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RECENT DECISIONS

CIVIL PROCEDURE — JURISDICTION — NONRESIDENT MOTORIST STATUTE MAY BE APPLIED TO REACH AUTO OWNER WHO NEVER ENTERED STATE. — Ida Weitz, a resident of Texas, in purchasing a car to be used by her minor son while stationed at Camp Lejeune, N.C., obtained a liability insurance policy from the defendant, covering the named insured and anyone driving with her permission. A friend of the son, while driving the car with the latter's consent, negligently killed plaintiff's intestate. Plaintiff was awarded a default judgment in a North Carolina court against Weitz, after substituted service of process on her in Texas in accordance with the North Carolina nonresident motorist statute.¹ Plaintiff, unable to collect this judgment, sued the defendant on the insurance policy in the United States District Court for the Eastern District of North Carolina and recovered judgment to the amount of the policy, plus interest. Defendant, on appeal to the Fourth Circuit Court of Appeals, attacked jurisdiction of North Carolina courts over Weitz. *Held*: that state court jurisdiction did not offend due process and that the substantive findings of liability by the state courts were final and controlling, not having been appealed. *Davis v. St. Paul-Mercury Indemnity Co.*, 294 F.2d 641 (4th Cir. 1961).

The court found that the North Carolina statute, as interpreted in the state courts, authorized such service of process. The statute spoke of actions "growing out of any accident or collision in which said nonresident . . . [was] involved by reason of the operation by him, for him, and under his control or direction, express or implied, of a motor vehicle."² The case law held that there was sufficient "control or direction"³ if defendant had "the legal right to exercise control"⁴ when the death occurred. The *Davis* court concluded that "in turning the automobile over to her son Mrs. Weitz expressly authorized him to permit others to drive it."⁵

The court held that service in this case did not violate any constitutional rights of the defendant under the 14th amendment, that in personam jurisdiction is limited constitutionally only by the "standards of fairness embodied in the due process clause of the Fourteenth Amendment,"⁶ which require only the giving of adequate notice to the defendant,⁷ and a "reasonable" exercise of jurisdiction.⁸ This means, said the court, that the defendant must have "minimum contacts" with the state asserting jurisdiction such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."⁹ On this point, the court's discussion culminated in the holding:

[T]hat ownership of property, particularly that which is capable of inflicting serious injury, may fairly be coupled with an obligation upon the owner to stand suit where the property is or has been taken¹⁰ with his consent.¹¹

1 N.C. GEN. STAT. § 1-105 (Supp. 1959). For a discussion of other circumstances in which no personal service of process is required, see Ehrenzweig, *The Transient Role of Personal Jurisdiction: The "Power Myth and Forum Conveniens"*, 65 YALE L.J. 289, 309-311 (1956).

2 N.C. GEN. STAT. § 1-105 (Supp. 1959).

3 *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951).

4 *Pressley v. Turner*, 249 N.C. 102, 105 S.E.2d 289 (1958).

5 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 645 (4th Cir. 1961). Before she gave him the car, "Mrs. Weitz admonished her son to be careful how he drove and whom he let drive." *Id.* at 643.

6 *Id.* at 646.

7 Citing *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

8 *Supra* note 5, at 646. The court cites: *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316-320 (1945); *RESTATEMENT (SECOND) CONFLICT OF LAWS* § 74 (Tent. Draft No. 3, 1956).

9 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 646 (4th Cir. 1961). Citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

10 See generally Ehrenzweig, *supra* note 1, at 306; 40 Mich. L. Rev. 781 (1942).

11 See *Young v. Masci*, 289 U.S. 253 (1933), holding that the imposition of liability on a nonresident automobile owner for injuries caused by the negligent driving of a permittee not his agent or servant, when the laws of the owner's state did not impose such liability, was not

. . . [I]f the state chooses by appropriate law to assert its jurisdiction over him in respect to liability arising out of the use of his property in that state.¹²

Forty-nine states now have nonresident motorist statutes providing for some form of substituted service.¹³ An early New Jersey statute required an actual appointment of the Secretary of State as attorney for the nonresident motorist to receive service for him "in any action or legal proceeding caused by the operation of his registered motor vehicle within this state against such owner."¹⁴ The decision of the United States Supreme Court in *Hess v. Pawloski*,¹⁵ upholding a similar nonresident motorist statute,¹⁶ can be said to have provided the constitutional basis for the subsequent enactment of similar legislation, in which no actual appointment was required. In *Hess* the Court said that "having the power so to exclude, the State may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served."¹⁷ The motorist's fictitious consent to such appointment was denied later by the Supreme Court when it said that "the liability rests [rather] on the inroad which the automobile has made on the decision of *Pennoyer v. Neff*, 95 U.S. 714, as it has on so many aspects of our social scene."¹⁸ In fact, "the service depends on no consent, actual or implied, but merely upon declarations of the legislature in the valid exercise of the police power of the State."¹⁹

In many state decisions regarding the purpose and justification of this sort of legislation, the same rationale of "valid exercise of the police power" is followed. Thus, it is said:

The basis of jurisdiction is the fact of doing acts or causing them to be done, in the state, the acts being of a type so affecting the public interest, in that they are apt to give rise to causes of action in local citizens, that such police regulation as is represented by these statutes is allowable.²⁰

More frequent than the theory of "acts . . . affecting the public interest" are references to "cases in which the defendant or his agent has performed within the state an act traditionally characterized as dangerous to life or property."²¹ Another frequently found rationale, enunciated in *Hess*, is that "in the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways."²² In stressing local interests, another and probably more important motivation is that of giving residents of the state the same protection against nonresident drivers as against resi-

inconsistent with due process. But Judge L. Hand in *Scheer v. Rockne Motors Corp.*, 68 F.2d 942 (2d Cir. 1934) held that the owner would not be liable if the auto were taken into another state without the owner's consent. Lorenzen, in *Developments in the Conflict of Laws, 1902-1942*, 40 MICH. L. REV. 781, says: "The law was settled in this country at the beginning of the century that the law of the state in which a tort was committed, that is, where the injury or harm was done, determined the substantive rights of the parties."

12 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 648 (4th Cir. 1961). See RESTATEMENT (SECOND) CONFLICT OF LAWS, § 84a (Tent. Draft No. 3, 1956); ILL. STAT. ANN. ch. 110, § 17 (1)(c) (1956).

13 Apparently only Alaska does not. For a list of the nonresident motorist statutes, see 44 IOWA L. REV. 384 (1959).

14 The statute, upheld in *Kane v. State of New Jersey*, 242 U.S. 160 (1916), was subsequently replaced.

15 274 U.S. 352 (1927).

16 MASS. GEN. LAWS, ch. 90, as amended by St. Mass., ch. 431, § 2 (1923).

17 *Hess v. Pawloski*, 274 U.S. 352, 356-357 (1927).

18 *Olberding v. Illinois Central Railroad Co.*, 346 U.S. 338, 341 (1953).

19 *Ogdon v. Gianakos*, 415 Ill. 591, 114 N.E.2d 686, 690 (1953).

20 Leflar, *THE LAW OF CONFLICT OF LAWS*, 50-51 (1959).

21 *Developments in the Law — State Court Jurisdiction*, 73 HARV. L. REV. 909, 946 (1960).

22 *Hess v. Pawloski*, 274 U.S. 352, 356 (1927). But see Gibbons, *A Survey of the Modern Nonresident Motorist Statutes*, 13 U. FLA. L. REV. 257, 259 (1960): "This view of the statutes is widely accepted by state judges today, yet it is doubtful that, absent these statutes, non-residents would drive more carelessly because of an anticipation of an immunity from the inconvenience of local jurisdiction. At any rate, the idea that these statutes are merely a species of traffic regulations was not the major consideration behind their adoption."

dent drivers. This is accomplished by giving local residents access to local courts in actions against nonresident tortfeasors.²³

In attempting to establish what is probably a broader basis of jurisdiction in such cases than the usual police power rationale, the court in *Davis* adopted both the interest-analysis approach suggested in a Harvard Law Review article, *Developments in the Law — State Court Jurisdiction*,²⁴ and standards to be met in acquiring constitutionally valid, in personam jurisdiction over corporations, as set forth in *International Shoe Co. v. Washington*.²⁵

The *Shoe* case standard is fairness to all interested parties once certain "minimum contacts" were established. In fact, *Shoe* "may be merely a logical extension of the *Hess* and *Doherty*²⁶ holdings. Those cases explicitly recognized that state interests are relevant in determining whether it is fair to assert jurisdiction over nonresidents, and therefore should be viewed as limited precursors of *International Shoe*."²⁷ According to *International Shoe*, the question whether due process is satisfied "must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."²⁸ And this can be determined "only by weighing the competing interests."²⁹

Such a weighing of the interests in cases growing out of automobile accidents is found in the *Davis* opinion. The defendant has, in opposition to the interests of the forum state and the plaintiff, a definite interest in not being called upon to defend in the foreign state. It will usually be inconvenient and costly, involving disruption of his affairs and the necessity of obtaining unfamiliar counsel.³⁰ In any suit out of his own state, the hardships on the individual are likely to be greater, relatively, than they are on an out-of-state corporation.³¹ The plaintiff's interests usually include the convenience to him in bringing the action in his own state, where the witnesses are readily available, and where the jury may view the scene of the accident. Generally, it is "more desirable for an action to be tried in the state whose law is applicable."³² And finally, "in fairness to the plaintiff, he should not be deprived of jurisdiction over any defendant against whom there is a reasonable possibility of liability being proved at the trial."³³ Generally:

23 *Austinson v. Kilpatrick*, 82 N.W.2d 388 (N.D. 1957); *Tardiff v. Bank Line, Ltd.*, 127 F.Supp. 945, 948 (E.D. La. 1954).

24 73 HARV. L. REV. 909 (1960).

25 326 U.S. 310 (1945).

26 In *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935), the constitutionality of an Iowa statute was upheld — authorizing service of process on a business agent of defendant, in any action arising out of the conduct of an office established by the defendant for the transaction of business in any county other than his own — as applied to a nonresident individual who established an office in the state for dealing in securities, a business subject to special regulation by the state.

27 *Developments in the Law — State Court Jurisdiction*, 73 HARV. L. REV. 909, 947 (1960).

28 *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

29 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 647 (4th Cir. 1961). See *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). This "weighing" usually involves considerations similar to those involved in *forum non conveniens*. It is suggested, therefore, that the courts assume a positive function in such cases "of identifying the *forum conveniens* in terms of substantial contacts such as the plaintiff's residence, the origin of the cause of action, or the presence of property." Ehrenzweig, *supra* note 1, at 312. See also *Stimson, Limitations on the Exercise of Jurisdiction In Personam*, 10 HASTINGS L.J. 139, 143 (1958).

30 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 647 (4th Cir. 1961).

31 *Ibid.*; *Developments in the Law — State Court Jurisdiction*, 73 HARV. L. REV. 909, 936 (1960). See *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (4th Cir. 1956).

32 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 647 (4th Cir. 1961). See *Travelers Health Assoc. v. Virginia ex rel State Corporation Commission*, 339 U.S. 643, 649 (1950).

33 *Gibbons, A Survey of the Modern Nonresident Motorist Statutes*, 13 U. FLA. L. REV. 257, 283 (1960).

[T]he realities of automobile accident litigation point clearly to the situs of the accident as the most desirable place to conduct a determination of the merits of these controversies. One of the parties involved may be forced to travel to the distant forum to testify — a factor that cancels out, since there is no reason to prefer one party over the other. However, the annoyance and expense of employing foreign counsel to appear at the trial are less disadvantageous to the defendant in the usual case, in which his insurer assumes this obligation and has established local contacts. It is true that one party must be prepared to face a jury composed of his opponent's neighbors, but the widespread prevalence, indeed in many states the requirement, of automobile liability insurance tends to diminish any niggardly attitude even of a jury selected from residents of the defendant's locale.³⁴

In the *Davis* case, the interests of the plaintiff and of the state itself prevailed. It would seem that when the defendant's interests would be expected to prevail, correspondingly, "sufficient contacts"³⁵ will not be found.

