Notre Dame Law Review

Volume 28 | Issue 2 Article 6

2-1-1953

Recent Decisions

Richard M. Di Valerio

James A. Uhl

Donald J. Prebenda

Wilbur L. Pollard

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation

Richard M. Di Valerio, James A. Uhl, Donald J. Prebenda & Wilbur L. Pollard, *Recent Decisions*, 28 Notre Dame L. Rev. 256 (1953).
Available at: http://scholarship.law.nd.edu/ndlr/vol28/iss2/6

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

between the seller and the purchaser. It might also be advisable not to assign the note and chattel mortgage at the same time. If the additional security of the chattel mortgage is desired, the mortgage might be assigned later so that the distinction between the two instruments would be more readily apparent. In this way the "closeness of relationship" so relied on by the courts might be avoided. It should be noted, however, that in those jurisdictions where notes executed with chattel mortgages are denied negotiability, these precautions would be to no avail.

Anthony V. Amodio
Frank A. Howard

RECENT DECISIONS

ALIENS — INABILITY TO TAKE OATH OF ALLEGIANCE AS BAR TO NATURALIZATION. — *Petition of Plywacki,* 107 F. Supp. 593 (D. Hawaii 1952). The petitioner in this case is a Polish citizen and former member of the United States Air Force seeking naturalization under a special statutory provision for members of the armed forces, 62 STAT. 281 (1948), as amended, 63 STAT. 282 (1949). The Naturalization Examiner was informed by the petitioner that he was an atheist, and, as such, could not in good faith subscribe to the statutory oath of allegiance prescribed by 61 STAT. 122 (1947), as amended, 64 STAT. 1017 (1950). The petitioner requested permission to take an alternative oath omitting the words "on oath" and "so help me God." To replace these words of the prescribed oath, he offered to insert "and affirm in honor and sincerity." The remainder of the petitioner's alternative oath was substantially identical to that prescribed by the statute. The court questioned the petitioner and agreed that, as an atheist, he could not take the statutory oath in good faith. As a result, the court denied the petition for naturalization as a citizen of the United States because of the petitioner's inability to take the prescribed oath of allegiance.

The question presented in this case is whether an otherwise qualified alien may be refused citizenship in the United States solely because his disbelief in a Supreme Being prevents him from taking the oath of allegiance ordained by Congress.

The court in the case at bar answers this query in the affirmative, basing its determination upon two principles: that the government of the United States and its institutions are founded upon and presuppose the existence of God, and that an alien may obtain the privilege of citizenship only by strict conformance to the procedure provided by statute. *United States v. MacIntosh,* 283 U.S. 605, 626, 51 S.Ct. 570, 75 L.Ed. 1302 (1931); *United States v. Bland,* 283 U.S. 636, 51 S.Ct. 569, 75 L.Ed. 1319 (1931).

The above-mentioned cases are exemplary of the reluctance of federal courts to construe the naturalization laws liberally. In each case, naturalization was denied because the petitioners were, in a sense, conscientious objectors and, as such, were unable to take the oath of allegiance without qualification.

That it is within the province of Congress to prescribe the form of the oath is beyond dispute. In re *Clark,* 301 Pa. 321, 152 Atl. 92 (1930). In view of the fact that Congress has deemed it necessary to establish specific procedures for naturalization, the judiciary has insisted that it cannot dispense with them, even if it may result in hardship to an individual. *United States v. Olaechea,* 293 Fed. 819 (D. Nev. 1923); *see United States v. Ginsberg,* 243 U.S. 472, 475, 37 S.Ct. 422, 61 L.Ed. 853 (1917); Ex parte *Eberhardt,* 270 Fed. 334, 337 (E.D. Mo. 1921); In re *Hollo,* 206 Fed. 852, 854 (N.D. Ohio 1913); In re *Liberman,* 193 Fed. 301, 302 (W.D. Wash. 1912). At least one court has deemed the statutory oath to be a condition precedent to admission to citizenship. In re *Kullman,* 87 F. Supp. 1001 (W.D. Mo. 1949).

In adopting a stringent policy for naturalization, Congress has in the past provided that "A person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this Act, and not otherwise." 54 STAT. 1140 (1940). The courts have repeatedly held that it is their duty to adhere rigidly to the legislative will, especially with regard to a matter of such great public concern as naturalization, *United States v. Ginsberg, supra.*

A large number of the decisions construing the prescribed oath deal with conscientious objectors. *United States v. Schwimmer,* 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889 (1929). To rationalize the apparent injustice which resulted from their decisions, the courts invoked the application of a compliant principle stating that wherever doubt exists concerning a grant of citizenship, the case should be resolved against the claimant.

The necessity for such rationalization has been diminished, however, both by liberal judicial construction and recent legislative enactment. In *Girouard v. United States,* 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084 (1946), the Supreme Court reversed its position and overruled the *MacIntosh* and *Bland* cases, holding that an alien with religious convictions against bearing arms could nevertheless be attached to the principles of the Constitution and therefore be eligible to become a citizen. Substantially the same rule had been applied in In re *Kinloch,* 53 F. Supp. 521 (W.D. Wash. 1944), where aliens serving in the military forces were granted citizenship upon application although they were conscientious objectors and could not subscribe fully to the statutory oath.

Remaining doubts concerning this problem were resolved by Congress through repeal of the prior statutory provisions by 66 STAT. 280 (1952). Under the new enactment, provision is made for aliens who because of

religious convictions refuse to bear arms in defense of the United States. The oath of allegiance to be taken by aliens petitioning for naturalization now prescribed, 66 STAT. 258, 8 U.S.C.A. § 1448 (Supp. 1952), does not specify the exact terminology to be used.

Under the Federal Rules of Civil Procedure, whenever an oath is required to be taken in a federal court, a solemn affirmation will suffice. FED. R. CIV. P. 43(d). This general policy is extended also to the oaths of allegiance prescribed by Congress for members of the armed forces, 64 STAT. 146 (1950), 50 U.S.C. § 737 (Supp. 1952); 30 STAT. 1009 (1899), 34 U.S.C. § 593 (1946); REV. STAT. § 1609 (2d ed. 1878), 34 U.S.C. § 694 (1946). The form of these oaths omit any reference to God and are flexibly worded so as to include atheists. The Constitution of the United States casts further light upon the issue at hand. U.S. CONST. Art. 6, § 3 states:

> . . . all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Pursuant to this provision, any qualified citizen may hold public office, notwithstanding the fact he is a disbeliever. Consequently, a duly elected member of Congress may "declare and affirm" rather than "swear" that he will support and defend the Constitution. In view of the fact that influential legislative offices may thus be vested in atheists, it is difficult to conceive that Congress, in prescribing the oath of allegiance for aliens, intended it to serve as a religious test.

The courts have insisted upon a rigorous adherence to the statutory oath primarily out of fear of criticism for indulging in "judicial legislation." Ex parte *Lange*, 197 Fed. 769 (E.D. Mo. 1912); In re *Clarke*, *supra*. While this contention has merit, it overlooks the effect of 1 U.S.C. § 1 (Supp. 1952), which deals with statutory construction. This section notes:

> In determining the meaning of any Act or resolution of Congress . . . a requirement of an "oath" shall be deemed complied with by making affirmation in judicial form.

Amtorg Trading Corp. v. United States, 71 F.(2d) 524, 530 (C.C.P.A. 1934), cites Section 1 as the basis for the acceptance of an affirmation in lieu of an oath with regard to affidavits. Weighing the effect of this statute, the court in the principal case might well have deemed it proper to accept the petitioner's affirmation. The omission of the words "so help me God" in the proposed alternative oath need not render the oath invalid.

Alluding briefly to the Immigration and Nationality Act, it is well to observe that the legislature has required specifically that aliens seeking citizenship must be of good moral character, 66 STAT. 242 (1952), 8 U.S.C.A. § 1427 (Supp. 1952). Negatively, Congress has prohibited the

naturalization of anarchists and members of the Communist Party of the United States. 66 STAT. 240, 8 U.S.C.A. § 1424 (Supp. 1952). However, in the requirements concerning the opinions and conduct of the applicant we find none to the effect that one should be refused citizenship because of his lack of belief in God. Surely the omission of such an express requirement from the naturalization statutes is worthy of note.

Bearing in mind the constitutional provision, U.S. CONST. Art. 6, § 3, and the applicability of 1 U.S.C. § 1 (Supp. 1952), we may conclude that it was not the intention of Congress in framing the oath required to impose any religious test. Consequently, it is submitted that a grant of citizenship to the petitioner in the principal case would more accurately conform to the principles upon which our government is founded. As stated by Justice Holmes, dissenting in *United States v. Schwimmer, supra,* 279 U.S. at 654:

> . . . but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.

Richard M. Di Valerio

ATTORNEY AND CLIENT — CONTINGENT FEES — DIVORCE ACTIONS. —*Krieger v. Bulpitt,* ....Cal.(2d)...., 251 P.(2d) 673 (1953). The plaintiff, attorneys, had contracted with the defendant to defend him in a pending divorce action instituted by the defendant's wife, and to secure a favorable property settlement for him. As compensation, the plaintiffs were to receive ten per cent of the value of the property obtained for the defendant, with a minimum and maximum fee stated. A property settlement agreement was secured by the plaintiffs, which the defendant orally approved. Later, however, he refused to execute it, and permitted his wife to secure an interlocutory decree of divorce without contest. The plaintiffs sued the defendant to collect their fees under the contract, and received a judgment in their favor. Execution was levied on an airplane purportedly owned by the defendant, title to which was subsequently claimed by a third party. The present action was instituted to determine the title to the airplane, and the claim of the third party. The lower court found that title was in the defendant. This appeal was taken by the third party on the ground that the judgment in the previous contract action between the plaintiffs and the defendant was void as against public policy since it was based on a contingent fee contract negotiated in a divorce action. The court held that the contract was not void.

The issue presented is whether or not a contingent fee contract between attorneys and their client to defend a divorce suit previously in-

stituted by the wife of the client and to protect the client's interest in the adjustment of property rights is an invalid contract as contrary to public policy.

In most American jurisdictions, a contingent fee contract between attorney and client is recognized as valid and binding in the absence of fraud or imposition or any element which renders such contract contrary to public policy. *Davis v. Webber,* 66 Ark. 190, 49 S.W. 822 (1899); *Geer v. Frank,* 179 Ill. 570, 53 N.E. 965 (1899); *Markarian v. Bartis,* 89 N.H. 370, 199 Atl. 573 (1938). The reason for this rule is that otherwise an indigent party who has a meritorious cause of action, but no means with which to employ an attorney, would be unable to vindicate his rights. *Gruskay v. Simenauskas,* 107 Conn. 380, 140 Atl. 724, 727 (1928); *Lipscomb v. Adams,* 193 Mo. 530, 91 S.W. 1046, 1048 (1906).

