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### Recent Decisions

John A. Vuono

Robert D. LeMense

Louis G. Basso

Harry D. Snyder

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Party. Until that decision is rendered it is up to the court's discretion to preserve our procedural safeguards, but yet to dispense justice as facilely and quickly as possible. To that discretion we entrust this problem.

*Carl F. Eiberger, Jr.*

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## RECENT DECISIONS

CONFLICT OF LAWS — FOREIGN MARRIAGE INCESTUOUS BY LEX DOMICILII HELD VALID. — In *re May's Estate*, 305 N.Y. 486, 114 N.E.2d 4 (1953). The respondent, Sam May, and the decedent, his niece by the half blood, at all times were domiciled in New York. In contravention of a New York statute, N. Y. DOM. REL. LAW § 5(3), which branded marriage between uncle and niece as incestuous and void, they were married in nearby Rhode Island. Being of Jewish descent, the parties contracted a valid marriage by virtue of an exception to Rhode Island laws on incest, R. I. GEN. LAWS c. 415, §§ 4, 9 (1938), whereby persons of the Jewish faith within the degrees of consanguinity and affinity allowed by their religion, are permitted to marry. Two weeks after the ceremony the respondent May and the decedent returned to New York where they lived as man and wife for thirty-two years until decedent's death. Subsequently, the respondent filed an objection to the issuance to petitioner, one of six children born of the marriage, of the letters of administration of the estate of the decedent, upon the ground that he is the surviving husband and accordingly has the permanent right to administer her estate. In affirming the lower court's decision, 280 App. Div. 647, 117 N.Y.S.2d 345 (3d Dep't 1952), the Court of Appeals of New York, notwithstanding the aforementioned statute which declares such a marriage void, held that the marriage was valid, and granted the letters to the respondent as decedent's surviving husband.

The principal issue involved is whether a state whose statutes unequivocally declare marriages between uncle and niece to be incestuous and void must recognize such a marriage between its domiciliaries as existing and valid because lawfully celebrated in another state.

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<sup>74</sup> In all fairness it must be mentioned that a Communist-action organization as defined in the Act must be shown to have a connection with the world communist movement. This item might have been hard to prove though it might easily have been proved that the party advocates force and violence in the overthrow of the government. This leads to another question: can judicial notice be taken of the control over American parties and organizations by the Russian (or other foreign) organizations? That this was attempted in New York as regards church factions see article by this writer 28 NOTRE DAME LAW. 398, 399 (1953).

The rule that a marriage valid where celebrated is valid everywhere is so well recognized by American courts, for reasons of general policy, that it has almost become a maxim in the field of conflict of laws. *Fensterwald v. Burk*, 129 Md. 131, 98 Atl. 358 (1916); *Thorp v. Thorp*, 90 N.Y. 602 (1882); RESTATEMENT, CONFLICT OF LAWS § 121 (1934). However, this rule has been held to rest on comity alone, *Commonwealth v. Custer*, 145 Pa. Super. 535, 21 A.2d 524, 526 (1941); and to be subject to the principle that: "Every state has the power to determine who shall assume or occupy the matrimonial relationship within its borders." *Toler v. Oakwood Smokeless Coal Corp.*, 173 Va. 425, 4 S.E.2d 364, 366 (1939).

Accordingly, two major exceptions to the general rule have, for all practical purposes, achieved universal acceptance by American courts. The first of these is ordinarily made in the case of a marriage repugnant to the laws of nature as generally recognized in Christian countries, with reference specifically to incest, *United States ex rel. Devine v. Rodgers*, 109 Fed. 886 (E.D. Pa. 1901); polyandry, *People v. Kay*, 141 Misc. 574, 252 N.Y. Supp. 518 (N.Y. City Mag. Ct. 1931); polygamy, *Earle v. Earle*, 141 App. Div. 611, 126 N.Y. Supp. 317 (1st Dep't 1910); or miscegenation, *Eggers v. Olson*, 104 Okla. 297, 231 Pac. 483 (1924).

The main point of consideration herein is the operation of the exception in reference to incestuous unions. While the exception appears relatively simple at first glance, its application poses many difficulties, not the least of which is to determine what constitutes an incestuous marriage. As early as 1856, the courts limited the term "incestuous" to marriages (1) between persons in the direct lineal line of consanguinity, such as a marriage between father and daughter, grandfather and granddaughter, and (2) marriages among the collaterals of the first degree, such as brothers and sisters; said marriages being regarded as against the law of God according to standards of morality generally prevailing in Christendom. *Stevenson v. Gray*, 56 Ky. (17 B.Mon.) 193 (1856). A more difficult question and one that has frequently arisen concerns the status of a marriage between uncle and niece, *Audley v. Audley*, 196 App. Div. 103, 187 N.Y. Supp. 652 (1st Dep't 1921), or aunt and nephew, *Martin v. Martin*, 54 W.Va. 301, 46 S.E. 120 (1903). At least one court, while basing its decision upon a statute, N.Y. DOM. REL. LAW § 5, stated that, "[The Bible] specifically prohibits marriage between nephew and aunt." *Incuria v. Incuria*, 155 Misc. 755, 280 N.Y. Supp. 716, 719 (N.Y. Dom. Rel. Ct. 1935). However true this may be, whatever additions that have been made to the prohibited degrees as announced in *Stevenson v. Gray*, *supra*, have been made by local rules or laws as dictated by local policy in individual states, and such additions are not to be regarded as a part of the divine law as to incest.

The *lex loci contractus* rule is subject to a second exception with reference to a marriage repugnant to the public policy of the domicile of

the parties, *Gilbert v. Gilbert*, 275 Ky. 559, 122 S.W.2d 137 (1938). There is considerable authority in this country supporting the view that although the degree of relationship is not within the prohibition as to incest of the divine law as understood in Christendom, a marriage celebrated in, and valid under the law of another jurisdiction, if prohibited by the law of the forum, will not be there recognized as valid. *United States ex rel. Devine v. Rodgers, supra, Johnson v. Johnson*, 57 Wash. 89, 106 Pac. 500 (1910). This is particularly so if the parties were at the time of the celebration domiciled in such forum and went to another state for the purpose of having the marriage performed, returning to their domicile immediately thereafter. *Osoinach v. Watkins*, 235 Ala. 564, 180 So. 577 (1938). The District Court in the *Rodgers* case, in reiterating the exception to the general rule pointed out, 109 Fed. at 887:

If the relation thus entered into elsewhere, although lawful in the foreign country, is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court sitting in this state to recognize the foreign marriage as valid.

