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Recent Decisions

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RECENT DECISIONS

DOMESTIC RELATIONS—DIVORCE—DURATION AND TERMINATION OF DECREE FOR SUPPORT—WHETHER ENFORCEABLE OUT OF FATHER'S ESTATE UPON HIS DEATH.—*Robinson v. Robinson et al.*, ...W. Va....., 50 S. E. (2d) 455 (1948). On August 26, 1943, Laura G. Robinson was awarded a divorce from W. E. Robinson, and it was decreed by the court:

> And it appearing to the Court that the defendant has voluntarily agreed to pay the sum of $45.00 per month for the support and maintenance of said children, . . . it is adjudged, ordered and decreed that the defendant pay unto said plaintiff for said support and maintenance of said children the sum of $45.00 per month . . . and that such payments shall continue until further order of this Court.

W. E. Robinson died testate in 1944 before either of the two children provided for in the decree reached majority, the bulk of his property going to R. W. Robinson, a son by a previous marriage. As administrator of the estate, R. W. Robinson found that he could not dispose of certain real estate owned by the deceased because the Federal Housing Authority regarded the divorce decree as a continuing lien upon the real estate. He brought this action to have the decree cancelled and declared null and void, so that he might profitably dispose of the property. A demurrer to the complaint was filed on the grounds that the decree was a final one and became res judicata and could not be disturbed, save by a bill of review or petition filed in the same court wherein it was rendered; that the lien imposed by the decree was a valid and subsisting one upon the real estate described in the complaint. The demurrer was sustained in the circuit court and the court on its own motion certified the ruling to the Supreme Court of Appeals of West Virginia. The ruling was reversed and the cause remanded.

The question of whether a divorced father's estate shall remain liable for the support and maintenance of the children after his death has proved a vexatious one for the state courts. To narrow this point, it can be said that the claim for maintenance out of a divorced father's estate may arise in one of three ways: by agreement separate from the decree, by a decree into which an agreement may or may not be merged, and finally by the common law obligation of the father toward his children in the absence of an agreement or decree.

As to the first, there is no dispute since it is general law that the obligation based on a contract does not terminate upon the promisor's death, where the contract is not based on personal services of the promisor. RESTATEMENT, CONTRACTS § 459 (1932). An English case, specifically in point, held that a promise for valid consideration of weekly payments in a separation agreement was not discharged by the death of the promisor. *Kirk v. Eustance*, [1937] A. C. 491. Similarly, the third does not cause any difficulty, for it is generally recognized that the common law obligation of a father to support his minor children ends with his death. MADDEN, DOMESTIC RELATIONS § 115 (1st ed. 1931). This doctrine was also recognized in both the majority and minority decisions of the instant case. The claim based on a decree then, is the type which has given rise to the controversy.

In the instant case, the court felt that sustaining this claim would violate the children's statutory right of inheritance where the father died intestate, because such a ruling would prefer one child over another; further, upholding the claim would be encroaching on the statutory and common law right of a person to dispose by will of his property as he wished subject only to the dower right of the spouse in the real estate of the decedent, and his or her right to participate in the distribution of the decedent's personal estate. The court also took cognizance of the difficulties involved in settling an estate upon which there would be a lien that could conceivably be attached for a period of fifteen or more years.

Finally, it was recognized by the court, that under the statutes and decisions of West Virginia, the rights of creditors are superior to any claim that the minor children may have for support out of the estate of their parents. It was the opinion of the majority that the adoption of the rule contended for by the defendants would "in many cases place the entire estate of the decedent beyond the reach of his creditors" and that "there simply is no law which would authorize such a procedure. . . ." The court claimed that it was not disturbing the final decree of a court of competent jurisdiction but was merely interpreting it.

To find precedents for such reasoning the court had to search beyond the cases decided within its jurisdiction, there being none strictly in point. *Blades v. Szatai,* 151 Md. 644, 135 Atl. 841 (1927), involved a similar situation, except that the divorce was awarded to the husband rather than to the wife. Holding that a husband under these circumstances should not be denied his right of testamentary disposition, the court refused to construe the statute which provided that the court may at any time after the original decree "annul, vary or modify the same," in derogation of the common law, which ends the parent's obligation at his death, or invalidates the parent's right of testamentary disposition. Another similar case was *Guinta v. Lo Re,* 159 Fla. 448, 31 So. (2d) 704 (1947), wherein the court decreed that the weekly payments for the maintenance and custody of the children should begin at a certain time, but omitted any statement as to when they should cease; even the so-called ambiguous phrase of the West Virginia Court of Common Pleas, "until further order of the court," was lacking. In view of the indefiniteness of the order, the Florida court would not uphold the claim.

Two other cases cited in support of the ruling of the majority were clearly distinguishable. In *Barry v. Sparks,* 306 Mass. 80, 27 N. E. (2d) 728 (1940), the husband obtained a divorce from his wife. The custody of the child was awarded to the maternal grandmother and the decree ordered the father to pay certain amounts for its support and maintenance. When the wife died, the grandmother sued for payments accruing after the wife's death. In rendering its decision the court said:

> But when such a decree has been entered, upon the death of one of the parents, the divorce decree ceases to have any further continuing effect, at least when, as here, the decree makes no provision for its continuance beyond the lives of the parents . . . When the divorced wife of the defendant died there was no longer any effective decree of court depriving the father of the custody of the child and relieving him from the common law duty to support it. Defendant's common law right to custody of his child revived and his obligation to support it again arose when the divorce decree became ineffective upon the death of the mother.

Thus, in effect, the court substituted the common law obligation for the one arising out of the decree. Whether it would have extended its ruling so as to deprive the child of the means of support it gained out of the divorce decree upon the death of the father is a matter of conjecture, since that question was not before the court. The distinguishing feature of *Carey v. Carey,* 163 Tenn. 486, 43 S. W. (2d) 498 (1931), was that there was no provision for support made in the decree; it merely awarded the wife a lump sum for alimony and gave her custody of the children, but it made no statement concerning their support. The Tennessee court made note of the fact that there were authorities that held that a definite provision for support by the father would be enforceable after his death out of his estate, but they could find none that so held when there was not such definite provision. In denying the claim, the court said, "The common law obligation terminates with the death of the parent." Judge Haymond, in his dissenting opinion in the instant case, considers this point:

> Of course the last sentence contains a correct statement, in absence of a decree imposing the obligation of support which by virtue of the decree would survive against the estate after his death; but that statement has no application to the question of the effect of the decree which arises in the case at bar.

Judge Haymond continued in his dissent literally to charge the majority with wreaking havoc with West Virginia law. He logically points out that by statute, W. VA. CODE ANN. §§ 3761-3762 (1943), the decree was a judgment, that by statute, W. VA. CODE ANN. § 3766 (1943), this judgment became a valid lien upon the real estate of the decedent. "The lien having arisen by virtue of the judgment it continues until judgment is discharged in some legal manner . . . It does not cease to be a lien because of the death of either party and may be enforced at equity without revival." Thus there is a difference between the duty of a father and the effect of a judgment based on that duty. The duty in absence of any adjudication terminates upon death, the judgment does not. Judge Haymond cited *Goff v. Goff,* 60 W. Va. 9, 53 S. E. 769 (1906), wherein the plaintiff sued the estate of her divorced husband for alimony awarded her by decree which was to accrue after his death. In that case the court reasoned that every judgment for money rendered in West Virginia became a lien on all real estate of or to which the judgment debtor was entitled after the date of such a judgment. The court remarked, "The only question is whether future installments are a lien. We think they are." In *Hale v. Hale,* 108 W. Va. 337, 150 S. E. 748 (1929), a similar case, the court, basing its decision on an early statute, stated:

> Our statute Code 64 § 11, clothes the chancellor with wide power in making such a "decree as it shall deem expedient, concerning the estate and maintenance of the parties, or either of them, and the care, custody and maintenance of the minor children." We think this is of sufficient breadth to warrant a requirement by the trial court that permanent alimony be paid out of a husband's estate after his death, when in the chancellor's opinion, such course is just and right. [See W. VA. CODE ANN. § 4715 (1943)]

In considering these cases, the majority attempted to make some distinction between alimony and "care, custody and maintenance of minor children," although the same statute was the source of the court's power to decree either or both.

In refutation of the majority's argument about the rights of creditors, the dissenting judge maintained that the children became judgment creditors by virtue of the decree. In conclusion, Judge Haymond declared, in a tactful manner, that he seriously doubted whether the decree as set down by the court of common pleas was in need of "interpretation."

Aside from incurring the lengthy dissent of Judge Haymond, the majority placed themselves in the unenviable position of adopting the minority view on this issue. In addition to the states represented by the instant case and the four cases cited by the majority, only Kentucky and New York have put themselves on record as being opposed to the enforcement of the decree after death. *Sandlin's Adm'x v. Allen,* 262 Ky. 355, 90 S. W. (2d) 350 (1936); *Carry v. Estate of Johnson,* 295 N. Y. 857, 67 N. E. (2d) 260 (1946). New York, however, places a great deal of importance on the definiteness of the decree and the intent of the divorced husband. In an alimony case, *Babcock v. Babcock,* 174 Misc. 900, 265 N. Y. S. 470, *aff'd,* 239 App. Div. 384, 265 N. Y. S. 474 (1933), the court said:

> When a decree of a court of this state fixed alimony at a certain amount pursuant to the agreement of the parties, to continue during the life of the wife, the alimony did not cease upon the death of the husband, but could be collected from his estate during the life of the wife.

A more recent case involving the validity of a decree for alimony after the death of the husband, *Daggett v. C. I. R.*, 128 F. (2d) 568 (C. C. A. 2nd 1942), *cert. denied*, 317 U. S. 673, 63 S. Ct. 78, 87 L. Ed. 540 (1942), states:

> New York courts have no power to decree alimony for the life of a wife so as to bind the husband's estate in the event he predeceases her, because the husband's marital duty of support is upon him only during his lifetime . . . But a husband may voluntarily consent, either by way of separation agreement or through a decree of court, to make periodic payments to the wife for support during her life, and in that event, should he predecease her, his estate will be held legally responsible for the remainder of the wife's life.

At least nine cases have held that the statement "until further order of the court" is definite enough to enforce payment out of the estate of installments that accrue subsequent to the death of the father. *Miller v. Miller*, 64 Me. 484 (1874); *Creyts v. Creyts*, 143 Mich. 375, 106 N. W. 1111 (1906); *West v. West*, 241 Mich. 674, 217 N. W. 924 (1928); *Newman v. Burwell*, 216 Cal. 608, 15 P. (2d) 511 (1932); *Garber v. Robitshek et al*, 226 Minn. 435, 33 N. W. (2d) 30 (1948); *Myers v. Harrington*, 70 Cal. App. 680, 234 Pac. 412 (1925); In re *Estate of Smith*, 200 Cal. 654, 254 Pac. 567 (1927); *Silberman v. Brown*, 72 N.E. (2d) 267 (Ohio Com. Pl. 1946); *Edelman v. Edelman*, ...Wyo....., 199 P. (2d) 840 (1948). In the *Creyts* and *Newman* cases an order was obtained determining the value of the installments until the time the child reached majority, and payment in a lump sum was decreed. In addition, there are cases which hold that a decree providing for periodic payments during the minority of the child is enforceable against the estate. *Stone v. Bayley*, 75 Wash. 184, 134 Pac. 820 (1913); *Murphy v. Moyle*, 17 Utah 113, 53 Pac. 1010 (1898); *Smith v. Funk*, 141 Okla. 188, 284 Pac. 638 (1930). The underlying reason behind all these decisions is the court's solicitude for minor children, who, through no fault of their own, have been forced to live away from one of their parents.

It is to be noted that the instant case is the only recent one which rejects the definite trend of courts to hold a divorced father's estate liable for the maintenance of a minor child when there has been a decree issued providing for periodic payments. Certainly such a doctrine is moral; a minor child should have the right to look to those who brought him into the world for support, especially when that child has been subjected to the humiliation and vicissitudes of separated parents. The arguments of the majority in the instant case would seem feeble in light of the effects of a contrary decision. The difficulties involved in distributing the estate would be no more than those involved if, instead of a decree, the estate were bound by a valid contract. Such situations are common. The argument that the rights of creditors would be infringed upon has already been answered by the fact that the child is actually a judgment creditor. As to testamentary disposition, "a man must be just before he is generous." *Silberman v. Brown, supra.*

Sidney Baker

TORTS—PROXIMATE CAUSE—EXPLOSIVES.—*Kingsland et al. v. Erie County Agr. Soc. et al.*, ...N. Y....., 84 N. E. (2d) 38 (1949). The chain of causation is not broken when independent intervening forces, reasonably foreseeable, cause the injury complained of. This was the basis on which the Court of Appeals of New York refused to disturb a jury verdict rendered for the plaintiff in this case.

The plaintiff's brother, aged thirteen, a trespasser on the defendant's fairgrounds, pilfered a "ground bomb," a powerful type of fireworks, which subse-

quently caused plaintiff's injury. Between the time of the asportation and the explosion, the boy's mother saw the "bomb." It is doubtful whether she was aware of its dangerous propensities. However, she did know it was an explosive, though she believed it to be a dud, and she told her boy she didn't want it in the house.

Is the theory of liability for foreseeable consequences of intervening causative forces as predicated in the present case grounded merely on dispassionate legal analysis; or is it, rather, based upon unexpressed considerations of public policy? A comparison of the instant case with *Perry v. Rochester Lime Co.*, 219 N. Y. 60, 113 N. E. 529 (1917), on which the dissenting opinion principally relied, indicates the uncertainty with which the courts of New York have approached the problem. In the *Perry* case, several boys discovered hidden nitroglycerin caps in an unlocked chest, stole a box of the caps and carried it to their home a half mile away, where a playmate subsequently was killed by an explosion of the caps. In the instant case the fireworks were wrapped in paper in an open box. The boy took one home and the next day an infant brother was injured. Yet in the *Perry* case and the instant case opposite results were reached. The acts of the boys in the *Perry* case were considered independent intervening forces. In the instant case, however, the stealing of the deadly fireworks, the knowledge of the mother and injury to the plaintiff were held reasonably foreseeable; hence the leaving of the explosive concealed in the box was the proximate cause of the injury. The court based its decision on the manner in which the explosives were stored. Is this distinction warranted on the facts; or is this "public policy" digging in the deepest pocket?

Another case which appears to be contra to the instant case is *Babcock v. Fitzpatrick*, 221 App. Div. 638, 225 N. Y. S. 30 (1927), *aff'd*, 248 N. Y. 608, 162 N. E. 543 (1927). Workmen had left dynamite caps under the porch of a house near where they were working. The caps were visible from the road and a nephew of the owner of the house carried them away and distributed them among his friends. In attempting to light the fuse on one of the caps an injury was sustained. In that case the court of appeals held the acts of the nephew to be unforeseeable intervening forces.

> "Proximate cause" is the limitation which the courts have been compelled to place, as a practical necessity, upon the actor's responsibility for the consequences of his conduct. The limitation is sometimes one of causation, but more often is one of various considerations of policy which have nothing to do with causation. [PROSSER, TORTS 311 (1941).]

With this in mind, it can be well understood that causation cannot be reduced to an equation so long as there remain so many variables.

Other jurisdictions have been perplexed with the same problem. The Massachusetts court in *Bruso v. Eastern States Exposition*, 269 Mass. 21, 168 N. E. 206 (1929), directed a verdict for the defendant when evidence disclosed that four days after a fireworks display, a boy of thirteen found an unexploded part of a piece of fireworks from which he extracted the explosive powder and was injured when he poured the powder on an open fire. The same court, in *Horan v. Town of Watertown*, 217 Mass. 185, 104 N. E. 464 (1914), held that the negligent keeping of dynamite in a box near the street was not the proximate cause of injuries inflicted when boys who had taken some dynamite from the box were injured by an explosion which resulted from their throwing it on an open fire.

However, the other extreme was expressed by the Circuit Court of the Sixth District in *Bridges v. Dahl*, 108 F. (2d) 228 (C. C. A. 6th 1939). This court held that causation was a question for the jury when the facts showed that a boy fifteen years of age had stolen dynamite and fuses from an open garage and was injured in firing the explosives.

These cases illustrate that the only approach to questions of causation is through the cases. A general statement that

> . . . in order that an act or omission may be the proximate cause of an injury, the injury must be the natural and probable consequences of the act or omission and such as might have been foreseen by an ordinary reasonable prudent man, in the light of the attendant circumstances, as likely to result therefrom,

as stated in COOLEY ON TORTS § 32 (Rev. Stud. ed., Throckmorton 1930), can at best be useful only as a charge to the jury. The fictictious "ordinary reasonable prudent man" test prevents any degree of certainty.

The "substantial factor" test was applied and liability imposed in a case where lightning had struck a barge in which the plaintiff was working, causing an explosion of the gases negligently left therein. *Johnson et al v. Kosmos Portland Cement Co.,* 64 F. (2d) 193 (C. C. A. 6th 1933). In another case, a Massachusetts court stated that the intervening acts of a third person which create a condition necessary to the injurious effect of the original negligent act will not excuse the first wrongdoer; this rule was applied where someone other than the gas station attendant left the cover off of a coil and a spark ignited vapors which were present because of the negligence of the gas attendant in filling the gas tank. *Teasdale v. Beacon Oil Co.,* 226 Mass. 25, 164 N. E. 612 (1929). Even a test long believed dead was revived fairly recently to plague the courts when the "last human wrongdoer" test of *Vicars v. Wilcocks,* 8 East 1, 103 Eng. Rep. 245 (1806) was applied by the House of Lords in the case of *Singleton Abbey v. Paludina,* [1927] 1 A. C. 16.

These cases indicate the futility of attemping to formulate any general rule as to intervening forces and causation. The underlying forces behind these negligence cases are many, but they are conveniently classified under one heading, public policy.

Arthur L. Beaudette

REAL PROPERTY—PRESCRIPTIVE EASEMENTS OF WAY—PRESUMPTION OF PERMISSIVE USE.—*Wilson v. Waters et al.,* ....Md....., 64 A. (2d) 135 (1949). This action was brought to recover damages against an owner of a suburban lot for barricading a "country lane" crossing her property. The four plaintiffs claimed a prescriptive right of way by having used the roadway to the rear of their houses for well over the statutory period of twenty years. Defendant resisted the claim of an easement, maintaining that the user was not adverse or exclusive, but permissive, since the property had been "unenclosed and unimproved" prior to 1934, twelve years before the barricading, and in any event the use was "in connection with permissive use of the general public."

