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Recent Cases

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ADMINISTRATIVE LAW—ADMINISTRATIVE PROCEEDINGS—ADMISSIBILITY OF HEARSAY EVIDENCE—Ellen Knauff, war bride arrived in New York harbor on August 14, 1948. She was detained by Immigration Service officers on Ellis Island pending final determination of her admissibility for permanent residence. Three years, two and a half months later the Attorney General ordered her release by approving a decision of the Board of Immigration Appeals. *Matter of Ellen Knauff*, 6937471, Bd. of Immigr. App., Aug 29, 1951; App'r. A. G., Nov. 2, 1951.

Ellen Knauff (nee Ellen Raphael), a thirty-six year old native of Germany, was once a citizen of Czechoslovakia by virtue of her first marriage to Edgar Boxhorn and is now stateless. In 1939, to avoid anti-Semitic prosecution, she went to England, where she joined the Royal Air Force in 1942, serving for four years in the Intelligence Office in preparing maps and briefiing pilots. In May 1946, she went to Germany to work for the American Military Government, in the hope of finding her family.

For over a year, Mrs. Knauff was employed as a telephone monitor by the Civil Censorship Division. For a time, she became a Relevant Record's typist-analyst, then a clerk-typist in the Office of Chief Signal Officer in Frankfort and later worked with the Army Pictorial Division. On February 28, 1948, she married Kurt Knauff, a United States citizen and an honorably discharged World War II veteran, with whom she had worked while with the American Military Government.

The Attorney General ordered Mrs. Knauff's exclusion without a hearing under the provisions of 22 U. S. C. §223 (1946) and 8 C. F. R. 175.53(k), 175.57 (1949) which, by virtue of a Presidential Proclamation issued under the above statute, authorized the barring of an alien whose entry is considered as prejudicial to the interests of the United States "on the basis of confidential information, the disclosure of which would be prejudicial to the public interest". Authority to exclude in this fashion was upheld by the Supreme Court. *Knauff v. Shaughnessy*, 338 U. S. 537 (1950).

However, on March 19, 1951, the Attorney General directed that Mrs. Knauff be accorded a hearing before a Board of Special Inquiry, because a part of the confidential information relating to her exclusion could then be disclosed without prejudice to the public interest. The Board of Special Inquiry ruled that Mrs. Knauff was not eligible for admission: first, as an alien likely to engage in subversive activities, contrary to section 1(3) of the Act of October 16, 1918, as amended, 8 U. S. C. §137 (1946); and secondly, as as alien whose admission would be prejudicial to the interests of the United States, as defined in 8 C. F. R. 175.53(k) (1949).

The Assistant Commissioner of Immigration affirmed the order of exclusion and the case was appealed to the Board of Immigration Appeals, Department of Justice. The Board passed on only one question in reversing the prior finding and that concerned the sufficiency of the evidence in support of the alien's exclusion.

The Government relied on the testimony of three witnesses to establish its premise that, from August 1947 to the Spring of 1948, Mrs. Knauff transmitted confidential information to the Czechoslovak Liason Mission at Frankfort. These witnesses were: First, Anna Lavickova, a typist-telephone operator with the Czech Mission. She failed to link Mrs. Knauff's three known visits to the Czech Mission with alleged espionage activity. Second, Major Vaclav Victor Kadane, former Deputy Chief of the Military Missions at the Czech Mission from August 1947 to April 1948. He attempted to identify Mrs. Knauff as a Communist special agent named "Kobyla", but failed to do so, because it was not clearly established that he

knew through personal knowledge, rather than hearsay, that Mrs. Knauff was the same person as agent "Kobyla". Third, Captain William C. Hacker, Counter Intelligence Corps member stationed in Germany from 1946 to 1948. He testified that he learned from a source, which he declined to disclose, that Mrs. Knauff had transmitted classified information available through her work to the Czech Mission. Since this witness did not know this information through personal knowledge, it was considered valueless.

In rebuttal Mrs. Knauff denied all these allegations of espionage activities and stated that her work in Germany did not involve secret information in any way, a fact which was amply corroborated. In addition, the Board pointed out in its decision that "There is not the faintest thread of traditional (Communist) party line thinking or Marxist philosophy apparent in her background."

Since the testimony of the Government's witnesses was hearsay evidence, the Board was called upon to determine whether such evidence was admissible. The Board stated that the Supreme Court, in granting administrative agencies greater latitude in acceptance of evidence, made it quite clear in *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197 (1938) that:

> .... hearsay is still hearsay whether it is introduced into a court or before an administrative agency. The line of cases which permits the admission of hearsay evidence and the relaxation in administrative hearings of traditional rules of evidence has been widely misinterpreted by administrative boards and commissions. It does not give them carte blanche to consider that everything and anything is of the highest probative value .... "Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

The Board quotes with approval from several Supreme Court decisions on the hearsay problem. In *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88 (1913), the Court stated:

> .... the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules .... by which rights are asserted or defended .... A finding without evidence is arbitrary and baseless.

Similarly, in *Morgan v. United States*, 298 U. S. 468 (1936), the Court held that a full hearing is necessary administratively and the evidence adduced must be adequate to support pertinent, necessary findings of fact. And see *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U. S. 123 (1951). In summary the Board stated:

> It is our conclusion that the record lacks substantial evidence as that term has been defined by the Supreme Court to support the finding (1) that Ellen Knauff transmitted any information of a secret or confidential nature to the Czechoslovakian authorities and (2) that on the basis of information alleged to have been given to the Czechoslovakian authorities by Mrs. Knauff an adequate premise has not been established to warrant the inference that if admitted to the United States she would be likely to engage in activities subversive to the national security and prejudicial to the best interests of the United States.

CHARLOTTE P. MURPHY*

CONSTITUTIONAL LAW—CONCURRENT POWERS—FEDERAL POWER COMMISSION—INTERSTATE COMMERCE—NATURAL GAS ACT— In *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U. S. 329 (1951), the United

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States Supreme Court decided another problem arising under the *Natural Gas Act of 1938,* 52 Stat. 821 (1938), 15 U. S. C., Sec. 717 (1946), concerning federal and state concurrent powers.

Appellant's piping of natural gas from Texas, Oklahoma, and Kansas into other states was regulated by the Federal Power Commission under the *Natural Gas Act of 1938, supra.* Appellee, Michigan Consolidated Gas Company, a public utility, distributed natural gas obtained exclusively from appellant to Detroit customers. Appellant, planning to sell directly to large industrial consumers supplied by Michigan Consolidated, offered to pay the city of Detroit for the right to lay and operate its pipe line within the city, and procured a direct sale contract with Ford Motor Company.

The Michigan Public Service Commission ordered appellant to obtain a certificate of public convenience and necessity before proceeding, since another public utility was rendering the same service within the same area. Upon appellant's refusal to apply for the certificate, the public service commission issued a cease and desist order to prevent appellant's execution of its plan. The Supreme Court of Michigan affirmed that order, whereupon appellant brought his appeal to the United States Supreme Court, contending that the commission's order was an absolute denial of its right to sell directly to consumers and that this traffic in natural gas was not within the state's regulatory power.