A close parallel can be drawn between the instant case and *Osoinach v. Watkins, supra*, which involved a similar controversy over who should be granted letters of administration of an estate. This latter case concerned the marriage of a nephew to the widow of his deceased uncle, both domiciled in Alabama. The marriage was contracted in Georgia, where such a union is considered valid. The court held that under the statutes of Alabama, as recodified, ALA. CODE tit. 14, § 325 (1940), such a marriage is absolutely void *ab initio*, even though it was contracted in another state where such marriage was valid. Consequently, on the death of the nephew, the alleged widow was not granted any right of property in his estate.

In the instant case, the majority of the court ruled that the statute making marriage between an uncle and his niece incestuous and thus void according to the law of New York, N.Y. DOM. REL. LAW § 5(3), had no extra territorial effect and therefore should not be extended by judicial construction. The court based its decision on *Van Voorhis v. Brintnall*, 86 N.Y. 17 (1881), in which a foreign marriage in apparent contravention of N.Y. DOM. REL. LAW § 8, forbidding the guilty party in a New York divorce judgment to marry again within a certain time, was sustained on the ground that § 8 being penal in character there was no legislative intent to give it effect outside the territorial limits of the state. However, the instant case is readily distinguished from this case as it is concerned with § 5, which holds as void certain marriages, an object totally alien to that of § 8 as construed in the *Van Voorhis* case, *supra*.

In the light of what has been said, § 5 may be taken as expressive of the strongest public policy. Thus, it follows that the instant case falls squarely within the second exception to the *lex loci* principle, as being

repugnant to the public policy of the domicile of the parties. We are inclined to agree with the well-reasoned dissent in the instant case that the decision in effect contravenes the express intentions of the legislature as manifested in § 5(3). In addition, there is merit in the contention that such a marriage may be contrary to the principles of natural law and morality as generally recognized in Christian countries, and thus falls within the first exception to the general rule.

It is submitted that if a citizen of a foreign state, in which polygamy is legal, would bring his half dozen or so legal wives to our country, the marriage of the six spouses to the one spouse would hardly be considered legal or valid by us. The reason is that there is a positive law against polygamy. Equally so, there is a positive law against marriage between nephew and aunt. Can it be said that the latter is less positive than the former, and therefore allow it to be thwarted by the mere crossing of a state line? The majority of the court in the instant case has taken this view by ruling that a marriage contrary to the positive law of New York will be recognized if it is considered valid in the sister state where it was performed, which appears to be stretching the *lex loci contractus* rule beyond its legal and logical limits.

John A. Vuono

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CONSTITUTIONAL LAW — EQUAL PROTECTION — ENFORCEMENT OF RACIAL RESTRICTIVE COVENANTS. — *Barrows v. Jackson*, ....U.S....., 73 Sup. Ct. 1031 (1953). The petitioner brought an action for breach of a covenant running with the land which restricted non-Caucasians from the use and occupancy of real property within a certain neighborhood. The trial court sustained a demurrer to the complaint and the District Court of Appeals for the Second Appellate District affirmed, 112 Cal. App.2d 534, 247 P.2d 99 (1952). The Supreme Court of California denied hearing and certiorari was granted, 345 U.S. 902 (1953).

Can a party to a racial restrictive covenant seek damages for breach thereof by way of an action at law in a state court? The categorical answer of the Supreme Court is in the negative.

Five years ago the Supreme Court held that racial restrictive covenants could not be enforced in the state courts by way of a suit in equity. *Shelley v. Kraemer*, 334 U.S. 1 (1948). In that decision equitable relief *via* an injunction to oust non-Caucasians from real property was denied as unconstitutional under the equal protection guarantee of the Fourteenth Amendment. The defendants (Negroes) were the actual persons at whom the restrictive covenant was aimed; the plaintiffs seeking to have the state courts enjoin them from occupying property described in the covenant. The majority opinion stressed that the mere making of the

covenant was not a violation of the Fourteenth Amendment and, "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State. . . ." *Shelley v. Kraemer, supra*, at 13. The plaintiffs argued that judicial enforcement of the covenants would not amount to state action. The Court struck this down with numerous references to prior decisions and concluded, *Shelley v. Kraemer, supra*, at 18:

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials.

Action by the state courts could then be nothing else but discriminatory action expressly prohibited by the Fourteenth Amendment.

The *Shelley* case started in the Missouri courts. A companion case with a similar set of facts and decided in the same opinion originated in Michigan, *McGhee v. Sipes*, 334 U.S. 1 (1948). The rule was applied in a District of Columbia case in *Hurd v. Hodge*, 334 U.S. 24 (1948).

The rule announced in *Shelley v. Kraemer, supra*, has now been extended to include actions at law for breach of racial restrictive covenants. By the decision in the instant case, the Supreme Court has relegated the racial restrictive covenant to the role of a legal non-entity.

Legal writers anticipated the decision in the instant case after *Shelley v. Kraemer, supra*, but not without qualms and uneasy reflection. Scanlan, *Racial Restrictions In Real Estate — Property Values Versus Human Values*, 24 NOTRE DAME LAW. 157 (1949); Ming, *Racial Restrictions And The Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. OF CHI. L. REV. 203 (1949). Why did the Court see a need for reaffirmation of the *Shelley* case principles? The reason stated was, *Barrows v. Jackson, supra*, 73 Sup. Ct. at 1033:

. . . because of the importance of the constitutional question involved and to consider the conflict which has arisen in the decisions of the state courts since our ruling in the *Shelley* case, *supra*.

The respondent in the instant case could not claim the protection of the Fourteenth Amendment for herself. Her defense lay in the invasion of the rights of others if the courts acted to enforce the racial restrictive covenant against her. The Court remembered its own rule in such situations; that the party before the Court should not set up constitutional rights of third parties as a defense. The late Chief Justice Vinson, who delivered the majority opinion in the *Shelley* case, prodded its memory in his vigorous dissenting opinion. Fortunately, and some will say inevitably, the Court freed itself from its own restrictions, *Barrows v. Jackson, supra*, 73 Sup. Ct. at 1035:

This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state court which might result in the denial of constitutional rights

and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect fundamental rights which would be denied by permitting the damages action to be maintained.

Three state cases and one from the District of Columbia spotlighted the need for the decision in the instant case. A brief examination of the conflict is enlightening. Suits at law for breach of racial restrictive covenants were dismissed under the *Shelley* rule in Michigan, *Phillips v. Naff*, 332 Mich. 389, 52 N.W.2d 158 (1952); and in the District of Columbia, *Roberts v. Curtis*, 93 F. Supp. 604 (D.D.C. 1950).

