Catholic University Law Review

Volume 4 | Issue 2 Article 5

1954

Recent Cases

John F. Hughes

Rosemarie Serino

Patrick J. Foley

Harlan J. Choate

Paul J. Sirwatka

See next page for additional authors

Recent Cases

Authors

John F. Hughes, Rosemarie Serino, Patrick J. Foley, Harlan J. Choate, Paul J. Sirwatka, and Thomas E. O'Neill

CONSTITUTIONAL LAW—IMMUNITY BEFORE CONGRESSIONAL INVESTIGATING COMMITTEES EXTENDED TO THE STATE COURTS—Petitioner Adams testified before a United States Senate Committee investigating crime. He freely confessed conducting a gambling business in Maryland. The State of Maryland prosecuted Adams and used that confession to convict him of conspiring to violate Maryland's anti-lottery laws. Adams claimed immunity based on a federal statute, 18 U. S. C. §3486, which states that no testimony given by a witness in Congressional investigations "shall be used as evidence in *any* criminal proceeding against him in *any* court. . . ." The Maryland Court of Appeals held that this statute did not apply in state courts and further held the immunity did not extend to testimony voluntarily given. *Adams v. State of Maryland,* 97 A. 2d 281 (Md. 1953). The Supreme Court of the United States granted certiorari to discover the full scope of 18 U. S. C. §3486. The Supreme Court reversed the Maryland court by holding that a witness need not claim the privilege against self-incrimination to be protected by 18 U. S. C. §3486, and that the statute applies to testimony freely given and applies in any court, state as well as federal. *Adams v. State of Maryland,* 22 L. W. 4150 (U. S. 1954).

This case presented a question of first instance in the United States Supreme Court.

The Fifth Amendment to the United States Constitution, concerning self-incrimination, does not give a witness immunity against state prosecution, because the Fifth Amendment applies only to the Federal Government. *United States v. Murdock,* 284 U. S. 141 (1931). There the Court stated:

> This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. *Id.* at 149.

The statute in the *Adams Case, supra,* was similar to, and substantially the same as the federal statute which preceded it, and which was construed in *Counselman v. Hitchcock,* 142 U. S. 547 (1892). There the Court held that the immunity granted must be absolute and coextensive with the privilege accorded by the Fifth Amendment. In the instant case the Court would make the immunity absolute for all criminal proceedings, state as well as federal. There is no necessity under 18 U. S. C. §3486 to claim the Fifth Amendment in order to be accorded the immunity. If you testify, you are immune. The full text of 18 U. S. C. §3486 states:

> No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege. (June 25, 1948, ch. 645, §1, 62 Stat. 833, eff. Sept. 1, 1948.)

This statute was held to be the same as the statute set forth in *Counselman v. Hitchcock, supra,* (28 U. S. C. §634), and further extends the immunity con-

cerned therein. *United States v. Barksy,* 72 F. Supp. 165 (D. D. C. 1947). Generally, Congress has granted a witness no more immunity than is necessary. *Heike v. United States,* 227 U. S. 131 (1912). At common law the immunity did not extend beyond the jurisdiction. *See* 8 WIGMORE, EVIDENCE (3d ed. 1940) §2252. The U. S. Constitution does not relieve a witness before a federal court of the duty of testifying because he might thereby incriminate himself under the law of some state. *Hale v. Henkel,* 201 U. S. 43, 68, 69 (1906); *Brown v. Walker,* 161 U. S. 591, 597 (1896); *Jack v. Kansas,* 199 U. S. 372, 382 (1905). This is the same as the English rule of evidence which says that a witness is not protected against disclosing offenses in violation of the laws of another country. *Queen v. Boyes,* 1 B. & S. 311, 330 (1861).

State immunity statutes have been held not to bar prosecution by the Federal Government. *Feldman v. United States,* 322 U. S. 487 (1944); *Jack v. Kansas, supra.* Justice Holmes, in dicta, in *Brown v. Walker, supra,* expressed doubt whether Congress could prescribe rules of proceeding for state courts, but that doubt has proved groundless here. In *Hale v. Henkel, supra,* it was held that a witness could not refuse to testify before a federal grand jury because the immunity statute did not extend to prosecutions in a state court, and further held that in granting immunity the only danger to be guarded against is one within the same jurisdiction and under the same sovereignity. The Court went on to say that all immunity statutes are constitutional as long as they are limited to the jurisdiction of the sovereign.

The U. S. Supreme Court, in *United States v. Murdock, supra,* said full and complete immunity against prosecution by *the* government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. In *Glickstein v. United States,* 222 U. S. 139 (1911), the Supreme Court held that testimony can be compelled under the Bankruptcy Act where complete immunity was given.

As to the subject matter of the testimony, it was stated in *May v. United States,* 175 F. 2d 994, 84 U. S. App. D. C. 233 (1949), that only the testimony and not the subject matter concerned in the investigation was privileged. The Court went on to state that where a Congressman testified voluntarily he was not protected by the statute because the testimony must be compelled. Thus the *Adams Case, supra,* effectively overruled the case of *May v. United States, supra.*

In *United States v. Bryan,* 339 U. S. 323 (1950), the Court stated that the purpose of this immunity statute was to require the attendance of witnesses, full response to all questions and the production of all pertinent records. There the Court held that the failure of a witness to testify can be used against him in subsequent criminal proceedings.

Two Federal District Court opinions have held that 18 U. S. C. §3486, does not give the witness full protection and therefore he may plead the Fifth Amendment against self-incrimination before a Congressional Committee. *United States v. Fitzpatrick,* 96 F. Supp. 491 (D. D. C. 1951); *United States v. Jaffe,* 98 F. Supp. 191 (D. D. C. 1951). Where a witness declined to answer and would not claim the Fifth Amendment, the witness was not compelled to answer and a prosecution brought against him was proper. *United States v. DeLorenzo,* 151 F. 2d 122 (2d Circ. 1945).

Congressional investigations are presumed to be proper and the Senate can subpoena and enforce answers by contempt proceedings. *McGrain v. Daugherty,* 273 U. S. 135 (1927). Since the purpose of Congressional inquiries is to aid in enacting legitimate legislation, which is the supreme law of the land, Congress

can prescribe such immunity as it deems necessary. This is true even when the law affects the rules of practice within state courts. *Brown v. Walker, supra* at 606-608.

The purpose of the immunity statute is to prevent the introduction of evidence into criminal proceedings which was obtained by inquisitorial, or at least non-Courtroom methods. Therefore it is only proper that the immunity apply to *all* witnesses, to *all* testimony, and in *all* courts.

JOHN F. HUGHES

COPYRIGHTS—CONSTITUTIONAL LAW—Plaintiffs, manufacturers of electric lamps, obtained copyrights on dancing-figure statuettes, pursuant to 17 U. S. C. A. § 5 (g), as being in the class of "Works of Art; models or designs for works of art." Thereafter, the statuettes were embodied into lamp bases and were sold throughout the country both as lamp bases and as statuettes. Without authorization, the Defendants, also in the business of manufacturing and selling lamps, copied the statuettes, embodied them in lamps and sold them.

Plaintiffs brought suit to recover damages for infringement. Defendants challenged the validity of the copyrights, contending that although copyrighted as "works of art", the statuettes, having been industrially reproduced as lamp bases, were ineligible for copyright protection, but were within the scope of design patents for "articles of manufacture."