The United States Supreme Court affirmed the decision of the Supreme Court of Michigan, holding that sale across state lines is interstate commerce, but sale to local consumers is local in aspect and therefore subject to state regulation in the public interest. Such regulation does not infringe the commerce clause of the United States Constitution, Art. I, sec. 8, cl. 3, because of the local interest involved. Under the *Natural Gas Act, supra,* Congress intended to regulate only interstate sale for resale. Section 717 of the act expressly excludes regulation of direct sale, leaving control in this area to the states. The certificate requirement is a reasonable regulation, not an absolute prohibition, of appellant's right to sell.

In his dissent, Mr. Justice Frankfurter, joined by Mr. Justice Douglas, expressed the view that this was exclusively interstate commerce solely within the regulatory power of the Federal Power Commission.

The instant case follows the majority trend of the United States Supreme Court decisions since enactment of the *Natural Gas Act, supra,* in recognizing a need for state control where the local public interest is involved.

State regulation of rates was upheld in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana,* 332 U. S. 507 (1947), wherein defendant ordered plaintiff to file certain information for the purpose of rate regulation. The Court held sale of imported gas by plaintiff was interstate commerce subject to federal control, but also subject to state regulation because of the local public interest involved. The act was held to cover only sale for resale. Section 717 of the act expressly limits its application to sale "for resale for ultimate public consumption for domestic, commercial, industrial or other use." The true purpose of the act, the Court pointed out, is to provide federal-state cooperation for protection of consumers against exploitation by gas companies.

That the purpose of the act is only to control that part of the industry which the states cannot control, and not the entire natural gas field, is brought out in *Federal Power Commission v. Hope Natural Gas Co.,* 320 U. S. 591 (1944), wherein the Federal Power Commission ordered defendant, a West Virginia corporation selling most of its gas to West Virginia consumers who distributed it in other states, to reduce its rates. The Court upheld that order, stating the purpose of the act was only to fill a vacuum left when, before 1938, the states could act in matters of local

public interest but not in matters involving interstate commerce. The Court denied the Public Utilities Commission of Ohio the power to fix rates for interstate shipment of natural gas in *Public Utilities Commission of Ohio v. United Fuel Gas Co.,* 317 U. S. 456 (1943), but advanced the same view, that Congress intended by the act to complement state regulation of shipment of natural gas, not supplant it.

The United States Supreme Court upheld rate-fixing by the Federal Power Commission in *Interstate Natural Gas Co. v. Federal Power Commission,* 331 U. S. 682 (1947), where plaintiff transported gas from its Louisiana field in a main line into part of Mississippi and back into Louisiana for sale to pipe line companies which transported it into other states for sale to consumers. This was interstate commerce subject to federal control. The Court stated that the only purpose of the act was to occupy a field in which the states cannot act, the field of interstate commerce.

The United States Supreme Court considered federal control of sale of gas leases by the corporation, which is a party in the principal case, in *Federal Power Commission v. Panhandle Eastern Pipe Line Co.,* 337 U. S. 498 (1949), and denied to the Federal Power Commission the power to prevent the corporation from selling leases, stating that this was a matter for state regulation, pointing out that section 1(b) of the act excludes "producion and gathering" of natural gas from federal regulation. Justices Black, Douglas and Rutledge, dissenting, deplored this diminishing of the federal government's power.

The farthest limit of the Federal Power Commission's power to regulate interstate shipment of natural gas is illustrated in *Federal Power Commission v. East Ohio Gas Co.,* 338 U. S. 464 (1950). Defendant owned and operated a natural gas business solely within Ohio, buying from sources outside the state. The Court upheld the commission's order that it keep certain accounts and submit certain reports required by the *Natural Gas Act, supra,* on the theory that it was involved in interstate commerce and that Congress did not intend to except such sale totally within the state from federal regulation. Justices Jackson and Frankfurter dissented, holding that this was interstate commerce, but not subject to exclusive federal regulation, and stated that the purpose of the act was to complement, not replace, state regulation.

Mr. Justice Frankfurter appears to have expressed two divergent views for in the principal case he felt that *all* interstate shipment of natural gas should be under exclusive control of the Federal Power Commission. It is submitted that the dissent in *Federal Power Commission v. East Ohio Gas Co., supra,* is the better reasoned of the two in that it exposes the true legislative intent behind the *Natural Gas Act, supra,* federal-state cooperation, and that the dissent in the principal case erroneously ignores the provisions of the act which clearly except certain operations, such as direct sales, from federal control.

It is axiomatic that once Congress has seen fit to exercise its power over interstate commerce its authority is supreme, and conflicting state legislation becomes inoperative. *Cloverleaf Butter Co. v. Patterson,* 315 U. S. 148 (1942). But where Congress has seen fit to designedly leave certain aspects of regulation to the states as contemplated by the statutory scheme of dual regulation, there is no necessity to determine the respective powers of a federal commission and a state. *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission, supra.* Since there was no absolute prohibition on the free flow of commerce, but mere regulation thereof by the State of Michigan, the Court correctly held that the interests of the citizens of that state should not be prejudiced or exploited by granting a certificate where local conditions did not warrant an additional service.

BETTY ROSS

COPYRIGHT LAW—CONTRACT—COURTS—JURISDICTION—LITERARY PROPERTY—RADIO LAW. Plaintiff acquired the sole and exclusive right to use for radio broadcasting purposes the two leading characters portrayed in stories published in the New Yorker magazine, in a stage play, and in a motion picture, each entitled "My Sister Eileen." He spent considerable money in preparing a sample audition program on a phonograph record and submitted it, together with a written script to the defendant, Columbia Broadcasting System, as an idea for a regular radio program series. Defendant orally agreed to compensate the plaintiff, if the idea or any part of it was used. Later, the defendant began its own weekly radio series, entitled "My Friend Irma."

Plaintiff charged defendant was copying, using, and embodying his radio idea and program, and instituted an action for infringement of his radio program.

In reversing the decision of the lower court sustaining the defendant's demurrer, the California District Court of Appeals held, that, in the absence of any allegation in the complaint that the stories were copyrighted, court would not assume that they were copyrighted and divest itself of jurisdiction. Plaintiff's program, based on the admittedly old idea of a "dumb" girl getting an intelligent one into various scrapes and embarrassments, because of its reduction to concrete form for radio presentation was not as a matter of law, devoid of originality and novelty which would sustain an action for infringement. *Kurlan v. Columbia Broadcasting System,* 233 P. 2d 936 (Cal. App. 1951).

Was the infringement action within the jurisdiction of a state court?

Infringement suits involving registered copyrighted property present a federal question. *Loew's, Inc. v. Superior Court,* 18 Cal. 2d 418, 115 P. 2d 983 (1941). Such suits are under the jurisdiction of the federal courts.

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases. 28 U. S. C. §1338(a) (Supp. 1951).

But a state court will not assume that a literary work is copyrighted and thereby lose jurisdiction. *Satterblom v. Wasson,* 111 Ind. App. 377, 41 N. E. 2d 674 (1942); *Peterson v. Donelley,* 33 Cal. App. 2d 133, 91 P. 2d 123 (1939).

As a matter of fact, "My Sister Eileen" is copyrighted under the Copyright Code, 17 U. S. C. §35 (1946). But plaintiff did not allege in his complaint whether it was copyrighted. Hence, the state court, in the principal case, rightfully assumed jurisdiction of this infringement action.

