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RECENT DECISIONS

ADMINISTRATIVE LAW—HEARINGS—SEPARATION OF FUNCTIONS OF PROSECUTOR AND JUDGE UNDER THE FEDERAL ADMINISTRATIVE PROCEDURE ACT.—*Wong Yang Sung v. McGrath*,U. S....., 70 S. Ct. 445 (1950). The question involved in this case was whether the Administrative Procedure Act, 60 STAT. 237, 5 U. S. C. § 1001 *et seq.* (1946), permits an inspector of the Immigration and Naturalization Service to serve as a presiding officer at a deportation hearing. The Supreme Court held that the deportation proceedings conducted by that Service must conform with the sections invoked by the petitioner, namely, sections 5 and 11 of the Act.

The case arose upon petition by Wong Yang Sung, a native and citizen of China, for a writ of habeas corpus while in custody awaiting deportation. Wong had been arrested by immigration officials on a charge of being unlawfully in the United States through having overstayed shore leave as a member of a shipping crew. A hearing was held before an immigration inspector who recommended deportation. The acting commissioner approved this action, and the Board of Immigration Appeals affirmed it. The sole ground of the petition for the writ of habeas corpus was that the administrative hearing had not been conducted in conformity with sections 5 and 11 of the Administrative Procedure Act, which sections require a complete separation of the prosecuting and judicial functions. The Government admitted non-compliance, but asserted that the Act did not apply.

The District Court, after the habeas corpus hearing, discharged the writ and remanded the prisoner to custody, holding that deportation proceedings were exempt from the Administrative Procedure Act by virtue of the exemptions in section 5 and section 7(a); see 80 F. Supp. 235 (D. C. 1948). The Court of Appeals affirmed the District Court; see 174 F. (2d) 158 (D. C. Cir. 1949).

The administrative hearing had followed the uniform practice of the Immigration Service; see 8 CODE FED. REGS. § 150.1 *et seq.* (1949). An immigrant inspector otherwise unconnected with the case, but whose duties included investigating and prosecuting functions, acted for the purposes of the hearing as "presiding inspector," with the duty to "conduct the interrogation of the alien and witnesses and . . . cross-examine the alien's witnesses and present such evidence as . . . necessary to support the charges in the warrant of arrest"; see 8 CODE FED. REGS. § 150.6 (b) (1949). Such person was to lodge an additional charge, if appropriate, and was to proceed to hear his own accusation in like manner; see 8 CODE FED. REGS. § 150.6 (1) (1949). After reviewing the underlying purpose and the legislative history of the Administrative Procedure Act, the Court noted that standardization of practice and separation of the functions of prose-

cutor and judge were recurrent themes, the present hearing being an exemplification of the practices unanimously condemned.

That the original Bills, S. 674 and S. 675, recommended in 1941 by the majority and minority of the Attorney General's Committee, were intended to apply to the hearings of the Immigration Service cannot be doubted in view of the legislative history. A committee named by the Secretary of Labor, whose jurisdiction at the time included the Immigration and Naturalization Service, recommended that the presiding inspectors be relieved of their duties of presenting the case against aliens and be confined entirely to the duties customary for a judge. See REP. SEC. LABOR COMM. AD. PROC. 81 (1940). This study was available to the Attorney General's Committee and was considered by it in the recommendations of its final report. See REP. ATT'Y. GEN. COMM. AD. PROC., 4n. 2, 46n. 4, 261n. 4 (1941). Major Schofield, representative of the Service, appearing before the Senate Judiciary Committee in 1941, stated: "We agree with the view of the majority of the Attorney General's Committee that it is desirable to vest the power of decision in the man who heard the case and saw the witnesses. . . . We think that the hearing-commissioner system would improve our present procedures to a considerable extent without stultifying the administration of the laws." *Hearings before a Sub-committee of the Committee on the Judiciary on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess.* 571 (1941). But the Act as finally passed in 1946 differed in specific details from the plan recommended in 1941. It was with this background that three issues were thus presented to the Court in the instant case: the scope of Section 5; the effect of congressional inaction after favorable committee reports upon exemptory legislation requested by the Department; and the character of the exemption under Section 7.

Section 5 established formal requirements to be applicable in every case of adjudication "required by statute." The Government contended that there was no express requirement for a hearing in the Immigration Act, 39 STAT. 874 (1917), as amended, 8 U. S. C. § 155 (a) (1946). It consolidated its position by citations to the legislative history which showed that the original Bills provided for application of the section where adjudication was "required by law." Thus the Government contended that the substitution of "required by statute" for "required by law" indicated a legislative intent that the formal requirements of section 5 are to apply only when the adjudication is required by statute, and do not apply when the adjudication is ordered by any less requirement. In addition, the Government cites the fact that the Attorney General suggested the wording of the section be changed to "required by the Constitution or statute." *Hearings before a Subcommittee of the Committee on the Judiciary on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess.* 577 (1941). The

Court pointed out that "without such hearing there would be no constitutional authority for deportation." An antecedent deportation statute had been construed to require a hearing to bring it into harmony with the Constitution. *Yamataya v. Fisher*, 189 U. S. 86, 23 S. Ct. 611, 47 L. Ed. 721 (1903). The Court, therefore, thought that the limitation on hearings "required by statute" in Section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion pursuant to decisions of the courts.

Prior to the hearing in question, the Service made a ruling that Section 5 (c) requiring separation of functions did not apply to deportation proceedings because "the Act was designed to regulate only cases where the statute requires a hearing for the creation of a record upon which a determination is made." 7 WARRAN, FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 297 (1947). In *Eisler v. Clark*, 77 F. Supp. 610 (D. C. 1948), Judge Goldsborough stated that:

. . . Courts have read due process into the Act . . . and due process means a hearing, and therefore a hearing is an integral part of the Deportation Act; in fact, just as much as if the Act itself in words stated that a hearing should be held.

Following this decision the department asked Congress for "exempting legislation," upon which appropriate committees of both houses reported favorably, but upon which Congress took no further action before adjourning. The Government argued that Congress knew that the Service had construed the Act as not applying to deportation proceedings, and that the action it took indicated agreement with that interpretation. On the other hand, the petitioner contended that the agency admitted it was acting upon a wrong construction by seeking ratification from Congress. The Court refused to draw any inferences in favor of either construction.

Ordinarily, where Congress has not re-enacted a specific clause of a statute after administrative construction, but has merely remained silent, the inference that Congress has thereby approved such construction is not of much force. *Fleming v. Moberly Milk Products Co.*, 160 F. (2d) 259 (D. C. Cir. 1947), *cert. denied*, 331 U. S. 786, 67 S. Ct. 1304, 91 L. Ed. 1816 (1947). A stronger statement can be found in *Helvering v. Hallock*, 309 U. S. 106, 119, 60 S. Ct. 444, 84 L. Ed. 604 (1940), where it is stated that: "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities." Yet, in *United States ex rel. United States Borax Co. v. Ickes*, 98 F. (2d) 271, 281 (D. C. Cir. 1948), it was stated: "The failure of Congress to amend a statute, after administrative rulings have been made construing or applying

it, has been recognized as evidence of Congressional approval of such rulings." But there is no assurance of such recognition unless the act has been before Congress several times to be amended and no change has been made. *Corning Glass Works v. Robertson*, 65 F. (2d) 476 (D. C. Cir. 1933). It is evident in the instant case that the Court has applied the general rule of construction—that the failure of Congress to make a completed legislative act in respect to an administrative determination raises no presumption of its acquiescence in an administrative determination.

In support of the petitioner's position, the case of *Federal Trade Commission v. Bunte Brothers*, 312 U. S. 349, 352, 61 S. Ct. 580, 85 L. Ed. 881 (1941), states:

This practical construction of the Act [no power over intrastate commerce] by those entrusted with its administration is reinforced by the Commission's unsuccessful attempt in 1935 to secure from Congress an express grant.

But in the present case the Court stated:

Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations. We do not feel justified in holding that a request for and failure to get in a single session of Congress clarifying legislation on a genuinely debatable point of agency procedure admits weakness in the agency's contentions.

The inference against the agency thus arises only when the agency has construed the act against itself, or has no merit in its interpretation, and then requests authority or exemption from Congress.

The exception of Section 7(a) of the Act contended for by the Government provides:

. . . but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute.

The Court construed this section as merely qualifying, as presiding officers at hearings, the agency and one or more of the members of the body comprising the agency, and leaving untouched any others whose responsibilities and duties as hearing officers are established by other statutory provision. As to the alleged exemption the Court said:

But if hearings are to be had before employees whose responsibility and authority derives from a lesser source, they must be examiners whose independence and tenure are so guarded by the Act as to give the assurances of neutrality which Congress thought would guarantee the impartiality of the administrative process.

Mr. Justice Reed, dissenting, would not so limit the scope of Section 16 of the Immigration Act, 39 STAT. 885 (1917), 8 U. S. C. § 152 (1946), as not expressly providing for hearing officers in deportation cases. It is interesting to note that Ugo Carusi, former Commissioner

of Immigration and Naturalization, said, ". . . the deportation statutes, unlike the legislation dealing with entry, make no provision for a hearing." 7 WARRAN, FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES, 294 (1947).

The construction of Sections 5 and 7 involved in the decision of the principal case will have profound effect upon other agencies which have assumed some of their hearings to be exempt, upon reasoning analogous to that of the Commissioner of Immigration and Naturalization. The Court has forestalled the legislative fear that the exception of Section 7 may be "a loophole for avoidance of the examiner system." SEN. DOC. No. 248, 79th Cong. 2d Sess., 216 (1946). "Total Justice" spoken of by Senator McCarran in announcing his introduction of a Bill "To Provide General Rules of Practice and Procedure Before Federal Agencies," McCarran, *Total Justice and Administrative Procedure*, 24 NOTRE DAME LAWYER 149 (1949), may not have been the goal of the present Act, but the Court apparently has acquired some of the Senator's spirit, gaining the conviction that the present Act is of such a nature that, in the interests of substantial justice, it is to be construed to include rather than exclude agencies from its formal requirements.

Joseph N. Low

ADMINISTRATIVE LAW—USE OF DECLARATORY JUDGMENT ACTION WHEN THERE IS AN ADMINISTRATIVE REMEDY UNEXHAUSTED.—*American Life & Accident Ins. Co. of Kentucky v. Jones*,Ohio...., 89 N. E. (2d) 301 (1949). In the interest of speedy justice, a court, having determined by declaratory judgment that an insurance company was not obligated to pay contributions in respect to its agents under the Unemployment Compensation Act, OHIO GEN. CODE ANN. § 1345-1 (1946), may then grant the incidental relief of returning to the insurance company the contributions which it had wrongfully been compelled to pay, rather than require it to resort to the alternative administrative remedy.

The Unemployment Compensation Act excludes from the classification "employee," for whom contributions must be paid by the respective employers thereof, an individual who performs service for one or more principals who is compensated on a commission basis therefor, and who in the performance of the work is master of his own time and efforts, and whose remuneration is wholly dependent upon the amount of effort he chooses to expend. The plaintiff, an insurance company, brought this action against the defendant, the administrator of the Bureau of Unemployment Compensation in 1944, and prayed for a declaratory judgment that its agents were not em-

ployees under the Act; that it was not and is not liable for contributions therefor; and that the contributions theretofore paid to the administrator be returned to the plaintiff insurance company.

The court found said agents to lie squarely within the exclusion clause of the Act and declared that they were not employees. It was found that the instant case involved a justiciable controversy requiring speedy relief "to preserve the right of insurance company to refuse to pay contributions to the fund." The recovery of the contributions theretofore made was determined proper, since it was but incidental to the primary object of the suit, i. e., the determination of the status of the agents, and because it was a more expeditious method of effecting the return of the contributions than the administrative method would prove to be. The administrative remedy referred to provides that an employer who has paid any contributions which he deems wrongfully assessed "*shall* make application for . . . a refund" to the administrator, OHIO GEN. CODE ANN. § 1345-2(e) (Supp 1948), and that he "*shall* be promptly notified of the administrator's denial of his application . . . which shall become final unless, within thirty days . . . an appeal is taken to the common pleas court of Franklin County" OHIO GEN. CODE ANN. § 1345-4(H) Supp. 1948). (Emphasis supplied).

This is the same court in which plaintiff filed its action for a declaratory judgment. The plaintiff had exhausted the first half of the administrative remedy by making an application for a refund on several occasions, the last one being denied by the administrator approximately eleven months before this action was commenced. The plaintiff did not on this or any prior occasion take an appeal from the denial of the refund, to the court of common pleas of Franklin county as provided by statute, in order fully to exhaust the administrative remedy.

The court answered the administrator's contention that the plaintiff had "an equally serviceable and, therefore, *exclusive* procedure provided by law . . . and that, therefore, an action for a declaratory judgment does not lie" by stating that in Ohio an action for a declaratory judgment may be alternative to other remedies when the court, in the exercise of sound discretion, finds the action within the spirit of the Uniform Declaratory Judgments Act, OHIO GEN. CODE ANN. § 12102-1 (Supp. 1948). (Emphasis supplied.) Seemingly this rule that a declaratory judgment may be alternative was the keystone of the court's reasoning, for once it determined that the instant case came within the scope of the rule and that the determination of the status of the agents was the primary object of the action, the relief concerning the return of contributions paid to the administrator was deemed "incidental" and granted. The answer of the court to the above quoted contention makes no direct reply to the appropriateness

of the employment of the word "exclusive" therein, and the silence of the court concerning the issue hidden behind the use of this word is perhaps the basis for the criticism given this case, i.e., that it makes no mention whatsoever of the doctrine of exhaustion of administrative remedies. See 18 U. S. L. WEEK 1098 (1950).

The doctrine of administrative remedies is "the doctrine that, where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." *Board of Directors of St. Francis Levee Dist. v. St. Louis-San Francisco Ry. Co.*, 74 F. (2d) 183 (8th Cir. 1934). The word "exclusive" is significant when it is noted that generally, when a court determines that a remedy provided by statute for a certain situation was intended by the legislature to be exclusive, such remedy must be employed, and any attempted judicial proceeding, including a declaratory judgment action in lieu thereof, is improper, *United States Fidelity & Guaranty Co. v. Thirion et al.*, 123 N. J. L. 29, 7 A. (2d) 863 (1939), and in some cases a court attempting to invoke the same may be subject to a writ of prohibition. *Abelleira et al. v. District Court of Appeal, Third District et al.*, 17 Cal. (2d) 189, 109 P. (2d) 942 (1941); *State ex rel. Bettman v. Court of Common Pleas of Franklin County et al.*, 124 Ohio St. 269, 178 N. E. 258 (1931). This branch of the "exhaustion doctrine" dealing with exclusive remedies is quite consistently followed, BORCHARD, DECLARATORY JUDGMENTS 342 (1941) in contrast to the multifarious ramifications rendered the doctrine as a whole. See ANNUAL SURVEY OF AMERICAN LAW 201-05 (1945); *id.* 217-24 (1946); *id.* 237-38 (1947); *id.* 160-63 (1948). Since a study of the "exhaustion doctrine" in general is beyond the scope of this article and because it is adequately reviewed elsewhere, Berger, *Exhaustion of Administrative Remedies*, 48 YALE L. J. 981 (1939), only the question of the propriety of a declaratory judgment action in lieu of an unexhausted administrative remedy will be examined herein.

This question is efficaciously dissected into two specific phases: First, where there is an exclusive administrative remedy, the exhaustion doctrine is strictly applied, thereby causing exhaustion of the said remedy to be a jurisdictional prerequisite to resort to the courts. See BORCHARD, DECLARATORY JUDGMENTS 342 (1941), and cases cited therein. Secondly, where the administrative remedy is not exclusive, the courts may or may not intervene, depending upon the local adherence to the exhaustion doctrine. See, e.g., *Scripps Memorial Hospital, Inc. v. California Employment Commission*, 24 Cal. (2d) 669, 151 P. (2d) 109 (1944); *Ward v. Keenan et al.*, 3 N. J. L. 298, 70A. (2d) 77 (1949). Since the first phase evinces a rather consistent rule when the remedy is patently exclusive, it need be examined but briefly here; it is the second phase in which the pri-

mary controversy lies, for here the elements of the determination of legislative intent are involved. Where the statutory remedy is not expressly exclusive and the scope of the Declaratory Judgment Act not expressly limited, the legislative intent (as determined by the courts) of the administrative remedy on the one hand, and the Declaratory Judgments Act on the other, will largely influence the use of the "exhaustion doctrine." To illustrate: if the courts of a given state have deemed the exhaustion doctrine optional in its application and have interpreted the Declaratory Judgment Act liberally, as in the instant case, the "exhaustion doctrine" has been avoided by determining that the administrative board was without jurisdiction, *New York Post Corporation v. Kelley et al.*, 296 N. Y. 178, 71 N. E. (2d) 456 (1947); or that a question of law was involved, *Kirn v. Noyes* 262 App. Div. 581, 31 N. Y. S. (2d) 90 (1941); or that a failure to declare the empowering statute of an administrative tribunal unconstitutional would be detrimental. *Goodwin et al. v. City of Louisville et al.*, 309 Ky. 11, 215 S. W. (2d) 557 (1948). Finally, the "exhaustion doctrine" can be avoided by a failure to consider it at all, as in the instant case. On the other hand, if the "exhaustion doctrine" is recognized and the Declaratory Judgment Act construed less liberally, the action for a declaratory judgment has been refused and the party directed to return to his administrative remedy. *Adams v. Atlantic City*, 26 N. J. Misc. 259, 59 A. (2d) 825 (1948).

