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RECENT CASES

ADMINISTRATIVE LAW - CONSTITUTIONAL LAW - DELEGATION OF POWERS - WAR POWERS - SEPARABILITY CLAUSE - HOUSING AND RENT ACT OF 1949 - CONGRESSIONAL ACT PENDING ACTION. - Section 209(a)(2) of the Housing and Rent Act, before the 1949 Amendments, made it unlawful upon the sale of housing accommodations to a cooperative to evict any tenants in the housing accommodations involved unless there was a participation of 65% of the tenants in occupancy in the cooperative. The lower court action was instituted in the United States District Court for the Northern District of Illinois by the Housing Expediter to enjoin the defendant, Shoreline Cooperative Apartments, Inc., from violating this provision of the Act by evicting tenants of a cooperatively owned apartment house when less than 65% of the stockholders were tenants in occupancy. While the suit was pending, the 1949 Act was adopted effective April 1, 1949. A supplemental complaint was filed substituting the United States as plaintiff, and seeking to enjoin violations of Section 209 of the amended Act and the regulations issued pursuant thereto which continued in effect the substance of the provisions of the 1948 statute. The defendants filed motions to dismiss on the grounds that the complaint failed to state a cause of action upon which relief could be granted, and that Section 209 was void because it violated the constitutional rights of the defendants.

The District Court dismissed the cause for want of jurisdiction holding that Section 204(J) of the Housing and Rent Act of 1949 (not directly involved in the case) was an unconstitutional delegation of power by Congress, and that since Congress would not have passed the 1949 Act without Section 204(J), the separability clause (Section 303 of the 1949 Act) was ineffective to justify the operation of the Act without Section 204(J). The entire Act was thus held unconstitutional. (Above facts contributed by the Clerk of the Supreme Court). HELD: Judgment of the District Court reversed in a per curiam decision. United States v. Shoreline Cooperative Apartments, Inc., et al., 338 U.S. 897 (Dec. 1949).

Section 204(J) of the 1949 Housing and Rent Control Act, commonly referred to as the "local option clauses", provides in the first paragraph that, "Whenever the Governor of any State advises the Housing Expediter that the Legislature of such state has adequately provided for the establishment and maintenance of maximum rents, or has specifically expressed its intent that state rent control shall be in lieu of Federal rent control, with respect to housing accommodations within defense-rental areas in such state", all federal control shall cease, 84 F.S. 662. Paragraph 2 provides that, "If any state by law declares that Federal Rent Control is no longer necessary in such state, or any part thereof", all controls shall be immediately dissolved. Furthermore, paragraph 3, Section J, provides for decontrol in any incorporated city, town or village, merely "upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law based upon a finding by such governing body reached as the result of public hearing held after ten days' notice that there no longer exists such a shortage

in rental housing accommodations as to require rent control in such city, town or village, provided that such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter." 84 F. Supp. 663 (1949).

The Shoreline Cooperative Apartments based their claim as to the unconstitutionality of the 1949 Act on these latter clauses. This reasoning, though supported by the Illinois District Court, has been rejected on seven different occasions, but the case gains recognition because of the constitutional issue concerning the validity of the delegation of powers contained in the "local option clauses."

As far as can be found, the District Court for the Northern District of Illinois stands alone in its decree that the 1949 Housing and Rent Control Act is unconstitutional. Judge Shaw was of the opinion that, as a result of paragraph 204(J)(1), any State could act arbitrarily with respect to what constituted both maximum rents and adequate housing.

The holding of the Illinois District Court has been rejected by seven other District Courts, and besides, by the U.S. Supreme Court. In United States v. Emery, 85 F. Supp. 354 (S.D.Cal. 1949) Judge Yankwich states, "I do not agree with the recent decision in the case of Woods v. Shoreline Cooperative Apartments...wherein the Housing and Rent Act was held unconstitutional." The judge believed that the present Act follows the pattern of other Rent Acts and that where Congress authorized cities to recommend decontrol after hearings, the delegation of power there was no greater than that given to the Advisory Committees under the Agricultural Adjustment Act, which delegation he upheld. The holding of United States v. Resch, 85 F. Supp. 389 (W. D. Ky. 1949), also disagrees with the Illinois court.

Other district court decisions holding the Act constitutional are United States v. Bize, 86 F. Supp. 939 (D.C. Neb. 1949); United States v. Fireman (N.D. Cal.) No. 28920-G, decided September 14, 1949; United States v. Crenshaw (D. Mont.), No. 444, decided September 28, 1949; and, without reference to the Shoreline decision, on August 1, 1949, Judge Atwell in United States v. Cox (N.D. Tex.), No. 3687, overruled a motion to dismiss based upon the alleged invalidity of Section 204(J). (Latter citations contributed by the Clerk of the U.S. Supreme Court.) On November 1, 1949, in Shimek v. Woods (District Court for the District of Columbia), Judges Prettyman, Letts, and Pine denied the plaintiff's contentions that the delegation of power to the state was illegal as a delegation of war and legislative powers and without appropriate standards of control, saying: "The provisions of Section 204(J) of the Housing and Rent Control Act of 1947, as amended by Public Law 31, Eighty-first Congress, i.e. 1949 Housing and Rent Control Act, are a valid constitutional enactment."

The question as to what is a sufficient standard, which must be presented in order to sustain the lawfulness of a delegation of authority, is a precise and important one. In the Miller case, supra, the court sustained the lawfulness of the delegation to the Housing Expediter "to remove rents if in his judgment the need for continuing rents no longer exists or the demand for rental housing accommodations has been otherwise reasonably met." Section 204(J), clauses 1, 2, and 3 contain substantially the same standard. A decision by a State that rent control would no longer be neeessary would require a judgment as to the relationship between adequacy of housing facilities and the demand therefor; the word "necessary" as used in clause 2 of Section 204(J) is an intelligible guide to conduct because, as is stated in Lichter v. United States, 334 U.S. 785 (1948), "Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied." Furthermore, "They derive much meaningful content from the

purpose of the Act, its factual background and the statutory concept in which they appear," American Power and Light Co. v. Securities Exchange Comm., 329 U.S. 90, 104 (1946). The purpose of the Housing and Rent Control Act and its historical background established a sufficient meaning for the word "necessary" as used in the Act. In view of the above criteria, it is not extravagant to say that the delineation of policy was well made.

The standard is comparable to other legislative specifications which have been upheld by the Supreme Court: "Just and reasonable" rates for sale of natural gas, Federal Power Commission et al., v. Hope Natural Gas Co., 320 U.S. 591, 600-601 (1944); "A public interest, convenience, or necessity" in establishing rules and regulations under the Federal Communications Act, N.B.C. v. United States, 319 U.S. 190, 225-226 (1943); prices yielding a "fair return" or the "fair value" of property, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397-398 (1940); and "fair and reasonable rent" for premises, Levy Leasing Co. v. Siegel, 258 U.S. 242, 243, 248-250 (1922); "fair and equitable" commodity prices to be fixed under the Emergency Price Control Act of 1942, Yakus v. United States, 321 U.S. 414, 423-7 (1944); the power to approve consolidations in the "public interest", New York Central Securities Corp. v. United States, 287 U.S. 12, 24 (1932); fixing maximum rents which are "generally fair and equitable", Bowles v. Willingham, 321 U.S. 503, 517 (1944).

Even if Section 204(J) were unconstitutional, the remainder of the Housing and Rent Act would not fall. The judges in those courts disagreeing with the holding of Woods v. Shoreline Cooperative Apts., Inc., did not enter into as lengthy a discussion as did Judge Shaw concerning the separability or "saving clause"; they were satisfied, however, with the wording of the clause itself which stated: "If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act, and the applicability of such provision to other persons or circumstances, shall not be affected thereby." In this latter clause Congress has left no room for construction of its intent; however, the construction of the "saving clause" alone should not prevail. As the Act conferred authority upon the Housing Expediter to decontrol rents in any area "if in his judgment the need for continuing maximum rents in such areas or portion thereof — no longer exists" (Section 204(C), as amended or upon recommendation of the local boards (Section 204(E)(3), as amended), these provisions demonstrate that the Housing Act can operate without Section 204(J).

Joseph L. Tobin

ATTORNEY AND CLIENT - INJUNCTION - BARRATRY - MAINTENANCE - FORUM NON CONVENIENS. - This case is an appeal from a decree of the Chancellor in the Superior Court of Cook County in which the appellant, Sol Andrews, was enjoined from prosecuting a large number of injury actions under the F.E.L.A. against the railroads. Atchison, Topeka and Santa Fe Railway Company v. Andrews et al., Southern Pacific Company v. Andrews et al., 338 Ill. App. 552, 88 N.E. 2d 364 (1949).

In the prayer for the injunction the two railroads alleged that each operates lines which traverse New Mexico, California and Arizona; within which area arose the aggregate total of 74 actions at law filed against the two plaintiffs within a year's time by the defendant, Sol Andrews, an attorney, licensed to practice in Illinois. Sol Andrews procured these actions as a result of solicitation by "chasers" under the guise of "Sylvan Associates", a partnership

in which Andrews had invested $200,000, along with another who invested $50,000, and by misrepresentation as to the attitude of plaintiffs toward their injured employees. The establishment of "Sylvan Associates" through the attorney Sol Andrews and his agents, engaged in the practice of soliciting claims for suit in personal injury actions, was for the purpose of bringing actions thereon in some jurisdiction other than the place where injury occurred. Plaintiffs state, "It is the theory of plaintiffs that it is contrary to law for an attorney, directly or by confederates, (1) to disrupt the relations between an employer and its employees, (2) to foment litigation between an employer and its employees, (3) to procure by solicitation his employment as attorney for injured employees, (4) to transport into this jurisdiction claims of persons residing in foreign states and which arise out of transactions occurring in foreign states, and (5) to use the processes of the courts of Illinois to carry out an illegal scheme." The plaintiffs were unduly burdened by the increased cost of their defense due to the distance involved from the jurisdictions in which the actions accrued to Chicago where the actions were filed and the difficulty in procuring witnesses. The expenses alone totaled more than $100,000 for each of the corporations and thereby deprived them of their civil rights and invaded their property rights. The plaintiffs as a result prayed that an injunctional order be entered restraining the defendant, Sol Andrews, from prosecuting in the Superior Court of Cook County the actions described in the complaint, from soliciting employment as attorney for injured employees of plaintiffs, and from agreeing to divide fees with laymen engaged as solicitors.

The defense of Sol Andrews is that he is an attorney, licensed to practice law, and represents the plaintiffs in the suits in question; and that equity was without power to enter the restraining order against him. He cites no authority in support of his position. The court answered this defense by saying that it would be a strange principle of law that would allow Sol Andrews to use his license to practice law as a defense to the charges contained in the complaint.

Due to the amount of money involved — viz. the claims for damages and the expense to the railroads of defending the personal injury actions — and to the extensive area over which these roads operate, the case is such that it is not surprising that no champerty or maintenance cases have been found that are comparable to it.