But lack of concurrence was demonstrated by the Missouri Supreme Court in *Weiss v. Leon*, 359 Mo. 1054, 225 S.W.2d 127 (1949), even though the court refused to allow equitable enforcement of a restrictive covenant. Damages for breach of the covenant were sought in the same suit and the problem was plainly stated, 225 S.W.2d at 131:

We are of the opinion that an action for damages for the breach of a valid agreement need not be affected by the Fourteenth Amendment. The United States Supreme Court has not expressly ruled on this question up to this writing so far as we are able to determine.

The old trick of the financially irresponsible straw man was used in an attempt to circumvent a possible successful suit for breach of covenant in *Correll v. Earley*, 205 Okla. 366, 237 P.2d 1017 (1951). The Oklahoma Supreme Court gave lip service to *Shelley* by refusing equitable relief *via* cancellation of the deeds of Negroes, but the Fourteenth Amendment was lost in the shadow of the ruse of the straw man and the consequent action for damages. The real issue of equal protection was subordinated to the minor issue of the conspiracy to violate the racial restrictive covenant and to avoid damages. The fact that racial restrictive covenants were valid *per se* was utilized to justify state sanction of a suit for breach. The all-important qualifying fact was ignored; namely, that enforcement of such covenants must be by voluntary individual adherence only and not by state action, *Shelley v. Kraemer, supra*.

The need for another racial restrictive covenant decision in an action at law for its breach was evident. The instant case provided the necessary set of operative facts on which the Court could clearly enunciate its views. Whether intentionally or not, the Court emphasized the great necessity and importance of the ruling with its unequivocal handling of the "rights of others" issue. And this was done, in the face of "A line of decisions — long enough to warrant the respect of even the most hardened skeptic of the strength of *stare decisis*. . . ." *Barrows v. Jackson, supra*, 73 Sup. Ct. at 1038. Obviously a violation of the guarantee of equal protection of the law was not to be allowed, at least in this instance, by way of a technical legal subterfuge. The loopholes of the *Shelley* case had to be plugged firmly and with unmistakable vigor and determination.

The dismissal of three other contentions of the petitioners in four short paragraphs of the majority opinion also contributes to the complete disintegration of the racial restrictive covenant. The claim that unidentifiable group rights were being asserted was discounted inasmuch as the personal rights of particular non-Caucasians to the use of the land were being violated. Likewise, when the sanctity of contract was raised as an issue, the petitioners were reminded that the Constitution provides for protections of contracts from legislative action, not the courts. And finally, the ironical twist of the petitioners themselves claiming a denial of due process and equal protection under the Fourteenth Amendment is answered by a quotation from *Shelley v. Kraemer*, 334 U.S. at 22:

The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals.

The decision in the instant case should settle the fate of the racial restrictive covenant in the courts. Parties to existing restrictive covenants will have to face the fact that personal bigotry plus lack of a profitable offer to breach will be the major deterrents to the breakdown of the covenant. But bias and bigotry are ready victims of a gainful transaction, especially when there can be no retribution in the form of a suit for damages. Nevertheless, discrimination and consequent segregation will not be eliminated by the decision in the instant case. However, it is significant insofar as the Court reflects changing public policy and social attitude.

After the *Shelley* case a wealth of legal writing appeared that analyzed the subject from all angles. As has already been mentioned, the instant case was anticipated. So also were many schemes advanced whereby racial discrimination in real property interests could be continued in defiance of the *Shelley* case rule. There was speculation as to the effectiveness of various plans such as corporate land holding, real estate clubs, block captain setups, etc. Scanlan, *supra*, 24 NOTRE DAME LAW. 157, 182-6 (1949). So far only the racial restrictive covenant has been put to the ultimate test — and found wanting. The test of any other discriminatory plans would necessitate that the parties look to the courts for enforcement. A fair presumption is that most lawyers will be extremely hesitant to advise a client that a particular racial restrictive scheme can guarantee them bigotted serenity.

*Robert D. LeMense*

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LITERARY PROPERTY — WRONGFUL APPROPRIATION OF AN IDEA. — *Belt v. Hamilton Nat. Bank*, 108 F. Supp. 689 (D.D.C. 1952). The plaintiff, who was in the advertising business, conceived an idea for a radio program. The radio program involved the use of school children



who possessed vocal and instrumental talent. The plaintiff presented this concept to the defendant, indicating that he expected compensation if his idea was used. The radio program appealed to the defendant, and it engaged the plaintiff at twenty-five dollars a week to make preparations with the understanding that it could terminate the working agreement on two weeks notice. Since the plan incorporated the use of school children, permission from the school authorities had to be obtained. While awaiting the approbation of the authorities the plaintiff was discharged. Some time later the defendant received the school authorities' approval, and it proceeded to put the plaintiff's idea into effect. The defendant employed another advertising agency for this purpose; the plaintiff received no compensation. Being the originator of the idea, the plaintiff brought suit for its wrongful appropriation. The jury rendered a verdict in his favor, and the defendant moved for a judgment notwithstanding the verdict.

In denying the defendant's motion the court held that the common law, ever-changing to meet the needs of society, will protect the originator's property rights in an idea where that idea is concrete, original, and novel.

It has been a standing principle in law that property rights in ideas are not protected by copyright statutes. Statutory copyright does not protect property in ideas but only the tangible material form in which the author expresses them. *Baker v. Selden*, 101 U.S. 99 (1880); *Ansehl v. Puritan Pharmaceutical Co.*, 61 F.2d 131 (8th Cir. 1932); *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926); *Shipman v. RKO Radio Pictures, Inc.*, 20 F. Supp. 249 (S.D.N.Y. 1937), *aff'd*, 100 F.2d 533 (2d Cir. 1938). In *Perris v. Hexamer*, 99 U.S. 674 (1879), where the plaintiff sought to protect a method of mapping, the court held that the copyright did not protect his ideas but only gave him the exclusive right of multiplying copies of what he had written or printed.

It also has been a principle of the common law that the law will not recognize property rights in mere abstract ideas. *O'Brien v. RKO Radio Pictures, Inc.*, 68 F. Supp. 13 (S.D.N.Y. 1946); *Plus Promotions, Inc. v. RCA Mfg. Co.*, 49 F. Supp. 116 (S.D.N.Y. 1943).

