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## Recent Cases

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## Recent Cases

### Authors

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## RECENT CASES

ADMINISTRATIVE LAW—WATERFRONT COMMISSION COMPACT ACT—PROVISIONS NOT IN VIOLATION OF 14TH AMENDMENT.—Upon recommendation of the New York Crime Commission, and after eighteen months of investigation of crime and corruption on the waterfront of the Port of New York District, the legislatures of New York and New Jersey passed the Waterfront Commission Compact Act. MCK. UNCON. LAWS, Sec. 6700-aa et. seq.; 32 N.J.A.A. 23-1 (1953). The stamp of approval of the Congress of the United States was promptly secured, 67 STAT. 541 (1953). Three months later the constitutionality of this compact was tested in the U. S. District Court for the Southern District of New York, on the ground that the Waterfront Commission was given excessive discretionary power.

The petitioners, union officials of a longshoremen's local, sought to enjoin the Commission from carrying out provisions of the compact. Under attack was a provision which enabled the Commission in its discretion to deny registration to such longshoremen whose presence at the piers or other waterfront terminals in the Port of New York District was found by the Commission, on the basis of the facts and evidence before it, to constitute a danger to the public peace and safety. The Compact also provided that no person could work on the waterfront unless he was registered with the Commission.

The union officials contend that: (1) this provision has nothing to do with the competency of the men to work; (2) the provision places arbitrary power in the Commission to reject whomever they wish; and (3) the provision furnishes no standard of conduct for the Commission to apply. The U. S. District Court refused to grant the injunction and held that the standard was constitutional under the 14th Amendment.

The case went to the Supreme Court of the United States on direct appeal from a decision of a three-judge federal court. 62 STAT. 926 (1948), 28 U.S.C. §1253 (1953). The Court affirmed the decision of the District Court without opinion. *Linehan v. Waterfront Commission of New York*, 347 U.S. 439 (1954).

The District Court presumes that the Commission will not act arbitrarily, but says that if it does, its action can be attacked directly in the usual hearing procedure provided, and/or in the courts. In the exercise of its police power, a state has the right by means of reasonable regulations, to protect the public health and safety. *People of the State of New York ex rel Lieberman v. Van De Carr*, 199 U.S. 552 (1905).

In the *Lieberman* case, *supra* at 560, the Supreme Court ruled once again that such regulations should be uniform and such administrative boards should not act arbitrarily:

It is presumed that public officials will discharge their duties honestly and in accordance with the rules of law. . . . This Court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people.

Article IX of the Waterfront Commission Compact Act sets up requirements for regularity of employment to eliminate persons from the waterfront who have no substantial relation to the business of stevedoring. Petitioners contend that this Article has nothing to do with public safety and was therefore an uncon-

stitutional provision. The Supreme Court reasoned, however, that the elimination of these so-called fringe stevedores was immediately connected with the purpose of the Act since the crowding of the piers made employment difficult and uncertain, and is likely to lead to the abuses uncovered by the New York Crime Commission.

Another viewpoint is presented for consideration in the dissenting opinion by Justice Douglas, in the *Linehan* case, *supra* at 441:

Perhaps a way could be found to sustain all the challenged provisions of the Compact. Perhaps they could be so construed as to save any and all individual rights. But the motion to dismiss or affirm and the reply to it only stir these profound questions and do not put them at rest. . . . The right to work—which goes to the very heart of our way of life—is at stake in these appeals. If we conclude that the Compact is constitutional, we should give our reasons so that all interests will be protected. Congress expected as much in all but frivolous cases coming here by appeal.

The Supreme Court, however, by adopting the reasoning of the lower court and re-affirming the cases and rules of law cited, clearly answered the objections raised by the dissent of Justice Douglas. It has been repeatedly held that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business, which is the proper subject of regulation within this police power, is not violative of rights secured by the 14th Amendment. *Nebbia v. People of the State of New York*, 291 U.S. 502 (1934).

The *Linehan* case, presents a perfect example of a state utilizing its inherent police power to protect the peace and safety of its people. The discretionary power which a state may grant an administrative board has not been extended beyond reasonable limits as argued by the petitioners. The right to work is an individual right and must always be subordinated to the common good.

ALBERT SIDNEY JOHNSTON, III

CIVIL SERVICE—CAREER CIVIL SERVICE EMPLOYEE HELD TO RETAIN HIS RIGHTS UNDER LLOYD-LAFOLLETTE ACT AS TO DISMISSAL PROCEDURE EVEN THOUGH HIS POSITION IS EXCEPTED FROM CLASSIFIED CIVIL SERVICE.—Plaintiff, an attorney, occupied various positions with the Federal Government since 1938. He acquired competitive status on April 15, 1943, under Exec. Order No. 8743, 6 Fed. Reg. 2117 (1941). This presidential directive, providing for the inclusion of attorneys in the Federal Government in the classified Civil Service, was issued pursuant to the so-called Ramspeck Act, 54 Stat. 1211-1212, as amended, 5 U.S.C. § 631(a) & (b) (1952).

On May 1, 1947, all attorney positions in the Federal Government were placed on Schedule A, which includes government positions that are excepted from competitive service, by Exec. Order No. 9830, 12 Fed. Reg. 1259 (1947). However, classified civil service rules were to continue to apply to those persons having status. This was supplemented by Exec. Order No. 9973, 13 Fed. Reg. 3600 (1948), 1948 U.S. Code Cong. Serv. 2658, and Exec. Order No. 10440, 18 Fed. Reg. 1823 (1953), 1953 U.S. Code Cong. and Adm. News 1000.

