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Recent Decisions

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signing the application. The Nebraska type statute in no way provides the parent with an escape from liability, and this liability is placed squarely on the parent of the child.

Conclusion

The general principle at common law was that a parent was not liable for the torts of his child merely by virtue of the relationship. There were two exceptions to parental immunity: first, where the doctrine of respondeat superior could be applied to the factual situation; second, where the facts showed that the parent himself had been negligent or participated some way in the tort. Then the liability lay for the fault of the parent, not the fault of the child. Statutes were subsequently enacted in the field and with the Nebraska type law, have derogated from the common law and imposed liability on the parent for a minor's injuring another's property.

These latter statutes add an element to common law jurisprudence which previously had found no sanction in the courts. The weight given to the maxim, no liability without fault, has lessened in the face of modern needs. And it is submitted that this imposition of liability upon a parent marks a trend in the proper direction. When a plaintiff is harmed, he should have his satisfaction. Property rights are basic to our society. Perhaps pressure in the right direction will teach more respect for the right of others to hold their property free from vandalism. If the lesson is not learned, at least the teacher and pupil will pay, not the innocent victim.

Peter H. Lousberg

RECENT DECISIONS

ATTORNEYS — NEGLIGENCE — LIABILITY TO CLIENTS. — *Pete v. Henderson,* .... Cal. App.2d. ...., 269 P.2d 78 (1954). Plaintiff retained an attorney, Henderson, to represent him in a pending action. An adverse decision having been rendered, Henderson was instructed to appeal, and he was paid $150 for so doing. He filed the notice of appeal a day late, and the original judgment of $1600 became final. The plaintiff, *in propria persona,* then moved against Henderson's administratrix (Henderson having died), basing his action on Henderson's negligence in letting the judgment become final, and alleging that the case was certain to have been reversed on appeal. The trial court held that the plaintiff

might recover the retainer, but nothing more, since it lacked the power to review a final judgment of a sister court after the period of appeal had elapsed. The district court of appeal reversed this latter ruling as not being a collateral attack on the judgment, since proving the error in the judgment for $1600 constituted the only means available to show that the plaintiff had been damaged.

The question of an attorney's negligence has long been recognized in the common law jurisdictions. In 1767 an English court was confronted with an action by a client against his attorneys, very similar to the instant case. *Pitt v. Yalden,* 4 Burr. 2060, 98 Eng. Rep. 74 (1767). Here the attorneys did not declare against a third person within two terms of court as required. The attorneys were held not liable in this instance because they did not know that this point had been settled due to the fact of their being country attorneys and far away from all the courts; *cf. Shilcock v. Passman,* 7 Car. & P. 289, 173 Eng. Rep. 128 (1836) (recovery allowed for failure to exercise diligence).

The first point to be considered when the question of an attorney's liability for negligence arises is whether or not the relationship of attorney and client exists. *Kendall v. Rogers,* 181 Md. 606, 31 A.2d 312 (1943). If not, there can be no recovery, as where the plaintiff is a third person with whom no privity of contract exists. *National Savings Bank v. Ward,* 100 U.S. 195 (1880). The fact that the attorney was not employed, but acted gratuitously is sufficient to establish the relationship. *Glenn v. Haynes,* 192 Va. 574, 66 S.E.2d 509 (1951).

The attorney is a professional man, like a physician or surgeon, *McCullough v. Sullivan,* 102 N.J.L. 381, 132 Atl. 102 (1926), who holds himself out to the public as having the skill and knowledge ordinarily possessed by the average member of the legal profession, *Hodges v. Carter,* 239 N.C. 517, 80 S.E.2d 144 (1954), and if a member of the public is injured because of a lack of this ability the attorney is liable. *Godefroy v. Dalton,* 6 Bing. 460, 130 Eng. Rep. 1357 (1830). This does not necessarily mean that an attorney always undertakes to "cure" or win, but whether or not he used the proper degree of skill and care in the handling of his case. *Lamphier v. Phipos,* 8 Car. & P. 475, 173 Eng. Rep. 581, 583 (1838). Therefore, an attorney is clearly not an insurer, unless he so contracts, *Babbitt v. Bumpus,* 73 Mich. 331, 41 N.W. 417 (1889), nor is there a warranty existing merely because there is the relationship of attorney and client. *Sullivan v. Stout,* 120 N.J.L. 304, 199 Atl. 1 (1938).

There has been some dispute of whether an attorney is liable only for gross negligence or for lack of ordinary care and skill.

The court in *Evans v. Watrous,* 2 Port. 205 (Ala. 1835), attempting to follow the authority of *Pitt v. Yalden, supra,* said an attorney is liable only for gross negligence. However, in *Goodman and Mitchell v. Walker,* 30 Ala. 482 (1857) this was explained as lack of ordinary care and skill. This is the general rule in American jurisdictions. *Pennington v. Yell,* 11 Ark. 212 (1850); *Holmes v. Peck,* 1 R.I. 242 (1849).

Another disagreement arises from *Pitt v. Yalden, supra,* where it was stated that if an attorney acts to the best of his skill and knowledge he ought to be protected from liability. This rule was applied in *Finch v. Scott,* 3 How. 314 (Miss. 1839), but in *Gambert v. Hart,* 44 Cal. 542 (1872), the rule was stated as proper skill consistent with the profession. The latter rule is the much more reasonable view, for under the former the more ignorant of the law an attorney might be, the less would be his liability. A complete reading of *Pitt v. Yalden, supra,* seems to support the California rule, especially where the court says, 98 Eng. Rep. at 75: "Therefore an attorney ought not be liable, in cases of reasonable doubt."

Having seen the necessity of a relationship and the duty thus arising, two elements of the tort of negligence regarding attorneys have been established. The third requirement is that the damage must appear to have been proximately caused by the attorney's negligence. *Kendall v. Rogers, supra; Vooth v. McEachen,* 181 N.Y. 28, 73 N.E. 488 (1905); *Laehn Coal & Wood Co. v. Koehler,* 267 Wis. 297, 64 N.W.2d 823 (1954).

Following upon this general idea of an attorney's negligence, specific situations frequently present themselves where there is a want of professional ability for which a lawyer will be held answerable. Perhaps the most obvious and self-evident is ignorance of the law. This applies to the rules of the courts in which he practices. In re *Woods,* 158 Tenn. 383, 13 S.W.2d 800 (1929); and current county records, *Chavis v. Martin,* 211 Ark. 80, 199 S.W.2d 598 (1947). But if the point in question has not been spoken on by the highest court of his state and reasonable attorneys can maintain doubt about it, he is not liable for an error or mistake in judgment. *Hodges v. Carter, supra; accord, Citizens Loan Fund & Sav. Ass'n of Bloomington v. Friedly,* 123 Ind. 143, 23 N.E. 1075 (1890); *Gimbel v. Waldman,* 193 Misc. 758, 84 N.Y.S.2d 888 (Sup. Ct. 1948). Disagreement arises when the law of a foreign jurisdiction is involved. New Jersey holds that a lawyer is not presumed to know the laws of another state and if he applies them negligently he will not be held responsible. *Fenaille and Despeaux v. Coudert,* 44 N.J.L. 286 (Sup. Ct. 1882). To the contrary is *Degen v. Steinbrink,* 202 App. Div. 477, 195 N.Y.

Supp. 810 (1st Dep't 1922), *aff'd,* 236 N.Y. 669, 142 N.E. 328 (1923), where the defendant attorneys from New York drew up chattel mortgages on personal property in New Jersey and Connecticut which proved to be invalid. In holding the attorneys liable the court said that if an attorney undertakes to draft such instruments he must do it in such a way that there will be no defects. This decision was reached on the basis of the huge volume of interstate business and the accessibility of foreign state statutes and reporters.