The court found that there were no legal presumptions upholding the contention of permissive user so that the plaintiffs' evidence of their open, continuous, and unobjected use was sufficient in itself to presume adverse use, and, in the absence of any affirmative evidence by the defendant showing permission, the use established a prescriptive easement.

In ruling that there were no legal presumptions of permissive use, but that a presumption of adverse use had arisen, the court has brought into focus two scintillating and vigorously controversial points: (1) Can a presumption of permissive use be predicated of urban property, and if so, what is the proper test? (2) What effect does the public use of a way have on the right of an individual who originally established the way, and claims a prescriptive easement over it?

The court examined the general rule of presumption of permissive use which is applied to the user of "unenclosed" rural land, *Bowman v. Wickliffe,* 15 B. Mon. 84 (Ky. 1854); *Boyden v. Achenbach,* 86 N. C. 397 (1882), former app., 79 N. C. 539 (1878); *Trump v. McDonnell,* 120 Ala. 200, 24 So. 353 (1898); 17 AM. JUR., Easements § 71, but criticized the use of the word "unenclosed," adopting as the test the far more satisfactory term "unimproved," *Worrall v. Rhoads,* 2 Whart. 427 (Pa. 1837) (by implication); *Shepard v. Gilbert,* 212 Wis. 1, 249 N .W. 54 (1933) (by implication), especially as a test for urban property. See Note, 170 A.L.R. 820 (1947). The court makes an unexplained distinction between unimproved "wild land, woodland, and other land in the general state of nature" and unimproved urban property having a depth of 150 feet, peremptorily refusing to embrace the test of its adoption to the case.

It might be argued that the test is immaterial to the case since the lot was improved, but the rather indefinite facts indicate that the propery was first improved in 1934, only twelve years before the barricading. Connecting this with the doctrine that user originating with permission or the presumption of permission establishes the character of user which continues until the changed circumstances or acts of the parties affirmatively reject it, and that the *period of prescriptive use first commences running from such time of affirmative rejection, Richardson v. Horn,* 282 Ky. 5, 137 S. W. (2d) 394 (1940); *Louisville & N. R. Co. v. Cornelius,* 165 Ky. 132, 176 S. W. 964 (1915); *Bowman v. Wickliffe, supra;* 4 TIFFANY, REAL PROPERTY § 1196a (3rd ed., Jones, 1939), it becomes obvious that there is reason to apply the unimproved test, if it is applicable to urban property, to determine whether the use before 1934 was permissive.

Is the test applicable to urban property? As stated above, originally the presumption of permission only arose from use of unenclosed or unimproved rural land, especially woodland. Courts have been mysteriously reluctant in many jurisdictions to apply the same test to urban property. *Shepard v. Gilbert,* 212 Wis. 1, 249 N. W. 54 (1933). This may be traced in part to the seemingly imperishable vestiges of the old "do-not-break-my-close" Blackstonian attitude. But why should any distinction be drawn between urban and rural property? Perchance it is the romantic assumption that city property need be and can be more effectively guarded. The very basis of that assumption, however, creates its antithesis: that the close association of city life necessitates legally unfettered mutual accommodation.

Just as the courts have predicated permissive use to unimproved rural land upon the grounds that:

> It would be unreasonable to deduce from the owner's quiet acquiescence, a simple act of neighborhood courtesy, in the use of a way convenient to others, and not injurious to himself, over land unimproved or in woods, consequences so seriously detracting from the value of the land thus used, and compel him needlessly to interpose and prevent the enjoyment of the privilege in order to the preservation of the right of property unimpaired,

Boyden v. Achenbach, 86 N. C. 397, 399 (1882), former app., 79 N. C. 539 (1878), they have apprehended the popular movement towards neighborliness in urban communities as well, and have begun to apply the identical test to such property.

One of the first cases adopting the principle was *Clarke v. Clarke,* 133 Cal. 631, 66 Pac. 10, 11-12 (1901), where the court, in refusing to disturb a jury's finding of permissive user, denounced in dictum the presumption of adverse use to unimproved vacant city property, citing reasons of "kindness" and "neighborliness."

A prescriptive right was refused across a vacant portion of industrial property in *King v. Battle Creek Box Co.,* 235 Mich. 24, 209 N. W. 133 (1926), where the

court held: "The use for a way of passage of uninclosed vacant land not in use by the owner . . . is not in itself hostile to the owner. The presumption would be . . . subordination to the legal title."

The Ohio Appellate Court indicated that the making of a beaten path across an unimproved vacant city lot, and from time to time spreading cinders and ashes on the path, is not an infringement of the rights of the owner sufficient to give notice of an adverse claim. *Davidson v. Dunn,* 16 Ohio App. 263 (1922). "The use of vacant, uninclosed, and unoccupied land will be presumed to be by permission, and not adverse." *Waller v. Hildebrecht,* 295 Ill. 116, 128 N. E. 807 (1920). Both of these cases are of controlling significance in the present case. The former squarely controverts this court's implication that some upkeep of a roadway by the user gels the presumption of adverse use. The latter exactly parallels the instant case; it involves a vacant *portion* of an improved lot.

An excellently written case with the court sitting *en banc, Northwest Cities Gas Co. v. Western Fuel Co.,* 13 Wash. (2d) 75, 123 P. (2d) 771 (1942), *aff'd,* 17 Wash. (2d) 437, 135 P. (2d) 867 (1943), involving industrial property, held that the general rule as to the presumption of adverseness if the use of way is unexplained:

> . . . does not apply however, to vacant, open, uninclosed, and unimproved lands . . . Courts do not, in such cases, infer adverse user but require evidence of facts or circumstances that user was indeed adverse and not permissive.

Elsewhere the court states, ". . . the question of adverse user is a question of fact." This holding is unqualifiedly quoted and adopted in a case concerning vacant lots in a suburban development. *Roediger v. Cullen,* 26 Wash. (2d) 690, 175 P. (2d) 669 (1946).

An analysis of these typical cases evinces that the contemporary tendency is to apply the test of "unimproved" to urban as well as rural property. Anything more than a cursory examination of the cases discloses that the courts are evolving even a more flexible rule. It might be stated: permissive user of way will be presumed, in the absence of any *affirmative* conduct by the parties to the contrary, if such user is indicative of neighborly accommodation (not permission) and involves no *substantial* interference with the owner's normal use. This rule, yet to be explicitly stated although already applied, espouses the common sense rule that use of a neighbor's land resulting from mere neighborly accommodation or courtesy is not adverse. *Meike v. Schober,* 12 Ohio Supp. 41 (1943).

The court here has subjected the landowner to the older and narrower view, which admittedly has support in many jurisdictions. Their refusal to apply the test of "unimproved," much less the broader rule stated above, to the defendant's lot, has precluded the possibility of permissive use before 1934, which if accepted would have prevented the running of the prescriptive period of twenty years. Consequently, to her surprise, the landowner has given a right of way across her lot; common sense has been confounded; the ends of neighborliness and charity have been frustrated. These ramifications do not make this holding an impressive milestone in the annals of judicial progress.

Proceeding to the second point, the defendant contended that user was to be deemed permissive, as the plaintiffs' use was only as a part of the public. The court held that the facts did not support this contention, but nevertheless in dictum subscribed to the doctrine of *Hall v. Backus,* 92 W. Va. 155, 114 S. E. 449 (1922), saying:

> If a road, which was started in such a manner as to make the user adverse and exclusive, is afterwards enjoyed in common with the public,

the user does not lose its exclusive character as the result of the joinder of the public therein.

This is declarative of the theory that the establishment of a road to one's property (with no mention of necessity; the facts of this case imply convenience) is a fact sufficient in itself to create a presumption of adverse exclusive user, even though the public has joined in the use therein, with the burden of rebutting this presumption resting on the property owner. Although the court later speaks of the commencement of a way by an individual as a fact from which the jury may find an exclusive use, the suggestion actually laid down is more than legal acceptability of a possible factual conclusion. The rule lies somewhere in that nebulous no-man's land between legal presumptions and factual conclusions. The case being followed, *Hall v. Backus,* 92 W. Va. 155, 114 S. E. 449 (1922), is one of the few, if not the only case that has gone that far. The overwhelming rule is that the use of way by an individual in common with the public at least rebuts the presumption of adverse exclusive use, *Day v. Allender,* 22 Ind. 511 (1864); *Witt v. Creasey,* 117 Va. 872, 86 S. E. 128 (1915), if it does not establish a presumption of permissive use itself. *Blakemore v. Matthews,* 154 Tenn. 344, 285 S. W. 567 (1926). Therefore it becomes a question of fact as to what constitutes exclusive use, with the burden of proof resting squarely upon the one attempting to set up the right in himself. *District of Columbia v. Robinson,* 180 U. S. 92, 21 S. Ct. 283, 45 L. Ed. 440 (1901); *Witt v. Creasey, supra; Blakemore v. Matthews, supra.*

By reviewing other authorities, it appears that the court may have gone too far by suggesting that the commencement of a road by an individual, even in a manner connoting adversity, creates a presumption of adverse use despite the fact that the public subsequently joins in the use thereof. If we would normally presume permission to the public, why should not permission be presumed to the concurrent use by a member of the public regardless of the chronological order of commencement? Even more compelling is the objection that the dictum does not follow the spirit of reality in the modern view that permissive use will be presumed whenever possible, *Northwest Cities Gas Co. v. Western Fuel Co.,* 13 Wash. (2d) 75, 123 P. (2d) 771 (1942), *aff'd,* 17 Wash. (2d) 437, 135 P. (2d) 867 (1943); *Roediger v. Cullen,* 26 Wash. (2d) 690, 175 P. (2d) 669 (1946), to prevent the deprivation of one's property because he has been kind.

In the face of the obvious weight of authority, bolstered by common sense, one is compelled to suggest that the rule should be that permissive user will be presumed when an individual is joined by the public in the use of a way, with the burden falling upon the individual to rebut this presumption and affirmatively establish his claim of individual exclusive adverse use.

It must be re-emphasized that the facts as given in the opinion are not beyond other interpretation; that the court may easily have been perfectly correct in its holding and dictum on the actual facts; but that the inferences reasonably drawn from the facts as stated promulgate rules that are a distinct handicap to the typical landowner, discourage neighborliness and courteous accommodation, and pointedly conflict with common sense and any unsophisticated ideal of natural justice and Christian charity.

Mark Harry Berens

CONSTITUTIONAL LAW—ELECTIONS—DISCRIMINATION AGAINST APPLICANTS FOR THE FRANCHISE ON THE BASIS OF RACE OR COLOR.—*Davis v. Schnell,* 81 F. Supp. 872 (S. D. Ala. 1949). This case marks the unsuccessful conclusion of another attempt to deprive the American Negro of the right to vote. Specifically, it was an attempt to avoid the decision of the Supreme Court of the United States in *Smith v. Allwright,* 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944), by passing

an amendment to the Constitution of the State of Alabama. The realistic test of what constitutes "state action" laid down in *Smith v. Allwright* caused the advocates of "white supremacy" to find another way to bar the Negro from voting. The "Boswell Amendment" was enacted as the best means of accomplishing this purpose. The present decision is the answer of the courts to this evasive effort.

This suit was brought in the United States District Court for the Southern District of Alabama by ten Negro citizens of Mobile County, Alabama, against the Board of Registrars of said county and the individual members thereof, to declare and secure their rights to register as electors. The relief sought was a declaratory judgment declaring the Boswell Amendment unconstitutional and an injunction against the further enforcement of the provisions thereof. The Boswell Amendment, as it is popularly captioned, was an amendment to § 181 of the Constitution of Alabama changing the requirements for registration of electors so that only those persons who could "understand and explain" any article of the Constitution of the United States could be registered as electors.

The plaintiffs alleged that this amendment was purposely sponsored, its adoption obtained, and its provisions so administered as to prevent the plaintiffs and others, solely because of their race, from exercising their right to vote. It was further alleged that this amendment vests in the Board of Registrars unlimited discretion to grant or deny the plaintiffs or others similarly situated the right to register as electors; that the right to register is a prerequisite to voting in any election, federal, state or local; that said amendment contains no definite, reasonable or recognizable standard or test to be applied in determining the qualifications of electors; that the defendants refused to register the plaintiffs while at the same time the defendants were registering white applicants without requiring them to explain any articles of the Constitution. The defendants denied these allegations but admitted there was a controversy such as would satisfy the constitutional requirements in respect to declaratory judgments.

The charges of discrimination were substantiated in the evidence by factual statistics garnered from the records kept by the defendant Registration Board which showed that of the estimated 230,000 citizens of Mobile County, Alabama, (approximately sixty-four percent white and thirty-six percent colored) 2800 white persons had been registered and approximately 104 Negroes.

In deciding upon the constitutionality of this amendment, the court readily admitted that the states, and not the Federal Government, have the power to prescribe the qualifications of electors; that the courts intervene in such matters only when there is a question of contravention of the Fourteenth or Fifteenth Amendments. The issue thus narrowed itself to the question of whether the test imposed by this amendment was contrary to the provisions of the Fourteenth and Fifteenth Amendments. The courts have held that states may prescribe a literacy test for electors. *Guinn v. United States,* 238 U. S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 (1915). The states may not, however, deny due process or equal protection of the laws in the exercise of the right of suffrage because of the prohibitions in the Fourteenth Amendment. *Nixon v. Herndon,* 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759 (1927). The Fifteenth Amendment is more specific in its protection in that it guarantees the free exercise of the right of franchise as against state discrimination based upon race or color. *Guinn v. United States, supra; Lane v. Wilson,* 307 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281 (1939).

The court held that the Boswell Amendment did not meet the test of either the Fourteenth or Fifteenth Amendments and was therefore unconstitutional. The court found as a matter of fact that discrimination had been practiced. This was obvious from the statistical record of rejections by the board. The next step was an examination of the test of qualification for registration provided by the Boswell Amendment. The key words in the Amendment were "understand and

explain." After a critical examination of the meanings which might be ascribed to such words, the court decided that they were ambiguous, uncertain and indefinite in meaning, and in effect conferred upon such registration boards an arbitrary power to accept or reject a prospective voter. As the court said:

> The language does not call for a simple, fair or reasonable understanding or explanation. It does not say that the understanding and explanation must be partial, full, complete, definite, proper, fair, reasonable, plain, precise, correct, accurate, or give any rule, guide or test as to the nature of the understanding or explanation that is required. . . No uniform, objective or standardized test or examination is provided whereby an impartial board could determine whether the applicant has a reasonable understanding and can give a reasonable explanation of the articles of the Constitution (if, indeed, the test were to be a *reasonable* understanding and a *reasonable* explanation).

The court illustrated the gross impossibility of imposing such a test by citing the fact that even the learned Justices of the Supreme Court of the United States are split four different ways as to the effect of the Fourteenth Amendment on the applicability of the first eight Amendments of the Constitution to state action. Viewed in this light, it was evident to the court that the test imposed by the Boswell Amendment had given the board the arbitrary power to accept or reject any prospective registrant. The court said: "Such arbitrary power amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution, and is condemned by Yick Wo and many other decisions of the Supreme Court." [*Yick Wo v. Hopkins,* 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)].

The court went on to state that the measure was unconstitutional, not only in its purpose, but in its operation and administration as well. This was easily deducible from the fact that many Negroes had been refused registration for inability to explain the constitutional articles when otherwise qualified. On the other hand, not one white applicant was excluded for these reasons.

To the objection made by the defendants that the amendment was not racist in origin and that it did not expressly refuse the right of registration to a Negro because of race or color, the court replied with a quotation from the *Lane* case rejecting a similar objection:

> The Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination . . . It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."

This statement apparently typifies the attitude of the present Supreme Court toward subtle attempts by would-be oppressors of human rights to hide behind the literal provisions of a measure which in fact operates to rob men of their constitutional rights. This attitude seems to sound the "death knell" for those who would rely on "strict formalism in the law" as an instrumentality to be utilized in blocking realistic and humane decisions dictated by precepts of natural justice.

The Supreme Court of the United States affirmed this decision of the federal district court without opinion, ... U. S. ...., 69 S. Ct. 749 (1949). Mr. Justice Reed was the only Justice who thought the appeal worthy of granting jurisdiction. The reason given was that the case involved a constitutional provision of a state. He in no way suggested that he would dissent on the merits of the case.

Our constitutional history subsequent to the passage of the Fourteenth and Fifteenth Amendments abounds with cases exposing the attempts to prevent Ne-

groes from voting by measures which are not in literal contravention of the Constitution. Citation of a few leading cases will illustrate the nature and variety of these attempts and give some idea of what may be expected in the future moves of the advocates of "white supremacy."

For many years certain southern states utilized the so-called "grandfather clauses" to bar the Negro vote. These clauses based the privilege of voting upon qualifications of a period prior to the adoption of the Fifteenth Amendment, which the Negroes could not satisfy, of course, since they were descendants of ancestors not qualified to vote prior to the passage of these amendments. These clauses were declared unconstitutional in *Guinn v. U. S., supra.*

The next "escape valve" of major importance was the doctrine that primary elections were not part of the electoral process and therefore not covered by provisions of the Fifteenth Amendment. A leading case supporting this view was *Newberry v. United States,* 256 U. S. 232, 41 S. Ct. 469, 65 L. Ed. 913 (1921). It was overruled by *United States v. Classic,* 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941).

In an attempt to bar the Negro from voting in the Texas primary elections, a statute was enacted which expressly stipulated that no Negro was eligible to vote in a Democratic primary in the State of Texas. This was held to be a violation of the Fourteenth Amendment in *Nixon v. Herndon, supra.* The Texas legislature followed this decision by a statute which attempted to delegate to the State Executive Committee of the Democratic Party the right to prescribe the membership qualifications, and thereby bar the Negro from the vote, but this was likewise declared an unconstitutional delegation of state power. *Nixon v. Condon,* 286 U. S. 73, 52 S. Ct. 484, 76 L. Ed. 984 (1932). To meet this decision, Negro membership in the Democratic Party of the state of Texas was prohibited by a resolution of the state convention of the party. This prohibition was upheld by *Grovey v. Townsend,* 294 U. S. 699, 55 S. Ct. 351, 79 L. Ed. 1292 (1935), on the theory that this did not constitute state action since it was not based on any state statute.

