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# Recent Decisions

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the right is that given by the Brandeis-Warren article, the more liberal common law jurisdictions, and the constitutional jurisdictions. The common law must ever progress to protect citizens against unjust abuse in a free society. If, conscientiously, the common law states cannot grant the necessary scope of relief without resorting to statutes, then statutes should be passed. If, further, the law in New York is to remain in its present mummified state under the existing statutes, the statutes must be broadened. No wrong should be suffered without a remedy. The willful infliction of mental injury is a wrong; the rest of the syllogism follows. Whether we denominate this injury a breach of the right of privacy, or whether we label it a "new tort" of intentional mental suffering, some legal theory in all jurisdictions should permit recovery when the justice of the case demands it. If there was ever a legal relationship where the ancient apology *damnum absque injuria* were applicable, that maxim nevertheless has no meaning or place in the situations discussed herein. If the law suffers the willful invasion of personality without offering a satisfactory remedy, the law is an officious pretender.

*Joseph V. Wilcox*

## RECENT DECISIONS

WORKMAN'S COMPENSATION—DEATH BENEFITS—"WIDOW" WITHIN THE FEDERAL LONGSHOREMAN'S COMPENSATION ACT.—*Moore Dry Dock Co. v. Pillsbury*, 169 F. (2d) 988 (C.C.A. 9th 1948). The Longshoreman's and Harbor Workers Compensation Act, 44 STAT 1424 (1927), 33 U.S.C. §§ 901-950 (1946), provides that upon the death of an employee, subject to the provisions contained in § 3 and § 9 of the act, the deputy commissioner shall award a death benefit to the deceased employee's widow as defined in § 2(16) of the act:

> The term widow includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

This case arrived in the U. S. circuit court when the Moore Dry Dock Co. and its carrier, the Fireman's Fund Indemnity Co., brought injunction proceedings against the deputy commissioner, Pillsbury, to prevent him from awarding the death benefit to the claimant, Luella G. Campbell. In their complaint, the plaintiffs alleged that the claimant was not a widow under the definition of the act. The injunction was refused and the deputy commissioner's ruling was sustained.

The claimant and the deceased, William A. Campbell, were married on February 8, 1922. The deceased deserted her on September 4, 1923, and although there was no divorce, they never again lived together, nor had the claimant depended upon the deceased for support. Claimant, on May 14, 1938, entered into a marriage ceremony with another man under the justifiable presumption that her first husband was dead. On May 12, 1945, William A. Campbell died in such a manner as to render a widow, as defined in § 2(16), eligible for the death benefits provided by the act. Plaintiff contended that by entering into marital

relations and living with another man for seven years prior to the death of William A. Campbell, claimant forfeited her right as a widow for purposes of this act. It was held, in effect, that the act did not provide for inquiry into the subsequent life or conduct of the wife if the original separation was for justifiable cause or by reason of desertion, and that such a provision should not be read into the act by judicial construction.

Thus the ninth circuit found itself in the company of the second and third circuits, which have handed down similar rulings, *Associated Operating Co. v. Lowe,* 52 F. Supp. 550 (E. D. N. Y. 1943), *aff'd,* 138 F. (2d) 916 (C.C.A. 2d 1943); *Traveler's Insurance Co. v. Norton,* 34 F. Supp. 740 (E. D. Penn. 1940). The fifth circuit, however, holds a contrary view and Judge Mathews, in his opinion in the instant case, said, "To the extent that decisions of the Fifth Circuit support the contrary view, the Ninth Circuit deems them erroneous and declines to follow them."

This conflict does not seem to stem from a different construction of any of the words or phrases contained in the definition. In all jurisdictions where the question arose, the word "wife," which is contained in the definition of "widow" but is not itself defined, has been construed by the use of the law of the state in which action is brought. By this means common law wives, bringing their claim into the federal circuit court while it is sitting in a state which requires a legal ceremony and does not recognize the validity of a common law marriage, have been held not to be "widows" for purposes of the act. *Bolin v. Marshall,* 76 F. (2d) 668 (C.C.A. 9th 1935), *cert. denied,* 296 U. S. 573, 56 S.Ct. 116, 80 L.Ed. 404 (1935); *Keyway Stevedoring Co. v. Clark,* 43 F. (2d) 983 (Md. 1930); *Green v. Crowell,* 69 F. (2d) 762 (C.C.A. 5th 1934), *cert. denied,* 293 U. S. 554, 55 S.Ct. 88, 79 L.Ed. 656 (1934). The phrase "justifiable cause" has been given its legal meaning of matrimonial misconduct which the court deems serious enough to warrant a separation. Thus a wife living apart from her husband so that he might collect relief was denied the status of "widow." *Weeks v. Behrend,* 135 F. (2d) 258, (App.D.C. 1943). This definition has not been questioned by any other jurisdiction. Nor has the word "apart" caused any difficulty. In *T. J. Moss Tie Co. v. Tanner,* 44 F. (2d) 928 (C.C.A. 5th 1930), *cert. denied,* 383 U. S. 829, 51 S.Ct. 353, 75 L.Ed. 1442 (1931), it was held that actual physical dwelling together was not necessary, and a wife temporarily absent from the home to earn money to pay for the home was living with her husband for the purposes of the act. No dispute has arisen here among the several jurisdictions. Finally, all courts that have been called upon to decide whether the definition of "widow" is applicable to the phrase "surviving wife" appearing in § 9 of the act (the section which provides for the apportionment of the death benefit) have harmoniously decided that they are the same. *Weeks v. Behrend,* 135 F. (2d) 258 (App. D.C. 1943); *Williams v. Lawson,* 35 F. (2d) 346 (C.C.A. 5th 1929). Judge Walker, in rendering the opinion in *Williams v. Lawson,* said:

> The words "surviving wife" used in section 9 of the act describe the same person as would have been described by the word widow. That the words "surviving wife" in the above-quoted provision of section 9 were intended to be the equivalent of the word "widow" is indicated by the succeeding part of the same sentence which makes the prescribed compensation payable "during widowhood." A preceding section of the act having defined the word "widow" when used in the act, it is to be inferred that an intended effect of making the prescribed compensation payable "during widowhood" was to keep the right provided for from accruing in favor of one who was the wife of the deceased employee at the time of his death, but whose state or condition at that time was not that of a widow as defined in section 2 of the act.

Thus the real controversy appears: can a legal wife whose separation was originally caused by her husband's matrimonial misconduct or by reason of his desertion be denied the rights of a widow as defined by this act? The fifth circuit answered yes. In *American Mutual Liability Co. v. Henderson,* 141 F. (2d) 813 (C.C.A. 5th 1944) the wife left her husband for justifiable cause and then a year later went to live with another man to whom she bore five children. Judge Holmes, in his decision of that case, said:

> Although the original separation was due solely to her husband's desertion and her living apart was then for justifiable cause, her later act in living with and bearing children to another man was done of her own free will, was in derogation of her relationship as the lawful wife . . . and became the independent cause of her living apart from her husband at the time of his death. . . . this new and independent reason for her living apart from her husband operated as a matter of law to forfeit any and all rights of the wife as a claimant of compensation under the act.

In a similar case decided in the second circuit, *Associated Operating Co. v. Lowe,* 52 F. Supp. 550 (E.D. N.Y. 1943), *aff'd,* 138 F. (2d) 916 (C.C.A. 2d 1943), the wife left for justifiable cause, went to live with another man, and bore him three children. In holding for the claimant, the court declared that it could find no authority for adding to the statute provisions which are not even by inference to be found in it; thus the wife's subsequent conduct did not affect her status as a "widow."

The "independent cause" doctrine was used again by Fifth Circuit Judge McKorcle to deny a claim in *Ryan Stevedoring Co. v. Henderson,* 138 F. (2d) 348 (C.C.A. 5th 1943), where the wife, after leaving her husband for justifiable cause, entered into a bigamous marital relationship for three and one-half years. On the other hand, neither the ninth circuit in the instant case nor the third circuit in the *Norton case* (the facts of which show that subsequent to the desertion, the claimant lived with and held herself out to be the wife of another for six years prior to the employee's death), could discover within the definition provided by the act authority for inquiry into the wife's conduct after the original desertion.

Thus the issue resolves itself into whether a judge has the right to limit an unambiguous statute in order to prevent a person who may be justified legally but not morally to the benefits of the statute. Perhaps the answer can be found in the fundamental purpose of our American courts. They were created to act as a check upon the executive and legislative departments, to carry on their various administrative tasks, and to interpret statutes when such interpretation was needed. Their *primary* function is not the determination of moral issues. The question whether this statute can be interpreted so as to prevent a wife from claiming compensation under the act when her own misconduct deprives her of the legal right to support from her husband at the time of his death, can best be answered by Judge Bard's words in the *Norton* case:

> The desirability of such a statute may readily be conceded. Nevertheless, had Congress intended that such a rule govern awards of compensation under the Longshoreman's and Harbor Worker's Compensation Act it could have stated so explicitly. To read such a provision into an unambiguous statute would exceed the bounds of judicial function.

*Sidney Baker*

TAXATION—CHARITIES—CONSTRUCTION OF THE WORD "BENEVOLENCE".—*Assessors of Lancaster v. Perkins School,* .... Mass. ...., 82 N.E. (2d) 883 (1948). The taxpayer in this case was considered a charitable institution, within the purview of the statute exempting its property from taxation.

The Perkins School, which operated for the education and care of retarded or badly adjusted children and of others requiring special educational or medical treatment, was assessed on certain personalty and realty by the Assessor of Lancaster. The Perkins School appealed to the appellate Tax Board, which held that the property assessed was exempt from taxation on the grounds that the property fell within the statute, MASS. LAWS ANN., c. 59, § 5 (1945), exempting "Personal property of literary, benevolent, charitable and scientific institutions and of temperance societies incorporated in the commonwealth, the real estate owned and occupied by them or their officers for the purpose for which they are incorporated."

Whether an institution is considered literary, benevolent, charitable or scientific within the purview of the statute depends upon the purpose that it declared and the work that it does. *Board of Assessors v. Garland School of Home Making,* 296 Mass. 378, 6 N.E. (2d) 374 (1937).

An interesting point which emanates from this case is the construction of the word "benevolent" in relation to charitable institutions. In the law of trusts it is not necessary that there be a definite *cestui que trust* to create a charitable trust. All that is necessary is that a description be given of that which the law acknowledges to be a charitable purpose. Does the word "benevolent" sufficiently describe a charitable purpose which the law acknowledges?

In *Morice v. The Bishop of Durham,* 10 Ves. 522, 32 Eng. Rep. 947 (Ch. 1805), property was bequeathed to the bishop upon trust to dispose of the same to such objects of benevolence and liberality as he would most approve. The court said that this was not a trust because the words "benevolence and liberality" were not restricted to charity. In the principal case, however, the word "benevolent" as used in the statute was given the same construction as the word "charitable." The word "benevolent," therefore, in the statute is no broader than the word "charitable." It therefore seems from this construction that the law of trusts is different from the law of taxation in regard to the creating of a charitable trust and that the two fields of law cannot be reconciled in this respect.

The court in *Morice v. The Bishop of Durham,* 10 Ves. 522, 539-543 (1805), in justifying its conclusion stated:

> As it is a maxim, that the execution of a trust shall be under the controul of the Court, it must be of such a nature, that it can be under that controul; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust, therefore, which, in case of mal-administration could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles familiar in other cases, it must be decided, that the Court can neither reform mal-administration, nor direct a due administration. . . . I do not apprehend, that under any authority upon such words [benevolence and liberality] the Court could have charged him with mal-administration, if he had applied the whole to purposes, which according to the meaning of the testator are benevolent and liberal; though not acts of that species of benevolence and liberality which this Court in the construction of a Will calls charitable acts.

A trust, therefore, declared in a manner which could not be executed by the court must fail and thus go to the benefit of the next of kin. The doctrine of

*Morice v. The Bishop of Durham* was severely attacked by Professor Ames in 5 HARV. L. REV. 389 (1892), but as vigorously defended by Professor Gray in 15 HARV. L. REV. 509 (1902).

In the principal case, however, it must be noted that "benevolent" was construed in conjunction with the word "charitable." When so construed the two words were synonymous and added nothing to the word "charitable." *Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 54 N.E. (2d) 199 (1944). In *Morice v. The Bishop of Durham* the doctrine of *ejusdem generis* does not apply as it did in the principal case because the word "benevolence" is not used in conjunction with "charitable," but with the word "liberality" which does not mean charitable. In such a case, "benevolence and liberality" was not a sufficient description to have the trust restricted to charity. It follows, consequently, that there being no charitable trust which the courts could enforce and no *cestui que trust*, there was no one who could compel its performance. For this reason the trust failed.

Perhaps the distinction that in the principal case "benevolence" was used in conjunction with "charitable" giving them the same meaning and consequently a sufficient description of a charitable purpose, while in *Morice v. The Bishop of Durham* it was used with the word "liberality," which does not adequately describe a charitable purpose, will suffice to narrow the cleavage and reconcile the two cases. Also the conflict can be reconciled by saying that a close scrutiny of the words describing a charitable purpose as a condition precedent to creating a charitable trust is relaxed when the only question involved is the taxability of the property.

*John C. Castelli*

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REMOVAL OF CAUSES TO THE DISTRICT COURT—NEW JUDICIAL CODE.—*City of Buffalo v. Spann Realty Corp. et al.*, 80 F. Supp. 171 (W. D. N. Y. 1948); *Thomas v. Thompson*, 80 F. Supp. 225 (E. D. Ark. 1948). These recent cases serve to highlight the changes in the new Judicial Code in respect to the removal of actions begun in the state courts to the federal district courts. The new provisions for removal, 28 U. S. C. § 1441, 1 U. S. CODE CONG. SERV. 493 (1948), replace 36 STAT. 1094 (1911), as amended, 28 U. S. C. § 71 (1946), which formerly governed such actions.

*City of Buffalo v. Spann Realty Corporation et al.* illustrates the manner in which "local prejudice," which was required for removal in diversity of citizenship cases under the old provisions, is no longer required under the new code. The petition for removal to the federal district was filed because the plaintiff in the state action was alleged to be represented by persons of political influence, and it was claimed that because of this influence the petitioner would be unable to obtain justice in the state court.

