Notre Dame Law Review

Volume 25 | Issue 1 Article 6

10-1-1949

Recent Decisions

Louis Albert Hafner

Patrick F. Coughlin

George J. Murphy

Benedict R. Danko

RECENT DECISIONS

BILLS AND NOTES—IMPOSTOR RULE.—*United States v. Continental-American Bank and Trust Co. et al.*, 175 F. (2d) 271 (10th Cir. 1949). Bertha Smith, assuming the name of one Beulah Mitchell Gibbs, who was the unremarried widow of Ben Gibbs, Jr., a deceased soldier, pretended to be that person in applications and affidavits presented by mail to the Veterans Administration. This was done for the purpose of wrongfully obtaining allowances due to Beulah Mitchell Gibbs as the unremarried widow of Ben Gibbs, Jr. In due course of business, the Veterans Administration sent a series of checks issued in the name of Beulah Gibbs, to Bertha Smith, believing her to be the widow of Ben Gibbs, Jr., and expecting them to be cashed and endorsed with the signature purporting to be the true and genuine signature of Beulah Mitchell Gibbs, the payee. Bertha Smith, posing as Mrs. Gibbs, presented the checks to one of the defendant banks who paid them on the presentment of identification. The defendant banks, on their own endorsement, collected them from the Treasury of the United States through the appropriate banking channels. All of the defendants' endorsements carried the words "prior endorsements guaranteed." After the checks had been collected by the defendant banks, the United States discovered what had taken place. Thereupon, the Government brought this suit against the defendant banks, relying on the guaranty of the prior endorsements. It was held that the United States could not collect from the defendant banks since the case fell under the "impostor rule." Under this rule, banks are only required to have the named payee endorse the check in proper form, thereby making the endorsement a genuine one even though the name used was assumed. As such, the guaranty of the bank indicates only that the person to whom it was issued has endorsed it and not that the check has been honestly procured from the drawer.

The question of importance involved in this case is whether the signatures of the payee were forgeries or mere steps in the perpetration of a fraud under which there would be an application of the impostor rule. The answer to this question has never been decided by the Supreme Court of the United States, but there are numerous cases dealing with this rule in the lower courts.

If the signature of the assumed payee had been viewed as forgery, the collecting bank could acquire no rights to the instrument and would be liable to the drawer. But, if the circumstances of the case invoked the use of the impostor rule, the endorsement of the payee would, as in the instant case, be valid; the banks thereby would acquire rights to the instrument, and the guaranty, as such, would not have been broken. *United States v. First National Bank of Albuquerque*, 131 F. (2d) 985 (10th Cir. 1942).

The general rule in impostor cases is that where a person, by fraudulent impersonation of another, in person, induces the maker of a note or the drawer of a check to issue the instrument payable to the order of the person impersonated and to issue the same to the impostor, the impostor acquires a valid title thereto. The courts have extended this doctrine to transactions which are conducted by the use of mails or telegraph. *Halsey et al. v. Bank of New York and Trust Co. et al.*, 270 N. Y. 134, 200 N.E. 671 (1936). Now, by the weight of authority, the impostor who conducts fraudulent impersonations by mail or telegraph gets a valid title to the instrument thus fraudulently obtained. BRITTON, BILLS AND NOTES § 151 (1943).

The rationale behind the impostor rule has been placed on two distinct theories. The rule as stated in *Montgomery Garage Co. v. Manufacturers' Liability and Ins. Co.*, 94 N. J. L. 152, 109 Atl. 296, 22 A. L. R. 1224 (1920), represents the majority view. Under this rule, the drawer intends to make the check payable to the impostor with whom the drawer has dealings. The *Montgomery Garage Co.* case was concerned with face-to-face transactions, but in later cases, courts have applied the rule of intent to transactions which are conducted via correspondence. The leading authority for the minority view is stated in *Tolman v. American National Bank*, 22 R. I. 462, 48 Atl. 480 (1901). The Supreme Court of Rhode Island in that case maintained that the intent of the drawer, who had made inquiries as to the identity of the payee, was that the impersonated party and not the impersonating one was to receive title to the instrument. Under this rule, the negligence of the drawer, if any, estops the drawer from asserting his intentions.

Does the impostor rule have application where commercial paper has been issued to an impostor by the United States as in the instant case? In *National Metropolitan Bank v. United States*, 323 U. S. 454, 65 S. Ct. 354, 89 L. Ed. 383 (1945), the Supreme Court of the United States decided that federal rather than local law governs controversies over commercial paper issued by the Government, and, in the absence of an applicable act of Congress, the federal courts must fashion the governing rule. But although the Federal Government becomes a party to commercial paper, it is nonetheless bound by the same obligations which govern private persons under the same circumstances. *Clearfield Trust Co. v. United States*, 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943). In the absence of any direct decision by the Supreme Court of the United States on the impostor rule, we must look to the existing federal authority in order to clarify the status of the rule in the federal courts.

In *United States v. First National Bank of Prague, Okla., et al.*, 124 F. (2d) 485, 486 (10th Cir. 1941), the court said:

> With few exceptions, it is held that the drawer of a check, bill of exchange, or other negotiable instrument, cannot recover from an intermediary bank on its endorsement, or from the payee bank upon its payment, where the check, bill, or other instrument is drawn and delivered to an impostor under the mistaken belief on the part of the drawer that he is the person whose name he has assumed and to whose order the check, bill, or other instrument is made payable, and the intermediary bank acquires it from the impostor upon his endorsement thereon of the name of the payee, or the payee bank pays it upon such endorsement, as the case may be. Although not in full accord in respect of the reasons for their conclusion, most courts hold that while the drawer acts in the mistaken belief that the person with whom he deals either in person or by correspondence is the person whose name he has assumed and pretends to be, still it is the intent of the drawer to make the check, bill, or other instrument payable to the identical person with whom he deals and therefore to be paid on his endorsement.

Another leading federal case is *Security-First National Bank of Los Angeles v. United States,* 103 F. (2d) 188 (9th Cir. 1939). In that case, negotiations were carried on with representatives of the Veterans Administration by an impostor, in person, who represented himself as being a veteran who was in fact deceased. A check was mailed to the impostor who endorsed it in the name of the impersonated party. In a suit for collection by the United States against the defendant bank, it was held that recovery could not be had as the impostor received title to the check, and that his endorsement in the name of the payee was not a forgery. The court further held that the facts of the case required the holding that the Government was estopped from questioning the genuineness of the impostor's endorsement, and the fact that there was an express guaranty of prior endorsements added nothing to the defendant's liability. A similar result was reached in *United States v. First National Bank of Albuquerque, supra.*

In criticism of Judge Hutchinson's dissenting opinion in the principal case, it appears that he completely ignored the gist of the impostor rule in failing to consider the intent of the drawer. If the courts were to adhere to this line of reasoning, the Government in its issuance of checks would be immune from the possibility of an impostor receiving its checks. Thereby, banks would receive government checks at their peril. This would undoubtedly, as a practical matter, restrict the negotiability of such instruments, as the burden of ascertaining the identity of the correct or intended payee would fall upon the banks. In *Clearfield Trust Co. v. United States, supra,* the Supreme Court said that the United States is not exempted from the general rule governing the rights and duties of drawees either by the vastness of its dealings or by the fact that it must act through an agent. As a corollary to this, no reason can be seen for arriving at a different conclusion where the United States is the drawer rather than the drawee.

Most of the cases relied upon in the instant case by the Government revolved around the question of the liability of a guarantor on a

forged endorsement. The court did not consider these cases to be in point since they do not treat of the impostor rule and the liability of a guarantor of an endorsement under it. It is interesting to note that in *National Metropolitan Bank v. United States,* 323 U. S. 454, 459, 65 S. Ct. 354, 89 L. Ed. 383 (1945), where the case turned upon the issue of forgery, the Supreme Court stated:

> We do not say that there may not be some circumstances, not now before us, under which the government might be precluded from recovery because of conduct of a drawer prior to a guaranty of endorsement. We do hold that negligence of a drawer-drawee in failing to discover fraud prior to a guaranty of the genuineness of prior endorsements does not absolve the guarantor from liability in cases where the prior endorsements have been forged.

The decision arrived at by the majority of the court in the principal case seems to recognize the definite trend in the federal courts toward the application and the complete acceptance of the impostor rule with reference to negotiable paper of the United States. In this way can the negotiability of federal commercial paper remain unimpaired. The fact that the Government operates amid a maze of bureaus and agents seems to be an insufficient reason for refusing to apply the impostor rule to the United States.

Louis Albert Hafner

CONSTITUTIONAL LAW—ATTORNEYS—ADMISSION TO PRACTICE CONTROLLED BY JUDICIARY AND NOT LEGISLATURE.—*Application of Kaufman et al.,* ....Idaho...., 206 P. (2d) 528 (1949). This case presented a controversy as to whether the power to admit attorneys to the Bar is a judicial or legislative prerogative. A recent Idaho statute, Idaho Sess. Laws 1949, c. 73, § 1, laid down certain alternate qualifications which were prerequisite to admission to the state Bar. In addition, the law provided as follows:

> An applicant who shall comply with the above requirements and pay the admission fee provided by law, *shall* be entitled to have issued to him by the Supreme Court of the State of Idaho, a certificate authorizing him to practice as an attorney and counselor at law in all courts in the State of Idaho. (Emphasis supplied.)

In pursuance of the provisions of this enactment, three applicants, Samuel Kaufman, Jr., John W. Gunn, and Sumner Delana, filed, with the clerk of the Supreme Court of the State of Idaho, documents indicating their qualifications and compliance with the statutory requirements, Idaho Sess. Laws 1949, c. 73, § 1.

The State Bar Commissioners filed objections to these applications and asserted that the supreme court had the exclusive and inherent power over regulations prescribing the procedure, fitness and qualifications of persons seeking admission to the Bar, and that said statute in-

vaded and nullified such power and was an attempt by the legislature to exercise powers properly, exclusively, and inherently belonging to the judicial department, all of which was in violation of the constitution, IDAHO CONST. Art. II, § 1, which divides the powers of government into three distinct departments and forbids the exercise by any one of these departments of power "properly belonging to either of the other." Furthermore, it was objected that the statute violated Art. V, § 13, which provides, in part, that the legislature of Idaho shall not "deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government."

The applicants denied the Commissioners' objections and justified the statute by arguing that it was a valid and reasonable enactment of the legislature under its police and reserve power as proclaimed in Art. I, § 21, and that the constitution does not expressly give such regulation and control of admissions to the Bar to the judiciary branch of the government.

Amicus curiae, John A. Carver, Jr., agreeing with the applicants, conceded that the power to admit attorneys was a judicial function, but exercised solely as an act of admitting—that all antecedent matters such as determining age, learning, character, and citizenship are no part of the judicial function which comprises alone the act of admission.

The court in making its decision against the applicants did not totally agree with any one of the parties to the action, but held:

> First, that the process of admitting to the bar comprehends fixing standards as to mental and scholastic qualifications and determining whether the applicant possesses such requirements; second, that the exercise thereof is a judicial function, inherent in the courts; and third, the legislature may enact valid laws in aid of such functions and may, if in furtherance thereof, fix minimum requirements, but in no event, maximum; and may not require the courts to admit on standards other than accepted or established by the courts, and that any legislation which attempts to do so is an invasion of the judicial power and violative of the constitutional provisions establishing the separate branches of government and prohibiting the legislature from invading the judiciary.

This holding coincides with the stand that the majority of the jurisdictions have taken on this same question. See *State* ex rel. *Ralston v. Turner,* 141 Neb. 556, 4 N. W. (2d) 302 (1942); In re *Levy,* 23 Wash. (2d) 607, 161 P. (2d) 651 (1945); Ex parte *Steckler,* 179 La. 410, 154 So. 41 (1934); In re *Day,* 181 Ill. 73, 54 N. E. 646 (1899); In re *Bledose,* 186 Okla. 246, 97 P. (2d) 556 (1939).

The general conclusion that can be drawn about the law on this subject is that the relevant cases fall into one of three categories. The first of these categories is definitely a minority stand and is the doctrine that the power of admission of attorneys to the Bar is in the legislature. This doctrine has been espoused by only two and possibly three jurisdictions; e.g., North Carolina, New York, and possibly Florida. In re *Applicants for License,* 143 N. C. 1, 55 S. E. 635 (1906), and *Matter*

of Cooper, 22 N. Y. 67 (1860), held to this minority opinion. *State* ex rel. *Wolfe v. Kirke,* 12 Fla. 278 (1868), has been cited as placing Florida in this category, but in *Petition of Florida Bar Association,* 134 Fla. 851, 186 So. 280, 285 (1938), the Florida court held to the contrary and stated:

> Dicta in State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314, and Gould v. State, 99 Fla. 662, 127 So. 309, may at first blush appear contrary to the general rule here approved, but careful examination discloses that the dicta in these cases were merely statements of the early common-law rule under which admission to the bar was deemed to be a legislative function....

The theory that the prerogative of regulating admission to the Bar is a judicial one with the legislature having no power to interfere is the second of these categories and is well exemplified in In re *Day, supra,* where the Supreme Court of Illinois held that the function of determining whether one who seeks to become an officer of the courts is sufficiently acquainted with the rules pertains to the courts themselves, just as does the authority over disbarment. According to this theory, the power is inherent in the judiciary and it would be unconstitutional for the legislature to usurp this power peculiar to the courts. See also, In re *Bailey,* 30 Ariz. 407, 248 Pac. 29 (1926), *aff'd.,* 31 Ariz. 407, 254 Pac. 481 (1927); In re *Splane,* 123 Pa. 527, 16 Atl. 481 (1889).