On June 25, 1953, Exec. Order No. 10463, 18 Fed. Reg. 3655 (1953), 1953 U.S. Code Cong. and Adm. News 1026, amended the Civil Service Regulations,

providing that the rules would not apply to Schedule A positions. Plaintiff was removed from the Government service as of the close of business, July 31, 1953, by letter dated June 29, 1953. No notice was given, and no reasons for the dismissal or opportunity to be heard were afforded plaintiff. *Roth v. Brownell*, 215 F.2d 500 (D.C. Cir. 1954), *cert. denied* No. 328, U.S. Sup. Ct., October 25, 1954.

The issue involved was whether the plaintiff could be removed legally from office without following the requirements of the Lloyd-LaFollette Act, 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948), 5 U.S.C. § 652(a) (1952). This act provides that no person in the classified service shall be removed without notice of charges and hearing. Plaintiff conceded that he had no vested right in his job, but argued that he had acquired the statutory right to removal procedures under 5 U.S.C. § 652(a) above.

*Held:* The power of Congress to limit the President's otherwise plenary control over appointments and removals is clear. The Lloyd-LaFollette Act so limited the power of the President to *remove* classified employees without giving them notice of the charges. No formula can obviate the requirements of the Statute. Plaintiff's removal was not in accordance with law, and he should be restored to his position.

The court thus reversed the lower court's decision favorable to the defendant. 117 F. Supp. 362 (D.D.C. 1953).

The general rule is that employees of the Executive branch of the Government hold office at the pleasure of the appointing authority, except for statutory limitations. Government employment is not property and is not a contract within the protection of the due process clause of the Fifth Amendment. *Wetzel v. McNutt*, 4 F. Supp. 233 (S.D.Ind. 1933). In the absence of a statute or ancient custom to the contrary, executive offices are held at the will of the nominating authority. *Levy v. Woods*, 171 F. 2d 145 (D.C. Cir. 1948).

Similarly it has been held that a public officer, regardless of the form of the statute under which he takes office, does not hold by contract, but he enjoys a privilege revocable by the sovereignty at will. *Field v. Giegengack*, 73 F. 2d 945 (D.C.Cir. 1934).

The rule also is that an unsuccessful applicant for office in the United States Government has no constitutional right to a hearing or a specification of the reasons why he is not appointed. The power of removal of the Executive branch of the Federal Government is an incident of the power of appointment. *Myers v. United States*, 272 U.S. 52 (1926); *Levine v. Farley*, 107 F. 2d 186 (D.C.Cir. 1940), *cert. denied* 308 U.S. 622 (1940).

On the other hand, once a person is a member of the classified service he is entitled to the statutory removal procedures set out in the Lloyd-LaFollette Act. So, it has been held that a Civil Service employee may not be discharged unless the statutory procedure requirements are followed, *but where they are, the discharge is not reviewable, except for fraud or bad faith.* (Emphasis added.) *Gadsden v. United States*, 78 Supp. 126 (Ct.Cl. 1948). On the same point, the courts have held that under the Statute, 5 U.S.C. § 652, respecting *removal* of employees from the classified civil service and providing for notice of charges preferred against employees, the information furnished must be sufficient to inform him with reasonable certainty and precision of the cause for his removal. *Deak v. Pace*, 185 F. 2d 997 (D.C.Cir. 1950).

Besides affirming the above holdings, the Supreme Court in denying certiorari in the Roth case, in effect, espouses plaintiff's contention that once a person has

been admitted to the classified civil service and he remains in that position, he may not be removed from that position by executive *fiat*, and remains in the classified service even though the position he holds may no longer be classified. In effect, a member of the classified civil service acquires a statutory interest, namely the right to a notice of the charges and the right to the procedure for removal outlined in the Statute.

The above seems to be certainly the conclusion to reach with respect to an employee who has continued in office in the same capacity in which he was hired and covered by the classified civil service provisions. The problem of what happens to an employee who has, even for the slightest period of time, assumed other functions is not answered by the decision in the Roth case. It would seem that, if plaintiff, in the above case, had taken a position other than that of attorney after 1947, the outcome might well have been different. Whether this is the case, however, will only be ascertained after litigation on that set of facts.

A possible solution, if desired by the Executive, is, of course, to request the enactment of legislation covering the above situations so as to conform to its understanding of the law on classified civil service.

While the decision of the Supreme Court in the Roth case has been widely acclaimed as "restoring to Government workers their security rights", it would appear more correct to state, upon analysis, that the Government worker in the classified civil service is protected against arbitrary removal only so long as the statutory removal procedure of the Lloyd-LaFollette Act is not followed. From a practical viewpoint it is granted that the necessity to give notice of specific charges is a powerful block to any wholesale arbitrary removals of Government workers. Yet, there is little comfort to the employee to note that once the letter of the Statute has been obeyed, in other words once the agency has applied the removal procedure strictly, the courts will not interfere with the outcome. *Angilly v. United States*, 105 F. Supp. 257 (D.C.N.Y. 1952), affirmed 199 F. 2d 642 (2d Cir. 1952). To prove fraud or bad faith on the part of the firing official, as suggested in the Gadsden case, *supra*, is no easier than to establish the existence of the legendary Fairyland of the tales of old.

RODOLPHE J. A. DE SEIFE\*

CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF PUBLIC HEALTH—FLUORIDATION OF PUBLIC WATER.—Following an investigation and the subsequent favorable report on the practicality and feasibility of fluoridation of the city water supply, delivered by the Director of Public Utilities and the Director of Health and Welfare, the Cleveland City Council adopted a resolution authorizing the commencement of the necessary steps toward fluoridating the public water. Contracts were prepared to this end, but were never executed due to the pendency of this action. This suit was instituted by a taxpayer to enjoin the City from proceeding with its plans. The grounds were basically, first, that the ordinance authorizing this move violated the guaranteed personal liberties of the First and Fourth Amendments to the United States Constitution. Secondly, it was urged that the

\*Columbus Division

practice would adulterate the public water in violation of the State and Federal Pure Food Acts. R.C. §3715.01 *et seq.*; 21 U.S.C.A. §301 *et. seq.*

The Court of Appeals of Ohio, affirming the judgment of the Court of Common Pleas, held the ordinance constitutional, and a valid public health measure. *Kraus v. City of Cleveland*, 121 N.E.2d 311 (Ohio 1954).

