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Recent Cases

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RECENT CASES

TORTS—STATUTORY NEGLIGENCE—EVIDENCE OF NEGLIGENCE

The plaintiff under a standard District of Columbia lease occupied one unit in an apartment house owned by the defendant. Four months before the plaintiff took possession, the plaster had been pronounced in good sound condition by a contractor hired by the defendant to inspect and repair. The D. C. Housing Regulations (1955) require the landlord to put the premises in a safe condition prior to rental, and the tenant to refrain from occupying the unsafe premises. The plaintiff had been in occupation for four months when the bedroom ceiling fell, causing the injuries which gave rise to the present action for damages. The trial court rendered summary judgment for the defendant. On appeal, *held:* judgment reversed and case remanded for a new trial. The case should have gone to the jury. The Housing Code is a police regulation which affects the landlord's tort responsibility. A violation is not necessarily negligence *per se,* but it is at least evidence of negligence. Thus, if the plaintiff has made out a prima facie case showing a violation of the Housing Code, the court must send the case to the jury with instructions on statutory negligence and evidence of negligence. *Whetzel v. Jess Fisher Management Co.,* U.S. App. D. C. No. 15287, 282 F.2d 943 (1960).

The court adheres then to the common law rule that absent a contractual or statutory duty, a lessor is not responsible for a defect in the premises which developed during the term. *Bowles v. Mahoney,* 91 U.S. App. D.C. 155, 202 F. 2d 320 (1952), *cert. denied,* 344 U.S. 935 (1953). It now finds a statutory duty in the Housing Code. Much of the opinion is devoted to tracing the movement of the court away from the doctrine of statutory negligence toward that of evidence of negligence, where a violation of a statute is in issue.

The statutory negligence doctrine has received widespread acceptance in American jurisdictions. It is not confined to the landlord-tenant relation, but is applied in widely divergent areas of the law. Thus a failure to erect fire escapes as required by statute is negligence *per se. Fassi v. Schuler,* 349 Mo. 160, 159 S.W. 2d 774 (1942). A violation of statutes or municipal ordinances prescribing traffic rules is negligence *per se. Portland-Seattle Auto Freight, Inc. v. Jones,* 15 Wash. 2d 603, 131 P. 2d 736 (1942). A violation of a statute forbidding garbage disposal chutes in tenement houses was negligence *per se. Rimco Realty & Investment Corp. v. LaVigne,* 114 Ind. App. 211, 50 N.E. 2d 953 (1943).

There are a substantial number of holdings which recognize the doctrine of violation of a statute or ordinance as only evidence of negligence to be considered by the jury along with all other relevant circumstances. Thus violation of a safety statute requiring a truck driver to set out flares behind his disabled truck is evidence of negligence only. A Massachusetts court felt that the jury could reasonably find that the collision had occurred before the trucker had a sufficient amount of time in which to comply. *Harsha v. Bowles,* 314 Mass. 738, 51 N.E. 2d 454 (1943). Violation of a statute intended to promote safety to those using the highways is a fact to be considered along with others by the jury in determining whether negligence has been established. *Barney v. Adcock,* 162 Neb. 179, 75 N.W. 2d 683 (1956). Violation of a statute requiring a driver's license is no longer to be regarded as conclusive of liability of such unlicensed driver; rather

liability is to be based on fitness to drive as determined by the jury as a fact issue. *Mandell v. Dodge-Freedman Poultry Co.*, 94 N.H. 1, 45 A. 2d 577 (1946).

The statutory negligence doctrine has been subjected to a number of exceptions as courts have sought to temper its severity. One such exception is termed the statutory purpose rule. Thus a wartime blackout state was held to protect the public at large, not for the protection of an air raid warden who was injured in a fall in the dark following a successful attempt to extinguish a light burning in violation of the statute. *Klein v. Herlim Realty Corp.*, 184 Misc. 852, 54 N.Y.S. 2d 144 (1945). So also a tax assessor's statutory duty to correctly compute taxes was for the purpose of securing the public revenue and expediting the taxation process. It was not for the buyer's protection at a tax delinquency sale. *Routh v. Quinn*, 20 Cal. 2d 488, 127 P. 2d 1, (1942).