The interests of the state, the third interested party in such suits, were taken into account and characterized from the earliest days of such litigation. Because automobiles are "dangerous machines," it has been said, the state has a "strong interest in being able to provide a convenient forum where its citizens may be able to seek, from the owner as well as from the actual operator, compensation for injuries that will often be extremely serious."³⁶ And the state's interest in encouraging careful driving is served, for, conversely, "knowledge by nonresident motorists that they are not amenable to suit in the foreign state may encourage negligent conduct."³⁷ Similarly, in defense of another sort of nonresident jurisdictional statute, it is said that "Iowa treats the business of dealing in corporate securities as exceptional, and subjects it to special regulation."³⁸ Thus it seems that the state's interest in "exceptional activity" as a class, as a result of which activity its citizens may be damaged,³⁹ and in providing redress "against persons who, having substantial contacts with the State, incur obligations to those entitled to the State's protection,"⁴⁰

34 *Id.* at 261.

35 47 *Geo. L.J.* 342, 357 (1958):

"[T]he tests used for forum non conveniens are not the only considerations for valid jurisdiction over a nonresident. They do go a long way, however, toward indicating whether there has been a substantial contact with the forum. If, for example, a court would feel obliged to reject jurisdiction under the forum non conveniens doctrine, there would be a rather unsubstantial contact with that forum by the defendant."

36 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 648 (4th Cir. 1961); *Olberding v. Illinois Central R.R.*, 346 U.S. 338, 341 (1953) stressing "the potentialities of damage by a motorist, in a population as mobile as ours, such that those whom he injures must have opportunities of redress against him provided only that he is afforded an opportunity to defend himself"; *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673, 676 (1957); 44 *Iowa L. Rev.* 248, 252 (1959). That the extent of a state's need to exercise jurisdiction in a certain situation is to be considered in determining whether such jurisdiction exists, see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950):

"It is sufficient to observe that whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard."

37 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 648 (4th Cir. 1961).

38 *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623, 627 (1935).

39 *Cf. Cleary, The Length of the Long Arm*, 9 *J. of Pub. L.* 293, 297 (1960):

"A state is 'interested' in every kind of liability which it permits to be established in its courts. The passage of regulatory legislation in regard to such things as automobiles, insurance, and securities sales merely indicates that the traditional common-law treatment of these matters has not proved satisfactory. Failure to adopt special measures indicates satisfaction with the status quo, not lack of interest."

40 *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673, 679 (1957).

are strong enough to support that state's assertion of jurisdiction over nonresidents in appropriate cases.

Perhaps the most important question involved in the approach to these jurisdictional cases adopted in *Davis*, involved the required "minimum contacts." The question, which was passed over with little comment by the *Davis* court, is: Did the presence in the forum state of the nonresident defendant's automobile, driven by a sub-permittee, constitute minimum contacts sufficient to enable the state to validly exercise jurisdiction? It seems that the degree of contact in the *Davis* situation is sufficient. The state courts have not formulated the problem in precisely this way, but they and the federal courts have faced and met the problem.

Generally, to support jurisdiction where a sub-permittee is involved, there must be some peg such as a theory of agency,⁴¹ or the family purpose doctrine,⁴² upon which a charge of liability can be hung.⁴³ It seems that,

[I]f there is no consent to the operator's possession, the owner has done nothing that would give the state of the place of the injury a connecting link. [And] under Judge Hand's point of view, even though there may be consent to possession but no consent expressly or impliedly to take the car to the state of the accident, the owner-bailor would not be responsible nor would he be amenable to the jurisdiction of a court there.⁴⁴

Some courts say that "proof or admission of ownership by the defendant of the motor vehicle involved in an accident is sufficient to make out a *prima facie* case of agency which will support, but not compel, a verdict against the owner under the doctrine of *respondet superior* for damages proximately caused by the negligence of the nonowner operator of the motor vehicle."⁴⁵ Although many states still construe their statutes in this area strictly, the most desirable attitude is that the jurisdictional statute is to be interpreted to mean that whoever is a nonresident and may be legally liable in tort to the injured party may be served.⁴⁶

41 *McDonald v. Superior Court*, 43 Cal. App. 2d 621, 275 P.2d 464 (1954).

42 *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951); *Norwood v. Parthemos*, 230 S.C. 207, 95 S.E.2d 168 (1956).

43 See generally Stumberg, *Extension of Nonresident Motorist Statutes to Those Not Operators*, 44 IOWA L. REV. 268, 270-271 (1959):

"None of the statutes in the United States purports to impose liability upon the bailor or to bring him within the terms of the nonresident motorist provisions unless he has consented to the operator's taking possession; but if a local statute were so construed as to impose liability on a nonconsenting owner, as where the injury is inflicted while the car is in the possession of a wrongdoer such as a thief, the view of Judge Hand [in *Scheer v. Rockne Motors Corp.* 68 F.2d 942 (2d Cir. 1934)] would be all the more applicable."

44 Stumberg, *supra* note 43, at 271. Statutes clearly permitting service on nonresident owners who consent to the use of their cars are: ARIZ. REV. STAT. ANN. § 28-502 (1956); CAL. VEHICLE CODE § 404; FLA. STAT. § 47.29 (1957); IOWA CODE § 321.499(3) (1958); MICH. COMP. LAWS § 257.403 (Supp. 1952); N.Y. VEHICLE & TRAFFIC LAW § 253; WASH. REV. CODE § 46.64.040 (1957).

45 *Howard v. Sasso*, 253 N.C. 185, 116 S.E.2d 341 (1960) quoting *Lynn v. Clark*, 252 N.C. 289, 292, 113 S.E.2d 427, 430 and cases there cited. *Contra*: *Wilson v. Hazard*, 145 F.Supp. 23 (D. Mass. 1956). See *Gibbons, supra* note 21, at 260, n. 13: Where an owner is made subject to jurisdiction when his vehicle is driven with his permission "an argument has been made that to assume jurisdiction over the owner by presuming his permission to the driver might be violative of the owner's constitutional rights." In *Bowman v. Atlanta Baggage & Cab Co.*, 173 F.Supp. 282 (N.D. Fla. 1959), jurisdiction was upheld in such a case, despite contractual limitations on the lessee's authority to drive the vehicle in that state.

46 *Gibbons, supra* note 33, at 278: "In a growing minority of jurisdictions, . . . owners of vehicles involved in accidents are covered if the vehicle was being driven with the 'permission, consent, or acquiescence of the owner.'" That "operator" means one for whose purposes the vehicle is being used: *Pray v. Meier*, 69 Ohio App. 141, 43 N.E.2d 318 (1942); *Boulay v. Pontikes*, 93 F.Supp. 826 (W.D. Mo. 1950); *Weaver v. Winn Dixie Stores, Inc.*, 6 Ohio Op. 2d 267, 160 F.Supp. 621 (N.D. Ohio 1958). It was held in *Kentucky v. Maryland Casualty Co. of Baltimore*, 112 F.2d 352 (6th Cir. 1940) that where a petition did not state a cause of action under the family purpose doctrine, attempted service on the Secretary of State as defendant's agent was void and of no effect as not "due process of law" within the 14th Amendment, and a default judgment pursuant to it was void.

[But] in general the courts have officially ignored this problem and adopted the narrow view of these statutes, leaving the task of reducing any possible jurisdictional lag to the legislatures. There are signs of progress, however, in a few recent cases that have suggested that the question of the existence of substantive liability may be a proper factor in determining jurisdictional coverage.⁴⁷

The force of the "exceptional activity" rationale, in the "dangerous instrumentality" formulation,⁴⁸ seems to support the conclusion that, in regard to the motorist, the driving or procuring,⁴⁹ or directing of driving, within the foreign state provides sufficient contacts, so that jurisdiction may later be exercised in the event of an "accident."⁵⁰ In other cases, the doing of business is sufficient for a cause of action arising out of that business.⁵¹ However, since some states have statutes providing for judicial jurisdiction over nonresidents as to causes of action arising from one or more isolated acts done by them within the state,⁵² and since some courts achieve the same effect by defining "doing business" to cover doing isolated acts,⁵³ it may be that "the fact that the injury is a local one gives rise to sufficient interest to permit application of the law of that place."⁵⁴ In *Nelson v. Miller*,⁵⁵ the Illinois Supreme Court said:

The rational basis of the decisions upholding the nonresident motorist statutes is broad enough to include the case in which the nonresident defendant causes injury without the intervention of any particular instrumentality. The legislature may direct its policy to the fact of injury as well as to its probability.⁵⁶

The United States Supreme Court has suggested that certain single acts, such as are the basis of nonresident motorist cases, "because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit,"⁵⁷ and, supposedly, the individual. Whatever the qualities that specifically distinguish activities out of which nonresident jurisdiction may

47 *Gibbons, supra* note 33, at 283, citing *Culver v. Tucker*, 182 F.Supp. 385 (N.D. Fla. 1960) and *Thomas v. Warren*, 162 F. Supp. 101 (D. Mont. 1958).

48 The "most popular rationale with the states today, since 'consent' was laid to rest." *Gibbons, A Survey of the Modern Nonresident Motorist Statutes*, 13 U. FLA. L. REV. 257, 259 (1960).

49 *Leggett v. Crossnoe*, 206 Tenn. 700, 336 S.W.2d 1 (1960): held that "any nonresident . . . who . . . shall procure the use of a motor vehicle licensed under the laws of this state," includes parents who merely joined in the application for the license which their minor son could not otherwise have obtained.

50 *Young v. Masci*, 289 U.S. 253, 258 (1933): "A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument." In *W. H. Elliott & Sons Co. v. Nuodex Products Co.*, 243 F.2d 116 (1st Cir. 1957), jurisdiction was upheld where consequences following in the other state could reasonably have been expected. Jurisdiction even lawfully extends to personal representatives of nonresident deceased motorists, in actions for wrongful death. *State ex rel Sullivan v. Cross*, 314 S.W.2d 889 (Mo. 1958). For a list of other such cases, see 25 Mo. L. Rev. 83 (1960).

51 *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664, 667 (1951): "The exercise of that privilege may give rise to obligations . . . [which] require the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." See ILL. STAT. ANN. ch. 110, § 17 (1) (1956).

52 *Cleary, supra* note 39, at 299. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 84, Reporter's Note (Tent. Draft No. 3, 1956).

53 *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951).

54 *Stumberg, supra* note 43, at 269. See *Leflar, The Converging Limits of State Jurisdictional Powers*, 9 J. OF PUB. L. 282, 283 (1960):

"There is reason to believe that some of the older due process choice-of-substantive-law cases in which the United States Supreme Court required forum courts to apply another state's law despite the forum's having substantial connection with the facts will be overruled or narrowly distinguished when the court has appropriate opportunities thus to discard them."

55 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

56 *Id.* at 679.

57 *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). See 44 IOWA L. REV. 374, 375 (1959).

grow, the Court has made it clear that it "is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the . . . State, thus invoking the benefits and protections of its laws."⁵⁸

It is perhaps in connection with this idea that the *Davis* court states that "far more important" than any "momentary physical presence of the defendant within the state" are the "consequences foreseeable from his authorizing the use of his automobile there."⁵⁹ Although the statement is not clarified as to the exact importance of these "consequences foreseeable," it would seem that they are the reason why the "ownership of property, particularly that which is capable of inflicting serious injury, may fairly be coupled with an obligation upon the owner to stand suit where the property is or has been taken with his consent."⁶⁰ This court has also retained the usual reference to the "dangerous instrumentality,"⁶¹ to the possible effects of which the court probably meant to advert in speaking of "consequences foreseeable."