Recent actual laboratory experimentation has produced copious sets of facts which show definite valuable effects of fluoridated water in reducing dental caries. The indicated formula is one part fluoride salts to one million parts water. Also noteworthy is the fact that we are dealing with a pandemic disease, affecting most of our population both adults and children, commonly known as tooth decay. *Chapman v. City of Shreveport*, 74 So.2d 142, 144 (La. 1954).

The most argumentative constitutional point in the matter of fluoridation of public water is the alleged violation of freedom of religion. The First Amendment to the Federal Constitution absolutely guarantees to every citizen freedom to believe whatever he wishes. But it implies only a qualified freedom of conduct in accordance with these beliefs. For example, contrary to the religion of some, the state may compel people to send their children to school. *Commonwealth v. Beiler*, 168 Pa. Super. 462, 79 A.2d 134 (1952). Polygamous marriages have been made criminal notwithstanding religious beliefs. *Reynolds v. United States*, 98 U.S. 145 (1878). Thus, under the police power of the state, religious practices are regulated for the protection of society. Nor is such regulation necessarily either oppressive or unreasonable. *De Aryan v. Butler*, 119 Cal. App.2d 674, 260 P.2d 98, 100 (1953).

Fluoridation does not contravene the Fourteenth Amendment to the United States Constitution by measurably affecting only children from the ages of six to twelve. Many decisions have held no objection to the fact that a police measure does not extend to all classes. As cited by *Chapman v. City of Shreveport*, *supra* at 146, a case directly on point:

. . . a long line of decisions by this court has . . . settled that in the exercise of the police power, reasonable classification may be freely applied, and the regulation is not violative of the equal protection clause merely because it is not all embracing. *Zucht v. King*, 260 U.S. 174 (1922).

Even with this honorable backing the instant case notes the lack of any real problem in this respect, for fluoridation ultimately benefits the whole community. Children will retain its effects throughout their adult life.

It should then follow that fluoridation as a legal health measure must also be a valid one. Fluoridation to be a reasonable and necessary means to general dental health must not be deleterious. The two fundamental cases on point, *Chapman v. City Shreveport*, *supra*, and *De Aryan v. Butler*, *supra*, commensurate with the instant case, have cited actual findings of their respective health departments. These facts indicate that the proposed amount of fluoride salt in the water will not affect the *potability*, *palatability*, and *purity of the water*, and could not possibly endanger the health of any person at any age.

This subject of increasing importance is viewed in two aspects. First, it is a just exercise of police power in accordance with public policy and the common good. Second, it is alleged to be an unjust and palpable invasion of the fundamental Constitutional guarantees of freedom of religion and of equal protection. It is submitted, therefore, that both equal protection and the freedom of religion, and all other constitutional guarantees are governed by the common good, and as such, may not exclude it. While the opponents of fluoridation

are definitely justified in their own constitutional right to guard closely their just demands, it would appear in this situation both inevitable and most desirable that public policy should, as the trend here indicates, take precedence.

WILLIAM C. MITCHELL, JR.

CONSTITUTIONAL LAW—PROTECTION OF CIVIL RIGHTS—Action against the State Attorney of Florida under the Federal Civil Rights Act, 18 U.S.C.A. § 242, for failure to seek the release of a prisoner who was confined in order that the state could secure information charging him with being an accessory after the fact. The prisoner had previously been acquitted of murder by a directed verdict. The period of confinement was 19 months and 8 days. Counsel for the prisoner discussed the matter with the state attorney but neither the counsel, the prisoner, nor friends of the prisoner exerted any pressure to obtain a release. The defense offered was that the failure to seek release was a waiver of the prisoner's right to due process.

The District Court dismissed the indictment and the United States appealed. The Circuit Court of Appeals held that no duty existed on the part of the State Attorney of Florida either by statute or any principle of common law to make application for the release of the prisoner and, therefore, he did not violate the Federal Civil Rights Statute. To decide otherwise would cast the Civil Rights Statute back into the same morass of uncertainty from which the Supreme Court had rescued it. *United States v. Hunter*, 214 F.2d 356 (5th Cir. 1954).

The purpose of noting this case is that it is an amplification of the controversial principles found in the cases interpreting civil rights statutes and affords an opportunity to review recent decisions analysing these statutes.

Few cases have pointedly decided that inaction, by itself, is punishable under 18 U.S.C.A. § 242. In one case, a sheriff was convicted under this statute for failure to protect the constitutional rights of certain Jehovah Witnesses, such failure being a violation of his common law duty. *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943). Again, one charged with keeping the peace cannot assume the role of an innocent bystander when another's constitutional rights are being invaded. He must stand on the side of the law or be counted among the mob. Diligent and conscientious effort is all that is required since officials are keepers not insurers of the peace. Otherwise, officers would be civilly and criminally liable for every breach of constitutionally protected rights. *Downie v. Powers*, 193 F.2d 760 (10th Cir. 1951).

Turning to a general analysis of the statutes themselves, it can be seen that the scope of protection originally encompassed the equality rights of the Negroes but later was extended to include aliens as well as all other citizens. *Roberto v. Hartford Fire Ins. Co.*, 177 F.2d 811 (7th Cir. 1949). Protection is also afforded those who are not technically citizens because of a conviction for a felony. *Gordon v. Garrson*, 77 F. Supp. 477 (E.D. Ill. 1948). The statutes do not, however, protect the individual from an invasion upon his private rights. *Bottone v. Lindsley*, 170 F.2d 705 (10th Cir. 1948).