While the dissenting opinion in the principal case was also silent on the subject of the "exhaustion doctrine," the arguments proffered therein seemingly stress factors upon which the "exhaustion doctrine" is partially based, that is, convenience or comity. *Railroad and Warehouse Commission of Minnesota et al. v. Duluth Street Railway Company*, 273 U. S. 625, 47 S. Ct. 489, 71 L. Ed. 807 (1927). The dissenting judge in the instant case emphasized the fact that in both of the cases upon which the majority relied for the rule that a declaratory judgment action may be alternative to other remedies, *Radaszewski v. Keating et al.*, 141 Ohio St. 489, 49 N. E. (2d) 167 (1943), and *Schaefer v. First Nat. Bank of Findlay*, 134 Ohio St. 511, 18 N. E. (2d) 263 (1938), it was recognized that such an action cannot be maintained unless there is a need for speedy adjudication. The dissenting judge contends that the administrative remedy would be just as speedy and "would just as effectively determine the status of these employees, by way of res judicata for the years subsequent to 1944, as a decision in the declaratory judgments action." If the administrative remedy would offer just as speedy relief and "would just as effectively determine the status," then the best reasons behind the arguments of the dissent for employing the administrative remedy, rather than a declaratory judgment action, would seem to be the convenience and judicial orderliness resulting from the

maintenance of a sifting process through the administrative strata before engaging the courts, *United States v. Sing Tuck*, 194 U. S. 161, 24 S. Ct. 621, 48 L. Ed. 917 (1904); and these are also reasons lying at the basis of the "exhaustion doctrine" itself. Berger, *Exhaustion of Administrative Remedies*, 48 YALE L. J. 981, 983 (1939).

Appearing to mark one of the outer limits on the scope of discretion in the utilization of declaratory judgment actions in Ohio is *Price v. Dempsey et al.*, 68 Ohio App. 136, 36 N. E. (2d) 533 (1941), wherein the court states that "an action for a declaratory judgment may not be instituted and maintained in the same court in which there is a proceeding pending at the time between the same parties, involving the same subject matter." Obviously, there was no proceeding pending in the same court in the instant case since no appeal was taken, but it is submitted that the court in the instant case needlessly approached this outer boundary of judicial discretion by failing to require that the administrative remedy be exhausted.

Robert A. Stewart

BANKRUPTCY—VALIDITY OF TRUST RECEIPTS AS A SECURITY DEVICE PRIOR TO THE RECENT AMENDMENT OF SECTION 60(a).—In re *Harvey Distributing Company, Inc.*,F. Supp....., (E. D. Va. 1950). A lender's security interest in goods in the possession of a borrower by virtue of a trust receipt executed and perfected pursuant to the provisions of the UNIFORM TRUST RECEIPTS ACT, 9 UNIFORM LAWS ANN. 665 *et seq.* (1942), was held not enforceable against the borrower's trustee in bankruptcy. The Harvey Distributing Company, Inc., executed certain notes and trust receipts to the Coin Machine Acceptance Corporation, covering the phonographs in question in this proceeding, during a period from December 1, 1947 to March 18, 1948. On March 28, 1948, a statement of trust receipt financing was filed with the Secretary of the Commonwealth of Virginia in accordance with statutory provisions, VA. CODE ANN. § 6-562 (1950), UNIFORM TRUST RECEIPTS ACT § 13. On March 4, 1949, an involuntary petition in bankruptcy was filed against the Harvey Company, and on March 21, 1949, the corporation was adjudicated a bankrupt. The Coin Machine Acceptance Corporation filed a petition alleging the execution of the notes and trust receipts, the bankrupt's default in payment of the notes, that the bankrupt estate had no equity in the machines covered by the trust receipts, and asked the court to treat the petitioner as a preferred creditor to the extent of the proceeds from those machines. The court held that inasmuch as the bankrupt had possession of the machines with liberty of sale, the

entruster's security rights were not good against a buyer in the course of trade under the provision of VA. CODE ANN. § 6-558 (1950), UNIFORM TRUST RECEIPTS ACT § 9. Consequently, the transaction failed to meet the bona fide purchaser test of Section 60(a) of the Bankruptcy Act, 30 STAT. 562 (1898), as amended, 11 U. S. C. § 96 (1946), respecting the effective time of such transfers, and the prayer of the petitioner was denied.

It is under Section 60(a) of the Bankruptcy Act that problems similar to that in the principal case arise from the conflict in interest between secured creditors and the trustee in bankruptcy over alleged preferential transfers, within the four month period, by the bankrupt to such a creditor. A clear understanding of the recent amendment, Pub. L. No. 461, 81st Cong., 2d Sess. (March 18, 1950), to this provision requires a review of the historical development of the problem.

The original provision, as amended by 32 STAT. 799 (1903), stated that: "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required." In the hands of the courts, the provision soon proved itself incapable of invalidating the secret liens against which it was directed. In *Sexton v. Kessler*, 225 U. S. 90, 32 S. Ct. 657, 56 L. Ed. 995 (1912), the Supreme Court refused to set aside a delivery of securities to a creditor of the bankrupt made within four months of the filing of the petition in bankruptcy, because of a promise made by the bankrupt several years previously to hold the securities in escrow for the creditor as security for a loan. The court held that the promise to give present security gave the creditor an equitable lien on the goods so promised, and an execution of that promise within the four month period by a transfer of possession to the creditor was not a voidable preference, because the transfer related back to the time of the promise. Relying on its decision in the *Sexton* case, the Court ruled in *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 36 S. Ct. 50, 60 L. Ed. 275 (1915), that a return to the vendor of goods in the bankrupt's possession by virtue of a conditional sales contract was not a voidable preference. The Court reasoned that title to the goods was still in the vendor, that the goods were not then the bankrupt's property, and therefore a disposal or encumbrance of such goods could not work a depletion of his estate—the event at which the provision was aimed.

The courts continued to vitiate the Congress' attack on secret liens in decisions concerning transfers of realty and chattel mortgages. In *Carey v. Donohue*, 240 U. S. 430, 36 S. Ct. 386, 60 L. Ed. 726 (1916), the trustee's suit to set aside a transfer of realty, not recorded until after commencement of the four month period, was denied.

In this case, the recording requirement of Section 60(a) was held to be intended for the benefit of creditors of the bankrupt, in whose position the trustee stood. Therefore, the Court reasoned, where the applicable state law gave no priority to the creditors of a grantor of realty (*i. e.*, those whose protection was intended in Section 60(a) over the holders of an unrecorded deed), but only to a bona fide purchaser from the grantor, such a transfer could not be voided as a preference. A further disability was imposed upon the trustee in *Martin v. Commercial National Bank of Macon*, 245 U. S. 513, 38 S. Ct. 176, 62 L. Ed. 441 (1918), where it was held that before the trustee could avoid a transfer he must represent a creditor who *in fact* stood in a superior position to the challenged transfer, while it was unrecorded and within the four month period. Under applicable state law, only a creditor who secured a lien before the recording of a chattel mortgage could avoid the effect of such encumbrance, and when no such creditor appeared in the case, the trustee was held to be without remedy against a mortgagee-transferee who recorded the instrument within the four month period. This case was cited as controlling authority in a memorandum opinion two years later in *Bunch v. Maloney*, 246 U. S. 658, 38 S. Ct. 425, 62 L. Ed. 925 (1918).

The enervating effect of these decisions upon the legislative attempt to curb depletion of the bankrupt's estate by transfers resulting from secret liens necessitated the amendment of Section 60(a), and the bona fide purchaser test was inserted into the Act, 52 STAT. 869 (1938), 11 U. S. C. § 96 (1946):

... a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein . . .

In its report on S. 88 the House Committee on the Judiciary commented on this amendment, saying, H. R. REP. No. 1293, 81st Cong., 1st Sess. (1949):

In 1938, the Bankruptcy Act was amended to obviate the effect of these cases . . . But, in so doing, the authors of the amendment went further than was necessary, and it brought about results which they did not anticipate. The amendment placed the trustee in the position of an artificial potential bona fide purchaser, and, by so doing, unintentionally invalidated many types of liens acquired in good faith and for value, in normal and accepted business and financial relationships.

The case of *Corn Exchange Bank and Trust Co. et. al. v. Klauder*, 318 U. S. 434, 63 S. Ct. 679, 87 L. Ed. 884 (1943), led the way in achieving the results quoted above. In that case the petitioner bank made advances to the bankrupt on concurrently made assignments of accounts receivable, recording the transaction on the books, but failing to notify the debtors. That failure made the transaction vulnerable to a subsequent assignment under state law, hence equally vul-

nerable to the assignor's trustee in bankruptcy under the bona fide purchaser test. With a factual situation similar to that of the *Klauder* case, and following its authority, came *In re Vardaman Shoe Co.*, 52 F. Supp. 562 (E. D. Mo. 1943). The court decided that the applicable state law was that found in RESTATEMENT, CONTRACTS § 173 (1932), although the state courts had never expressly adopted that view on priority of assignments. It was held that ". . . if there are *any means* under the applicable state law by which such a hypothetical subsequent assignee can defeat the prior assignee, then the trustee defeats the prior assignee." *In re Vardaman Shoe Co.*, *supra*, at 563. (Emphasis supplied.)

The theory of the *Vardaman* case was disavowed, albeit not expressly, in *In re Rosen et al.*, 157 F. (2d) 997 (3d Cir. 1946), where an assignment of book accounts, unrecorded within the four month period, was held valid against the trustee. Again, applicable state law was the RESTATEMENT, CONTRACTS § 173 (1932), but the court reasoned that the exceptions listed therein which would give a subsequent assignee priority were occurrences *after* the transaction, while Section 60(a) required that the bona fide purchaser defeat the prior assignee by virtue of the transaction itself. This logical decision, while clarifying somewhat the position of a non-notifying assignee of book accounts, might seem to conflict with that portion of the *Klauder* case, carried to its extreme in *In re Vardaman Shoe Co.*, *supra*, holding that only so long as a bona fide purchaser is precluded is the trustee likewise precluded.

The principal case is but another example of Section 60(a)'s nullifying effect upon recognized security devices, and its result contributed to the well-grounded fears concerning the validity of such devices in bankruptcy proceedings. In H. R. REP. No. 1293, *supra*, it was stated that:

The resultant confusion has cast grave doubt upon the validity of normal business security, in all of the areas covered by trust receipts, factor liens, oil leases, cattle loans, airplane-equipment financing, chattel mortgages, assignments of accounts receivable, conditional sales agreements for resale, etc. . . .

These decisions illustrating the unintended but well-nigh inevitable results of placing the trustee in the position of a hypothetical bona fide purchaser prompted the passage of PUB. L. No. 461, 81st Cong., 2d Sess. (March 18, 1950). It amends Section 60(a) by eliminating the bona fide purchaser test, and fixes the time of transfer of personalty as of the time when it became so far perfected that no subsequent lien superior to the rights of the transferee could be obtained through legal or equitable proceedings on a simple contract. Lest the equitable lien doctrine of *Sexton v. Kessler*, *supra*, be revived by this language, it is further provided that equitable liens will not be recognized where available means of perfecting legal liens

have not been employed. Where applicable law fixes a period of time within which a transfer of personalty must be perfected by recording or delivery in order to prevent the attachment of a lien as before described, it is provided that if such perfection is completed within twenty-one days of such transfer, the transfer is deemed to have been made at the time of transfer; otherwise, the time of perfection is the time of transfer. Finally, it is provided that the trustee shall occupy the position of a lien creditor as to all property of the bankrupt, thus accomplishing a much-needed correlation of the trustee's functions with other sections of the Bankruptcy Act.

The effect of the new amendment on transactions under the UNIFORM TRUST RECEIPTS ACT, 9 UNIFORM LAWS ANN. 665 *et seq.* (1942), should be to make the entruster's security interest paramount to the rights of the borrower's trustee in bankruptcy, if the provisions of Section 8 of the Act as to filing are fulfilled. If such filing be had, only special liens arising out of contractual acts of the borrower could defeat the entruster's interest, UNIFORM TRUST RECEIPTS ACT § 11; the type of liens contemplated by the amendment are subordinate to that interest. UNIFORM TRUST RECEIPTS ACT § 8. It must be pointed out, however, that the Act specifies a thirty-day period for perfection of transfers by filing, while the amendment requires such perfection to be accomplished within twenty-one days if it is to be effective from the time of transfer. Therefore, the entruster must file the statement of trust receipt financing within twenty-one days of the transaction if his position as security holder as against the borrower's trustee in bankruptcy is to be dated from the time of the transfer.

As to the principal case, it may be asserted that because of the amendment to Section 60(a) of the Bankruptcy Act, the decision as to the validity of an entruster's security interest, obtained pursuant to the provisions of the UNIFORM TRUST RECEIPTS ACT, in bankruptcy proceedings, is no longer of any effect.

William M. Dickson

CONSTITUTIONAL LAW—DUE PROCESS AND EQUAL PROTECTION OF THE LAWS—POLITICAL ASSEMBLY AS A DISTURBANCE OF THE PEACE.—*Winkler et al. v. State*Md....., 69 A. (2d) 674 (1949). This was a criminal action brought in Maryland against appellants for violation of a policy of the Board of Parks and Recreation of the City of Baltimore against interracial tennis matches. All seven appellants were members of a political organization known as the Young Progressives of Maryland, which organization numbered among its members both colored and white persons of all religions and creeds.

The State Director of this group gave notice of the intent to hold the matches to the Superintendent of Parks who replied that permission could not be granted due to the Park Board's policy against interracial tennis matches. After a meeting by all parties concerned, requisite permits were obtained individually by those intending to play, and on July 11, 1948, those selected to test the question arrived on the scene, claimed the courts for which they had permits, and began playing in mixed groups, white and colored. Prior to the date set for the matches, leaflets advertising the action to be taken were distributed, and a number of spectators appeared. Police officers appeared, ordered the players to cease playing, and upon their refusal placed them under arrest. They were subsequently indicted for violating a "rule" of the Park Board. This indictment was subsequently dropped when state authorities learned that the board did not actually have a "rule" against such matches, but merely a "policy." Appellants were again indicted, this time under charges of riot and a conspiracy to disturb the peace. They were tried and found guilty under this indictment, which charged that "'defendants' unlawfully did conspire, combine, confederate and agree together with each other unlawfully, riotously and tumultuously to assemble and gather together to disturb the peace." The appellants were sentenced to various terms in the House of Correction and also were fined. The sentences were suspended, and they were placed on probation for two years. From the judgment of the trial court, this appeal was taken.

Judge Marbury, speaking for the majority of the court, began a consideration of the case by considering the denial by the lower court of various motions to quash the indictment and in arrest of judgment based upon substantial error. The majority stated that the error alleged by the appellants was not of such a substantial nature as to justify holding the trial court's verdict a nullity. Aside from this procedural aspect, the appellants alleged that the trial court should have ordered the State's Attorney to try them upon the first indictment returned, which indictment alleged a violation of a "rule" of the Park Board. This charge had been previously dropped by the prosecution since the board did not actually have a *rule of record*, but merely a *policy* against interracial matches. The court answered this contention by stating that it was within the discretion of the prosecution as to which of the charges the defendants should be tried upon, and that the appellants did not have a constitutional right to be tried upon the earlier charges. Also, the court held that the indictments under which appellants were tried were sufficiently clear and regular upon their face, and would permit proof of unlawful acts concurrent with, or in excess of, the lawful assertion of civil rights. The court insisted that the court of appeals could not review the evidence unless appellants could show such unfairness in the proceedings of the

trial itself as to warrant such action. In essence, the majority opinion stated that the appellants were guilty of no crime in merely holding the interracial tennis matches, but that, by attracting such attention to the matches, they created the danger of a disturbance which the state had a right to prevent in the valid exercise of its police powers. The appellants by resisting an order of the police to stop the matches and by their previous acts in publicizing the event were guilty of a conspiracy to disturb the peace, which of itself the court termed a crime under the facts as given. Secondly, the court decided that although the appellants were originally indicted for violation of a "rule" of the Board of Parks and Recreation, this did not give them the right to be tried on such a charge if the state did not think it could secure a conviction upon it. The court reasoned that since the appellants had been convicted of a conspiracy to disturb the peace in the lower court, and the evidence had been reviewed by the supreme bench of Baltimore, this court could not reopen the case for an examination in toto. Appellants had had their day in court, and under existing practice the court should not re-examine the evidence upon the grounds urged.

