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## Recent Cases

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## Recent Cases

### Authors

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## RECENT CASES

### ADMINISTRATIVE LAW - JUDICIAL REVIEW - SUBSTANTIAL EVIDENCE. -

On January 25, 1944, Imre Chairman was discharged by the Universal Camera Corp. The question consequently presented to the NLRB was whether the discharge was attributable to Chairman's "gross insubordination" or to his "having given testimony at a NLRB representation hearing." The NLRB trial examiner, favoring the former reason, recommended dismissal of the complaint. He was reversed by the Board which found that the Universal Camera Corp. had violated sec. 8 (4) of the National Labor Relations Act of 1935, 49 Stat. 449, 29 U.S.C. 158, which forbids an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." Subsequently, the Board's decision was sustained by the reviewing Court of Appeals, and a decree of enforcement was entered. 179 F. 2d 749 (1950). The Court held that the scope of review under the NLRA of 1935 had not been extended by the Labor-Management Relations Act, 61 Stat. 136, 29 U.S.C. 141 et seq. (Supp. 1946) because the phrase, "in the record considered as a whole," which is found in the latter statute, does no more than make definite what was already implied. It further held that the reviewing court "could not consider as a factor in its own decision the Board's reversal of the trial examiner". Accordingly, the court found that the Board's decision was supported by substantial evidence. Upon appeal to the Supreme Court of the United States, the judgment was vacated and the cause remanded. The Supreme Court held that:

(1) The Labor-Management Relations Act and the Administrative Procedure Act 60 Stat. 237, 5 U.S.C. sec. 1001 et seq., (1946), have common requirements in respect to the scope of judicial review of the findings of administrative tribunals.

(2) The scope of judicial review is not extended beyond the requirements of the Wagner Act (NLRA).

(3) The findings of fact by the trial examiner insofar as they are rejected by the Board are to be a factor in the decision of the reviewing Court. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). This holding throws much light upon the scope of judicial review in administrative procedure generally, and in labor board procedure particularly. It should be kept in mind that inasmuch as the Supreme Court has not identified the scope of judicial review under the Labor-Management Relations Act with that provided by the Administrative Procedure Act, any observation upon either, to that extent, shall likewise be applicable to the other. The National Labor Relations Act and the Labor-Management Relations Act will hereinafter be referred to by their popular names, The Wagner Act and the Taft-Hartley Act, respectively.

Here, it will be appropriate to determine what the scope of review was under the Wagner Act. The Act, at sec. 10 (e), had merely provided that "the findings of the Board as to the facts, if supported by evidence shall be conclusive." Soon, judicial interpretation introduced to "evidence" the

qualification "substantial." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). In that decision, "substantial evidence" itself was defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". The same Consolidated Edison case, supra, cited with approval the case of NLRB v. Thompson Products Co., 97 F. 2d 13, 15 (6th Cir. 1938). This latter case opined that "substantial evidence was more than a mere scintilla of evidence. Rather, such a term was intended to mean that "the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions, and conclusions to be drawn therefrom and considering them in their entirety and relation to each other, arrives at a fixed conviction". Another important case, NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292, 299, 300 (1939) accepted the definition offered in the Consolidated Edison case, supra, and explained, "Substantial evidence . . . must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury". This was the definition of substantiality, but it was not determined what evidence was to be judged substantial.

It appears that the Supreme Court looked at the record as a whole to determine the substantiality of the Board's findings: In NLRB v. Indiana & Michigan Electric Co., 318 U.S. 9, 17 (1943), the Court said: (We) "have examined all the evidence in the certified transcript and not merely the evidence set forth in the printed record." In NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 350 (1938) the Court looked at "the entire evidence, pro and con." In NLRB v. Virginia Electric and Power Co., 314 U.S. 469, 479 (1941), "the whole course of conduct revealed by this record" was examined. But some of the practices of the circuit courts of appeals were suspected of unduly restricting the scope of judicial review. Indeed, several decisions did lend colorable support to the prevailing criticism that reviewing courts were sustaining the findings of the Board by considering only isolated parts of the evidence in the record. Wilson and Co. v. NLRB, 126 F. 2d 114, 117 (7th Cir. 1942). There, findings of fact greatly contrary to the weight of the evidence were sustained. In NLRB v. Columbia Products Corp., 141 F. 2d 687, 688 (2d Cir. 1944) a fact which greatly strained but which did not break down one's credulity was accepted. Whatever the cause for these decisions, whether the caprice of the court's language - Stason, "Substantial Evidence" in Administrative Law, 89 U. of Pa. L. Rev. 1026, 1050 (1941) - or a misapprehension by the court of the standard, or whether a faulty application of the test, the effect was a general dissatisfaction sharply evident in the legislative histories of the Taft-Hartley Act and the Administrative Procedure Act. Congress became resolved that the alleged false standard should be eliminated. Consequently, sec. 10 (e) of the Taft-Hartley Act was so drafted as to provide that the Board's findings, "If supported by substantial evidence in the record considered as a whole, shall be conclusive. The underlined words constitute the physical changes in the amendment of the Wagner Act.

Inasmuch as the statutory expression reaffirmed the substantial evidence test, a critical split developed in the courts of appeal as to whether there was an actual extension in the scope of review. The Supreme Court found, however, in its survey of the legislative history of the statute, an unequivocal mandate of Congress that existing review practices should be reformed. In that, the court found compensation for the lack of precise statutory expression. It observed that Congress was seeking to effect a stricter and more uniform practice among reviewing courts by imposing on them a responsibility which had not always been recognized. Accordingly, in the light of what

Congress wanted, the Supreme Court gave meaning to what the statute said. Reviewing courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than those same courts have shown in the past. Universal Camera Corp. v. NLRB, *supra*. They must enforce the requirement that evidence appear substantial when reviewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the courts of appeal. Definitely precluded now is the perverse practice of selecting evidence to support the Board's findings of fact without also considering contradictory evidence. Courts are instructed to set aside the Board's decision whenever it is not justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

This is not to say, however, that in matters which involve "expertise" or even a choice between two fairly conflicting views, the reviewing court may substitute its judgment for the Board's. Rather, the court must conscientiously judge whether the evidence is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. That the decision extends the scope of review is concretely evidenced in the court's instruction to the reviewing court that it consider the Board's reversal of the trial examiner as a factor in its decision. For only if substantiality is to be determined in reference to the relevant parts of the entire certified transcript, may the findings of the examiner be considered along with the consistency and inherent probability of testimony. As for the consequent problem, the difficulty of assigning a weight to the report, the Supreme Court's solution is that the examiner's findings be given the weight that in reason and judicial experience they deserve.

The effect of the opinion of Mr. Justice Frankfurter is to set up a new, extended scope of judicial review in respect to findings of fact by administrative tribunals. The requirement of substantiality is not changed. Rather, it is the method of such determination that is changed. No longer may the question be merely, "Is the fact supported by evidence which is substantial?" Now, the question must be, "Is this fact supported by evidence which is substantial in the light of all relevant evidence in the entire, certified transcript?" Or, to put it more formally, the new standard is: whether on the record considered as a whole there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. However manifest the standard of review itself may now be, it still remains to be seen how the courts shall be able to apply it. There is but a very fine line between the new standard properly applied and the "preponderance of evidence" test which would be followed in a trial *de novo*. Many disputes seem certain to arise as to which standard a reviewing court is using. Another area of contention will arise from the consideration of the Board's reversal of the trial examiner. Frankfurter appears to have given the examiner's findings a presumption of competence and of correctness in all cases. It seems a certainty that the recommendation of the trial examiner will be the decisive factor in any case where the credibility of witnesses is critical. The presumption of competence on his part will be almost insuperable.

Philip F. Jehle

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ADMINISTRATIVE LAW - WORKMEN'S COMPENSATION - JUDGMENTS - RES JUDICATA. - The plaintiff was involved in an automobile accident while performing duties relating to his employment. A few days later he sustained

a heart attack. Subsequently he filed a claim for compensation under the Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1424 (1927), 33 U.S.C. sec. 901 et seq. (1946), alleging disability brought about by the heart attack. The deputy commissioner held that the heart attack was not due to the accident but was caused by a pre-existing heart disease, and dismissed the claim. The plaintiff then brought this action to recover disability benefits under an accident policy carried with the same insurance company which carried the employer's liability insurance as provided by the workman's compensation act. The defendant insurance company claimed that the commissioner's determination that the disability was caused by disease rather than an accident was res judicata and moved for summary judgment. The motion was denied by the court. Segal v. Travelers Ins. Co., 94 F. Supp. 123 (D.D.C. 1950).

Whether the determination of an administrative agency is res judicata in a later judicial proceeding between the same parties and involving the same issues is a question which has caused considerable confusion in the courts.

The position of the Federal courts and some of the State courts is grounded on the reasoning that the administrative process and the judicial process are governed by different principles, fulfill different functions, operate in separate spheres, and often have completely different procedure. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). A determination of an administrative agency is not res judicata in another administrative proceeding, for such tribunals are sui generis and the history and experience of judicial proceedings should not be transplanted into the realm of administrative law. Churchill Tabernacle v. Federal Communications Comm., 160 F. 2d 244 (D.C. Cir. 1947). If a decision in an administrative proceeding is not res judicata in another administrative proceeding then, a fortiori, it should not be res judicata in a later judicial proceeding. See Hoage v. Terminal Refrigerating & Warehousing Co., 78 F. 2d 1009 (D.C. Cir. 1935). Further, it has been held that a rate-making order of an administrator is not res judicata in a later civil action involving the validity of such an order. State Corp. Comm. of Kansas v. Wichita Gas Co., 290 U.S. 561 (1934).

This view of administrative agency determinations has been upheld by Roscoe Pound in an article entitled Administrative Law and the Courts in which he says:

"Instead of a law which thinks of citizens and officials as equally subject to law, we are told of a public law which subordinates the citizen to the official and enables the latter to put claims of one citizen over those of another, not according to some general rule of law but according to his personal ideas for the time being."  
24 B.U.L. Rev. 201, 223 (1944).

