allows the use of "the deposition of a witness, whether or not a party," if "the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition," is intended to prevent injustice where the expense of producing witnesses who are at great distances from the place of trial is prohibitive and would result in extreme inconvenience for the producing party. The "exceptional circumstances" clause was inserted as an addition to the four previous conditions of Rule 26 (d) (3), thereby implying that this clause was to be used only where the other four were not applicable. Notes to the Rules of Civ. P. for the District Courts of the United States, March 1938, Advisory Committee on Rules for Civ. P., p. 29.

In Odell v. Miller, supra, the only objection raised as to the admissibility of the deposition was procurement. It has been held, however, that where counsel for both sides fully examined the witness in taking the deposition, and where nothing is shown which indicates the demeanor or appearance of the witness would have an advantageous effect for the opposite party, there is no procurement. Weiss v. Weimer, 14 F.R.S. 26d. 44, Case 1 (D.Md. 1950). In Odell v. Miller, supra, it was pointed out that the counsel for the respective parties had proceeded with the taking of the deposition and certain exhibits were presented in evidence. There was no offer by the plaintiff to show any advantageous effect to the plaintiff from the oral testimony of

the witness. Consequently on the basis of Weis v. Weimer, supra, there was no procurement by the defendant.

In the absence of procurement by the defendant, Rule 26 (d) (3) 3 is applicable and since clause five is only to be used when any of the other four conditions are absent, there is no necessity for resorting to the "exceptional circumstances" provision.

John M. Lothschuetz
William P. Murray

LABOR LAW - LABOR MANAGEMENT RELATIONS ACT - REINSTATEMENT PROCEEDINGS - INDISPENSABLE PARTIES - Complainant alleges that the respondent union has engaged in unfair labor practices within the meaning of sec. 8 (b) (2) and secs. 2 (6) and 2 (7) of the National Labor Relations Act, as amended by the Labor Management Relations Act, more commonly referred to as the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U.S.C. 141 (Supp. III 1946).

Respondent Union requested the Parker Pen Co., the employer, to discharge the complainant on the ground that she had failed to pay fines due to the union for violation of an unspecified union rule. Pursuant to this request, the employer discharged the complainant. The court found that fines were not included within the terms "periodic dues" and "initation fees." Thus, the union by inducing the employer to discharge the complainant committed an unfair labor practice. Held: that the union caused the employer to discriminate against the complainant, in violation of sec. 8 (b) (2). The Board decreed that the respondent shall compensate the complainant for all losses resulting from this unfair labor practice, and shall notify employer that it no longer has objection to her immediate reinstatement on her job. In re Pen and Pencil Workers' Union, Local 19593, A.F.L., and Wilhelmina Becker, 91 N.L.R.B. No. 155 (Oct. 10, 1950).

Sec. 8 (b) (2) provides that it shall be an unfair labor practice for a union "to cause an employer ... to discriminate against an employee with respect to whom membership in such organization has been denied ... on some ground other than his failure to tender the periodic dues and initiation fees."

Sec. 8 (a) (3) provides that it shall be an unfair labor practice "for an employer by discrimination in regard to hire or tenure of employment ... to encourage or discourage membership in any labor organization." It appears that the employer violated this section by discharging the complainant upon the request of the union.

In Sec. 10 (c) of the Act provision is made for affirmative action by the Board when an unfair labor practice is proved. Included in such affirmative action is the reinstatement of employees with or without back pay.

In such cases as this where the employer is also guilty of an unfair labor practice in violation of Sec. 8 (a) (3), it should be the policy of the Board to join the employer as a party defendant, regarding him as an indispensable party to the proceeding. Failure to effect such a joinder results in an incomplete remedy since no reinstatement order as provided by Sec. 10 (c) can issue.

Indispensable parties are parties who have such an interest in the controversy that a final decree cannot be made without either affecting their interest or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience. Chidester v. City of Newark, 162 F. 2d 598 (3d Cir 1947). Indispensable party

is one who has such a direct interest in the litigation that it cannot be separated from that of the parties to the action. Baird v. Peoples Bank and Trust Co. of Westfield, 120 F. 2d 1001 (3d Cir. 1941).

In a case similar to the present one, both employer and union were joined as parties defendant, thus permitting the issuance of a reinstatement order and granting plaintiff a complete restoration of his rights. H. M. Newman, 85 N.L.R.B. 725 (1949). It would seem that only by regarding the employer as an indispensable party can the Board reach a final determination of the rights of the complainant.