The justifiable violation doctrine is a further limitation on the statutory negligence rule. Thus where a Texas statute required lights to be lighted on a truck at night, judgment for a plaintiff who crashed into the rear of the truck was reversed. The truck driver was driving slowly, close to the side of the road in an effort to reach a garage 400 feet away, where he expected to procure the services of a repairman. A Texas court thought due care had been exercised in spite of the statutory violation. *Taber v. Smith*, 26 S.W. 2d 722, (Tex. Civ. App. 1930). The same result has been reached when a motorist's taillights ceased functioning at night without his knowledge, although a statute required that taillights be in working order. The court felt that the jury might reasonably have found that the lights had been functioning properly until after the collision. *Bissell v. Seattle Vancouver Motor Freight*, 25 Wash. 2d 68, 168 P. 2d 390 (1946).

Some courts have refused to extend the statutory negligence rule beyond violations of statutes. The rule is not applied to ordinances or administrative regulations. Thus, an Iowa court held that violation of an ordinance prescribing the law of the road was only evidence of negligence. *Carlson v. Meusberger*, 200 Ia. 65, 204 N.W. 432 (1925). A municipal corporation cannot create a right of action between third persons nor enlarge the common law or statutory liability of citizens among themselves. *Bain v. Ft. Smith Light & Traction Co.*, 116 Ark. 125, 172 S.W. 843 (1915).

Occasionally courts have escaped the statutory negligence rule by employing the lack of proximate cause argument. Thus where a motorist violated a 7 mph speed limit at a railroad crossing by traveling 15 mph and hit a building in order to avoid a train, her violation of the speed limit was not the proximate cause and the defendant was liable for her injuries. *Hinton v. Southern Ry. Co.*, 172 N.C. 587, 90 S.E. 756 (1916). A motorman exceeding the speed limit was hit by a falling tree. The traffic violation was not the cause of his injuries. The court did not accept the argument that had he observed the speed limit, the tree would have fallen before he arrived. *Berry v. Sugar Notch Borough*, 191 Pa. St. 345, 43 A. 240 (1899).

There are certain arguments which defendants almost invariably make in statutory negligence cases. The most common of these are: contributory negligence, not the type situation the statute was intended to cover, or that the plaintiff was not one of the class for whose protection the statute was passed. Arguments based on the above described exceptions to the statutory negligence rule are not uncommon. If the court permits the case to get to the jury as a result of any of these arguments, the doctrine of statutory negligence has not commanded adherence.

Whether the judge accepts and/or instructs as to the reasonably prudent man standard or one or more of the arguments mentioned above, the end result will not differ essentially from an instruction based on the evidence of negligence doctrine.

The problem ultimately reduces itself to one of judicial administration and the results will be approximately the same whether the method employed be termed negligence *per se* as tempered by the many exceptions, or evidence of negligence. Thus it seems that the court, in substituting the evidence of negligence doctrine for that of the statutory negligence plus exceptions idea, is actually making but a terminological break with the past.

GARRETT N. WYSS

TRUSTS—IRREVOCABILITY OF A CHARITABLE TRUST—RESERVATION OF THE POWER OF REVOCATION OR MODIFICATION—PERPETUITY AND THE PRESUMPTION OF IRREVOCABILITY—The settlor teachers' association was incorporated in 1894 to provide annuities to retired and permanently disabled teachers who might become members of the association. In 1928, after the government instituted a retirement program for teachers, the association closed its membership. A new constitution was adopted which authorized the conveyance of the association's assets to a bank to be held in trust "in perpetuity," the income to be paid as annuities to retired and disabled members of the association and after the death of all such members to be used for the "relief and benefit of white teachers of the public schools of the District of Columbia." No provision was made for disbursement from, or distribution of, the corpus. The constitution provided that it could be amended from time to time. Pursuant to the terms of the constitution, a trust of $121,500 was established. The trust instrument did not expressly reserve a power of revocation or amendment to the settlor but the constitution was attached thereto and expressly incorporated therein. By the terms of the trust instrument, the trustee was to be "guided" by amendments of the constitution upon notification. In 1957, the association amended the constitution to increase the size of the annuity payments to its members. Alleging that the increase would require a serious encroachment on the corpus, the trustee sought instruction concerning the validity of the amendment. The District Court granted summary judgment to the trustee instructing it to maintain intact the corpus. On appeal, *held,* judgment affirmed; since the association had not clearly and unmistakably reserved the power to revoke or modify, the trust is irrevocable and the association may not alter its terms in a manner which would impair or extinguish the interest of remote beneficiaries. *Teachers Annuity and Aid Association v. Riggs National Bank,* U.S.App.D.C. No. 15202, decided May 5, 1960, 278 F.2d 452 (1960).

