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Recent Decisions

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to the Secretary of the Treasury can be costly and time consuming, possibly more expensive than the vehicle itself. As a result, many cannot afford to make use of the remedy and justice is not open to all. Regardless of the rule that a forfeiture is an *in rem* proceeding, an injustice is done to innocent owners, bailors, lienors, or mortgagees. Courts have recognized this and, where possible, have so interpreted the law as to free such claimants from its effect, as in the cases interpreting the term "facilitate," where courts have distorted its definition to avoid forfeiture. The fact that the law itself provides a remedy by administrative appeal is an indication that Congress realized that it might work injustices if the vehicle is guilty.

Does the law strike at the pocketbook of the criminal as the Committee suggested? [78] If that is its purpose, can it not be accomplished in conjunction with a recognition of the rights of the innocent?

In the final analysis, the judiciary is bound by the statutes enacted by Congress. For that reason and because many decisions have firmly established the rules for forfeiture, it is impossible for courts to work substantial changes in the law. With the courts so bound, the responsibility for a necessary alteration lies with the legislature.

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RECENT DECISIONS

CONFLICT OF LAWS — JURISDICTION TO REDRESS INJURIES TO FOREIGN REAL ESTATE. — *Reasor-Hill Corp. v. Harrison, Judge,* 38 A.B.A.J. 315 (Ark. Sup. Ct. Jan. 21, 1952). Planters Flying Service dispatched a plane from Arkansas to Missouri to spray insecticide over a cotton field in Missouri belonging to Barton. An action was brought in Arkansas to collect the account and Barton filed a cross-complaint alleging that the insecticide was of inferior quality and had damaged his crop. In the present action, Reasor-Hill Corp., manufacturer of the insecticide, sought a writ of prohibition to prevent the trial court from entertaining the suit on the ground that Arkansas had no jurisdiction to redress an injury to real estate in Missouri because the action was local in character. Admitting the impressive array of judicial authority to the contrary, the Arkansas court held the action transitory, maintainable in Arkansas.

The ruling of the Arkansas court disturbs a generally accepted rule of law. It also revives interest in the question whether an action to redress injury to real property is local or transitory. May such action

78 *Ibid.*

be prosecuted in any jurisdiction in which the defendant is personally served or must the venue be laid in the state where the property is located?

An investigation of the rule in England, denominating such action as local, assists in an understanding of the majority rule in the United States. Originally all actions in England were considered local, the rule arising from the early practice which required that a case be tried before a jury of the vicinage, presumed to have knowledge of the pertinent facts at issue. GOODRICH, CONFLICT OF LAWS § 96 (3d ed. 1949). When the courts came to require disinterested jurors, Lord Mansfield opined, by way of dictum, that suits to redress injury to foreign realty should be maintainable in England. *Mostyn v. Fabrigas,* 1 Cowp. 161, 98 Eng. Rep. 1021, 1032 (K.B. 1774). But this view was repudiated in *Doulson v. Matthews,* 4 T. R. 503, 100 Eng. Rep. 1142 (K.B. 1792), and the common law rule that actions for damages to real property were local became firmly established. *British South Africa Co. v. Companhia de Mocambique,* [1893] A.C. 602. The rule is peculiar to the common law, contrary to the continental view, as indicated by the courts in Louisiana where the civil law obtains. *Holmes v. Barclay,* 4 La. Ann. 63 (1849).

By the majority rule in America, the action is a local one. An early expression on the subject in the United States is found in *Livingston v. Jefferson,* 15 Fed. Cas. 660, No. 8,411 (D. Va. 1811). In that case a dispute arose between the Federal Government and Livingston concerning ownership of land in Louisiana. Jefferson, acting in his capacity as President, directed the marshal to eject Livingston. When Jefferson's term expired Livingston brought trespass *quare clausum fregit* in the federal court in Virginia. A plea to the jurisdiction was made to the effect that the land was outside the jurisdiction of the court. Livingston contended that he would be remediless unless the action be termed transitory, but the court felt itself bound by the English common law under stare decisis. In a concurring opinion, Justice Marshall followed the judicial precedents but expressed dissatisfaction with a rule which "produces the inconvenience of a clear right without a remedy." 15 Fed. Cas. No. 8,411 at 665. The case so settled the rule in America that few litigants have since put the point in issue.

The rule has later been criticized by a court applying it. *Potomac Milling & Ice Co. v. B. & O. R. R.,* 217 Fed. 665, 668 (D. Md. 1914). However, it is followed in the majority of jurisdictions. *Ellenwood v. Marietta Chair Co.,* 158 U.S. 105, 15 S. Ct. 771, 39 L. Ed. 913 (1895); *Shell Petroleum Corp. v. Moore,* 46 F. (2d) 959 (5th Cir. 1931); *Kroll v. Chicago, B. & Q. R. R.,* 98 Neb. 322, 152 N.W. 548 (1915); *Doherty v. Catskill Cement Co.,* 72 N.J.L. 315, 65 Atl. 508 (1905); *Montesano Lumber & Mfg. Co. v. Portland Iron Works,* 78 Ore. 53, 152 Pac. 244 (1915). The rule is embodied in RESTATEMENT, CONFLICT OF LAWS § 614 (1934).

However, even in those states where the majority rule is followed, an exception is noted in those cases in which negligence in one state damages realty in another. In such case the plaintiff may elect to sue in either jurisdiction. *Smith v. Southern Ry.*, 136 Ky. 162, 123 S.W. 678 (1909); *Ducktown Sulphur, Copper & Iron Co. v. Barnes*, 60 S.W. 593 (Tenn. Sup. Ct. 1900).

The minority rule in America, designating an action to recover damages for injury to realty as transitory, obtained only in Minnesota, *Little v. Chicago, St. P., M. & O. Ry.*, 65 Minn. 48, 67 N.W. 846 (1896), and Louisiana, *Holmes v. Barclay, supra,* until the Arkansas court handed down its rule in the instant case. Since Louisiana courts have never felt themselves bound by common law precedents, Minnesota was, for many years, the only American court to flatly reject the principle of *Livingston v. Jefferson, supra,* as unsound. In the *Little* case damages were sought in Minnesota for injury to real property in Wisconsin. Ruling the action properly laid, the court stated, 67 N.W. at 847:

> Almost every court or judge who has ever discussed the question has criticised or condemned the rule as technical, wrong on principle, and often resulting in a total denial of justice, and yet have considered themselves bound to adhere to it under the doctrine of stare decisis. An action for damages for injuries to real property is on principle just as transitory in its nature as one on contract or for a tort committed on the person or personal property. The reparation is purely personal, and for damages. Such an action is purely personal, and in no sense real.

The various arguments employed by the Minnesota and Arkansas courts for the adoption of the minority rule have also been given expression by eminent text writers. In 3 BEALE, THE CONFLICT OF LAWS § 614.1 (1935), the following observation was made:

> It would seem on principle that proceedings *in personam,* including actions to recover damages for trespass to land, should be held to be transitory. The nature of the remedy sought rather than the nature of plaintiff's rights, should determine whether an action is local or transitory.

The majority rule has been condemned as a shield for wrongdoers who escape liability by remaining beyond service of process in the jurisdiction where the land is located. GOODRICH, CONFLICT OF LAWS § 96 (3d ed. 1949). The argument that one state should not try title to land in a sister state has been answered by pointing out that conversion of standing timber is maintainable as a transitory action though the question of guilt may often turn upon the ownership of land. STUMBERG, CONFLICT OF LAWS 174 (2d ed. 1951). Strong condemnation of the majority rule is found in 3 BEALE, CONFLICT OF LAWS § 614.1 (1935) where it is stated: "The history of the doctrine of Livingston v. Jefferson in the state courts is an example of stare decisis in its worst aspect — namely, blind adherence to precedents."

Even in the states in which an action for damages to realty is deemed local, a relaxation of the rule is possible if the court succeeds

in labeling the tort conversion instead of trespass *quare clausum fregit.* Where the gravamen of the action was for conversion of lumber manufactured from trees wrongfully cut and removed, the action was transitory. *Peyton v. Desmond,* 129 Fed. 1 (8th Cir. 1904). Courts have proved adept at finding the transitory action of conversion even in a complaint which set forth principally trespass *quare clausum fregit. Stone v. United States,* 167 U.S. 178, 17 S. Ct. 778, 779, 42 L. Ed. 127 (1897); *Arizona Commercial Mining Co. v. Iron Cap Copper Co.,* 119 Me. 213, 110 Atl. 429, 431 (1920).

Growing dissatisfaction with the majority rule has led to suggestions that the action be called transitory when no question of title is interposed, *Ingram v. Great Lakes Pipe Line Co.,* 153 S.W. (2d) 547, 550 (Kansas City Ct. App., Mo. 1941), and when it is evident the wrongdoer will otherwise escape liability, *Potomac Milling & Ice Co. v. B. & O. R. R., supra,* 217 Fed. at 668.

It has been suggested that if a change in the rule is necessary and courts feel powerless to make the change by reason of stare decisis, the change should originate in the legislature. *Brisbane v. Pennsylvania R. R.,* 205 N.Y. 431, 98 N.E. 752, 753 (1912). Of more than passing interest is the fact that the court's suggestion prompted the New York legislature to enact in 1913 a statute permitting the action. It has been re-enacted into the present N.Y. REAL PROP. LAW § 536. For an application of the statute see *Stark v. Howe Sound Co.,* 148 Misc. 686, 266 N.Y. Supp. 368 (Sup. Ct. 1933), *aff'd,* 241 App. Div. 637, 269 N.Y. Supp. 936 (3d Dep't 1934), *amended,* 242 App. Div. 668, 271 N.Y. Supp. 1097 (3d Dep't 1934).

In the instant case the Arkansas court breaks away from a rule that has long ago lost its *raison d'etre.* The abolition of the practice of empaneling only those jurors personally acquainted with the facts in issue should have also marked the death of the rule making actions to redress damages to realty local in character. In answer to the argument that a state should not try title to land in a sister state it is submitted that courts frequently settle this issue in cases involving the transitory action of conversion, without any raising of the judicial eyebrow.

That the rule rests upon a historic accident seems clear. It was formulated at a time when transportation facilities were such that little hardship was seen in its application but, in this age of increased mobility, the injustice of the rule is readily apparent in those instances in which the plaintiff is unable to personally serve the defendant due to defendant's hasty departure from the jurisdiction in which the land is situated. As remarked in the case under discussion, the injured party could hardly be expected to discover the damage and file an attachment suit before the pilot has flown into another jurisdiction.