In regard to the old code, the court said that such an allegation as the petitioner made in the present case would not entitle the district court to take jurisdiction. The prejudice or local influence referred to in the old code was required to exist either among the population or in the court. Here there was no allegation that the court or local population was under such influence. Under the new code, it would seem that the petition should have been granted. The petition was refused by the court on the ground that it had not been filed in the time allowed by the new code (which is twenty days after the commencement of the action or after service of process). The old code had set the time limit by the time allowed under state law for the defendant's answer. Therefore, while the effect of the new code as to removal was discussed, it was not the express ground of the court's ruling.

*Thomas v. Thompson* is another of the cases decided by the federal courts involving removal of actions under the new judicial code. For purposes here, the case involved the question whether, under the new code, the cause could be removed to the federal courts, when the plaintiff sued the defendant railroad in a state court and joined the engineer who was, with the plaintiff, a citizen of the state where the action was brought. The pertinent section of the new code was § 1441 (b) which states in part that "any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought." Holding that the question of whether the engineer is a proper party is one of state law, the court decided that under Arkansas law the engineer in this case was a proper party and under the code the action was not removable.

The defendant relied on subsection (c) of § 1441 to sustain his petition for removal. Subsection (c) reads

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein. . .

This contention was denied, the court holding that subsection (c) would not permit the removal of separable controversies as in this case, but only separate causes of action.

The old code provided that when "any" defendant is a non-citizen the cause may be removed. The new code on this point states the action shall be removable only if none of the parties joined as a defendant is a citizen of the state in which the action is brought.

Under the new code interesting problems will arise for the plaintiff's attorney. Generally speaking, he seeks to keep the cause of action in the state courts which have been thought more favorable to the plaintiff, particularly in cases where the defendant is a common carrier and corporation of another state.

The new code would seem to give the plaintiff an opportunity to retain the case in the state court even if the damages are over the three thousand dollar mark where the jurisdiction of the federal district courts begins, if the plaintiff is able to join a citizen of the state where the action is brought as a proper party. Under the old code, the joining of even one non-citizen together with a claim of damages for over three thousand dollars would have been sufficient to allow the non-resident to remove the action. In the instant case the joining of the resident defendant prevented a removal under the new code which would have been allowed under the provisions of the old code.

The net conclusions as pointed out by these cases are that insofar as local prejudice is dropped as a requirement for federal jurisdiction, the federal courts will no longer have to determine when it exists. This will give greater uniformity in the cases, since under the old code, facts which might appear to one district court to be sufficient for removal might appear insufficient to another court.

The new provision, which allows removal only in those cases where all the defendants are non-residents of the state where the action is brought, will divest the district courts of many cases brought before them under the old code. Formerly, in actions pending against non-resident common carriers, claims for damages were often scaled down in order to prevent removal by the defendant. Now that the code is changed, claimants in these cases may well demand more liberal damages, and it is conceivable that a frantic search will be conducted to find a proper resident defendant to be joined so as to prevent removal.

*John J. Cauley*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—DISCRIMINATION ON PUBLIC CARRIERS.—*Day v. Atlantic Greyhound Corporation,* 171 F. (2d) 59 (C.C.A. 4th 1948). This case represents another in a long series of attempts by the American Negro to achieve the equality of treatment that he believes to be both his constitutional and natural right. More immediately, it is one of the many cases that has arisen as an aftermath of the decision in *Morgan v. Virginia,* 328 U. S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317 (1946), which declared a segregation statute of the State of Virginia to be a violation of Article 1, Section 8 of the Constitution. Since the holding in that case is of utmost importance to the presently reviewed decision, it should be advantageous to review it. The majority opinion in the *Morgan* case, written by Mr. Justice Reed, declared that the segregation statute, by requiring the continual movement about and changing of seats by passengers in order to enforce the law, imposed an undue burden on interstate commerce and was for that reason unconstitutional. He said: "It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel."

This decision has given rise to a multiplicity of litigation. Two general patterns stand out in these cases. The first group attempts to extend the holding in the *Morgan* case to include regulations by public carriers, while the second group of cases consists of suits brought under the supposition that this holding declared all segregation in interstate commerce unconstitutional per se as a violation of the Fourteenth Amendment. To date both methods of attack have proved equally unsuccessful.

In the present case the plaintiff was an elderly Negro woman who had purchased a round trip bus ticket from Syracuse, New York to Winterhaven, Florida, with a three week stopover in Richmond, Virginia. She resumed the trip at Richmond and proceeded without incident until the regular stop for the evening meal was made at South Hill, Virginia. It was here that the cause of action arose. The plaintiff, upon re-entering the bus, took a seat near the front. The driver told her that she would have to take a seat in the rear of the bus as was required by the regulations of the company. She refused to do so and subsequently was forcibly ejected by several police officers. She resisted the officers on the way to the police station and in the scuffle lost several articles of personal property. There was no evidence that the officers had used more than reasonable force. At the police station the plaintiff was charged with disorderly conduct and locked up. After three hours she was allowed to deposit twenty dollars in lieu of bail and was discharged. This action was brought in the district court to recover for personal injuries incurred in the altercation. The lower court submitted the question of the reasonableness of the pertinent regulations of the defendant company to the jury, who returned a verdict in favor of the defendant corporation.

This appeal was based upon the theory that any segregation on a basis of racial differentiation was violative not only of the common law but also of the rights protected by the Fourteenth Amendment. The court held that this question could not be debated because there were binding decisions of the Supreme Court explicitly holding that interstate carriers have a right to impose such regulations requiring segregation, provided there is no discrimination in the arrangement. See *Hall v. DeCuir,* 95 U. S. 485, 24 L.Ed. 547 (1877); *Chiles v. Chesapeake & Ohio R. Co.,* 218 U. S. 71, 30 S.Ct. 667, 54 L.Ed. 936 (1910). The court said carriers have this right to impose regulations notwithstanding the recently decided cases which declared that Negroes have certain rights which must be protected. *Morgan v. Virginia* and *Bob-Lo Excursion Co. v. Michigan,* 333 U. S. 28, 68 S.Ct. 358 (1948). 23 NOTRE DAME LAWYER 382 (1948). The latter case held that a Michigan civil rights law, based on the Civil Rights Act passed by Congress and declared unconstitutional in 1883, did not impose an undue burden on the defendant company.

The defendant in that case had attempted to exclude all Negroes on its excursion trips which involved foreign commerce to Canada, but which were of particular local importance and therefore could be regulated by the State of Michigan. These two cases were distinguished on the basis that they involved a state statute whereas the present regulations were imposed by the defendant under reservations filed with the Interstate Commerce Commission. Relying directly on *Chiles v. Chesapeake & Ohio R. Co.*, the court limited the inquiry to the nature of the regulation enforced in the present case and refused to rule on the question of the discriminatory nature of segregation per se.

The regulations in point were issued following the decision in the *Morgan* case and were meant to avoid the effect of that decision by obviating the necessity for the passengers to be continually changing seats in the enforcement of the segregation plan. The company issued these regulations in a form letter to all drivers. The company was careful to conform to the rule of reasonableness of segregation regulations laid down in the case of *Plessy v. Ferguson*, 163 U. S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). In that decision the court stated the general test of reasonableness to be: "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," and this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. "Regulations which are induced by the general sentiment of community for whom they are made and upon whom they operate cannot be said to be unreasonable." This decision was the basis for the "separate but equal" doctrine.

At the time this controversy arose, the defendant corporation had on file with the Interstate Commerce Commission, pursuant to the requirements of the Interstate Commerce Act of 1935, 49 STAT. 55, 560 (1935), 490 U.S.C. §§ 316(a), 317(a) (1946), and pursuant to the regulations of the Commission promulgated thereunder, a reservation which makes the following provision: "(2) The carriers reserve to themselves full control and discretion as to seating of passengers and reserve the right to change seating at any time during the trip." By allowing the defendant to operate under this reservation the Interstate Commerce Commission has, in effect, admitted the right of the company to make such regulations and such permission has the force of a ruling by the Interstate Commerce Commission. In *Prigden v. North Carolina Coach Co.*, 229 N.C. 46, 47 S.E. (2d) 609 (1948), substantially identical regulations were involved. The court held that they were reasonable within the meaning of § 316(a), which in effect required the carriers to file "reasonable" and "just" regulations concerning the handling of passengers.

That the lower court proceeded under the "separate but equal" theory laid down in *Plessy v. Ferguson* is evident from a study of the history of the doctrine of reasonableness, although the court does not refer to the case by name. The instruction to the jury was, in substance, that if they believed that the accommodations and facilities provided for white and Negro passengers were substantially equal the verdict should be for the defendant; if, on the other hand, they found the accommodations unequal or discriminatory against Negroes, they should return a verdict for the plantiff. The jury found for the defendant. On appeal the circuit court of appeals affirmed the decision of the district court. The court declared that both the reasonableness of the regulation and the manner in which it was enforced were fairly submitted to the jury and determined against the plaintiff.

The circuit court of appeals added a dictum to the effect that if the seating arrangement had been such that it would have required continual changing of seats on the part of the passengers (Negroes) it would be of itself discriminatory treatment in deprivation of their rights; but that this was not the case before them. They said that the plaintiff was virtually alone at the time she was re-

quesed to move and could have done so at little or no inconvenience to herself or anyone else. This dictum appears inconsistent; it applies the test of an undue burden embodied in the *Morgan* case which the same court had already distinguished.

From the cited cases it is apparent that the circuit court of appeals followed the precedents laid down in the decided cases to the letter. It is equally evident that these cases represent a deplorable blot on the jurisprudence of a democratic nation. It appears that the most expedient method of eradicating this cancerous growth of legal doctrine would be by congressional action pursuant to the power delegated under the Commerce Clause of the Constitution. This remedy has been suggested in the decisions for the past seventy years, from *Hall v. DeCuir* (1877) to *Morgan v. Virginia* (1946). Mr. Justice Black, as he begrudgingly concurred in the majority opinion in the latter case, asserted this to be the proper course of action. In 15 BROOK. L. REV. 12, 21 (1949), Osmond K. Fraenkel cites this method as one also recommended by President Truman's Civil Rights Commission.

Civil Rights legislation, even if passed, will be a difficult method of accomplishing the desired result in view of the decision in the *Civil Rights Cases,* 109 U. S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). In declaring the Civil Rights Act of 1875 to be unconstitutional, the court stated the scope of the Fourteenth Amendment to be the following: "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." Since that date neither Congress nor the Interstate Commerce Commission has legislated concerning segregation in interstate commerce.

It is conceivable that the present Supreme Court will have difficulty in countenancing the rule of reasonableness employed in the present case and might well overrule the *Plessy* case as far as that rule is concerned. In a recently decided racial restrictive covenant case Chief Justice Vinson stated: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley et. ux. v. Kraemer et. ux.,* 334 U. S. 1, 22, 68 S. Ct. 836 (1948). If this statement is at all representative of the attitude of the present Supreme Court it would apparently lend support to a prediction of an early demise of this rule of reasonableness.

It is suggested that the test of reasonableness used in the instruction to the jury in this case is a vestigal remnant of an era of prejudice and must be abolished if our legal system is to escape the charge of hypocrisy and nonprotection of constitutional rights. The "separate but equal" doctrine can be defended only by an appeal to the mores principle, a dominant tenet of the Historical School of Jurisprudence, and a questionable ethical norm in an age that has seen its logical and disastrous extension in the Nazi regime. If we would save our legal system from the disrespect with which other systems have been plagued throughout the world it would behoove us to recognize that there can be no segregation of races without discrimination. Discrimination is a psychological attitude and has little to do with physical equality except as a consequence of this attitude. See Note, in 23 NOTRE DAME LAWYER 220 (1948) for an excellent discussion of the "separate but equal" concept as applied in education.

In a realistic manner the courts are beginning to look into the element of psychological coercion in determining the admissability of confessions. See the dissent in *Upshaw v. United States,* .... U. S. ...., 69 S.Ct. 170, 172 (1948); 24 NOTRE DAME LAWYER 432 (1949). *McNabb v. United States,* 318 U. S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943). Enigmatic as this problem might seem from the legal viewpoint, the simple truth would make men free.

*Francis W. Collopy*

INFANTS—TORT LIABILITY TO CHILD AFTER BIRTH FOR PRENATAL INJURY.—*Mays v. Weingarten*, .... O. App. ...., 82 N.E. (2d) 421 (1948).—*Williams v. Marion Rapid Transit, Inc.*, 82 O. App. 445, 82 N.E. (2d) 423 (1948). These two cases are irreconcilable in that they reach opposite conclusions by their rulings on the same point of law. The first case, decided in the Seventh Appellate District of Ohio, held that a child after birth cannot recover for prenatal injury caused by the negligence of the defendant. Because of the negligence of its owner, a parked automobile started to move and collided with a bus, in which the pregnant woman was riding, resulting in injuries to mother and child. In the opinion of this court, an unborn child is not a person within the constitutional provision that every person shall have a remedy by due process of law for an injury done to him. Thus the defendant automobile owner was not liable to the child in this case. This decision adheres to the general rule of almost universal application in the United States—that in the absence of statute, neither an infant nor his personal representative may recover damages from a prenatal injury to the child. *Drobner v. Peters*, 232 N. Y. 220, 133 N.E. 567 (1921); *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638 (1900).

In the second Ohio case, the Third Appellate District Court reached a contrary conclusion. In this case, because of the negligent operation of the defendant company's bus by its servant, the mother fell from the steps of the bus, thereby sustaining injuries from which the mother subsequently died and caused the child to be born prematurely in a greatly weakened condition. The court held that an infant, as an existing viable child in its mother's womb has a cause of action after birth for injuries caused by the negligence of another. They recognized that this was contrary to the *Mays v. Weingarten* rule, *supra*, and to the general rule in the United States, but went on to say that the duty of the court ". . . should be not so much in extracting a rule of law from precedents as in making an appraisal and comparison of social values, the result of which may be decisive in determining what rule to apply."