The instant case is one in a series of suits presenting the same or similar question which resulted in a diversity of decisions: the first action brought was *Stein v. Expert Lamp Co.,* 96 F. Supp. 97 (N. D. Ill. 1951), where the court dismissed the complaint and held that statues which were intended solely to be put to practical use were not copyrightable subject matter. The Court of Appeals affirmed. 188 F. 2d 611 (7th Cir. 1951). In *Stein v. Rosenthal,* 103 F. Supp. 227 (S. D. Cal. 1952), the court held that sculptured statues were works of art which were entitled to copyright protection against the defendants who copied the form of the statues into lamp bases. This was affirmed on appeal. 205 F. 2d 633 (9th Cir. 1953). In the principal case, the District Court dismissed the complaint. *Stein v. Mazer,* 111 F. Supp. 359 (D. Md. 1952). The Court of Appeals reversed and held the copyrights valid. 204 F. 2d 472 (4th Cir. 1953).

To resolve the conflict in decisions, after several years of litigation, the Supreme Court granted certiorari, 346 U. S. 811, and held: (1) the intended use, or use of, an artistic work reproduced as a manufactured article does not invalidate its copyright, and (2) the patentability of the statuette does not preclude its copyrightability as a work of art. *Mazer v. Stein,* 22 L. W. 4141 (March 8, 1954).

The Constitution of the United States invests Congress with the power "to promote the progress of science and useful arts, by securing for limited times to their authors and inventors the exclusive right to their respective writings and discoveries." Art. I, sec. 8, cl. 8. Pursuant thereto, Congress has provided for two separate and distinct classes of protection, viz., the copyright, 17 U. S. C. A. §§ 1 et seq., and the patent right, 35 U. S. C. A. §§ 101 et seq. Although similar in some respects, *Silverman v. Sunrise Pictures Corp.,* 273 Fed. 909 (2d Cir. 1921), there is no analogy between an author and an inventor within the meaning of the two laws with respect to the originality of their productions. *Baker v. Seldon,* 101 U. S. 99 (1879). It is readily apparent from a comparison of the copyright

laws pertaining to "works of art" with those of the patent laws pertaining to ornamental design for articles of manufacture that there are significant differences between what is contemplated by these separate laws, *Burrow-Giles Lithograph Co. v. Sarony,* 111 U. S. 53 (1884); *Taylor Instrument Cos. v. Fawley-Brost Co.,* 139 F. 2d 98 (7th Cir. 1943), notwithstanding that in *Rosenthal v. Stein,* 205 F. 2d 633, 635 (9th Cir. 1953), it was maintained:

> The area in which a thing would be either a copyrightable work of art or a patentable design . . . is perhaps unsurveyable. Whether a thing is a work of art or a patentable design cannot be determined by excluding one from the other. . . . The two are not necessarily distinct one from the other.

There is a necessity, therefore, primarily, to distinguish between a design patent and a copyright.

A design patent may be obtained by anyone who invents a "new, original and ornamental design for an article of manufacture." 35 U. S. C. A. § 171. The length of protection is 3½, 7 or 14 years as the applicant may elect. 35 U. S. C. A. § 173. The purpose of the design patent law is to promote the decorative arts and to stimulate the exercise of the inventive faculty by protecting an improvement in the appearance of the article of manufacture. *Hueter v. Compco Corp.,* 179 F. 2d 416 (7th Cir. 1950). As a pre-requisite for protection, the design must be original, *Alfred Bell & Co. v. Catalda Fine Arts, Inc.,* 199 F. 2d 99 (2d Cir. 1951); and ornamental, *Pelonge Scale Mfg. Co. v. American Cutlery Co.,* 102 F. 2d 916 (7th Cir. 1900). The exercise of inventive skill is also required. *In re Brooks,* 110 F. 2d 686 (C. C. P. A. 1940); *S. Dresner & Son, Inc. v. Doppelt,* 120 F. 2d 50 (7th Cir. 1941). Although an object utilitarian in purpose and character is subject to patent protection, *Baker v. Seldon, supra,* the fact that the article on which a design patent is sought has utility, neither precludes obtaining a design patent thereon, nor a copyright. *In re Montagne,* 55 F. 2d 486 (C. C. P. A. 1932). It is the peculiar or distinctive appearance of the design, "the aesthetic appeal to the eye," which constitutes, mainly, the contribution to the public which the law protects. *Gorham Mfg. Co. v. White,* 14 Wall. 511 (1871).

A copyright, on the other hand, is the exclusive right granted an author to reproduce his writings for a limited time (28 years), 17 U. S. C. A. § 24, after publication. *Perris v. Hexamer,* 99 U. S. 674 (1878). It is wholly statutory and dependent on the right created under the law. *Wheaton v. Peters & Griggs,* 8 Pet. 591 (1834); *Fox Film Corp v. Doyal,* 286 U. S. 123 (1932). The scope of the copyright protection includes "all the writings of an author," 17 U. S. C. A. § 4. But the copyright proprietor's right is limited to the right to make or use copies of the protected material. *Bleistein v. Donaldson Lithograph Co.,* 188 U. S. 239 (1903). This protection is absolute and the copyrighted material cannot be copied for any purpose without the consent of the holder of the copyright. *Stein v. Rosenthal,* 103 F. Supp. 227 (S. D. Cal. 1952); *White-Smith Music Co. v. Apollo,* 209 U. S., 17 (1908).

There is a distinction between the common law right to intellectual productions and the statutory copyright, in that the former entitles the author to the exclusive use of his unpublished works, 17 U. S. C. A. § 2; *Holmes v. Hurst,* 174 U. S. 82 (1899); whereas, the latter is the protection granted an author in his works after publication. *Ferris v. Frohman,* 223 U. S. 424 (1912). The term "publication" denotes a disclosure of the production to the public at which point the common law copyright is lost, *Millar v. Taylor,* 4 Burr. 2331, and the statutory copyright is acquired. *Associated Press v. Internat. News Service,* 245 Fed. 244 (2d Cir. 1917).

Unlike a patent giving the patentee "the right to exclude others from making, using or selling the invention," 35 U. S. C. A. § 154, a copyright gives protection only to the expression of the idea contained in the copyrighted work and prevents others from copying the creation of the author. *King Features Syndicate v. Fleischer,* 299 Fed. 533 (2d Cir. 1924). To be copyrightable, a work must be original, in that it owes its origin to the author, i. e., that the idea originated in the mind of the author who gave it tangible expression. *Dorsey v. Old Surety Life Ins. Co.,* 98 F. 2d 872 (10th Cir. 1938). Since the purpose of the copyright law is to protect authorship, the essence of the copyright shield is the protection of originality rather than novelty or invention. *Bleistein v. Donaldson Lithograph Co., supra.* It must not be solely utilitarian. *Stein v. Rosenthal, supra.* It is valid without regard to the novelty of the subject matter. *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.,* 281 Fed. 83 (2d Cir. 1922).