The violator may be a state officer or a federal officer acting under color of state or federal law since the statutes are aimed at those who deprive individuals of constitutionally protected rights. *Screws v. United States*, 325 U. S. 91 (1945). However, it was recently held that federal law enforcement officers do not come



under the purview of civil rights statutes imposing civil liability since they are immuned from civil liability while acting within the scope of their employment. *Swan v. Willis*, 114 F. Supp. 434 (D.C. Alaska 1953). Those subject to the statutes include: private detectives acting under pretense of state authority, *Williams v. United States*, 341 U.S. 97 (1951); individuals who make the law of the mob the law of the state, *Downie v. Powers, supra*; individuals if they aid and abet the state officials, *United States v. Lynch*, 189 F.2d 476 (5th Cir. 1951); and justices of the peace acting unlawfully. *Picking v. Pennsylvania R. Co.*, 151 F.2d 240 (3rd Cir. 1945). State judges, however, acting in accordance with state laws, are immune. *Francis v. Lyman*, 108 F. Supp. 884 (D. Mass. 1952).

After the possible individual violator is determined, he must be found to have misused that power which he possesses by virtue of a state law, such misuse being possible only because he has the authority of state law. This misuse of power is *color of law* and an essential part of civil rights statutes. *United States v. Classic*, 313 U.S. 299 (1941). *Color of law* has also been defined as pretense of law which may or may not include authority of law. *United States v. Jones*, 207 F.2d 785 (5th Cir. 1953).

Not only must the individual criminal violator misuse his power but he must act willfully and for the purpose of depriving an individual of a constitutional right. This requirement of specific intent to deprive a person of a federal right which has become definite by decisions or other rules of law saves those statutes imposing criminal liability from any charge of unconstitutionality on the grounds of vagueness. *Screws v. United States, supra*. It is sufficient that the violator has acted with the purpose of depriving a constitutional right even though he may be ignorant of the constitutional provision. *Clark v. United States*, 193 F.2d 294 (5th Cir. 1951). The mental state of the perpetrator must show a purposeful intent to deprive a person of a constitutional right not simply the intent to do the act causing the deprivation. *Pullen v. United States*, 164 F.2d 756 (5th Cir. 1947).

In criticism of *United States v. Hunter*, the principal case, it must be noted that the statutes in question were designed to protect rights not to enforce duties. Their application in coercing officials to perform the expressed duties of their office would mean that the basic purpose of the statutes would be supplanted by this interpretation given by the court. Should the emphasis be laid upon the expressed duties of the officials and not the rights of the individual, it would be possible for the legislature to circumvent the purpose of the statute by clearly defining the duties of the state attorney so as not to include the protection of some rights.

PAUL J. SIRWATKA

EVIDENCE—CRIMINAL LAW—CONFESSION INFLUENCED BY COERCION OF PRIOR INVOLUNTARY CONFESSION—VOID AS A MATTER OF LAW—Defendant was accused of having murdered his parents. While in custody he was subjected to prolonged and exhaustive questioning and had made damaging admissions to questioner. He was then taken to his parents funeral by the police and thereafter was allowed to rest one and one half hours. He was then brought back to the police station, placed in a room with a concealed microphone and introduced to a physician who was supposed to prescribe for his sinus condition. The doctor, however, was a psychiatrist and subjected the defendant to one hour and a half of questioning minimizing his moral guilt, extending offers of help interspersed with suggestions regarding the clarity of incidents leading up to and through the murder

and thus, bringing about damaging admissions on the part of the defendant. Shortly after this interview the defendant made a full confession to the police captain and immediately thereafter repeated the gist of the confession to his business partner who was asked by a detective to be present.

At 10 P.M. the same evening he confessed the crime to two assistant district attorneys who had stenographers take down the written statement of confession.

The confessions were introduced in evidence and defendant was convicted and sentenced to death. The Court of Appeals reversed on the grounds that the first confession to the psychiatrist was coerced as a matter of law. *People v. Leyra*, 302 N.Y. 353, 98 N.E.2d 553 (1951).

As to the other confessions the court states:

Whether the coercion which we find implicit in defendant's statement to the doctor extended over and into the later confessions to the Meenahan, Herrschaff and the Assistant District Attorneys remains a question of fact for determination by the jury, and this question was never properly submitted to them.

In the second trial the wire recording of the coerced confession was submitted to the jury with instruction that it was illegal and must not be considered on the question of guilt, but only on the issue of coercion and influence on the defendant as to subsequent confessions.

The Court of Appeals affirmed the judgment of conviction and held that submission to the jury on issue of whether the coercion carried over to subsequent confessions was proper. Two judges dissented. *People v. Leyra*, 304 N.Y. 468, 108 N.E.2d 673 (1952).

The defendant then asked the Supreme Court for certiorari and it was denied. 345 U.S. 918 (1953). Having exhausted state remedies defendant then filed habeas corpus proceedings in the United States District Court charging that the confessions used against him were coerced, depriving him of due process of law. The court denied habeas corpus, stating that the decision as to voluntariness of statements was properly left to the jury and that this fulfilled conditioned requirements of due process. 113 F. Supp. 556 (1953). The Court of Appeals affirmed. 208 Fed.2d 605 (1953). The defendant then asked for and was granted certiorari on the grounds that the constitutional question of denial of due process (that the confessions to the police captain, friend, and two assistant district attorneys were coerced) appeared substantial. 347 U. S. 926 (1954).