The general rule is that a trust is presumed to be irrevocable. This presumption, however, can be overcome if a power of revocation can be inferred from the terms of the trust. The power of revocation or modification need not be stated in expressed terms, if an intent to have such a privilege in the settlor is in fact indirectly expressed or inferable. 2 RESTATEMENT, TRUSTS §330; 3 SCOTT, TRUSTS §330 [citing *Lambdin v. Dantzebecker,* 169 Md. 240, 181 A. 253, 102 A.L.R. 277 (1935)]; BOGERT ON TRUSTS AND TRUSTEES §993. The presumption of irrevocability has been applied in the District of Columbia with respect to private trusts. *Hurt v. Gilmer,* 55 U.S.App.D.C. 282, 40 F.2d 794 (1930); *Liberty National*

Bank v. Hicks, 84 U.S.App.D.C. 198, 173 F.2d 631, 9 A.L.R. 2d 1355 (1949). As to charitable trusts, the question had not been decided in the District.

Charitable trusts are generally favored in the law and the construction of all instruments where they are concerned is liberal in their behalf. *Board of Directors of City Trusts v. Maloney,* 141 F.2d 275 (1944); *Fay v. Hunster,* 86 U.S.App.D.C. 224, 181 F.2d 289 (1950). The Court of Appeals in the *Teachers Annuity* case purported merely to apply the presumption of irrevocability to the charitable trust. The constitutional provision for amendment did not necessarily mean that the trust could be modified in a manner which would impair its corpus. The court, however, rested its decision on the novel argument that the provision that the trust shall be perpetual was an "affirmative provision for irrevocability." Generally, words of perpetuity merely describe the estate as unlimited as to time or duration. 70 C.J.S. p.569ff. In order to overcome the presumption of irrevocability when strengthened by words of perpetuity the court requires that the power of revocation be "clearly and definitely" stated and "unqualifiedly and unmistakably reserved." By its decision the court rules out the possibility of an indirectly expressed or inferred power of revocation in a perpetual trust.

The decision in the *Teachers Annuity* case seems to follow the conservative trend established by the Court of Appeals in an earlier decision this year concerning the application of the *cy pres* doctrine. The amount bequeathed in trust to the West Point Military Academy to construct a memorial hall was insufficient. The lot specified for the building had been programmed for other expansion. The United States asked that the trust be modified so that a wing, dedicated to the purposes specified in the bequest, could be added to a projected building. The District Court, applying the *cy pres* doctrine, granted the modification. The Court of Appeals reversed on the grounds that the *cy pres* doctrine did not apply. *Connecticut College v. U.S.,* U.S.App.D.C. No. 15023, decided March 10, 1960, 276 F.2d 491 (1960). The court seems to have narrowed the more liberal approach to the *cy pres* doctrine found in earlier decisions. It has been held that the site specified in the will for a playground can be changed without destroying the bequest. *Stead v. American Security and Trust Co.,* 84 U.S.App.D.C. 358, 173 F.2d 650 (1949). Under the doctrine of *cy pres* the court substituted another university when the specified institution rejected the bequest for an art museum. *Noels v. Olds,* 78 U.S.App.D.C. 155, 138 F.2d 581, *cert. denied,* 321 U.S. 773 (1943). When lots designated for a memorial retreat for indigent maiden ladies had become unsuitable, the court authorized the purchase of another site. *Shoemaker v. American Security and Trust Co.,* 82 U.S.App.D.C. 270, 163 F.2d 585 (1947).

The Court of Appeals seems to be following a conservative trend in its recent trust decisions. Both the *Teachers Annuity* case and the *Connecticut College* case seem to point to a less liberal construction of trust instruments in the District of Columbia.

STEVEN P. FRANKINO

ACTION IN THE COURT OF CLAIMS TO RECOVER BACK PAY—PRESIDENTIAL POWER TO REGULATE MILITARY JUSTICE—On December 13, 1956, Garrard Johnson, then a Master Sergeant in the United States Air Force, was convicted of

larceny by a General Courts Martial. His sentence was six months at hard labor, forfeiture of $44 per month for six months and a bad conduct discharge. Johnson's conviction was approved by the Convening Authority but the portion of the sentence providing for the bad conduct discharge was suspended. On May 8, 1957, the unexecuted portion of the sentence, including the bad conduct discharge, was remitted and he was retained in the Air Force. He was reduced to the lowest enlisted grade as of January 6, 1957. According to Air Force administrative practice, the reduction was an automatic consequence of the court-martial sentence pursuant to the Manual For Courts Martial (U.S. Dept. of Defense, Manual For Courts Martial (1951), (issued by Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951). [hereinafter cited as Manual] Para. 126(e), as amended by Exec. Order 10652, 21 Fed. Reg. 235 (1956). On May 10, 1957, a review board in the office of the Judge Advocate General of the Air Force affirmed the action of the Convening Authority, and on August 21, 1957, the United States Court of Military Appeals denied Johnson's petition for review. *United States v. Johnson,* 8 U.S.C.M.A. 773 (1957).