A well recognized exception to this rule is a contract for the payment of a fee to an attorney, contingent upon his success in procuring a divorce for his client, or a fee contingent upon the amount of alimony obtained or the amount of the property secured for his client in the divorce action. This type of contract is held void as *contra bonos mores. Theisen v. Keough,* 115 Cal. App. 353, 1 P.(2d) 1015 (1931); *Newman v. Freitas,* 129 Cal. 283, 61 Pac. 907 (1900); In re *Sylvester's Estate,* 195 Iowa 1329, 192 N.W. 442 (1923); *Jordan v. Westerman,* 62 Mich. 170, 28 N.W. 826 (1886); *Van Vleck v. Van Vleck,* 21 App. Div. 272, 47 N.Y. Supp. 470 (4th Dep't 1897); *Opperud v. Bussey,* 172 Okla. 625, 46 P.(2d) 319 (1935); 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION § 696 (1891); 6 WILLISTON, CONTRACTS § 1743 (Rev. ed. 1938). The Iowa Supreme Court, in In re *Sylvester's Estate, supra,* emphasized the public policy element which condemns such a contract, by stating, 192 N.W. at 444:

> The sanctity of the marriage relation, the welfare of children, the good order of society, the regard for virtue, all of which the law seeks to foster and protect are ample reasons why such contract should be held to be contrary to public policy.

In *McCarthy v. Santangelo,* 137 Conn. 410, 78 A.(2d) 240, 241 (1951), the court tells in what way these contracts may work evil:

> The vice . . . lies in the strong inducement which it offers to an attorney to ignore the possibility of reconciliation and to press, for personal gain, the dissolution of a marriage which patience and effort might salvage. Such agreements may thus thwart public policy.

The *Kreiger* decision relied for its authority, in the most part, upon *Hill v. Hill,* 23 Cal.(2d) 82, 142 P.(2d) 417 (1943). The *Hill* case concerned an action between divorced parties. The wife sued her previous husband to recover payments under a property settlement agreement executed while the parties were still husband and wife; they had been living separate and apart for the two years previous to the agreement. The court held the property agreement was not void as against public policy, and stated, 142 P.(2d) at 422:

> While it is true that contracts condemned by the courts usually have been termed "promotive of divorce" as distinguished from those "incidental to divorce" or "conditioned on divorce," this terminology is not always accurate or descriptive. The validity of such contracts must be determined in the light of the factual background of each case and considerations of public policy appropriate thereto.

The California court found the facts in the *Kreiger* case very similar to those which existed in the *Hill* case in that "the domestic status of the parties was unsettled and their relations unsatisfactory." *Hill v. Hill, supra.* The court extended the application of the property settlement doctrine of the *Hill* case to contracts with attorneys for contingent fees in divorce actions, holding that, on the facts, the contract in the instant case was not promotive of divorce and, therefore, not against public policy.

Few courts have been called upon to decide the validity of such contingent fee contracts in the peculiar factual situation confronting the California court. The usual case concerns a wife who engages an attorney to procure a divorce for her, and who agrees to pay a certain percentage of the alimony or property obtained by him as compensation for his services. *Wiley v. Silsbee,* 1 Cal. App.(2d) 520, 36 P.(2d) 854 (1934); *Evans v. Hartley,* 57 Ga. App. 598, 196 S.E. 273 (1938); *Coleman v. Sisson,* 71 Mont. 435, 230 Pac. 582 (1924). In the principal case the husband had a divorce action pending against him; he had no funds to reimburse attorneys who would defend him in the action and protect his interest, and under these circumstances he entered into the contingent fee contract with the plaintiffs.

In *Dannenberg v. Dannenberg,* 151 Kan. 600, 100 P.(2d) 667 (1940), a contract was entered into between a wife and an attorney whereby the attorney was to defend the pending divorce action against the wife, and receive as compensation the fees allowed by the judge in the action, and, in addition, fifty per cent of the money or property secured. No property settlement was allowed without the concurrence of both client and attorney. The provisions of this contract relating to the contingent fee and no outside settlement without consent of the attorney were struck down separately and distinctly as being void as against public policy.

There is a distinction between a contract involving a husband and wife in which property rights are settled and a contract entered into with an attorney by a party to a divorce action whereby the attorney is to prosecute or defend the divorce action and obtain a property settlement for the client on a contingent fee basis. *Theisen v. Keough, supra; Overstreet v. Barr,* 255 Ky. 82, 72 S.W.(2d) 1014 (1934). In a property settlement agreement between a husband and wife, the fee paid to the attorney for drawing up such contract is not dependent upon a divorce decree, even though the property settlement may be a prelude to a divorce. These property settlement agreements are held valid unless found

to be collusive or to facilitate divorce. *Gallemore v. Gallemore*, 94 Fla. 516, 114 So. 371 (1927); *Shankland v. Shankland*, 301 Ill. 524, 134 N.E. 67 (1922); *Dennison v. Dennison*, 98 N.J. Eq. 230, 130 Atl. 463 (Ch. 1925); *Giddings v. Giddings*, 167 Ore. 504, 114 P.(2d) 1009 (1941). In a contingent fee divorce action, the third party-attorney, whose highest fee under the contract is contingent, not only on the amount of property secured for his client, but also, on the divorce, has a temptation to prevent or hinder reconciliation. The courts have recognized this temptation as too great to permit, and, therefore, such agreements with contingent fee provisions have been held invalid as contrary to public policy. *Brindley v. Brindley*, 121 Ala. 429, 25 So. 751 (1899); *McConnell v. McConnell*, 98 Ark. 193, 136 S.W. 931 (1911); *Jordan v. Westerman, supra; Klampe v. Klampe*, 137 Minn. 227, 163 N.W. 295 (1917); *Opperud v. Bussey, supra.*

In sustaining the contingent fee contract, the court in the principal case emphasizes the fact that the object of the contract was not the dissolution of a marriage: that is, the attorneys were not engaged to procure a divorce for their client, but rather, to defend their client in an already existing divorce action, and at the same time, protect the client's property interests affected by the divorce action. Nevertheless, such a combination in a contingent fee contract renders it susceptible to the objection that it tends to bring about the alienation of the husband and wife by the strong inducement it offers the third party to advise the dissolution of the marriage ties and ignore the possibilities of reconciliation. *Newman v. Freitas, supra; McCarthy v. Santangelo, supra; Barngrover v. Pettigrew*, 128 Iowa 533, 104 N.W. 904 (1905); *Jordan v. Westerman, supra.*

In summary, it may be said that a contingent fee contract between an attorney and his client for the defense of a pending divorce action and the obtaining of a favorable property adjustment, is as much within the purview of condemnation on the public policy ground of the sanctity of the marriage relation and the good order of society as a contingent fee contract for the prosecution of a divorce action with a favorable property settlement.

James A. Uhl

CONSTITUTIONAL LAW — CIVIL RIGHTS ACT — IMMUNITY OF THE JUDICIARY. — *Francis v. Lyman*, 108 F. Supp. 884 (D. Mass. 1952). The plaintiff, Francis, instituted this action under the provisions of the Civil Rights Act, REV. STAT. § 1979 (2d ed. 1878), 8 U.S.C. § 43 (1946), to recover damages for an alleged deprivation of his constitutional rights. In 1931, Francis voluntarily became an inmate of a state institution for the custody and education of the feeble-minded. Under protest, he was later transferred on application of the institution's superintendent, accompanied by the report of two experts on insanity, to a state penal in-

stitution for defective delinquents. The order for removal was signed by Special Justice Crafts who is joined as defendant. Pursuant to MASS. ANN. LAWS c. 123, § 116 (1949), Crafts, prior to signing the order, was to determine the mental capacity of the plaintiff to be insufficient and to find him guilty of such wrongful conduct as to make him a proper subject for the penal institution. This the defendant failed to do. Crafts contended that Section 43 of the Civil Rights Act was inapplicable by virtue of the common law immunity conferred upon judicial officers when acting in their official capacity. The court held that the common law privilege prevailed despite the provisions of the Civil Rights Act.

The significance of the decision rests in its complete rejection of *Picking v. Pennsylvania R.R.*, 151 F.(2d) 240 (3rd Cir. 1945), *cert. denied*, 332 U.S. 776, 68 S.Ct. 38, 92 L.Ed. 361 (1947), a case which was seemingly decisive of the issue of whether the Civil Rights Acts abrogated the common law privilege given to judges. The importance of the question, the hesitancy of some courts when confronted by it, and the multiplicity of suits brought under the Acts in recent years demands final judicial determination.

Momentarily disregarding the Civil Rights Acts, the existence of an immunity to one acting in a judicial capacity is indisputable. The principle had its origin in early English law in *Floyd v. Barker*, 12 Co. Rep. 23, 77 Eng. Rep. 1305 (K.B. 1608), and is supposedly firmly established in the United States as emphasized in *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (U.S. 1872); *Yaselli v. Goff*, 12 F.(2d) 396 (2nd Cir. 1926); *Allen v. Biggs*, 62 F. Supp. 229 (E.D. Pa. 1945); *United States v. Chaplin*, 54 F. Supp. 926 (S.D. Cal. 1944); *Yates v. Lansing*, 5 Johns. 282 (N.Y. 1810). The privilege has been extended to include even those acts by a judge which were unquestionably malicious. *Davis v. Burris*, 51 Ariz. 220, 75 P.(2d) 689 (1938); *Pomeranz v. Class*, 82 Colo. 173, 257 Pac. 1086 (1927); *Francis v. Branson*, 168 Okla. 24, 31 P.(2d) 870 (1933). The rationale for the support of the immunity is axiomatic, for if judges were subject to civil liability for every misuse of discretion, who, indeed, would desire such a position? Chancellor Kent in *Yates v. Lansing, supra*, 5 Johns. at 298, states the proposition succinctly:

> No man can foresee the disastrous consequences of a precedent in favor of such a suit. Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence, and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty.

Since the inception of this protective necessity, it has remained, without interruption, a guide in our judicial system and should continue to endure. "The house should not be burned to destroy the mouse." *United States v. Chaplin, supra*, 54 F. Supp. at 934.

Of late it has been contended that the Civil Rights Acts have abolished this immunity. *Picking v. Pennsylvania R.R., supra; McShane v. Moldovan,* 172 F.(2d) 1016 (6th Cir. 1949); *cf. Burt v. New York,* 156 F.(2d) 791 (2nd Cir. 1946). That Congress had the power to abolish the common law privilege to further or protect federal rights is an undeniable principle of our system of government. See Ex parte *Virginia,* 100 U.S. 339, 25 L.Ed. 676 (1879). If there has been an abolition of the privilege, the conclusion is inevitable that any act of a judge under a state statute constitutes action by the state and permits him no escape from civil liability. The supposedly wrongful conduct, however, must deprive another of one of his constitutional freedoms and must be a denial of the equal protection of the laws. *Snowden v. Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944). *Cf. Mitchell v. Greenough,* 100 F.(2d) 184 (9th Cir. 1938).