But where prior to disclosure the originator forms an express contract with those to whom he is about to reveal his idea, the common law will protect the author's property even in an abstract idea. The court in *Alberts v. Remington Rand, Inc.*, 175 Misc. 486, 23 N.Y.S.2d 892 (Sup. Ct. 1940), held that, in the absence of an express agreement, the originator or proprietor of an idea which could not be sold or negotiated without disclosure could not hold another liable for its use. *Moore v. Ford Motor Co.*, 28 F.2d 529 (S.D.N.Y. 1928); *Rodriguez v. Western Union Tel. Co.*, 259 App. Div. 224, 18 N.Y.S.2d 759 (1st Dep't 1940), *aff'd*, 285 N.Y. 667, 34 N.E.2d 375 (1941); *Stone v. Liggett & Myers Tobacco*

Co., 260 App. Div. 450, 23 N.Y.S.2d 210 (1st Dep't 1940); *Williamson v. N.Y. Cent. R.R.*, 258 App. Div. 226, 16 N.Y.S.2d 217 (2d Dep't 1939).

In *Soule v. Bon Ami Co.*, 201 App. Div. 794, 195 N.Y. Supp. 574 (2d Dep't 1922), *aff'd*, 235 N.Y. 608, 139 N.E. 754 (1923), the court pointed out that ideas which were to be the consideration and the subject in a contract must be novel and new to be legal consideration. No one by contract could monopolize an idea which belongs to the common stock.

The author of an abstract idea may not recover in an action based on the theory of implied contract for its use by another. *Stanley v. Columbia Broadcasting System*, 192 P.2d 495, 501 (Cal. 1948), *aff'd*, 208 P.2d 9 (1949), 35 Cal.2d 653, 221 P.2d 73 (1950). However, the courts will grant protection to an author's property right in his idea in an action based on the theory of implied contract when the idea is concrete, new and novel. In *Stanley v. Columbia Broadcasting System*, *supra*, the plaintiff introduced a radio program to the defendant and the court in affirming the decision stated, 221 P.2d at 75:

. . . the right of the originator of an idea to recover from one who uses or infringes it seems to depend upon whether or not the idea was novel and reduced to concrete form prior to its appropriation by the defendant, and, where the idea was disclosed by the originator to the appropriator, whether such disclosure took place under circumstances indicating that compensation was expected if the idea was used.

Such circumstances that would indicate expectation of payment for the use of a concrete and novel idea existed in *Liggett & Myers Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N.E. 206 (1935), where the plaintiff informed the defendant in a letter that a reasonable charge would be expected if his advertising scheme was used. In *Ryan & Associates, Inc. v. Century Brewing Ass'n*, 185 Wash. 600, 55 P.2d 1053 (1936), the defendant solicited plaintiff's advertising slogan and the plaintiff in submitting his idea warned defendant that the use of the slogan was forbidden unless arrangements were made. The defendant used the slogan without permission and the plaintiff recovered on the theory of *quantum meruit*. Cf. *American Mint Corp. v. Ex-Lax, Inc.*, 263 App. Div. 89, 31 N.Y.S.2d 708 (1st Dep't 1941).

Another interesting point concerning an author's right to property in an idea was stated in *Haskins v. Ryan*, 71 N.J. Eq. 575, 64 Atl. 436 (Ch. 1906), *aff'd*, 75 N.J. Eq. 623, 73 Atl. 1118 (Ct. Err. & App. 1909), where the court denied equitable relief to the plaintiff who had revealed to the defendant a scheme for combining the white lead industries. It was pointed out that the plaintiff had no means to effectuate his plan, and therefore he lacked control over his idea. This scheme, the court said, could not be called property, for the originator could not apply it to his own use. Cf. *Universal Sav. Corp. v. Morris Plan Co.*, 234 Fed. 382, 386 (S.D.N.Y. 1916).

The question of whether or not an idea is concrete is one of law. *Golding v. RKO Pictures, Inc.*, 35 Cal.2d 690, 221 P.2d 95, 97 (1950). In *Stanley v. Columbia Broadcasting System*, *supra*, 192 P.2d at 503, the court in discussing what was a concrete idea referred to definitions found in Webster's New International Dictionary (2d ed. 1936) in which "abstract" is defined as, "Considered apart from any application to a particular object;" and "concrete" as, "Having a specific application; particular." A slogan "Neighborly Haberle" revealed to the defendant brewery orally was found to be abstract where the author brought suit for its use in *Bailey v. Haberle Congress Brewing Co.*, 193 Misc. 723, 85 N.Y.S.2d 51, 52 (Syracuse Munic. Ct. 1948). An idea for a ship-to-shore radio service for travelers was found to lack specific application in *Rodriquez v. Western Union Telegraph Co.*, *supra*, while in *Liggett & Myers Tobacco Co. v. Meyer*, *supra*, the plaintiff was allowed to recover for the use of an advertising idea consisting of two men, one offering the other a cigarette and receiving a reply of, "No thanks; I smoke Chesterfields." The court considered this idea to be concrete.

But even though an idea is concrete and the author expresses his desire for compensation an implied contract will not be assumed if the idea is not new or original. *Larson v. General Motors Corp.*, 2 F.R.D. 294 (S.D.N.Y. 1941).

Whether an idea is new or novel is a question of fact. *Dezendorf v. Century-Fox Film Corp.*, 99 F.2d 850 (9th Cir. 1938); *Shaw Advertising, Inc. v. Ford Motor Co.*, 112 F. Supp. 121 (N.D. Ill. 1953). Novelty was found to be lacking in the plaintiff's idea to solicit Negro patronage with an advertising campaign employing the endorsements of outstanding Negroes in *Hampton v. LaSalle Hat Co.*, 88 F. Supp. 153 (S.D.N.Y. 1949).

The court in the instant case found the plaintiff's idea to conform to the requirements of novelty, concreteness, and originality. This coupled with the fact that the plaintiff expected compensation was sufficient to allow the plaintiff to recover for the use of that idea.

Whether the courts will further extend protection to property in ideas in other instances as our society progresses and becomes more complex will only be determined by the courts as such instances are pleaded before them.

*Louis G. Basso, Jr.*

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PARTIES — SUBROGATION — PARTIALLY SUBROGATED INSURER AS REAL PARTY IN INTEREST. — *Powers v. Ellis*, ....Ind....., 108 N.E.2d 132 (1952). The plaintiff brought an action to recover damages alleged to have been sustained by reason of defendant's negligence in operating a truck which struck and damaged plaintiff's fruit and grocery market.

The trial court entered judgment for the plaintiff, and the defendant appealed asserting that among the errors committed by the trial court was its overruling of defendant's motion to make plaintiff's insurance company a party to the action, and its striking out of interrogatories concerning possible assignment or subrogation of plaintiff's claim.