The Supreme Court held that where an admittedly involuntary confession and subsequent confessions were all extracted in the same place within a period of about 5 hours, after intermittent intensive police questioning, the subsequent confessions were also involuntary as a matter of law. *Leyra v. Denno*, 347 U.S. 556 (1954).

The principal issue was whether the three confessions were coerced in violation of the 14th Amendment.

The rule has been and still is that admissibility of a confession is based upon its trustworthiness. *People v. Fox*, 319 Ill. 606, 150 N.E. 347 (1925); *Pollack v. State*, 215 Wis. 200, 253 N.W. 560 (1934); *Gallegos v. Nebraska*, 342 U.S. 55 (1951).

Since *Brown v. Mississippi*, 297 U. S. 278 (1936) the Supreme Court reviewed the introduction of confessions at state trials and in *Prince v. State*, 155 Tex. Crim. 108, 231 S.W.2d 419 (1950) Judge Davidsons clearly states the present rule:

The Supreme Court of the United States has announced the law to be that a conviction by a state court for a state crime by the use of a coerced, forced, or

involuntary confession constitutes a denial of due process as guaranteed by the 14th Amendment to the Federal Constitution. In such cases, that court takes jurisdiction and, from its independent examination, determines from the undisputed facts whether the confession was procured under circumstances rendering its admission as evidence a denial of due process.

The case: *Malinski v. New York*, 324 U. S. 401 (1945) holds that admission into evidence of an involuntary confession constitutes a violation of due process even though there is other sufficient evidence on which to base conviction.

In reviewing the various state decisions the Supreme Court has consistently stated that it will review only those which have undisputed facts in determining the correctness of the trial court's findings on the basic character of the confession for purposes of admissibility. *Stroble v. California*, 343 U.S. 181 (1945); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

While the court has determined situations *inherently coercive* by an evaluation of all the circumstances of procurement it could also have justifiably found these confessions actually coerced and therefore untrustworthy. (Italics added.) 36 Minn. L. Rev. 276 (1952).

However, the undisputed facts conceded by both sides may give rise to conflicting inferences and in *Lyons v. Oklahoma*, 322 U.S. 596 (1944) the court states:

The voluntary or involuntary character of the confession is determined by conclusion on whether the accused at the time he confesses is in possession of mental freedom to confess or to deny suspected participation in crime.

The relationship between a first and second confession is considered:

The fact that an earlier confession was obtained from defendant by coercion is to be considered in determining whether later confessions was voluntary or involuntary.

The court in the case also answers the fears that underlying motivations and not reasons may sway the court (such as punishment of enforcement officers) viz:

A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police but because declarations procured by torture, are not premises from which a civilized forum will infer guilt.

Mental pressure may be more coercive than physical torture. *State v. Butts*, 349 Mo. 213, 159 S.W.2d 790, 793 (1952). However, confessions have been admitted where there were admonitions to tell the truth. *State v. Allison*, 24 S.D. 662, 124 N.W. 747 (1910). Also, where they were procured by trick. *Commonwealth v. Hipple*, 333 Pa. 33, 3 A.2d 353 (1939); *Burchett v. State*, 35 Ohio App. 463, 172 N.E. 555 (1930).

The Supreme Court in the present case holds in effect, that a continuous coercion existed during the five hour span between the first and last confession bringing about an untrustworthy confession.

It should be noted, that the Supreme Court felt it essential to attach lengthy excerpts of the psychiatric examination in order to strengthen its position regarding the examination's effect on the subsequent admissions.

The writer feels that the instant decision assists in the control of the use of psychiatric coercion. It tends to safeguard an emotionally and physically exhausted defendant against reliance on false representations and indirections of a psychiatrist to his detriment.

ADRIAN COZZI

TORTS—INFANTS—WRONGFUL DEATH STATUTE—RIGHT OF ACTION—Plaintiff brought an action for the death of her unborn child under a wrongful death statute of Mississippi, claiming that the defendant-physician negligently killed the baby by trying to force its birth with forceps. (MISS. CODE § 1453 (1942) requires that the wrongful act complained of be such as would have supported an action by the deceased had he survived.) Defendant testified that his actions were justified by the emergency which arose when the baby became twisted in an unnatural position. The trial resulted in a hung jury, after which the defendant filed for a judgment notwithstanding the mistrial verdict. Sustaining this motion, the trial court dismissed the suit on the ground that the defendant was entitled to a peremptory instruction. Considering for the first time whether the negligent killing of an unborn viable child was actionable under § 1453, the Supreme Court of Mississippi reversed, holding that an action could be maintained, and the question of negligence was a jury issue. *Rainey v. Horn*, 72 So.2d 434 (Miss. 1954).

At common law an unborn infant enjoyed certain rights to property, 1 BL. COMM. \*129, 130; and inheritances, 57 AM. JUR., WILLS §§ 1367, 1384; and was also protected against criminal acts. *Beale v. Beale*, 1 P. Wms. 244, 246, 24 Eng. Rep. 373 (Ch. 1713); 3 CO. INST. \*50. But this concern for the infant *en ventre sa mere* was held to be limited, so as not to include protection against the torts of others. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (1884) (based mainly on the lack of precedent to the contrary). This ruling, that a child had no common law right of action for prenatal injuries, was recently reaffirmed by the same court, *Cavanaugh v. First National Stores, Inc.*, 329 Mass. 179, 107 N.E.2d 307 (1952); and was followed in other jurisdictions, but not always for the same reason.