The contrary view, and the view adopted by a majority of the State courts and a few Federal decisions, was expressed by Chief Justice Hughes in Crowell v. Benson, 285 U.S. 22 (1931). There he drew a distinction between determinations of fact by an administrative body within the purview of a particular act and determinations of fact that are fundamental or jurisdictional - that is, the existence of that fact is a condition precedent to the operation of the particular act. "There can be no doubt that the Act (Longshoreman's and Harbor Worker's Compensation Act) contemplates that, as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by

evidence and within the scope of his authority, shall be final.” *Id.* at 46.

As to questions of fact involving fundamental or jurisdictional issues, such questions are determinable de novo by the court. The court in such a case is not confined to the evidence taken and record made before the deputy commissioner. Chief Justice Hughes supports his contention that administrative determinations involving no jurisdictional issues should be final by saying, “To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.” *Id.* at 46. Cases following Crowell v. Benson, *supra*, are compiled in 122 A.L.R. 550 (1939).

It is obvious that the determination of the Court in the Segal case, *supra*, was correct, not so much because the principle of res judicata is inapplicable to administrative determinations, but because the cause of action arose out of an entirely distinct contract of insurance from that to which the determination of the deputy commissioner applied.

A more difficult question would have been presented to the court had the defendant raised the defense of collateral estoppel. “But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.” Cromwell v. County of Sac, 94 U.S. 351, 353 (1876).

The plaintiff in the Segal case, *supra*, failed to pursue the logical remedy by appealing the determination of the deputy commissioner, and instead elected to bring a separate cause of action at law, even though it involved the same factual issue and the same parties. He thereby placed himself in the position of accepting as conclusive the determination of the commissioner relative to the factual issues.

Where a judgment is rendered against a party and he fails to carry the case to a higher court, it has been held that the judgment is conclusive in subsequent controversies on different causes of action, as to the matters actually litigated and determined, even though the judgment was erroneous. Wors v. Tarlton, 95 S.W. 2d 1199 (1936); see Restatement, Judgments sec. 69 (e) (1942). The analogy seems clear.

Had the issue been properly presented to the court, the holding of Crowell v. Benson, *supra*, should have been applied. In these days when crowded dockets cause considerable inconvenience and delay to litigants who are seeking their “day in court,” it seems reasonable for the courts to deny a trial de novo to a party who, by failing to appeal a decision, has, in effect, acquiesced in its factual determinations. He should be bound by these established facts even though they may be determinative of his new cause of action. It is submitted that though the doctrine of res adjudicata should not be categorically applied to administrative determinations, a proper measure of discretion should be used by the courts, to deny to parties the right to relitigate factual matters properly established by an administrative body and not controverted by an appeal therefrom.

John M. Lothschuetz  
Stephen Opsasnick

**POLICY.** - Corbin D. Hughes, as administrator of the estate of Harold G. Hughes, brought an action against Glenn C. Fetter and the Farmer Mutual Automobile Insurance Co. in the Milwaukee, Wisconsin Circuit Court, basing his claim on the wrongful death statute of Illinois. All the parties, including the Insurance Co., were and are Wisconsin residents. The court dismissed the complaint and the Supreme Court of Wisconsin held that an action for death caused by a wrongful act in another state, though brought on the statute of that state, could not be maintained in Wisconsin. Wisconsin Statute 1949, sec. 331.03 provides for recovery for death by wrongful act when the act was committed in the state of Wisconsin. The court said that the words of the Wisconsin statute providing that such action shall be brought when the act occurred in Wisconsin were plain and excluded action where the act occurred in another state. Hughes v. Fetter et al., 257 Wis. 35, 42 N.W. 2d 452 (1950).

Statutes are to be construed strictly, but it is up to the courts to construe them to the ends of natural justice. The Wisconsin Statute, sec. 331.03 is an enactment of the principle of Lord Campbell's Act, and has been in existence in its present form in Wisconsin since 1857. Wisconsin Session Laws 1857, ch. 71, sec. 1. Prior to Hughes v. Fetter et al., supra, Wisconsin uniformly had enforced the wrongful death statute. Sheehan v. Lewis, 218 Wis. 588, 260 N.W. 633 (1935); Bernard v. Jennings, 209 Wis. 116, 244 N.W. 589 (1932); Bain v. Northern Pacific Railroad Co., 120 Wis. 412, 98 N.W. 241 (1904). The general rule is that where a wrongful death has occurred, the law of the place of the injury will be applied no matter where the action is brought or what jurisdiction the state has over the parties involved. 15 C.J.S. 862, Conflict of Laws, sec. 4 g (4), "Only two states, Illinois and Wisconsin, limit the jurisdiction of their respective courts by excluding consideration of actions for a death not caused within the state." Hughes v. Fetter et al., supra, Brief of Appellant, argued before the Supreme Court of the United States, March 1, 1951. The constitutional question involved in this case is whether a state may, without violating the full faith and credit clause, U.S. Const., Art. IV, sec. 1, and the due process clause, U.S. Const., Amend. XIV, forbid access to its courts for a wrongful death based upon the statute of another state, where the death occurred in that other state.

Subject to the Federal Constitution, states may limit the jurisdiction of their courts, the types of controversies and the parties who shall bring suit in their courts. St. Louis, Iron Mountain & S. Railroad Co. v. Taylor, 210 U.S. 281 (1908). The full faith and credit clause of the Constitution forbids any state from denying access to its courts. This clause ". . . like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nationwide application." Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943). In accord, Angel v. Bullington, 330 U.S. 183 (1947); Broderick v. Rosner, 294 U.S. 629 (1935). A court should not override its own state's rights or rights of its citizens if the foreign law would contravene the positive policy of the forum, but to defeat the plaintiff's right of action it must be made to appear that such right is against good morals or natural justice or that for some other reason enforcement of it would be prejudicial to the general interest of the citizen of the state of the forum. Rick v. Saginaw Bay Towing Co., 132 Mich. 237, 93 N.W. 632 (1903). Since it is not against public policy of a state just because the forum has no statute on the subject, it follows that it would not be against the public policy of the state



when that state itself gives a right of action for the wrongful act done. Where the law of the forum contains a statute similar to that which is sought to be enforced, such fact constitutes evidence that the enforcement of the right of action would not be contrary to the public policy of the forum. St. Louis etc. R. Co. v. Brown, 62 Ark. 254, 35 S.W. 225 (1896). Wisconsin has no public policy opposed to collection of damages for wrongful death, therefore no question of public policy in the ordinary sense is involved. Wisconsin's refusal to allow plaintiff to maintain this action is a refusal to enforce a transitory right or cause of action, and, as stated in Slater v. Mexican R. Co., 194 U.S. 120 (1904), it is a transitory right which follows the person.

The case of Loucks v. Standard Oil Co. of N.Y., 224 N.Y. 99, 120 N.E. 198 (1918) held that a right of action for wrongful death given by a sister state, where the death occurred, is a property right. To refuse the plaintiff the right to bring action in the Wisconsin Court is to leave him without a remedy and take away his property without due process of law. It is true that Wisconsin is not seeking to hide those who are offenders and escaping liability, but where death occurs in another state and the offender returns to Wisconsin, complainant cannot obtain jurisdiction over that offender. As long as he remains in Wisconsin he is free from liability which in all justice should be applied either by the Wisconsin Court or another. The right that plaintiff has must be protected; he must be helped to get what is his. It is a principle of every civilized law that vested rights shall be protected. Comity which is a favor, rather than a strict right, gives a discretionary power to the states but this discretion was not intended to extend to the courts whereby they can close their doors when the justice asked for does not violate their principles. Cuba R. Co. v. Crosby, 222 U.S. 473 (1912). If the cause of action is proper, comity will enforce rights no matter where they arise and without regard to whether they are of common law or statutory origin. Hall v. Industrial Commission, 165 Wis. 364, 162 N.W. 312 (1917).

The statute of Wisconsin has taken away a vested right of the plaintiff, and, in so doing, has violated the due process clause of the Constitution of the United States.

Carl J. Morano  
Anne Carlisle Rozier

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CONSTITUTIONAL LAW - ALIENS - DEPORTATION PROCEEDINGS - DECLARATORY JUDGMENTS. - In 1939, Peder Kristensen, a citizen of Denmark, was granted a temporary visitor's visa to attend the New York World's Fair. Being prevented from returning to his native land by the war, he applied for an exemption from military service under section 3 (a) of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. 303 (1940), as amended, 60 Stat. 341, 50 U.S.C. 301, et. seq. (1946). This section provides that any person "residing" in the United States within the meaning of the Act who makes application, shall thereafter be barred from becoming a citizen of the United States. In 1946, respondent requested a suspension of a deportation order under the Immigration Act of 1917, 39 Stat. 889, 8 U.S.C. 155 (1940). The sole ground for refusing to suspend the order was the fact that Kristensen was ineligible for naturalization, eligibility being a statutory prerequisite to the Attorney General's exercise of discretion to suspend deportation. Respondent sought a declaratory judgment to determine his status as to naturalization. The government contended that the Attorney

General's refusal to suspend deportation had administrative finality and therefore precluded judicial review except by habeas corpus. The respondent contended that since he had never been detained, the issues were the right of the alien to be heard and the finality of the decision of the immigration authorities. Respondent maintained that he was not a "resident" within the terms of the Selective Service Act of 1940, supra. Held: A declaratory judgment was the proper remedy for the respondent to pursue, and that Kristensen was not a "resident alien" within the meaning of the Selective Service Act and therefore did not forfeit his right to future naturalization. Kristensen v. McGrath, 340 U.S. 162 (1950).

It had been the ruling of the courts since the inception of immigration legislation that an administrative order for deportation is final if no issue of citizenship is involved. Kessler, District of Immigration and Naturalization v. Strecker, 307 U.S. 22 (1939). The seeking of a declaratory judgment by the respondent is a departure from the traditional remedy of habeas corpus after arrest for deportation. A writ of habeas corpus is the proper method of seeking relief when an alien has been placed in detention. Wong Yang Sung v. McGrath, 339 U.S. 33 (1949) and Fung Ho v. White, 259 U.S. 276 (1922). When there has been no arrest, however, the rights of the alien are in controversy and such an issue will give the federal courts jurisdiction within the terms of the Declaratory Judgments Act, 62 Stat. 964, 28 U.S.C. 2201 (1948), as amended, 63 Stat. 105, 28 U.S.C. Supp. 2201 (1949). In the case of Perkins v. Elg, 307 U.S. 325 (1938), the petitioner brought a bill for a declaratory decree to establish her status as an American citizen. The court held that this was an actual controversy offering a basis for a petition for a declaratory judgment. In Muskrat v. United States, 219 U.S. 346 (1910), the court held that federal courts only act on cases and controversies and do not give advisory opinions. Here there was an actual controversy between the alien and the immigration authorities over the legal right of the alien to be considered for suspension of deportation.