Section 43 of the Civil Rights Act provides, 8 U.S.C. § 43 (1946):

> Every person who, under color of any statute . . . subjects . . . any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

Legislation pertaining to the Fourteenth Amendment was concerned primarily with securing equality for Negroes. See *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). Nevertheless, it has been stated that the purpose was "to protect all persons in the United States in their civil rights, and furnish the means of their vindication." CONG. GLOBE, 39th Cong., 1st Sess. 211 (1886). Thus, the question arose as to whether the legislature was fully cognizant of what the effect of their toils would be. In general discussion and floor debates the problem was considered at least lightly. See CONG. GLOBE, 42d Cong., 1st Sess. 365, 368, 385 (1871). Perhaps the most concise expression of the reigning confusion was theorized as follows, *Id.* at Appendix 217:

> What is to be the case of a judge? The Legislature of a State passes a law. It goes before a judge of the State court for interpretation. Under the oath . . . he conscientiously renders a decision which another man, a judge of the district court of the United States, may suppose deprives some person of a right, privilege, or immunity secured by the Constitution of the United States. Is that State judge to be taken from his bench? Is he to be liable in an action?

No clear-cut, dogmatic statement was discovered which manifested an intent by Congress to repeal the aged immunity. The point was discussed, and if passed on at all, it must have been by implication.

Extensive weight is accorded *Screws v. United States, supra,* and *United States v. Classic,* 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1423 (1941), by the court in *Picking* and the cases which follow the rule therein enunciated. See *McShane v. Moldovan, supra*; and *Burt v. New York, supra.* The *Classic* decision is the foundation of the *Screws* holding; both cases are concerned with the construction of Section 20, the Criminal Code of the Act, 18 U.S.C. § 52 (1946). In *Screws,* the

defendant sheriff, as alleged, maliciously beat a Negro while attempting to incarcerate him. The Court held that anyone acting under color of law, regardless of position, who wilfully deprives another of his constitutional rights is criminally liable. Under the ruling in *Picking*, Section 43 of the Act must be read in pari materia with Section 20 of the Criminal Code. Such an interpretation negatives the question of wilfullness in applying the Act to civil liability. The court in the instant case disagrees with the interpretation given to the *Screws* and *Classic* decisions by *Picking*, pointing out that those actions concerned violations of state law and were, therefore, distinguishable. In this contention there is support. See *Papagianakis v. The Samos*, 186 F.(2d) 257 (4th Cir. 1950). The court also indicates that Ex parte *Virginia, supra*, and *Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667 (1880), referred to in *Picking* are inapplicable to the issue to be decided. The wrongs therein were discriminations against Negroes and essentially extra-judicial. Regardless of their applicability to the issue involved, the opinions are indicative of what the judges at that time thought the intent of Congress to be, and may be beneficial to the proper disposition of the problem. The court in the principal case cites *United States v. Chaplin, supra* and *Allen v. Biggs, supra*, in support of its contentions. Both decisions are prior to *Picking* and are decided under Section 20 of the Criminal Code. These opinions substantiate the common law immunity and refuse to apply the Act to judges.

A glance at the more recent decisions denotes that the pendulum has begun a backward swing. Many of these cases refuse to take the stride of *Picking*. *McGuire v. Todd*, 198 F.(2d) 60 (5th Cir. 1952); *Bottone v. Lindsley*, 170 F.(2d) 705 (10th Cir. 1948). *Accord, Schatte v. International Alliance*, 182 F.(2d) 158, 166 (9th Cir. 1950); *Souther v. Reid*, 101 F. Supp. 806, 807 (E.D. Vir. 1951). Exemplary is the conclusion in *Bottone v. Lindsley, supra*, 170 F.(2d) at 707:

> . . . yet we are certain that to make out a cause of action under the Civil Rights Statutes, the state court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law. To hold otherwise would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision.

The effect of the *Picking* decision, if carried to its logical conclusion, could result in absurdities. As the court in the instant case opines, 108 F. Supp. at 887,

> . . . is a judge of a state inferior court who admits a confession and a judge of a court of last resort who sustains the admission . . . which the Supreme Court of the United States later holds constitutionally inadmissible, liable for damages . . . ?

It is submitted that malicious deprivations alone should create civil liability. Any other conclusion would impose too great a burden upon a member of the judiciary conscientiously performing his office.

Donald J. Prebenda

CONSTITUTIONAL LAW — EXTRADITION — HABEAS CORPUS — "EXHAUSTION OF REMEDIES" DOCTRINE. — *Sweeney v. Woodall,* ....U.S....., 73 S.Ct. 139, 97 L.Ed. *86 (1952). Woodall, a Negro, was convicted of burglary in Alabama and sentenced to hard labor at a state penitentiary. After six years he escaped and was apprehended in Ohio. The Governor of Alabama instituted proceedings for his return. In an attempt to prevent his rendition to Alabama, Woodall applied for a writ of habeas corpus, relying upon the Eighth and Fourteenth Amendments. His contention was that his past confinement had amounted to cruel and unusual punishment, and that any future confinement administered by Alabama would similarly be in violation of rights secured to him under the Federal Constitution. He offered to prove that he had been frequently flogged with a nine pound strap having five metal prongs, that he had been forced to work in the sun all day without rest, and that upon entrance to the prison he was forced to serve as a "gal-boy" or female for the homosexuals among the prisoners. Woodall asked that the petitioner's efforts to return him to the custody of Alabama be halted and that he be immediately released.

On a writ of certiorari, the Supreme Court held that Woodall was not entitled to a hearing on the merits of his constitutional claim until he had exhausted all available remedies in the Alabama state courts.

The question confronting the Court was: should a federal court in the asylum state consider the merits of a fugitive's claim on a petition of habeas corpus prior to his "exhausting the remedies" in the state from which he fled? Cases similar to the instant case give rise to a second question: is certiorari to the United States Supreme Court essential to the exhaustion of those remedies?

In rendering its opinion, the Supreme Court in the principal case adhered to the Federal Constitution, U.S. CONST. Art. IV, § 2, cl. 2, the legislative implementation of that provision, 18 U.S.C. § 3182 (Supp. 1952), and the doctrine enunciated in Ex parte *Hawk,* 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944). *Accord*: *Ross v. Middlebrooks,* 188 F.(2d) 308 (9th Cir. 1951); *Davis v. O'Connell,* 185 F.(2d) 513 (8th Cir 1950), *cert. denied,* 341 U.S. 941, 71 S.Ct. 995, 95 L.Ed. 1368 (1951); *Johnson v. Matthews,* 182 F.(2d) 677 (D.C. Cir.), *cert. denied,* 340 U.S. 828, 71 S.Ct. 65, 95 L.Ed. 608 (1950); *United States* ex rel. *Jackson v. Ruthazer,* 181 F.(2d) 588 (2nd Cir.), *cert. denied,* 339 U.S. 980, 70 S.Ct. 1027, 94 L.Ed. 1384 (1950); Note, 1 DUKE B.J. 188 (1951).

There is a strong policy underlying the doctrine of "exhaustion of remedies." That policy has been called one of "comity," and is given effect for the promotion of accord, both among the States and between the States and the Federal Government. The doctrine of Ex parte *Hawk, supra,* is a culmination of that policy. The Court stated in 321 U.S. at 116, 117:

> . . . an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court *only after all state remedies available,* including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, *have been exhausted.*
>
> . . . it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interefere with the administration of justice in the state courts only "in rare cases where exceptional circumstances of peculiar urgency are shown to exist." [Emphasis supplied.]

Congress saw fit to permanently codify the Ex parte *Hawk* doctrine by enacting 28 U.S.C. § 2254 (Supp. 1952).

In *Wade v. Mayo,* 334 U.S. 672, 68 S.Ct. 1270, 92 L.Ed. 1647 (1948), a 5-4 decision which was decided eleven days prior to the enactment of Section 2254 caused considerable confusion. The Court held that appeal or certiorari from the state supreme court was not indispensable to the exhaustion of state remedies. However, Justice Reed, writing for the dissent, stated, 334 U.S. at 688, 689:

> Today the Court both limits and confuses the doctrine of exhaustion of state remedies so clearly expounded in *Ex parte Hawk.* . . . Certainty in habeas corpus procedure for review of state convictions is essential so that the applicant may know the way to test the constitutionality of his conviction and so that the public and its judicial system may be spared undue expense. . . . *I conclude that certiorari should be considered a part of the state procedure for purposes of habeas corpus.* [Emphasis supplied.]

In *Darr v. Burford,* 339 U.S. 200, 70 S.Ct. 587, 94 L. Ed. 761 (1950), Justice Reed, now writing for the majority opinion, relied upon Ex parte *Hawk, supra,* and Section 2254, and stated that whatever deviation *Wade* may have implied from the established rule will be corrected by the *Burford* decision.

Prior to *Darr v. Burford, supra,* several relevant decisions had been rendered by lower courts. In *Johnson v. Dye,* 175 F.(2d) 250 (3rd Cir. 1949), *rev'd per curiam sub nom. Dye v. Johnson,* 338 U.S. 864, 70 S.Ct. 146, 94 L.Ed. 530 (1949), petitioner, Johnson, was tried and convicted for murder and sentenced to hard labor for life. He escaped from a Georgia chain gang, and eventually came to Pennsylvania. Johnson petitioned for habeas corpus and alleged the violation of his constitutional rights. The lower court held that the obligation of a state to treat its convicts with decency and humanity was absolute and Johnson must be set at liberty since the State of Georgia had failed in one of its signal duties.

Two decisions were rendered in New Jersey, relying upon *Johnson v. Dye, supra,* prior to its reversal by the Supreme Court. In Ex parte *Marshall,* 85 F. Supp. 771, 772 (D. N.J. 1949), the petitioner alleged that while in prison in Georgia he was "subjected to constant, cruel, barbaric and unusual punishment in violation of the Fourteenth Amendment," and that while confined he was "the victim of numerous cruel

and inhuman incidents at the hands of his jailors to the extent that his life and health were in great jeopardy," and that if returned to the State of Georgia he must finish a term of 30 to 60 years under those conditions. Georgia was represented by an official in the hearing who illustrated improvements in the Georgia penal system. The court ordered that Marshall be returned to the custody of the asylum state and not delivered to Georgia authorities until he could perfect an appeal to the Court of Appeals and until that decision had been rendered.

Soon after Ex parte *Marshall, supra, Harper v. Wall,* 85 F. Supp. 783 (D. N.J. 1949), was decided. There the petitioner, a colored boy of 15 years, relied upon the decision in *Johnson v. Dye, supra.* He complained of beatings often administered in the prison camp in Alabama, unfit food, injuries when dogs were purposely set upon him, and his inability to obtain medical attention. The court ordered him discharged from custody. It is to be noted that while the State of Alabama did not present any evidence in the trial, they had the opportunity to do so.

In *Lyle v. Stewart,* 80 F. Supp. 167 (W.D. Mo. 1948), the petitioner alleged that he was absent during the empaneling of the jury, that there was no compulsory process for obtaining witnesses in his favor, no preliminary hearing, and no waiver of indictment by Grand Jury. The court there considered the decision in *Wade v. Mayo, supra,* not to be controlling since the law relating to procedure in habeas corpus proceedings had been changed; it confirmed the doctrine of "exhaustion of state remedies" as delineated in Ex parte *Hawk, supra.*

Yet, the court in *Miller v. Hudspeth,* 176 F.(2d) 111 (10th Cir. 1949), relied on the decision in *Wade v. Mayo, supra,* and thought there was nothing in Section 2254 supporting a construction that application for certiorari to the United States Supreme Court constituted a part of a state remedy.

