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## Recent Cases

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## Recent Cases

### Authors

William F. Sondericker, John M. Kearney, Rosemarie Serino, Nancy-Nellis Warner, Henry J. Cappello, M. Durkan Cannon, Andrew Codispoti, Harry Balfe II, William B. Kamenjar, Donald J. Letizia, John M. Lothschuetz, and Betty Ross

## RECENT CASES

CONFLICT OF LAWS—CONSTITUTIONAL LAW—FULL FAITH AND CREDIT—JURISDICTION FOR DIVORCE—Arthur married Florence in North Carolina but shortly thereafter found Florence was the lawful wife of X. They agreed that Arthur should pay part of the expenses and that Florence should go to Florida to obtain a divorce from X. Florence had no intention to change her domicile, but intended and did return to Virginia immediately after procuring the decree. A few weeks later they remarried in Maryland. When marital difficulties developed, Arthur brought suit in Vermont to have the two marriages declared null and void, on the ground that the Florida court had no jurisdiction to render a decree and that Florence's marriage to X was never terminated. Neither the petitioner nor the record raised the question of whether or not the divorce was contested by X. The Vermont court found that Florence had deceived the Florida court as to her domicile and annulled the first marriage to Arthur. The petition as to the second marriage was dismissed, but the Supreme Court of Vermont reversed and held the second marriage also null and void. The United States Supreme Court granted certiorari. Held: That the Vermont court could not deny full faith and credit to the Florida decree in a collateral attack if no evidence was adduced by the assailant to overcome the presumption of validity, thereby rendering the issue of jurisdiction *res judicata*. *Cook v. Cook*, 341 U. S. 126 (1951).

It is settled that a decree is final everywhere when the court has made a finding of domicile in a cause where the defendant has appeared generally, or answered and had an opportunity to litigate that question. *Sherrer v. Sherrer*, 334 U. S. 343 (1948); *Coe v. Coe*, 334 U. S. 356 (1948); *Davis v. Davis*, 305 U. S. 32 (1938). Likewise, a stranger is precluded from attacking the decree collaterally if the rendering state would not permit such attack under its internal law, *Johnson v. Muelberger*, 340 U. S. 581 (1950); for the principles of *res judicata* are equally applicable to questions of jurisdiction over parties and subject matter as they are to other issues. *Treinius v. Sunshine Mining Co.*, 308 U. S. 66, 78 (1939); *Baldwin v. Traveling Men's Assn.*, 283 U. S. 522 (1931). In the same manner principles of estoppel may prevent a party who has procured a divorce from later denying its validity in another forum. *Krause v. Krause*, 282 N. Y. 255, 26 N. E. 2d 290 (1940); *Brown v. Brown*, 242 App. Div. 33, 272 N. Y. 877 (4th Dep't 1934), aff'd. 266 N. Y. 522, 195 N. E. 186 (1935). But a sister state is free to determine whether or not a bona fide domicile of one party is established in an *ex parte* proceeding in another state rendering the decree, *Williams v. North Carolina II*, 325 U. S. 226 (1945), although the judgment on its face presumes competent jurisdiction. *Titus v. Wallick*, 306 U. S. 282 (1939); *Adams v. Saenger*, 303 U. S. 59 (1939); *Esenwein v. Commonwealth*, 325 U. S. 279 (1945).

The decision in the *Cook case*, *supra*, has further extended these established principles to give greater force and effect to the Full Faith and Credit Clause. Now forum #2 must not only presume the validity of the foreign decree, but it must further assume that it was rendered in a contested and not an *ex parte* proceeding. The burden of showing that the decree was uncontested lies upon the assailant unless the record contains the decree or a stipulation concerning it, insofar as it reveals the nature of the proceeding. *Cook v. Cook*, *supra*.

The instant case points up the numerous problems confronting courts in giving credit to foreign divorce decrees. A state now knows that a fraudulent

claim of domicile by the petitioner is not material to enforceability if the other spouse has contested or appeared in the proceeding. Still a more paternal state may question the applicability of the Full Faith and Credit Clause as a limitation on its control over its citizens and their health, safety and morals. The basis for this objection is that marriage is so interwoven with public policy that consent of the parties to a divorce in another jurisdiction without a change of domicile renders the decree impotent. *Andrews v. Andrews*, 188 U. S. 14, 41 (1902). Yet, a constitutional command permits the two consenting parties to temporarily leave the state to escape the severity of its laws, obtain a migratory divorce in a "divorce mill" state, and then return with a decree which the interested state must recognize, though it was never represented. Justice Frankfurter, dissenting, *Sherrer v. Sherrer*, *supra* at 356, 361; *Coe v. Coe*, *supra* at 378. It is true that when the court has jurisdiction over the subject matter and the parties the judgment is valid everywhere, even though it was rendered on a cause plainly contrary to the public policy of a second forum. *Fauntleroy v. Lum*, 310 U. S. 230 (1908). But from an analytical standpoint a sister state should not be bound to recognize a decree affecting the marital status when the essential nexus between the res and the court is lacking. *Bell v. Bell*, 181 U. S. 175 (1901). Without jurisdiction to divorce, there can be no divorce. *Cook v. Cook*, *supra*, Justice Frankfurter, dissenting at 130; and such a judgment is not entitled to the full faith and credit which the Constitution of the United States demands. *Hansberry v. Lee*, 311 U. S. 34, 40-41 (1940); *Williams v. North Carolina*, *supra* at 229

From an empirical viewpoint it appears that domicile as a jurisdictional factor in divorce actions has been reduced to mere form. This essential has been justifiably disregarded on the basis of the academic and social desirability for certainty in the law. *Williams v. North Carolina*, *supra* at 227, 230; Justice Holmes, dissenting, *Haddock v. Haddock*, 201 U. S. 562, 628 (1906). Whether or not domicile in the forum should have any significance except for the statutory residence requirement of the state is open for inquiry since departure from this standard would meet no constitutional objection. It is only formally required in an international sense. *Le Mesurier v. Le Mesurier*, [1895] A. C. 517 (P. C.).

It is submitted, however, that as long as bona fide domicile remains as a jurisdictional prerequisite to divorce, it should not be circumvented by a constitutional rationalization. The zeal to reach a desired result should not be obtained at the expense of exposing our legal system to the evils of judicial legislation.

WILLIAM F. SONDERICKER

DOMESTIC RELATIONS—COMMUNITY PROPERTY IN WASHINGTON STATE—ABSENCE OF VALID MARRIAGE—EQUITY—DIVISION OF PROPERTY.—Respondent and appellant lived together without the formality of a marriage ceremony. Differences arose and action was brought to determine respective interests in considerable real estate and personal property acquired during their meretricious cohabitation. Respondent contended that she believed her prior marriage had been dissolved by divorce and that the subsequent marriage was valid under the common law, although not recognized in the State of Washington.

The court held that it was immaterial whether either of these parties believed they were validly married. Despite the essential community property requirement of a valid marriage, the court determined that the authority and

jurisdiction of the court to divide the property accumulated during such a relationship was in consequence of inherent equity powers. The court divided the real property on an equitable basis. With reference to the personal property, respondent was permitted to recover on the "innocent party" theory. *Poole v. Schrichte*, 236 P. 2d 1044 (Wash. 1951).

Both parties relied upon rules laid down in a recent decision, *Creasman v. Boyle*, 31 Wash. 2d 345, 196 P. 2d 835 (1948), wherein the court declared that property acquired by a man and woman, not married to each other but living together as husband and wife, is not community property and, in the absence of a trust relationship, belongs to the one in whose name legal title is held. In the principal case the court clarified and added to *Creasman v. Boyle*, *supra*, by reiterating that even though there be no lawful marriage between the parties,

"...yet if either or both of them in good faith enter into a marriage with the other, or with each other, and such marriage proves to be void, a court of equity will protect the innocent party in the property accumulated by the joint efforts of both;"

The court further differentiated *Creasman v. Boyle*, *supra*, citing that one of the parties therein had died, leaving no way to determine intent, the other party being forbidden under the "dead man's statute" from testifying. The rights of the respondent did not stem from any alleged marriage relationship, but from the fact that she had contributed proceeds of money and time which constituted a larger portion than that of appellant; therefore, distribution was effected under the community property system in accordance with equitable principles.

The principal case reveals aspects of the basic structure involved in the extremely complicated community property system. All property earned by husband or wife during their marriage is presumed to be community property, except that acquired by gift or inheritance; community property includes income earned as the result of a sale of community property or income from the community property. *DuPont de Nemours & Co. v. Garrison*, 13 Wash. 2d 170, 124 P. 2d 939 (1942).

Any obligation on a note signed by either spouse during marriage is an indebtedness shared by the wife, regardless of knowledge, if used for community purposes. *Fies v. Storey*, 37 Wash. 2d 105, 221 P. 2d 1031 (1950). The ultimate test applied by the courts is whether or not the obligation was intended to be used for the benefit of the community. *Fies v. Storey*, *supra*. However, property owned by either spouse prior to the marriage belongs to him or her separately, as does property acquired by gift, inheritance, devise after betroth, or income from separate property. It is necessary to clearly establish evidence of separate property, for all property is presumed to be community until shown to be separate. *Berol v. Berol*, 37 Wash. 2d 380, 223 P. 2d 1055 (1950). The rule is well settled in Washington State that status of property as community or separate is determined as of the date acquired; if separate when acquired, it will remain such as long as it can be traced and identified; and, further, that its rents, issues and profits will remain separate. *Burch v. Rice*, 37 Wash. 2d 185, 222 P. 2d 847 (1950). Either spouse has full power to convey or devise his or her separate property. Rem. Rev. Stat. §6890. Since Washington State has abolished curtesy and dower, there is no need to speak of waiving the will and taking a statutory forced share in the separate property. Rem. Rev. Stat. §1341. A spouse may do as he or she pleases with their respective separate property. Such is not the case with community property. A spouse can devise only his

or her half of the community, but no more. *McKnight v. Basilides*, 19 Wash. 2d 391, 143 P. 2d 307 (1943); Rem. Rev. Stat §1342 (Wash. 1932); de Funiak, *Principles of Community Property* §199 (1943); McKay, *Community Property*, §1383 (1925). On intestacy, the community property of one-half interest passes to the survivor or survivors to the exclusion of collateral heirs, subject to the community debts and expenses of administration. Rem. Rev. Stat. §1342.

