Notre Dame Law Review

Volume 30 | Issue 1 Article 7

12-1-1954

Recent Decisions

James E. Murray

Edmund L. White

Peter H. Lousberg

Wilbur L. Pollard

RECENT DECISIONS

COURTS — CONTEMPT — PROHIBITION OF PHOTOGRAPHS AT ARRAIGNMENT.—*State v. Clifford,*....Ohio App....., 118 N.E.2d 853 (1954). One Giaimo, a co-worker of the defendant newspaper reporter, was warned by the court that no photographs could be taken in the courtroom or chambers at the arraignment of a former judge, to take place the following day. In defiance of this order, Giaimo, assisted by the defendant Thomas and directed by the defendant Clifford, took a picture at the arraignment proceedings. As a result of this action, the defendants were cited for contempt of court and found guilty.

Whether or not the prohibition of photographs at an arraignment is an abuse of the judge's discretion in regulating courtroom procedure and decorum was the question presented to the court of appeals. The court decided that it was not.

In general, contempt is a disregard of, disobedience to, or disorderly or insolent interruption of, the proceedings of a legislative or judicial body, In re *MacKnight,* 11 Mont. 126, 27 Pac. 336 (1891), and was an offense at common law. It was considered an offense against the court as an organ of public justice and, as such, was punishable by the court. *Meyers v. United States,* 264 U.S. 95, 103 (1923). Since a court has an inherent right to conduct its work and sessions without disturbance, one who does disturb that peace and good order is guilty of contempt. In re *Seed,* 140 Misc. 681, 251 N.Y. Supp. 615 (Sup. Ct. 1931).

Though this power to punish for contempt has been used sparingly in the past, it has been generally held that it is completely within the discretion of the injured court in determining and dealing with contempt. *Thompson v. Thompson,* 197 App. Div. 228, 188 N.Y.Supp. 785 (2d Dep't 1921). A wilful failure to comply with a court order is such an interference with the administration of justice as to constitute a contempt. In re *Sylvester,* 41 F.2d 231 (S.D. N.Y. 1930).

For quite a long period of time the test of contempt was whether or not the contemptuous act was done within the physical confines of the courtroom. *Batchelder v. Moore,* 42 Cal. 412 (1871). An action committed outside the building which housed the court could not be punished by the abused court even though the work of the court may have been seriously hampered. In re *Oldham,* 89 N.C. 23 (1883).

Although the Supreme Court expressly overruled *Toledo Newspaper Co. v. United States,* 247 U.S. 402 (1918) in *Nye v. United States,* 313 U.S. 33 (1941), the words used seem to vindicate the instant decision, 313 U.S. at 52, "It was not misbehavior

in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business." In the *Toledo* case, *supra,* a newspaper publisher had criticized the action of a federal court in a pending case. The instant case involved a physical action within the confines of the courtroom in defiance of the express warnings of the judge.

The authority to act summarily against publishers and their associates has generally been upheld in the United States. *Respublica v. Oswald,* 1 Dall. 319 (U.S. 1788). When a publication will tend to obstruct justice is a question of degree which a trial court intimately conversant with the particular situation, must pass upon. Freedom of the press, though guaranteed by the Constitution, cannot be exploited in a manner which destroys the equal and correlative right of an accused to a fair and impartial trial. U.S. CONST. AMEND. I; *Pennekamp v. State,* 328 U.S. 331 (1946).

In regard to specific instances of the taking and publication of photographs of courtroom proceedings, it has been held that pictures of a prisoner on the way to the courtroom may be prohibited and any photographs taken in defiance of such a court order may be confiscated. *Ex Parte Sturm,* 152 Md. 114, 136 Atl. 312 (1927). In another case strikingly similar to the instant case, a newspaper photographer who merely took pictures of the corridors of the courthouse was found guilty of contempt. In re *Seed, supra.* The court there held that the snapping of photographs, even those taken outside the immediate area of the courtroom, may be done in such a manner as to disturb the decorum of the court and it was properly within the discretion of the trial judge to ban such an action.

While the freedom conferred upon the press has been given a broad construction by the courts, it has never been interpreted as an absolute license to publish anything, free from all civil or criminal liability. *Shaefer v. United States,* 251 U.S. 466 (1919); *Layne v. Tribune Co.,* 129 Ala. 349, 146 So. 234 (1933). It is apparent then that this right does not deprive the state of its sovereign duty to exercise police power in preserving law and order. *Barton v. City of Bessemer,* 234 Ala. 20, 173 So. 626 (1936). Yet this "due administration of justice" has received a much more qualified definition in recent years and the privileges granted to the nation's press have increased. *See Bridges v. California,* 314 U.S. 252, 265 (1941).

In the instant case, the misbehavior was direct, in the presence of the court, and in violation of an express command; contempt both at common law and under the state statute. OHIO REV. CODE § 2101.23 (1953). It is submitted that the court, having authority

to regulate the character of proceedings within its own bar, properly exercised its discretion in ordering that no pictures be taken.

Searching beneath the surface of the facts of the case, it becomes apparent that the sole purpose of the court was not merely to maintain order within its domain but it also sought to protect the defendant from unwarranted and damaging publicity. The result is that the court has intervened to protect the defendant from prejudicial publicity and to insure a fair trial.

The aspect of the instant case which distinguishes it from the vast majority of contempt proceedings against the press is the fact that the court was punishing the defendant not for the publication of the photograph, but for the momentary disturbance caused in the courtroom by the flash of the camera bulbs. The net effect is the same — the complete prohibition of courtroom photographs.