The appropriateness of copyright registration is determined by the artistic character of the work of art as registered, and not by the ability or intent of the applicant to use the work as the form of a utilitarian object. *Stein v. Rosenthal, supra.* Copyrighting "works of art" or "designs of works of art" does not give to the copyright registrant a monopoly on the article as an article of manufacture. *Kemp & Beatley, Inc. v. Hirsch,* 34 F. 2d 291 (E. D. N. Y. 1929). Since an article having both artistic and utilitarian qualities is copyrightable for its independent artistic value, the possession by that article of practical qualities does not render it ineligible for copyright. In *Mazer v. Stein, supra,* the Court stated that neither the copyright statute nor any other says that because a thing is patentable, it may not also be copyrighted. To uphold the argument of the Defendants in the *Mazer Case, supra,* "would require a judicial inquiry into the mind of every copyright proprietor and determine his plans and intentions as of the time of registration." It was never contemplated by the framers of the Constitution that the scope of the copyright law should be so limited. *Rosenthal v. Stein,* 205 F. 2d 633 (9th Cir. 1953).

Nonetheless, difficulty arises in an attempt to determine definitely what constitutes "writings" and "authors" within the meaning of the Federal constitution. The "writings" thus far separately classified under the copyright law include: (a) books; (b) periodicals; (c) lectures; (d) dramatic compositions; (e) musical compositions; (f) maps; (g) works of art; (h) reproductions of works of art; (i) drawings or plastic works of a scientific or technical character; (j) photographs; (k) prints and pictorial illustrations; (l) motion-picture photoplays; (m) motion pictures. 17 U. S. C. A. § 5. These specifications, however, do not limit the subject matter of copyright which comprises "all the writings of an author," as indicated in the concurring opinion of Justice Douglas:

> The interests involved in the category of "works of art" as used in the copyright law are considerable. The Copyright Office has copyrighted: statuettes, bookends, clocks, lamps, doorknockers, candlesticks, inkstands, chandeliers, piggy banks, sun dials, salt shakers, fish bowls, casseroles and ash trays.

In addition, sculpture of the type protected by the Plaintiffs in the *Mazer Case, supra,* has been recognized as "writings" also. *See Fleischer Studios, Inc. v. Ralph A. Freundlish, Inc.,* 73 F. 2d 276 (2d Cir. 1934). It is readily apparent that although the works mentioned might be "writings" in the constitutional sense, they are obviously not "writings" in the popular sense. Since the Supreme Court has never ruled precisely on the scope of either word, both are susceptible of broad definitions.

The decision in the *Mazer Case, supra,* when added to the legislative history of the copyright laws and the practice of the Copyright Office, reflects the philosophy underlying copyright legislation—in order to encourage creative productions of individuals which are of general benefit to the public, the Constitutional terms are broad enough to authorize the copyright of a work which is the representation of the "intellectual conceptions" of an author at the time of registration, notwithstanding its utilitarian potentiality.

ROSEMARIE SERINO

CRIMINAL LAW—MANSLAUGHTER—VIOLATION OF MOTOR VEHICLE STATUTE —Defendant was convicted of manslaughter for having caused a death while violating a state motor vehicle law. The prosecution did not establish a conscious nor reckless disregard for the lives and safety of others. The state statute did not define the crime; consequently, the Supreme Court of Delaware based the conviction upon the common law definition of involuntary manslaughter. The defendant argued that there should be a distinction made between acts *mala in se* and acts merely *mala prohibita.* The defendant further urged that the common law requires more than ordinary negligence for a conviction of involuntary manslaughter and that the punishment was too harsh. The Court defined common law involuntary manslaughter as "homicide committed unintentionally, but without excuse, and not under such circumstances as to raise the implication of malice." The Supreme Court of Delaware held that if a death results proximately from the violation of a motor vehicle law, a conviction of common law involuntary manslaughter will be affirmed without any proof of conscious or reckless disregard of the lives or safety of others. *State v. Huph,* Del. , 101 A. 2d 355 (1953).

Manslaughter, both voluntary and involuntary, is essentially a common law crime. *People v. Garman,* 411 Ill. 279, 103 N. E. 2d 636 (1952). The common law requires an act *malum prohibitum* to be accompanied by an added wantonness or recklessness to be the basis of involuntary manslaughter, while acts *mala in se* suffice without further wrongdoing. *State v. Horton,* 139 N. C. 588, 51 S. E. 945 (1905).

Involuntary manslaughter is the causing of a death unintentionally and without malice, but without excuse. It may arise from malfeasance, which is a criminal act not amounting to a felony nor tending to great bodily harm. *State v. Barnett,* 218 S. C. 415, 63 S. E. 2d 57 (1951); *Middleton v. Commonwealth,* 202 S. W. 2d 810 (Ky. 1947). The homicide is not excusable because it is caused by a criminal act. *State v. Beckman,* 23 Iowa 154, 92 Am. Dec. 417 (1867). Conviction of common law involuntary manslaughter depends upon the nature of the criminal act. If the criminal act or violation is *malum in se,* a death from a malfeasance may be the basis for a conviction of common law involuntary manslaughter. If the act is merely *malum prohibitum,* that alone will not suffice as a basis for common law involuntary manslaughter, *State v. Lingman,* 97 Utah 180, 91 P. 2d 457 (1939); *State v. Horton, supra; Commonwealth v. Adams,* 114 Mass. 323 (1873).

Crimes *mala in se* are those which are violations of the natural law, and the common law punishes only that which is wrong in itself. These crimes are so adjudged by the sense of a civilized community. They may be the bases of common law involuntary manslaughter convictions without proving malice aforethought, a felonious act, or a natural tendency to cause death. *State v. Kellison,*

233 Iowa 1274, 11 N. W. 2d 371 (1943). The act must be such as might probably cause an unlawful consequence. *People v. Garman,* 411 Ill. 279, 103 N. E. 2d 636 (1952). One is criminally liable for acts occurring unintentionally while he is in the execution of an intended act *malum prohibitum* or an unintended act *malum in se. Thiede v. State,* 106 Neb. 48, 182 N. W. 570 (1921).

Acts *mala prohibita* are determined, in this country, to be wrong by the legislature, and if such acts result in an accidental death, there is no criminal homicide. *Commonwealth v. Adams, supra; State v. Budge,* 126 Me. 233, 137 Atl. 244 (1927); *State v. Horton, supra.* Acts *mala prohibita* will not serve as the bases of common law manslaughter without a showing of criminal negligence, recklessness, or a disregard for the lives and safety of others. *State v. Beckman,* 219 Ind. 176, 37 N. E. 2d 531 (1941). A violation of a traffic statute, without more, does not impose a criminal liability for a resulting death because the violation is an act only *malum prohibitum.* An unintended or technical violation of a traffic statute will not cause criminal liability for a death resulting proximately therefrom unless the violative act is accompanied by recklessness or is such that it is likely to result in death. *Hurt v. State,* 184 Tenn. 608, 201 S. W. 2d 988 (1947); *State v. Barker,* 196 P. 2d 723 (Utah 1948); *Cain v. State,* 55 Ga. App. 376, 190 S. E. 371 (1937); *State v. Thomlinson,* 209 Iowa 555, 228 N. W. 80 (1929).

A homicide must have a criminal intent to render the accused culpable of manslaughter unless the resulting death is the natural or probable consequence of the act. The law imputes a criminal intent to all acts *mala in se. Keller v. State,* 155 Tenn. 633, 299 S. W. 803 (1927); *Thiede v. State, supra.* Acts *mala prohibita* do not supply that intent, not even if the acts are violations of statutes. The *Thiede* case, *supra,* held that if an act be *malum prohibitum,* effectuated without a wrongful intent or reckless disregard for human safety, there is no resulting criminal liability. Specific intent is immaterial if the death is caused by criminal negligence in an act *malum in se. State v. Long,* 30 Del. 397, 108 Atl. 36 (1919). So also, if one knowingly engages in a criminal act of any nature or evinces a reckless indifference to the safety of others, he is liable criminally for a greater but unintended result. *State v. Stanton,* 37 Conn. 421 (1870); *Schultz v. State,* 89 Neb. 34, 130 N. W. 972 (1911).