Combined with these other elements, the holding draws additional strength from the concept of in personam jurisdiction based on ownership of property in the forum state. Usually the sort of property which supports jurisdiction is real property,⁶² but it seems that "a relation to personalty may constitute as substantial a contact with the state in which it is located as a relation to realty,"⁶³ especially when the personalty is a chattel as large, valuable, and potentially dangerous as an automobile.⁶⁴ In addition, "personalty receives protection from the laws of the jurisdiction in which it is presently located as does real property."⁶⁵ This assertion of jurisdiction is surely "within limitations of reasonableness appropriate to the relationship derived from the ownership of the thing."⁶⁶

The opinion contains a sufficient basis for its conclusion, although, in the end, much of what is said seems superfluous. Although an analysis of the different interests to be balanced may be useful in the abstract, the analysis in *Davis* of these factors had nothing to do with the concrete, individual interests of the particular parties involved in the lawsuit at hand. It was a foregone conclusion that jurisdiction would be upheld if it were found "reasonable" to hold the defendant substantively liable.⁶⁷ Since "unquestionably a state in which an automobile tort was committed has . . . some interest in being able to open its courts to the action,"⁶⁸ and since the consent of the owner to its use in that state would be sufficient as a

58 *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Cf. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). *Henry L. Doherty & Co. v. Goodman* 294 U.S. 623, 626-627 (1935), citing *Davidson v. H. L. Doherty & Co.*, 214 Iowa 739, 241 N.W. 700, 702 (1932):

"The justice of such a statute is obvious. It places no greater or different burden upon the nonresident than upon the resident of this state. . . . A non-resident who gets all the benefit of the protection of the laws of this state with regard to the office or agency and the business so transacted ought to be amenable to the laws of the state as to transactions growing out of such business upon the same basis and conditions as govern residents of this state. . . . It makes no hostile discrimination against non-residents, but tends to put them on the same footing as residents. . . ."

59 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 648 (4th Cir. 1961). See *Pugh v. Oklahoma Farm Bureau Mut. Ins. Co.*, 157 F.Supp. 155 (E. D. La. 1958); 44 VA. L. REV. 999 (1958).

60 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 648 (4th Cir. 1961).

61 "[P]roperty . . . capable of inflicting serious injury," *Ibid.*

62 *Dubin v. City of Philadelphia*, 34 Pa. D. & C. Rep. 61 (Phil. Co. Ct. 1938). ILL. STAT. ANN. ch. 110, §§ 16, 17 (1956).

63 44 IOWA L. REV. 374, 382 (1959).

64 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 648 (4th Cir. 1961). "When a person engages in activities in a particular jurisdiction he can, with good reason, be required to expect inconvenient consequences to arise therefrom — such as appearing in that state to defend a lawsuit." 44 IOWA L. REV. 374, 378 (1959).

65 44 IOWA L. REV. 374, 382 (1959).

66 RESTATEMENT (SECOND) CONFLICT OF LAWS § 84a (Tent. Draft No. 3, 1956).

67 See notes 34 & 35 *supra* and accompanying text.

68 *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 648 (4th Cir. 1961).

basis both for an assertion of substantive liability as well as jurisdiction,⁶⁹ the holding in terms of "ownership of property" seems inappropriate. It seems that, if the defendant was subject to substituted service according to state law, the decision on the validity of that particular holding should take into account the terms in which it is necessarily couched — the terms of the nonresident motorist statute, which do not limit themselves to situations where the defendant is the owner of the automobile. There may be jurisdiction for any action "growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle. . . ."⁷⁰

Lawrence J. Gallick

PERPETUITIES — BUSINESS LEASE FOR A TERM TO COMMENCE UPON COMPLETION OF A BUILDING DOES NOT VIOLATE THE RULE AGAINST PERPETUITIES. — Plaintiff Isen owned options on some land. Isen contracted with defendant Giant Food to enter into a lease at some time in the future, contingent upon Isen obtaining commercial zoning for the land. The lease which was contemplated provided that its term was not to begin until Isen completed a building upon the property concerned.

After Isen had obtained the required zoning, Giant Food refused to enter into the lease, and a lawsuit ensued. At trial, Giant Food urged that both the contract and the proposed lease violated the Rule Against Perpetuities, and obtained summary judgment in its favor. On appeal to the United States Circuit Court for the District of Columbia, *held*: reversed. The contract contemplated that plaintiffs obtain the zoning within a reasonable time (which would certainly be less than 21 years), and the lease, if entered into, would have vested an immediate interest in Giant Food and thus have prevented application of the Rule. *Isen v. Giant Food, Inc.*, 295 F.2d 136 (D.C. Cir. 1961).

This opinion is a welcome injection of good sense into an area of commercial law which has been too long muddled. It is common practice to lease space in unconstructed buildings — often before the foundation is laid — to ensure sufficient tenants to make the construction commercially feasible, to obtain payments in advance, and to lend security to backers. The practice is particularly widespread in the shopping center business, where it is a valuable promotion device.

Lawyers drafting such "future leases" before 1958 could obtain some assurance of their validity from older English and American cases, such as *Redington v. Browne*¹ and *Gex v. Dill*,² which, while perhaps blurring over ancient conceptual distinctions between "vested" and "non-vested" interests, seemed to hold that a lease term to begin on a contingency was nevertheless valid (as against the Rule), if it should appear that the contingency was highly likely to occur within a reasonable time, and within the period of the Rule's operation.³

This situation was changed for the worse by the 1958 decision in *Haggerty v. City of Oakland*,⁴ where a California appellate court held that a lease whose term

69 Cf. *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957), RESTATEMENT (SECOND) CONFLICT OF LAWS § 84 (Tent. Draft No. 3, 1956). See note 50 *supra* and accompanying text.

70 N.C. GEN. STAT. § 1-105 (Supp. 1959).

1 32 L.R. Ir. 347 (1893).

2 86 Miss. 10, 38 So. 193 (1905).

3 *Gex v. Dill*, for instance, is bottomed on the likelihood that a turpentine merchant, who has a lease on land to "commence bowing, working, and using the said timber . . . at any time," to run for three years thereafter, is going to start doing so within a reasonable time. See also *Kirkland v. Odum*, 156 Ga. 131, 118 S.E. 706 (1923); *Fletcher v. Moriarty*, 62 Fla. 482, 56 So. 437 (1911). All the American and British cases are collected in an exhaustive annotation at 66 A.L.R.2d 733 (1959).

4 161 Cal. App.2d 407, 326 P.2d 957 (1958).

was to begin upon completion of a certain municipal building was voided by the possibility that the building might not be finished within 21 years. Although Bray, J., dissented scathingly, calling the result "legalistic formalism completely out of step with modern concepts and conditions,"⁵ and Leach characterized the decision as "an absurd result,"⁶ it remained a source of great concern that the *Haggerty* rationale might be accepted by other courts in search of the rare authorities in the area. The subsequent decision in *Southern Airways Co. v. De Kalb County*,⁷ although reversed on appeal, gave a hint of possible legal difficulties to come. There, Southern Airways had a lease on the De Kalb County airport, to begin after the U.S. Government relinquished control over the property. At the time of trial, the Government had what amounted to a perpetual privilege to renew. In support of its finding that the Southern Airways lease violated the Rule, the court cited *Haggerty*. The Supreme Court of Georgia reversed with the terse statement that "a valid lease, the term of which is to commence in the future, may be made," but failed to discuss or distinguish *Haggerty*.⁸

Although another California appellate court, faced with a similar but not identical problem, observed in a gratuitous dictum that if the case before it *were* identical, it would not follow *Haggerty*,⁹ the situation remained in considerable doubt.

This is the way things stood when the instant case arose in the District of Columbia.

The Rule Against Perpetuities is among the more complex and abstruse areas of our common law of property. The reasons for the complication are many, but perhaps the most important is that there are, basically, two views of the purpose and function of the Rule. The tension between these two views has been appropriately termed a "battleground of jurisprudence."¹⁰

One view, represented by John Chipman Gray's influential treatise, is that the Rule is directed primarily against "remoteness of vesting" and only secondarily against "suspension of alienability."¹¹ Under this view, the Rule forbids the creation of remote future interests even where the land subject to the interest remains fully alienable by persons in being.

Under a second view of the Rule, an interest is good, though remote, so long as there are persons in being (within the period of the Rule) who can convey a fee simple. It is likely that this view was held by the framers of the New York Revised Statutes who, in purporting to codify the Rule, stated that:

Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article. Such power of alienation is suspended, where there are no persons in being, by whom the absolute fee in possession can be conveyed.¹²

The revisers did not specifically state whether their codification was intended to replace the common law or merely to declare part of it. Consequently, in New

5 *Id.* at 968.

6 Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318 (1960).

7 101 Ga. App. 689, 115 S.E.2d 207 (1960).

8 216 Ga. 358, 116 S.E.2d 602, 607 (1960).

9 *City of Santa Cruz v. MacGregor*, 178 Cal. App. 2d 45, 2 Cal. Rptr. 727 (1960); *Cf. Oliver v. Schene*, 182 Cal. App. 473, 6 Cal. Rptr. 461 (1960).

10 Rollison, *The History of Estate Planning*, 37 NOTRE DAME LAWYER 160, 167 (1961).

11 GRAY, *THE RULE AGAINST PERPETUITIES* 4 (4th ed., Roland Gray, 1942).

12 *Id.* at 681. Gray considers it a mistake to view the Rule as directed primarily against restraints on alienation. This accusation may be unfair as regards the framers of the Revised Statutes, as it was not until later in the 19th century that it was finally declared by the English courts that an interest might be void for remoteness even where there were living persons who could convey the fee. *London & S.W. Ry. v. Gomm*, L.R. Ch. D. 20 (1882). As to subsequent legislation modeled on the New York statute, the language used might be construed as a limitation on the common law rule, and as sanction for the creation of remote interests where the land remains alienable within the perpetuities period. See, e.g., *Mineral Land Inv. Co. v. Bishop Iron Co.*, 134 Minn. 412, 159 N.W. 966 (1916): "The common law rule against perpetuities is superseded by statute."

York and in the other states which adopted the New York scheme, it remained in doubt for many years (and in some states to this day) whether future interests could be created which, though remote, did not suspend the power of alienation. The debate goes on, but the toughness of the common law and the pre-eminent influence of the Gray work are such that it is sometimes held that statutes of the New York type, even where enacted long after the common law rule against remoteness became crystal clear, do not abrogate the rule against remoteness in codifying the rule against suspension of alienation.¹³ This is unfortunate, in a sense, because if the statutory view were to prevail, no simple lease would ever be voided by the Rule.

In the instant case, the circuit court was dealing with Virginia law. That state has no statutory Rule, and thus the common law rule is in force. The Gray formulation of the common law rule, which has been widely adopted, is that "no future interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."¹⁴ The Virginia rule is not significantly different, though stated in converse: "An executory interest which, by possibility, may not take effect until after lives in being and twenty-one years and ten months, is *ipso facto* and *ab initio* void."¹⁵

The instant case involves two "perpetuities situations": (1) the initial contract between Isen and Giant Food and (2) the lease agreement itself. They will be discussed in order. The initial contract obliged Giant Food to enter the lease only after Isen had obtained favorable zoning. Such a contract to lease is subject to the Rule,¹⁶ and it is fairly clear that no recognized interest "vested" in Giant Food as of the making of the agreement; it is also quite clear that the contract *might* not take effect or be rescinded until after twenty-one years and ten months. [When no lives in being are involved the Rule period becomes twenty-one years.] This is because the zoning application might conceivably be delayed for that length of time and because Giant Food might conceivably wait that long for its building (although the latter is highly unlikely). Thus, one would expect, the contract is void.

Not so, said the court. Since Isen was to "diligently pursue" the zoning application and obtain zoning "as soon as possible" it is obvious that the zoning was required to be obtained within a reasonable time, which time would certainly be well within the perpetuities period.

This holding is a significant departure from traditional perpetuities learning. The question of "reasonable time" does not usually enter into the calculations,¹⁷ the courts finding a remote possibility of non-vesting even where the overwhelming probabilities are in favor of vesting. Thus it has been held that a woman of greatly advanced age or a babe in arms might bear children, the so-called "fertile octogenarian" and "precocious infant" rules.¹⁸

The Isen court refreshingly ignores this line of cases in favor of recognizing commercial reality. The possibility of Giant Food waiting twenty-one years to enter a favorable market area — or to decide not to — is distinctly contrary to American retail practices. The court is to be commended on its good sense.

The second "perpetuities situation" involves the actual lease contemplated by the contract. Although the parties never entered into the lease, owing to Giant Food's breach of contract, attorneys for the defense argued that the court should "read it together" with the prior agreement, to show the heinousness of the transaction. The court obligingly did so, though not with the result expected.