An excellent presentation of the difficulties encountered by the courts in reconciling the right of the press to bring pictures of current news value to the public and the duty of the court to maintain at all times a proper decorum in the courtroom is contained in *United States v. Sullens,* 36 F.25 230, 238 (S.D. Miss. 1929):

> The administration of justice and the freedom of the press, though separate and distinct, are equally sacred, and neither should be violated by the other. The press and the courts have correlative rights and duties and should cooperate to uphold the principles of the Constitution and laws, from which the former receives its prerogative and the latter its jurisdiction .... This court must be permitted to proceed with the disposition of its business in an orderly manner free from outside interference obstructive of its constitutional functions. This right will be insisted upon as vital to an impartial court, and, as a last resort, as an individual exercises the right of self-defense, it will act to preserve its existence as an unprejudiced tribunal.

The court in the instant case not only followed accepted judicial precedent, but has also relied upon approved ethical standards for the legal profession. See CANONS OF JUDICIAL ETHICS OF THE AMERICAN BAR ASSOCIATION, CANON No. 35 (1947). The court did not seek to ban the press entirely; it sought only to prevent disturbances which would have or might have presented the arraignment proceedings in a "circus" light. The major significance of the instant case was not the extension of judicial discretionary powers but the vigorous enforcement of a sometimes neglected, though long-standing, judicial duty to maintain a detached air in the courtroom for the protection of the accused.

James E. Murray

DEEDS—LEGAL DELIVERY—EFFECTIVENESS OF UNRECORDED MUTUAL DEEDS TO REALTY BETWEEN HUSBAND AND WIFE.—*Kniebbe v. Wade,* 161 Ohio St. 294, 118 N.E.2d 833 (1954). The plaintiff, daughter of the decedent and stepdaughter of the defendant, brings this action to determine her rights in certain realty in which the decedent owned an undivided one half interest. After obtaining a divorce from the plaintiff's mother, the decedent married the defendant and thereafter acquired four parcels of real estate which he and his wife owned as tenants in common. They then executed and exchanged mutual deeds to each other for their undivided one half interests. This interchange of deeds was accomplished in the office of a notary public who acknowledged both transactions. The unrecorded deeds were taken to their home by the wife and placed in a box readily accessible to both. Upon her husband's death, the defendant recorded the four deeds from the decedent to her. The daughter, upon learning of her father's death, brought an action for declaratory judgement against her stepmother, the decedent's surviving widow, for an order declaring her right, title and interest in the four parcels of realty.

The court of common pleas, whose decision was subsequently affirmed by the court of appeals, entered judgement for the defendant declaring that the four deeds vested title in the wife. In reversing these decisions, the Supreme Court of Ohio in essence held that the deeds were testamentary in character and invalid for lack of a legal delivery. The question to be resolved by the court was whether or not there was a valid delivery and acceptance as a present, immediate, and unconditional conveyance of title from one to the other.

It is a settled principle in the law of real property deeds that, in order to constitute a valid conveyance, there must be both a delivery by the grantor and an acceptance by the grantee. *Dobbs v. First Nat. Bank of Atlanta,* 65 Ga.App. 796, 16 S.E.2d 485 (1941); *Tighe v. Davis,* 283 Mich. 244, 278 N.W. 60, 62 (1938). The delivery by the grantor must be accompanied by an intention to pass a present, immediate and unconditional title. *Seibert v. Seibert,* 379 Ill. 470, 41 N.E.2d 544 (1942). The Supreme Court of Georgia recently reaffirmed the principle that a primary requisite for the validity of a conveyance is the necessity of delivery after execution. *Giuffrida v. Knight,* 210 Ga. 128, 78 S.E.2d 29 (1953). These views were upheld in the instant case, with the main issue centering upon what constitutes a valid delivery. In *Newton and Seeley v. Bealer,* 41 Iowa 334 (1875), the plaintiffs, heirs of the decedent, brought an action to set aside his deed on the grounds that there was no valid delivery. The facts showed that the decedent made a deed and left it with his papers; the

defendent recorded the deed upon the latter's death. The court, in holding for valid delivery, reiterated the principle that although delivery is an essential element of a deed, this does not mean the actual physical transfer of possession since it depends largely on the surrounding circumstances coupled with the intent of the grantor.

At common law, a deed was in its embryonic stage until delivery after which it came into its own existence as a separate legal conveyance. In an historical analysis, the court in *Willingham v. Smith*, 151 Ga. 102, 106 S.E. 117 (1921), stated 106 S.E. at 118:

> In the early English cases the delivery of a deed of grant was regarded as in effect the symbolical transfer of the land itself, analogous to livery of seisin. Hence a physical or manual delivery was deemed essential. Contrary to the doctrine of the earlier cases, the modern English view seems to be that delivery is largely a question of intention.

As late as 1953, this case was cited and the import of the analysis was explained and approved in *Giuffrida v. Knight, supra.* The intent to part with control can be gathered from the surrounding circumstances. Whether or not the grantor intended to reserve the *locus poenitentiae,* is a true test of a valid conveyance receiving almost universal recognition. 7 THOMPSON, REAL PROPERTY § 4113 (Perm. Ed. 1940). In the present decision, the court adopted a very strict interpretation of delivery, seemingly giving insufficient weight to the intention of the grantor.

Where a deed was placed in a trunk by the decedent and not found until after his death, the court in *Alford v. Henderson,* 237 Ala. 27, 185 So. 368 (1938), held that a deed could not be delivered after the death of the grantor. The distinction determining validity of delivery was clearly stated, 185 So. at 369:

> Although the actual custody of the instrument has not passed from the hands of the grantor, any words or acts or both clearly showing an intent that the deed be presently effective, become the deed of the grantee, subject to his or her control, and is held by the grantor or a third person as a mere agent or custodian of the grantee, and evidence an effectual delivery. But where the grantor reserves the *locus poenitentiae,* that is to say, not a mere custody, but a right to withdraw from an incompleted transaction, reserves control over the document in his own right, there is no delivery.