The court's holding that Kristensen was not a citizen within the meaning of the Selective Service Act of 1940, supra, was based on the fact that the respondent had been in this country on a temporary visitor's visa which had been extended because of the exigencies of the war. Kristensen, who was a non-declarant alien, was not classified as a resident neutral alien until May 16, 1942. The application for exemption from service was made on March 30, 1942. Until May 1942, therefore, respondent was in the same class as a newly arrived non-declarant alien. Since he was not a resident, any compliance with a law not applicable to him was void ab initio. Kristensen, therefore, was either an alien or a non-resident of the United States for the purpose of Selective Service and his request for an exemption could not operate as a future bar to naturalization.

The declaratory judgment is the correct procedure in this case. The proceeding is an implement of "preventive" justice rather than "curative" justice. The purpose of the declaratory judgment is to settle the disputes before there has been any overt or physical invasion of a party's rights. If Kristensen had been taken into custody, then habeas corpus proceedings would have been the only means of determining his status. In a situation of this nature, it is desirable that the court declare the rights of the parties and establish their legal status without the interference of the person's status quo.

This decision has set up a new approach that may be followed in the interpretation of the rights of the government and aliens under the pertinent sections of the Selective Service Acts of 1940 and 1948. Prior to this time,

the lower federal courts seemed to have favorably construed the Act in the interest of the government. The decisions of the courts in Petition of Moser, 182 F. 2d 734 (2d Cir. 1950), cert. granted, 340 U.S. 910 (1950) and Benzian v. Godwin, 168 F. 2d 952 (2d Cir. 1948) reveal this tendency. In the former case, the petitioner filed for exemption from military service under the Selective Service Act of 1940, supra, on the revised Form DD301 which was accompanied by a statement that such an application would not be a bar to naturalization. The court in the Benzian case, supra, denied the petitioner the right to a review of his status as a citizen as established by the local draft board. On the basis of the rule of the court in Kristensen v. McGrath, supra, it may be asserted with reasonable certainty that the petitions for naturalization in Petition of Moser and Benzian v. Godwin, supra, would be granted. The concurring opinion of Mr. Justice Jackson strongly indicates this liberal construction of the Act as being most desirable.

Mary A. Dolan  
John Wasnick

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CONSTITUTIONAL LAW - CIVIL LIBERTIES - ELECTIONS - STATE SUBVERSIVE ACTIVITIES ACT. - The validity of the Maryland Subversive Activities Act, popularly known as the "Ober Law", was recently tested in the Court of Appeals of Maryland. A writ of mandamus to compel the Secretary of State to accept certificates nominating certain candidates for state and federal offices without the filing by the candidates of affidavits that they are not engaged in subversive activities was denied in the lower court. On appeal, held: the Subversive Activities Act does not conflict with the Maryland Constitution, and that section of the Act requiring filing of an affidavit by a candidate for election that he is not engaged in subversive activities is operative as to candidates for state office but not as to candidates for federal office. Shub v. Simpson, 76 A. 2d 332 (Md. 1950).

Petitioners, who were candidates of the Progressive Party for the offices of Governor, of United States Senator, and of Representative in Congress, respectively, contend that the affidavit required by the Subversive Activities Act, Md. Code Art. 85A sec. 15 (1949), is an additional oath of office. They maintain that such oath is contrary to Article 37 of the Maryland Declaration of Rights, which provides that the Legislature shall not prescribe any oath of office other than the oath prescribed by the Maryland Constitution. They claim also that the Act as a whole abridges fundamental rights of freedom of speech, press and assembly; that it is vague and indefinite and therefore violates due process; that it is a bill of attainder; and that it attempts to establish guilt by association and should be stricken in its entirety.

In holding the Act applicable to candidates for state office, the decision was based upon the Legislature's inherent power to safeguard elections. The Court stated that Article 37 of the Maryland Declaration of Rights does not prohibit candidates for state office from being required to make affidavits as to their qualifications, citing previous Maryland cases in which affidavits as to qualifications for office had been upheld. Kenneweg v. Allegany County Commissioners, 102 Md. 119, 62 Atl. 249 (1905); Munsell v. Hennegan, 182 Md. 15, 31 A. 2d 640 (1943); Hennegan v. Geartner, 186 Md. 551, 47 A. 2d 393 (1946). Since Art. 15 sec. 11 of the Maryland Constitution, as amended in 1948, provides that no person who is a member of an organization that advocates the overthrow of the Government through force or violence shall be

eligible to hold office, it was reasoned that the affidavit required by the Subversive Activities Act is merely an affidavit as to qualification. The purpose of the affidavit is merely to implement the 1948 Constitutional amendment by requiring of candidates an oath to the effect that they possess the qualification for office prescribed by that amendment. The Constitutional amendment and the statute requiring candidates to file affidavits that they are not subversive must be construed together. The presumption in favor of the validity of a statute was relied upon. Since the Legislature felt the threat of a world Communist movement to be a sufficient basis of necessity for passage of the Act, it comes to the Court "encased in the armor wrought by prior legislative deliberation". Bridges v. California, 314 U.S. 252 (1941).

The Court avoided a detailed discussion of the Federal Constitutional issues involved, relying rather on three federal cases which dealt with the general problem of civil liberties, holding that loyalty oaths do not abridge the Constitutional guarantees of freedom of speech, press, and assembly. Dunne v. United States, 138 F. 2d 137 (8th Cir. 1943) and United States v. Dennis, 183 F. 2d 201 (2d Cir. 1950), cert. granted 340 U.S. 863, passing upon the Smith Act, 18 U.S.C. sec. 2385 (Supp. 1946); and American Communications Association v. Douds, 339 U.S. 382 (1950), which approved the oath required by the Taft-Hartley Act, 29 U.S.C. sec. 141 et seq. (Supp. 1946).

The statute was held inapplicable to candidates for Federal office because the qualifications for such office are prescribed by the Federal Constitution and judged by Congress. Article VI of the Constitution of the United States sets forth the oath to be taken by federal officers, and a state is not authorized to add qualifications to those prescribed by the Federal Constitution.

A recent decision of the New Jersey Supreme Court seems directly opposed to the decision here. In Imbrie v. Marsh, 3 N.J. 578, 71 A. 2d 352 (1950), a statutory loyalty oath as applied to candidates for public office was held unconstitutional because it added to the constitutional oaths for state officers, which the New Jersey Court held to be exclusive and beyond the power of the Legislature to impair, supplement or vary. The majority opinion in the instant case, however, distinguishes the Imbrie case, supra, on the ground that there is no constitutional provision in New Jersey similar to Art. 15, sec. 11 of the Maryland Constitution providing a loyalty qualification for the holding of public office.

This case is another landmark in the struggle between maintaining individual civil liberties on the one hand, and safeguarding our internal security against the threat of world Communism on the other. The courts today have a grave responsibility in interpreting the present mass of legislation aimed at restricting the activities and influence of those who advocate the overthrow of the government by force and violence, and whose primary allegiance is to a foreign power hostile to our way of life. While we must protect ourselves from the enemy within, there is danger that in doing so we will destroy the democratic ideals which we seek to preserve. Since we are faced with an emergency, it would seem that a certain amount of personal liberty must be temporarily sacrificed to secure permanently to our people the basic freedoms upon which this nation was founded, but we are proceeding upon a legislative road fraught with dangers, and great caution must be exercised lest we veer toward police state methods.

The Maryland Legislature, in 1948, passed an amendment to the Constitution of that state which declared ineligible for public office any member of a subversive organization. This was an emergency measure to take effect immediately and was part of the Maryland Constitution at the time the presently disputed Ober Act was enacted. In view of the 1948 amendment to the

Constitution, it would seem that the requirement of filing an anti-subversive affidavit on the part of all candidates for state office is not violative of the Maryland Constitution, but, rather, effectuates the purpose of the amendment.

Mary A. Dullea

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CONSTITUTIONAL LAW - EVIDENCE - FIFTH AMENDMENT - PRIVILEGED COMMUNICATIONS. - Petitioner refused to answer questions put to her by a federal grand jury concerning her affiliation with the Communist party of the state of Colorado. She invoked the privilege granted by the Fifth Amendment to the Federal Constitution. She was found guilty of contempt and sentenced to a year's imprisonment. The conviction was affirmed by the Circuit Court of Appeals for the Tenth Circuit. Blau v. United States, 180 F. 2d 103 (10th Cir. 1950). The Supreme Court of the United States reversed, holding that the petitioner had reason to fear criminal prosecution under the Smith Act, 18 U.S.C. sec. 2385 (Supp. 1946), and could, therefore, invoke the privilege against self-incrimination. Blau v. United States, 340 U.S. 159 (1950).

If a direct answer may tend to disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict the witness of any crime, he is not bound to answer it so as to furnish matter for that conviction. Under such circumstances a witness must himself judge what his answer must be; and if he say under oath that he cannot answer without accusing himself, he cannot be compelled to answer. United States v. Burr, 25 Fed. Cas. 38, No. 14,692e (C.C.D. Va. 1807). The meaning of the Fifth Amendment is not merely that a person shall not be compelled to be a witness against himself, but also that he shall not be compelled when acting as a witness in any investigation to give testimony which may tend to show that he himself has committed a crime. Counselman v. Hitchcock, 142 U.S. 547 (1892). A statutory enactment granting immunity must grant absolute immunity against future prosecution for the offense to which the questions relate. Ballman v. Fagin, 200 U.S. 186 (1906); Boyd v. United States, 116 U.S. 616 (1886).

Along with the Blau case, supra, another case must be considered. Irving Blau, husband of the petitioner in the first case, was also brought before the grand jury and was asked questions concerning his affiliations with the Communist party. He was also asked the whereabouts of his wife, who had evaded service of process and could not be found. He refused to answer the questions concerning his activities on the basis of the Fifth Amendment, and refused to answer the questions as to his wife's whereabouts on the basis of confidential communication between husband and wife. He, too, was held in contempt. The Supreme Court of the United States reversed the conviction on the basis of the first Blau case, supra. Blau v. United States, 340 U.S. 332 (1951).