Is the plaintiff's radio idea and program the subject matter of ownership and legal protection?

Ideas in themselves have never been clothed with a property interest that will be given protection by the courts. *Golding v. RKO Pictures, Inc.,* 85 Cal. App. 2d 265, 193 P. 2d 153 (1948), aff'd, 208 P. 2d 1 (Cal. 1949), aff'd, 221 P. 2d 95 (Cal. 1950). Courts will not protect property in an idea that has not been reduced to concrete form. *Bowen v. Yankee Network, Inc.,* 46 F. Supp. 62, 63 (D. Mass. 1942). In *Grant v. Kellogg,* 58 F. Supp. 48 (S. D. N. Y. 1944), aff'd 154 F. 2d 59 (2nd Cir. 1946), the court held that the common law and the copyright statute do not protect intellectual conceptions, however meritorious they may be, until they have been produced. Judge Learned Hand said:

> Property is a historical concept; one may bestow much labor and ingenuity which inures only to the public benefit; "ideas", for instance, though upon them all civilization is built, may never be "owned." The law does not protect them at all, but only their expression; and how far that protection shall go is a question of more or less; .... *Whiteman v. RCA Mfg. Co.,* 114 F. 2d 86, 90 (2nd Cir. 1940), cert. denied, 311 U. S. 712 (1941).

Although there is no property right in an idea there may be a property right in a particular combination of ideas. *Barsha v. Metro-Goldwyn-Mayer,* 32 Cal. App. 2d 556, 561, 90 P. 2d 371 (1939). In *Stanley v. Columbia Broadcasting System,* 192 P. 2d 495, 502 (Cal. 1948), aff'd 208 P. 2d 9 (Cal. 1949), aff'd 221 P. 73 (1950), the court states:

> When an idea takes concrete form or,.... when the material is the expression of an idea or a concrete combination of ideas and elements, in differentiation from a mere abstract idea, it is a property right subject to sale.

In *Cole v. Phillips H. Lord, Inc.,* 262 App. Div. 116, 28 N. Y. S. 2d 404, 409 (1st Dep't 1941), the court held that a property right exists with respect to a "combination of ideas evolved into a program."

The patent laws do not protect program ideas because these laws encompass only "any new and useful art, machine, manufacture or composition of matter, or any new and useful improvements thereof." 29 Stat. 692 (1897), 35 U. S. C. §31 (1946). A program idea is not "any new and useful art" because:

> The abstract must be resolved into the concrete. The patent must be for a thing not for an idea merely. *Detmold v. Reeves,* 7 Fed. Case No. 383, at 549 (E. D. Pa. 1851).

The copyright statute, 17 U. S. C. §1-65 (1946), has been construed to protect the "expression" of a copyrighted work; but the theme, the plot, the ideas may always be freely borrowed. *Dellar v. Samuel Goldwin, Inc.,* 150 F. 2d 612 (2nd Cir. 1936). In a comprehensive discussion on *Legal Protection of Program Ideas,* 36 Va. L. Rev. 289, 298, 299 (1950), Harry P. Warner ascribes two reasons for refusing to extend the scope of the Copyright Code to protect ideas. His first reason is that ideas when disclosed are common property (they are all in the public domain), and are not susceptable of private appropriation. The second reason is premised on grounds of public policy. "The grant of a monopoly in ideas would discourage authors and inventors from exploiting their ideas for the common good and thus restrict the opportunity for progress."

In *Stanley v. Columbia Broadcasting System, supra,* 221 P. 2d at 77, 78 it was stated:

> ....the range of rights and liabilities existing at common law with respect to intellectual productions is essentially and greatly different from those existing under the copyright statutes. [*Bobbs-Merrill Co. v. Straus,* 210 U. S. 339 (1908)]....The common law prohibits any kind of unauthorized interference with, or use of, an unpublished work on the ground of an exclusive property right, and the common-law right is perpetual, existing until lost or terminated by the voluntary act of the owner,.... while a statutory copyright permits a "fair use" of the copyright publication, without deeming it an infringement.... 18 C. J. S., Copyright and Literary Property, §2, p. 138, et seq. (1939).

Whether plaintiff had a protective property interest in his program is marked by an originality directly attributable to his own ingenuity. Justice Traynor, dissenting in *Stanley v. Columbia Broadcasting System, supra,* 208 P. 2d at 19. The question of originality is not one of law to be determined by the court but one of fact for the jury. *Kovacs v. Mutual Broadcasting System, Inc.,* 99 Cal. App. 2d 56, 221 P. 2d 108 (1950); *Stanley v. Columbia Broadcasting System, supra,* 192 P. 2d at 504. In the principal case, the court held that, even though originality is a matter of fact, hence a question for the jury, it is a matter of law for the court to determine whether the complaint sufficiently alleged facts to support a finding of originality in favor of the plaintiff. From the plaintiff's manner of development, his

presentation and radio technique, the court said, as a matter of law, plaintiff's production could not be said to lack originality and novelty. In *Universal Pictures Co., Inc. v. Harold Lloyd Corp.,* 162 F. 2d 354, 363 (9th Cir. 1947), the court held that originality is attained by "taking common-place materials and acts and making them into a new combination and novel arrangement." Even though plaintiff may have borrowed materials from others, if he has combined them in a different manner his composition will be protected. *Edwards & Deutsch Lithographing Co. v. Boorman,* 15 F. 2d 35, 36 (7th Cir. 1926).

If plaintiff's program is sufficiently original and novel, what test must be applied in ascertaining whether there was an infringement?

In the *Stanley* case, *supra,* 221 P. 2d at 78, the court, citing much case authority, points out that there must exist such similarity between the two programs so as to suggest to the average person that the defendant was using an idea originating with the plaintiff. Quoting from the majority opinion of the court:

> In determining whether the similarity which exists between a copyrighted literary, dramatic or musical work and an alleged infringing publication is due to copying, the common knowledge of the average reader, observer, spectator or listener is the standard of judgment which must be used.

In the principal case, on the issue of copying, the court concluded that there is a similarity in the two programs; that defendant was familiar with plaintiff's program and did produce its own program later in time. From these facts it can be easily inferred that defendant copied plaintiff's idea. The question of similarity between the two programs is a question of fact for the jury. *Stanley v. Columbia Broadcasting System, supra,* 221 P. 2d at 78.

Upon what theory may the plaintiff recover?

In 16 U. of Chi. L. Rev. 323, 324 (1949) it was stated that "the theoretical foundation of relief is two-fold: suit on the tort theory of appropriation of literary property, or suit on the basis of an express or implied contract arising from the manner in which the defendant gained access to the material." Recovery may be had upon a theory of contract implied in fact or in law where the disclosure of the idea is made under circumstances indicating that compensation was expected if the idea was used. *Stanley v. Columbia Broadcasting System, supra,* 221 P. 2d at 75. In *Cole v. Phillips H. Lord, Inc., supra,* it was stated that whether plaintiff was entitled to recover on an implied contract was a question for the jury.

In conclusion, it may be stated that the creator of an idea may recover from one who uses or infringes his property right by copying, provided the idea is:

1. original and novel,
2. reduced to concrete form before appropriation, and
3. disclosed under circumstances implying remuneration for the use of the idea.