Following this principle, the possession of the deed or the property by the grantor during his lifetime does not invalidate the delivery. Delivery was affected and assent evidenced in *McDevitt v. Morrow,* 57 Ohio L.Abst. 281, 94 N.E.2d 2 (Ct. App. 1950), where the deed was placed in a safety deposit box and carried under joint names. The intent, expressed or implied,

together with a like acceptance were, once again, the controlling factors. The presumption that the possession of a deed by the grantee named therein evidences a valid delivery is supported by a number of decisions. *Cf. Rivera v. Ron,* 51 Cal. App.2d 702, 125 P.2d 517 (1942); *Lewis v. Tinsley,* 66 S.D. 613, 287 N.W. 507 (1939).

The court in the instant case treats the deeds as not having been delivered since the decedent had power and control over them. The proposition that one who executes a deed and retains possession of it until his death dies in full ownership of the property has been judicially recognized. *Alward v. Lobingier,* 87 Kan. 106, 123 Pac. 867 (1912). But it is also true that it will not be inoperative merely because the grantor retains possession of the deed during his lifetime, if there is an intention of delivery evidenced by words or acts. *Ferrell v. Stinson,* 233 Iowa 1331, 11 N.W.2d 701 (1943). The controlling factor is the recognition of the intent of the parties. *Huxley v. Liess,* 226 Iowa 819, 285 N.W. 216 (1939); *Mathewson v. Shields,* 184 Wash. 260, 50 P.2d 898 (1935). This principle is stated clearly in 13 O. JUR., *Deeds* 876 § 63 (1st ed. 1930), where it is said that: "No particular form or ceremony is essential: delivery may now be made by words and acts, *or either,* if accompanied with the intention that they shall have that effect." (Emphasis added) The more reasonable approach is that stated by the court in *Newton and Seeley v. Bealer, supra,* at 339:

> Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, there is, it seems to us, but little reason for saying that his deed shall be inoperative, simply because during life he might have done that which he did not do. It is much more consonant with reason to determine the effect of the deed by the intention existing up to the time of death, than to refuse to give it that effect because the intention might have been changed.

Deeds conditioned on survivorship are testamentary in character and do not convey title since it is felt that they are an attempt to avoid administration or the jurisdiction of a probate court. In *Landau v. Landau,* 409 Ill. 556, 101 N.E.2d 103, 107 (1951), a deed was held to be testamentary in character where the grantor conditioned them on his death. There was a retention of either control or possession which negates a transfer of a present interest. This should be done by a will, as required by law, and hence these deeds were invalid. The court, in the present decision, states that the deeds were testamentary in character because they were intended to be conditioned on survivorship. The purpose was to prevent interference from outsiders. In *Arnegaard v. Arnegaard,* 7 N.D. 475, 75 N.W. 797

(1898), a case cited as controlling by many courts, the purpose for which the deeds were kept a secret was to prevent the wife from acquiring interest. Here, the court recognized the deed, presuming assent if it was beneficial to the grantee, and noted the purpose to be, not the conditioning on death which would have made it testamentary, but the protection of the conveyance. There is a similarity of intent between this case and the present case with the exception that in the case at bar, the intent was not recognized as the controlling factor and the deeds were held invalid. The delivery of a deed during a grantor's lifetime changes its effect where its retention would have made it testamentary in character. *Nowakowski v. Sobeziak,* 270 Ill. 622, 110 N.E. 809 (1915).

A case similar to the present factual situation in regard to the issue of delivery, is In re *Tummond's Estate,* 158 Misc. 592, 287 N.Y.Supp. 386 (Surr. Ct. 1936). In this case, the husband and wife executed mutual deeds conveying their home and property to the other in the event of death. The husband placed the deeds in the home safe to which the wife had access and could have compelled delivery if she desired it. The deeds were not recorded until after the husband's death, at which time, his deeds were found but hers were not. The deed was held valid even though there had been no delivery of possession since there were sufficient facts or circumstances to show an intent on the part of the grantor to convey. With these present, the actual possession of the instrument itself is of secondary importance. The court reiterated the sound proposition that all cases seem to be governed by the question of intent. Substantiating its decision, the court cites *Fisher v. Hall,* 41 N.Y. 416 (1869), as the leading case declaring that there must be other facts or surrounding circumstances which evidence an intent to part with the title. Even more explicitly, it cites *Wallace v. Berdell,* 97 N.Y. 13 (1884), where the court quoted from 4 *Kent's Com.* 456, 97 N.Y. at 22-3:

> If both parties be present, and the usual formalities of execution take place, and the contract is to all appearances consummated without any conditions or qualifications annexed, it is a complete and valid deed, not withstanding it be left in the custody of the grantor.

These cases resound with the authoritative proposition that intent is to govern—a clear and logical approach to the problem of giving effect to a grantor's conveyances. The situation in In re *Tummond's Estate, supra,* was similar to that in the instant case, nevertheless, the decisions are contrary. The lower courts, in holding the deeds valid, should have been affirmed in view of past decisions in the majority of jurisdictions.

The decision of the Supreme Court of Ohio was based on the proposition that, since there was not delivery and acceptance with a present, immediate and unconditional conveyance of title, the deeds in question were testamentary in character and inoperative to pass title. Although citing many cases to support its contention that there was and could have been no delivery, the court avoided the question of intention, which, according to the majority of jurisdictions, is the controlling factor. Even though some control had been retained by the grantor, nevertheless, it would appear that this should be considered in conjunction with the intent of the grantor and not to the exclusion of it. In so emphasizing the control, it adopted a narrow and strict interpretation of the facts. This would seem to be against the trend in the courts today to give effect to the intention behind an act. Whether or not the courts will further narrow their approach, will only be determined as such cases are adjudicated in the future.

Edmund L. White

INJUNCTION—UNFAIR COMPETITION—CONTRACT NOT TO COMPETE OR USE NAME.—*Madison v. La Sene,* ....Wash.2d...., 268 P.2d 1006 (1954). Plaintiff and vendor, Andrew La Sene, entered into a contract for the sale of an upholstery business including the leasing of the premises, the business's good will and the use of the name, "La Sene's Custom Upholstery." The vendor covenanted not to engage in competition for five years within a radius of five miles. When plaintiff terminated his month-to-month lease on the premises, vendor, irate over the termination, established his inexperienced son, Ray, who knew of the covenant but was not a party thereto, in the upholstery business at the old location and used the name "La Sene".