Smith v. Allwright, supra, expressly overruled *Grovey v. Townsend.* In the process of declaring the prohibition of the Democratic convention to be state action, the Supreme Court adopted a new standard of what constitutes state action. The test formerly applied was based essentially upon the determination of whether the state or the party paid the expenses of the primary election. The test applied in the *Smith* case was, in effect, that if any kind of statutory recognition, however slight, were given to the party primary system it was sufficient to render such rules as to qualifications by the party state action. This test would apparently make any action by a recognized political party, operating with reference to a state statute under such a system, ineffective to exclude persons otherwise qualified to vote from participating in party primaries. It was this decision which the Boswell Amendment unsuccessfully attempted to negate.

From this fragmentary citation of recent decisions on this question, it appears that further attempts to bar the Negro vote by the instrumentality of discriminatory literacy tests will prove futile. They can now be classified as attempts to harass the Negro voter by contributing to the general plan of intimidation.

Notwithstanding the encouraging trend of Supreme Court decisions, it appears that the only true relief from the hydra-headed monster of racial discrimination against the Negro voter will come by way of congressional legislation. It is a matter of speculation whether the present Court would follow the statement of Mr. Justice Douglas in his dissent in the *Classic* case, wherein he expressed the belief that Congress has the power to control primary elections.

Francis W. Collopy

CONSTITUTIONAL LAW — POLICE POWER — REGULATION BY PROHIBITORY LICENSE FEE.—*Brackman v. Kruse,* .....Mont....., 199 P. (2d) 971 (1948). A Montana Statute, MONT. REV. CODES ANN. § 2620.45 (1935), imposed license fees of $250 per quarter on retail dealers in oleomargarine. In this case the Montana Supreme Court affirmed a declaratory judgment of a district court which declared this section unconstitutional. The court held this section to violate both the Fourteenth Amendment to the Constitution of the United States and sections 3 and 27 of Article III of the Constitution of Montana, in that "it denies to plaintiff and others similarly situated the right to carry on a lawful business without due process of law." The license fees collected on oleomargarine during the prior ten years had exceeded the cost of supervision and regulation for an average of 853 per cent. Since the court held the challenged measure to be of a regulatory rather than of a tax nature, such evidence warranted the court's finding that the license provided by the statute was unreasonable, excessive, confiscatory, prohibitive, and unconstitutional, as a denial of due process and equal protection of the laws, and as levying taxes for a private purpose.

The plaintiff, an owner and operator of two retail grocery stores in Montana, alleged that the fees exacted by the law were so excessive and unreasonable in amount as to prohibit the plaintiff and more than ninety-two per cent of the other grocery stores operating in Montana from selling oleomargarine, and thus that the fees so required were such as to be prohibitive of a useful and general occupation. The plaintiff based his claim on the fact that, while the questionable section purported to have been enacted in the exercise of the police power of the state, it in effect prohibited the carrying on of a legitimate, profitable industry and the sale of a healthful, nutritious food and that such prohibition was unnecessary for protection of public health, morals, safety, or welfare, and as a result is in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and of sections 3 and 27 of Article III and sections I and II of Article XII of the Montana Constitution.

The defendants were the Commissioner of Agriculture and the Dairy Commissioner of the State of Montana, both of whom are administrative officers authorized by law to administer and enforce the challenged section. In support of the defendants were various dairymen and buttermakers who were allowed to intervene as producers, buyers, and consumers of butter and other dairy products within the State of Montana.

The case resolved itself into an issue of whether the measure exacting the fees was regulatory or a simple revenue measure. The plaintiff alleged and the intervenors admitted that it was a regulatory measure; but the Attorney General and the defendants were quick to sense the danger in attempting to sustain the Act as a regulatory measure and therefore denied that it was enacted under the police power of the state and contended that it was nothing more than a simple revenue measure.

The statute involved in this case was originally enacted as part of a comprehensive measure regulating the dairy industry. To decide whether it was regulatory or fiscal in nature, the court examined the nature of the original Act. It was entitled:

> An Act to regulate the Dairy Industry in the State of Montana . . .; Designating the Powers and Duties of the Department of Agriculture, Labor and Industry in Relation to the Dairy Industry and the Enterprises Regulated by this Act; . . . Regulating the Handling and Sale of Oleomargarine and Other Substitutes for Dairy Products and Licensing of Persons Dealing Therein . . . .

The court said that a mere reading and examination of the Act clearly disclosed its regulatory nature.

This same court in *State* ex rel. *State Aeronautics Commission et al. v. Board of Examiners of State et al.*, ...Mont....., 194 P. (2d) 633 (1948), fully considered and discussed the distinction between a revenue measure enacted under the police power and one made under the power to tax, holding that while the former has a regulatory purpose, the latter is only intended to produce revenue. In line with this distinction see 4 COOLEY, TAXATION § 1809 (4th ed. 1924), wherein it is stated:

> A fee for a license . . . must be such a fee only as will legitimately assist in the regulation; and it should not exceed the necessary or probable expense of issuing the license and inspecting and regulating the business which it covers.

Having made the decision that the measure was a regulatory one rather than one for revenue, the court found ample precedent for declaring the measure unconstitutional on the ground that it was unreasonable, excessive, confiscatory, and prohibitive. The Supreme Court of Pennsylvania in *Flynn et al v. Horst et al.*, 356 Pa. 20, 51 A. (2d) 54 (1947), held a state license fee of $500 on wholesalers and $100 on retailers of oleomargarine violative of the Fourteenth Amendment. This Pennsylvania fee was so excessive that the amount collected was two to five times the amount expended, and was therefore an oppressive and unwarranted restriction on a lawful business. The Pennsylvania Court held that the exaction was a fee rather than a tax, and since the income was grossly disproportionate to the cost of regulating the business, it was unreasonable, arbitrary, and oppressive. As Cooley, 2 COOLEY, CONST. LIMITATIONS 1228 (8th ed., Carrington 1927), has stated:

> The exercise of power for the public welfare may inconvenience individuals, increase their labor, and decrease the value of their property. It is a matter resting in the discretion of the legislature, and the courts will not interfere therewith except where the regulations adopted are arbitrary, oppressive, or unreasonable.

In declaring the questionable statute unconstitutional in the instant case the Montana Supreme Court said:

> The dairy commissioner's records disclosed that the license fees collected on oleomargarine during the past ten years exceeded the cost of supervision and regulation for an average of 853 per centum. Such evidence fully warrants the trial court's finding that the license provided for by section 2620.45, R. C. M. 1935, is excessive, confiscatory and prohibitive.

The decision in this case can best be understood by reviewing the history of the many burdensome restrictions imposed on the sale of oleomargarine both by Congress and many state legislatures. In 1886, the first federal tax was passed which imposed a two cent per pound excise tax on all margarine, and also imposed license taxes on all manufacturers and sellers of the product, 24 STAT. 209 (1886). This law was upheld by the United States Supreme Court in its first decision relating to oleomargarine, Ex parte *Kollock*, 165 U. S. 526, 17 S. Ct. 444, 41 L. Ed. 813 (1897). This law, however, did not serve to restrict the sales of colored oleomargarine, and thus most of the states passed laws prohibiting the sale of all oleomargarine or prohibited the sale of the colored product. In 1902, Congress passed the Graut Bill which levied a tax of ten cents per pound on colored oleomargarine and one-fourth cent per pound on uncolored oleomargarine. This Act exists in its amended form today. 24 STAT. 209 (1886), as amended, 26 U. S. C. § 2301 (1946). In *McGray v. United States*, 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904), the United States Supreme Court sanctioned this split tax and took the position that the Fifth Amendment did not prohibit the imposition of a tax which would destroy a legitimate business. The

Court conceded that the tax would prohibit colored margarine, but refused to look into the motives of Congress in passing the law, and, since it was a revenue measure on its face, held it a valid exercise of the taxing power. This case is now considered the law on the subject, and has been cited in *Cliff v. United States,* 195 U. S. 159, 25 S. Ct. 1, 49 L. Ed. 139 (1904), and again with approval in *Carolene Products Co. v. United States,* 323 U. S. 18, 65 S. Ct. 1, 89 L. Ed. 15 (1944).

In the early days of the states' absolute prohibiton of the sale of oleomargarine, the courts were inclined to uphold the measures as an exercise of the valid police power of the state. *Powell v. Pennsylvania,* 127 U. S. 678, 8 S. Ct. 992, 32 L. Ed. 253 (1888); *Plumley v. Massachusetts,* 155 U. S. 461, 15 S. Ct. 154, 39 L. Ed. 223 (1894); and *Capital City Dairy Co. v. Ohio,* 183 U. S. 238, 22 S. Ct. 120, 46 L. Ed. 171 (1902), are examples of this early attitude of the courts. In 1898 the rule of the *Powell* case came into conflict with the Interstate Commerce Clause and in *Schollenberger v. Pennsylvania,* 171 U. S. 1, 18 S. Ct. 757, 43 L. Ed. 49 (1898), the rule was restricted to intrastate transactions, the Court holding that the same Pennsylvania statute upheld in the earlier cases could not be applied to a sale by an importer or his agent in the original package. From 1898 to 1927, when *Jelke Co. v. Emery,* 193 Wis. 311, 214 N. W. 369 (1927), was decided, there were many conflicting decisions on the question of state power to restrict absolutely the sale of oleomargarine, but by 1927 most of the statutes having that effect had been repealed and *Jelke v. Emery, supra,* by striking down the last one, put an end to them entirely.

The old and absolute outright method of prohibition gave way to the modern method of regulation and prohibition by taxation. In *Magnano Co. v. Hamilton,* 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109 (1934), the Supreme Court held that the difference between butter and margarine was sufficient to warrant a separate classification for tax purposes, and that a tax, being a revenue measure, did not violate the Due Process Clause even though it would result in the destruction of the business. In accord with this holding are *Hammond Packing Co. v. Montana,* 233 U. S. 331, 34 S. Ct. 596, 58 L. Ed. 985 (1914), and *Schmitt v. Nord,* .....S. D....., 27 N. W. (2d) 910 (1947), *app. dis.,* 334 U. S. 809, 68 S. Ct. 1018, 92 L. Ed. 984 (1948), refusing to look behind the revenue designation of the law to expose its regulatory character. In *Coy v. Linder,* 183 Ga. 583, 189 S. E. 26 (1936), a tax was upheld which taxed all margarine except that made from certain enumerated oils. *Contra: Thorin v. Burke,* 146 Neb. 94, 18 N. W. (2d) 664 (1945), which held that such a classification was unreasonable since the vegetable oils were equal in every way to the tax exempt animal fat.

In the light of this short historical summary, it is plain why in this instant case the Montana court first found it necessary to hold that the questionable measure was regulatory, and not merely fiscal in nature. In the light of the above enumerated past decisions, the court had sufficient judicial authority to hold the measure unconstitutional when it found that it was an unreasonable exercise of the state's regulatory power; however, had they held that it was a revenue measure, they would have run into considerable opposition and had little supporting judicial authority in declaring the measure unconstitutional. The *Magnano* rule has never been overruled and is still the law in most jurisdictions.

A definite trend of judicial opinion has been manifested by the many court decisions handed down. As has been seen, the courts have altered considerably their views toward oleomargarine since the early days when it was held in the *Powell* case that absolute prohibition was legal. Now they are refusing to remain blind to the real purpose of fiscal and regulatory legislation, as in *Flynn v. Horst, supra,* and in the instant case. In the early decisions the courts talked about the need of regulating the new margarine industry for the benefit of the

consumers. Now they are speaking about the protection of the oleomargarine producers' rights to engage in a free competitive business. There is also much evidence that there is an ever-increasing reaction against the dairymen's lobby; against their concerted effort to keep a cheap and much needed article off the market. As the principal case illustrated, the legislation their actions inspire is becoming increasingly difficult to disguise as regulation in the public interest. About the only thing upon which they can rely is the Supreme Court's ruling that it is not against due process to burden unfairly a business with revenue taxes to such an extent that it is prohibitive and even destructive of the business. If anything will make the courts alter their stand on this matter it will be the growing popular demand for oleomargarine and the growing reaction against the unfairness of discriminatory legislation to both the producers and potential consumers of oleomargarine.

Patrick F. Coughlin

UNITED STATES — SOCIAL SECURITY ACT — RELATIONSHIP OF EMPLOYER AND EMPLOYEE.—*Party Cab Co. v. United States*, 172 F. (2d) 87 (C. C. A. 7th 1949). The court in the instant case seems to have given the recent amendment to the Social Security Act, 49 STAT. 647 (1935), as amended, 62 STAT. 438, U. S. C. A. §1301 (a) (6) (Supp. 1948), limiting the definition of the term "employee" to its common law signification, its intended effect in holding that taxi drivers who rented their taxis from the plaintiff, but were subject to partial control, were independent contractors, and thus not within the coverage of the Act. The amendment provides:

> The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

This is the most concrete statement of a definition of the term "employee" for the purposes of the Act that has yet been attempted. Prior to this amendment, there was no definition of the relationship of employer and employee except that provided by Amended U. S. Treas. Reg. 90 (1939), 26 CODE FED. REGS. § 403.204 (Supp. 1940). See also U. S. Treas. Reg. 91 (1936), 26 CODE FED. REGS. § 401.3 (1938).

The plaintiff, an Illinois corporation organized "to operate taxicabs and automobiles for hire as a public and private carrier of freight and passengers," sued to recover taxes alleged to have been illegally assessed and collected under the provisions of Titles VIII and IX of the Act. 49 STAT. 636, 639 (1935), as amended, 53 STAT. 1 (1939), 42 U.S.C. §§ 1001 *et seq.*, 1101 *et seq.* (1946). See INT. REV. CODE, §§ 1400, 1410, 1520. Plaintiff owned the taxicabs and had procured all city and state licenses as well as personal injury insurance required by the state for their operation. He was listed in the classified telephone directory as offering taxicabs for hire; and he maintained an office equipped with switchboard operators to take in-coming calls for taxi service, which calls the drivers were not required to accept. Plaintiff also maintained a garage with mechanics for the repair and maintenance of his equipment and took care of all other expenses, except that drivers bought their own gas and oil for operating the cabs. The drivers' principal livelihood was derived from this occupation; they paid the plaintiff a set amount for use of the cabs and were not required to report their earnings, nor was their area of operation under control of the plaintiff. They

operated plaintiff's cabs in shifts determined and fixed by the plaintiff under an oral agreement effective from day to day. In the course of operations, the plaintiff had occasionally called a meeting to instruct the drivers in safety measures, and had forbidden drinking while on duty.

The main issue presented for decision was whether the drivers of plaintiff's taxicabs were, under the terms of the Act, its employees, whose earnings were wages so as to make the plaintiff liable for the tax sought to be recovered. The court, in reversing the lower court's decision and granting judgment for the plaintiff, in the light of the amendment to the Social Security Act, applied the strict common-law test for determining the existence of the employer-employee relationship. They held that the relationship exists when an employee is subject to the will and control of the employer not only as to what shall be done, that is, the result, but also as to how it shall be done, that is, the means by which that result is accomplished. They added that:

> While the plaintiff no doubt was interested in the operation to the extent that it was in the interest of its business that the public be satisfactorily served, we are unable to discern how it had any considerable authority over the accomplishment of such a result.

In arriving at this decision, the court relied principally upon the congressional purpose in amending the Act. They said that its importance lay in the fact that other courts had been widening the scope of the term "employee" beyond the concept of the definition as laid down in this amendment; consequently, "such cases and the rationale thereof carry little, if any, weight at the present time." However there is a split of authority respecting the problem presented for decision. Many courts have decided that the strict common-law control test should be applied in determining the relationship. See, e.g., *United States v. Aberdeen Aerie,* 148 F. (2d) 655 (C.C.A. 9th 1945); *McGowan v. Lazeroff,* 148 F. (2d) 512 (C.C.A. 2nd 1945); *Glenn v. Standard Oil Co.,* 148 F. (2d) 51 (C.C.A. 6th 1945); *Tidwell v. United States,* 63 F. Supp. 609 (W.D. Tenn. 1945); *Cannon Valley Milling Co. v. United States,* 59 F. Supp. 785 (Minn. 1945); *American Oil Co. v. Fly,* 135 F. (2d) 491 (C.C.A. 5th 1943); *Texas Co. v. Higgins,* 118 F. (2d) 636 (C.C.A. 2nd 1941); *Radio City Music Hall Corporation v. United States,* 135 F. (2d) 715 (C.C.A. 2nd 1943); *United States v. Mutual Trucking Co.,* 141 F. (2d) 655 (C.C.A. 6th 1944).

Numerous other courts have either given a liberal interpretation to the common-law "control test" or have disregarded it altogether. See e.g., *Fahs v. Tree-Gold Co-Op., Inc.,* 166 F. (2d) 40 (C.C.A. 5th 1948); *Schwing et al. v. United States,* 165 F. (2d) 518 (C.C.A. 3rd 1948); *Atlantic Coast Life Ins. Co. v. United States,* 76 F. Supp. 627 (E.D. S. C. 1948); *Woods v. Nicholas,* 163 F. (2d) 615 (C.C.A. 10th 1947); *Bartels et al. v. Birmingham et al.,* 332 U. S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947 (1947); *Rutherford Food Corporation et al. v. McComb,* 331 U. S. 722, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947); *United States v. Silk,* 331 U. S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757 (1947); *United States v. Wholesale Oil Co.,* 154 F. (2d) 745 (C.C.A. 10th 1946); *United States v. Vogue, Inc.,* 145 F. (2d) 609 (C.C.A. 4th 1944); *National Labor Relations Board v. Hearst Publications, Inc.,* 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944). These courts have decided whether or not the employer-employee relationship existed by giving weight to the congressional purpose or intent in bringing the Act into effect. The court in the principal case, while positively admitting there is room for argument on both sides of the problem, nevertheless was conclusively convinced that Congress, by the language it employed in amending the Act, did not exclude from coverage merely those who are designated as independent contractors; but that it excluded, also, and without describing them, others not employees under the common-law rules.

The lower court, in finding for the defendant, relied rather heavily on the rationale of the Supreme Court in *United States v. Silk, supra.* The workmen there were unloaders of coal. They provided their own tools, worked only when they wished, and were paid an agreed price per ton to unload the coal. The Supreme Court held that they were employees and that the employer was taxable under the Act. They rejected the common-law "right to control" test as the sole determining factor, and gave weight to the congressional purpose and intent of the Act as other courts have done. (See cases cited in preceding paragraph.)