To allow a recovery might give rise to cases where the answer to the question, whether the death or affliction sustained by the child was the direct result of prenatal injury, would be based upon conjecture. *Stanford v. San Francisco Ry. Co.*, 214 Ala. 611, 108 So. 566 (1926). Besides, a child before birth is not a person, existing apart from the mother, to whom a duty of care is owing. *Berlin v. J. C. Penney Co.*, 339 Pa. 547, 16 A.2d 28 (1940); *Jacketti v. Pottstown Rapid Transit Co.*, 67 Montg. 37 (Pa. 1950). And no right of action survived to the administrator of a child, born dead because of an accident, for the reason that none existed at the time of death. *Newman v. Detroit*, 281 Mich. 60, 274 N.W. 710 (1937).

Due to the absence of a common law precedent, an infant could not maintain an action for prenatal injuries; consequently, after his death the next of kin could not recover for those injuries. *Gorman v. Budlong*, 23 R.I. 169, 49 Atl. 704 (1901). Also, the rule expressed in the RESTATEMENT, TORTS § 869 (1939), that "a person who negligently causes harm to an unborn child is not liable to such child for the harm," was approved and followed. *Stemmer v. Kline*, 128 N.J.L. 455, 26 A.2d 489 (1942). A further deterrent was the likelihood of many fictitious claims arising once a recovery was permitted. *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (1935); *Lewis v. Steres Sash & Door Co.*, 177 S.W.2d 350 (Tex. Civ. App. 1943) (a petition asserting that prenatal injuries caused a child to be born dumb was dismissed).

The courts in some jurisdictions have not gone to the extent of denying completely the child's right to recover. One court, while deciding that an infant had no cause of action for injuries sustained before it could be born viable (allegedly, the injuries were inflicted at the foetal age of five months), restricted itself to the particular facts of the case, and did not express what its opinion would be in a case where the child was viable when injured. *Lipps v. Milwaukee Elec-*

*tric Ry. & Light Co.*, 164 Wis. 272, 159 N.W. 916 (1916). On the other hand, the survivors of a deceased child could not maintain an action under a wrongful death statute where the child was born dead as a result of prenatal injuries. *Howell v. Rushing*, 261 P.2d 217 (Okla. 1953); *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W.2d 229 (1951) (the court, however, intentionally left the issue undecided where the child is born alive).

But in other jurisdictions the courts recognized a common law right of action for prenatal injuries, where the infant was viable at the time the injuries were received. An infant was said to be viable when it reached that stage of foetal development where it could survive a premature separation from the mother, and could continue its independent existence under normal conditions. *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D.D.C. 1946). It should be noted that these decisions were rendered in comparatively recent years. In addition, they should not be confused with those cases where a mother, who brought an action for the personal injuries which caused her miscarriage, sought to have the loss of her child included as an element of damages. (In the majority of jurisdictions, no compensation is awarded to the mother for such loss of her child. See Note, 10 A.L.R.2d 640.)

One who negligently injured an unborn viable child was held liable by way of damages for his wrongful act. *Amann v. Faidy*, 415 Ill. 422, 114 N.E.2d 412 (1953); *Rodriguez v. Patti*, 415 Ill. 496, 114 N.E.2d 721 (1953); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691, 27 A.L.R.2d 1250 (1951); *Cooper v. Blanck*, 39 So.2d 352 (La. App. 1923) (based on civil law). Lack of precedent was no refuge. *Bonbrest v. Kotz*, *supra*. Since the common law recognized the property rights of an infant *en ventre sa mere*, it seemed illogical to deny the infant a right to personal security. *Tucker v. Howard*, 208 Ga. 201, 65 S.E.2d 909 (1951). In a sense, a child did not continue to be a *part* of its mother until the moment of its birth; hence, a right to protection arose when the child reached the stage of viability, and the court permitted the child to exercise it after birth. *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951). As soon as the infant was capable of independent existence, injuries wrongfully inflicted upon his person became redressible. *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334, 10 A.L.R.2d 1051 (1949); *Jasinsky v. Potts*, 153 Ohio St. 529, 92 N.E.2d 819 (1950). A contrary holding would leave an innocent child to carry through life the consequence of another's negligence; that is, the law would fail to provide a remedy for a serious wrong. *Steggal v. Morris*, 363 Mo. 124, 258 S.W.2d 577 (1953).

Moreover, where an infant was born dead because of prenatal injuries a right of action accrued to the personal representative under a wrongful death statute. *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838, 10 A.L.R.2d 634 (1949); *Cooper v. Blanck*, *supra* at 360. *But cf. Valence v. Louisiana Power & Light Co.*, 50 So.2d 847, 849 (La. App. 1951). And in a recent decision, not yet reviewed by the highest court of the state, an infant had a right of action for injuries sustained during the third month of pregnancy. *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953), *motion for leave to appeal granted and question certified*, 129 N.Y.S.2d 914 (1954). An infant's statutory right of action was also recognized, *Scott v. McPheeters*, 33 Cal. App.2d 629, 93 P.2d 562 (1939), and later restricted to instances where the infant was born alive. *Norman v. Murphy*, 268 P.2d 178 (Cal. App. 1954).

*Summary:* Seven jurisdictions deny completely a common law right of action for prenatal injuries. Two jurisdictions deny a recovery where the child is born

dead; while another recognizes no right of action unless the child is viable when injured. Nine jurisdictions, including Mississippi, recognize a common law right of action, and permit a recovery where the infant is viable when injured. One jurisdiction allows a recovery on the basis of the civil law, while another relies upon the construction of a statute.

It is submitted that the ruling in the instant case demonstrates a correct combination of common law principles with present day scientific observations. Furthermore, the fact that the decedent was born dead is no reason to deny a recovery, in light of the court's construction of the wrongful death statute. And, a contrary decision, making the plaintiff ineligible to recover under the wrongful death statute, would entail an additional finding that the deceased had no cause of action for his injuries. Such a finding would be unwarranted and unduly harsh.