The Appellate Court of Indiana, in banc, two judges dissenting, reversed the trial court's decision, ruled that it was error to sustain the plaintiff's motion to strike out interrogatories, and ordered a new trial, ....Ind. App....., 103 N.E.2d 907 (1952). On appeal to the Supreme Court of Indiana the trial court's decision was reinstated, the court holding *inter alia*, that joinder of the insurance company was not necessary, because judgment satisfied against the defendant by the insured would fully protect the defendant from further suit by the insurance company from the same cause.

The basic question considered by the court concerns the interpretation of a "Real Party In Interest" statute to determine whether the insurer or insured is the proper party plaintiff in cases of partial or complete subrogation of claims. The difficulties which the Indiana courts have encountered in endeavoring to apply the statute to specific situations typify the problems which have arisen in the majority of code states.

In examining the cases decided under "Real Party In Interest" statutes, it is significant to note that the prime motive which prompted the various states to include such provisions in their codes was the desire to abandon the common law rule requiring actions to be brought by the nominal plaintiff, *i.e.*, the one whose *legal* right had been affected. It was thought more desirable to adopt the equity rule which allowed anyone with a *beneficial* interest in the controversy to become a party. "The aim of the codifiers was a unified system of law and equity." Clark and Hutchins, *The Real Party In Interest*, 34 YALE L.J. 259, 262 (1925).

In 1881, Indiana followed the wording used by many of the code states and enacted a statute providing: "Every action must be prosecuted in the name of the real party in interest. . . ." Ind. Acts 1881 (Spec. Sess.), c. 38, § 3, p. 240. The Supreme Court of Indiana was first compelled to interpret the statute with regard to subrogation of insurance rights in *Cunningham v. Evansville & T.H.R.R.*, 102 Ind. 478, 1 N.E. 800 (1885). The defendant railroad company asserted that the plaintiffs, whose property had been burned through sparks and coals which escaped from defendant's engines, were not the real parties in interest because of full reimbursement for such property loss by various insurance companies. In holding that the plaintiffs (appellants) were the proper parties the court stated, 102 Ind. at 482, 1 N.E. at 803:

The contracts of the appellants for the insurance of their property, with the insurance companies, and their subsequent conduct in relation thereto, are matters in which the appellee, as the wrongdoer, had no concern, and which do not affect the measure of its liability.

No distinction was made by the court between full and partial compensation; the insurance company being an unnecessary party in either case. In rendering its decision, the court relied on earlier decisions in other jurisdictions. *Clark v. Wilson*, 103 Mass. 219 (1869); *Perrott v. Shearer*, 17 Mich. 47 (1868); *Weber v. Morris & Essex R.R.*, 35 N.J.L. 409 (Sup. Ct. 1872). It is interesting to note, however, that in these and other cases cited as controlling, the decisions were rendered on the basis of the common law and not in light of the "Real Party in Interest" statutes.

While the courts of Indiana and several other jurisdictions continued to follow the holding in the *Cunningham* case, *supra*, in cases of full payment by the insurer, *Citizens Gas & Oil Mining Co. v. Whipple*, 32 Ind. App. 203, 69 N.E. 557 (1904); *Illinois Central R.R. v. Hicklin*, 131 Ky. 624, 115 S.W. 752 (1909); *Alaska Pac. S.S. v. Sperry Flour Co.*, 94 Wash. 227, 162 Pac. 26 (1917); it became the majority rule that where the insurance fully covered the loss, the insurer became the real party in interest, and hence, was the only one entitled to sue. *Southern Ry. v. Stonewall Ins. Co.*, 163 Ala. 161, 50 So. 940 (1909); *Atchison, T. & S.F.R.R. v. Home Ins. Co.*, 59 Kan. 432, 53 Pac. 459 (1898); *Powell and Powell v. Wake Water Co.*, 171 N.C. 290, 88 S.E. 426 (1916).

Where the loss exceeded the insurance paid, however, the majority of courts deemed the insured the proper party plaintiff. *Solberg v. Minneapolis Willys-Knight Co.*, 177 Minn. 10, 224 N.W. 271 (1929); *Harrington v. Central States Fire Ins. Co.*, 169 Okla. 255, 36 P.2d 738 (1934). Indiana sided with the majority on this second proposition; its position following naturally from the broader rule that the insured could sue even under full subrogation. *Cunningham v. Evansville & T.H.R.R.*, *supra*. Indiana also followed another majority trend and provided for permissive joinder of insurer and insured in cases of partial subrogation. *Pittsburg C.C. & St.L.R.R. v. Home Ins. Co.*, 183 Ind. 355, 108 N.E. 525 (1915).

Apparently influenced by the increasing trend away from the position held in the *Cunningham* case, *supra*, the Appellate Court of Indiana in *Boyd Motor Co. v. Clafey*, 94 Ind. App. 492, 165 N.E. 255 (1932), held that in a case of reimbursement for the entire loss suffered and full assignment of claims to the insurance company, such company was the only proper party plaintiff. In referring to the fully indemnified owner, the court, emphasizing its point, quoted from an earlier case, *Board of Comm'rs v. Jameson*, 86 Ind. 154, 163 (1882):

It seems to us that he thus divested himself of all beneficial interest in the claim, and vested it in the company. If he retained no substantial interest, then his assignee became the real party in interest, and, under our code, was the only proper plaintiff.

In a later Indiana case, *Williamson v. Purity Bakeries*, 101 Ind. App. 441, 193 N.E. 717 (1935), the court attempted to distinguish between a

case wherein the insured had assigned his claim to the insurance company before the commencement of the action (*Claffey* case, *supra*), and the case before the court wherein the insured had been fully paid by his insurance company, thereby subrogating the company to his claim. The court ruled that in the former case the insurance company was the only proper plaintiff, whereas in the latter instance the insured could sue as the real party in interest. In ruling as it did in this case of complete payment and subrogation, the court relied on the *Cunningham* case, *supra*, differentiating it and the case at hand from the *Claffey* case, *supra*. However, this supposed distinction has met with adverse criticism. *E.g.*, 10 IND. L.J. 528, 530 (1935): "The legal distinction between an assignment and subrogation can only be negligible, if any distinction can be made at all." See also 2 GAVITT, INDIANA PLEADING AND PRACTICE § 242 (1942).