In the principal case the court rightly held, as a matter of law, that plaintiff's complaint stated sufficient facts to proceed to trial and to permit a determination of the factual issues by a jury.

HARRY BALFE, II
WILLIAM B. KAMENJAR

INTERNATIONAL LAW — CITIZENSHIP — DUAL NATIONALITY — EXPATRIATION — MILITARY SERVICE — POLITICAL ELECTIONS. Plaintiff was born in the United States of parents who were Italian subjects. Birth in the United States conferred American citizenship; birth from Italian subjects, under Italian law,

conferred Italian citizenship regardless of place of birth. Hence, plaintiff acquired dual nationality.

During minority plaintiff was taken to Italy, where, as a minor, he was drafted into the Italian army and took an oath of allegiance to Italy. In 1946 and 1948 he voted, under duress, in the Italian elections.

Plaintiff alleged that he wrote to the American consul in Naples in 1937 "regarding expatriation" but received no answer. He further alleged that his continued residence in Italy was caused by poverty which prevented his return to the United States.

This action was brought against the Secretary of State to procure a judgment declaring him a citizen of the United States.

The Government defended on grounds that plaintiff became expatriated by failing to make an election of citizenship within a reasonable time after reaching his majority, by serving in the Italian army, and by voting in Italian political elections.

HELD: 1. A native born citizen who possesses dual nationality and who permanently resides during his minority in the other country which claims his allegiance, need not make any election to retain his American citizenship on reaching his majority, and does not become expatriated for failure to do so;

2. involuntary military service in a foreign state does not deprive such person of his citizenship;

3. voting, under duress, in a political election in a foreign country does not terminate his citizenship. *Tomasicchio v. Acheson.* 98 F. Supp. 166 (D. D. C. 1951).

American citizenship is governed by the Constitution of the United States and Acts of Congress. All persons born in the United States and subject to its jurisdiction are citizens thereof. U. S. Const. Amend. XIV Sec. 1; *United States v. Wong Kim Ark,* 169 U. S. 649 (1898); *Nationality Act of 1940,* 54 Stat. 1138 (1940), 8 U. S. C. §601(a) (1946). A citizen, however, has an inherent right of expatriation. Morrow, *The Early American Attitude Toward the Doctrine of Expatriation,* 26 Am. J. Int'l L. 552, 564 (1932). "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." *Perkins v. Elg,* 307 U. S. 325, 334 (1939). "The very essence of expatriation is that it be voluntary." *Doreau v. Marshall,* 170 F. 2d 721 (3rd Cir. 1938). It must be shown by an express act. *Schaufus v. Attorney General of the United States,* 45 F. Supp. 61 (D. Md. 1942). "As far as expatriation of American nationals is concerned, the important act is not naturalization in a foreign state but the act of the individual in voluntarily taking steps which indicate his desire not to have the obligations of an American citizen." Lidell, *The United States Position in Regard to the 'Right of Expatriation,'* 23 Temp. L. Q. 325, 364 (1950).

In the principal case three distinct grounds for expatriation are reviewed: (1) the doctrine of election of citizenship upon attaining majority; (2) foreign military service; (3) foreign political voting.

In regard to the doctrine of election, prior to 1926 the State Department required persons born in the United States and living abroad to demonstrate their election of nationality upon reaching majority by returning to the United States, or else subjecting themselves to the loss of United States citizenship. 3 Moore, Digest of International Law 348 (1906). In 1926 the Department reconsidered the subject of election. It concluded that, in the absence of legislative authority, the Department could not fail to recognize the United States citizenship of the person, born in the United States of alien parents, merely because he resided abroad before and after reaching majority. 3 Hackworth, Digest of International Law 371 (1940). If the person resided in the country in which he was also a national, for a pro-

tracted time, he subjected himself to the loss of protection as an American citizen. Flournoy, *Dual Nationality and Election,* 30 Yale L. J. 545, 563 (1921). On the other hand, it has not been the Department's view that such a person automatically became expatriated. He is merely a native citizen "whose residence abroad creates a presumption of voluntary abandonment of claim to protection." 22MSS. *Instructions to France* 255, 3 Moore, Digest of International Law 945, 946 (1906). In *Perkins v. Elg, supra* at 346 the court, *obiter dicta,* stated that a child born in the United States who spent his minority in a foreign country is not expressly required by statute of the United States to make an election upon reaching majority. But, an American citizen who possesses dual nationality may expatriate himself by obtaining naturalization in a foreign state through the naturalization of his parents provided that upon reaching twenty-three years of age he does not elect to return to the United States. *Nationality Act of 1940,* 54 Stat. 1168 (1940), 8 U. S. C. §801(a) (1946). *In the Matter of R——,* 1 *Dec. Imm. and Nat. Laws* 389, 392 (1943), the Immigration and Naturalization Service did not recognize that a native born child having dual nationality must elect between two citizenships upon attaining his majority.

In regard to foreign military service, an American citizen may lose his citizenship by entering foreign military service. *Nationality Act if 1940,* 54 Stat. 1168 (1940), 8 U. S. C. §801(c) (1946). It was held that an American citizen emigrating into a foreign country and entering its military service completely renounced his American citizenship. *Juando v. Taylor,* 13 Fed. Cas. 1179, No. 7, 558, 2 Paine 652 (S. D. N. Y. 1818). Accord, *United States ex rel. De Cicco v. Longo,* 46 F. Supp. 170 (D. Conn. 1942); *Baur v. Clark,* 161 F. 2d 397 (7th Cir. 1947); *Hamamato v. Acheson,* 98 F. Supp. 904 (S. D. Cal. 1951). On the other hand, involuntary service in the army of a foreign state does not deprive an American citizen of his citizenship. *State v. Adams,* 45 Iowa 99, 24 Am. Rep. 760 (1876). The court in interpreting subsection (c) of the *Nationality Act of 1940, supra,* held that this subsection would not apply to citizens of the United States entering foreign military service involuntarily. The court reasoned that if such interpretation were not given any American citizen who was "grabbed and put in the army of a foreign state would automatically lose his American citizenship." *Dos Reis ex rel. Camara v. Nicolls,* 161 F. 2d 860 (1st Cir. 1947). This subsection only applies to citizens entering foreign military service voluntarily and "without legal or factual compulsion," *Ishikawa v. Acheson,* 85 F. Supp. 1 (D. Hawaii 1949), and not to citizens who entered foreign military service under duress. *Shibita v. Acheson,* 86 F. Supp. 1 (S. D. Cal. 1949). A minor who served in a foreign army does not, thereby, lose his American citizenship because during his minority he could not renounce allegiance to the United States. *United States ex rel. Boglivo v. Day,* 28 F. 2d 44 (S. D. N. Y. 1928). See 18 Geo. Wash. L. Rev. 410 (1950).