When handling litigation an attorney must act with reasonable diligence and is responsible for damage resulting from his inadvertance. *Williams v. Knox,* 10 N.J. Super. 384, 76 A.2d 712 (L. 1950); or for failure to prosecute before the statute of limitations has run, *Lally v. Krister,* 177 Cal. 783, 171 Pac. 961 (1918); or abandoning suit in the midst of trial, *Mirich v. Underwriters at Lloyd's London,* 64 Cal. App.2d 522, 149 P.2d 19, 24 (1944). But he is not liable if the point of law is doubtful providing he has proceeded and lost because of this, *Hill v. Mynatt,* 59 S.W. 163 (Tenn. 1900); or if he abandons suit relying on a Supreme Court decision, which is later overruled. *Marsh v. Whitmore,* 21 Wall. 178 (U.S. 1874).

Much the same situation arises in the collection of claims. The client is again entitled to skillful prosecution of the claim by his attorney. *Pennington v. Yell, supra;* In re *Dahl,* 159 Minn. 481, 199 N.W. 429 (1924). Also where a lawyer undertakes to examine a title he must be able to spot defects and know the law and statutes applicable to conveyancing. *Clinton v. Miller,* 124 Mont. 463, 226 P.2d 487 (1951); *Toth v. Vasquez,* 3 N.J. Super. 379, 65 A.2d 778 (Ch. 1949). Again in drafting, *McCullough v. Sullivan, supra;* preserving, *Robertson v. Clocke,* 18 App. Div. 363, 46 N.Y. Supp. 87 (2d Dep't 1897); and recording, *Hempel-Lawson Mercantile Co. v. Poe,* 169 Ark. 840, 277 S.W. 29 (1925), legal documents, the attorney must exercise professional skill.

Finally, where the attorney violates the express instructions of his client, and the client is injured for this reason, the attorney is liable. *Finch v. Scott, supra; Vooth v. McEachen, supra.* A clear case on this point is *Ramage v. Cohn,* 124 Pa. 525, 189 Atl. 496 (1937), where the defendant lawyer was instructed to prosecute a claim for the plaintiff and one Clark. Upon its successful termination he was instructed to give the check, received in settlement, to Clark only upon receipt of $4250 from the latter. The lawyer gave Clark the whole check without receiving the cash and Clark absconded. The court held the plaintiff could recover his loss from his attorney because the latter did not follow his instructions.

It is clear that every time a case is lost a client cannot immediately sue his attorney. Only when actionable negligence is present is there a cause to complain. As mentioned in *Lamphier v. Phipos, supra,* it is not always possible to predict actual liability, but a safeguard does exist for attorneys in lawyers' professional indemnity insurance. This covers not only each partner, but the acts and omissions of each employed lawyer, abstractor, law clerk, associate lawyer, and all other employees such as stenographers.

The instant case falls in line with the general rules enunciated above. Actually, here the lawyer conceded his negligence and offered to pay back the fee that was given to bring the appeal. He denied further damage liability on the basis of a claim that the success of the appeal was conjectural. The court decided that the attorney's negligence *had made* the possible success or failure of the appeal "conjectural" rather than a settled fact. Hence the plaintiff who had appeared *in propria persona* was given the opportunity to amend his complaint to attempt to prove that the appeal would have been successful. Here then is a case where an attorney's failure in a routine duty has opened him to possible damages that, if allowed, will be predicated on a lower court's theory of what a higher appellate court might have done. The realm of "might-have-been" however, does not remove the case from the general rules applicable to attorney negligence liability.

James M. Corcoran, Jr.

CRIMINAL LAW—MENTAL DISORDER AS A DEFENSE—CHANGING TEST OF RESPONSIBILITY—*Durham v. United States,* 214 F.2d 862 (D.C. Cir. 1954). Subsequent to a trial, without a jury, in the United States District Court for the District of Columbia, Monte Durham was convicted of housebreaking. The accused had a long history of mental unsoundness. In 1945 he was found to have a "profound personality disorder" and was discharged from the Navy. In 1947 he was kept in a hospital for observation after attempting suicide. In 1948 and 1951 he was committed to a hospital after being adjudged to be of unsound mind in lunacy inquiries. He was released two months prior to his arrest on the housebreaking charge out of which the instant case arose. Three months later, he was again committed to the hospital after two psychiatrists

diagnosed that he was suffering from "psychosis with psychopathic personality." He remained, this fourth time, in the hospital for sixteen months when he was released to stand trial. The defense of insanity was rejected below for the reason that it had not "been established that the defendant was of unsound mind . . . in the sense that he didn't know the difference between right and wrong or that even if he did, he was subject to an irresistible impulse by reason of the derangement of mind." 214 F.2d 862, 865.

Admitting the correct application of local law to the holding of the district court, it was argued on appeal that the traditional test was inadequate, and that past history of mental instability ought to be accorded weight in determining the present ability to commit crime. The court of appeals rejected the criteria for criminal responsibility where the defense of insanity is pleaded and laid down a new rule in which the jury's range of inquiry was not limited by any of the prevailing legal tests. The court also held that, where insanity is claimed as a defense, the law presumes a person to be sane; but if some evidence is introduced to show his lack of mental capacity, it is up to the prosecution to prove beyond a reasonable doubt that the accused was sane. The issue of the burden of proof will not be treated in this discussion.

Lord Hale, one of the first to comment on the subject of insanity as a defense to crime determined that ". . . a person . . . labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years. . . ." 1 HALE, PLEAS OF THE CROWN 30 (1st Amer. Ed. 1847). During the 18th century, this "child of fourteen" test was augmented by the so called "wild beast" test in *Arnold's Case,* 16 How. St. Tr. 695, 764 (1727), where the court said:

> . . . it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment. . . .

It is therefore to be noted that the courts, from this early time, determined that sanity depended not so much upon past history, but upon the state of mind of the person at the time of the crime. Implicit in this determination is a presumption that sanity at that instant is always conceivable. This is not to say that a past determination of insanity is to be overlooked, for a number of jurisdictions recognize a presumption of continuing insanity and attach evidentiary weight to it. *State v. Garver,* 190 Or. 291, 225.P. 2d 771 (1950); In re *Brown,* 39 Wash. 160, 81 Pac. 552 (1905). The presumption of continuing insanity has been held to abate on discharge from the institution. *State v. Stucker,* 352 Mo. 1056, 180

S.W.2d 719 (1944).

It was not until the middle part of the 19th century that the courts in England, in deciding *Daniel M'Naghten's Case,* 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843), devised a test which has been universally accepted in common law jurisdictions and is still the sole test in England. *Regina v. Holmes,* [1953] 2 All E.R. 324 (C.A.). The rule of *M'Naghten's Case* laid the foundation for the development of the legal aspects of insanity. In the *Holmes* case, *supra,* the court enunciated the following as the standards for determining criminal responsibility as set out in *M'Naghten's Case,* 2 All E. R. 324:

> The test of insanity . . . is whether or not the accused knew the nature and quality of the act he was doing. If he did not it establishes insanity. If he did, one must then go further and ask whether he knew at the time of its commission that the act was wrong — wrong in the sense of contrary to law, not wrong in the sense of contrary to morals.

If the mental condition of the accused is such that it does not fit within these two criteria, he is not excused even though presently insane.

As a general rule, American courts have accepted the rule of *M'Naghten"s Case,* so-called the "right-wrong" test, and in a majority of jurisdictions it is relied upon as the exclusive test of the defense of insanity although its terminology varies considerably. See, WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 51, 129 (1954). A typical example of this rule may be found in *Spencer v. State,* 69 Md. 28, 13 Atl. 809, 812 (1888):

> And according to the law as we find it settled by the great preponderance of judicial authority, if the party accused be competent to form and execute a criminal design, or, in other words, if, at the time of the commission of the alleged offense, he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understand the nature, and consequence of his act as applied to himself, he is a responsible agent, and amenable to the criminal law of the land for the consequences of his act.