Although the "right to control" was considered the most important factor at common-law, the determination today generally depends upon a consideration of a number of important factors. The RESTATEMENT, AGENCY, § 220 (1933), lists nine such factors. Also, in respect to tort liability, there are listed, TIFFANY ON AGENCY, § 37 (2d ed. 1924), several important factors. The term "employee" as used in the Act should have a more extensive application than the "control test." In the dissenting opinion in *Earle Restaurant v. O'Meara,* 160 F. (2d) 275 (App. D.C. 1947), Associate Justice Clark maintained that to establish the relationship the *actual conduct* of the parties rather than the right to control should be the determinative factor. In *Schwing v. United States, supra,* the court affirmed what was said in the *Silk* case, and held that in determining whether the relationship exists under the Act, degree of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important matters to consider. Furthermore, the court maintained that no one factor is controlling, nor are those mentioned exclusive. It appears from the foregoing statements that the application of the term "employee" should not be constricted, but that it should be construed so as better to accomplish the purpose which the Act was intended to serve. As Mr. Justice Reed in the *Silk* case points out, a constricted interpretation:

> . . . would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

These considerations have guided the courts' construction of the Act. See e.g., *Social Security Board v. Nierotko,* 149 F. (2d) 273 (C.C.A. 6th 1945), *aff'd,* 327 U. S. 358, 66 S. Ct. 637, 90 L. Ed. 718 (1946); *Buckstaff Bath House Co. v. McKinley,* 308 U. S. 358, 60 S. Ct. 279, 84 L. Ed. 322 (1939). Also, see *General Wayne Inn, Inc., v. Rothensies,* 47 F. Supp. 391 (E. D. Pa. 1942), where the court held that the "power to hire and fire" is the most significant factor in determining upon whom, as "employer," the economic burden of the social security program is placed.

The court in the principal case did not attribute much weight to the fact that the lower court found that the plaintiff did exercise "a reasonable amount of control over the methods and means by which the drivers performed their services." They dismissed the fact by stating that "a reasonable amount of control" is too relative a term, and that as a factual statement it is too uncertain and indefinite. Yet it is found that "a reasonable amount of control" is determinative and substantial enough to show that an employer-employee relationship exists in many cases. See e.g., *Hearst Publications, Inc. v. United States,* 70 F. Supp. 666 (N. D. Calif. 1946); *United States v. Wholesale Oil Co., supra; United States v. Vogue, Inc., supra; Jones v. Goodson,* 121 F. (2d) 176 (C.C.A. 10th 1941).

The sole dissenting opinion of the principal case, by Judge Swygert, was very much in harmony with the idea of "a reasonable amount of control" as substantially enough ground upon which to determine that the relationship exists.

While agreeing that the plaintiff's liability must be measured by applying the common-law rule, he said, nevertheless, *inter alia*, that "the circumstances which indicate that these taxicab drivers are employees outweigh those which may indicate otherwise." It was his impression that those circumstances were sufficient to meet the test of the common-law rule, thus being very much in accord with the doctrine that "a reasonable amount of control" is determinative and substantial enough to indicate that the relationship exists.

In view of the opposing results which have often been reached and the divergence of opinion reflecting the views of various judges, the dissent of Judge Swygert appears to represent the most desirable interpretation. From the social and economic aspect, it appears better that wherever persons are subjected to the existing evils which the legislation of the Act was intended to defeat, they should be covered in the interpretation given to the Act, regardless of whether they are deemed employees in the strict common-law sense or not. It is the responsibility of Government to guarantee a minimum standard of security to its people, to bear the responsibility of assuring that every individual will at least have the minimum necessities to maintain his life in sound health and moral decency. It was in the grave interest of the national health and welfare that the institution of the Social Security Act had taken form. The gravity of that problem of *insecurity* with which the country was once faced should not be forgotten simply because of our present relative prosperity.

Benedict R. Danko

CONTRACTS — EXTENSION OF THE SCOPE OF DECLARATORY JUDGMENTS.—*Beit et al. v. Beit*, ...Conn....., 63 A. (2d) 161 (1948). This was an action by plaintiffs for a declaratory judgment to determine whether a restrictive covenant limiting the right to engage in business is legal and enforceable. From a judgment declaring the covenant invalid and unenforceable, the defendant appealed. The decision was affirmed.

The plaintiffs, husband and wife, were in partnership with the husband's two brothers and their wives. The partnership operated three stores which were engaged in the sale of groceries. The plaintiffs sold their interests in the business, and to carry out the transaction, each of the plaintiffs executed two bills of sale. All of the instruments contained the following clause: "I further expressly covenant and agree with this vendee, his heirs and assigns, not to engage in the meat market or grocery business within the limits of New London County, Connecticut, for a period of thirty years, from this day." The plaintiff sought to engage in the retail grocery and meat business in New London County and brought this action requesting a judgment declaring the covenants illegal.

The trial court's declaring the contract illegal as in restraint of trade was not the basic issue. The question was whether the plaintiffs were entitled to maintain an action which sought a declaratory judgment as to the legality of these covenants. The court said:

> It is sometimes stated generally that the courts will not grant affirmative relief to the promisor in such a covenant by way of rescission or the like . . . Where, however, the invalidity of the agreement is based on the fact that it is against public policy, we have found only one decision which directly denies such relief to a promisor, and in that case it was pointed out that no public interest were involved. National Harrow Co. v. Hench et al., 76 F. 667, 670. . . On the other hand, it has been held that in a proper case equity will grant relief of that nature to the prom-

> isor on the ground that the agreement is against public policy. Duval v. Wellman, 124 N. Y. 156, 160; 26 N. E. 343. . . .

Cf. *Merchants' Line v. Baltimore and O. R. Co.*, 222 N. Y. 344, 118 N. E. 788 (1918). The *Duval* case had been appealed from the Common Pleas Court of New York where it had been held for the defendant, 1 N. Y. S. 70 (1888).

The minority opinion states that the majority cites no authority setting forth logical and convincing reasons for granting affirmative relief by declaratory judgment under the present circumstances, but bases its reasoning for permitting a promisor to prove the invalidity of the agreement on Lord Mansfield's opinion in *Holman v. Johnson*, 1 Cowp. 341, 343, 98 Eng. Rep. 1120 (1775), where he said:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say.

See *Funk v. Gallivan*, 49 Conn. 124, 128, 44 Am. Rep. 210 (1881).

The dissenting judge felt that the principle, enunciated by Lord Mansfield in the words just quoted, is clear from the further language which follows:

> So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*. . . . (Emphasis supplied).

The dissent also states that this limitation upon the principle has been recognized repeatedly by the Connecticut court, namely: "The law could not take any other position than that it will not lend its aid to either of the parties to an unmoral or illegal transaction."

In *Cox v. Donnelly*, 34 Ark. 762 (1879), cited by the majority opinion, the court said:

> Although, in general, courts of equity will not interpose to grant relief to persons who are parties to agreements or other transactions against public policy, there are cases where the public interest requires that they should, for the promotion of public policy, interpose, and the relief in such cases is given to the public through the party. . . [citing] Hatch v. Hatch, 9 Vesey 292; Lord St. John v. Lady St. John, 11 Vesey 526; Jackman v. Mitchell, 13 Vesey 501; Law v. Law, 3 P. Williams 391.

In *Schaefer v. National Bank of Findlay*, 134 Ohio St. 511, 18 N. E. (2d) 263 (1938), the Ohio court paid tribute to the value of the declaratory judgment in enabling a debtor to obtain release from an unconscionable or illegal debt. Another case in point is *Aetna Life Ins. Co. v. Haworth et al.*, 300 U. S. 227, 244, 57 S. Ct. 461, 81 L. Ed. 617 (1937), which points out: "But the character of the controversy and of the issue to be determined is essentially the same whether it is presented by the insured [for a declaration of liability] or by the insurer [for a declaration of non-liability]."

The minority view that it is manifest that the conclusion of the majority was based upon the effect of the restriction on the plaintiffs themselves, as distinguished from any effect it might have upon the public, was answered quite emphatically:

> Where a promisor in such an agreement seeks to have equitable relief based upon its illegality, the situation is very different from that presented where the promisee seeks to enforce it; for the promisor is not seeking to put it into effect but rather is asserting and furthering the public policy of the state.

The majority also points out that the Supreme Court of Illinois has said:

> The answer to this is that in a situation of this kind the interest of the public, rather than the equitable standing of individual parties, is of determining importance. The defense is not here allowed because the party raising it is entitled to any consideration, but upon principles of public policy and to conserve the public welfare. *Parish v. Schwartz,* 344 Ill. 563, 572, 176 N. E. 757 (1931).

It is well to remember that although the parties are *in pari delicto,* yet the courts may interfere and grant relief at the suit of one of them even though the result may be that a benefit will be derived by a plaintiff who is in equal guilt with the defendant. *Gilchrist v. Hatch,* 183 Ind. 371, 106 N. E. 694 (1914); *White v. Crew,* 16 Ga. 416 (1854); *James v. Steere,* 16 R. I. 367, 16 Atl. 143 (1888).

The minority states:

> A decision which establishes the right of a person, who today has executed such a restrictive contract as here for a substantial consideration paid, to procure tomorrow a decree of court which effectively determines that no liability rests upon him under this contract and that he can keep the consideration he has received may well constitute a potent temptation to fraud and place a premium upon dishonesty.

However, the facts of this case disclose that the clause contained in all the instruments which prevented the plaintiffs from engaging in the meat business, had not been discussed by either of the parties previous to the sale; nor had any mention of inclusion been made. The attorney who drafted the bills inserted the clause thinking that it would meet with the desire of the parties to do so, and basing the provision on what he believed would be fair and reasonable; nor was the clause discussed when the instruments were executed. These facts can only be interpreted in one manner; not as labeled by the dissent "substantial consideration paid," but as a gratitous ratification for which no consideration passed.

In this type of case, plaintiffs have found, in the declaration of the invalidity of their contracts, a handy and effective source of removing potential infringements and obtaining a release from obligations. Their motives may vary. At times the purpose is frankly to rid themselves of illegal instruments which are held over the plaintiffs as encumbrances or pseudo-obligations. Whatever the purposes or motivating principles, we need not fear a strong temptation towards fraud, nor be guilty of placing a premium upon dishonesty because we are judicially ready to extend the scope of the declaratory judgment to enable meritorious plaintiffs to benefit by it. If public policy is only to be served by allowing a plaintiff to seek a declaratory judgment, why hesitate and withhold such a remedy merely because the plaintiff is also to benefit? This case illustrates the necessity for the extension of the scope of the declaratory judgment.

Joseph M. Gaydos

CONSTITUTIONAL LAW — LICENSING — EXTENT OF THE POLICE POWER.—*State v. Ballance,* ....N. C. ...., 51 S. E. (2d) 731 (1949). Under the guise of the police power, a state cannot validly enact a statute which prevents any person from participating in a lawful occupation, innocuous in itself, unless the protection of the public health, morals, safety, or general welfare renders it necessary.

In this criminal action, Owen Ballance was convicted of engaging in the occupation of photography for compensation while not licensed. In a special verdict, the jury found that Ballance, by taking and producing photographs at a

unit price in excess of ten cents per picture in a city whose population exceeded twenty-five hundred people, violated a state statute. Under this special verdict the court found the defendant guilty and fined him accordingly. Upon appeal, the Supreme Court of North Carolina declared the law unconstitutional.

The statute applicable in this case provided for a State Board of Photographers composed of persons who had at least five years experience in professional photography and who were appointed by the governor. Any person desiring to practice commercial photography had to pass an examination administered by this board and qualify as to competency, ability, and integrity to become eligible for a license. The statute read as follows:

> Prior to any applicant being admitted to an examination or license, said board shall have the power to require proof as to the technical qualifications, business record and moral character of such applicant, and if an applicant shall fail to satisfy the board in any or all of these respects, the board may decline to admit said applicant to examination or to issue license.

The statute expressly prohibited any unlicensed person in North Carolina, with certain class exemptions, from engaging in commercial photography, if he practiced his profession in a city whose population exceeded twenty-five hundred, or if he charged more than ten cents per unit. The licenses obtained could be revoked because of failure to pay the annual license fee, for fraud or unethical practices, for willful misrepresentations, or for being convicted of any crime in North Carolina involving moral turpitude.

The defendant maintained that the statute violated the Due Process Clause of the United States Constitution; since a person's business or occupation is "property" within the meaning of the Due Process Clause and is included in the right to liberty, the defendant rightly could maintain that he was deprived of his property and his liberty by being prohibited from engaging in his chosen occupation.

In order to declare this statute unconstitutional, the court had to overrule the previous law of the state as enunciated in *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586 (1938), which had held this statute to be constitutional. That case held that it was necessary to invoke the police power of the state since: (1) photographers use combustible materials and there is a fire hazard, (2) photographs are used in evidence, (3) photographs are used in detecting forgeries and altered instruments, (4) photographs can lead to fraud through their use in advertising, (5) photography is used in newspapers and periodicals.

Certainly none of these reasons tenders a cogent argument in favor of the constitutionality of this statute, especially when the very able dissent of Judge Barnhill in *State v. Lawrence* is viewed. His dissent posed the question: "Does the General Assembly have the power to create an administrative agency with power to deprive a citizen of the right to practice one of the *ordinary and usual* trades such as commercial photography?"

Regulation of businesses cannot be valid where it is an arbitrary interference with the rights of the individual to engage in any lawful occupation. The regulation is dependent upon a reasonable necessity for its exercise to protect the health, safety, morals, or general welfare of the state, and unless an act restricting the ordinary occupations of life can be shown to fall within these objects of the police power, the act is void. *Doe v. Jones*, 327 Ill. 387, 158 N. E. 703 (1927).

The dissenting opinion in *State v. Lawrence* further points out that:

> The regulations of business and professions through administrative licensing has heretofore been limited to those professions having a direct

and positive relation to the health, safety, or morals of the community. The trade of photography bears no genuine resemblance to any of these professions.

The statute in the instant case was declared also to be in violation of the state constitution, which states:

> That we hold it to be self-evident that all men are created with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness. . . No person ought to be taken, imprisoned, or disseised of his freehold, liberties, or privileges or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. . . Perpetuities and monopolies are contrary to the genius of a free state and ought not be allowed.

The "liberty" which may not be unlawfully interfered with means not only freedom from imprisonment or restraint, but also the right to live and work and earn a livelihood in any lawful calling, or to pursue any lawful trade or avocation. *Saidel v. Village of Tupper Lake,* 254 App. Div. 22, 4 N. Y. S. (2d) 814, 818 (1938).

In view of the above excerpts from the North Carolina constitution and the interpretation generally applied to the word "liberty," it would seem that the court was justified in declaring the statute in the instant case unconstitutional as an unwarranted use of the police power.

> Broad as is the police power, its limit is exceeded when the state undertakes to require moral qualifications of one who wishes to engage or continue in a business which, as usually conducted, is no more dangerous to the public than any other ordinary occupation of life. [*Rawles v. Jenkins,* 212 Ky. 287, 279 S. W. 350, 352 (1926)].

The dissent in the instant case maintains that the enactment of the statute is within the police power of the state since that power is not limited to the preservation of good order or the public safety and health, but includes the prevention of fraud and deceit which are incidents of the business.

The decision in the instant case is in conformity with other jurisdictions that have ruled upon such statutes. In *State v. Cromwell,* 72 N. D. 565, 9 N. W. (2d) 914 (1943), a similar statute requiring licensing of photographers was defended on the ground that the relation between photographer and customer was so intimate as to require the invoking of the police power of the state to control the selection of photographers. The court held that the police power is not restricted to matters concerned with the public health, morals and peace, but that it can be invoked whenever public welfare demands it. However, the police power can only regulate such businesses, not exclude persons therefrom. In declaring the unconstitutionality of the regulatory measure, the court remarked that the purpose of the regulation must be to protect public health, morals or general welfare and it must be *reasonably adapted* to that end.

Also in support of the instant case is *Bramley v. State,* 187 Ga. 826, 2 S. E. (2d) 647 (1939), which declared unconstitutional and void a photographers' licensing act "as an exercise of the police power, in that the prescribed regulations are imposed upon a lawful business, and considered as a whole are such as do not bear any reasonable or substantial relation to the public health, safety or morality, or other phase of the general welfare."

Other supporting cases are: *Sullivan v. De Cerb,* 156 Fla. 496, 23 So. (2d) 571 (1945); *Moore v. Sutton,* 185 Va. 481, 39 S. E. (2d) 348 (1946); also see *Wright v. Wiles,* 173 Tenn. 334, 117 S. W. (2d) 736 (1938).

The principal case was decided on very firm ground since the purpose of the statute obviously was to serve the special interest of a few who were engaged in a particular occupation. It is indeed paradoxical that these few persons would attempt to promote their own interests in a monopoly of a given occupation by invoking the police power of the state which is intended to serve the public welfare. This type of class legislation is aimed at destroying the kind of individual initiative which has made progress possible in such fields as photography.

The reasoning applied in the instant case is of the utmost force since, even in *State v. Lawrence,* the only case holding that the licensing of photographers was constitutional, the majority granted that while the General Assembly had authority to say what professions and occupations were within the police power of the state, it always had to have due regard for the provisions of the Fourteenth Amendment to the Constitution of the United States and the North Carolina Constitution affirming the unalienability of the rights of life, liberty, and property and prohibiting the creation of monopolies. In *Liggett v. Baldridge,* 278 U. S. 105, 111-12, 49 S. Ct. 57, 73 L. Ed. 204 (1928), Mr. Justice Sutherland used similar reasoning, saying:

> The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment, only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. . . A state cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.

As already pointed out, this decision in the instant case brings North Carolina into line with the other states which have declared statutes unconstitutional which make it possible for a state administrative body to prohibit a person from practicing commercial photography because of his incompetency, lack of ability or lack of integrity, as determined by the administrative body.

Undoubtedly the state can invoke the police power, through the legislature, to enact laws to protect or promote the health, safety, morals, order or general welfare within constitutional limits. *State v. Lockey,* 198 N. C. 551, 152 S. E. 693 (1930); *Town of Clinton v. Ross,* 226 N. C. 682, 40 S. E. (2d) 593 (1946). The questions that arise immediately are: When does the health, safety, morals, order or general welfare empower the state to use this power, and what are the constitutional limitations on this power?

These questions cannot be answered in the abstract, but only as to concrete problems. In the practice of photography it is held that the constitutional limitations prevent the state from invoking the police power. The status of any other occupation is, as here, dependent on the necessity of its regulation to protect the public health, order, morals, safety or general welfare.