The lease, you will remember, would have provided that Giant Food was to have the property for a term to commence on Isen completing a building on the lot.

13 Gray v. Gray, 300 Ky. 265, 268-70, 188 S.W.2d 440, 442-43 (1945).

14 GRAY, *op. cit. supra* note 11 § 201.

15 Burruss v. Baldwin, 199 Va. 883, 103 S.E.2d 249, 252 (1958).

16 For this proposition the Isen court cites SIMES AND SMITH, FUTURE INTERESTS § 1242 (2d ed. 1956).

17 6 AMERICAN LAW OF PROPERTY § 24.21 (1952).

18 *Id.* at § 24.22.

The instrument itself provided that it was a *present lease*.¹⁹ Had the instrument been, say, a deed granting a fee simple to Giant Food subject to a life estate in Isen, the interest of Giant Food would be considered to be "vested," and would be quite good. On the other hand, if the *Haggerty* case above were followed, the lease as contemplated is void, *ab initio*.

There is obviously an inconsistency in a Rule which permits postponement of enjoyment until a healthy man's death but forbids a limitation on a contingency which will in all likelihood take place much sooner. In this particular instance, the inconsistency flows from the conceptual limitations of the idea of "vesting."

According to one accepted formulation a future interest is "vested" where it is ascertained as to person and "subject to no condition precedent other than the termination of preceding vested estates."²⁰ A leasehold term to commence on the completion of a building is subject to a condition precedent other than that indicated; *ergo*, one would suppose, it is not "vested" and will violate the Rule if it may continue in that state for twenty-one years. This is, of course, in the face of the fact that a leasehold is among the most freely alienable of all the possible future land entanglements, since there will always be a lessor and lessee, or successors thereof, who can convey the fee.

The idea of "vesting," fruit of a law of freehold estates and seisin, will not quite handle the leasehold-perpetuities area without a little legal surgery, which the *Isen* court failed to perform.

The court ignored the "vesting" problem and merely cited a Virginia case (involving vested *remainders* — quite a different situation) for the proposition that "an interest in property is vested when there exists a present right to possession at either a present or future time,"²¹ from which (the court said) it follows that the proposed lease, if entered into, would have been outside the operation of the Rule Against Perpetuities.

This failure to deal with the vesting problem is unfortunate. Although it has been wisely said that the problem of the lease for a future term ought to be decided on the basis of the policy behind the Rule,²² the fact remains that our property law heritage would force all but the most revolutionary court to talk in terms of the concepts which have come down to us. The Rule Against Perpetuities has not lent itself to "policy arguments."

It would seem difficult enough to deal with our logically inspired heritage in terms of its rather carefully defined concepts; it is doubly so where, as here, courts appear to be confusing these concepts, and use an example of the "sort of interest which does vest" to prove that another interest, of a different sort, vested also.

There existed to the hand of the *Isen* court two ways out of the vesting dilemma, either of which, it is submitted, would have been preferable to the route it did take. It could have said, as it did with respect to the *contract*, that the *lease term* would begin "within a reasonable time," having regard to commercial reality. Or it could have used another tool, of indisputable feudal respectability, called the *interesse termini*, or "interest of a term."

This obscure little interest is first mentioned in Coke, who sets out that the lessee under a lease whose term begins in the future owns an "interesse termini."²³ Simes and Smith note in their treatise that the old law did not treat the "interesse termini" as the sort of interest which vests, and advise that arguments about vesting

19 "Landlord does hereby lease and demise unto the Tenant . . . the building to be constructed," 259 F.2d at 138.

20 SIMES AND SMITH, *op. cit. supra* note 16, § 1232.

21 259 F.2d at 138. The Virginia case was *Allison v. Allison's Ex'rs*, 101 Va. 537, 44 S.E. 904 (1903).

22 SIMES AND SMITH, *op. cit. supra* note 16, § 1242.

23 2 Co. LITT. 270a.

will not resolve the "future lease" problem; rather, as mentioned above, they urge a policy decision.²⁴ However, it seems clear from the instant case and the meager precedents that the courts prefer to speak in terms of the old concepts. Therefore, a square holding that the lessee under a lease for a future term takes a vested interest called an "interesse termini" would have been preferable to the actual holding, bot-tomed on an easily distinguishable remainders case. It would have been better because it would be less easily escaped by a future court bent on applying the Rule in all its pristine vigor. The "reasonable time" alternative would also have been preferable for the same reasons.

Modern British courts have, in fact, treated the "interesse termini" as a vested interest; thus did the Irish court in *Redington v. Browne*,²⁵ and the English Chancery Division in *Mann v. Registrar*,²⁶ in which latter case the proposition is explicitly stated.

Regardless of these possible technical deficiencies, the essential importance of the instant case should not pass unremarked. It has now been recognized unequivocally by the D.C. Circuit that commercial leases for terms to begin in the future do not necessarily violate the Rule Against Perpetuities, a holding which should render a useful security and promotion device relatively free of the danger of being held void, and should be a useful antidote to "legalistic formalism" in the Perpetuities area.

Joseph P. Summers

SALES — IMPLIED WARRANTY — NO WARRANTY IN BLOOD TRANSFUSION BY HOSPITAL. — Plaintiff sued defendant hospital for the wrongful death of a patient as the result of a transfusion of improper blood, for which decedent was to be charged \$200. The case was presented solely on the theory of breach of an implied warranty that the transfused blood would be fit for the purpose intended by the purchaser. The trial court dismissed the complaint. On appeal to the Supreme Court of Utah, *held*: affirmed. A hospital does not *sell* blood used in transfusions; thus no warranty of fitness can arise from the transaction. *Dibblee v. Dr. W. H. Groves Latter-Day Saints Hospital*, 364 P.2d 1085 (Utah 1961).

Webster defines a "warranty" as:

A collateral engagement or undertaking, express or implied, that a certain fact regarding the subject of a contract is, or shall be, as it is expressly or impliedly declared or promised to be. Breach of such an engagement does not avoid the contract, but renders the warrantor liable for damages.¹

Section 15 of the Uniform Sales Act states that:

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose.²

Since the Sales Act is couched in terms of buyers and sellers, any warranty sought to be implied under the Act must of necessity arise out of a sale. From this fact has arisen a great deal of learned controversy and judicial dissertation, of which the instant case is but one example. The Act itself defines a "sale" as: "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called a price."³

The issue of whether a hospital warrants the fitness of blood it gives to its

²⁴ *Supra*, note 22.

²⁵ 32 L.R. Ir. 347 (1893).

²⁶ [1918] 1 Ch. 202.

1 WEBSTER, NEW INTERNATIONAL DICTIONARY 2877 (2d ed. 1960).

2 UNIFORM SALES ACT § 15(1).

3 UNIFORM SALES ACT § 1(2).

patients has only three times been presented to the courts. In each case the hospital was held free of liability.⁴

The leading case dealing with the problem is *Perlmutter v. Beth David Hospital*,⁵ a New York case which was heavily relied upon by the Utah court in the instant decision. In *Perlmutter* the New York court held, in a 4-3 decision, that no cause of action in warranty was made out by a complaint which stated that:

[T]he blood used in the transfusion was sold by the defendant to the plaintiff for \$60; and that defendant, who knew the purpose for which the blood was to be used and upon whose skill and judgment plaintiff relied, impliedly warranted that the blood was fit for such purpose.⁶

The court based its decision on a finding that there was no "sale" of the blood within the meaning of the Uniform Sales Act,⁷ and thus no warranty.

When service predominates, and the transfer of personal property is but an incidental feature of the transaction, the transaction is not deemed a sale within the Sales Act. . . . There is no doubt that the main object sought to be accomplished in this case was the care and treatment of the patient. . . . The conclusion is evident that the furnishing of blood was only an incidental and very secondary adjunct to the services performed. . . .

[W]hen one enters a hospital as a patient; he goes there not to buy medicine or pills, not to purchase bandages or iodine or serum or blood, but to obtain a course of treatment in the hope of being cured of what ails him.⁸

The dissent in *Perlmutter* criticized the holding as essentially an extension of the doctrine of charitable immunity, pointing out that previously, hospitals had been free from liability only where the tort was committed by a nurse or doctor, such persons being deemed independent contractors. In *Perlmutter*, noted the dissent, the hospital itself had supplied the blood, not an independent contractor.⁹

Although *Perlmutter* has been generously criticized by the law reviews,¹⁰ it has been followed by the courts.¹¹

The reasoning of the *Perlmutter* case and its progeny is not novel. In the early days of the Sales Act, and at common law, it was widely held that a restaurant did not warrant the quality of the food it served, since no sale took place. The courts said that the serving of food was an "utterance" and not a "sale," because a person had no right to take home what he did not eat, and because he entered a restaurant primarily for the services he would receive there.¹² With respect to food, this view has been generally rejected by modern courts,¹³ but has hung on in the blood area. Thus in *Cushing v. Rodman*,¹⁴ for instance, a restaurant was held liable for a pebble found in a roll served to the plaintiff, who chipped a tooth on it. The court noted, "[W]e think it unnecessary to rest the choice [whether a warranty should be implied] on the answer to the somewhat narrow question whether or not there can be said to be, in the technical sense, a sale of food." The court also went on to say, citing *Williston*:¹⁵

Even though the transaction is not a sale, every argument for implying a warranty in the sale of food is applicable with even greater force to the serving of food to a guest or customer at an inn or restaurant. The basis

4 *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954); *Gile v. Kennewick Public Hospital District*, 296 P.2d 662 (Wash. 1956); see also *Hidy v. State*, 137 N.Y.S.2d 334, 143 N.E.2d 528 (Ct. Claims 1957). For a discussion of blood transfusion cases generally, see 59 A.L.R.2d 770 (1956).

5 308 N.Y. 100, 123 N.E.2d 792 (1954).

6 *Id.* at 793.

7 N.Y. PERS. PROP. LAW § 96.

8 123 N.E.2d 792, 794-97 (1954).

9 *Id.* at 797.

10 69 HARV. L. REV. 391 (1955); 29 ST. JOHN'S L. REV. 305 (1955); 103 U. PA. L. REV. 833 (1955).

11 *Golez v. J. K. and Suzy L. Wadley Research Institute and Blood Bank*, 50 S.W.2d 573 (Tex. 1961); see also cases cited note 4 *supra*.

12 See 1 WILLISTON, SALES 639 (1948).

13 ANNO. 7 A.L.R.2d 1027 (1949), contains a complete discussion.

14 82 F.2d 864 (D.C. Cir. 1936).

15 1 WILLISTON, SALES 486 (2d ed. 1924).

of implied warranty is justifiable reliance on the judgment or skill of the warrantor. . . .

Briefly, necessity for the protection of that portion of the public concerned and the imposition of an effective incentive to protect the public are the basis of imposed insurance liability.¹⁶

The liability of one serving food for immediate consumption, on the theory of implied warranty, has been upheld even where the food is served under circumstances which make it clear that the food is served as an incidental to a larger transaction involving the rendition of services.¹⁷ The cases stress the justifiable reliance of the patron on the expectation of being served wholesome food.

In commenting on these food cases the court in *Gottsdanker v. Cutter Laboratories*¹⁸ (involving defective Salk polio vaccine) stated that it could

conceive of no reason for applying the rule to foodstuffs which does not equally extend to drugs . . . the fact that the entry is made by injection rather than ingestion in no way alters the premise that each is for human consumption, each enters the human system. In fact, the digestive system has means of rejecting or minimizing the effects of many toxic compounds taken orally. Such defenses are much less available as against harmful elements introduced into the system by hypodermic injection.¹⁹

(Query: would not the same reasoning apply with equal vigor to blood?)