A few states have codified the *M'Naghten* rule by statutory enactment. LA. REV. STAT. § 14:14 (1950); MINN. STAT. § 610.09 (1945); N.D. REV. CODE § 12-0201 (1943); OKLA. STAT. tit. 21, § 152 (1951); S.D. CODE § 13.0201 (1939). The New York statute, N. Y. PENAL LAW § 1120, provides: "a person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as: 1. Not to know the nature and quality of the act he was doing, or, 2. Not to know that the act was wrong."

A sizable minority of jurisdictions have supplemented the "right-wrong" test with what is commonly referred to as the "irresistible impulse" test. *Thompson v. Commonwealth,* 193 Va. 704, 70 S.E.2d 284, 291 (1952); see note, 173 A. L. R. 391 (1948). Where this test is utilized it is held that a person is not only excused if he is incapable of distinguishing right from wrong but even if he does know that his act is wrong he is not held responsible if he has so lost control of his will that he cannot curb the impulse to commit the act. The rationale of this theory was adequately set forth in the case of *Parsons v. State,* 81 Ala. 577, 2 So. 854, 859 (1887) where the court said: "... there must be two constituent elements fo legal responsibility in the commission of every crime . . . (1) capacity of intellectual discrimination; and (2) freedom of will." The "irresistible impulse" test however has been limited to acts which were the result of a disease of the mind and not to acts which are committed in the heat of passion. *Golden v. Commonwealth,* 275 Ky. 208, 121 S.W.2d 21 (1938).

In the instant case, the court rejected the "right-wrong" and "irresistible impulse" tests, which were the prevailing standards in the District of Columbia. It was said that *M'Naghten's* rule is based upon only one symptom and does not take sufficient account of scientific knowledge, thus making it inapplicable to all actual circumstances. The "irresistible impulse" test is defective in that it gives no recognition to mental illness characterized by brooding, thus resulting in the application of the inadequate "right-wrong" test to acts produced by such illness.

The court adopted a rule long in use in New Hampshire which, in effect, is a rejection of all legal tests. The New Hampshire rule was laid out in *State v. Jones,* 50 N. H. 369, 9 Am. Rep. 242 (1871), where it was held that the accused would be relieved of responsibility if the crime was the offspring or product of mental disease, for the criminal intent would be lacking. It is a fundamental principle that one of the constituent elements of a crime is criminal intent, *mens rea.* CLARK AND MARSHALL, CRIMES § 39 (5th ed. 1952). The relation of insanity to this mental element in crime is apparent. Obviously, an act which is the offspring of a mental disease negatives the required criminal intent.

The issue before the court, where the New Hampshire rule is applied, would result in a question of fact to be determined by the jury. That is, whether or not the accused had a mental disease, and, if he did, whether or not the act was a result of the disease. In resolving this question, the court in the instant case held that the jury may consider "symptoms, phases or manifestations," testimony of psychiatrists, the past history of the defendant and all other relevant evidence. This is a recognition by the court that

the traditional legal tests do not account for all manifestations of insanity but consist of merely a statement of a portion of the phenomena of mental disease. Whether a person has a mental disease then is as much a question of fact as whether he has tuberculosis, and whether a crime was the product of such a disease is as much a conclusion of fact as whether pain is the product of cancer. To allow the court to categorize certain symptomatic tests of insanity would amount to attributing to the judge the knowledge of an expert in this field. Insanity, in the opinion of the court in the instant case, is a matter of fact not to be determined by legal rules. The jury should be instructed by psychiatrists and other qualified persons, not by the judge, as to what constitutes insanity. It would appear that the problem is thus reduced to a battle of expert witnesses, similar to a compensation case in which a physical disability is claimed. As a jury in a compensation case would be required to decide whether or not the claimant actually was under a physical disability based on the testimony of doctors, so the jury in an insanity case would be required to decide whether the accused actually was insane based on the testimony of psychiatrists and other qualified witnesses.

Despite its merits, New Hampshire had, until now, stood alone in its adherence to this rule. The court in the instant case is the first to follow New Hampshire in this view of the problem. That this court has recognized the inadequacy of the traditional tests and, after more than half a century has finally found, in the New Hampshire rule, a solution to the problem, might be indicative of a trend in the direction of scientific, medical approach to this problem.

Manuel A. Sequeira, Jr.

CRIMINAL LAW—PROBATION—POWER OF FEDERAL TRIAL COURTS TO GRANT PROBATION AFTER SERVICE OF SENTENCE BEGINS.—*Phillips v. United States*, 212 F.2d 327 (8th Cir. 1954). On February 11, 1949 defendant, Phillips, entered a plea of guilty to an information containing five separate counts. Judgment was entered against him and he was sentenced to one year and one day on each of three counts, and three years each on the remaining counts, all of which were to run consecutively for nine years and three days. In April, 1953 Phillips filed a "motion for modification and suspending execution of sentences" with the district court. Phillips claimed that he had served sentences based on counts one and two and was then serving sentence on count

three, which would expire in February, 1954. Having been denied parole by the parole board, he sought the aid of the district court in an effort to obtain probation for the remaining periods of the consecutive sentence which he had not yet served.

The court denied the motion on the ground that it did not have jurisdiction to grant probation to the defendant after he had commenced service of his sentence. The court did, however, allow the defendant leave to appeal this denial because of the indefinitness of the probation law in this area.

The precise question presented is whether the district court may suspend further execution of sentence and place a prisoner on probation where the prisoner has already commenced to serve time on consecutive counts and periods of imprisonment, but has not served some periods.

The decisions dealing with commutation or suspension of sentence have been somewhat confused because of the interchanging use of two different terms, "probation" and "parole." Properly, probation is defined as relating to action taken before the prison door is closed. *Lovelace v. Commonwealth,* 285 Ky. 326, 147 S.W.2d 1029, 1033 (1941). "A probation order is an authorized mode of mild and ambulatory punshment." *Korematsu v. United States,* 319 U.S. 432, 435 (1943). Whereas parole is: ". . . the release of a prisoner prior to the expiration of his term of imprisonment conditioned upon his continuing good behavior during the remainder of the term." *Ex Parte Peterson,* 14 Cal.2d 82, 92 P.2d 890, 891 (1939).

In the leading federal case involving the question presented in the instant case, the court explains what was meant by probation under the Probation Act of 1925, 18 U.S.C. § 724 (1940). *United States v. Murray,* 275 U.S. 347, 357-8 (1928):

> The avoidance of imprisonment at time of sentence was therefore the period to which the advocates of the Probation Act directed their urgency. *Probation was not sought to shorten the term.* (emphasis added) Probation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence. The beginning of the service of the sentence in the criminal case ends the power of the court even in the same term to change it . . . . Such a limit for probation is a natural one to achieve its end.

Thus, the Supreme Court expressly defined the power of the federal courts under the Probation Act, and the purpose of probation. The Court admitted in the *Murray* case, *supra,* that the Probation Act could be interpreted differently, but said that the

present interpretation best carried out the intent of Congress. In *Roberts v. United States,* 320 U.S. 264, 272 (1943), it was said that the basic purpose of probation is an opportunity for the unhardened offender "to rehabilitate himself without institutional confinement." The dissenting opinion, however, added a cautionary note, 320 U.S. at 273: "The probation system was devised to allow persons guilty of antisocial conduct to continue at large but under appropriate safeguards."

Since these cases were decided there have been some changes engrafted upon the Probation Act, 43 STAT. 1259 (1925), 18 U.S.C. § 724 (1926), as amended, 62 STAT. 842, 18 U.S.C. § 3651 (1948):

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States ... may suspend the imposition or execution of sentence and place the defendant on probation. ...

Before these changes to the Probation Act the cases followed the rule set forth in the *Murray* case, *supra,* that the federal courts could not grant probation, even in the same term, after the defendant had commenced service of his sentence. *Bozel v. United States,* 139 F.2d 153 (6th Cir. 1943); *Trant v. United States,* 90 F.2d 718 (7th Cir. 1937); *United States v. Durkin,* 63 F.Supp. 570 (N.D. Ill. 1945). Some of these courts strictly adhered to the rule as aforementioned. In the *Trant* case, *supra,* the defendant was convicted of violating the counterfeiting laws and sentenced to ten years. The marshall took him into custody before he had applied for probation. The court deemed itself powerless to hear the application for probation because the defendant had commenced serving his sentence even though only one day had elapsed.