EMIDIO S. SPURIO

TORTS—WORKMAN'S COMPENSATION ACTS—COMPENSABILITY OF NEUROSIS.  
—Plaintiff and the deceased were co-workers in the process of lowering a scaffold into working position. Due to some defective mechanism, one end of the scaffold gave way, hurling the plaintiff's co-worker eight stories to his death. Plaintiff suffered minor injuries only, which healed in a very short time. He now claims, however, that because of the accident, he emotionally freezes every time he goes near a scaffold and hence, he is not able to perform the duties of a qualified iron worker.

The District Court of Harris County granted the compensation requested. The Texas Court of Appeals, over medical testimony to the contrary, overruled the district court decision in stating that a neurosis caused by fright is not a compensable *injury* under VERNON'S TEXAS ANN. CIV. STAT. Art. 8309, § 1, viz:

The terms injury or personal injury shall be construed to mean damages or harm to the physical structure of the body and such diseases and infections which naturally result therefrom.

*American General Insurance Company, v. Bailey*, 268 S.W.2d 528 (Tex. 1954).

The principal problem we are faced with is whether a neurosis preceeded by a *slight physical injury* is compensable under the Workman's Compensation Acts.

Some jurisdictions have perhaps laid the foundation for the reasoning in the instant case. In *Kowalski v. New York, New Haven and Hartford Railroad Company*, 116 Conn. 229, 164 Atl. 653 (1933), the rule is enunciated that the compensable consequences of an injury, although far reaching so far as the chain of causation remained unbroken, do not include an unhappy, mental or nervous state, which did not pertain to the original injury. In Florida, there is a statute which specifically states that a mental injury due to fright or excitement, shall be deemed not to be an injury by accident arising out of employment. FLA. STAT. Sec. 440.02(19) (1949).

A good criterion in deciding Workman's Compensation Cases was laid down in Connecticut in 1926. In *Madore v. New Departure Mfg. Co.*, 104 Conn. 709, 713, 134 Atl. 259, 261 (1926), Chief Justice Wheeler queried:

Was the employment the proximate cause of the disablement, or was the injured condition merely contemporaneous or coincident with the employment? If it was the latter then no award can be made.

It has been stated in RESTATEMENT, TORTS § 312:

It is a well recognized rule that the liability for fright, shock or other similar and immediate emotional disturbances caused by negligence does not extend to the effects of subsequent brooding over the negligent conduct or danger to which it had exposed the person affected.

Following the aforementioned authoritative sources, it would seem that in order to recover compensation, there has to have been a definite physical injury out of which grew the neurosis.

On the other hand, as early as 1910, when a collier, in assisting a fatally injured workman, received such a severe nervous shock that he became neurotic and unable to resume work, it was held that a nervous shock constituted a personal injury caused by an accident arising in the course of his employment entitling him to compensation. *Yates v. South Kirby, F & H Collieries*, 3 B.W.C.C. 418, 3 N.C.C.A. 225. Along the same lines, the court in *Mills v. Detroit Tuberculosis Sanatorium*, 323 Mich. 200, 35 N.W.2d 239 (1948), stated the rule that:

Although the courts are bound by the Workman's Compensation Acts as enacted they may interpret them reasonably in the purpose underlying their enactment.

We must now attempt to determine what the general intent of the legislature is concerning the adoption of the Workman's Compensation Acts. At common law, the rule was that a nervous shock without a flesh wound or external trauma was not the basis for liability. When the various states were individually in the process of adopting the Workman's Compensation Acts, the insurance companies tried to impose this rule. The carriers were defeated, however, when England and most American jurisdictions embodied in their acts the fact that physical impact is not necessary for compensation. Horowitz, *Injury and Death under the Workman's Compensation Laws*, 75 (1944).

In construing a provision of the Workman's Compensation Acts, it is the duty of the court to ascertain and give effect to the intention of the legislature, if not contrary to law, as expressed in the act, and not to redraft the statute. Where legislative intent is expressed in unambiguous language, the court cannot inquire into the soundness of the legislature's policy. *Larochelle v. Hickory House, Inc.*, 96 A.2d 830 (R.I., 1953). However, where there is an ambiguity, a liberal construction must rule. *Massey v. Poteau Trucking Company*, 221 Ark. 589, 254 S.W.2d 959 (1953).

To what extent should the term *injury* be carried? The rule is very adequately spelled out in *Burton Shields Company v. Steale*, 119 Ind. App. 216, 83 N.E.2d 623, 626 (1949) where it was maintained:

Injury as used in the Workman's Compensation Acts is broader than the mere reference to some objective physical break or wound to the body, but includes also the consequences therefrom such as *mental ailments*. (Italics supplied)

Finally, we will consider the case of *Simon v. R.H.H. Steel Laundry*, 25 N.J. 50, 95 A.2d, 446, *aff.* 26 N.J. 598, 98 A.2d 604 (1953), wherein the court said that the Workman's Compensation Law in which statutory basis for compensation award is an *injury*, does not exclude from the import of that term such injuries as result from the non-physical, i.e. *physic trauma*.

In the principal case, the Texas Court of Appeals has departed from the more reasonable rules of precedent in reference to Workman's Compensation cases. In effect, the Texas court established a new criterion, i.e. strict interpretation of workman compensation statutes. The use of such criterion will inevitably find its way into future decisions concerning the compensability of emotional disturbances which arise out of employment. However, because of the rule set down in the *Yates* and the *Simon* cases, *supra*, plus the liberal interpretation generally given to the Workman's Compensation Acts, it is submitted that the Texas Court reasoned erroneously and ruled unreasonably in refusing recovery to the plaintiff in the principal case.

WILLIAM J. RILEY, JR.