As a practical compromise between the two theories already outlined, some courts have taken a middle ground recognizing a dual jurisdiction. The doctrine in this third category is that, while the power of admission and discipline is judicial, yet the legislature may prescribe reasonable regulations in which the courts will acquiesce, largely as a matter of courtesy to a co-ordinate branch of the government. Under this theory the legislature by virtue of its police power can prescribe certain minimum requirements as a protection to the citizens, but it can in no way force a court to admit anyone to the Bar. Said in another way, the courts in the exercise of their inherent power may demand higher qualifications than the legislature has required. For cases supporting this theory, see Ex parte *Garland,* 71 Wall. 333, 18 L. Ed. 336 (U. S. 1867); In re *Cannon,* 206 Wis. 374, 240 N. W. 441 (1932); In re *Lavine,* 2 Cal. (2d) 324, 41 P. (2d) 161 (1935); and Ex parte *Steckler, supra.*

It is clear to anyone reading the instant case, or any of the many cases that have been decided on the subject, that the greatest challenge to the courts is the establishment of the fact that the power of admission to the Bar is a judicial function in contradistinction to a legislative function. Once this point is firmly entrenched, it is a simple matter for a court to strike down any legislation which infringes on this power of the court.

American constitutions have refrained from explicitly depositing this power in any one of the traditional branches of government; conse-

quently, the question has remained as to which branch of the government possesses the requisite authority. The majority of the courts have wisely decided that the power is inherent in the courts. Their position can be vindicated on the proposition that to hold otherwise would be to take away the effect of the constitutional separation of governmental departments. Nor can there be any quarrel with legislation that lays down requirements to be met prior to admission, if the same legislation does not attempt to be mandatory and hold itself out as the sole authority on the matter. If, however, as in the principal case, legislation does attempt to be mandatory, the courts are on solid ground in declaring it void for the reasons that have been discussed.

Patrick F. Coughlin

CONSTITUTIONAL LAW—CIVIL RIGHTS—DISCRIMINATION AGAINST COLORED CITIZENS BY A PRIVATE HOUSING CORPORATION RECEIVING STATE ASSISTANCE.—*Dorsey et al. v. Stuyvesant Town Corporation et al.*, 299 N. Y. 512, 87 N.E. (2d) 541 (1949). Joseph R. Dorsey, a Negro war veteran, brought this action against Stuyvesant Town Corporation and its parent company, Metropolitan Life Insurance Company, to enjoin the defendants from refusing to rent to the plaintiff or others similarly situated any apartments in Stuyvesant Town because of the race or color of such persons. Stuyvesant Town Corporation was organized by the Metropolitan Life Insurance Company in 1943 as a redevelopment company under a state law, N. Y. REDEVELOPMENT COMPANIES LAW, § 3401-3426. It was wholly owned by Metropolitan and represented an investment of not less than $90,000,000 of private funds held by Metropolitan for the benefit of its more than thirty-three million policyholders. A review of the housing laws of New York will help to clarify this action. The basic authority is contained in the New York constitution, N. Y. CONST. Art. XVIII, § 1, which reads:

> Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas or for both such purposes. . . .

The purpose of the redevelopment law was to encourage the entrance into the housing field of life insurance companies and other sources of private capital, and provided in part:

> . . . that provision must be made to encourage the investment of funds in corporations engaged in providing redevelopment facilities to be constructed according to the requirements of city planning and in effectuation of official city plans and regulated by law as to profits, dividends and disposition of their property or franchises . . . and that provision must

> also be made for the acquisition for such corporations and companies at fair prices of real property required for such purposes in substandard areas and for public assistance of such corporations and companies by the granting of partial tax exemption.

Pursuant to the above law, Stuyvesant entered into a contract with the City of New York that embodied a plan for the rehabilitation of a substandard area comprising eighteen city blocks in the borough of Manhattan, by the erection of thirty-five apartment houses capable of accommodating about twenty-five thousand people. The city agreed to condemn and bring under one good title the entire area. Stuyvesant agreed to acquire the area, demolish the old buildings and construct new ones, all without expense to the city. The city granted tax exemption to the extent of the enhanced value and gave title to the land in streets in the area in exchange for areas of land on the border of the project.

The legislature did not make any regulations concerning the choice of tenants. The contract with the city did not impose any requirements in the selection of tenants. This raises the main question presented by this suit. Does a corporation organized under the redevelopment law have the privilege, admittedly possessed by an ordinary private landlord, to exclude Negroes from consideration as tenants? The appellant contended that Stuyvesant was subject to the restraints of the equal protection clauses of the state and federal constitutions and that in their selection of tenants they could not lawfully discriminate against Negroes. NEW YORK CONST. Art. 1, § 11, states:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Bouvier, III BOUVIER, LAW DICTIONARY 2962 (Rawle's 3d Rev. 1914), defined civil rights as:

> . . . those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the parental and marital powers and the like. . . .

At first glance this provision in its usual interpretation would be controlling. But the majority of the court held that the right to acquire an interest in real property was not a civil right. Why? Because the legislature has not declared it to be such. The common sense of mankind, the declarations of the Federal Civil Rights Law, REV. STAT. § 1978 (1875), 8 U. S. C. § 42 (1946), declaring that such is a civil right, and the classic definitions of legal writers had no weight with the court. The legislature has failed to proclaim the right and even though man by his nature is possessed of that right, the court refused to protect it. The court took what appears to be a very narrow, constricted view of civil rights that will probably not stand long in the

face of the present public policy of protecting all men in their natural rights despite mere formalistic defects in stating these rights, or legal hair-splitting in assisting, however innocently, irrational racial prejudices. This policy against discrimination was aptly stated by the late Justice Murphy: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U. S. 81, 100, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943).

After ruling that the state constitution was inapplicable, the court ruled that the Federal Constitution was also not applicable since it protects civil rights only from state action, not from invasion by private persons. See *Shelley v. Kraemer,* 334 U. S. 1, 13, 68 S. Ct. 836, 92 L. Ed. 1161 (1948); In re *Civil Rights Cases,* 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883). The court held that Stuyvesant was a private corporation and the contribution of millions of dollars in tax exemption by the state, the loaning of the sovereign's power of eminent domain and the continuing regulation of profits, dividends, and disposition, did not constitute governmental action. The public purpose had been accomplished when the area was rehabilitated and the corporation had all the rights of a private landlord. Therefore, the court determined, there was no state action connected with the discrimination, and the Fourteenth Amendment and the Federal Civil Rights Law did not apply.

Judge Fuld, in his logical dissent, struck hard at the fallacious reasoning employed in the majority opinion. He pointed out that even the conduct of private individuals offends the constitutional provisions, if it appears in an activity of public importance, and if the state has accorded the transaction either the panoply of its authority or the weight of its power, interest and support. See *Smith v. Allwright,* 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944); *Nixon v. Herndon,* 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759 (1927). Stuyvesant Town bore the unmistakable signs that it was governmentally conceived, governmentally aided and governmentally regulated. There was "state action" exerted in aid of discrimination by the city in approving the contract with Stuyvesant when it knew discrimination would be practiced. The city of New York does not have the right to contract away the rights of its citizens. The constitutional rights of American citizens are involved and such rights may not be used as pawns in driving bargains. Mr. Justice Holmes has pointed out, "One whose rights, such as they are, are subject to state restriction cannot remove them from the power of the state by making a contract about them." *Hudson County Water Co. v. McCarter,* 209 U. S. 349, 357, 28 S. Ct. 529, 52 L. Ed. 828 (1908). The city as a branch of the state government is required to grant equal protection to all its residents under the Fourteenth Amendment and it cannot permit discrimination by hiding

behind a contract. The Negro citizens of New York have contributed to the project through their taxes and those who have paid and will continue to pay should share in the benefits.

Those who raise the cry of invasion of private property in this instance should consider a further point. Some Negroes of New York, and of the nation, are among the thirty-three million policy-holders of the Metropolitan Life Insurance Company. In fact, a state statute, NEW YORK INSURANCE LAW § 209, prohibits any discrimination between white and colored persons in issuing life insurance. Thus, the colored person can pay into the coffers of this vast establishment, but the funds can only be used in the unjust manner deemed advisable by the encrusted prejudices of the company directors. Here the payments by Negroes are directly harmful to themselves, since they will be used to bar them from more and more housing projects. This is directly contrary to the Natural Law principle that no man acts to harm himself. How far will the doctrine of private property be stretched to protect the mere stewards of other persons' money in acting against the interests of these very people?

The decision of the four judges of the majority would seem too mechanical in its application of the constitutional provisions for equal protection. While holding firm to the letter of the law, they have apparently stifled its spirit. We can only wait to see whether the Supreme Court of the United States will vindicate the opinion of the three dissenting judges.

George J. Murphy, Jr.

CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES—DEFECTIVE DELINQUENT.—*Petition of Commissioner of Correction,* ....Mass....., 87 N.E. (2d) 207 (1949). The facts in the present case give rise to a review and affirmation of a few familiar principles of statutory construction. The case originated as the result of a petition by the commissioner of correction under state law, MASS. ANN. LAWS c. 123, § 115 (1942), as amended, MASS. ANN. LAWS c. 123, § 115 (Supp. 1948), for the discharge of Clarence Gilbert, a defective delinquent. The latter was confined at a state farm under commitment by the district court of Springfield on October 29, 1943. Section 115 of the statute provides:

> All persons confined on October first, nineteen hundred and forty-seven under commitment as defective delinquents as provided in this chapter shall be examined forthwith by two psychiatrists appointed by the commissioner of public health and all reports of such examinations shall be transmitted to the commissioner of correction. In any case where such examination discloses that the person examined is not mentally defective

> immediate steps shall be taken by the commissioner of correction in the probate court to secure the termination of his defective delinquent status.

A decree was entered in the probate court dismissing the petition, and Gilbert appealed.

The relevant facts were that Gilbert had committed various offenses since he was thirteen years of age, among them a number of unnatural acts and sexual perversions with a child, whom he had on one occasion badly beaten and bruised because of his resistance. The psychiatrists who examined Gilbert reported to the district court that Gilbert's "sexual sadistic drives make him a menace to children and . . . that there will be a recurrence of these previous episodes."

While at the state farm Gilbert's conduct had been good. The two psychiatrists appointed by the commissioner of mental health reported that the psychiatric examination on April 10, 1948, revealed that Gilbert made a good impression and that his I. Q. had improved. They declared that Gilbert was not a mental defective. According to the statute, MASS. ANN. LAWS c. 123, § 113 (1942), as amended, MASS. ANN. LAWS c. 123, § 113 (Supp. 1948), a "defective delinquent" is one who:

> . . . is found to be mentally defective, and the court, after examination into his record, character and personality, finds that he has shown himself to be an habitual delinquent or shows tendencies toward becoming such and that such delinquency is or may become a menace to the public. . . .

As to various classifications of defective delinquents, see Papurt, *Classification of Defective Delinquents*, 26 J. CRIM. L. 421 (1935).

The issue to be decided on appeal was whether the lower court was bound, with regard to § 115 of the statute, by the conclusions of the psychiatrists and consequently required to register mechanical approval without any consideration of other facts. The appellant had strongly contended that the report from the two psychiatrists was a condition precedent, and that upon its production the court was compelled to declare the status of defective delinquency at an end. The statute, MASS. ANN. LAWS c. 123 § 118 (1942), as amended, MASS. ANN. LAWS c. 123, § 118 (Supp. 1948), stated in somewhat similar terms that upon the report of two psychiatrists, a defective delinquent "found by such examination not to be mentally defective shall be taken before the probate court by the commissioner of correction for discharge from defective delinquent status."

The court held that sections 115 and 118 do not restrict the court in the receipt of evidence, findings of fact, and the entering of such decree as will enforce the rights of the parties according to the facts properly found. Thus, whether the appellant was a defective delinquent at the time of the hearing in the lower court was a question of fact to be determined by the court in the consideration of *all* the evidence before it. The court added: "If said sections 115 and 118 were construed in accordance with the contention of the appellant, they would constitute an

unconstitutional interference by the Legislature with the exercise by the court of its proper judicial function."

Here, then, is the crux of the matter. In this regard, it was most ably pointed out in In re *Opinion of the Justices,* 251 Mass. 569, 147 N. E. 681, 702 (1925), that the constitutional provision for division of powers of governmental departments precludes the legislature from requiring a court merely to register mechanical approval of the determinations of administrative instrumentalities without any examination of the legal merits of such proceedings. This opinion of the justices upon which the court in the instant case heavily relied went on to state, *inter alia:*

> Courts in reaching decisions are bound to exercise an independent judicial function. Simply to set in motion machinery perfunctorily and inevitably leading to a specified final judgment, without first exercising an untrammeled decision in accordance with established constitutional and legal principles, would not be judicial work. A court cannot be made an automatic adjunct of an administrative board. [In re *Opinion of the Justices,* 251 Mass. 569, 147 N.E. 681, 702 (1925).]

See, e.g., *Cosmopolitan Trust Co. v. Mitchell et al.,* 242 Mass. 95, 136 N. E. 403 (1922). One is reminded, of course, that such opinions of the justices rendered in compliance with provisions of the state constitution, MASS. CONST. Part II, Chap. III, Art. II, although resting on judicial investigation and deliberation, are advisory in nature. They are not binding authorities, but are subject to re-examination and revision if and when the points considered are raised in litigation. *Mayor of Somerville v. District Court of Somerville,* 317 Mass. 106, 57 N. E. (2d) 1 (1944). This article of the constitution does not extend to the determination by the justices of questions of fact. *Dinan et al. v. Swig,* 223 Mass. 516, 112 N. E. 91 (1916). Advisory opinions are not given by the court as a whole, but rather by the justices as individuals. *Bowe et al. v. Secretary of the Commonwealth,* 320 Mass. 230, 69 N. E. (2d) 115 (1946).