William T. Huston

WILLS — CONSTRUCTION — REASONABLE TIME AS A FACTOR IN RENUNCIATION OF LEGACIES.—In re *Wilson's Estate,* .... N. Y. ...., 83 N. E. (2d) 852 (1949). Kate Wilson, decedent, made a will wherein she bequeathed to her son, Leslie B. Wilson, a legacy consisting of a one-third interest in her residuary estate. The value of this interest amounted to about twelve thousand dollars.

At the request of a judgment creditor, the surrogate court enjoined Leslie's brother and sister, as executors under the will, from transferring any of the legacy to the debtor, Leslie B. Wilson. The court also enjoined this debtor from

in any way disposing of his interest in the legacy. In a few days the court appointed a receiver to take title to the debtor's legacy. Within a week the debtor filed a renunciation of this legacy. Leslie's mother had been deceased for about ten months before the filing of this renunciation.

The supreme court upheld the surrogate court's ruling that the renunciation was valid, thus defeating the judgment creditor, and allowing his brother and sister, as remaining residuary legatees (also executors), to take Leslie's one-third share. The receiver appealed to the Court of Appeals of New York seeking advice and instructions as to the true construction of the will in view of the alleged renunciation. This court reversed the lower court rulings and directed the executors to pay over the one-third share of Leslie's interest to the receiver to be applied in satisfaction of the judgment creditor's claim against him. In so ordering, the court held that a renunciation of a beneficial legacy must be made within a reasonable time; that this time would be shorter when the effect thereof would be to prevent satisfaction of a judgment against the legatee. The court said that the legacy had also been accepted by the word and conduct of the debtor preceding his filed renunciation. Further, under the statute, N. Y. CIVIL PRACTICE ACT, § 916, as construed by this court, the legatee had such an interest in the legacy that he could be (and was) enjoined from disposing of it in any way, including renunciation. This interest that Leslie had from the moment of his mother's death was defined as a chose in action.

Justice Fuld, in writing the dissent, concurred in by Chief Justice Loughran, claimed that the debtor had not by word or act accepted the legacy, had no interest capable of being enjoined, had not waited an unreasonable length of time under the circumstances, and had in fact made a timely and absolute renunciation of the gift.

The majority construed the statute to mean that the debtor had a chose in action between the time his mother died until he had by an affirmative act renounced the gift. Once enjoined, Leslie could not part with this chose in action, and hence it resulted in his having accepted the legacy as a matter of law.

The weight of authority holds that a legacy is an offer passing no title. In re *Wells' Estate,* 142 Iowa 255, 120 N. W. 713 (1909); *Albany Hosp. v. Albany Guardian Society and Home for Friendless,* 214 N. Y. 435, 108 N. E. 812 (1915); *Schoonover v. Osborne,* 193 Iowa 474, 187 N. W. 20 (1922); *People v. Flanagin,* 331 Ill. 203, 162 N. E. 848 (1928). By the instant decision a chose of action passes in New York. No interest passes in this same state by a devise of realty. *Albany Hosp. v. Albany Guardian Society and Home for Friendless, supra.* A creditor cannot force a devisee or legatee into accepting or rejecting a gift. *Schoonover v. Osborne, supra.*

At common law the interest of a legatee before distribution generally was not attachable by the legatee's creditors, 4 AM. JUR., Attachment and Garnishment, § 412 (1936), because beneficiaries do not have full title or the right of possession. ROLLISON ON WILLS, §§ 266, 325 (1939). It is uniformly held that a beneficial legacy is presumed to be accepted. PAGE, WILLS, § 1407 (1941).

There are few cases construing what is a reasonable time within which a devise or legacy must be accepted. PAGE, WILLS, § 1408 (1941). A delay of seven months was held to be reasonable in *Schoonover v. Osborne, supra.* In *Strom v. Wood,* 100 Kan. 556, 164 Pac. 1100 (1917), five years was said to be unreasonable. There seem to be no cases reported that close this gap. (In re *Howe,* 112 N. J. Eq. 17, 163 Atl. 234 (1932) held four months to be unreasonable, but that case involved a question of avoiding inheritance transfer tax.) Kentucky has solved the problem by limiting by statute the time within which a beneficiary may renounce. *Bottom v. Fultz,* 124 Ky. 302, 98 S. W. 1037 (1907).

It can be said that the minority opinion tends toward the general common law views above expressed. The majority relied upon the construction of the statute and the equitable principle as expressed by Mr. Justice Cardozo in *Oliver v. Wells*, 254 N. Y. 459, 460, 173 N. E. 679 (1930):

> The general principle is that election must be made within a time that is equitable in the light of all the circumstances. This time may be very long, if injury to others will not result from the delay, and by the same token very short if the failure to act promptly may work injury or hardship. . . . [citing] 1 Pomeroy Equity Juris. (4th Ed.) § 513; Halsbury Laws of England, title Equity, §§ 141, 144, and cases there collated.

It would seem that in New York, creditors are included in this category. This result is realistic. It promotes the fulfillment of legal obligations — or satisfaction of debts. There is no doubt that the instant decision will benefit creditors, and in the light of our present economic trend, this may well mean that the *Wilson* case will have increasing significance.

Francis J. Keating

LABOR LAW — PICKETING — ENJOINING ONLY VIOLENCE OR ALL PICKETING.— *Henderson et al. v. Southern Cotton Oil Co.*, ... Ark. ...., 217 S. W. (2d) 261 (1949). A permanent injunction enjoining all picketing was here modified to allow peaceful picketing. The employees of the Southern Cotton Oil Co. were called out on a strike order. All but five of the 117 workers obeyed the order. To further enforce their claim and to inform others of it, the union set up a picket line. On the tenth day of the strike, December 26, 1945, certain members of the union and those in the picket line began to threaten, coerce, and intimidate persons bringing cotton seed into the plant. In addition, threats were made to the five non-striking employees, culminating in an attack upon them by about fifteen of the strikers. One of the strikers was killed and one of the employees hospitalized. Because of this outbreak, a temporary injunction was issued prohibiting all picketing. A motion to make permanent was made by the company on May 28, 1946. A permanent injunction granted on Janury 20, 1948 formed the basis of this appeal.

The court based its decision to modify on the fact that more than thirty-seven months had passed since the instance of violence. In so modifying, the court questioned whether ". . . but for the temporary injunction unlawful acts would have been committed, and whether, if restraint should be removed, violence would recur." Emphasis was thereby placed not on the coercive effect of such picketing but on recurrence of violence. Justification of this decision required consideration of the entire matter of the use of "blanket injunctions" in labor disputes.

The justification for a blanket injunction is that, without it, any picketing would have the effect of coercion and intimidation. That is, where past picketing was of a violent nature, future picketing, though peaceful, is presumed to have a coercive effect. See *Milk Wagon Drivers Union of Chicago, Local 753, et al v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 294, 61 S. Ct. 552, 85 L. Ed. 836 (1941); *Local Union No. 858 of Hotel and Restaurant Employees International Alliance v. Jiannas*, 211 Ark. 352, 200 S. W. (2d) 763, 767 (1947). But see *Miller et al. v. Gallagher et al.*, 176 Misc. 647, 28 N. Y. S. (2d) 606, 609 (1941). From this point of view it would appear at first glance that the dissenting opinion in the instant case was correct. In dissenting, Mr. Justice Holt said that on the

basis of the *Jiannas* case, wherein a blanket injunction was allowed because of previous violence, a similar decision should be given here. However, on the facts presented, the cases are distinguishable. In the *Jiannas* case there were continued acts of violence to such a degree that violence was enmeshed with the picketing. On such basis it would seem that injunctive relief should be granted to fulfill the purpose as stated in the *Meadowmoor* case. That case was relied on by the court in the *Jiannas* case in arriving at its decision. Where violence is limited to a "sporadic outburst," a permanent blanket injunction should not be allowed. This is especially true where a temporary injunction has been strictly followed. See *Lloyd P. Jones, Inc. v. International Association of Machinists, District No. 54, et al.*, ... Ohio St. ...., 75 N. E. (2d) 446 (1947). But where a temporary injunction restraining violence has been violated, the court is justified in restraining all picketing. *Steiner et al. v. Long Beach Local No. 128 of the Oil Workers International Union, et al.*, 19 Cal. (2d) 676, 123 P. (2d) 20 (1942). The scope of injunctions should be limited where passage of time has lessened the possibility of coercive effect: "Further, when the acts of violence are remote in point of time, as in the instant case, the tendency of the courts has been not to declare a blanket injunction against all picketing." *Rowe Transfer and Storage Co. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers, Local Union No. 621, A. F. L.*, ... Tenn. ...., 209 S. W. (2d) 35, 37 (1948).

The right to strike is firmly established in this country. Incident to this right is the right to picket. These rights in themselves cannot be infringed by unreasonable state action. See *American Federation of Labor, et al. v. Swing, et al.*, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1941); *Meier v. Speer*, 96 Ark. 618, 132 S. W. 988 (1910). Only lawful means, of course, may be used to solicit support, and thus it is inconceivable that picketing when accompanied by force and violence should find support under our laws. *Smith, et al. v. State*, 207 Ark. 104, 179 S. W. (2d) 185 (1944). Control of picketing as such is limited, however, by the right to freedom of speech and expression. See *Milk Wagon Drivers Union of Chicago, Local 753, et al. v. Meadowmoor Dairies, Inc., supra* (dissenting opinion). Where these rights are exceeded by infringement on the rights of others all picketing should be enjoined, if necessary. See *Steiner, et al. v. Long Beach Local No. 128 of the Oil Workers International Union, et al.*, 19 Cal. (2d) 676, 123 P. (2d) 20 (1942); *Yale Knitting Mills, Inc. v. Knitgoods Workers Union, Local 190*, 334 Pa. 23, 5 A. (2d) 323 (1939). Peaceful picketing should be allowed, however, whenever it is improbable that serious detriment to better relationships and the rights of all the parties involved would result. See *Douds v. Wine, Liquor & Distillery Workers Union, Local, et al.*, 75 F. Supp. 447 (S. D. N. Y. 1948).

This court took into consideration various conditioning factors, such as labor's rights, previous violence, the time factor, and the general purpose of the blanket injunction in arriving at its decision, and in so doing achieved a proper balance of rights, duties, and justice.

John E. Lindberg

TORTS — NUISANCE — INJUNCTION — FUNERAL PARLOR.—*Devereux, et al. v. Grand-Americas Junior Corporation*, ... Misc. ...., 85 N. Y. S. (2d) 783 (1949). A supreme court of New York, recognizing that a funeral parlor is not a nuisance per se, denied an injunction to restrain the establishment of an undertaking business in a semi-residential section zoned for business. In this case the defendants planned to shield from public view the loading and unloading of all bodies and caskets under a covered enclosure erected upon its premises. The court held that where the method of operation is designed to minimize any possible offense to the

sensibilities of the immediate neighborhood, the depressing effect induced by the mere presence of a funeral parlor, its unfavorable reception, and the slight inconvenience it may cause are insufficient reasons to warrant an injunction.

Courts generally subordinate the doctrine that one may use his property as he sees fit to the maxim *sic utere tuo ut alienum non laedas,* but in the law of nuisance this maxim is subject to differing interpretations. With respect to an undertaking establishment located in a purely residential area, the majority rule is that such establishment may become a nuisance if its normal operation creates a constant reminder of death, induces a feeling of depression, appreciably impairs the happiness of the immediate neighborhood, and depreciates the value of neighboring property. See *Arthur v. Virkler,* 144 Misc. 483, 258 N. Y. S. 886, 890 (1932) (consciousness of death affects the normal man); *Brown v. Arbuckle,* .... Cal. App. ...., 198 P. (2d) 550, 553 (1948) (mental injury); *Kundinger v. Bagnasco, et al.,* 298 Mich. 15, 298 N. W. 386, 387 (1941); *Clutter v. Blankenship,* 346 Mo. 961, 144 S. W. (2d) 119, 121 (1940) (constant reminder of death destroys comfort, well-being, and property rights); and *Fraser, et al. v. Fred Parker Funeral Home,* 201 S. C. 88, 21 S. E. (2d) 577, 585 (1942) (emotions and mental pains are as acute as physical suffering). The minority rule requires a physical element in the constitution of a nuisance. See *Canfield v. Quayle,* 170 Misc. 621, 10 N. Y. S. (2d) 781, 793 (1939) (requiring a substantial invasion by inordinate noise); *Higgins & Courtney v. Bloch,* 216 Ala. 153, 112 So. 739, 741 (1927) (escaping noxious odors); *Dean v. Powell Undertaking Co.,* 55 Cal. App. 545, 203 Pac. 1015, 1017 (1922) (danger of contagious diseases). See cases collected in Notes, 23 A. L. R. 745 (1923), 43 A. L. R. 1171 (1926), and 87 A. L. R. 1061 (1933), defining the above rules.

The principal case supports the minority rule:

> To restrain the conduct of a business not prohibited by statute at the location in question, the inconvenience to adjoining owners must not be fanciful, or slight, but must be certain and substantial, and must interfere with the physical comfort of the ordinarily reasonable person.

See *Dutt v. Fales,* 250 Mich. 579, 230 N. W. 948, 949 (1940) (some noise and congestion is not sufficient to constitute a nuisance). But see *White v. Luquire Funeral Home,* 221 Ala. 440, 129 So. 84, 86 (1930) (reminder of death is a discomfort which is not fanciful or imaginative to the over-sensitive person alone).

Where the character of the neighborhood is transitional or semi-residential, the courts are apparently inclined to support the minority rule. In *Jones v. Chapel Hill,* 273 App. Div. 510, 77 N. Y. S. (2d) 867, 871 (1948), the court did not allow enlargement of funeral parlor operations because it would offend ordinary sensibilities. See also *Rick, et al. v. Cramp, et ux.,* 357 Pa. 83, 53 A. (2d) 84, 89 (1947); *O'Connor v. Ryan, et al.,* 159 S. W. (2d) 531, 533 (Tex. Civ. App. 1942). But see *Tureman v. Ketterlin,* 304 Mo. 221, 263 S. W. 202, 204 (1924) where the court observed that:

> An undertaking establishment stands on a different footing from that of the occasional corner grocery and oil filling station. . . The latter may offend the aesthetic sense of those living in their proximity; the former would destroy, in an essential respect, the comfort and repose of their homes.

The manner of operation is an important factor in determining whether a funeral parlor is a nuisance. *Fentress v. Sicard,* 181 Ark. 173, 25 S. W. (2d) 18, 19 (1930); *Kirk v. Mabis, et al.,* 215 Iowa 855, 246 N. W. 759, 762 (1933) (the operator must exercise proper, ordinary, and reasonable care). See also *Medahl v. Holberg,* 55 N. D. 523, 214 N. W. 802, 803 (1927); *Jordan v. Nesmith,* 132 Okla. 226, 269 Pac. 1096, 1098 (1928); *Clutter v. Blankenship,* 346 Mo. 961, 144

S. W. (2d) 119, 122 (1940) (it would be a serious injustice to require one actually to suffer damages before being allowed to seek relief). In connection with the importance of locality, see *Jones v. Chapel Hill,* 273 App. Div. 510, 77 N. Y. S. (2d) 867, 871 (1948); "Defendant is in a particularly inequitable position in that it proposes to take advantage of this environment, whose character at the same time it proposes to destroy"; *Medahl v. Holberg, supra,* (where the immediate neighborhood does not make it obnoxious it is merely a business); *Lewis v. Baltimore, et al.,* 164 Md. 170, 164 Atl. 220, 224 (1933) (to consider incidents and not location will make it neither a public nor a private nuisance per se, but it need not be expelled as a nuisance from the viewpoint of either incidents or location if its unreasonable use justifies exclusion).

Just how much the question of laches and good faith has been allowed to influence the decision of this case is difficult to discern. Mr. Justice Nathan disclosed that this question was given serious consideration. The delaying of the present action until the defendant had expended a substantial sum did not appear equitable; but an injunction was granted, nevertheless, in *Arthur v. Virkler,* 144 Misc. 483, 258 N. Y. S. 886 (1932), despite considerable expenditures on the part of the defendant. The question of good faith was considered more serious than that of laches. The court admitted that the doubt cast on the plaintiff's good faith was inferred from insufficient evidence which implicated a competing firm, previously established in the neighborhood, as the moving inspiration behind the present action.

The question of good faith involves the element of motive. If, at the discretion of a court, motive is to be a selective factor in determining a decision, utilitarian policy must be distilled from legal precepts. Motive must be weighed in the light of sound principles, if the concept of justice is to be persuasive in the conduct of men. The natural law gives every man the right to earn his livelihood. Correlative with the possession of such right, society is obliged to secure the exercise of it; this protection ought to issue from the legal system. Any violation of this natural right could come within the scope of nuisance and an injunction would be an appropriate remedy. But free enterprise cannot recognize such a right and still retain its inherent theory of unlimited competition. The naïvete of the statement to the effect that:

> . . . the utmost caution must be exercised to prevent the possibility of an apparently bona fide injunction action being used as a subtle instrumentality in restraint of trade,

indicates how deeply the principles of free enterprise have been entrenched into the legal reasoning of our courts in preference to principles of the natural law.

James D. Matthews

TORTS — LIABILITY FOR DEFAMATION — GROUP SLANDER.—*Montgomery Ward & Co., Inc., et al. v. Harland,* .... Miss. ...., 38 So. (2d) 771 (1949). This was an action for slander brought by one of three sales clerks employed in the defendant company's store. It was a companion case of *Montgomery Ward & Co., Inc., et al. v. Blakely,* 200 Miss. 81, 25 So. (2d) 585 (1946), and *Montgomery Ward & Co., Inc., et al. v. Skinner,* 200 Miss. 44, 25 So. (2d) 572 (1946), brought individually by the other two clerks. Plaintiff brought this action for slander alleged to have been committed by the assistant manager of the defendant company's store.

It had been called to the attention of the assistant manager that an eight dollar check and a ten and a twenty dollar bill were found under a plaque

near a cash register in the store. After reporting this fact to the manager, the assistant manager was told to find and discharge the clerk guilty of this carelessness. Failing to obtain a confession from any of the three clerks he suspected, the assistant manager charged them in a loud voice and in the presence of customers in these words:

> . . . All damned three of you are going out of here this afternoon without a recommendation and with a blot on your record and character . . . You are one of three who trifled with the money. You all deny it, but one of you did it. You laid it and hid it there with ill intentions and you are fired without a recommendation.

It was further proved that some customers in the store stopped to listen. After having been discharged, the clerk was unable to obtain work in that area in spite of the fact that services of a clerk were in demand, that she previously had a good record, and that she was a proficient sales clerk. The defendant contended that the assistant manager had a qualified privilege and that the charge was in the alternative rather than directed to any particular clerk.