It is imperative that protection be available to restrain such activities. It is submitted that the Court, in an opinion delivered by Mr. Justice Scanlan, properly affirmed the decretal judgment of the chancellor granting an injunctional order restraining the defendant, Sol Andrews, from prosecuting in the Superior Court the actions described in the complaint.

The following questions must be considered in coming to this conclusion: (1) Do courts of equity have the general power to (a) enjoin an attorney from representing his clients at the complaint of the other party to the damage of the suing employees, (b) enjoin the commission of a crime and (2) Does a court of equity have jurisdiction over defendant as a member of the Illinois Bar?

In McCloskey v. San Antonio Public Service Company, (Texas Civil Appeals), 51 S.W. 2d 1088 (1932), the Texas Court held that a writ of injunction was a proper exercise of the powers of a court of equity where it had been established that the barratry laws had been violated by a personal injury claim adjustor under a statute which provided for the punishment of all persons who were guilty of barratry. Subsequent to a contrary holding of the same court, in a previous action involving McClosky v. San Antonio Traction

Co., (Texas Civil Appeals), 192 S.W. 1116 (1917), the Legislature had amended the statute intending to provide punishment not only for attorneys, but for all citizens committing such an offense.

Although the defendant in the McCloskey case was not an attorney, he held attorneys in readiness for the purpose of handling personal injury claims; such activities running parallel to those of Noah Andrews who though not an attorney had contributed capital to Sylvan Associates, but later withdrew when the scheme appeared to be illegal. It was the intention of the Legislature to provide for the punishment of attorneys and all other persons; therefore it is clear that the Texas court would have enjoined McCloskey from fomenting litigation by solicitation of claims whether or not he was an attorney.

In McCloskey v. Tobin, 252 U.S. 107 (1920), it was held, Mr. Justice Brandeis speaking for the court, that while the meaning of barratry included the activities of attorneys at common law and apparently independently of any statute, it has been applied to one soliciting a large number of claims of the same nature and charging a fee for his services in connection with the claims contingent on the amount recovered. Statutes in some jurisidctions specifically make solicitation of employment by and for attorneys, as well as solicitation of claims for the purpose of prosecuting, defending, or collecting the same by persons generally, an offense of barratry. Such a statute has been declared to be constitutional. In State v. Chitty, (So. Car. Law), 1 Bailey 379 (1830), the opinion by Mr. Justice Bay at p. 400 states: "Maintenance, it seems, is a species of barratry; and the champerty and conspiracy belong to the same class of offenses . . ." And as the opinion states at p. 371 in the present proceedings: "The practice of champerty and maintenance reached a new low level when members of the instant conspiracy induced, by promise of reward, certain Santa Fe employees to secretly enter into the conspiracy against their employer." Although barratry may be a criminal offense, it is true that courts have no authority to grant a writ of injunction to prevent or restrain a crime. Yet, in the instant proceedings and in the McCloskey case the plaintiffs are merely seeking to safeguard their financial interests and to prevent criminal assaults on their property from these exploiters with unlawful purposes of greed and criminal appropriation of property not their own.

The Texas court in the McCloskey case held that "The injunction was maintained because the corporation was not seeking to enforce any criminal law, but was seeking to be protected from a criminal appropriation of its property." We may therefore conclude that since the property rights of the plaintiffs in both instances were invaded, the court properly held that a writ of injunction was a proper exercise of the powers of the court of equity under the circumstances, whether or not the defendant is an attorney.

In Chicago B. & Q. R. Co. v. Davis, 111 Neb. 737, 197 N.W.599 (1924), an action was brought by plaintiff railroad company to restrain defendants from violation of an "anti-ambulance chasing" statute; which statute prohibited the soliciting of claims for purposes of instituting suits thereon outside the state.

The fact situation in the Chicago B & Q. case and that of the instant proceeding are almost identical in that the plaintiffs seeking the injunctions in each case are railroad corporations and the defendant in each case is an attorney, in the Chicago B. & Q. case, a non-resident. The opinion states in 197 N.W. at page 601: "The conduct of the defendants, if persisted in, would entail upon the plaintiff financial loss, by way of expenses in defending itself in a foreign jurisdiction." It may therefore be concluded from this case that a court of equity has jurisdiction to restrain a resident as well as a non-resident attorney from such solicitation of suits.

Are the rights of the suing employees affected by the decree? The chancellor concluded that he could not determine whether the principle of forum non conveniens could be invoked by the railroads in the injury actions against them, where plaintiffs in such actions were not parties to the injunction suits. This appears to be a just conclusion since the suing employees were not deprived of their right to bring suit in the superior court unless Sol Andrews acted as their attorney; therefore their right to trial by jury and to recompense for their injuries under the act were not denied.

The basis of the equitable jurisdiction and the answer to the question as to why the particular remedy was chosen in place of a complaint before the grievance committee of the Illinois Bar Association is found in the Illinois Constitution of 1870, "Legal Basis of Injunction," Article II, Section 19: "Every person ought to find a certain remedy in the law for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay." A complaint by the grievance committee of the Bar Association would not have achieved the remedy needed under the circumstances and as provided for in the above section of the Illinois Constitution. It was imperative that the defendants be restrained promptly and permanently not only from invading the property rights of the plaintiffs but also the rights of the suing employees who were lured into going to remote places and selecting wholly unknown lawyers and courts to litigate their claims thus becoming involved in "a dice game for big stakes", only a fraction of which would ever get to them. The defendant must also be restrained in the misuse of the superior court of Illinois and its processes in furtherance of the conspiracy. As the chancellor so aptly put it when the injunction was issued: "It is conceivable that if all had gone well with the scheme Chicago would have become the personal injury litigation capitol of the United States. Its courts would have become clogged with cases filed by plaintiffs living in distant places concerning facts which occurred far from the scene of the trial and testified to by witnesses brought great distances."

Therefore, since a court of equity has jurisdiction under the authorities cited to grant an injunction prohibiting the prosecution of the suits in question in the Superior Court due to defendant's solicitation of these suits to the damage of the property rights of the plaintiffs, with no injury to the suing employees who are not restrained from bringing their suits in the Superior Court with someone other than the defendant acting as their attorney, and since the need for prompt action was imperative, the better reasoning would make it appear that the Superior Court decree was properly affirmed.

M. Victoria Gallegos

CONFLICT OF LAWS - LIMITATIONS OF ACTIONS - SUBSTANCE OR PROCEDURE - WRONGFUL DEATH ACTS. - A recent case decided by the United States Court of Appeals for the District of Columbia has ostensibly settled the question as to whether the statute of limitations of the lex fori or that of the lex loci should govern an action brought under a wrongful death statute of the latter state.

Specifically, the issue presented in the case of Lewis v. Reconstruction Finance Corporation, 177 F. 2d 654 (1949), is whether an action brought in the District of Columbia under the Wrongful Death Act of Nebraska is subject to the two year limitation of that Act or the one year limitation of the District

statute. The question arises out of the death of one Lewis, who was killed in a plane accident in Nebraska, allegedly through the negligence of the Defense Plant Corporation which by Congressional authority has been succeeded by the Reconstruction Finance Corporation. Suit was filed in the United States District Court for the District of Columbia about twenty-two months after the fatal accident. The defendant by answer invoked as a bar the local limitation and moved for a judgment on the pleadings. The motion was granted and the plaintiff appealed.

It was the conclusion of the appellate court that the limitation laid down by the law of the state where the fatal injuries occurred should govern, unless the public policy of the forum is clearly opposed. The court reasoned further that the fact that the Nebraska Law provides a longer period for filing suit does not manifest any conflict in policy between the two jurisdictions inasmuch as the purpose of both is to create a right of action within a limited period for death occasioned by negligence. However, the ratio decidendi of the decision was reduced to little more than dicta by the pronouncement that regardless of the principles involved an insurmountable obstacle to the application of the local limitation was the fact that the District wrongful death statute, and the limitations thereof, are confined to deaths resulting from injuries suffered within the District of Columbia. Thus the real basis for the court's holding seems to be that the narrow scope of the law precludes its application in any part to a case where the fatal injuries occurred outside the District of Columbia.

Although the appellate court regarded the case as one of first impression, a very similar situation was presented in Weaver v. Railroad, 21 D.C. 499 (1893). Since the decision in that case was influenced by a variant factual situation, consideration of this case as one of first impression is justified.

Under the common law a right of action existed for any length of time until the death of the person to whom such right belonged. However, sound policy and public convenience required that the right be restrained to quiet possessions, to secure repose from litigation, and to prevent injustice. The period described by the statute of limitations defines the maximum time within which, in the judgment of the legislature of a state, substantial justice can be done.

No principle of comity demands that the forum shall regard a right of action as living which has no life by the law of its creation. As to this, authorities are generally agreed. Where the situation is reversed, as in Lewis v. Reconstruction Finance Corporation, supra, and the right of action is alive under the law of its creation, but is barred by the law of the forum, cases in support of the Lewis decision proceed on the theory that the limitation of time declared by the state whose statute creates the liability is so far substantive in character that, in the true spirit of comity, it must be enforced notwithstanding that, by the policy of the forum, the action is barred by its statute of limitations; otherwise the right itself would be diminished. It is the contention that the time prescribed in wrongful death statutes operates as a limitation of the liability itself which is created by the statute and not of the remedy alone. Bringing suit within the time limited is deemed to be a condition attached to the right to sue, and so, is made of the essence of the right, which is lost if the time is disregarded. It is logically concluded that because the liability and the remedy are created by the same statute, the limitation of the remedy must be treated as a limitation of the right. One of the oldest cases cited in approbation of this doctrine is Theroux v. Northern P. R. Co., 64 F. 84 (C.C.A. 8th 1894). To like effect are Wilson v. Massengill, 124 F. 2d 666 (C.C.A. 6th 1942) and Maki v. George R. Cooke Co., 124 F. 2d 663

(C.C.A. 6th 1943), 146 A.L.R. 1352, 316 U.S. 686.

The prevailing sentiment of those courts which would be inclined to sustain the doctrine advocated in the Lewis case is best expressed by the court in Calvin v. West Coast Power Co., 44 F. Supp. 783 (D. Ore. 1942), wherein the court in adopting the doctrine of the Theroux case, supra, stated: "It was early held and it is still the law that when the state where the death occurred placed a limitation upon the time within which action could be brought, such action could not be maintained in another state after the designated time had expired even though the latter state would have permitted an action for death by wrongful act which had occurred within its boundaries to be maintained for a much longer time...But when the doctrine of these decisions was logically extended to allow action to be brought all during the time when it could have been maintained in the state of origin of the right of action, even though the jurisdiction wherein the court was held had limited action for death within its own boundaries to a lesser time, a cleavage of authorities occurred. Text writers and theorists indicate the doctrine that the limitation of the forum must be applied because the symmetry of the legal structure is thus maintained, but if the right is given and is cut off when the statute of the state which conferred it designates, then length of time is as much of substantive law as is the right of action itself."