We have seen in our principal case, *Poole v. Schrichte*, *supra*, how the Washington State courts have expanded the community property system. Whereas the doctrine involved is not entirely new, it is a clarification that there is no rule of law or equity which says that the respondent forfeits her interests by living with a man during an invalid marriage. Respondent's rights arise out of her property rights, not from the invalid marriage. In the words of the court:

In an equity case, the trial is de novo in this court, and, although the trial court's findings are given great weight, we do, so far as necessary, make our own findings and draw our own conclusions, and certainly we are not bound to perpetuate error.

JOHN M. KEARNEY

DOMESTIC RELATIONS—HUSBAND DENIED RIGHT TO EVICT MOTHER-IN-LAW FROM PROPERTY JOINTLY HELD WITH HIS WIFE.—“So far as diligent search reveals, . . . the first recorded case where one seeks legally to evict a mother-in-law” is *Fine v. Scheinhaus*, 109 N. Y. S. 2d 307 (1952). Here a husband sued in ejectment to evict his mother-in-law from a dwelling owned by the plaintiff-husband and his wife as tenants by entirety.

The Supreme Court of New York, Special Term for Motions, held that (1) the wife is legally entitled to permit her mother to share possession with her because both husband and wife are entitled to possession of the dwelling house owned by them as tenants by entirety, and that (2) the husband has no right, as head of the family, to dispossess his mother-in-law in the absence of proof that the wife granted the husband sole right to the possession of the house.

Prior to 1848, a husband was “lord of his castle” and had the legal right to eject whoever was distasteful to him. By *jure mariti* the right was conferred upon him to possess his wife's lands and occupy them, because possession of land by husband and wife was presumptively the possession of the husband. Moreover, the husband could divest the wife of possession during his life because he had full control of the property held by the entirety. Since the enactment of legislation in 1848-1860 (Married Women's Acts, Chap. 200, Laws of 1848, Chap. 375, Laws of 1849, Chap. 90, Laws of 1860) the husband has been deprived of his common law right to the possession of and control over the wife's property. The wife has been given equal right of possession with her husband of real estate held by both as tenants by entirety. The essential characteristic of such an estate by entirety is that each spouse is seized of the whole—*per tout et non per my*—and not of a share, divisible part or moiety. *Palmer v. Mansfield*, 222 Mass. 263, 110 N. E. 283 (1915).

Where property is conveyed to husband and wife as tenants by entirety, the title is inseverable. They are co-owners by virtue of this title acquired after marriage. *Vasilion v. Vasilion*, 192 Va. 735, 66 S. E. 2d 599 (1951). Husband and wife during joint lives are entitled to joint possession, enjoyment and control. *Commissioner of Internal Revenue v. Hart*, 106 F. 2d 269

(3rd Cir. 1939). A husband may not divest a wife's rights in property without her assent. *Gasner v. Pierce*, 286 Pa. 529, 134 A. 494 (1926). Only when a husband acquires full power over the property by survivorship or is granted sole possession by the wife, may the husband do as he pleases against the wishes of the other spouse. *Fairclaw v. Forrest*, 76 U. S. App. D. C. 197, 130 F. 2d 829 (1942). Since in the instant case there was no claim that the wife ever granted sole right of possession of the dwelling to her husband, the plaintiff had no right to dispossess his mother-in-law.

In the case at bar, the crucial question is: was the plaintiff denied possession? His suit in ejectment to evict his mother-in-law could not succeed without proving, either actually or inferentially, that the defendant ousted the plaintiff from possession. New York Civil Practice Act, §1004. *Finnegan v. Humes*, 277 N. Y. 682, 14 N. E. 2d 389 (1938). Defendant claimed that the wife had "not withheld possession of said premises from said plaintiff at any time" and the court held that the plaintiff had not been dispossessed. Thus the plaintiff could not succeed in an action for ejectment.

Justice Searl remarked in the principal case that the only reasonable solution was apparently one of "give and take."

If each one could place himself or herself in the position of the other and accord the same treatment, respect, and privileges as would be desired under the same circumstances, home life would be much happier and the limited days of life granted us by the Creator pass more pleasantly.

In deciding the case, the court failed to take judicial notice of the principle that a husband is the head of his family. A single controlling head is necessary for the unity and preservation of the family, and the husband is that head. *Cassidy v. Constantine*, 269 Mass. 56, 168 N. E. 169 (1929). The Married Women's Acts do not divest the husband of his rights as head of the family. *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160 (1883). It is true that under these Acts a woman is given equality of legal personality. But they do not destroy a husband's rights to direct family affairs, *Brewer v. Brewer*, 79 Neb. 726, 113 N. W. 161 (1907) and to determine where and what the home of the family shall be. *Atkins v. Atkins*, 253 Ala. 43, 42 So. 2d 650 (1949).

When two persons marry, a new family is formed and new obligations and duties arise. If in conflict with former obligations and duties, the new obligations and duties of the husband and wife are more important. As noted in the case of *Spafford v. Spafford*, 199 Ala. 300, 74 So. 354 (1917), conjugal duties are paramount and in keeping with the Biblical statement:

God made them male and female. For this cause a man shall leave his father and mother, and shall cleave to his wife. And they two shall be in one flesh. (Mark, X, 6-8)

By analogy, it would seem to be the concomitant duty of the wife to leave her father and mother and cleave to her husband. Filial duty is commendable but it must not supersede conjugal duty. In the leading case of *Brewer v. Brewer*, 79 Neb. 726, 113 N. W. 161 (1907), the Court said:

The family is the unit of the social organism, and, while the institution of new families to some extent involves the disintegration of the older household, it is absolutely necessary to the continued social existence. When a man marries and founds a new family, he assumes new duties and obligations; and, when these conflicts with her former ties, they must be held paramount. The very existence of the family depends upon the enforcement of the principle.

This has even been held true where a spouse was an infant. *McWhorter v. Gibson*, 19 Tenn. App. 152, 84 S. W. 2d 108 (1935).

It would appear that the case was decided on a technicality, *viz.*, could the plaintiff prove, either actually or inferentially, that the defendant ousted the plaintiff from possession. There were no arguments by the defendant that the mother-in-law, if ejected, would be thereby subjected to the privation of physical necessities. It is a generally recognized rule that the duty of a husband is to provide a home—a home wherein the wife is free from unwarranted interference from the members of his family. *Salyer v. Salyer*, 303 Ky. 653, 198 S. W. 2d 980 (1947). Similarly, it would seem equitable, when there are no indications that the parent would be in physical need if ejected, that a husband should be free from unwarranted interference from members of his wife's family.

ROSEMARIE SERINO  
NANCY-NELLIS WARNER

EXTRADITION—REFUSAL TO DELIVER PERSON CONVICTED UNDER LAWS OF ANOTHER STATE WHO WAS NOT WITHIN STATE AT TIME OFFENSE ALLEGED.—Petitioner's wife sued him in 1947 in the District of Columbia for separate maintenance for herself and three children. The decree of the court, as subsequently modified, required him to pay \$30 each two weeks for the support of his minor children. After entry of the original decree, his wife took the three children to North Carolina, where they have since remained. The petitioner remained in the District of Columbia until May 1, 1950 when he went to North Carolina to attend the funeral of a close relative. Upon arrival he was taken into custody on a warrant of arrest based upon his wife's complaint sworn to by her on April 29, 1950, alleging that he abandoned her and his children on March 1, 1950, and had since failed and refused to provide for their support in violation of North Carolina laws G. S. 14-322.

Immediately following his arrest the petitioner was taken before the Domestic Relations Court of the City of Charlotte and Mecklenburg County, where on a plea of guilty he was sentenced to two years imprisonment in the county jail, assigned to work on the roads. Sentence was suspended on condition that he pay into court immediately \$50, and each two weeks subsequently \$40, said payments to be applied to the support of his wife and children, and to be credited on the order of the District of Columbia. He was permitted to return to the District of Columbia. About a month later a *capias instantur* was issued by the clerk of the Domestic Relations Court for violating the order regarding payments. This could not be executed because the petitioner was then in the District of Columbia. The Governor of North Carolina, upon request of the local prosecutor, issued a requisition to the District of Columbia. Upon receipt, the District Judge (who acts as chief executive in requisition cases in the District of Columbia) issued a fugitive warrant for the petitioner. On the same day, the petitioner (Fowler) was arrested and delivered to the North Carolina Agent (Ross), the order of the judge reciting that he was "satisfied, after a hearing duly had, that the prisoner is the identical person mentioned in the said requisition."

Thereupon, the petitioner petitioned the District Court to grant him a writ of *habeas corpus*. After a hearing in which the entire history of the case was brought to the attention of the court, it was held that the petitioner was a fugitive from North Carolina, that he is still under sentence of a North Carolina court on a charge of non-support, and that therefore, as a matter of law, the petitioner



must be returned to that State to complete his sentence. This appeal from the denial of the writ of *habeas corpus* followed. *Fowler v. Ross*, No. 10,850, D. C. Cir. March 27, 1952.

The U. S. Court of Appeals for the District of Columbia reversed the decision of the District Court and ordered the release of the petitioner, holding that the affidavit of the petitioner's wife did not charge the commission of the crime on May 1, 1950, but on March 1, 1950, and since the uncontradicted facts indicate that at that time the petitioner was not in North Carolina, no offense was committed under the North Carolina Statute. To substantiate its position, the court cited several North Carolina cases holding that the statute requires that both elements of the offense, abandonment *and* non-support, must occur in North Carolina. To the contention that the offense is a continuing one, the court answered that the failure to allege in the complaint that abandonment had occurred within the state of North Carolina vitiated the proceeding in the North Carolina Court. The court further held that any complaint charging a crime *in futuro* is bad on its face.