The plaintiff was granted an injunction in the lower court on the basis of conspiracy, fraud and deceit. The defendants, father and son, were both ordered to obey, strictly, the terms of the original covenant; that is, they were enjoined from carrying on an upholstery business within a five mile radius under the name "La Sene" for five years. The son appealed on the grounds that he was not a party to the original restrictive covenant.

The issue on appeal went to the question of whether the son, Ray La Sene, could be enjoined from carrying on an upholstery business within a five mile radius under the La Sene name.

The supreme court affirmed the injunction's prohibition of the use of the name, basing its decision on a theory of conspiracy to engage in unfair competition. The latter part of the injunction, restraining appellant personally, was modified permitting him,

under another name but not in conjunction with his father, to enter the upholstery business.

Good will, included in the sale of a going business, has often been the subject of litigation. The crux of the court's duty lies in determining what preventive steps it should take to protect the purchaser's property right in good will from any unfair competition by the vendor.

The granting of good will does not, of course, require a covenant by the vendor not to compete. *Warp v. Warp,* 307 Ill. App. 205, 30 N.E.2d 148 (1940); *Ranft v. Reimers,* 200 Ill. App. 386, 65 N.E. 720 (1902); *Mouton v. Herbert,* 199 So. 172 (La. 1940). But because the vendor has not convenanted to refrain from competing, does not mean he is free to resort to means of competition which would jeopardize the good will which he has sold. The rule recognized in the above three cases was stated as follows in *Warp v. Warp, supra,* 30 N.E.2d at 148:

> The rule is that the vendor of a business, or interest therein, including the good will, may re-enter a rival or competing business in an adjacent locality and publish, advertise for and solicit customers, if there was no covenant . . . not to re-enter a like business.

Direct solicitation of old customers is a limitation on this rule however. In *Ranft v. Reimers, supra,* the court said, 65 N.E. at 722:

> We do not think that the defendant ought to be allowed, after selling and warranting a good will to the complainants, to purposely endeavor to prevent their receiving the benefit of it [good will], or to attempt to disturb them in its enjoyment.

In that case, the court enjoined the defendant from soliciting old customers directly, and also from using the former telephone number of the business which she had sold.

In the situation where the vendor agrees not to re-enter competition for a reasonable time within a reasonable area, equity will come to the aid of the purchaser and enforce the covenant. The extent of aid depends upon the court's construction of the terms. In *Railway Audit and Inspection Co. v. Pendleton,* 175 La. 4, 142 So. 781 (1932), defendant sold his detective agency to plaintiff, covenanting not to "enter into a similar or comparative line of business" for two years. Defendant then entered the employment of a rival firm, giving wide publication to the event. The court denied the plaintiff an injunction on the ground that agreements in the restraint of competition should be strictly construed. The court held that entering the employment of another was not entering into a competing business. *Accord, May v. Johnson,* 13 La. App. 521, 128 So. 540 (1930). *But cf. Emery v. Bradley,* 88 Me. 357, 34 Atl. 167 (1896), where the

defendant was restrained from re-entering the field of competition at any level, *i.e.*, in his own name, in the name of his son, or as agent or clerk of *anyone*, for to so engage in competition directly or indirectly would be a violation of the spirit of the covenant.

The *Emery* case, *supra*, deals with the majority rule that the attempt of the covenantor to enter into competition under the name of a relative or an associate is a violation of the self-imposed restriction against re-entering competition. *Yost v. Patrick*, 245 Ala. 275, 17 So.2d 240 (1944); *Akers v. Rappe*, 30 Cal. App. 290, 158 Pac. 129 (1916); *C. H. Brant Co. v. Ainsworth*, 156 Mich. 351, 120 N.W. 797 (1909); *Bradley v. Paul*, 153 Minn. 441, 190 N.W. 789 (1922); *Wall v. Chapman*, 84 Okla. 114, 202 Pac. 303 (1921); *Lyle v. Haskins*, 24 Wash.2d 883, 168 P.2d 797 (1946); *Merager v. Trunbull*, 2 Wash.2d 711, 99 P.2d 434 (1940). In the last two cited cases, third persons not a party to the restrictive covenant were enjoined from engaging in business with the covenantor. The cases were based upon a conspiracy doctrine. Because the third parties had knowledge of the "no competition" agreement and nevertheless aided and abetted the vendor in appropriating the good will which was protected by the covenant not to compete, they were properly made parties to the injunction. The acts found to constitute the violation and conspiracy were in the main investments and behind-the-scenes management. The reasoning in these two cases was relied upon by the court in the instant case in which the co-defendants were found to have conspired in violation of the restrictive covenant to the detriment of the good will sold to the plaintiff.

An interesting problem arises when a corporation is the vendor that agrees to refrain from competition. Does the restrictive covenant run only to the corporate entity, or does it reach behind the entity and bind the corporate officers, directors, and stockholders? In *Hall Mfg. Co. v. Western Steel and Iron Works*, 227 Fed. 588 (7th Cir. 1915), defendant corporation sold the production of a line of farm implements to plaintiff, agreeing not to enter into competition. In violation of the agreement, defendant company re-entered competition. The plaintiff prayed for an injunction to restrain the defendant company, and one of its officers in particular, from engaging in competition. The court enjoined the corporation but said that the covenant did not affect the officers, directors, or shareholders from competing with plaintiff outside of the entity of the defendant company. *See Sloan v. Charlevoix State Savings Bank*, 260 Mich. 291, 244 N.W. 477 (1932). *But cf. Sineath v. Katzis*, 218 N.C. 740, 12 S.E. 2d 671 (1941), where defendant owned ninety-eight per cent of the corporation capital. The court ruled that the covenant

went behind the entity and bound the owner.