Other authorities supporting the applicability of the statute of limitations of the lex loci are: 3 Beale, Conflict of Laws 605.1; 68 A.L.R. 210; 146 A.L.R. 1356 and 16 Am. Jur. 110,111.

As was succinctly stated by Judge Proctor of the Court of Appeals in the Lewis case, the view of opposing authorities is that, "a time limitation prescribed by a statute creating a right of action, is a declaration of public policy by the enacting state against the institution of any suit of like nature in its courts beyond the period prescribed by its law; that otherwise the effect would be to extend to residents of a state allowing a longer limitation more liberal rights than those accorded its own residents;" that it is the general principle that the limitation of actions is governed by the law of the forum; and that "The limit of time in the death statute of the forum may be interpreted as a statute of limitations for all actions of death irrespective of the place of the wrong, as well as a statute limiting the existence of rights created by statute; and in that case the suit must be brought within the time limited in that statute as well as within the time limited in the statute of the place of injury." Restatement Conflict of Laws 397 (B).

While the bar of the statute by which the cause of action is created precludes the maintenance of an action thereon in another jurisdiction, the law of which allows a longer period, the converse is not necessarily true. It is true that some cases hold that the statute creating the cause of action governs in this respect even when it prescribes a longer period of time for bringing the action than is allowed by the law of the forum. However, advocates of the rule that the statute of limitations of the forum should apply contend that the aforementioned view rests upon a misapprehension. The reason the lapse of the time prescribed by the statute creating the cause of action prevents the maintenance of an action in another jurisdiction is that it extinguishes the right of action, and there is thenceforth nothing to support an action in any jurisdiction. Assuming, however, that the time allowed by the foreign statute creating the cause of action has not expired, the plaintiff comes to the bar of the forum with a concededly existing right of action. But it is not apparent why an action thereon should not, as in the case of an existing cause of action at common law, fall within the operation of the general principle that the limitation of actions is governed by the law of the forum. The same principle

which characterizes the limitation prescribed by the foreign statute as a condition affecting the right of action itself, and not merely the remedy, will, if applied to the corresponding statute of the forum creating a similar cause of action, characterize the limitation prescribed by that statute as a matter of right rather than of remedy, and thus confine its operation to causes of action arising at the forum. But the fact remains that the limitation affects both the right and the remedy at the forum. Therefore as long as it does affect the remedy when an action is brought under a statute of the forum, should not the same limitation of the forum also be applied to foreign causes of action not barred by the statute of their creation, rather than extend the remedial measures of the forum to accomodate the foreign right of action? Comity does not demand that the public policy, which the state of the forum has the right to establish and enforce, be thus subordinated to that of the state which has created the liability.

Practically speaking, the decision in the Lewis case does not resolve the problem as to whether the law of the forum or that of the lex loci should govern the action. Like the Lewis case, Weaver v. Baltimore & O.R. Co., 21 D. C. 499 (1893), the actual basis for the decision is that the limitation prescribed by the District statute creating a right of action for death only applies to those causes of action which arise within the District and that if there is any statute of limitations applicable, it is the general statute of the forum which fixes a period of three years for general tort claims.

Among the authorities holding that the statute of limitations of the forum, whether general or special, bars a foreign action where the statute of limitations of the place where the right of action accrued permits a longer time for bringing suit are the following: Hutchings v. Lamson, 96 F. 720 (C.C.A. 7th 1899); Platt v. Wilmot, 193 U.S. 602 (1904). Similarly, a Pennsylvania court in Rosenzweig v. Heller, 302 Pa. 279, 153 A. 346 (1931), adopted the view of Wharton that an action could not be maintained in Pennsylvania on a cause of action created by the wrongful death statute of New Jersey, which provided that the action should be commenced within two years after the death; although in this case less than two years, but more than one year, had expired since the cause of action arose, where the Pennsylvania statute limited to one year the time in which to bring suit for wrongful death. Cauley v. S. E. Massengill Co., 35 F. Supp. 371 (D.C. Tenn. 1940) and numerous other authorities support this point of view. Cf. 3 Beale, Conflict of Laws 605.1; Restatement, Conflict of Laws 397, 603, 605; 2 Wharton, Conflict of Laws 1264 (3rd ed.); Goodrich, Conflict of Laws 86 and 1 Wood, Limitations 65.

In conclusion, it appears that it is one thing to say that the time limitation contained in an act creating a liability and conferring a right of action is a condition annexed to the enforcement of the right, and quite another that it is so much of the substance of the right that it must be enforced everywhere. Such conclusion is not demanded except upon a refined and artificial logic. In refusing to give weight to the well recognized truth that the period of limitation contained in the statute creating the liability affects the remedy as well as the right, a provision which, intrinsically, is a time limitation, is exalted into one of pure substance of the right. Thus rights of action created by statute are put in a separate class and upon a higher plane than those existing at common law, with no substantial reason therefor. And, in the name of comity, the public policy which the state of the forum has the right to establish and to enforce is subordinated to that of the state which has created the liability. The rule sought is the general principle that questions affecting the remedy are to be decided by the law of the forum. The application of the rule, in a case such as the Lewis case, does not, in a real sense, impair the

right of action. The courts of the forum recognize and respect the right of action; and even though by their own public law, the liability may not exist, yet they will not refuse the remedy in a proper case. When, however, their own statute of limitations operates as a bar, they do refuse the remedy on the theory that the principle of comity does not demand the surrender of the public policy of the state with respect to the time within which suits may be brought in its courts. Statutes of limitation, being designed according to the sound policy of each state for itself to put at rest litigation after the lapse of certain varying periods of time, cannot be extended by the legislatures of foreign states; and one cannot accept the argument made in support of the contention that there may be cases in which the right is so inextricably a part of the remedy that the lex loci would control the pursuit in the forum if barred by the statute of the forum.

Charles D. Speake

CONSTITUTIONAL LAW -DUE PROCESS - SEGREGATION IN SCHOOLS - DISCRIMINATION - SEPARATE BUT EQUAL. - This appeal from the granting of summary judgment by the District Court of the United States for the District of Columbia was brought by Marguerite Carr, an infant, through her father as next friend, against the Superintendent of Schools and the members of the Board of Education of the District of Columbia. It was alleged that the Board's policy of segregating children on the basis of race or color in separate schools affording "equal" education deprived her of the schooling to which she was entitled. She asked that the Board of Education be enjoined to permit her to attend the school closest to home in which the courses of education required and prescribed by law are offered, without regard to the previous use or designation of such school on account of the race or the color of the student enrolled therein. Held: Constitutional invalidity does not arise from the mere fact of separation, and, if there be an equality of the privileges which the law gives to the separated groups, the races may be separated. Carr v. Corning, (C.A.D.C.) No. 9878, 18 U.S. L.W. 2377 (1950).

The majority followed the course which American Courts have followed and based their decision on the "separate but equal" doctrine. The doctrine was first stated in Plessy v. Ferguson, 163 U.S. 537 (1896), and it has been reaffirmed by an unbroken line of Supreme Court decisions, including: Sipuel v. Board of Regents, 332 U.S. 631 (1948); Fisher v. Hurst, 333 U.S. 147 (1948); Mitchell v. United States, 313 U.S. 80 (1941); Gong Lum v. Rice, 275 U.S. 78 (1927); Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938). The doctrine is thus stated: If there is equality of privileges which laws give to the separate groups, races may be separated. The majority also pointed out that the school system of the District of Columbia operates under the direct mandate of Congress, and despite the Constitution, the Fifth Amendment, Congress itself maintained separate schools in the District of Columbia since 1862.

The dissent by Judge Edgerton is primarily based on the impossibility of securing objective equality without abolishing segregation. Therefore, he concludes, the appellees should be required to cease to exclude any pupil from any school because of color.

In 1896, the Supreme Court in Plessy v. Ferguson, supra, upheld segregated railroad facilities so long as they were equal. However, it is well to remember that railroad cars can be exactly alike, but schools can seldom be "equal" because of the factors of location, environment, space, size of classes, and faculty. Furthermore, the dissent by Justice Harlan stated: It is "difficult to reconcile that boast with a state of the law which, practically,

puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done."

With regard to segregation in housing, the Supreme Court, in the case of Buchanan v. Warley, 245 U.S. 60 (1917), decided that racial segregation by city ordinance, although applied equally between white and Negro residents, was unconstitutional because it interfered with private property rights without due process of law. In Corrigan v. Buckley, 271 U.S. 323 (1925), relating to racial restrictive agreements in the District of Columbia, the Court held that the due process clause of the Fifth Amendment was a limitation on the Federal Government and not directed against action by individuals.

However, this limitation has been extended to court action in covenant enforcement proceedings; Shelley v. Kraemer, 334 U.S. 1 and Hurd v. Hodge, 334 U.S. 24 (1948); these cases were argued separately but on the same day. The court held that judicial enforcement of valid private contracts, if discriminatory, is state action, and their enforcement in the Courts is unconstitutional. Then, as to the District of Columbia, the racial covenants were held unenforceable in the Federal Courts because they were violative of the public policy of the United States. The Court did not pass on constitutionality, but held it inconsistent to allow federal courts to exercise general equitable powers denied to the state courts.

The Supreme Court has now under consideration three cases which strike at the legal props of segregation and the "separate but equal" doctrine. In the case of Sweatt v. Painter et al, 338 U.S. 865 (1949), Marion Sweatt has refused to attend a segregated law school, no matter how equal the facilities may be, contending that the very fact of separation destroys equality and is a denial of equal opportunity to Negroes. Moreover, even though the physical facilities may be equal, there is an absence of the relationship and contact with students of different race, color, or creed, which is an essential and integral factor in education.

The better view, as voiced by Judge Edgerton, states that there can be no equality of facilities where there is separation in the school system, and the very idea of segregation is a form of inequality and discrimination signifying that each member of the colored race is not equal to any member of the white race.

The Federal Government has recognized the right of a Negro to get his educational training side by side with the white citizen and his children, and has submitted briefs as amicus curiae in Sweatt v. Painter et al. supra, McLaurin v. Oklahoma, and Henderson v. United States now pending in the Supreme Court.

Michael J. Drape

CONSTITUTIONAL LAW - FOURTEENTH AMENDMENT - EQUAL PROTECTION CLAUSE - RACIAL DISCRIMINATION - STATE ACTION IN CONCERT WITH PRIVATE ACTION. - The primary question in Dorsey v. Stuyvesant Town Corporation, 299 N.Y. 512, 87 N.E. 2d 541 (1949), is whether a corporation organized under the Redevelopment Companies Law of New York State has the privilege, admittedly possessed by an ordinary private landlord, to exclude Negroes from consideration as tenants. The appellant, a Negro, has been denied the right of establishing a residence within a housing development because of racial discrimination, a policy exercised by the

corporation in the selection of tenants. The housing development concerned has been subsidized by the State of New York. The subsidy is in the form of cash loans, the power of eminent domain exercised by the State for the corporation, and partial tax exemptions. The appellant here denies that the Stuyvesant Town Corporation or the Metropolitan Life Insurance Company, a major investor in the project, has the right to bar an individual from leasing an apartment within the development because of race, color or creed.