TORTS—NEGLIGENCE PER SE—STOLEN AUTO—PROXIMATE CAUSE—KEYS IN IGNITION.—A thief stole the taxicab of defendant's servant and while in flight ran into plaintiff's vehicle causing property damage. Plaintiff stated that the leaving of the key in the ignition of the defendant's cab was in violation of the Uniform Traffic Act. Section 92 of Article XIV of this Act reads:

- a. No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key, or when standing upon any perceptible grade without effectively setting the brake thereon and turning the front wheels to the curb or side of the highway.
- b. No person shall operate or drive a motor vehicle who is under fifteen years of age. Ill. Rev. Stat. 1953, c. 95.5, s 189.

The plaintiff charged that this action on the part of the defendant constituted prima facie negligence which caused the accident. The defendant argued that the Traffic Act is simply a traffic regulation which would not impute liability to the owner for the actions of a thief, who was the real proximate cause. The trial court entered judgment for the plaintiff. The Supreme Court of Illinois affirmed the First District Court in favor of the plaintiff. *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 117 N.E.2d 74 (1954).

The Supreme Court of Illinois, by imputing actionable negligence to motor vehicle owners who leave their keys in the car ignition in violation of a statute, exhibits another example of the extension of the proximate cause theory in the interest of public safety.

In the case of *Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943), the Court of Appeals for the District of Columbia came to the conclusion that the intervening act of a third person made no difference as long as the statute was violated. Once the key is left in the ignition the owner is responsible for the results. The Court said the fact that a third person does act improperly is not an intelligible reason for excusing the defendant. RESTATEMENT, TORTS § 449. The *Ross* case, *supra* overruled the previous District of Columbia case based on the same facts *Squire v. Brooks*, 44 D.C. App. 320 (1916). The Municipal Court of Appeals for *supra*, overruled the previous District of Columbia case based on the same facts, whether the cab was considered unattended. *Bullock v. Dahlstrom*, 46 A.2d 370 (D.C. Munc. Ct. 1946). The Illinois Supreme Court in the *Ney* case, *supra*, also overruled its precedent in *Cockrell v. Sullivan*, 344 Ill.App. 620, 101 N.E.2d 878 (1951). The court here found that the violation itself was not the proximate



cause of the accident. The *Cockrell* case, *supra*, had overruled *Ostergard v. Frisch*, 333 Ill.App. 359, 77 N.E.2d 537 (1948). In deciding this issue in Louisiana, *Maggiore v. Laundry and Dry Cleaning Service, Inc.*, 50 So. 397 (La. App. 1933), the court said, the violation of the statute was the proximate cause of the damage, when the acts of the intervening parties were considered reasonable.

In the past the courts have determined, in the majority of jurisdictions, in favor of treating the statutes of this type as mere traffic regulations. The resultant torts have been treated as stemming from the intervening act and not from the leaving of the keys in the ignition in violation of the statute. In *Lustbader et. al. v. Naders Delivery Co.*, 67 A.2d 237 (Md.App. 1949), the truck was attended. Therefore, the court held that the entire statute did not apply. In a situation where the statute made specific provision that no civil liability should result the court held this ordinance irrelevant. *Richards v. Stanley*, 271 P.2d 23 (Calif. 1954). The tendency here has been to avoid the statutes. Minnesota holds that the owner should not be held liable where the acts took place hours, days, weeks or months after the flight from the theft. *Wannebo v. Gates et al.*, 227 Minn. 194, 34 N.W.2d 695 (1948).

Negligent driving of the thieves was the proximate cause of decedents death and the negligence of the defendant, if any, was too remote in the eyes of the law to be regarded as connected as cause therewith. *Anderson v. Theisen*, 231 Minn. 369, 43 N.W.2d 272, 273 (1950).

The conduct of the thief was an intervening cause which the defendants were not bound to anticipate and guard against, *Galbraith v. Levin*, 323 Mass. 255, 81 N.E.2d 560 (1948). The statute required locking or making fast the vehicle. The *Galbraith* case, *supra*, overruled *Malloy v. Newman*, 310 Mass. 269, 37 N.E. 2d 1001 (1941). Following this concept the Appellate Court of Indiana would not presume the likelihood of an intervention as reasonably foreseeable in their jurisdiction. *Kiste v. Red Cab, Inc.*, 122 Ind.App. 587, 106 N.E.2d 395 (1952).

It is generally held, that in the absence of ordinances or statutes, that the owner of a car, left standing with the keys in the ignition, is not responsible for injuries occasioned by the negligent operation by an intervening party. The courts reason that such negligent operation is the proximate or direct, efficient cause of the injuries. *Wilson v. Harrington*, 265 App. Div. 891, 56 N.Y. Supp. (3rd Dept. 1946), *aff'd*, 295 N.Y. 667, 65 N.E.2d 101 (1946); *Walter v. Bond*, 267 App. Div. 779, 45 N.Y.Supp. 2d 378 (2d Dept. 1943); *Rhad v. Duquesne Light Co.* 255 Pa. 409, 100 Atl. 262 (1917); *Reti v. Vaniska, Inc.*, 14 N.J.Super. 94, 81 A.2d 377 (1951).

In conclusion, the *Nej* case, *supra*, holds that the violation of the statute is prima facie evidence of negligence. The violation is not absolute negligence. The court holds that whether the violation is the proximate and direct cause of the injury is a question for the jury. The intervening act of the third party, a thief, was of no effect.

It is submitted, therefore, that the extension of the doctrine of proximate cause is too harsh on the owners of automobiles. The burden of liability shifts from the thief to the owner who has left his keys in the ignition. Today, when a mere key is no detriment to a mechanically minded thief, this doctrine provides too ponderous a penalty for this type of misfeasance. The courts should not be expected to enforce traffic regulations in such manner. The extremes to which this doctrine can extend are too great not to be checked.

ROGER X. HANLEY