The present case, then, concerns a situation different from that which appeared in either the *Claffey* or *Williamson* cases, *supra*. Here we have no question of complete subrogation, or full assignment of rights, but instead, a case of part payment and subrogation. The appellate court did not consider the question of a distinction between partial and complete subrogation. The distinction between subrogation and assignment was preserved, however, and a new trial was granted because the court below had not allowed the defendant to determine by means of interrogatories whether the plaintiff had completely assigned his claim.

The decision of the Supreme Court of Indiana, superseding the appellate court ruling, was based on the proposition that since recovery by the plaintiff would be a complete bar to a further suit against the defendant by the plaintiff's insurance company, the insured was the proper party plaintiff. Although citing the *Williamson* case among the authorities for the decision, the court avoided the question of possible distinction between assignment and subrogation. It did, however, state that as far as the *Claffey* case was in conflict with the court's opinion, it was disapproved, 108 N.E.2d at 136. Although the statement is mere dicta and not an express holding of the court, it tends to emphasize the court's contention that the controlling factor under the "Real Party In Interest" statutes is the fact that recovery by the insured will protect the tortfeasor from further litigation by the insurer. Although there is obvious logic to this reasoning in a case such as the present one of partial subrogation, it is hoped that the court will not follow its indication of approval of the *Williamson* case and disregard for the *Claffey* case, and extend the rule to cases of complete subrogation or assignment, thereby allowing a suit to be brought by a plaintiff who has no beneficial interest whatsoever in the outcome of the controversy. It would seem that the designation of such a person as the real party in interest would contravene the express wording of the statute.

*Harry D. Snyder, Jr.*

TORTS — LIBEL AND SLANDER — CONSIDERATIONS DETERMINATIVE OF WHETHER CHARGING ONE AS BEING A COMMUNIST IS SLANDEROUS PER SE. — *Lightfoot v. Jennings*, ....Mo....., 254 S.W.2d 596 (1953). Plaintiff, Lightfoot, brought this action for actual and punitive damages for slander and libel. Defendant, Jennings, filed a motion for dismissal. Plaintiff alleged that after a public meeting and in the presence of approximately one hundred persons defendant approached and said: "You are not going to talk here you damned communist." Plaintiff alleged that the words were defamatory and slanderous, "Meaning and intending to mean and being understood by those present to mean that plaintiff was a member of the Communist Party and advocated, abetted, advised, taught or encouraged the duty, necessity, desirability or propriety of overthrowing or destroying the Government of the United States." Plaintiff premised the latter pleading upon the Smith Act, 18 U.S.C. § 2385 (Supp. 1952), a felony, which would render the words orally spoken as being slanderous per se. There was no allegation of special damages.

The trial court sustained the defendant's motion for dismissal. The Supreme Court of Missouri, citing as authority directly in point *Von Gerichten v. Seitz*, 94 App. Div. 130, 87 N.Y. Supp. 968 (4th Dep't 1904), ruled that the petition stated a cause of action and reversed and remanded the case. The rule in Missouri is that oral words imputing or charging the commission of a crime amounting to a felony are defamatory and actionable per se, even where the act imputed is a crime under the laws of another jurisdiction, in the instant case, the laws of the United States.

The question to be resolved by the Missouri Supreme Court was whether the language relied upon was defamatory and slanderous per se. The reading of cases relevant to this issue points up a second question: how compelling should the "historical distinction" between libel and slander be upon the courts today in reaching their decisions?

The imputation of political principles or practices objectionable to the average person in the community has been recognized as defamatory and actionable per se. *Mencher v. Chesley*, 297 N.Y. 94, 75 N.E.2d 257 (1947). It has quite generally been held libelous per se to falsely charge a person with being a Communist. *Utah State Farm Bureau Federation v. National Farmers Union Service Corp.*, 198 F.2d 20 (10th Cir. 1952); cf. *Gallagher v. Chavalas*, 48 Cal. App.2d 52, 119 P.2d 408 (App. Dep't 1941); *Ward v. League for Justice*, 93 N.E.2d 723 (Ohio App. 1950); see also *Grant v. Reader's Digest Ass'n*, 151 F.2d 733 (2d Cir. 1945). Contra: *McAndrew v. Scranton Republican Pub. Co.*, 364 Pa. 504, 72 A.2d 780, 784 (1950).

Two notable cases recently decided have held that it was not slanderous per se to charge orally that a person is a Communist. In *Pecyk v. Semoncheck*, 157 Ohio St. 354, 105 N.E.2d 61 (1952), the plaintiff made

no allegation of proof of special damages. The alleged defamatory words (Communist or Communist sympathizer) were made at a meeting of the Political Action Committee of the CIO in Cleveland, Ohio. The words were held not to be slanderous per se the court stating in 105 N.E.2d at 63:

In the instant case, there is nothing in the petition or in the evidence to indicate that . . . Pecyk was injured in his trade or calling by reason of the scandalous statement made concerning him. Therefore, notwithstanding our belief that such a statement would subject . . . Pecyk to public hatred, ridicule and contempt by the vast majority of American citizens, yet, *without an allegation and proof of special damage, the words used herein are not actionable.* [Emphasis supplied].

In *Keeffe v. O'Brien*, 203 Misc. 113, 116 N.Y.S.2d 286 (Sup.Ct. 1952), an action was brought for slander asking for damages in the amount of \$20,000. It was held that to charge orally that a person is a Communist is not slanderous per se. The court gave no sound basis for distinguishing *Mencher v. Chesley*, *supra*, except that in that case the publication had been written. The court stated in 116 N.Y.S.2d at 288:

To hold that calling one a communist is slander would unwittingly entrap the unwary, for nothing would please Communists better than to enable them to institute suits for damages promiscuously, regardless of the ultimate outcome. It has been amply demonstrated that it is part of communist doctrine and strategy to make the courtroom its forum for propaganda purposes.

Is it not the function of our courts to determine whether a pleading is sham or valid? In most instances in the law of libel and slander one speaks at his own peril. Such a rationalization as this would but foster injury to innocent persons.

The New York Supreme Court has also held that it is not libelous per se to call a man a Communist since Communists can organize as a lawful political party in the United States, and it is not for the courts to meddle in political controversy. *Garriga v. Richfield*, 174 Misc. 315, 20 N.Y.S. 2d 544 (Sup. Ct. 1940); cf. *Hays v. American Defense Society Inc.*, 252 N.Y. 266, 169 N.E. 380 (1929).