It was also the opinion of the majority in the second Blau case, supra, that the husband was allowed to avail himself of the defense of privileged communications. All communications between husband and wife are presumptively confidential. Wofle v. United States, 291 U.S. 7 (1933). The government failed to overcome the presumption.

The common law rule against compelling a person to testify against himself is firmly rooted in American tradition. It is contained in the Federal Constitution and in all state constitutions, with the exceptions of Iowa and New Jersey. These provisions are a result of the Star Chamber and In-

quisitorial practices of the Middle Ages. Corwin, The Supreme Court's Construction of Self-Incrimination, 29 Mich. L. Rev. 191 (1930). The privilege to remain silent could be removed as a constitutional nuisance by narrowly construing the scope of the privilege, or by broadly construing the doctrine of waiver of the privilege. Since Lilburne's trial before the Star Chamber in 1637 we find judicial recognition of the maxim, "Nemo tenetur prodere (or accusare) seipsum." Nobody is bound to accuse himself. Professor Wigmore attributes the adoption of the Fifth Amendment to the great agitation in France against the inquisitorial features of the Ordinance of 1670, which supported compulsory self-incrimination. 4 Wigmore, Evidence sec. 225 (2d ed. 1923).

The Blau rule is an expression of the intent of the founding fathers to prevent that which we see expressed in Iron Curtain countries today. No matter how desirable it may be to apprehend those who would enslave us, we must be vigilant not to cast aside those standards of justice that have been a part of us for 175 years.

Joseph D. Cummings  
John J. C. O'Shea

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CONSTITUTIONAL LAW - INTERSTATE COMMERCE - LOCAL ORDINANCE - STANDARDS OF JUDICIAL REVIEW. - The petitioner, a processor of milk, came before the Supreme Court to determine the validity of a Madison, Wisconsin, ordinance prohibiting the sale of milk in that city unless said milk was pasteurized and bottled within five miles of the center of the city. The petitioner, an Illinois corporation, applied for and was refused a license to distribute milk in Madison, solely because its processing plants were more than five miles away.

It was contended that the ordinance was unconstitutional because it placed an undue burden on, and discriminated against, interstate commerce, but the Wisconsin Supreme Court upheld it on the ground that it promotes "convenient, economical and efficient plant inspection."

In reversing the case, the Supreme Court of the United States said that interstate commerce could not be burdened and discriminated against by the city, "even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve local interest are available . . . To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951).

By analogy to Brimmer v. Rebman, 138 U.S. 78 (1891), the Madison ordinance was clearly unconstitutional because it discriminates against interstate commerce. In the Brimmer case the Court declared invalid a Virginia statute which prohibited the sale of meat unless it came from animals slaughtered within one hundred miles of the point of sale.

"Undoubtedly a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws make discrim-

inations against the products and industries of some of the States in favor of the products and industries of its own or other states... Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the states, and therefore, void." Id at 82.

Why the U.S. Supreme Court chose to introduce the concept of "reasonable alternative" into its decision is not clear, particularly in view of the strong precedents which would have allowed the ordinance to be invalidated merely because it discriminated against interstate commerce.

In a strong dissent, Justice Black questions the propriety of the Court's decision, commenting that although the "reasonable alternative" concept has been applied to other questions, it has not been used to date to strike down local health laws. Dean Milk Co. v. Madison, supra at 357.

The determination of whether or not "reasonable alternatives" exist is an issue of fact. The Court has always been divided on the finality of findings of fact by state legislatures in enacting legislation. In Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), the Court reversed the Arizona Supreme Court on the grounds that the legislature made an unwise decision in a statute providing that trains should be limited in length for safety. The Court went to great lengths to set forth the facts as it saw them, and substituted its decision for that of the legislature. Similarly in Burns Baking Co. et al. v. Bryan, 264 U.S. 504 (1924), the Court invalidated a Nebraska statute because it was "not necessary for the protection of purchasers against imposition and fraud . . . and is not calculated to effectuate that purpose." It also stated that the act subjected the bakers and sellers of bread to "restrictions which are essentially unreasonable and arbitrary and is therefore repugnant to the 14th Amendment." Id. at 517. Great stress was laid by the court on evidence which opposed the application of the statute. The dissent of Justice Brandeis concluded that:

"To decide as a fact that the prohibition of excess weights 'is not necessary for the protection of the purchasers against imposition and fraud by short weights,' that it 'is not calculated to effectuate that purpose;' and that it 'subjects bakers and sellers of bread' to heavy burdens, is in my opinion an exercise of the powers of a super-legislature -- not the performance of the constitutional function of judicial review." Id at 534.

The contrary view is set forth in Powell v. Pennsylvania, 127 U.S. 678 (1888), where the Court upheld a statute prohibiting the sale of oleomargarine. Evidence was offered to show that oleomargarine was not dangerous and injurious to health, but rather a wholesome food fit for human consumption. Speaking for the majority, Justice Harlan said, "It is not a part of their (the courts) function to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, as they happen to approve or disapprove its determination of such questions." Id. at 685. The same problem has been discussed in Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926), (statute forbidding use of "shoddy" in manufacture of bedding); Jacobson v. Massachusetts, 197 U.S. 11 (1905), (statute requiring compulsory vaccination); Polk Co. et al. v. Glover, County Solicitor

et al., 305 U.S. 5 (1938), (statute requiring labelling of containers to indicate state of origin of fruit); Standard Oil Co. et al. v. City of Marysville et al., 279 U.S. 582 (1929), (statute requiring gasoline storage tanks to be at least three feet underground); and Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902), (statute forbidding the use of coloring in oleomargarine).

The important aspect of the Dean Milk Co. case is that the decision of the Supreme Court indicates, on its face, that even though it decides that a local ordinance is necessary and within the police power of the state, it may still be invalidated if the Court determines that some alternative regulatory measure directed toward the same end might be equally effective but less burdensome.

It is hoped that the use of the words "reasonable alternative" by the Supreme Court of the United States will not serve to establish a new standard for determining whether the local police power in the field of public health is being constitutionally exercised. This would be an unfortunate result. State and local governments have traditionally been allowed to pass laws for the health and safety of the people without undue interference from the courts. Inquiry into the validity of local health laws by the courts has been limited to whether they are unreasonable or discriminatory in their operation, and has not previously extended to whether more reasonable alternatives are available.

As the Wisconsin Supreme Court in its opinion in the Dean Milk Co. case, 257 Wisc. 308, 43 N.W. 2d 480, 483 (1950), emphatically stated, "A city like Madison, in the interests of public health is entitled to set up its own system of milk inspection, if it be a reasonable one. The city is not forced to rely upon inspection by some other governmental unit nor to submit to 'reciprocal inspection' unless some higher authority properly decrees it." The higher authority referred to is the State Legislature or Congress, not the courts.

Donald C. McGean

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**FEDERAL PROCEDURE - INTERPLEADER - LABOR DISPUTE - DIVERSITY OF CITIZENSHIP.** - Plaintiff is a Pennsylvania corporation. Defendant is an unincorporated association with headquarters in Camden, New Jersey but has many members in Pennsylvania. Defendant's local union is likewise an unincorporated association with headquarters in Chester, Pennsylvania with most of its members living in Pennsylvania. In February 1948, plaintiff and defendant entered into a collective bargaining agreement whereby plaintiff was to check off monthly union dues of its employee members and turn over the amount collected to the defendant's local union. In March 1949, most of the officers and members of the local union disaffiliated themselves from the defendant. The disaffiliated members and the loyal members each claimed the dues collected. In April 1949, the plaintiff filed an action of interpleader under the Act of June 25, 1948, 62 Stat. 931, 28 U.S.C. sec. 1335 (Supp. 1946) which provides in part that "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader . . . if, (1) Two or more adverse claimants, of diverse citizenship . . . are claiming or may claim to be entitled to such money or property." Plaintiff alleged that this was an action between two labor organizations within the meaning of sec. 301 of the Labor-Management Relations Act of June 23, 1947, 61 Stat. 156, 29 U.S.C. sec. 185 (Supp. 1946), which provides: "(a) Suits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations, may be brought in any District Court



of the United States having jurisdiction of the parties . . . without regard to the citizenship of the parties." Defendant and the loyal members of the local union were made plaintiffs-in-interpleader and the disaffiliated members were named defendants-in-interpleader. On motion by the plaintiffs-in-interpleader for a summary judgment the action was dismissed for lack of jurisdiction on the ground that there was no diversity of citizenship between the parties, and no federal question under sec. 185 (a) of the Labor-Management Relations Act, supra, since the contract involved was that of the local union's affiliation with the defendant and not the collective bargaining contract entered into by the plaintiff and the defendant. Sun Shipbuilding and Dry-Dock Co. v. Industrial Union of Marine and Shipbuilding Workers of America et al., 19 U.S.L. Week 2310 (E.D. Pa. Dec. 28, 1950). The court, citing Sperry Products, Inc. v. Association of American Railroads, 132 F.2d 408. (2d Cir. 1942); Levering and Garrigues Co. v. Morrin, 61 F.2d 115 (2d Cir. 1932); Williams v. United Brotherhood of Carpenters and Joiners of America, 81 F. Supp. 150 (N. D. Ohio 1948), held that an unincorporated association having no entity distinct from its members has no citizenship of its own and therefore no diversity existed in this case. Sec. 185 (a) of the Labor-Management Relations Act, supra, was held inapplicable on the basis of Snoots v. Vejlupek, 87 F. Supp. 503 (N.D. Ohio 1949) and Kriss v. White, 87 F. Supp. 734 (N.D. N.Y. 1949) in that it gives federal courts jurisdiction over suits for violations of collective bargaining contracts but not over suits for violation of any other type of contract into which a union might enter. Sun Shipbuilding and Dry-Dock Company v. Industrial Union of Marine and Shipbuilding Workers of America et al., supra.

This case represents an attempt by the plaintiff to circumvent the requirements of diversity of citizenship between the adverse claimants as set forth in sec. 1335, Interpleader Act, supra, by alleging that sec. 185 (a), Labor-Management Relations Act, supra, makes such diversity unnecessary.