In a very determined dissent Judge Markell attacks the conviction on the grounds that the appellants have been convicted of a criminal offense for the assertion of their constitutional rights, namely: (1) the right of equal protection of the laws and of personal liberty under the Due Process Clause to play interracial tennis on a public park court, upon compliance with all formal requirements, in the absence of any valid segregation law, rule or regulation—or in this case any at all, and (2) the right of freedom of speech and of the press and the right of peaceable assembly, to invite attendance of others at the tennis tournament and to distribute the circulars for that purpose. The dissenting judge deplors permitting the state to base a criminal conviction upon a conspiracy to disturb the peace for the assertion of constitutional rights in a peaceful and lawful manner as a protest against the "policy" of segregation in a public place. He states that the court of appeals, by refusing to review the evidence in the case, places itself in a rather peculiar position, in view of the fact that whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon the Supreme Court of the United States to review the case in its totality, in order that the appropriate enforcement of the federal right may be assured. In concluding his rather polemic dissent, Judge Markell asserts that:

It is to be regretted that Maryland should add to the list of cases in various states (many of them involving racial matters) in which a prosecution has succeeded, against law and justice, by manipulation of procedural devices, in attaining a conviction and escaping correction in state courts.

A review of the cases involving the right of assembly in its relation to a charge of a conspiracy to disturb the peace would make it seem that the position assumed by the dissent deploring the stand of the majority may well be vindicated. Here the appellants were attempting to assert a constitutional right, and had no other means to test the policy of the Board. In the absence of a showing of the possibility of irreparable injury, an injunction against criminal prosecution will not as a general rule be granted. *Fenner v. Boykin*, 271 U. S. 240, 46 S. Ct. 492, 70 L. Ed. 927 (1926). The normal way to test such a disputed right is to exercise it and take the risk of criminal prosecution. *Beal v. Missouri Pacific R. Corp.*, 312 U. S. 45, 49, 61 S. Ct. 418, 85 L. Ed. 577 (1941). Thus they took the usual method to test the constitutionality of the Board's "rule."

It should be pointed out that the appellants were not convicted for an actual disturbance of the peace, but rather for a *conspiracy* to disturb the peace. A conspiracy has been defined as a confederation to effect an unlawful object by lawful means, or by unlawful means a lawful object, and is a misdemeanor at common law. 2 WHARTON, CRIMINAL LAW § 1602 (1932). Any willful and unjustifiable disturbance of the public peace is a crime both at common law and under the statutes. The offense may consist of disturbing a neighborhood or a number of people assembled in a public meeting, or of disturbing an individual in such a manner or to such an extent as to provoke a breach of the peace. *Commonwealth v. Collberg*, 119 Mass. 350 (1876). The question before the trial court was whether the defendants were actually guilty of a confederacy to disturb the public peace willfully and unjustifiably by their assembly, which question the court of appeals does not discuss. The constitutional issue was avoided, following the rule of construction, and the decision was based upon the propriety of the procedure as due process of law.

Freedom of assembly is a political and social right of major importance. In view of their traditional part in American life, public meetings have a valid, socially useful function as a medium of expression. In deference to state courts one should be hesitant to be unduly critical of decisions involving disturbances of the peace. Local authorities must face these problems from day to day, oftentimes with laws inadequate to meet the situations which are bound to arise. Yet, there always is the overriding consideration as to when the police power of the state collides with the rights of an individual. Practically any exercise of the police power is valid so long as it is reasonable, and the Supreme Court of the United States has ruled that acts or words which tend to cause a breach of the peace may be prohibited. *Cantwell v. Connecticut*, 310 U. S. 296, 308, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). But the state cannot combat the substantial possibility of this evil by subjecting public meetings with such fore-

seeable consequences to prior censorship. *Hague v. C. I. O.*, 307 U. S. 496, 518, 59 S. Ct. 954, 83 L. Ed. 1423 (1939). If the state is faced with the prospect of riot and disorder as a result of the exercise of these freedoms, it at least cannot arbitrarily substitute a qualified prior restraint as a means to combat the evil, since its duty is to maintain order by means of its law enforcement facilities. *Hague v. C. I. O.*, *supra*, at 516. In most of these cases the Court has balanced the interests of the individual and of the community, and it appears that the variable factors which influence the Court in determining whether the state action is arbitrary and unreasonable are: the social utility of the particular form of exercise, *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-73, 62 S. Ct. 766, 86 L. Ed. 1031 (1942); the nature and seriousness of the evil which the state is attempting to guard against, *Whitney v. California*, 274 U. S. 357, 376-78, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (concurring opinion); interest in protecting government and industrial ownership from overthrow by violence, *Prince v. Massachusetts*, 321 U. S. 158, 165, 64 S. Ct. 438, 88 L. Ed. 645 (1944); interest in protecting the welfare of children, *Schneider v. State*, 308 U. S. 147, 162, 60 S. Ct. 146, 84 L. Ed. 155 (1939); interest in keeping the community's streets clean, and the nature of the means which the state has chosen to accomplish its purpose and the resultant extent to which the freedom has been curtailed, *Cox v. New Hampshire*, 312 U. S. 569, 574-76, 61 S. Ct. 762, 85 L. Ed. 1049 (1941); *Cantwell v. Connecticut*, *supra*; *Hague v. C. I. O.*, *supra*; *Near v. Minnesota*, 283 U. S. 697, 713-17, 51 S. Ct. 625, 75 L. Ed. 1357 (1931).

The right of freedom of assembly as provided for in the First Amendment to the Constitution has been construed to be bound up in the word "Liberty" as used in the Fourteenth Amendment. *DeJonge v. Oregon*, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937). The scope of protection afforded to this right has grown considerably over the past decade, but a brief resume of the cases above may give an insight into the formation of a new concept, or the novel application of such a concept in the process of testing the availability of constitutional safeguards for the type of activities involved in the particular case.

The essence of the case under discussion lies in the fact that the State of Maryland or City of Baltimore has attempted to deny to its citizens the right to play tennis in interracial groups upon the basis of a potential danger of a disturbing of the peace because they had invited a crowd to witness the matches by distributing handbills. Under the rule of thumb of Justice Holmes as to the presence of a clear and present danger of the happening of an evil which Congress (or the state under the Fourteenth Amendment) may prevent, *Schenck v. United States*, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed.

470 (1919), it does not appear that such a potentiality was present in the instant case, for there was no disturbance of any kind until civil authorities arrived to provoke it. As stated very clearly by Justice Rutledge in *Thomas v. Collins*, 323 U. S. 516, 529, 65 S. Ct. 315, 89 L. Ed. 430 (1945):

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

Freedom of speech, of the press and of assembly are closely allied in that they are the most responsible means through which ideas and information may be disseminated. These principles have guided our steps through a drastic period of reformation in the efficient operation of a democratic society. It is submitted that procedural technicalities should not be used to nullify the hard won gains of the past years in the field of natural rights.

The appellants in the instant case continued to urge a violation of their constitutional rights. As pointed out by the dissent in the present case, the court of appeals chose to avoid the constitutional issue involved, and followed a course of procedural manipulation. When as applied in a particular case, state procedure, not in itself invalid, comes into collision with the Constitution of the United States, that procedure must yield to the Constitution. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (1819). An asserted denial of a constitutional right is to be tested by an appraisal of the totality of facts in a given case. *Betts v. Brady*, 316 U. S. 455, 462, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942). As stated by Justice Hughes in *Norris v. Alabama*, 294 U. S. 587, 590, 55 S. Ct. 579, 79 L. Ed. 1074 (1935):

When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect . . . If this requires an examination of evidence, that examination must be made. Otherwise review by this Court would fail of its purpose in safeguarding constitutional rights.

In *Davis v. Wechsler*, 263 U. S. 22, 24-25, 44 S. Ct. 13, 68 L. Ed. 143 (1923), Mr. Justice Holmes, speaking for the Court, stated:

Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice . . . The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal rights.

The court of appeals in the instant case does not go into the "separate but equal concept" as laid down in *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), wherein it was held that carriers could provide for segregation so long as the accommodations afforded passengers were separate but equal and reasonable, the general test of reasonableness being: "the established usages, customs, and traditions of the people and the promotion of their comfort and the preservation of the public peace and good order." The principal case does not state whether other accommodations were provided for Negroes; however, the court would seem to be warranted in refraining from a discussion of this question since the matches in dispute were between mixed groups, that is, both white and colored persons.

In retrospective analysis, it would seem that the present case illustrates another example of constitutional circumvention through procedural manipulation.

Edward G. Coleman

CONSTITUTIONAL LAW—SEARCH AND SEIZURE.—*United States v. Rabinowitz*,U. S....., 70 S. Ct. 430 (1950).—The United States Supreme Court in the instant case held that under the Fourth Amendment to the Constitution, which prohibits unreasonable searches, if the premises where the crime was committed and the arrest made are under the control of the person arrested, the premises are subject to search without a search warrant and such search is not "unreasonable."

Rabinowitz sold four stamps bearing forged overprints to a postal employee, sent by Government officers, who had reliable information that the respondent possessed several thousand more forged stamps. Ten days later, and fifteen days after first obtaining this information concerning the respondent, the officers procured a warrant for his arrest and arrested him in his one-room office. Over his protest they searched his entire office for an hour and a half, until they uncovered 573 forged stamps. Rabinowitz was subsequently convicted of selling the four forged stamps and of possessing the 573 others with intent to fraudulently sell them. The Court of Appeals, relying on the case of *Trupiano v. United States*, 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663 (1948), which held that search warrants must be procured when reasonably practicable, reversed the respondent's conviction. The Court of Appeals reasoned that since the officers had had time in which to procure a search warrant and had failed to do so, the search was illegal. The United States Supreme Court granted certiorari.

The Fourth Amendment provides, U. S. CONST. AMEND IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Justice Minton, speaking for the majority, disposes of the question of whether the arrest itself was valid, upon which question the validity of the search is initially dependent, by showing that even if the warrant was insufficient to authorize arrest, the officers had probable cause to believe that a felony was being committed in their presence. He further states that the right to search the place where arrest is made is well established, having stemmed from the recognized authority to search the person and also to search for other proofs of guilt within the control of the accused. Justice Minton cites *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), as authority that the search of premises where arrest was made, under control of the accused, was not "unreasonable" though made without a warrant. He further cites *Marron v. United States*, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927), which held in effect that the authority of officers to "search and seize" extended to "all parts of the premises used for the unlawful purpose."

The leading case of *Trupiano v. United States*, *supra*, is cited by Justice Minton, who contends that that case's "rule of thumb" requirement of a search warrant in all cases where procurement is practicable is not a correct test; but rather that the true test is "whether the search was reasonable." The reasonableness of the search "depends upon the facts and circumstances the total atmosphere of the case."

Mr. Justice Frankfurter, joined by Mr. Justice Jackson, very forcefully and persuasively dissents from the majority opinion. He calls attention to the fact that:

. . . the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity. Even a warrant cannot authorize it except when it is issued "upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized."

Judge Learned Hand, sitting in the Court of Appeals below, 176 F. (2d) 732, 735 (2d Cir. 1949), reasoned that to make the validity of a search:

. . . depend upon the presence of the party in the premises searched at the time of the arrest . . . would make crucial a circumstance that has no rational relevance to the purposes of the privilege.

Of the exception to the prohibition by the Fourth Amendment, Justice Frankfurter says: "Its basic roots . . . lie in necessity." This necessity, he enumerates, is first to protect the arresting officer and

to deprive the prisoner of potential means of escape, *Closson v. Morrison*, 47 N. H. 482 (1867); and secondly to avoid destruction of evidence by the prisoner. *Reifsnyder v. Lee*, 44 Iowa 101 (1876). Therefore it follows that search may be made of a prisoner's person as well as things within his immediate physical control. But, exclaims Justice Frankfurter: "What a farce it makes of the whole Fourth Amendment to say that because for many legal purposes everything in a man's house is under his control therefore his house—his rooms—may be searched."

A second exception to the prohibition arises in *Carroll v. United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), from the fact that the subject of the projected search was a vehicle capable of being quickly removed from the jurisdiction. That exception obviously does not apply to the search here made of respondent's premises. As the Court said in *Carroll v. United States*, *supra*, 267 U. S. at 156: "In cases where the securing of a warrant is reasonably practicable, it must be used. . . ."

Justice Frankfurter cites *Gouled v. United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1920), saying:

. . . these amendments [IV and VI] should receive a liberal construction, so as to prevent stealthy encroachment or "gradual depreciation" of the rights secured by them . . . by well-intentioned but mistakenly overzealous, executive officers.

There is an existing confusion of the admitted right to search the person arrested and the articles of his immediate person (as well as the visible instruments or fruits of the crime at the scene of the arrest), with the alleged right to search the place of arrest. Justice Frankfurter points out how the confusion developed through the adoption of language in *Carroll v. United States*, *supra*, 267 U. S. at 158, mentioning the legality of seizure of "whatever is found upon his person or in his control . . . which may be used to prove the offense" and language in *Weeks v. United States*, 232 U. S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652, (1913), referring to the right "to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime." Justice Frankfurter sums up the errors by saying: "the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it." He warns that to expand the limits of search without warrant beyond the person and his physical extension "is to subvert the purpose of the Fourth Amendment by making exception displace principle," to which displacement no line of rational limitation can be drawn.

The test set forth by Justice Frankfurter for judging the validity of searches and seizures is "whether conduct is consonant with the main aim of the Fourth Amendment," which is directed "against in-

vasion of the right of privacy as to one's effects and papers without regard to the result of such invasion." This test is crystallized by Frankfurter into the requirement that there must be a warrant for search, barring only "inherent limitations" upon that requirement when there is good excuse for not getting one, *i.e.*, when searching the person and those things which he immediately controls, or when searching moveable vehicles.

Therefore, the presence or absence of ample opportunity for getting a search warrant becomes very important. In the instant case the Government had fifteen days in which to procure a search warrant, and such an abuse "is precisely what the Fourth Amendment was directed against—that some magistrate and not the police officer should determine . . . who shall be rummaging around in my room." Frankfurter continues:

The justification for intrusion into a man's privacy was to be determined by a magistrate uninfluenced by what may turn out to be a successful search for papers, the desire to search for which might be the very reason for the Fourth Amendment's prohibition. The framers did not regard judicial authorization as a formal requirement for a piece of paper. They deemed a man's belongings part of his personality and his life.

The final *coup de grace* is administered to the holding of the majority by Justice Frankfurter's concluding sentence:

Especially ought the Court not re-enforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors.

Justice Black, in a separate dissenting opinion, based his reasoning upon the principle that the rule of the *Trupiano* case was an evidentiary policy properly laid down by the Supreme Court in its supervisory capacity over the federal courts, which policy should be adhered to "at least long enough to see how it works."

The reaction to this case, both adverse and otherwise, has already been strong. What will be the ultimate effect of such an interpretation of a fundamental constitutional safeguard, if indeed it survives the already rising opposition, is at once sobering and alarming.

James F. O'Rieley

CONSTITUTIONAL LAW—STATUTE PROHIBITING RELIGIOUS ASSEMBLAGE WITHOUT DISCRETIONARY PERMIT.—*People v. Kunz*,N. Y....., 90 N. E. (2d) 455 (1949). The defendant, a clergyman, had been convicted of unlawfully conducting a religious meeting without a permit in violation of sections 435-7.0 of the city's administrative code, which makes its unlawful for any person to collect a crowd, "for

public worship or exhortation, or to ridicule or denounce any form of religious belief . . . or to preach or expound atheism or agnosticism . . . in any street." A clergyman may, however, preach or expound his cause, "in any public place or places specified in a permit therefor which *may* be granted and issued by the police commissioner." (Emphasis supplied.) Kunz received a public worship permit in 1946. After many complaints that he had "ridiculed and denounced religion," the police commissioner revoked the permit, and denied annual permits for 1947 and 1948. Subsequently Kunz was arrested for conducting a religious meeting without the necessary permit. He maintained that the statute was unconstitutional on its face as an abridgement of the freedoms of religion and speech guaranteed by the Federal and state constitutions. He was convicted and this conviction was affirmed by the Court of Appeals of New York, with Mr. Justice Desmond delivering the majority opinion.

Despite this conclusion of the New York court, numerous decisions by the Supreme Court of the United States have reiterated the proposition that the exercise of the rights of religion, of speech, and of assemblage cannot be wholly precluded in public areas such as parks and streets by sweeping general restrictions, and cannot be subjected to the prerequisite of permits, the granting of which is not regulated by such definite rules as are necessary to safeguard the exercise of these rights under reasonable conditions. *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1938); *Schneider v. State*, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939); *Jamison v. State of Texas*, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869 (1942); *Marsh v. State of Alabama*, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1945); *Tucker v. State of Texas*, 326 U. S. 517, 66 S. Ct. 274, 90 L. Ed. 274 (1945); *Saia v. People of State of New York*, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1947). See *Commonwealth v. Gilfedder*, 321 Mass. 335, 73 N. E. (2d) 241 (1947), for citations to other pertinent cases.