The court distinguished between the terms embryo and viable foetus. The latter term signifies a child developed to the extent that it can live outside the uterus. It is possible, after the child has reached this stage of development, even though the mother has died, that medical science can save the life of the child. Biologically speaking, the child has had life since the moment of its conception for purposes of inheritance. *Kimbro v. Harper*, 113 Okla. 46, 238 Pac. 840 (1925). By analogy it would seem reasonable that legal science should recognize the existence of a child *en ventre sa mere* and allow recovery for injury to the unborn child. In the words of Blackstone, "Life is an immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 BL. COMM. *129.

The argument for allowing recovery was well stated in the dissenting opinion of Judge Bogg in *Allaire v. St. Luke's Hospital, supra*:

> If, in delivering a child, an attending physician, acting for compensation, should wantonly or by actionable negligence injure the limbs of an infant, and thereby cause the child, although born alive and living to be maimed and crippled in body or members it would be abhorrent to every impulse of justice or reason to deny to such child a right of action against such physician to recover damages for the wrongs and injuries inflicted by such physician.

A New Jersey case held that a physician owed a duty to the unborn child in the womb of the mother, and after birth the child could recover for the prenatal injuries caused by the negligence of the doctor. *Stemmer v. Kline*, 19 N. J. Misc. 15, 17 A. (2d) 58 (1941). This was reversed by *Stemmer v. Kline*, 128 N. J. 445, 26 A. (2d) 489 (1942), where the court held that in absence of

statute the common law rule applied. However the common law rule holds that, for all beneficial purposes a child is a person *in esse*, insofar as civil rights are concerned, from the moment of conception. *Hall v. Hancock*, 15 Pick. (Mass.) 255, 26 Am. Dec. 598 (1834). This rule has been applied frequently to protect the property rights of an unborn infant. Examples of this are: allowing the child to recover under a will, or appointment of a guardian for the unborn child. *Deal v. Sexton*, 144 N. C. 157, 56 S.E. 691 (1907). In the field of criminal law this recognition is also given. If there was intentional injury to the unborn child, who, after birth, died as the result of the prenatal injury, such action constitutes murder. *Clark v. State*, 117 Ala. 1, 23 So. 671 (1897).

If a child *en ventre sa mere* is to be recognized for purposes beneficial to it, allowing recovery in tort would certainly seem to inure to the child's benefits as well as would the protection of the property rights of the infant. Again, if the state will have its due against the wrongdoers for the infliction of prenatal injuries, does it not seem morally unjust not to allow to the aggrieved person, himself, pecuniary compensation for the wrong suffered? The opinion in the second Ohio case is in accord with most text writers on this subject. PROSSER ON TORTS § 31 (1941). The Supreme Court of Canada has also allowed recovery. *Montreal Tramways v. Leveille*, S.C.R. 456, 4 Dom. L. Rep. 337 (1933).

*Arthur B. Curran, Jr.*

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CONSTITUTIONAL LAW—MISCEGENATION STATUTE.—*Perez et al. v. Lippold*, .... Cal. ...., 198 P. (2d) 17 (1948). This was an action to determine the constitutionality of California's miscegenation statutes. The majority opinion held that the provisions of the Civil Code, CALIF. CIVIL CODE §§ 60, 69 (1941) violated the equal protection clause of the United States Constitution by restricting the right of individuals to marry on the basis of race alone, and by arbitrarily and unreasonably discriminating against certain racial groups. It also ruled that the statutes were too vague and uncertain to be enforceable regulations of a fundamental right.

This was a proceeding in mandamus by the petitioners Andrea D. Perez and Sylvester S. Davis, Jr., against Earl O. Lippold, County Clerk of the County of Los Angeles. Petitioners wished to obtain a certificate of registry and a license to marry. However, because Andrea Perez was a white person and Sylvester Davis was a Negro, the defendant refused to comply with their request. As a defense, Lippold invoked the relevant provision of the Civil Code, CALIF. CIVIL CODE § 69 (1941), which states that ". . . no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." The Civil Code further provides, CALIF. CIVIL CODE § 60 (1941), that: "All marriages of white persons with Negroes, Mongolians, members of the Malay race or mulattoes are illegal and void."

Petitioners protested that the statutes interfered with the free exercise of their religion. Both are members of the Roman Catholic Church which permits intermarriage of Negroes with whites. Petitioners argued that marriage is a sacrament to which they are entitled in the free exercise of their religion. The majority of the court, however, did not decide the case on the issue of the petitioners' right to the free exercise of their religion.

The majority of the court in deciding that the statute was in conflict with the equal protection clause of the United States Constitution declared that the

right to marry naturally implies that one is free to join in marriage with anyone of his choosing and that since the equal protection clause of the United States Constitution does not limit its protection to groups, but affords protection to the individual citizen, this choice is guaranteed by the Constitution. *State of Missouri ex rel Gaines v. Canada,* 305 U. S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938).

The California court said:

> Distinction between citizens solely because of their ancestry are by their very nature odious to free people whose institutions are founded upon the doctrine of equality. For that reason, legislation classification or discrimination has often been held to be a denial of equal protection. Yick Wo v. Hopkins, 118 U. S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); Yu Cong Eng v. Trinidad, 271 U. S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1926); Hill v. Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942).

However, the majority opinion in the instant case pointed out that public interests may prohibit the marriage of two persons. Therefore, if the spouse or any offspring become infected by a loathsome disease, legislation may disqualify such a marriage. But susceptibility to disease, or the alleged mental, physical, and social inferiority of certain races are not grounds for disqualification.

Moreover, the majority ruled that the miscegenation statutes were vague in their application; for there remains the question of how the progeny of miscegenous marriages are to be classified. Are they to be distinguished by physical appearance or by geneological research? What proportion of mixed ancestry classifies a man as a Malayan, or Mongolian? Who is to determine the decisive proportion? In enacting laws, the law-making body must express its intent in clear and plain language, to the end that the people upon whom they are designed to operate may be able to understand the legislative will. In re *Alpine,* 203 Cal. 731, 265 Pac. 947 (1928).

Although there have been decisions to the effect that statutes forbidding interracial marriages are not in violation of the Fourteenth Amendment, Ex parte *Francois,* 9 Fed. Cas. 669, No. 5,047 (W. D. Tex. 1879); Ex parte *Kinney,* 14 Fed. Cas. 602, No. 7,825 (E. D. V. 1879); In re *Hobbs,* 12 Fed. Cas. 262, No. 6,550 (N. D. Ga. 1871); *State v. Tutty,* 41 Fed. 753, (S. D. Ga. 1890); *State v. Gibson,* 36 Ind. 389, 10 Am. Rep. 42 (1877); *State v. Kennedy,* 76 N. C. 251, 22 Am. Rep. 683 (1871); *Green v. State,* 58 Ala. 190, 29 Am. Rep. 739 (1877); *Frasher v. State,* 3 Tex. App. 263, 30 Am. Rep. 131 (1877); *Dodson v. State,* 61 Ark. 57, 31 S.W. 977 (1895); *Kirby v. Kirby,* 24 Ariz. 9, 206 Pac. 405 (1922); In re *Shun T. Takahashi's Estate,* 113 Mont. 490, 129 P. (2d) 217 (1942), these decisions are to be distinguished from *Perez et al. v. Lippold,* in that the statutes in the above cases were properly directed to promote the welfare of society as a whole as well as its individual members, and were not, as in the instant case, vague in their application or in conflict with the equal protection clause of the United States Constitution.

It has been recognized that the state has a definite interest in the contract of marriage. Marriage affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state. *Stevens v. United States,* 146 F. (2d) 120 (C.C.A. 10th 1944). A state has power to prescribe by law the age at which persons may enter into marriage, the procedure essential to constitute a valid marriage, the duties and obligations which it creates and its effects upon the property rights of both parties. *Maynard v. Hill,* 125 U. S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888). It has been held that the state has the sovereign power to regulate and define by law the marital status of its citizens. *Wilkes v. Wilkes,* 245 Ala. 54, 16 So. (2d) 15 (1943); *Crouch v. Crouch,* 28 Cal. (2d) 243, 169 P. (2d) 897 (1946); *Kelsey v. Miller,* 203 Cal. 61, 263 Pac.

200 (1920); *Harding v. Townsend,* 280 Mass. 256, 182 N.E. 369 (1932); *Fearon v. Treanor,* 272 N. Y. 268, 5 N.E. (2d) 815 (1936). The authority of a state to regulate the institution of marriage is referred to the police power of the state. *Raia v. Raia,* 214 Ala. 391, 108 So. 11 (1926); *Waddey v. Waddey,* 290 N. Y. 251, 49 N.E. (2d) 8 (1943); *Chatwin v. United States,* 326 U. S. 455, 66 S.Ct. 233, 90 L.Ed. 198 (1946).

No appeal was made from the judgment within the period fixed by law and therefore it will not go before the Supreme Court. Justice Edmonds, in the concurring opinion, stated that the statutes operated as an undue regulatory power which restricted the petitioners' chosen form of religion thereby violating the First and Fourteenth Amendments of the United States Constitution. *Cantwell v. Connecticut,* 310 U. S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

Though freedom of conscience and belief are absolute, freedom of action is not. An overt act which is criminal cannot be justified in the performance of a religious conviction. Freedom of religion is an absolute right personal to all and cannot be restricted by legislation, but when religious principles find expression in overt acts which endanger peace and good order, civil authorities have the power to control such action by appropriate legislation. Though Congress has no power to legislate on the matter of religious opinion, it is free to reach actions which violate social responsibilities and which are subversive to good order. *Reynolds v. United States,* 98 U. S. 145, 25 L.Ed. 244 (1878); *Davis v. Beason,* 133 U. S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1889).

The decision in the instant case is without doubt a triumph over racism, a victory for civil liberties. The Catholic Church teaches that races are equal in the eyes of God and that man according to the natural law has no right to discriminate between races. The Church does not place any impediment against racial intermarriage but because of existing social conditions in the United States, neither does it encourage them. The Rev. John La Farge, S. J., LA FARGE, THE RACE QUESTION AND THE NEGRO (1943), states:

> Quite independently of any dubious biological consideration, there are grave reasons against any general practice of intermarriage between the members of different racial groups. These reasons, where clearly verified, amount to moral prohibition of such a practice.

The reasons that Fr. La Farge had in mind according to his own explanation are the social tensions which would naturally follow such intermarriage under conditions that prevail in the United States. Where social ostracism would not be the natural result of intermarriage the moral prohibition would cease to exist. With a steady advance of the Negro cultural status, circumstances favorable to racial intermarriage may be expected to increase. At present such circumstances are the exception rather than the rule.

Robert F. Drinan, S.J., commenting upon the decision in the instant case, 80 AMERICA 429 (1949) states:

> There should, of course, be no agitation to repeal such statutes since (1) it is unrealistic to expect any such repeal, and (2) such a course of action might perpetuate the fallacy that Negroes as a general practice desire to intermarry. But let us be grateful to the participants in *Perez et al. v. Lippold* and to the California Supreme Court for voiding laws which are anachronistic, discriminatory and, under our Federal Law, unconstitutional.

*Louis F. DiGiovanni*

STATUTE OF FRAUDS—PAROL SALE OF STANDING TIMBER.—*Rankin et al. v. Ridge et al.*, .... N. M. ...., 201 P. (2d) 359 (1948). The Supreme Court of New Mexico, for the first time, has been called upon to decide this question: Is an oral contract for the sale and immediate severance of standing timber a valid sale of personalty, or is such sale one of an interest in land and voidable unless in writing as specified in § 4 of the Statute of Frauds? It was held by a unanimous court to be a sale of personal property.

This case came up from the District Court of Grant County, New Mexico. Appellees (plaintiffs in the lower court) sued Robert Ridge and others, appellants (defendants in the lower court), to recover for timber cut from the land then owned by the appellees. The defendants filed a cross action alleging an oral contract between the plaintiffs' predecessor in title and themselves. The trial court dismissed defendants' cross-complaint, because it was based on a sale of standing timber, which sale, the judge ruled, must be in writing according to § 4 of the Statute of Frauds. On appeal the case was reversed and remanded.

The appellees purchased a ranch in New Mexico from one Gibbs during 1946. Prior to this sale, Gibbs had entered into an oral contract with the appellants. There was a valid consideration in this parol contract, by the terms of which, Gibbs sold the appellants the standing timber on the ranch. Gibbs told the appellees that they purchased the ranch subject to the rights established in the parol timber contract between himself (the grantor) and the appellants. Once the appellees went into possession of this ranch, they refused to recognize this oral timber contract and further refused to allow the appellant to cut the timber in pursuance thereto. The appellees next sued the appellants in the trial court for the value of the timber already cut and removed, claiming the timber contract to be voidable under the Statute of Frauds. Appellants' counter-claim for damages on the oral contract was dismissed upon appellee's motion in the lower court. This present court ruled that the trial court erred in sustaining appellee's motion to dismiss.

This supreme court adopted the "immediate severance" fiction, and in ruling for the appellants, construed the oral contract to say the "immediate severance" of the timber was intended by the contracting parties. This allowed the case to fall under an exception to § 4 of the Statute. Also the court pointed out that appellants could sue the appellees on the parol timber contract as third party beneficiaries of another contract which conveyed the ranch from Gibbs to the appellees, wherein appellees agreed to be bound by this parol timber contract.

The general rule in cases where a sale of standing timber is involved, may be stated thus: The sale of such standing timber is one of an interest in land, and must be in writing to comply with the Statute of Frauds. *Walton Land & Timber Co. v. Long*, 135 Fla. 843, 185 So. 839 (1939); *Kileen v. Kennedy*, 90 Minn. 414, 97 N.W. 126 (1903); *Walton v. Lowrey*, 74 Miss. 484, 21 So. 243 (1897); *Putney v. Day*, 6 N.H. 430, 25 Am. Dec. 470 (1833); *Van Alstine v. Wimple*, 5 Cow. 162 (N. Y. 1825); *Beckman v. Brickley*, 144 Wash. 558, 258 Pac. 488 (1927). The Statute of Frauds of England, 1677, 29 CAR. II, c. 3, is part of the common law of New Mexico. *Childers v. Talbott*, 4 N.M. 168, 16 Pac. 275 (1888).