The controlling principle is stated by the court to be that a warrant of requisition by a Governor is but *prima facie* sufficient to hold the accused. Where the uncontradicted testimony of the accused together with the stipulation of counsel as to the facts shows that the accused was not present within the state at the time of the commission of the crime charged, he cannot be said to be a *fugitive* from justice within the meaning of section 5278, Rev. Stat. (now Title 18, §3182, U. S. Code, Supp. 1951) citing *Hyatt v. People etc.* ex rel *Corkran*, 188 U. S. 691 (1903).

In a dissenting opinion, Circuit Judge Washington refutes the majority's view of the *Corkran* case, *supra*. He states that the dictum of the Supreme Court in that case should no be "taken with absolute literalness" in "that unless the relator was within the demanding state at the time the crime was committed he cannot *under any circumstances* be extradited. The . . . case simply does not stand for that proposition." He distinguished the *Fowler* case from the *Corkran* case on the fact that *Corkran* had *never* been within the state—for trial or other purposes. He contends that where, as here, the relator is arrested, tried and convicted in North Carolina, he is "a fugitive from justice of that state in the fullest constitutional and statutory sense." *Fowler v. Ross, supra* at pp. 21-24.

This case is concerned with a peculiar aspect of criminal law, extradition between states (or more properly, rendition), which is controlled by provisions of the U. S. Constitution (Art. IV, Sect. 2, Cl. 2) and implementing legislation enacted by the Congress (Title 18, §3182, U. S. Code, Supp. 1951). To that extent it is *sui generis*, *State v. Quigg*, 91 Fla. 197, 107 So. 409 (1926). In the ordinary case where rendition is sought of a person accused of a crime the test applied by the majority in the *Fowler* case, requiring a showing that the person sought actually was in the demanding state at the time of the alleged crime, seems proper. But where the person sought has actually been convicted of a crime, and has escaped from prison, or violated his parole or the terms of a suspended sentence, additional factors come into play. Where the judgment (or the District of Columbia), *Loughbran v. Loughbran*, 292 U. S. 216, 227, 228 (1934) the U. S. Constitution commands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." Art. IV, Sect. 1.

The requirement of "full faith and credit" is not normally associated with criminal proceedings. *Commonwealth v. Green*, 17 Mass. 515, 546 (1822). It has become an axiom of conflict of laws that "one state does not enforce the penal laws of another." *Huntington v. Attrill*, 146 U. S. 657 (1892). This rule has developed from the time honored refusal of courts generally to award a money judgment on a cause of action based either on a penal award of damages in a civil suit, or a fine in a criminal suit by the courts of another state. But in the case of extradition proceedings based on a conviction in another state, it cannot properly be said that the court is "enforcing" the penal laws of the other state. It is merely complying with the mandate of the Constitution by delivering up a fugitive from justice. The Constitution imposes a duty upon the executive authority of the State in which a fugitive has taken refuge to cause his surrender upon proper demand by the executive authority of the State from which he fled. If the governor of a State refuses to discharge his duty to surrender such a fugitive, there is no way to compel him, *Kentucky v. Dennison*, 24 How. 66 (1860), but no such discretion to arbitrarily refuse to perform this duty vests in a District Judge acting in an analogous capacity in the District of Columbia. The court at this stage has no right to inquire into the merits of the system of justice which the other State has set up; if it is to comply with the Constitutional requirement and accord "full faith and credit" to all judicial proceedings, it must follow the rule that the judgments of a State are subject to collateral attack in the courts of another State only on the ground that they were entered by a court which lacked jurisdiction of the parties or of the subject matter. *Huntington v. Attrill*, *supra*, at p. 685. The obligation of the executive of the State to which a fugitive from justice has fled, to deliver him to the demanding state, exists without any reference to the character of the crime charged or to the policy or laws of the former state. *Kentucky v. Dennison*, *supra*, at p. 103.

Where extradition of an escaped convict or parole violator is sought the facts upon which the requisition of the governor is based should not be required to conform to the "technical" requirement of the Statute, (Title 18, §3182, U. S. Code, Supp. 1951), viz. the production of "a copy of an indictment or an affidavit made before a magistrate." The record of conviction of such person is more than ample proof of an adequate indictment or affidavit charging a crime.

It is clear that, in enunciating a general proposition, there was no intention of excluding or exempting convicted escaped persons from liability to extradition. No narrow or strained construction should be placed upon the word "charged" as used in the Constitution and in the Federal Statute. It is broad enough to include all classes of persons duly accused of crime. A person can be said to be "charged" with a crime as well after his conviction as before. The conviction simply establishes the charge conclusively. An unsatisfied judgment of conviction still constitutes a "charge" within the true meaning of the Constitution. An indictment or affidavit merely presents the charge, while a conviction proves it. To warrant extradition the statute requires an indictment or affidavit charging a crime, but if, in addition thereto, there is also presented a record of conviction, the case is not weakened, but rather strengthened.

*In re Hope*, 7 N. Y. Crim. Rep 406, 10 N. Y. S. 28, 29 (1889); and see *Hughes v. Pflanz*, 138 Fed. 980 (6th Cir. 1905), and note 78 A. L. R. 419 (1932).

The logical application of the doctrine of "exhaustion of remedies," *Gusik v. Schilder*, 340 U. S. 132 (1950), to the instant case, requires that the court in its hearing confine itself to the immediate issue of extradition, and under

the mandate of "full faith and credit" even more narrowly to the issue whether the North Carolina court had jurisdiction over the person and subject matter. Jurisdiction is a matter of power and covers right as well as wrong decisions. *Lamar v. United States*, 240 U. S. 60, 64 (1916); *Fauntleroy v. Lum*, 210 U. S. 230, 234 (1908). If the judgment of the North Carolina court was erroneous on the law or the facts, the defendant is required to exhaust his remedies by way of appeal before any court can entertain *habeas corpus* proceedings. Accordingly insofar as the Court of Appeals has based its reversal of the *Fowler* case on the merits of the North Carolina judgment rather than the North Carolina court's lack of jurisdiction to hear the cause, its decision seems clearly erroneous. *State ex rel Rinne v. Garber*, 111 Minn. 132, 126 N. W. 482 (1910).

Admittedly, as pointed out in the dissenting opinion, sentencing him to a term of two years in a "chain gang" may be a very poor way of forcing the petitioner to support his family, but no court can justify using a "hard case to make bad law." The ramifications of this case in obstructing the enforcement of criminal law are very great. Carried to its logical conclusion, this decision would require a retrial on the merits of every case where the extraditee claims he was not present when the crime was committed. With the difficulty of assembling witnesses and other similar hardships, a large number of escaped prisoners and parole violators would escape reconfinement.

HENRY J. CAPPELLO

FEDERAL PROCEDURE—RULE 34, FEDERAL RULES OF CIVIL PROCEDURE—GOOD CAUSE—PRIVILEGED DOCUMENTS—FEDERAL TORT CLAIMS ACT.—Three civilian electronic engineers, employed by a private organization, acted as observers on an experimental test flight of a United States Air Force B-29. The plane crashed killing all three civilian employees. The widows of the deceased civilian employees instituted suit for damages, under the Federal Tort Claims Act, in the United States District Court for the wrongful deaths of the deceased. The United States filed answers making general denials. The plaintiffs, pursuant to Fed. R. Civ. P. 34, moved for the production of statements made by the survivors and an official investigation report made by the Air Force. The United States refused to produce the documents alleging that they were classified information and privileged.

The Circuit Court of Appeals for the Third Circuit, affirmed the lower court's decision that, pursuant to Fed. R. Civ. P. 37 (b) (ii), negligence was deemed to have been established against the United States for failure to produce the statements and report. The court reasoned that in accordance with Rule 34, good cause had been shown for the production of the documents which the plaintiffs asked the United States to produce, that the statements and report were not privileged and that any claim of privilege by the government was for the determination of the court. *Reynolds v. United States*, 192 F. 2d 987 (3rd Cir. 1951), cert. granted 20 U. S. L. Week 3266 (April 7, 1952).

The principal case presents the question whether, pursuant to Rule 34, good cause exists for the production and inspection of documents under the above circumstances and whether a judge may properly order classified information of a military nature bared in court as non-privileged matter.

Rule 34 Fed. R. Civ. P., requires that a party moving for the production and inspection of documents must show "good cause" why such an order should issue from the court. *Hickman v. Taylor*, 329 U. S. 495 (1947); *Allmont v. United States*, 177 F. 2d 971 (3rd Cir. 1949). No degree of certainty exists as to what is meant by the term good cause. *William A. Meier Glass Co. v. Anchor Hocking Glass Corp.*, 11 F. R. D. 487 (W. D. Pa. 1951). A bare conclusion or assertion is not sufficient good cause under Rule 34. *Radtke Patents Corp v. Rabinowitz*, 1 F. R. D. 126 (W. D. N. Y. 1940); *Gebhard v. Isbrandtsen*, 10 F. R. D. 119 (S. D. N. Y. 1950). However, it has been deemed that good cause has been shown if it specifically appears that the documents are relevant to the subject matter of the action, *United States v. Schine Chain Theatres*, 2 F. R. D. 425 (W. D. N. Y. 1942); that they may contain evidence material to the issue, *Hirshhorn v. Mine Safety Appliance Co.*, 8 F. R. D. 11 (W. D. Pa. 1948); that impossibility or difficulty of access to witness exists or a refusal to respond to requests for information on the need of such statements for impeachment purposes, *Morrone v. Southern Pacific Co.*, 7 F. R. D. 214 (S. D. Cal. 1947); *Dusha v. Pennsylvania R. Co.*, 10 F. R. D. 150 (N. D. Ohio 1950); that the information was taken on the spot and unavailable to the other party due to his physical incapacity, *Newell v. Capital Transit Co.*, 7 F. R. D 732 (D. D. C. 1948); *DeBruce v. Pennsylvania R. Co.*, 6 F. R. D. 403 (E. D. Pa. 1947); that the sources of information were within the complete control of the opposing litigant, *Evans v. United States*, 10 F. R. D. 255 (W. D. La. 1950). But cf. *Safeway Stores, Inc. v. Reynolds*, 176 F. 2d 476 (App. D. C. 1949), wherein good cause was not shown for the production of the plaintiff's own statements made to an attorney for defendant's insurer investigating the accident before plaintiff was represented by counsel.