Joseph C. Spalding

CONSTITUTIONAL LAW — FEINBERG LAW — FREE SPEECH AND DUE PROCESS CLAUSES. — *Adler v. Board of Education of City of New York,* ....U.S....., 72 S. Ct. 380, 96 L. Ed. *295 (1952). Irving Adler and others brought a declaratory judgment action praying that the so-called Feinberg Law, N. Y. EDUCATION LAW § 3022, be declared unconstitutional and that the action of the Board of Education of the City of New York thereunder be enjoined. The statute related to ineligibility for employment of any person advocating, or belonging to organizations advocating, the overthrow of the government by force, violence or unlawful means. The New York Supreme Court held the statute unconstitutional. *Lederman v. Board of Education,* 196 Misc. 873, 95 N.Y.S. (2d) 114 (Sup. Ct. 1949). The Appellate Division reversed. 276 App. Div. 527, 96 N.Y.S. (2d) 466 (2d Dep't 1950). The Court of Appeals affirmed the Appellate Division. *Thompson v. Wallin,* 301 N.Y. 476, 95 N.E. (2d) 806 (1950).

The United States Supreme Court, in a six to three decision, held the statute constitutional. Justice Minton, spokesman for the majority, made the distinction at the outset between the constitutional right to assemble, speak and believe, and the "right" to work for the state. He stated that one can work for the state only if he complies with the reasonable terms laid down by the proper authorities. The majority held this statute did impose a reasonable condition of state employment.

There has been much litigation concerning the rights and limitations of the state and federal governments in imposing conditions or terms of employment upon present and prospective employees. *Garner v. Board of Public Works of Los Angeles,* 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951); *United Public Workers v. Mitchell,* 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947); Ex parte *Curtis,* 106 U.S. 371, 1 S. Ct. 381, 27 L. Ed. 232 (1882); *McAuliffe v. Mayor of City of New Bedford,* 155 Mass. 216, 29 N.E. 517 (1892); *Board of Regents of Oklahoma Agricultural Colleges v. Updegraff,* ....Okla....., 237 P. (2d) 131 (1951).

The courts in the above cases are uniform in holding that one does not have a constitutional right to government employment, and that the legislatures can make reasonable restrictions. The usual purpose of the restrictions is to promote efficiency, competency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Ex parte *Curtis, supra,* 1 S. Ct. at 384. For the legislation to be valid, it is not necessary that the regulation be more than an act reasonably deemed by the legislature to interfere with the efficiency of the public service. *United Public Workers v. Mitchell, supra,* 330 U.S. at 101. The government must at all times possess the power to protect itself. *American Communications Assn., CIO v. Douds,* 339 U.S. 382, 394, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

It has been stated that a public employee does not have a vested, proprietary right to his position which over-balances the public or general welfare of the community he serves. *Thompson v. Wallin,* 301 N.Y. 476, 95 N.E. (2d) 806, 811 (1950). Therefore, the state may reasonably regulate employment of persons already employed.

The Feinberg Law, N.Y. EDUCATION LAW § 3022, specifically concerns itself with conditions of employment for teachers in public schools. It prohibits the hiring of teachers who advocate the unlawful overthrow of the government by force and violence, or who belong to organizations that advocate the violent overthrow of the government. The instant case represents the first time the Supreme Court has passed on the constitutionality of such a statute.

The instant case is distinguishable from a recent California case, *Tolman v. Underhill,* ....Cal. App. (2d)...., 229 P. (2d) 447 (1951), which invalidated a requirement of a non-communist oath as a condition of employment. The New York statute involved in the cited case did not require the taking of a loyalty oath or the execution of a loyalty affidavit. However, in California, the university regents passed a resolution calculated to bar members of the Communist Party from faculty positions, and the resolution required faculty members to take a loyalty oath. The resolution was held invalid because it violated a specific provision of the state constitution. CAL. CONST. Art. XX, § 3 (1879). This provision prescribed the form of oath to be given to those in "office or public trust," and specifically provided that no other oath, declaration, or test should be required for qualification. In *Garner v. Board of Public Works of Los Angeles, supra,* another case arising in California, the United States Supreme Court held the loyalty oath valid under the Federal Constitution. Here the employees were not in "office or public trust" and not within the California state constitutional provision. Therefore the reasoning employed in the *Tolman* case had no bearing upon the decision of the case under discussion.

The reasonableness of the New York legislature's Feinberg Law should be weighed in the light of recent Supreme Court cases. The need for restriction of the Communist Party in the United States was distinctly shown in *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), where the Smith Act, 18 U.S.C. § 2385 (1946), was held to be constitutional and where the Communist Party was deemed a "clear and present danger" to our fundamental traditions. Certainly our public school system is part of that tradition.

The dissents in the case under discussion, by Justices Frankfurter, Black and Douglas, do very little to weaken the reasoning of the majority. Justice Frankfurter dissented on the jurisdictional ground that there was no real controversy, hence no reason to decide the constitutional question. Justices Black and Douglas stated that the statute in effect places censorship on speech and thought. 72 S. Ct. at 393.

The argument of Justice Douglas, 72 S. Ct. at 394, that ". . . guilt of the teacher should turn on overt acts," is unfounded when the administrative methods and procedures of the Feinberg Law are analyzed. The organizations are declared "subversive" only after notice and hearing. If a teacher belongs to such an organization there is a prima facie case against him, but he too receives notice and hearing. The slightest good reason for membership in the organization places the burden of proof on the Board to show that the teacher does advocate the overthrow of the government by force and violence. Does that not constitute guilt by overt acts?

The writer concludes that the constitutionality of this statute is unquestionable if the Court looks to principles which it set forth in the *Garner* case. But if the constitutionality of this statute must find its basis in the wisdom of the legislature, then Justices Black and Douglas might be correct. However, the Court should decide the law, not pass on the wisdom of the legislature.

R. Emmett Fitzgerald

CONSTITUTIONAL LAW — FREEDOM OF SPEECH — MOTION PICTURE CENSORSHIP AS PRIOR RESTRAINT. — *Joseph Burstyn, Inc. v. Wilson,* 303 N.Y. 242, 101 N.E. (2d) 665 (1951), *cert. granted,* 20 U.S.L. WEEK 3271 (U.S. April 22, 1952). See arguments before United States Supreme Court, 20 U.S.L. WEEK 3281 (U.S. April 29, 1952). The original proceeding was against Lewis A. Wilson as Commissioner of Education of the State of New York, and others, constituting the Board of Regents of the University of the State of New York, to review a determination by the Board of Regents rescinding licenses for the public exhibition of a motion picture entitled "The Miracle."

The motion picture licensing statute of New York requires that all motion pictures, prior to public exhibition, be reviewed by the Education Department of the State Board of Regents and that licenses be issued unless the film or a part thereof is obscene, indecent, immoral, inhuman or sacrilegious. N.Y. EDUCATION LAW § 122.

"The Miracle," an Italian import, was licensed by the Education Department of the Board of Regents for exhibition with and without English subtitles. Its showing with English subtitles in New York City stirred up waves of indignation and caused the Board of Regents to review the Education Department's issuance of the license. The Board found the picture sacrilegious and revoked the license. The revocation was sustained by the Appellate Division of the Supreme Court. 278 App. Div. 253, 104 N.Y.S. (2d) 740 (3d Dep't 1951). The petitioner brought this appeal contesting both the power of the

Board of Regents to review the issuance of the license and the constitutionality of the statute.

Of the various constitutional objections advanced by the petitioner, two are most noteworthy. One was the narrow issue concerning the necessity, on the part of the Regents, of making a religious judgment in order to find the film "sacrilegious." The petitioner's contention was that the First Amendment precluded any authority in the Regents to make a religious judgment. The court termed the argument "specious" when applied to motion pictures offered to the public as a form of entertainment. The reasoning of the Appellate Division of the Supreme Court was quoted in support of this contention, 101 N.E. (2d) at 672:

> "All it [the statute] purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion is not a denial of religious freedom."

In the instant case the religious aspect of the Regents' decision was not considered. The question whether they could constitutionally make the religious judgment was left unanswered. However, the United States Supreme Court has made such judgments in the past. See *Murdock v. Pennsylvania,* 319 U.S. 105, 110-2, 63 S. Ct. 870, 87 L. Ed. 1292 (1943); *Davis v. Beason,* 133 U.S. 333, 10 S. Ct. 299, 300-1, 33 L. Ed. 637 (1890).

The second, and more important, constitutional objection brought by the petitioner was that the statute was unconstitutional *in toto* as a prior restraint on the freedom of speech. Although the majority upholds the constitutionality of the statute, the dissenting opinion creates doubts concerning the validity of the reasons set out by the majority.

In the case under discussion the court considered the prior restraint feature of the statute and stated, 101 N.E. (2d) at 673, that "motion pictures are primarily a form of entertainment, a spectacle or show, and not such vehicles of thought as to bring them within the press of the country." This statement is substantially a reiteration of the ruling of the United States Supreme Court regarding motion pictures. *Mutual Film Corp. v. Industrial Commission of Ohio,* 236 U.S. 230, 35 S. Ct. 387, 59 L. Ed. 552 (1915). Since that decision the Supreme Court has not directly considered the question whether motion pictures come within the protection of the First Amendment.

Following the *Mutual Film* case, a New York court held that motion pictures were properly excluded from the press of the country on the ground that viewing a motion picture involved no mental effort as compared with literacy required in reading a newspaper. *Pathé Exch., Inc. v. Cobb,* 202 App. Div. 450, 195 N.Y. Supp. 661, 665 (2d Dep't 1922). In the nearly forty years since the *Mutual Film* case was decided, motion pictures have been withheld from exhibition solely because of the ideas they sought to convey. *Distinguished Films, Inc.*

v. Stoddard, 271 App. Div. 715, 68 N.Y.S. (2d) 737 (3d Dep't 1947); *United Artists Corp. v. Board of Censors,* 189 Tenn. 397, 225 S.W. (2d) 550 (1949).

The Court of Appeals in the Fifth Circuit recently predicted in *Rd-Dr Corp. v. Smith,* 183 F. (2d) 562, 563 (5th Cir. 1950), that the Supreme Court "as now constituted" would not overrule the *Mutual Film* case, and felt itself bound by that decision. Later the Supreme Court denied certiorari, 340 U.S. 853, 71 S. Ct. 80, 95 L. Ed. 625 (1950). This prediction, compared with recent dicta emanating from the Supreme Court, has renewed interest in the question whether motion pictures are a part of the press. In *Kovacs v. Cooper,* 336 U.S. 77, 96, 69 S. Ct. 448, 93 L. Ed. 513 (1949), a concurring opinion noted that "Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated." But this statement indicating a favorable view toward continued censorship is to be contrasted with a dissenting opinion, 336 U.S. at 102:

> Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, *moving pictures,* and public address systems. To some extent at least there is competition of ideas between and within these groups. The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition. [Emphasis supplied.]

In *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 166, 68 S. Ct. 915, 92 L. Ed. 1260 (1948), the Court said: "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." In the above cases, the particular question of prior restraint in motion pictures was not under consideration, but the obiter dicta may one day become a principle of constitutional law.

The motion picture industry has learned through experience that it better protects its own interests by refraining from offenses against public decency. See Kupferman and O'Brien, *Motion Picture Censorship — The Memphis Blues,* 36 CORNELL L. Q. 273, 298-300 (1951); Note, 49 YALE L. J. 87, 102-8 (1939), for reference to the experience of the industry under its own Production Code Administration in censoring its operations from within, and the successful restraint exercised by the National Board of Review and the Legion of Decency from without.