In the non-food area, the fact that work or services are to be performed in connection with the transfer of property in goods does not ordinarily negate the implied warranty. Thus a mechanic who fixes a clutch warrants the parts he installs;²⁰ a contractor who installs an elevator warrants the parts thereof, where separately stated on the bill;²¹ an air conditioner sold with installment included is nonetheless warranted.²² In the last-mentioned case the court reasoned that even though a salesman had already convinced the buyer of the air conditioner to purchase it before the installer offered his services, the installer was to supply the air conditioner and install it. Thus he was held to have warranted the machine. The court did not know whether he had made a profit on the machine itself.²³

In another recent case,²⁴ involving the installation of a radiant heating system, the court noted that the transaction was not even a true sale of the materials installed, but that a warranty was attached anyway:

Although the provisions of the Uniform Sales Act with respect to implied warranty (Civ. Code §§ 1734-1736) apply only to sales, similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified.²⁵

The English courts have also dealt with the service-sale problem, and in view of the close similarity between their sales act and ours, their decisions have been held entitled to weight in construing the Uniform Act.²⁶

Implied warranties have been found in England where hair dye was applied by a beautician,²⁷ when a bad connecting rod was installed in an auto,²⁸ where a dentist made bad-fitting dentures,²⁹ and where defendant inoculated cattle with

16 82 F.2d 864, 868-69 (D.C. Cir. 1936).

17 *Cliett v. Lauderdale Biltmore Corp.*, 39 So. 2d 476 (Fla. 1949) (meal served to a paying guest in a hotel); *Barringer v. Ocean Steamship Co.*, 240 Mass. 405, 134 N.E. 265 (1922) (food served to a steamship passenger).

18 6 Cal. Rptr. 320 (1960).

19 *Id.* at 323.

20 *Delco Auto Supply Co. v. Tobin*, 198 Misc. 601, 100 N.Y.S.2d 135 (Sup. Ct. 1950).

21 *Fifteenth Street Investment Co. v. People*, 102 Colo. 571, 81 P.2d 764 (1938).

22 *Carver v. Denn*, 117 Utah 180, 214 P.2d 121 (1950).

23 *Ibid.*

24 *Aced v. Hobbs-Sesack Plumbing Co.*, 12 Cal. Rptr. 257, 360 P.2d 897 (1961).

25 *Id.* at 902. See also UNIFORM COMMERCIAL CODE § 2-313, comment 2.

26 *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918). Section 15(1) of the Uniform Sales Act is the same as § 14(1) of the English Sales of Goods Act.

27 *Watson v. Buckley*, [1940] 1 All E.R. 174 (K.B. 1939).

28 *G. H. Myers and Co. v. Brent Cross Service Co.*, [1934] 1 K.B. 46, 150 L.T.R. (n.s.) 96 (1933).

29 *Samuel v. Davis*, [1943] 1 K.B. 526.

bad vaccine.³⁰ In the vaccine case, the court reasoned that if the vaccine had been sold, the seller would clearly have warranted its quality; thus he ought not escape liability merely because he administered it as well.³¹

Thus it will be seen that the blood cases are quite out of line with the general trend of authority, which rejects the service-sale dichotomy in the major area of food warranties, and certainly plays it down in other areas. It is suggested that the findings of "no sale" in the blood cases actually represent a conscious or unconscious resolution of policy issues which will be presented later in detail. Otherwise, the trend of authority is quite inexplicable when viewed in connection with other areas of warranty law.

The instant case, *Dibblee*, does not seem to depend upon the usual statement that the blood is transferred incidentally to a course of treatment, but rather on a flat holding that transfusing blood, at least in a hospital, is a service pure and simple. Thus the court says: "Furnishing blood by a hospital at the specific request of a patient or his doctor, and for a charge, is a part of a service, not a sale in *any connotational sense* of those terms."³²

In reinforcement of its holding the *Dibblee* court adds some unique analytical ideas to the lore of implied warranty:

We think of hospitals not as profit-seeking vendors in the market place. . . . [A hospital] furnishes [blood] at the cost of procurement, preservation, testing and administration, — for a few pieces of silver. . . . No hospital gives green trading stamps on the occasion of a blood transfusion . . . or has a sales or advertising agent, telecasts with commercials, billboard bits of art, health suggestions, or muscle-building come-ons incident to a "sale."³³

The court thus suggests that the hospital is free of liability not because the blood was furnished incidental to a course of curing (the only reason for denying the transaction its otherwise clear status of a sale) but because the hospital *makes no profit* in providing the blood, but furnishes it merely as an "accommodation."³⁴

It is interesting to note that *Perlmutter*, on which *Dibblee* relies heavily, places great stress on an Illinois tax case in which it was held that eyeglasses "furnished" by an optometrist were only incidental to the correction of vision.³⁵ This argument would not be available in Utah, where it has been held that a shoe repairer *sells* the leather he puts into shoe soles, even though he charges for a total service, and in spite of the fact that the leather is less than 30% of the price charged and is not separately stated on the bill.³⁶ In the shoemaker's case it would seem to be quite clear that the leather is furnished "incidental" to the larger service of repairing shoes, and that the *Perlmutter* holding is to that extent weakened, at least in Utah. However, the *Dibblee* court takes no note of this problem.

The argument advanced in *Dibblee*, that the absence of the pecuniary profit motive negates the existence of a sale would seem to be clearly invalid. The Uniform Sales Act defines "sale" in terms of transfer of property for a price, and does not mention the existence of a profit.³⁷ To choose a simple example, a sale

30 *Dodd v. Wilson*, [1946] 2 All E.R. 691 (K.B.).

31 *Id.* at 695.

32 364 P.2d at 1087.

33 *Ibid.*

34 *Ibid.* However, in *Yochem v. Gloria Inc.*, 134 Ohio 427, 17 N.E.2d 731 (1938), a restaurant was held to have warranted the water it served free with meals.

35 *Babcock v. Nudleman*, 367 Ill. 626, 12 N.E.2d 635 (1937).

36 *Western Leather & Finding Co. v. State Tax Comm'n*, 87 Utah 227, 48 P.2d 526 (1935).

37 It would appear that the only instance where the lack of a profit motive would be determinative in warranty cases is the case of charitable immunity. In such instances, the courts recognize the existence of the warranty, but deny recovery on the basis of a finding that warranty sounds in tort, and hence is excluded by the immunity. See, e.g., *Forrest v. Red Cross Hospital*, 265 S.W.2d 80 (Ky. 1954) (food served in a hospital); *Lovich v. Salvation Army*, 81 Ohio App. 317, 75 N.E.2d 459 (1947) (food served in a home for girls). In Utah, however, there is no charitable immunity, *Sessions v. Thomas Dee Memorial Hospital Ass'n*, 94 Utah 460, 78 P.2d 645 (1938).

of an automobile would hardly be less a sale because the owner sold it for less than he paid. Thus in *Ganavan v. City of Mechanicsville*,³⁸ it was held that the providing of water for a price by a municipal utility was a sale and, "That the furnishing was without profit to the corporation is weightless."³⁹

The court in the *Dibblee* case bases its opinion on a dichotomy between "service" and "sale" which is rapidly being rejected in most other areas of warranty law. It also considers the absence of pecuniary profit important in deciding whether a "sale" exists, contrary to the clear definition in the Uniform Sales Act. It mentions the absence of green stamps, billboards and promotional stunts in hospital administration, factors which have never been given weight in prior decisions and whose appearance in the court's opinion seem close to frivolous. It would seem that the opinion is a clear indication of the problems which arise from making important decisions turn upon the definition of a word whose meaning is fundamentally unrelated to the policy issues involved. Making decisions turn on the meaning of "sale" has produced surprising results: morphine is held to have been sold upon injection,⁴⁰ while blood is not;⁴¹ a transfer of liquor by a "social, literary and musical club" to its members is held a sale,⁴² while a transfer of blood by a charitable blood bank (for a large and apparently compensatory fee) is not.⁴³ (It should be noted in passing that where a blood bank is involved, there can hardly be any argument that the blood was provided incidentally to a service — there is nothing for it to be incidental to as far as the blood bank is concerned.) Leather transferred in a shoe repair transaction is held to have been sold,⁴⁴ while blood transferred in human repair is but an incidental to a service.⁴⁵

Of course, "sale" in fact means different things in different contexts. The morphine case noted above was a criminal prosecution under the narcotics laws; the liquor case involved a liquor control law; and so on. Nevertheless, when a patient enters a hospital, it would seem irrelevant as a basis for liability whether he will be "sold" blood or not. In any case he pays for — and expects to get — blood that will not kill him.

Decisions in this area must grapple with and answer such issues and arguments as the difficulty of proving a hospital negligent in handling blood; the existence of charitable immunity in the jurisdiction; the justice of imposing the total loss from a blood mistake upon the patient, which in effect forces him to make an exceedingly large charitable donation against his will; the availability of cheap liability insurance; whether strict liability will promote the finding of safer methods; and finally, whether a patient who is entirely and completely at the mercy of the technical competence of a hospital ought to have the right to rely on the quality of blood injected into him. The patron of a restaurant has at least the possibility of smelling bad food or seeing the rock in his pie before he eats it; yet he is protected. The hospital patient does not have this advantage.

California has resolved these issues by statute, and simply provides that no warranty will attach to any blood transfusion.⁴⁶ This approach has the merit of recognizing that the problems with blood transfusions are simply *different* from

38 229 N.Y. 473, 128 N.E. 882 (1920).

39 *Id.* at 883. See also *Yochem v. Gloria Inc.*, 134 Ohio 427, 17 N.E.2d 731 (1938) (water served in restaurant).

40 *Ratigan v. United States*, 88 F.2d 919 (9th Cir. 1937).

41 *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954).

42 *State v. Delaware Saengerbund*, 5 Boyce 162, 91 Atl. 290 (Del. 1914).

43 *Golez v. J. K. and Suzy L. Wadley Research Institute and Blood Bank*, 50 S.W.2d 573 (Tex. 1961).

44 *Western Leather and Finding Co. v. State Tax Comm'n*, 87 Utah 227, 48 P.2d 526 (1935).

45 *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954); *Dibblee v. Dr. W. H. Groves Latter-Day Saints Hospital*, 364 P.2d 1085 (Utah 1961).

46 CAL. HEALTH AND SAFETY CODE § 1623.

the ordinary warranty situation, and does not add to the confusion of the common law by depending upon a definition of "sale."

Although the same effect — denying recovery under warranty — can be achieved through defining and redefining the word "sale," such a course of action creates precedent which complicates future non-blood cases and can also result in *any* transfer of blood being deemed a "service" regardless of whether the supplier actually administered the blood as an "incidental," according to the reasoning of the original *Perlmutter* case.

That this latter event will happen is evidenced by the recent Texas case of *Golez v. J. K. and Suzy L. Wadley Research Institute and Blood Bank*,⁴⁷ in which it was held, *inter alia*, that the furnishing of blood by a blood bank (which contributed nothing else to the process of curing) is a service, notwithstanding the blood bank demanded cash or blood in exchange for its product, acted merely as a supplier, and had been known to sue for its fees. This is a long way from *Perlmutter*. The "sale" or "service" approach may or may not work justice in the individual case; it *will* create analytical confusion.

Thomas J. Kelly

SUCCESSION TAX — VALUATION OF STOCK — SIZE OF BLOCK OF SHARES HELD NOT TO AFFECT VALUE. — Testatrix bequeathed 8,100 shares of stock to be held in trust for the members of her family. The county auditor, for succession tax purposes, valued the stock at \$19.75 per share, which was the mean between the bid and asked price of over-the-counter sales on the date of the decedent's death. The probate court, in determining the tax, found that the block could not have been sold in the existing over-the-counter market within a reasonable time (thirty days) without materially depressing the price. The court was also satisfied that the most efficient method of disposing of the shares would be through a sale to a brokerage underwriter at around \$18 per share, the broker's commission being estimated at \$1.75 per share. Consequently, the court valued the stock at \$18 per share in assessing the tax. The Court of Appeals affirmed the probate court and on appeal the Ohio Supreme Court *held*: reversed. For succession tax purposes the value of shares of stock should be the actual market price at which shares of the same stock were sold on the date of death, in units in which they are usually sold, regardless of the size of the block. *In re Sears' Estate*, 178 N.E.2d 240 (Ohio 1961).