The majority of states today hold that punishable negligence must be more than ordinary negligence; it must be gross, culpable, or reckless to be a basis for a conviction of common law involuntary manslaughter. *State v. Barnett,* 63 S. E. 2d 57 (S. C. 1951); *State v. Graff,* 228 Iowa 159, 297 N. W. 97 (1940); *Cutshall v. State,* 191 Miss. 764, 4 So. 2d 289 (1941). An unintentional violation of a traffic statute is not culpable negligence unless dangerous in itself. *State v. Lowery,* 223 N. C. 598, 27 S. E. 2d 638 (1943); *State v. Clark,* 196 Iowa 1194, 196 N. W. 82 (1923); *Commonwealth v. Arone,* 265 Mass. 128, 163 N. E. 758 (1928); *State v. Lingman, supra.* The violation of a traffic statute is only *prima facie* evidence of negligence in a civil suit. *White v. Saudner,* 299 Ky. 269, 158 S. W. 2d 393 (1942). A minority of courts hold that such violations evince negligence *per se.* See *Willis v. Schlagenhauf,* 188 Atl. 700 (Del. 1936).

An operator of an automobile voluntarily doing an improper act or refraining from doing a proper act, is not chargeable with involuntary manslaughter unless he evinces a heedless disregard for the safety of others or takes the chance of an accident occurring, even without an intent that it should occur. Gross and culpable negligence or reckless indifference to life must be superimposed upon a charge of a statute violation *malum prohibitum* in order that

the criminal intent essential to manslaughter may be supplied. *People v. Crego,* 285 Ill. 451, 70 N. E. 2d 578 (1947).

Culpable negligence is gross and flagrant and evinces reckless disregard to human life and consequences of the acts. Gross negligence itself does not impute a wilful wrongdoing. It is higher than what is held to be gross negligence in civil cases. *Preston v. State,* 56 So. 2d 543 (Fla. 1952); *State v. Homme,* 32 N. W. 2d 151 (Minn. 1948); *People v. Costa,* 252 P. 2d 1 (Cal. 1953). Wilful and wanton misconduct differs from negligence *per se* both in kind and degree. *Murphy v. Snyder,* 63 Ohio App. 423, 27 N. E. 2d 152 (1930). One acting in violation of a positive statute and evincing a reckless disregard for the lives of others commits acts that impute the criminal intent essential for a conviction of involuntary manslaughter. Recklessness involves intentional conduct, although the resulting harm may be unintentional. *Dunnville v. State,* 188 Ind. 373, 123 N. E. 689 (1919).

Involuntary manslaughter cannot be based upon a violation of a traffic statute because the violation is only *malum prohibitum.* A traffic statute is a safety statute, and a violation thereof is not criminal negligence unless the act is wilful or accompanied by recklessness. The violation may be *prima facie* evidence of negligence; however, negligence alone will not suffice as a basis for a conviction of common law involuntary manslaughter. *State v. Kellison,* 233 Iowa 1274, 11 N. W. 2d 371 (1943); *Zirkle v. Commonwealth,* 189 Va. 862, 55 S. E. 2d 24 (1949).

The general trend today is to enact statutes to cope with automobile drivers causing death. These statutes take the form of negligent homicide or reckless, careless, or criminal negligence statutes. The District of Columbia, for example, utilizes a negligent homicide statute, the elements for the conviction of which are: the death of a human being by a motor vehicle operated at "an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly." 40 D. C. Code 606 (1951).

While granting that the States have the authority to change the common law, it should be effected by virtue of statutes. It is an unwarranted extension of a clear definition of common law involuntary manslaughter to hold that a violation of a statute may be the basis of common law manslaughter when the act complained of is merely *malum prohibitum.* The Court in *State v. Barnett, supra,* reflected the general preference today where, although forced by tenacious precedents to convict the defendant of involuntary manslaughter for simple negligence, stated that the punishment was too harsh and if the question were one of original impression, they would not be in favor of adopting it. They recognized in that opinion that the conviction was inadvisable but that the change should be effected through the legislature. That is the proper course to follow and should have been done in Delaware in the present case.

PATRICK J. FOLEY

FEDERAL SECURITIES ACT—ARBITRATION CLAUSE IN BROKERAGE AGREEMENT DOES NOT PRECLUDE STATUTORY SUIT FOR MISREPRESENTATION—Plaintiff sued to recover damages for misrepresentation in connection with the purchase of stock from defendants, partners in a securities brokerage firm. The suit was brought under section 12(2) of the Securities Act of 1933, 48 Stat. 84, 15 U. S. C. §771 (2), which provides that the seller shall be liable to the purchaser

of a security which is sold by means of a prospectus or oral communication which falsely states a material fact, or omits a material fact necessary to make seller's statements not misleading. The purchaser may sue at law or in equity in any court of competent jurisdiction. The parties had agreed to settle any controversy arising between them by arbitration in accordance with the United States Arbitration Act. Defendant moved to stay the trial of the action pursuant to section 3 of the United States Arbitration Act, 43 Stat. 883, 9 U. S. C. §3, until an arbitration in accordance with the agreement was had.

The question before the court was whether the agreement to arbitrate a future controversy was a *condition, stipulation,* or *provision* within the meaning of section 14 of the Securities Act, which provides that "any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 48 Stat. 84, 15 U. S. C. §77n. The District Court denied a stay of the proceedings on the ground that under the Securities Act a controversy between the parties was not referable to arbitration. *Wilko v. Swan,* 107 F. Supp. 75 (S. D. N. Y. 1952). The Court of Appeals reversed, holding that it was unable to find, in the purpose or in the language of the Securities Act, any Congressional policy which would be strong enough to override the Congressional policy of the Arbitration Act. 201 F. 2d 439 (2nd. Cir. 1953). The Supreme Court of the United States reversed the Court of Appeals holding that the plaintiff would be deprived of the effectiveness of the remedies afforded by the Securities Act if she were compelled to arbitration proceedings, and that therefore the agreement to arbitrate *was* a waiver and as such void under section 14 of the Act. *Wilko v. Swan,* 22 L. W. 4044 (U. S. 1953).

The Securities Act was enacted to protect investors against fraud and malpractice in security transactions. In effect it substituted for the ancient rule of *caveat emptor* the doctrine, "Let the seller beware." The burden of telling the truth is on the seller. 77 Cong. Rec. 937 (March 29, 1933). The buyer is given a wide choice of remedies for material misrepresentation or omission by the seller and any agreement to waive the provisions of the Act is made void.

On the other hand, the law of most jurisdictions to-day shows a strong policy in favor of arbitration as a substitute for litigation. It has been held that contracts containing clauses providing for settlements by arbitration are valid and irrevocable, except on such grounds as exist at law or in equity for revocation of any contract. *General State Authority, to Use of Dunzik v. John McShain,* 25 A. 2d 572 (Pa. 1942). In the United States Arbitration Act, Congress has evidenced its approval of arbitration.

In effect, *Wilko v. Swan, supra,* presented the Court with two problems: (1) Did the agreement to arbitrate in fact constitute a waiver of any provision of the Securities Act? (2) Is there a conflict between the two Congressional policies evidenced by the Securities Act and the Arbitration Act and, if so, which should prevail? The Court divided in its answer to these questions.