In the instant case the court admits that motion pictures do convey ideas as do newspapers, but it finds justification for the prior restraint in the great potentiality for dissemination of evil doctrines through motion pictures. 101 N.E. (2d) at 668. The rationalization under the state's police power advanced by the New York court might not now have the force it had in the *Mutual Film* case in 1915 if the Supreme

Court were asked to pass on the question today. It is altogether possible that the Court would find the element of communication of ideas in motion pictures of more importance today. Among other reasons, freedom of speech seems to have attained a "preferred position" in our society. *Kovacs v. Cooper, supra,* 336 U.S. at 88. Beside this attitude toward a more zealous guarding of the freedom of speech and press stands the fact that motion pictures today are admittedly different from the 1915 nickelodeons.

Howard V. Burke

CONSTITUTIONAL LAW — EVIDENCE INADMISSIBLE IN STATE COURTS UNDER DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. — *Rochin v. People of California,* ....U.S....., 72 S. Ct. 205, 96 L. Ed. *154 (1952). Three Los Angeles County deputy sheriffs forcibly entered Rochin's room without a search warrant. Upon their entry Rochin, the accused, seized two capsules and put them in his mouth. The officers by the use of force and violence tried to extract them. Failing, they took Rochin to a hospital and with a stomach pump extracted the two capsules which were found to contain morphine. Rochin was convicted of illegal possession of morphine. The crucial evidence, the morphine capsules, had been admitted over the defendant's objection. The state court of appeals affirmed the conviction and the Supreme Court of California denied a petition for a hearing, 101 Cal. App. (2d) 140, 225 P. (2d) 913 (1951), in spite of the fact the officers were found guilty of unlawful breaking and entering, assault and battery and false imprisonment. The court of appeals also found that this did not violate due process of law protected by U.S. CONST. AMEND. XIV. The Supreme Court of the United States, speaking through Justice Frankfurter, held the admission of this evidence by the California court violated the Due Process Clause. Justices Black and Douglas, in concurring opinions, disagreed with the reasoning of the majority. Their thesis was that a definite standard should be framed by incorporating the Fourth and Fifth Amendments of the Federal Constitution into the Due Process Clause of the Fourteenth.

The problem presented is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law which the Fourteenth Amendment entitled him.

The Court did not set out specifically the conduct upon which they based their decision, but stated, 72 S. Ct. at 210-1, "On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause." Therefore, it becomes necessary to examine not only the law of unlawful search and seizure but also the law pertaining to self-incrimination.

Evidence seized by federal officers in violation of the Fourth Amendment is inadmissible in federal courts. *Weeks v. United States,* 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). But the majority rule in state courts is that evidence obtained through an illegal search and seizure is admissible. *Banks v. State,* 207 Ala. 179, 93 So. 293 (1921); *Benson v. State,* 149 Ark. 633, 233 S.W. 758 (1921); *People v. Mayen,* 188 Cal. 237, 205 Pac. 435 (1922); *State v. Reynolds,* 101 Conn. 224, 125 Atl. 636 (1924); *Kennemer v. State,* 154 Ga. 139, 113 S.E. 551 (1922); *State v. Johnson,* 116 Kan. 58, 226 Pac. 245 (1924); *State v. Schoppe,* 113 Me. 10, 92 Atl. 867 (1915); *People v. Defore,* 242 N.Y. 13, 150 N.E. 585 (1926); *Commonwealth v. Dabbierio,* 290 Pa. 174, 138 Atl. 679 (1927); *Hall v. Commonwealth,* 138 Va. 727, 121 S.E. 154 (1924).

According to the minority view, illegally obtained evidence is inadmissible. *Flum v. State,* 193 Ind. 585, 141 N.E. 353 (1923); *Youman v. Commonwealth,* 189 Ky. 152, 224 S.W. 860 (1920); *Tucker v. State,* 128 Miss. 211, 90 So. 845 (1922); *State v. Gibbons,* 118 Wash. 171, 203 Pac. 390 (1922); *Hoyer v. State,* 180 Wis. 407, 193 N.W. 89 (1923). Thirty-one states allow such evidence while sixteen hold it to be inadmissible. See *Wolf v. Colorado,* 338 U.S. 25, 38, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949).

The major point of the instant case deals with the privilege against self-incrimination. This privilege dates from Lilburn's case, 3 How. St. Tr. 1365 (1637), and has been incorporated into forty-six state constitutions; Iowa and New Jersey, the two exceptions, provide for the privilege by statute. 8 WIGMORE, EVIDENCE § 2252 (3d ed. 1940). As incorporated into the United States Constitution, U.S. CONST. AMEND. V, it is a limitation upon federal, and not state, action. *Barron v. Baltimore,* 7 Pet. 243, 8 L. Ed. 672, 674 (U.S. 1833).

In the majority of states this privilege applies only to testimonial utterances, oral or written. *Davis v. State,* 189 Md. 640, 57 A. (2d) 289, 291 (1948); *Skidmore v. State,* 59 Nev. 320, 92 P. (2d) 979, 982-3 (1939); *State v. Sturtevant,* 96 N.H. 99, 70 A. (2d) 909, 911 (1950); *State v. Alexander,* 7 N.J. 585, 83 A. (2d) 441, 444-5 (1951); *Bovey v. State,* 197 Misc. 302, 93 N.Y.S. (2d) 560, 565 (Ct. Cl. 1949); *State v. Gatton,* 60 Ohio App. 192, 20 N.E. (2d) 265 (1938); *State v. Cram,* 176 Ore. 577, 160 P. (2d) 283, 285-9 (1945); *Commonwealth v. Statti,* 166 Pa. Super. 577, 73 A. (2d) 688, 691 (1950). The evidence obtained from the defendant's stomach would be admissible in the above jurisdictions; at least, they would not deny admission because of self-incrimination. They would undoubtedly reason that such evidence need not be given by the defendant, but could be presented by the doctor or the deputy sheriff. Thus it would not amount to testimonial compulsion.

There are some cases to the contrary, *Bethel v. State,* 178 Ark. 277, 10 S.W. (2d) 370 (1928); *State v. Height,* 117 Iowa 650, 91 N.W. 935 (1902); *State v. Matsinger,* 180 S.W. 856 (Mo. Sup. Ct. 1915), all concerned with the examination for venereal disease, and *Apodaca v. State,* 140 Tex. Crim. Rep. 593, 146 S.W. (2d) 381 (1941), which involved the chemical analysis of urine. These cases, which held that the privilege against self-incrimination was violated by the admission of this testimony, even though the facts were presented by other witnesses, have been sharply criticized. See 8 WIGMORE, EVIDENCE § 2252 (3d ed. 1940).

In the MODEL CODE OF EVIDENCE, Rule 205 (1942), it is suggested that one must allow body substances to be taken for analysis. The comment on this rule recites:

> This Rule deals only with the privilege against self-incrimination, and leaves entirely open the question whether any other rule of law protects a witness or party against invasion of an asserted right to freedom from interference with his person.

The decision of the majority in the instant case applies the "other rule of law" which "protects a witness or party" — i.e., the Due Process Clause of the Fourteenth Amendment. Due process has been defined as "the approval of the Supreme Court." CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 154 (6th ed. 1938).

Having surveyed the holdings of various jurisdictions in regard to unlawful search and seizure and self-incrimination, we pass to an examination of the effect the instant case is going to have upon them. Justice Frankfurter would not have the Court overthrow eighty years of interpretation of the Fourteenth Amendment as would Justices Black and Douglas. The views of the latter are not clearly set forth in the instant case, but if their opinions are read in light of their statements in *Adamson v. California,* 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947), it is safe to conclude that they believe that the prohibitions of the Fourth and Fifth are so fundamental that they should be incorporated per se into the Fourteenth Amendment. The majority opinion is merely a revitalization of the theory of constitutional law which leaves to the Supreme Court the decision whether the acts complained of in any individual case violate "due process." The cases admitting evidence obtained by unlawful search and seizure, blood tests, urinalysis and lie detectors are not necessarily overruled, but must be re-evaluated according to the Due Process Clause. Justice Frankfurter said, 72 S. Ct. at 210, "We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices. . . ." The Court was careful to limit its holding to the security of the personal sanctity of the individual from invasion of his bodily tissues. Stated more specifically, the rule of the case is that evidence obtained by pumping of the accused's stomach is inadmissible as violating due process. The majority opinion may be

criticized for being vague, and that it is not so vague as the provisions of the Fourteenth Amendment which it applies is indeed little justification. But as stated in Note, 33 IOWA L. REV. 666, 677 (1948):

> In the final analysis, it is the Court which protects the liberties that we enjoy and since the sum total of those liberties is impossible of enumeration prospectively, it must devolve upon the Court to decide, as each alleged violation comes before it, whether such state action is to be allowed or denied the state.

Though there may be a great deal of criticism directed toward the reasoning in the *Rochin* case, the result is, in the opinion of the writer, a salutary one. In all probability the defendant was guilty as charged and will go free as a result of the decision, but this would be no justification for a contrary decision on the issues involved. It would be better for the common good that a few guilty parties avoid the sanctions of law rather than subject all people to the invasion of their personal and bodily security. As pointed out by Justice Carter in his dissent in *People v. Rochin,* 101 Cal. App. (2d) 140, 225 P. (2d) 913, 915 (1951): "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime. . . . Power is a heady thing; and history shows that the police acting on their own cannot be trusted."

Andrew V. Giorgi

CONSTITUTIONAL LAW — PAY-WHILE-VOTING STATUTES. — *Day-Brite Lighting, Inc. v. State of Missouri,* ....U.S....., 72 S. Ct. 405, 96 L. Ed. *343 (1952). The appellant was convicted of violating Mo. REV. STAT. c. 129, § 060 (1949) which provides that a person may absent himself from his employment for a period of four hours between the opening and closing of the polls on any election day, and that any employer who shall discharge, or who ". . . shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege" shall be guilty of a misdemeanor. One of appellant's employees, Grotemeyer, whose normal work day extended from 8:00 A.M. until 4:30 P.M., requested a leave of absence of four hours in order that he might vote. Appellant permitted Grotemeyer, along with the other employees, to leave work at 3:00 P.M., thus allowing four hours before the polls closed. Subsequently, the appellant refused to pay wages for the time missed from work. This action was brought by the state contending that the failure to pay wages for the missed time constituted a deduction of wages forbidden by the statute. Appellant was convicted in the trial court and fined one hundred dollars. The conviction was affirmed by the Missouri Supreme Court, *State v. Day-Brite Lighting, Inc.,* ....Mo....., 240 S.W. (2d) 886 (1951), and appellant appealed from that decision.

The issue presented here is whether the statute, Mo. REV. STAT. c. 129, § 060 (1949), is violative of the Due Process and the Equal Protection Clauses, U.S. CONST. AMEND. XIV, § 1, and the Contract Clause, U.S. CONST. Art. I, § 10. The Supreme Court ruled the statute was not unconstitutional, and that such matters should be left to the discretion of the state legislatures.