When the occasion arises, many courts will find one excuse or another to justify the rule that oral contracts for the sale of standing timber are not within § 4. This is what the court in the instant case did, and it illustrates the growing tendency of courts to evade the Statute's application where contracts of this type are involved. If a case presents a situation calling for an "immediate severance" of the timber, a majority of these courts will hold that such sale is outside the Statute, hence enforceable. *Cheatham v. Head*, 203 Ky. 489, 262 S.W. 622 (1924); *White v. Foster*, 102 Mass. 375 (1869); *Philip A. Ryan Lbr. Co. v. Ball*, 177 S.W. 226 (Tex. Civ. App. 1915). *Contra: Hirth v. Graham*, 50

Ohio St. 57, 33 N.E. 90 (1893). England has also followed this idea. *Marshall v. Green,* 1 C.P.D. 35 (1875). Concurring judges in such cases may reach the same ultimate position by using other ever-present exceptions. Where a case in no way spells out the "immediate severance" fiction, a court may use one of many other fictions, such as "constructive severance," "benefit derived from the soil," etc., to evade the Statute of Frauds. Many injustices would result if courts did not circumvent the sting of § 4 as it applies to timber contracts.

Some brave courts have tried to follow the title when applying exceptions found in ancient cases and have ended by making distinctions where no real differences exist. *Asher Lumber Co. v. Cornett,* 22 Ky. L. Rep. 569, 58 S.W. 438 (1900); *Smith v. Bryan,* 5 Md. 141, 59 Am. Dec. 104 (1853); *Midyette v. Grubbs,* 145 N.C. 85, 58 S.E. 795 (1907); *Kingsley v. Holbrook,* 45 N.H. 313, 86 Am. Dec. 173 (1864); *Kee v. Carver,* 95 Ore. 406, 187 Pac. 1116 (1920). The standard encyclopedias also illustrate well this dilemma in relation to contracts of standing timber.

There is a reason for this prolific diversion from § 4 of the Statute. In most states the Statute of Frauds of 1677 has been adopted with little change. Its purpose then was to prevent fraud and perjury believed to exist when the only evidence in a case was the recollection of witnesses. At that time parties to an action could not testify at its trial. In modern American law this is no longer true. Dangers attempted to be protected 272 years ago no longer exist substantially in many instances respecting timber sales.

The present state of the law concerning standing timber sales, because of the unbridled use of exceptions, defies exact definition. What the legislatures have omitted doing, the judiciary has tried to accomplish by piecemeal exceptions. The challenge for broad concrete rules, for the most part, has gone unanswered.

The judicial discretion in the use of exceptions has allowed the courts to play on both sides of the fence at once. By rehashing cases back to George I, a court may return almost any judgment it pleases. The Supreme Court of Georgia did return two seemingly inconsistent timber sales decisions by this method. *Compare Graham v. West,* 126 Ga. 624, 55 S.E. 931, 932 (1906), *with Baucon v. Pioneer Land Co.,* 148 Ga. 633, 97 S.E. 671 (1918).

Eminent text authorities and cases illustrating their theories are found in the instant case. The New Mexico Court does not attempt a reconciliation of them, but nevertheless concluded that the parties to the parol contract intended "immediate severance" of the timber, and this fact in some unexplained way makes the contract one concerning personal property.

Thus there is a seeming conflict between the general rule respecting sales of standing timber, and the conclusion of the New Mexico Court that a sale of personal property was involved.

This case would seem to be one instance of the attempt by the courts to limit the effect of § 4, as it applies to contracts for the sale of standing timber, by piecemeal exceptions. It is interesting to note that the UNIFORM SALES ACT § 76, in its definition of "goods," and the RESTATEMENT, CONTRACTS § 200 (1932), apparently follow the "immediate severance" doctrine also.

The courts could to some extent relieve themselves from their embarrassing predicament by following the rules of law laid down in a Pennsylvania case, *Havens v. Pearson,* 334 Pa. 570, 6 A. (2d) 84, 86 (1939), where it was stated:

> Where, however, timber is to be cut and removed by the purchaser within a definite or reasonable time, it becomes a question of the *intent* of the parties as to whether a sale of realty, the creation of a chattel real, or a sale of personalty was intended. . . . It has been stated in

> many of our cases that the contract to be a sale of personalty must intend an immediate severance; it would be more accurate to say that the real test is, considering the nature and extent of the land, the number of feet of merchantable timber and the time given for removal, whether the vendor *intended* the vendee to have an interest in the standing timber as land, or whether he contemplated a removal within a time reasonably necessary therefor, in which case the vendee would have a chattel interest.

It is submitted that the adoption of the above rule would better serve the ends of justice and would, in addition, avoid the clumsy fiction of "immediate severance."

*Francis J. Keating*

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CONTRACTS—SPECIFIC PERFORMANCE—AUTOMOBILE SALES CONTRACTS.—*Kelley v. Creston Buick Sales Co., et al.*, ....Iowa....., 34 N. W. (2d) 598 (1948). The plaintiff and defendant entered into a contract for the purchase and sale of a Buick automobile in 1945. The plaintiff, as purchaser, sought to have this contract specifically enforced. The trial court, after a hearing on the issues of law raised in the pleadings, found for the defendant. The ground on which the lower court based its decision was that the plaintiff's petition did not sufficiently allege defendant's ability to perform. However, the trial court decided adversely to the defendant respecting definiteness, mutuality, and uniqueness of chattel. On appeal the decision was upheld by a five-to-three vote, but upon grounds exactly opposite to those of the lower court.

The appellate court held that the fact that the plaintiff's petition averred that the defendant "has had in its possession" a car of the type set out in the contract "since the execution of the contract" and "is now able to perform" sufficiently alleged defendant's ability to perform and the enforceability of a decree for specific performance, if rendered. The appeal court thereby upheld the trial court's result on a point of law rejected by the lower court. The majority said:

> But it does not follow that the decision must be reversed. It may be sustained upon ground rejected by the trial court notwithstanding defendant did not appeal.

This position is well supported. *Laughlin v. Eicher*, 145 F. (2d) 700 (App. D. C. 1944), *cert. denied*, 325 U. S. 866, 65 S. Ct. 1403, 89 L. Ed. 1985 (1945); *Wykoff v. Monmouth County*, 127 N. J. L. 268, 21 A. (2d) 791 (1941).

The court upheld the decision of the lower court "on the ground that the alleged contract does not bind plaintiff to pay any definite, agreed price and lacks the mutuality and definiteness necessary to make it subject to specific performance." The indefiniteness of the contract lay, said the court, in the terms "day of delivery" which would determine the price of the car; "except insofar as the product of the factory and the requirements of other customers will in your (defendant's) judgment permit" which, by the reasoning of the court, left it up to the defendant to decide when delivery could be made; and "as soon as possible" which also left the delivery date uncertain. On the court's interpretation therefore the contract could not be enforced because:

> There is no such date fixed by or fixable under the contract or in the petition. It depends upon defendant's judgment as to "the product of the factory and the requirements of other customers."

The majority opinion cited three cases as authority for refusing specific performance on contracts similar to the one in the instant case. *Kirsch v. Zubalsky*, 139 N. J. Eq. 22, 49 A. (2d) 773 (1946); *Goodman v. Henry Caplan, Inc.*, 188 Misc. 242, 65 N.Y.S. (2d) 576 (1946); *Daub v. Henry Caplan, Inc.*, ....Misc....., 70 N.Y.S. (2d) 837 (1946). These cases will be discussed below.

The dissenting opinion states that from the terms of the contract, though a price is not fixed, it is ascertainable and that is all that the law requires. The provision of the contract to the effect that "the price effective on the day of delivery will be the governing price" made the price "ascertainable with certainty," said the minority.

Of the three cases cited by the majority opinion, the *Zubalsky* case was decided on the grounds that an automobile is not a unique chattel and the difficulty of procuring one does not make it so; the opinion in the *Goodman* case said that,

> The instant contract is indefinite as to time of performance, model and type of car, price (despite the printed clause of the contract), and color, all essential elements and parts of the contract. The court cannot decree that a specific piece of personalty be turned over to the plaintiff when there is no definite personalty involved in the contract.

The contract in the *Goodman* case was not only more indefinite as to the price, time of performance, etc. than the contract in the instant case, but the court there insisted that there be some definite description of the car in order to merit specific performance. The instant case was not decided on such grounds. In the *Daub* case, the contract set forth the plaintiff's name as buyer, and showed a payment of $100 but otherwise was blank, having neither the terms of payment set forth, the time for delivery, the model, the price, nor the make of the automobile.

The problem raised in the instant case is a recent one, and was caused by the discontinuance during the war years of the manufacturing of vehicles for civilian use, and the consequent tremendous backlog of orders for new cars when civilian production was resumed. Thus, in some states the uniqueness of the automobile was considered, and the decision of the court as to whether or not it was unique controlled. *Poltorak v. Jackson*, 322 Mass. 699, 79 N. E. (2d) 285 (1948) (spec. perf. denied); *Kirsch v. Zubalsky*, 139 N. J. Eq. 22, 49 A. (2d) 773 (1946) (spec. perf. denied); *Welch v. Chippewa Sales Co.*, 252 Wis. 166, 31 N. W. (2d) 170 (1948) (spec. perf. denied); *Heidner v. Hewitt Chevrolet Co.*, ....Kan....., 199 P. (2d) 481 (1948) (spec. perf. granted); *De Moss v. Conart Motor Sales*, ....Ohio...., 72 N. E. (2d) 158 (1947), *aff'd*, 149 Ohio 299, 78 N. E. (2d) 675 (1948) (spec. perf. granted). In other cases it has been held that a *specific* and *ascertained* chattel must be determinable from the terms of the contract. *Gellis v. Falcon Buick Co.*, 191 Misc. 566, 76 N.Y.S. (2d) 94 (1947) (spec. perf. denied); *Kaliski v. Grole Motors*, ....Misc....., 69 N.Y.S. (2d) 645 (1946) (spec. perf. denied); *Cohen v. Rosenstock Motors*, 188 Misc. 426, 65 N.Y.S. (2d) 481 (1946) (spec. perf. denied); *Goodman v. Henry Caplan, Inc.*, 188 Misc. 242, 65 N.Y.S. (2d) 576 (1946) (spec. perf. denied).

The instant case differs from similar cases in that the controlling factor leading to the decision was not the uniqueness of the chattel (a matter which was not mentioned by the majority opinion), or the exactness in description of the chattel as defined in the contract, the court having stated at the very outset that since defendant had a car in its showroom identical with that described in the contract, it would be able to perform were a decree of specific performance rendered. The decision in the principle case was based on the indefiniteness of the contract as to price and delivery.

The term "as soon as possible" is not one which places an arbitrary discretion in the vendor but means "within a reasonable time." *Wilcox v. Turner*, 51 Ga.

App. 523, 181 S. E. 95 (1935); *Birmingham Paper Co. v. Holder,* 24 Ga. App. 630, 101 S. E. 692 (1919); *Fletcher Savings and Trust Co. v. American Security Co. of New York,* 92 Ind. App. 651, 175 N. E. 247 (1931); *Ingram Day Lumber Co. v. Germain Co.,* 135 Miss. 490, 100 So. 281 (1924); *Coburn v. Metropolitan Life Ins. Co.,* 230 Mo. App. 1140, 91 S. W. (2d) 157 (1936); *De Moss v. Conart Motor Sales,* ....Ohio...., 72 N. E. (2d) 158 (1947), *aff'd.* 149 Ohio 299, 78 N. E. (2d) 675 (1948); *Shreve Chair Co. v. McCarty,* ....Tex....., 246 S. W. 733 (1922). Such a reasonable time is evidenced from the deliveries made to other customers and the time between the signing of the contract and the bringing of the action; in this case almost eighteen months elapsed; in *De Moss v. Conart Motor Sales,* supra, only thirteen and one-half months had elapsed and specific performance was granted.

The majority of the court in the instant case declared that the stipulations in the contract as to price were to indefinite to permit specific performance. Though the contract did not state a definite price it would have been a comparatively simple matter to determine the price from the express terms of the contract. Such determinability is all the law requires. In *R. F. Robertson Co. v. Drew,* 83 N. H. 459, 144 Atl. 67, 68 (1928) Allen, J. said:

> When it is said that a necessary term of a contract of sale is a statement of price, that does not mean that the contract itself must fix the price or that the price may not be implied. If the contract prescribes a method which will necessarily result in the determination of the price, that is enough.

See also *Goerke Kirch Co. v. Goerke Kirch Holding Co.,* 118 N. J. Eq. 1, 176 Atl. 902 (1935); *Colcott v. Sutherland,* 36 N. M. 370, 16 P. (2d) 399 (1932); *Lake Shore Power Co. v. Village of Edgerton,* 43 Ohio App. 545, 184 N. E. 37 (1933); *Edwards v. Tobin,* 132 Or. 38, 284 Pac. 562 (1930).

The question of mutuality was based upon the clause which read: "that the price . . . is subject to change without note, . . . I [plaintiff], however, have the privilege of cancelling this order, provided the changed price is not satisfactory." The immateriality of this clause in the construction of the contract is pointed out by the defendant himself in his argument:

> The foregoing clause giving the seller the power to change the price of the automobile before the day of delivery necessarily implies the existence of an agreed upon original price with respect to which the seller may exercise such power. Since the parties did not specify any such original or initial price in the order it is obvious that there is no price with respect to which the seller's power to change can be exercised and hence *the provision of the order above quoted never can become operative.* (Emphasis supplied.)

The last clause to be construed was the one reading: "It is also expressly agreed that you (defendant) do not obligate yourself except insofar as the product of the factory and the requirements of other customers will in your judgment permit." This clause was not presented for argument by defendant; it was not mentioned in its brief; defendant did not contend that the requirements of its other customers were such that it could not perform its contract. However significant is the complete disregard of this clause by defendant, the affirmation of defendant's present ability to perform declared by the majority at the beginning of its opinion renders incongruous any dependence upon this clause later in the opinion.