The legislative intent, consistent with Ex parte *Hawk, supra,* and *Darr v. Burford, supra,* is clearly stated in Parker, *Limiting the Abuse of Habeas Corpus,* 8 F.R.D. 171, 177 (1949).

The basic premise of this problem is to be found in Ex parte *Hawk, supra; Darr v. Burford, supra;* and 28 U.S.C. § 2254 (Supp. 1952). As intimated by Justice Reed in the latter case, one could still obtain the writ of habeas corpus " 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist'." 321 U.S. at 117. Courts of federal stature will merely be more reluctant to consider petitions by escapees from demanding states, until the petitioner has "exhausted his state remedies," including certiorari to the Supreme Court.

Wilbur L. Pollard

CORPORATIONS — RIGHT OF DIRECTOR TO INSPECT BOOKS AND RECORDS. — *State* ex rel. *Paschall v. Scott*, ...Wash....., 247 P.(2d) 543 (1952). An action in mandamus was brought by Helen W. Paschall, who was both a minority stockholder and director of two corporations, to compel the defendant, Scott, who was the president and a director of both corporations, and other officers of the corporations to make certain corporate books and records available to her or to her accountants for inspection. The defendants refused to allow the plaintiff or her accountants to inspect the books and records asserting that the plaintiff, Mrs. Paschall, had a scheme to interfere with, harass and sabotage the business of the corporation by contacting distributors and customers, and by making information regarding the business available to competitors. The plaintiff contended that her status as a stockholder and director of the corporations gave her an absolute and unqualified right to examine the corporate books and records regardless of her motives.

The Supreme Court of Washington held that since the plaintiff's purposes and motives were hostile to those of the corporation she had no right either as a stockholder or as a director to examine the books and records of the corporation.

In Washington the right of a stockholder to inspect corporate books and records is governed by statute, WASH. REV. CODE § 23.36.120 (1951):

> Every shareholder shall have a right to examine, in person or by agent or attorney, at any reasonable time or times, *for any reasonable purpose*, the share register, books of account and records of the proceedings of the shareholders and directors and to make extracts therefrom. [Emphasis supplied.]

The court is applying the statute stated that because it had been shown that the plaintiff's purposes in seeking an examination of the books were hostile to the corporation, her purposes were not "reasonable" within the meaning of the statute. Therefore, she had no right as a stockholder to examine the books and records in question. Under the common law the same result would have been reached since the common law did not give the stockholder an absolute right to inspect, but made it dependent upon the motive and purposes of the shareholder and upon whether or not the purpose was in the interest of the corporation. *State* ex rel. *Weinberg v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 58 Pac. 584 (1899).

It has often been said that there is a difference between the right of a stockholder to inspect the books and records of a corporation and the right of a director to do so. In *Machen v. Machen & Mayer Electrical Mfg. Co.*, 237 Pa. 212, 85 Atl. 100, 104 (1912), it was stated that although both the director and the stockholder had a right to inspect the books of the corporation at common law, the right of the former was unqualified, while the latter was to a certain extent a qualified right. The reason for the distinction was that the duties of a director required him to keep

familiar with the affairs of the company, and an inspection of the corporate books by him would be made with the intention of enabling him to perform his duties intelligently, while a shareholder would inspect primarily for the purpose of protecting his individual interests. The following courts have also made statements to the effect that the director has an unqualified right to examine corporate books and records without discussing the possibility that there might be exceptions to the rule under certain circumstances. *Leach v. Davy,* 199 Mich. 378, 165 N.W. 927 (1917); *Lawton v. Bedell,* 71 Atl. 490 (N.J. Ch. 1908); *Diamond v. Jarold Shops,* 91 N.Y.S.(2d) 585 (1949), *rev'd on other grounds,* 275 App. Div. 919, 90 N.Y.S.(2d) 683 (1st Dep't 1949); *Lavin v. Lavin Co.,* 264 App. Div. 205, 34 N.Y.S.(2d) 947 (2d Dep't 1942); *People* ex rel. *McInnes v. Columbia Paper Bag Co.,* 103 App. Div. 208, 92 N.Y. Supp. 1084 (1st Dep't 1905); *State* ex rel. *Anderson v. Frederickson,* 133 Wash. 28, 233 Pac. 291 (1925); *State* ex rel. *Keller v. Grymes,* 65 W. Va. 451, 64 S.E. 728 (1909).

All of the courts seem to agree that the directors are entitled to full and complete information as to corporate affairs in order that they may make their fullest contribution to the management of the corporate business. Since knowledge of the information contained in the books of the corporation is necessary to the proper exercise of judgment in managing the corporation, to deny the directors the right to inspect the books would be to prevent them from properly exercising their fiduciary duty. *Drake v. Newton Amusement Corp.,* 123 N.J.L. 560, 9 A.(2d) 636, 637 (Sup. Ct. 1939). The courts, however, are not all in harmony as to what effect a director's hostile motives would have upon his right.

The weight of authority seems to be that a director has an absolute right to make an inspection of the corporate books and records even though it may be shown that he has a hostile motive or purpose which might result in damage to the corporation. *State* ex rel. *Dixon v. Missouri-Kansas Pipe Line Co.,* 42 Del. 423, 36 A.(2d) 29 (Super. Ct. 1944); *Drake v. Newton Amusement Corp., supra; Javits v. Investors League,* 92 N.Y.S.(2d) 267 (Sup. Ct. 1949); *Halperin v. Air King Products Co.,* 59 N.Y.S.(2d) 672 (Sup. Ct. 1945); *People* ex rel. *Leach v. Central Fish Co.,* 117 App. Div. 77, 101 N.Y. Supp. 1108 (1st Dep't 1907); *People* ex rel. *Gunst v. Goldstein,* 37 App. Div. 550, 56 N.Y. Supp. 306 (1st Dep't 1899); *State* ex rel. *Aultman v. Ice,* 75 W.Va. 476 84 S.E. 181 (1915).

Thus, in *Machen v. Machen & Mayer Electrical Mfg. Co., supra,* it was held that a director was entitled to inspect the corporate books even though he had neglected his duties, was interested in a competing concern, and had interfered with the proper management of the corporation. In *People* ex rel. *Muir v. Throop,* 12 Wend. 183 (N.Y. 1834), the court said the fact that a person who was both a director and a stockholder of a corporation was hostile to the institution, had circulated reports un-

favorable to it, and was engaged in collecting the bills of the company to aid a rival institution, was not sufficient reason to justify a refusal to permit him to inspect the books and records. In *Davis v. Keilsohn Offset Co.,* 273 App. Div. 695, 79 N.Y.S.(2d) 540 (1st Dep't 1948), it was held that the director's motives were immaterial even where it was alleged that he sought to injure the corporation and aid its competitor. To the same effect was the decision in *Wilkins v. Ascher Silk Corp.,* 207 App. Div. 168, 201 N.Y. Supp. 739 (1st Dep't 1923), *aff'd per curiam,* 237 N.Y. 574, 143 N.E. 748 (1924), where the director was engaged in competition with the corporation and sought to further a claim which he had against it, and in *People* ex rel. *Stauffer v. Bonwit Bros.,* 69 Misc. 70, 125 N. Y. Supp. 958 (Sup. Ct. 1910), where the director was allowed to inspect the corporate books even though he was obviously a dummy director without any interest in the corporation. The New York view seems to be that if the director is so hostile that it would justify his removal from office, this remedy would be sufficient. *People* ex rel. *Leach v. Central Fish Co., supra,* 101 N.Y. Supp. at 1110; *Wilkins v. Ascher Silk Corp., supra,* 201 N.Y. Supp. at 740. However, this circuitous method of preventing the director from inspecting the books would seem to be rather inefficient and in some instances tardy.

The contrary rule, which the court in the instant case followed, that a director may be denied the right of inspection when it is shown that his motives are hostile to the corporation, has a smaller following.

In *Hemingway v. Hemingway,* 58 Conn. 443, 19 Atl. 766 (1890), the court held that a director did not have a right to examine the books and records of a corporation when his purposes were hostile to the corporation. In this particular case the director was inspecting the books of the corporation and at the same time was organizing and managing a competing company in the same town. It appeared that he was using the records for the benefit of the competing company. Under the circumstances, the court decided that an action for assault would not lie against another officer of the corporation who forcibly took the records from him.

Two early New Jersey cases implied that where the director has a mischievous purpose in wanting to inspect the books the court would not aid him by mandamus. *Mitchell v. Rubber Reclaiming Co.,* 24 Atl. 407 (N.J. Ch. 1892); *State* ex rel. *Rosenfeld v. Einstein,* 46 N.J.L. 479, (1884). However, these cases probably no longer control in view of a 1939 New Jersey decision which followed the majority rule. *Drake v. Newton Amusement Corp., supra.* An early Illinois case also intimated that if a director had improper motives he could not obtain the aid of the courts to gain access to the books of the corporation. *Stone v. Kellogg,* 165 Ill. 192, 46 N.E. 222 (1896).

In New York there have been a few cases which have not followed the majority rule to the letter, as have most of the New York decisions.

In *Melup v. Rubber Corporation of America,* 181 Misc. 826, 43 N.Y.S. (2d) 444, 445-6 (Sup. Ct. 1943), the court said:

> But while it has been stated as a general expression that the right of a director to an examination and inspection is absolute irrespective of motive . . . , it is subject, of necessity, to certain exceptions, as to whether the examination and inspection sought are for unlawful purposes, for objects hostile to the interests of the corporation, to annoy or harass the corporation, or for purposes detrimental to it; and if such appear to be the fact, the right, however absolute, will be refused; and these limitations apply with equal force to both stockholder and director.

In *People* ex rel. *Bellman v. Standard Match Co.,* 208 App. Div. 4, 202 N. Y. Supp. 840 (2d Dep't 1924), a corporation had undergone voluntary dissolution. The court did not allow the director to inspect the corporate books. It maintained that although before dissolution he had an absolute right to inspect the books to enable him to perform the duties of his office, after dissolution the court could properly deny access where it was shown that his purposes were not in furtherance of his duties as a director but were in reality hostile to the corporation.

Possibly these New York decisions can be distinguished from the other cases in New York in that the hostility of the directors in these last two cases did not warrant a removal of them from office, *Wilkins v. Ascher Silk Corp., supra,* and thus this remedy would not have been sufficient to protect the corporation.

In Pennsylvania it is probably that in view of the language in *Strassburger v. Philadelphia Record Co.,* 335 Pa. 485, 6 A.(2d) 922 (1939), the courts have shifted to the minority rule. There the court stated that a director must act in good faith and not exercise his right of examination for purposes that would be in conflict with the performance of his fiduciary relationship.

It would not be accurate to state that there is a trend towards the minority rule in view of the fairly recent decisions in Delaware, New Jersey, and New York, which still adhere to the majority view. However, the result of the instant case, which followed the minority view, seems highly desirable and may have an influence on courts of other states when similar questions arise in their own jurisdictions. The reasoning behind the minority view was well stated in the instant decision, 247 P.(2d) at 549:

> The right of a director to examine corporate records at all is based upon the principle that he must be able to do this in order to perform his corporate duties. His corporate duties require him to preserve and protect the corporation and to do nothing which will damage or destroy it. . . . His duty is to not entertain hostile and improper motives concerning his corporation.