The appellant contends that these respondents are subject to the restraints of the equal protection clauses of the State and Federal Constitutions and that in their selection of tenants they cannot legally discriminate against Negroes, a policy which has been adhered to in renting apartments in the Stuyvesant Town Development in New York City.

Since the constitutional provisions referred to impose restraints on state action only, and not on private action, the precise question to be decided is whether Stuyvesant and Metropolitan in the circumstances of this appeal are subject to the constitutional limitations applicable to state action. Article XVIII, of the New York State Constitution provides: "Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe, for low rent housing for persons of low income as defined by law, or for the clearance, replanning, reconstruction, and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto."

The two purposes are distinct and different, and Stuyvesant Town involves the clearance and rehabilitation of a substandard and insanitary area and not low rent housing for persons of low income. This concept is expressed clearly in Murray v. La Guardia, 291 N.Y. 320 (1943), where the court in its opinion stated that the statute authorizes the incorporation of "redevelopment companies", the corporate purposes of which are stated to be to acquire one or more areas and to construct, own and operate projects according to a "plan", which is defined (sec. 3, subd. 5) as an undertaking for the clearance, replanning and reconstruction or rehabilitation of a substandard or insanitary area or areas and for recreational or other facilities incidental or appurtenant thereto to effectuate the pruposes of Article XVIII of the New York Constitution. The statute also provides (sec. 25) that a redevelopment company may be organized and financed by an insurance company which in turn may "own and control, the stock or the income debenture certificates or both of any redevelopment company". It may fairly be said that the housing provision has two purposes; first, low rent housing for persons of low income is to be a function of government, and second, the rehabilitation of substandard areas is to be the function of private enterprise aided by government. The respondents are private companies and they contend that they are beyond the reach of the constitutional restraint and are free to select arbitrarily the tenants who will occupy Stuyvesant Town.

The Court in this case held that: "The moral end advanced by the appellant cannot justify the means through which it is sought to be attained. Respondents cannot be held to answer for their policy under the equal protection clauses of either Federal or State Constitution. The aid which the state has offered to the respondents and the control to which they are subject are not sufficient to transmute their conduct into state action under the constitutional provisions here in question". The Court quoted Steele v. Louisville & Nashville R.R. Company, 323 U.S. 192 (1946), in its opinion.

The dissent in this case, handed down by Judge Fuld, shed a penetrating light through the dim fog which permeates our race problems. He said in

part: "The average citizens, the majority of whom believe in the equality of man no matter what his race, creed or color, but unschooled in legal niceties, will, I venture, find the decision which the court now makes extremely perplexing. While the Stuyvesant Town Housing Project was in the blueprint stage and under construction, the public understood, and rightly, that it was an undertaking on which the State and the City of New York had bestowed the blessings and benefits of governmental powers. Now that the development is a reality, the public is told in effect that, because the Metropolitan Life Insurance Company and the Stuyvesant Town Corporation are private companies, they are not subject to the equal protection clause, and may, if they choose, discriminate against Negroes in selecting tenants. That conclusion strikes me as totally at odds with common understanding and not less so with the facts and circumstances disclosed by the record."

Judge Fuld begins his dissent with, "Undenied and undeniable is the fundamental proposition that 'distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality'. Hirabayashi v. United States, 320 U.S. 81 (1943)."

The constitutional provisions referred to in this case impose restraints on "state action" only, and not on "private action". Private action as used here is classed as that of a private corporation, financed, operated, and owned privately in the "laissez faire" tradition. Public action is action by the body politic, owned and operated by the people. The pivot point involved here is whether Stuyvesant and Metropolitan are operating in this venture as private or state organizations. By the facts and legal principles involved, the majority opinion was to be expected even though the legal lines are finely drawn. The building of this housing development could not be strictly interpreted as state action, but on the other hand it is difficult to understand how the development could be classed as a direct result of private enterprise. The subsidization granted to this development by the State of New York was in a direct sense granted by the people of the State. There is a definite lack of discrimination when taxes are collected, but as this case has shown there is discrimination when the taxes are spent for "public" welfare. The real cause of this decision does not rest with the court but with the State Legislature; it is the duty of the legislature to promulgate laws which will not be so ambiguous as to allow any tinge of prejudice or discrimination to be foisted upon our citizens no matter what their race, creed or color.

The XIVth Amendment of the Constitution of the United States provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". In the case at bar, the housing development has been legally adjudged a private enterprise and as such is not subject to the constitutional amendments concerned.

When state legislatures grant to private concerns financial assistance, partial tax exemption, and exercise for such private concerns the states' power of eminent domain, these concerns should be classed as "quasi-public" institutions if for no other reason than judicial application of the equal protection clauses of the Federal Constitution and the State Constitution concerned.

Joseph F. O'Connor

CONSTITUTIONAL LAW - FOURTEENTH AMENDMENT - FIRST AMENDMENT - DUE PROCESS - FREEDOM OF SPEECH - FAIR ADMINISTRATION OF JUSTICE - CLEAR AND PRESENT DANGER DOCTRINE - "TRIAL BY NEWSPAPER" v. TRIAL BY JURY. - In an extraordinary opinion handed down this term, the United States Supreme Court refused certiorari in the case of Baltimore Radio Show, Inc. v. State __ Md. __, 67 A. 2d 497, cert. denied, 338 U.S. 912 (1950). The denial of certiorari was accompanied by an opinion by Mr. Justice FRANKFURTER, in which he pointed out that the refusal to consider the case did not imply either approval or disapproval of the opinions below. The "sole significance of such a denial of a petition for a writ of certiorari... simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion'." In his discussion of various reasons which may lead to such denials, the one which seems to be most significant is contained in the following two sentences: "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."

The case which the Supreme Court thus found not yet ripe arose in the Criminal Court of Baltimore City where the Baltimore Radio Show, Inc., et al., Respondents, were found guilty of contempt and fined for broadcasting over local radio stations matter relating to one Eugene H. James at a time when he was in custody on a charge of murder. The murder in question was that of a little girl who was seized while at play with several companions and stabbed to death. Coming as it did just ten days after a similar horrible murder of a little girl in the neighboring city of Washington, D.C., it aroused tremendous excitement in the community. It was under these circumstances that Respondents broadcast the information for which they were held in contempt of court. The broadcast began with the words, "Stand by for a sensation!" The announcer then announced that James had been apprehended and charged with the murder, that he had confessed to the crime, that he had a long criminal record, that he had reenacted the crime at the scene and there revealed the murder weapon, and that, during questioning by the police, he was "wary" and "not an obvious mental case." The trial court, in the contempt case, commenting on this broadcast, said: "The court has no difficulty in concluding that the broadcast was devastating. Anybody who heard it would never forget it. The question then before us is: Did that broadcast and others which were less damaging by the other stations, have a clear and present effect on the administration of justice?"

Brushing aside the possibility of any ill effects on the judge in the murder case ("Judges are supposed to be made of sterner stuff."), the court found that "James' free choice to either a court trial on the one hand and a jury trial on the other, has been clearly and definitely interfered with." This was supported by the testimony of James' counsel to the effect that he felt he had no choice, but was forced to elect a court trial. The court therefore concluded that "these broadcasts did constitute, not merely a clear and present danger to the administration of justice, but an actual obstruction of the administration of justice, in that they denied the Defendant, James, of his Constitutional right to have an impartial jury trial." Md. Const. Art. V.

On appeal to the Court of Appeals of Maryland, the convictions were reversed, the court sustaining "the chief contention of the appellants, that the power to punish for contempt is limited by the First and Fourteenth Amendments to the Federal Constitution, and that the facts in the case at bar cannot support the judgments, in the light of these amendments, as authoritatively construed by the Supreme Court." Baltimore Radio Show, Inc. v. State, supra.

The authorities relied on for support of this view were three cases involving summary contempt proceedings in state courts for out-of-court publications, Bridges v. California, 314 U.S. 252 (1941), Pennekamp v. Florida, 328 U.S. 331 (1946), Craig v. Harney, 331 U.S. 367 (1947); and in each case convictions for contempt were reversed, the court applying the "clear and present danger" rule and finding no such danger present. In all of these cases the issue was the protection of "fair judicial trial free from coercion or intimidation." Bridges v. California, supra. There was no question of a danger to jury trial, the acts sought to be punished being attempts to coerce or intimidate judges; and these attempts were held to create no clear and present danger to the administration of justice because judges are "made of sterner stuff." This distinction between judges and jury, which was recognized in the Bridges, Pennekamp, and Craig cases, was rejected by the majority of the Maryland Court of Appeals as "hardly tenable". Baltimore Radio Show, Inc. v. State, supra, at 508. The majority cited the cases named as controlling, and then cited the dissenting opinions in those cases to prove that the ratio decidendi of those "controlling" cases was "hardly tenable"! In the words of Judge Markell, dissenting,

> "I think the conclusion of this court (a) purports to follow the Supreme Court decisions, but (b) rejects that court's doctrine, and adopts the minority view, as to the relation of judges to publications and (c) departs from the court's decisions, and from the reasoning of all the justices, by applying the disputed doctrine, regarding judges, to jurors, to whom none of the justices have applied it." Baltimore Radio Show, Inc. v. State, supra, at 520.

The majority, seemingly conceding this point, went on: "Granted that the decisions are not directly in point, they seem to go further than we are required to do in the case at bar." Baltimore Radio Show v. State, supra, at 509.

We do not intend to examine the court's consideration of the facts, involving as it does the exercise of judgment as to whether they presented a clear and present danger in the instant case. The important matter for our consideration is rather the principle applied — Do the Bridges, Pennekamp, and Craig cases govern a case involving prejudice to the jury in a criminal trial? It is submitted that they do not. In all those cases, the publications sought to be punished were comments concerning the attitude of the judges, "not comments on evidence or rulings during a jury trial." Pennekamp v. Florida, supra, at 348. The same distinction between judges and juries, a distinction which the Maryland court refused to make, appears on the same page of the decision in the Pennekamp case, where Mr. Justice REED said:

> "Certainly, this criticism of the judges' inclinations or actions in these pending non-jury proceedings could not directly effect such administration (of justice). This criticism of their actions could not affect their ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearing." (emphasis added).

In the principal case, judicial action had not yet been taken, a jury trial was impending, and the comments of the respondents were not criticisms aimed at the judge whose "sterner stuff" could rebuff them, but rather highly pre-

judicial material broadcast throughout the community from which prospective jurors were to be chosen. It can hardly be said that such a broadcast "could not affect their ability to decide the issues."