A subsequent case declined to follow this ruling and held that the words "Nazi and Communist" as applied to a lawyer, were defamatory per se. The alleged libel in *Levy v. Gelber*, 175 Misc. 746, 25 N.Y.S.2d 148 (Sup. Ct. 1941), was in the form of an open letter to the members of a union. No special damages were alleged. Upholding the sufficiency of the complaint the court stated in 25 N.Y.S.2d at 150:

Certainly, in light of the public attitude today as evidenced, only in small part, by these legislative enactments it may not be held as a matter of law that to place an attorney falsely in the category of those to whom Government employ is forbidden does not adversely affect his standing in his profession.

Cf. *Cerveney v. Chicago Daily News Co.*, 139 Ill. 345, 28 N.E. 692 (1891); *Toomey v. Jones*, 124 Okla. 167, 254 Pac. 736 (1926).



The result reached in the instant case appears to this writer to be a reasonable one. Other cases on the subject present the anomalous situation in the law of defamation, viz., is there a rational basis for the differentiation that written defamatory words are libelous per se, while the same words if uttered orally are not slanderous per se? New means of communication have found the courts unprepared to resolve this "historical distinction." PROSSER, TORTS § 92 (1941). For the view that this distinction is "mere historical accident" see 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 363-65 (5th ed. 1942); 2 POLLOCK & MATTLAND, HISTORY OF ENGLISH LAW 537 (2d ed. 1923). For a contrary view see Justice Cardozo's opinion in *Ostrowe v. Lee*, 256 N.Y. 36, 175 N.E. 505 (1931) where he states in 175 N.E. at 506:

The schism in the law of defamation between the older wrong of slander and the newer one of libel is not the product of mere accident. . . . It has its genesis in evils which the years have not erased. Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmuted into print. *What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides* and "perpetuates the scandal." [Emphasis supplied].

Historically, words have been held to be slanderous per se in the following instances: the imputation of a serious crime, *Heming v. Power*, 10 M. & W. 564, 152 Eng. Rep. 595 (Ex. 1842); the imputation of certain loathsome diseases, *Kaucher v. Blinn*, 29 Ohio St. 62, 23 Am. Rep. 727 (1875); imputations affecting the plaintiff in his office, *Fitzgerald v. Piette*, 180 Wis. 625, 193 N.W. 86 (1923); and in some jurisdictions, the imputation of unchastity to a woman, *Cooper v. Seaverns*, 81 Kan. 267, 105 Pac. 509 (1909). Contra: *Pollard v. Lyon*, 91 U.S. 225 (1876).

The instant case fits in the first category above, but there appears to be no great distinguishing feature between this case and *Mencher v. Chesley*, *supra*, though the latter is in libel. It is beyond doubt that the name Communist or Communist sympathizer would subject a person to public aversion and expose him to public hatred, ridicule and contempt by the vast majority of American citizens. *Pecyk v. Semoncheck*, *supra*. That there is a great American aversion for Communism has been illustrated. See Reisman, *Democracy and Defamation*, 42 COL. L. REV. 1282, 1304 (1942). In 3 RESTATEMENT, TORTS § 620 (1938) the rationale is found that one of the reasons for permitting an action in libel without proof of special damage is to allow the plaintiff to vindicate himself. Should not this reasoning be extended to false, oral accusations of Communism?

One celebrated English case involved the "historical distinction." In *Thorley v. Lord Kerry*, 4 Taunt. 355, 128 Eng. Rep. 367 (1812), the issue was whether an action would lie for words written, notwithstanding that such an action would not lie for them if spoken. Lord Mansfield, at 4 Taunt. 364, 365, 128 Eng. Rep. at 371 stated:

. . . I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. . . . So it has been argued that writing shews more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So, it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, . . . may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be very generally read, but that is all casual.

. . .

If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

That the "distinction" has remained as a vestige in present-day decisions. see *Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30 (1947), the court intimating that it was not prepared to do what Lord Mansfield declared he could not do in *Thorley v. Kerry*, *supra*, viz., abolish the "distinction" between written and oral defamation. The concurring opinion stated in 73 N.E.2d at 33: "Abolition of the line between libel and slander would . . . be too extreme a break with the past to be achieved without legislation."

A writing is defamatory per se that is, actionable without allegation of special damage, if it tends to expose a person to hatred, contempt, or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him. *Peck v. Tribune Co.*, 214 U.S. 185 (1909). Oral utterances could definitely meet the requisites of this rule. *A fortiori*, the policy which has been instituted to combat Communism would reasonably lead substantial numbers of persons to believe those clothed with the Communist stigma to be immoral. If this is a reasonable inference it then appears it would not be unreasonable to declare false accusations in this area as slanderous per se.

Mr. Justice Holmes, in rendering the decision in *Peck v. Tribune Co.*, *supra*, a libel action for a false whiskey endorsement found it unnecessary to decide if the publication was a tort per se. He thought it sufficient to do the plaintiff practical harm if a large number of persons knew of the publication and an "appreciable" fraction of that number regarded her with contempt.

So it is that a great majority of decisions will support the finding that special damage must be alleged and proved for slanderous statements spoken orally, while at the same time if the words had been written they would be actionable per se. We can safely predict that judicial decisions will adhere to the "historical distinction" which has been termed "mere accident" by numerous writers in jurisprudence. Mr. Justice Holmes was not thinking in abstraction when he wrote in his, *THE COMMON LAW*, p. 5 (1881):

A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains.

Many courts did not have the federal enactment, 18 U.S.C. § 2385 (Supp. 1952), upon which to find that orally charging one with being a Communist was slanderous per se. Perhaps other state courts will make use of that provision in the future. The "historical distinction" is incongruous when it presumes damage if words are written on a postal card for example, while a plaintiff bringing an action on the same words orally uttered before a gathering of 2,000 people must allege and prove special damages. It is very doubtful that many courts will abolish the "distinction" which has become so well entrenched. It would seem feasible for the courts to abolish the "distinction" and to treat each factual situation on a case to case basis, especially in the area under discussion. Experience has shown us that the doctrine of stare decisis will continue to plague and confuse judicial minds at the expense of justice.

Wilbur L. Pollard

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UNFAIR COMPETITION — INFRINGING USE OF TRADE MARKS — USE OF SIMILAR TRADE MARKS ON DISSIMILAR PRODUCTS. — *Consolidated Cosmetics v. Neilson Chemical Co.*, 109 F. Supp. 300 (E.D. Mich. 1952). The plaintiff manufactured cosmetics and toiletries and had established and registered the trade-marks "Tabu" and "Taboo" in conjunction with the sale of its products. Defendants, in 1945, filed an application with the United States Patent Office for registration of its trade-mark "Rustaboo" for a chemical and detergent preparation designed to clean and prepare metal surfaces for painting. The Patent Office accepted the application. Plaintiff brought a suit in equity to enjoin the use of such trade-mark and to reverse the decision of the Patent Office on the ground of unfair competition and trade-mark infringement. The District Court affirmed the decision of the Patent Office, stating that the goods in question did not possess the same descriptive properties and that there was little chance of confusion as regards the trade-marks used with these products.