It may be well at this point to recall that it is generally considered a canon of statutory construction that none of the words of a statute are to be treated as superfluous or unnecessary, but all are to be given some meaning, so that, as far as possible, the statute shall be a consistent and harmonious whole. *Bolster v. Comm'r. of Corporations and Taxation,* 319 Mass. 81, 64 N. E. (2d) 645 (1946). In the current case, the only way to accomplish that result in the treatment of the language of sections 115 and 118, and yet keep them within constitutional limits, was to declare that those sections did not purport to instruct the court as to *what* action it should take, nor was the conclusion to be drawn that the legislature intended to make affirmative action by the court mandatory. The court cites In re *Keenan,* 310 Mass. 166, 37 N. E. (2d) 516, 137 A. L. R. 766 (1941), to substantiate, to an extent, the latter part of this declaration. This was a case which involved a statutory provision providing procedure for petitions for admission to

the bar. The court reasoned that the provision did not purport to regulate or restrict the court's exclusive jurisdiction over admissions to the Bar, or import that every such person shall be admitted, but was merely in aid of the judicial department. In so deciding, the court mentioned that the statute *must* be interpreted as making provision to aid the judicial department in making proper selection of persons qualified for admission. See also, In re *Opinion of the Justices,* 279 Mass. 607, 180 N. E. 725, (1932).

With regard to the lower court's decision in relation to the defective delinquent's decided improvement while at the state farm, the court aptly pointed out, "Intelligence quotient tests are not standards to determine whether or not one is defective by reason of being possessed of sadistic lusts." Though it is a known fact that often enough the practical and functional nature of intelligence tests stands out clearly, especially when one surveys the history of their development, yet it must be conceded that they, like any other instruments of measurement, have their limitiations. For an interesting article in this respect, see Hunt, *The Uses And Abuses of Psychometric Tests,* 35 KY. L. J. 38 (1946). Also, in passing, it should be mentioned that with regard to the various treatments accorded defective delinquents, Massachusetts is to be highly commended. See, e.g., Andriola, *Some Suggestions For Treating The Defective Delinquent,* 31 J. CRIM. L. 279 (1940).

In summarizing, it should be noted that although no specific mention is made, the court in the principal case indirectly relied on the principle of statutory construction that the legislature is presumed to have intended to act strictly within constitutional limits. *Commonwealth v. Welosky,* 276 Mass. 398, 177 N. E. 656 (1931), *cert. denied,* 284 U. S. 684, 52 S. Ct. 201, 76 L. Ed. 578 (1932). Consequently, every rational presumption is in favor of the validity of a legislative act, and courts will sustain the statute unless its unconstitutionality is established beyond reasonable doubt or it is impossible to interpret it in harmony with the constitution. *Attorney General v. Secretary of the Commonwealth,* 306 Mass. 25, 27 N. E. (2d) 265 (1940). As the principle was rather capably summarized by Mr. Justice Holmes:

> . . . the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same. [*Blodgett v. Holden,* 275 U. S. 142, 148, 48 S. Ct. 105, 72 L. Ed. 206 (1927).]

This was also declared at an early time by the Massachusetts' courts to be a fundamental principle of constitutional law, and has been followed consistently for more than a century.

Benedict R. Danko

CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT—EFFECT OF THE FOURTEENTH AMENDMENT.—*Johnson v. Dye,* 175 F. (2d) 250 (3d Cir. 1949). The first question presented by this case was whether a federal court had jurisdiction in extradition proceedings where state remedies had not been exhausted. The second and main question was whether an escaped convict held under state extradition proceedings could obtain his freedom in a federal court, having been subjected to cruel and unusual punishment in the original state of confinement. It was held that he could.

Plaintiff, a convicted murderer in the State of Georgia, escaped during a prison break involving 175 inmates. He was apprehended in Pennsylvania under an executive warrant issued pursuant to extradition proceedings. Johnson originally brought his petition for a writ of habeas corpus in the state court of common pleas. It was refused both there and on appeal. Without going to the supreme court of the state, Johnson brought his petition to the federal district court. His petition was dismissed and he appealed to this court. The court of appeals based its assumption of jurisdiction, though the state remedies had not been exhausted, on the decision in *Roberts v. Reilly,* 116 U. S. 80, 6 S. Ct. 291, 29 L. Ed. 544 (1885). Overruling a former decision, *Powell v. Meyer,* 147 F. (2d) 606 (3d Cir. 1945), the court reinstated its decision in *United States* ex rel. *Darcey v. Superintendent of County Prisons,* 111 F. (2d) 409 (3d Cir. 1940), to the effect that exhaustion of state remedies was not necessary in extradition cases. In so holding the court followed the decision in *United States* ex rel. *McCline v. Meyering,* 75 F. (2d) 716 (7th Cir. 1934), which held that such a petitioner could discontinue a state action already begun and file for relief in a federal court.

Johnson's petition was based on three main contentions. Only the second, that he was subjected to "cruel, barbaric, and inhuman treatment" after conviction, was the basis for the decision. The extent of punishment was not mentioned by the court, since it was considered as reflecting "little credit on this generation for posterity." Further discussion of the manner of proof will be made later. It is sufficient to state at present that the court accepted as true the allegations as made and proved by the plaintiff. Having so accepted them, the court discussed the application of the Fourteenth Amendment. It came to the conclusion that where "basic" and "fundamental" rights are concerned, they will be protected by the Fourteenth Amendment. Freedom from cruel and unusual punishment was held to be such a right.

Subsequent to the passage of the Fourteenth Amendment, many attempts were made to force a construction of it so as to make the first eight amendments, as such, applicable to the states. The Supreme Court has continually refused to hold that the Fourteenth Amendment was intended to secure, against state invasion, *all* the rights protected

by the first eight amendments. *Chambers v. Florida,* 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940); *Collins v. Johnston,* 237 U. S. 502, 35 S. Ct. 649, 59 L. Ed. 1071 (1915); *Palko v. Connecticut,* 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937); *Slaughter House Cases,* 16 Wall. 36, 21 L. Ed. 395 (U. S. 1873); *McElvaine v. Brush,* 142 U. S. 155, 12 S. Ct. 156, 35 L. Ed. 971 (1891). In *Minor v. Happersett,* 21 Wall. 162, 22 L. Ed. 627 (U. S. 1875), the Court said with reference to the Fourteenth Amendment: "The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had." But recently, under the so-called "modern view," the courts have, as in the principal case, gone further in incorporating into the Fourteenth Amendment the rights guaranteed under the first eight amendments where those rights are fundamental and basic. *Saia v. New York,* 334 U. S. 558, 68 S. Ct. 1148, 93 L. Ed. 1574 (1948); *Chambers v. Florida,* 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940); *Cantwell v. Connecticut,* 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); see *Twining v. New Jersey,* 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908) (dissenting opinion), wherein the Court, though denying in general the incorporation of the federal Bill of Rights into the Fourteenth Amendment, stated that in the cases where the rights are fundamental (enumerating these rights), they are enforceable as against the states.

The existence of fundamental or basic rights is not denied. However, these rights are not limited nor extended by the federal Bill of Rights. *Minor v. Happersett, supra.* It would appear more correct to say that they are protected by our laws and courts ". . . because they are of such a nature that they are included in the conception of due process of law." Manion, *The Church, The State and Mrs. McCollum,* 23 NOTRE DAME LAWYER 456, 460 (1948). Such a conception of the proper application of the Fourteenth Amendment was upheld in *Louisiana* ex rel. *Francis v. Resweber,* 329 U. S. 459, 468, 67 S. Ct. 374, 91 L. Ed. 422 (1947), where the Court stated:

> In an impressive body of decisions this Court has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guaranties of the Bill of Rights. They neither contain the particularities of the first eight amendments nor are they confined to them.

It is unthinkable that a state by whim or caprice could take property, set up a state religion, or punish in an inhuman and barbaric manner. These rights are, and must be, protected.

The principal case has already been cited in a recent New York case. *People* ex rel. *Jackson v. Ruthazer,* ..... App. Div. ....., 90 N. Y. S. (2d) 205 (1949). In this case, however, the prisoner was not set free. The basis for the decision was not that the court did not accept the rights as stated in the principal case. Rather, it was based on the proof and the manner of proof, with the court indicating that if the proof had

been sufficient as to the punishment, the prisoner would have been set free. In the *Jackson* case, representatives from Georgia had come to the hearing and had given evidence contrary to that which was given by the petitioner. No additional witnesses, other than the petitioner himself, were present at the hearing, as there were in the principal case. This, it appears, was the main basis of distinction between the two cases.

Circuit Judge O'Connell, concurring in part and dissenting in part in the principal case, brought up a very important point as to the effect of this case. He concurred insofar as the prohibitions of the Fourteenth Amendment applied to the states, but in so doing stated that it was with reluctance that he arrived at the decision, since he was aware that because Georgia disregards the fundamental rights of a convicted murderer, he is turned loose among the citizens of Pennsylvania. The Judge continued that, considering this decision as applied to the other 175 prisoners who made the escape at the same time as Johnson, the possible results are frightening.

The main basis of the dissent, however, was not the possible effect of the decision, but rather the manner of proof adopted by the court. The court had accepted as true the allegation of cruelty upon Johnson's own testimony and that of other convicted criminals. The dissent pointed out that such testimony should be studied with the greatest degree of care. It was further stated that the mere fact of cruel and unusual punishment might not in all cases indicate a granting of the petition as a matter of course. All the aspects of the situation, such as the fact of Johnson's race (Negro), and the possible ill effects of returning him to Georgia, were to be taken into consideration. Constitutional rights must be protected, but in instances similar to the principal case, the effect of the decision must also be considered in relation to the interests of society.

John E. Lindberg

CONSTITUTIONAL LAW—STATE GRANTS TO HOSPITALS GOVERNED BY MEMBERS OF A PARTICULAR RELIGIOUS GROUP.—*Kentucky Building Commission et al. v. Effron,* 310 Ky. 355, 220 S. W. (2d) 836 (1949). This was an appeal from a declaratory judgment action wherein the court declared unconstitutional two statutes authorizing state aid to hospitals, insofar as the provisions of these statutes applied to non-profit hospitals not owned and operated by the state or one of its subdivisions. The statutes in question were enacted by the Kentucky legislature in order to take advantage of the Hospital Survey and Construction Act of 1946, 60 STAT. 1041, 42 U. S. C. § 291 *et seq.* (1946), which appropriated funds to be distributed to the states in order "to assist the several states . . . to construct public and other non-profit

hospitals. . . ." One of the state statutes, KY. REV. STAT. ANN. § 211.105 (Cum. Supp. 1949), created a division within the Kentucky Department of Health to receive the federal funds and to establish and regulate the hospitals and related services. A later statute, KY. REV. STAT. Chapter 47, Part Three (1948), appropriated ten million dollars to be expended, among other things, in "matching funds for hospital construction under any law now existing or that may be passed by the National Congress." In carrying out the provisions of these statutes, the defendant commission allotted funds to two non-profit hospitals which were governed by members of particular religious denominations, but which hospitals did not teach religion and were open to the general public. The plaintiff taxpayer contested these grants as being in violation of three sections of the constitution, KY. CONST. §§ 3, 5, and 171. The lower court ruled in favor of the plaintiff, and on this appeal the judgment was reversed. Sections 3 and 171 of the constitution were clearly not applicable, the issue being whether allocations to such hospitals violated section 5, which reads, "No preference shall be . . . given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity. . . ." The court of appeals held that the courts would look to the use to which these funds were put rather than the conduits through which they ran; and based its decision on the "spirit of the law," saying that it never was the intention of the framers of the constitution to prevent an institution from rendering a public service merely because the governing body of that institution was composed of a particular denomination.

To those who favor strict adherence to the letter of the law in deciding cases of this nature, it appears that the holding could as well have been based upon the law of the state. In interpreting section 5 in relation to the facts, the "preference by law" must take the form of some aid or control given to one or more denominations to the exclusion of others. The aid may be either direct or indirect. Kentucky, having no constitutional provision expressly prohibiting grants of aid to sectarian institutions from the general fund, has already sanctioned indirect aid to such associations. In *Nichols v. Henry,* 301 Ky. 434, 191 S. W. (2d) 930 (1945), where a county's provision of transportation for parochial school children was upheld, the court admitted that such aid was an indirect benefit to these schools. Also, in *Crain v. Walker,* 222 Ky. 828, 2 S. W. (2d) 654 (1928), state school funds were used by a local school district to teach children in the confines of a sectarian orphans' home, the teachers and curriculum being under control of the state. The court in this case did not refer to section 5, but held the matter constitutional even in the face of section 189, which

expressly prohibits any apportionment of funds raised for educational purposes "in aid of" any denominational school. With reference to direct aid, the fact that no direct benefit to any religious group was involved in the principal case is indisputable. The obvious purpose and effect of the statutes in question is to improve the public health by supplying adequate hospital facilities. The people are the direct beneficiaries.

In regard to control, the Kentucky statute, KY. REV. STAT. ANN. § 211.105 (8) (Cum. Supp. 1949), gives a division within the department of health the authority to make such regulations as are necessary for the "conduct and operation" of such hospitals. The Federal Government also retains control, to the extent of the use of the funds, by virtue of a provision, 60 STAT. 1041, 42 U. S. C. § 291h (1946), which, among other things, provides that any violation as to the use of the funds will subject the offending institution to a penalty of one-third of the value of the hospital at the time of the offense. To prevent any discrimination, § 291f of the same law provides that no application meeting the requirements of the act shall be rejected without affording the applicant an opportunity for a hearing before the state agency.