In *Williams A. Meier Glass Co. v. Anchor Hocking Glass Corp.*, *supra*, in discussing the considerations which will show good cause the court suggests the following test:

"These [considerations] include practical convenience, necessity of the moving party in preparation of his case, facilitation of proof at the trial of the action, and aid in the progress of the trial."

In *Dulansky v. Iowa-Illinois Gas & Electric Co.*, 10 F. R. D. 146 (S. D. Iowa 1950) the court in considering good cause for the production of documents pithily states that good cause consists in the "reasoning why their production is called for."

The principal case combines both of the above criteria and holds that "special circumstances make it essential to the preparation of the party's case to see and copy the documents" since the "instrumentality involved in an accident was within the exclusive possession and control of the defendant," and the statements made by the survivors immediately after the crash when the events were fresh in their minds were of unique and vital importance to the plaintiff's case.

Sovereign immunity from liability in a civil tort action has been removed by the Federal Tort Claims Act, 28 U. S. C. §1346(b), §2671-2680 (Supp. 1951):

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ."

By this enactment Congress has declared that public interest will best be served by placing the United States on a par with any other tortfeasor. Consenting to be sued and be made defendant in a civil tort action, the United States has

submitted itself to the procedural requirements of the Federal Rules of Civil Procedure. *Wunderly v. United States*, 8 F. R. D. 356 (E. D. Pa. 1948). Being a defendant in a civil tort action, the United States is subject to those provisions of discovery of the Federal Rules of Civil Procedure as any other defendant. *Evans v. United States*, *supra*.

Rule 34 excludes from discovery information which is privileged. Privilege in respect to governmental matters arises out of sovereignty and is twofold:

1. sovereign common law privilege,
2. sovereign immunity based on public policy.

Sovereign common law privilege pertains to state secrets of national interest and security—military and diplomatic. *Zimmerman v. Poindexter*, 74 F. Supp. 933 (D. Hawaii 1947). When information is unequivocally a state secret the courts freely grant it absolute exclusion from discovery. *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E. D. N. Y. 1939).

Sovereign immunity based on public policy has rendered confidential information in the administration of government privileged in order to better promote public interest. This privilege has arisen through the express statutory enactments of Congress and through the directives of the heads of the various agencies of government under authority of R. S. 161 (1875), 5 U. S. C. 22 (1946). The purpose of such statutes and directives has been to promote the public interest by keeping secret proceedings in certain governmental matters and in permitting governmental "house-keeping" records to be free from discovery. *Boske v. Comingore*, 177 U. S. 459 (1900).

Statutory enactments of sovereign immunity from discovery of specific matters are declaratory of the public interest and render such matters privileged. These are binding on the courts as law. *Irvine v. Safeway Trails, Inc.*, 10 F. R. D. 586 (E. D. Pa. 1950). Directives of agency heads, regarding the privilege to be enjoyed by matters within the agency's official control, are not declaratory of public interest as are statutes, but are concerned chiefly with departmental organization. Immunity from discovery in these matters has found effectiveness in the government's inability to be made a party to a tort action. *Zimmermann v. Poindexter*, *supra*.

Privilege arising out of sovereign immunity based on public policy is not as broad as that accorded sovereign common law privilege, but is ambulatory and subject to the legislative will. The legislative will, within constitutional limits, may extend, modify or divest the government of its privilege. *Bank Line, Limited, v. United States*, 76 F. Supp. 801 (S. D. N. Y. 1948). The Federal Tort Claims Act, *supra*, in making the United States amenable for its torts, is a declaration of Congress based on public interest. That declaration neither restricts nor limits the United States in regard to the discovery provisions of Rule 34, and abolishes all privilege except common law privilege and statutory privilege.

As a party moving for the production of documents must make a showing of good cause, so too must the government make a showing of privilege in order to withhold documents from discovery. *Crosby v. Pacific S. S. Lines, Ltd.*, 133 F. 2d 470 (9th Cir. 1943). The showing of privilege, as in good cause, must not be a bare conclusion or assertion, but must be a specific showing that the alleged privileged matter falls within statutory privilege or common law privilege involving the national security. This view has cogently been stated in *Cresmer v. United States*, 9 F. R. D. 203, 204 (E. D. N. Y. 1949), in which the court ordered an alleged privileged report by a Navy Board of Investigation produced as not within common law privilege:

"In the absence of a showing of a war secret, or secret in respect to munitions of war, or any secret appliance used by the armed forces or any threat to the national security."

Classified information has been defined, 14 F. R. 7313, 32 C. F. R. §505.1:

"Definition—(a) *Classified Matter*. Information or material in any form or any nature which in the public interest must be safeguarded in the manner and to the extent required by its importance."

The term classified matter includes top secret, secret, confidential and restricted information. These comprise both state secrets and "housekeeping" records. As a result of the Federal Tort Claims Act abolishing all privilege, except common law privilege and statutory privilege, the assertion that information is classified and thereby privileged cannot be substantiated without a further showing that it concerns the national security and falls within common law privilege.

In the principal case, classified information is categorized as military information which is not privileged unless a specific showing is made that it contains information affecting the national security and thereby is within common law privilege.

Although due deference will be extended to an agency's determination of matters wholly within the realm of state secrets, the ultimate decision in view of specific cases and controversies, rests within judicial review. Likewise when cases arise in which state secrets and other information are intermingled, it is the duty of the court, under Rule 30(b), Fed. R. Civ. P., to peruse such information in camera or to conduct an ex parte hearing and issue an order conducive to justice in making available that which is not privileged and protecting that which is privileged. *Evans v. United States*, supra at 257; *Cresmer v. United States*, supra at 204; *Zimmerman v. Poindexter*, supra at 936; *United States v. Cotton Valley Operators Committee*, 9 F. R. D. 719-721 (W. D. La. 1949), aff'd. by an equally divided court, 339 U. S. 940 (1950).

In summation, the principal case follows previous case authority on the showing of good cause under Rule 34, Fed. R. Civ. P., for the production of documents. However, the case invokes a novel, but judicially sound, principle that a broad claim of privilege by an agency of the government, unless first determined by judicial review, is unavailing.

M. DURKAN CANNON

INTERNATIONAL LAW—ALIENS—SECTIONS 2, 9(a), 39, TRADING WITH THE ENEMY ACT.—Petitioner instituted suit under Sec. 9(a) of the *Trading with the Enemy Act*, 40 Stat. 417 (1917), 50 U.S.C. § 1 *et seq.* (Supp. 1951), to recover property vested by the Alien Property Custodian. He alleged that: He is a German citizen who lived in Hawaii continuously from 1876 to 1938. In 1938, he took his family to Germany for a vacation. After the outbreak of war, he was unable to secure passage home before 1940 when his reentry permit expired. When the United States entered the war he was detained involuntarily, first by the Germans and later by the Russians until 1949, when he returned to this country. He had done nothing to aid the war effort of the enemy.

HELD: 1. Petitioner was not a resident in Germany within the meaning of the definition "enemy" in Sec. 2, and was entitled to bring suit under Sec. 9(a) authorizing a suit by any person not an enemy to recover property vested by the Alien Property Custodian.

2. Construed in the light of its legislative history and constitutional issues which otherwise would be raised, Sec. 39, forbidding the return of property of any national of Germany or Japan vested in the Government after December 1941, applies to those German and Japanese nationals otherwise ineligible to bring suit under Sec. 9(a). *Guessefeldt v. McGrath*, 342 U.S. 308 (1952).

The purpose of the *Trading with the Enemy Act*, *Supra*, was to deprive the enemy from using for its own purposes any property which it owned and controlled in the United States and to make the same property available for defense and support of the United States. *Clark v. Continental National Bank of Lincoln*, 88 F. Supp. 324 (D. Neb. 1950). See Bishop, *Judicial Construction of the Trading with the Enemy Act*, 62 Harv. L. Rev. 721 (1949); Lourie, *The Trading with the Enemy Act*, 42 Mich. L. Rev. 205 (1943).

The first question to be decided was whether the petitioner was a resident within the territory of a nation at war with the United States within the meaning of Sections 2 and 9(a) of the *Trading with the Enemy Act*.

Under Sec. 2 of the *Trading with the Enemy Act*, *supra*, alien enemy is defined as a person residing in an enemy country. However, it does not include a temporary sojourn. *Stadmuller v. Miller*, 11 F.2d 732 (2nd Cir. 1926). In order to effect a change in residence there must be an intention to abandon the old and the intention to remain in the new domicile and the change in residence must be voluntary. *Morris v. Gilmer*, 129 U.S. 315, 328 (1889). So it was held that a person compelled to stay in Germany during the war did not lose his residence or domicile in the United States, *Stadmuller v. Miller*, *supra*; an immigrant who returned to Germany and became a Red Cross surgeon during World War I was not an enemy within the meaning of Sections 2, and 9(a) of the Act, *Vowinkel v. First Federal Trust Co.*, 10 F. 2d 19 (9th Cir. 1926); a naturalized citizen of Italian birth who went to Italy for his health and was unable to return because of the war was not a resident of a designated enemy country within the meaning of the Act as to permit seizure of his property by the Alien Property Custodian, *Josephberg v. Markham*, 152 F.2d 644 (2nd Cir. 1945); and a citizen of the United States in Germany during the war was not of itself sufficient to make him an enemy within the meaning of Sections 2, and 9(a) of the Act. *Sarhou v. Clark*, 78 F. Supp. 139 (S.D. Cal. 1938). See note 148 A.L.R. 1423 (1944).