Another element appeared in the present case which lent itself to defrauding the plaintiff of his rights under the contract of sale, that is, the use of the name "La Sene" in a conspiratorial competition. The inclusion of the name in the injunction against the appellant brings into consideration the question of unfair competition.

The test to determine if the use of one's own name constitutes unfair competition is essentially a question of fact. If use of a certain name will cause public confusion and injury to a prior user's good will, this is unfair competition. *Eastern-Columbia, Inc. v. Waldman,* 30 Cal 2d 268, 181 P.2d 865 (1947), defendant's use of name "Western-Columbia" enjoined; *Dyment v. Lewis,* 144 Iowa 509, 123 N.W. 244 (1909), where defendant's verbatum apporpriation of plaintiff's business name was enjoined. Since a man generally has the right to use his own name in business, the court will not enjoin its use if it is similar to a prior user's name but sufficiently distinguished therefrom. *Deister Concentrator Co. v. Deister Machine Co.,* 63 Ind. App. 412, 112 N.E. 906 (1916), here there was found differentiation by virture of the defendant's advertising which acknowledged plaintiff as a competitor.

The general rule is that everyone has this right to use his own name in his business ventures. Exceptions are recognized when the name is used with an intent to defraud, or where the name has gained a secondary meaning. Then the user may be restrained from using his own name in his business. Whether the name was adopted with intent to deceive and confuse the public, *Hugo Stein Cloak Co. v. Stein and Sons,* 58 Ohio 377, 16 N.E.2d 609 (1937); or merely adopted unintentionally, *Stern Furniture Co. v. Stern,* 52 Ohio 527, 83 N.E.2d 804 (1948), does not matter. The prior user who has built up good will around his name is permitted to use the name. In the instant case, the appellant had permitted the use of his name in the fraudulent conspiracy with his father and was therefore enjoined from the use of his own name in his own upholstery business.

It is submitted that the court in the instant case rightfully took cognizance of the necessary preventives in order to protect the plaintiff's acquired good will. The appellant had no equities in the case. The modification of the injunction to permit the appellant to engage in the upholstery business, even without using the name "La Sene", was a "legal" leniency. The record reveals that the appellant had little knowledge of the upholstery business. His conspiracy with his father was shown to be nothing more than a bare intentional attempt to defraud the blameless plaintiff. But perhaps this is a moral rather than a legal con-

demnation. Certainly the court was justified in enjoining the appellant from the use of the name, for its resulting use would have only lent to the confusion of the public and a deprivation of the plaintiff's rightful property in the good will for which he had given consideration.

Peter H. Lousberg

LABOR LAW—CONCURRENT JURISDICTION IN A STATE TO ENJOIN ACTIVITIES PROHIBITED BY THE LABOR MANAGEMENT RELATIONS ACT.—*Sommer v. Metal Trades Council*, 40 Cal.2d 392, 254 P.2d 559 (1953). Plaintiff manufactured, distributed, and installed auto service stations and equipment. He had in his employ fifty persons who were not organized. Defendants, affiliated with the American Federation of Labor, demanded recognition as the exclusive bargaining representative of plaintiff's employees, and that only members of the unions be employed by him. The employees held meetings to organize Local No. 1, without national affiliation, and demanded that plaintiff recognize it as their exclusive bargaining representative. The plaintiff refused to recognize either Local No. 1 or the defendant unions as the employees' collective bargaining agent, whereupon the defendants commenced peaceful picketing and secondary boycott activities. Local No. 1, the employees' group, filed a petition with the National Labor Relations Board for certification as the representative for collective bargaining purposes and the defendant unions intervened. The N.L.R.B., finding the plaintiff-employer engaged in an industry "affecting commerce", ordered an election. It was alleged that a vote was taken and that the employees' group attained a majority, but it did not appear whether the election was pursuant to the Board's directions or whether certification followed.

The defendants continued their picketing and secondary boycott activities whereupon the plaintiff brought this action seeking an injunction and damages in the state court. A preliminary injunction issued and an appeal was taken. The defendants contended, *inter alia*, that the jurisdictional dispute was governed solely by federal law; the plaintiff maintaining that the conduct of the defendants was in violation of and enjoinable pursuant to the Jurisdictional Strike Act, CAL. LAB. CODE ANN. § 1115 *et seq.* (1947). It is not questioned that the picketing and secondary boycott activities substantially interfered with the conduct of plaintiff's business.

Thus, the issue was clearly presented: whether a state court may exercise jurisdiction over a subject matter explicitly cognizable by the National Labor Relations Act as amended, 61 STAT.

136 (1947), 29 U.S.C. § 141 *et seq.* (Supp. 1952), which has placed the primary and exclusive duty upon the Board to redress unfair labor practices.

It was held in the instant case that the state court had jurisdiction to issue the injunction notwithstanding federal law governing the same subject matter. The court stated its position, 254 P.2d at 563:

> It may . . . be assumed that the evidence which was relevant in the representation contest and to the several charges of unfair labor practices before the National Board bears on the issues here. But it does not follow that the state court does not have jurisdiction of this controversy.

The majority opinion attempted to distinguish two prior California decisions which are in direct conflict with the holding of the present decision. In re *DeSilva,* 33 Cal.2d 76, 199 P.2d 6 (1948); *Gerry v. Superior Court,* 32 Cal.2d 119, 194 P.2d 689 (1948). The grounds of distinction were that in these two cases there was no state statute or policy which regulated the activity. This distinction is without substance. Congressional commitment of exclusive jurisdiction to the Board is not erased by the enactment of a state statute. *Cf. Bethlehem Steel Co. v. New York State LRB,* 330 U.S. 767 (1947), wherein the Supreme Court held that the state could not intervene, even though the Board had not exercised its power, because the Board has exclusive jurisdiction. State court judges too often disregard the duty imposed upon them by the U.S. CONST. Art. VI. See *Testa v. Katt,* 330 U.S. 386 (1947) and *Claflin v. Houseman,* 93 U.S. 130 (1876).