Kentucky follows the almost universal rule that the court will not invalidate a legislative act unless the unconstitutionality of that act is so clear as to be free from doubt. *Campbell v. Commonwealth,* 229 Ky. 264, 17 S. W. (2d) 227 (1929). This state also follows the jurisdictions which state the rule in somewhat stronger language, i.e., that the unconstitutionality of the statute must be established "beyond a reasonable doubt." *Sanders v. Commonwealth,* 117 Ky. 1, 77 S. W. 358 (1903). It appears that the decision in this case could well have been based on these long established rules, since it is obvious that there is doubt whether such grants constitute a "preference by law" of any religious sect, society, or denomination.

It is interesting to note, also, that the plaintiff taxpayer's right to bring the suit was not questioned. In past decisions Kentucky courts have apparently ignored this controversial issue and decided such cases on the merits. *Standard Printing Co. v. Miller,* 304 Ky. 49, 199 S. W. (2d) 731 (1946).

The instant case is significant as it presents a common sense approach to the problem of separation of Church and State. Aid for the afflicted is an immediate need, and should not be hampered by minor technicalities of law detected by individual taxpayers. The inadequacy of existing hospital facilities cannot be questioned. Furthermore, it is the recognized duty of the state to care for the afflicted. The state and Federal Governments have both decided that these needs can be best

supplied by supplementing existing facilities, rather than by exhausting available funds and consuming time in building new state-owned hospitals. No existing hospital which meets standard requirements is to be denied assistance. No "preference" of any religion is intended or effected by laws so enabling the state to fulfill its duty.

The court of appeals wisely chose to give greater recognition to the paramount interest of the general welfare rather than quibble over vague terminology, the meaning of which has never been definitely settled despite years of debate, both in the courts and the legislature.

William J. O'Connor

CONTRACTS — PATENT RIGHTS — RIGHT TO INVENTION AS BETWEEN EMPLOYER AND EMPLOYEE.— *Velsicol Corporation v. Hyman*, ... Ill. App. ....., 87 N. E. (2d) 35 (1949). Plaintiff corporation brought a bill for specific performance to compel the defendant, a skilled chemist and former vice president, stockholder, and operating head of the plaintiff, to assign four pending patent applications to the plaintiff. The complaint declared on a written contract, and in the alternative on an implied contract arising out of a fiduciary relationship existing between the parties. The contested applications involved insecticide discoveries made in the plaintiff's laboratories and at its expense.

The corporation had been founded upon the chemical ability of the defendant and the capital of two small corporations which were predominantly owned by the other two officers of the plaintiff corporation. Although the original purpose of the corporation was to finance the defendant's research in polymer drying oils, the laboratories under defendant's exclusive direction had turned, at least in part, to insecticide research. During a period of thirteen years, thirty-nine patents, five relating to insecticides, were obtained by the defendant, and assigned, as a matter of course, to the plaintiff.

The court, in a two-to-one decision, denied relief because the "clear proof" required for specific performance was absent, stressing that:

> . . . the law inclines so strongly to the rule that the invention shall be the property of its inventor, that nothing short of a clear and specific contract to that effect will vest the property of the invention in the employer, to the exclusion of the inventor. [citing] *Joliet Mfg. Co. v. Dice*, 105 Ill. 649, 651 (1883).

Specifically the court held that: an express contract had not been proved; the circumstances of the formation of the corporation upon the defendant's inventive powers, his position as the *alter ego* of the corporation exclusively directing its operations and research, and his previous assignments of thirty-nine patents did not raise an implied

contract to assign founded upon a fiduciary relationship. Any penetrating consideration of the possibility of a fiduciary relationship was cursorily by-passed by emphasizing that the parties originally only contemplated research in polymer drying oils and not insecticides, and furthermore, that previous assignments are not controlling and do not necessarily establish an implied agreement to assign present or future inventions. *Pressed Steel Car Co. v. Hansen,* 137 Fed. 403 (3d Cir. 1905); *Lambert Tire & Rubber Co. v. Brubaker Tire Co. et al.,* 5 F. (2d) 414 (6th Cir. 1925). The majority opinion did not indicate adequate deliberation on the effect of the defendant's supreme position in the corporation, nor did it even mention that five of the thirty-nine patents previously assigned were for insecticides.

The piercing dissent construes both the facts and the law differently. It suggests a far more reasonable view of the law, as well as one that appears to have been promulgated in most of the latest decisions.

Admittedly, the governing rule is that a mere contract of employment does not give the employer a right to inventions of the employee. *Hapgood et al. v. Hewitt,* 119 U. S. 226, 7 S. Ct. 193, 30 L. Ed. 369 (1886); *Danzell v. Dueber Watch Case Mfg. Co.,* 149 U. S. 315, 13 S. Ct. 886, 37 L. Ed. 749 (1893). However, this rule is modified by two broad exceptions: (1) the employee can contract, expressly or impliedly, to vest all property of his inventions in the employer: *Solomons v. United States,* 137 U. S. 342, 11 S. Ct. 88, 34 L. Ed. 667 (1890); *Standard Parts Co. v. Peck,* 264 U. S. 52, 44 S. Ct. 239, 68 L. Ed. 560 (1924); *Magnetic Mfg. Co. et al. v. Dings Magnetic Separator Co.,* 16 F. (2d) 739 (7th Cir. 1926); and, (2) the circumstances and relations of the parties may be such that a fiduciary relationship is established from which, in justice, it is necessary to imply a contract in law to assign the property in the inventions to the employer: *Dinwiddie v. St. Louis & O'Fallon Coal Co.,* 64 F. (2d) 303 (4th Cir. 1933); *Dowse v. Federal Rubber Co.,* 254 Fed. 308 (N. D. Ill. 1918); *Dailey v. Universal Oil Products Co.,* 76 F. Supp. 349 (N. D. Ill. 1947).

Since the insufficiency of the evidence appears to have precluded the establishment of an express contract, specific performance could only have been granted upon a contract implied in fact, or upon one implied in law arising out of a fiduciary relationship.

A contract implied in fact is suggested by the relationship established between the parties at the very formation of the corporation. Certainly it was not in the contemplation of the parties acting as reasonable men that the corporation was being formed merely to finance the experiments of the defendant, who exclusively would obtain the benefits of any valuable discoveries he might make. That such a grotesque situation did not exist is indicated by the thirty-nine previous assignments. In a case analogous to the present one, where an employee was hired to invent, the court held that two previous assign-

ments by him were "most persuasive." *Magnetic Mfg. Co. et al. v. Dings Magnetic Separator Co.*, 16 F. (2d) 739 (7th Cir. 1926).

Nor is it material that the defendant originally was engaged in polymer drying oil research. In *Houghten v. United States*, 23 F. (2d) 386, 390 (4th Cir. 1928), the court stated:

> The right of the employer to the invention or discovery of the employee depends, not upon the terms of the original contract of hiring, but upon the nature of the service in which the employee is engaged at the time he makes the discovery or invention, and arises, not out of the terms of the contract of hiring, but out of the duty which the employee owes to his employer with respect to the service in which he is engaged. It matters not in what capacity the employee may originally have been hired, if he be set to experimenting with the view of making an invention, and accepts pay for such work, it is his duty to disclose to his employer what he discovers in making the experiments, and what he accomplishes by the experiments belong to the employer.

The same doctrine is applied in *State et al. v. Neal et al.*, 152 Fla. 582, 12 So. (2d) 590 (1943), *cert. denied*, 320 U. S. 783, 64 S. Ct. 191, 88 L. Ed. 420 (1943). The applicability of this rule to the principal case is confirmed by the fact that if the parties did not contemplate any other discoveries than drying oils to be the subject matter of the employment, it would be tantamount to declaring that the defendant was guilty of breaching his employment contract by subsequently engaging in other research at the expense of the plaintiff.

It is thus seen that the tendency of the law is to imply readily a contract to assign inventions when the actions of the employee, under the circumstances, are such that the reasonable inference is that the employee has sold his inventive powers to the employer.

The same result is possibly more cogently arrived at on the theory of a contract implied in law arising out of a fiduciary relationship. The corporation was founded on the inventive ability of the defendant-chemist; it was continued in the face of large deficits, in expectation of the eventual fruitfulness of this ability. Corporate operations were subordinated to the exclusive direction of the defendant. Its very existence was inextricably united with his genius.

Where a corporation is organized with the funds of one party and the inventive genius of another, with the inventor put in full charge of the operations and research of the company, even in the absence of any agreement, express or implied, that inventions created by him are to become the property of the company, the relationship of the parties necessitates the implication that the "equitable title" to the inventions is in the company. *Dowse v. Federal Rubber Co.*, 254 Fed. 308 (N. D. Ill. 1918); *Dailey v. Universal Oil Products Co.*, 76 F. Supp. 349 (N. D. Ill. 1947); see *Diversey Corp. v. Mertz*, 13 F. Supp. 410, 412 (N. D. Ill. 1936). The test appears to be whether the corporation depends upon the inventive powers of the party *coupled* with his author-

ity over its operations. Some cases apparently holding a contrary view are distinguishable in that they involve situations where the inventor was employed as an operating or production manager without regard to his inventive ability, or in that, although he was hired as an inventor, he did not have control over the research, and his invention was clearly outside the scope of his employment. See *Detroit Testing Laboratory v. Robinson et al.*, 221 Mich. 442, 191 N. W. 218 (1922).

The conclusion clamours for recognition that the defendant owed an absolute duty of fidelity, regardless of contract, to the corporation, and that as its *alter ego* he was in such a position of trust that in justice his inventions were to become its property. To hold otherwise is to pose the question, "When can one party's dependence on another be sufficient to create a fiduciary relation?"

This case is significant in that it demonstrates what inequitable results are possible when basic principles of jurisprudence are subordinated to mere transient policy. The policy here is the fostering of inventive genius to expand American industry by securing to the individual inventor the unmitigated fruits of his genius. The basic principle is that in the face of conflicting equities men will be judged according to their actions, the law implying reasonable inferences in full regard of the circumstances. Here by over-emphasizing policy, the court has misapplied the law to the factual situation establishing an undesirable legal precedent, as well as apparently denying justice in the instant case.

Furthermore, in giving this undue stress to the ostensible protection of the individual inventor, the court has failed to take cognizance of the fact that the tempo of American invention has had acceleration proportional to the development of industrial research laboratories, which in all reason must be supported in the future by their creations of the present.

Mark Harry Berens

COURTS — FEDERAL PROCEDURE — APPEALABILITY OF INTERLOCUTORY DECREES.— *City of Morgantown, W. Va. v. Royal Ins. Co., Ltd.*, ... U. S. ....., 69 S. Ct. 1067 (1949). The right of appeal is so integrated with our constitutional right of trial by jury under the Bill of Rights that Congress has seen fit to safeguard this inherent right by pertinent statutes. The case under review is illustrative of the problem involved in interpreting this type of statute; namely, the problem of attempting to regulate appeals from interlocutory and final decrees. The question involved is whether an order denying a demand for trial by jury in a federal court is appealable.

This was an action by the Royal Insurance Company, Limited, against the City of Morgantown, W. Va., for reformation of an insurance policy and for a declaration of no liability for loss by fire. The defendant filed a counterclaim to recover on the policy as written. The defendant's demand for a jury trial was stricken out by the court, thus setting the case for trial to the court without a jury. An appeal from such order was dismissed by the Court of Appeals, and the defendant brought certiorari. The Supreme Court of the United States held that the Court of Appeals was correct in dismissing the appeal and affirmed the judgment.

The late Justice Murphy, who delivered the majority opinion of the Court, reasoned that the order striking out the demand for a jury trial was interlocutory in form and substance, but this did not of itself amount to an "injunction" within the section of the code allowing an appeal from an interlocutory order or decree granting an injunction, and so was not appealable. He stated that nothing in the language of the judicial code brings it within the class of appealable decisions.

This section of the code, 44 STAT. 233 (1926), 28 U. S. C. § 227 (1946), the substance of which has been retained in 28 U. S. C. § 1292 (Supp. 1949), reads as follows:

> Where . . . an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused . . . an appeal may be taken from such interlocutory order or decree. . . .

The court drew a distinction between the principal case and that of *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440 (1935), and *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188, 63 S. Ct. 163, 87 L. Ed. 176 (1942). In each of these two latter cases an action at law was brought on an insurance policy which, of course, entitled the plaintiff to a trial by jury. The defendant asked for a cancellation of the policy because of fraud. The district court entered an order suspending the action at law, until subsequent equitable proceedings involving trial without jury were considered. The Supreme Court was called upon to construe the above quoted section of the judicial code. The Court held that the staying of an action at law by the chancellor is an interlocutory injunction and as such is appealable.

The majority opinion thus points out that in the present case the plaintiff instituted a suit in equity for the reformation of an instrument. The insured, by way of counterclaim, contested that suit and, in addition, sought recovery on the policy. The latter was a conventional action at law which, under the Constitution, entitled the defendant to a jury trial. The judge stayed the continuance of this action at law until the prior equitable proceeding could be concluded.

The decision of the majority further pointed out that the facts in the present case are precisely opposite to those in the *Enelow* case. In

the instant case there was no intervention by a court of equity in proceedings at law, but a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The *Enelow* and *Ettelson* cases presented an order that was appealable because it was a stay by a court of equity of a common-law action and, since the principal case is not such a stay, the decision leaves the *Enelow* and *Ettelson* cases untouched.