As the case required subjective findings of the purpose and knowledge of an alleged violator of the Act, arbitration proceedings would be made without explanation of their reasons and without a complete record of their proceedings which could not be examined. In order to assure plaintiff the effectiveness of the Act, judicial direction would be required. The minority, in their opinion, stated that "in the absence of any showing that settlement by arbitration would jeopardize the rights of the plaintiff, the advantages of the Arbitration Act should not be assumed to be denied in controversies arising under the Securities Act."

An analogous problem was presented by the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201, which allowed an employee who had not been paid the minimum hourly wage or the overtime premiums required by the Act to sue for double damages plus attorneys' fees. Although the Act was silent on the point, in *Brooklyn Savings Bank v. O'Neil,* 324 U. S. 697 (1945), the Court held that a release given for less than the full benefits afforded by the Act, was not binding on the plaintiff. The Court, stating that the history of the Act showed an intent on the part of Congress to protect the interest of certain groups from sub-standard wages and excessive hours which endangered the national health and welfare, held that such a statutory right, conferred on a private party but affecting the public interest, could not be waived or released. This rule has been modified by the *Portal-to-Portal Act,* 63 Stat. 910, 29 U. S. C. § 216(c), but even under the amended statute, a waiver or release, to be valid, must have been supervised by the Administrator of the Wage and Hour and Public Contract Divisions of the United States Department of Labor. See *Harrel v. S. D. Bell Dental Mfg. Co.,* 110 F. Supp. 538, (N. D. Ga. 1953).

There are a number of other Federal Statutes which contain express provisions relating to waiver or settlement of claims. *Federal Employees' Liability Act,* 45 U. S. C. §55; *Jones Act,* 46 U. S. C. §688 and *Settlement of Wages Claims of Merchant Seamen,* 46 U. S. C. §§596, 644. The provisions of these Statutes have been interpreted strictly by the Federal Courts so as to protect the employee *Garrett v. Moore McCormack Company, Inc.,* 317 U. S. 239 (1942); *Henderson v. Glen Falls Indemnity Company,* 134 F. 2d 320 (1943); and *Westenrider v. United States,* 134 F. 2d 772 (1943).

If the prohibition of waivers was intended to be limited to certain types of proceedings, Congress could have so limited it. Since the prohibition is not limited, it must be construed as being broad and general, and any agreement which would defeat the purpose of the act would be a waiver within the section. The ruling in the principal case indicates that where certain groups are put in a class which is to be protected from fraudulent practices, the statute will be construed so as to give the most benefit and protection to that class.

ALBERT B. MACKAREY

TORTS—ABSOLUTE LIABILITY—BLASTING—Plaintiffs brought this action to recover for damage to their property caused by concussion and vibration resulting from dynamite blasting. The blasting had been carried on by the Defendants over a period of fifteen months in connection with grading operations for laying railroad tracks. The Plaintiffs contended that the rule of absolute liability extends to liability for damage caused by concussion from blasting and that it is sufficient to prove that the blasting was the proximate cause of the damage.

The Supreme Court of Oregon found that the jury should decide whether blasting was the proximate cause of the damage to the property and held that blasting was an ultrahazardous activity and the one who engaged in it did so at his peril. *Bedell v. Goulter,* 261 P. 2d 842 (Ore. 1953).

The underlying question is whether the courts should restrict a property owner's use of his property so as not to injure his neighbor, or should the courts adopt the principle which would permit the fullest use of his land? The question of absolute liability has long been a judicial thorn in the side of English

and American law. The instant case is an adoption of the doctrine of absolute liability in reference to property damaged by concussion and vibration resulting from blasting with dynamite.

The doctrine of absolute liability was announced by Justice Blackburn in *Fletcher v. Rylands,* 1 Exch. L.R. 265 (1866), and afterwards approved in *Rylands v. Fletcher,* L.R. 3 H.L. 330 (1868), wherein it was held that a person who brought anything of a dangerous nature upon his land acted at his peril and was *prima facie* liable for all damages which were the natural consequences of its escape. The courts have consistently held that, irrespective of negligence, one engaged in a blasting operation is liable for damages to adjoining or neighboring property where there has been an actual physical invasion by stones or other debris. *Hay v. Cohoes Co.,* 2 N. Y. 159 (1849); *Asheville Constr. Co. v. Southern R. Co.,* 19 F. 2d 32 (4th Cir. 1927).

The extension of the doctrine of *Rylands v. Fletcher, supra,* to encompass cases where the damage resulted from vibration or concussion due to blasting, had early opposition in this country. *Booth v. Rome,* 140 N. Y. 267, 35 N. E. 592 (1893). At common law, one carrying on blasting operations was liable for all direct damage, but the liability was not extended, in the absence of negligence, to cases where damage was caused by concussion. *Jinkins v. Tomasello,* 286 Mass. 180, 189 N. E. 817 (1934). Such injuries were held to be consequential and that blasting, without negligence, did not constitute a nuisance, trespass, or unreasonable use of land. *Booth v. Rome, supra.* The necessity of requiring proof of negligence was based on the old difference between the actions of trespass and trespass on the case. The former required no proof of negligence, while the latter required proof of negligence, as well as substantial damages. *Wendt v. Yant Constr. Co.,* 125 Neb. 277, 249 N. W. 599 (1933). It has been contended that only in rare instances does the law provide exception to the general rule that fault is a necessary requisite to liability and that concussion cases are not included as an exception, but are governed by the rule which requires an allegation and proof of negligence. *Reynolds v. Hinman Co.,* 145 Me. 343, 75 A. 2d 802 (1950). The requirement of proof of negligence as a necessary element of recovery was recently approved in *Bennett v. Texas-Illinois Gas Pipeline Co.,* 113 F. Supp. 788 (E. D. Ark. 1953). The court, in that case, based its decision on the ruling in *Holden v. Carmean,* 178 Ark. 375, 10 S. W. 2d 865 (1928), wherein the court stated that the highest degree of care must be exercised by a user of dynamite in order to prevent injury to the property of others.

The reasoning of the courts of this country which require proof of negligence where damage results from concussion was attacked at an early date as being erroneous. The court in *Colton v. Onderdonk,* 69 Cal. 155, 10 Pac. 395 (1886) stated that there was no material difference between damage to the plaintiffs' dwelling caused by rocks and that caused by concussion. Blasting was said to be an unusual and unnatural use of property. In *Patrick v. Smith,* 75 Wash. 407, 134 Pac. 1076 (1913), such distinctions were labeled as "illogical". One year later, in the case of *Johnson v. Kansas City Terminal R. Co.,* 182 Mo. App. 349, 170 S.W. 456 (1914), the court went so far as to declare that damage resulting from concussion was a trespass. The court reached a similar result in *Muskogee v. Hancock,* 58 Okla. 1, 158 Pac. 622 (1916), stating that there was as much physical invasion by concussion as there was by rocks or other debris. Again in *Hickey v. McCabe and Bihler,* 30 R.I. 346, 75 Atl. 404 (1910), the court, in rejecting the reasoning of *Booth v. Rome, supra,* denounced the distinction made between damage caused by concussion and that caused by rocks.