This position is untenable because the two statutes are unrelated and can not be combined. That Congress did not intend that sec. 185 (a), Labor-Management Relations Act, supra, should be allowed to create an exception to the jurisdictional requirements of the Interpleader Act, supra, is evident from the legislative history of this section.

Prior to the Labor-Management Relations Act of June 23, 1947, supra, the laws of many states made it difficult to sue effectively and to recover a judgment against an unincorporated labor union. Wilson v. Airline Coal Co., 215 Iowa 855, 246 N.W. 753 (1933); Iron Molders' Union No. 125 v. Allis-Chalmers Co., 166 Fed. 45 (7th Cir. 1908). In some states it was necessary to serve all members before an action could be maintained. Since this was an almost impossible process, collective bargaining contracts were made enforceable in the federal courts. See 1 CCH Lab. Law Rep., Para. 3350.05.

The purpose of sec. 185 (a) Labor-Management Relations Act, supra, permitting actions for violations of contracts between an employer and a labor organization or between any such labor organizations to be brought to any district court without regard to diversity of citizenship was to protect interstate and foreign commerce by creating a new substantive liability actionable in federal courts for breach of a collective bargaining agreement in an industry affecting interstate or foreign commerce. Under this section a labor union can sue and be sued whether or not the law of the state of the labor organization's existence or state wherein the organization is doing business so provides. Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of U.S. and Canada, 182 F.2d 158 (9th Cir. 1950); Shirley-Herman Co. v. International Hod Carriers,

Building and Common Laborers Union of America, Local Union No. 210, 182 F. 2d 806 (2d Cir. 1950).

The constitutionality of this section has been upheld over the objection that it is an attempt to extend the jurisdiction of the federal courts beyond their constitutional limits and thereby provide a new forum for the enforcement of contracts theretofore enforceable only in the state courts. The theory is that this section is an exercise of the commerce power of Congress, i.e. Congress, having created a substantive right of management and labor to enforce a collective bargaining contract in an industry affecting interstate commerce in the exercise of its power under U.S. Const. Art. I, sec. 8, cl. 3, may also provide the procedure for enforcing that right by making voluntary labor organizations legal entities for the purpose of suit. Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of U.S. and Canada, *supra*; Wilson and Co. v. United Packinghouse Workers of America, 83 F. Supp. 162 (S.D. N.Y. 1949); Amazon Cotton Mill Co. v. Textile Workers Union, 167 F. 2d 183 (4th Cir. 1948); Colonial Hardwood Flooring Co. v. International Union United Furniture Workers of America et al, 76 F. Supp. 493 (D. Md. 1948); See Note 57 Yale L.J. 630 (1948).

If Congress had intended to give federal courts jurisdiction of an interpleader action based on a federal question without regard to diversity of citizenship it could have done so when the Interpleader Act, *supra*, was revised in 1948. Congress did not do so, however. The fact that the 1948 revision was enacted after the passage of sec. 185 (a), Labor-Management Relations Act, *supra*, is proof that diversity of citizenship remains a necessary requirement of an interpleader action and the presence of a federal question under sec. 185 (a), will not alter this requirement.

Daniel J. Flanagan

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**JURISDICTION - FEDERAL PROCEDURE - MULTIPLE CORPORATION - DIVERSITY OF CITIZENSHIP.** - Plaintiffs, citizens of New Jersey, brought suit in the Federal District Court of New Jersey against the defendant railroad. The railroad was incorporated in two states, New Jersey and New York. The District Court dismissed the suit for lack of diversity of citizenship. On appeal, it was held that the fact the defendant was a multiple corporation, incorporated in the same state of which the plaintiff was a citizen, did not defeat federal jurisdiction for want of diversity. Gavin v. Hudson and Manhattan R. Co., 185 F. 2d 104 (3d Cir. 1950).

"A complaint in an action brought in a federal district court for New York by citizens of that state against a railroad incorporated in New Jersey and also voluntarily incorporated in New York for injuries allegedly sustained because of negligence of the railroad would be dismissed for lack of requisite 'diversity of citizenship', notwithstanding that the accident occurred in New Jersey." Murphy v. Hudson and Manhattan R. Co., 45 F. Supp. 720 (E.D.N.Y. 1942). Where a plaintiff sues a corporation in his own state, and the corporation is chartered in that state, no diversity exists "notwithstanding the fact that the corporation is also incorporated in another state or states." Lucas v. New York Cent. R. Co., 88 F. Supp. 536, 537 (S.D.N.Y. 1950). Where the defendant railroad company voluntarily consolidated with other railroads, and thereby acquired citizenship in more than one state, one of the states being Illinois, an Illinois citizen could not maintain action against the defendant in the Federal District Court of Illinois on grounds of diversity of

citizenship. Starke v. N. Y., Chicago & St. Louis R. Co., 180 F. 2d 569 (7th Cir. 1950).

The majority rule is expressed by the cases cited above. It seems to make little difference where the locus delicti is, even though the cause of action is a transitory one. . .“(It) is difficult to see why the place of the accident should alter the situation. The cause of action is a transient one and, in any event, the issue is phrased in terms of citizenship, not place of the accident.” Murphy v. Hudson and Manhattan R. Co., *supra*, at 720. The court, in the principal case agrees, declaring: “We think it does not matter in determining the place where the plaintiff may sue whether he was hurt by the defendant in New York or New Jersey. It is perfectly obvious that there is only one operating group and its employees work just as fully for one corporation as the other. It is little short of absurd to say that the New York corporation commits the New York torts, if any, and the New Jersey corporation the torts in New Jersey, if any.” Gavin v. Hudson and Manhattan R. Co., *supra*, at 106.

“Suits by or against an association incorporated in two or more states may be brought by or against the association as a corporation of any of the incorporating states.” Restatement, Conflict of Laws sec. 207 (1934). But the Restatement expressly disclaims pronouncing on the question of removal of causes to federal courts. The court, in the principal case, does make that pronouncement. It looks to the fact that the plaintiff declared against the defendant as a New York corporation, not as a New Jersey corporation. It argues, and reasonably, that the defendant is as much a citizen of New York as of New Jersey. It points out that it is inequitable to deny the plaintiff access to the District Court of New Jersey when, having declared against the defendant as a New York corporation, the requisite diversity of citizenship exists. It relies on the case of Southern Railway Co. v. Allison, 190 U.S. 326 (1903), in which case it was held that where a foreign corporation, desiring to do business in the State of North Carolina, must comply with certain specified provisions in the statutes of that state, and on complying therewith will become a domestic corporation of North Carolina, such fact does not affect the character of the original corporation, and it does not become a citizen of North Carolina so far as to affect the jurisdiction of the Federal courts upon a question of diverse citizenship. But that case can be distinguished by the use of the words “and it does not become a citizen of North Carolina. . .” *Id.* at 330. In the instant case, it has, in fact, become a citizen of New York, which fact is not denied by the plaintiff, nor, indeed, by the Circuit Court of Appeals, Third Circuit.

Equity is on the side of the plaintiff in the Gavin case, *supra*. He has declared against the two-state corporation as a New York corporation. It is clearly a citizen of New York. Unfortunately, it is no less a citizen of New Jersey, in spite of the fact that it is not being sued as such. There is not, then, the requisite diversity of citizenship, and the United States District Court for the District of New Jersey was correct in dismissing the complaint for lack of jurisdiction. The Circuit Court of Appeals for the Third Circuit was in error.

James F. Carroll

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LEGAL ETHICS - BROTHERHOOD LEGAL AID PLAN - SOLICITATION. - Hildebrande was one of three attorneys recommended for discipline by the State Bar of California for participating in the Legal Aid Plan of the Brother-

hood of Railroad Trainmen, which, it was contended, involved practices equivalent to solicitation, fee-splitting, and the practice of law by unlicensed persons - all of which are forbidden by the Rules of Professional Conduct of the State Bar. The Brotherhood established the Legal Aid Department as a service to its members and their families, to assure them of the services of competent attorneys at low cost, to prosecute damage claims for industrial injuries against the railroad companies. Defendants were retained as regional counsel, by contract with the Brotherhood, to represent injured railroad men on claims against the railroad companies. Under this arrangement, a contingent fee of 19% was allowed the successful attorney, while 6% of the amount recovered was turned over to the Legal Aid Department to cover the purported "costs of administration and investigation." Held: The arrangement was repugnant to recognized standards of professional conduct. Attorneys could not possibly participate in the Brotherhood's Legal Aid Plan without violating the Rules of Professional Conduct. The proceeding, however, was dismissed without disciplinary action, to serve as a guide to members of the profession. Hildebrande v. State Bar, 225 P. 2d 508 (Cal. 1950).

The court based its decision on People v. Levy, 8 Cal. App. 2d 763, 50 P. 2d 509 (1935), pointing out that Hildebrande, et al., could not have performed their legal services for such a small contingent fee had they not been assured of a large volume of business through the solicitation of the Brotherhood. This satisfied the Court that such solicitation must have had its "origin in the minds of" defendants, and that they had also performed "overt acts calculated to bring about the employment solicited," thus meeting the test set forth in the cited case. In the mind of the court, there was no doubt that the defendants had been aware that their employment was being thus solicited. The decision referred to Rule 3 of the Rules of Professional Conduct, which denounces an attorney's acceptance of employment brought about by the "activities of . . . any association or corporation that, for compensation, controls, directs, or influences such employment."

Hildebrand v. State Bar, 18 Cal. 2d 816, 117 P. 2d 860 (1940), and Ryan v. Pennsylvania R. Co., 268 Ill. App. 364 (1932), cited by defendants as upholding the Brotherhood practices, were distinguished by the court as not having decided the questions here at issue; and it was further pointed out that the Ryan case, had been greatly restricted by In re O'Neill, 5 F. Supp. 465 (E.D.N.Y. 1933), in which an attorney had been censured for participating in the Brotherhood Plan. The Ryan case was decided on the theory that the contract - similar to the one in the principal case - was not contrary to public policy, because the Brotherhood was engaged in rendering an enlightened service to its members. The question of the propriety of the lawyer's conduct did not, therefore, enter into this decision. In In re O'Neill, supra, however, it was held that the attorney, the facts being similar, merited censure.