This case is based upon the same facts and governed by the same holding as the two aforementioned cases. In deciding for one of the other two clerks in *Montgomery Ward v. Skinner,* the court disposed of the first defense by holding that there was no qualified privilege because the charge by the assistant manager was not made in good faith, nor in the proper manner and to the proper parties only. It was found that there were no justifiable grounds for suspecting a clerk of anything more than carelessness.

In deciding for the plaintiff on the defendant's second defense, the court relied upon the reasoning in *Forbes v. Johnson,* 50 Ky. 48 (1850), where two persons had been charged in the disjunctive with altering a note. In a civil action brought by one of the persons defamed, the court held that since each of them was charged equally, it was in effect a charge against both. The court reasoned that to hold otherwise would allow a willful defamer to make with impunity a charge in the alternative and cause substantially the same harm as would be caused by charging them jointly or separately.

Civil recovery for class slander depends to a great extent on the number of persons in the class. See Note, 21 NOTRE DAME LAWYER 21 (1945). If a large class is alluded to disparagingly, it is difficult to show that the defamation is personally applicable to a particular member of that class, and the courts are therefore reluctant to grant relief. In *Noral v. Hearst Publications, Inc.,* 40 Cal. App. (2d) 348, 104 P. (2d) 860 (1940), an action for libel was brought by the president of Workers' Alliance against the defendant for publishing an article stating that the officers of that organization were channelling the membership dues to further Communist agitation under direction from the Third Internationale. Recovery was denied because the defamation was directed at a large group of persons (at least 162 officials), thus precluding determination with any certainty of the individual accused. In *Watts-Wagner Co., Inc. v. General Motors Corporation,* 64 F. Supp. 506 (S. D. N. Y. 1945), the defendant charged that an army of racketeers was sweeping the country selling a fake panacea for battery troubles. Although the plaintiff was selling a battery solution, he was not allowed to recover because the class was a large one and no recovery could be had unless the statement was reasonably susceptible of special application to the plaintiff.

The possibilities of recovery for class slander increase as the size of the group decreases. A small group of doctors constituting a residential staff of a hospital was allowed to recover in *Bornmann v. Star Co.,* 174 N. Y. 212, 66 N. E. 723 (1903) for defamatory statements made about their group which did not point out any one of them in particular. The same is true of statements made about

families in their collective capacity. In *Chandler v. Holloway,* 4 Port. 17 (Ala. 1836), it was held that each member of a family could collect against the defamer who called the family a gang of murderers. While this special treatment of small groups produces just decisions, it appears to be based not upon the intensity of injury to the reputation of each individual, but on the legal fiction that in cases where small classes are slandered, each member will be presumed to have been personally mentioned. See Note, 34 COL. L. REV. 1322 (1934). The reason for this fiction was to prevent the harsh effects of the doctrine laid down in *Sumner v. Buel,* 12 Johns. 475 (N. Y. 1815) to the effect that recovery was denied unless the person defamed could show special reference to himself.

Where a member or part of a group is impersonally defamed, the courts have refused to apply this fiction. They have followed the old doctrine of *Sumner v. Buel,* regardless of the size of the group. Thus in *Harvey v. Coffin,* 5 Blackf. 566 (Ind. 1841), where the defendant said that "One of Coffin's boys," had stolen his corn, the court said that plaintiff had to prove that the defendant alluded to him, and the fact that the plaintiff was one of the sons was not sufficient. It seems that all of Coffin's sons were injured by this accusation, whether they were referred to individually or not. A similar case was that of *Bull v. Collins,* 54 S. W. (2d) 870 (Tex. Civ. App. 1932). There the plaintiff could not recover for slanderous remarks made by the defendant manager of a store who charged that either the plaintiff or another stole money from the store. The court said: "Words imputing an accusation that either A or B stole money, without indicating whether the one or the other, are not sufficient to charge that A stole the money." But who will trust a man so accused? If I suspect that one of two men is a killer, I will not turn my back to either of them. These decisions show that the courts were blindly following the doctrine of *Sumner v. Buel.* They refused to recognize that the basis of liability for defamation is the injury to the reputation of the plaintiff.

Since the unfavorable impression reasonably created in the mind of the third party is the essence of the action of slander, it seems correct that the clerk in *Montgomery Ward v. Harland* was allowed to recover. See RESTATEMENT, TORTS § 564 (1938). Even though nothing was said which would lead another to believe that the plaintiff was guilty to the exclusion of the other two clerks, the grave suspicion which must have been created in the mind of the customers in the defendant's store regarding each of the clerks should have been sufficient to support recovery in an action for slander. To allow recovery, as this court did, prevents a substantial harm being done to the plaintiff without a remedy therefor.

In deciding for the plaintiff, the court made a distinction between this case and others involving alternative charges. It was pointed out that in this instance the plaintiff was present and the hearer could see the one charged. This does not seem controlling, since it matters little whether the hearer can see the one charged or merely knows to whom the reference is made. The court may have found it easier to say in this case that the authority cited by the opposition was not on point, but it would have eliminated confusion if the court had openly admitted that this case is a departure from the majority of cases in point and that this departure accomplishes, ultimately, justice without fiction.

Lawrence S. May, Jr.

BANKRUPTCY — LIENS — PRIORITY OF GOVERNMENT PERFECTED TAX LIEN AS AGAINST WAGE CLAIMS AT DATE OF BANKRUPTCY.—*Goggin v. Division of Labor Law Enforcement, of California,* .... U. S. ...., 69 S. Ct. 469 (1949). This case holds that United States tax claims are entitled to priority as against wage

claims when the Collector of Internal Revenue has perfected a tax lien on the taxpayer's personalty and has actual possession of it before the filing of the petition in bankruptcy, even though the Collector subsequently relinquishes possession of such property to the trustee in bankruptcy for purposes of sale. It was decided that such procedure was not in conflict with the provisions of § 67 of the Bankruptcy Act, 30 STAT. 564 (1898), as amended, 11 U. S. C. § 107 (c) (1946).

The Supreme Court unanimously decided that § 67 (c), in its attempt to protect wage claims and administration expenditures from obliteration by large delinquent tax claims, does not require a collector, under similar circumstances, to retain possession of the personalty of the bankrupt after the petition in bankruptcy has been filed in order to guarantee the continued priority of the tax lien.

This section reads as follows:

> § 67. Liens and Fraudulent Transfers:
>
> c. Where not enforced by sale before the filing of a petition in bankruptcy . . . though valid under subdivision (b) of this section, statutory liens, including liens for taxes . . . owing to the United States . . . *on personal property not accompanied by possession* . . . shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision (a) of section 64 of this Act. . . . (Emphasis supplied). [30 STAT. 544 (1898), as amended, 11 U. S. C. § 107 (c) (1946).]

Clauses (1) and (2) of subdivision (a) of § 64 of the Act, 30 STAT. 563 (1898), as amended, 11 U. S. C. § 104 (a) (1946), give first priority to the costs and expenses of administration and second priority to wage claims of workmen, etc.

The facts of the instant case are as follows: prior to filing any voluntary petition in bankruptcy, a Collector of Internal Revenue of the United States perfected a statutory lien upon the personal property of the Kressco Engineering Corporation, incorporated in California, and took possession of it. On two occasions, the Collector attempted to sell the taxpayer's assets but each time the bids were unsatisfactory, whereupon the Collector relinquished possession of the property to the trustee in bankruptcy for sale upon the condition that the Government's lien was to attach to the proceeds of the sale, subject to costs and expenses.

The referee ordered that the proceeds of the sale be used first to pay the expenses of administration and that the balance was to be surrendered to the Collector in partial payment of the Government's tax claims. The Division of Labor Law Enforcement, State of California, the statutory assignee of certain prior wage claimants, appealed from the judgment of the district court. The judgment was reversed by the court of appeals, 165 F. (2d) 155 (C. C. A. 9th 1947), stating that the Collector had relinquished possession of the bankrupt's property and ordered that the tax claims be postponed and subordinated to the wage claims pursuant to § 67 (c) of the Act. In so deciding, the court stated:

> The government lien holder must either sell the property under its lien or eventually surrender it into the bankruptcy proceedings. We find no authority whatever for the proposition that the government can turn the property over to the trustee under a consent based upon the receiver's assurance that the lien shall continue upon the property and also upon the money it may bring when sold as a part of the bankruptcy estate.

However, it is well established law that it is within the power of the courts to sell the property of a bankrupt free from liens if it is reasonable to assume that the property will yield greater profits thereby. In re *Beardsley*, 38 F. Supp, 799 (Md. 1941). When a trustee sells property free from liens, the lien-holders are entitled to receive a preference from the proceeds equal to the amount or value of the property covered by their liens. In re *Wesley Corporation*, 18 F.

Supp. 347 (E. D. Ky. 1937); *cf.* In re *Wilkes, Leslie v. Knight Soda Fountain Co.*, 55 F. (2d) 244 (C. C. A. 2nd 1932). A creditor's rights to a bankrupt's estate are frozen by the filing of the petition in bankruptcy. Thus, the decision in In re *Wissmeier*, 26 F. Supp. 806 (E. D. N. Y. 1939), asserts that the priorities in a bankruptcy proceeding must be determined as of the time of bankruptcy and, according to § 1 (13) of the Act, "time of bankruptcy" refers to the date when the petition is filed. 30 STAT. 544 (1898), as amended, 11 U. S. C. § 1 (13) (1946). In view of these decisions, it would appear that the Collector's lien priority was well established at the time of bankruptcy and such priority could not be altered when the personalty of the bankrupt was relinquished by the Collector to the trustee for sale after the bankruptcy petition had been filed.

The court of appeals in the instant case, citing *City of New York v. Hall*, 139 F. (2d) 935 (C. C. A. 2nd 1944), held that the world "possession," as used in § 67 (c) of the Act, means actual possession, since it is the purpose of this section to protect creditors and warn them of the fact that a lien exists on the property in question. The court was side-tracked in its discussion of the *Hall* case since in that case there was no actual possession by the lien-holder. Thus, the *Hall* case is distinguished from the instant case and the true holding of the former was that possession was required by § 67 (c) of the Act as a penalty for the inaction of the tax authorities.

Since a trustee in bankruptcy acquires no better title to the bankrupt's property than the bankrupt himself had, it would not seem logical to conclude that the lien of the Collector was affected by bankruptcy proceedings. Nor would it seem logical to conclude that the Collector lost his lien priority when he relinquished possession of the bankrupt's personalty since, as has been previously stated, the priority of the tax lien was determined once and for all at the inception of the bankruptcy proceedings. Bankruptcy proceedings take place in a court of equity, and holders of valid liens have a statutory right to preferred treatment. In re *Bowen*, 46 F. Supp. 631 (E. D. Pa. 1942); *cf.* In re *Erie R. Co.*, 37 F. Supp. 237 (E. D. Ohio 1940). Claims constituting valid and existing liens on the bankrupt's property at the time of bankruptcy, which are not invalidated by the Act, are entitled to priority and payment in full from the property covered by the liens or the proceeds of such property, not only before the claims of general creditors, but also before payment of claims designated in § 64 of the Act relating to priorities. In re *Centralia Refining Co.*, 35 F. Supp. 599 (E. D. Ill. 1940).

For reasons of policy then, it would be inequitable to require a trustee to sell the property of a bankrupt subject to a lien since it would operate to the detriment of the unsecured creditors as well as the statutory lien-holders. The lien-holders would be required to retain actual possession of the chattels to be assured of full priority and the property would undoubtedly yield a lessor price if sold subject to liens.

From a review of the cases already cited, it would seem that it was the intent of the legislators of § 67 (c) of the Act to protect uninformed claimants from dormant tax claims which often swallow up the residue of a bankrupt's estate. To remedy such situations, § 67 (c) was enacted, requiring statutory lien-holders to have actual possession of the property subject to the lien so that other creditors might be informed of the lien.

The Court in the instant case felt that the creditors of the bankrupt had ample warning and notice of the Government's tax lien after the Collector had, on two previous occasions, attempted to sell the personalty of the bankrupt. The Government's tax lien in this case did not arise out of the bankruptcy of the taxpayer, but rather from delinquent taxes accruing prior to the petition in bankruptcy.

Maurice J. Moriarty

CRIMINAL LAW—ADMINISTRATIVE LAW AND PROCEDURE—FEDERAL ASSIMILATIVE CRIMES ACT.—*Air Terminal Services, Inc. v. Rentzel et al.*, 81 F. Supp. 611 (E. D. Va. 1948). The Administrator of the Civil Aeronautics Board issued a regulation which prohibited racial segregation at the Washington National Airport. The plaintiff was a restaurant operator at the airport and operated under a lease from the administrator. He claimed that the federal criminal code adopted the racial segregation laws of Virginia under the Federal Assimilative Crimes Act and therefore invalidated the regulation of the administrator. The plaintiff sought to determine the validity of the regulation and to restrain its enforcement. This case thus presented the question whether the federal criminal code adopted racial segregation and applied it to federal enclaves that are located within states that require such segregation.

The Washington National Airport is located within the boundaries of Virginia, but it was put under exclusive federal jurisdiction by the provisions of 59 STAT. 553 (1945), which provided that:

> Sect. 107. The State of Virginia hereby consents that exclusive jurisdiction in the Washington National Airport . . . title to which is now in the United States shall be in the United States.

This was confirmed by the Virginia General Assembly in Va. Acts 1946, c. 26, p. 46.

The authority of the administrator to make regulations for the airport is contained in 54 STAT. 686 (1940), which reads:

> Sect. 2. The Administrator shall have control over, and responsibility for, the care, operation, maintenance, and protection of the airport, together with the power to make and amend such rules and regulations as he may deem necessary to the proper exercise thereof.

It is contended that the federal criminal code required racial segregation at the airport. The federal code is said to have adopted the provisions of the Code of Virginia, which did have this provision, VA. CODE ANN. §§ 1796a, 1796b (1942), by the action of the Federal Assimilative Crimes Act. This Act was intended to provide each federal reservation with a criminal code for its local government by filling in the gaps in the federal criminal code through the application of local state statutes. The Act provides that:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession or District in which such place is situated by the laws thereof in force at the time of such act or omission shall be guilty of a like offense and subject to a like punishment. [62 STAT. 645, U. S. CODE CONG. SERV., Unbound Title 18 U.S.C. § 13 (1948).]

Does this statute adopt the racial segregation laws of Virginia and require their enforcement in federal areas within Virginia? The court held that the Virginia laws for separation of the white and colored races were not adopted by the federal code.

The court stated that the purpose of the Assimilative Crimes Act was to fill in gaps in the federal criminal code. It could not be used to adopt state laws where a federal law already existed or where there was a federal policy at variance with the state law. Where Congress had legislated, there could be no question of supplanting that act by a state act. Where there was no positive federal law, but a federal policy, the federal policy would still prevail over the state law. The Federal Assimilative Crimes Act could only be invoked where Congress had not legislated by either law or pronouncement of policy.

In *Johnson v. Yellow Cab Transit Co.*, 321 U. S. 383, 389, 64 S. Ct. 622, 90 L. Ed. 966 (1944), the Supreme Court asked several questions for the purpose of testing the application of the Assimilative Crimes Act to the prohibition laws of Oklahoma:

> This statute, it is said, adopts all of the various penal statutes of Oklahoma relating to liquor and makes them the federal law applicable to the Fort Sill Reservation . . . Petitioner's argument raises at least three distinct questions, no one of which is easily resolved: (1) Which, if any of the Oklahoma penal statutes are so designed that they could be adopted by the assimilative crimes statute and applied to Fort Sill? . . . (2) If there are Oklahoma statutes which could be so adopted, are all or any of them in conflict with federal policies as expressed by Acts of Congress . . .? (3) Assuming that certain Oklahoma statutes are adaptable, and are not inconsistent with federal policies would such statutes make penal the liquor transaction stipulated to have taken place?

The provisions of the Virginia Segregation Laws would certainly require an affirmative answer to the second question. The policy of the Federal Government has been to grant equal protection to all persons without regard to their race. One of the strongest affirmations of that policy was stated in the Fourteenth Amendment to the United States Constitution and another was in the Civil Rights Act of 1866, REV. STAT. § 1978 (1875), 8 U.S.C. § 42 (1946). In *Hurd v. Hodge*, 334 U. S. 24, 34-35, 68 S. Ct. 847, 92 L. Ed. 1187 (1948), the Supreme Court in deciding that one of the policies of the federal government is the avoidance of racial discrimination in federal matters, said:

> But even in the absence of the statute [Civil Rights Act of 1866] there are other considerations which indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States . . . The power of the federal court to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents.

It would seem illogical to hold that the Congress of the United States simply took over completely all the state laws by the terms of the Federal Assimilative Crimes Act. The court was on sound ground in holding that the Act did not adopt a law contrary to the public policy of the United States. It acted reasonably in upholding the right of the administrator to make necessary rules and in dismissing the complaint.

George J. Murphy, Jr.

DOMESTIC RELATIONS—DIVORCE—CUSTODY OF CHILDREN AWARDED TO ADULTEROUS WIFE—ABUSE OF DISCRETION.—*Bunim v. Bunim*, 298 N. Y. 391, 83 N. E. (2d) 848 (1949). This was an appeal from a divorce action granting custody of two teen-age daughters to an adulterous mother. The question before the court was whether there had been an abuse of discretion by the trial court in awarding such custody. The plaintiff-husband was awarded an absolute divorce on grounds of his wife's adultery. Custody of two daughters, eleven and thirteen years of age, was granted to the defendant-wife, with whom they expressed a desire to live, though they professed love for both parents. The appellate court, by a four to two decision, affirmed the trial court's finding. The court of appeals reversed this decision as to custody and support by a four to two majority, holding that the award to the adulterous mother was such an abuse of discretion as to be an error of law.

It is well settled that trial courts have broad discretionary powers in determining which one of the parents is best fitted to have custody of the children. *Matter of Welch,* 74 N. Y. 299 (1878). The general view is that the trial judge's close personal contact with the parties to the action, the children involved, the witnesses, and his first hand knowledge of all the facts, place him in a better position to determine the issue. Consequently, his decision usually will not be disturbed. But such a judgment is not absolute, and the law and facts may be reviewed by the higher courts at the instance of either party when the judgment rendered is inconsistent with the best interests of the children. N. Y. CIVIL PRACTICE ACT § 1170.