It is this "ability to decide the issues" which is endangered in cases like this one, not the attempted coercion of judges as in the three cases relied upon. As Professor Chafee, in his Report from the Commission on Freedom of the Press, Government and Mass Communications, Univ. of Chicago Press (1947), vol. I, at page 413, points out, "a great deal of this endless controversy about coercion of judges is beside the point." And in the same report, at page 418, he describes the immediate evil presented by this case:

> "... unfortunately the vitiating of criminal trials by advance newspaper sensationalism is familiar to everybody. As soon as a suspect is arrested, and even before he is indicted, he may be adjudged guilty by giant headlines. Very likely this kind of early discussion of criminal cases does more harm than what is printed during the actual trial. It makes the selection of impartial jurors much longer and harder and creates a tension in the community which is too strong to be relaxed by a later abstention from comment. As Mr. Justice HOLMES said, 'Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.' "Dissenting in Frank v. Mangum, 237 U.S. at 349 (1915).

Although the immediate question before the court was the effect of the broadcast on the minds of prospective jurors, a matter not relevant in the three cases cited as controlling, the situation presented by this case raises the further question of the effect of such comments on the mind of a judge. "The real harm," says Professor Chafee, op. cit. at page 413, "against which judges seek to protect their work when they institute contempt proceedings against the press... (is)... not being swerved but being disturbed." For a fuller analysis of this "non-intimidating type of harm from improper discussion in the press" he refers the reader to the concurring opinion of Mr. Justice FRANKFURTER in the Pennekamp case wherein is discussed the "mischief of exposing even the hardiest nature to extraneous influence". Carefully distinguishing between coercion and non-intimidating influence, Mr. Justice FRANKFURTER said:

> "Weak characters ought not to be judges, and the scope allowed to the press for society's sake may assume that they are not. No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations. However, judges are also human, and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process. While the ramparts of reason have been found to be more fragile than the Age of Enlightenment had supposed, the means for arousing passion and confusing judgment have been reinforced. And since judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print." Pennekamp v. Florida, supra, at 357.

It is submitted that the irresponsible broadcast of the respondent in the principle case constituted a clear and present danger to the administration

of justice, very probably in the effect it had on the mind of the trial judge, and certainly in its effect upon the minds of prospective jurors; and that, in any event, the Court of Appeals of Maryland was in error in holding the cases cited as controlling.

The questions raised in this case have not yet been decided by the Supreme Court of the United States. Some idea of the problems which will be presented when a "ripe" case reaches that court will be found in the appendix to Mr. Justice FRANKFURTER's opinion accompanying the denial of certiorari, in which he has listed 17 English decisions concerning contempt of court for comments prejudicial to the fair administration of criminal justice.

> "Reference is made to this body of experience merely for the purpose of indicating the kind of questions that would have to be faced were we called upon to pass upon the limits that the Fourteenth Amendment places upon the power of States to safeguard the fair administration of criminal justice by jury trial from mutilation or distortion by extraneous influences. These are issues that this Court has not yet adjudicated. It is not to be supposed that by implication it means to adjudicate them by refusing to adjudicate." Maryland v. Baltimore Radio Show, Inc., et al., 338 U. S. 912, 920 (1950).

The responsibility of the press under "clear and present danger" standard is not too great but is rather to be expected from anyone who exercises any influence in a free society. Referring to this standard, the court in the Pennekamp case at page 334 said:

> "It was, of course, recognized that this formula as would any other, inevitably had the vice of uncertainty, (citing the Bridges case) but it was expected that, from a decent self-restraint on the part of the press and from the formula's repeated application by the courts, standards of permissible comment would emerge which would guarantee the courts against interference and allow fair play to the good influences of open discussion."

Editors and broadcasters who, with the aid of their legal advisers, are incapable of exercising a "decent self-restraint", are then, incapable of wielding the power which is vested in those who control the means of mass communication. Freedom of speech and of the press can be properly exercised only in conjunction with responsibility. Where, through failure of that responsibility, the rights of others are endangered, the courts have the right and the duty to secure these rights by punishing the offenders.

James J. Pie
Burton T. Ryan
Robert M. Weldon

CONSTITUTIONAL LAW - FOURTH AMENDMENT - ILLEGAL SEARCH AND SEIZURE - REASONABLENESS OF SEARCH AS OPPOSED TO PRACTICABILITY OF OBTAINING WARRANT. - Government officers, having obtained information that respondent, Rabinowitz, a stamp dealer, had received a large number of postage stamps bearing forged overprints, sent a postal employee

to respondent's place of business where he purchased four stamps. The stamps were found by experts to be forgeries and ten days after the sale a warrant for the arrest of the respondent was obtained. The federal officers, armed with the warrant for arrest, and accompanied by two stamp experts, then proceeded to the respondent's place of business which was a one room office. After making the arrest, the officers searched his desk, safe and files for about an hour and a half, finally finding therein 573 stamps which were later determined to bear forged overprints. Respondent was indicated and convicted on two counts, the second of which charged that "he did keep in his possession and conceal, with intent to defraud, 573 forged and altered stamps." Timely motions for the suppression of this evidence as having been illegally obtained were denied. On appeal, the Court of Appeals for the second circuit relied on the case of Trupiano v. United States, 334 U.S. 699 (1948), in which case the officers had had ample time to obtain a search warrant, and reversed the district court's judgment. The Supreme Court granted certiorari and on review held that "since some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant." To the extent that Trupiano v. United States, 334 U.S. 699 (1948), requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a valid arrest, that case is overruled. (5 to 3 decision, one justice not participating). United States v. Rabinowitz, 338 U.S. __, 70 Sup. Ct. 430 (1950).

Prior to the decisions in Harris v. United States, 331 U.S. 145 (1947) and Trupiano v. United States, supra, the only apparent limitations on the right of search without a warrant, following a lawful arrest, were the extensiveness of the search or the nature of the things seized. Agnello v. United States, 269 U.S. 20 (1925); United States v. Lefkowitz, 285 U.S. 452 (1932).

In the Agnello case the defendant was arrested for the possession of cocaine without proper registration and, for failure to pay the tax required thereon. The arrest took place on the street, while government officers conducted the search without a warrant at the defendant's home several blocks away. Such a search was held illegal as not being an incident to a lawful arrest and the judgment of the circuit court was reversed. The court, however, did not deny the right "always recognized under English and American law to search the person of the accused,when legally arrested,to discover and seize the fruits of evidences of a crime." Weeks v. United States, 232 U.S. 383 (1914). The rationale of this concept is that an arresting officer should have the authority to make a search in order to unveil weapons which might be used to effect an escape, and to confiscate contraband evidence which might be destroyed. The decision in Carroll v. United States, 276 U.S. 132 (1925), sustaining a search of a vehicle without a search warrant incident to arrest as reasonable "because the vehicle can be quickly moved out of the locale or jurisdiction in which the warrant must be sought" may fairly be said to be of the same general tenor.

The Lefkowitz case added the principle that general exploratory searches were not permissible even though there may have been a lawful arrest. It distinguished a search merely to get evidence to convict an accused of crime from a search for stolen goods or the tools of the crime. In effect it made it necessary for the arresting officer to have a specific objective in mind before undertaking the search.

Such was the status of the law until the more recent decisions in the cases of Harris v. United States, supra; Trupiano v. United States, supra; and

United States v. Rabinowitz, supra.

It is manifest, after an analysis of the rulings in the latter three cases, that little, if any, clarification has been made of this unsettled situation. In the Harris case a search was made incident to a valid arrest for two canceled checks, not only in the room in which the defendant was arrested, but also in the other three rooms of his apartment. Approximately five hours later, a discovery was made of a sealed envelope, which was torn open, and found to contain draft cards, the possession of which was a federal offense. It was held that the search was not rendered invalid by the fact that it extended beyond the room in which the accused was arrested. This was, without a doubt, the most far reaching decision rendered by the court on the principle of what would constitute a reasonable search under the provisions of the Fourth Amendment. The Court declared that the same meticulous investigation which would be appropriate in a search for two small canceled checks would not be considered reasonable where agents are seeking a stolen automobile or an illegal still.

Modification of the Harris rule was effected by the test adopted in the Trupiano case. Now the test of the validity of the search was the practicability of obtaining a search warrant prior to the making of such search, rather than upon the reasonableness of the search itself. Furthermore, the case states that "the proximity of the contraband property to the person ... at the moment of his arrest was a fortuitous circumstance which was inadequate to legalize the seizure." The Court formally reconciles these two apparently irreconcilable decisions on a factual basis, showing in the Harris case that the officers had no knowledge of the precise nature and location of the contraband, as here. Whether or not such a difference is significant is at least questionable. In at least one case decided since the Trupiano case, prior knowledge played a part in the result. That case was McDonald v. United States, 335 U.S. 451 (1948), where the petitioner had been kept under surveillance for two months, and then was arrested while committing a crime in the presence of officers. No warrant was had for either arrest or search and a conviction for operation of an illegal lottery was reversed on the grounds that the search accompanying the arrest was not justified, since there was at least a two month period in which a warrant for search could have been obtained. The fact that the petitioner or his aides could have removed a few adding machines and changed headquarters at moment's notice apparently had no bearing on the decision. The instant case represents a reversion in part to the doctrine of the Harris case in that the evidentiary policy of the Supreme Court previously set forth by the Trupiano case has been completely disregarded. In more precise language the ultimate question for judicial determination is not whether the officer had ample time and opportunity to get a warrant for search, but "the criterion in turn depends upon the facts and circumstances — the total atmosphere of the case."

In deference to the Constitution of the United States it is submitted that the majority in the present case were right.

The Fourth Amendment has no requirement for reasonableness in procuring a warrant when the search itself is reasonable. It is unreasonable searches that are prohibited. Carroll v. United States, supra. To hold that an officer should be forced to decide in every instance whether or not a warrant should be procured before a search could validly be made incidental to an arrest would in many cases thwart justice; inasmuch as there is a possibility that valuable evidence might be destroyed in the interim, if the officer unfortunately forms a wrong judgment. It is true that the rule will require that nice distinctions be made of what is and what is not a reasonable search,

but, are not such problems of "reasonableness" inherent in law and order themselves?

Ultimately the issue resolves itself into whether or not adequate protection for society is gained at a disproportionate loss of individual security. On the one side is the social need that crime be repressed. On the other hand there is a danger that principles of law purportedly affording protection for the individual will be transcended by over-zealous officers and courts. That there is a hazard in either choice cannot be denied. The logical solution would seem to lie in an honest effort to strike a balance between the opposing interests.

James E. Heffernan, Jr.
William F. Sondericker

CRIMINAL LAW - HOMICIDE - MURDER - FELONY-MURDER DOCTRINE - CHARGE TO JURY. - On January 30, 1947, the defendant, along with B and C, drove to an Acme Market intending to perpetrate a robbery therein. Having accomplished their purpose, and on leaving the market, the defendant, B and C were intercepted by local police. Patrolman Ingling, while off duty was in the vicinity of the crime, returning to his car to join his wife and children. He attempted to apprehend one of the culprits and was fatally wounded. B and C were caught, tried, and convicted of first degree murder. The defendant was also tried for the crime and was subsequently convicted. A portion of the charge to the jury was broad enough to include a previous statement by the judge during the trial. The judge had said,

> "....I will rule it out, and I will charge the jury that it makes no difference who fired the shot, even if the shot was fired by Mrs. Ingling, it is still murder."