The theory that in some cases a large block of stock should be valued lower than the existing market price, is not a new one in the field of appraisal for inheritance and gift tax purposes. "Blockage" was adequately explained in *Phipps v. Commissioner*,¹ wherein the court stated:

The reasoning on which this theory of valuation is based is that a large block of stock cannot ordinarily be marketed and turned into cash as readily as a few shares; also, that where there is only a limited market for a stock, offering a large block of the stock depresses the market and lowers the price that can be obtained for the stock. The conclusion that flows from this premise is that evidence of sales of small blocks of stock is not a criterion of the value of a large block of the same stock.²

Taxpayers see in this theory of valuation a convenient method of reducing taxes, and make every effort to convince the court that "blockage" should be invoked. On the other hand, the tax authorities make equally strong efforts to apply the unit rule, which is a method of valuing stock whereby the total number of shares to be valued is multiplied by the sale price of one share sold on a stock exchange, without regard for other factors affecting value.³ The question of how

47 50 S.W.2d 573 (Tex. 1961).

1 127 F.2d 214 (10th Cir. 1942).

2 *Phipps v. Commissioner*, 127 F.2d 214, 216 (10th Cir. 1942).

3 *Citizens Fidelity Bank & Trust Co. v. Reeves*, 259 S.W.2d 432 (Ky. 1953).

securities should be valued has been at issue in the federal as well as in the state courts. This discussion will begin with a study of federal cases; an attempt will be made to trace the history of "blockage," and to show what tests the federal courts have developed over the years to arrive at the value of large blocks of stock for tax purposes. Though the instant case was concerned with valuation for inheritance tax purposes, the survey will also include cases concerning valuation for the imposition of gift taxes, as the principles involved in both areas are the same.

The proponents of the blockage theory did not get recognition in the federal courts without a struggle. The early Treasury Regulations specifically provided that the size of the block of securities to be valued should not be considered in determining fair market value, and stated that the value should be determined by the price at which the stock actually sold on the relevant market on the critical date.⁴

Three federal cases seem to have followed this Regulation, as in each the court refused to be swayed by testimony that all the shares could not be sold at one time at the price for which smaller amounts had sold on the stock market on the date of death. The courts affirmed the value found by checking the stock market quotations.⁵ In *Gamble v. Commissioner*,⁶ the court stated: "The price which the stock, as a block, would have brought on the basic date was purely speculative. The conclusion was based upon an assumed state of facts."⁷

However, in 1937, the courts started to break away from the Regulations. In *Jenkins v. Smith*,⁸ the court held that in valuing corporate stock for estate tax purposes, evidence that a large block could not be sold at the same price as small blocks on the date of decedent's death, should be considered in determining fair market value. The court held as it did even in the face of an objection that the taxpayer had not disposed of the shares. It said that to determine fair market value as of the critical date, an estimation of what the stock would have sold for was necessary, because fair market value as of a given day means the price that *actually could have been realized* on that day. In 1938, the same court again refused to be bound by the regulations and gave recognition to the size of the block, although it stated that this was only one factor to be considered.⁹

Final commitment to the idea that the size of the block to be valued should be considered, the Regulations notwithstanding, came in 1938.¹⁰ In affirming the Board of Tax Appeals the Fourth Circuit held:

In our opinion, the Board was right in basing its conclusions upon the realities as it found them rather than upon considerations of abstract logic. It could not ignore the pregnant fact, having found it to exist, that a large block of stock cannot be marketed and turned into money as readily as a few shares. The opposite condition might possibly have prevailed, for the influence of ownership of a large number of shares upon corporate control might give them a value in excess of prevailing market quotations; in which event the application of the administrative rule would be unfair to the government. It would have been improper of course to have adopted as the true value of the stock the price obtainable by forcing or dumping the whole block on the market at one time; and likewise improper to have based the finding on the value as of an earlier or later date. But the Board did none of these things. It took into consideration the difficulty inherent in disposing of so large a quantity of stock, the market price for a few hundred shares on the day of death, and the downward trend of the market as indicated by sales before and after death, and it made an estimate of market value of the whole, as required by the statute.¹¹

4 Treas. Reg. 79 § 506 Art. 19-1 (1932); Treas. Reg. 80 § 302 Art. 10 (a) (1936).

5 *Gamble v. Commissioner*, 101 F.2d 565 (6th Cir. 1939); *Richardson v. Helvering*, 80 F.2d 548 (D.C. Cir. 1935); *Roth v. Wardell*, 77 F.2d 124 (9th Cir. 1935).

6 101 F.2d 565 (6th Cir. 1939).

7 *Id.* at 567.

8 21 F. Supp. 251 (D. Conn. 1937).

9 *Knoblich v. Smith*, 25 F. Supp. 156 (D. Conn. 1938).

10 *Helvering v. Safe Deposit & Trust Co. of Baltimore*, 95 F.2d 806 (4th Cir. 1938).

11 *Id.* at 812.

This leading decision was followed by several more cases in which the Regulations were also rejected.¹²

As a result of the courts' refusal to be bound, the "unit rule" provision was removed from the Regulations in 1939, and for the next nineteen years neither the statute nor the regulations contained any reference to "blockage."¹³ Apparently by 1942, the doctrine was generally considered to be part of the federal law, because the Eighth Circuit Court of Appeals said:

As well as any controverted question of administrative law may be settled without declaration by the Supreme Court, it is established that the size of a block of listed stock may be a factor to be considered in its valuation for gift or estate tax purposes.¹⁴

In the early forties the courts adopted a somewhat different attitude as to what effect the size of the block of shares should have in determining value. The courts began to look not at what the block could be sold for on one day, but rather to the price at which the stock could be sold within a reasonable time after the valuation date by a skilled broker or executor. In *Bull v. Smith*,¹⁵ the court affirmed the Commissioner's valuation of a large block of shares at the price the stock sold for on the stock market on the date of decedent's death, in spite of testimony that if all the shares had been sold on that day, the market would have been depressed. The court said:

In a reasonably ready market shares of stock might be worth the price quoted on a particular date even though no purchaser would have been available for a large block if in the near future all the shares could have been "peddled out" according to the practice of prudent executors at the price realizable on the critical date for a small number of shares.¹⁶

The same test was set out in three other cases.¹⁷

The next development occurred around 1945 when the courts began to recognize the fact that the normal method of disposing of large blocks of stock is by way of a secondary distribution. When this method is used, the shares are sold to a broker or underwriter, who then resells them in such a way as not to depress the market. Since the broker or underwriter receives a commission on every share he sells, the fair market value is held to be the market price less the commission. This method of valuation was sanctioned in at least three cases.¹⁸

As was stated earlier,¹⁹ after losing out in the courts, the federal tax officials dropped the provision that the size of the block to be valued should not be considered in determining fair market value. From 1939 until 1958 the Regulations were silent on the subject; but in 1958, the Regulations to the 1954 Code took notice of "blockage" once again. The Regulations now state:

In certain exceptional cases, the size of the block of stock to be valued in relation to the number of shares changing hands in sales may be relevant in determining whether selling prices reflect the fair market value of the block of stock to be valued. If the executor can show that the block of stock to be valued is so large in relation to the actual sales on the existing market that it could not be liquidated in a reasonable time without depressing the market, the price at which the block could be sold as such outside the usual market, as through an underwriter, may be a more accurate indication of value than market quotations.²⁰

12 Page v. Howell, 116 F.2d 158 (5th Cir. 1940); Commissioner v. Shattuck, 97 F.2d 790 (7th Cir. 1938); Helvering v. Kimberly, 97 F.2d 433 (4th Cir. 1938); Dupont v. Deputy, 26 F. Supp. 773 (D. Del. 1939).

13 1 MERTENS, FEDERAL GIFT & ESTATE TAXATION 504 n. 26 (1959).

14 Helvering v. Maytag, 125 F.2d 55, 63 (8th Cir. 1942).

15 119 F.2d 490 (2d Cir. 1941).

16 *Id.* at 491.

17 Richardson v. Commissioner, 151 F.2d 102 (2d Cir. 1945); Mott v. Commissioner, 139 F.2d 317 (6th Cir. 1943); Helvering v. Maytag, 125 F.2d 55 (8th Cir. 1942).

18 Commissioner v. Stewart's Estate, 153 F.2d 17 (3d Cir. 1946); Groff v. Mumford, 150 F.2d 825 (2d Cir. 1945); Bartol v. McGinnes, 185 F. Supp. 659 (E.D. Penn. 1960).

19 See note 13 *supra*.

20 Treas. Reg. § 20.2031-2(e) (1961).

Thus, it would seem that the federal tax authorities have finally acquiesced in the thinking of the courts.

Generally speaking, the blockage rule has fared much better in federal courts than it has in the states. Many of the arguments in the state courts involving valuation of stock for inheritance tax purposes, have centered around the interpretation of the statute which set the standard of value to be determined. It is striking that the statutes of the various states, though different in form and wording, are usually all interpreted to call for a value determined by the price to be received from a sale between a willing seller and a willing buyer. But once having arrived at relatively the same interpretation, the courts have differed in applying it to the facts. A consideration of some state cases and statutes will illustrate this point.

The Ohio statute in the instant case called for the determination of the "actual market value."²¹ The court interpreted this value to be the price that could be obtained in the open market from a sale between one who wants to sell and one who wants to buy, neither party being forced to do so. It decided further that to adopt the price for which the shares could be sold, within the declared time of thirty days after death, would be arbitrary and unrealistic. A sale of this kind, reasoned the court, would be a forced sale and not a sale that the seller was willing to make, and, therefore, not a proper test of the actual market value as defined by the statute and interpreted by the court.²²

The Minnesota court²³ interpreted a statute²⁴ which called for the determination of "full and true value," in terms of the price to be obtained from a sale which was made willingly, and which was not a forced or auction sale. The court held that to determine the "full and true value" as the price which could be received from a sale of all the stock on one day or from a wholesale transaction through a broker would be contrary to the statute because such a sale would be a forced sale. In *Florida Nat. Bank of Jacksonville v. Simpson*,²⁵ the court was concerned with the "full cash value,"²⁶ for intangibles tax purposes. Although the majority decided the case on other grounds, without defining "full cash value," one of the dissenting judges felt that this standard of value meant the amount of cash that could have been received if the property was sold and, therefore, the taxpayer should only be taxed on what the large block of stock would have brought, if he had sold it all on one day.

Other states have statutes defining the value to be determined in terms of a willing seller and willing buyer, but their courts have arrived at the opposite result. In a Kentucky case,²⁷ the court applied a constitutional provision which specified that for tax purposes property was to be valued at its "fair cash value, estimated at the price it would bring at a voluntary sale."²⁸ Now it would seem that a voluntary sale should mean a sale between a willing buyer and seller, but the court allowed the fact that the block of stock could not have been sold on one day without depressing the market to be taken into account in arriving at "fair cash value."

Another example of how the courts can interpret the statutes which set the standard of value in the same way and arrive at opposite conclusions, is *Calvert v. Kattar*,²⁹ a Texas case. In that case the standard of value was "actual market value,"³⁰ and this value was defined in terms of a willing seller and buyer; still

21 OHIO REV. CODE § 5731.02 (Anderson 1953).

22 In Re Sears' Estate, 178 N.E.2d 240 (1961).

23 State v. Wagner, 233 Minn. 286, 46 N.W.2d 676 (1951).

24 MINN. STAT. ANN. § 272.03 (1945).

25 59 So.2d 751 (Fla. 1952).

26 FLA. STAT. ANN. § 199.05 (1941).

27 Citizens Fidelity Bank & Trust Co. v. Reeves, 259 S.W.2d 432 (Ky. 1953).

28 *Id.* at 433-34.

29 301 S.W.2d 318 (Tex. 1957).

30 General Laws of Texas, Acts 1923, 2nd C.S., P63; amended, Acts 1939, 46 Leg. p.646 § 3.

the court gave a large block of stock a discounted value because of its size.

It seems appropriate to point out at this time that the federal tax regulations also define "fair market value" in terms of the willing buyer and seller,³¹ but few federal courts have taken this factor into consideration in valuing large blocks of stock. One of the few courts³² that did consider this factor refused to value the block of stock at a lower figure because of its size and indicated that it felt that stock market prices were the best indication of "true market value."³³

Another point on which the state courts differ is whether "blockage" should be applied when the taxpayer has no need nor desire to sell the large block of stock. The Ohio court,³⁴ though it did not decide the case solely on that ground, did mention that blockage should not be applied where none of the stock had been sold nor would need to be sold for any reason. *State v. Wagner*,³⁵ also stressed this fact in refusing application of the blockage rule; and it was precisely because the stock did not have to be sold that the court in *Florida Nat. Bank of Jacksonville v. Simpson*,³⁶ refused to invoke "blockage."