Since the revision of the Probation Act there seems to be no clear cut acceptance or rejection of the rule as set forth in the *Murray* case, *supra.* The Supreme Court has never reversed itself, but some of the lower federal courts have not followed the decision. *Kirk v. United States,* 185 F.2d 185 (9th Cir. 1950).

The argument is made on behalf of the defendant in the instant case that a series of consecutive sentences are, for purposes of probation, individual sentences. The sentences which have not as yet been served or started are new sentences, and the power of the court to grant probation arises anew at the expiration of the present sentence. The *Kirk* case, *supra,* involved a defendant charged and convicted on three counts, the sentences to run consecutively. The court held that while one is serving the first of several consecutive sentences he is not serving the others, and thus while the court cannot reduce the present sentence it may

grant probation on the unserved sentences.

The court may sentence to imprisonment on one count and admit to probation on another, but under the Probation Act it has been held that this must be done at the time final judgment is handed down. *United States v. Craig*, 95 F.2d 202 (9th Cir. 1938); *United States v. La Shagway*, 95 F.2d 200 (9th Cir. 1938). As was concisely stated in *United States v. Hagedorny*, 9 F.R.D. 519, 521 (D.C.N.Y. 1949), ". . . it is the law that, once a defendant has begun to serve his sentence, the Court does not possess power under the Probation Act to grant him probation."

The Supreme Court has not ruled on this specific problem, that is, whether for purposes of probation consecutive sentences are separate sentences which may be suspended for probation at the beginning of each one or whether they are one single sentence for purposes of probation. However, some help may be derived from a recent statute, 18 U.S.C. § 4161 (1948) dealing with the computation of good time allowances and parole, and reading in part: "Where two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed." This section gives some insight as to legislative intent on such matters. Much of the confusion which arises out of situations such as are presented in the instant case is due in part to a misunderstanding of the purpose of probation, and a misunderstanding of the words of the present Probation Act. The purpose of probation as has been mentioned above is to "suspend the imposition or execution of sentence." Suspend means to hold in an undetermined or undecided stage awaiting fuller information. *Hild v. Polk County*, 242 Iowa 1354, 49 N.W.2d 206, 208 (1951). An imposition is a charge or something that is laid on, and execution means to enforce or carry out the satisfaction of a judgment. *Wieboldt Store v. Sturdy*, 384 Ill. 271, 51 N.E.2d 268-70 (1943). Thus we have the holding in an undetermined stage of that which is laid on or charged. This is probation. This takes place before the defendant begins service of the sentence.

It is submitted that the decision in the instant case follows the intent of Congress in its original Probation Act, and in the more recent probation provisions of the Code. However, it would be most advantageous to the district courts for the Supreme Court to render a definite statement concerning the powers of the courts under circumstances such as are presented in the instant case.

D. D. Robertson

EQUITY — REFORMATION AND SPECIFIC PERFORMANCE — STATUTE OF FRAUDS — FAILURE TO SET OUT BOUNDARIES IN DESCRIPTION OF LAND. — *Cripe v. Coates*, ... Ind. App. . . . ., 116 N.E.2d 642 (1954). Plaintiff entered into a written contract to purchase a portion of a larger tract of land owned by the defendant. The memorandum of sale described the land as having dimensions approximately 70 feet east and west by 200 feet north and south; that the lot contained two acres more or less; "that the west line thereof was to extend one foot west of the driveway to lead from the garage which defendants also agreed to erect...." No driveway or garage was in existence at the time of the agreement. The north line was described as being "a slight rise of land about two hundred feet back." The defendant refused to perform, and plaintiff sought to have the contract reformed to express the alleged agreement of the parties and specific performance. The defendant demurred on the ground that the description was insufficient to satisfy the Statute of Frauds, and the demurrer was sustained in the lower court. The appellate court affirmed, taking the view that even if the contract were reformed to coincide with the petitioner's complaint, the result would still not satisfy the requirements of the Statute of Frauds as to definiteness. The case is one of first impression in Indiana.

The question presented by this case is as follows: When a written agreement describes the area or dimensions of the tract to be sold, but does not definitely fix the boundaries between that land and a larger area including it and also owned by the seller, is the memorandum sufficient to satisfy the Statute of Frauds?

As a general proposition, a written memorandum need not be so perfect as to do away with any need for external aids and means of identification, and the court will attempt to construe the instrument as valid rather than void for uncertainty. *Klever v. Klever*, 333 Mich. 179, 52 N.W.2d 653 (1952). Thus, even with the writing in hand, there still might be a need to go out to the premises, or search records, before the actual tract to be sold can be definitely ascertained. *Schwartz v. Syver*, 264 Wis. 526, 59 N.W.2d 489 (1953). Even so, a writing will be legally sufficient if it serves as a key to identification which all the externals merely serve to pinpoint or amplify. *Klever v Klever, supra.*

A memorandum to sell only part of a tract of land owned by the seller is treated with more particularity and must set out the boundaries between that which is to be sold and that which is retained. 4 TIFFANY, REAL PROPERTY § 997 (3d ed. 1939). In *Foster v. Civale*, 134 Conn. 469, 58 A. 2d 520 (1948), the area in question

was described as a piece of land on Ann Street Extension, which was the northern boundary. The eastern boundary was also placed, and the dimensions of the lot were given. The description identified a piece of land co-owned by the defendant and adjoining other land owned by him to the south and west. Since a portion of his land was clearly set out by the description, defendant was held to his contract by the decision of the court that the memorandum was sufficient.

Foster v. Civale, supra, followed *Desmarais v. Taft,* 210 Mass. 560, 97 N.E. 96 (1912). A brief description of the land in this case was held sufficient because it was definite enough to determine the boundaries between the land conveyed and the land retained by the seller. The note represented the transfer of "a piece of land next to (one) Pelequin, seventy feet on the road and back to an old wall." Pelequin's land, the road, and the old wall made three boundaries, but the wall ran longer than the lot. In determining the shape of the land the court excused the brevity of the description by saying the language was not unlike that used by country folk, and it drew the fourth side of the lot on the assumption that the parties intended the line to be parallel to Pelequin's land opposite.

A memorandum that very nearly identified the property was found to be too indefinite to be sufficient in *Matney v. Odum,* 147 Tex. 26, 210 S.W.2d 980 (1948). The decision that the note did not satisfy the Statute of Frauds seemed to hinge on two words in the memorandum, which read, "four (4) acres out of the East end of a ten acre block on the P. Chireno Survey ...." The court said that if the phrase *off of* instead of *out of* had been used above, the note might have been held sufficient because the court then could have shaped four acres off one end of the land. The ten acres bargained for were the only land owned by the seller, but the court held that this fact would not make a memorandum, insufficient on its face, acceptable as an adequate description. The court's opinion indicates that Texas is even more strict than the majority of jurisdictions in requiring that definite boundaries be set out in a memorandum that conveys only part of a tract.

Where the grantor sells all he owns, a failure to lay out boundaries does not usually prove troublesome since parol evidence may be used to show that the description answers to the tract. *Roberts v. Bennett,* 166 Ky. 588, 179 S.W. 605 (1915), points out that more is required of a memorandum that purports to convey only a part of the grantor's land. In that case the note did not set out the boundaries between the 210 acres to be conveyed and the remainder of the seller's 305 acre tract. The

Kentucky court said that the writing itself must set out the boundaries, and no parol evidence was admissible to aid the writing in this respect. The note before the court, therefore, was found to be too indefinite to allow parol clarification.