Edward P. Manning

WORKMEN'S COMPENSATION -ACTION BY WIFE FOR LOSS OF CONSORTIUM - EMPLOYER'S EXCLUSIVE LIABILITY. - The appellant's husband was injured while in the employment of the appellee. He sustained severe and permanent abdominal injuries. Under the provisions of the Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1424 et seq. (1927), 33 U.S.C. 901 et seq. (1946), the applicable workmen's compensation statute for the District of Columbia, 45 Stat. 600 (1928), the appellant's husband received compensation for his injuries. This action was brought by the employee's wife for loss of consortium. The defendant moved for summary judgment on the grounds that the court lacked jurisdiction, and that the complaint failed to state a cause of action. The motion was granted and judgment was entered for the defendant. This appeal followed to test the validity of that order.

Two problems were presented to the court by the appeal; (1) Whether the wife of an injured employee has a separate cause of action for loss of consortium arising from the negligence of the employer; and (2) whether sec. 5 of the Compensation Act, (supra), providing that "liability of an employer ... shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law ... on account of such injury ... "cuts off the wife's right to bring this action." (Underscoring applied.) Hitaffer v. Argonne Co., 183 F. 2d 811 (App. D.C. 1950), cert. denied 71 S.Ct. 80 (1950).

The court at the outset indicated that it was aware other courts uniformly deny to the wife an action for loss of consortium under these circumstances. Nevertheless, Clark, J., said, "We remain unconvinced that the rule which they have laid down should be followed in the District of Columbia." It was further held that sec. 5 of the Compensation Act, (supra), was not to be interpreted as denying the right of a wife to maintain a separate action against her husband's employer for loss of consortium.

The reasoning of the court on the first question was that an invasion of the right of consortium is an injury to the right of a third person which is distinct from any injury compensable under the Compensation Act, (supra), since consortium comprehends not only the material services (support) of the husband, but also love, affection, companionship, and conjugal relations. The Married Women's Acts established equality for women in the eyes of the law; it is a strange anomaly that a husband can generally sue for loss of consortium while a wife cannot. However, the tendency of recent cases seems to be to allow a recovery to the wife as well as to the husband for an intentional invasion such as alienation of affections or criminal conversation. Commercial Carriers v. Small, 277 Ky. 189, 126 S.W. 2d 143 (1939).

In cases where the invasion of the right of consortium is due to negligence on the part of a third person, recovery has generally been allowed to the husband, Cook v. Atlantic Coast L.R. Co., 196 S.C. 230, 13 S.E. 2d 1 (1941); see note 133 A.L.R. 1156, but a few cases deny this recovery even to the husband, Marri v. Stamford St. R. Co., 84 Conn. 9, 78 Atl. 582 (1911). It seems illogical to deny a right of action to a wife for loss of consortium where it is permitted to the husband.

The court denies that a double recovery will result if the plaintiff is allowed additional compensation to that received by her husband. His compensation provides recovery for only part of the injury resulting from the invasion of the wife's right to consortium - the right to her husband's support. The other part of the injury - loss of companionship, love and martial relations - has not been compensated. The court states that by subtracting the value of any impairment of the husband's duty of support from the total damages to the wife's consortium, the amount which the wife should recover can be determined.

To the extent that the court recognizes a distinct cause of action for loss of consortium by the wife, in circumstances where the husband is allowed recovery, the reasoning of the court in the Hitaffer case seems sound and likely to be followed. However, the court's interpretation of the Compensation Statute, supra, whereby it denies that sec. 5 limits the liability of the employer for injuries to an employee to that set forth in the statute, seems strained and unrealistic.

The clear wording of the statute denies any other recovery not only to the injured employee, but also to the employee's "husband or wife." There does not seem to be any cause of action available to a husband or wife, as such, unless it be an action for loss of consortium. That this principle seems to have been clearly understood heretofor is indicated by the fact that the records are devoid of any attempt to obtain such recovery under this particular statute since its enactment in 1927. State workmen's compensation statutes having similar exclusionary provisions have been uniformly interpreted as denying to a third person a right of recovery under such circumstances, Holder v. Elms Hotel Co., 338 Mo. 857, 92 S.W. 2d 620 (1936); See note 104 A.L.R. 346.

In only a few cases, a joint tort feasor has been allowed to exact contribution from an employer who has paid workmen's compensation to the employee. It is this analogy which the court used in the Hitaffer case to establish that the rights of a third party having an independent cause of action are not barred by the exclusive recovery provisions of the statute, citing The Tampico, 45 F. Supp. 174 (D.C. N.Y. 1942), and Rich v. United States, 177 F. 2d 688, (2d Cir. 1949). It is submitted that the statute does not bar the right of a joint tort feasor to contribution. But, the specific wording of the statute denies any recovery to a "husband or wife." Clearly, the analogy drawn by the court is inapplicable to the Hitaffer case. Such an interpretation of sec. 5 of the statute, in effect, evades the limitation of liability in favor of the employer, which this section of the statute must have intended to provide.

Carl J. Morano