A director should direct, guide, and manage the affairs of a corporation. It necessarily follows that he must obtain all the information available with regard to the affairs of his company in order that he be

able to direct its operations intelligently and according to his best judgment in the interest of all the stockholders whom he represents. A hostile director certainly would not be directing the operations of the corporation in the best interests of the stockholders whom he represents. Thus, the rule followed by this court, that a director may be denied the right of inspection when it is shown that his motives are hostile to the corporation, is a much wiser rule and results in a greater protection to the company and its shareholders than does the so-called majority rule which gives the director an absolute and unqualified right to inspect corporate books even though he has a motive hostile to the corporation.

William N. Antonis

CRIMINAL LAW — CREDIT ON RESENTENCE FOR TIME SERVED UNDER AN ILLEGAL SENTENCE. — *Lewis v. Commonwealth*, ...Mass....., 108 N.E.(2d) 922 (1952). Petitioner was cónvicted and sentenced for the crime of armed robbery. Upon appeal, after the petitioner had served nine months of the sentence imposed, the court found that the evidence would only support a verdict of guilty to the crime of larceny. The judgment was reversed and the petitioner was returned to a lower court, and resentenced for that crime. This petition was filed to have the time served on the reversed sentence applied to the new sentence. The petitioner contended that the new sentence was invalid as it stood, because, by not allowing credit for the time already served, he would, in effect, be forced to serve nine months more in prison than the legal maximum of five years. The majority of the court, one judge dissenting, allowed credit for the time served. The dissenting judge did not object to the allowance of credit, but felt that whether it was to be allowed or not was entirely at the discretion of the court, and that failure to allow it was not error and not a proper subject of appeal.

Is time served on a sentence which has been reversed to be credited on resentence? If so, under what circumstances? There are basically two views on this question: (1) the strict view, which refused credit in all cases, (2) the moderate view, which allows credit under certain circumstances.

Under the first view no credit whatever may be allowed for time served on a reversed sentence, and it is immaterial whether that sentence is imposed on a verdict which is void for lack of jurisdiction by the trial court, or merely voidable for error. *People v. Williams*, 404 Ill. 624, 89 N.E.(2d) 822 (1950); *People v. Starks*, 395 Ill. 567, 71 N.E.(2d) 23 (1947), *cert. denied*, 334 U.S. 821, 68 S.Ct. 1073, 92 L.Ed. 1751 (1948); *People v. Heard*, 396 Ill. 215, 71 N.E.(2d) 321 (1947); *People v. Wilson*, 391 Ill. 463, 63 N.E.(2d) 488 (1945), *cert. denied*, 327 U.S. 801, 66 S.Ct. 900, 90 L.Ed. 1026 (1946); *McCormick v. State*, 71 Neb. 505, 99 N.W. 237 (1904).

This position is adopted because the courts reason that to allow credit would be an incroachment upon the executive prerogative of granting pardons. Even in these cases, however, the courts did in fact consider the time already served by setting a maximum sentence lower than the legal maximum sentence to the extent of the time served under the reversed sentence. In the Illinois courts, for instance, a very strict opinion was given in *People v. Starks, supra*; yet, on the same day, the same court, in *People v. Heard, supra,* pointed out that the lower court had legally considered the time already served, by reducing the legal maximum, and, in *People v. Williams, supra,* the court expressly stated that it was legally possible to give consideration by reducing the maximum term without encroaching upon the executive prerogative.

The second view adopts a more liberal position by making a distinction between sentences which are void, as rendered by a court without jurisdiction, and sentences which are erroneous, and hence, voidable. This is the view adopted by the majority of the courts in the United States, and by the court in the present case. In distinguishing between void and voidable sentences, it is generally held that the verdict and sentence rendered by a court which has jurisdiction of the cause and of the person of the defendant is voidable only and not void. *Smith v. Lovell,* 146 Me. 63, 77 A.(2d) 575, 580 (1950); *Sennott v. Swan,* 146 Mass. 489, 16 N.E. 448, 450 (1888); *Luitze v. State,* 204 Wis. 78, 234 N.W. 382, 383 (1931).

The general rule under this view is that credit for time served on a sentence which is merely voidable may be applied in mitigation on resentence. Ex parte *Wilson,* 202 Cal. 341, 260 Pac. 542 (1927); Ex parte *Silva,* 38 Cal. App. 98, 175 Pac. 481 (1918); *Jackson v. Commonwealth,* 187 Ky. 760, 220 S.W. 1045 (1920); *Laury v. State,* 187 Tenn. 391, 394, 215 S.W.(2d) 797 (1948). But time served on a sentence which is void may not be credited on resentence. Ex parte *Fritz,* 179 Cal. 415, 177 Pac. 157 (1918); Ex parte *Wilkerson,* 76 Okla. Cr. 204, 135 P.(2d) 507 (1943); *Ogle v. State,* 43 Tex. Cr. 219, 63 S.W. 1009 (1901). It is felt that when the court had no jurisdiction to render the judgment or impose the sentence in question, the verdict or sentence are mere nullities never existing in the contemplation of law. *Ogle v. State, supra,* 63 S.W. at 1013.

As applied to consecutive sentences, when the first sentence is vacated as having been illegally imposed, the rule is just the reverse. Credit is allowed on resentence when the first sentence was void by entry of the new sentence nunc pro tunc as of the time when the original sentence was imposed. *Ekberg v. United States,* 167 F.(2d) 380 (1st Cir. 1948); *Youst v. United States,* 151 F.(2d) 666, 668 (5th Cir. 1945); *Bennett v. Hollowell,* 203 Iowa 352, 212 N.W. 701 (1927). But credit is not allowed on resentence if the prior sentence was merely voidable and not void. *Kite v. Commonwealth,* 52 Mass. (11 Metc.) 581, 585 (1846); *Smith v. Lovell, supra.* With a consecutive sentence, one sentence is

made to commence when the time of the former expires, whether this event occurs through the passing of time, a pardon, reduction for good behavior, or reversal for error. Since a void sentence never existed in contemplation of law, the time spent in prison under that sentence must be considered having been spent upon the second sentence in the consecutive order; a sentence which is merely voidable is valid until reversed, and expires only when it is reversed — from which time the next sentence takes effect. It has been said that this second view is more in accord with dry logic than with natural justice.

A collateral issue involved is whether it is compulsory upon the court or merely discretionary to allow credit for time served under a voidable sentence. Some cases hold that it is discretionary with the court, and thus not reversible for error if credit is not allowed. *McDowell v. State,* 225 Ind. 495, 76 N.E.(2d) 249 (1947); *Commonwealth v. Murphy,* 174 Mass. 396, 54 N.E. 860 (1899), *aff'd sub nom. Murphy v. Massachusetts,* 177 U.S. 155, 20 S.Ct. 639, 44 L.Ed. 71 (1900); *People v. Trezza,* 128 N.Y. 529, 28 N.E. 533 (1891). Other courts hold it to be error for the courts to fail to allow credit for time served. They make the allowance of credit compulsory on the courts. Ex parte *Silva, supra*; *Jackson v. Commonwealth, supra.*

Some states have enacted statutes which provide that in certain instances credit shall be allowed on resentence without regard as to whether or not the prior sentence was void or merely voidable. IOWA CODE ANN. § 793.26 (1950), time served pending an appeal; MICH. STAT. ANN. § 28.1085 (Supp. 1951); N.Y. PENAL LAW § 1943, on resentence under habitual criminal sanction.

A slightly different, but closely related situation exists when the time already served in prison under an illegal sentence equals or exceeds the possible legal maximum which can be imposed on resentence. In this situation it is generally held that the prisoner is entitled to release, notwithstanding that the illegal sentence may have been void. Ex parte *Leypoldt,* 32 Cal. App.(2d) 518, 90 P.(2d) 91 (1939); *People v. Huber,* 389 Ill. 192, 58 N.E. (2d) 879 (1945); *Bennett v. Hollowell, supra*; Ex parte *Wall,* 330 Mich. 430, 47 N.W. (2d) 682 (1951).

The principal case follows the majority rule in making a distinction between void and voidable sentences, and in allowing credit for time served under a voidable sentence, indicating that they would refuse it in instances of a void sentence. Thus for the first time in Massachusetts it was held to be compulsory that the court allow credit. Although no prior decision in Massachusetts had actually decided the question, dicta had favored the stricter view expressed in the dissent to the effect that the granting of credit was not compulsory, but a matter of discretion with the court. As stated by the majority opinion, this is an indication of the trend in judicial thought.

Richard E. Shipman

CRIMINAL LAW — EVIDENCE — CONSIDERATIONS WHICH DETERMINE WHETHER SUBSEQUENT CONFESSION IS INFLUENCED BY COERCION OF PRIOR INVOLUNTARY CONFESSION. — *People v. Leyra,* 304 N.Y. 468, 108 N.E.(2d) 673 (1952). Defendant was accused of murdering his parents. While held in custody, the authorities arranged for a psychiatrist to see him. Unknown to accused, the district attorney and other police officers were listening in another room and recording the testimony by means of a wire recorder. After the doctor had minimized his actions and played upon his fears, the defendant confessed. No one had warned him that he was under no duty to speak, or that anything he might say would be used against him. An hour or two later he confessed to a police captain, his business partner who had been directed by the police to be present, and to two assistant district attorneys. The Court of Appeals reversed the trial court's conviction on the ground that the first confession was coerced as a matter of law. *People v. Leyra,* 302 N.Y. 353, 98 N.E.(2d) 553 (1951). The court pointed out that whether the coercion exercised over the defendant extended to the subsequent confessions was a matter of fact for the jury and had never been properly presented to them. In the second trial the wire recording was submitted to the jury with the instruction that the coerced confession be considered only in determining whether the coercion had ceased to influence the accused and not as to the question of guilt. The Court of Appeals affirmed the judgment of conviction and held that the submission to the jury of the coerced confession with the expressed limitation was proper. Two judges dissented, insisting that the submission of the coerced confession was prejudicial to the defendant.

The principal issue is whether an illegally coerced confession may be submitted to a jury with the instruction that it is not to be considered on the question of guilt, but only for the purpose of determining whether subsequent confessions were influenced by the prior coercion.

There has been no previous case in which a coerced confession has been given to the jury for the sole purpose of deciding whether the improper influence extended to subsequent statements. In *Lyons v. Oklahoma,* 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944), there was an involuntary confession with subsequent admissions of guilt. The majority of the Supreme Court, in affirming conviction for murder, held that where the prior confession was not offered in evidence, although the events surrounding it were considered by the jury in deciding that the improper influence had dissipated, there was no violation of due process. Likewise, in *State v. Gregory,* 50 N.C. 309, 5 Jones 315 (1858), where evidence of the improper inducement was given in the presence of the jury, it was held not to be error. In *Malinski v. New York,* 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945), the details of the coerced confession were not put into evidence, but many references were made to it in the testimony. The Court, in disallowing the second confession, said, "The

use made of the confession could hardly have been more effective had its details been put in evidence. It was not insulated from the trial." 324 U.S. at 410.