In some cases, the doctrine of absolute liability has been limited to, and dependent upon, the locality wherein the blasting takes place. Blasting in a sparsely settled country has been held to be a reasonable and justifiable use of property, provided reasonable care was used. *Cary Bros. v. Morrison,* 129 F. 177 (8th Cir. 1904). Whereas, the use of dynamite in a populous city has been held to be inherently dangerous. *Chicago v. Murdock,* 212 Ill. 9, 72 N. E. 46 (1904). Blasting in populated surroundings or dwelling places has been held to be an ultrahazardous activity in which the actor was liable regardless of the exercise of due care. *Alonso v. Hills,* 95 Cal. App. 2d 778, 214 P. 2d 50 (1950). In that case, the court pointed out that where blasting was done in remote places, with little danger of damage, it would not be considered a nuisance *per se* and would not be actionable without allegation and proof of negligence.

Some courts have limited the application of the doctrine of strict liability for property damage caused by concussion from blasting to circumstances which indicated that damage would have been the probable result of such blasting. Accordingly, one engaged in the inherently dangerous operation of blasting, where the property of another is necessarily or obviously exposed to danger, was absolutely liable regardless of negligence. *Whitman Hotel Corp. v. Elliott Co.,* 137 Conn. 562, 79 A. 2d 591 (1951). One who used the dangerous agency of powerful explosives in such a way that the probable result thereof would have been damage to property by concussion was liable, and proof of negligence was not essential. *Aycock v. Nashville C. & St. L. R. Co.,* 4 Tenn. App. 655 (1927). A defendant in Ohio was held absolutely liable because of the proximity of the blasting to adjoining land and the damage was the natural, necessary or probable result of the force of the explosion. *Louden v. Cincinnati,* 90 Ohio St. 144, 106 N. E. 970 (1914).

In a few cases recovery for damage by concussion was permitted where a nuisance could be established. Although blasting was not a nuisance *per se,* where concussions were "continual" the court held that a nuisance could be found as basis for applying the rule of absolute liability. *Crino v. Campbell,* 68 Ohio App. 391, 41 N. E. 2d 583 (1941). Where the court found that damage caused by continual concussions was a "private nuisance", a similar result was reached in *Morgan v. Bowes,* 17 N.Y.S. 22 (1891). Recovery was allowed without proof of negligence based on the theory that damage due to continual concussion was a nuisance. *Dixon v. N.Y. Trap Rock Corp.,* 293 N. Y. 509, 58 N. E. 2d 517 (1944).

One of the most important cases in the extension of the rule of absolute liability to include property damage by concussion from blasting is *Exner v. Sherman Power Constr. Co.,* 54 F. 2d 510 (2nd Cir. 1931). In that case, dynamite was held to be inherently dangerous, and the user became an insurer for damage resulting to others by concussion. The court based its decision upon the "nature" of the agency involved and was not limited by secondary rules of proximity, location, probability of damage, or negligence.

The tendency of courts today to base their decisions, supporting the rule of absolute liability, upon the "intrinsically dangerous nature" of blasting operations is exhibited in *Whitman Hotel Corp. v. Elliott, supra.* The more recent decisions are firm in accepting the principle predicated upon the "ultra hazardous nature" of the activity and upon the belief that the user acts at his peril and assumes the risk. *Fairfax Inn Inc. v. Sunnyhill Mining Co.,* 97 F. Supp. 991 (N. D. W. Va. 1951).

The RESTATEMENT OF TORTS, §§519, 520, applies the doctrine of absolute liability to damage caused by concussion from blasting. The liability of the user is based on the ultra hazardous nature of the agency and the probability of injury. *Federoff v. Harrison Constr. Co.*, 362 Pa. 181, 66 A. 2d 817 (1949).

The rule of absolute liability has not been accepted by all the jurisdictions in this country. However, the cases reviewed by the writer indicate that the weight of authority now lies in that direction. The principal case approves the doctrine of absolute liability, first expressed in *Rylands v. Fletcher, supra,* basing its holding upon the "ultrahazardous nature" of the activity. The inability to predict the severity of the explosion, coupled with the practical difficulty of proving negligence, gives additional support to the application of the doctrine of absolute liability, whereby the user of dynamite in blasting is held to be an insurer for damage by concussion or vibration resulting from such blasting.

HARLAN J. CHOATE

TORTS—MASTER AND SERVANT—SCOPE OF EMPLOYMENT—DUAL PURPOSE DOCTRINE—Action against the United States under the Federal Tort Claims Act, 28 U. S. C. A. §1346, for injuries sustained in an automobile collision with an automobile driven by an employee of the U. S. Government.

An employee of the Corps of Engineers, located in Los Angeles, California, had obtained permission to take several days annual leave in order to attend his son's graduation in Glendale, Arizona. Prior to his departure, an urgent project arose which necessitated the employee's traveling to Fort Huachuca, Arizona. In order to serve both ends, he was authorized to take two days leave, to travel by his own automobile, and he was given a per diem and traveling expense equal to the cost of travel by train. His itinerary shows that January 30th and 31st were charged to annual leave; he departed from Los Angeles on January 29th; the accident occurred on January 30th.

Deciding specifically the issue of whether the employee was acting within the scope of his employment, the Court held that no inquiry will be made as to which business the servant was actually engaged in at the time the plaintiff was injured, but the government is liable where it appears that the servant was combining his own business with that of the master or attending to both at substantially the same time. The case was then set for trial on the issue of negligence. *Marquardt v. U. S.*, 115 F. Supp. 160 (S. D. Calif. 1953).

This case is one of first impression in deciding that a government employee is considered within the scope of his employment when he travels in his own automobile and pursues a dual purpose, i. e., traveling to an official work assignment and at the same time traveling toward a personal destination en route. This decision enlarges the scope of employment as applied in the Federal Courts to such an extent that determination of the time, nature, intent of the employment and the various other tests as applied by the courts would be unnecessary.

While no *ratio decidendi* is given for the principle, an applicable *ratio* may be had from Young B. Smith's *Frolic and Detour,* 23 Col. L. Rev. 444 (1923), which states that much of the confusion arising from the determination of what is a complete departure from the line of employment or merely a slight deviation may be avoided by looking to the underlying policies of *respondeat superior* rather than the mechanical tests. The underlying policy is that it is socially more expedient to spread the losses which are inevitable in industry over a large group of the community than to cast the loss upon a few.

The origin of the principle set forth in the instant case can be traced through California courts to the ruling as expounded in *Brimberry v. Dudfield Lumber Co.*, 183 Cal. 454, 191 Pac. 894 (1920), which cited as authority SHEARMAN & REDFIELD, ON NEGLIGENCE, Vol. I, § 147 (1888). The foundation, as noted in the latter work, was *Patten v. Rea,* 2 C. B. (N. S.) 606, 140 Eng. Rep. 554 (1857) which, however, was decided on the fact that the servant had the implied authority of the master to perform the particular act in question, and the rule as such was not laid down.

As indicated, the doctrine of the principal case has been in effect for some time. It has been applied to simple intermingling of purpose conflicts, *U. S. v. Johnson,* 181 F. 2d 577 (9th Cir. 1950); and to deviation from the direct route to serve personal ends. *Wibye v. U. S.,* 191 F. 2d 181 (9th Cir. 1949). However, in some state courts, as in *Frankle v. Twedt,* 234 Minn. 42, 47 N. W. 2d 482 (1951), and *Ryan v. Farrell,* 208 Cal. 200, 280 Pac. 945 (1929), its applicability has been somewhat limited since those courts held that the right of control, of which a significant factor is the existence of a mutual agreement controlling the time, destination and purpose of the trip, determines whether the relationship of master and servant exists; these cases then held the instant principle applicable as determinant of the master's liability. The area of applicability of the doctrine was again restricted to that mode of employment which necessitated travel by its nature. *McNew v. Puget Sound Pulp & Timber Co.,* 37 Wash. 2d 495, 224 P. 2d 627 (1950).