Cases of solicitation and fee-splitting fall into three classes. Often an unsuccessful attorney attempts to improve his competitive position by employing laymen to solicit clients and instigate lawsuits on a percentage basis. The courts are unanimous in condemning this practice. Utz v. State Bar, 21 Cal. 2d 100, 130 P. 2d 377 (1942); In re Long, 263 App. Div. 658, 34 N.Y.S. 2d 261 (1942); In re McCullough, 97 Utah 533, 95 P. 2d 13 (1939). "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility." Canons of Professional Ethics, No. 34. "It is unprofessional to endeavor to procure professional employment through touters of any kind." Ibid, No. 27.

Laymen, individually or collectively, may drift from the business of collecting bad debts and settling tort claims privately, into the more profitable field of litigating the claims on a contingent basis. The fact that such "claims bureaus" have employed attorneys to prepare the necessary legal papers and appear in court does not divest such schemes of their fundamentally illicit character. In re Tuthill, 256 App. Div. 539, 10 N.Y.S. 2d 643 (1939); United Radio, Inc. v. Cotton, 61 Ohio App. 247, 22 N.E. 2d 532 (1938); Hightower v. Detroit Edison Co., 262 Mich. 1, 247 N.W. 97 (1933). While a lay person can legally be appointed agent to select an attorney for a third person, this is not the same as for a stranger, acting as a collection agent, to solicit claims and turn over to a lawyer those which he cannot collect. Midland Credit Ass'n v. Donnelley, 219 Ill. App. 271, 277 (1920). And the Court refused to countenance a similar arrangement, in which the claims agent, having attempted unsuccessfully to collect the claim without litigation, gave the creditor an opportunity to designate an attorney; but if (as was usually the case) he failed to do so, the claims agent selected a lawyer, and each received a percentage of any amount recovered. State v. Dudley, 340 Mo. 852, 102 S.W. 2d 895 (1937). Insurance and banking firms are also likely to become involved in the practice of law, at first as a service to customers, and later as a lucrative sideline. It has been held that a liability insurance company has a vested interest in the claims of its insurees, and thus may justly defend such claims. Liberty Mut. Ins. Co. v. Jones, 344 Mo. 932, 130 S.W. 2d 945 (1939). So-called "automobile associations," offering such insurance may retain an attorney to represent members in lawsuits involving the interests of the membership as a whole; but to set up a "Department of Claims and Adjustment" to prepare legal papers and give legal advice to subscribers was held to constitute the practice of law by unlicensed persons. American Automobile Ass'n v. Merrick, 117 F. 2d 23 (D.C. Cir. 1940). The court found nothing improper, however, in a lawyer's conducting a business offering various services to motorists, including the payment of counsel to represent them in suits arising out of their operation of motor vehicles, so long as he kept his business activities distinct from his law practice; and distribution of an information booklet containing, inter alia, a list of recommended lawyers in each town, was held not to constitute solicitation inasmuch as members were free to select their own counsel. In re Thibodeau, 295 Mass. 374, 3 N.E. 2d 749 (1936). An insurance company however, undertaking to furnish counsel and pay court costs for physicians accused of malpractice, but not to pay the amount of the adverse judgment, if any, was held to be a corporation practicing law, in violation of a statute. State ex rel Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 76 N.E. 567 (1905).

A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it; and a bank that conducted court proceedings under cover of the names of licensed attorneys who were its own salaried employees, and appropriated to its own use the fees was held to have engaged in the unauthorized practice of law. People v. Peoples Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931). Likewise, a banking corporation that employed a lawyer as vice-president at a fixed salary, continuing the practice of law along with his banking duties and turning over all his fees to the bank was held in violation of the statute which forbids a corporation to practice law. In re Otterness, 118 Minn. 254, 232 N.W. 318 (1930).

The principal case falls into a most difficult category: the furnishing of legal services by a non-profit association or corporation, for the benefit of its members. Generally, the furnishing of such services amounts to the practice of law, which is confined to duly licensed, natural persons. See

Note, 125 A.L.R. 1178 (1940). There is a conflict in the matter of public policy. Some contend that to outlaw such services would deprive. . . "the public of the only cheap and efficient legal remedy available in many classes of cases," and defeat the essential constitutional right to counsel. Weihofen, the Practice of Law by Non-Pecuniary Corporations, 2 U. Chi. L. Rev. 119, 125 (1934). In view of the fact that the bar associations generally sanction the practice of law by "Legal Aid" bureaus under their own auspices, the frequent assertion that an artificial entity cannot practice law, because it "cannot pass a bar examination," would seem to be specious. In a decision severely criticized by Weihofen, supra, however, an association of taxpayers organized to fight unjust and corrupt tax conditions was held in contempt of court for furnishing counsel to prosecute the claims of several of its members in this connection. People ex rel Courtney v. Assn. of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933).

Others would agree with the majority holding in the subject case that the worthiness of the enterprise does not obscure the issue of the violation of professional standards in participating in the basic plan.

It is noted by Weihofen, supra, that English labor unions are generally permitted to provide counsel for their members in suits connected with their employment. In this country, the decisions seem to turn on the propriety of the attorney's accepting such cases. Where a union had solicited clients for an attorney who not only shared his fee with the union, but in his contracts with the clients included provisions for "donations" to the union, the attorney was suspended. In re Claiborne, 119 F. 2d 647 (1st Cir. 1941).

On the other hand, it was held that an officer of the International Longshoremen's Association, who visited an injured member and arranged for an attorney to represent him (there being no financial consideration between the officer and the attorney) had merely performed his duty as a walking delegate. In re Seidman, 228 App. Div. 515, 240 N.Y.S. 592 (1930). And where an employees' group who had retained an attorney to represent them in prosecuting claims against their employer, told him that another employee was a member of the group and also wished to be represented, his letter to her did not constitute solicitation. In re Mason, 203 S.W. 2d 750 (Mo. 1947).

"A lawyer may accept employment from any organization . . . to render legal services in any matter in which the organization, as an entity is interested, but this employment should not include the rendering of legal services to the members . . . in respect to their individual affairs." Canons of Professional Ethics of the American Bar Association, No. 35.

There would appear to be no doubt that arrangements such as that under which Hildebrande was employed are illegal and unethical. The implications of this decision remain to be determined. Broadly interpreted, it would seem to prohibit any assistance whatsoever on the part of the unions to members wishing to prosecute individual claims against their employers. This would seem to be the purport of the Courtney decision, supra, and of sec. 35 of the Canons of Professional Ethics. It is not unlikely, however, that a middle course will be taken, permitting some assistance by the unions, as in the Seidman and Mason cases, supra, but permitting the client free choice of attorneys and eliminating any practice partaking of the nature of fee-splitting. The Hildebrand case, supra, reasserts the paramount importance of maintaining an upright and self-controlled Bar, without which even the most enlightened plan of wholesale legal services must fail.

Della K. McKnew

**TORTS - ACTIONS BETWEEN PARENT AND CHILD - IMMUNITY OF PARENTS TO SUIT - MALICIOUS TORT.** - The Court of Appeals of Maryland has taken a unanimous stand in favor of permitting a five year old illegitimate daughter to bring suit against her father's estate for personal injuries caused by the atrocious acts committed by her father in her presence. Mahnke v. Moore, 77 A. 2d 923 (Md. 1951). These acts consisted of the father's shooting the child's mother in her presence, keeping the child with the dead body for six days, and then himself committing suicide before her. The gory spectacle resulted in shock, mental anguish, and permanent nervous and physical injuries to the child.

The problem of parental immunity from suit has arisen in the decided cases on two tort grounds - negligent and willful acts. The early cases made no distinction in applying a rule of absolute immunity, however.

Since 1891, and the historic decision of the Mississippi Supreme Court in Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891), in which a minor child was denied the right to sue her mother for false imprisonment by maliciously confining her in an insane asylum, it has been the weight of authority in this country that a minor child can not sue its parent in any kind of a tort action. The court based its decision, not on precedent, but on public policy. Indeed there was no precedent for the decision in either English or American decisions. Nevertheless Hewellette v. George, *supra*, became the guidepost for most American decisions on the subject for forty years. The extreme limit seems to have been reached in Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905), when the Supreme Court of Washington held that a fifteen year old unemancipated daughter could not sue her father for ravishing her, though he was sentenced to the penitentiary for the crime. The few cases which were decided contra involved suits by children against persons standing in loco parentis to them, though the courts treated them as parents and allowed suits to be brought by the children. Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903).

What were the fundamental reasons adopted by these courts in denying the child civil rights against its parent? Two were substantial - upholding of parental authority, and promoting family peace. Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925). Others were of little weight: depleting the family purse for the benefit of one child and to the detriment of others, Roller v. Roller, *supra*; danger of fraud in prosecution of stale claims after the child came of age, Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); the possibility that the father as next of kin might reacquire the damages paid should the child predecease him, Roller v. Roller, *supra*; and an analogy to husband versus wife suits, allowance of which required statutory change not made in regard to parent and child, Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929). Most of the opinions eulogized the home and family life. In the cases dealing with parental acts done in good faith, though negligent or even unreasonable, the eulogies were well taken. In cases like Roller v. Roller, *supra*, where the daughter was ravished and the father was sentenced to the penitentiary for the crime, the eulogy seemed in bad taste.

Insurance played a significant part in the problem of immunity, particularly after the advent of automobile liability insurance. Where the child sued to recover for personal injuries received through the parent's negligent operation of a car, and the parent was covered by liability insurance, the reasons for the rule lost their forcefulness. The family peace, purse, or discipline would not be disrupted by the suit when the insurance company must pay the judgment. A rule without reason should logically lose its vitality. Yet the

majority of the cases on point blindly followed the Hewellette case, supra and its rule of absolute immunity. Owens v. Auto Mut. Indemnity Co. et al., 235 Ala. 9, 177 So. 133 (1937).

The first decisive modification of the rule of absolute immunity came in 1930 when the Supreme Court of New Hampshire in Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930), allowed a son, hired by his father, to sue him for negligence in maintenance of the working premises. See Note, 71 A.L.R. 1071 (1950). The father was covered by insurance. This case strongly criticized the rule of absolute immunity when applied to situations of negligence when insurance bore the loss, and to willful tortious acts. However, the son in this case was emancipated since he occupied a master-servant relationship to his father, so the case is not four square authority for allowing a minor unemancipated child to sue his parent, although it contained strong dicta to that effect.