In *Stroble v. California,* 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1952), relied upon by the dissent in the instant case, the first confession had been submitted by transcript and wire recording to the jury. The Supreme Court, affirming the conviction, decided that the confession was not coerced. In pointing out that the conviction would have been set aside if the confession were involuntary, the Court did not decide whether an insulated coerced confession could have been submitted.

The question arises: what considerations determine the admissibility of a confession made subsequent to an involuntary confession?

If an involuntary confession is used, a conviction must be overthrown despite the presence of other evidence which might be sufficient to sustain the verdict. *Malinski v. New York, supra*; *Lyons v. Oklahoma, supra.* There is a presumption that the inducements of the involuntary confession continue and that the subsequent confession is a result of the same influence. *People v. Jones,* 24 Cal.(2d) 601, 150 P.(2d) 801, 805 (1944); *People v. Sweetin,* 325 Ill. 245, 156 N.E. 354, 356 (1927); *Whitley v. State,* 78 Miss. 255, 28 So. 852, 853 (1900). There is nothing, however, permanently irrevocable in an improper inducement. 3 WIGMORE, EVIDENCE § 855 (3d ed. 1940).

No universal rule prevails regarding the admissibility of a confession which follows an involuntary confession. *Williams v. State,* 88 Tex. Cr. R. 87, 225 S.W. 177 (1920); 3 WIGMORE, EVIDENCE § 855 (3d ed. 1940). Although each case must be determined by its facts, there are guide posts which courts and juries have considered in deciding the extent of the influence.

An important consideration is the length of time between the two confessions. The general rule is that a sufficient period of time must elapse to rebut the presumption that a subsequent confession was influenced by the prior inducements. The burden is on the prosecution to establish the contrary. *United States v. Chapman,* 25 Fed. Cas. 404, No. 14,783 (W.D. Pa. 1851); *People v. Jones, supra.* In *State v. Guild,* 10 N.J.L. (5 Hals.) 163, 18 Am. Dec. 404 (Sup. Ct. 1828), the court argued against the proposition that an influence can be presumed to continue indefinitely. To the contention that once having made a confession, it was natural for an accused to persevere in the same tale, the court said, 10 N.J.L. at 183:

> Such may be the result, if the confession were true. But a steady adherence to falsehood, which he saw produced him no benefit, and was assured would consign him to death, cannot, it is believed, be reconciled with any ordinary principles of human conduct.

It has been generally held that the influence is removed when the accused is properly warned before the subsequent confession. Such warn-

ing should apprise him that anything he might say could be used against him, and that the involuntary confession cannot be used against him. *State v. Gregory, supra*; 2 WHARTON, CRIMINAL EVIDENCE § 601 (11th ed. 1935). But in *Vermont v. Carr,* 37 Vt. 62, 2 Veazey 191 (1864), where the first confession was involuntary, it was held that a warning against self incrimination was sufficient, the additional caution that no use could be made of his first confession being unnecessary. In *Ford v. State,* 75 Miss. 101, 21 So. 524 (1897), a warning that accused could make a voluntary statement which could be used against him was held not to satisfy the requirement. *Accord, State v. Chambers,* 39 Iowa 179 (1874). And in *Jones v. State,* 133 Miss. 684, 98 So. 150 (1923), the court laid down the rule that a subsequent confession will not be admitted if the improper influence still remains, although the officer taking it states that the defendant need not make a statement unless he desires to do so and that such a statement will be used against him. See *Howard v. Commonwealth,* 28 Ky. L. Rep. 737, 90 S.W. 578 (1906). Where the defendant acted upon the belief that her involuntary confession to the district attorney compelled her to repeat it on the witness stand, it was held that the subsequent admission was unpurged of the duress that attached from the time of the first confession. *Flamme v. State,* 171 Wis. 501, 177 N.W. 596 (1920).

The age and intelligence of the accused must be considered in determining whether the influence still exists. *United States v. Cooper,* 25 Fed. Cas. 629, No. 14,864 (W.D.Vir. 1857); *Williams v. State, supra.* In *Porter v. State,* 55 Ala. 95, 105 (1876), the court pointed out that:

> . . . when previous inducements have resulted in drawing a confession, the proof should be very clear and strong, that the mind of the prisoner had been completely disabused. . . . In considering the facts of each particular case, the degree of intelligence of the prisoner should be taken into the count.

The state of mind and general disposition of the accused at the time of the second confession is important. *Louisiana v. Wilson,* 36 La. Ann. 864 (1884); *State v. Guild, supra.* And the fact that the subsequent statements are made to a person other than those to whom the original confession was made creates no presumption that the improper influence is gone. *People v. Sweetin, supra*; 3 WIGMORE, EVIDENCE § 855 (3d ed. 1940). The nature and character of the inducement is material. *Young v. State,* 50 Ark. 501, 8 S.W. 828 (1888); *State v. Howard,* 17 N.H. 171 (1845), *o'ruled on other grounds,* 83 N.H. 86, 139 Atl. 189 (1927). In the *Young* case, where there was a threat of arrest unless accused confessed, it was held that a second confession made after the arrest was not influenced by the prior threat.

A retraction of the inducement may render the confession admissible. *Howard v. Commonwealth, supra.* The relationship between the prisoner and the person to whom the second confession is made may be such as to indicate that it is voluntary, *Lyons v. Oklahoma, supra,* where the accused,

a former inmate of the prison, was well acquainted with the warden. This was likewise true of the third confession made later to a guard who was from the same locale as the prisoner and acquainted with him.

The surroundings in which the second confession is made affect its voluntariness. In *United States v. Chapman, supra,* the presence of the constable who had induced the illegal confession coupled with the fact that the accused was subjected to the same scenery for forty-two hours was sufficient evidence that the improper influence subsisted. The court said, 25 Fed. Cas. at 406:

> Had he been at liberty, among friends, with opportunity for advice and reflection, a voluntary confession afterwards made would probably not be liable to legal objection. . . .

The submission of the coerced confession to the jury, properly insulated, as was done in the instant case, is a further aid to that body, along with the guide posts enumerated, in deciding whether the illegal coercion extends to subsequent statements. In each case this aid should be weighed against possible prejudicial effects on the defendant amounting to a violation of due process.

Richard D. Heman

DOMESTIC RELATIONS — ADOPTION — IDENTITY OF RELIGION AS AN ELEMENT IN GRANTING ADOPTION. — *Petition of Gally,* ....Mass....., 107 N.E.(2d) 21 (1952). Proceedings were initiated by the petitioners, husband and wife, in the Probate Court for the adoption of a two year old girl. No opposition to the petition was registered, and the proceedings also showed that the natural mother of the child had consented to the adoption. The petitioners had acquired custody of the child from a boarding home when she was about three weeks old. Until the date of the petition the child had received the best of care, and there was no indication that such care would not continue. Nevertheless, the Probate judge denied the petition because the petitioners were not of the same religious faith as the child. Denial of the petition was based upon MASS. ANN. LAWS c. 210, § 5B (Supp. 1952). Essentially the statute provides that "when practicable," the court must give custody in adoption proceedings only to persons of the same religious faith as the child. Whenever a disposition is made contrary to this policy, the courts must state the reasons why such adoption was granted.

On appeal the Massachusetts Supreme Court, with one dissent, reversed the lower court. Due to an irregular procedure existing in the record, the court was able to make original findings of facts. In their consideration of the statute the majority agreed with the dissent that the statute gave more weight to the religious factor than the Massachu-

setts courts had formerly been obliged to. Nevertheless, the court said that the statute was not to be interpreted in order that the religious factor would be the principal consideration. By the very words of the statute, the test was a practical consideration of the circumstances. In the court's consideration, in view of the good standing of the petitioners, and since the natural mother had consented to the change of religion, it would be impractical to deny the petition.

The thesis of the dissenting opinion was that since the legislature had enacted this statutory guide, their intendment was that from henceforth the denial of such petitions would be the general rule and not the exception. This position is strengthened by two considerations: one, formerly in Massachusetts whatever weight was allowed the religious divergence was completely discretionary with the court, *Purinton v. Jamrock,* 195 Mass. 187, 80 N.E. 802 (1907); and two, the present statute expressly calls for the court's reasons where an adoption is granted to persons of a different religious faith. Pursuant to these premises the dissent reasoned that the petitioners were only entitled to a decree if they could show that it was not practical to have the child placed with persons of the same religious faith. *Cf. Mastrovich v. Mavric,* 66 S.D. 577, 287 N.W. 97 (1939), declaring that the burden of proof is upon the petitioners to show facts justifying the adoption. Since the record was "meager" in its failure to present facts showing that persons of the same religious faith were not available, the dissent held that there was no abuse of discretion in denying the petition.

Unknown at common law, the right of adoption exists solely by virtue of statute. Conceding, however, that the parties applying for adoption satisfy the statutory requisites, nevertheless the primary consideration before the court is the welfare and best interest of the child. The question presented by the instant case is where the religious affiliations of the petitioners and the child differ, does the welfare of the child demand that the court refuse the decree of adoption?

In the absence of specific statutory authority, the courts generally will not oppose an adoption solely on the grounds that there is a lack of unanimity of religious beliefs. See Notes, 22 A.L.R.(2d) 696; 23 A.L.R.(2d) 701 (1952). In *Denton v. James,* 107 Kan. 729, 193 Pac. 307, 311 (1920), where no legislation was in force, the court stated that as long as a person was otherwise qualified to have custody of the child, the divergence of religious views afforded no grounds for denying custody to that person. A similar result was reached in *Eggleston v. Landrum,* 210 Miss. 645, 50 So.(2d) 364 (1951), when the court granted the adoption of a four year old boy to members of the Christian Science Church. A distinguishing factor, however, is to be noted, for the petitioners testified under oath that "they . . . [had] no objection or conscientious scruples against having a physician or surgeon, or both, attend the child. . . ." 50 So.(2d) at 367.

In almost every case where a child is sought to be adopted, the petitioners must obtain the child through a state or sectarian child-placing institution. Once the child has been surrendered to these institutions, either by the natural parents, or through a court decree, the institutions stand in *loco parentis* and their consent to the adoption is required. Where the policy of the state has been to place the child with persons of the same religious faith, and the institutions award temporary custody to persons of a different creed, who subsequently apply for adoption, a controversy may result. In In re *McKenzie,* 197 Minn. 234, 266 N.W. 746 (1936), the court would not allow the State Board of Control to withhold its consent on the basis of state policy after the child had lived with the petitioners for three years. Evidence in the case also showed that the petitioners had made arrangements for the child's own religious instructions. The opposite result, however, was obtained in *Palm v. Smith,* 183 Ore. 617, 195 P.(2d) 708 (1948), where the court held an adoption decree void. Although the agency which had custody of the child consented to the adoption, it did so with knowledge that a prior court decree nullified its authority over the child. Revocation of the child's initial placement was based upon the state's statutory policy of placing, when practicable, children with families of the same religious faith. ORE. COMP. LAWS ANN. § 126-331 (1940).