Statutes similar to the one in issue here, have been enacted in several states. See Note, *Pay While Voting,* 47 COL. L. REV. 135 n.7 (1947). These statutes differ in the amount of time an employee may absent himself, and also in the type of election to which they apply. The statutes are, however, all similar in the pay-while-voting requirement. The precise issue which was litigated in the instant case has been decided in several previous cases. The highest courts of Illinois and Kentucky have held similar statutes unconstitutional, but the opposite result has been reached in intermediate courts of New York and California. The purpose of this discussion is to provide a brief review of these cases.

This problem was first presented to the Illinois Supreme Court in *People v. Chicago, M. & St. P. Ry.,* 306 Ill. 486, 138 N.E. 155, 157 (1923). The Illinois statute provided that any person entitled to vote should be entitled to absent himself from any services or employment for a period of two hours between the opening and closing of the polls. The court held that insofar as the statute gave an employee the right to absent himself for two hours in order to cast his vote, it was valid and binding, but insofar as the statute required employers to pay wages for the time spent in exercising the right of suffrage, it was invalid. The court held the latter half of the statute unconstitutional on three grounds: it was an unreasonable abridgment of the right to make contracts; it was discriminatory in its operation inasmuch as it placed a burden upon employers to the exclusion of all others; and it deprived employers of their money and property without due process of law. It is interesting to note that the statute in question has survived several re-enactments of the Illinois Election Code and it is still a part of that Code, ILL. STAT. ANN. § 43.879 (Jones 1944).

The Kentucky Court of Appeals also held such a statute to be unconstitutional, *Illinois Cent. R.R. v. Commonwealth,* 305 Ky. 632, 204 S.W. (2d) 973 (1947). The Kentucky Constitution provides that ". . . all employers shall allow employees, under reasonable regulations, at least four hours on election days, in which to cast their votes." KY. CONST. § 148. A statute was enacted, under this provision of the constitution, which is almost identical to the statute in the instant case. It provided that employees shall be entitled to absent themselves from their employment for four hours on the day of an election, and that such employees shall not be subject to a penalty or deduction of wages because of the exercise of the privilege. KY. REV.

STAT. ANN. c. 118, § 340 (Baldwin 1943). The court affirmed that portion of the statute which gave to employees the right to absent themselves for the purpose of voting, as did the Illinois court in *People v. Chicago, M. & St. P. Ry., supra,* but it held that portion which required the employer to pay wages for such time unconstitutional, saying, 204 S.W. (2d) at 975:

> . . . a statutory provision which has the effect of requiring an employer to pay an employee for 4 hours of unemployed time, whether or not he votes, whether or not he has opportunity to vote before he starts to work, whether or not he spends just 10 minutes in voting — this could not, we think, be constitutional. It does not seem to be in keeping with the American tradition.

The court further held that the statute was arbitrary in its application in that it singled out a certain class, namely employers, and imposed on this class the maintenance of a public enterprise. The United States Supreme Court denied certiorari. *Kentucky v. Illinois Central R.R.,* 334 U.S. 843, 68 S. Ct. 1511, 92 L. Ed. 1767 (1948).

A New York statute providing that an employee shall be entitled to absent himself for two hours on election day, and that no deduction should be made from usual salary or wages, N.Y. ELECTION LAW § 226, was held to be constitutional in *People v. Ford Motor Co.,* 271 App. Div. 141, 63 N.Y.S. (2d) 697 (3d Dep't 1946). This statute differs from those already discussed only in that it does not apply to primary elections if the polls are open for two hours before or after the work-day. The majority of the court held the statute was a valid exercise of the police power since its purpose was "to encourage the right of sufferage [*sic*] to keep it pristine and render it efficient. . . ." 63 N.Y.S. (2d) at 699. In answer to the objection that the statute was discriminatory the court maintained that its burden was so slight it was not oppressive: simply because the burden may be borne unequally does not render its placement unlawful. The dissent gave much weight to the decision in *People v. Chicago, M. & St. P. Ry., supra,* and maintained, 63 N.Y.S. (2d) at 704, that the law as expressed by the highest court of Illinois should be persuasive. See also, *Lee v. Ideal Roller & Manufacturing Co.,* 197 Misc. 389, 92 N.Y.S. (2d) 726 (N.Y. Munic. Ct. 1949), where it was held that when overtime hours are worked during the same week in which the employee is allowed time to vote, the time spent in voting cannot be used to reduce the overtime rates.

In *Ballarini v. Schlage Lock Co.,* 100 Cal. App. (2d) 859, 226 P. (2d) 771 (1950), the court was called upon to decide the constitutionality of a statute providing that an employee could absent himself for a period of two hours on election day, and that the employer must pay for that time. CAL. ELECTION CODE, § 5699 (Deering 1945). The court held that the statute was a valid exercise of the police power, "being in the public interest and promoting the public welfare. . . ." 226 P. (2d) at 774. In answer to the argument that the statute was

an unreasonable interference with the freedom of contract, the court held that it was as much a part of every employment contract as it would be if expressly incorporated therein.

The Missouri Supreme Court, in the decision from which this appeal was taken, *State v. Day-Brite Lighting, Inc., supra,* held that the statute was a valid exercise of the state's police power. The court argued that the purpose of the statute was to guarantee the right and opportunity of each citizen to vote and, as such, it was reasonable. The court also stressed the fact that since elections are held so infrequently in relation to the total working days in a calendar year, the economic burden placed upon the employer was comparatively slight.

Those who would hold this type of statute unconstitutional do so on four grounds: it is an unreasonable abridgment of freedom of contract; it is discriminatory in its operation; it is a deprivation of property without due process of law; and it is contrary to the American tradition to "pay" a citizen for exercising his right of franchise. Those who would declare such laws valid do so on the ground that the statutes tend to encourage the right of suffrage by preventing the evil of employer dominance, and thus are a valid exercise of the police power.

The Supreme Court has upheld the constitutionality of this statute, stating that this is merely a matter for the state legislatures. The Court maintains that it could strike down this law only if it returned to the philosophy of the early cases in which it was held that statutes regulating hours of work, *Lochner v. New York,* 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), and prescribing minimum wages, *Adkins v. Children's Hospital,* 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923), were unconstitutional. It is difficult to see the relation between statutes regulating hours of work and minimum wages, and the statute here involved. Justice Jackson in his dissenting opinion, 72 S. Ct. at 409, points out where the analogy fails: payment of minimum wages for hours worked is totally different from payment for time that is not worked.

It is perhaps significant to look at the instant decision in the light of an article by Swisher, *The Supreme Court in a Changing Role,* 20 KAN. CITY L. REV. 1 (1952). In this article Professor Swisher decries the fact that the Supreme Court is not facing up to its responsibilities and is permitting other voices, here the various state legislatures, to determine the rules to be enforced with respect to men and property. He states, *supra* at 2-3, that the Supreme Court has virtually abandoned substantive due process as a basis for the protection of property rights. It is submitted that the present decision is an example of this abandonment.

Richard F. Welter

CONTRACTS — RESTRAINT OF TRADE — PARTIAL ENFORCEABILITY OF ILLEGAL PROMISES. — *Ceresia v. Mitchell*, ...Ky...., 242 S.W. (2d) 359 (1951). Appellant Ceresia was enjoined for ten years from competing, in the wholesale fruit and vegetable business in Muhlenberg County, Kentucky, with appellee, Mitchell, to whom the former had sold his business and goodwill. The contract of sale prohibited appellant, his children, executors and administrators, from ever engaging directly or indirectly in any business in Muhlenberg County. Appellant later resumed his wholesale trade, claiming among other things, that the sale contract was an illegal bargain in restraint of trade, wholly unenforceable because its illegal parts were not severable from the rest of the contract. The lower court ruled that since the sale contract expressed the parties' intention to transfer the business, including goodwill, appellant should be enjoined from competing with appellee in Muhlenberg County for a fixed period of ten years from the date of sale, and that the contract should be enforced to the extent that it was legal, whether divisible in terms or not. The Kentucky Court of Appeals affirmed.

Should performance of an illegal bargain in restraint of trade be enforceable in so far as it would constitute a reasonable restraint, even though the terms of the contract are indivisible?

The majority rule today answers in the negative. It bases the validity of contracts in restraint of trade, where not divisible in terms, upon the reasonableness of the total restraint imposed, *J. H. Arnold & Co. v. Jones Cotton Co.*, 152 Ala. 501, 44 So. 662 (1907); *Samuel Stores, Inc. v. Abrams*, 94 Conn. 248, 108 Atl. 541 (1919), which in turn is determined by its relative harm to the public interest. *Parish v. Schwartz*, 344 Ill. 563, 176 N.E. 757 (1931), or to the protection required by the covenantee, *Milwaukee Linen Supply Co. v. Ring*, 210 Wis. 467, 246 N.W. 567 (1933).

This analysis was approved in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (6th Cir. 1898), *modified*, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899), where it was said:

> . . . no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.

Public policy forbids one to restrict unduly his personal liberty by contract. 5 WILLISTON, CONTRACTS § 1652 (rev. ed. 1937). It was held in *Steinmeyer v. Phenix Cheese Co.*, 91 N.J.L. 351, 102 Atl. 150 (1917), that a contract to withdraw from all business whatever, even within a limited geographic area, was invalid.

If, according to the tests of reasonableness, full performance of a bargain which is indivisible in terms would result in unjust restraint,

the bargain is illegal and is not enforceable even for so much of the performance as would constitute reasonable restraint. *Losquadro Coal Corp. v. Rubel Corp.*, 86 F. Supp. 774 (D. N.J. 1949); *Interstate Finance Corp. v. Wood*, 69 F. Supp. 278 (E.D. Ill. 1946); *Wisconsin Ice and Coal Co. v. Lueth*, 213 Wis. 42, 250 N.W. 819 (1933); RESTATEMENT, CONTRACTS § 518 (1932).

Beit v. Beit, 135 Conn. 195, 63 A. (2d) 161 (1949), follows the majority rule. There an agreement by the vendor not to compete in the same county with the buyer of his grocery business was held unduly restrictive, and, since indivisible, unenforceable even in the towns in which the buyer operated his stores. The court stated, 63 A. (2d) at 166:

> Where the covenant is intended by the parties to be an entirety, it cannot properly be so divided by a court that it will be held good for a certain area but invalid for another; indeed, as the trial court well states in its memorandum of decision, this would be to make an agreement for the parties into which they did not voluntarily enter.

Legal portions of divisible contracts have been enforced even though other parts are illegal. *Kessler v. Jefferson Storage Corp.*, 125 F. (2d) 108 (6th Cir. 1941); *Consolidated Syrup Corp. v. Kaiser*, 22 N.Y.S. (2d) 307 (Sup. Ct. 1940). In an early case, *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251 (1886), an agreement not to compete in a certain county or elsewhere was held divisible, and was enforceable in that county only.

The accepted test of severability is whether or not the restrictions are stated as separate, distinct covenants, *Putsman v. Taylor* [1927] 1 K.B. 637 (1926), but the later tendency of the American courts has been to ". . . strain to put such a construction upon the covenant so as to save it in part." *John T. Stanley Co. v. Lagomarsino*, 53 F. (2d) 112, 115 (S.D. N.Y. 1931).