The majority opinion in the instant case was not adhered to without strong dissent however. The gravamen of the dissent is that the instant case is controlled exclusively by the Labor Management Relations Act of 1947, *supra,* therefore jurisdiction being committed by Congress to the Board; any state policy, legislative or judicial must of necessity give way. The view of the dissent is best stated, 254 P.2d at 572:

> . . . it is clear that the circumstances existing here present either a case of an unfair labor practice, or that the conduct is protected by the national act . . . which questions are . . . determinable by the National Board.

The dissenting opinion has a firm basis in law. Other states have recognized that under such circumstances first resort should be had to the National Labor Relations Board. *Garner v. Teamsters, Chauffeurs and Helpers, Etc.,* 373 Pa. 19, 94 A.2d 893 (1953) *aff'd* 346 U.S. 485 wherein the state could have provided precisely the same remedy as that given by the national Act.

Norris Grain Co. v. Nordaas, 232 Minn. 91, 46 N.W.2d 94 (1951); *Costaro v. Simons,* 302 N.Y. 318, 98 N.E.2d 454 (1951); *Grimes & Hauer, Inc. v. Pollock,* 119 N.E.2d 889 (Ohio Ct. App. 1954).

The federal courts have likewise held that the NLRB's jurisdiction over activities constituting unfair labor practices is exclusive. *Amazon Cotton Mill Co. v. Textile Workers Union,* 167 F.2d 183 (4th Cir. 1948); *Born v. Cease,* 101 F. Supp. 473 (D.C. Alaska 1951). In *Capital Service, Inc. v. N.L.R.B.,* 204 F.2d 848 (9th Cir. 1953), *aff'd,* 347 U.S. 501 (1954) a state court had issued an injunction enjoining consumer boycott activities. Upon petition by the Board to a federal district court the defendants were enjoined from further availing themselves of the benefits of the injunction issued by the state court. The court stated its reason, 204 F.2d at 852:

> . . . Congress has pre-empted this function to the National Labor Relations Board and . . . the state court is without jurisdiction to issue such an injunction. Such a boycott to enforce unionization is prohibited by the Taft-Hartley Act, Section 8(b) (1) (A).

Precursory decisions to that of *Capital Service, supra,* were *Direct Transit Lines v. Local Union,* 199 F.2d 89 (6th Cir. 1952); *Amazon Cotton Mill, supra; Pocahontas Term Corp. v. Portland Bldg. & Const., Etc.,* 93 F. Supp. 217 (S.D. Maine 1950).

The Supreme Court has recognized that ". . . uncertainty as to which [tribunal] is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two [tribunals] for supremacy." *La Crosse Telephone Corp. v. Wisconsin ERB,* 336 U.S. 18, 26 (1949). *Cf. Hill v. Florida,* 325 U.S. 538 (1945) wherein it was held that federal rights could not be frustrated by state legislation.

The majority opinion in the instant case could not be dependent upon the legislative history of the Labor Management Relations Act. It was not the intent of Congress to permit common law courts to apply common law standards to labor activities affecting commerce. See 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 p. 1057 (1948); Cox, *The Role of Law in Labor Disputes,* 39 CORNELL L.Q. 592, 601 (1954). The proceeding is wholly statutory. *N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937). The legislative intent to preclude state action may be express as well as implied. *Napier v. Atlantic Coast Line R.R.,* 272 U.S. 605 (1926). The will of Congress ". . . is to be discovered as well by what the legislature has not declared, as by what they have expressed." *Houston v. Moore,* 5 Wheat. 1, 20-22 (U.S. 1820). The judicial duty of determining that intent is not to be lightly regarded. Cf. Mr. Justice Holmes' statement of the duty in *Johnson v. United*

States, 163 Fed. 30, 32 (1st Cir. 1908).

Congress, in its wisdom, has provided the plaintiff in the instant case a well considered remedy or remedies. Section 8(b)(4) of the Taft-Hartley Act regulates and prohibits secondary boycotts for certain specified objectives. If the activity is prohibited by this section it then becomes mandatory upon the Board to petition the proper district court and that court has jurisdiction to grant such injunctive relief as it deems just and proper, notwithstanding any other provision of law pursuant to § 10 (1). Section 303(b) provides the plaintiff with a remedy for the recovery of damages either in a federal district court or a state court having jurisdiction.

The decision in the instant case ignores the apparent potentials of conflict. If it were to declare its relief ancillary to NLRB action, it may result in a deprivation of rights protected by federal law, especially were the NLRB to find that the charge of violation of § 8(b)(4) to be wthout merit. It is a reasonable inference from the legislative history of the Act that if certain activities are not prohibited they are meant to be left free of restriction. *Garner v. Teamsters, Chauffeurs and Helpers, Etc.,* 346 U.S. 485 (1953); *Grimes & Hauer, Inc. v. Pollock, supra.*

The Supreme Court has held that "Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary." *Missouri Pac. R.R. v. Porter,* 273 U.S. 341, 345-346 (1927). In order that the Board may give a uniform application of standards to controversies affecting commerce the states should voluntarily refuse jurisdiction over such disputes. The reason for excluding state administrative bodies from assuming control of matters placed within the competence of the federal Board also excludes state courts from like action. *Cf. Bethlehem Steel Co. v. New York State LRB, supra.*

To make every labor dispute affecting commerce dependent upon the varied applications of state law would reduce the national Act to a mere futility. This certainly was not the Congressional intent except in the areas explicitly stated by Congress. The instant case does not fit into one of those exceptions.