In the Court of Claims Petitioner relied on *United States v. Simpson,* 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959), which declared that Para. 126(e), authorizing automatic reduction in grade, was invalid and held that, to be effective, a reduction in grade must be specifically provided in the court-martial sentence. The rationale was that the reduction in grade constituted a judicial act and therefore acted improperly to increase the sentence of the court-martial. *Held,* the reduction in grade pursuant to Para. 126(e) was administrative in nature, a valid exercise of the presidential power under the constitutional provision making the President the Commander in Chief of the Armed Forces and was not invalid under any theory that it improperly authorized the exercise of a judicial act subsequent to a court-martial. The proper exercise of judicial restraint required the court to decline to intervene in the long established patterns of procedure within the military. *Garrard Johnson v. United States,* — Ct. Cl. —, 280 F.2d 856 (1960).

In reaching its decision, the Court of Claims followed the dissenting opinion of *Latimer, J.,* in the *Simpson* case, *supra,* recognizing the constitutional basis of the president's power to regulate military justice. (U.S. Const. art. I, sec. 8; Id. art. II, sec. 1; Id. art. II, sec. 2). It is to be noted that the Supreme Court has consistently held that the president has the power to issue regulations, having the force of law, for the government of the Armed Forces. *Carter v. McClaughry,* 183 U.S. 365, 387 (1902); *Smith v. Whitney & Others,* 116 U.S. 167, 181 (1886); *United States v. Freeman,* 44 U.S. (3 How.) 556, 567 (1884). The president's authority to issue such regulations includes the power to promulgate and prescribe rules of practice and procedure for Courts Martial. *Ex Parte Reed,* 100 U.S. 13 (1879); 10 U.S.C. § 836 (1958). In one of its first opinions the U.S.C.M.A. held that the act of Congress (the UCMJ) and the act of the Executive (the Manual) are on the same level and that silence on the part of Congress does not necessarily require the like silence on the part of the Executive when the president has been expressly authorized to prescribe rules of procedure for Courts Martial. Both acts are on the same level and the ordinary rules of statutory construction apply. *United States v. Lucas,* 1 U.S.C.M.A. 19, 1 C.M.R. 19 (1951).

Congress joined in expressing its dissatisfaction with the *Simpson* holding and subsequent to the *Johnson case* passed Public Law 86-633, 74 Stat. 468 (1960),

amending 10 U.S.C. § 855 et seq., providing statutory authority for the reduction to the lowest enlisted grade of an enlisted member convicted by court-martial whose approved sentence includes a punitive discharge, confinement or hard labor without confinement (or a combination of these punishments).

Both Congress and the Court of Claims fail to recognize that Para. 126(e) is so interwoven with the court-martial process that it cannot be regarded as anything but judicial in purpose and effect. The passage of Public Law 86-633 has not remedied the defects noted, by the U.S.C.M.A., in the *Simpson* case. Instead, it enables the reviewing authority, at its discretion, to increase the original sentence of the court-martial.