In deciding which party is best fitted to insure the proper physical, moral, and mental development of the children, the court considers many factors. The property of the parents, their moral fitness, their past conduct and devotion to the children, and the age, sex, love and preferences of the children, are all elements of varying importance which guide the trial judge in making his decision. And while he has wide latitude in evaluating each of the factors in relation to the others, if the resulting judgment deviates greatly from policy and sound reasoning, it becomes the duty of the higher court to correct such error.

As a general rule, custody is granted to the innocent party, *Lester v. Lester,* 178 App. Div. 205, 165 N. Y. S. 187, *aff'd,* 222 N. Y. 546, 118 N. E. 1065 (1917), but the best interests of the child will sometimes warrant an award to the party against whom the decree is granted. However, where such an award has been made, the decision generally has been justified by the presence of other circumstances which leave no doubt as to the reasonableness of the judgment. Thus in *Osterhoudt v. Osterhoudt,* 28 Misc. 285, 59 N. Y. S. 797 (1899), *aff'd,* 168 N. Y. 358, 61 N. E. 285 (1901), while the husband was granted a divorce on grounds of adultery, custody of the children was given to the wife because of the latter's belief in the validity of a foreign divorce decree and subsequent marriage, in addition to the fact that the children had always been in her good care. Custody has also been given the guilty party in cases where there was proof that the other party was unfit, *Burritt v. Burritt,* 53 Misc. 24, 102 N. Y. S. 475 (1907); and where there was but a single moral lapse in an otherwise spotless record, and also doubt as to the successful party's moral character, *Kruczek v. Kruczek,* 264 App. Div. 242, 35 N. Y. S. (2d) 289, *aff'd,* 289 N. Y. 826, 47 N. E. (2d) 434 (1943); and where there was doubt as to the legitimacy of the child, V. ..... v. V. ....., 179 Misc. 970, 40 N. Y. S. (2d) 579 (1943).

In the present case, however, the mother was not only proved guilty of adultery and perjury, but professed a belief that the practice of adultery by sexually dissatisfied wives was to be condoned. In addition, she showed no repentance for her wrongdoings and gave no indication that she would refrain from such acts in the future. On the other hand, the moral fitness of the father was unquestioned, the lower court holding that he was a *fit and proper* person to have such custody. Past decisions hold that the custody of the children should not be granted to a mother who is morally unfit or degenerate. *People* ex rel. *Wright v. Gerow et al.,* 136 App. Div. 824, 121 N. Y. S. 652 (1910), *People* ex rel. *Lawson v. Lawson,* 111 App. Div. 473, 98 N. Y. S. 130 (1906).

The trial judge placed great emphasis on the preferences of the children. According to precedent, the children's wishes, where they express love for both parents, will have little weight, *People* ex rel. *Elder v. Elder,* 98 App. Div. 224, 90 N. Y. S. 703 (1904), except where the claims of the parties are otherwise equal, *Israel v. Israel,* 38 Misc. 335, 77 N. Y. S. 912 (1902). Their preferences should not be given much consideration unless the children are of sufficient age and discretion to have an intelligent opinion. *Cariola v. Cariola,* 131 Misc. 66, 225 N. Y. S. 692 (1927). It could hardly be deemed reasonable to hold that a mother who believed in and practiced adultery was a fit person, with a claim to the custody of the children equal to that of a reputable and successful father. Nor could two

adolescent girls be expected to have the capacity correctly to decide which parent would best serve their future welfare.

In the court of appeals, Judge Fuld stated in his dissenting opinion, "Likewise pertinent was proof that the wife was ever a good and devoted mother; that her indiscretions were unknown to the children. . . ." It is not logical to assume that a woman can be a good mother and an adulteress at the same time. The primary duty of any mother is to educate her children in basic moral principles. One who does not possess these principles can hardly be expected to teach them to others. Furthermore, how long would two inquisitive young girls remain sheltered from their mother's "indiscretions"? The judge's additional remarks appear to be insignificant in the light of the other factors already discussed.

It is indeed exceedingly difficult to prescribe what constitutes a reversible abuse of discretion in decisions of this kind. But the court should not sacrifice justice in adhering to a "hands-off" policy as suggested in Judge Fuld's dissent. It seems evident in this case that the lower court's unreasonable evaluation of the facts and its failure to take cognizance of past decisions constituted an abuse of discretion which the court of appeals wisely corrected. Had the final decision been otherwise, it would have established authority tending to make the discretionary powers of trial judges more arbitrary. A different decision would also have granted the lower courts license to assign little value to the parent's moral character, a most important consideration in determining the proper party to have custody of the children.

William J. O'Connor

REAL PROPERTY—SURFACE WATERS—PROPERTY OWNER CANNOT DISCHARGE SURFACE WATERS IN MANNER INJURIOUS TO PROPERTY OF NEIGHBORS.—*Staats et al. v. Hubbard et al.*, ...Del....., 63 A. (2d) 856 (1949). This was an action brought in the Court of Chancery in Delaware for damages and also to enjoin defendants from diverting their drainage and surface waters onto the land of the plaintiff. The court denied a motion of defendants to dismiss the complaint.

In this dispute between neighbors over the flow of surface waters from one property to another, the plaintiffs complained that defendants raised the level of their land and thereby caused surface waters to flow onto plaintiff's land in damaging quantities during heavy rains. The motion to dismiss the complaint was denied by the Vice-Chancellor, who indicated in his decision that he thought the plaintiffs had an equitable claim for relief. He cited the case of *Chorman v. Queen Anne's R. Co.*, 3 Pennewill 407, 54 Atl. 687 (1901), in which it was held that a railroad company had no right, through its duty to passengers or shippers to protect its roadbed, to dig ditches alongside its track embankment, thereby accumulating surface water and casting it on adjacent land in unnatural quantities.

The term "surface water" is used to refer to water derived from falling rain or melting snow and diffused over the surface of the ground while it remains in such diffused state or condition. *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, 73 N. W. 540 (1897). Three divergent views have been taken by the courts with regard to the discharge of surface waters. The first view is called the "common enemy" doctrine, and its adherents hold the surface waters to be a common enemy, which every proprietor may fight and get rid of as best he can. Neither the retention, diversion, repulsion, nor altered transmission of surface waters is an actionable injury under this view, even though damage ensues. *Nathanson v. Wagner et ux.*, 118 N. J. Eq. 390, 179 Atl. 466 (1935).

In the early Massachusetts case of *Gannon v. Hargadon*, 10 Allen 106, 87 Am. Dec. 625 (1865), the court stated that it was not material whether a party ob-

structs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers, or by changing the level of the soil so as to turn it off in a new course after it has come within his boundaries. "The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil." It was further affirmed in *Durkes v. Town of Union,* 38 N. J. Law 21 (1875), that the diversion of surface water, even when such a diversion injured another, was not an actionable wrong. The court somewhat enlarges upon the reasoning leading to this view in the case of *Lare et al. v. Young et al.,* 153 Pa. Super. 28, 33 A. (2d) 662 (1943). In this case it was held that an owner may not proceed negligently so as to do unnecessary damage to others, but insofar as he acts upon his right to protect his enjoyment of his own property, any incidental loss to his neighbor is *damnum absque injuria.* The court further stated: "Owners of lots in cities and towns buy and own with the manifest condition that natural or existing surface is liable to be changed by the progress of municipal development."

It is this very point that constitutes the well-recognized exception to the second and opposing view, which is called the "civil law" rule. This view holds that the upper land-owner has a right to the uninterrupted passage from his land of water caused by falling rain or melting snow, and such flow or passage cannot be arrested or deterred to the detriment of either the upper land-owner or another. *Whitman et al., State Roads Commission v. Forney,* 181 Md. 652, 31 A. (2d) 630 (1943). The reason for the exception to the general rule in the cases concerning cities and towns is that this rule is generally associated with agriculture and good husbandry, and is considered necessary to protect arable land against other than the natural flow of waters. Cities and towns employ drains and sewers to eliminate excess waters, and therefore the strict interpretation that generally accompanies the civil law rule is neither necessary nor reasonable. The courts following the civil law rule stress the flowing of surface waters in the *natural* course and manner, undiverted and unaccelerated by interference. It has been held that the act of flooding the lands of an upper owner is wrongful per se, although it may actually have caused benefit instead of injury. *Tootle v. Clifton,* 22 Ohio St. 247, 10 Am. Rep. 732 (1871). The rigidity of this rule is again emphasized in *Pettigrew v. Evansville,* 25 Wis. 223, 3 Am. Rep. 50 (1870), where the court held that it was the duty of every owner of land wishing to carry off the surface water from his own land to do so without material injury or detriment to the lands of his neighbor. Thus it has been held that one may not grade his land in such a manner as to cause water ordinarily falling on his land to run upon the land of another. *Adams v. Walker,* 34 Conn. 466, 91 Am. Dec. 742 (1867). This principle was later affirmed in *Tide Water Oil Sales Corp. v. Shimelman et al.,* 114 Conn. 182, 158 Atl. 229 (1932).

A number of states have declined to accept either of these views, qualifying the common enemy doctrine in accordance with the maxim that "one must so use his property as not unnecessarily to injure others," and modifying the civil law rule to the extent of permitting a property owner to repel surface water when such action is reasonably necessary for the protection of his property. In these states it is held that while surface water may be fended off if done reasonably and with the exercise of due care, liability arises if the natural flow is obstructed negligently, wantonly or unreasonably. *Baker v. Allen,* 66 Ark. 271, 50 S. W. 511 (1899). In *Rutka v. Rzegocki et al.,* 132 Conn. 319, 43 A. (2d) 658 (1945), the court held that a landowner must not use or improve his land in such a way as to increase the total volume of surface water flowing from it to adjacent property, thereby discharging this water upon such property in a manner different in volume or course from its natural flow, to the substantial damage of the adjoining owner.

It is this middle-of-the-road doctrine of reasonable use which the Vice-Chancellor in the present case appears to advocate when he quotes a previous article: "Where, however, there has been an act of man which has altered or accelerated the flow of natural surface water to the plaintiff's land, there has been a tendency to make the question of liability depend on the doctrine of reasonable user." Noel, *Nuisances from Land in its Natural Condition,* 56 HARV. L. REV. 772 (1943).

In his conclusion that the complaint states a claim for equitable relief, the Vice-Chancellor sees the governing principle of law in this field reflecting the practical adjustment of conflicting interests, thus requiring one to be conscious of the effect of his actions on his neighbors.

In the light of the existent sectional divergence among the courts, perhaps the best conclusion that could be made on this question is contained in 3 FARNHAM, WATERS AND WATER RIGHTS § 889 (1st ed. 1904), referring to the disposition of surface waters: "Each case must be dealt with upon its facts, applying the rule which will be reasonable under the circumstances, and under the general rule that water should be allowed, as far as possible, to seek its natural outlet."

Charles James Perrin

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT.—*Simon v. Standard Oil Co.,* ....Neb....., 36 N. W. (2d) 102 (1949). Within the provisions of the workmen's compensation acts, an employee injured by an accident arising out of and in the course of the employment is entitled to disability benefits. This case holds that an employee's injury, proximately resulting from his voluntarily exposing himself to risk of harm, entirely foreign to any reasonable requirement of his employment, is not compensable as arising out of and in the course of the employment.

Plaintiff, an employee of the defendant company, received a severe hand injury from the blades of an electric exhaust fan. The paint room, in which the fan had recently been installed, and the wash room, in which the plaintiff normally carried out the duties of his employment, were located side by side in the same building on defendant's premises. He was not prohibited from going into the adjacent paint room, but had only occasional duties to perform there. The exhaust fan was installed some thirty feet from the doorway in the room's far corner. On the day of the accident the plaintiff completed his duties about 3:30 P. M., but did not immediately leave the premises. Instead, he made his way into the paint room to inspect the new fan, and there placed his hand in close proximity to it in order "to see how much air it was pulling through." He suffered the injury for which compensation is claimed when the suction drew his hand into the whirling blades. The primary question presented was whether the plaintiff's accidental injury "arose out of and in the course of his employment," within the meaning of the Workmen's Compensation Act of Nebraska. NEB. REV. STAT. § 48-101 (1943); § 48-151(6) (Supp. 1947).

Willful negligence is the only defense available in Nebraska once the requirement that the employee's accidental injury "arose out of and in the course of" the employment is satisfied. The term "willful negligence," as applicable to the instant case, is defined as, ". . . (a) deliberate act, (b) such conduct as evidences reckless indifference to safety. . . ." NEB. REV. STAT. § 48-155(7) (Supp. 1947).

The terms "arising out of" and "in the course of" are not equivalent in meaning, and an injury occurring in the course of the employment does not necessarily mean that it also arises out of the employment. The statute imposes a dual requirement and both must be met before compensation will be allowed. Courts

have distinguished the terms in deciding numerous cases since the institution of workmen's compensation acts. The distinction was aptly put in the early case of *Speas v. Boone County*, 119 Neb. 58, 227 N. W. 87, 88 (1929), where the court said:

> . . . an injury "arises out of" an employment when there is a reasonable causal connection between the conditions under which the work is, in all circumstances, required to be performed and the injury is received while the employee is thus engaged; and that the injury is received "in the course of" the employment when, at the time the injury is received, the workman is engaged at the work he is employed to perform or in some duty incidental to that work. If incidental, it must be incidental to the main character of the business on which the employee was engaged for the employer. It cannot occur independent of the relation of master and servant.

In the *Simon* case, the Supreme Court of Nebraska reversed the judgment of the district court sustaining an award of compensation in favor of the plaintiff. In reaching its final decision, the court reasoned that because the plaintiff was not engaged in the performance of any of the required duties of his employment, or any work even incidental thereto at the time of the accident, and that he searched out the cause of his injury on his own initiative, urged on by his personal curiosity, the relationship of master and servant was severed, and the injury received was not compensable as arising out of and in the course of the employment. The decision is in agreement with the holdings in countless cases involving the same question in this and other jurisdictions. *Saucier's Case*, 122 Me. 325, 119 Atl. 860 (1923); cf. *Bergantzel v. Union Transfer Co.*, 124 Neb. 200, 245 N. W. 593 (1932); cf. *Maronofsky's Case*, 234 Mass. 343, 125 N. E. 565 (1920). In *Sullivan's Case*, 128 Me. 353, 147 Atl. 431 (1929), an eighteen year old boy, who was employed in a woolen mill, suffered the loss of four fingers and part of his thumb when, for the sole purpose of satisfying his curiosity, entirely independent of any required or incidental duty of his employment, he placed his hand in a machine used to sheer nap from cloth. The court in that case found that the injury did not arise out of and in the course of the employment, thereby precluding recovery. In a more recent case containing fundamentally the same factual situation, compensation was awarded. *Bernier v. Greenville Mills, Inc.*, 93 N. H. 165, 37 A. (2d) 5 (1944). The court decided in favor of the plaintiff in that case because he was not expressly forbidden to inspect the machine, because he was returning from the performance of a duty of his employment when his curiosity urged him on to his injury, because he was not acquainted with the nature of the machine, and because it might reasonably be expected that a boy of the plaintiff's age, experience, and apparent mentality would stop to inspect the machine in operation. Notwithstanding the apparent validity of the reasons pointed out by the court for awarding compensation, it appears that the view taken approaches an even more liberal interpretation of workmen's compensation laws.

Justice Carter dissented from the majority holding in the instant case. He was of the opinion that the terms "arising out of" and "in the course of" should be given a more liberal construction in order to effectuate the intent of the legislature and to reflect the very purpose of the Workmen's Compensation Act: to make compensable those accidental injuries connected with the employment for which liability had previously been denied. His reasons for deciding in favor of the plaintiff correspond in some respects to the bases upon which the compensation award was granted in the previously mentioned *Bernier* case. At this juncture, cognizance should be taken of the fact that, although the existing act has greatly enlarged the employer's liability, thus relieving the employee of the burdens and expense of litigating his own cause of action, it has defined certain definite limitations beyond which the employer will not be held accountable. One of these limi-

tations, and by far the most important one, is that the injury *must* "arise out of and in the course of" the employment in order to be compensable. These are the very words contained in the Nebraska Act. According to Justice Carter, the injury which befell the plaintiff should have been anticipated by his employer. The plaintiff was not prohibited from entering the room in which he was injured. It was a known fact that man is, by nature, an inquisitive being. Furthermore, in liberally construing the Nebraska Act, the only conclusion Justice Carter could derive was that the injury was incidental to the employment, and therefore compensable.

Apparently, if there is any reasonable connection between a dangerous activity or condition, within the scope or sphere of the employment, and the employee's injury, sufficient grounds are established for a compensation award. The present trend is toward a more liberal construction of statutes applying the already strict liability of workmen's compensation acts. It is conceivable, therefore, that an employer will eventually become subjected to a form of absolute liability. In the instant case, the majority of the court was not willing to liberalize to such a degree as to declare the plaintiff's injury compensable as arising out of and in the course of his employment, since they felt that he had clearly severed the employment relationship and went on a frolic of his own. To allow recovery in such a case, which was the professed intention of the dissenting justice, would effectively charge the employer with insuring the good health of his employees. True, liberal construction is to be favored, but liberalization cannot proceed to oppose the very wording of the Act without destroying the Act's validity and effectively reducing it to a worthless scrap of paper. The position of the dissenting justice appears to be untenable on the facts of the case. In a commendable effort to promote the spirit of the law and allow recovery in the situation here presented, the dissenting justice has gone to such lengths as to lose sight of the fundamental principles upon which compensation is allowed. In considering the extremes of liberal construction, the final decision of the Nebraska Supreme Court seems in accord with a reasonable and fair interpretation of the present Workmen's Compensation Act.

Albert R. Ritcher

CONSTITUTIONAL LAW—LABOR LAW—"RIGHT TO WORK" AMENDMENTS.—*Lincoln Federal Labor Union No. 19129, American Federation of Labor, et al. v. Northwestern Iron & Metal Co., et al.; Whitaker et al v. State of North Carolina,* ....U. S....., 69 S. Ct. 251 (1949); *American Federation of Labor et al. v. American Sash & Door Co. et al.,* ....U. S....., 69 S. Ct. 258 (1949). Long awaited because of their vital effect on fifteen state statutes, the decisions relative to the "Right to Work" Amendments, as they are popularly known, were delivered by the United States Supreme Court on January 3, 1949. The Court, with Mr. Justice Black writing the opinion, was unanimous in sanctioning the validity of the Nebraska constitutional amendment and the North Carolina statute, and rendered an eight to one decision (with Mr. Justice Murphy dissenting) upholding the Arizona statute. Mr. Justice Black most ably defined the so-called "Right to Work" amendments, saying: "Precisely what these state laws do is to forbid employers acting alone or in concert with labor organizations deliberately to restrict employment to none but union members."