The freedoms of speech, press, religion and assembly, which are secured by the First Amendment against abridgement by the United States, are mirrored among the fundamental personal rights and liberties secured to all persons by the Fourteenth Amendment against abridgement by a state. *Lovell v. Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1937); *Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1939). In the realm of religion and politics, acute differences arise. In both fields the tenets of one man may seem to be the rankest error to his neighbor. However, it is only by free debate and free exchange of thought that our American Government remains responsive to the will of the people. *De Jonge v. Oregon*, 299 U. S. 353, 57 S. Ct. 225, 81 L. Ed. 278 (1937). A

community may not suppress the dissemination of views because they are "unpopular, annoying, or distasteful." If such a device were sanctioned, the door would be opened for the suppression of any faith which a minority cherishes, but which at the time is not in esteem of the majority. This would completely repudiate the fundamental law as stated in the Bill of Rights. *Murdock v. Pennsylvania*, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1628 (1943). Therefore, one function of free speech under our system is to invite dispute. Though this freedom is not absolute, *Chaplinsky v. New Hampshire*, 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), it may not be infringed on slender grounds, and is susceptible of restriction only to prevent grave dangers to interests which the state may lawfully protect. *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).

Freedom of speech is correlated with freedom of assembly. In a previous decision, *People v. Smith*, 263 N. Y. 257, 188 N. E. 745 (1934), the same New York Court of Appeals stated that the legislature "might forbid meetings and speaking in the streets entirely." It also limits the use "to certain purposes." This decision is not consonant with those of the Supreme Court today, for as stated in *Hague v. C. I. O.*, *supra*, 307 U. S. at 515:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

Even though the use of streets and parks may be regulated in the interest of all in conformity with "peace and good order," it must not be denied or abridged in the guise of regulation. *Cantwell v. State of Connecticut*, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

A permit process is an entirely permissible procedure if it is established so that it may be reasonably administered without discrimination. *People v. Nahman*, 298 N. Y. 95, 81 N. E. (2d) 36 (1948); *People v. Hass*, 299 N. Y. 190, 86 N. E. (2d) 169 (1949). However, the court stated in the *Nahman* case, *supra*, 81 N. E. (2d) at 37:

No power to suppress the publication of facts or opinions is thereby conferred and the sole standard of official action thereby countenanced is the promotion of the beauty and utility of the public parks of the city . . . an objective which undoubtedly goes far to secure the safety, comfort and convenience of a population of more than eight million people.

The regulation is only a reasonable measure of control affecting liberties in an allowable degree. See *Cox v. New Hampshire*, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049 (1941). In the instant case re-

ligious assembly is conditioned upon a permit, the grant of which rests solely in the discretion of a police commissioner. This contemplates an arbitrary standard of permission and is a forbidden burden upon the exercise of liberty protected by the Constitution.

In *Saia v. People of State of New York*, *supra*, a similar statute (permission had to be obtained from the chief of police to use a loud speaker), was declared unconstitutional, for there were "no standards prescribed for the exercise of his discretion." The Supreme Court held in *Hague v. C. I. O.*, *supra*, (a license was required for public assemblage, administered by a local official who could refuse a permit if in his opinion the refusal would prevent "riots, disturbances or disorderly assemblage") that the ordinance was void on its face since it might be made "the instrument of arbitrary suppression of free expression of views of national affairs." This Court in another case concluded that the dissemination of ideas depending upon approval by an official (the mayor issuing a permit if he "deems it proper or advisable") was unconstitutional for it was "administrative censorship in an extreme form." *Largent v. State of Texas*, 318 U. S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (1942). Neither a state nor a municipality can absolutely prohibit the distribution of pamphlets containing religious ideas on its streets, or make that right dependent on a tax or permit which is issued by an official who can deny it at will. *Marsh v. State of Alabama*, *supra*. In *Murdock v. Pennsylvania*, *supra*, the same Court said that a municipal ordinance which requires religious colporteurs to pay a license tax, "as a condition to the pursuit of their activities," is invalid under the Federal Constitution. The Supreme Judicial Court of Massachusetts followed the conclusions reached by the Supreme Court in *Commonwealth v. Gilfedder*, *supra*, when it declared that an ordinance forbidding the making of public addresses in any of the city's public grounds without a permit from the mayor was unconstitutional as denying freedom of speech, of the press and of assembly. This repudiated an earlier decision by this court limiting the use of public streets. *Commonwealth v. Davis*, 162 Mass. 510, 39 N. E. 113 (1865).

Thus the freedoms of speech, press and assembly guaranteed by our Constitution embrace the liberty to discuss openly all matters of national concern without previous restraint. *Stromberg v. California*, 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931); *Schneider v. State*, *supra*; *Lovell v. Griffin*, *supra*. This freedom of previous restraint was described by Blackstone in a striking parallel respecting freedom of the press when he said in 4 BL. COMM. *152:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the

freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.

It seems plain that in respect to general principles no distinction can be drawn between the right of the press and the right of speech in connection with freedom from previous restraint. This limitation is inconsistent with the reason for the privilege, as a privilege so limited would be of only nominal value for the purposes for which it was established. *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931).

The New York Court of Appeals applied the conclusion reached by the Supreme Court in *Kovacs v. Cooper*, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513 (1949), in holding the ordinance in the principal case constitutional. However, the situation here would not seem to be compatible with the facts of that case, for there an ordinance barred sound trucks from broadcasting in a "loud and raucous manner" in the streets. The permit was merely the exercise of the power granted to the city by New Jersey, "to prevent disturbing noises," N. J. STAT. ANN. § 40-481 (8) (1937), nuisances within the power of the municipality to regulate. Prohibition of such conduct would not abridge the constitutional liberty, for activity of this nature bears no immediate relationship to the freedom to speak, write, print or distribute information in pamphlets. Neither is the *Kovacs* case comparable to the *Sala* case, where the use of a loud speaker was placed in the uncontrolled discretion of the chief of police. On the other hand the latter decision, which stated that "a more effective restraint is difficult to imagine," is applicable under the present circumstances.

Our civil liberties necessarily imply the existence of an organized society to maintain public order, for without this, liberty itself would be stifled by unrestrained abuses. Therefore all conduct remains subject to regulation for the protection of society. *Davis v. Beacon*, 133 U. S. 333, 10 S. Ct. 299, 33 L. Ed. 637 (1880). However, this does not include the right to prohibit assemblages in the streets in order to lessen the possibility of disorder. Breaches of the peace can be enforced through appropriate criminal action. See *People v. Galpern*, 259 N. Y. 279, 181 N. E. 572 (1932).

The words delivered by the Court in *Cantwell v. State of Connecticut*, *supra*, 310 U. S. at 310, explain the importance of protecting our inalienable rights:

The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish.

We should not retreat from the firm positions which we have taken in the past. It is our tradition to permit the widest space for discussion, and the narrowest range for restriction, especially when that liberty is exercised with peaceable assembly.

James J. Haranzo

CRIMINAL LAW—DOUBLE JEOPARDY.—*State v. DiGiosia*, 3 N. J. 413, 70 A. (2d) 756 (1950). Under the principle of *autrefois acquit*, an acquittal of a crime charged in a previous prosecution will prevent further prosecution for the same offense.

The state indicted the defendant for the crime of carnal abuse alleged to have been committed on November 15, 1948, upon a girl under sixteen years of age. At the trial, the prosecution introduced evidence not only of the crime charged in the indictment, but proof of another similar crime alleged to have been committed on the same child. The accused was tried without objection for both of the alleged offenses under the indictment charging but one. The jury was instructed by the court that in an indictment for carnal abuse the averment of the time of the commission of the act is formal and not of the essence of the offense, and that if they believed beyond a reasonable doubt that the accused committed the crime charged, or a similar crime on the same child, not barred by the statute of limitations, they should return a verdict of guilty. The jury acquitted the defendant. Subsequently the state indicted the defendant for the second crime not specifically alleged in the first indictment, but which had been submitted to the jury in the first trial. The defendant was found guilty on this second indictment. The appellate court affirmed the verdict. On appeal to the Supreme Court of New Jersey the verdict was reversed, the court holding that:

In such circumstances, there is former jeopardy, for the second prosecution is for an offense of which the accused had in fact been acquitted. The contrary view would impair the substance of the principle of double jeopardy.

The court, in arriving at this conclusion, premised its argument on the proposition that the evidence necessary to obtain and support a conviction under the second indictment had been sufficient to procure a conviction on the first one, and therefore to prosecute on the second indictment would in effect place the defendant in jeopardy twice for the same offense. In determining the validity of this conclusion, the manner in which the court regarded the principles of double jeopardy should be noted. The court stated:

Immunity from double jeopardy was one of the cherished basic liberties of the ancient common law comprised in this guaranty of the

Great Charter. The principle was secured by the successive constitutions of New Jersey.

Proceeding in its argument, the court, in sustaining the well established principle of former jeopardy, emphasized the necessity that the offense charged must be identical both in law and in fact with the former offenses for which there was an acquittal in order to sustain the plea of *autrefois acquit*.

The prosecution before the supreme court in the instant case urged, of course, that the defendant had not been placed in double jeopardy. It argued that the evidence admitted at the first trial of a similar offense other than that specifically stated in the indictment was not submitted for the purpose of convicting the defendant of the offense, not specifically stated in the indictment, but for the purpose of corroborating the testimony in order to prove the principal crime charged. The state maintains that it introduced this evidence under an exception to the general rule that evidence of other crimes may not be introduced as relevant to an indictment of a particular crime. The exception allows introduction of evidence of similar crimes with the same person in cases of statutory rape to corroborate the testimony of the accusing victim and to show an "amorous inclination and mutual disposition at the time of the offense charged." In one of the leading cases, *People v. Thompson*, 212 N. Y. 249, 106 N. E. 78 (1914), the court stated:

The preponderance of judicial opinion now is that acts subsequent to the act charged in the indictment (as well as those prior to it) reasonably indicating a continuity of the lascivious disposition, are relevant, subject, however, to the rule that when the admissibility of evidence depends upon collateral facts, the regular course is for the trial judge to pass upon the fact in the first instance, and then, if he admits the evidence, to instruct the jury as to its purpose and effect, and to exclude it if they should be of a different opinion on the preliminary matter.

Other jurisdictions upholding this general principle are: *People v. Koller*, 142 Cal. 621, 76 Pac. 500 (1904); *Talley v. State*,Fla....., 36 So. (2d) 201 (1948); *People v. Gray*, 251 Ill. 431, 96 N. E. 268 (1911); *State v. Cotton*,Iowa....., 33 N. W. (2d) 880 (1948); *State v. More*, 115 Iowa 178, 88 N. W. 322 (1901); *Keene v. Commonwealth*, 307 Ky. 308, 210 S. W. (2d) 926 (1948); *Thayer v. Thayer*, 101 Mass. 111 (1869); *Phillips v. State*, 85 Okla. Crim. 81, 185 P. (2d) 239 (1947); *Commonwealth v. Kline*, 361 Pa. 434, 65 A. (2d) 348 (1949); *Taft v. Taft*, 80 Vt. 256, 67 Atl. 703 (1907).

The Supreme Court of New Jersey, in ruling on the prosecution's case emphasized that here the evidence of the prior sexual acts had not been received for the limited purpose of corroborating the testimony as to the offense specifically charged in the indictment. The court reasoned that as the jury had been instructed in the first trial

that the time of the commission of the offense was purely formal, and not of the essence, and if it were found that the offense or any similar offense was committed within the period fixed by the statute of limitations, it was their duty to return a verdict of guilty. This principle was set forth in the case of *State v. Yanetti*, 101 N. J. L. 85, 127 Atl. 183 (1925).

The state in the first trial should have elected to restrict the proof to the single crime charged in the indictment. When the evidence of a similar crime was submitted the state should have requested the court to charge the jury that this evidence was introduced only for the limited purpose of corroborating testimony. If the court had so charged, the defendant in the second trial could not have interposed the plea of former jeopardy. In the present controversy the state did not make the election, nor did they request the proper charge to be given to the jury. As the accused on the first trial was in jeopardy as to both alleged offenses, to prosecute him further for either offense after his acquittal would undoubtedly impair the substantive law of former jeopardy. *State v. Horton*, 132 Conn. 276, 43 A. (2d) 744 (1945); *State v. Healy*, 136 Minn. 264, 161 N. W. 590 (1917).

It is submitted that the decision of the Supreme Court of New Jersey in the instant case is an exceptionally clear cut and valid decision in spite of a possible miscarriage of justice by a jury in acquitting the defendant in the first instance. The possibility of a miscarriage of justice is outweighed by the greater benefit derived from the personal security afforded by freedom from double jeopardy. The reasoning of the court in the light of our heritage and legal system is commendable.

Robert C. Enburg

CRIMINAL LAW—PROCEDURE—WHETHER GOVERNMENT EMPLOYEES ARE QUALIFIED TO SERVE ON JURIES IN CASES INVOLVING COMMUNISTS—*Dennis v. United States*,U. S....., 70 S. Ct. 519 (1950). Federal Government employees are not disqualified by reason of their employment from serving on a jury trying a Communist for contempt of Congress. The fact that the defendant is a Communist does not warrant an exception to the rule of *United States v. Wood*, 299 U. S. 123, 57 S. Ct. 177, 81 L. Ed. 78 (1936), and *Frazier v. United States*, 335 U. S. 497, 69 S. Ct. 201, 93 L. Ed. 175 (1948).

Petitioner voluntarily appeared before the House Committee on Un-American Activities which had under consideration two bills to outlaw the Communist party. At that time the petitioner was General Secretary of the Communist Party of the United States. At this

voluntary appearance, petitioner refused to answer questions as to his name, date and place of his birth. The chairman of the committee then directed that a subpoena be served upon the petitioner requiring him to appear before the committee. On that date the petitioner did not appear in accordance with the subpoena, but instead sent a representative. Whereupon, for his failure to appear personally before the committee, the petitioner was subsequently indicted for contempt of Congress.

When the case was called for trial, petitioner made a motion for a change of venue upon the ground that he could not obtain a fair and impartial trial in the District of Columbia. In his affidavit supporting the motion, he based his contention mainly on the ground that Government employees, who comprise a large part of the District of Columbia's population, are subject to the Loyalty Order, Exec. Order No. 9835, 12 FED. REG. 1935 (1947), which provides standards for their discharge upon reasonable grounds for belief that they are disloyal to the Government of the United States. He argued that Government employees would be afraid to risk the charge of disloyalty or possible termination of employment which would allegedly flow from a verdict of acquittal.

Upon being questioned by the attorney for the petitioner, each member of the jury panel indicated that he was employed by the Government. Petitioner then challenged for cause all Government employees. The court denied the challenge. Having exhausted all his peremptory challenges against Government employees, seven of the twelve finally selected were Government employees. Each of these seven expressed belief that he could render a fair and impartial verdict.

The Supreme Court of the United States granted certiorari, limiting the question to whether the petitioner was entitled to a new trial because his challenge to the Government employees for cause was not sustained.

The problem of implied bias, caused by the presence of Government employees on juries trying a case to which the Government is a party is not a new one. It existed at common law. From the early commentators and decided cases it is found that there was no settled rule as to the absolute disqualification of Crown servants as jurors. STAUNFORD, *PLEAS OF THE CROWN* 162 (1557); 2 HAWKINS, *PLEAS OF THE CROWN*, c 43, 32, 33 (1721), as quoted in 27 J. CRIM. L. 914. See also 5 *Bac. Abr. Juries* 355. An early case in point is the *King v. Edmonds*, 4 B. and Ald. 471, 106 Eng. Rep. 1009 (1821).

Regardless of how unsettled this practice of disqualification or qualification of Crown servants may have been in England, there is some indication of a definite policy in this country. The Sixth

Amendment specifies that an accused shall be entitled to an "impartial" jury. It states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

Since the Amendment is applicable to trials in the District of Columbia, *Callan v. Wilson*, 127 U. S. 549, 8 S. Ct. 1301, 32 L. Ed. 223 (1888), and to trials in all federal courts, *Betts v. Brady*, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), the petitioner in the principal case could avail himself of it. The important question then is whether this constitutional guarantee removes the conflict which existed at common law as to Crown servants serving on juries trying a case to which the Government is a party or whether the question still is an open one.

In order to determine this it would be well to inquire as to what constitutes an "impartial" jury. "Impartial," as applied to a jury, means not favoring a party or an individual because of the emotions of the human mind, heart or affections. It means that, to be impartial, the party, his cause or the issue in his cause, should not, must not, be prejudged. *Randle v. State*, 34 Tex. Crim. 43, 28 S. W. 953 (1894). In order for there to be an impartial jury within the provisions of the Constitution, it is essential that every jurymen be wholly free from suspicion of bias. *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1 (1893). And to be an impartial juror, as Lord Coke said, "he [the juror] must be indifferent as he stands unsworn." *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244 (1879), quoting 3 Co. Litt. *460.

Because this "impartial" jury guarantee did not exist at the common law, *Patton et al. v. United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930), it is little wonder that there was a divergent view as to the disqualification of Crown servants as jurors in criminal cases. There is no available evidence indicating whether or not Government servants could serve as jurors in a criminal case in the Colonies at the time the Sixth Amendment was adopted. *United States v. Wood, supra*. So, therefore, an interpretation of this Amendment in the light of the practice in the Colonies as to Government employees serving as jurors would not indicate whether the question is settled in this country either.