The doctrine of no inquiry except the master's predetermined liability when the dual purposes of master and servant are apparent in one transaction has a limited jurisdictional acceptance, and, in fact, the contrary was held in *U. S. v. Eleazer,* 177 F. 2d 914 (4th Cir. 1949). The facts being similar to the principal case, the Court, however, decided that the officer was not within the scope of his employment when he chose to drive his own car in traveling to his new duty station, having been given deferred leave, instead of availing himself of commercial transportation. He was acting in furtherance of his own purpose, not that of the government, and the mode of travel was for his own use and benefit and subject to the control of no one but himself; therefore, the government was not liable for the injuries sustained by a third person.

The Court in *U. S. v. Eleazer, supra,* quoted from the opinion of Judge Walter H. Sanborn in the case of *Standard Oil Co. v. Parkinson,* 152 F. 681 (8th Cir. 1907):

> There can be no recovery of a person for the act or omission of his alleged servant under the maxim 'respondeat superior', in the absence of the right and power in the former to command or direct the latter in the performance of the act or omission charged, because in such a case there is no superior to respond.

Similarly, a soldier with a pass traveling in his own auto under orders to report to his new station without being reimbursed for travel was not within the scope of his employment when traveling, since the government had no control or direction over his movements. *U. S. v. Sharpe,* 189 F. 2d 239 (4th Cir. 1951).

To be within the scope of employment, the act must be done within the space and time limits of the employment, and there must be an intent to perform services for the master. RESTATEMENT OF AGENCY, §237. When the employee is thus within the scope of his employment and engaged to some extent in his

master's business, it is immaterial that he may also have combined with this some private purpose of his own. *Thomas v. Slavens,* 78 F. 2d 144 (8th Cir. 1935). The master's ends must actuate the servant to some appreciable extent. RESTATEMENT OF AGENCY, §236. Should the servant do something incidental to his employment when on a private venture, the master may be liable if the servant would not have ventured for purely personal reasons. *McNew v. Puget Sound Pulp & Timber Co., supra.* The result is otherwise when an employee uses his own car for his own purpose and only by chance happens to do something incidental to benefit the employer. *Graffagnini v. George Engine Co.,* 45 So. 2d 412 (La. 1950).

The liability of the master extends to third persons injured by the servant driving his own automobile within the scope of his employment when the use of the instrumentality is either expressly or impliedly authorized by the master. *Mid-Continent Pipe Line Co. v. Whitely,* 116 F. 2d 871 (10th Cir. 1940). However, if an employee uses his own automobile for his own convenience when he was not hired to drive, the employer is not liable. *Gittleman v. Hoover Co.,* 337 Pa. 242, 10 A. 2d 411 (1940). But where the employer is merely interested in the results and gives acquiescence to the travel of the employee by means of his own automobile, in the absence of a right of direction, the employer would not be liable for the negligent driving. *Gosney v. Metropolitan Life Insurance Co.,* 114 F. 2d 649 (8th Cir. 1940).

To determine whether a master is liable, various tests have been devised by the courts. Judge Cardozo, in *Marks' Dependents v. Gray,* 251 N. Y. 90, 167 N. E. 181 (1929), stated that if the work did not create the necessity for travel, and if the journey had gone forward, though the business errand had been dropped, but would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk. The employer's right and power to direct and control his imputed agent in the performance of the casual act or omission at the very instant of the act or neglect determines his liability. *Standard Oil Co. v. Parkinson, supra.* It must be proved either that the master exercised control over the instrumentality, or the use of the instrumentality at the time and place of the act complained of must be of such vital importance in furthering the business of the master that the latter's actual or potential control of it at the time and place may reasonably be inferred. *John Wesolowski v. John Hancock Mutual Life Ins. Co.,* 308 Pa. 117, 162 Atl. 166 (1932). Where the measure of control relates primarily to the contractual feature of the agent's employment and not to the physical details as to the manner of performance of his movements, the master is not liable. *Reiling v. Missouri Ins. Co.,* 153 S. W. 2d 9 (Mo. 1941). The master should have control as to the manner his agent drives his car. *Hutchins v. John Hancock Mutual Life Ins. Co.,* 192 Atl. 498 (N.H. 1937). The California Court, in *Loper v. Morrison,* 23 Cal. 2d 600, 145 P. 2d 1 (1944), held that the various factors to be considered in determining liability are the intent of the employee, the nature, time and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties.

Mechem states that definite results, upon which everyone will agree, cannot be expected since so much depends on the nature of the employment, the habits and conduct of the parties, and other circumstances of the case. However, he criticizes

those courts that would not attempt to draw the line between the act of the individual and that of the servant:

> But certainly the mere difficulty of making a distinction which justice and the rules of law approve, is no excuse for not attempting it; and the liability of innocent masters for their servants, which has already been carried far beyond the limits fixed by natural justice, ought not to be still further extended merely because it may be difficult to draw the line. MECHEM, LAW OF AGENCY, § 1887.

The instant case, in applying the principle of no investigation when the dual purposes present themselves, has extended the scope of employment of government employees traveling under the guise of dual purpose so as to make the government the indemnifier or insurer for the negligence of its employees, and has bartered individual justice for easily determined results.

PAUL J. SIRWATKA

TRADE REGULATION—RESALE PRICE MAINTENANCE—NON-SIGNER PROVISION OF FLORIDA FAIR TRADE LAW UNCONSTITUTIONAL—The Miles Laboraories, makers of Alka-Seltzer, brought a bill to enjoin the defendant, Eckerd's Drug Store from selling below minimum prices as established under contracts authorized by the Florida Fair Trade Law. Defendants were non-signers to an agreement entered into between the Miles Company and others, establishing minimum resale prices for plaintiff's product. The granting of defendant's motion to dismiss was upheld by the Supreme Court of Florida.

The Court ruled unconstitutional the non-signer clause of the Florida Fair Trade Act, Chapter 25204, Laws of 1949, reciting once again the long standing hostility of the Florida courts toward fair trade. "This Court has expressed its views on fair trade and unequivocally rejected, on constitutional grounds, both the underlying theory and the economic facts on which they are sought to be predicated." Judge Terrell stated further that the non-signer clause results only in "anti-competitive price fixing", not in the protection of the good will of trade marked products, and therefore such law is an invalid use of the police power for a private purpose. *Miles Laboratories, Inc. v. Eckerd,* —— Fla. ——. 22 L. W. 2458 (1954).

The *Miles* decision did not mark the first time the Florida Supreme Court has declared fair trade agreements unlawful insofar as they apply to non-signers. A former fair trade law, Chapter 19201, Laws of 1939, provided for prosecution of non-signers, since it bound them to sell at the set price whether the vendor "was or was not a party to such a contract". This provision was held invalid in *Bristol Meyers Co. v. Webb's Cut Rate Drug Co.,* 137 Fla. 508, 188 So. 91 (1939). The Court held the non-signer clause as not within the scope of the title of the Act which indicated that the Act applied only to retailers who *voluntarily* entered into the contracts. Thus an attempt to bind a person who was not a party to the contract was an invalid extension of the scope of the Act, since under Florida law the title of the Act determines its scope.