Since the petitioner was detained involuntarily in Germany, he was not an enemy within the meaning of Sec. 2 of the Act and, therefore, under Sec. 9(a) of the *Trading with the Enemy Act*, *supra*, which authorizes a suit by any person not an enemy to recover property vested in the Alien Property Custodian, petitioner could recover his property.

The next question was whether the petitioner was prohibited from recovering his property because of Sec. 39 of the *Trading with the Enemy Act*, *supra*, which expressly forbids the return of any vested property to any national of Germany and Japan. Two issues are involved in construing Sec. 39 of the Act: (1) Whether, because of the legislative history of the Act, Congress intended to construe Sec. 39 harmoniously with the other sections of the Act; (2) If Sec. 39 is not to be construed harmoniously with the other sections of the Act, whether this Sec. 39 would raise constitutional questions.

In regard to the first issue, after the passage of the *Trading with the Enemy Act* in 1917, the interpretation of Sec. 2 of the Act represented a deliberate modification of Congressional power over enemy property. 55 Cong. Rec. 4842 (1917). This policy of modification culminated with the *Settlement of War Act*,

45 Stat. 252, 270, 274 (1928), 50 U.S.C. App. Sec. 9(b)12-14(9m) (1946). Congress provided for the return to enemy owners 80% of their vested property. The return of the German property was postponed when it appeared that Germany was in default payment of war claims in 1934. 48 Stat. 1267 (1934). But merely because the United States after World War I intended to deal justly with former owners of seized property detracted nothing from the title acquired by the United States in retaining or disposing of such property. *Cummings v. Deutsche Bank*, 300 U.S. 115, 120 (1937).

In 1941 Congress extended power of seizure and vesting to all property of any foreign country or national thereof in exercising its war powers. 55 Stat. 839 (1941), 50 U.S.C. App. Sec. 5(b) (1946). However, while Sec. 5(b) extended the power of seizure, it did not limit or restrict the scope of Sec. 9(a) of the Act.

In 1946, Sec. 32 of the *Trading with the Enemy Act*, 60 Stat. 784 (1947), 50 U.S.C. App. Sec. 32 (Supp. 1948), was passed. It empowered the President to make discretionary administrative returns of World War II vested enemy property.

Before passage of Sec. 39 of the Act the terms "enemy alien", "enemy national", "Japanese or German national" were used interchangeably without regard to the precise meaning in the context of the Act. Hearings before a *Subcommittee of the Senate Committee on Judiciary* on H.R. 4044, 80th Cong., 2nd Sess. 124 (1948). However, the *House Committee on Interstate and Foreign Commerce* on H.R. Rep. No. 976, 80th Cong. 1st Sess. 2 (1947), reported favorably on the bill. It stated that Congress intended to institute a policy of non-return and non-compensation of enemy property. Such a policy did not violate international law or morality because both private property of German and Japanese nationals and public property of Germany and Japan were controlled by their respective governments.

Sec. 39 of the Act was enacted as part of the *War Claims Act of 1948*, 62 Stat. 1246 (1948), 50 U.S.C.A. App. Sec. 39 (Supp. 1949). It provides for compensation of the United States citizens who suffered during the last war under the Germans and the Japanese. U.S. Code Cong. Service 2317 (1948).

Sec. 13(a) of the *War Claims Act*, 62 Stat. 1246 (1948), 50 U.S.C.A. App. Sec. 2012 (Supp. 1949), provides that the source of funds of these claims shall be received from German and Japanese vested property under Sec. 39 of the *Trading with the Enemy Act*. Thus, Congress resolved "not to permit recurrence" of World War I policy of returning enemy property. H.R. Rep. No. 976, 80th Cong., 1st Sess. 2 (1947).

In regard to the second issue, Congress has the power of confiscation of enemy property under U.S. CONST. Art. I, Sec. 8, Cl. 11, without paying full or adequate compensation. *United States v. Chemical Foundation*, 227 U.S. 1, 11 (1926); *Stoehr v. Wallace*, 225 U.S. 239 (1921); *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1920). However, when the United States expropriates property of friendly nations the Fifth Amendment requires payment of just compensation. *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931). And as matter of interpretation of the *Trading with the Enemy Act*, a resident enemy even though interned must be given access to the American courts. *Ex parte Kowato*, 317 U.S. 69 (1942). On the other hand, the court in *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (1920), held that a national of an enemy country wherever resident is an enemy alien and his right to sue is a matter of



grace. The United States Supreme Court affirmed the rationale of the *Techt case, supra*, in *Johnson v. Eisenstranger*, 339 U.S. 763, 771-773 (1950). There is "no constitutional prohibition against confiscation of enemy properties." *United States v. Chemical Foundation, supra*. "There is no doubt but that under the war powers, . . . the United States, may vest in itself the property of a national of an enemy nation." *Silesian-American Corp. v. Clark*, 332 U.S. 469, 475 (1947). See, Lourie, 'Enemy' under the Trading with the Enemy Act and Some Problems of International Law, 42 Mich. L. Rev. 383 (1943).

This brief legislative history of the Trading with the Enemy Act reveals a change of Congressional policy from one of early relaxation by returning vested enemy property, to one of stringent control by forbidding return of property to even friendly nationals of enemy countries. This policy of confiscating property of friendly nationals of enemy countries has sound justification under our Federal Constitution.

It is submitted that the court erred in the principal case in interpreting Sec. 39 of the Act. Petitioner should have been barred from recovery because Sec. 39, under the correct interpretation, should have amended Sec 9(a) by adding to the categories of enemies not only those who are under Sec. 2 but also those who are nationals of enemy countries.

ANDREW CODISPOTI

LABOR LAW—LABOR MANAGEMENT RELATIONS ACT—FREE SPEECH PROVISIONS—CONTRACTS.—The union and the petitioner had been engaged in contract negotiations for a few days when the employees tiring of the delay threatened to strike. Upon hearing this, the petitioner's president spoke to the employees. He told them that he was alarmed by the talk of an impending strike; that there was no occasion for the employees to strike and that while he was willing to negotiate with the union, he would not sign a closed-shop contract, since he believed it was unlawful. He said further:

. . . we would hate to see you quit, and if through some effort on the part of a group of people you go out on what might be called a strike, we would not consider it a strike, because there is nothing that you would be striking against. We have no contract. You would be quitting your job, and if you do we won't take you back. We will try to replace you as rapidly as possible.

The threatened strike did not materialize.

The National Labor Relations Board issued an order directing the petitioner to cease and desist from "threatening its employees that it would not rehire them if they went out on strike" or otherwise coercing them from exercising their right of self-organization under Sec. 7 of the National Labor Relations Act, as amended by Labor Management Relations Act, 29 U. S. C. §157 (1947) and to post notice to that effect at its plant. From this order the petitioner appealed. *Collins Baking Co. v. N.L.R.B.*, 193 F. 2d 483 (5th Cir. 1951).

In upholding the Board's decision, the court determined the issue to be whether or not the speech was purely persuasive argument, expressly sanctioned by the 'free speech' amendment, §8(c) of the National Labor Relations Act, as amended by Labor Management Relations Act, 29 U. S. C. §158(c), or whether in violation of §8(a) (1) it amounted to interference, restraint, coercion of its employees in the exercise of their right to self-organization secured to them by §7 of the Act and was therefore an unfair labor practice.

One of the most galling aspects of the former National Labor Relations Act to the employer was the restriction on being able to fully answer the union arguments during organizing drives or to give their honest opinions. The feeling of unfairness felt by the employer finally resulted in (c) being added to Section 8 of the 1947 Amendments to the Act.

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the Act, of such expression contains no threat of reprisal or force or promise of benefit.

As a matter of fact the provision had little practical effect; for some time previous to its enactment the Board had been permitting the employer to speak to the employees on labor matters. *Bausch & Lomb Optical Co.* 72 N. L. R. B. 132 (1947); *Fisher Governor Co.*, 71 N. L. R. B. 1291 (1946). The utterances are not unlawful as long as they involve no greater degree of interference and coercion than would inevitably flow from any such speech considering the employer's position and superior economic position. So the statutory provision merely enacted the current practice and forbade the return to the former view.

The question whether a statement is coercive is one of fact. The test used to determine the fact of coercion is known as the "totality of conduct" doctrine and was set forth in the case of *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469 (1941). There the court held that although a bulletin posted by the employer could not be found coercive in itself, it should be considered in the light of the "whole complex of activities" for the purpose of determining whether the utterances should be "raised . . . to the status of coercion by reliance on the surrounding circumstances".

Words are not pebbles in alien juxtaposition; they have only a communal existence; not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation of the speaker and the hearers is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to the employee may be the manifestation of a determination which it is not safe to thwart.

L. Hand, J. in *National Labor Relations Board v. Federbush Company*, 121 F. 2d 954, 957 (2nd Cir. 1941.)

The court in the instant case distinguished *N. L. R. B. v. Sidran*, 181 F. 2d 671 (10th Cir. 1950) saying that there the words were milder and free from intimidating threats and were also said in less critical circumstances than the present statement. Threats of discrimination are no less a violation of the rights of employees secured by §7 of the Act than are acts of discrimination. *D. H. Holmes Co. v. N. L. R. B.*, 179 F. 2d 876 (5th Cir. 1950); *N. L. R. B. v. Gate City Cotton Mills*, 167 F. 2d 647 (5th Cir. 1948).

An employer guilty of no unfair labor practice has a right to continue his business and to protect it during an economic strike and is allowed to fill places left vacant by the strike. In *Kansas Milling Co. v. N. L. R. B.*, 185 F. 2d 413 (10th Cir. 1950), the employer warned employees already on strike that unless they returned to work the company would have no alternative but to fill their jobs and to deny them reinstatement after a named date. The court held that there was no coercion and that the words were merely persuasive.