The problem of the presence of Government employees on District of Columbia juries was first presented to the Supreme Court of the United States in *Crawford v. United States*, 212 U. S. 183, 29 S. Ct. 260, 53 L. Ed. 465 (1908). In that case the petitioner was indicted for conspiracy to defraud the United States and was convicted of the same. He appealed from the judgment entered upon the verdict of

guilty to the Court of Appeals, on the ground that the court erred in not disqualifying a juror by reason of his relation with the Government as a postal clerk in a subpostal station. The conviction was affirmed, but upon application by the petitioner the Supreme Court granted certiorari. The Court held that the statute prescribing the eligibility of jurors in the District of Columbia, D. C. CODE § 11-1416 (1940), did not control the subject. The Court turned to the common law in force in Maryland when the District was formed, and said that since a servant was subject to challenge for cause at common law where the master was a party to the trial, by analogy the rule should apply to Governmental employees.

However, in 1935, Congress, prompted by the scarcity of qualified jurors which resulted from the *Crawford* decision, passed a statute redefining the eligibility for jury service in the District of Columbia. After exempting certain classes, the act provided:

All other persons, otherwise qualified according to law whether employed in the service of the government of the United States or of the District of Columbia . . . shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service. . . . [D. C. CODE § 11-1420 (1940).]

Immediately the constitutionality of this act was questioned. *Wood v. United States, supra*. There the respondent was convicted of petit larceny in the Police Court of the District and was imprisoned. After exhausting the peremptory challenges, there remained as jurors, despite a challenge for cause, a recipient of a Civil War pension and two clerks employed by the Government. The conviction was affirmed on appeal and the Supreme Court granted certiorari. Thereupon, the Court carefully emphasized that the act left the accused person free to show the existence of pretrial bias, but Government employees are not disqualified as a matter of law in a case to which the Government is a party. The Court felt that "in the light of English precedents and in the absence of any satisfactory showing of a different practice in the Colonies," they were unable to follow the *Crawford* decision. Chief Justice Hughes, delivering the opinion of the Court, said that even if such a disqualification existed at common law, Congress had the power to remove it. The act was held constitutional.

In 1948 in *Frazier v. United States, supra*, the ruling of the *Wood* case was affirmed. There the petitioner was convicted of violating the Harrison Narcotics Act, 53 STAT. 271 (1939), 26 U. S. C. § 2553 (1946), as amended, 58 STAT. 721 (1944), 26 U. S. C. § 2553 (1946), by a jury composed entirely of employees of the Federal Government. In fact, one juror, and the wife of another were employed in the office of the Secretary of the Treasury, who is charged by law with the responsibility of administering and enforcing the federal narcotics statutes, 53 STAT. 283 (1939), 26 U. S. C. § 2606

(1946). Mr. Justice Rutledge, in delivering the opinion of the Court, reiterated what was said in the *Wood* case.

In many states the courts, without discussing their constitutional requirement for an impartial jury, have held that officers and employees of the state government and its subdivisions are not disqualified by reason of their positions from serving as jurors in criminal cases. *Pate v. State*, 158 Ala. 1, 48 So. 388 (1909) (Deputy Sheriff); *Jackson v. State*, 74 Ala. 26 (1883) (Coroner); *Corley v. State*, 162 Ark. 178, 257 S. W. 750 (1924) (Mayor); *O'Connor v. State*, 9 Fla. 215 (1859) (Coroner); *State v. Adams*, 20 Iowa 486 (1866) (County Supervisor); *Spittorff v. State*, 108 Ind. 171, 8 N. E. 911 (1886) (Bailiff); *State v. McDonald*, 59 Kan. 241, 52 Pac. 453 (1898) (School District Officer); *State v. Petit*, 119 La. 1013, 44 So. 848 (1907) (Deputy Sheriff); *State v. Carter*, 106 La. 407, 30 So. 895 (1901) (Constable); *State v. Wright*, 53 Me. 328 (1865) (Postmaster); *Fellow's Case*, 5 Me. 333 (1828) (Constable); *People v. Lange*, 90 Mich. 454, 51 N. W. 534 (1892) (Justice of the Peace); *Glassinger v. State*, 24 Ohio St. 206 (1873) (Justice of the Peace); *State v. Cosgrove*, 16 R. I. 411, 16 Atl. 900 (1889) (Constable); *Mingo v. State*, 61 Tex. Crim. 14, 133 S. W. 882 (1911) (Deputy Sheriff); *Thompson v. Commonwealth*, 88 Va. 45, 135 S. E. 304 (1891) (City Treasurer and Councilman); *State v. Galbraith*, 150 Wash. 664, 274 Pac. 797 (1929) (Member of the State Senate).

As is to be expected, if the state officer has some special interest in the case, he is disqualified from jury service. *Evans v. State*, 13 Ga. App. 700, 79 S. E. 916 (1913) (Justice of the Peace who issued warrant for the defendant); *Gaff v. State*, 155 Ind. 277, 58 N. E. 74 (1900) (Deputy Sheriff who collected fees dependent on convictions); *State v. Galubski*,Mo. App...., 45 S. W. (2d) 873 (1932) (A Deputy Sheriff whose superior officer and co-deputies were witnesses at the trial.)

Some states exempt public employees from jury service. *Jackson v. State*, 74 Ala. 26 (1883) (Coroner); *State v. Forbes*, 111 La. 473, 35 So. 710 (1903) (Deputy Sheriff); *State v. Barker*, 68 N. J. L. 19, 52 Atl. 284 (1902) (National Guardsman); *State v. Cosgrove*, 16 R. I. 411, 16 Atl. 900 (1889) (Constable); *State v. Lewis*, 31 Wash. 75, 71 Pac. 778 (1903) (Justice of the Peace). But such exemption is held not to be a disqualification. It is a personal privilege which can be waived by the employee if he so chooses.

In a very few states Governmental employees are disqualified by statute. *Johnson v. State*, 123 S. C. 50, 115 S. E. 748 (1923) (Deputy Sheriff). See also *Block v. State*, 100 Ind. 357 (1884) (Deputy Prosecuting Attorney), and *Zimmerman v. State*, 115 Ind. 129, 17 N. E. 258 (1888) (Person employed by Sheriff to serve sub-

poenas on witnesses), where state employees were disqualified without a statutory command to that effect.

The majority of the Court in the principal case decided that the existence of the "Loyalty Order," which was the basis of the petitioner's challenge for cause of the Government employees, and the fact that the petitioner was General Secretary of the Communist party in the United States, did not call for an exception to *United States v. Wood*, *supra*, and *Frazier v. United States*, *supra*. The majority of the Court held that the "Loyalty Order" should provide only "limited illumination" upon whether or not the Government employees were impliedly biased. It may be interesting to note that in April, 1950, "limited illumination" and the "Loyalty Order" were not synonymous as they were to the majority in the instant case. *Morford v. United States*,U. S....., 70 S. Ct. 586 (1950). The Court reasoned that since the "Loyalty Order" preceded this trial only by about three months and was not in effect until after the trial, such order was not subject to anticipatory fear by the jurors. In fact the Court pointed out that each Government employee's answer to the interrogatories on the influences of the "Loyalty Order" was categorically to the contrary. "We must credit those representations," said Justice Minton in delivering the opinion of the Court.

With respect to this last point, Chief Justice Marshall stated long ago that a person:

. . . may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice. *United States v. Burr*, 25 Fed. Cas. No. 14, 692g, at 50 (C. C. D. Va. 1807).

Nevertheless, the court concluded that the failure to sustain the petitioner's challenge for cause did not deny him an "impartial" jury.

It is submitted that, in light of the "Loyalty Order" and the existing and ever present aversion to communists, the propriety of such sentiments being unquestioned, there was implied bias on the part of the jury by reason of their Government employment. This question of implied bias in the case of Federal Government employees today is very concrete and one with respect to which public policy and interests of justice require an affirmative finding. As Justice Frankfurter stated in his dissent in the instant case:

To conclude that because government employees are not *ipso facto* disqualified from sitting in a prosecution against a drug addict or a thief requires a holding that they are not disqualified in prosecutions inherently touching the security of the Government, at a time when public feeling on these matters is notoriously running high, is to say that things that are very different are the same.

Moreover, the comparative insecurity of office under civil service, due to the "Loyalty Order" affirming immediate control by the prosecu-

tion over the juror, makes imminent the possibility of a Government employee finding himself in the predicament of the immortal King's brewer, who served as a juror on a political case. 2 MACAULEY, HISTORY OF ENGLAND 267 (1861) (Account of the case of the *Seven Bishops*, 3 Mod. 212, 87 Eng. Rep. 136 (1688): "If I say Not Guilty, I shall brew no more for the King; and if I say Guilty I shall brew no more for anybody else.")

E. Milton Farley III

CRIMINAL LAW—REVOCATION OF SUSPENDED SENTENCE—RIGHT TO NOTICE AND HEARING.—*Ex parte Dearo*,Cal....., 214 P. (2d) 585 (1950). Albert Dearo, convicted of a misdemeanor but free on probation, was sent to the county jail by an act of a city court after revocation without notice of his suspended sentence, which revocation was based solely on the report of a probation officer. Upon a petition for a writ of habeas corpus, challenging the validity of the act of the city court, the question arose as to whether or not the petitioner had been deprived, without due process of law, of his constitutional right to liberty. The petitioner had had his probation summarily revoked, without an opportunity to be heard regarding the evidence relating to his alleged violation of the conditions imposed upon his suspended sentence. The court denied his petition and based this denial upon CAL. PENAL CODE § 1203.2 (1949), of which the pertinent part reads:

At any time during the probationary period . . . the court may in its discretion . . . revoke and terminate such probation, if the interests of justice so require, and if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating any of the conditions of his probation. . . .

The court asserted that:

. . . probation is a matter of grace. It necessarily follows that there is no constitutional right to notice and hearing on revocation of probation or suspended sentence.

This view is not without authority: *Kirsch v. United States*, 173 F. (2d) 652 (8th Cir. 1949); *People v. Frank*,Cal....., 211 P. (2d) 350 (1949); *Ex parte Young*, 121 Cal. App. 711, 10 P. (2d) 154 (1932); *McGraw v. Commonwealth*, 308 Ky. 838, 215 S. W. (2d) 996 (1949); *State v. Gordon*, 214 La. 822, 38 So. (2d) 794 (1949); *State v. Meyer*, 228 Minn. 286, 37 N. W. (2d) 3 (1949); *State v. Simon*,W. Va....., 52 S. E. (2d) 725 (1949). This view was strongly expounded by Chief Justice Charles Evans Hughes in construing the Federal Probation Act, 43 STAT. 1259 (1925), 18 U. S. C.

§§ 724-27 (1946), in the case of *Burns v. United States*, 287 U. S. 216, 220, 33 S. Ct. 154, 77 L. Ed. 266 (1931), where he stated:

Probation is thus conferred as a privilege and it can not be demanded as a right. It is a matter of favor and not of contract. There is no requirement that it must be granted on a specified showing.

And again he states:

There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. The authority for the latter purpose immediately follows that given for the former, and is in terms equally broad.

Thus it is clear, where the matter of probation is granted and left to the discretion of the court by statute, that the probationer has no right to demand a suspended sentence. The view taken by some of the courts under such a statute is that the conditional right to freedom is a mere grant of grace, clemency or favor, and where the court in its discretion has the power to give such a favor, it also has the power to take it away. It is asserted that in the best interests of the penal system, in the matter of probation, it would be detrimental to saddle the courts with additional procedural encumbrances, since a judge might then, in the first instance, be reluctant to grant probation. *Ex parte Boyd*,Okla....., 122 P. (2d) 162 (1942).

However, some courts view their discretionary power in a different light and concede that although a convicted criminal has no right to probation, that once it is granted the situation is changed in respect to revocation. Justice Cardozo, in construing at a later date the same federal statute as Chief Justice Hughes in *Burns v. United States*, *supra*, said, in the case of *Escoe v. Zerbst*, 295 U. S. 490, 493-4, 55 S. Ct. 818, 79 L. Ed. 1566 (1935):

Doubt, however, is dispelled when we pass from the words alone to a view of ends and aims. Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake or even down right malice. . . . This does not mean that he may insist upon a trial in any strict or formal sense. . . . It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper.

Further on he states:

When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to habeas corpus to put an end to the restraint.

It is also interesting to note that in none of the states having a statute regarding the court's discretionary power of revocation has the statute ever been construed to give the court power to revoke arbitrarily a suspended sentence. In the instant case, the court in effect

overruled an earlier decision dealing with the same statute. *Ex parte Cook*, 67 Cal. App. (2d) 20, 153 P. (2d) 578, 580 (1944). In a similar fact situation, this court granted the writ of habeas corpus and ordered the prisoner discharged. In rendering its decision the court quoted in part from *Bailey v. Taaffe*, 29 Cal. 422, 423-4 (1866), wherein the court stated:

It has long been the rule in this state that when "discretionary power is conferred upon the courts, the discretion intended is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles."

Further on the court states:

On principle it would seem to be only proper and just that under the provisions of Section 1203.2, notice and an opportunity to be heard should be granted a defendant before a suspended sentence could be revoked.

In some jurisdictions the probationer's interest in the matter of notice and hearing prior to the revocation of his suspended sentence is regarded as a constitutional right. *Brill v. State*, 159 Fla. 682, 32 So. (2d) 607 (1947); *State v. Gooding*, 194 N. C. 271, 139 S. E. 436 (1927); *Ex parte Lucero*, 23 N. M. 433, 168 Pac. 713 (1917); *State v. Zolantakis*, 70 Utah 296, 259 Pac. 1044 (1927); *State v. O'Neal*, 147 Wash. 169, 265 Pac. 175 (1928). These courts say, in effect, that the suspension of sentence judicially confers a right upon the probationer which has its foundation in what amounts to a contract between the state and the defendant, the result of which is that the defendant is entitled to his liberty until it is proved that he has violated some condition of his probation. In some jurisdictions the right of the probationer to notice and hearing is guaranteed by the specific wording of the statutes. *United States v. Lowe*, 173 F. (2d) 346 (2d Cir. 1949); *Balkcom v. Gunn*, 206 Ga. 167, 56 S. E. (2d) 482 (1949); *People v. Enright*, 332 Ill. App. 655, 75 N. E. (2d) 777 (1947); *Blusinsky v. Commonwealth*, 284 Ky. 395, 144 S. W. (2d) 1038 (1940); *People v. Myers*, 306 Mich. 100, 10 N. W. (2d) 323 (1943); *People v. Hill*, 164 Misc. 370, 300 N. Y. S. 532 (1937); *Howe v. State*, 170 Tenn. 571, 98 S. W. (2d) 93 (1936).

After a search of the cases, it seems to be a more general rule that in the absence of a statute to the contrary, or an express reservation of power of summary revocation at the time probation is granted, a person who is free on probation, parole or conditional pardon is entitled to notice and an opportunity to be heard before some court or body of competent jurisdiction, either by writ of habeas corpus or otherwise, on the question whether the conditions have been violated, before such freedom can be effectually revoked. *Ex parte Horne*, 52 Fla. 143, 42 So. 714 (1906); *People ex rel. Joyce v. Strassheim*, 242 Ill. 358, 90 N. E. 188 (1909); *State ex rel. O'Conner v. Wolfer*, 53 Minn. 135, 54 N. W. 1065 (1893); *Cooper v. State*,

175 Miss. 718, 168 So. 53 (1936); *State v. Smith*, 196 N. C. 438, 146 S. E. 73 (1929); *New York v. Kriegel*, 124 Misc. 67, 207 N. Y. S. 646 (1924); *Ex parte Ridley*, 3 Okla. Crim. Rep. 350, 106 Pac. 549 (1910); *Ex parte Houghton*, 49 Ore. 232, 89 Pac. 801 (1907).

It must be noted in the instant case that the court did in fact seem justified in revoking the suspended sentence of Albert Dearo, and that it was meticulous in its legal reasoning. This, however, does not obviate the conclusion that the court's interpretation of its discretionary power has sanctioned a tendency for future tribunals to become arbitrary in the matter of revoking probation. It is maintained that on a logical basis a person who stands convicted on a criminal matter and whose rights have been judicially determined under the laws of the land has no constitutional rights in the matter of probation, parole, or conditional pardon. But it can be argued that the probationer does have some specie of right, qualified or conditional, and it is submitted that the probationer's interest should be assured at least as much consideration in the revocation of the suspension of sentence as in the granting of it. It is also submitted that this consideration is not in the least removed from the salutary policy behind the parole and probation systems. Finally, the best interests of justice would be served if the probationer knew that he might rely upon the conditions of his probation and be heard before his sentence is reinstated.

Jerome A. Kolenda

CRIMINAL LAW—SEPARATION OF THE JURY DURING A CAPITAL FELONY TRIAL.—*Nelson v. State*,Ala....., 43 So. (2d) 892 (1949). The Alabama Supreme Court reversed a conviction sentencing Napoleon B. Nelson to the electric chair for murder in the first degree. The grounds for the reversal were that the jury was allowed to separate during the trial without the consent of the accused. The court ruled that the consent of the accused on such issue must be personally granted, and that the consent of his attorney without his knowledge or acquiescence is inadequate. The court further ruled that where the jury was dispersed without the consent of the accused, the burden of proving the absence of prejudice is upon the state.