The question in its pristine form was presented to the Supreme Court of Oregon in 1950 by the case of Cowgill v. Boock, 218 P. 2d 445 (Ore. 1950). The father, in a drunken stupor, forced his son to get into his car and insisted on driving himself. Both were found dead in the crashed car. The administrator of the child's estate sued the administrator of the father's estate under a Death Statute which allowed the action to be brought if one could have been brought while deceased was alive. The issue concerned the nonliability of a parent for "willful misconduct" toward his child. An evenly divided court - three judges for affirming the lower court's judgment for the child, and three vigorously dissenting, decided, "After a careful consideration of the authorities, we think the general rule - so well established by the authorities - should be modified to allow an unemancipated minor child to maintain an action for damages against his parent for a willful or malicious personal tort." Id at 453. Justice Rossman, in a concurring opinion pointed out that though judges, corporations, and Congressmen enjoy immunity for certain acts, it is not an absolute immunity. When they act outside the sphere to which the immunity is properly confined, the immunity ceases. No reason could be seen for extending an absolute immunity to another class, parents. When they act outside their role as parents they should likewise become liable to those harmed by their acts. A succinct point made by the court was, "The courts universally hold that an unemancipated son has a right of action against his father for misappropriation of the son's property entrusted to the father. To reverse the judgment in this action, in the light of the facts, would be placing 'property rights' over human rights." Id at 456. The two dissenting opinions, in which a third judge joined, reviewed all the arguments presented for absolute immunity. Justice Brand felt the majority was adopting a nebulous-middle position that would only confound court and jury. Id at 457. Justice Lusk indicated that he might go along with the majority if the conduct of the father had been malicious, but objected to the decision when no malice was evidenced. Id at 458.

From these two recent cases of Mahnke v. Moore, supra, and Cowgill v. Boock, supra, it would seem that substantial inroads have been made into the rule of absolute immunity. The Cowgill case would allow an action for gross negligence; the Mahnke case, an action for a malicious tort. These modifications of a rule, which is in the main salutary, bring it more into accord with what seems to be fundamentally just. No one would advocate complete abandonment of the rule. Since society casts upon the parents the duty of properly raising their children, it is sound public policy to extend an immunity to parents for parental acts done in good faith and in performance of their duty. The natural love and affection of a parent is ordinarily a



sufficient safeguard to the child. But when it is not, when the parent acts as no normal parent would, he should not be able to draw about him the cloak of an immunity that was not created for non-parental acts. The reason for the rule of maintaining family peace and discipline vanishes when an act is done for which the criminal law of our land will imprison the parent or the juvenile courts take the child from his custody. The family peace, even the family, is already disrupted. A civil suit by the child should no longer be barred. He should have the same rights as any other injured person to a remedy in our courts.

Even in negligence cases, where the parent acts in good faith, the rule should not apply when an insurance company has been paid by the parent to assume his liability for negligent acts. Otherwise the insurance company is given a gratuity, while the child forfeits rights accorded to any one else, with no resultant benefit to the parents for whom the rule was established. The parents are duty bound to care for the injured child, and so the law in the form of a favor should not force upon them an empty immunity in lieu of compensation. The argument that the wrongdoer benefits by his own wrong should not outweigh the fact that others also benefit - the injured child, and the other innocent members of the family. In view of the fact that other immunities of the law can be waived by those for whom created, it would not be unreasonable to permit the parent to waive his immunity from suit in these instances.

It is worthy of comment that the court in Mahnke v. Moore, *supra*, treated the father as if a legitimate one. The court then proceeded to an opinion establishing a new precedent in tort law. But, at the same time, it ignored a problem present in the case without the necessity for an assumption of legitimacy, and that is - does an illegitimate father have any immunity from suit by his child? On the meagre authorities available, it is doubtful that he does. "It is universally recognized principle of common law that the father of a bastard child has no parental power or authority over his illegitimate offspring." Timmons v. Lacy, 30 Tex. 116, 135 (1867). "According to the principles of the common law, an illegitimate child is filius nullius, and can have no father known to the law." Brewer v. Blougher, 14 Pet. 178, 198 (U.S. 1840). The mother, rather than the father, is generally entitled to the custody, care and government of the illegitimate child. Young v. State, 53 Ind. 536 (1876). In Maryland, a statute permits inheritance by the illegitimate child only through the mother. Md. Code sec. 7, Art. 46 (Flack 1939). Since the law generally accords to the illegitimate father no authority over or custody of the child, it would seem a strange policy to allow him immunity at the suit of the child. There is surely lacking the argument for immunity of maintenance of the parental authority and preservation of the family peace. The fact that in the Mahnke case, *supra* the father had for several years lived with the child and her mother as a family might have borne some influence with the court to the contrary. The only case found touching on the problem was Garcia v. Fantauzzi, 20 F. 2d 524 (1st Cir. 1927). In that case an illegitimate child sued her father for fraudulent avoidance of the father's statutory duty to acknowledge, support and educate and was decided in accord with Puerto Rico's laws regarding illegitimates. However, dicta in the case, *id* at 528, wherein the court comments on the fact that the defendant father did not claim any immunity as a parent, indicates that such a defense would have been for naught in the case of this illegitimate child.

Isabelle R. Cappello

**TORTS - DYNAMITE BLASTING - ABSOLUTE LIABILITY - ALLEGATION OF NEGLIGENCE.** - The plaintiffs instituted suit for property damages caused by vibration and concussions from defendant company's blasting operations on an adjacent highway construction project.

The declaration averred that it was defendant's duty to so carefully do the blasting that plaintiff's property would not be damaged by explosions and vibrations, and that defendant negligently blasted with excessive amounts of explosives causing vibrations and concussions resulting in severe damage to plaintiffs' property. Defendant demurred specially claiming that the declaration did not state a cause of action because plaintiffs failed to allege specific acts of negligence.

Held: The declaration failed to state a cause of action under the rules of negligence pleading in the State of Maine where fault is a requisite to liability and where the doctrine of absolute liability in blasting operations is not adopted. Reynolds et al v. W.H. Hinman Co., 75 A. 2d 802 (Me. 1950).

"In the so-called 'blasting cases' an absolute liability, without regard to fault, has uniformly been imposed by the American courts wherever there has been an actual invasion of property by rocks or debris." Exner et ux v. Sherman Power Const. Co., 54 F. 2d 510, 513 (2d Cir. 1931). This rule of absolute liability for direct injury from blasting applies to both property and person. It is applied to property in Asheville Const. Co. et al v. Southern Ry., 19 F. 2d 32, 34 (4th Cir. 1927). "Where one, in the carrying on of blasting operations, throws rocks or debris on the property of another, he is liable for damage done, on the principle that he is guilty of trespass, and quite irrespective of the question of his negligence." Its application to the person is found in Sullivan v. Dunham et al, 54 N.Y.S. 962, 55 N.E. 923 (1900) where a young lady, lawfully on a highway, was killed by a tree section hurled more than 400 feet by a blast. In this case the court permitted recovery without proof of negligence.

But there is a conflict of judicial opinion on the question of liability for damage by concussion and vibration from blasting. Some jurisdictions impose liability irrespective of negligence while others impose liability only in the case of negligence.

The rule imposing liability irrespective of negligence finds expression in Louden v. City of Cincinnati, 90 Ohio St. 144, 106 N.E. 970 (1914), similar in facts to the instant case, where the court held that blasting on one's property, though lawful and permissible, must be accompanied by absolute liability for injuries to adjacent property because of the natural and probable consequences of such operations. Therein the court pointed out that it was unable to distinguish between injury caused by direct physical impact or by concussion through the earth or air by the same explosion. In Brown v. L.S. Lunder Const. Co., 240 Wis. 122, 2 N.W. 2d 859 (1942) the court followed the majority view sustaining this rule of absolute liability without proof of negligence irrespective of whether damages were caused by actual invasion or concussion and vibration. Some jurisdictions consider blasting an ultra-hazardous activity and hold the person so blasting to an absolute liability for damages resulting from concussion, irrespective of negligence. This is the view urged by the Restatement, Torts sec. 519 (1938), and followed in Federoff et al v. Harrison Const. Co., 362 Pa. 181, 66 A. 2d 817 (1949).

The rule imposing liability only in case of negligence finds support in a minority of jurisdictions. In Madsen v. East Jordan Irr. Co., 101 Utah 552, 125 P. 2d 794, 795 (1942) the court stated, "The minority rule, led by New York, holds that negligence must be alleged in concussion cases. These

jurisdictions do not concede liability in blasting cases where damage is caused by shock or air vibrations rather than the hurling of rock, earth, or debris." The leading case of Booth v. Rome, W & O R.R., 140 N.Y. 267, 35 N.E. 592 (1893), cited in Fagan v. Pathe Industries, 86 N.Y.S. 2d 859, 863 (1949), announces the New York rule, "In blasting cases, it is well established that damage to nearby property resulting from vibration alone is not enough to create liability, unless the blasting has been negligently performed. . ." The following cases are in accord with this rule: O'Regan v. Verrochi, 325 Mass. 391, 90 N.E. 2d 671 (1950); Crain v. West Texas Utilities Co., 218 S.W. 2d 512 (Tex. 1949); Williams v. Codell Const. Co., 253 Ky. 166, 69 S.W. 2d 20 (1934).

In the principal case the court rejected the rule of absolute liability as a "rule of hardship which if used would necessitate many exceptions"; the court follows the minority rule that fault is a requisite for liability in concussion cases. Booth v. Rome, W & O R.R., *supra*. Under this view negligence must be alleged and proved. Crain v. West Texas Utilities Co., *supra*.

Absolute liability should attach in both situations. There is no reason for imposing different liability for results of an explosion, whether caused by concussion and vibration or by actual invasion of property by rocks and debris. In Britton v. Harrison Const. Co., 87 F. Supp. 405, 407, (S.D. W. Va. 1948) the court stated, "In both cases the property is damaged by physical force coming upon it. Whether such force is visible or invisible, or whether it causes the damage by smashing or by shaking is of no consequence." In Brown v. Lunder Const. Co., *supra*, at 861, it was stated, "There is really as much a physical invasion of property in one case as there is in the other; and the fact that the explosion causes stones or other debris to be thrown upon the land in one case and in the other operates by vibrations or concussions through the earth and air, is held to be immaterial."