HENRY E. FORGIONE II

FORENSIC MEDICINE—ARMED FORCES—SELF-INCRIMINATION—ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE—EXTRACTION OR SUBMISSION OF BODY FLUIDS—Appellant McClung, Private First Class, U.S. Army, was found by fellow soldiers, lying unconscious in the barracks latrine. "An eye dropper was found in one hand, and a hypodermic needle was discovered either in the other hand or on a nearby shelf." After being carried, still unconscious, to the station hospital in an ambulance, McClung was given a routine physical examination. Further, and while the patient was still unconscious, blood samples were extracted. The medical officer, concluding that McClung was suffering from a reaction to narcotic drugs, notified the Criminal Investigation Detachment. By application of physical stimuli, the patient was returned to a conscious state. In the presence of the C.I.D. agent, the medical officer asked McClung "if he could give us a urine specimen so that we could examine it and he said he would." Appellant was able to pass the specimen after ingesting eight or ten glasses of water. During the proceeding, the patient intermittently lapsed into unconsciousness and could be roused by talking to him. Analysis of the specimens demonstrated the presence of a morphine derivative in the body fluid. Testimony regarding the laboratory results was received over defense objection that the samples had been improperly obtained. McClung was found guilty of (1) the wrongful possession of heroin, and (2) the wrongful use of a narcotic drug, both in violation of the UNIFORM CODE OF MILITARY JUSTICE, Article 134, 10 USC sec. 934. Intermediate appellate authorities affirmed, and the United States Court of Military Appeals granted review. On review, *held,* it was prejudicial error to admit evidence of urine analysis results, since the circumstances indicated only a semiconscious state; and a semiconscious accused is in no condition to voluntarily respond to an inquiry whether he is willing to furnish evidence against himself. (2-1). *United States v. McClung,* 11 U.S.C.M.A. 754, 29 C.M.R. 570 (1960).

Appellant contended he should have been advised of his rights under the UNIFORM CODE OF MILITARY JUSTICE, Article 31, 10 USC sec. 831, before being asked to provide law enforcement personnel with a urine sample. Counsel directed their briefs and arguments to that question. (Article 31 is based on the Constitutional guarantee of the Fifth Amendment regarding self-incrimination.) The court (*United States v. McClung,* 29 C.M.R. at 756 of the advance sheet), refused to address itself to the question.

Three situations appear to have been clear prior to the decision. (1) In the

case of a conscious patient, specimens must either be voluntarily furnished, or furnished without compulsion, coercion, or unlawful influence or inducement. *United States v. Booker,* 4 U.S.C.M.A. 335, 15 C.M.R. 337 (1954); *United States v. Jordan,* 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957). (2) In the case of a conscious patient unable to "understand" his rights under Article 31, the evidence rendered by an accused is inadmissible. *United States v. Hernandez,* 4 U.S.C.M.A. 465, 16 C.M.R. 39 (1954); *United States v. Dison,* 8 U.S.C.M.A. 616, 25 C.M.R. 120 (1958). (But in the *Hernandez* case, it was a question of "understanding" the English language, and in *Dison,* time was not of the essence in obtaining *oral* testimony from accused who was intoxicated.) (3) In the case of an unconscious patient to "determine the necessity for, and the nature of, a course of treatment," body fluids may be extracted and subsequently, though not initially intended as such, the results may be used in evidence. *United States v. Baker,* 11 U.S.C.M.A. 313, 29 C.M.R. 129 (1960).

As a result of the *McClung* case, forensic scientists are confused. Since the *court* found the patient was not unconscious, the *Baker* doctrine did not apply; nor did the *court* find the patient conscious, in which case the *Hernandez-Dison* doctrine might apply. Rather, the *court* found that McClung was semiconscious, and the procedure to be followed is certainly not clarified by this decision. Does the result mean that if a serviceman accused of a narcotics violation is in a "semiconscious" condition (by the *court's* criteria) when examined, that results of chemical analyses will *never* be admitted? This could be a strict interpretation of Judge Ferguson's opinion.

In his concurrence in the *Booker* case, Judge Quinn said at p. 338: "However, in this case, the accused voluntarily co-operated with the authorities. Under the circumstances, he has no cause to complain. Article 31 of the Code does not apply because the urine specimen was obtained with his consent, and since there was no interrogation of any kind, there was no need to warn the accused . . ."

In view of the above statement, by finding in the instant case that accused was semiconscious, Judge Quinn has avoided, at least to some extent, an apparent self-contradiction.

On the other hand, one observes consistency in Judge Ferguson's partiality toward the rights of the individual under Article 31. (See, e.g., *Baker* case at 318 of advance sheet; *United States v. Wilmot,* 11 U.S.C.M.A. 698, 29 C.M.R. 514 (1960), at 703 of advance sheet; *United States v. Wynn,* 11 U.S.C.M.A. 195, 29 C.M.R. 11 (1960).) It may be of interest to note that the individuals whose rights were being protected in cases cited, were involved in narcotics traffic or use, a not inconsiderable social problem. In this respect, consider Judge Latimer's dissent in the *Jordan* case at p. 250: ". . . while Congress and most forward-thinking persons are striving valiantly to control the traffic in habit-forming drugs, we appear to be taking a step backward in denying to the Services a valuable and legal means of controlling a most despicable offense."