In regard to foreign political voting, an American citizen may lose his citizenship by voting in a foreign political election. *Natonality Act of 1940,* 54 Stat. 1168 (1940), 8 U. S. C. §801(e) (1946), even though when voting he did not intend to lose it. *Acheson v. Kunuyuki,* 190 F. 2d 897 (9th Cir. 1951). Voting however, "under influence, coercion, and duress" will not result in the loss of citizenship. *Farano v. Acheson,* 94 F. Supp. 381 (S. D. Cal. 1950); *Kai v. Acheson,* 94 F. Supp. 383 (S. D. Cal. 1950). It has also been decided that a native born citizen voting in the Japanese elections of 1946 did not vote in a political election within the meaning of the *Nationality Act of 1940,* Subsection (e), *supra,* because Japan was an occupied power, and, therefore, not a sovereign nation. *Arikawa v. Acheson,* 83 F. Supp. 473 (S. D. Cal. 1949). See 99 U. of Pa. L. Rev. 1032 (1951).

In the principal case the court clearly distinguished between a person born

in the United States of alien parents whose allegiance is claimed by the state of his parents' nationality, and a person born in the United States who acquires naturalization in a foreign country through the naturalization of his parents.

The court properly held that the plaintiff belonged to the former category of dual nationality and, therefore, was not required to make an election upon reaching majority. Since the *Nationality Act of 1940,* §801(a) expressly applies to only those persons belonging to the latter group, only that group must expressly make an election.

The court's holding, that foreign military service when involuntary, or political voting under duress, do not expatriate an American citizen, is in accord with established case authority.

ANDREW CODISPOTI

PERSONAL PROPERTY—AGENCY—COURT OF CLAIMS—ARTICLES OF WAR. Plaintiff, an American soldier in France, found an unidentified bag containing currency during World War II. He sent the bag with its contents to the division finance officer and obtained a receipt therefor. After the war, plaintiff demanded payment from the Department of the Army but was refused on the ground that the money belonged to the government.

Suit was brought in the United States Court of Claims to recover the value of the currency. The Government contended that the court had no jurisdiction in the absence of a contract between the plaintiff and the Government, and that *Article of War 80,* 10 U. S. C. A. §1552, refuted plaintiff's claim that the "law of finders" applied.

Held: 1. No contractual relationship existed between the parties by virtue of the receipt. Jurisdiction of the Court of Claims is not limited to cases on contracts but includes claims founded on the United States Constitution. Act of March 3, 1887, 24 Stat. 505.

2. *Article of War 80, supra,* and not the "law of finders" applies. Within the meaning of this article the French currency was classified as "abandoned property." The soldier acquired no proprietary interest since he took possession as agent of the United States, and the Government acquired title on failure of the true owner to reclaim the property. *Foster v. United States,* 98 F. Supp. 349 (Ct. Cl. 1951).

The jurisdiction of the United States Court of Claims and the Articles of War were properly invoked in the principal case.

The Court of Claims is a court of limited jurisdiction and has only such jurisdiction as is conferred upon it by Acts of Congress. *In re Mississippi Val. Iron Co.,* 61 F. Supp. 347 (E. D. Mo. 1945). By Act of March 12, 1863, 12 Stat. 820, it was provided that:

> any person claiming to have been owner of any such abandoned or captured property may,.... prefer his claims to proceeds thereof in the Court of Claims;....

After the Civil War the Court of Claims had jurisdiction to determine claims involving abandoned and captured property. *United States v. Quigley,* 103 U. S. 595 (1880); *Carroll v. United States,* 13 Wall. (U. S.) 151 (1871); *United States v. Klein,* 13 Wall. (U. S.) 128 (1871). By an act passed March 3, 1887, known as the Tucker act, 24 Stat. 505, the Court of Claims was vested with jurisdiction over four distinct classes of cases:

> (1) those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an Executive Department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. *United States v. Lynah,* 188 U. S. 445, 475 (1903); *Dooley v. United States,* 182 U. S. 222, 224 (1901).

U. S. Const. Amend. V. provides: ".... nor shall private property be taken for public use, without just compensation." In *United States v. Causby,* 328 U. S. 255 (1946), the United States Supreme Court stated that, if there is a taking of property without due process of law, the claim is one based on the Constitution and is within the jurisdiction of the Court of Claims to hear despite the absence of an implied contract. This was the basis of jurisdiction in the principal case. This clause of the Fifth Amendment has been extended to permit an alien to sue in the Court of Claims. *Russian Volunteer Fleet v. United States,* 282 U. S. 491 (1931).

The Articles of War are the governing rules of conduct for soldiers. *Article of War* 80, *supra,* which provides:

> Any person subject to military law who .... deals in or disposes of captured or abandoned property .... or who fails wherever such property comes into his possession .... to turn over such property to the proper authority without delay, shall, ... be punished by fine or imprisonment ....

supersedes the "law of finders" in matters concerning military personnel. At common law the plaintiff would be entitled to the money as against the whole world but the true owner. *Armory v. Delamirie,* 1 Strange 505, 93 E. R. 664 (1772). By the weight of authority in the United States, plaintiff, as a private person, would be entitled to the money as finder regardless of where found. *Durfee v. Jones,* 11 R. I. 588, 23 Am. Rep. 528 (1877). But plaintiff, as a soldier, is subject to the Articles of War. *Hartigan v. United States,* 196 U. S. 199 (1905). The Articles of War have the force of law over the military. *Nordmann v. Woodring,* 28 F. Supp. 573 (W. D. Okla. 1939). Hence the Articles of War governed.

Under the Articles of War, the property in question fell within the meaning of "abandoned property." In the principal case the court construed "abandoned property" to mean ".... not only property abandoned by the enemy, but by civilian populations in flight from the perils of the combat zone, or from the bombed area, and who have left something behind or cast it aside to expedite their escape."

In *United States v. Klein, supra,* the Court of Claims held that the United States Government constituted itself as trustee or agent of "abandoned and captured" property from the Civil War. Since plaintiff was an agent of the United States Government he acquired no proprietary interest in the property. *South Straffordshire Water Co. v. Sharman,* 2 Q. B. D. 44 (1896). Members of the National Guard are considered to be agents, servants, and employees of their sovereign state. *Decicco v. State,* 152 Misc. 541, 273 N. Y. S. 937 (Ct. Cl. 1934). In a recent English case involving a situation similar to the instant case, a soldier found a valuable brooch in a leased building being used as a military hospital. The English court ruled that the soldier was entitled as finder against all but the true owner. *Hanna v. Peal,* 1 K. B. 509 (1945). The rule announced in *Armory v. Delamirie, supra,* was followed. But in the principal case, a soldier, as an agent of the United States Government, and subject to the Articles of War, *Haartigan v. United States, supra,* must turn over to the proper authority, the United States Government, any abandoned property found. *Article of War 80, supra.*

The wisdom in the court's application of the Article of War can readily be seen in the light of the extensive abandonment of valuables in World War II. Aside from this consideration, however, the decision in the principal case casts considerable

doubt upon the status of property of all descriptions in the hands of ex-servicemen who claimed such property as "war souvenirs." Are these items recoverable by the United States on the strength of this decision?

JOSEPH D. CUMMINGS
EDWARD J. LOTZ

TORTS—LIBEL AND SLANDER—PRIVILEGED COMMUNICATIONS. Plaintiff commenced an action in libel and slander for loss of position as Deputy Port Superintendent in Pusan, Korea, and sought damages for false and defamatory information about him supplied by his former employer (defendant) upon inquiries made by the Federal Bureau of Investigation acting under law. The United States Department of Justice asumed the defense on the ground that the communications made to the Bureau were absolutely privileged.