Even though the description may refer quite correctly to a government survey and give the section, county, state, etc., if the writing does not establish the boundaries between the part to be sold and the rest of the section, the note fails. The courts often say the memorandum describes a tract somewhere, but where? *Stovall v. Finney,* 152 S.W.2d 887 (Tex. Civ. App. 1941); *Martinson v. Cruckshank,* 3 Wash.2d 570, 101 P.2d 604 (1940). In the *Martinson* case, *supra,* the court held a note insufficient for indefiniteness that read "160 acres, more or less, in Section 2, Township 13N, Range 2 East."

The general rule in cases like the present one is that memoranda which do not definitely separate the portion to be sold from the tract remaining with the seller are insufficient to satisfy the Statute of Frauds. *Huntress v. Portwood,* 116 Ga. 351, 42 S.E. 513 (1902). In this case a memorandum, transferring 200 acres out of some 300 acres of one very irregularly shaped tract, was found insufficient for indefiniteness. The note said: "containing two hundred acres, more or less, bounded as follows: On north by land of E. I. Anderson; on east by lands of Daniel Evans, colored; on south by land of Addison Ogletree; on west land said Absalom G. Evans and Mary E. Evans." The court found itself unable to presume the west boundary to be a straight line running north and south, because there were no starting points given, suggesting that if there were one starting point the shape could have been completed. *Cf. Desmarais v. Taft, supra.*

In a case similar to the present one, *Safe Deposit & Trust Company v. Diamond Coal & Coke Co.,* 234 Pa. 100, 83 Atl. 54 (1912), the written description of the land did not definitely establish any one of the four boundaries. The description was held insufficient, especially in the light of the fact that the vendor was permitted to shift the boundaries about so long as he conveyed two hundred acres.

The court in the present case relied strongly on *Michelson v. Sherman,* 310 Mass. 744, 39 N.E.2d 633 (1942). In this case the memorandum held insufficient read in part: "Sherman property with 11,000 or more sq. feet of land on Eliot Memorial Drive and numbered 15 Eliot Memorial Drive, Newton." The property was part of a larger piece owned by the seller, and the above memorandum was held by the Massachusetts court not to satisfy the Statute of Frauds. The court said, 39 N.E.2d, at page 635:

> The location of the boundary line between the land sold and the land kept by the defendants was an essential element of the oral contract. But no reference whatever to the location of the boundary line appears in the memorandum.

The memorandum in the *Sherman* case, *supra,* and the instant case, as well as those descriptions found insufficient in other cases noted, do not specify one parcel of land which can be distinguished from all others. Similar parcels could fall under the same description, although they might all include some area in common. The compelling reason in the instant case is more persuasive than the *Sherman* case, *supra,* because had the oral agreement in the latter been exactly transcribed, it woud have been sufficient. But even the oral agreement was insufficient in the instant case, for the parties themselves were never certain where the boundaries would be. There were only approximate boundaries, and as such they were not sufficient to identify one piece of land to the exclusion of all others. There being no way to determine the exact parcel to be sold, due to the inadequate description in the memorandum, it necessarily follows that the court must refuse to enforce the agreement to sell. By its decision in this case of first impression, Indiana has allied itself with the general rule followed in other American jurisdictions.

Joseph B. Joyce

INSURANCE—AVAILABILITY OF RES JUDICATA TO PRECLUDE INSURER FROM LITIGATING THE QUESTION OF ITS POLICY LIABILITY. *Bettinger v. Northwestern National Casualty Co.,* 213 F.2d 200 (8th Cir. 1954). The seventeen year old son of the defendant, conducted negotiations whereby his mother purchased an automobile on conditional sale. Mrs. Bettinger purchased public liability and property damage insurance in her own name from the defendant. The policy covered any person using the car with the owner's permission and provided that the insurer would defend any suit, "even if such suit is groundless, false or fraudulent," against the insured for injury or damage caused by the automobile. In August 1951, Mrs. Bettinger transferred the certificate of title of the automobile to the son ostensibly selling her son the automobile. The transfer was notarized. On the day before the insurance contract expired, the son was involved in an accident with another automobile which resulted in extensive injuries to the occupants. An action to recover damages for the bodily injuries was brought against Mrs. Bettinger and the son by the occupants of the

automobile who claimed that Mrs. Bettinger was the owner of the car and that her son was driving with her consent. Notice was given the defendant-insurer with a demand that it defend the suit but the insurer denied any duty to defend on the ground that Mrs. Bettinger was not the owner of the automobile; that on the day of the accident she had no insurable interest in the automobile.

The insurer instituted an action for declaratory judgment to determine its nonliability in which Mrs. Bettinger answered generally that she had always been the owner of the car; that the transfer to her son was for personal reasons and there was no intention to pass any interest. The plaintiffs in the injury action intervened, asserting the liability of the insurer on the date of the accident. The trial of the injury action being imminent, the insurer moved to advance its action in order to settle the question. After a hearing, the motion was denied. Upon trial by jury in the personal injury action testimony admitting ownership in Mrs. Bettinger and her consent to her son's driving the automobile was adduced and remained undisputed. The trial court directed verdict against the Bettingers and the jury awarded substantial damages.

In the declaratory judgment proceeding it was admitted that the issue of res judicata was not raised by the pleadings concerning the ownership of the automobile, but it was contended that the issue of ownership was determined in the personal injury action. The district court acknowledged the prior ruling on the issue of ownership but held that the doctrine of res judicata did not apply to preclude the insurer from contesting ownership of the automobile. It was held that Mrs. Bettinger was not the owner of the automobile at the time of the accident. On appeal the ruling was affirmed on the ground that the doctrine of res judicata was not available to estop the insurance company from having its claim of nonliability adjudicated in the instant action, concluding that the insured had had no insurable interest in the automobile.

Res judicata is one of the defenses to actions involving matters pertaining to the law of insurance wherever questions relating to nonliability have been discussed.

> . . . to constitute res judicata four elements must concur,—identity in the thing sued for; identity of cause of action; identity of persons and of property; and identity of the quality in the persons for or against whom the claim is made. . . . So, it has been held that in applying the principle of res judicata the inquiry is not always as to identity of cause of action merely, but also involves identity of the matter essentially and directly in issue. . . 8 COUCH, CYCLOPEDIA OF INSURANCE LAW §2148 (1931).

The insurance company is not obligated to defend nor is it

bound by the finding of the court if the insured has violated the insurance contract. *Farm Bureau Mutual Automobile Ins. Co. v. Hammer,* 177 F.2d 793 (4th Cir. 1949). To hold otherwise would be to estop the insurance company by acts of the insured over which it has neither concern nor interest and to deprive it of its day in court to litigate the company's nonliability on the contract.

The majority of jurisdictions, including Minnesota, have held that the doctrine of res judicata was not available to estop the insurance companies from having their claim of nonliability adjudicated in a subsequent action. *Accord: Farm Bureau Mutual Ins. Co. v. Hammer, supra; Manthey v. American Automobile Ins. Co.,* 127 Conn. 516, 18 A.2d 397 (1941); *Welborn v. Illinois National Casualty Co.,* 347 Ill. App. 65, 106 N.E.2d 142 (1952); *McCann v. Iowa Mutual Liability Ins. Co. of Cedar Rapids,* 231 Iowa 509, 1 N.W.2d 682 (1942); *Perkins v. Becker,* 236 Mo. App. 786, 157 S.W.2d 550 (1942); *Jewtraw v. Hartford Accident & Indemnity Co.,* 131 N.Y.S.2d 745 (3d Dep't 1954); *Leonard v. Murdock,* 147 Ohio St. 103, 68 N.E.2d 86 (1946); *United States Fidelity & Guaranty Co. v. Dawson Produce Co.,* 180 Okla. 119, 68 P.2d 105 (1937); *Vaksman v. Zurich General Accident & Liability Ins. Co.,* 172 Pa. Super. 588, 94 A.2d 186 (1953); *Utilities Ins. Co. v. Montgomery,* 134 Tex. 640, 138 S.W.2d 1062 (1940). *Contra: Washington Gaslight Co. v. District of Columbia,* 161 U.S. 316 (1896); *Jones v. Zurich General Accident & Liability Ins. Co.,* 121 F.2d 761 (2d Cir. 1941); *Maryland Casualty Co. of Baltimore v. Sturgis,* 198 Ark. 574, 129 S.W.2d 599 (1939); *Edinger & Co. v. Southwestern Surety Ins. Co.,* 182 Ky. 340, 206 S.W. 465 (1918); *Saragan v. Bousquet,* 322 Mass. 14, 75 N.E.2d 649 (1947); *Dally v. Pennsylvania Thresher & Farmers Mutual Casualty Ins. Co.,* 374 Pa. 476, 97 A.2d 795 (1953); *East v. Fields,* 42 Wash.2d 924, 259 P.2d 639 (1953).