It was hoped by the parties engaged in the forensic medical field that the *Jordan* case, *United States v. Musguire,* 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958), and the *Baker* case had woven a fabric of enforcement procedure and accused parties' rights. As it stands, attorneys, those in the medical sciences, and enforcement agencies of the military services may well confess to a sense of futility upon the occurrence of future situations similar to *McClung.*

DAVID LEWIS, D.D.S.

CONTRACTS—LABOR AGREEMENT—ARBITRATION CLAUSE—ARBITRATION CLAUSE UNENFORCEABLE UNDER COMMON LAW—Stine operated a plumbing supply shop employing journeymen plumbers. A plumbing union represented the journeymen plumbers. Stine and the union, through negotiations, entered into a collective bargaining agreement containing arbitration covenants to preserve "harmonious relations between the parties . . . for the purpose of prevention of strikes and lockouts by facilitating the just and peaceful adjustment of disputes and grievances that may arise from time to time." The union contrary to the arbitration clause ordered a strike against Stine resulting in the closing of his plumbing supply shop. In an action for damages, based on the union's alleged breach of the arbitration clause in the labor agreement, there was a judgment for Stine in the sum of $50,000. The union appealed from the judgment. *Held,* Provision in labor agreement requiring submission of future controversies to arbitration is enforceable and employer was entitled to maintain an action against the union for injuries sustained in consequence of union's violation thereof in calling a strike without first resorting to remedies under the arbitration clause of the contract. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 525, Las Vegas, Nevada v. William K. Stine,* 351 P.2d 965 (Nev. 1960).

Appellant contended that under the common law in England, agreements to submit any and all future disputes to arbitration are unenforceable. This is the rule of the United States with the exception of ten states and the Federal Government which have enacted special arbitration statutes. Nevada is not one of the states enacting a special arbitration statute, but to the contrary "(T)he common law of England so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution or laws of this state, shall be the rule of decisions in all courts of this state." N.R.S. 1.030.

Appellant contends that the overwhelming weight of authority is to the effect that the common law rule must be followed. This is supported by *Park Construction Co. v. Independent School District No. 32, Carver County, Minnesota,* 209 Min. 182, 296 NW 475, 135 A.L.R. 59 (1941) and the annotation in 135 A.L.R. 79, which cites cases from the Supreme Court of the United States and the courts of last resort of over half of the states of the Union, as well as England and Canada.

The Supreme Court of Nevada in sustaining the judgment and denying the union's appeal indicated that the question of the enforceability of arbitration agreements in the State of Nevada is *res integra.* In reaching the conclusion that it was not compelled by statute to apply the common law rule the court cited as precedent *Jones v. Adams,* 19 Nev. 78, 6 P442 (1885) and *Reno Smelting, Milling and Reduction Works v. Stevenson,* 120 Nev. 269, 21 P 317 (1889). In the *Jones* case the court refused to adopt the common law doctrine of riparian rights and in the *Reno* case the court held that the Nevada statute declaring that the common law of England shall govern does not preclude the consideration that the applicability of that law was meant only as it is applicable to the conditions of the state. Where the common law rule has been upheld there has been a constant recurrence of dissenting opinions criticizing the holding. *Local 1111 of the United Electrical, Radio and Machine Workers of America et al. v. Allen-Bradley Co.,* 259 Wis. 609

49 N.W. 2d 720, (1951) and *Latter v. Holsum Bread Co.,* 108 Ut. 364, 160 P.2d 421 (1945).

The reasons usually stated for the common law rule that covenants for arbitration are unenforceable is that they are contrary to public policy because they oust courts of their jurisdiction. The rule is the product of judicial jealousy rather than judicial reasoning. *Scott v. Avery* 5 H.L.C. 811 (1856). Arbitration simply removes the controversy from the arena of litigation and is no more an ouster of judicial jurisdiction than is compromise and settlement. *Park Construction Co. v. Independent School District No. 32, Carver County, Minnesota, supra.* The rule that parties cannot stipulate beforehand to submit their rights generally to the judgment of a designated third party for a final determination is unsound. *Rueda v. Union Pacific R. Co.* 180 Or. 133, 175 P.2d 778 (1946). The history of labor disputes indicates a trend away from the courts and toward arbitration and conciliation. The holding in the present case reflects the crystallization of this trend into public policy. Those states having already enacted statutes enforcing arbitration agreements may be considered the leaders in developing this trend.

PAUL D. MAHONEY