The dissent answered this contention by stating:

> In the Enelow case the Court said . . . that "it makes no difference that the two cases . . . are both pending in the same court, in view of the established distinction between 'proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity.'"

In *Liberty Oil Co. v. Condon Nat. Bank,* 260 U. S. 235, 43 S. Ct. 118, 67 L. Ed. 232 (1922), the Court held that a distinction between law and equity must be preserved as a constitutional requirement. The holding in this case is interesting insofar as the Court in the *Enelow* case apparently adhered to this distinction. The case of *Gatliff Coal Co. v. Cox,* 142 F. (2d) 876 (6th Cir. 1944), substantially upholds this distinction. The majority opinion states further that "since an interlocutory proceeding in an action at law cannot possibly be brought within the limited class of appealable interlocutory decisions . . . there is an end to the matter."

The members of the dissent again pointed to the *Enelow* case which held:

> . . . when an order or decree is made . . . requiring, or refusing to require, that an equitable defense shall first be tried, the court, exercising what is essentially an equitable jurisdiction, in effect grants or refuses an injunction. . . .

The case of *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.,* 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583 (1935), held that where an order is made requiring or refusing to require that an equitable defense shall first be tried, the court in effect grants or refuses an injunction restraining proceedings at law and such order, although interlocutory, is appealable. Accord, *New York Life Ins. Co. v. Panagiotopoulos,* 80 F. (2d) 136 (1st Cir. 1935); *Radio Corporation of America v. Raytheon Mfg. Co.,* 296 U. S. 459, 56 S. Ct. 297, 80 L. Ed. 327 (1935); *Berning v. Louisville & Nashville Railroad Co.,* 92 F. (2d) 997 (6th Cir. 1937).

The basis for overruling the *Enelow* and *Ettelson* cases, according to the view of the minority opinion, appears to be the Court's hostility to "piecemeal appeals."

Supporting the minority opinion in its apparent disagreement concerning "piecemeal appeals," the case of *Attorney General of Utah v.*

Pomeroy et. al., 93 Utah 426, 73 P. (2d) 1277 (1937), held that the important policy of the law that cases cannot be appealed piecemeal is subject to the far more important principle of avoiding injustice and hardship whenever possible.

It is interesting to note that the Supreme Court of Alabama has recognized this hardship and injustice by holding that the court may permit a limited review in respect of certain interlocutory orders and decrees in equity which are not appealable, and which are injurious to the complaining party, when to review them on appeal from a final decree does not afford adequate relief. *Rowe et. al. v. Bonnear-Jeter Hardware,* 245 Ala. 326, 16 So. (2d) 689 (1943).

It appears that the granting of an appeal in the present case would not tend to sustain appeals from every adverse ruling made during the process of a trial. Ordinary trial errors, such as admission of evidence, cannot be classified with a denial of trial by jury. Should not such orders, as in the present case, which in effect grant or refuse an injunction, be interpreted as an injunction and appealable as such under the provisions of the code? This is especially true when to review such order after a final decree is rendered will not afford adequate relief. The statute should not be restricted by its terminology, but should be construed as to the substantial effect of the order made.

Joseph M. Gaydos

CRIMINAL LAW—CONFESSIONS.—*Watts v. Indiana,* ....U. S....., 69 S. Ct. 1347 (1949). This case came before the Supreme Court of the United States on a writ of certiorari. Mr. Justice Frankfurter announced the decision of the Court in an opinion in which the late Justices Murphy and Rutledge joined. On the same day the Court decided the cases of *Turner v. Commonwealth of Pennsylvania,* ....U. S....., 69 S. Ct. 1352 (1949), and *Harris v. State of South Carolina,* ....U. S....., 69 S. Ct. 1354 (1949). These two subsequent cases involved the same type of factual situation and the opinions of the Court in these cases were based on the *Watts* case.

Watts was charged and convicted on two counts, the first of which charged murder in the first degree of one Mary Lois Bumey; the second count charged murder while attempting to rape the said Mary Lois Bumey. Appellant was convicted on the second count and sentenced to death. Appellant appealed to the Supreme Court of Indiana on the ground that a written confession introduced as evidence was admitted over the objections of his counsel. Watts contended that the undisputed evidence showed that this confession was made under the influence of fear produced by threats and intimidation which rendered the confession inadmissible.

The Supreme Court of Indiana affirmed the decision of the trial court on the ground that the defendant's contention was brought before the jury and contradicted by the witnesses for the state, and that the court would not question the validity of the evidence on appeal. In addition the Indiana court held that the fact that the defendant, before making his confession, was taken from place to place in Indianapolis and held for several days without process, would not of itself be sufficient to invalidate the confession.

In reversing the decision of the Supreme Court of Indiana, the Supreme Court of the United States followed the policy laid down in similar cases which have reached the Court in a steadily increasing number since 1936, when the Court declared, in *Brown v. Mississippi,* 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936), that it had the power to review a criminal case involving the question of illegally obtained confessions. In the *Brown* case, it appeared that since no other evidence was available against the defendants which would substantiate a conviction, the police beat the Negro defendants relentlessly until they agreed to sign a confession. The defendants were submitted to an ignominious trial lasting little longer than a day. Although a police officer who took part in the inquisition testified that the confessions were obtained only after the defendants had undergone prolonged beatings, and that, if it had been left to him, he would have done a much better job of beating the defendants, the lower court allowed the jury to convict the defendants on the basis of these forced confessions.

Prior to 1934, the Supreme Court applied the "voluntary-trustworthy" test in reviewing both state and federal court convictions involving the use of confessions as evidence. Then, in *McNabb v. United States,* 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943), the Court went still further in holding that arresting officers must use "civilized standards" of procedure in acquiring admissible evidence. The Court held that the detention was also illegal because the federal officers had failed to take the defendants immediately before the commissioner. By exercising its power under the Fourteenth Amendment, the Court has applied the same standards to state cases. The majority opinion pointed out in the *Watts* case that "although the Constitution puts protection against crime predominantly in the keeping of the states, the Fourteenth Amendment severely restricted the states in their administration of criminal justice." The Court acknowledged that it does not usually determine issues of fact in state cases, but since "issue of fact" is a "coat of many colors," the Court will review such issues as seem to that body to demand its determination.

After the Court's decision in *Mitchell v. United States,* 322 U. S. 65, 64 S. Ct. 896, 88 L. Ed. 1140 (1944), many observers were of the opinion that the Court was prepared to overrule its *McNabb* rule in the then pending case of *Upshaw v. United States,* 335 U. S. 410, 69

S. Ct. 170, 93 L. Ed. 129 (1948). A close scrutiny of the facts in the *Mitchell* and *McNabb* cases reveals that the Court did not depart in the *Mitchell* case from its policy of safeguarding the rights of individuals. In the *Mitchell* case the record showed that the defendant had promptly and spontaneously admitted his guilt within a few minutes after he had arrived at the police station, and the fact that he was held eight days illegally had no retroactive effect on his freely admitted confession.

Then, in the *Upshaw* case, the Court held that a confession is inadmissible if made during an "illegal detention" irrespective of the fact that the confession may have been extracted voluntarily. In order to determine what is an illegal detention, the Court established the "without unnecessary delay" standard, which is in conformity with, and a declaration of, the law as found in the Federal Rules of Criminal Procedure and the criminal codes of practically every state. The federal rules, FED. R. CR. P. 5, 18 U. S. C. foll. § 687 (1946), provide that an accused be brought immediately before a commissioner. It is further provided that the defendant must be informed of the complaint against him, his right to retain counsel, and his right to have a preliminary examination. The state statute, IND. ANN. STAT. § 9-704 (Burns 1933), provides that an arrested person be brought immediately before a magistrate.

The American Bar Association, the offices of district attorneys and prosecutors, the Federal Bureau of Investigation, and the many interested citizens who desire swift and adequate remedies for crimes against society were disturbed by the decisions of the Court in the *McNabb* and *Upshaw* cases. In Inbau, *Confession Dilemma in the United States Supreme Court,* 43 ILL. L. REV. 442, 447 (1948), a typical criticism is made:

> . . . the Supreme Court overlooked several fundamental and important practical considerations: 1. Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information of other criminal suspects. . . .

In the instant case, the Court answered these criticisms with a crystallizing decision which should leave little doubt of the Court's determined fight to safeguard the rights of individuals. After observing the facts in the *Brown* and *Watts* cases, it is little wonder that "this Court does not leave to local determination whether or not the confession was voluntary." Since the states and the Federal Government tend to compromise principle for the sake of expediting convictions, the Court set down the single standard to which all courts may refer in determining the validity of confessions—the arresting officers must bring a suspected criminal without unreasonable delay before a magistrate or commissioner.

Mr. Justice Jackson, in his dissent in the *Watts* case, reasoned that the majority decision would allow the police no delay whatever before

bringing an accused before a magistrate, and that the decision requires "absolute prohibition" of interrogation while the accused is in custody before arraignment. In answer to this objection, the Court stated that, regardless of what the implications may be, society "must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." The protection of the accused against any form of police pressure in the extortion of confessions, the right to a prompt hearing, the assistance of counsel, and the right to be advised of one's constitutional rights are "all characteristics of the accusatorial system and manifestations of its demands." In realizing the importance of establishing law which will safeguard the rights of individuals, the Court took cognizance of the history of criminal law which "proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating, whatever may be their effect in a particular case."

William G. Greif

CRIMINAL LAW—EJUSDEM GENERIS—DISSEMINATION OF OBSCENE MATTER.—*Alpers v. United States,* 175 F. (2d) 137 (9th Cir. 1949). Appellant was charged with the violation of certain provisions of an act entitled "Importing and Transporting Obscene Books," 62 STAT. 768 (1948), 18 U. S. C. § 1462 (Supp. 1949). Appellant admitted that he deposited phonograph records for carriage in interstate commerce and also that obscene matter was transcribed upon such records. The pertinent provisions of this Act are as follows: "Whoever shall deposit . . . with any express company . . . for carriage from one state to any other state . . . any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of indecent character. . . ." Appellant contended that it was the intention of Congress in mentioning specific classes of obscene matter to limit the application of the statute and the general words employed therein. While the Government agreed that Congress intended to limit the general words, it insists that this statute does prohibit the shipment in interstate commerce of phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language. In the interpretation of this statute the court considered the evil that the act was designed to suppress; the meaning of the terms "print" and "writing"; and the doctrine of *ejusdem generis.*

When the language of a statute is ambiguous, it may be construed with reference to the evil it was designed to suppress. However, the court in the instant case held that this rule applies only to instances which are embraced in the language employed in the statute, or implied from a fair interpretation of its context. *United States v. Chase,* 135

U. S. 255, 10 S. Ct. 756, 34 L. Ed. 117 (1890). The court in the principal case stated that since phonograph records are not embraced within the language employed, the fact that they cause the same evil the statute was intended to suppress is not controlling.

The two means which may be used in communicating obscene matter to the mind are visual and auditory representations. These may be employed with or without mechanical assistance. Prior to 1920, the statute contained the broad classification of visual representations, but as scientific discoveries increased, it became evident that all visual representations were not *ejusdem generis* with respect to the species mentioned, since the former required no mechanical contrivance to make them intelligible. To alleviate this condition Congress specifically added motion pictures to the act, thereby indicating that it did not consider the statute as it formerly existed applicable to them. Since phonograph records also require mechanical assistance, the court reasoned that Congress probably did not intend to include this means of communicating obscene matter to the mind.

The court supplemented this reasoning with an attempt to show that Congress did not intend the word "writing" to include phonograph records. The court maintained that since motion pictures are successions of photographs and since the word photograph means a light writing, Congress must not have intended the word "writing" to be used in its broadest sense or it would not have added motion pictures to the act. Because the word phonograph means sound writing, the court concluded that the term "writing" was not intended to apply to phonograph records either.

The Government contended that a phonograph record is a "print" within the broad meaning of the term. In discussing the word "print" in *United States v. Harman*, 38 Fed. 827, 829 (Kan. 1889), the court stated that in its broadest sense, "print" may be an impression of either figures, characters, or letters, but added that in its more common sense, it is used as applicable to letters. And in *Forbes Lithograph Manuf'g. Co. v. Worthington*, 25 Fed. 899 (Mass. 1886), the court stated, "the word "print" has a wide range of significance, but its ordinary meaning is to impress letters, figures, and characters, by types and ink of various forms and colors, upon paper of various kinds, or some such yielding surface." The court in the present case added that the method of production of phonograph records and its transmission of sound with the aid of a mechanical device is so radically different from the means of imparting to the senses the content of articles generally associated with the printing acts, that there is a strong presumption that Congress did not intend to include them. The court concluded that a strict construction requires a holding that phonograph records are not included in the term "print."

The court also decided that phonograph records were not included in the phrase "or other matter of indecent character" since to so include them would be to hold that the term "matter" relates to a class or species contained in the statute. The Government contended that phonograph records would only belong to the class covered by the word "print" and the court had already decided that Congress did not intend the species of print to be so broad as to include communication by auditory representations. The phrase "or other matter of indecent character" is not all inclusive because of the application of the doctrine of *ejusdem generis.*

The intent of the legislature is governing on the courts in the interpretation of all statutory enactments. *United States v. Rosenblum Truck Lines,* 315 U. S. 50, 62 S. Ct. 445, 86 L. Ed. 671 (1942). It is only in the case of statutes of doubtful meaning that the courts have a need to interpret this intent. *State v. Borah,* 51 Ariz. 318, 76 P. (2d) 757 (1938). When this happens, various aids are at the court's disposal, possibly the most helpful of which is the doctrine of *ejusdem generis.* This is a rule of strict interpretation to the effect that "where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4909 (3d ed. 1943). The rationalization of *ejusdem generis* is that the courts would not have used specific words had it not intended thereby to limit the general ones. *Rex v. Wallis,* 5 Tr. R. 375, 101 Eng. Rep. 210 (1793).