In effect, some courts, while supposedly following the majority rule, have interpreted contracts as divisible and partially enforceable where there is no logical basis for division. An agreement not to compete in business in the northern half of California was construed divisible and thus enforceable in the county of San Francisco only. *Edwards v. Mullin*, 220 Cal. 379, 30 P. (2d) 997 (1934). See *New England Tree Expert Co. v. Russell*, 306 Mass. 504, 28 N.E. (2d) 997 (1940); *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N.J.L. 613, 71 Atl. 265 (1908).

It is a short step from this later interpretation to the present minority rule, which states that enforceability of illegal bargains in restraint of trade should depend, not on so-called "divisibility of terms," but on the reasonableness of enforcing the promise to the extent that it would be lawful. 5 WILLISTON, CONTRACTS § 1660 (rev. ed. 1937).

This principle is firmly established in Massachusetts and is applied to contracts for the sale of a business, *Metropolitan Ice Co. v. Ducas,* 291 Mass. 403, 196 N.E. 856 (1935), and to agreements restraining competition of former employees. *Thomas v. Paker,* ....Mass....., 98 N.E. (2d) 640 (1951); *Chase Photographic Laboratories v. Hennessey,* ....Mass....., 97 N.E. (2d) 397 (1951); *Brannen v. Bouley,* 272 Mass. 67, 172 N.E. 104 (1930). It is gaining acceptance in other jurisdictions, *Hill v. Central West Public Service Co.,* 37 F. (2d) 451 (5th Cir. 1930); *General Paint Corp. v. Seymour,* 124 Cal. App. 611, 12 P. (2d) 990 (1932), which involved sales of business assets and goodwill with agreements not to compete, and *Foltz v. Struxness,* 168 Kan. 714, 215 P. (2d) 133 (1950); *Herrington v. Hackler,* 181 Okla. 396, 74 P. (2d) 388 (1937), which contained agreements of physicians not to compete. In *American Weekly, Inc. v. Patterson,* 179 Md. 109, 16 A. (2d) 912 (1940), the vendor's contract not to engage in a certain type of publishing business was partially enforced though not divisible. A restrictive contract ancillary to the sale of a partnership was enforced to the extent necessary to prevent unfair competition in *Goldstein v. Maisel,* 271 App. Div. 971, 67 N.Y.S. (2d) 410 (2d Dep't 1947).

In *Hill v. Central West Public Service Co., supra,* 37 F. (2d) at 452, the court said that when an indivisible agreement to refrain from competing

> . . . extends the area of the restraint beyond the territory within which the engaging in the same business by a seller would be likely to affect the value of the sold business, it is unenforceable to the extent that the restraint is greater than is required to preserve to the purchaser what the latter acquired by his purchase.

The minority rule is based on expediency and public policy. In several cases the total refusal of enforcement resulted in injustice to one party and reward to the defaulting covenantor, a consequence certainly against public policy. *Beit v. Beit, supra* (criticized in dissenting opinion); *Kex Manufacturing Co. v. Plu-Gum Co.,* 28 Ohio App. 514, 162 N.E. 816 (1928). A fine example of this injustice is found in *Consumers' Oil Co. v. Nunnemaker,* 142 Ind. 560, 41 N.E. 1048 (1895), where defendant sold his city-wide oil business and agreed not to compete within the state. The court held the indivisible restriction excessive and declared the whole contract void, thus permitting defendant to resume his former business within the same city and to deprive the vendee of the goodwill he had purchased. Discouraging dishonesty in business dealings should be as much the concern of public policy as is determining validity of contracts on the basis of so vague a term as "divisibility."

While it is true that application of this principle may change the terms of the agreement, the result is not a new contract, but merely a modification of the original. Corbin, *A Comment on* Beit v. Beit,

23 CONN. B.J. 43, 50 (1949). This modification, based on reasonableness of the restraint, results in much less a variation from the effects intended by the parties than would total non-enforcement. The very fact that the contract, to which they mutually assented, calls for a greater degree of restraint usually implies their assent to the lesser degree.

Where the contract as a whole is concededly illegal and unenforceable since amounting to an undue restraint of trade, it by no means follows that the contract is completely void, that enforcement may not be had to a lesser extent than that called for by the express terms of the agreement. Such a holding establishes a rule in which enforceability depends on form alone. Given two restrictive contracts containing identical provisions, one may be enforceable and the other void depending entirely on the wording of the contract as a whole.

Though most jurisdictions still follow this principle, courts in recent cases have applied the minority rule, and still others have in effect adopted the minority rule while still giving lip service to the word "divisibility." The modern trend toward the minority rule is a trend toward a more just and reasonable interpretation of partially illegal contracts in restraint of trade.

Edward L. Burke

DOMESTIC RELATIONS — ENJOINING SPOUSE FROM ASSOCIATION WITH THIRD PARTY. — *Pashko v. Pashko*, ...Ohio St....., 101 N.E. (2d) 804 (1951). Plaintiff, in this alimony action against her husband, sought an injunction *pendente lite* restraining the defendants Joseph Pashko and Florence Haas from contacting and associating with each other. It was alleged that the defendant Florence Haas enticed the defendant Joseph Pashko away from his wife, the plaintiff, by various means, and that because of this relationship a separation between the plaintiff and her husband resulted.

The Court of Common Pleas of Ohio affirmed the decree of the trial court granting the injunction on the ground that irreparable injury might otherwise be caused. The court inferred that there was a possibility of reconciliation and that it should restrain any actions by the "other woman" which would thwart that possibility. 101 N.E. (2d) at 808.

This question, whether courts should issue a temporary injunction restraining the wayward spouse from associating with the "other woman" or "other man," as the case may be, has been considered by few appellate courts and no general rule can be gleaned from the decisions.

A temporary injunction was refused in *Ellis v. Ellis,* 55 Misc. 34, 106 N.Y. Supp. 217 (Sup. Ct. 1907), a suit by the wife for separation from bed and board. The court decided that although equity courts have power to restrain the commission of an act or continuance of a course of conduct which, during the pendency of the divorce action, would be injurious to the plaintiff, it would not restrain the husband from cohabiting with another woman. The reasoning assigned was the fact that the only relief requested was the separation and this could be granted without resort to the injunction.

The Supreme Court of Alabama granted a temporary injunction against the "other woman" in *Henley v. Rockett,* 243 Ala. 172, 8 So. (2d) 852 (1942). In that case the husband and wife were still living together and no suit for separate maintenance had been instituted. In *Knighton v. Knighton,* 252 Ala. 520, 41 So. (2d) 172, 175 (1949), where the husband and wife were living separately, the same Alabama court considered it vain and useless to attempt to encourage a reconciliation by injunction.

There has also been some disagreement among American courts as to whether equity should grant a *permanent* injunction in a situation such as this. Texas has uniformly granted such relief. *Smith v. Womack,* 271 S.W. 209 (Tex. Civ. App. 1925); *Witte v. Bauderer,* 255 S.W. 1016 (Tex. Civ. App. 1923); Ex parte *Warfield,* 40 Tex. Crim. Rep. 413, 50 S.W. 933 (1899). Other states, notably Michigan, *Hadley v. Hadley,* 323 Mich. 555, 36 N.W. (2d) 144 (1949), and Massachusetts, *White v. Thomson,* 324 Mass. 140, 85 N.E. (2d) 246 (1949), have refused to grant a permanent decree.

Probably the most emphatic argument against a permanent injunction in domestic relations cases is found in *Snedaker v. King,* 111 Ohio St. 225, 145 N.E. 15 (1924). There the mother of four children alleged that the defendant, by her amatory conduct, was causing the plaintiff to lose the love and affection of her husband. The trial court granted a sweeping injunction restraining the "other woman" from associating with, being near to, or communicating with the husband. The Ohio Supreme Court reversed the decree, stressing the difficulty or impossibility of enforcement. The court doubted if beneficial results would be obtained by the injunction. In a concurring opinion, it was stated, 145 N.E. at 17: "Under these circumstances it is difficult to see how the court can enforce the injunction granted herein without attaching a probation officer permanently . . ." to both parties. The dissent stressed the contract rights of the wife, stating, 145 N.E. at 20:

> A contract right has uniformly been held to be a property right, and it has been further held that inducing a breach of such a contract is an actionable tort. While injunction does not lie in all such cases, it is very generally held that an injunction will lie to restrain third persons from inducing the breach of a lawful contract by one of the parties thereto, when it will result in irreparable injury.

In answer to the majority argument that the trial court would have great difficulty in enforcing the injunction, the dissenting justice asserted, 145 N.E. at 20-1: "I anticipate, however, that the defendant would not lightly disobey the injunction if it is permitted to stand."

The fact that a person's conduct is socially and morally wrong is not sufficient justification for the granting of an injunction. *Baumann v. Baumann,* 250 N.Y. 382, 165 N.E. 819 (1929). The court in *Hadley v. Hadley, supra,* 36 N.W. (2d) at 147, after considering the doubtful results of injunctive relief in this situation, concluded that the proper relief for the aggrieved party should be a dissolution of the marital relations rather than an injunction.

It is the writer's opinion that the decision in *Snedaker v. King, supra,* 145 N.E. at 17, is entirely correct where it is stated that an injunction will have quite the reverse of the desired effect. The problems of modern marriage and morals will not be solved by the decrees of equity chancellors. A plaintiff who "drags" the erring spouse through a legal action can scarcely entertain any hope for a reconciliation. The very fact that the wife was legally victorious would inevitably tend to completely destroy rather than reinstate the domestic tranquility — such is human nature. In *Baumann v. Baumann, supra,* 165 N.E. at 822, it was aptly stated: "Attempts to govern the morals of people by injunctions can only result in making ridiculous the courts which grant such decrees."

Frank A. Howard

FEDERAL STATUTES — SECTION 2255 OF THE JUDICIAL CODE — EFFECT UPON WRIT OF HABEAS CORPUS. — *United States v. Hayman,* ....U.S....., 72 S. Ct. 263, 96 L. Ed. *206 (1952). The respondent was sentenced in a federal district court in California and was confined in the McNeil Island penitentiary in Washington. He invoked the new procedure under 28 U.S.C. § 2255 (Supp. 1951) which allows a prisoner to bring a motion in the sentencing court to have the sentence set aside or corrected. His motion alleged he did not enjoy the assistance of counsel as guaranteed by the Sixth Amendment, for the reason that a principal witness was a defendant in a related case and was represented by the same attorney.

The lower court conducted the hearing without the respondent being physically present, found that he had consented to such an arrangement and dismissed his motion. On appeal the circut court of appeals treated Section 2255 as a nullity and dismissed the respondent's motion. He was directed to proceed by habeas corpus in the district of his confinement. The Supreme Court granted certiorari, 341 U.S. 930, 71 S. Ct. 803, 95 L. Ed. 1360 (1951). The issue before the Supreme

Court was whether the respondent should have been given notice of, and leave to appear personally at, the hearing. The Supreme Court vacated the judgment of the court of appeals stating, 72 S. Ct. at 274-5:

> . . . the District Court erred in determining the factual issues raised by respondent's motion under Section 2255 without notice to respondent and without his presence. We hold that the required hearing can be afforded respondent under the procedure established in Section 2255. The Court of Appeals correctly reversed the order of the District Court but should have remanded the case for a hearing under Section 2255 instead of ordering that respondent's motion be dismissed.