Wilbur L. Pollard

SALES—IMPLIED WARRANTY—LIABILITY OF SELLER FOR INJURIOUS SUBSTANCE IN PRODUCT.—*Simon v. Graham Bakery,* ....N.J. Super. ...., 105 A.2d 877 (App. Div. 1954). The plaintiff purchased a loaf of bread from the defendant who was both manu-

facturer and seller, and in the process of consumption the plaintiff was cut by glass imbedded in the bread. The complaint being simply drafted, the defendant, assuming that the plaintiff would proceed on the theory of negligence, prepared to introduce evidence as to the care exercised in the manufacture of the bread. On the morning of the trial, the plaintiff announced that he would base his action on breach of the defendant's implied warranty of fitness. The latter offered testimony of due care but it was rejected by the trial court with the result that judgment was rendered for the plaintiff. The defendant appealed to the superior court contending that he was prevented from adequately defending his case, first, because it was not forseeable that the plaintiff would proceed in contract and second, because the defense of due care ought to be allowed in either case. The superior court on the question of the propriety of the exclusion of said evidence, held that where a plaintiff proceeds on the theory of a breach of an implied warranty of fitness, due care was not an element nor a defense, and testimony of that nature was properly excluded.

In the early law the sale of food stuffs covered a more comprehensive obligation. "In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy (damages for deceit) may be had." 3 BL. COMM.* 166. In *Rosewell v. Vaughan* (1607) Cro. Jac. 196, 79 Eng. Rep. 171, 172, the court in discussing warranties applying to sale of goods stated that ". . . if a man sell victuals which is corrupt, without warranty, an action lies, because it is against the commonwealth", thus allowing recovery in tort when a contractual action does not lie.

This doctrine appeared in our country in 1815 in *Van Bracklin v. Fonda,* 12 Johns N.Y. 468, 7 Am. Dec. 339, where the court held that one may recover damages for deceit if provisions are not wholesome, for it is implied in contract that the goods will be fit for the use intended. This theory is acquiesed in by Professor Williston, noted American authority. 2 WILLISTON, CONTRACTS § 995, (1936).

Historically, then, the theory of such an action overlapped not only a contract but also a tort action, the action on warranty for fitness sounding in tort since the cases speak of it in the nature of in action on the case for deceit. See 1 WILLISTON, SALES § 197 (3d. ed. 1948). The more recent cases concern themselves with the liability of both the manufacturer and the retailer. In the instant case the defendant was both and, therefore, no problem of privity of contract was encountered.

In *Collins Bakery Co. v. Savage,* 227 Ala. 408, 150 So. 336

(1933), the bread the plaintiff bought from the defendant manufacturer contained tacks and wires. The court ruled for the plaintiff but held that the manufacturer was not liable to a subpurchaser on the contract but was liable for negligence in the making of an article of a dangerous or obnoxious character. And the court further stated that the foreign matter in the bread established a prima facie case of negligence. In a similar case on substantially the same facts, *Cohen v. Dugan Brothers,* 132 Misc. 896, 230 N.Y.Supp. 743, (Sup. Ct. 1928), *rev'd on other grounds,* 236 N.Y.Supp. 769 (1929), plaintiff sued both the retailer and the baker on both breach of implied warranty and negligence. The court allowed recovery from the baker relying upon the authority of *Mac Pherson v. Buick,* 217 N.Y. 382, 111 N.E. 1050 (1916) and held that privity need not be shown between manufacturer and subpurchaser if the article was negligently manufactured. In the second part of the suit recovery was allowed against the retailer for breach of warranty but not for negligence. Hence we can see the manufacturer's liability sounds in tort and the retailer's in contract to purchasers who are injured by foreign substances in foodstuffs.

If the goods are canned or packed, thus preventing inspection by the retailer, some courts have refused to hold the dealer liable on the theory of implied warranty. This view was illustrated in *Kroger Grocery Co. v. Lewelling,* 165 Miss. 71, 145 So. 726, (1933), where the plaintiff was made ill due to poisonous substances in can of tomatoes that the defendant had purchased from a reputable wholesaler and had subsequently resold to the plaintiff. The leading case in opposition to this holding is *Ward v. Great Atlantic & Pacific Tea Company,* 231 Mass. 90, 120 N.E. 225 (1918). Here the plaintiff was injured by a pebble in a can of beans. The defendant maintained that it would be unjust to hold them liable for a foreign substance in the beans when they received a closed package from the manufacturer and had no chance to inspect the goods. The court said that it could find no sound reason for making an exception to the general rule (implied warranty of food) in the case of canned goods, and further pointed out that the purchaser would be at a disadvantage in cases of this nature if his only remedy were aganst the manufacturer. On similar facts a retailer was held liable for a defect in canned goods, where the court stated the liability to be based not on any terms of contract or negligence but on broad principles of warranty imposed by law as a matter of "public policy" for the protection of public health. *Griggs Canning Co. v. Joesy,* 139 Tex. 623, 164 S.W.2d 835 (1942). In cases that refuse to find the manufacturer liable on contract obligations, negligence is the basis of recovery. In *Crigger v. Coca-Cola,* 132 Tenn. 545, 179

S.W. 155 (1915), the plaintiff became ill when he took into his mouth the body of a decomposed mouse that was in the "Coke" he was drinking. The court rejected the contract obligation theory but said that those who put sealed packages or bottles on the market owe a high duty to the public but the liability is based on negligence and the way should be left open for escape of the innocent bottler or packager.

The question of implied warranty also arises when one is injured due to foreign substance in food served in a restaurant. Whether or not there is an implied warranty of fitness and quality of food sold is a matter of conflict. It has been held that the transaction is essentially a sale of goods for a purpose made known to the seller, where the latter's skill and judgment is relied on, from which circumstances a warranty can be implied. *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N.E. 407 (1918). However, it is also maintained that the essence of the transaction is the service in the satisfaction of a human want and the property of the food is not transferred. *Kenny v. Wong Len,* 81 N.H. 427, 128 Atl. 343 (1925). If this theory is maintained there can be no recovery on implied warranty as there is no sale and the plaintiff is given the more difficult task of showing negligence in obtaining or preparing of the food before he can recover for his injury. Of course, regardless of whether it is a sale or service, the plaintiff can recover for negligence in preparing the food. *F. W. Woolworth Co. v. Wilson,* 74 F2d 439 (5th Cir. 1934).