A conviction of murder in the first degree was affirmed by the Pennsylvania Supreme Court which held the charge to be a correct declaration of the law. Commonwealth v. Almeida, 362 Pa. 596, 68 A. 2d 595 (1949). The Pennsylvania Statute provided:

> "All murder which shall be committed in the perpetration of or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree." Stat. Ann. Title 18 sec. 4701 (Purdon 1945).

This is essentially in accord with the common law theory of the felony-murder doctrine.

This case, as above construed, marks an extreme application of this doctrine. It is a long established principle that he whose felonious act is the proximate cause of another's death is criminally responsible for that death. He must answer to society for it exactly as he who is negligently the proximate cause of another's death is civilly responsible for that death and must answer in damages for it. Wharton on Homicide, 3rd Ed. p. 30. Causal relation is the universal factor common to all legal liability, and it applies to crimes with the same force and effect as it applies to torts. The courts had no difficulty in finding two felons jointly guilty of murder where one of them had actually committed the murder. This is the original application of this theory of causation. Anderson v. State 197 Ark. 600, 124 S.W. 2d 216 (1939), People v. La Vers 27 Cal. App. 2d 336, 80 P.2d 1002 (1938), State v. Bennett, 226 N.C. 82, 36 S. E. 2d 708 (1946).

It has not been as simple a matter for the courts to establish causality in the instances where someone other than a felon does the killing. Cases involving this point have resulted in conflicting opinions as to the guilt of the felons. Finding sufficient causality to hold felons guilty of murder the court in Commonwealth v. Moyer, 357 Pa. 181, 53 A. 2d 736 (1947) said,

> "A man or men engaged in the commission of such a felony as robbery can be convicted of murder in the first degree if the bullet which causes death was fired not by the felon, but by the intended victim in repelling the aggressions of the felon or felons."

The same reasoning was followed in Taylor v. State 41 Tex. Cr. R. 564, 55 S.W. 961 (1900), where the defendant was held liable, whether the shot was actually fired by him or by a third party, since the robbers placed the deceased in a dangerous position.

The opposite result was reached in Butler et al v. People, 125 Ill. 641, 18 N.E. 338 (1888), where the opinion stated,

> "No person can be held responsible for a homicide unless the act was either actively or constructively committed by him. And in order to be his act it must be committed by his hand or by someone acting in concert with him, or in furtherance of a common design or purpose."

Accord: Comm. v. Moore, 121 Ky. L. Rep. 97, 88 S.W. 1085 (1905). In People v. Garrippo, 292 Ill. 293, 27 N.E. 75 (1920), the defendant was held not responsible for a shooting done by another person when there was no concert of action between them.

Although the Pennsylvania Supreme Court, in the Almeida case, concluded that the statement concerning Mrs. Ingling was not in the Court's instruction to the jury, the Court passed over the statement's incorporation by reference in the judge's charge. If thus incorporated, there would be no causation involved and the result would be conclusive, barring the intervention of a felonious act on the part of another. Is causal relation useful in determining the guilt of the offender under the felony - murder doctrine? Causal connection would then be a rule of law, not fact, which could not be overthrown even by remoteness. As the accused instigated the chain of events, the result must follow the felonious act. The only questions the jury would be called upon to decide would be the occurrence of the felony and defendant's participation therein. Once this is established, plus the interpretation of causation as a rule of law, the conviction would necessarily follow. The above quoted statement presents the problem which, by construction, can have a destructive effect on the original proximate cause principle. Its application in the future will bear watching.

Richard P. Conaboy
William J. Nealon

DECEDENTS ESTATES - BENEFICIARY OF GOVERNMENT BONDS - INSOLVENCY - CREDITORS' RIGHTS. - The question of the respective rights in the proceeds of registered U.S. Savings Bonds of a beneficiary of the deceased owner and of the personal representative of the deceased owner for the benefit of unpaid creditors was litigated in In re Laundree's Estate, 91 N.Y.S. 2d 482 (1949). One William J. Laundree had, during his lifetime,

purchased U.S. Savings Bonds of the maturity value of $1950, which he had registered in his own name as owner and made payable on his death to his brother as beneficiary. At the time of the death of Laundree, intestate, on Nov. 17, 1946, three of the bonds aggregating $150 were in the hands of the beneficiary and the remainder came into the possession of the decedent's widow as administratrix. The administratrix brought this action pursuant to a New York Statute to discover property in the hands of the brother and to impress a trust on the proceeds of all the bonds. The complainant alleged that the beneficiary had paid no consideration for the purchase of the bonds; and that the assets of the decedent amounted to $175, and he was indebted to the extent of $600, owing to the Department of Mental Hygiene of N.Y. for the care of his son for 2 years preceding his death, and $773.01 for funeral expenses. On the basis of these facts, which were uncontroverted by the defendant-beneficiary, the administratrix contended that Laundree, the decedent, made a voluntary transfer, without consideration, which rendered him insolvent at the time of his death, and therefore the transfer was fraudulent as to his creditors.

The defendant contended that upon the death of the owner of the bonds he, as beneficiary, became the sole and absolute owner of the bonds and the proceeds thereof, relying upon a regulation of the Secretary of the Treasury which provides that the owner of a bond may redeem it without the consent of the beneficiary but, "If the registered owner dies without having presented and surrendered the bond for payment or authorized reissue and is survived by the beneficiary, upon proof of such death and survivorship, the beneficiary will be recognized as the sole and aboslute owner of the bond, and payment or reissue as though the bond were registered in his name alone, will be made only to such survivor". (Code of Federal Regulations, 1945 Supplemental Title 31, sec. 315.46, subd. [c]).

Surrogate Savarese in an extended opinion upheld the contention of the administratrix and held that the bonds were fraudulently transferred, and ordered the beneficiary to execute the necessary documents to redeem the bonds and to turn the proceeds over to the administratrix.

Until the decision of the instant case the law seemed perfectly settled that the beneficiary was entitled to U.S. Savings Bonds upon the death of the registered owner, even though the courts were at a loss as to the proper term to describe this right during the life of the owner — whether vested, vested subject to divestment, contingent, or a mere expectancy. Regardless of the status of the beneficiary's rights during the lifetime of the owner, the beneficiary became the sole and absolute owner of the bonds and their proceeds at the moment of the death of the owner. However, the decision of the Surrogate Court has furnished a means of defeating the rights of the beneficiary, and has raised in the law a new question as to what rights the beneficiary really acquires.

Outside of the case in question no court has as yet agreed with Surrogate Sarvarese' conclusion that insolvency at the time of death warrants the court in declaring the beneficiary of U.S. Savings Bonds a constructive trustee of the proceeds for the benefit of creditors. A few cases have decided similar questions on similar theories of justice before generosity. In Ibey v. Ibey, 93 N.H. 434, 43 A. 2d 157 (1945), the court declared the beneficiary a constructive trustee of the proceeds of U.S. Savings Bonds which a husband had purchased with intent to defraud his wife of her share of the estate at the time of the husband's death. The theory of this case was that the beneficiary who had given no consideration for his designation as such should not be allowed to profit as the result of a fraud even though he were innocent of any

fraud on his part. Decker v. Fowler, 199 Wash. 549, 92 P. 2d 254 (1939), decided that the proceeds of United States bonds belonged to the estate of the deceased owner, rather than the registered beneficiary, on the theory that bonds could not be the subject of a gift inter vivos because of the control over the bonds which the owner retains during his life. Iowa Methodist Hospital v. Long et. al., 234 Iowa 843, 12 N.W. 2d 171 (1943), ordered a debtor-owner to cash U.S. Savings Bonds and pay the proceeds into court in satisfaction of a judgment. However, the courts have found little difficulty in reaching such a decision because of the fact that the Secretary of the Treasury has issued regulations governing this particular situation. The courts have likewise held that a trustee in bankruptcy may enforce payment on U.S. Savings Bonds on the theory that the trustee stands in the place of the debtor and may exercise the debtor's election to cash the bonds.

On the other hand, the courts of other jurisdictions have consistently held that the bonds and their proceeds became the sole and absolute property of the registered beneficiary at the moment of the death of the owner. The theory of these cases is that the relation between the United States and the owner creates a third-party beneficiary contract and must be enforced according to its terms. United States v. Dauphin Deposit Co., 50 F. Supp. 73 (M.D. Pa. 1943); Mitchell v. Edds, 143 Tex. 307, 181 S.W. 2d 323 (1944); affd. 184 S.W. 2d 823 (1945). This contract is enforced even though the state does not recognize the third-party beneficiary doctrine or has a decedent's estate law to the contrary because of the supremacy of Federal law. Harvey v. Rachliffe, 141 Me. 169, 41 A. 2d 455 (1945); Frank Washington Trust Co. v. Beltran, 133 N.J. Eq. 11, 29 A. 2d 854 (1943). In re Briley, 155 Fla. 798, 21 So. 2d 595 (1945), where the deceased owner was insolvent at the time of his death, held that the contract between the United States and the purchaser could not be hampered by state law. Likewise, in Reynolds v. Danko, 134 N.J. Eq. 560, 36 A. 2d 420 (1944), where a transfer in fraud of creditors was alleged, the court held that fraud must be proved and cannot be presumed; and, therefore, the beneficiary became the sole and absolute owner of the bonds on the death of the owner.

It is submitted that the New York court, in its eagerness to satisfy creditors, one of whom was a state agency, has overlooked several applicable principles of existing law and wholly disregarded the extreme effects which its decision may have upon other phases of the law. It is difficult to see how the decedent without the aid of a crystal ball could have forseen insolvency at the time of his death, much less the date of his death itself. In the opinion of the court, it is said that an existing indebtedness at the date of transfer is a prerequisite to a presumption of fraud. As to the debt of the estate for funeral expenses, whether the date of the purchase of the bonds or the date of the death of the registered owner is considered the date of transfer, this debt was neither existing nor contemplated at the date of transfer. This debt clearly could not give rise to any presumption of fraud nor could it be said that the decedent was insolvent at the time of his death. A more difficult problem is presented with respect to the indebtedness due the Department of Mental Hygiene. There was no showing that the deceased owner was indebted at the time he purchased the bonds or that he contemplated any indebtedness in the future. If the date of the death of the owner be considered the date of transfer an indebtedness did in fact exist at this time. This makes it necessary to determine what rights, if any, the beneficiary has in the bonds. In its attempt to pierce the maze and determine the rights of the beneficiary the court draws an analogy to a "Totten trust". In re Totten, 179 N.Y. 112 (1904). The writer has no argument with the court's conclusions as to the