Since the enactment of this amendment in 1948, it has caused some confusion. The history behind its enactment is interesting. The federal prisons where large numbers of prisoners are concentrated presented a difficult problem to the local district courts. The number of applications for habeas corpus was excessive and so crowded the courts' dockets that extreme difficulty was encountered in discharging normal business. Congress enacted Section 2255 as a remedy.

This amendment has been said to be a substitute for a writ of coram nobis. *United States v. Calp*, 83 F. Supp. 152, 153 (D. Md. 1949). But coram nobis is actually much narrower, since by that writ a judgment can be set aside, by the court entering it, only for material errors of fact, but not of law, unknown to the court when it was entered. This was clearly indicated by Chief Justice Vinson in the cited decision. 72 S. Ct. at 271. Section 2255 has as its purpose the authorization of a motion to vacate, set aside, or correct a sentence. The motion must be made in the court where the sentence was imposed and relief must not be sought in some other court by resort to habeas corpus unless it appears that the remedy by motion will be inadequate. *Birtch v. United States,* 173 F. (2d) 316 (4th Cir. 1949). Many courts faced with the problem of interpretation were of the opinion that compliance with Section 2255 was merely a prerequisite to, and not a substitute for, habeas corpus. *Mugavero v. Swope,* 86 F. Supp. 45 (N.D. Cal. 1949); *St. Clair v. Hiatt,* 83 F. Supp. 585, 586-7 (N.D. Ga. 1949); *United States v. Calp, supra,* 83 F. Supp. at 154; *Stidham v. Swope,* 82 F. Supp. 931 (D. Cal. 1949); *Wong v. Vogel,* 80 F. Supp. 732 (E.D. Ky. 1948).

However, it is interesting to note that other federal courts have considered the same section and seem to be of the opinion that it is a substitute for habeas corpus, at least under certain circumstances. *Birtch v. United States, supra,* 173 F. (2d) at 317; *Howell v. United States,* 172 F. (2d) 213, 215, 216 (4th Cir. 1949); *United States v. Meyers,* 84 F. Supp. 766; 767, 768 (D. D.C. 1949); *United States v. Lowrey,* 84 F. Supp. 804, 807 (W.D. Pa. 1949). One court has even stated that Section 2255 was enacted to replace habeas corpus in cases where the sentence is void or otherwise subject to a collateral attack. *Taylor v. United States,* 177 F. (2d) 194, 195 (4th Cir. 1949).

The Court in the instant case distinguished *Ahrens v. Clark,* 335 U.S. 188, 68 S. Ct. 1443, 92 L. Ed. 1898 (1948), from the case at hand. In *Ahrens* the lower court decided it could not hold a habeas corpus hearing because it was without power to order the presence of a prisoner confined in another jurisdiction. The Supreme Court there held that the phrase in the habeas corpus statute, 28 U.S.C. § 2241 (Supp. 1951), limiting the habeas corpus power of federal courts to "their respective jurisdictions," required the presence of the petitioners within the territorial jurisdiction of the district court as a prerequisite to their filing applications for habeas corpus. This case ruling was not applicable to the present case, according to the Court, because it involved the habeas corpus statute, not Section 2255. 72 S. Ct. at 273.

The Court looked to the purpose of Section 2255 and found it necessary that petitioners be present at the hearing, stating, 72 S. Ct. at 273:

> An order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is "necessary or appropriate" to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law.

In support of its argument the Supreme Court cited cases in which appearance of the prisoner before the court, under Section 2255 proceedings, was had without difficulty even where the prisoner was confined outside the jurisdiction. *Sturgeon v. United States,* 187 F. (2d) 9 (5th Cir. 1951); *Foster v. United States,* 184 F. (2d) 571 (5th Cir. 1950); *Parker v. United States,* 184 F. (2d) 488 (4th Cir. 1950); *Hurst v. United States,* 180 F. (2d) 835 (10th Cir. 1950). In one case, even under a Section 2255 hearing, the court required that the prisoner be present in open court for the purposes of the motion even though the statute expressly provides that the prisoner need not be there. *United States v. Paglia,* 190 F. (2d) 445, 448 (2d Cir. 1951).

The Supreme Court in the instant decision held that a prisoner need not be present at a hearing under Section 2255 but stated, 72 S. Ct. at 274:

> Whether the prisoner should be produced depends upon the issues raised by the particular case. Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing.

The Court carefully considered, 72 S. Ct. at 274, the provision contained in Section 2255, which states that habeas corpus can be resorted to if the procedure under the statute proves inadequate to test the legality of an individual's incarceration, and concluded that the Section 2255 remedy would be adequate if the respondent is physically present at the hearing.

In conclusion, it might be stated that the writ of habeas corpus has merely been supplemented by a provision of statutory law which makes

it more flexible. But this stride toward a more efficient administration should not destroy a prisoner's opportunity to attack a doubtful conviction. The wisdom of this new procedure must await the test of time and trial.

Robert C. Enburg

TORTS — BUSINESS INVITEES — ASSUMPTION OF RISK — MATTER OF LAW OR FACT. — *Swift & Co. v. Schuster,* 192 F. (2d) 615 (10th Cir. 1951). The plaintiff, a Government meat plant inspector, sued for personal injuries sustained when he slipped on a wet, greasy slaughter floor in the defendant's meat plant after stepping from his inspection platform. Both the alleged negligence of the company for nonmaintenance of a step to the platform and the affirmative defenses of contributory negligence, assumption of risk, and *volenti non fit injuria* were submitted to the jury and verdict was rendered for the plaintiff. Defendant's appeal was based on a denial of his motions for dismissal and for a directed verdict.

Judgment for the plaintiff was affirmed in a two to one decision. The majority recited that the three defenses were, in effect, all forms of contributory negligence and that this question, concerning plaintiff's contributory negligence, was properly submitted to the jury. The dissent, however, advocated the application of the rule that when a condition is as obvious and known to the invitee as to the invitor, regardless of what the defense is called, the invitee, as a matter of law, should not recover.

When does a condition become so obvious, known and apparent that a business invitee may be said, as a matter of law, to have assumed the risk?

This discussion is limited to cases involving assumption of risk as based on the Latin maxim *volenti non fit injuria,* independent of contractual relations. And it has been so limited in an attempt to exclude the many difficulties in the cases arising from a failure to distinguish between contributory negligence and assumption of risk. However, this limitation cannot be completely accomplished, as is evident from this court's erroneous conclusion that in all such cases the primary question is actually one of contributory negligence. This led the court to set out a test, which excludes assumption of risk and which is based upon contributory negligence alone, in order to answer the question above.

Similar tests or rules state, as here, that a risk is not assumed until the danger is so hazardous and imminent that a prudent person would not take the risk. *Nauman v. Central & Lafayette Realty Co.,*

137 N.J.L. 428, 60 A. (2d) 242 (Sup. Ct. 1948); *Bouchard v. Sicard,* 113 Vt. 429, 35 A. (2d) 439 (1944). The instant case derives this test directly from *Southern Pac. Co. v. McCready,* 47 F. (2d) 673 (9th Cir. 1931). In the *McCready* case the invitee was injured when he came in contact with charged electric wires of which he had full knowledge. After an excellent development of the distinctions between these three principles the court concluded, 47 F. (2d) at 677:

> . . . mere knowledge of the dangerous condition . . . was not alone sufficient to bar a recovery, unless the hazard resulting from its use was so imminent that no reasonably prudent person would have made the attempt. This, we think, is the true test, and applicable here.

But let it be submitted that the test in *McCready* and in the principal case is erroneous when applied to assumption of risk. The departure from the standard of the reasonably prudent man required by this test is not assumption of risk, but is by definition contributory negligence. PROSSER, TORTS § 52 (1941). Thus the test which the opinion used, based as it is on the conduct of the imprudent man, is certainly not the correct answer, for the assumption of risk should be that of the prudent man. *Miner v. Connecticut River R.R.,* 153 Mass. 398, 26 N.E. 994 (1891); *Dietz v. Magill,* 104 S.W. (2d) 707 (St. Louis Ct. of App., Mo. 1937).

A reading of many decisions on the point leads to the conclusion that there are no clear-cut tests to determine whether the question of assumption of risk should go to the jury. In fact, there is but one rule given, namely, that an invitee who voluntarily continues his activity with knowledge of all the open and obvious dangers, assumes all risk. From this point each case is governed by its own peculiar circumstances. Accordingly, one can but turn to the many varying factual situations and ascertain the pertinent holdings.

Most cases hold that mere knowledge of the defect is not enough. *E.g., Frost v. McCarthy,* 200 Mass. 445, 86 N.E. 918, 919 (1909); *Loney v. Laramie Auto Co.,* 36 Wyo. 339, 255 Pac. 350, 354 (1927). For a directed verdict, there must be a full realization of the extent and nature of the danger. *Rheaume v. Goodro,* 113 Vt. 317, 34 A. (2d) 315, 317 (1943). This awareness is the real question in these cases, *S. S. Kresge Co. v. Holland,* 158 F. (2d) 495 (6th Cir. 1946), for there may be *perception* without *comprehension* of the risk. *Frost v. McCarthy, supra.* Thus in each case a person's age, intelligence and experience must be taken into account to see if a full realization has been obtained. *Barrett v. Building Patent Scaffolding Co.,* 311 Mass. 41, 40 N.E. (2d) 6, 9 (1942). Also, the consent must have been to the danger known and not to a second danger inherent in the first. *Fred Harvey Corp. v. Mateas,* 170 F. (2d) 612, 615-6 (9th Cir. 1948).

In the usual case, the question of knowledge of the danger is approached from the point of view of obviousness. If a danger or defect

is open and obvious to a person of normal intelligence, and he continues, he is deemed to have full knowledge of the danger and to have consented to and assumed the risk. When is a condition so obvious that a directed verdict based on assumption of risk will be granted? A perusal of the cases reveals four main types of "obvious" danger.

First there are those conditions that are so inherently or overwhelmingly dangerous that they might be termed obvious "per se." Here are included cases dealing with electric wires, *McCready v. Southern Pac. Co., supra;* walking between two ships on a gangplank fastened on one end only, *Regenbogen v. Southern Shipwrecking Corp.,* 41 So. (2d) 110 (La. App. 1949); walking up a parking ramp rendered "blind" by several turns, *Hild v. Montgomery,* 342 Pa. 42, 20 A. (2d) 228 (1941); and standing on a chair when it could be expected that the natural reaction of a crowd would be to surge back from the rail after a race was over, *Gordon v. Maryland State Fair Inc.,* 174 Md. 466, 199 Atl. 519 (1938).