The court cited *Mitchell et al v. State*, 244 Ala. 503, 14 So. (2d) 132 (1943), as authority for its decision. The court in that case held:

If the jurors be permitted to separate as here, under instructions from the court, with or without the consent of defendant, such separation is subject to challenge by motion for new trial, whereupon the burden is upon the state to clearly show no injury resulted from such separation.

The state attempted to show that the provisions of ALA. CODE ANN. tit. 30, § 97(1) (Supp. 1947), invalidated the law as set down in *Mitchell et al v. State, supra*. The pertinent section of that Act reads:

If the accused and his counsel and also the prosecuting attorney, in any prosecution for felony, whether capital or non-capital, consent thereto in open court, the trial court in its discretion may permit the jury trying the case to separate during the pendency of the trial, whether the jury has retired or not. A separation so permitted shall not create a presumption of prejudice to the accused, but on the contrary it shall be prima facie presumed that the accused was not prejudiced by reason of the separation of the jury.

The court in the instant case, ruled that the stipulation in the statute which required the "accused *and* his counsel" to consent to the separation acted to make the statute inapplicable because the accused was not aware of the agreement to allow such separation. For this reason *Mitchell et al. v. State, supra*, was still controlling authority.

This case presents two problems concerning the separation of the jury during a criminal trial. The first concerns the issue whether the jury should be compelled to remain together at all times during a capital felony trial, or whether it should be left to the discretion of the court to allow them to separate. In support of the former view, *State v. Frank*, 23 La. 213 (1871); *State v. Howard*, 117 Me. 69, 102 Atl. 743 (1918); *Woods v. State*, 43 Miss. 364 (1871); *Hilands v. Commonwealth*, 111 Pa. 1, 2 Atl. 70 (1886); and *State v. Shawley*, 334 Mo. 352, 67 S. W. (2d) 740 (1933), have held that if the jury is allowed to separate with or without the consent of the accused, the separation is prima facie evidence of prejudice to the defendant and grounds for a new trial. In support of this theory a New Jersey court, in *State v. Cucuel*, 31 N. J. L. 249 (1865), said:

Ascertaining then that the practice in capital cases of keeping the jury, to a certain extent, in privacy during the entire course of the trial, has, with complete uniformity, always prevailed, I feel bound to recognize in such form an institute of law which is wholly beyond the control of the court, and which belongs to the citizen as of right.

The other view, that it is discretionary with the court to allow separation, is the more widely accepted policy. Among those courts holding this majority view, the discretion of the court has been upheld in *People v. Witt*, 170 Cal. 104, 148 Pac. 928 (1915); *People v. Erno*, 195 Cal. 272, 232 Pac. 710 (1925); *State v. Williams*, 96 Minn. 351, 105 N. W. 265 (1905); *Bergin v. State*, 31 Ohio 111 (1876); *Wesley v. State*, 36 Okla. Crim. 97, 252 Pac. 442 (1927). In *Bilansky v. State*, 3 Minn. 427, 429, (1859), the Minnesota court advanced an argument why separation of the jury during a trial of any cause should be allowed:

The importance of keeping the minds of jurors free from improper or disturbing influences in all cases, especially criminal cases, is conceded,

but it is denied that confinement is necessary to secure that result. Twelve active business men, taken fresh from their daily avocations, their families, and domestic companionship, and kept together constantly for days or weeks as jurors in a criminal cause, are not likely, as it seems to me, when the cause is finally submitted to them, to receive it with that healthy tone of mind—that freedom from prejudice and bias which the determination of grave and solemn issues demands.

The second controversial problem is the question upon whom to place the burden of the proof as to whether there is prejudice when the jury is permitted by the court to separate during a criminal trial. Generally, states which prohibit the separation of the jury divide into two views on this point. The first group holds that the defendant is presumed to be prejudiced by the separation, but such presumption may be rebutted by the state on the presentation of affidavits of the jurors to the effect that dispersal of the jury offered no occasion to prejudice them. *State v. Orrick*, 106 Mo. 111, 17 S. W. 176 (1891). The others ascribe to the view that separation is prima facie evidence of prejudice which automatically creates a basis for allowing an appeal for a new trial. *Long v. State*, 132 Tenn. 649, 179 S. W. 315 (1915).

In the more liberal states which allow the court to exercise its discretion, there are also two standards. One is that a conviction will not be set aside even though the separation was permitted against the objection of the accused, unless it is affirmatively proved by him that such separation of the jury did cause prejudice. *People v. Chaves*, 122 Cal. 134, 54 Pac. 596 (1898). In contrast to this is an Indiana case, *Quinn v. State*, 14 Ind. 589 (1860), which held it error to permit a dispersal of the jury over the objection of the accused. It is the practice of most states allowing the court to use its discretion on this matter to demand that the defendant prove prejudice toward him. *Quartermours v. State*, 114 Ark. 452, 170 S. W. 225 (1914).

It is a well recognized principle of criminal law that a man is considered innocent until he is proved guilty. See, e.g., *Adams v. State*, 27 Ala. App. 404, 174 So. 319, (1937). In adhering to this theory the better view would seem to be that a court may allow such a dispersal of the jury, but only with the permission of the defendant. Moreover, it would seem that the accused should not be asked by the court in the presence of the jury whether he will permit the order of the court to such effect. Such a request leaves the accused no alternative but to allow the dispersal or risk prejudicing the jury by denying them their freedom of movement. A Mississippi court recognized this paradoxical situation in *Woods v. State*, *supra*, 43 Miss. at 366, when it stated:

The prisoner ought not to be asked to consent. Who dare refuse to consent, when the accommodation of those, in whose hands are the

issues of his life or death, is involved in the question? He would have to calculate the chances of irritation from being annoyed by a refusal on the one hand, and of tampering on the other.

The wording of the Alabama statute would seem to imply doubt as to the ethics of the legal profession, by demanding the consent of the accused *and* his counsel, the lack of which consent caused the court to reverse the lower court's decision in the instant case. It implies either that the counsel for the defense is not properly defending his client by adhering to his wishes or is overlooking his better interests by allowing the jury to depart from the presence of their fellow jurors to be confronted by outside influences. However, the statute seems to be in keeping with the theory of giving an accused every opportunity to prove his innocence. In such a light the clause cannot be held to be objectionable.

The proper view on this matter, concerning the ability of the counsel for the defense to give permission for his client, would seem to be negatively expressed in *State v. Stockhammer*, 34 Wash. 262, 75 Pac. 810 (1904), where the court noted:

. . . we think there are no cases which hold, under the provisions of a statute such as ours, that the consent of the counsel, the defendant being present and hearing the consent announced by the court, is not sufficient.

It would seem that the Alabama statute serves the purpose of protecting the accused, by a stringent requirement, which apparently was inserted to prevent a pre-trial agreement without the consent of the accused, as apparently happened in the principal case.

Bernard James McGraw

LABOR LAW—SECONDARY BOYCOTTS AND THE TAFT-HARTLEY ACT.—*National Labor Relations Board v. Wine, Liquor and Distillery Workers Union, Local 1, et al.*, 178 F. (2d) 584 (2d Cir. 1949). The National Labor Relations Board petitioned the circuit court for enforcement of its order against the respondent labor union. The Board had found that the union was engaged in a secondary boycott in violation of Section 8(b)(4)(A), 61 STAT. 141 (1947), 29 U. S. C. § 8(b)(4)(A) (Supp. 1948), of the Taft-Hartley Act and had issued a cease and desist order. *Wine, Liquor and Distillery Workers Union, Local 1, et al.*, 78 N. L. R. B. 504 (1948). The court affirmed the Board's finding and pointed out that the clearly ascertainable intent of Congress was to outlaw all secondary boycotts by the provisions of Section 8(b)(4)(A) of the Act.

Members of the union were employed by whiskey distributors in New York to deliver the product to consumers in the metropolitan

area. Schenley Distillers operate a distillery in Kentucky, hiring members of a sister union. The Kentucky union struck for higher wages, and shortly thereafter the respondent union struck against the distributors in New York. On complaint by the distributors, the Board conducted a hearing and found that an object of the New York strike was to force the distributors to cease doing business with Schenley, thereby bringing secondary pressure on Schenley and forcing a satisfactory settlement of the Kentucky strike.

Section 8(b)(4)(A) of the Taft-Hartley Act provides that it shall be an unfair labor practice for a union to engage in a strike or refusal, in the course of employment, to process or transport any product where an object of such strike or refusal is to force the employer to stop using or selling the products of any other producer or to cease doing business with any other person.

The decision of the circuit court serves to renew interest in the question: did the ban on secondary boycotts so effectively curtail labor's activities as to upset the balance in bargaining power, this time in favor of management? See Note, 24 NOTRE DAME LAWYER 97 (1948). Labor spokesmen have been quick to point out that Section 8(b)(4)(A) leaves the union with no weapons in those instances in which unjust employers can be reached only through secondary boycotts.

Pending its final adjudication of charges concerning unfair labor practices, the Board is empowered by Section 10(1), 61 STAT. 149 (1947), 29 U. S. C. § 1611 (Supp. 1948), of the Act to petition in the various district courts for a temporary injunction against a union or employer. When a district court is so petitioned, it is without jurisdiction to decide if an unfair labor practice actually exists, but must confine its decisions to whether the petitioning agent of the Board has reasonable grounds for believing such a condition exists. *Styles v. Local 74, United Brotherhood of Carpenter & Joiners, et al.*, 74 F. Supp. 499 (E. D. Tenn. 1947). However, it has been held that prior to granting injunctive relief, the district court should inquire into the reasonableness of the charge and evaluate the evidence. *Douds v. Confectionery and Tobacco Jobbers Employees Union*, 85 F. Supp. 191 (S. D. N. Y. 1949). The Board has experienced little difficulty in obtaining temporary injunctions against unions in the district courts. See *Douds v. International Brotherhood of Teamsters, et al.*, 85 F. Supp. 429 (S. D. N. Y. 1949); *Le Baron v. Los Angeles Building & Construction Trades Council, et al.*, 84 F. Supp. 629 (S. D. Cal. 1949); *Brown v. Oil Workers International Union*, 80 F. Supp. 708 (N. D. Cal. 1948); *Evans v. United Electrical, Radio & Machine Workers*, 79 F. Supp. 318 (S. D. Ind. 1948); *Cranefield v. Bricklayers, Stone Masons, Tile Layers, et al.*, 78 F. Supp. 611 (W. D. Mich. 1948). The courts have undoubtedly been

influenced by the fact that they need ascertain only that the Board has reasonable grounds for believing an unfair labor practice exists. However, many of the district courts did comment on the fact that the Taft-Hartley Act effectively banned all secondary boycotts, regardless of the fact that certain situations may arise in which the deprivation of such right would leave labor unions with no weapons in given areas of economic conflict.

The fact that the Board is not bound by district court findings has led, in at least one instance, to incongruity between district court decisions and Board orders. On March 30, 1948, in *Sperry v. Denver Building & Construction Trades Council, et al.*, 77 F. Supp. 321 (Colo. 1948), the Colorado district court held that the Taft-Hartley Act did not apply, because no interstate commerce was involved, and that the matter was one of purely local concern. On April 13, 1949, ruling on the same case, the Board refused to accept the district court's finding and proceeded to demonstrate the fullness of its statutory powers by issuing a cease and desist order on the grounds that the secondary boycott affected interstate commerce. *Denver Building & Construction Trades Council, et al.*, 82 N. L. R. B. 1195 (1949).

If the labor forces were hopeful that the National Labor Relations Board would refuse to eliminate completely the secondary boycott, their hopes have been dealt a severe blow by the recent orders of that body. Keeping in mind that the orders of the Board can be reviewed by only circuit courts and the Supreme Court, these recent rulings by the Board demonstrate that Congress has so arranged the labor-management situation that the secondary boycott is no longer a part of labor's bargaining equipment. Refusing to consider that in some instances a secondary boycott might be justified, the framers of the Taft-Hartley Act have made serious inroads into the rights and powers of collective bargaining agencies by effectively excluding it.

The Board gave a literal interpretation to Section 8(b)(4)(A), as did the circuit court in the instant case, in *Bricklayers, Stone Masons, Marble Masons, et al., and Martin Osterink, et al.*, 82 N. L. R. B. 228 (1949); *Local 760, International Brotherhood of Electrical Workers and Roane-Anderson Company*, 82 N. L. R. B. 696 (1949); *Local 74, United Brotherhood of Carpenters and Joiners, et al.*, 80 N. L. R. B. 533 (1948); *Denver Building & Construction Trades Council, et al., supra.* In issuing a cease and desist order in *Local 1796, United Brotherhood of Carpenters, et al. and Montgomery Fair Co.*, 82 N. L. R. B. 211, 212 (1949) the Board said:

. . . we regard Section 8(b)(4)(A) of the Act as specifically prohibiting peaceful picketing in the circumstances of this case, and . . . we shall presume the constitutionality of this prohibition unless advised by the courts to the contrary. . . .

The unions have contended that the right to picket peacefully is protected by the free speech provision of Section 8 (c), 61 STAT. 142 (1947), 29 U. S. C. § 158 (c) (Supp. 1948), of the Act and that the two sections should be read together, making peaceful picketing lawful in the case of secondary boycotts. The Board rejected this as an improper statutory construction and held that the right to peaceful picketing was abrogated in those instances involving secondary boycotts. *Printing Specialties and Paper Converters Union, et al. and Sealright Pacific, Ltd.*, 82 N. L. R. B. 271 (1949); *United Brotherhood of Carpenters and Joiners, et al.*, 81 N. L. R. B. 802 (1949). In *International Brotherhood of Electrical Workers, et al. and Samuel Langer*, 82 N. L. R. B. 1028, 1029 (1949), the Board said:

We have recently held, however, that Section 8(b)(4)(A) prohibits peaceful picketing. . . . in furtherance of an objective proscribed therein, and that Section 8(c) does not immunize such conduct.

The conclusion would seem to be inescapable that the National Labor Relations Board has seen fit to give a strict application of Section 8(b)(4)(A), possibly proceeding on the premise that if the outlawing of secondary boycotts may in some instances be unjust, the initiative for remedying the injustice must originate in the halls of Congress.

A suggestion that the Board may not give such a strict interpretation to the section in future decisions was made in 18 U. S. L. WEEK 1097 (1950). There it was pointed out that in several recent rulings the Board held that boycott requests made to supervisors and "hot goods" clauses are not in conflict with the section. But it is to be noted that both groups of decisions involved inducements made to "employers" and not to "employees." The first group of decisions merely held that the term "employee" did not include supervisors. The "hot cargo" clause in a union contract, whereby the union refuses to agree to handle struck work, is outside the ban of the Act, because it is not an inducement or encouragement to strike made to employees. This relieves none of the onerous aspects of Section 8(b)(4)(A), inasmuch as it does not empower labor to use a secondary boycott unless management agrees at the time the labor contract is negotiated that it will be allowed.

That some secondary boycotts were justified, and others not, the distinction being found in the necessity of preserving the fundamental right to strike, was recognized by the late Justice Brandeis in at least two instances. Dissenting in *Bedford Cut Stone Company et al. v. Journeymen Stone Cutters Association, et al.*, 274 U. S. 37, 59, 47 S. Ct. 522, 71 L. Ed. 916 (1927), Justice Brandeis commented on the then existing laws limiting the use of secondary boycotts:

If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act

an instrument for imposing restraints upon labor which reminds one of involuntary servitude.

In *Duplex Printing Press Co. v. Deering, et al.*, 254 U. S. 443, 482, 41 S. Ct. 172, 65 L. Ed. 349 (1921) the same Justice, dissenting, wrote:

But other courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself.

The circuit court in the instant case had no practical alternative, regardless of their personal opinions concerning secondary boycotts. In the face of the mass of legislative discussion which shows an unmistakable intent on the part of Congress to outlaw the practice completely, a different decision would have been a most striking example of judicial law-making. If Section 8(b)(4)(A) proves a too objectionable feature, recourse must be had to Congress, for the Act as now drawn will admit of no other construction.

Joseph C. Spalding

REAL PROPERTY—DELIVERY OF A DEED IN ESCROW AN INTER VIVOS OR TESTAMENTARY DISPOSITION?—*Leatherman et al. v. Abrams et al.*,Ohio App....., 90 N. E. (2d) 402 (1950). Milton Leatherman, deceased, was the grantor of the deeds in question. Some two years before his death, he manually gave the two deeds to the respective defendants. They were each instructed to transmit their deed to one Sebrell, an attorney, to be held for them until the death of the grantor and recorded if at such time the respective grantee was living. In the event the grantee should die before the grantor, the deed should be returned to the grantor. The plaintiffs sought to enjoin the recording of the deeds on the ground that there was no valid delivery. The lower court rejected this contention, but upon appeal, in the instant case, the Court of Appeals declared the delivery void, holding that the disposition was testamentary and ineffectual to pass title.