In a 1936 New Jersey case,³⁷ the judge made it clear that he was not impressed with the idea of estimating the results of a fictitious sale, when no sale had been made:

The argument is unsound. It is undoubtedly true that if the executors had placed this entire block on the market on the day of decedent's death, the price would have broken to approximately nothing. But the executors were not required to sell that block on that day. The statute says nothing about selling; the statute speaks only of the fair market value on the day of death.³⁸

Other states, however, have not felt that this issue was controlling or even of much weight.³⁹ For example in *Newberry v. Walsh*,⁴⁰ the court stated: "It is immaterial, of course, that no sale has taken place. If market value is to be an index of appraisal we necessarily deal in a hypothetical transaction so far as the claimant is concerned."⁴¹ At least one federal case took the same view.⁴²

It seems safe to say that recognition of "blockage" is firmly imbedded in the federal courts, especially since the Regulations have been amended. But even though "blockage" is recognized, it would not be prudent for federal taxpayers to assume that just because they have a large block of stock, they will get an automatic reduction in value. As the court said in *Maytag v. Commissioner*:⁴³

[T]he fact that a gift involves a large number of shares compared with the amount of like stock currently sold on the market, standing alone and without more, does not create a presumption that the fair market value of the stock constituting the gift is less than the quotations on the market.⁴⁴

On the state level it is impossible to make a general statement of the status of the blockage rule. Relatively few states have had to consider the issue and there is no indication of a trend either towards its recognition, or away from it.

It is also worth mentioning that the blockage rule could be a two-edged sword; that is, "blockage" could be applied in an appropriate case to show that the value of a large block of shares is actually in excess of the market quotations. The situa-

31 Treas. Reg. § 20.2031-1(b) (1961).

32 Union Nat. Bank of Pittsburgh v. Driscoll, 32 F. Supp. 661 (W.D. Penn. 1940).

33 *Id.* at 662-63.

34 In Re Sears' Estate, 178 N.E.2d 240 (Ohio 1961).

35 233 Minn. 286, 46 N.W.2d 676 (1951).

36 59 So.2d 751 (Fla. 1952).

37 Spalding v. Martin, 11 N.J. Eq. 603, 183 Atl. 281 (1936).

38 *Id.* at 285.

39 Calvert v. Kattar, 301 S.W.2d 318 (Tex. 1957); *Newberry v. Walsh*, 20 N.J. 484, 120 A.2d 242 (1956).

40 20 N.J. 484, 120 A.2d 242 (1956).

41 *Id.* at 249.

42 Jenkins v. Smith, 21 F. Supp. 251 (D. Conn. 1937).

43 187 F.2d 962 (10th Cir. 1951).

44 *Id.* at 966.

tion could arise where the receipt of a large block of stock would give the recipient control of the corporation. This possibility was discussed in at least three cases,⁴⁵ although in no case was "blockage" applied to raise the value.

The holding in *Sears*⁴⁶ is a wise decision and it is to be hoped that more such rulings will be handed down in the future as the issue of "blockage" arises. It is unfortunate, for several reasons, that the doctrine ever gained recognition. First, the rule provides an apparent tax break for large stockholders. Why should the recipient of a small block of shares pay more tax per share than the recipient of a large block? In two state cases, this result was thought to be not only unfair, but also offensive to the constitution.⁴⁷

Second, it is illogical to apply "blockage" in cases where the taxpayer has no need, desire, nor intention of selling his stock. There is no need to invent a hypothetical forced sale where there will be no real one.

Third, in practically every case, invocation of the rule defies the statute which sets the standard of value to be determined. The statutes presume a sale between a willing buyer and seller, but when the courts apply "blockage," they assume a seller forced to sell and a very willing buyer, at his price. In other words, the courts have speculated as to the price to be obtained in a buyer's market.

There are, however, two situations when determining value by the price the stock sold for on the date of death could work a hardship on the taxpayer. The first of these is in a case where stock in fact must be disposed of in a forced sale, as where it has to be sold to raise money to administer the estate or pay taxes, and the price received is less than the appraised value. A provision in the law like that in Minnesota⁴⁸ is the solution; there, the taxpayer can deduct this loss from his inheritance tax payment. The other situation where market price on date of death may not be a fair valuation, could be where prices took a sharp drop immediately after the date of death. At present there is a provision in the federal estate tax which will safeguard the estate from this unfortunate event. The executor now has the option, in the case of property not disposed of within one year, between valuing the shares as of the date of decedent's death or one year thereafter.⁴⁹ If these provisions were widely adopted, there would seem to be no good reason for retaining the blockage rule.

Louis P. Pfeiler

TORTS — NEWSPAPERS — PUBLISHERS OF A NEWSPAPER UNDER NO OBLIGATION TO ACCEPT ADVERTISING. — Defendant, the owner and publisher of the only three newspapers with a general circulation in the Worcester, Massachusetts, area, refused to accept for publication advertising tendered by the corporate plaintiff, who was engaged in buying and selling real estate in the same area. Plaintiffs, contending that such advertising was an absolute necessity to the carrying on of their business, brought an action in tort. The Superior Court sustained defendant's demurrer. On appeal, *held*: affirmed. A publisher of a newspaper who enjoys a virtual monopoly in a given area may refuse to accept an advertisement if he sees fit to do so, *J. J. Gordon, Inc. v. Worcester Telegram Publishing Co.*, 177 N.E.2d 586 (Mass. 1961).

Plaintiff's action was predicated on an allegation that a newspaper was a "public

⁴⁵ *Helvering v. Safe Deposit & Trust Co. of Baltimore*, 95 F.2d 806 (4th Cir. 1938); *Citizens Fidelity Bank & Trust Co. v. Reeves*, 259 S.W.2d 432 (Ky. 1953); *State v. Wagner*, 233 Minn. 286, 46 N.W.2d 676 (1951).

⁴⁶ 178 N.E.2d 240 (Ohio 1961).

⁴⁷ *In Re Sears' Estate*, 178 N.E.2d 240 (Ohio 1961); *State v. Wagner*, 233 Minn. 286, 46 N.W.2d 676 (1951).

⁴⁸ *State v. Wagner*, 233 Minn. 286, 46 N.W.2d 676 (1951).

⁴⁹ 26 U.S.C. § 2032 (1959).

utility" thus attempting to bring it under section 763 of the Restatement of Torts which says:

One who engages in a business which carries with it a duty to serve without discrimination and on proper terms all who request his service and who, without legal excuse refuses so to serve another is liable to the other for the harm caused thereby.¹

This section is an exception to section 762 which states:

One who causes intended or unintended harm to another merely by refusing to enter into a business relation with the other, or to continue a business relation terminable at his will is not liable for that harm.²

The court in *Gordon* held the allegation that defendant is a public utility to be a conclusion of law and not admitted by the demurrer and further stated that a newspaper was not a public utility. It drew a distinction between a so-called private enterprise and a business affected with a public interest with the implication that this latter classification is similar to a public utility in having the effect of limiting freedom to indiscriminately refuse to contract with the public. The question then arises: Granting the fact that a newspaper is not a public utility, is it so impressed with a public use, or does it affect a public interest to such an extent, that justice would be served only by treating it as similar to a public utility and applying the limitations on the right to contract incident to that latter classification of business?

In *Charles Wolff Packing Co. v. Court of Industrial Relations*,³ the United States Supreme Court was called on to decide whether an act declaring certain enterprises to be affected with a public interest was valid. This problem arose from that Court's earlier decision in *Munn v. Illinois*,⁴ which allowed a broader classification of these enterprises. In deciding *Wolff*, the Court formulated three groups of businesses which assume the characteristics sufficient to clothe them with a public interest.

- (1.) Those which are carried on under the authority of a public grant or privilege. . . . Such are the railroads, other common carriers, and public utilities.
- (2.) Certain occupations regarded as exceptional. . . . Such are those of the keepers of inns, cabs and gristmills.
- (3.) Those businesses which though not public at their inception which may be fairly said to have arisen to be such. . . . (where) the owner by devoting his business to the public use, in effect grants the public an interest in that use . . . although the property continues to belong to its private owner. . . .⁵

Another interpretation of the prerequisites necessary to cause a business to be affected with a public interest was expressed in the Iowa case of *Bowlin v. Lyons*.⁶ Here the court stated:

The persons engaged in these vocations are in some sense servants of the public, and in conducting their business they exercise a privilege conferred upon them by the public, and they have secured to them by the law certain privileges and rights which are not enjoyed by members of the public generally.⁷

In *Commonwealth v. Boston Transcript Co.*,⁸ the Massachusetts Supreme Court, confronted specifically by the prerequisites in *Wolff*, said that in some circumstances

1 RESTATEMENT, TORTS, § 763 (1939).

2 *Id.* § 762.

3 262 U.S. 522 (1923).

4 94 U.S. 113 (1876).

Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *Id.* at 126.

5 262 U.S. at 535.

6 67 Iowa 536, 25 N.W. 766 (1885).

7 *Id.* at 768.

8 249 Mass. 477, 144 N.E. 400 (1924).

the publisher of a newspaper may, perhaps, be held to fall within the third class of business clothed with a public interest but implied this was only in relation to the dissemination of news, and where there was an attempt by the legislature to force a publisher to publish findings of a minimum wage board they refused to hold "that newspapers are affected with a public interest so as to stand on less favorable ground . . . than the ordinary person."⁹

The court in *Gordon* admitted that the public has a strong interest in the operation of the newspaper publishing business, but as in *Boston Transcript*, distinguished between its interest in the dissemination of news and its interest in the paper's function as a publisher of advertisements.

In any given case, it may be difficult to ascertain just what interest is involved, or to determine whether it deserves protection. . . . The only interest the community can have, in any individual merchant advertising without being discriminated against, is the interest in obtaining knowledge which is essential to the wise expenditure of money. Generally speaking, the law has not seen fit to protect such interests as yet.¹⁰

In *Mack v. Costello*,¹¹ the Supreme Court of South Dakota was presented with an injury to the plaintiff much greater than that present in *Gordon*. Defendant, owner of the only newspaper in the area, refused to publish a legal notice offered by the plaintiff, thus depriving him of the only means available to retain the legal right of excluding his land from the corporate limits of the city. The court rejected the theory that a newspaper is an enterprise affected with a public interest and that the publisher has special rights or duties conferred on him by his relation to the public, as required by *Bowlin*, thus imposing a duty on him to deal indiscriminately with the public.

The publisher, in publishing a newspaper, assumes no "office, trust, or station," in a public sense, or enters into any public or contractual relation with the community at large. It may be said that the publishing of a newspaper is a quasi-public business; but, if so, it is only because, from long existence, it is regarded as a public necessity. But as much might be said of the hardware or grocery business, and yet no one would contend that a grocer or hardware dealer could be compelled . . . to sell his wares if he preferred to keep them on his shelf.¹²

Almost every case in which the public nature of a newspaper business is at issue must contend, at the outset, with an early Ohio decision, *Uhlman v. Sherman*,¹³ wherein it was specifically held that because of the great importance of the newspaper, the favors extended to it by the law in providing for the publication of official notices, and the general dependence, interest and concern of the public therein, the newspaper has become clothed with a public interest, and that it therefore must be classed with warehouses, public wharves, inns, and many kindred lines of business which have been held so clothed.¹⁴

A recent New York decision,¹⁵ gives an indication of how courts have generally contended with *Uhlman*. That case involved a situation similar to the instant case. Plaintiff claimed that the only general newspaper in the Poughkeepsie area refused to publish his advertisements, causing his business to suffer. The court, in rejecting

9 *Id.* at 402.

10 80 U. PA. L. REV. 314, 315, n.12 (1931).

11 32 S.D. 511, 143 N.W. 950 (1913).

12 *Id.* at 951.

13 *Uhlman v. Sherman*, 22 Ohio N.P.(n.s.) 225, 31 Ohio Dec. 54 (C.P. 1919).