A court of equity is not bound strictly by stare decisis and should be concerned mainly in seeing that justice is done in a particular case. WALSH, EQUITY § 8 (1930). The cases decided before on this point should not govern this case if, by so following them, an injustice would be done. Courts of equity should spe-

cifically enforce a contract if it can be done feasibly. 4 POMEROY, EQUITY JURISPRUDENCE § 1405b (5th ed. 1941). Considering the fact that the defendant was presently able to perform and that the court could easily have supervised a decree for plaintiff, such a judgment should have been rendered.

*William G. Mahoney, Jr.*

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NEGLIGENCE—LANDLORD AND TENANT—RELUCTANCE TO EXTEND DOCTRINE OF IMPUTED NOTICE.—*Hale v. Depaoli*, .... Cal. ...., 201 P. (2d) 1 (1948). May a tenant find a basis for a cause of action against a landlord by utilizing the knowledge imputed to the landlord while in the position of a principal in a former agency? The Supreme Court of California has held that such knowledge would not be so available.

A partnership composed of Louis Depaoli and L. Ferreiros constructed and sold a house; Ferreiros was in charge of its construction, and Depaoli conducted its sale. After the partnership had terminated, Depaoli purchased the house and subsequently leased it. Ferreiros later died. The daughter of Depaoli's tenant was injured as the result of a fall occasioned by the collapse of the back porch railing against which she was leaning. Evidence tended to show that the railing had been defectively secured by finishing nails, concealed by putty and paint. In an amended complaint the appellant, in seeking a reversal of a nonsuit entered by the trial court, charged Depaoli, as a contractor, with liability for the structural defect and, as a lessor, for his failure to reveal the concealed defect to the lessee. The court, on consideration of the first charge, reversed the nonsuit, but held that there was no basis for a cause of action on the second charge.

Justice Edmonds in the majority opinion clung to the viewpoint of the prior opinion, 192 P. (2d) 815 (1948), that the dual capacity involving Depaoli must be distinguished and each component capacity treated separately. With this distinction in view, the court examined the defendant's liability as a constructing owner. The general rule of the common law interposes the protective shield of "lack of privity" in cases involving claims by third persons, but the defense conceded the exception stated in *Johnston v. Long*, 56 Cal. App. (2d) 834, 837, 133 P. (2d) 409, 410 (1943), to the effect that:

> . . . the contractor is liable if the work done and turned over by him is so negligently defective as to be imminently dangerous to third persons, provided the contractor knows, or should know, of the dangerous situation created by him.

The court held that in the absence of direct evidence, deduction from testimony may reasonably infer the defect; that the defect was not required to be "imminently dangerous" but only "reasonably certain to place life and limb in peril when negligently made," citing *Kalash v. Los Angeles Ladder Co.*, 1 Cal. (2d) 229, 34 P. (2d) 481, 482 (1934), which approved a statement to the same effect by Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, 1053 (1916).

In reference to Depaoli's lack of actual knowledge of the defect, the court declared that "if there was a defect, the carpenters had knowledge of it, and such knowledge is imputable to the members of the partnership." This statement is at wide variance with the approach in the prior opinion. There the court saw Ferreiros as the agent, and objected that if in deference to the statute, CAL. CIV. CODE § 2332 (Deering, 1941), knowledge of the defective railing is to be imputed

to Depaoli, a "preponderance of evidence" must first show that Ferreiros possessed actual knowledge of the defect. On this question the prior opinion is apparently in conflict with the majority of jurisdictions that hold the principal liable for knowledge which the agent could have obtained by the use of *ordinary care.* 2 AM. JUR. AGENCY § 382.

The prior opinion noted that "when land is leased to a tenant, the law of property regards the lease as equivalent to a sale of the premises for the term." Harkrider, *Tort Liability of a Landlord,* 26 MICH. L. REV. 260, 261 (1928). The rule of *caveat emptor* would generally protect such a lessor, but the exception to the rule takes cognizance of concealed defects known to the landlord but unknown to the tenant. The court in the prior opinion would not, however, impute personal negligence to Depaoli as a landlord from imputed knowledge as a principal, and distinguished the case of *Couch et al. v. Pacific Gas and Electric Co.,* 80 Cal. App. (2d) 857, 183 P. (2d) 91 (1947). There the defendant as an owner of an electric power house installed defective wiring in a house which the defendant leased to one of his employees. When a child of this employee was killed as a result of the defective wire, the court held that the dual capacity of the defendant gave him a greater responsibility than the responsibility of a mere landlord.

The majority opinion agreed that the imputation of knowledge to Depaoli as a principal would not create a general liability attributable to Depaoli as a landlord. "The doctrine of imputed notice does not justify such compounding and extension of the rule." But Justice Carter in the dissenting opinion metaphorically quoted that such reasoning was like wandering with Alice in Wonderland. The viewing of Depaoli as two distinct persons "is a highly metaphysical division of a person's mind into departments each of which is wholly insulated from the other." He interprets the statute, CAL. CIV. CODE § 2332 (Deering, 1941), as equating constructive or imputed knowledge in effect to actual knowledge. On this basis the effect of imputed knowledge would be to make Depaoli liable as for actual knowledge in any capacity where the subject matter of such knowledge is pertinent. The dissenting opinion failed to see why the majority opinion would not make this transition if they conceded that imputed knowledge had the same legal effect as actual knowledge. But it appeared that the majority opinion limited the effect of such knowledge to that very transaction through which it was imputed. It wavered slightly in making this restriction in reference to third persons who "have had dealings with the principal . . . which make the matter material to the protection of their interests." 2 MECHEM ON AGENCY § 1827 (2d ed. 1914). But Depaoli in the capacity of a contractor had had no dealings with the tenant. Consequently, he could not be made liable on this basis without trespassing into the danger zone of extending the scope of imputed knowledge. Since the doctrine of imputed knowledge is conceived as resting on motives of policy, the use of caution is advised as a necessary element of its application. 2 POMEROY, EQUITY JURISPRUDENCE § 676 (5th ed. 1941).

There is a suggestion in the present case of a tendency to confuse the distinction between imputed and actual knowledge in combination with the theory of conclusive presumption. As has been stated, note, 4 A.L.R. 1592, 1593 (1919):

> The presumption that the agent has communicated the facts known to him is as conclusive as the presumption that the principal remembers facts brought home to him personally. It cannot be rebutted by showing that the agent did not in fact impart such information . . .

The essential question which seems to be in the eye of this court is to what degree shall the effect of actual knowledge legally existing approach actual knowledge actually existing. The court finds it difficult in theory to dissolve

the barriers that encompass two different concepts, even though the law may say the effect of one is equivalent to the effect of the other. The general trend of courts in California is to limit the extension of the doctrine of imputed notice, 1 So. CALIF. L. REV. 176, 180 (1928). A leading case, *Trentor v. Pothern*, 46 Minn. 298, 49 N.W. 129 (1891), is in accord with this trend and states:

> But while this rule may be a salutary and just one, if properly applied, it would be a very dangerous one, if applied without proper discrimination. Hence the tendency of the courts is rather to restrict the doctrine of imputed notice, or at least not to extend it, but to reduce it within clear and definite principles.

But if the courts cannot avoid extension of the doctrine without an imputation of the employee's conscience to another, to effect the knowledge the other ought to have, the courts may find it more convenient to reverse the trend.

*James D. Matthews*

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MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCES—CONSTITUTIONAL RIGHT OF FREE SPEECH.—*Kovacs v. Cooper*, ....U. S....., ....S. Ct....., 17 L. W. 4163 (1949). The courts of the United States have always jealously guarded the individual citizen's right of free speech as guaranteed by our Constitution. Difficulties arise, however, when one person's privilege of free speech conflicts with another's right to privacy. The case under review presents a recent illustration of this problem.

The appellant, Kovacs, had been operating a sound truck on the streets of Trenton, N. J., in and around the business district. The program consisted of music, interspersed with comments upon a current labor dispute in the city. A policeman, who heard the broadcast, arrested him in pursuance to City Ordinance No. 430, which reads as follows:

> 4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned.

The appellant was found guilty of violating the ordinance by the appellee, judge of the First District Police Court of Trenton. The Supreme Court of New Jersey upheld the conviction, *Kovacs v. Cooper*, 135 N. J. L. 64, 50 A (2d) 451 (1946), and the judgment was affirmed by an equally divided court in the New Jersey Court of Errors and Appeals, *Kovacs v. Cooper*, 135 N.J.L. 584, 42 A. (2d) 806 (1947). The Supreme Court of the United States took jurisdiction to consider the constitutional questions involved. The appellant contends that the ordinance is violative of the first section of the Fourteenth Amendment and also that he was convicted without due process of law.

Mr. Justice Reed, who delivered the majority opinion of the court, held that the restrictions imposed by the ordinance were a valid exercise of the authority granted to the municipality by the state. He stated that the police power of a state extends beyond health, morals, and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a

community. The Court was of the opinion that the individual citizen has a right to freedom from interference of his privacy in his home and in the street, and that he is practically helpless to protect himself from these annoyances unless the municipality takes appropriate action. Although the Court felt that the right of free speech was guaranteed to every citizen that he might reach the minds of willing listeners, they did not believe that the right of free speech compelled a municipality to allow such mechanical voice amplification on any of its streets.

> We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities.

A distinction was drawn between this case and that of *Saia v. People of the State of New York,* 334 U. S. 558, 68 S.Ct. 1148, 92 L.Ed. 1087 (1948). In the latter case, the appellant, a Jehovah's Witness, had obtained permission from the Chief of Police of the City of Lockport, N. Y., to proclaim his views upon religious matters through the medium of sound amplifying equipment mounted atop his automobile. A license had been issued upon previous occasions for the lecturer to use this means of dissemination, but upon complaints received from nearby residents the Chief of Police refused to renew his permit. However, Saia continued his expositions and was convicted of violating the ordinance against his contention that it violated his rights of freedom of speech, assembly, and worship under the Federal Constitution. The municipal ordinance was expressed as follows:

> Section 3. Exception—Public dissemination, through radio, loudspeakers, of items of news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police.

The Supreme Court of the United States held the ordinance unconstitutional on its face as it placed a previous restraint on the right of free speech. No standards were prescribed in the ordinance which would guide and control the discretion of the Chief of Police. As the Court describes the situation:

> He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine.

This contention had been upheld in several previous decisions. *Cantwell v. Connecticut,* 310 U. S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1946), illustrated a similar restraint upon the right of free speech by placing the power to determine whether or not a cause was religious in the hands of the secretary of the public welfare council. As the issuance of the permit depended upon his discretion and affirmative action, the ordinance was held to be in effect a censorship of religion and a denial of liberty as protected by the Constitution. An ordinance which prohibited the distribution of literature of any kind, at any time, at any place, and in any manner without a permit from the City Manager, was also struck down as unconstitutional in *Lovell v. City of Griffin,* 303 U. S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). Another instance of previous restraint imposed by an ordinance was set forth in *Hague v. Committee for Industrial Organization,* 307 U. S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). A member of the union had been using a sound truck to express his views on the organization of industry in Jersey City. The Supreme Court held that he could not be convicted under a municipal ordinance which gave the director of public safety the authority to refuse to issue a permit if ". . . he shall believe it proper to do so for the purpose of preventing riots, disturbances, or disorderly assemblage." The conclusion to be derived from these cases is that any municipal ordinance which allows censorship of any kind will be held unconstitutional on its face.

This theory of censorship, however, does not seem to apply to cases involving commercial advertising. A municipality may validly invoke an ordinance which requires the procurement of a permit or license without being confronted with a possible violation of the Federal Constitution, as decided in *Valentine v. Chrestensen,* 316 U. S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942). While the Court recognized that the streets were proper places for the exercise of the freedom of communicating information and opinion, they held that there was no restraint imposed by the Constitution on governments as respected purely commercial advertising.

Municipalities may not limit the right of free speech or press by contending that the distribution of religious literature resulted in a littering of the streets with paper and consequently a violation of a city ordinance regarding sanitation. *Schneider v. Irvington,* 308 U. S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939). The purpose of keeping the streets clean and of good appearance was not sufficient to justify an ordinance which prohibited a person rightfully on a public street from handing out literature to one willing to receive it. The added burden imposed upon the city of keeping the streets clean was considered insignificant when compared to the threatened impairment of rights guaranteed to the citizens by the Constitution. Although this right of free speech and communication is regarded as one of our basic fundamental rights by the courts, it is not without limitations. A citizen could not disregard traffic regulations because it was his religious belief that they should be violated, nor could he force an unwilling pedestrian to accept literature. One person's right of privacy may not be subordinated to another's unreasonable exploitation of his right of free speech. The case of *Hamilton v. City of Montrose,* 109 Colo. 228, 124 P. (2d) 757 (1942), supports this theory. Hamilton was convicted of violating a municipal ordinance which prohibited the use of any loud or offensive device for the purpose of attracting a crowd or which would by its nature disturb or annoy any person. There was no discrimination charged and the court held the sound truck to constitute a public nuisance, stating, "We believe the people of Montrose have the right to protect themselves from concentrated and continuous cacophony."

The very nature of the sound truck seems to be at the base of the problem. While the courts recognize the value of a sound truck to public dissemination and would brand a discretionary or a prohibitory ordinance against their use unconstitutional, they are not in accord as to where the exercise of the right of free speech may take the form of a public nuisance. Great emphasis should be placed upon the term "willing listener." By the same reasoning that a citizen may not be forced to accept literature on the streets, he should not be subjected to a continuous bombardment of religious or political views which are objectionable to his ears.

A solution to the problem is advanced in Report No. 123 of the National Institute of Municipal Law Officers. Their view is that:

> . . . the municipalities should adopt an ordinance which prohibits the use of sound trucks for non-commercial purposes during such hours and in such places and with such volume as would constitute this use a public nuisance. Under such an ordinance each case would stand or fall on its own facts and the ordinance unless unreasonably drawn should be upheld . . .