In one state, Louisiana, the availability of res judicata is specifically set out by statute. This statute, LA. CIV. CODE ANN. art. 2286 (West 1952), applied in the *Ingram* case, *supra,* provides that:

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

Either the contract theory of the "reservation of rights" theory is employed by the jurisdictions which hold that the doctrine of res judicata is not available to estop the insurance company from

having their claim of nonliability adjudicated in a subsequent action. Under the terms of the latter theory, the insurance company, by defending the suit, does not waive its right to have its liability on the insurance contract litigated in a subsequent suit. *Manthey v. American Automobile Ins. Co., supra.* Should the contract theory be applied, the reasoning is similar to that used in *Leonard v. Murdock, supra,* in which case the Ohio court made a distinction between tort and contract as the basis for litigating the two actions. In the *Leonard* case, 68 N.E.2d at 89, the court said:

> It is claimed that the doctrine of res judicata should be applied in the instant case. Without entering into a lengthy discussion of that subject suffice it to say that the case of *Leonard v. Glenn Cartage* (the original action) sounded in tort, the present action sounds in contract, the parties in the two cases are not the same, the issues are not the same, different proofs were required to sustain the two actions, and the controversy sought to be precluded, to wit, the liability of the Ocean Accident & Guarantee Corp. upon its policy was not tried or determined in the Glenn Cartage case.

For the jurisdictions holding that the doctrine of res judicata is applicable and the insurance company is estopped from litigating its nonliability in a subsequent suit, the reasoning is premised on representation or on the basis that findings in the initial cause of action are decisive of the question litigated, not only in the first suit, but in a subsequent litigation. The Washington court in *East v. Fields, supra,* used the representation approach, 259 P.2d at 639:

> The rule is that when an insurer has notice of an action against an insured, and is tendered an opportunity to defend, it is bound by the judgment therein upon the question of the insured's liability.

The alternate approach for the minority was used in the *Dally v. Pennsylvania Thresher & Farmers Mutual Casualty Ins. Co.* case, *supra.* The court said, 97 A.2d at 796:

> In the suit between the injured and Dally, both Dallys had been found liable in trespass actions against them. That finding necessarily implied that Anthony Dally was acting as agent of his company at the time of the accident otherwise the verdicts against the company whereon judgments were entered, could not have been sustained. To hold that establishment of A. Dally's agency for his company is now a material inquiry in the suit here would run counter to the rule of res judicata.

Freeman states the rule thusly:

> The action for indemnity is obviously a different cause of action

> from the one in which judgment causing the loss was rendered; consequently the adjudication is conclusive only as to those matters which were actually litigated and determined. The judgment is not, therefore, conclusive as to whether the defendant is liable over or bound to indemnify the plaintiff unless the facts which determine that matter were necessarily adjudicated in the action. 1 FREEMAN ON JUDGMENTS, §450 (5th ed. 1925).

Baxter v. Central West Casualty Co. of Detroit, Mich., 186 Wash. 459, 58 P.2d 835 (1936) is similar to the instant case in that the controversy centered on the ownership and title to the automobile. This policy contained a warranty on the part of the insured that the truck was owned by the named insured. The insured's son was operating the truck when it struck and killed thirteen year old James Baxter. In the action by the father against the insured, the insurance company defended, however the policy contained a non-waiver or reservation of rights clause. In a subsequent action, the company sought to prove breach of warranty as to ownership contained in the policy, in that the insured held only legal title thereto as security and that a son was the owner and purchaser of the truck. The trial court ruled that the original action by Baxter against the insured was res judicata and had settled the ownership issue. The judgment was reversed by the Supreme Court of Washington, 58 P.2d at 836:

> Where . . . the question in the second action, although similar to the first, and although growing out of the same subject-matter, involves a different question, there is no res judicata in the first judgment.

In conclusion, it is submitted that the court's decision in the instant case is in accord with the majority of jurisdictions. The reasons behind the doctrine of res judicata should not estop the insurer from litigating the question of its liability on the insurance policy which is a separate and distinct issue. Any other rule would deprive the insurer of the right to its day in court. The doctrine of res judicata is properly applied to promote justice and should not be applied where injustice will result.

A. J. Deutsch

LABOR LAW—Peaceful ORGANIZATIONAL PICKETING—EMPLOYER DENIED INJUNCTIVE RELIEF.—*Wood v. O'Grady*, 307 N.Y. 532, 122 N.E.2d 386 (1954). The plaintiff-employer herein is seeking an injunction for unlawful picketing, *i.e.*, picketing having an unlawful objective and employing unlawful means. In October of

1951, the defendant-union initiated a general campaign to enlist non-union store clerks into its membership preparatory to representing them as bargaining agent. The employer was advised of the union's policy and that his clerks would be among those solicited. No contract was tendered at any time. The employer rejected the idea of a union in his store and stated that he would discharge any employee who would join. Subsequently pickets, carrying placards publicizing the fact that the establishment was non-union and asking customers not to patronize, commenced patrolling the store. There was no record of violence, and although the employer had to get his merchandise directly from the wholesaler, since union teamsters would not cross the picket line, he showed no shortage of stock or loss of business. The picketing has continued for one and one-half years.

The court of appeals, in reversing the appellate division, 283 App. Div. 33, 126 N.Y.S.2d 408 (1st Dep't 1953), denied the plaintiff's request for injunctive relief, and ruled that the activity of the union was no coercion upon the employer. The controlling facts in the decision of the court were the employer's attitude toward the union, the threat of discharge facing the employees and the failure of the employer to either allege or prove any damage to his business from the lengthy picketing, all of which induced the court to find the union activity was to protect the right of the employees to make a free choice as to whether they desired to belong to a union or not.

By virtue of this decision the concept of organizational picketing is broadened to include peaceful picketing of a non-union establishment without any intent by the union to claim representation of the employees working therein. The fact that an employer may suffer slight discomfort in the loss of potential trade or in obtaining his stock does not lessen the right of the union to picket.

Picketing has been related to freedom of speech and is protected under the First Amendment of the Constitution. *Thornhill v. Alabama,* 310 U.S. 88 (1940). But in *Milk Wagon Drivers v. Meadowmoor Dairies,* 312 U.S. 287 (1941), the Supreme Court qualified the scope of the right by holding that picketing, when accompanied by violence, could be enjoined. In 1942, the Supreme Court went still further, and by distinguishing picketing from free speech, acknowledged the inherent coercive effect of picketing, and held that the state courts do not have to tolerate even peaceful picketing in every instance. *Bakery Drivers v. Wohl,* 315 U.S. 769 (1942). The right of a union to picket peacefully, and thereby use economic pressure on an employer to effect unionization has been upheld, *McKay v. Retail Auto Salesman,* 16 Cal. 2d 311, 106 P.2d 373 (1940), and the question of whether or not

the union represented any of the employees of the location to be picketed has also been held to be of no importance. *May's Furs & Ready to Wear v. Bauer,* 282 N.Y. 331, 26 N.E.2d 279 (1940); *accord, Exchange Bakery v. Rifkin,* 245 N.Y. 260, 157 N.E. 130 (1927). In the latter case it was said, 157 N.E. at 132: "The purpose of a labor union to improve the conditions under which its members do their work . . . may justify what would otherwise be a wrong."