In blasting cases, a strict application of the maxim, "Sic utere tuo ut alienum non laedas", should be followed. In Britton v. Harrison Const. Co., *supra* at 408, which supports the majority, the court concluded thus: "The use of dynamite in blasting is a well-recognized practice, but the injurious results often occasioned thereby are equally well known. Any person who uses it in such manner as to cause damage to his neighbor must be held absolutely liable therefor." This is the view especially applicable to present day conditions, when construction and rebuilding are done on a large scale and in overpopulated areas. The minority of jurisdictions, and the principal case, do not hold to the sounder view.

William B. Kamenjar  
Dominic F. Zarella

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TORTS - PROFITABLE INSTITUTIONS - RESPONDEAT SUPERIOR - EMPLOYEE'S NEGLIGENCE. - Plaintiff suffered severe burns because of the placing of an electric plate upon her body in a negligent manner by a nurse. The nurse was employed by the defendant hospital and did not have a license as a nurse, but had had some training. The patient was being prepared for an operation and it was ascertained from the facts that the operating surgeon relied on the nurses furnished by the defendant, to have the patients fully prepared before he entered the operating room. The hospital is a private hospital, operated for profit. The jury found: (1) the injuries were caused by the electric plate; (2) the plate was improperly placed against the body of the plaintiff; and (3) the doctor who performed the operation was not re-

quired to supervise the activities of the nurse in preparing the plaintiff for the operation. The trial court awarded damages to the plaintiff. This decision was reversed by the appellate court, which said that the preparation was a part of the operation which was under the control of the surgeon, thereby placing no responsibility on the defendant hospital and, further, that the defendant hired the nurse to furnish services to the plaintiff and did not undertake to furnish these services itself. Bakal v. University Heights Sanatorium, 101 N.Y.S. 2d 385 (1950).

It has been definitely settled that a hospital is not liable for the negligent acts of a private nurse, hired by the patient, even though she works within the hospital and uses the facilities of the hospital. Kamps v. Crown Heights Hospital, 277 N.Y. 602, 14 N.E. 2d 184 (1938). This rule does not apply in the Bakal case, supra, because the negligent nurse was not hired by the plaintiff, but was hired by the defendant hospital as its regular and permanent employee.

It is also settled law that a hospital is not liable for the torts of nurses, committed in the rendition of medical services in conjunction with and under the supervision of an independent doctor practicing within the hospital. Steinert v. Brunswick Home, 172 Misc. 787, 16 N.Y.S. 2d 83 (1939), affirmed 259 App. Div. 1018, 20 N.Y.S. 2d 459 (1940). Randolph v. Oklahoma City General Hospital, 180 Okla. 513, 71 P. 2d 607 (1937). The nurse, in the principal case, was not under the control of the operating surgeon and was designated by the supervisory nurse to perform the duties which, when negligently undertaken, resulted in the harm to the plaintiff.

The jury determined that the surgeon owed no duty of supervision in the placing of the electric plate which was the cause of the injury complained of. Whether the nurse is a servant of the hospital or of the surgeon is a question of fact for the jury. Cavero v. Franklin Hospital, 214 P. 2d 854 (Cal. App. 1950), Housman v. Waterhouse, 191 App. Div. 850, 182 N.Y. Supp. 249 (1st Dep't. 1920).

Questions of fact in an action at law are to be determined by the court of original jurisdiction and not by the appellate court. Housman v. Waterhouse, supra; Champlin Refining Co. v. Gasoline Products Co., 29 F. 2d 331 (1st Cir. 1928).

What the nurse did was within the scope of her employment and was a part of a service for which the plaintiff was paying the defendant. The liability of the defendant in this case should rest on the well established doctrine of respondeat superior. Post v. Crown Heights Hospital, 173 Misc. 250, 17 N.Y.S. 2d 409 (Sup. Ct. 1940). When a doctor has no supervision over the actions of a nurse, it is implied that the nurse is under the control of the hospital, rendering it liable for her torts. Danville Community Hospital v. Thompson, 186 Va. 746, 43 S.E. 2d 882 (1947).

The court, in reversing, reasoned that the hospital procured the nurse to furnish services to the plaintiff, and did not undertake to render these services itself, and that it was, thereby, freed from liability for the tort of the nurse. The profits of the hospital are realized through the selling of these services to the public. Public policy demands that persons entering these institutions be secure in the feeling that they will be protected from the negligence of hospital employees. President and Directors of Georgetown College v. Hughes, 130 F. 2d 810 (D.C. Cir. 1942). Extending the argument of the court in the principal case to an analogous case of a negligent taxicab driver, it could well be argued that, under the rule propounded therein, the cab company would not be liable for the tort of the driver because it hired the driver to render the services, and did not undertake to render them itself.

The decision in the Bakal case, supra, definitely tends to destroy the doctrine of respondeat superior, and is, therefore, unsound.

John H. Bolgiano

**TRADE REGULATIONS - ROBINSON-PATMAN AMENDMENT - PRICE DISCRIMINATION - GOOD FAITH.** - A petition was made to the Supreme Court of the United States, praying a reversal of the affirmation by an appellate judicial court of the Federal Trade Commission's "cease and desist" order under sec. 2(b) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. sec. 13 (a,b) (1936). The Supreme Court reversed and the case was remanded. Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 (1951).

The petitioner, Standard Oil Co., was selling gasoline, discriminating in price among its "jobber" customers. The petitioner made this price discrimination in order to meet the lawful price reduction of its competitor, and thereby to retain the favored "jobber" customers, who otherwise would have purchased their gasoline from the petitioner's competitor.

The commission found that this discrimination was destroying, injuring, and preventing competition between the favored "jobber" and retail dealers in petitioner's gasoline and other major brands of gasoline and cited as authority to issue its "cease and desist" order, the Clayton Act, supra, as amended by sec. 13 (a) of the Robinson-Patman Act, supra, which provides in substance that it is unlawful to discriminate in price between different purchasers where the effect of such discrimination is to destroy, injure, or prevent competition.

The petitioner's defense was, in effect, as follows: that the price of discrimination was made in good faith to meet the lower price of a competitor and thereby to enable it to retain its "jobber" customers, which it would have otherwise lost. It cited as authority for its defense sec. 13 (b) of the Robinson-Patman Act, supra, which provides that once the prima facie case of price discrimination is established, nothing in the Act should prevent the seller's rebutting the prima facie case by showing good faith to meet a lawful equally low price of a competitor.

The commission rejected the petitioner's evidence of good faith as being immaterial, because the discrimination injured, destroyed, and prevented competition. The commission conceded that prior to the amendment of the Clayton Act, supra, proof of good faith would have been an absolute defense. Sugar Institute, Inc. et al. v. United States, 297 U.S. 553 (1936); American Can Co. v. Lodoga Canning Co., 44 F. 2d 763 (7th Cir. 1930), cert. denied 282 U.S. 899 (1931).

The Circuit Court of Appeals, Seventh Circuit, affirmed the determination of the commission. Standard Oil Co. v. Federal Trade Commission, 173 F. 2d 210 (7th Cir. 1949).

The question presented to the Supreme Court was: Is the proof of good faith, valid under the Clayton Act, supra, rendered invalid by the Robinson-Patman Amendment, supra? The Supreme Court decided that the amendment did not render proof of good faith immaterial. The Court held, in effect, that price differential made in good faith to meet a lawful and equally low price of a competitor is a complete defense to a charge of unlawful price discrimination. Mr. Justice Reed dissented.

The majority opinion stated that Congress did not intend to abolish competition by the amendment or to curtail it so that a seller would be defense-

less against a price change of a competitor. This decision establishes that evidence proving good faith in meeting the price reduction of a competitor is relevant, even in the face of affirmative proof that the effect of the discrimination is to injure, destroy, and prevent competition. The Court pointed out that in both Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726 (1945), and Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945), under sec. 13 (b) of the Robinson-Patman Amendment, evidence in support of the defense to meet in good faith an equally low price of a competitor was reviewed at length. The defense in those cases failed only because there was insufficient proof. Alluding to the Clayton Act, as well as to the Robinson-Patman Amendment, the Circuit Court of Appeals, Seventh Circuit, in A.E. Staley Mfg. Co. v. Federal Trade Commission, 135 F. 2d 453, 455 (7th Cir. 1943) said, "Congress was dealing with competition, which it sought to protect, and monopolies which it sought to prevent."

Discussions of the problems arising under this type of legislation, and its effects, are found in Clark, Toward A Concept of Workable Competition, 30 Am. Econ. Rev. 241 (1940), and in Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289 (1947). As to the question of materiality, see Willoughby v. Jamison, 103 F. 2d 821, 823 (8th Cir. 1939), in which the Court said, "Facts which are material must be determined by the nature of the right or liability asserted."

The commission interpreted the Act as to remove the good faith defense whenever there is or might be injury to competition resulting from a price discrimination. They excluded the evidence as immaterial because the discrimination resulted in injury to competition at a lower level, which was, in fact, beyond the petitioner's control. His "jobber" customers were at liberty to sell at the prevailing wholesale price or at a lesser figure. Some chose to sell at a lesser price, which raised the allegation of injury.

To adopt the commission's interpretation of the Robinson-Patman Act, however, would render the proviso of sec. 13(b) of that Act so inapplicable as to make it meaningless. In General Shale Products Corp. v. Struck Construction Co., 37 F. Supp. 598, 603 (W.D. Ky. 1941), the Court said, "A sale at a reduced price is not illegal unless made for the purpose of discriminating between competitive buyers."

The discrimination made in the principal case was not for the purpose of discriminating between buyers, and was not, therefore, illegal. The exclusion of good faith evidence has the effect of making the rebutting of a prima facie case of discrimination impossible.

To accept, therefore, either the commission's or the lower court's interpretation would defeat the intent of Congress, which plainly was only to modify and amend the Act, and not to destroy it entirely. The Supreme Court of the United States kept the concept of competition in mind as one which is essential to our economy. Its interpretation of the Robinson-Patman Amendment is that only abuses of competition, and not legitimate practices which are common to the commercial world, are to be controlled.

Alan E. Kean  
Louis J. Marinucci