If this type of ordinance were accepted universally, there would undoubtedly be less consternation as to whether constitutional rights have been transgressed. The courts could then stand in the position of mediators in each individual case and be able to compromise and reconcile the conflicting rights.

*James W. Oberfell*

MASTER AND SERVANT—LABOR DISPUTE—EMPLOYEE'S RIGHT TO UNEMPLOYMENT COMPENSATION.—*General Motors Corporation (Chevrolet Gear & Axle Division) v. Appeal Board of Michigan Unemployment Compensation Commission et al.*, .... Mich. ...., 34 N.W. (2d) 497 (1948). The claimant for unemployment compensation in this case was an employee of General Motors Corporation and a member of a duly recognized union known as the International Die Sinkers Conference, which union was in no manner affiliated with the UAW-CIO. A labor dispute arose between the UAW-CIO and the employer which indirectly caused the claimant and some forty or fifty other die sinkers to be temporarily unemployed, even though their union was not in dispute with the employer. Members of the claimant's union have their own particular section of the building and their own particular machines with which to carry on their operations entirely separate and distinct from the other employees. As there was no labor dispute within the operating unit as represented by the claimant's union, the stoppage of work in that unit was solely because of a stoppage of work due to a labor dispute in other departments upon which claimant's unit was entirely dependent for work.

The Michigan unemployment compensation commission awarded claimant compensation for the period of unemployment; on certiorari to the circuit court by the plaintiff employer, claimant was denied the compensation and he appealed. To determine claimant's eligibility for compensation it was necessary for the court to construe the relevant provisions of the state unemployment act, MICH. STAT. ANN. § 17.531 (Callaghan, 1937), which states:

> . . . An individual shall be disqualified for benefits: . . .
>
> (c) For any week with respect to which his total or partial unemployment is due to a stoppage of work existing because of a labor dispute in the establishment in which he is or was last employed: Provided, however, that no individual shall be disqualified under this section if he shall establish that he is not directly involved in such dispute. For the purpose of this section, no individuals shall be deemed to be directly involved in a labor dispute unless it is established:
>
> (4) That at any time, there being no labor dispute in the particular establishment or department or unit in which he was then employed, he shall have become unemployed because of a stoppage of work which was directly caused in his particular establishment or department or unit by and solely because of a stoppage of work due to a labor dispute which was then in progress in some other establishment or department or unit of the same employing unit by whom he was then employed.

Originally this controversy was decided by the supreme court on June 14, 1948. *General Motors Corporation (Chevrolet Gear & Axle Division) v. Appeal Board of Michigan Unemployment Compensation Commission et al.*, 321 Mich. 604, 33 N.W. 90 (1948). In that decision the court, in a seeming attempt to conform their reasoning to a preconceived notion of a desired result, awarded compensation to the claimant by substituting a key word in the statute to effect a change in its meaning. The unemployment statute clearly establishes the conditions under which an individual shall be deemed to be involved in a labor dispute and enumerates them in four separate paragraphs. Instead of interpreting paragraph (4) as an addition to the three preceding conditions, as clearly shown in the act, the court construed this paragraph as an amendment to the three preceding conditions as limiting what otherwise might be a disqualification of an employee seeking unemployment compensation under the act. In the words of the court in the previous case:

> This intended meaning of the amendment would have been clear had the word "if" been substituted for the word "unless" in a prefatory sen-

> tence. It would then have read: But unless they are directly involved under the preceding paragraphs (1), (2), or (3) (which is not claimed on this appeal), "no individuals shall be deemed to be directly involved in a labor dispute if (not unless) it is established: * * * (4) that at any time, there being no labor dispute in the particular establishment or department or unit in which he was then employed he shall have become unemployed because of a stoppage of work * * * *"

This obvious error of departing from the plain meaning of the statute was repudiated in the instant case, which is a rehearing of the former controversy, and the court took a position seemingly in line with the intent of the legislature. In reconsidering the former decision with reference to the statute, the court stated that paragraph (4) of subdivision (c) of the act supplemented the conditions previously specified in paragraphs (1), (2), and (3) which disqualify an employee for receiving unemployment compensation. By interpreting paragraph (4) as being a further condition of disqualification and not a limitation upon the previous three conditions, the claimant was considered as directly involved in the labor dispute and thus not entitled to compensation. In thus reversing its former decision the court conceded that it had exceeded its judicial powers by giving a meaning to the statute that the legislature had not intended.

As the policy of the unemployment compensation act is clearly stated to be to provide funds to persons unemployed through no fault of their own, and the claimant in the instant case had no part whatsoever in the labor dispute, it would seem a miscarriage of justice not to allow compensation to the claimant. If there has been injustice done, the fault rests with the legislature and not with the court's construction of the statute, for in correcting its previous erroneous decision the court clearly gave the meaning to the statute that was intended by the amendment. The legislature had the power to make the amendment, and the court in construing the intention of the legislature had to follow the accepted rule of construction that, where a statute expresses first a general intent, and afterwards an inconsistent particular intent, the latter will be taken as an exception from the former and both will stand. *Rodgers v. United States,* 185 U.S. 83, 22 S.Ct. 582, 46 L.Ed. 816 (1902). Here the amendment in question was clearly at conflict with the stated policy of the act and the court merely gave effect to the modification intended by the legislature, as it had no power to determine the wisdom or efficacy of a legislative tenet.

*John B. Palmer*

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LICENSES—CONSTITUTIONALITY—TAX ON OCCUPATIONS NOT AN INCOME TAX.—*City of Louisville v. Sebree,* .... Ky. ...., 214 S.W. (2d) 248 (1948). The Kentucky Court of Appeals has declared valid an ordinance of the city of Louisville imposing an annual license fee for the privilege of engaging in any business, occupation, calling, profession or labor in the city.

In their attack on this ordinance, plaintiffs relied principally on the fact that it is measured by the earnings or profits from the exercise of this privilege. Though designated as a license fee, plaintiffs maintained that it is, in fact, an income tax and prohibited to the municipalities by statute. KY. REV. STAT. ANN. § 91.260 (Baldwin, 1943).

Answering this allegation, the court acknowledged precedent for the claim in two previous decisions: *Dole v. City of Philadelphia,* 337 Pa. 375, 11 A. (2d) 163 (1940), and *Carter Carburetor Corporation v. City of St. Louis,* 356 Mo. 646,

203 S.W. (2d) 438 (1947), in which similar ordinances were declared to be a species of income tax.

In the Missouri case, the court points out a familiar distinction between a license tax and a tax in the common conception of the word: "The tax obviously is not a license tax under the police power, for the ordinance is not in any sense regulatory and the tax is imposed expressly 'for general revenue purposes.'" *Carter Carburetor Corporation v. City of St. Louis,* 356 Mo. 646, 203 S.W. (2d) 438 (1947). This dividing line, which makes a license regulatory and a tax for purposes of revenue only, has seldom been held strictly binding and many licenses have been sustained though imposed for revenue purposes.

The Kentucky Constitution provides that the power to impose and collect license fees on franchises, trades, occupations and professions might be delegated to cities, but establishes no standard for measurement. KY. CONST. § 181. By statute however cities of the Louisville class are expressly authorized to raise revenue from taxes "based on income, licenses and franchises," KY. REV. STAT. ANN. § 91.260 (Baldwin, 1943) indicating, as the court elected to construe the statute, that the legislature did not look upon the use of income as a basis for taxation as necessarily constituting an income tax.

There are decisions from other jurisdictions in accord with the proposition that a tax which uses income as a standard of measurement is not necessarily an income tax. Thus, in the California Court of Appeals, a Los Angeles occupation tax measured by gross receipts was declared not to be invalid as an "income tax," *Franklin v. Peterson,* ....Cal. App....., 197 P. (2d) 788 (1948). Georgia and South Carolina decisions, *Forrester v. Culpepper,* 194 Ga. 744, 22 S.E. (2d) 595 (1942), and *Hay v. Leonard,* 212 S.C. 81, 46 S.E. (2d) 653 (1948), point out the distinction between related taxes based on income and income taxes in fact. The Illinois Supreme Court in *Ahern v. Nudelman,* 374 Ill. 237, 29 N.E. (2d) 268 (1940), calls a tax measured by gross receipts from certain sales, an occupation tax. As long ago as 1915, the Supreme Court of the United States in *Anderson v. Forty Two Broadway Co.,* 239 U. S. 69, 36 S.Ct. 17, 60 L.Ed. 152 (1915), pointed out that a tax though measured by reference to an income, is not in any proper sense an income tax law but is an excise on the conduct of a business.

Concluding, therefore, that the ordinance was not an income tax but a license, the court conceded its validity under statute.

It is, of course, too early to check the effects this decision may have on Kentucky state and municipal taxation law. Though possibly not an income tax by definition or by construction, its similarity in terms of a source of revenue is apparent and it may well be that other cities will seize this opportunity to by-pass restrictions against income taxes, and by similar measures accomplish the same end.

Occupation taxes are familiar in most jurisdictions throughout the United States and in some instances are based, as in the principal case, on income, which seems to be a logical enough standard. The Kentucky ordinance, while perhaps not alone, is somewhat unique by the all inclusive sweep of its terms. With a single specified exception, domestic servants, it includes everyone who earns a monetary return for any species of work within the city, from the highest paid executive to the most unskilled in manual labor.

When considering this feature, it should be kept in mind that the percentage of income forfeited under the ordinance is one per cent of gross proceeds from salaries and wages, without permitting deductions for personal income or social security taxes. It would appear that those in extremely low income groups, if

supporting a family, will be harshly burdened. If that is so, the ordinance takes on a somewhat arbitrary aspect.

A rule that might be used equitably as a guard against arbitrary occupational taxation was stated by the Missouri Supreme Court:

> . . . a city has no power to tax a business or occupation unless such business or occupation is specifically named as subject to the license tax in the city's charter . . . or in the statute . . . *Moots v. City of Trenton*, ... Mo. ...., 214 S.W. (2d) 31 (1948).

And it is submitted that simply including all who engage in any business, occupation, calling, profession or labor, is not specific in the sense intended, but quite as broad as simply saying, "all who earn money." The reasoning of the Court of Appeals in the Kentucky case is clear and valid. Following this same approach it is difficult to see how the case could have been decided otherwise. Nevertheless certain objections are not without merit and deserve consideration.

The ordinance was upheld as a license fee for the privilege of working within the city. Consulting any standard reference for a definition of the word license, an element common to them all is apparent from even superficial research. A license implies the *conferring* of the right or privilege of doing something which the licensee would not otherwise be entitled to do.

It is a fundamental precept of our government that among the rights inherent in man, not granted merely by the power of human legislation, is the right to life, and as an obvious corollary, the right to all reasonable means of maintaining life. It would seem self-evident that to sustain life, man must work, indeed it has been decreed that he shall do so; "With labor and toil shalt thou eat . . ." Genesis 3:17. Man has not only the inherent right to labor but it is a duty placed upon him by the fall of Adam. To impose a license tax on an inherent and unalienable right is to presume to confer a privilege that existed before government, in the nature of man itself.

Income taxes are not to be considered in question, nor are all related licenses to be thus scrutinized. Beyond doubt it is not only expedient but wise to license a specialty, be it learned as medicine and law, or the more humble callings of barbers or peddlers. Limited to this scope or perhaps expanded to include any business affecting the public, licenses are regulatory and necessary to insure skill, quality of service or product and protection of the public. To deprive anyone so engaged of his license does not take away his power to earn a livelihood. But to impose a license on labor, per se, is usurping a power that is difficult to concede to human government. To deprive the licensee of his franchise, for any reason, is to forbid a right given by nature. Nor does it solve anything to say, as the court does, that the tax is not on the right to labor, but on the exercise of that right, or the labor itself. The two are so obviously and inexorably bound that they cannot be separated, at the very least by a refined juristic fiction.

While the right of government to tax has been upheld in many and widely varied types of litigation under the Fifth and Fourteenth Amendments of the Federal Constitution, it hardly seems possible that the deprivation arrived at in this particular instance, if carried to its ultimate conclusion, could have been intended. Justice Siler, dissenting in the instant case, said, at page 257:

> There should be no privilege tax levied upon earning bread in a servile way, but such a tax should, I believe, be reserved exclusively for enterprises and professions and individual activities performed in an unsupervised manner. A privilege of doing business is one thing. Earning a living is another.

Any attempt at justification which invokes expediency alone is pragmatism. In a complex civilization such as the one in which we live, the temptation to ignore fundamentals and rationalize their violations in favor of pragmatic values, is a danger that must be carefully guarded against in preserving our government in the principles on which it was instituted. From the seed of minor departures, greater ones may blossom. If such a viewpoint is adopted, the ordinance, as claimed above, becomes arbitrary and might well be submitted as a further test of due process. As a purgative for its shortcomings it calls for a more specific classification of those subject to it and a reiteration by a higher court of those inalienable rights with which man may not tamper and which our government is instituted to protect.

There are decisions to the effect that occupational taxes for revenue are purely matters of local or municipal concern, *Mayor and Common Council of City of Prescott v. Randall,* .... Ariz. ...., 196 P. (2d) 477 (1948), *Post v. City of Grand Junction,* .... Colo. ...., 195 P. (2d) 958 (1948), and in specific instances it may be true. However there is another objection to laws of this kind (other than their apparent arbitrariness), couched in terms of practical and long-run consequences, that casts doubt on whether an ordinance of the nature peculiar to the one in question should be left in municipal hands. In *Carter Carburetor Corporation v. City of St. Louis,* 356 Mo. 646, 203 S.W. (2d) 438 (1948), the court sees such measures having repercussions beyond the limits of the city that imposes them and therefore, better fit for state control. Judge Ellison of the Missouri Supreme Court sounded the tocsin:

> The impact of the "earnings" tax contemplated by the ordinance under adjudication would fall on non-residents of the city who might be residents of any and every county and city of the state—and other states. And if there be now or hereafter other cities in the state with charters containing a provision . . . they could retaliate with a corresponding ordinance which would equally bind citizens of St. Louis and all other like cities. Certainly such matters would not be a matter of purely local concern, from the viewpoint of state government.