Actually, the primary question with which the Court was concerned was the due process issue: Does the Due Process Clause forbid a state to pass laws clearly designed to safeguard the opportunities of non-union members to get and hold jobs, free from discrimination against them because they are non-union members? The Court answered this unequivocally in the negative.

A seemingly endless controversy has raged over the interpretation and use of the term "closed shop." Undoubtedly there has been, and still is, a social stigma implied in the connotation of the term. Consequently unionists have long favored the appellation "preferential shop" in lieu of the semantically unsavory "closed shop." For the purposes of clarity and this discussion, the following definition will govern:

> A closed shop, as popularly understood in the United States, is a place of employment where none but union members may work. 3 ENCYCLOPEDIA OF SOCIAL SCIENCES 568, 570 (1937).

With the inception of the 1929 Nevada statute, NEV. COMP. LAWS ANN. § 10473, (1929), many state legislatures have been, and remain solicitous concerning the role of the non-union employee. Just as the infamous "yellow-dog contracts" were eventually legislated out of existence by the Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U.S.C. § 101-115 (1946), it would appear that the public policy section therein, which barred employers from entering into non-enforceable understandings, may be reciprocally applied to the validity of the present state statutes. Thus, the state legislatures and the courts would be entitled to prevent employer-union contracts which preclude employing or retaining a non-union member, for the Norris-LaGuardia Act specifically reads ". . . wherefore . . . he should be free to decline to associate with his fellows. . . ."

In support of this reasoning, a recent United States Supreme Court case, decided subsequent to the cases under discussion, broached the question of the Commerce Clause, wherein the Court said:

> No serious question is presented by the Commerce Clause of the Constitution standing alone. It never has been thought to prevent the state legislatures from limiting "individual and group rights of aggression and defense" or from substituting "processes of justice for the more primitive method of trial by combat." [*International Union, U. A. W., A. F. of L., Local 232 et al. v. Wisconsin Employment Relations Board et al.*, ...U. S....., 69 S. Ct. 516 (1949).]

Non-enforceability of existent contracts between employers and unions was contested in the instant cases on the ground of violation of the Due Process Clause of the Fourteenth Amendment. Citing *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 570-571, 31 S. Ct. 259, 55 L. Ed. 328 (1910), which states:

> The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the state. . . While the court, unaided by legislative declaration, and applying the principles of common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law,

the Court said the legislation did no more than protect *both* union and non-union members from discrimination. Since the states have such constitutional power, it follows they also have power to ban contracts which, if performed, would lead to the barred discrimination.

A major, and rather devious allegation posed by the unions, was the contention that the state laws indirectly infringe their constitutional rights of speech, assembly and petition, as guaranteed by the provisions of the First and Fourteenth Amendments. The unions reasoned that a "closed shop is indispensable to achievement of sufficient union membership to put unions and employers on a full equality for collective bargaining. . . ." From a purely statistical viewpoint it is propitious to pause here to review union membership strength over the twenty-year period ending in 1948.

Union organizing culminated in a total membership of approximately 15,600,000 of a total of 50,400,000 employed in 1948, or a ratio of three out of ten; whereas, in 1928 the figures were 3,567,000; 35,505,000; and one out of ten, respectively. A cursory analysis of the above figures shows that the unions more than trebled their membership while the total employed in the United States increased by less than half. The union membership totals and the total employment figures for 1948 are taken from MEMBERSHIP OF LABOR UNIONS IN THE UNITED STATES, U. S. Dept. of Labor, Bureau of Labor Statistics (mimeographed pamphlet); the employment figures for 1928 are taken from *Employment and Unemployment of the Labor Force*, 1900-1940, 2 CONFERENCE BOARD RECORD 77, 80 (1940).

Indeed, a most vivid imagination would be required to conjecture as to the possibilities of a decline in union strength in view of these figures. In any event, the Court dispatched the argument saying:

> The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans.

Mr. Justice Frankfurter, in his concurring opinion, more than corroborated the Court's basic premises when he mentioned the extant principles of collective bargaining in Great Britain and Sweden, where no such uncompromising demands for contractually guaranteed security exist. He also, significantly, relied in great part on the writings, opinions and teachings of the late, great Mr. Justice Brandeis. A most important summary of Mr. Justice Brandeis' views on unionism was made in 1905, at which time he said:

> It is not true that the "success of a labor union" necessarily means a "perfect monopoly." The union, in order to attain and preserve for its members industrial liberty, must be strong and stable. It need not include every member of the trade. Indeed, it is desirable for both the employer and the union that it should not. Absolute power leads to excesses and to weakness: Neither our character nor our intelligence can long bear the strain of unrestricted power. The union attains success when it reaches the ideal condition, and the ideal condition for a union is to be strong and stable, and yet to have in the trade outside its own ranks an appreciable number of men who are non-unionist. In any free community the diversity of character, of beliefs, of taste—indeed mere selfishness—will insure such a supply, if the enjoyment of this privilege of individualism is protected by law. Such a nucleus of unorganized labor will check oppression by the union as the union checks oppression by the employer. [Quoted from Louis D. Brandeis' contribution to a discussion entitled *Peace With Liberty and Justice* in 2 NAT. CIVIC FEDERATION REV., No. 2, pp. 1, 16 (May 15, 1905).]

Without doubt Mr. Justice Frankfurter achieved a notable personal coup by referring to the UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 20, cl. 2, adopted by the General Assembly of the United Nations, December 11, 1948, declaring that "No one shall be compelled to belong to an association." This declaration, in a few words, summarized the whole public policy outlook of the Court.

The legislative fruit of the instant decisions may well be the passage of similar "Right to Work" Amendments in heretofore hesitant state legislatures, who have guided their legislative calendars with a wary "wait and see" intent. Unions surely should not have cause for concern, nor to sound the alarums, declaring an anti-union trend, inasmuch as thirteen states, thus far, have rejected similar proposals, sometimes repeatedly.

However, if the pendulum of policy should swing to such a degree that discrimination or collusion, to the detriment of the unions, again occurs, the Court may abrogate any state legislation that exceeds constitutional *power* under the guise of *policy*.

Henry Martin Shine, Jr.

CONTRACTS—NEGATIVE COVENANT ANCILLARY TO EMPLOYMENT CONTRACT.—*Orkin Exterminating Co. v. Dewberry*, ...Ga....., 51 S. E. (2d) 669 (1949). This was an appeal from the granting of an injunction which restrained defendant in certain particulars, and on judgment sustaining a demurrer to the answer, one portion of which stated that the contract in question was contrary to public policy, the decision of the trial court was reversed.

Defendant, a veteran-trainee, was employed by the plaintiff exterminating company. Several days after beginning work, he was required to sign a contract with the employer in which he covenanted not to engage in the same line of business within a seventy-five mile radius of certain cities in Georgia for a period of one year after his employment was terminated. Defendant subsequently resigned, and immediately thereafter took a similar job with a competing company in continuance of his on-the-job training. This was a bill to enjoin defendant from violating his agreement. The plaintiff alleged that the defendant was engaged in soliciting customers within the territory embraced in the terms of the contract.

The court held the contract unenforceable as contrary to public policy, unreasonable as to the excessiveness of the territory included, and otherwise unreasonable under the particular facts of the case.

A Georgia statute, GA. CODE, § 20-504 (1933), provides: "Contracts against public policy; . . . A contract which is against the policy of the law cannot be enforced; such are . . . contracts in general restraint of trade. . . ."

It is recognized everywhere that a contract in restraint of trade must be reasonable. There are numerous decisions to the effect that in order for a contract of this nature to be valid, it must be reasonable as to time and place, and not otherwise unreasonable. If the contract is unreasonable in any one of these particulars, it is invalid. *National Linen Service Corp. v. Clower*, 179 Ga. 136, 175 S. E. 460 (1934). In such instances, the reasonableness of the covenant is always a matter for the court to pass on, not the jury. *Hood v. Legg*, 160 Ga. 620, 128 S. E. 891 (1925).

In passing on this question, the court cited *Rakestraw v. Lanier*, 104 Ga. 188, 30 S. E. 735 (1898), as laying down the general test to which such covenants are subjected. There it was said: "The court will consider the nature and extent of the trade or business, the situation of the parties, and all other circumstances." With respect to the parties involved, therefore, the court must take into account whether the restraint is greater than is necessary for the reasonable protection of the party seeking relief, the effect of the restriction on the party to be enjoined, and whether it may so affect the interests of the public as to be contrary to public policy.

In the instant case, plaintiff contended that the trial court erred in not enjoining the defendant within the entire territory specified. There seemed no sound basis for this contention, for as the court pointed out, the contract embraced virtually the entire state of Georgia, and included areas in which the employer had never conducted business at all. In order that the contract be held reasonable, the restrictions must be confined to the territory in which the employer carries on his business. *Thomas W. Briggs Co. v. Mason*, 217 Ky. 269, 289 S. W. 295 (1926). In considering the question of whether the territorial limitations in the case at hand were too extensive, the court found no case in point

within the jurisdiction. Stating that in the majority of cases in which it had held such covenants valid, the restrictions had been confined to cities or towns, the court said that it had never yet held lawful an employment contract even approaching the dimensions embraced in the case under consideration. Nor did counsel for plaintiff offer any such cases in support of its position.

With respect to the ruling sustaining the demurrer, the court held this error, inasmuch as the contract was unduly harsh and oppressive and tended to deprive the employee of the right to make use of the experience and knowledge gained in such employment. The ease with which such contracts may be terminated by the employer would render any other rule inequitable and ineffective. The employee has nothing but his labor to sell, and more often than not, he is not in a position to be selective, whereas the employer generally is. In *Union Strawboard Co. v. Bonfield,* 193 Ill. 420, 61 N. E. 1038 (1901), it was said:

> The reason for the rule is, that it is against the policy of the state that the people of the whole state should be deprived of the industry and skill of a party in an employment useful to the public, and he should be compelled either to engage in other business or abandon his citizenship of the state and remove elsewhere in order to support himself and family.

Arising from this deprivation is the possibility that the employee and his children may consequently become dependent on the state. The duty of the court is of paramount importance in instances of this nature, for as was aptly stated in *Sternberg v. O'Brien,* 48 N. J. Eq. 370, 22 Atl. 348, (1891):

> To many persons the right to labor is the most important and valuable right they possess. It is their fortune; constituting the only means they have to obtain food, raiment, and shelter, and to acquire property. To such persons a deprivation of this right is ruin, and to abridge it is to do them an injury which will very likely result in their ruin. When, therefore, a court is asked to deprive a person of this right, or to abridge it, it is its duty before it acts, to consider with the utmost care whether, if it does what it is asked to do, it will not, on a careful comparison of consequences, do more injustice than justice.

By way of illustration, the court in the instant case drew a comparison between cases involving contracts of sale as distinguished from contracts of employment. Recognizing the fact that broader restraint is permitted in cases relating to a sale of business, the court cited the *Hood* case, *supra,* where it was stated by Judge Gilbert, drawing rather extensive from 6 R.C.L. 793 (1929):

> There are several reasons for upholding a covenant on the part of the vendor in all cases to desist from the business in competition with the purchaser, which do not obtain in other cases . . . the vendor receives an equivalent for his partial abstention from that business, in the increased price paid him for it on account of his covenant; and his entering into and observance of the covenant not only do not tend to his pauperization to the detriment of the public, but on the contrary, by securing to him the full value of his business and its good will . . . the covenant operates to his affirmative pecuniary benefit and against his impoverishment. . . .

On the other hand, in the *Rakestraw* case, which involved an employment contract, it was said that restrictive covenants:

> . . . tend to injure the parties making them, diminish their means of procuring livelihoods and a competency for their families; tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression; tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves.

The judgment of the trial court in restraining the defendant from working in areas he had covered while employed by plaintiff would have rendered adequate justice among all, had the contract not been otherwise unreasonable. In granting the injunction, it apparently failed to devote sufficient attention to the other attendant circumstances which tended to shroud the entire agreement with an unlawful taint.

The fact that a contract embraces more territory than reasonably necessary for the protection of the employer does not preclude it from being enforced to the extent of the separability of its lawful provisions. Equity will grant relief where the contract is clearly divisible, if the circumstances of the case warrant it. *New England Tree Expert Co. v. Russell,* 306 Mass. 504, 28 N. E. (2d) 997 (1940); *Consolidated Syrup Corp. v. Kaiser,* 22 N. Y. S. (2d) 307 (1940). In requiring employees to sign such covenants, however, employers are quite often tempted to include provisions more excessive than reasonably necessary for their protection, feeling confident that at least adequate relief will be granted, and possibly a bit more.

Aside from the unreasonable territorial feature involved, the court found the contract "otherwise unreasonable" and contrary to public policy under the particular facts of the case. Taking cognizance of the purpose for which the Servicemen's Readjustment Act, 58 STAT. 284 (1944), 38 U.S.C. § 693 *et seq.* (1946), was intended, it stated that the result of such a contract as this would be the waste of public money expended in training the veteran. Among the other things that influenced its decision were, (a) the representation of the plaintiff to the Veterans' Administration office that there was reasonable certainty that employment would be available to the veteran upon completion of his training, (b) the Veterans' Administration's ignorance of the contract clause, which it would not have sanctioned had it known the facts, and (c) the fact that the trainee's knowledge and experience gained in such employment would have been of no practical value to him and to the state if not permitted to use it. To substantiate its holding in this respect, it declared:

> It is manifest that the provisions of the Servicemen's Readjustment Act . . . were intended to furnish to veterans on-the-job training in order to speedily provide for their employment in a gainful occupation, to reduce the problem of unemployment among returning veterans, and to assure the veterans, provided with on-the-job training, of a reasonable certainty of using that training in a gainful occuption.

In support of its reasoning, the court cited *Robinson v. Reynolds,* 194 Ga. 324, 21 S. E. (2d) 214 (1942), as stating the applicable rule governing such cases. There it was held: "Contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit."

The decision of the court was sound in every respect. The policy of the American courts is to look with disfavor on agreements which are too oppressive or unreasonable, and which are inimical to the public welfare. Consequently, the courts strictly interpret bargains or contracts restricting competition, and are usually inclined to hold that the paticular act sought to be enjoined does not constitute an actionable breach. The purpose of any covenant of this type is to lessen competition with the covenantee, and to secure as great an advantage for him as possible. Thus, contracts of this nature naturally tend to eliminate competitors from the field and discourage contenders in such a manner that the necessary stimulus required to keep a healthy competitive business on its toes becomes either non-existent or is reduced to a state of feeble activity. The resultant consequences lead to but one thing: monopoly. Thus the law seeks to discourage and prohibit such contracts.

Cyril C. Vidra

BAILMENTS—SILENCE AND INACTION AS JUSTIFICATION FOR RECOVERY ON QUANTUM MERUIT.—*Tamburello v. Hurwitz-Mintz Furniture Co.*, 38 So. (2d) 668 (La. App. 1949). Suit was brought by the bailee, on a quantum meruit basis, to recover for storage of an old, dilapidated truck.

In 1938 the plaintiff, operator of an automobile parking garage, verbally agreed with the defendant, a furniture store partnership, to permit the latter to park three of the furniture store trucks in the plaintiff's establishment. The price agreed upon was a flat rate of nineteen dollars per month. In 1939, one of the aforementioned trucks became completely unusable, and was placed in a vacant lot belonging to the plaintiff adjoining the enclosed garage. The defendant's other two trucks, with one or more automobiles, continued to use the parking facilities. The defendant was well aware of the disposition taken as to the third truck. In 1947, after a disagreement between the parties, the defendant withdrew his vehicles from the plaintiff's establishment with the exception of the dilapidated truck which was left in the lot. All bills were paid up to that time.

Sometime thereafter the plaintiff sent the defendant a bill for ten dollars for one month's storage of the old truck. The evidence is vague as to the exact action the defendant advised the plaintiff to take, but it was in effect that the plaintiff might dispose of the truck in any manner that he chose, as the truck was worthless to the defendant. The plaintiff refused to dispose of the truck and continued to send the defendant monthly storage bills of ten dollars per month which were ignored completely until this suit was brought eleven months later.

The court held that the defense, as to an authorization to dispose of the truck, was not supported by sufficient evidence. Thus the plaintiff was under no duty and had no right to dispose of the truck, but the defendant was under a duty to remove the truck from the lot or dispose of it in some way. The plaintiff had rendered services for the defendant in keeping the truck upon his lot. The court further held that by leaving the truck on the lot after notification that monthly storage charges were being imposed, the defendant tacitly agreed to the rate charged and was liable for that amount. Quantum meruit was said to lie for a larger amount than the value of the truck stored because the space occupied by the truck was as valuable to the plaintiff as if used by a valuable truck.

Recovery on quantum meruit is allowed without regard to the intention or assent of the parties bound, but is dictated by reason and justice. The action was devised to allow recovery for benefits conferred, not gratuitously, but under circumstances precluding an implication of mutual assent. It is a contract implied in law to prevent unjust enrichment of the recipient at the expense of the plaintiff. 4 AM. JUR., Assumpsit § 5; 58 AM. JUR., Work and Labor § 2.

Upon termination of the bailment contract, in regard to the parking privileges of the three trucks, the plaintiff became a gratuitous bailee of the dilapidated truck. It was not the plaintiff's duty to remove the truck or dispose of it. He was held to have received no authority to do so. The plaintiff could have terminated the bailment by giving reasonable notice to the bailor (defendant) so that he would have opportunity to remove the truck. Upon tender and refusal to receive, the bailee (plaintiff) might lawfully have removed the truck from his premises or have it stored elsewhere at the risk and expense of the bailor. *Roulston v. McClelland*, 2 Smith 60 (N. Y. 1853); *Dale v. Brinkerhoff*, 7 Daly 45 (N. Y. 1877); *Weinstein v. Sheer*, 98 N. J. L. 511, 120 Atl. 679 (1923).

In order to change a gratuitous bailment to a bailment for storage or for compensation, the bailee must either notify the bailor, *G. A. Crancer Co. v. Combs*, 95 Neb. 403, 145 N. W. 863 (1914), or be reasonably certain that the bailor has knowledge of the situation and reasonable opportunity to remove the goods or subject himself to storage fees, *Christopher v. Jerdee*, 152 Wis. 367, 139 N. W. 1132 (1913). Generally, an offeree need make no reply to offers, and his silence