The illegal purpose doctrine was enunciated in *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490 (1949), where the Court brushed aside the complete protection of the Constitution and allowed the state court to restrain a peaceful picket on the basis that the purpose of the picketing was to force the employer to perform an act in restraint of trade. The courts now, while protecting the element of communication in picketing, no longer protect it in all instances, but enjoin picketing when they determine that it is for an illegal object. *Journeymen Plumbers v. Graham,* 345 U.S. 192 (1953), picketing with purpose to eliminate all non-union employees; *Teamsters Union v. Hanke,* 339 U.S. 470 (1950), picketing an establishment conducted solely by the owner; *Hughes v. California,* 339 U.S. 460 (1950), picketing to force selective hiring on a racial basis.

In the instant case, the court saw no illegal object in the acts of the defendant and determined that the picketing was organizational. The problem facing this court was in determining whether the picketing was recognitional or organizational. Thus, if it can be shown that the union has claimed a majority representation or has asked for an election or demanded a contract, then the picketing will be termed recognitional. If the union makes no demands for an election or a contract and claims no representation, then the picketing is organizational. See *Bldg. Service Employees v. Gazzam,* 339 U.S. 532 (1952); Compare *Way Baking Co. v. Teamsters & Truck Drivers,* 335 Mich. 478, 56 N.W.2d 357 (1953).

In *Larson Buick Co. v. United Automobile Workers of America,* 21 CCH LAB. LAW REP. ¶ 66,970 (1952), there was only one union; no claim to a majority status; nor was there any election pending. The picketing was peaceful and allegedly for organizational purposes. The employer contended that its purpose was coercive and illegal. In denying the injunction, the court set forth three conditions which, in themselves, do not add up to an illegal purpose. They are (1) the picketing union is seeking to organize the employees (2) there are no rival unions and (3) the picketing union is not seeking an advantage before the N.L.R.B. *Accord, Kenmike Theater, Inc. v. Moving Picture Operators,* 139 Conn. 95, 90 A.2d 881, 884 (1952).

A contrary ruling exists in *Amazon v. Hotel & Restaurant Union*, 23 CCH LAB. LAW REP. ¶ 67,469 (1953), where substantially the same facts exist. There was only one union, a reluctance of the employees to join any union, and the union claimed a legitimate organizational purpose. The court granted the injunction, stating that there were means of persuasion other than picketing open to the union. It reasoned that the resulting economic disadvantage through coercion of the employer was an illegal object.

Four possible sources for the discovery of the true motive as to whether the picketing is organizational or recognitional were enumerated in *Strause Stores Corp. v. District 65, D P O W A*, 23 CCH LAB. LAW REP. ¶ 67,421 (1953). The court used the following as guides: (1) statements made by the employer to his employees and statements made by the men doing the picketing; (2) the words and expressions stated on the placards carried by the pickets; (3) any correspondence between the employer and the union; and (4) any conversation between the employer and the union representatives.

In the instant case, the employer's appeal to the New York State Labor Board for an election to determine whether or not the union had a majority representation was denied. Under New York law, an employer may not petition for an election. N.Y. LABOR RELATIONS ACT, § 705 (4). Under Federal Law, LABOR MANAGEMENT RELATIONS ACT, 61 STAT. 136 (1947), 29 U.S.C. § 159 (C) (1) (b) (1952), the employer may petition the Board for an election but if it is found that the union has not claimed a majority status or demanded a contract or asked to be recognized as the bargaining agent, then the petition will be denied. See In re *Advance Pattern Co.*, 80 N.L.R.B. 29 (1948). What remedies do the contending parties have? The employer cannot receive relief from the labor board and, by reason of the rule herein, may not appeal the board's decision to the court. The union is allowed the opportunity to refrain from asking for an election until it feels that it has a majority representation. The only avenue left open is continued picketing and likely economic coercion. It is submitted that when organizational picketing occurs, the employer be allowed to petition for, and receive an election to determine whether or not the union has the necessary representation for a bargaining agent. This would curb such lengthy picketing and eliminate the danger of undue pressure.

Lawrence J. Dolan

PROCESS — SUBSTITUTED SERVICE ON NON-RESIDENT MOTORISTS — APPLICABILITY OF SERVICE ON OWNER WHERE STATUTE PERMITS SERVICE ON OPERATORS. — *Larson v. Powell,* 117 F. Supp. 239 (D. D. C. 1954). The plaintiff instituted an action to recover damages for personal injury occasioned when an automobile, operated by the son of the owner, overturned on a Colorado highway. The father, made a co-defendant in the action, had consented to the use of the car by his son, but was not present in Colorado when the alleged accident occurred. Both the defendants were residents of the state of Nebraska. Pursuant to COLO. REV. STAT. § 13-8-2 (1953), which provides for the formal appointment of an agent for receipt of process by an non-resident motorist and further that in lieu of such appointment the operation of a motor vehicle is deemed to be equivalent to the designation of the Secretary of State for that purpose, the plaintiff served a summons and complaint on the Secretary of State of Colorado. On a motion by both defendants, appearing specially, to quash the service, the federal district court held the service on the driver was valid but not so the service on the owner. It was determined that a statute providing for substituted service on non-resident motorists is in derogation of common law and being strictly construed, the term "operator" could not be interpreted so as to include within its scope one who merely owned the vehicle involved.

It is well established that a statute providing for substituted service on a non-resident motorist who has become involved in an accident within the jurisdiction of the state must provide a reasonable probability of actual notice of the pending action. *Wuchter v. Pizzuti,* 276 U. S. 13 (1928). As long as the statute operates to give reasonable notice, *e. g.,* if it orders the agent for process forthwith to send the summons to the non-resident defendant by registered mail and requires a return receipt, there is no question of a violation of the due process provisions of the Fourteenth Amendment to the Constitution. *Hess v. Pawloski,* 274 U.S. 352 (1927). In the *Hess* case, *supra,* it was reasoned that the state, having a substantial interest, had the power to regulate its highways, and the effect of such a statute was merely to place the non-resident on the same footing with the residents and further, the court said that there was no substantial difference between formal and implied appointment as far as due process is concerned.

Those states, prior to and after the decision in the *Hess* case, *supra,* which provided for substituted service on a non-resident motorist expressed the scope or coverage in terms of "The operation by a non-resident" or "operator or owner." COLO. REV. STAT. §13-8-2 (1953); ILL. ANN. STAT. C. 95½, §23 (1950). Compare, PA.

STAT. ANN. tit. 75 §1201 (1953); D.C. CODE ANN. §40-403 (1951); MASS. ANN. LAWS c. 90, §3A (1954). In this early type of statute, a problem of statutory construction often arises in determining the person who is subject to such service. The courts have concerned themselves with the breadth of the contex and results have varied depending on the exact terminology of the statute and the circumstances involved. See note 155 A.L.R. 333 (1944).

Upon the premise that such a statute derogates from the common law, early decisions based upon a statute limited to "the operation by a non-resident motorist" determined that the person subject to such service could only be the one working the mechanism of the automobile or one controlling the driver. *Morrow v. Asher,* 55 F.2d 365 (N.D. Tex. 1932); *Flynn v. Kramer,* 271 Mich. 500, 261 N.W. 77 (1935); *O'Tier v. Sell,* 252 N.Y. 400; 169 N.E. 624 (1930). The reason given for excluding the owner where he is otherwise not operating the vehicle is that the class of operators directed by the statute should be limited to those explicitly mentioned. Thus, in *Wood v. White,* 68 App. D.C. 341, 97 F.2d 646, 648 (1938) the court expressed the usual rule of construction:

> . . . where a statute . . . in derogation of the common law . . . effects substantial rights, it cannot be extended by implication to include persons who do not come within its terms, but instead must be strictly construed.