There is a crucial difference between an employer's addressing his employees before they have started their threatened strike and addressing them after they have gone out on strike. After they have gone out on strike there could be no coercion, for contrary to the statement made by the employer in the instant

case, their action of striking does not terminate their status as employees. They remain employees for the remedial purposes of the Act, and Sec. 8 of the Act forbids an employer from discrimination against his employees in favor of their replacements at the termination of the strike. *N. L. R. B. v. Mackey*, 304 U. S. 333, 346 (1938); *J. A. Bentley Lumber Co. v. N. L. R. B.*, 180 F. 2d 641 (5th Cir. 1950).

The employer in stating that he would not sign a closed shop agreement was on firm ground, and the mere execution of contract clauses providing for closed shops, preferential shops, union hiring halls, or referral systems violates the Act, even if they are not enforced. *Hager & Sons*, 80 N. L. R. B. 163 (1948).

One is left with the question of how really coercive the employer's action was when the employees had threatened to strike within a week after a consent election had selected the union as their bargaining agent.

## HARRY BALFE, II

NEGOTIABLE INSTRUMENTS—BANKS AND CUSTOMERS—STOP-PAYMENT ORDER—LEGALITY OF BANK RELEASE FROM LIABILITY FOR NEGLIGENT PAYMENT OF STOPPED CHECK. Plaintiff, a depositor with the defendant bank, drew and delivered to a third person a check on his account. Before presentment of the check for payment, plaintiff orally and later by written request notified the defendant to stop payment. The written request to stop payment contained a clause which purported to release the bank if it paid the check through its inadvertence, accident, or oversight. Subsequently the check was presented by the third party and payment was made by the defendant through inadvertence. Plaintiff's account was charged and when defendant refused to restore credit to the plaintiff, this suit followed.

Held, judgment for plaintiff. Defendant bank paid at its peril when payment had been stopped. It is the legal duty of a bank to exercise reasonable care not to pay a check upon which it has received adequate and reasonable notice to stop payment and any release given by a depositor to a bank relieving the bank for payments through inadvertence is without legal effect and void as against public policy, even though drawn so as to import consideration. *Thomas v. First National Bank of Scranton*, 20 U. S. L. Week 2370 (Feb. 26, 1952); *The Legal Intelligencer*, Feb. 18, 1952, p. 1, col. 3.

It is well settled that a bank's relation to its depositor is that of debtor and its obligation is to disburse in conformity with his order. *Reinhardt v. Passaic-Clifton Nat. Bank & Trust Co.*, 84 A. 2d 741 (N. J. 1951). By the great weight of authority, the drawer of a check retains right to countermand its payment at any time before it has paid or is certified and delivered to a bona fide holder for value. *Tremont Trust Co. v. Burack*, 235 Mass. 398, 126 N. E. 782 (1920). At common law, drawee bank failing to stop payment of an uncertified check on reasonable notice pays at its peril and is liable to the drawer. *Gaita v. Windsor Bank*, 251 N. Y. 152, 167 N. E. 203, 204 (1929). In view of this common law liability, banks have often sought to restrict their liability by release clauses. *Reinhardt v. Passaic-Clifton Nat. Bank & Trust Co.*, supra at 743.

Whether a bank may exempt itself from liability for paying a check as a result of inadvertence or accident, through a release clause contained in a stop-payment order, is a question about which there is a split in judicial opinion.

The validity of these releases has been upheld in jurisdictions which admit that the common law liability of a bank for paying a check or order in disregard of the drawer's countermand may be limited by contract. In the leading case, *Gaita v. Windsor Bank*, *supra* at 204, the court stated:

"The common law liability of a bank in regard to a specific transaction may be limited provided the limitation has the assent of the depositor. In such a situation the clearly expressed intention of the parties will prevail and the rule of 'freedom of contract' will be enforced."

The court in *Speroff v. First Cent. Trust Co.*, 149 Ohio St. 415, 79 N. E. 2d 119, 121 (1948), though deciding against the validity of such a release, announced that some jurisdictions uphold the release as a valid contract supported by sufficient consideration which springs from the mercantile relation of the parties and the reciprocal rights and obligations which the law attaches to that relation. In *Tremont Trust Co. v. Burack*, *supra*, the court upheld these releases against the claim that they were opposed to public policy. Likewise, the court in *Hodnick v. Fidelity Trust Co.*, 96 Ind. App. 342, 183 N. E. 488 (1932) upheld them as being based on a sufficient consideration. The furthest extension in the validating of these releases is found in *Edwards v. National City Bank of New York*, 150 Misc. 80, 629 N. Y. S. 637 (N. Y. Munic. Ct., 1934) where the court, following the reasoning of the *Gaita case*, *supra*, did not hold the bank liable for payment of a certified check after the giving of a stop-payment order containing a release clause against liability through inadvertence or oversight.

On the other hand, some authorities hold that these release clauses are without consideration and are void against public policy. In *Speroff v. First Central Trust Co.*, *supra*, and *Hiroshima v. Bank of Italy*, 78 Cal. App. 362, 248 Pac. 947 (1926), the courts held these release clauses were without supporting consideration, against public policy, and ineffective to relieve the bank from liability. Chief Justice Maltbie in *Calamita v. Tradesmen's Nat. Bank*, 135 Conn. 326, 64 A. 2d 46 (1949) nullified the clause because of the absence of consideration and declined to pass on any issue of public policy. Likewise, in the *Reinhardt case*, *supra*, a New Jersey court decided against the release clause on the ground of lack of consideration without any decision on the issue of public policy. Pennsylvania, in the principal case, outlaws the release clause on grounds of public policy irrespective of whether the clause is so drawn as to import consideration. Under this view the common law absolute liability of a bank for paying a check through inadvertence where a stop-order has issued, would attach.

It is submitted that these release clauses should be sustained when they are couched in unequivocal terms, and are a part of a written notice to stop payment of a check, to which the depositor legally assents. The express intention of the parties should prevail and the principle of "freedom of contract" announced in the *Gaita case*, *supra*, should be applied.

In most instances, the release clause, which is a part of the written notice to stop-payment, recites an exemption from liability for payment, "through inadvertence, accident, or similar reason." 1 A. L. R. 2d 1155 (1948). Such a clause is clear, unambiguous and susceptible of accurate meaning. *Gaita v. Windsor Bank*, *supra* at 204. In *Pyramid Musical Corp. v. Floral Park Bank*, 268 App. Div. 783, 48 N. Y. S. 2d 866 (Sup. Ct., 1944), following the *Gaita case*, *supra*, the court in upholding the release clause, stated, "The notice qualified the bank's common law liability. It [bank] did not become legally liable in the absence of evidence of willful disregard of the notice." Clearly, this is not a general exemption

from total liability for negligence, nor does it render the bank immune in all circumstances for failing to observe stop-payment orders. Indeed, no bank could obtain customers under such an agreement.

It should be further observed that the stop-order containing a release clause requires the assent of the customers. Once the drawer assents and serves such a qualified notice, the obligation of the bank is thereby limited and the bank will not be liable to the drawer if the check is inadvertently paid. *Gaita v. Windsor Bank, supra*. There the court further stated:

"If a drawer desires to hold a bank to its common law liability and impose upon it the absolute duty of stopping payment of a check, the notice served on the bank should be *positive* and *unqualified*. Then, if the bank does not desire to assume the liability imposed by such a notice, it may cancel the account and terminate its relationship with the depositor."

Since both parties are free to contract on whatever terms they deem proper and suitable, a depositor may resort to the unconditional stop-payment order and its attending absolute liability, but when he chooses to issue the stop-payment order containing a release clause, no reasons of public policy or consideration for a contract should discredit or invalidate such a qualified order which he chose to issue and legally assented to. By selecting the stop-order with a release clause the depositor permits a continuous administration of his checking account and relieves himself of the burden of having his account cancelled which may well be essential to stop payment of his check when liability is absolutely due to the issuance of a stop-order. The bank itself is also free to more expeditiously handle all checks, so important in our world of credit. It can exercise ordinary care and be legally free, with responsibility attaching in instances of willful disregard of such notice or flagrant business mismanagement.

The principal case fails to accord a more equal and equitable footing to the bank in its relationship to the customer. It would resort to common law absolute liability when the needs of both depositor and the greatly expanding banking institution would be better served under these circumstances necessitating a limited liability.

WILLIAM B. KAMENJAR

**TORTS — CHARITABLE INSTITUTIONS.**—Plaintiff fell and received injuries because of defective curbing in front of a charitable institution. Suit was brought against the City of Pittsburgh, which impleaded the charitable institution. The lower court entered judgment for the plaintiff and granted the charitable institution's motion for judgment notwithstanding the verdict. City of Pittsburgh appealed.

Pennsylvania Supreme Court held that, under the doctrine of immunity of charitable organizations from tort liability, the charitable institution was not liable over to the City of Pittsburgh.

**DISSENT:** The doctrine of immunity is not applicable because of the statutory duty on the part of the charitable institution to maintain and keep in repair its sidewalks. *Bond v. City of Pittsburgh*, 368 Pa. 404, 84 A. 2d 328 (1951).

Three theories have been promulgated under which charities have been immunized from tort liability. The first and most generally accepted basis for exemption is the trust fund theory. That doctrine was announced in *Feoffees of Heriot's Hospital v. Ross*, 12 C. & F. 507, 8 Eng. Rep. 1508 (1846), where the court stated:

"There is a trust, and there are persons intended to manage it for the benefit of those who are the object of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view but would divert it to a completely different purpose."

The rule was made applicable in *Gables v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087 (1910) where the plaintiff, a hospital patient, was badly burned when a nurse inadvertently placed a hot water bottle in the plaintiff's bed. The court denied recovery stating "that it is a doctrine too well established to be shaken that a public charity cannot be made liable for the torts of its servants."