In the second group of cases recovery is denied as a matter of law when the person injured has had a long or very close association with the particular conditions. This category is typified by the employee of an independent contractor who unloaded curved steel sheets for over eight hours knowing that they would fall if placed in the wrong position. *Union Tank and Supply Co. v. Kelly,* 167 F. (2d) 811 (5th Cir. 1948). Contra is *Barrett v. Building Patent Scaffolding Co., supra,* where the question of assumption of risk was submitted to the jury although the painter had worked on the warped plank for some time knowing it to be so. But in general, an experienced employee, as a matter of law, assumes the obvious risks incident to his work and within the common knowledge of other persons in the same occupation. *Kuptz v. Sollitt & Sons Const. Co.,* 88 F. (2d) 532, 534 (5th Cir. 1937).

The "time" element is brought out in *Weber v. City Water Co.,* 206 Ill. App. 417 (1917), where the plaintiff and his horses had used a ferry boat without end guard railings between 70 and 80 times. The court held that he had assumed the risk when the horses became frightened and jumped off. The same conclusion was reached when a woman fell over another customer's grocery basket in the aisle, since she had traded at the store for four years and had followed the same custom herself. *Gargaro v. Kroger Grocery & Baking Co.,* 22 Tenn. App. 70, 118 S.W. (2d) 561 (1938). An Ohio case in accord involved a customer who slipped on oil spots in a store's parking area, she having known of the conditions for seven years. *Plotner v. Great A. & P. Co.,* 59 Ohio App. 367, 18 N.E. (2d) 409 (1938). Similar to these cases are those in which the plaintiff has encountered the danger previously without injury, and, continuing, is injured. In *Funari v. Gravem-Inglis Baking Co.,* 40 Cal. App. (2d) 25, 104 P. (2d) 44 (1940), the

plaintiff and his helper both slipped and fell on wet flour which they had tried to clean up. The plaintiff, continuing, fell again and a hand truck loaded with sugar fell on him. The court affirmed a judgment *non obstante verdicto* for the defendant. *Accord: Wallace v. Great A. &P. Co.,* 85 F. Supp. 296 (N.D. W.Va. 1949).

The third group of cases is perhaps the most common in an invitor-invitee relationship, and is typified by falls on steps and on slippery floors. But these cases also contain the most disagreement between submitting the question to the jury and deciding it as a matter of law, the danger being more subtle than the dangers involved in the first two classes. It is generally stated that the invitor is entitled to assume that the invitee will perceive that which is evident to his senses. *Funari v. Gravem-Inglis Baking Co., supra,* 104 P. (2d) at 46. Thus when an entrance way was wet from rain, everyone was presumed to know that it would be more slippery than when dry. *S. S. Kresge Co. v. Fader,* 116 Ohio St. 718, 158 N.E. 174 (1927). The same conclusion was reached with regard to mud and water tracked in on a bank floor. *Curtis v. Traders National Bank,* ....Ky....., 237 S.W. (2d) 76 (1951). But in almost identical circumstances in New Jersey, it was held to be a question for the jury. *Picariello v. Linares and Rescigno Bank,* 127 N.J.L. 63, 21 A. (2d) 343 (Sup. Ct. 1941), *aff'd,* 127 N.J.L. 565, 23 A. (2d) 396 (1942). In *Batson v. Western Union Tel. Co.,* 75 F. (2d) 154 (5th Cir. 1935), the fact that the customer noticed the damp floor and used due care showed further that she assumed the risk and merely contented herself with this precaution. One who uses a floor with full knowledge of its condition is thus deemed to have assumed the risk. *Bridgford v. Stewart Dry Goods Co.,* 191 Ky. 557, 231 S.W. 22, 23 (1921) (wet floor); *Kitchen v. Womens City Club of Boston,* 267 Mass. 229, 166 N.E. 554 (1929) (waxed floor); *Hogan v. Metropolitan Bldg. Co.,* 120 Wash. 82, 206 Pac. 959 (1922) (inclined entrance).

But other courts have held that these slippery conditions were not such obvious dangers that ordinary, prudent persons would avoid them and that, therefore, they did not assume the risk as a matter of law. *S. S. Kresge Co. v. Holland, supra; Kroger Grocery & Baking Co. v. Monroe,* 237 Ky. 60, 34 S.W. (2d) 929 (1931). A like determination was reached even though it was reasonable to expect that the invitee would discover and realize the danger. *Williamson v. Derry Electric Co.,* 89 N.H. 216, 196 Atl. 265 (1938). Where the invitee had talked to the employee as she mopped and then fell less than six minutes later in the same place, the question was for the jury. *Surface v. Safeway Stores Inc.,* 169 F. (2d) 937 (8th Cir. 1948). *But cf. Dahnke v. Hunt,* 55 Ohio App. 44, 8 N.E. (2d) 838 (1936).

In the fourth group are the so-called "amusement" or "sporting event" cases. In these there is a relatively stabilized rule stating that

the invitee assumes the risk of the customary dangers; for example, the risk of being hit by a ball while attending a baseball game, *Quinn v. Recreation Park Ass'n.*, 3 Cal. (2d) 725, 46 P. (2d) 144 (1935); or by a puck at a hockey game, *Ingersoll v. Onondaga Hockey Club, Inc.*, 245 App. Div. 137, 281 N.Y. Supp. 505 (3d Dep't 1935). *Contra: Thurman v. Ice Palace*, 36 Cal. App. (2d) 364, 97 P. (2d) 999 (1939). As to active participation, in *Englehardt v. Philipps*, 136 Ohio St. 73, 23 N.E. (2d) 829 (1939), where a boy of twelve slipped on a wet diving board and was held to have assumed the risk, it was said, 23 N.E. (2d) at 833:

> . . . it may be assumed that a person of whatever age is able to appreciate the obvious risks incident to any sport or activity in which he may be able to engage with intelligence and proficiency and must act accordingly.

In regard to amusement devices, it is necessary only to quote the famous dictum of Justice Cardozo, "The timorous may stay at home." *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173, 174 (1929). This conception, however, has been criticized as referring to venturesome conduct and not to true passive consent. Comment, 19 U. OF CIN. L. REV. 407, 409 (1950).

Returning to the principal case, it appears that the dissenting opinion was correct. Considering both the erroneous test of the majority and the fact that the plaintiff had worked for a month without complaint under obviously slippery and dangerous conditions, he apparently had full knowledge of the danger and had thus voluntarily assumed the risk as a matter of law.

Carl F. Eiberger

TRADE REGULATION — SHERMAN ANTI-TRUST ACT — ADVERTISING MONOPOLY — DOMINANT NEWSPAPER'S ATTEMPT TO COMPEL BOYCOTT OF LOCAL RADIO STATION. — *Lorain Journal Co. v. United States*, ...U.S....., 72 S. Ct. 181, 96 L. Ed. *121 (1951). This was a civil anti-trust suit brought by the United States against the publisher of the only daily newspaper in Lorain, Ohio, to enjoin alleged violations of the Sherman Act, 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1946), arising from the publisher's threat to cancel the advertising of local merchants who advertised over radio station WEOL. Before the advent of the station, the Journal was virtually the only outlet for news and advertising in the Lorain area, reaching 99% of the families in that city of 52,000 population. Shortly after the construction of the station, the Journal notified the merchants that it would refuse to accept advertising proffered by those in the county who were also advertising over WEOL. The immediate effect was

that many, though desirous of employing both media for reaching their customers, discontinued their use of the radio. The existence of WEOL was seriously threatened.

In affirming the issuance of an injunction by the District Court for the Northern District of Ohio, the Supreme Court of the United States decided that the newspaper's use, in this manner, of the power inherent in its position was an attempt to monopolize interstate commerce, violative of the Sherman Act; and that the injunction so issued did not contravene any guaranteed freedom of the press under the First Amendment. This decision necessitated the resolution of several very important issues: whether a local newspaper, as a private business concern, could select its customers and refuse advertising for the purpose of destroying its only competition; and, whether a question of interstate commerce was actually involved where the newspaper's circulation was entirely local and the radio station was licensed to service only an intrastate area, though admittedly it was heard in adjoining states on occasion.

The right of a trader, manufacturer, or other individual engaged in an entirely private business to deal, or refuse to deal, with whomever he pleases, for reasons sufficient to himself, has been long recognized. *Eastern States Retail Lumber Dealer's Association v. United States,* 234 U.S. 600, 34 S. Ct. 951, 955, 58 L. Ed. 1490 (1914); *United States v. Trans-Missouri Freight Ass'n.,* 166 U.S. 290, 17 S. Ct. 540, 551, 41 L. Ed. 1007 (1897). Both these cases, however, indicate that any arrangement having for its direct purpose, probable effect, or necessary tendency, the extinguishment or undue restriction of legitimate competition in trade is unlawful. This is true at the common law, *Anderson v. Jett,* 89 Ky. 375, 12 S.W. 670 (1889), under the federal anti-trust statutes, *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 59 S. Ct. 467, 475, 83 L. Ed. 610 (1939), and under state statutes, *Merchants' Ice & Cold Storage Co. v. Rohrman,* 138 Ky. 530, 128 S.W. 599, 605 (1910).

The doctrine was laid down explicitly in *United States v. Colgate & Co.,* 250 U.S. 300, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919), when the Court said:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] . . . act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.

The principal case reaffirms this rule, restricting a newspaper's right to accept or reject advertising to occasions when its motive is not the creation of a monopoly.

The illegality of an attempt to monopolize is more readily apparent if coercive measures are utilized to produce that result. Accordingly,

the authorities hold illegal an association which refuses to deal with any person who does not patronize its members exclusively, for the purpose of monopolizing the particular business in a community, suppressing competition and enforcing submission to the dictates of the combination. *E.g., W. W. Montague & Co. v. Lowry,* 193 U.S. 38, 24 S. Ct. 307, 48 L. Ed. 608 (1904).

Perhaps more significant in the instant case was the Court's determination that the radio station in question was engaged in interstate commerce. While a noticeable trend has been developing in this direction, preceding authorities have by no means been unanimous. The decision here must be considered as pointing the way.

The power of Congress to regulate interstate commerce, including communication by wire and radio, need not be discussed. That interstate communication may be the subject of federal control was pointed out in *Butler Bros. Shoe Co. v. United States Rubber Co.,* 156 Fed. 1, 17 (8th Cir. 1907), where it was stated:

> . . . all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or *information,* is a transaction of interstate commerce. [Emphasis supplied.]

Accord: International Text-Book Co. v. Pigg, 217 U.S. 91, 30 S. Ct. 481, 487, 54 L. Ed. 678 (1910). The transmission of intelligence and information between states is a form of intercourse which is commerce. *Fisher's Blend Station, Inc. v. State Tax Commission,* 297 U.S. 650, 56 S. Ct. 608, 80 L. Ed. 956 (1936).