Little can be said to improve on this warning. It is sufficient to review the pages of history to discover the viciousness and ill-will that followed the wake of the danger cautioned against, the danger of retaliatory laws.

*Louis P. Peck*

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CONSTITUTIONAL LAW—INTERSTATE COMMERCE—DISCRIMINATORY REGULATION BY PUBLIC UTILITY COMMISSION.—*Lakewood Express Service, Inc. v. Board of Public Utility Commissioners et al.,* .... N.J.L. ...., 61 A. (2d) 730 (1948). This case was an appeal by the Lakewood Express Service, Inc., against the Board of Public Utility Commissioners of New Jersey and others, from a unanimous judgment of the former supreme court (New Jersey having recently altered its judiciary department) dismissing a writ of certiorari. *Lakewood Express Service v. Board of Public Utility Commissioners,* 137 N.J.L. 440, 60 A. (2d) 298 (1948). That judgment affirmed a determination and order of the Board of Public Utility Commissioners that the operations of the appellant were subject to the jurisdiction of the board, that the appellant failed to comply with the applicable statute and the rules and regulations of the board, and that the appellant should cease and desist from the operations challenged by the complaint of the Lincoln Transit Co., Inc., filed pursuant to statute.

The appellant operates an express passenger service between New York City and Lakewood and Asbury Park in New Jersey. The service is provided by several seven-passenger sedan automobiles. It was undisputed that the business is interstate in character; no intrastate service was involved.

Regulation B-7, Par. 31(b) of the board specifically prohibited the use of equipment of the "sedan type" as an autobus in operations such as those in which the appellant is engaged. This regulation was promulgated under the authority of the statute, N.J.S.A. § 48:4-18, which provides as follows:

> The board of public utility commissioners may prescribe *reasonable* regulations with respect to the construction and equipment of autobusses carrying passengers between points in this state and points in other states. Such regulations shall be consistent with regulations prescribed by the board applying to the operation of autobusses between points in this state. (Emphasis supplied.)

The first contention of the Express Service was that Regulation B-7 was not legally applicable to it since it does no intrastate business in New Jersey.

The court, per Justice Oliphant, agreed with the opinion below that the Regulation did apply to the appellant and concurred in the reasons stated therein for such a conclusion. It is generally agreed that the states are not excluded from every kind of regulation of a business merely because the business happens to be engaged in interstate commerce. All that is required is that the states refrain from discrimination—that is, the regulations by a state on a business engaged in *inter*state commerce must be the same as those imposed on businesses in *intra*state commerce. As long ago as 1851 the Supreme Court of the United States realized that local regulation of interstate commerce is indispensable.

> . . . the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule . . . ; and some . . . as imperatively demanding . . . diversity. *Cooley v. Board of Wardens of the Port of Philadelphia et al.*, 12 How. 299, 319 (U. S. 1851), 13 L.Ed. 996.

The appellant's second contention, which presented the basic question in this case, was that Regulation B-7 was unreasonable and arbitrary, and therefore illegal and unconstitutional, in that it absolutely prohibited the use of the *sedan* type of automobile in the interstate transportation of passengers for hire, and thereby resulted in the deprivation of the appellant's property without due process of law, in violation of the New Jersey State Constitution and the Fourteenth Amendment of the Constitution of the United States.

The former Supreme Court had concluded that since, in the experienced judgment of the Board of Public Utility Commissioners, the standards prescribed by Regulation B-7 bore "a real and substantial relation to safety in transportation," the court could not brand its action as arbitrary. *Lakewod Express Service v. Board of Public Utility Commissioners,* 137 N.J.L. 440, 60 A. (2d) 298, 301 (1948). The present Court pointed out that the very statute, N. J. REV. STAT. § 48:4-1, subd. d (1937), as amended, N.J.S.A. § 48:4-1, subd. d, under which the challenged regulation was promulgated, negates the idea that the sedan type of equipment is per se dangerous when used as an autobus, since it *excludes* from regulation "any autobus with a carrying capacity of *not more than eight* passengers operated under municipal consent upon a route established wholly within the limits of a single municipality . . . " (Emphasis supplied.)

The court below had stressed previous decisions concerning review by certiorari of a decision of the Board of Public Utility Commissioners, wherein it

had been held that the court should not substitute its judgment for that of the Board since the Board acts as a legislative agency in the performance of its duty and that the court will not presume to substitute its judgment for that of such a quasi judicial body where there is proof to support the conclusion of the Board. *Interstate Telephone & Telegraph Co. v. Board of Public Utility Commissioners,* 84 N.J.L. 184, 189, 86 Atl. 363 (1913); *New Jersey Suburban Water Co. v. Board of Public Utility Commissioners,* 123 N.J.L. 303, 307, 8 A. (2d) 350 (1939). The court here said that the federal and state constitutions fix the limits of the exercise of such powers by prohibiting the deprivation of property without due process of law and by guaranteeing to all the equal protection of the laws.

The testimony which sought to justify the prohibition of sedans was to the effect that sedans are designed for private rather than public operation, that the doors may be opened at will by the passengers, that they are frequently overloaded, and that because a sedan is a light or medium weight machine it does not provide adequate protection to the passengers. It is obvious that all of these reasons are equally applicable to any seven passenger automobile, and, as stated previously, the statute involved in this case negates the idea that "any autobus with a carrying capacity of *not more than eight passengers*" is dangerous per se. N. J. REV. STAT. § 48:4-1, subd. d (1937), as amended, N.J.S.A. § 48:4-1, subd. d. (Emphasis supplied.)

Several other minor objections to the use of sedans were stated, but the court easily dismissed these with the comment that such situations "could readily be dealt with by adequate regulation rather than absolute prohibition."

It was therefore concluded that Regulation B-7, par. 31(b) was unreasonable and arbitrary and bore no substantial relation to its object, which was to protect the safety of the traveling and general public. The judgment of the former supreme court was accordingly reversed by a four to one vote.

This decision appears quite just. It is difficult to see just how the Board of Public Utility Commissioners could say that sedan automobiles are too dangerous per se to be used by the public as autobusses, in view of the large number of this type of vehicle in private use. Would it be regarded as a bit of absurd legislation if a law were passed making the operation, private or public, of all sedan automobiles illegal, on the grounds that this type of automobile is too dangerous? As Justice Oliphant pointed out, the Board in the instant case contradicted itself by admitting that sedan automobiles are not per se dangerous when used as autobusses in municipalities.

The ostensible reasons for the regulation having been refuted, opened wide is the field for conjecture as to the actual reasons for the board's action in outlawing this type of autobus. Perhaps the answer can be found in the Board's allegations that the policing and inspection of sedans operated for hire would be most difficult since it is hard to distinguish them from other sedan cars privately owned. No doubt this is true, but the difficulty is obviously not insurmountable. And is the Board supposed to be acting for the purposes of its own convenience in policing, or are its actions supposed to be directed toward the public safety?

The references, made twice by the court, to the regulation of the Board as "legislation" provide an interesting sidelight to this case. Here we have a state court calling action by a public utilities commission "legislation," whereas the law in the same state is that the legislature cannot delegate the power to make laws—to legislate—to any other authority or body. *Hudspeth v. Swayze,* 85 N.J.L. 592, 89 Atl. 780 (1914). Of course this is merely careless terminology on the part of the court, and has no effect upon the decision here.

Another interesting aspect, related to the same subject of delegation of the legislative power, is the word "reasonable" in the statute which forms the basis for this case. N.J.S.A. § 48:4-18. This word affords the opportunity for much judicial legislation, placing this statute in the same category, in this respect, with such broad documents as the Federal Constitution and the Sherman Anti-Trust Act. The courts, in ruling on any action taken under the authority of this statute, have only to look to the reasonableness of the action. But if the word "reasonable" were omitted from the statute, would anyone be so bold as to say that actions under this statute would not have to be reasonable? This thought presents the query: Is the word "reasonable" either necessary or of any value in the statute? Apparently not. Therefore the courts have no special norm or standard to guide their decisions in respect to this statute. They may rule actions constitutional or unconstitutional with little or no check on their decisions. They may legislate judicially.

*George Ratterman*

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MONOPOLIES—GAMING.—*Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n., Inc.*, .... Fla. ...., 37 So. (2d) 692 (1948). This was an action by the Gulfstream Park Racing Association to contest the constitutionality of a recent Florida statute, FLA. STAT. § 550.08-1 (Supp. 1947), directing the state racing commission in the following manner:

> The horse race track having produced the largest amount of tax revenue during the preceding year of its operation shall be granted its choice of the three established racing periods . . .

Petitioner alleged that the peak of the tourist season in southeastern Florida for many years has been from about January 20 to March 15, and that consequently this period is the most profitable for operating horse races and pari-mutuel betting.

Because there are three race tracks within a radius of one hundred air miles of each other, the legislature in 1947 allocated a 120 day racing period; or forty days for each race track. Stating frankly that the operation of horse racing and legalized pari-mutuel and mutuel betting was a substantial business and that the taxes derived therefrom constituted an integral part of the state and county tax structures, the legislature had evolved the contested statute to provide for a continued high revenue.

Contending denial of due process and equal protection, misleading title, and deprivation of property right, plaintiff sought relief by requesting the court to hold the section unconstitutional, and further, to direct the Florida Racing Commission to allocate the racing dates in a fair and impartial manner, or that the court set up a fair plan of rotation for the three race tracks. It is interesting to note that prior to the adoption of the statute in question, the power to determine the dates for each of the three tracks had been vested in the Commission. FLA. STAT. § 550.07 (1941). During the period in which the power of assigning dates rested with the Commission, the plaintiff had never been allocated the supposedly "choice date" of the forty day period running approximately from January 20 to March 3.

The court denied the petitioner's request on the ground of public policy. It enumerated the powers of the state to create monopolies, exclusive privileges and franchises when necessary to the public safety and welfare.

Since authorized gambling is a matter over which the state may exercise greater control and exercise its police power in a more arbitrary manner than

in the usual case, this decision, though assuredly novel, rests on firm constitutional ground. However, other states in which racing is either prominent or predominant have approached the subjects of revenue and regulation in different ways.

California, beset alike with the racing period assignment problem, has not candidly said that racing revenues are an integral part of the state and county tax structures, as has Florida. But impliedly, the revenues do constitute an important segment of the state treasury, for moneys received are credited to a special fund known as the "Fair and Exposition Fund" CALIF. BUSINESS AND PROFESSIONS CODE § 19620 (Deering, 1941 Supp.). Determination of racing dates has been placed in the jurisdiction of the Horse Racing Board, but specifically provides for review, upon questions of law only, by the superior court of the county with which license was, or was to be, exercised.

Kentucky, where horse racing is more prominent than predominant, denied that its statute regulating horse racing is either a revenue measure or an exercise of the right of eminent domain. In *Douglas Park Jockey Club v. Talbot et al.*, 173 Ky. 685, 191 S.W. 474, 477 (1917), the court categorically said:

> The only authority exerted by the rule is one of police regulation, declared by the legislative authority of the state to be necessary to render appellant's business legal, and not a nuisance.

Though revenue, as such, is not mentioned in New York statutes, the authority for revenue receipts is discussed. Ten per cent of the total deposits of pari-mutuel pool betting is set aside; six per cent is apportioned to the State Tax Commission, the remainder going to the operators. The management of race tracks pay the aforementioned sum for "the privilege of conducting pari-mutuel betting." N. Y. UNCONSOL. LAWS § 7568 (McKinney).

Here, again, the responsibility for determining racing dates rests with the State Racing Commission.

> In the assignment of dates by the State Racing Commission to corporations or associations for conducting running races or steeplechases no conflict shall be deemed to exist by reason of duplication of dates as between race meetings . . . if the race courses at which such meetings are held are at least one hundred miles apart. . . . L. 1940, c. 254, § 22.

Apparently the Commission may permit conflicting racing periods, if it chooses, for the Attorney General said:

> The State Racing Commission has the authority and the duty to assign or allocate racing dates among its various licensees. . . . Op. Atty. Gen., January 2, 1941.

The case under discussion may be the forerunner of litigation to be expected as the "gate" wanes when the so-called "easy money" disappears at the many race tracks throughout the United States. It is a novel case because it introduces the degree to which legislation pertinent to gaming, i.e., horse-racing, has been detailed in Florida. California, Kentucky and New York presumably chose a less controversial course by granting broad administrative and regulatory powers to their respective commissions.

The court seems to have adopted a pragmatic and expedient concept by adhering to the avowed intention of the Florida legislature which was, unquestionably, the derivation of high revenue from gaming enterprises through qualified restriction by police power. It would appear to be the more equitable view to have granted a rotation of racing periods. Objectively, one race track, granted a period toward the end of the seasonal tourist influx, can hardly be expected to derive high revenue and, therefore, cannot hope to gain the favored period.

*Henry M. Shine, Jr.*

CRIMINAL LAW—CONFESSIONS.—*Upshaw v. United States,* .... U. S. ...., 69 S.Ct. 170, 17 L.W. 4053 (1948). The petitioner in this case was found guilty of grand larceny in the United States District Court for the District of Columbia and sentenced to serve sixteen months to four years in prison. The case came to the United States Court of Appeals for the District of Columbia on a writ of certiorari. The government's case in the original action was based entirely on a confession made by the petitioner. The admissibility of that confession was put in issue by this appeal.

The petitioner was arrested on suspicion and held for thirty hours before arraignment. During this period he confessed voluntarily without physical or psychological coercion on the part of the arresting officers.

The bases of the appeal were, first, Rule 5(a) of the Federal Rules of Criminal Procedure, 54 STAT. 688 (1940), 18 U.S.C. § 687 (1946), which directs an arresting officer to bring an arrested person before the nearest available committing magistrate with no unreasonable delay, and, second, *McNabb v. United States,* 318 U. S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1942). The majority of the Court found the confession inadmissible and in so doing declared that the purpose of Rule 5 was to prevent *third degree* methods. They declared that the *McNabb* case decided that this type of a confession was the fruit of such third degree methods and should therefore be inadmissible.