To what extent a harmony of religious beliefs, which is prescribed by a state's statute, will oppose the wishes of a deceased parent in a subsequent adoption suit was decided in In re *Duren,* 355 Mo. 1222, 200 S.W.(2d) 343 (1947). The maternal grandmother, the child's legal guardian and a member of the Baptist Church, opposed the adoption by the child's paternal aunt and her husband, who were Catholics. Prior to the natural father's death, he had placed the child with the aunt. A state statute forbade the appointment of guardians of a religious faith different from that of the parents', if other agreeable persons were available. Although the court took cognizance of the state policy, it held that the statute placed the practical and temporal necessities and the wishes of the deceased parent first, even though he was a Protestant.

This occurs when the natural parents profess different religious faiths, are divorced, and custody of their child is awarded to the natural mother, who subsequently remarries. If the natural father has abandoned the child, he cannot object to the adoption of the child by the husband of the natural mother, who professes the same religious faith as that of the mother. *St. George's Adoption,* 45 Pa. D. & C. 387 (1942).

The dissenting opinion relied heavily upon the New York statutes which also declare that "when practicable" the courts, in granting letters of adoption, should grant them only to persons of the same religious faith. N.Y. SOCIAL WELFARE LAW § 373.3; N.Y. DOMESTIC RELATIONS LAW § 113. No case in New York has directly passed upon the issue in the present case although judicial comment would seem to indicate that

the statutes are to be given considerable weight. In re *Adoption of Anonymous,* 195 Misc. 6, 88 N.Y.S.(2d) 829, 834 (Surr. Ct. 1949). Although the court denied the adoption on the grounds that the petitioners had failed to show abandonment by the natural mother, with reference to the religious affiliations of the parties, and in light of N.Y. DOMESTIC RELATIONS LAW § 113, the court said that it would not, by "judicial fiat," override the legislative policy. See In re *Miller,* 179 N.Y. Supp. 181 (County Ct. 1919); and In re *Korte,* 78 Misc. 276, 139 N.Y. Supp. 444 (County Ct. 1912); where prior to the New York statute, the courts considered the religious welfare of the child. In light of Subdivision 4 of Section 373 of the N.Y. SOCIAL WELFARE LAW, which states that Subdivisions 1, 2 and 3 should be interpreted so as to protect and preserve the child's religious faith, the area of discretion of the New York courts would indeed seem to be narrowly defined. See In re *Santos,* 278 App. Div. 373, 105 N.Y.S.(2d) 716 (1st Dep't 1951), *appeal dismissed,* 304 N.Y. 483, 109 N.E.(2d) 71 (1952).

Under the facts of the instant case the reasoning of the dissenting opinion appears more correct. Since the Massachusetts statute has been patterned after the New York law, the majority opinion apparently overlooks the quasi-mandatory interpretation placed upon the statutes by the New York courts. The approach taken by the dissent, if we may state as our premise that the best interest of the child requires that his religion by birth be safeguarded, merits recognition both in the field of statutory construction and natural law.

Thomas P. Meaney, Jr.

JUDGMENTS — DENIAL OF INJUNCTIVE RELIEF IS RES JUDICATA ON TITLE TO LAND — THIRD PARTY EXERCISING CONTROL IN PREVIOUS ACTION MAY PLEAD RES JUDICATA. — *Patterson v. Saunders,* ....Va....., 74 S.E.(2d) 204 (1953). Plaintiff brought this action against defendants Saunders, Gray, King and the Canton Lumber Company, Inc. to recover $50,000 damages for the wrongful cutting of lumber from a 60 acre tract of land allegedly owned by the plaintiff. The defendants each filed separate pleas of res judicata, and established that the same plaintiff in 1946 unsuccessfully brought a chancery suit against two of the present defendants, Gray and King, to enjoin them from trespassing and from cutting timber from the same 60 acres. The Chancellor's decree, in dismissing the bill, 74 S.E.(2d) at 206, stated that the plaintiff

> . . . has failed to establish his ownership of the property, and having failed to prove that either of the defendants have cut any timber from the complainant's land, . . . doth adjudge, order and decree that the complainant's petition for a temporary injunction be and the same is hereby denied. . . .

The Supreme Court of Virginia in a four to three decision affirmed the trial court's decision and held that not only was the denial of injunctive relief a bar to the present action for damage, but further stated that since the equity court denied the plaintiff's prayer for relief, title to the land was not in the plaintiff. Defendants Gray and King, parties defendant in the equity suit, were allowed to plead res judicata. The court permitted defendant Saunders to avail herself of the defense of res judicata because it found that she actively participated in the defense of the equity action. The reasons for allowing the Canton Lumber Co. to plead res judicata are not explicitly stated in the court's opinion, other than the statement that the rights of the defendants "are so identified in interest that each has the right to invoke the proceedings in the chancery cause in bar of this action." 74 S.E.(2d) at 209.

The doctrine of res judicata as stated in 2 FREEMAN, JUDGMENTS 1322 (5th ed. 1925), is that:

> . . . and existing final judgment or decree rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties or their privies in all other actions in the same or any other judicial tribunal of concurrent jurisidiction, on the points and matters in issue and adjudicated in the first suit.

Applying this definition to the facts of the case, two principal questions were presented to the Virginia court for its determination: what "points and matters were in issue and adjudicated" in the equity suit, and upon what parties will the decision be operative and conclusive?

Ordinarily, since the mere denial of injunctive relief does not have to be based on the merits of the case, it does not serve as a bar to a subsequent action at law. However, where the cause is heard on its merits and there is a denial of the requested relief, the decree in equity will act as a final adjudication of the matters actually in issue. 2 BLACK, JUDGMENTS § 518 (1891); 2 FREEMAN, JUDGMENTS § 760 (5th ed. 1925). In the ordinary suit to enjoin the defendant from trespassing upon the plaintiff's land and from severing and removing the plaintiff's timber, title to the property is not placed in issue. In *Morse v. Marshall*, 97 Mass. 519, 522-3 (1867), the court stated:

> A judgment for the defendant in an action of trespass *quare clausum* does not necessarily settle anything beyond the particular facts of the trespass sued for. It may be rendered upon failure of the plaintiff to prove the acts alleged, or upon his failure to prove his right of possession. Either would be sufficient to sustain the judgment for the defendant. If the proofs should make it appear that the issue by which the case had been determined was upon the right of possession, still the judgment would only determine the right of possession at the time of the commission of the trespass set forth in that case. It is not conclusive upon the title, because the right of possession only, and not the title, is involved in an action of trespass.

ACCORD: *Hargus v. Goodman*, 12 Ind. 629 (1859); *Kimbal v. Hilton*, 92 Me. 214, 42 Atl. 394 (1898); *Stapleton v. Dee*, 132 Mass. 279 (1882). Some courts hold that a judgment for trespass will be conclusive

of ownership if title to the land is placed in issue by a plea of *liberum tenementum* — that is, if the defendant himself claims title. *Chicago Terminal Transfer R. R. v. Barrett,* 252 Ill. 86, 96 N.E. 794, 797 (1911); *Herschbach v. Cohen,* 207 Ill. 517, 69 N.E. 932 (1904); *Campbell v. Cross,* 39 Ind. 155 (1872); *White v. Chase,* 128 Mass. 158 (1880). But even if there is a plea of soil and freehold and it still does not appear from either the record or from the evidence that the jury has determined the question of title, the judgment rendered will not be conclusive as to the ownership of the land. *Kimbal v. Hilton, supra*; *Morse v. Marshall, supra.*

Other courts state that regardless of the pleadings, if the question of ownership is placed in issue during the course of the litigation and actually passed upon by the court, the judgment will be conclusive as to the title. *Winkelman v. Winkelman,* 310 Ill. 568, 142 N.E. 173 (1923), *cert. denied,* 264 U.S. 594, 44 S.Ct. 453, 68 L.Ed. 866 (1924); *Shettlesworth v. Hughey,* 9 Rich. L. 387 (S.C. 1856).

However, where there is a general denial of the alleged trespass, a judgment by itself will not be conclusive as to the ownership of the land. As reasoned in *Herschbach v. Cohen, supra,* 69 N.E. at 934:

> If, in an action of trespass *quare clausum fregit* to recover damages for the cutting of timber upon the plaintiff's land, the plea is the general issue, or not guilty, and the defendant denies that he cut the timber, then the issue is one of fact, presented to the jury, and as to whether or not the defendant did cut the timber, and as to how much the defendant should pay for the timber so cut. In the case of such an issue in the action of trespass the judgment of course decides nothing as to title.

In the case at bar, the defendants in the previous equity suit merely answered the plaintiff's bill by denying each and every allegation. This in itself, according to the above authorities, did not place the ownership of the land directly in issue. Further, it does not clearly appear from the decree, or from extrinsic evidence, that the plaintiff's ownership of the land was placed in issue and determined during the course of the equity suit. The implication as pointed out in the dissenting opinion, is that the decree did not actually adjudicate the plaintiff's title to the land. If so, when the court held that the plaintiff, as a result of the equity suit, did not have title to the 60 acres of land, it was directly opposed to the authorities cited above.

Nevertheless, even though the court based its opinion on the fact that ownership to the land was in issue and conclusively adjudicated as to the plaintiff in the prior equity proceeding, it did not err ultimately in barring this present action at law for damages from the same trespasses. The bill in equity was dismissed with prejudice, and as such it was a final and conclusive adjudication of the rights of the plaintiff. In *Indian Land & Trust Co. v. Shoenfelt,* 135 Fed. 484, 487 (8th Cir. 1905), the court stated:

> A general decree of dismissal of a suit in equity, without more, renders all the issues in the case res adjudicata, and constitutes a bar to an action at law for the same cause. Hence, when a court of equity has no jurisdiction of a suit, the decree of dismissal must expressly adjudge that it is rendered for that reason, or must expressly provide that it is made without prejudice, to the end that the complainant may resort to his action at law for any damages he may sustain if he is so advised.

Thus, the denial of injunctive relief in equity will act as a bar to a subsequent action at law for damages resulting from the same trespasses.

The second question presented to the Virginia court for its scrutiny is whether or not all of the four defendants in this present action could properly establish the equity suit as a bar to the present action. The general rule is that only actual parties or privies in the prior litigation can successfully plead res judicata. 2 BLACK, JUDGMENTS § 534 (1891). An exception to this rule arises when a third person openly and avowedly expresses control over the defense of the previous litigation. When that happens, the third person can successfully rely upon the decision rendered therein as a basis for the defense of res judicata. *Hy-Lo Unit & Metal Product Co. v. Remote Control Mfg. Co.*, 83 F.(2d) 345 (9th Cir. 1936); *Carson Inv. Co. v. Anaconda Copper Mining Co.*, 26 F.(2d) 651 (9th Cir. 1928); 2 BLACK, JUDGMENTS § 534 (1891). However, as stated in *Williams v. Lumberman's Ins. Co.*, 332 Pa. 1, 1 A.(2d) 658, 660 (1938):

> Merely to aid in the trial, either personally or through counsel, or to pay the attorney's fees, or to contribute toward the expenses of the litigation, is not enough to cause the person so doing to be bound by the judgment rendered.