Following the mandate of a strict construction, legislatures in the several states have broadened the scope of their non-resident motorist service statute. The New York provision, N.Y. VEHICLE AND TRAFFIC LAW §52, has been amended seven times since its inception in 1930, the latest amendment occurring in 1954. See also CAL. VEHICLE CODE ANN. §404 (1944); FLA. STAT. §47.29 (1951); MICH. STAT. ANN. §9.2103 (1952). The Indiana statute is complimentary to most jurisdictions where a revision has been made to reach the owner where he is not operating the automobile, IND. STAT. ANN. § 47-1043 (Burns 1952):

> The operation by a non-resident or by his duly authorized agent . . . (such non-resident motorist) while operating or so permitting to be operated. . . .

While the decision in the Michigan case of *Flynn v. Kramer, supra,* under a 1929 statute, operated to restrict the scope of the proper person to be served to the driver, the present statute extends the coverage to the consenting owner as well as the driver. *Plopa v. Du Pre,* 327 Mich. 660, 42 N.W.2d 777 (1950). Such statutes that have initially contained terminology relating to the operator's permissive user have been held not to require the owner to be the

person physically operating the vehicle. See note, 2 GOODRICH-AMRAM, PENNSYLVANIA PROCEDURAL RULES SERVICE WITH FORMS § 2077 (a) 4 (1953); *Rigutto v. Italian Terrazzo Co.*, 93 F. Supp. 124 (W.D. Pa. 1950).

Where the vehicle operator acts as agent or employee of the principal or owner on the business of the principal the courts have been more liberal in finding service on the owner valid in spite of physical operation by the agent. The court in *Skutt v. Dillavou*, 234 Iowa 610, 13 N.W.2d 322, 324 (1954), held that:

> Inasmuch as a corporation can only function through the aid and by means of individuals, it must have been intended that a foreign corporation would, in a proper case, be subject to substituted service under our statute as a "person in charge of the vehicle and of the use and operation thereof" even though the actual physical operation was by an officer, or agent, or employee.

Accord, *Rigutto v. Italian Terrazzo Co., supra,* (partnership as owner).

The determination by the court in the instant case is in accord with the prevailing rule where the older form of substituted service statute is still in existence. Later amendments in the several states have extended the scope of the statute to include permissive user but without the necessary amendment the traditional strict interpretation of the statute properly ought to prevail.

Otto K. Hilbert

TORTS — ATTRACTIVE NUISANCE — LUMBER PILED ON PRIVATE PREMISES NOT A DANGEROUS INSTRUMENTALITY.—*Kahn v. James Burton Co.*, 1 Ill. App.2d 370, 117 N.E.2d 670 (1954). A city lot owner entered into a contract for the construction of a two story brick house. Later a supplier, under directions from the general contractor, delivered lumber for the joists and flooring and piled it on the lot in the customary way. Children had been noted playing on the premises when the foundations were laid, but this was prior to the time the defendant moved on the site. The plaintiff, an eleven year old boy, saw the lumber pile while riding his bicycle in the alley and went over to play on it. Injuries resulted when the planks on which he was climbing slipped and crushed him. On the day following this mishap, the contractor's workmen entered the premises and began work. The court below, by jury verdict, found against the defendant, holding that he maintained an attractive nuisance on the premises and awarded $20,000 in damages. On appeal the verdict was re-

versed, the court holding, as a matter of law, that the lumber pile could not have constituted an attractive nuisance. It also stressed that the ordering of lumber would not charge a contractor with notice that the piled lumber, when delivered, would become a dangerous instrumentality.

The issue is whether or not a pile of lumber placed on private premises to be used in building construction is an attractive nuisance.

In the instant case the court recognized the usual rule for the attractive nuisance doctrine when it stated, 117 N.E.2d at page 676-7:

> The person against whom it is invoked must have been in possession or control of the premises and of the instrumentality which caused the injury. The instrumentality or condition must be dangerous in itself and likely to cause injury to those coming into contact with it. It must be attractive and alluring to young children who are incapable because of their youth of comprehending the danger. The instrumentality or condition must be exposed and readily accessible to the children. The person in control or possession of the premises must have foreseen or, in the exercise of ordinary care, should have foreseen that children would come in contact with it.

The application of this rule to lumber piles has often been the subject of controversy and it is the general rule that recovery attempted on this doctrine will be refused. See NOTE, 36 A.L.R. 213 (1925).

The reason most commonly utilized by courts in refusing recovery on the attractive nuisance doctrine is that a lumber pile is not per se a dangerous instrumentality. *Branan v. Wimsatt,* 298 Fed. 833 (D.C. Cir. 1924). In this case recovery was denied even though six children testified that private premises on which the injury occurred were frequently used as a playground. The court emphasized that the only duty owed was not to expose children to hidden dangers or other perils as it considered lumber yards not ". . . noxious, harmful, tempting, or alluring to children." 298 Fed. 833, 838. Specific articles like wood shelves piled two or three feet from a public alley, used as a short cut in going to and from school, held not an attractive nuisance in *Manos v. Myers-Miller Furniture Co.,* 32 Ga. 644, 124 S.E. 357, 358 (1924). The injury was considered "a pure and unforeseen accident," as shelves are not "inherently dangerous or alluring."

In *Peters v. Pearce,* 146 La. 902, 84 So. 198 (1920) the court refused to recognize the attractive nuisance doctrine treating the injury as the result of a trespass. In this case the child was injured by a skid pole set in motion by his brother playing on a lumber pile.

In *Martino v. Rotondi,* 91 W. Va. 482, 113 S.E. 760 (1922) lumber stored on a wall and subsequently falling and causing death was sufficient to refuse recovery. The court stressed that the defendant did not contribute to the actual collapse of the wall as the lumber would have remained in position unless disturbed by an external force, and therefore he was only using his property in a reasonable way. *Accord, Holland v. Wisconsin Michigan Power Co.,* 296 Mich. 668, 296 N.W. 833 (1941).

The economic burden of making a property owner an insurer of a trespassing child's welfare coupled with the modern tendency of restricting the application of the attractive nuisance doctrine were the reasons advanced in *Slattery v. Drake,* 130 Ore. 693, 281 Pac. 846 (1929) for denying recovery. In the *Slattery* case, *supra,* the court not only noted the fact that a lumber pile was merely a common object and as such it was immaterial that children were lured, but it said that the law could not expect the defendant to build a wall around the timber as, perhaps, the wall itself would be an attractive nuisance. In *Carr v. Oregon-Washington Ry. & Nav. Co.,* 123 Ore. 259, 261 Pac. 899 (1924), where the defendant knew children played around the yard and a child was killed by falling ties placed next to the right of way, the court said, 261 Pac. at page 904:

> If the law should regard such a common object as a pile of ties an attractive nuisance, it would lead to vexatious and oppressive litigation and impose upon owners a burden of vigilance and care which would materially impair the value of property and seriously cripple owners in making beneficial use of the property.

Childish emotions were rejected in *Lynch v. Knoop,* 118 La. 611, 43 So. 252 (1907), the court holding a lumber pile not a place to attract children and excite their curiosity. In *Missouri K. & T. Ry. of Texas v. Edwards,* 90 Tex. 65, 36 S.W. 430, 432 (1896) the court impressed with the issue, "What object at all unusual is exempt from infantile curiosity?" reversed a verdict for plaintiff on grounds there was "no peculiar allurement about the yard of the defendant." *Accord, Mayor and City Council of Baltimore v. De Palma,* 37 Md. 179, 112 Atl. 277 (1920); *Morris v. Lewis Mfg. Co.,* 331 Mich. 252, 49 N.W.2d 164 (1951); *Vanderbeck v. Hendry,* 34 N.J.L. 467 (1871); *Middleton v. Reutler,* 141 App. Div. 517, 126 N.Y.Supp. 315 (1st Dep't 1910).

While the modern view bars the trespassing child on the attractive nuisance theory, the courts have in some instances permitted recovery if it considers the instrumentality dangerous in fact. In *St. Louis & S.F.R.R. v. Underwood,* 194 Fed. 363 (5th Cir. 1912), the court considered a pile of lumber dangerous to children as its location was exposed and easily accessible to chil-