The United States Circuit Court of Appeals for the Second Circuit reversed the lower court's order of dismissal and held that, if the communication was "motivated by malice," it was not absolutely but conditionally privileged. *Foltz v. Moore-McCormack Lines,* 189 F. 2d 537 (2nd Cir. 1951), cert. denied 342 U. S. 871 (1951).

The doctrine of absolute privilege as distinguished from conditional or qualified privilege is based essentially on public policy. It is analogous to the doctrine of "overruling necessity," where, at times, the rights of the general public transgress the rights of a particular individual. *Reagan v. Guardian Life Ins. Co.,* 140 Tex. 105, 166 S. W. 2d 909 (1933).

The Supreme Court of Oklahoma in *Hughes v. Bizzell,* 189 Okl. 472, 474, 117 P. 2d 763, 765 (1941), justifies the doctrine of absolute privilege:

> The .... principle upon which .... privileged communication rests is public policy. This is more especially the case with absolute privilege where the interests and necessities of society require that the time and occasion of the publication or utterance, even though it be both false and malicious, shall protect the defamer from all liability to prosecution for the sake of public good ....

Because of the immunity afforded by the doctrine to those who require its protection, the law is in effect creating an ultra class of persons beyond the realm of justice. *Johnson v. Brown,* 13 W. Va. 71 (1878).

Absolute privilege of communication is universally applied to all legislative and judicial proceedings. In *Johnson v. Independent Life & Accident Ins. Co.,* 94 F. Supp. 959. 961 (E. D. S. C. 1951) the court stated:

> The class of absolutely privileged communications is narrow and is practically limited to legislative and judicial proceedings and other acts of state, including, it is said, communications made in the discharge of a duty under express authority of law, by or to heads of executive departments of the state, and matters involving military affairs.

In *Kelly v. Doro,* 47 Cal. App. 2d 418, 118 P. 2d 37 (1941), it was held that a witness before a legislative committee was entitled to the same immunity under the doctrine of absolute privilege as a witness in a judicial proceeding.

The doctrine is equally applicable, according to the consensus of judicial opinion, to public agencies exercising power of inquiry and discretion not in a judicial but in a quasi-judicial manner. In *Independent Life Ins. Co. v. Rodgers,* 165 Tenn. 447, 55 S. W. 2d 767 (1933), it was decided that a State Insurance Commission was quasi-judicial in character, and communication to that body was confidential and privileged. In *Bleecker v. Drury,* 149 F. 2d 770, 772 (2nd Cir. 1945), the court held that a proceeding before the New York Industrial Board was similar

to a judicial proceeding and extended the privilege to more than only relevant and material communications. The court stated that "the doctrine embraces not only statements pertinent to the issue but anything that may possibly be pertinent." In two recent federal cases which involved substantially the same facts, the courts ruled that draft boards were classed as quasi-judicial bodies and that members of the board when acting within their official capacity were immune from civil action. *Gibson v. Reynolds,* 77 F. Supp. 629 (W. D. Ark. 1948), aff'd, 172 F. 2d 95 (8th Cir. 1949); *Dodez v. Weygandt,* 173 F. 2d 965 (6th Cir. 1949).

The doctrine of absolute privilege also immunizes administrative agencies discharging duties under express authority of law. See *Stafney v. Standard Oil,* 71 N. D. 170, 299 N. W. 582 (1941), where the defendant-employer was compelled under penalty of law to divulge information concerning plaintiff's misconduct to the Workmen's Compensation Bureau. See also *Garcia v. Hilton Hotels International,* 97 F. Supp. 5 (D. Puerto Rico 1951). The Supreme Court of Texas in *Reagan v. Guardian Life Ins. Co., supra,* favored the doctrine under the reasoning that absolute privilege in communications to a state commission was a necessary corollary of the statute creating the commission.

But in *Johnson v. Independent Life & Accident Ins. Co., supra,* it was stated that:

> The courts in other jurisdictions vary in their holding as to the degree of privilege to be accorded a communication made by a private person or concern to public authorities.

The Supreme Court of Colorado in *Lininger v. Knight,* 266 P. 2d 809, 813 (Colo. 1951), ruled that no action for libel would lie on a petition presented by the defendant to the Board of County Commissioners because it was absolutely privileged as an "act of state." Therein the court states:

> While the class of absolutely privileged communication is carefully narrowed by the decisions, its scope embraces communications relating to legislative and judicial proceedings, and other acts of state.

Statements made by the president of a state university before the board of regents bearing on the fitness of the plaintiff were held absolutely privileged in the case of *Hughes v. Bizzell, supra,* at 765. There the court concluded:

> The statements being absolutely privileged, it is immaterial as to whether they were made with improper motives or whether they were false.

However, the Georgia Court of Appeals in the case of *Fedderwitz v. Lamb,* 68 Ga. App. 233, 22 S. E. 2d 657 (1942), aff'd, 195 Ga. 691, 695, 25 S. E. 2d 414, 418 (1943), declined to extend the doctrine on communications to the Department of Revenue, holding:

> There are many purely administrative and even executive functions which require the exercise of discretion; but merely because they call for it, does not make them either judicial or quasi-judicial acts.

In the leading case of *Peterson v. Steenerson,* 113 Minn. 87 129 N. W. 147 (1910), the court refused to apply the doctrine of absolute privilege to public authorities in general and narrowed it only to the legislature and judiciary.

In the federal courts the tendency is to extend the doctrine and not merely limit it to heads of executive departments, *Spalding v. Vilas,* 161 U. S. 483 (1895), *Mellon v. Brewer,* 57 App. D. C. 126, 18 F. 2d 168 (1927), cert. denied 275 U. S. 530 (1927), but "to cover lesser officials" upon the principle of delegation of authority, as expressed in *Cooper v. O'Connor,* 69 App. D. C. 100, 99 F. 2d 135

(1938), cert. denied 305 U. S. 673 (1939). An extreme application of the doctrine of absolute privilege is found in *Gregoire v. Biddle,* 177 F. 2d 579, 580 (2nd Cir. 1949). Subsequent to a release on writ of habeas corpus granted after being imprisoned for nearly four years as an enemy alien, plaintiff brought suit against the Attorney General for false imprisonment. The court in denying plaintiff judgment stated, "Officers of the Department of Justice, when engaged in prosecuting private persons enjoyed the same absolute privilege as judges."

In the principal case, if malice could be proved, the communications to the Bureau would be conditionally rather than absolutely privileged. By analogy, the courts in cases involving fraud will not permit the Statute of Frauds to perpetrate a fraud and by the same token will not allow the doctrine of absolute privilege to pervert justice. In *White v. Nicholls,* 3 How. 266 (1844), the United States Supreme Court expressly stated:

> .... no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms.

The maxim, "privilege ends when falsity begins," should prevail.

DOMINIC F. ZARELLA.

TORTS—NEGLIGENCE—RES IPSA LOQUITUR. In an action against a telephone company for inquiries allegedly received from an electric shock, plaintiff introduced evidence that, in answering a telephone, he was rendered unconscious and that his doctor was of the opinion that part of plaintiff's condition was due to trauma and shock.