This case substantiates an ever-growing tendency of the courts. Where the goods are noncompetitive and are not of the same descriptive properties, the courts have discounted the likelihood of confusion in the similarity of trade-marks and have generally favored the new applicants. *American Steel Foundries v. Robertson*, 269 U.S. 372 (1926); *Goodall-Sanford, Inc. v. Landers Corp.*, 187 F.2d 639 (C.C.P.A. 1951); *McKesson & Robbins, Inc. v. Isenberg*, 167 F.2d 510 (C.C.P.A. 1948);

*Goldsmith Bros. v. Atlas Supply Co.*, 148 F.2d 1016 (C.C.P.A. 1945); *Proctor & Gamble Co. v. Sweets Laboratories, Inc.*, 137 F.2d 365 (C.C.P.A. 1943).

The modern view holds that actual competition is no longer an essential element in determining trade-mark infringement as constituting unfair competition. Lunsford, *The Trade Mark Anomaly*, 42 TRADE MARK REP. 1 (1953). The statutes likewise, have this view in mind. Under the Federal Trade Commission Acts, 38 STAT. 719 (1914), as amended, 15 U.S.C. § 45 (Supp. 1952), actual competition is no longer necessary for the enjoining of unfair competition and unfair or deceptive acts or practices. The fact that a trade-mark probably will not deprive the original user of trade is no longer a valid defense. *Stork Restaurant, Inc. v. Marcus*, 36 F. Supp. 90 (E.D. Pa. 1941). More recently, confusion has been held to be an important test. *Chappell v. Goltsman*, 99 F. Supp. 970 (M.D. Ala. 1951).

How far the courts will extend trade-mark infringement into the field of noncompetitive goods remains a matter of conjecture. See, e.g., *Lady Esther, Ltd. v. Lady Esther Corset Shoppe, Inc.*, 317 Ill. App. 451, 46 N.E.2d 165 (1943); *Hanson v. Triangle Publications, Inc.*, 163 F.2d 74, 78 (8th Cir. 1947). There has been pointed objection to this tendency. Comment, 44 ILL. L. REV. 182 (1949). It is argued that the object of the courts in trade-mark cases should be protection of the public and not the protection of the trade-mark rights of noncompetitive producers.

Even though under the modern interpretation it makes little difference if the products are in actual competition, still, without proof of confusion of the public and prospective purchasers, there is no trade-mark infringement irrespective of any similarity between goods or trade-marks. RESTATEMENT, TORTS §§ 730-31 (1938). In effect, this is the interpretation which the courts put on the Lanham Trade Mark Act, 60 STAT. 427, 15 U.S.C. § 1051 *et seq.* (1946). The Lanham Act, while making the likelihood of confusion as to source the basic test, *American Automobile Ins. Co. v. American Auto Club*, 184 F.2d 407, 409-10 (9th Cir. 1950), still pursues the interests of the trade-mark owner in attempting to incorporate into the act the common law policy of strict protection of property rights and the then existing similar construction of earlier trade-mark acts. Martin, *The Defense of Trade Marks and Unfair Competition Cases*, 41 TRADE MARK REP. 99 (1951).

Although, generally, the modern trend of the courts has placed the emphasis in determining trade-mark infringement on the likelihood of confusion as to source of the product, still there is no clear cut standard when the test is applied to noncompetitive goods. Where the rights of the infringer have been narrowly construed the courts have applied the dilution doctrine. *L. E. Waterman Co. v. Gordon*, 72 F.2d 272, 273-74 (2d Cir. 1934):

The theory on which the wrong has been extended to include the use of the mark on goods never made or sold by the owner, is that, though the infringer's user cannot at the moment take away his customers, it may indirectly do so by tarnishing his reputation, or it may prevent him from extending his trade to the goods on which the infringer is using the mark.

Dilution is any activity on the part of one producer which somehow decreases the consumer's association of use or product with a particular trade name of another producer.

This doctrine is based on the rule that a trade-mark is a property right and must be protected strictly in the favor of the owner. This was an important factor in the earlier cases. *Trade-Mark Cases*, 100 U.S. 82, 92 (1879). This doctrine has received some recognition. *Philadelphia Storage Battery Co. v. Mindlin*, 163 Misc. 52, 296 N.Y. Supp. 176 (Sup. Ct. 1937); *Tiffany & Co. v. Tiffany Productions, Inc.*, 147 Misc. 679, 264 N.Y. Supp. 459 (Sup. Ct.), *aff'd*, 237 App. Div. 801, 260 N.Y. Supp. 821 (1st Dep't 1932), *aff'd*, 262 N.Y. 482, 188 N.E. 30 (1933). The dilution doctrine, though usually involving noncompetitive goods has been applied in one case involving similar competitive articles with similar name. *Pro-Phy-Lac-Tic Brush Co. v. Jordan Marsh Co.*, 165 F.2d 549 (1st Cir. 1948) (hairbrushes).

The instant case is in accord with the modern trend of the courts in impliedly rejecting the dilution doctrine. *Chas. D. Briddell, Inc. v. Al-globe Trading Corp.*, 194 F.2d 416 (2d Cir. 1952); *Creamette Co. v. Conlin*, 191 F.2d 108 (5th Cir. 1951); *American Automobile Ins. Co. v. American Auto Club*, *supra*; *Chappell v. Goltsman*, *supra*. The test now seems to be based on the descriptive properties of noncompetitive articles in determining whether confusion as to source or product would result from the use of a similar name. *White Co. v. Vita-Var Corp.*, 182 F.2d 217 (C.C.P.A. 1950).

The courts in the trade-mark cases, however, have never decidedly rejected the producers property interest. As was stated in *Yale Electric Corp. v. Robertson*, 26 F.2d 972, 974 (2d Cir. 1928):

However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use. . . .

*Cf. S. C. Johnson & Son, Inc., v. Johnson*, 116 F.2d 427 (2d Cir. 1940).

In the cases concerning noncompetitive foods, drugs, and cosmetics the more recent decisions have tended to construe the rights of the infringer narrowly. Mock, *Status of Food, Drug, and Cosmetic Trade Marks*, 39 TRADE MARK REP. 283 (1949):

In general, a mark used for a drug has hitherto not been considered to anticipate a mark used for cosmetics and vice versa. There are a number of