Torn by judicial limitation, the fair trade standard stood for a decade enforceable only against signers to fair trade contracts. The final blow overthrowing the complete statute came in *Liquor Store v. Continental Distilling Corp.,* 40 So. 2d 371 (Fla. 1949), where the law was held unconstitutional inasmuch as it violated the equal protection clauses of the State and Federal Constitutions. The

Court further held the classification arbitrary and unreasonable, since those persons who sold non-trademarked items could not avail themselves of the protection of the Act. It was also determined that this power to fix prices under the fair trade law was a delegation of the sovereign power of the state to a private person to be used for a private purpose and hence unconstitutional.

Following the 1947 upset of fair trade in Florida by judicial act, the legislature took up the cause once more. This time in order to secure the act against further judicial attack, the legislature, in the repassage of fair trade legislation, sought to circumvent judicial objections set out in the *Continental Case, supra.* In the new Act, Chapter 25204, Laws of 1949, a preamble was written into the fair trade law, entitled "Findings of Fact". This preamble stated most emphatically that the fair trade law was *in fact* in the public interest, since price-cutting was harmful to the general welfare. The Florida Legislature also added Section 10 to the Fair Trade Act, providing that the Attorney General might investigate contracts of this class, and upon finding them to be against the purpose of the Act, he was entitled to bring an action in the name of the state to enjoin compliance with the minimum price provision.

After the enactment of the 1949 Fair Trade Law, the Supreme Court of Florida again took a critical view of the new Fair Trade Law in *Seagrams Distillers v. Ben Greene, Inc.*, 54 So. 2d 235, (Fla. 1951). The Court said that the "Findings of Fact" were not entitled to the customary presumption of correctness, since they were mere conclusions, and were subject to judicial inquiry. However, the invalidity of the non-signer provision in this case was governed by the decision of the United States Supreme Court in *Schwegmann v. Calvert Distillers Corp.,* 341 U. S. 384 (1951), which held the non-signer provisions of state law not exempt from the provisions of the Sherman Act, 15 U. S. C. § 1, 50 Stat. 693 (1937), under the wording of the so-called Miller-Tydings Amendment of 1937, which exempted "contracts or agreements" for minimum resale prices from the provisions of the Sherman Act.

Originally resale price maintenance was forbidden under Section 1 of the Sherman Anti-trust Act, 15 U. S. C. § 1, 26 Stat. 209 (1890), which prohibited contracts or agreements in restraint of trade. The Supreme Court judicially construed this section to prohibit resale price maintenance agreements. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U. S. 373 (1911). The Miller-Tydings Act of 1937, an Amendment to Sec. 1 of the Sherman Act, legalized certain fair trade agreements and resolved the conflict between state and federal laws on this question. The Miller-Tydings Act of 1937 was designed to remove every obstacle which would hinder free enforcement by the states of their local fair trade acts. However, this law, and the subsequent McGuire Act legalized contracts for minimum resale prices *only insofar as the state laws so provided.* Thus, it was left up to the states to determine ultimately whether or not they would have fair trade laws.

It was not until after the passage of the McGuire Act, 15 U. S. C. § 45 (a) (2)-(6), 66 Stat. 632 (1952), which declared state non-signer provisions not in conflict with the Sherman Act, that the Florida courts again found it necessary to reconsider the Fair Trade Law. This statute in effect revalidated the non-signer provision declared unconstitutional in *Seagrams Distillers v. Ben Green, supra,* because that decision was based on the technical ruling of the *Schwegmann Case.* Thus on March 15, 1954, the Florida Supreme Court once more struck down the non-signer clause as an unconstitutional exercise of the police power. *Miles v. Eckerd, supra.*

The Court in the *Miles* decision did not act as decisively against the Fair Trade Law as it did when pronouncing the whole statute invalid in *Liquor Store v. Continental Distilling Co., supra.* However, the Court, in *dicta,* cited with approval its *Continental* decision and stated that the Fair Trade Act in question was substantially identical with the former Act inasmuch as nothing material had been added except the findings of fact and the provision for an injunction by the Attorney General, leaving the law in no better shape than it had been before.

The distinction between the situation prevailing after the *Continental Case, supra,* and the situation today lies in the fact that in the period after the *Continental* decision *all* "fair trading" was illegal, while the *Miles* decision leaves "contracts and agreements" for resale price maintenance valid, but non-signers are free to determine price themselves.

The constitutionality of fair trade statutes in California and Illinois, which were similar to the one struck down in the *Miles Case, supra,* were sustained against arguments of denial of equal protection of the laws, lack of due process, delegation of price fixing power to private persons, and ambiguity of the term "fair and open competition." *Old Dearborn Distributing Co. v. Seagram Distillers Corp.,* and *Triner Corp. v. McNeil,* 299 U. S. 183 (1936); *Pep Boys v. Pyrol Sales Co., Inc.,* and *Kunsman v. Factor & Co.,* 299 U. S. 198 (1936).

With the decisions in these cases, and the green light given by the Miller-Tydings Act, all states passed fair trade laws except Vermont, Missouri, Texas, and the District of Columbia. These state fair trade laws have been upheld almost universally in the state courts in a chain of decisions extending over the past twenty years. Thus Florida, in the decisions of *Liquor Store v. Continental Distilling Corp., supra,* and *Miles Laboratories v. Eckerd, supra,* has definitely set up a minority rule.

The antipathy of the Florida courts toward fair trade might claim to draw at least token support from some recent decisions in other states. The Supreme Court of Michigan ruled the fair trade law of that state invalid in *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.,* 334 Mich. 109, 54 N. W. 2d 268 (1952). The Court based its decision in great part on the *Schwegmann Case, supra,* but the Court explicitly adopted the Florida rule of *Liquor Store v. Continental Distilling Corp., supra,* calling it the better reasoned view, meanwhile stating that fair trade was an invalid exercise of the police power since it bears no reasonable relation to the general welfare.

The Georgia Supreme Court struck down the fair trade law of that state in *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.,* 209 Ga. 613, 75 S. E. 2d 161 (1953). There, however, the Court was not concerned with the police power argument, but held the Act invalid because at the time of its passage in 1937 it was inconsistent with the Sherman Act, and thus offended the supremacy clause as well as the commerce clause of the Federal Constitution. It was, therefore, void *ab initio.* But subsequently the Georgia legislature passed an act revalidating fair trade in that state which became effective on January 6, 1954.

Also declared invalid was the non-signer provision of the Minnesota Act, in *Calvert Distillers Corp. v. Sachs,* 234 Minn. 303, 48 N. W. 2d 531 (1951), but again, the reasoning was based on the Supreme Court's decision in *Schwegmann v. Calvert Distillers Corp., supra.*

The Court of Appeals held the non-signer provision of the New York fair trade act unconstitutional in *Doubleday, Doran & Co., Inc. v. Macy & Co.* 269 N. Y. 272, 199 N. E. 409 (1936), but the Court reversed itself and held

the Act constitutional in *Bourjois Sales Corp. v. Dorfman.* 273 N. Y. 267, 7 N. E. 2d 30 (1937).

The District Courts in Arkansas and Nebraska within the last few months have delivered opinions holding the fair trade acts of these states invalid, but final determination of the question will have to be made by the state supreme court in each case.

THOMAS E. O'NEILL