HELD: Evidence was insufficient to render the doctrine of res ipsa loquitur applicable. Plaintiff must establish first and foremost the nature of the instrumentality alleged to have caused the injury, and its identity with the defendant.

Dissent: Res ipsa loquitur was applicable. Plaintiff did not know for certain what caused his being rendered unconscious and could not allege an electric shock was the cause. An inference could be drawn that defendant was negligent since a person answering a telephone is not normally rendered unconscious. *Manley v. New York Telephone Co.,* 303 N. Y. 18, 100 N. E. 2d 113 (1951).

It is submitted that, in accordance with the dissenting opinion, the doctrine of res ipsa loquitur should have been applied in the instant case.

The doctrine of res ipsa loquitur was applied in *Delahunt v. United States Telephone & Telegraph Co.,* 215 Pa. 241, 64 Atl. 515 (1906) where plaintiffs were only required to show that their father was killed by an electric shock while using the instrument furnished by the defendant company. In *Hanaman v. New York Telephone Co.,* 104 N. Y. S. 2d 315 (3d Dep't. 1951) the plaintiff merely proved that she sustained an electric shock while using the phone. There it was held proper to allow the jury to draw the inference of negligence on the part of the defendant.

Res ipsa loquitur is a Latin phrase which literally means "the thing speaks for itself." From it there has developed a "doctrine" which has been the source of much confusion. The statement of this doctrine most often quoted is that of Chief Justice Erle in *Scott v. London & St. Katherine Docks Co.,* 159 Eng. Rep. 665 (1865):

> there must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of due care.

Some authorities have adhered literally to the requirement of exclusive control and have refused to apply the doctrine when the instrumentality causing the injury was not within the exclusive control of the defendant at the time of the injury. *Myers v. Campo Corp.*, 26 N. Y. S. 2d 332 (1st Dep't. 1941). The reason for the rule is that, when the defendant has exclusive control, knowledge of the causes of the injury are more accessible to him than to the plaintiff. On the other hand, according to *Goldman & Freiman v. Sindell,* 140 Md. 468, 117 Atl. 866 (1922), the requirement of exclusive control has been held necessary only to exclude the possibility that the injury was caused by an intervening act of the plaintiff or a stranger, and once plaintiff has proved no such intervening cause, the purpose of the requirement is satisfied. It was held in *Rafter v. Dubrock's Riding Academy,* 75 Cal. App. 2d 621, 171 P. 2d 459 (1946) that constructive control or right of control was sufficient to invoke the doctrine of res ipsa loquitur.

It is well settled that a res ipsa loquitur case is a circumstantial evidence case which permits the jury to infer negligence from the mere occurrence of the accident itself. *Harks v. Haase,* 335 Mo. 1104, 75 S. W. 2d 1001 (1934). Of course it is never enough for the plaintiff to prove only that he has been injured by the negligence of someone unidentified; it is necessary for the plaintiff to associate this negligence with the defendant. *Olson v. Whittmore & Swan,* 203 Cal. 206, 263 Pac. 518 (1928). However, he may do this by another inference, based on a showing of some specific cause for the accident within the defendant's responsibility, or on a showing that the defendant was responsible for all reasonable and probable causes to which the accident can be attributed. In *Helms v. Pacific Gas & Electric Co.,* 21 Cal. App. 2d 711, 70 P. 2d 247 (1937) it was held that, when the defendant's light globe fell to the sidewalk, it was easy to suggest that some third person may have tampered with it, yet the jury may still find as a more probable explanation that the company was negligent in its maintenance.

The presumption or inference of negligence arising by virtue of the doctrine of res ipsa loquitur is not conclusive of the question, but is rebuttable and may be overcome by appropriate evidence. *Nabson v. Mordall Realty Corp.,* 257 App. Div. 659, 15 N. Y. S. 2d 38 (1st Dep't. 1939). It is enough to avoid a non-suit or a dismissal. *Sasso v. Randforce Amusement Corp.,* 243 App. Div. 552, 275 N. Y. S. 891 (2d Dep't. 1934). It is not enough to entitle him to a directed verdict even though the defendant rests without evidence. *George Foltis, Inc. v. City of New York,* 287 N. Y. 108, 38 N. E. 2d 455 (1941). It shifts no burden to the defendant, except in the sense that if the defendant offers no evidence he takes the risk that the jury may find against them. *Union Pac. RY. Co. v. DeVany,* 162 F. 2d 24 (9th Cir. 1947). The jury is permitted to accept the inference but it is not compulsory; they may find for the defendant. *Conover v. Hecker,* 317 Mich. 285, 26 N. W. 2d 774 (1947).

The doctrine of res ipsa loquitur should have been applied in the principal case. The defendant would have suffered no irreparable harm had the court held the doctrine applicable; by not allowing the plaintiff to invoke the doctrine, plaintiff was deprived of his remedy at law.

DONALD J. LETIZIA

TORTS—NUISANCE—FALSE IMPRISONMENT—LIABILITY FOR DOUBLE PARKING. Plaintiff legally parked his automobile along a curb in the City of New York. When he returned to the automobile he was unable to move it because the defendant, in violation of a municipal ordinance, had double-parked his car alongside. In consequence of the defendant's act, the plaintiff was unable to leave until the

defendant returned and moved the car. The plaintiff alleged that this caused discomfort to him in the amount of twenty-five dollars.

The Municipal Court of the City of New York held that the defendant's act was tortious and recovery was permitted on the theory of nuisance. *Harnick v. Levine,* 106 N. Y. S. 2d 460 (N. Y. Munic. Ct. 1951).

The instant case is novel in that it adds another rule to the new and growing field of liability arising from parking violations.

The theory that obstructing the highway constitutes a nuisance was announced by Lord Ellenborough in *Rex v. Cross,* 3 Camp. 224, 225, 170 Eng. Rep. 1362, 1363 (N. P. 1812). He declared:

> And is there any doubt that if coaches, on the occasion of a rout, wait an unreasonable length of time in a public street, and obstruct the transit of his Majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause or permit such coaches so to wait are guilty of nuisance? .... every unauthorized obstruction of a highway, to the annoyance of the King's subjects, is an indictable offense.... The King's highway is not to be used as a stableyard.

In *Cohen v. Mayor of New York,* 113 N. Y. 552, 21 N. E. 700 (1889) the City of New York was held liable for maintaining a nuisance by illegally issuing a license to park a wagon in the street, which caused the death of a pedestrian. The theory of nuisance for obstructing the highway was applied in *Sive v. Papillo,* N. Y. Times, May 6, 1951, where plaintiff recovered damages sustained while attempting to manuever his automobile around an illegally double-parked vehicle into the flow of traffic from his space at the curb.

But in *Conn v. Hillard,* 82 A. 2d 369 (D. C. 1951) where defendant attempted to extricate his automobile legally parked directly in front of plaintiff's car, plaintiff was entitled to recovery for damage done to the front end of his car, even though he had violated traffic regulations by parking too close behind defendant's automobile and too close to an intersection. The court held that, even though violation of a traffic regulation may be a proximate cause of damage to another automobile, the unreasonable force used by the defendant in extricating his automobile was the proximate cause of the damage. The slight delay and inconvenience resulting from a call made by the defendant to have plaintiff's car removed, was of no consequence in the decision.