In conclusion, then, this case appears to advance the public feeling that a manufacturer should be an "insurer" of his product by stripping him of his defense of due care. However, whether such a situation as in the instant case could repeat itself where adequate pre-trial procedure is provided is doubtful, hence the probability of a manufacturer-retailer being surprised by general pleading is correspondingly slight.

John L. Rosshirt

UNEMPLOYMENT INSURANCE — RELIGIOUS BELIEFS AFFECTING ELIGIBILITY OF CLAIMANT FOR BENEFITS.—*Tary v. Board of Review, Bureau of Unemployment Compensation,* 161 Ohio St. 257, 119 N.E.2d 56 (1954). The claimant, Regina Tary, applied for unemployment benefits under the OHIO UNEMPLOYMENT COMPENSATION ACT, OHIO GEN. CODE ANN. §§ 1345-1346 (1938), on November 25, 1949, when her services with a public accounting firm were terminated. On January 1st of the following year she refused to accept employment to which she had been referred by

the administrator of the bureau of compensation because the new position, unlike her previous employment, would reqiure her to work on Saturdays. The claimant was a Seventh Day Adventist and observed Saturday as a day of rest, a violation of which practice would expel her from the denomination.

The board of review denied the claimant any further benefits because she refused the position offered. Reversal of this ruling by the court of common pleas was affirmed by the court of appeals on the grounds that claimant's refusal was in good faith because the offered employment was a risk to her morals.

The problem of the supreme court was to determine whether or not a personal religious belief would justify the rejection of an otherwise suitable offer of employment. By a four to three margin, the Supreme Court of Ohio ruled that the claimant was still eligible to receive compensation because the offered job did not meet the criteria of suitability.

In *Kut v. Albers Super Markets, Inc.*, 146 Ohio St. 522, 66 N.E.2d 643 (1946), one of the few cases involving religious beliefs and disqualification from unemployment compensation, a contrary decision was reached. There the Ohio court ruled that a Jewish employee who observed Saturday as his Sabbath and refused to accept a job requiring him to work on Saturdays was not available during the entire week for work and thus disqualified himself for unemployment benefits. In the instant case, the court fully discussed *Kut v. Albers, supra,* but ruled that the case no longer applied because the Ohio compensation law had since been amended to insure that tendered employment be "suitable" for a claimant. Risk to the claimant's morals was now specified by the legislature as a factor in determining suitability, where formerly only the fitness of the claimant for the job had any bearing. OHIO REV. CODE § 4141.29 (1949).

How to determine if a job is *suitable* and what part personal beliefs and danger to one's morals play in that determination represent the problem in cases involving refusal by the claimant of tendered employment. Many of the other state unemployment compensation statutes are similar to Ohio's, in that in determining the suitability of a job, they prescribe that consideration be given to the degree of risk involved to the claimant's morals. See CAL. UNEMPLOYMENT INS. CODE ANN. § 1258 (1953); IND. ANN. STAT. § 1539a (Burns 1951); NEW JERSEY STAT. ANN. § 43:21-5 (1950).

In states where no statutory command prevails, whether or not employment is suitable depends largely on compelling individual circumstances. *Kentucky Unemployment Insurance Comm'n. v. Henry Fischer Packing Co.*, 259 S.W.2d 436 (Ky.

1953), (Butcher's job not suitable for epileptic). But, notwithstanding the instant decision, the cases involving refusal to accept a job for a personal reason have usually been decided against the claimant. In *Goings v. Riley,* 98 N.H. 93, 95 A.2d 137 (1953), the claimant refused a job working the second or third shift because she had to care for her paralyzed mother. The court disqualified her for compensation, saying "If the restrictions attached by the claimant are not usual and customary in the particular occupation, that is an added reason for denying unemployment compensation benefits." 95 A.2d at 139. A refusal to accept an offered job on the day shift where the claimant desired to work only on the night shift because she had two small children to raise, made her likewise ineligible for benefits in *Squires v. Unemployment Compensation Board of Review,* 172 Pa. Super. 424, 94 A.2d 172 (1953).

Where a sheet metal worker quit his employment to go into business for himself at a later time, and applied for unemployment compensation, the Pennsylvania court held him ineligible for benefits, saying by way of dictum that offensive habits of fellow employees, or work which is opposed to one's religious or moral beliefs, does not constitute sufficient "good cause". *Sun Shipbuilding and Dry Dock Co. v. Unemployment Compensation Board of Review,* 358 Pa. Super. 224, 56 A.2d 254, 261 (1948).

What does constitute "good cause" then, is difficult to define without knowing the facts of each case. A Wisconsin court, discussing the voluntary termination of employment, similar to the problem in the instant case, stated that a compelling personal reason for the termination will forestall disqualification. A nineteen year old unemancipated girl was thus ruled eligible for unemployment insurance when her parents insisted that she give up her job and accompany them to California. *Western Printing and Lithographing Co. v. Industrial Comm'n.,* 260 Wis. 124, 50 N.W.2d 410 (1951).

Obviously, the extent to which a claimant may go in imposing restrictive conditions on a new position is the subject of great conflict. Coal miners were refused benefits when they rejected a 5-day work week because they preferred to work only three days a week in order to make the work last longer. *Unemployment Compensation Comm'n. v. Tomko,* 192 Va. 463, 65 S.E.2d 524 (1951). But, in *Erie Resistor Corp. v. Unemployment Compensation Board of Review,* 172 Pa. Super. 430, 94 A.2d 367 (1953), a mother was not disqualified for refusing to accept a job on the same shift that her husband worked. Work was not available on any other shift. She declined the job on the grounds that with both parents working the same hours, their