rights of a creditor or a trustee in bankruptcy to reach the trust res, in this case the bonds, during the lifetime of the donor. As previously stated, the regulations promulgated by the Secretary of the Treasury specifically provide for this situation. But the analogy ends there and is consequently dropped there by the court. A much closer analogy may be made to a policy of life insurance payable to a designated beneficiary on the death of the insured. Such policies take many forms, one of which includes a policy payable to a beneficiary in which the insured may not change the beneficiary without his consent, but in which the insured reserves a right to surrender the policy at any time for its cash surrender value. In practically every jurisdiction it is the rule that the beneficiary of a policy which reserves no right in the insured to change the beneficiary has an absolute, vested interest in the policy from the date of its issuance, delivery and acceptance. This general rule applies alike to a policy to which there is attached the incidents of a cash surrender value. Blum v. New York Life Insurance Co., 197 Mo. 513, 95 S.W. 317 (1906); Mutual Benefit Life Insurance Co. v. Cummings, 66 Or. 272, 126 Pac. 982 (1912); affd. 133 Pac. 1169 (1913); Morse v. Commissioner of Internal Revenue, 100 F. 2d 593 (C.C.A. 7th 1938). Upon the death of the insured, the rights of the beneficiary will be protected against the claims of creditors of the insured unless it be proved that the premiums were paid in fraud of creditors. Central National Bank v. Hume, 128 U.S. 195 (1888); Lowenstein v. Koch, 152 N.Y.S. 506 (1912); affd. 217 N.Y. 634, 112 N.E. 1063 (1915); Irving Bank v. Alexander, 280 Pa. 466, 124 A. 634 (1924). The same situation exists where U.S. Savings Bonds have been purchased. So long as the purchase has not in fact rendered the purchaser insolvent or the cash been paid out while an indebtedness exists or is contemplated there is no sound reason to presume that anyone has been defrauded. A further fact militates against allowing subsequent creditors to plead fraud at the death of the purchaser, since sufficient provisions have been made whereby a diligent creditor may protect his rights and realize the amount owed him from the bonds during the lifetime of the owner.

If the decision of the New York court in the Laundree case, supra, is carried to its logical result, every person making a gift would necessarily be held to forecast his solvency or insolvency at the time of his death, under penalty of having the gift declared fraudulent and void if he predicted solvency and his prediction were wrong. Also, as has been shown by analogy, insurance policies naming a beneficiary would be mere nullities if the insured died insolvent, whether or not premiums had been paid out of money which ought to have been paid to creditors.

It is submitted that the N.Y. court erroneously diagnosed the rights of the beneficiary of U.S. bonds and misapplied the law of fraudulent conveyances to the situation. The true relationship seems to be that the beneficiary has a vested right, subject to divestment during the life of the registered owner, and that he becomes the sole and absolute owner of the bonds or their proceeds at the date of the death of the owner. So long as no creditors are defrauded at the time the money for the bonds is paid, there is no sound policy in the law to force the beneficiary to give up the bonds for the benefit of subsequent creditors, and this is even more striking in view of the remedies provided for subsequent creditors to protect their claims during the registered owner's lifetime.

Charles F. Steininger

EVIDENCE - THE ADMISSIBILITY OF ILLEGALLY SEIZED EVIDENCE IN STATE COURTS. - Local police officers entered the private office of the

petitioner, a practicing physician, without a warrant and seized his private books and records. As a result of the evidence thus obtained, the petitioner was convicted of conspiracy to perform an abortion. The petitioner claimed that his constitutional rights were invaded, contending that due process of law under the Fourteenth Amendment includes freedom from unreasonable search and seizure and prohibits the admission of illegally seized evidence. This was denied by the Supreme Court of Colorado, and the conviction was affirmed. Wolf v. People of the State of Colorado, 117 Colo. 279, 187 P. 2d 926 (1947). On certiorari to the Supreme Court of the United States, the decision of the Colorado Supreme Court was affirmed. Wolf v. Colorado, 338 U.S. 25 (1949). This case establishes a precedent in that this was the first case in which the Supreme Court has passed on whether the admission of illegally seized evidence in a state prosecution violates due process.

In Wolf v. Colorado, supra, the Court declared that the substantive right guaranteed by the Fourth Amendment, "freedom from unreasonable search and seizure," is now a part of the Due Process Clause of the Fourteenth Amendment; but the exclusionary rule applied to evidence obtained as a result of an unreasonable search and seizure by federal officers, Weeks v. United States, 232 U.S. 383 (1914), is not vital to the protection of the right to be free from unreasonable search and seizure, and consequently not of the essence of due process.

The contention that all of the guarantees of the Bill of Rights are incorporated in the Due Process Clause has been consistently rejected by the Supreme Court. Hurtado v. California, 110 U.S. 516 (1884); Palko v. Connecticut, 302 U.S. 319 (1937); Adamson v. California, 332 U.S. 46 (1947). And even though the Supreme Court has held that the entire Bill of Rights is not incorporated in the Fourteenth Amendment, it has held that the fundamental rights, such as freedom of speech, press, religion, and assembly — which are among the rights guaranteed by the first eight amendments — are an essential part of due process. Gitlow v. New York, 268 U.S. 652 (1925); Near v. Minnesota, 283 U.S. 697 (1931); Everson v. Board of Education of the Township of Ewing et al., 330 U.S. 1 (1947); De Jonge v. Oregon, 299 U.S. 353 (1937). Justice Frankfurter for the Court, in the Wolf case, supra, pointed out that freedom from unreasonable search and seizure is basic to a free society, and that as such, it is incorporated in the Due Process Clause of the Fourteenth Amendment in the same manner as freedom of speech, press, religion, and assembly. Although the Court held that freedom from unreasonable search and seizure was a part of the Due Process Clause, it was declared that the rule which excludes evidence obtained during an unreasonable search and seizure by federal officers was not a part of the Fourteenth Amendment, but that it was merely a judicial rule of evidence, which Justice Black, concurring, said was established in McNabb v. United States, 318 U.S. 332 (1943).

Thus, the importance of this case lies in its determination that the admission of illegally seized evidence is not a violation of due process of law under the Fourteenth Amendment. The Supreme Court has traditionally held that procedural due process requires that the accused receive a fair trail in all respects and at all stages. In capital crimes a state cannot deprive the accused of the assistance of counsel, Powell v. Alabama, 287 U.S. 45 (1932); nor can it secure a conviction based on perjured evidence, Mooney v. Holchan, 294 U.S. 104 (1935); or on a confession obtained by coercion, Brown v. Mississippi, 297 U.S. 278 (1936); but a common-law jury and a grand jury indictment are not required, Hurtado v. California, supra; nor is there a prohibition against self-incrimination, Twining v. New Jersey, 211 U.S. 78 (1908).

To this effect, in the Wolf case, supra, the late Justice Murphy, dissenting, declared that the Supreme Court's refusal to apply the exclusionary rule in state cases involving an illegal search and seizure takes the teeth out of the Fourth Amendment, rendering it powerless to effect the end for which it was drawn. Alluding to the alternative devices that might be used — namely, self-help, a civil action in trespass, or a criminal prosecution by the District Attorney or his assistants for a well-meaning violation of the Fourth Amendment — and demonstrating the futility of these substitutes for the exclusionary rule, the dissent holds that there can be no substitute for the rule used in federal cases. Alternatives imply an equality of effectiveness which right reason denies. Supported by his brothers, Douglas and Rutledge, also dissenting, he declared that the only effective means of enforcing the Fourth Amendment through the Fourteenth Amendment is to give the illegal search and seizure no sanction at all, and unequivocally reject the evidence obtained through such methods.

The Wolf case, supra, while theoretically extending the right of privacy embodied in the Fourth Amendment by incorporating it into the Fourteenth Amendment, does not in fact increase the protection which a person had previously from illegal searches and seizures by state officials. Self-help by the individual whose right was violated, civil liability of the offending agent, or criminal prosecution against the offending agent have been urged as proper methods for the vindication of the rights of the aggrieved person. Individuals are reluctant to exercise the ancient common-law remedy of self-help, for this would place the burden on the individual to determine whether or not the search is justified. Another remedy, that of a trespass action for damages, has been suggested as a means of effecting a remedy to secure freedom from unreasonable searches and seizures. This case negates the necessity of a positive deterrent with a constitutional basis against violators of the search and seizure clause as set out in the Fourth Amendment and applied to the states through the Fourteenth Amendment. Punitive damages are not permitted in some states and even in those states which allow them there must be malice or ill will and physical damage by the guilty party. It would be very difficult to show malice or ill will on the part of a searcher in hot pursuit of a crime. Even though a substantial verdict could be had, the officer may be judgment proof. If the violator exerts care in searching the property, he can avoid all but nominal damages. A suggestion has been made that criminal prosecutions would be effective in securing a remedy against unreasonable searches and seizures. It is difficult to conceive a District Attorney who would prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid which he or his associates have ordered.

Therefore it is seen that the decision while paying lip service to the Fourth Amendment in failing to include the federal exclusionary rule of evidence has added nothing to the interpretation of the Due Process Clause of the Fourteenth Amendment.

In the words of Justice Murphy in Wolf v. Colorado, supra, quoting from Justice Holmes in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), "It reduces the Fourth Amendment to a form of words."

Mark D. Buchheit

INFANTS - UNBORN CHILDREN - LIABILITY FOR INJURIES - NEGLIGENCE AS TO VIABLE UNBORN CHILDREN - WRONGFUL DEATH STATUTE. - The question: Whether or not the special administrator of the estate of an unborn child that died prior to birth as the result of another's negligence has a cause of action on behalf of the next of kin of said unborn child under a wrongful death statute. The statute states: "When death is caused by wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission." Minn. S.A. Sect. 573.02. This was an action by plaintiff father, as special administrator of the estate, of baby girl Rita Verkennes, deceased, against Albert D. Corniea and Maternity Hospital for wrongful death. The facts are these: The mother of the deceased child, during her period of pregnancy, went under the care of defendant doctor. The doctor thereafter made arrangements with defendant hospital for admittance of the expectant mother. She entered the hospital and while there advanced in pregnancy to the parturition period, during which mother and child died. The plaintiff alleged negligence on the part of the doctor and hospital in not assisting the mother and child during delivery in a manner required under like circumstances. To this, one defendant demurred, on the ground that plaintiff had no right to sue since his decedent had never existed as a human being. The demurrer was sustained at trial. On appeal, HELD: That under the wrongful death statute the action will lie. Verkennes v. Corniea et al., 38 N.W. 2d 838 (Minn. 1949).

The proponents of the non-recovery doctrine have been long in the majority; the preponderance in their favor speaks for itself. The first case in which the issue arose in the United States was the leading case of Dietrich v. Inhabitants of Northhampton, 138 Mass. 14 (1884). In that case, Justice Oliver Wendell Holmes expressed what was to be the law until recent times. In his opinion he stated: "No case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received in its mother's womb." He expressed doubt whether "a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being." In effect he rejected analogies and dissenting views hereinafter set forth. The cases that followed the Dietrich decision down through the years are of a very tight weave and may be found in the Verkennes case, supra, set out in chronological order as a formidable wall against recovery.