It is very likely that an action of this nature might be sustained on the theory of false imprisonment. In *National Bond and Investment Co. v. Winthorn,* 276 Ky. 204, 123 S. W. 2d 263 (1938) the court held that, when a person is lawfully in his vehicle and the path of the vehicle is obstructed so that he may not proceed in the direction and manner he desires, false imprisonment lies even though no restraint is placed upon the person of the motorist. In *Cordell v. Standard Oil Co.,* 131 Kan. 221, 289 Pac. 472 (1930) an action against a defendant, who drained water from the radiator of plaintiff's automobile to prevent his moving the car, was sustained on the theory of false imprisonment.

In the principal case the court pointed out that the uniqueness of a situation will not obstruct justice. If the maxim "where there is a wrong, there is a remedy" is invoked, a court will give cognizance to a legal injury and grant relief. A recent application of this aphorism is seen in *Pollak v. Public Utilities Commission,* 19 U. S. L. Week 2579 (1951) where an action was brought by passengers, wearied of listening to advertisements over the radio, as a "captive audience" against the defendant, transit company, which monopolized the transportation facilities in the District of Columbia. By analogy it may be argued that this class of cases presents a situation involving a "captive motorist."

It is manifest that future cases involving double parking violations conceivably could be decided on either theory. In the principal case this inference may be drawn from the dicta of the court, but the issue was not decided because the court had no jurisdiction over actions for false imprisonment. *Harnick v. Levine, supra* at 461.

Three new rules in the field of tort liability are apparent. they are:

1. A motorist illegally double-parking his vehicle is liable to fellow motorists for any suffering or inconvenience he may cause. *Harnick v. Levine, supra.*
2. A motorist who finds his right of way obstructed by another who is illegally parked may recover if he suffers damage in attempting to extricate himself with a reasonable amount of force. *Sive v. Papillo, supra.*
3. A motorist illegally parked may recover damages sustained by the unreasonable force expended by one legally parked in attempting to extricate himself. *Conn v. Hillard, supra.*

That such actions should be maintainable is supported by the acute traffic problem facing large cities with the ever increasing number of automobiles being operated. Perhaps a civil liability imposed upon a traffic violator in addition to the criminal one already in effect, will substantially change motorist's' tendencies to disregard traffic ordinances.

WILLIAM MCGARRITY

WILLS—JOINT WILLS—SON, MURDERER OF FATHER, TAKES PROPERTY LEFT BY JOINT WILL OF FATHER AND MOTHER. Husband and wife, joint owners of realty, executed a joint will whereby the survivor would take a life estate with complete power of disposal in all the property of the first to die. Whatever might remain undisposed of at the death of said survivor was to pass to their issue, and if none, to others. The wife died survived by her husband and a son. The husband then made a separate will devising and bequeathing all to his son. Subsequently the son murdered his father and confessed that his entire motive was to obtain the property to which he would be entitled under his father's will.

Suit was brought to obtain an adjudication that the son be barred from taking as a devisee through his father. The commissioner in chancery reported that the father had a valid power of appointment under his wife's will which he exercised by his subsequent single will, and since the son murdered his father he was barred from taking anything as devisee.

On appeal from confirmation of the commissioner's report, the Supreme Court of Appeals of Virginia held that the son was not barred entirely. Although a statute, Va. Code sec. 64-18 (1950) prohibited acquisition by descent or distribution or by will of any interest in the estate of another whom the beneficiary has killed in order to obtain such interest, the court ruled that the statute was not wholly applicable in that the son was barred from taking through his father but not through his mother. It was stated that by the joint will a remainder interest had vested in the son on the date of probate after the death of the mother, subject to defeasance by an inter vivos disposition by the father, The Supreme Court of Appeals reversed with directions to enter a decree that, upon the father's death, the son, under the mother's will, became the fee simple owner of the realty of which she died seized. *Blanks v. Jiggetts,* 192 Va. 337, 64 S. E. 2d 809 (1951).

Whatever approach, equitable or analytical, is employed, it is submitted that, in the instant case, the son should have been barred from acquiring any interest by his reprehensible act.

From an equitable standpoint, the decision in the *Blanks* case appears to be contrary to the common law rule in the law of wills which is based on the equitable doctrine that no man shall profit by his own wrong. Thus, one who deprives a person of his right to do with his property as he sees fit, by slaying that person, cannot obtain through him. *In re Wilkin's Estate,* 192 Wis. 111, 211 N. W. 652 (1927). Some states have adopted this rule by statute. See note, 3 L. R. A. (N. S.) 730 (1906). The decision appears to conform to the majority rule under the law of descent and distribution which does allow the murderer to take in spite of his crime. This latter rule, however, is based solely on statutory construction, and not on any common law rule or doctrine of public policy. *McAllister v. Fair,* 72 Kan. 533, 84 P. 112 (1906); *Hagan v. Cone,* 21 Ga. App. 416, 94 S. E. 602 (1917).

In the *Blanks* case, the court sitting in equity, declared it was obliged to follow what it said was the letter of the statute, and that public policy should not influence its decision. Citing the case of *Oleff v. Hodapp,* 129 Ohio St. 432, 195 N. E. 838 (1935), it based its determination on the tenet that "this is a court of law and not a theological institution." It should be remembered, however, that the Va. Code Sec. 64-18 (1950) expresses the common law rule which is based on the equitable maxim that no man shall profit by his own wrong. *In re Wilkin's Estate, supra.* Thus, the statute is interpretive and not creative of the law. The following quotation apparently fits the problem:

> It will always be presumed that the legislature intended exceptions to its language which would avoid injustice, oppression or an absurd consequence. The reason of the law in such cases should prevail over the letter. *United States v. Kirby,* 74 U. S. 482 (1868); *Reiche v. Smythe,* 80 U. S. 162 (1871).

It is entirely possible that the legislators, who drafted the statute concerned, did not contemplate a situation similar to the instant case.

> Experience shows that no law-maker can foresee all things which may happen; and therefore it is fit, if there be any defect in the law, that it should be reformed by equity which is no part of the law but a moral virtue which corrects the law. *Grotius de Equitate,* sec. 12; *Puff. Elem. Jur.,* lib. 1, sec. 22-23; 5 L. R. A. 343.

On the other hand, the analytical approach need not produce the same result as concluded by the court in the principal case. First, the wording of the statute is to be considered.

> No person shall acquire by descent or distribution or by will any interest in the estate of another whom he has killed in order to obtain that interest. *Va. Code sec.* 64-18 (1950).

It cannot be denied that the son acquired his remainder interest by "will" and that he would have succeeded in fee by operation of the same will. The statute does not state that the will mentioned need be that of the present holder of the estate; it states very plainly that no person shall obain by will if he commits murder in order to take under that will. Prior to the murder, the son lacked the present enjoyment of a fee. To obtain this at that time, he had to kill the life tenant, his father. Thus, he succeeds to the enjoyment of the fee by divesting the father's estate in order to take as remainderman. Clearly, it is not a strain on the interpretation of the statute to conclude that the son did acquire an interest in the estate of another by killing since a life estate is an interest in realty.

In conclusion, therefore, it is submitted that the Virginia statute should be applicable and that the court in the *Blanks* case should have ruled that the son be barred from profiting by his crime.

ROBERT F. WOODSON