While the doctrine of *ejusdem generis* still has vitality in most jurisdictions, it was a far more important tool in the past when the legislatures were more prone to pass penal statutes prescribing punishment far out of proportion to the harm done to society. As the courts were affected by the growing humanitarianism of the Seventeenth Century, they strictly interpreted these legislative enactments, defeating the legislative intent, but bringing justice into the case before them. See Hall, *Strict or Liberal Construction of Penal Statutes,* 48 HARV. L. REV. 748 (1935). However, when the legislatures became more aware of the rights of man, much of the need for strict construction was obviated and the doctrine of *ejusdem generis* has been hedged and avoided by the courts, and in many states overthrown by the legislatures. See Hall, *supra.*

At the present time, when the rule of *ejusdem generis* is applied, it has certain limitations which aid the court in determining the legislative intent. For example, general words will be held applicable to something outside the class, if the terms preceding the general terms are themselves general, *Jones v. State,* 104 Ark. 261, 149 S. W. 56 (1912); or, if terms enumerated, although specific, are essentially diverse in

character, *United States v. Lawrence,* 26 Fed. Cas. 878, No. 15,572 (S. D. N. Y. 1875). In those instances the language of the statute furnished no criterion by which to restrict the general words. Also, if the specific words exhaust the whole class the same result follows. *United States v. Mescall,* 215 U. S. 26, 30 S. Ct. 19, 54 L. Ed. 77 (1909). This is because of another principle of construction to the effect that all words in a legislative enactment are presumed to have some meaning. It seems that some courts also consider the results of the application of *ejusdem generis* in the case before them in order to determine whether it shall be applied, for it has been held that it will not be applied if the result reached by its application would not be in accord with the object of the statute. *Gooch v. United States,* 297 U. S. 124, 56 S. Ct. 395, 80 L. Ed. 522 (1936); *Commonwealth v. Klucker,* 326 Pa. 587, 193 Atl. 28 (1937).

It seems that the tendency now is to employ the doctrine of *ejusdem generis* only when the court decides, as it did in the present case, that the legislature intended to use the words restrictively. It should not, however, follow from the fact that the legislature intended that the general words should not be used in their broadest meaning, that the courts should give only the narrowest application to those words. A reasonable application should be allowed whether a penal or remedial statute is considered. Only then can the judicature assume its true function of interpreting the legislative enactments according to the intent of the people's representatives. Restricted as it is, the doctrine of *ejusdem generis* still defeats the intent of the legislature in some cases.

It seems reasonable that more emphasis should be placed upon the consideration of the evil a statute was designed to remedy. See *Caminetti v. United States,* 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917). There is no substantial difference in the evil resulting from immoral books, which are embraced in the statute, and immoral phonograph records which are excluded from it by this court. See *People v. Jaffe,* 178 Misc. 523, 35 N. Y. S. (2d) 104 (1942). In modern society both are equally permanent and as easily communicated to the mind.

While one may not find fault with the consistency of the conclusion which this court has reached, the premise forced upon it by strict construction of penal statutes in the past would seem questionable. Since the intent of the legislature is the determining factor, and since ends must be intended before means can be devised, the courts should refrain from being too technical in interpreting the letter of the law. To the extent that they do so interpret the law, there will be a premium on inventing new devices which, though theoretically legal, are as efficient at achieving the result which the legislature attempted to prevent as those devices specifically forbidden.

Lawrence S. May, Jr.

DAMAGES—LIABILITY OF PUBLISHER—MEASURE OF DAMAGES FOR ERRONEOUS NEWSPAPER ADVERTISEMENT.—*Meridian Star v. Kay et al.*, ...Miss....., 41 So. (2d) 30 (1949). This was an action brought by Sidney Kay, as owner of a mercantile firm, to recover damages for the alleged negligence of a newspaper in allowing a price error to be published in an advertisement. The circuit court of Mississippi rendered a verdict and judgment for the plaintiff in the amount of $4000, and the newspaper appealed. The supreme court affirmed the judgment as to liability, but remanded the case on the issue of damages.

The plaintiff contracted for two advertisements, one to be published on December 15th, announcing a 25% reduction on stock prices, the other to be published on December 26th, announcing a 50% reduction on stock prices. Through the error of the publisher, the December 26th advertisement appeared in the December 15th issue. Upon discovery of the error, defendant offered to take certain measures to attempt in a feasible manner to forestall and alleviate the damage. However, this offer was refused by the plaintiff on the grounds that customer reaction to the suggestions of defendant would be unfavorable, and the plaintiff thereupon proceeded to accept the 25% loss as unavoidable. Having computed the quantum of damages through sales receipts, plaintiffs disregarded their contract rights and proceeded to bring a tort action in negligence against the defendant newspaper.

The first question that is presented is the appropriateness of the plaintiff's choice of remedy. A tort has been generally defined as a civil wrong other than a contract. *Jewett v. Ware et al,* 107 Va. 802, 60 S. E. 131 (1908). It has even been held that to constitute a tort, the act or commission must be entirely independent of contract right. *Clark v. Gates et al,* 84 Minn. 381, 87 N. W. 941 (1901). But the general rule is more properly stated in the case of *Oliver v. Perkins et al,* 92 Mich. 304, 52 N. W. 609, 612 (1892), where the court said:

> The fact that defendants were under contract relations with plaintiff . . . does not make the conduct less tortious, protect them from liability for the same conduct, or limit the remedy to an action on the contract; neither does it exclude considerations arising out of the existence of the contract or conduct under it in the same line calculated to produce the same result.

This doctrine, pertaining to the right of plaintiff to choose to proceed in either contract or tort, is perhaps most explicitly set forth in the case of *Rich v. New York Central and Hudson River Railroad Company,* 87 N. Y. 382, 390 (1882), in which the court stated:

> And yet it is conceded that a tort may grow out of, or make part of, or be coincident with a contract and that precisely the same state of facts, between the same parties, may admit of an action either *ex contractu* or *ex delicto.*

With the principal case, therefore, proceeding in tort, the trial jury had found the act of the defendant to be a negligent one. When ac-

tionable wrong has been adjudged, liability thereupon becomes fixed at least for nominal damages. Further damages must necessarily be the proximate and reasonable result of the negligent act. Proximate damages are generally held to be such as are the ordinary and natural results of the omission or commission of acts of negligence, and such as are usual and might have been reasonably expected or contemplated. *Smith v. Bolles,* 132 U. S. 125, 10 S. Ct. 39, 33 L. Ed. 279 (1889). What damages were to be reasonably expected in the present case was a factual question and therefore for the jury. The jury must attempt to establish an answer to the question: was the situation here such as to justify Kay in electing to suffer a maximum loss, and was his decision final and controlling? If the jury should find that the course followed by the plaintiff was the only one reasonably available, the defendant would be liable for the full 25% loss incurred on all sales.

The circuit court had refused the defendant's requested instructions: (1) that the advertisement did not constitute a binding obligation by the merchant to sell goods at prices stated in the advertisement, and (2) that if the merchant elected to hold the sale at prices stated in the advertisement, the publisher was not liable for damages resulting from the sale. The supreme court, upon rehearing, said such instructions were properly refused where they did not submit this same issue of the reasonableness of the merchant's election to proceed to hold the sale at the prices stated.

In considering a case of this kind, the question of the existence of a duty upon the plaintiff to mitigate his damages by reasonably available means becomes a relevant factor. The term mitigation of damages imports a reduction of the amount of recoverable damages by proof of facts which tend to show that the plaintiff's cause of action does not entitle him to as large an amount of damages as he otherwise would merit. Thus, evidence is admissible to ascertain to what extent the damages claimed are to be attributed to the acts of the plaintiff after the injury, or to his failure to exercise reasonable care to minimize his damages. *Salladay v. Dodgeville,* 85 Wis. 318, 55 N. W. 696 (1893). As a general rule there can be no recovery for losses which might have been prevented by reasonable efforts on the part of the person injured, especially where the act is not willful or intentional. *Richmond Hill Realty Co. v. East Richmond Hill Land Co. et al.,* 246 App. Div. 301, 285 N. Y. S. 424 (1936). What is reasonably required depends on the extent of the threatened injury as compared with the expense of remedying the situation, and the practical certainty of success in preventive effort. *Mobile & O. R. Co. v. Red Feather Coal Co.,* 218 Ala. 582, 119 So. 606 (1928). The test is what an ordinarily prudent man would be expected to do under like circumstances. *Montgomery Bank & Trust Co. v. Kelly,* 202 Ala. 656, 81 So. 612 (1919).

Since the quantum of damages is the point of contention in this appeal (the liability of the defendant already having been established), the offer of the publisher to take certain definite measures to alleviate the amount of damages would seem to be worthy of admittance for material consideration. It is generally held that where the party primarily liable attempts, or promises to take proper steps, to reduce or prevent damages when the injury is pending or has actually begun, such fact may be weighed in connection with the failure of plaintiff to perform the necessary act or to make the requisite effort to limit or avoid the loss. *Kaufmann v. Delafield,* 224 App. Div. 29, 229 N. Y. S. 545 (1928).

It appeared that the amount of damages in this case hinged upon the important fact that if the plaintiffs proceeded with the sale at their own election, they did so at the risk that they were adopting a course which, under all the circumstances, might be found to be unreasonable. The court believed that a new trial, with the issuance of new instructions to the jury as to what factors may be taken into account in adjudging whether Kay's injury was self-inflicted in the face of a reasonable and safe alternative or whether it was reasonably to be considered inevitable for lack of such option, would result in a satisfactory verdict both on the law and on the facts.

Charles James Perrin

DIVORCE—PROPERTY RIGHTS.—*Rice v. Rice,* ....U.S....., 69 S. Ct. 751 (1949). The conclusion reached in this case by the Supreme Court of the United States followed necessarily from the decisions heretofore handed down by the same Court. The Court upheld a declaratory judgment which declared that, with respect to property located in Connecticut, the superseded wife of the decedent, who died intestate after having obtained an *ex parte* divorce in Nevada, was the lawful widow and entitled to the inheritance of property in Connecticut.

Herbert Rice, after twenty years of married life in Connecticut with Lillian Rice, went to Nevada to obtain a divorce. He rented a room in Reno and, as soon as the law permitted, obtained a divorce. Then he sent to Connecticut for his prospective wife Hermoine, who married him in Reno two weeks after the divorce. They spent a short time in Nevada and then moved to California. Six months later Herbert died intestate. The basis on which the Connecticut court rendered its decision was that, upon the evidence presented, Herbert was found not to have acquired a domicile in Nevada and thus Connecticut was not required by the Full Faith and Credit Clause of the Constitution to recognize the validity of the divorce and subsequent remarriage.

It would be well to look at the premises upon which this decision was rendered. In *Williams v. North Carolina,* 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273 (1942), it was held that a divorce granted by a Nevada court upon a finding that one spouse was domiciled there must be respected in North Carolina, where Nevada's finding of domicile was not questioned, although the other spouse had neither appeared nor was served with process in Nevada. By this decision the *ex parte* divorce received official sanction from the highest court in the land. In a second appeal of the same case, *Williams v. North Carolina,* 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 (1945), the Supreme Court, in a lengthy opinion, held that the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is entertained, and that domicile is a jurisdictional fact, subject to independent determination in the courts of the forum where the judgment is sought to be enforced. This was the initial step. Then followed the case of *Estin v. Estin,* 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561 (1948), in which the Supreme Court upheld the right of New York to provide that a prior separate maintenance decree survives an *ex parte* divorce, provided no discrimination against foreign decrees is practiced. The result was to make the *ex parte* divorce decree divisible, giving effect to the decree insofar as it affects the marital status, and making it ineffective on the property issue of alimony.

Other decisions have restricted the right to attack collaterally foreign divorces on the ground of lack of domicile. The case of *Davis v. Davis,* 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A.L.R. 1518 (1938), held that if a spouse answered and actually participated in the adjudication of the jurisdictional question, that spouse was precluded from subsequently attacking the decree in another state on jurisdictional grounds. The restriction was further tightened in *Sherrer v. Sherrer,* 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429, 1 A. L. R. (2d) 1355 (1948), and *Coe v. Coe,* 334 U. S. 378, 68 S. Ct. 1094, 92 L. Ed. 1451, 1 A. L. R. (2d) 1376 (1948), which held that even if the jurisdictional question was not in issue in the foreign court, if a spouse personally appeared and was accorded full opportunity to contest the jurisdictional issue, the Full Faith and Credit Clause of the Constitution would bar that spouse from collaterally attacking the decree on jurisdictional grounds, unless the decree is susceptible to such attack in the state rendering the decree.

Of course, even at common law, the validity of a foreign divorce as it affected dower rights was determined by the law of the situs. The result was that a woman might find her dower barred in one state but not in another. Of course, estoppel may still prevent a claim of dower if the wife partook of the fruits of the questioned divorce. In a great number of states, dower has been abolished and in its stead the wife re-

ceives a statutory share of the realty owned by the husband during their marriage. A divorce, terminating the marriage, entirely cuts off a spouse's interest in the realty, but such a decree can not dispose of a wife's interest in real property located in a foreign jurisdiction. Neither can an order of a foreign court compel a spouse to convey land situated in another state. The general rule is that the law of the state of the situs governs the disposition upon the granting of a foreign divorce. The enunciation of these principles, and the implications of the instant case, indicate the difficulties to be expected when the recipient of a foreign divorce attempts to convey land held during his marriage.