The determination of the legal effect of a deed has been a source of difficulty to the courts of many jurisdictions. Escrow deliveries and conditional deliveries have not helped to lighten this difficulty. Some courts have held transactions similar to that of the principal case to be valid inter vivos transfers. *Hudson v. Hudson*, 287 Ill. 286, 122 N. E. 497 (1919); *Boone Biblical College v. Forrest*, 223 Iowa 1260, 275 N. W. 132 (1937). Other courts have held them to be testamentary dispositions. *Thompson v. Thompson*, 91 Cal. App. 554, 267 Pac. 375 (1928); *Wilson v. Carter*, 132 Iowa 442, 109 N. W. 886 (1906).

The particular distinction between a will and a deed is that a will passes no interest until the death of the testator, and up until that time is freely revocable. A deed purports to pass interest in the property to the grantee in the grantor's lifetime, and the latter has no right to revoke it. However, a deed may be delivered in escrow to be held until the death of the grantor or the happening of some other contingency—then to be recorded for the grantee. In practically all jurisdictions it is recognized that a grantor can deliver a deed to a third person to hold and record at the grantor's death for a grantee, and that this constitutes an effective delivery of the deed. See, e.g., *Thurston v. Tubbs*, 257 Ill. 465, 100 N. E. 947 (1913); 4 TIFFANY, REAL PROPERTY § 1049 (3d ed. 1939). The grantee does not have to be aware of the situation, it being sufficient that the grantor intends at the time of delivery to the custodian to part with all rights and control of the deed forever. The delivery to the escrow agent must be absolute, be incapable of revocation and out of the control of the grantor in order to be a properly executed deed. If the deed is not delivered absolutely or is subject to control of the grantor, then the delivery is invalid.

In escrow cases, the third person is considered the agent of the grantee holding the deed until the fulfillment of the condition. Legal effect takes place with the absolute delivery of the deed to the escrow agent.

The instant case cites *Oberholtz v. Oberholtz*, 79 Ohio App. 540, 74 N. E. (2d) 574 (1947), as one of the principal authorities. In that case the court held that for the delivery to be effective *inter vivos*, the grantor must deliver the instrument with the intent to part with the right to withdraw, revoke, or control the instrument. The intention of the grantor was the turning point of the decision. Another case cited by this court was *Stone v. Daily*, 181 Cal. 571, 185 Pac. 665 (1919), in which intention was the prime consideration. The case held that the handing of the deed by a grantor to a grantee with the words, "Here is the deed, and now the property is yours," is a valid delivery if done as a final act. However, if such transfer also showed an intent that the deed should then be deposited with a third person to be kept until the death of either the grantor or the grantee, and then delivered to the survivor, the delivery is not effectual. The intent completely governs the effect.

In 4 TIFFANY, REAL PROPERTY, § 1049 (3d ed. 1939) it is stated that the great majority of authorities in this country hold that a conditional delivery of a deed cannot be made to a grantee. If the grantor hands the instrument to the grantee, there is necessarily an absolute delivery. *McCann v. Etherton*, 106 Ill. 31 (1883); *Bunting v. Hromas*, 104 Neb. 383, 177 N. W. 190 (1920); *Arnold v. Patrick*, 6 Paige 310 (1837); *Chaudoir v. Witt*, 170 Wis. 556, 174

N. W. 925 (1919). Tiffany, in the same section, also expresses his view, that where the mere physical transfer of a deed to the grantee is allowed to override the grantor's explicit declaration of intention that the deed shall not be immediately operative, this is an illustration of the primitive formalism in the law.

Justice Doyle, in the case under discussion, holds contrary to the weight of authority. He did not consider the signing and the delivery of the deed by the grantor as prima facie evidence of its valid delivery or as giving rise to a factual presumption that is rebuttable. See the theory set forth in *Chambley v. Rumbaugh*, 333 Pa. 319, 5 A. (2d) 171 (1939). The intent of presently passing title is the primary basis of his opinion. He held the grantees to be the agents of the grantor. They were delegated by the grantor to hand the deeds over to the escrow agent who was also designated by the court as an agent of the grantor. This raises the dilemma: is it impossible for the deeds ever to be recorded for the grantees? The escrow agent, being the agent of the grantor, could only record the deeds on the death of the grantor; but when the grantor dies, the agency is revoked and the act of recording appears to be made without authority.

The general rule, in the cases where a deed is delivered to a third party to hold until the death of the grantor, seems to be that the intention of the grantor is controlling as to the determination of the legal effect of the deed. However, it is still the majority rule that a direct manual delivery to the grantee of a deed to be held in escrow is an absolute delivery. Considering the circumstances of the case and the two majority rules together, the question is presented as to what rule should prevail when there is a direct manual delivery to the grantee to forward the instrument to an escrow agent to hold until the grantor's death. Should the direct manual delivery to the grantee be absolute or should the intention of the grantor be the determining factor? Strict logic dictates that the formal manual delivery should prevail, because it affirmatively states that an escrow delivery cannot be made to the grantee. The better rule would seem to be the rule based on intention, if confusion is to be avoided and justice attained. As Tiffany states, there is no necessity to follow primitive formalism.

Considering the intention of the grantor in the instant case, it appears quite apparent he did not wish the deed to be transferred to the heirs of the grantee if the grantor should survive the grantees. Had there been a complete parting of control at the time of delivery, the deed would go to the grantee's heirs even if the grantor survived the grantee. It is quite apparent from his instructions that the grantor did not want that to take place or he would not have been so meticulous in trying to prevent it. On the other hand, if he did not want to pass some legal interest to the grantees, he would not

have delivered each deed to the respective grantee directly. But, complete relinquishment being necessary to make a valid delivery, the grantor did not make a valid delivery. He wanted to give the deeds and keep them too. Practically and logically, there was no complete relinquishment. It has been stated, *ROLLISON, WILLS*, 196 (1939), that if the grantor intends at the time he makes delivery to the third person to retain the power to revoke, or subsequently to control the disposition of the instrument, the transaction is an attempt to make a testamentary disposition of the property. See *Dickason v. Dickason*, 107 Ind. App. 515, 18 N. E. (2d) 479 (1939); *Anderson v. Mauk*, 179 Okla. 640, 67 P. (2d) 429 (1937). For authority contra to these holdings, see *Boone Biblical College v. Forrest, supra*, where it was held that a delivered deed to a third person, which could be recalled on demand by the grantor, was a sufficient delivery of the deed inter vivos. In this case, where the action was brought after the death of the grantor and after the grantor failed to exercise his right to recall during his lifetime, the court held the delivery to be a valid inter vivos disposition.

The only way the principal case can be reconciled to both views is by taking into consideration the fact that the Ohio Court of Appeals did not consider the grantee as a grantee in law when the deed was delivered to him to be transferred to the escrow agent. The court considered the grantee as an agent of the grantor in that transaction.

It is doubtful if the court used such reasoning to reconcile the weight of authority, since it did not mention it. It seems more probable that the Ohio court intended to let the manifest intention of the grantor override the manual delivery to the grantee, even though that delivery would have been considered absolute by a majority view. The case may serve to help reverse the scale against "primitive formalism" in the law of conveyances.

R. Emmett Fitzgerald

TORTS—MALICIOUS PROSECUTION—COMPROMISE SETTLEMENT—SETTLEMENT UNDER DURESS, *Leonard v. George*, 178 F. (2d) 312 (4th Cir. 1949). The defendant, George, was the owner of a large turkey farm upon which he employed the plaintiff, Leonard, as manager. A third party involved in the case was R. B. Boykin, defendant's general superintendent and agent for the area where the turkey farm was located. Following the sale by Leonard of a large quantity of defendant's turkeys, Boykin caused a warrant to be issued charging plaintiff with fraudulent breach of trust. Plaintiff was arrested

and placed in jail, but released on bail shortly thereafter. Following his release, he and his father agreed to pay and did pay the sum of \$415.00 to Boykin, the sum alleged to have been involved in the fraud, in order to have the criminal prosecution dismissed. There is evidence that at the time of this payment and dismissal, plaintiff protested his innocence of the crime charged and stated that he was being "held up" and was making payment under protest because he had to get away in order to maintain a position which he had obtained at a nearby airfield.

Shortly thereafter plaintiff brought an action for damages against defendant for malicious prosecution and a second action for malicious abuse of process on the basis of the above facts. The jury found for plaintiff in both cases. Appeal is being taken only in the malicious prosecution case however. The principal contention made in the appeal is that defendant's motion for directed verdict should have been granted. The appellate court reversed with direction to enter judgment for defendants.

The rule concerning the effect of a compromise settlement of a criminal action upon a subsequent malicious prosecution suit is well settled. The rule involves the requirement that in order to maintain a malicious prosecution suit, plaintiff must show a favorable termination for himself of the criminal action involved. Where the original action has been settled by a voluntary compromise agreement between the parties, it has been generally held that the accused thereby makes such an admission of his guilt as to estop himself from later claiming his innocence in a malicious prosecution suit. *Barth v. Keller*, 315 Ill. App. 200, 42 N. E. (2d) 871 (1942); *Nelson v. National Casualty Company*, 179 Minn. 53, 228 N. W. 437 (1929); *Zebrowski v. Bobinski*, 278 N. Y. 332, 16 N. E. (2d) 355 (1938); *Stauffacher v. Brother*, 67 S. D. 314, 292 N. W. 432 (1940).

The rule is not applied in cases, though, where the settlement was not voluntarily and understandingly made, but was made under coercion or duress. *White v. International Text-Book Company*, 156 Iowa 210, 136 N. W. 121 (1912); *Lyons v. Davy Pocahontas Coal Company*, 75 W. Va. 739, 84 S. E. 744 (1915); *Schwartz v. Schwartz*, 206 Wis. 420, 240 N. W. 177 (1932).

The fact that the compromise of a criminal action is invalid under the South Carolina statute is immaterial to the question whether the compromise settlement of the original action in this case would bar the malicious prosecution suit, since plaintiff's admission of probable guilt by making that settlement would be present in the transaction, whether valid or not; and it is that admission which, if made, would bar his recovery here.

The question to be resolved in the case was actually whether the settlement was made voluntarily or under duress. The lower court

left the decision of this question to the jury, a procedure highly approved by Justice Barksdale in his dissenting opinion in the instant case. The majority of the appellate court however, felt that it was error to send that question to the jury under the facts, and to refuse defendant's motion for a directed verdict. In support of their position they cited *Jones v. Donald Company*, 137 Miss. 602, 102 So. 540 (1925), where the court stated:

But it is said by the appellee that the settlement by which the original proceeding here in question was dismissed was not voluntarily entered into by the appellant, but that he was coerced into making it. Conceding the soundness of the rule here invoked, there is no merit in this contention for the reason that the appellant himself initiated the negotiations which resulted in the settlement after he had been admitted to bail and was under no sort of duress other than the liability to answer the criminal charge which had been made against him, which duress, if such it can be said to be, is necessarily present in every settlement or compromise of this character.

In *Jones v. Donald Company*, *supra*, the plaintiff in the malicious prosecution suit had been arrested under a writ issued by a justice of the peace, upon an affidavit made by an officer of the company. Immediately upon arrest, he posted bond and secured his freedom. Afterwards Jones himself paid the court costs and the amount due the Donald Company and requested the justice to dismiss the prosecution, which the justice did upon the consent of the company's officer. It is distinguishable from the present case, at least so far as the record goes, in that there was neither protest at the time of payment, nor any suggestion that payment was being made under duress in the *Jones* case.

The record of this present case, as tried in the lower court, shows that both these elements were present. As reported in *George v. Leonard*, 71 F. Supp. 665 (E. D. S. C. 1947), the plaintiff testified:

"Dixie, (R. B. Boykin, agent for defendants) I don't owe Mr. Leonard any money. I have got to get away from here to get back to Shaw Field. If I don't qualify tomorrow you know I can't get my job. If I pay you any money I am not accepting any guilt. I will certainly pay you over my protest." . . . I said, "Judge, [the Magistrate] we are not accepting any guilt in this matter. We are protesting this payment but I have to get away from here. He has kind of got me where I can't get out but I have got to go and we are paying this under protest."

The precise question presented on the appeal here was whether these two elements of protest and claim that payment was being made under coercion were sufficient to take the case to the jury on the problem of duress. What constitutes duress is a matter of law, and whether duress exists in a particular transaction is a matter of fact. *Winget v. Rockwood*, 69 F. (2d) 326 (8th Cir. 1934); *Bartlett v. Richardson Company*, 27 Ohio App. 263, 161 N. E. 403 (1927); *Rochester Machine Tool Works v. Weiss*, 108 Wis. 545, 84

N. W. 866 (1901); *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495 (1900).

The fact that the plaintiff made payment "under protest" established nothing in itself other than that the act was done contrary to the desire of the party making the protest. There is no magic in these words that will establish compulsion or duress per se. *Steinberg Press Incorporated v. Charles Henry Publications Incorporated*, 68 N. Y. S. (2d) 793 (1947); *Mathews v. William Frank Brewing Company*, 26 Misc. 146, 55 N. Y. S. 241 (1899).

Duress is to be established from the surrounding circumstances in the particular case, and to prove that he acted under duress plaintiff must show that he was so imposed on and put in such fear as to be unable to act freely. *Schlensky v. Schlensky*, 369 Ill. 179, 15 N. E. (2d) 694 (1938); *American National Bank of Lake Crystal v. Hell-ing*, 161 Minn. 504, 202 N. W. 20 (1925); *Rochester Machine Tool Works v. Weiss*, *supra*.

What, then, were the circumstances surrounding the payment and settlement made in this case? Plaintiff had been arrested and released under bail. This was ruled as a matter of law to negative a claim of duress in *Jones v. Donald Company*, *supra*. The fact that he had been released under bail in a criminal action did not restrict his freedom of movement or prevent him from returning to his job. Under S. C. CODE ANN. § 256-65 (1942), he was required only to make himself amenable to the processes of the court.

The sole remaining evidence in support of plaintiff's claim of duress is his own fear that he might lose his job if he did not settle the action out of court at once. Again, it has been ruled as a matter of law that the mere fact that a person is in fear of some impending peril or injury, or in a state of mental perturbation at the time of doing any act is not sufficient ground for holding that the act was done under duress. *Goodrum v. Merchants and Planters Bank*, 102 Ark. 326, 144 S. W. 198 (1912); *Voelger v. Frederick A. Schmidt Company*, 51 Ohio App. 31, 199 N. E. 222 (1935). And the specific point of fear of losing a job was treated in *Barr Car Company v. Chicago & N. W. Railroad Company*, 110 Fed. 972 (7th Cir. 1901) where it was held that duress could not be inferred from the mere fact that an employee feared he would lose his employment if he asserted his rights, in the absence of a specific threat to that effect.

Where all the circumstances alleged to constitute duress have been ruled as a matter of law not to be duress, and no showing was made that the original criminal prosecution was dismissed for any reason other than the compromise agreement, a dictum of *Rochester Machine Tool Works v. Weiss*, 108 Wis. 545, 84 N. W. 866, 867 (1901), appears to be especially applicable:

When it is perfectly evident from the testimony adduced that there is no foundation for a claim of duress, the court may so decide, and take the case from the jury . . . We have carefully read the defendant's testimony, and are fully satisfied that, had a verdict for defendant been rendered, it could not stand. It would have been the plain duty of the court to have set it aside as being unsupported by the evidence.

Despite the fact that the weight of authority clearly indicates that the lower court erred in refusing a directed verdict for defendants, there is sound logic in the opposite contention that a payment made under protest should be left for jury determination as to whether duress was also present. As pointed out, the basis for the rule that a voluntary settlement will bar a subsequent malicious prosecution action is the plaintiff's implied admission of probable guilt in making that settlement. When the plaintiff declares his innocence at the time of payment, it would seem that his express avowal should more than offset any implied admission of guilt, at least to the extent of suggesting that he was making payment for some other reason.

Joseph T. Helling

TORTS—NEGLIGENCE—LIABILITY OF MANUFACTURER OF STRUCTURE FOR INJURY TO THIRD PERSON DUE TO FAULTY CONSTRUCTION.—*Foley v. Pittsburgh-Des Moines Co. et al.*, 363 Pa. 1, 68 A. (2d) 517 (1949). The established doctrine of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916), and subsequent cases, is that reasonable care must be exercised in manufacturing a chattel or liability may ensue. With this precedent as a basis, the Supreme Court of Pennsylvania in the instant case extended the applicability of such a decision from chattels to realty.

The relevant facts were that the Pittsburgh-Des Moines Co. manufactured and installed gas tanks for the East Ohio Gas Co. A tank collapsed causing the escape and ignition of natural gas. The tragic result of which was over a hundred fatalities. Some 231 separate suits for damages were instituted, of which the present action by the executrix of the estate of Michael F. Foley, deceased, was one. The trial court granted the defendants' motion for judgment notwithstanding a verdict for the plaintiff for \$50,000, denying the defendants' motion for a new trial. The plaintiff appealed. The Supreme Court of Pennsylvania remitted the case to the trial court to reinstate the verdict, and reconsider the motion for a new trial.