The problem involved is made apparent in the following quotation from 15 C.J.S. *Commerce* § 52 (1939): "The business of . . . radio broadcasting companies constitutes commerce subject to state or federal legislation according to whether it is intrastate or interstate." Many courts have made that distinction, thinking it to be a valid one. It was said, in *Albuquerque Broadcasting Co. v. Bureau of Revenue,* 51 N.M. 332, 184 P. (2d) 416, 430 (1947), that the "fact that Congress has taken control of the entire field of radio communications and broadcasting does not change the intrastate character of local broadcasting." That case specifically held that all broadcasting is not interstate commerce and that the mere fact that a local radio station is heard in other states does not necessarily establish that the advertising is an interstate transaction. Advertising which was of a local character was found, as a practical matter, to be intrastate business.

But there is ample authority for the contrary view, that the interstate and intrastate business of a radio company are so inextricably intertwined that the passage of the Federal Communications

Act, 48 STAT. 1064 (1934), as amended, 47 U.S.C. § 151 *et seq.* (1946), has pre-empted the entire field to federal control. The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. The Court said, in *Fisher's Blend Station, Inc. v. State Tax Commission, supra,* 297 U.S. at 655:

> By its very nature broadcasting transcends state lines and is national in its scope and importance — characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause.

Accord: Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 53 S. Ct. 627, 77 L. Ed. 1166 (1933); *Technical Radio Laboratory v. Federal Radio Commission,* 36 F. (2d) 111 (D.C. Cir. 1929).

Following the reasoning of these courts, the Ohio station involved in the instant case, by producing the radio emanations which actuated the receiving mechanisms located in other states (Michigan and Pennsylvania), was engaged in the business of transmitting advertising programs from its stations in Ohio to those persons in other states who "listen in." In all its elements, this procedure is similar to the sending of telephone or telegraph messages, which is interstate commerce.

This point of view has been developing. Certainly advertising is the sale of a business service which may be interstate commerce and, in *NLRB v. A. S. Abell Co.,* 97 F. (2d) 951, 954 (4th Cir. 1938), it was intimated that the dissemination of news gathered from all over the nation was an interstate commerce activity. Other cases have held that a radio station is an instrumentality of interstate commerce, *NLRB v. Pacific Gas & Electric Co.,* 118 F. (2d) 780, 786 (9th Cir. 1941), and that radio broadcasting might properly be classified as interstate commerce, as to either sending or receiving, when the radius extends beyond state lines. *National Broadcasting Co. v. Board of Public Utility Com'rs,* 25 F. Supp. 761, 763 (D. N.J. 1938). In the latter case, the court postponed until a later date, 25 F. Supp. at 762-3, the question of whether or not there could be radio operation strictly as an intrastate activity.

Now, apparently, that later date is here and the highest court in the land has settled this question in a manner indicating that perhaps all communication of a business nature which transcends state lines, regardless of the means employed to accomplish it, is interstate commerce subject to federal control. An interesting hypothetical is raised: whether the exposure of a signboard, in one state, to the view of dwellers in another, constitutes interstate commerce. In light of the decision in the cited case, extending "interstate commerce" as it does, an affirmative answer would not be too surprising.

In classifying an activity as intrastate or interstate, courts should be guided by its essential character as determined by substance and not form. Practical considerations and the complexity of modern business practices necessitate a corresponding extension of judicial concepts. Seemingly, the extension will be greatest where, in a close case like this one, there is a direct purpose to drive a competitor out of business in an attempt to create or preserve a monopoly.

William L. Kirchner, Jr.

TRADE REGULATION — SHERMAN ANTI-TRUST ACT — CONSPIRACY IMPLIED FROM CONSCIOUSLY PARALLEL PRACTICES. — *Milgram v. Loew's Inc.*, 192 F. (2d) 579 (3d Cir. 1951). Plaintiff, a partnership operating a recently constructed, well-appointed drive-in theatre in Allentown, Pennsylvania, brought this action against the eight major motion picture distributors for injunctive relief under Section 16 of the Clayton Act. 38 STAT. 737 (1914), as amended, 15 U.S.C. § 26 (1946). The plaintiff complained that the defendants had acted in concert to unreasonably restrain commerce by refusing to license first run films to his drive-in theatre. The district court pointed out that the defendants, generally referred to as the "Big Eight," control the distribution of about eighty-five percent of all the first rate feature films in the United States and are in full control of the market in which the plaintiff is functioning. Evidence produced by the defendants that the identical licensing policies were adopted by independent determinations in ignorance of the plans of the other distributors was rejected as "incredible" by the district court. *Milgram v. Loew's, Inc.*, 94 F. Supp. 416, 418 (E.D. Pa. 1950). That court found that the uniform plan of conduct, followed by the defendants with awareness that the other members of the clique controlling film distribution were pursuing identical restrictive practices, was an agreement to conspire in violation of Section 1 of the Sherman Act. 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1946). The district court found the conspiracy to be part of a national plan to relegate drive-in theatres to second run status. Viewing the evidence of the instant case in the light of recent anti-trust litigation concerning the movie industry, a majority of the court of appeals believed the inferential finding of conspiracy was warranted by the record. The dissenting judge argued that the finding of conspiracy was based on a misconception of the legal requisites essential to establish conspiracy.

The dilemma of an independent exhibitor seeking to upset a rigidly controlled system of movie exhibition is not novel. *See, e.g., Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F. (2d) 561, 564-5 (7th Cir. 1951), *cert. denied*, ...U.S....., 72 S. Ct. 302, 96 L. Ed. *228 (1952). However,

the main problem of the case, that of inferring conspiracy under the anti-trust laws from consciously parallel trade practices, is significant since it indicates the general relaxation of standards required to prove conspiracy in federal courts. This trend is particularly noticeable in federal trade regulation cases. The concurring opinion of Justice Jackson in *Krulewitch v. United States,* 336 U.S. 440, 445-58, 69 S. Ct. 716, 93 L. Ed. 790 (1949), traces this general relaxation. Actions under Section 5 of the Trade Commission Act, 38 STAT. 719 (1914), as amended, 15 U.S.C. § 45 (1946), have helped to advance a liberal formula for conspiracy. Under this formula conspiracy is inferred from the mere presence of consciously parallel trade action. *Triangle Conduit & Cable Co. v. FTC,* 168 F. (2d) 175, 179-80 (7th Cir. 1948), *aff'd per curiam sub nom. Clayton Mark & Co. v. FTC,* 336 U.S. 956, 69 S. Ct. 888, 93 L. Ed. 1110 (1949); *Allied Paper Mills v. FTC,* 168 F. (2d) 600, 607 (7th Cir. 1948), *cert. denied,* 336 U.S. 918, 69 S. Ct. 640, 93 L. Ed. 1080 (1949) (follows *Triangle* case). Cases involving regulation of the movie industry have played a unique role in developing this trend.

When deciding questions concerning the competition problem in the motion picture business, courts have approached the complicated issues cautiously. The business can be termed *sui generis.* The distribution-exhibition phase is notably complex. Successive exhibitions of motion pictures in a given locality are termed runs. The first showing is called the first run and so forth. On each subsequent run a gradual reduction in admission price is possible. Clearances are the time lapses (a seven day period is usually the basic unit in computing a lapse) between runs. Clearances and runs therefore stagger the showing of films in a given area. Taken together these devices protect exhibitors in each echelon of the exhibition framework, but they can also be instruments of suppression or discrimination in making the small independents fall in line. The Supreme Court in the movie anti-trust cases did not declare this practice illegal, but it ruled that the reasonableness of a clearance should be determined by reference to the special needs of the licensee. *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 144-8, 68 S. Ct. 915, 92 L. Ed. 1260 (1948), *affirming in part, reversing in part* 66 F. Supp. 323 (S.D. N.Y. 1946); 70 F. Supp. 53 (S.D. N.Y. 1947), *decree on remand,* 85 F. Supp. 881 (S.D. N.Y. 1949).

Although the concept of implied conspiracy possesses dark possibilities for misapplication, it is elementary, in trade conspiracies at least, that conspiracy is seldom capable of direct proof and may be inferred from things actually done. *Eastern States Retail Lumber Dealers' Association v. United States,* 234 U.S. 600, 612, 34 S. Ct. 951, 58 L. Ed. 1490 (1914); *Lawlor v. Loewe,* 235 U.S. 522, 534, 35 S. Ct. 170, 59 L. Ed. 341 (1915). Both of these cases involved the circulation of black lists used to restrain trade. The lists probably served as a link between the co-conspirators. Knowledge of the conspiracy could be

reasonably implied from the informal understanding contained in the black lists. In *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939), a letter was sent to the major film distributors by a corporation engaged in exhibiting motion pictures on first run, demanding certain restrictions on subsequent run exhibitors. The Supreme Court ruled that the court's finding of conspiracy was correct. The letter in this case tended to support a finding of actual agreement, but under the circumstances, knowledge plus participation in the contemplated scheme was held sufficient to uphold the finding. An express finding of agreement was not required as a prerequisite for conspiracy. *Interstate Circuit, Inc. v. United States, supra,* 306 U.S. at 225-7. Prior to the *Interstate Circuit* decision the major distributors were charged with conspiring to ban double features in the Philadelphia area. They insisted the unified ban was independent and not planned action. Conspiracy in this case was inferred from the simple working toward a common purpose through a tacit understanding. *Vitagraph, Inc. v. Perelman,* 95 F. (2d) 142, 147 (3d Cir. 1938), *cert. denied,* 305 U.S. 610, 59 S. Ct. 68, 83 L. Ed. 388 (1938). Generally a reviewing court will not set aside the trial judge's findings of fact unless clearly erroneous giving due regard to the trial court's opportunity to weigh the evidence. In line with this rule it has been held that the lower court will not be reversed on a fact finding of no conspiracy in anti-trust cases involving the "Big Eight." *Schad v. Twentieth Century Fox Film Corp.,* 136 F. (2d) 991 (3d Cir. 1943); *Westway Theatre, Inc., v. Twentieth Century Fox Film Corp.,* 30 F. Supp. 830 (D. Md. 1940) (by implication), *aff'd per curiam,* 113 F. (2d) 932 (4th Cir. 1940).

When an independent sought a more advantageous slot in the Chicago system of film releases, the court affirmed the finding of the ultimate fact of conspiracy by the trial court. *Bigelow v. RKO Radio Pictures, Inc.,* 150 F. (2d) 877, 882-3 (7th Cir. 1945), *rev'd on other grounds,* 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946). While similar licensing practices alone were insufficient to infer conspiracy, the court was of the opinion that the illegal effects of the practices supported the trial court's conclusions. *Bigelow v. RKO Radio Pictures, Inc., supra,* 150 F. (2d) at 882-3. In two cases where small independent theatre operators charged the Big Eight with conspiracy, an extension of the liberal rule regarding conspiracy resulted when the reviewing court reversed the trial court's finding of no conspiracy. *William Goldman Theatres, Inc. v. Loew's, Inc.,* 150 F. (2d) 738 (3d Cir. 1945); *Ball v. Paramount Pictures, Inc.,* 169 F. (2d) 317 (3d Cir. 1948). In the *Goldman* case, *supra,* 150 F. (2d) at 743 n.15, the court observed that " 'The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age.' " Since the revelations of the monopolistic genius of the major movie companies in *United States v. Paramount Pictures Inc.,*