The case for recovery and therefore the basis for the Verkennes decision, supra, is this: The common law recognized property rights of viable children or infants en ventre sa mere. 1 Blackstone, Comm. 130. Also, the killing of the infant in the womb was deemed manslaughter. Further, if the infant should die after delivery because of injuries inflicted while yet a foetus, this was thought to be murder. Gavit, Black. Comm. 833 (1941 Ed.). From these accepted rules of the common law, courts have drawn certain analogies. These are: The law will recognize the infant en ventre sa mere when there is a benefit or possible benefit to the infant (The George and Richard, L.R. 3 Ad. and Ecc. 466); why then will not the law recognize such infant when there be a definite detriment to said infant? Cf. dissenting opinion, Boggs, J., Allaire v. St. Luke's Hospital et al., 184 Ill. 359, 56 N.W. 640 (1900); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), dissent O'Brien, J; Walker v. Railway Co., L.R. Ir. 69 (1691). Cf. Prosser, Torts 188 (1944), which sets forth the two main reasons for non-recovery coupled with methods of eliminating these difficulties; and 26 Harv. L. Rev. 638. For recent treatment of the Verkennes case, supra, and the Williams case, infra, Cf. 63 Harv. L. Rev. 173

(1949). The Williams case, infra, is also treated in 38 Geo. L.J. 300 (1950).

Finally, after much theorizing, there was a break in the long line of cases against recovery. One of the first allowing recovery for deformities incurred in delivery was Bonbrest v. Katz, 65 F. Supp. 138 (D.C. 1946). Another allowed recovery to the infant dying after birth. Williams v. Marion Rapid Transit, Inc., 152 Ohio 114, 87 N.E. 2d 334 (1949), the first case of its kind in the United States, resolving a conflict in previous Ohio decisions (Mays v. Weingarten, 82 Ohio App. __, 82 N.E. 2d 421 (1943), a case disallowing recovery, as against Williams v. Marion Rapid Transit, Inc., 82 Ohio App. 445, 82 N.E. 2d 423 (1948), allowing recovery). In deviating from the rule of non-recovery, the court in the Williams case, supra, summed up thusly: "The general rule that a prenatal injury affords no basis for an action in damages in favor of the child is supported by substantial authority and for many years the Courts of last resort were almost unanimous in withholding recovery in such cases, the conclusions generally being based mainly upon precedent and high regard for stare decisis."

In Canada, the break came earlier through the case of Montreal Tramways v. Leveille, 4 Dom. L.R. 337 (1933). Here, the Supreme Court of Canada stretched the analogy which heretofore had been obiter dicta and dissent into a decision allowing recovery. The Court stated: "The wrongful act which constitutes the crime may constitute also a tort, and if the law recognizes the separate existence of this unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize its separate existence for the purpose of redressing a tort." Recovery was allowed for club feet resulting from negligent delivery.

The Verkennes case, in which recovery was allowed for the death before delivery of an infant en ventre sa mere is the culmination of a break in precedent which, until very recent times, has been one of the untouchables and so creates a new minority.

James A. Kelly

TAXATION - MEASURE OF TAX ON FOREIGN CORPORATION DOING BUSINESS IN INTERSTATE COMMERCE - STATUTORY INTERPRETATION - STAY OF PROCEEDINGS - CARRIERS. - The Connecticut Corporation Business Tax Act of 1935, Gen. Stat., Cum. Supp. 1935, secs. 416 C, et seq., imposes upon a corporation doing business within the state a tax or excise upon its franchise for the privilege of doing business within the state, such tax to be assessed at the rate of two per cent and to be derived from the entire net income of the corporation from business transactions within the state. Spector Motor Service, Inc. v. Walsh, Tax Commissioner, 139 F. 2d 980 (C.C.A. 2d), (1943, as modified March 18, 1944). The plaintiff, a Missouri Corporation, having its principal office in Chicago, Illinois, is engaged solely in interstate trucking, using the two way haul system between points in the Midwest and the Northeast. It leased terminals at Bridgeport and New Britain, Connecticut, which are used for bringing together, sorting, loading, unloading and distributing of freight handled in the long haul trips. In this state it is registered as a foreign corporation, having paid the minimum license fee. Staffs handle freight as well as local bookkeeping at both terminals, and a sales staff is maintained and paid at the New Britain office. The Spector Motor Freight Co. owns in Connecticut office furniture in the Bridgeport and New Britain Terminals, and five pick-up trucks are held by the Co. under conditional bills of sale, registered and used solely in Connecticut. All its long haul trucks are leased from a corporate affiliate, Wallace Transport Company, an Illinois

Corporation, and forty percent of the cost of this purchased transportation has been ruled by the State Tax Commissioner to be "rent" and not deductible in determining net income under the Act. The salaries and bills at these offices are paid by draft on the corporation at Chicago. The plaintiff does not engage in any hauls which both originate and terminate in Connecticut, however, from one third to one half, or approximately forty per cent, of the entire volume of plaintiff's business originates in this state. The forty per cent of the total cost ruled "not deductible" would be related to the forty per cent of the gross business originating within the state.

The Tax Commissioner in ruling that plaintiff was subject to the State tax, based his decision on sec. 420 C, which applies to corporations whose business is done partly out of the state. The measure of tax is based on the proportion of business carried on within the state. Sec. 420 C (3)(b), states that the net income, when derived from the manufacture, sale or use of tangible personal or real property, attributable to business done within the state, shall be determined by means of an allocation fraction to be computed as the simple arthimetical mean of three fractions. The first of these fractions shall represent that part of the average monthly fair cash value of the total tangible property held and owned by the taxpayer during the income year within the state. The second fraction represents the part of total wages, salaries and other compensation paid to employees during the income year from the offices or places of business within the state, provided such payments be assigned to those offices or places of business. The third fraction represents the part of the taxpayer's gross receipts from sales or other sources during the income year which is assignable to the local offices. Spector Motor Service, Inc. v. Walsh, 135 Conn. 37, 61 A. 2d 89 (1948).

The plaintiff's main objection is that in the event that Connecticut can levy this tax, then all states through which plaintiff's trucks operate can levy a similar tax, and plaintiff will be burdened by the iniquity of multiple taxation, which would be a burden to and direct tax upon interstate commerce in violation of the United States Constitution, U.S.C.A. Const. art. 1, sec. 8; Amend. 14, sec. 1.

The Federal District Court for the District of Connecticut, 47 Fed. Supp. 671 (1942), decided in favor of the plaintiff and enjoined the defendant from collecting the tax. The Circuit Court of Appeals, Second Circuit, 139 Fed. 2d 809 (1943), reversed the decision of the District Court. On certiorari granted to the U.S. Supreme Court, 323 U.S. 101, 106 (1944), it was decided that until certain questions as to the interpretation and application of the statute were first determined by the courts of Connecticut, the issue as to the constitutionality of the Act could not properly be decided in the federal courts. A new action by the Spector Motor Services, Inc., against Walter W. Walsh, Tax Commissioner, for a declaratory judgment as to whether assessments made against plaintiff under the Corporation Business Act of 1935 were illegal and void was then tried by the Superior Court, Hartford County, which Court found for the plaintiff on constitutional grounds. On appeal, the Supreme Court of Errors of Connecticut ruled that the trial court should not have decided whether the act was in violation of the U.S. Constitution, because that question is still before the federal courts for decision. This Court then directed the trial court to enter judgment on the file, except as to its ruling on the constitutionality of the Act. 135 Conn. 37, 61 A. 2d 89 (1948). A United States District Court decided that imposition of the tax on the plaintiff under the Act, as a motor freight carrier in interstate commerce, would be a violation of the Commerce Clause of the United States Constitution. 88 F. Supp. 711 (D.C. Conn. 1949). The United States Court of Appeals for the

Second Circuit reversed the District Court decision, and thereby upheld the constitutionality of the tax. C.C.H. Weekly State Tax Review for April 6, 1950. The outstanding principle of this case is that it proposes a theory that the states may, in spite of the Commerce Clause, require a foreign corporation having the situs of its principal office in another state to pay a tax based on that part of its corporate net income derived from its activities within the state, even though those activities are carried on as part of interstate commerce. This action would then be an exception to the tax immunity of a business engaged solely in interstate commerce. The traditional view is that the state cannot tax interstate commerce, or the privilege of engaging in it. In Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925), the court held invalid a Massachusetts excise tax measured in part by net income when applied to a company doing no intrastate business but doing a considerable amount of interstate business within the state, where it maintained a large office and sales staff. In Cooney v. Mountain States Tel. Co., 294 U.S. 384, 392, 393 (1935), the court held that a tax on telephones used by the companies in interstate commerce was invalid. In Matson. Nav. Co. v. State Board, 297 U.S. 441 (1936), it was decided that a foreign corporation whose sole business in a state is interstate and foreign commerce cannot be subjected to a privilege tax. In Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938), the court held an Indiana Gross Income Tax Act unconstitutional when applied to gross receipts derived by the corporation from sales in other states of goods manufactured by it in Indiana. In McCarroll v. Dixie Greyhound Lines, 309 U.S. 176 (1940), the court ruled against an Arkansas tax imposed on gasoline consumed by buses in interstate commerce in Arkansas, as unconstitutional. In Freeman v. Hewit, 329 U.S. 249 (1946), the court ruled the Indiana Gross Income Tax Act of 1933 unconstitutional, as a direct tax and a burden on interstate commerce, when applied to gross receipts from stock sold on the New York Stock Exchange in settling the estate of a decedent whose domicile was in Indiana.

The power of a state to tax in this type of case is supported by Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891), in which the court held that a state statute imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the state, pertained also to a corporation of another state running railroad cars into, through and out of the state. The court based the assessment on such proportion of the company's capital stock as the number of miles over which its cars ran within the state compared with the whole number of miles in this and other states over which its cars ran. It was declared that the tax, as applied to such a corporation, did not violate the clause of the U.S. Constitution granting Congress the power to regulate Commerce among the states. Again, in Postal Telegraph Cable Co. v. Richmond, 249 U.S. 252, 253 (1919), the court decided that a telegraph company engaged in interstate commerce may be charged a reasonable amount upon each pole maintained and used in the city streets in the nature of a rental. In First Banks Stock Corp. v. Minnesota, 301 U.S. 234 (1937), it was decided that the assets of a foreign corporation engaged in interstate commerce were taxable not only by the state in which the corporation had acquired a business situs, but also by the state in which it had a commercial domicile. In Western Live Stock Co. v. Bureau of Revenue, 303 U.S. 250, 254 (1938), it was decided that it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. In McGoldrick v. Berwind-White Coal Mining Company, 309 U.S. 33 (1940), the court held valid a New York Sales Tax of two per cent on all sales as applied to coal delivered in New York from Pennsylvania.

It is submitted that the State of Connecticut has no power so to tax this corporation as such a tax is violative of the Constitution of the United States. The corporation involved here carried on no intrastate business in Connecticut; it carried on solely interstate business. Because the business is in interstate commerce, the federal government has exclusive power to tax such corporation. This power is exclusive with Congress and is not shared by the states. This corporation tax is a direct tax on interstate commerce in violation of the United States Constitution, U.S.C.A., Const. art. 1, sec. 8.

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