The right of control includes the right to adduce testimony and to cross examine witnesses, *Litchfield v. Goodnow's Adm'r*, 123 U.S. 549, 8 S.Ct. 210, 31 L.Ed. 199 (1887), and in general must be of such a nature as to give the third party an opportunity to be heard. 1 FREEMAN, JUDGMENTS § 433 (5th ed. 1925). In the present controversy the court found that Saunders' participation in the equity proceedings was tantamount to control, and as such he properly pleaded res judicata. As to the Canton Lumber Co., the fourth defendant, it does not expressly appear in the opinion on what basis they were allowed to plead res judicata. It will be assumed that the Lumber Company was either in privity or had control over the litigation. If this is not a true assumption, then the court was clearly in error in sustaining the Company's plea of res judicata, and the plaintiff should have been allowed to maintain the action against the fourth defendant.

The final determination of the court in permitting three of the defendants, King, Saunders and Gray, to successfully plead the chancery suit as res judicata to the present action at law for damages, was in itself proper. The court, however, barred the plaintiff's action primarily on the basis that the prior judgment was res judicata as to the plaintiff's own-

ership of the 60 acres of land. Possibly, as stated earlier, in doing so it ruled contrary to the weight of authority. If the plaintiff had been successful in his equity suit, in a subsequent action by the defendants, Gray and King, against the plaintiff for ejectment, the latter could not plead his decision in trespass as conclusive of his ownership. *Potter v. Baker*, 19 N.H. 166 (1848). *A fortiori*, the denial of injunctive relief should not be interpreted as adjudicating that the plaintiff does not have title to the land.

John A. Pietrykowski

REAL PROPERTY — JOINT TENANCY — RIGHT OF A SURVIVOR WHO FELONIOUSLY KILLS HIS CO-TENANT. — *Vesey v. Vesey*, ...Minn....., 54 N.W.(2d) 385 (1952). A husband and wife owned two bank accounts as joint tenants with a right of survivorship. The plaintiffs, heirs of the husband, instituted this action alleging that the defendant wife feloniously killed their ancestor and requested that the funds held in the bank accounts be paid to the deceased husband's administrator for their benefit. A constructive trust was imposed upon the balance of the accounts for the benefit of decedent's estate.

The principal issue before the court was whether one joint tenant who feloniously kills his co-tenant is entitled to take the property held in joint tenancy, as the survivor. An analogous problem is presented where husband and wife hold real property as tenants by the entirety. "An estate by the entireties resembles a joint tenancy, in that there is a right of survivorship in both, and is sometimes referred to as a joint tenancy." 26 AM. JUR. *Husband and Wife* § 66 (1940). However, there is one important difference, *i.e.*, a tenancy by the entireties can be terminated or severed only by the joint action of husband and wife during their lives, whereas a joint tenancy may be terminated by a transfer or conveyance of his interest by one tenant. *Milan v. Boucher*, 285 Mass. 590, 189 N.E. 576, 578 (1934). It is important to bear this distinction in mind in considering the following cases.

This problem has arisen in a number of jurisdictions and has been solved in various ways. Two views stand out as extremes. Under the first the survivor takes all despite his wrongdoing; under the second, the court awards all to the estate of the decedent. The remaining views are modifications of these two.

Those states which hold that the survivor takes all regardless of his wrongdoing decide the question on the basis of strict contractual rights. They reason that the rights of both of the parties vest at the time the original contract is made and that the survivor, in theory, gains nothing by his co-tenant's death. Thus, in *Oleff v. Hodapp*, 129 Ohio St. 432, 195 N.E. 838, 841 (1935), the court said:

> Property cannot be taken from an individual who is legally entitled to it because he violates a public policy. Property rights are too sacred to be subjected to a danger of that character. We experience no satisfaction in holding that Tego is entitled to this account; but that is the law, and we must so find.

Illinois followed this decision in *Welsh v. James,* 408 Ill. 18, 95 N.E.(2d) 872 (1950), which involved real property and bank accounts held in joint tenancy. It was further held that to deprive the survivor of the property would be a violation of the state constitutional provision that ". . . no conviction shall work corruption of blood or forfeiture of estate. . . ." ILL. CONST. ART. II, §11 (1870). In *Smith v. Greenburg,* 121 Colo. 417, 218 P.(2d) 514 (1950), the court reiterated the proposition that each tenant's rights vested at the time the contract was made, and that the court did not have the power to prevent the survivor from taking. A somewhat earlier case, *Beddingfield v. Estill & Newman,* 118 Tenn. 39, 100 S.W. 108 (1907), dealing with a tenancy by the entirety reached the same conclusion. The court held that the husband, who was convicted of murdering his wife, had acquired title to the entire estate under the conveyance made to him and his wife, and that he continued to hold that title under the deed even though a statute precluded the survivor from taking by descent or distribution. He received no title from or through his wife, her interest being extinguished by her death. This decision was followed in *Wenker v. Landon,* 161 Ore. 265, 88 P.(2d) 971 (1939), which held that real property owned by a husband and wife as tenants by the entirety does not constitute an estate of inheritance.

The principal objection to this strict legal approach to the problem is that the courts which apply it ignore the fact that the survivor does derive some benefit by his crime. In the joint tenancy situations the survivor eliminates the possibility that the decedent may outlive him and thus take all of the property held under such tenancy. It also eliminates the possibility that the decedent may withdraw some or all of the funds held in a joint bank account. If the interest is a tenancy by the entirety, the survivor gains even more, for he avoids the requirement that his co-tenant must join in order to convey the property.

At the other extreme is the New York view which holds that the survivor should be deprived of all rights in the property and that everything should go to the estate of the decedent. The courts in applying this rule cast aside all legal principles and decide the question on purely moral considerations. Thus, in In re *Santourian's Estate,* 125 Misc. 668, 212 N.Y. Supp. 116, 118 (Surr. Ct. 1925), in reference to a bank account held in joint tenancy, the court held that the husband who had slain his wife should have no right to the property since the Surrogate was ". . . opposed to subscribing to any doctrine of law that will offer a premium to husbands to kill their wives." In *Bierbrauer v. Moran,* 244 App. Div. 87, 279 N.Y. Supp. 176 (4th Dep't 1935), the court held that

to allow a husband who had slain his wife to share in the property held in joint tenancy would be to allow him to profit by his felonious act. In *Van Alstyne v. Tuffy*, 103 Misc. 455, 169 N.Y. Supp. 173 (Sup.Ct. 1918), where real property was held as tenants by the entirety, the court held that the equitable principle that no one shall be permitted to profit by his fraud or wrong, or found any claim upon his own iniquity, or to acquire property by his own crime should govern. As a result, the survivor-husband was not permitted to enjoy the property, even though the tenancy contract was thereby nullified.

The courts which apply the above rule disregard not only the true nature of the interests created under a joint tenancy and an estate by the entireties, but also the constitutional provisions against forfeiture of estates.

In the remaining jurisdictions where this problem has arisen the courts have sought to find a middle ground upon which to base their decisions. This search for a just and equitable solution has resulted in a variety of decisions. In *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927), where the husband murdered the wife, the court held that although the murderer did not forfeit his legal title to the property held as tenants by the entirety, he did hold the interest of his deceased wife as a constructive trustee for her heirs. As survivor, he was further enjoined from conveying the property. The court resolved all doubt as to who may have survived as between himself and his victim by adjudging that upon his death the entire property should descend to the heirs of his victim.

Another solution was advanced in two Missouri cases. *Barnett v. Couey*, 224 Mo. App. 913, 27 S.W.(2d) 757 (1930), a bank deposit held by husband and wife as tenants by the entirety; *Grose v. Holland*, 357 Mo. 874, 211 S.W.(2d) 464 (1948), real property held by a husband and wife as tenants by the entirety. In each of these cases, the husband had slain his wife and the wife's representatives sought only one-half of the property. It was held that in order to qualify as a survivor, one must not only be a survivor in fact, but also a survivor in contemplation of law, that is, the death of the deceased must be "in the ordinary course of events and subject only to the vicissitudes of life." *Barnett v. Couey, supra*, 27 S.W.(2d) at 761. In each case the property was treated as if it had been held by the parties as tenants in common, and one-half was awarded to the survivor and the other half given to the wife's estate. Florida followed these Missouri decisions in *Ashwood v. Patterson*, ... Fla....., 49 So.(2d) 848 (1951) which dealt with real property held by a husband and wife as tenants by the entirety. In the Florida case the heirs of the slain wife had asked for all the property.

The New Jersey courts have presented another solution to the problem. In *Sherman v. Weber*, 113 N.J. Eq. 451, 167 Atl. 517 (Ch. 1933), the court held that since the right of survivorship is an incident

of an estate by the entirety, to cause a forfeiture of the estate would require a change in the law by the legislature — not the courts. The court made use of mortality tables in an attempt to reach a just solution, and stated, 167 Atl. at 518:

> The wife was older than her husband and in the natural course of events she would have predeceased him and he would ultimately have become the owner of the fee, as the survivor. The heir of the wife is therefore entitled to have the commuted value, as of the date of the wife's death, of the net income of one-half of the property for the number of years of the wife's expectancy of life, to be ascertained according to the mortality tables used by this court.

In *Nieman v. Hurff,* 11 N.J. 55, 93 A.(2d) 345 (1952), a husband and wife owned real property as tenants by the entirety and stock certificates in joint tenancy. The wife executed a will in which she named the Damon Runyon Memorial Fund for Cancer Research as her sole beneficiary, subsequently she was killed by her husband. The court held that, in equity, the Cancer Fund was entitled to an absolute one-half interest in the realty and corporate stock and to a remainder interest in the other half of the property — this remainder being subject only to the value of the survivor's life estate.

In *Colton v. Wade,* ....Del....., 80 A.(2d) 923 (Ch. 1951), where the husband and the wife held realty as tenants by the entirety, the wife had killed the husband. The court held that the survivor possessed the whole legal interest in the property, but a constructive trust was imposed for the benefit of those entitled to the estate of the deceased, except that the survivor was entitled to receive the commuted value of the net income of one-half of the property for the number of years of her life expectancy.

Still another solution was propounded by the Wisconsin court in In re *King's Estate,* 261 Wis. 266, 52 N.W.(2d) 885 (1952), in which husband and wife held real and personal property as joint tenants. Here the husband murdered his wife and then committed suicide. The court held that since the husband had murdered the wife, her status as a joint tenant did not end with her life; instead it continued on in her administrator and heirs at law. Thus, when the husband died, her joint tenancy became her estate of inheritance in the entire property.

The Minnesota court in the instant case, by imposing a constructive trust upon the entire bank account for the benefit of the decedent's estate, had added another chapter to the middle ground of this problem. Nevertheless, this solution closely approaches the extreme view advocated by New York.

It is obvious that the courts must contend with varied and conflicting interests in attempting to solve this problem. On the one hand, general property law vests the entire joint property in the survivor, and, thus, to deprive the wrongdoer of any or all of his interest is to cause a