Another theory advanced by the courts granting nonliability is the implied waiver doctrine; that is the beneficiary is deemed to have waived his right to recovery for any injury sustained in the reception of a benefit from the institution. *Powers v. Mass. Homeopathic Hospital*, 109 Fed. 294 (1st Cir. 1901).

Another theory was advanced in *Bodenheimer v. Confederate Memorial Ass'n*, 68 F. 2d 507 (4th Cir. 1934), where a plaintiff beneficiary was injured in a fall caused by the defective condition of the sidewalk. There the Court held that public policy is the rationale of the decisions sustaining immunity:

A policy of the law which prevents him who accepts the benefit of a charity from suing it for the torts of its agents and servants, and thus taking for his private use the funds which have been given for the benefit of humanity, which shields gifts made to charity from "the hungry maw of litigation" and conserves them for the purposes of the highest importance to the state, carries on its face its own justification, and without the aid of metaphysical reasoning, commends itself to the wisdom of mankind.

The leading case which broke the established doctrine of immunity was *President and Directors of Georgetown College v. Hughes*, 76 App. D. C. 123, 130 F. 2d 810 (1942). In that case the plaintiff was allowed to recover from the defendant on the theory that charities are liable for negligence the same as other persons and corporations. In *Foster v. Roman Catholic Diocese of Vt.*, 70 A. 2d 230 (Vt. 1950) the plaintiff was injured in a fall on some ice that had formed on the sidewalk. The court held that a private institution conducted solely for charitable purposes is not by that fact exempt from liability for an injury occasioned by its negligence. The court further declared that the defendant could also be liable for maintaining a public nuisance if a proper case were presented.

The theory of immunity from liability for charitable institutions has been subjected to various modifications. Some states have modified the doctrine of complete immunity and impose liability if the person harmed is a stranger to the charity. *Cohen v. Gen. Hospital Society of Conn.*, 113 Conn. 188, 154 Atl. 435 (1931). Other jurisdictions have extended the liability still further to protect paying beneficiaries of the institution as well as strangers. *Silva v. Providence Hospital*, 14 Cal. 2d 762, 97 P. 2d 798 (1939). And, finally, several states have granted recovery without distinction between strangers and beneficiaries. *Barwege v. City of Owatonna*, 190 Minn. 374, 251 N. W. 915 (1933).

The dissent in the principal case is in harmony with the almost universal criticism of the accepted rule and the basis upon which the rule is justified. Both the trust fund theory and the implied waiver theory have been shown to be without factual foundation. *Foster v. Roman Catholic Diocese of Vt.*, *supra*.

The third rationale of immunity, the public policy argument, is certainly not applicable to a large, impersonal, charitable organization of today.

It is submitted that the doctrine of absolute immunity from tort liability attaching to a charitable institution should yield in special circumstances, particularly in situations, like the principal case, where an institution has a statutory duty to maintain and repair sidewalks.

DONALD J. LETIZIA

TORTS—FEDERAL TORT CLAIMS ACT—RECOVERY BY MEMBERS OF THE ARMED FORCES.—This was an action brought in the United States District Court for the District of Massachusetts to recover damages for injury to plaintiff's personal property. This action was brought under the provisions of the Federal Tort Claims Act, 28 U. S. C. sec. 2671, et seq. (Supp. 1951). The plaintiff was an Ensign in the United States Naval Reserve. He was ordered to active duty for fourteen day training. Plaintiff, while on active duty parked his car in a designated parking area. Following completion of a training flight plaintiff returned to the parking area to pick up his car. He found his car pitted and dented. The only explanation for the damage was that someone was negligent in starting an airplane in the airplane parking area, resulting in stones and sand being thrown against the plaintiff's car. The defendant, the United States government argued that the action should be dismissed under the doctrine laid down in the case of *Feres v. United States*, 340 U. S. 135 (1950), that servicemen, while on active duty, cannot recover for injuries arising out of or incident to service. The District Court, however, held for the plaintiff, *Lund v. United States*, Civil No. 50-259, D. Mass., February 5, 1952.

This case represents another step in clarifying the problem of under what circumstances members of the armed forces may sue under the Federal Tort Claims Act.

The first case of importance brought by a member of the armed forces under the Federal Tort Claims Act was the case of *Brooks v. United States*, 337 U. S. 49 (1949). This was a case where a soldier, while on furlough, was injured by a government truck. The court allowed him to recover under the provisions of the Federal Tort Claims Act. The reasoning of the court in the *Brooks* case was that the injury did not arise out of or in the course of military duty; therefore, it did not come within the specific exceptions, applicable to members of the armed forces, as found in the Federal Tort Claims Act, *supra*, sec. 421.

The next case which determined who in the armed services could sue the government under the Tort Claims Act, was the case of *Feres v. United States*, *supra*. This was a case where decedent perished in a fire in an Army barracks. Negligence was alleged in quartering him in barracks that should have been known to be unsafe. The court denied the claim of the decedent's executrix. The reasoning of the court in this case was that the decedent was on active duty; therefore, Congress had provided him with a "simple, certain, and uniform compensation for injuries or death". *Id.* at p. 144.

The court distinguishes the *Feres* case from the *Brooks* case, in that in the former the injury was incident to service, while, in the latter, injury was not

incident to service. The reasoning in the *Feres case* was applied in a recent case in the District of Columbia, *Lewis v. United States*, 190 Fed. 22 (D. C. Cir. 1951), cert. denied, 342 U. S. 869 (1951).

A U. S. Park Policeman, while on active duty, was injured as a result of the negligence of a fellow officer, the injured officer was denied recovery under the Federal Tort Claims Act, even though he did not come within the provisions of the Federal Employees Compensation Act. 5 U. S. Code §751 (1946). Federal employees covered by this Act, are not permitted to sue under the Tort Claims Act, 28 U. S. Code §2671 et seq., (Supp. 1951). The injured Park Policeman was compensated through a uniform system of compensation provided for Metropolitan policemen.

Finally, we come to the *Lund case, supra*, where the court has permitted a serviceman on active duty to recover damages for injury to his personal property under the Federal Tort Claims Act. The court's reasoning in the case under consideration was that driving his car to the airbase was not incident to his service. Therefore, recovery should be allowed. At the present stage of development of case law interpreting the Federal Tort Claims Act, it appears that a member of the armed services, while on active duty, may recover for injury to his personal property when injury is not directly incident to the service; and may recover for personal injuries not directly incident to military service, but not for injuries incident to service.

JOHN M. LOTHSCHUETZ

TRADE REGULATION—MONOPOLY—RESTRAINT OF ATTEMPTED ADVERTISING MONOPOLY UNDER SECTION 2 OF SHERMAN ANTI-TRUST ACT. Appellants had published a daily newspaper in Lorain, Ohio since before 1932. In that year, they bought out their only competitor and, at the time of this suit, dominated the field, reaching 99 percent of Lorain families. The journal published state, national and international news and handled both local and national advertising. This domination of local advertising channels was threatened in 1948 by establishment of radio station WEOL by the Elyria-Lorain Broadcasting Company in Elyria, eight miles from Lorain, with a branch station in Lorain. The station carried state and out-of-state news and advertising, and most of its income came from broadcasting paid advertisements. The fact that the station was engaged in interstate activity is shown by evidence that its broadcasts were regularly heard by persons as far removed as southeast Michigan.

To meet the competition offered by the station, the journal refused to accept local advertising from anyone who advertised, or who planned to advertise, over WEOL. Many advertisers desired to use both media, and for some, use of the newspaper was essential.

In an equity action brought under the Sherman Anti-Trust Act, 15 U. S. C. § 1 and 2 (1946), the United States sought to have Lorain Journal Company and its principal officers enjoined from continuing their attempt to monopolize local advertising channels. The Government was successful in the District Court, *United States v. Lorain Journal Company*, 92 F. Supp. 794 (N. D. Ohio 1950), and the defendants appealed.



The United States Supreme Court unanimously affirmed that decision, holding appellants guilty of violating section 2 of the Act and enjoined the continuance of their unlawful activities. Section 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. 26 Stat. 209, 15 U. S. C. A. § 2.

Section 4 vests jurisdiction of such suits in the District Courts of the United States.

The United States Supreme Court held that local distribution of news was an inseparable part of the flow of interstate commerce, as were the broadcasting activities of station WEOL.

Appellants' asserted rights of freedom to select their customers and freedom of the press, guaranteed by the First Amendment to the Constitution, were conceded, but the court pointed out that the exercises of those rights is subject to curtailment when the free flow of interstate commerce is threatened. *Lorain Journal Company v. United States*, 342 U. S. 143 (1951).

Dissemination of news and advertising through a newspaper constitutes interstate commerce. *Associated Press v. United States*, 326 U. S. 1 (1945). It is equally clear that station WEOL was engaged in interstate commerce. "By its very nature, broadcasting transcends State lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject to the control, of the commerce clause." *Fisher's Blend Station v. State Tax Commission*, 297 U. S. 650, 655 (1936). With interstate commerce involved, the Journal's activities came within the range of federal control.

Earlier, the United States Supreme Court clarified the limitation imposed upon the right to choose one's customers by stating that right may be freely exercised "in the absence of any purpose to create or maintain a monopoly." *United States v. Colgate & Company*, 250 U. S. 300, 307 (1919). This principle was reiterated in *United States v. Bausch & Lomb Optical Company*, 321 U. S. 707 (1944) and in *Associated Press v. United States*, *supra*.

*Associated Press v. United States*, *supra*, offers an analogous situation, on a larger scale. Associated Press dealt in the gathering and distribution of interstate and foreign news. By means of its by-laws, it forbade furnishing of its product to non-members and enabled members to prevent others from joining the association. The Government proceeded against Associated Press under section 2 of the Sherman Act, and the Supreme Court enjoined continuance of these monopolistic practices, holding that an attempt to monopolize interstate commerce was involved and the fact that competitors had not been completely excluded did not prevent granting of an injunction. In response to Associated Press' allegation that freedom of the press was denied, the court said: "Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Ibid* at p. 20.