14 *Id.* at 63.

It is the best advertising medium for local merchants. . . . We therefore believe that a newspaper company when it has advertising space to sell has no right to discriminate against a local merchant who in his application for advertising, complies with the law and the reasonable rules of said newspaper company. . . . *Ibid.*

15 *Poughkeepsie Buying Serv. v. Poughkeepsie Newspapers*, 205 Misc. 982, 131 N.Y.S.2d 515 (Sup. Ct. 1954).

the rationale of *Uhlman*,¹⁶ noted that the District Court of Michigan,¹⁷ and the Supreme Court of Louisiana,¹⁸ have also expressly refused to follow *Uhlman*, and that other courts have spoken on the same subject, without citing the case, and have arrived at a different conclusion.

An example of this latter statement is found in another case quite similar to the instant case, *Shuck v. Carroll Daily Herald*.¹⁹ The court discussed newspapers from a historical viewpoint to ascertain whether they were ever clothed with a public interest at common law.

The rules forbidding the latter [carriers and inns] to discriminate between customers were established, yet nobody goes so far as to even claim that there is any holding at common law under which a newspaper was bound by the same rules.²⁰

The Iowa Court rejected the decision in *Uhlman* indirectly by holding that the newspaper business is an ordinary business.

It is a business essentially private in its nature — as private as that of the baker, grocer, or milkman, all of whom perform a service on which, to a greater or less extent, the communities depend, but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with the public use.²¹

Thus, it is submitted that the court in *Gordon* was not inconsistent with authority in its admission that the public has a strong interest in the operation of a newspaper and its subsequent refusal to grant relief on the ground that a newspaper is not affected with a public interest. There is a matter of degree separating the two.

The expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.²²

Having eliminated newspapers from the class of public utilities and from those enterprises creating such a close relationship with the public as to warrant inclusion in the class of enterprises "affected with a public interest," the question in *Gordon* narrows to one involving the right of an owner of a private enterprise to exercise freedom of contract, and the circumstances in which this freedom may be limited by considerations other than the public or quasi-public nature of the enterprise.

The Massachusetts Supreme Court had stated in the *Boston Transcript Co.* case that "the right to acquire, possess, and protect property includes the right to

16 "This court has also reached the conclusion that the rationale of said Ohio decision is not to be followed in this state in that it is contrary to general and fundamental doctrine laid down in our decisional law." *Id.* at 517.

17 *In re Louis Wohl, Inc.*, 50 F.2d 254, 256-57 (E.D. Mich. 1931):

Coming to the specific application of the doctrine invoked, the only case specifically holding a newspaper to be clothed with a public interest is the decision of the nisi prius court of Ohio in the case of *Uhlman v. Sherman*. It is interesting to note that there the nisi prius judge frankly admitted that learned and diligent counsel on both sides were unable to find a parallel case, and he himself had been unable to find one. * * * I find . . . that there is no such trend of decision as the trustee urges. A newspaper is not at the common law a business clothed with a public interest.

18 *Friedenberg v. Times Publishing Co.*, 170 La. 3, 127 So. 345 (1930). The court said:

The weight of authority is that the publishing of a newspaper is a strictly private enterprise, and the publishers thereof are free to contract and deal or refuse to contract and deal with whom they please. . . . There is, however, one case holding the contrary doctrine, to wit, *Uhlman v. Sherman*. But we prefer to follow the weight of authority.

19 215 Iowa 1276, 247 N.W. 813 (1933).

20. *Id.* at 814.

21 *Id.* at 815.

22 *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 536 (1923).

make reasonable contracts, which shall be under the protection of law."²³ The *Bowlin* case stated in this regard that the law does not regulate the citizen in the conduct of his private business. "In all matters of mere private concern he is left free to deal with whom he pleases, and to make such bargains as he is able to make with those whom he does deal."²⁴

However, this right to freedom of contract (which necessarily includes freedom to refuse to contract) is limited and not absolute. The court in *Gordon* stated that the right to refuse to accept advertisements is limited to situations where such refusal is not by one whose business has the necessary close connection with the public, as has been discussed, and also, where such refusal is not in furtherance of an illegal monopoly.

Thus, in the *Poughkeepsie* case, there was an allegation by the plaintiff that defendant's refusal to accept his advertising was a result of the persuasion and coercion of local merchants in competition with the plaintiff. The court stated that refusal to maintain trade relations with any individual is an inherent right which any person may exercise, but that this right is limited to situations where there are "absent factual allegations connecting them with a duly pleaded fraudulent conspiracy or with furthering an unlawful monopoly."²⁵ Relief was refused on the ground that the conspiracy was not specifically pleaded.

A review of the cases makes it apparent that the reasons stipulated for the refusal to contract are important in determining whether such refusals are sufficiently inimical to the public interest as to warrant limitation. In *Gordon*, the plaintiff alleged that defendant's refusal was without just cause and was motivated by "malice." However, the court ruled that allegations of this type are not admitted by a demurrer, and thus, no reason was actually passed on. In other cases, the refusal springs from a good reason, such as failure to pay a bill owed for previous advertising.²⁶

Several cases, among them *Mack v. Costello*,²⁷ and *Lepler v. Palmer*,²⁸ hold that even a refusal resulting from caprice, prejudice, or malice is not sufficiently adverse to the public welfare to require a limitation of the publisher's right. The remaining class of cases, where the refusal is grounded on a conspiracy to injure plaintiff or in furthering an unlawful monopoly, as *Gordon* points out, presents an essentially different question. While the general holding is that one engaged in an entirely private business has the right to exercise his own independent discretion as to persons with whom he may deal, where that reason is one of these two, the court will limit the owner's right to refuse.²⁹

In *Gordon*, the Court expressly admitted that the Worcester Publishing Company enjoyed a virtual monopoly in the area; it follows from this that since the plaintiff could have no recourse to another newspaper, the existing monopoly prevented him from utilizing a substantial means of communicating with the public, a

23 144 N.E. at 401.

24 25 N.W. at 767.

25 131 N.Y.S.2d at 518.

26 See, e.g., *In re Louis Wohl, Inc.*, 50 F.2d 254 (E.D. Mich. 1931).

27 It is not claimed by the defendant that there was not room in the columns of her paper for said notice, nor did she give any reason for her refusal to publish the same, other than the fact that she did not desire to publish it, and, being the absolute owner and manager of said paper, she was under no obligation, legal or otherwise, to publish it. * * * Nor may the court inquire into the motives of the appellant. Whether she is actuated by malice or con-
nivance, or mere caprice, is wholly immaterial. 143 N.W. at 951.

28 150 Misc. 546, 270 N.Y.S. 440 (Sup. Ct. 1934).

It is the well settled law of this State that the refusal to maintain trade relations with any individual is an inherent right which every person may exercise lawfully, for reasons he deems sufficient or for no reasons whatever, and it is immaterial whether such refusal is based upon reason or is the result of mere caprice, prejudice, or malice. *Id.* at 444.

29 See text at note 25 *supra*.

necessity called for by the nature of his business. The question then arises: Is the Court in *Gordon* consistent when it states that the presence of a monopoly will limit contractual freedom in some circumstances and yet will openly condone an existing monopoly which is in fact injuring a third party?

A monopoly has been defined as "the sole power of dealing in an article, or doing a specified thing, either generally or in a specific area."³⁰ The Supreme Court of Massachusetts in 1950 defined a monopoly as:

A combination, organization or entity so extensive and unified that its tendency is to suppress competition, to acquire a dominance in market and to secure the power to control prices to the public harm with respect to any commodity which people are under a practical compulsion to buy.³¹

The Sherman Antitrust Act³² was passed to prevent the formation of this type of arrangement involving an interference with interstate trade, and the states themselves have passed statutes for the purpose of preventing the suppression of trade within a state.³³ It is the policy of these federal and state antitrust laws to extend rather than restrict the common law rules as to monopolies, and to remedy their inadequacies, for example, by giving a right of action to third persons injured by a monopoly.³⁴ However, monopolies have always been considered odious at common law and inimical to the public welfare.³⁵ Therefore, it follows that a court confronted with a monopoly must take a stand consistent with the common law as declared in antitrust statutes. In the same spirit as this reasoning, the court in *Kay Dunhill, Inc. v. Dunhill Fabrics, Inc.*,³⁶ stated that "it is the duty of the courts to avoid sustaining a monopoly unless it be demanded by law."

Lorain Journal Co. v. United States,³⁷ is helpful in delineating the type of monopoly present in *Gordon*. In that case, defendant newspaper publisher enjoyed

30 *Tooke & Reynolds v. Bastrop Ice & Storage Co.*, 172 La. 781, 135 So. 239 (1931). The court said further:

It is considered that a monopoly exists whenever all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of *one man* or set of men as practically to bring the *handling or production* of the commodity or thing within such single control, to the exclusion of competition or free traffic therein. *Ibid.* (Emphasis by the court.)

31 *Commonwealth v. McHugh*, 326 Mass. 249, 93 N.E.2d 751, 759 (1950).

32 26 STAT. 209 (1890), 15 U.S.C.A. § 1.

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 . . . shall be deemed guilty of a misdemeanor. . . *Id.* at § 2.

33 MASS. GEN. LAWS ANN. ch. 93, § 1 (1954).

34 *Clark Oil Co. v. Phillips Petroleum Co.*, 56 F. Supp. 569 (D. Minn. 1945), *aff'd*, 148 F.2d 580 (8th Cir. 1945), *cert. denied*, 326 U.S. 734 (1945).

Under the Clayton Act, the right is not confined to persons in privity with the wrongdoer, but is given to anyone who has suffered injury to his business or property by reason of the wrongful acts. Under this law a civil action may be maintained for "threefold the damages by him sustained." *Id.* at 582.

35 See, e.g., *Schwab v. Moving Picture Mach. Operators Alliance*, 165 Or. 602, 109 P.2d 600 (1941).

Monopolies and combinations in restraint of trade are generally denounced as odious, intolerable, and contrary to public policy and common right. They are regarded as repugnant to the spirit of our government and institutions, and are frequently forbidden by constitutional as well as statutory enactment. Indeed, as the term is generally employed, injury to the public is implied from its use. Monopoly is said to be destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred on corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it. *Id.* at 607.

36 44 F. Supp. 922, 936 (S.D. N.Y. 1942).

37 342 U.S. 143 (1951).

a substantial monopoly of the mass dissemination of local and national news (including advertising) in the area, with a 99% coverage of the community's families. After the establishment of a competing radio station, the publisher refused to accept local advertisements from those who advertised over the radio station. The Supreme Court held that the publisher was engaged in an attempt to monopolize interstate commerce in violation of section 2 of the Sherman Antitrust Act and was properly enjoined from continuing the attempt. The Court stated:

The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases. . . . The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act.³⁸

Lorain Journal differs in two respects from *Gordon* in that the injury complained of was not to a third person but to a competitor, and in addition, the Sherman Antitrust Act applied. However, the fact that an interference is with intrastate trade, excluding the application of the Sherman Act, should make no difference in the result. Since state antitrust laws have been extended to cover injuries to third parties, it appears that the decision in *Gordon* is contrary to the purpose of the antitrust statutes as expressed in *Lorain Journal*, and in *Klors, Inc. v. Broadway-Hale Stores*,³⁹ where the court stated that the aim of this legislation is "to protect the public from harm which follows from concerted or monopolistic conduct designed to acquire control of a market, usually competitive, to which the public must ultimately resort. . . ."⁴⁰

The court in *Gordon*, by its failure to concern itself with the presence of a monopoly enjoyed by the defendant, was in essence condoning its existence. It "failed to protect the public from harm" and while this neglect may not be sufficient to demand reversal, its effect is to promote the evil effects of monopolies in the field of communications, which, as is said in *Mansfield Journal Co. v. Fed. Communications Comm.*,⁴¹ are "contrary to the public interest even if not in terms proscribed by antitrust laws."

Hurley D. Smith

38 *Id.* at 155.

39 255 F.2d 214 (9th Cir. 1958).

40 *Id.* at 231.

41 180 F.2d 28, 33 (D.C. Cir. 1950).