The jury had found that the defendants were negligent in failing to use reasonable care in the design and construction of the tank, in the selection of materials used in manufacturing, and in tests to de-

termine the safety thereof. The defendants contended that even though they had been negligent in their duties, such negligence was not the proximate cause of the collapse. They insisted that the intervening cause, relieving them of liability, was the failure of the East Ohio Gas Co. to conduct adequate inspections of the tank to discover any dangerous condition. However, the court ruled that the failure of the gas company to inspect the tank was not an intervening, independent cause sufficient to relieve the defendant of liability. In this the court followed virtually unanimous authorities, which hold that a manufacturer is not relieved of liability for negligent construction, which in its defective condition menaces the safety of others, merely because the vendee or some other person through whose hands the article passes has the opportunity, or is under the affirmative duty to inspect and fails to do so. PROSSER, TORTS 687 (1941); HARPER, TORTS 248 (1933); BOHLEN, STUDIES IN THE LAW OF TORTS 117 (1926); RESTATEMENT, TORTS § 396 (1934). The reason for this rule is that the failure of the vendee to inspect is foreseeable and within the ambit of risk. See *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 45 N. E. 559 (1896); *Moon v. Northern Pacific R. Co.*, 46 Minn. 106, 48 N. W. 679 (1891).

Since the manufacturer is proved *factually* responsible to the plaintiff, the further question arises as to whether the manufacturer is likewise *legally* responsible to the plaintiff. A proper understanding and appreciation of this problem is obtained by a summary of the evolution of the liability of a negligent manufacturer to an injured third person under modern law.

In 1842, the logical development of the law of negligence was checked for almost three quarters of a century. *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842), pronounced the general rule of common law that a vendor or manufacturer of a chattel is liable for injury to a user only where there exists privity of contract. Various reasons were given to support this rule. One was that the seller's misconduct was not legally the cause of the consumer's damage, since harm was not anticipated from defects inherent in the goods. This rule was based on the fact that there was an intervening resale by a responsible party which "insulated" the negligence of the manufacturer. *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865 (8th Cir. 1903). It would seem that this argument is fallacious: if the goods are sold to a dealer, the sale of such goods to a consumer, and injury thereby, if the articles are dangerously defective, is foreseeable and probable. PROSSER, TORTS 674 (1941).

Gradually the courts developed several widely recognized exceptions which whittled away the general rule derived from the holding in *Winterbottom v. Winchester*, *supra*. The first exception, embodied in *Thomas v. Winchester*, 6 N. Y. 397 (1852), decided that a manu-

facturer's or vendor's negligent act in manufacturing or inspecting an article is actionable by third parties irrespective of the existence of privity. Because of the element of foreseeability, there is a duty to prevent those who will use the article from becoming injured by it.

The second exception is that an owner may be liable for a negligent act which injures one invited to use defective appliances supplied for use on the owner's premises. *Heaven v. Pender*, L. R. 11 Q. B. 503 (1883).

A third exception, illustrated in *Huset v. J. I. Case Threshing Mach. Co.*, *supra*, is that one selling an article known to be imminently dangerous to life, without giving notice of such qualities, is liable to any person who suffers an injury therefrom. Such injury is held to be reasonably foreseeable regardless of want of contractual relations.

Early cases showed a narrow interpretation of the *Thomas v. Winchester* doctrine. Later cases, however, show a more liberal spirit. *Devlin v. Smith*, 89 N. Y. 470 (1882); *Statler v. George A. Ray Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063 (1909); *MacPherson v. Buick Motor Co.*, *supra*. In the epochal decision in 1916 in the *MacPherson* case, a more just and logical appraisal of the manufacturer's liability was propounded. An auto manufacturer who used a defective wheel on one of their cars was held liable to a buyer of such car for an injury sustained by the collapse of the defective wheel; such defects should have been discovered by reasonable inspection or testing. This added exception to the general rule may be generalized: the manufacturer of a product which by reason of negligence in production is dangerous to human safety is liable, without privity of contract, to one who suffers bodily injury while the article is being used reasonably for its intended purpose. Accord: *Rosebrock v. General Elec. Co.*, 236 N. Y. 227, 140 N. E. 571 (1923); *Krahn v. J. L. Owens Co.*, 125 Minn. 33, 145 N. W. 626 (1914); *Foster v. Ford Motor Co.*, 139 Wash. 341, 246 Pac. 945 (1929).

Thus, in the *MacPherson* case, Justice Cardozo extended the class of "inherently dangerous" articles to include anything which would be dangerous if negligently made regardless of contractual privity. See *MacPherson v. Buick Motor Co.*, *supra*, 111 N. E. at 1053:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added the knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. . . . We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be . . . in law.

It was debated before the court in the instant case whether the tank was capable of being classified as a chattel and thus analagous to the situation in the *MacPherson* case. The court decided that even if it were conceded that the tank was realty, though it was being used for the sole business of the gas company, and rested solely by its own weight on a concrete foundation, the law should not be different. Thus, this is in effect an extension of the *MacPherson* doctrine. It is absurd and illogical, the court pointed out, to hold a manufacturer liable for negligently building a small readily movable tank (chattel), but not to do so if the tank is large and stationary enough to be classified as realty.

Cases of this caliber deserve liberal construction. It would seem that reason and justice would dictate that the manufacturer owed a duty to the general public and is liable for injuries sustained by an innocent bystander. See *McLeod v. Linde Air Products Co.*, 318 Mo. 397, 1 S. W. (2d) 122 (1927); *Coca-Cola Bottling Works v. Sullivan*, 178 Tenn. 405, 158 S. W. (2d) 721 (1942); *Heckel v. Ford*, 101 N. J. L. 385, 128 Atl. 242 (1925). If there is negligence in the face of a danger which can be reasonably foreseen, liability should ensue. Public policy demands a fixed responsibility for the protection and safety of human life, and cannot suffer one to conduct himself in such a way as to place life in danger without incurring liability.

John F. Laughlin

WORKMAN'S COMPENSATION—EFFECT OF EMPLOYEE'S RELEASE OF THIRD PARTY TORT-FEASOR.—*Gardner v. City of Columbia Police Department*,S. C....., 57 S. E. (2d) 308 (1950). The Supreme Court of South Carolina, following an earlier decision delivered by the same court in *Taylor v. Mount Vernon-Woodberry Mills, Inc.*, 211 S. C. 414, 45 S. E. (2d) 809 (1947), has held that a full and complete release given to a tort-feasor by an injured employee without the consent of his employer bars the employee from further right to recovery under the Workmen's Compensation Act.

An award of compensation was affirmed by the Common Pleas Court and the Workmen's Compensation Fund appealed. The respondent, Gardner, an employee of the City of Columbia Police Department, while performing his duties as an officer, was injured by a truck owned and negligently operated by the Concrete Construction Company. The respondent filed claim under the Act, but prior to the hearing and without the consent of his employer he executed a release to the tort-feasor, the Construction Company. The primary question presented to the court was whether the release voluntarily given by the injured employee to the third party tort-feasor, who

was responsible for his injury, bars the employee from compensation under the Act. In answering this question it was necessary for the court to decide whether this settlement, which the respondent admitted by his own oral testimony to be valid and binding, completely freed the tort-feasor from all liability, thus extinguishing the employer's right of subrogation. The court based its decision upon a construction of the following statute, S. C. CODE ANN. § 7035-11 (1942):

When such employee, his personal representative or other person may have a right to recover damages for such injury, loss of service, or death from any person other than such employer, he may institute an action at law against such third person or persons before an award is made under this article, and prosecute the same to its final determination; but either the acceptance of an award thereunder, or the procurement and collection of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy . . .

In the leading case on the subject, *Taylor v. Mount Vernon-Woodberry Mills, Inc.*, *supra*, the same court construing the statute stated:

We are constrained to hold that this article does not empower an injured employee to circumvent the plain intent of the law and thus exclude the employer from all recourse upon the third party tort-feasor. Having obtained relief from the third party, he cannot pursue the alternate remedy.

Before the *Taylor* case the precise question had never been presented to a South Carolina court and thus the court in that case gave effect to the "plain meaning" of the statute. The court also was influenced in the *Taylor* case by decisions of the courts of Tennessee and Virginia, who had construed statutes of similar import. *Walter v. Eagle Indemnity Co.*, 166 Tenn. 383, 61 S. W. (2d) 666 (1933); *Stone v. George W. Helme Co.*, 184 Va. 1051, 37 S. E. (2d) 70 (1946). Other jurisdictions also hold that the act of an injured employee in effecting a voluntary settlement with the third party bars a claim to compensation under the Workmen's Compensation Act. *Bebout v. F. L. Mendez & Co.*, 110 Ind. App. 28, 37 N. E. (2d) 690 (1941); *Tews v. Hanks Coal Co.*, 267 Mich. 466, 255 N. W. 227 (1934); *White v. New Mexico Highway Commission*, 42 N. M. 626, 83 P. (2d) 457 (1938). *DeShazer v. National Biscuit Co.*, 196 Okla. 458, 165 P. (2d) 816 (1946); *Hart v. Traders & General Ins. Co.*, 144 Tex. 146, 189 S. W. (2d) 493 (1945); *Combined Locks Paper Co. v. Kray*, 187 Wis. 48, 203 N. W. 946 (1925).

Justice Stukes, who delivered the dissenting opinion in the *Taylor* case and reiterated it in the instant case, agrees that the facts of this case bring it in the precedent of the *Taylor* case. However, he reasons to the conclusion that the employer retains his right of subrogation and that the release does not bar the employee from obtaining compensation. Decisions in other states substantiate this view: *Commonwealth v. Wells*, 242 Ky. 656, 47 S. W. (2d) 81 (1932);

Everard v. Woman's Home Companion Reading Club, 234 Mo. App. 760, 122 S. W. (2d) 51 (1938); *Hugh Murphy Const. Co. v. Serck*, 104 Neb. 398, 177 N. W. 747 (1920); *Holland v. Morley Button Co.*, 83 N. H. 482, 145 Atl. 142 (1929); *Solomone v. Degnon Contracting Co.*, 194 App. Div. 50, 184 N. Y. S. 735 (1920); *State ex rel. Woods v. Hughes Oil Co.*, 58 N. D. 581, 226 N. W. 586 (1929); *Mercer v. Ott*, 78 W. Va. 629, 89 S. E. 952 (1916). Justice Stukes denies that a release is tantamount to the "procurement and collection of a judgment at law," and that the court erred in the *Taylor* case in referring to other jurisdictions in construing the above statute instead of independently administering the law as it stands in South Carolina. However, the court followed the common practice of adopting precedents established in other jurisdictions which were in point—specifically, the decision delivered in *Stone v. George W. Helme Co.*, *supra*, which is still the law in Virginia. A closer analysis of the dissenting opinion in the *Taylor* case reveals that it is based more upon sentiment than legal principles. The judge declared: "Every such release executed by unwary workmen will deprive them of their otherwise deserved benefits under the compensation act. . . ." By this statement the dissent implies that the employee does not have the contractual capacity to bargain for himself. The employee by his own oral testimony admitted voluntarily executing the release for a valid consideration. If the release had been secured by a mistake or by a misrepresentation of fact as to the degree of the injury, the court would probably have considered the release as being of no effect. *Avery v. Eddy Paper Corp.*, 295 Mich. 277, 294 N. W. 679 (1940). When the settlement was made the damages were unliquidated and they may never have equalled the three hundred dollars which the tort-feasor gave in exchange for the employee's relinquishment of his right to sue. If the damages had only amounted to fifty dollars, could the tort-feasor have sued to recover the difference? If not, then why compel the tort-feasor to be subject to double recovery?

It is submitted that the court in the instant case reasoned to a valid and fair conclusion, in spite of the modern trend to allow workmen recovery wherever possible. This case is a good example of a satisfaction of a valid claim and should be limited as such. It was the intention of the statute to prevent compensation to the employee twice for the same injury.

Andrew V. Giorgi

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—"SPECIAL ERRAND" AND "GOING AND COMING" RULES.—*Bengston v. Greening et al.*,Minn....., 41 N. W. (2d) 185 (1950). Within the provisions of the workmen's compen-

sation acts, an employee is covered when injured while on a special errand for his employer, such coverage extending to include the return journey as well as the outgoing travel. *Hansen v. Northwestern Fuel Co.*, 144 Minn. 105, 174 N. W. 726 (1919); *Nehring v. Minnesota Mining and Mfg. Co., et al.*, 193 Minn. 169, 258 N. W. 307 (1935); *Oestreich v. Lakeside Cemetery Ass'n. et al.*, 229 Minn. 209, 38 N. W. (2d) 193 (1949). The instant case holds that a person is covered even when he is injured on his own premises, provided he is directly returning from his special task.

The facts of the instant case are as follows: The employer operated a plumbing shop in Minneapolis. The plaintiff was his bookkeeper, her work week extending from Monday through Friday. She did no work for her employer on Saturdays. Prior to the Saturday of the injury she had worked only once on a Saturday morning. On the morning of the injury she was driven to the employer's shop by her husband, who waited for her, and took her directly home an hour later. She alighted from the car, crossed the public sidewalk, and about halfway between the sidewalk and the house, slipped and fell. The place where the accident occurred was on the premises owned by the plaintiff-employee and her husband.

In holding the injury to be compensable under the Act, the court found the plaintiff to be under the "special errand" and "going and coming" rules. These rules cover situations where the employee is not on the employer's premises when injured, but nonetheless his injuries are said to arise out of and in the course of employment, and are therefore compensable. In general, off-premises injuries *to and from work* are compensable in the following circumstances: if the employee is on the way to or from work in a vehicle owned or supplied by the employer, *Bailey v. Santee River Hardwood Co., et al.*, 205 S. C. 433, 32 S. E. (2d) 365 (1944); if the employee is subject to call at all hours or during emergencies, *Souza's Case*, 316 Mass. 332, 55 N. E. (2d) 611 (1944); *Nehring v. Minnesota Mining & Mfg. Co. et al.*, 193 Minn. 169, 258 N. W. 307 (1935); if the employee is traveling for the employer as a salesman, *Lief v. Walzer & Son et al.*, 248 App. Div. 651, 4 N. E. (2d) 727, *aff'd.*, 272 N. Y. 542, 4 N. E. (2d) 727 (1936); or is on a *special mission*, or going or coming therefrom even in his own car, *Kelly v. Metropolitan Edison Co., et al.*, 156 Pa. Super. 659, 41 A. (2d) 418 (1945); if the employee is ordered to finish her work at home, if injured by an auto on the way home, *Proctor v. Hoage*, 81 F. (2d) 555 (D. C. Cir. 1935). The scope of the rules is broad, and embraces many wide and varied situations. In *Robinson v. George et al.*, 16 Cal. (2d) 238, 105 P. (2d) 914, 918 (1940), the court, in quoting 1 CAMPBELL, WORKMEN'S COMPENSATION § 182 (1935) states the rules as follows:

When the employee is sent on a special errand, either as part of his regular duties or, at the express order of his employer, the former is under the Act and injuries sustained in the course thereof are compensable from the time of his beginning the assignment to its completion; that is, both going and coming or until he deviated therefrom for personal reasons.

The court in *Draper v. Railway Accessories Co. et al.*, 300 Ky. 597, 189 S. W. (2d) 934, 937 (1945), quotes from 6 SCHNEIDER, WORKMEN'S COMPENSATION LAW (3rd ed. 1939) 1264 (Supp.) saying of the "going and coming" rule:

The basis of the "going and coming" rule is that, though broadly speaking the injury is incidental to the employment, compensation under the Act is dependent upon the fact that the employee is engaged in some service *growing out* of his employment, and that an employee in merely coming to or going from his work is not rendering any such service. He is exposed to risk, not as an employee, but rather as a member of the general public and the Act is not intended to compensate for injuries resulting from such risks. (Emphasis supplied.)

The early rule was that, in order to be entitled to recovery under the Act, the injury must have arisen out of *and also* received in the course of employment. Neither alone was sufficient. An injury can be said to be received "*in* the course of" employment when it comes at a time the employee is performing a duty for which he was hired. An injury can be said to arise "*out* of the course of" employment when there is a reasonable causal connection between the conditions under which the work is to be performed and the resulting injury. In re *Employers' Liability Assur. Corp., Ltd.*, 215 Mass. 497, 102 N. E. 697 (1913). The later and probably better view abolishes the distinction between "out of" and "in" the course of employment. The court in *U. S. Fidelity and Guaranty Co. v. Barnes*, 182 Tenn. 400, 187 S. W. (2d) 610 (1945), aptly states, ". . . an injury arising out of any employment almost necessarily occurs in the course of it."

The "going and coming" and "special errand" rules are not exceptions to the rule that in order for an injury to be compensable under the Act it must arise out of and in course of employment. An injury which occurs under a factual situation so as to bring it within these rules is said to be out of and in course of employment *as a matter of law*. *Hansen v. Northwestern Fuel Co.*, 144 Minn. 105, 174 N. W. 726 (1919).

In the instant case the court held that the plaintiff was on a special mission for her employer; that the errand for the employer occasioned the travel; that by virtue of the "special errand" and "going and coming" rules she was covered by the Act and her injuries therefore compensable under it.

The case is unique in that never before has the coverage been thus extended to include coverage for an injury sustained by an