Section 2 of the Sherman Act is broad, covering not only a monopoly or attempt to monopolize individually, but also a conspiracy with others to monopolize "any part" of interstate or foreign commerce. (Section 1 deals only with

restraints of trade.) There has been much dispute as to the intent and actions necessary to constitute such an attempt or conspiracy to monopolize, and the essential elements which must exist before the court will strike down a business as a monopoly.

Total exclusion of competitors is not necessary to constitute a monopoly in violation of the Act. *American Tobacco Company v. United States*, 328 U. S. 781 (1946); *Associated Press v. United States*, *supra*. The intent to monopolize, in conjunction with a definite probability that a monopoly will be established, has been held sufficient to warrant granting of an injunction under the Sherman Act. *Swift & Company v. United States*, 196 U. S. 375 (1905). A specific intent to monopolize trade is not necessary. It is enough if one's activities result in establishment of a power to monopolize. The mere possession of a power to monopolize, however acquired, and even if it is unused, is condemned. *United States v. Griffith*, 334 U. S. 100 (1947). A lawfully acquired monopoly power becomes illegal when used to prevent competition or destroy competitors. *American Federation of Tobacco Growers v. Neal*, 183 F. 2d 869 (4th Cir. 1950) presented a situation where the Danville, Virginia tobacco board of trade possessed, under a State statute, control of selling of tobacco in the Danville market. The members of plaintiff, and tobacco farmers' cooperative association, were denied access to the market because of their advantage over Danville competitors in costs and taxes resulting from their location outside the city. The court granted damages and an injunction under the Sherman Act against this exclusion from the market, saying that the restraint was an unreasonable one and that this use of monopoly power by the board of trade to prevent competition, even though lawfully acquired, was illegal.

The extent to which one controls the market bears a definite weight in determining whether a monopoly exists. In *United States v. Besser Manufacturing Company*, 96 F. Supp. 304 (E. D. Mich. 1951), the District Court held that where two corporations controlled 65 percent of the total United States business of manufacturing concrete block machinery, the other 35 percent being divided among more than 50 other manufacturers and the strongest competitor controlling less than 8 percent of the total, there was strong evidence that they held a monopoly. Such a monopoly can be deterred before it reaches 100 percent control. Any combination of former or potential competitors which approaches complete control of any industry will be viewed with suspicion. *United States v. Gypsum Company*, 340 U. S. 76 (1950).

Section 2 of the Sherman Act condemns monopolizing "any part" of interstate or foreign commerce. The words, "any part", have been interpreted to mean any appreciable amount of that commerce. Clearly, in the *Besser* and *United States Gypsum* cases, *supra*, the control in each case was substantial enough to leave no doubt that it came within the purview of the Act. *United States v. Yellow Cab Company*, 332 U. S. 218 (1946), presents a factual situation almost as clear on the point of extent of control sufficient to be called a monopoly. There, the defendants were found guilty of conspiring to monopolize the sale of vehicles to be used as taxicabs in Chicago, Pittsburgh, New York and Minneapolis and the furnishing of taxi service in Chicago. Markin, a defendant, controlling Checker Cab Manufacturing Corporation, planned with others to merge the principal cab operating companies in several large cities. The defendants organized Parmelee Transportation Company which alone took over the business of transporting passengers between railroad stations in Chicago under exclusive contracts with the railroad companies. Parmelee acquired a controlling interest

in Chicago Yellow Cab Company, Inc., which company held 53 percent of the outstanding cab licenses in Chicago. Parmelee then acquired 100 percent of the total licenses in use in Pittsburgh, 58 percent in Minneapolis and 15 percent in New York City. The United States Supreme Court held that there was an unlawful conspiracy to monopolize this business and that the amount of interstate commerce affected was an "appreciable amount", sufficient for the activities to be stricken down under section 2 of the Sherman Act. In a recent case involving a similar situation, *United States v. National City Lines*, 186 F. 2d 562 (7th Cir. 1951), cert. den. 341 U. S. 916 (1951), defendants, transit line holding companies and their suppliers, were found guilty of conspiring to monopolize interstate commerce, the court holding that they violated the Sherman Act when they conspired to control all busses and supplies for busses used in public transportation in forty-five cities of the United States. This was sufficient to constitute monopolizing of an appreciable part of interstate commerce.

The principal case serves to dispel the idea that the Sherman Anti-Trust Act is designed or used only as a weapon against monopoly practiced by large enterprises. Any enterprise, the activities of which involve interstate commerce, even though small and concerned primarily with local affairs, is subject to federal regulation when it attempts to establish a monopoly or exert an existing monopoly power. The Sherman Act is concerned with more than the large, nation-wide obstacles to interstate trade. "The source of the restraint may be interstate, as the making of a contract or combination usually is; the application of the restraint may be interstate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the States." *United States v. Women's Sportswear Manufacturers Association*, 336 U. S. 460, 464 (1948). Congress may regulate even intrastate activities under the Sherman Act if they have any substantial effect on interstate commerce. *Myers v. Shell Oil Company*, 96 F. Supp. 670 (S. D. Cal. 1951).

The Sherman Act cannot be used as a remedy for all local barriers to trade, but the fact situation in the principal case is within its scope because the restraint attempted by the Lorain Journal threatened business which was essentially interstate in nature. The Sherman Act can be used to dispose of any restrictive practices, of a local nature, which threaten in any substantial way to impede the free flow of interstate commerce.

BETTY ROSS

WORKMEN'S COMPENSATION ACT—MALPRACTICE—RIGHT OF EMPLOYEE TO SUE PHYSICIAN AFTER ACCEPTANCE OF WORKMEN'S COMPENSATION AWARD—DOUBLE RECOVERY. Plaintiff, employee of the Virginia Electric and Power Company, brought action against defendant physician for malpractice, alleging aggravation in treating plaintiff's injuries received in the course of his employment. Defendant denied any right of action on the ground that plaintiff had already been compensated by his employer for both the original injury and the aggravation under the provisions of the Virginia Workmen's Compensation Act. Plaintiff replied that the employer-employee settlement did not include all of the elements of damage, such as pain, anguish, bodily disfigurement, loss of full wages, and other benefits, for the defendant as a third party tortfeasor was liable. The court dismissed plaintiff's action.

*Held*, an appeal, judgment reversed. Payment for injuries under the Virginia Workmen's Compensation Act does not protect third party tortfeasors, but only the employer from any action by his employee. Although the employee has received his statutory compensation, he is not prevented from proceeding against the physician for *actual* damages arising from the aggravation. *Fauver v. Bell*, 192 Va. 518, 65 S. E. 2d 575 (1951).

Whether or not an employee may sue a physician for actual damages resulting from malpractice after having been compensated by his employer, under the Workmen's Compensation Act, for both the original injury and the aggravation, has been a subject of much judicial conflict.

Under the common law, an employer who selected a skillful physician to treat his injured employee was not liable for a subsequent malpractice committed by the physician. *Atcheson, T. & S. F. R. Co. v. Zeiler*, 54 Kan. 340, 38 Pac. 282 (1894). The original tortfeasor was liable for both the injury and its aggravation. *Wallace v. Pennsylvania R. Co.*, 222 Pa. 556, 71 Atl. 1086 (1909). The physician was liable for the aggravation and its consequences. *Pike v. Honsinger*, 155 N. Y. 201, 49 N. E. 760 (1898). In order to prevent a double recovery, if the injured person recovered from the original tortfeasor for both the original injury and its aggravation, the latter became subrogated to the former's rights against the physician. *Fisher v. Milwaukee Ry. & Light Co.*, 173 Wis. 57, 180 N. W. 269 (1920). The overwhelming weight of authority at common law gave the injured person a separate cause of action against the original tortfeasor and the physician, since they were considered *severally* liable. *Viau v. Brooks-Scanlon Lumber Co.*, 99 Minn. 97, 108 N. W. 891 (1906).

The Workmen's Compensation Acts changed the common law and hold the employer liable for his employees' injuries arising out of the course of employment, irrespective of who may be the original tortfeasor. *Mulhall v. Nashua Mfg. Co.*, 80 N. H. 194, 115 Atl. 449 (1921). The employee is usually compensated by his employer for both the original injury and any aggravation thereof, but only on a statutory level of recovery which falls below the employee's actual damages. *Pawlak v. Hayes*, 162 Wis. 503, 156 N. W. 464 (1916); *Phillips v. Holmes Express Co.*, 229 N. Y. 527, 129 N. E. 901 (1920).

May the employee sue the physician for the actual damages arising from the aggravation, after having been partially compensated for it by his employer? The answer lies in each state's interpretation of its particular Workmen's Act as well as each court's approach to the subject.

Since the employee at common law was usually allowed a malpractice action against the physician—an action independent of the one against the original tortfeasor, *Viau v. Brooks-Scanlon Lumber Co.*, *supra*—this right can be denied him only if it is abrogated by statute.

A few states, however, hold that the malpractice is part of the original injury and, as such, compensable exclusively under the Act. *Burns v. Vilardo*, 26 N. J. Misc. 277, 60 A. 2d 94 (Sup. Ct. 1948); *Roman v. Smith*, 42 F. 2d 931 (D. Idaho 1930); *Ross v. Erickson Const. Co.*, 89 Wash. 634, 155 Pac. 153 (1916). This harsh result, which follows the common law minority rule, is reached by looking at the overall purpose of the Act as one primarily intended to remove from the courts multiple personal injury actions by employees. *Ross v. Erickson Const. Co.*, *supra*.

The majority of the states limit the abrogating effect of the Act only to actions against the employer. *Huntoon v. Pritchard*, 371 Ill. 36, 20 N. E. 2d 53 (1939). Most of them allow an action against the physician either because a third party