An examination of the *McNabb* case will show a much stronger set of facts for the ruling than is present here. In that case several comparatively ignorant hill-dwellers were removed from their homes and taken to a large city by arresting federal officers where they were questioned together and separately for numerous hours over a period of several days. All this took place before a confession was made and before any arraignment. Upshaw, in the present case, is a Negro with an education reaching through the first year of high school. He was arrested in his room in an apparently drunken condition and taken to a police station in the same city. No physical coercion was used on either McNabb or Upshaw. Obviously, from these facts the arrest and interrogation had a far greater psychological impact on McNabb than on the petitioner here. Apparently, the majority of the Court have decided that under the *McNabb* rule there is no question of degree of coercive effect upon a prisoner, but rather has set up an absolute rule that if there is unreasonable detention, any confession, regardless of time or circumstance, is inadmissible.

It is questionable whether such a strict rule was intended by the majority in the *McNabb* case. In writing the opinon Judge Frankfurter said:

> We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the *circumstances revealed here.* [Emphasis supplied.]

Does not this statement imply that the rule is to be applied to a flagrant disregard of rights found in this particular case? There was no express statement or implication that this rule should apply to all cases of confession obtained during unreasonable detention. Therefore is it not possible under the *McNabb* rule, that a voluntary confession made without coercion during a short but nevertheless technically illegal detention, would be admissible?

In the majority opinion there is a rejection of the rule in *United States v. Mitchell,* 322 U. S. 65, 64 S.Ct. 896, 88 L.Ed. 1140 (1944). In this case the detention of the prisoner in the police station was unreasonably long, but the confession was made very soon after arrest and arrival at the station. Therefore, there had been no unreasonable detention at the time the confession was made and the confession could not possibly have been affected by the detention. The

Court held this confession admissible. The rule in the *Mitchell* case was properly held inapplicable to the set of facts in the *Upshaw* case as there was a confession before any illegal act by the officers in the former case while here the confession and unreasonable detention are related acts.

The majority of the Court in the *Upshaw* case may have held correctly under the *McNabb* case, but in doing so the *McNabb* rule seems to have been misstated. To justify their holding the Court should, rather than state an absolute rule, show that the facts of the *Upshaw* case deprive the prisoner of rights to a degree strong enough to qualify it under the *McNabb* rule. Other courts have suggested that the *McNabb* rule is a coercion test. *Brinegar v. United States* 165 FED. (2d) 512 (1947). In *State v. Behler,* 65 Idaho 464, 146 P. (2d) 338 (1944), the rule was interpreted as excluding confessions obtained by *third degree* methods.

Mr. Justice Reed, in his excellent dissent, sees in the majority opinion of the instant case an interpretation of the *McNabb* rule as a penalty on arresting officers for non-observance of their duty under Rule 5 (a) of the Federal Rules of Criminal Procedure. If this was the intention of the majority of the Court, their position seems weak. As Justice Reed suggests, there are other adequate methods of penalizing police officers. More important than that, the penalty sought to be inflicted on the police is indirect, while the full impact falls upon the people, for whose protection the entire system was created. The release of a confessed prisoner because of some technicality in his confession may slightly irritate the police department, but the real victims of the action are the people upon whom the criminal is once again free to prey.

Prior to the *McNabb* rule the test applied to confessions was "voluntariness." According to logic this is the only true criterion of the genuineness of a confession. Voluntariness of confessions is adequately protected by due process. *Lisenba v. California,* 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166 (1941).

It would be illogical and arbitrary to say that an arrest made by a policeman who was smoking where smoking was prohibited would be invalid. The relationship between confessions and illegal detention of prisoners is equally absurd unless we are to presume that all unreasonable detentions are for purposes of forcing involuntary confessions out of prisoners. Such a presumption would be an insult to the integrity of law enforcement agencies and may become a great technical handicap to their efficient operation.

An illegal detention in connection with a confession is at most only evidence worthy of close examination for deprivation of due process under the voluntariness test. There is not sufficient relationship between the act of detention by arresting officers and a confession by a prisoner to support such a positive presumption as is found in the *Upshaw* case.

*John G. Smith*

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CONSTITUTIONAL LAW—INDICTMENT AND INFORMATION.—*Kennedy v. Walker,* .... Conn. ...., 63 A. (2d) 589 (1949). The question of the intent of the makers of the Fourteenth Amendment to the Constitution of the United States as to the right of the citizen to a trial subsequent to a grand jury indictment, rather than a prosecuting attorney's information, has not infrequently made its appearance in the courts. Recently the Due Process clause of the Fourteenth Amendment has been interpreted more liberally than in the past. See Mr. Justice Black, dissenting in *Adamson v. California,* 332 U. S. 46, 68, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947). That effect is to be considered in the present case.

The plaintiff was tried and convicted on a charge of conspiracy upon an information filed by a state's attorney and was serving his prison sentence. He appealed the case, alleging that under the Fourteenth Amendment he was entitled to a trial instituted by an indictment proceedings and not upon an information alone. The actual question was never presented to the court because the plaintiff failed to comply reasonably with the requirements of the procedure established for taking appeals to the court. On the basis of the authority invested in the judges of the Superior Court of Connecticut, the case was dismissed on motion. Thereupon the plaintiff brought an action of habeas corpus to secure his release, because he alleged that he had been denied due process of law by the dismissal of his appeal. The court quashed the writ and the Connecticut Supreme Court of Errors heard the plaintiff's appeal.

In investigating the general proposition of the plaintiff that he had been denied his rights of due process, the Connecticut court decided that in the matter of the dismissal of the appeal because of the failure to comply with the statutory requirements for appeal, the lower courts acted correctly, completely in accordance with the rules of procedure of the State of Connecticut.

In Connecticut, criminal trials are initiated on an information of a prosecuting attorney or on an indictment of a grand jury. CONN. GEN. STAT. (Rev. 1930), c. 333 § 6430, c. 334 § 6456. The court, in considering first the question raised under the state constitution, held that the provision, CONN. CONST. Art. I, § 9 (1818), which provides for an indictment in cases of offenses "the punishment of which may be death or life imprisonment" was inapplicable, since the crime was not of the serious nature described. The court was also able to dispose of the federal question readily, since the United States Supreme Court, in a long line of decisions dating from *Hurtado v. California,* 110 U. S. 516, 4 S.Ct. 11, 28 L.Ed. 232 (1884), has held that the provisions of the Fifth Amendment requiring process by indictment in cases involving "a capital or otherwise infamous crime" have not been made applicable to the states by the Fourteenth Amendment. Relying on this authority, the court was thus able to conclude that state procedure as to indictments and informations is a matter of state discretion, and that grand jury review is necessary only in cases involving charges for which the punishment is death or life imprisonment. It might be well to note at this point that the purpose of the plaintiff's contention is difficult to understand. Even if he had been able to prove that the provisions of the Fifth Amendment applied to the states, his crime, conspiracy, is in Connecticut a misdemeanor and would still fall outside the provisions of that amendment. CONN. GEN. ST., c. 327 § 1447e (Supp. 1939), c. 339 § 752g (Supp. 1943).

The instant case does, however, raise the question of whether, practically speaking, an information is just as effective and as fair to the accused as an indictment. Important to the perception of this issue is the understanding given to the words "due process" with respect to the terms "indictment" and "information." The intent of the makers of the Fourteenth Amendment was discussed at great length by the United States Supreme Court in *Adamson v. California, supra,* but with inconclusive results. The understanding generally attributed to the words "due process" is that government has no right to deprive a person of life, liberty, or property in a manner which is so far beyond the norm of justice as to constitute an arbitrary application of power. It says, in effect, that every man accused shall, before judgment is rendered, suffer an inquiry and a trial. Justice Reed in *Adamson v. California,* states that "the purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction."

The purpose of pre-trial procedure is to declare with reasonable certainty that the accused may be held on suspicion of a crime. In the greatest number

of cases an accused, before he is charged, stands a preliminary examination before a magistrate at which time he may make an answer to the evidence against him. Then the prosecuting attorney reviews the evidence and if he finds it sufficient, files an information publicly charging the person with a crime. The prosecuting attorney may pass that information to a grand jury who again investigate the charges and if they find them to be probably true, an indictment is issued charging a crime.

Thus indictment and information result in the same finality except that in the case of a crime requiring an indictment the evidence must undergo an additional inquiry from a group of citizens. It would seem that the attention of a grand jury should insure that the conclusions are more certain; but the National Commission on Law Observance and Enforcement, in its report, NAT'L COMM. ON LAW OBSERVANCE AND ENFORCEMENT REPORT No. 4, PROSECUTION 124-126 (1931), states that a survey of states still making frequent use of the grand jury system indicates ". . . that under modern conditions the grand jury is seldom better than a rubber stamp of the prosecuting attorney and has ceased to perform or be needed for the function for which it was established . . ." If this statement is true, and it seems to be established on good authority, then it appears that due process of law can be furthered little by a grand jury investigation, and thus the obligation of government to furnish due process is fulfilled by the combination of a challenging preliminary examination, an information established by an experienced servant charged with a public trust, and the ensuing trial in the courts of justice where judgment is rendered by fellow citizens. However, as the makers of the Fifth Amendment found it prudent to demand a grand jury indictment for the most serious of crimes in the federal courts, so it would seem that all men in all courts should, under the same circumstances, be given the same prudent consideration. For if the crime is so serious as to demand as punishment death or life imprisonment, then that person should have the special consideration of a competent grand jury to insure positively that his life will not be taken from him unjustly.

It would appear that the practical necessity for the indictment has been obviated by the existing system of criminal procedure; and that information proceedings ably meet the requirements of due process of law. At times, however, out of respect for human life and property, additional safeguards seem easily justified. The Constitution of the United States thus specifically requires an indictment, but only for a capital or otherwise infamous crime.

*James M. Wetzel*

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MORTGAGES—PRIORITY BETWEEN CHATTEL MORTGAGES AND ARTIFICER'S LIEN.—*United States v. United Aircraft Corporation*, 80 F. Supp. 52 (Conn. 1948). This case involves a consideration by the District Court of Connecticut of the priority between an artificer's lien and a chattel mortgage in an action of replevin by the United States. Litigation of a writ of possession is permissive but not mandatory after the mortgagor has gone into bankruptcy, and foreclosure and sale of the chattel mortgage has been authorized. CONN. GEN. STAT., c. 274, § 911h (Supp. 1945); 52 STAT. 883 (1938), 11 U.S.C. § 501 (1946). Thus an action of replevin may test the right of possession of the mortgagee as against an artincer claiming a lien.

In March, 1946, the Hoosier Air Freight Corporation executed two purchase-money chattel mortgages to the War Assets Corporation on two twin-engine Douglas aircraft, including "all parts, engines, equipment and accessories." The

mortgages were recorded with the Department of Commerce, Civil Aeronautics Administration, by aircraft numbers and manufacturer's serial numbers. In July, 1946, the Hoosier Air Freight Corporation removed the engines from the aircraft mortgaged and shipped them to Pratt & Whitney Division of United Aircraft Corporation for complete major overhaul. The United Aircraft Corporation claimed an artificer's lien for labor and materials and retained possession of the engines. In August, 1947, the Air-Borne Cargo Lines (formerly Hoosier Air Freight Corporation) was adjudicated bankrupt and a referee in bankruptcy authorized foreclosure of the chattel mortgage without prejudice to those asserting artisan's or possessory liens. The aircraft were sold without the engines.

The question presented was whether the recordation of the conveyances furnished sufficient notice of a pre-existing chattel mortgage upon the engines. The court held that, in view of the removeability and interchangeability of aircraft engines, a mortgage covering them must be of such reasonably sufficient particularity to warn artificers of inclusions of particular engines under claimed mortgage liens. The chattel mortgages herein had not described the engines to such an extent, and were therefore invalid against the artificers who claimed a subsequent possessory lien for labor done on the engines. 52 STAT. 1006 (1938), as amended, 54 STAT. 1235 (1940), 49 U.S.C. § 523 (1946).

The court was unable to find any interpretation of the statutes of Connecticut concerning the sufficiency of notice to third persons dealing with aircraft engines. Nor does the relevant provision of the Civil Aeronautics Act, 52 STAT. 1006 (1938), as amended, 54 STAT. 1235 (1940), 49 U.S.C. § 532 (b) (1946), attempt to define the particularity with which the aircraft or portions thereof should be described. Thus the particularity of description is taken to be such that would be reasonably sufficient for notice to third parties whose rights against transferees of title without delivery or possession would be cut off by the recording under the statute.

In view of the fact that an aircraft engine is a saleable article and that a major overhaul is a periodic requirement for proper maintenance, as requested in the mortgage, it was within the contemplation of the parties that the removal of the engines was to occur at periodic intervals. Since the description in the mortgage referring to the engine was only "all parts, engines, equipment and accessories," it was insufficient to give notice that the lien of the mortgage applied to those particular engines.

The principles of fraudulent conveyance of personalty where there is no transfer of possession have been held to apply except where notice to third parties that there was no transfer of possession has been given in accordance with pertinent regulations concerning conveyances of personalty. In the absence of a statute or consent by the mortgagee to the contrary, a mortgagor has no power to impose a special lien on mortgaged chattels which will take precedence over the mortgage. *Overland Automobile Company of Dallas v. Findley,* 234 S. W. 106 (Tex. Civ. App. 1921); see 14 C. J. S. CHATTEL MORTGAGES § 297. However, consent to give such precedence may be shown if the facts indicate an implied consent on the part of the mortgagee that the mortgagor may incur expenses for repairing the property. This broad interpretation has allowed a few cases to hold that a mortgagee, by allowing the mortgagor to retain possession for his own use, may be regarded as impliedly consenting to a bailment for reasonable repairs which enhance the chattels value and thus allow a superior lien in a repairman, *Grusin v. Stutz Motor Car Company of America,* 206 Ind. 296, 187 N. E. 382 (1933). See Notes, 88 A.L.R. 1186 (1934); L.R.A. 1915D, 1151 (1915). A few cases have even gone so far as to imply adequate consent from the very nature of certain articles left in the mortgagor's possession, *Rehm v. Viall,* 185 Ill. App. 425 (1914); *Kirtley v. Morris,* 43 Mo. App. 144 (1891).