In conveying the land situated in any state but the state of the divorce, the title would always be subject to the possible claim of the ex-wife upon the death of the conveyor. The foreign court's attempt to cut off the ex-wife's right to her statutory share in the realty would be a nullity as it was in this case. Certainly even a warranty deed would not protect the transferee, since the wife could still claim her statutory share in the realty, leaving as the only redress a claim against the estate of the deceased. Unless, of course, the ex-wife has already died, such a situation can only be averted by obtaining a divorce in the state where the property is situated, obtaining a release from the ex-wife, or having her join in the conveyance.

It has been seen that the ex-wife's share of realty in such situations can not be cut off by conveyance. Could the recipient of a foreign divorce do by will what he could not do by conveyance? The answer to this question is found in settled principles of wills. Like all other transfers of land, a will, to operate as a devise, must be valid by the laws of the state of the situs. If the law of the state prevents disinheritance of a widow, such a will would be inoperative in that state and the results would be similar to the results reached in the instant case. The probate of a will in one state has no bearing on its validity as a devise of real property in another state. *Robertson v. Bucknell*, 109 U. S. 608, 3 S. Ct. 407, 27 L. Ed. 1049 (1883). Hence, even the successful probate of a will in the state of the divorce would fail to affect the ex-wife's share in the realty.

The irony of the situation is well brought out when the possible effect of federal estate tax laws in such a situation is considered. It could be quite possible that the estate of the deceased would be required to pay tax on that portion of the estate which the first wife would receive under the laws of the state of the situs. *Thompson v. Union & Mercantile Trust Co.*, 164 Ark. 411, 262 S. W. 324 (1924).

The confusion is still greater when problems of reversionary interests and intestate succession are considered. If, in the instant case, Herbert Rice had an estate in fee tail general and there had been issue of both marriages, the court in Connecticut would have to circumvent the

present decision by accepting the issue of the second marriage, as well as the first, as heirs, because under this and previous decisions the divorce was valid with respect to severing the marital relationship and as a result, the issue of the subsequent marriage would be legitimate.

Such is the deplorable state of the law with respect to foreign divorce. Alleviation of this condition would have to come from the state legislature through uniform divorce legislation. Regardless of the desirability of such uniform legislation on divorce, the fact remains that the possibility of uniformity of forty-eight different sovereign states on this matter is scholastic idealism.

Arthur L. Beaudette

EVIDENCE—ADMISSIBILITY OF COVENANT NOT TO SUE.—*Aldridge v. Morris,* 337 Ill. App. 369, 86 N. E. (2d) 143 (1949). The Appellate Court of Illinois recently held that it is not error to admit evidence of a payment received by the plaintiff in consideration of a covenant not to sue, given by one who could be liable in tort for the injury complained of in that suit; it was also stated in the opinion that instructions to the jury, concerning the effect to be given such a covenant, are proper.

The plaintiff's deceased was riding in an automobile driven by the defendant which collided with an oil truck. The oil company paid the plaintiff $4,500 for a covenant not to sue; subsequently the plaintiff instituted this action against the defendant, the driver of the automobile in which the deceased was a passenger. In his answer to the complaint the defendant alleged, and the plaintiff admitted, the existence of the covenant given to the oil company by the plaintiff. The defendant was found not guilty, and the plaintiff thereafter appealed to the appellate court, assigning as error, among other things, the admission of the covenant as evidence. The decision of the lower court was affirmed.

Before proceeding to discuss the controversy which attends the covenant not to sue, it is necessary to recognize the distinction between such a covenant and a release given to a joint tort feasor. Theoretically, a release, when given by an injured person to one of two or more joint wrongdoers, releases all, for there is but a single cause of action and this is surrendered by the delivery of the release. See PROSSER, TORTS § 109 (1941). The distinguishing element would be then, that the covenant not to sue is not a surrender of any right but merely an agreement not to exercise that right, and the covenantor may proceed against any of the other wrongdoers. The question which is thereupon raised, as in the instant case, is whether a defendant may introduce a covenant, given by the plaintiff to a joint wrongdoer, as evidence in an

effort to mitigate the damages assessed against him. This question brings into focus two basic legal principles, (1) that a tort feasor is not entitled to contribution by a joint wrongdoer, and (2) that there can be only one satisfaction for an injury. The disagreement which has, to some extent, persisted in Illinois courts when confronted with this situation is traceable, partly, to their failure to reconcile these two principles seemingly brought into conflict; however, the inability of the courts to use explicit language in their decisions seems to have had a distinct effect in prolonging the issue.

The case of *Devaney v. Otis Elevator Co.*, 251 Ill. 28, 95 N. E. 990 (1911), has been cited as affirming the view that a wrongdoer cannot use a covenant not to sue to reduce the damages assessed against him. *Scharfenstein v. Forest City Knitting Co.*, 253 Ill. App. 190 (1929); *Onyschuk v. A. Vincent Sons Co.*, 277 Ill. App. 414 (1934). In that case, an instruction informing the jury that if they found the covenantee jointly guilty they should deduct the sum given as consideration to the plaintiff, was held to be erroneous, the court giving as its reason: "The Otis Elevator was not a party to this suit and it was improper to submit the question of its responsibility for the injury to the jury by this instruction." It was stated in passing that the defendant was not entitled to an apportionment of damages; the ruling was not, however, predicated on that theory. It is difficult to ascertain accurately the intention of the court, and unfortunately this case, with its ambiguities, has been rather frequently cited: *Onyschuk v. A. Vincent Sons Co., supra; Scharfenstein v. Forest City Knitting Co., supra; Bejnarowicz v. Bakos*, 332 Ill. App. 151, 74 N. E. (2d) 614 (1947).

The intention of the court is also vague in *Caruso v. City of Chicago*, 305 Ill. App. 571, 27 N. E. (2d) 545 (1940), and the reasoning employed as a means to the end attained fails in its purpose. The court deemed proper the introduction of the covenant as evidence; however, it declined to instruct the jury as to the proper effect to be given this instrument, stating: ". . . the city is liable for the entire amount of damages sustained by the plaintiff, and there can be no apportionment of these damages between the city and the joint tort feasor. . . ." The appellate court, in observing the amount of damages assessed against the defendant, pointed out that the jury unquestionably took cognizance of the covenant and, therefore, considered it in reaching their verdict. Thus, the court sanctioned an apportionment of damages in allowing the covenant as evidence, but at the same time decried its use as a means to reduce the damages by refusing the instruction. Similar reasoning was employed with the same results in *Onyschuk v. A. Vincent Sons Co., supra.*

The covenant not to sue was permitted in evidence in *Garvey v. Chicago R. Co.*, 339 Ill. 276, 171 N. E. 271 (1930), when a verdict was

entered against joint wrongdoers, and the plaintiff gave one tort feasor a covenant not to sue after a motion for a new trial had been entered. This case has been distinguished because of the time at which the covenant was given, although the principle involved is not affected, a two-fold recovery being possible regardless of what stage in the proceedings the agreement is effected. Several other Illinois cases substantiate the better view as perspicuously stated in the present case. *Brennan v. Electrical Installation Co.,* 120 Ill. App. 461 (1905); *Vandalia R. Co. v. J. W. Nordhaus,* 161 Ill. App. 110 (1911); *Gore v. Henrotin,* 165 Ill. App. 222 (1911); *Stoewsand v. Checker Taxi Co.,* 331 Ill. App. 192, 73 N. E. (2d) 4 (1947). This view has also received support by the majority of other jurisdictions: *Dwy v. Conn. Co.,* 89 Conn. 74, 92 Atl. 883 (1915); *Parry Mfg. Co. v. Crull,* 56 Ind. App. 77, 101 N. E. 756 (1913); *Bogdahn v. Pascagoula St. R. Co.,* 118 Miss. 668, 79 So. 844 (1918); *Adams Express Co. v. Beckwith,* 100 Ohio St. 348, 126 N. E. 300 (1919); *Ellis v. Essau,* 50 Wis. 138, 6 N. W. 518 (1880); *McWhirter v. Otis Elevator Co.,* 40 F. Supp. 11 (W. D. S. C. 1941). The opinion in *O'Neil v. National Oil Co.,* 231 Mass. 20, 120 N. E. 107, 110 (1918), contains a categorical statement of this view:

> [The covenantor's] cause of action was not extinguished by the receipt of the money. It was, however, a partial satisfaction of her claim, and she cannot receive, for the same wrong, remuneration in excess of her actual damage. It would be unjust for a plaintiff to retain money received from one of several tort feasors under a covenant not to sue him for the injury, and to recover from the other tort feasor full satisfaction for the same injury.

There can be little doubt that the courts, in general, have been reluctant in allowing an injured party to effect a double recovery; however, their tendency to cling somewhat persistently to precedent, in addition to misinterpretation and the use of vague and indecisive language, has undoubtedly contributed its full share in the extension of this disagreement. Lord Kenyon, in rendering his opinion in the well-known case of *Merryweather v. Nixan,* 8 T. R. 186, 101 Eng. Rep. 1337 (1799), probably did not intend that the "no contribution" rule would develop such a broad interpretation, for it is one thing to refuse to compel contribution among wrongdoers, and another to allow this form of apportionment to defeat the possibility of a double recovery. It is certain that the present case, by virtue of its explicit determination, lends substance to the existing Illinois authority; whether it will receive judicial recognition in that state is conjectural.

F. Richard Kramer

MONOPOLIES—UNFAIR COMPETITION.—*Standard Oil Co. of California v. United States,* ....U. S....., 69 S. Ct. 1051 (1949). This was an appeal to the Supreme Court of the United States from a decree rendered by the United States District Court for the Southern District of California, which held that the appellants were operating in violation of section 3 of the Clayton Act, 38 STAT. 731 (1914), 15 U. S. C. § 14 (1946). Applicable provisions of section 3 are:

> . . . it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

The Supreme Court held that the qualifying clause of section 3 which reads ". . . where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce," is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected and that it need not be demonstrated that competitive activity has actually diminished or probably will diminish.

The Standard Oil Company of California and its wholly owned subsidiary, Standard Stations, Inc., had entered into exclusive supply contracts, known as requirements contracts, with independent dealers in petroleum products and automobile accessories. By the terms of these contracts the dealers were prohibited from buying from competitors of Standard Oil. This case represents the latest step in a trend which at the outset required strict interpretation of the qualifying clause in conjunction with a necessity for showing the economic consequences of the contracts in question. The intermediate step in this trend did away with the necessity of showing economic results as regards tying-in clauses, while the decision in the instant case takes the same position in reference to requirements contracts.

One of the first cases decided by the Court construing section 3 was *United Shoe Machinery Corp. et al. v. United States,* 253 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708 (1922). The contract between the United Shoe Machinery Corporation and its lessees required that leased machinery could not be used on shoes or portions thereof where certain other operations had not been performed by other machines of the lessor. The lessees also agreed to purchase supplies from United Corporation and to use all of the additional machinery which might be provided. The Court said that such restrictive and tying agreements would necessarily lessen competition and tend to monopoly. In *International*

Business Machines Corp. v. United States, 298 U. S. 131, 136, 56 S. Ct. 701, 80 L. Ed. 1085 (1936), the Court by way of dicta regarded the economic consequences of the contract in the following manner:

> These facts, and others, which we do not stop to enumerate, can leave no doubt that the effect of the condition in appellant's leases "may be to substantially lessen competition," and that it tends to create monopoly, and has in fact been an important and effective step in the creation of monopoly.

Representing the intermediate step is the case of *International Salt Co. v. United States,* 332 U. S. 392, 396, 68 S. Ct. 12, 92 L. Ed. 20 (1947). This case rejected the necessity of demonstrating economic consequences when it said:

> The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious. Under the law, agreements are forbidden which "tend to create a monopoly," and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement.

The Supreme Court differentiated between a tying-in agreement which in itself suppresses competition and a requirements contract which could possibly be of economic benefit to all concerned including the general public. But the Court refused to make a differentiation in interpreting section 3 of the Clayton Act.

A decision rendered in *Pick Mfg. Co. v. General Motors Corp. et al.,* 80 F. (2d) 641 (7th Cir. 1936), recognized economic consequences in a special type of situation where warranties of automobile parts were involved. Contracts had been entered into which provided that dealers use only approved parts in making automobile repairs. The fact that competition had actually increased during the period of an exclusive purchase and use contract was considered by the court in rendering a decision for the defendants.

Consideration of economic results was rejected by the Court in the principal case when it said: "Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition. It was not left at large for determination in each case the ultimate demands of the 'public interest. . . .' " The Court then continued to state that it was not the intention of Congress when it passed the Clayton Act to require proof of economic consequences, and that in fact the Clayton Act supplements the Sherman Anti-Trust Act, 26 STAT. 112 (1890), 15 U. S. C. § 1 (1946), and was enacted with the specific purpose of doing away with the necessity for so-called economic investigation as required by the Sherman Act.

The Chief Justice and Mr. Justice Burton joined with Mr. Justice Jackson in a strong dissent wherein the trial court was criticized for not considering the economic effects of the requirements contracts and spe-

cifically stated that: "It is indispensable to the Government's case to establish that either the actual or probable effect of the accused arrangement is to substantially lessen competition or tend to create a monopoly."

In his separate dissent, Mr. Justice Douglas envisions the destruction of independent gasoline dealers as a result of this decision. He feels that in effect the Court is actually fostering monopoly because Standard Oil will possibly build its own stations, as opposed to its present arrangement with independents, thereby eventually doing away with all small operators. This would then be an effect opposite to that which the anti-trust laws seeks to achieve. It is understandable where a tying-in clause is under scrutiny that the Court should be harsh in its interpretation of the qualifying clause of section 3, but where the economic consequences are possibly beneficial to the general public it is questionable that such fact should be ignored.

Kenneth N. Obrecht

TORTS—CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.—*Heber v. Puget Sound Power & Light Company*, ...Wash....., 208 P. (2d) 886 (1949). The defendant power company maintained a transmission line, consisting of three wires, over a street and alley adjacent to the property of the decedent. Sometime during the early morning preceding the accident which gave rise to this case, one of the wires broke, as had happened on three previous occasions. Later that morning the decedent and the plaintiff, his widow, discovered the existence of the broken wire and attempted unsuccessfully to inform the proper officials of the power company. The broken wire in the meantime had ignited some straw and boards some eighty-five feet from the house, but, as the plaintiff testified, the straw "was really too damp to burn. It just smoldered." Decedent, nevertheless, attempted to put out the fire with water, and when this proved unsuccessful, attempted to remove the obviously charged wire by use of a pole six feet long. In this last attempt, the wire somehow touched the decedent, and he was electrocuted. The trial court held that the contributory negligence of the deceased was a factual issue to be determined by the jury.

Justice Robinson in the majority opinion approved the lower court's ruling in that he thought there was evidence that the plaintiff's property was endangered, and that the plaintiff had adopted a means of prevention of the danger which a trier of fact might consider reasonable under the circumstances. The case, however, was reversed on error in the instructions. Justice Simpson in the dissent asserted, on the other hand, that the deceased was guilty of contributory negligence as

a matter of law because the uncontroverted facts of the case showed a lack of care or ordinary prudence for his own safety.

In determining whether contributory negligence as a matter of law had been proved, the majority relied upon the test applied in *Scott v. Pacific Power & Light Co.*, 178 Wash. 647, 35 P. (2d) 749, 754 (1934), where it was stated:

> Upon an issue as to contributory negligence, where there is evidence and inferences to be deduced therefrom by which reasonable men may arrive at different conclusions, contributory negligence is a question for the jury; in passing upon that question, we must accept as true that view of the evidence most favorable to plaintiff.

That this is the accepted view in other jurisdictions is asserted by the majority in citing *Bricker v. City of Troy*, 315 Mo. 353, 287 S. W. 341 (1926), and *Temple Electric Light Co. v. Halliburton*, 136 S. W. 584 (Tex. Civ. App. 1911), which are obviously distinguishable, since they depended entirely upon an emergency to protect the plaintiff's home. They also cite *Leavenworth Coal Co. v. Ratchford*, 5 Kan. App. 150, 48 Pac. 927 (1897), in which the court denied contributory negligence as a matter of law. The latter case also depended, but to a lesser extent, upon an element of emergency. In that case the negligence of the defendant in the maintenance of a power line in a poor condition caused a wire to fall, thereby threatening the plaintiff's barn on which it fell. The plaintiff immediately seized a baseball bat, and attempted to knock the wire to a position of harmlessness. Instead, he was injured by the electricity. The court said that the plaintiff, even if there was damage threatened only to his property and not to any person, would not be guilty of contributory negligence unless he did not use reasonable care in preventing the injury, and this was to be decided by the jury. The exigency presented in that case permits the court to deny the necessity of answering the very question to be decided in the instant case. That question is, was the plaintiff, in his entry into a zone of obvious danger, showing such a wanton disregard of the consequences as to bar a recovery? The means adopted to prevent the injury have a bearing only when the previous question is answered in the negative. In the *Leavenworth* case, the means adopted was the only issue decided.

The Washington courts had, according to Justice Simpson's dissent, ruled upon this issue of contributory negligence as a matter of law affirmatively in *Druse v. Pacific Power & Light Co.*, 86 Wash. 519, 150 Pac. 1182 (1915), and he relied upon that decision as controlling. The facts of that case are that the plaintiff drove a hay derrick into contact with a sagging telephone wire which pulled the supporting poles together, thereby lowering a power line which then contacted the derrick. He knew some parts of the derrick were charged, but seized a supposedly harmless rope attached to the machine in an effort to free it from the contact, and was instantly electrocuted. This same court in that case

held that the plaintiff had been guilty of contributory negligence as a matter of law because he had, as in the instant case, entered the zone of danger in complete disregard of his own safety. With this precedent confronting them, it is difficult to rationalize the majority's position, which depends on distinguishable cases.

In the instant case, as in the *Druse* case, the facts are undisputed. Ordinarily, the question of contributory negligence is one to be submitted to the jury under appropriate instructions, but where the facts are uncontroverted and there is no room for reasonable difference of opinion, and where but one conclusion may fairly be drawn, the court is under a duty to determine the question as a matter of law and instruct the jury accordingly. The majority opinion assumes that there is a controversy for the jury to decide but nowhere shows any basis for this assumption.

It has been said that where there is danger and the peril is known, whoever encounters it *voluntarily* and *unnecessarily* cannot be regarded as exercising ordinary prudence, and therefore does so at his own risk. *Gosport v. Evans,* 112 Ind. 133, 13 N. E. 256 (1887). The instant case certainly falls within this rule in all respects: there is an appreciated danger in dealing with a wire charged with 67,000 volts; the plaintiff of his own volition, even though he had phoned for help, decided to move the wire; it was completely unnecessary to move the wire since only the slightest property was threatened even remotely. As was stated in *Haertel v. Pennsylvania Light & Power Co.,* 219 Pa. 640, 69 Atl. 282 (1908):

> While electric companies are bound to use the highest degree of care practicable to avoid injury to everyone who may be in lawful proximity to their wires, yet the ordinary person is held to know that danger attends contact with electric wires, and it is his duty to avoid them so far as he may. If one heedlessly brings himself in contact with such a wire, and is injured in consequence, his imprudence must be regarded as a contributing cause, and will prevent a recovery.

In view of the undisputed facts, it is difficult to see how the court could avoid finding that contributory negligence as a matter of law had been proved. While the majority beclouded the issue by speaking of the instrumentalities used in the prevention of further harm, it must not be forgotten that the primary consideration must be whether the decedent's conduct in voluntarily encountering the known danger, after due deliberation, was in itself so wanton as to constitute contributory negligence as a matter of law.

There must have been contributory negligence as a matter of law in the instant case, under the uncontroverted facts of the decedent's utter disregard for his own safety; otherwise there would be few occasions where a court could declare contributory negligence other than in cases involving the direct violation of a statute.

William T. Huston

TORTS—DEFAMATION—CONSTITUTIONALITY OF RETRACTION STATUTE.—*Werner v. Southern California Associated Newspapers,* ....Cal....., 206 P. (2d) 952 (1949). This case involved the constitutionality of a California statute, CAL. CIV. CODE § 48a (Supp. 1947). The court held this statute to be a denial of due process and equal protection of the laws as guaranteed by the Fourteenth Amendment. In substance, the statute provided that only special damages were recoverable in actions of defamation by radio, or libel by newspaper, unless a retraction of such defamatory material were requested by the plaintiff and refused by the defendant disseminator. If the retraction was made pursuant to the statute involved in this case, general damages would not be recoverable. As defined by the statute, "general damages" are those which result from a loss of reputation, from shame, mortification and hurt feelings. "Special damages" are those which the plaintiff proves he has suffered in respect to his business, trade, profession or occupation.

Erwin T. Werner, plaintiff in the case at bar, brought this action against the Southern California Associated Newspapers to recover damages for an alleged libel. The defendant association published that the plaintiff had been convicted of bribery and grand theft and that he had been sentenced to San Quentin prison. In the complaint, the plaintiff alleged: (1) the publication, (2) the falsity of said publication, and (3) actual malice. The defendant demurred to the complaint on the grounds that it was fatally defective since it did not allege a demand and refusal of a retraction of the supposed defamation as required by statute, CAL. CIV. CODE, § 48a (Supp. 1947).

The demurrer to the complaint was sustained and upon the plaintiff's refusal to amend, an order and judgment of dismissal was entered. From this decision the plaintiff appealed on the contention that said statute was a violation of the Fourteenth Amendment of the Constitution of the United States and similar articles in the California state constitution prohibiting the state from denying any person within its jurisdiction the equal protection of the laws.

In a majority of states today, it is well-settled law that any libel per se is actionable without the necessity of pleading and proving damage in fact suffered by the plaintiff. This rule was stated in an English case which aided in the establishment of the majority rule in the United States. *Thorley v. Lord Kerry,* 4 Taunt. 355, 128 Eng. Rep. 367 (1812). In its origin, libel was criminal in its nature and there was a necessity of proving malice, but today strict liability is generally imposed because of the permanent and extensive harm which is presumed to flow therefrom. Ordinarily, the publication of a retraction of a defamatory statement is merely a partial defense which does not obliterate the right of recovery of general damages but may be considered in mitigation thereof. *Webb v. Call Publishing Co.,* 173 Wis. 45,

180 N. W. 263 (1920); *Turner v. Hearst,* 115 Cal. 394, 47 Pac. 129 (1896); *Meyerle v. Pioneer Publishing Co.,* 45 N. D. 568, 178 N. W. 792 (1920). It would appear then that not only was the statute in question unconstitutional, but that the substantive rights enumerated therein were peculiar to a minority of states.

In the past, there have been several statutes, similar to the one in the instant case, which were declared unconstitutional and which formed the basis for the plaintiff's case at bar. See *Park v. The Detroit Free Press Co.,* 72 Mich. 560, 40 N. W. 731, 16 Am. St. Rep. 544 (1888); *Hanson v. Krehbiel,* 68 Kan. 670, 75 Pac. 1041, 104 Am. St. Rep. 422 (1904); *Byers v. Meridian Printing Co.,* 84 Ohio St. 408, 95 N. E. 917 (1911); *Osborn v. Leach,* 135 N. C. 628, 47 S. E. 811 (1904).

However, at least one statute similar in substance to the one in question still remains as law today. See *Allen v. Pioneer Press Co.,* 40 Minn. 117, 41 N. W. 936, 12 Am. St. Rep. 707 (1889). Accord, *Thorson v. Albert Lea Publishing Co.,* 190 Minn. 200, 251 N. W. 177 (1933). These cases deal with the Minnesota retraction statute, MINN. STAT. § 548.06 (Henderson 1945).

The *Allen* case, which is the leading case presented in support of the dissenting opinion in the case at bar, was decided upon grounds of public policy. This court held that although general damages are awarded by pecuniary compensation, their specific purpose is to vindicate the plaintiff's character. The Minnesota Supreme Court reasoned that the act was constitutional since it applied equally to all *publishers of newspapers.* The logic of this holding seems to have no firm foundation since no similar privileges and immunities are afforded persons other than newspaper publishers. The Minnesota statute would seem to be vulnerable to the charge of class legislation conflicting with the Equal Protection Clause of the Constitution.

It is interesting to note that in disposing of the issue in the *Allen* case, the court stated:

> The guarantee of a certain remedy in laws for all injuries to person, property, or character, and other analogous provisions . . . inserted in our bill of rights, the equivalents of which are found in almost every constitution in the United States, are but declaratory of general fundamental principles, founded in natural right and justice, and would be equally the law of the land if not incorporated in the constitution. These constitutional declarations of general principles are not, and from the nature of the case cannot be, so certain and definite as to form rules for judicial decisions in all cases, but up to a certain point must be treated as guides to legislative judgment, rather than as absolute limitations of their power. Hence a wide latitude must of necessity, be given to the legislature in determining both the form and the measure of the remedy for a wrong.

One cannot question the logic of the court's reasoning in the above quotation with respect to the "general principles" enumerated in the

constitutions of the states and of the United States. However, the danger appears to be in the determination of what is a general and what is a specific principle.

Behind the enactment of each of the aforementioned retraction statutes, there appears to be the old common law theory that malice is the gist of every action of defamation and that retraction removes the presumption of malice and abolishes the recovery of any damages other than those which the plaintiff specifically pleads and proves. The requirement that malice be proved at common law apparently emanated from the ecclesiastical law which was concerned with moral sin, and from the law of criminal libel where the allegation of malicious intent was required.

In an early English case, an action was brought against a defendant who said that he had heard the plaintiff had been hanged for stealing a horse, ". . . and on the evidence it appeared, that the words were spoken in grief and sorrow for the news; and Hobart [the judge] caused the plaintiff to be non-suit, for it was not maliciously [spoken]. . . ." *Crawford v. Middleton,* 1 Lev. 82, 83 Eng. Rep. 308 (1674). The pleading of malice became pure formality thereafter until the year 1825, when it was held in *Bromage v. Prosser,* 4 B. & C. 247, 257, 107 Eng. Rep. 1051 (1825), that:

> . . . in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it is never considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice.

This imposition of strict liability for the publication of libel is the prevailing view today.

The dissenting opinion in the instant case is weakened by its reliance on the public policy doctrine set forth in the *Allen* case. Even though newspapers, in their attempts to furnish the public with expeditious "spot news," are more apt to err than periodicals, they must be held liable for their mistakes on the basis of strict liability and cannot be heard to set up as their defense the First Amendment. The freedom of the press is subject to the correlative rights of the individual citizens.

As to the second point of the dissent, it is well recognized in a majority of the states, among which is California, that truth is a defense to any civil action for either libel or slander. Courts will generally decide cases on grounds other than that which requires a constitutional determination. However, this case was never tried on its merits in the lower court and the Supreme Court of California had no alternative but to decide the constitutional issue brought before it. It seems logical that the plaintiff in this instance would lose his case on the merits, but this is mere speculation. The factual background upon which Justice McComb bases his dissent regarding truth as an absolute defense is as follows: The plaintiff was convicted of bribery and grand theft