Notre Dame Law Review

Volume 23 | Issue 3 Article 6

3-1-1948

Recent Decisions

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mation". And it is concededly unfortunate that the legal basis of marriage must rest, partially, at least, in the shifting sands of contract law. While it is not fully acceptable, nor wholly Christian, the present attitude of the courts (and we are not speaking here of divorce, which is quite another problem) is better than the wholly un-Christian reasoning of the House of Lords.

Joseph V. Wilcox.

RECENT DECISIONS

UNITED STATES—STATUTORY CHARGES AND LIABILITIES.—*McLean v. United States*, 73 F. Supp. 775, (W. D. S. C. 1947). The United States cannot lawfully be sued without its consent, and this consent must be evidenced by an act of Congress. Therefore, suing the Federal Government is a privilege and not a right. A person who desires to take advantage of this privilege may do so only by a strict compliance with the terms and conditions prescribed by the manifest consent of the United States.

The plaintiff alleged in his complaint that he was convicted of manslaughter by a United States Navy Court Martial on Iwo Jima, Volcano Islands, in 1945, and was sentenced to imprisonment at hard labor for five years, to be followed by dishonorable discharge. He entered upon the service of his sentence, and after he had been in prison for approximately six months at the Navy Disciplinary Barracks at San Pedro, California, his conviction was set aside by the Judge Advocate General of the Navy, who adjudged that he was not guilty of the crime of which he was convicted and that his conduct in connection with the said charge did not constitute a crime against the United States or against any state, territory, or possession of the United States or of the District of Columbia, and that he did not intentionally, or by willful misconduct, contribute to bring about his arrest or conviction. He sues for damages in the sum of $5,000 against the United States under the provisions of the Act of May 24, 1938, 52 STAT. 438, 18 U. S. C. §§ 729, 730, (1941).

The defendant made a motion to dismiss the case on two grounds: (1) The district court lacks jurisdiction over the subject matter because exclusive jurisdiction is in the Court of Claims; and (2) the complaint fails to state a claim against the defendant upon which relief can be granted. The defendant also made a motion for summary judgment upon the ground that the plaintiff did not have a certificate of a court containing recitals or findings required by the statute.

The statute upon which the plaintiff based his right to the action provides essentially that anyone who has been convicted of a crime against the United States and has been imprisoned and has served any or all of his sentence and thereafter has been pardoned on the ground of innocence, may, subject to specified limitations, maintain suit against the United States in the Court of Claims for damages sustained by him as a result of such conviction and imprisonment. The limitations to the action are substantially summed up in the certificate of innocence from the court in which the person was adjudged not guilty, which is the only evidence admissable on the issue of innocence of the plaintiff, and which shall contain recitals or findings that—

> (a) Claimant did not commit any of the acts with which he was charged; or (b) that his conduct in connection with such charge did

> not constitute a crime or offense against the United States, or any State, territory or possession of the United States or the District of Columbia, in which the offense or acts were alleged to have been committed; and (c) that he has not, either intentionally, or by willful misconduct, or negligence, contributed to bring about his arrest or conviction.

To answer the general question, whether a person, who has been erroneously convicted by a court martial, may sue the United States for damages in a district court, the court had to resolve the circumstances into several issues of law. The first issue, the solution of which was an answer to the defendant's first ground for dismissing the complaint, was whether the action could be brought in the district court. From the wording of the Tucker Act, 24 STAT. 505 (1887), 28 U. S. C. § 41(20) (1941), and the decisions construing it, it is clear that the jurisdiction of the Court of Claims was expanded and that the District Courts have concurrent jurisdiction in all cases not sounding in tort where the amount involved does not exceed $10,000. The purpose of the Act, as was declared in *New York & O. S. S. Co. v. United States,* 202 F. 311, 312, (S. D. N. Y. 1912), was to provide a facility whereby persons having comparatively small claims against the United States could litigate them without being subjected to the expense and annoyance of suing in a court in Washington.

To state a claim upon which relief might be granted in accordance with the statute and in refutation of the defendant's second objection it has to be shown, not only that the United States could be sued for an erroneous conviction, but also that the plaintiff's supposed crime was against the United States; the court martial that convicted him was a lawful tribunal; the review of the court martial proceeding resulting in his exculpation was a judicial act having all the solemnity and significance of an act of a court of law, and was *res adjudicata* and not subject to review by a civil court.

The offense of which the plaintiff was convicted by the court martial was a violation of the Articles for Government of the Navy, REV. STAT. § 1624 (1862), 34 U. S. C. § 1200 (1941), which are congressional enactments finding their validity in Article I, Section 8 of the Constitution. Such an offense, violating an Act of Congress, is necessarily against the United States.

Courts martial derive their authority from enactment of rules for the armed forces, ARTICLES OF WAR, REV. STAT. § 1342, which are made by Congress as part of its constitutional function. The general judiciary scope of courts martial is expressed in *Carter v. Roberts,* 177 U. S. 496, 20 S. Ct. 713, 44 L. Ed. 861 (1900):

> Courts martial are lawful tribunals with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person or subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.

Article 54(b) of the Articles for Government of the Navy gives the Secretary of the Navy authority to review a court martial proceeding and remit or mitigate any sentence imposed. Under Article II of the Constitution, the final authority in military matters has been vested in the President, but this authority may be delegated to the Secretary of the Navy in matters involving the Navy. *United States v. Fletcher,* 148 U. S. 84, 13 S. Ct. 552, 37 L. Ed. 378 (1893); *United States v. Page,* 137 U. S. 673, 11 S. Ct. 219, 34 L. Ed 828 (1891).

The opinion that the action of the Secretary of the Navy (or the Judge Advocate General as in this case) in reviewing a court martial cannot be further reviewed in a civil court and is *res adjudicata* is advanced in 11 BROOKLYN L. REV.

30 which states: "While civil courts may review the determination of federal military tribunals, they are not empowered to exercise any appellate jurisdiction over them."

Thus it may be seen that the action of the plaintiff does conform to the requirements of the statute authorizing such suits in all particulars, with the single exception of producing the certificate of innocence from the reviewing authority. As to the defendant's motion for summary judgment because of this exception, the court decided that possession or non-possession of the certificate required by the statute was an evidentiary matter and could not be disposed of in the pleadings.

In authorizing suits against the United States for erroneous convictions, the statute has the beneficient purpose of compensating, as well as money can, for the injury of loss of liberty. By construing the statute to include those convicted in courts martial proceedings, the court here has set a precedent which will afford an able remedy for the many members of the armed forces who suffered erroneous convictions in this last war, many of whom are presently being exonerated by boards investigating unduly harsh and erroneous convictions.

William A. Adler.

SLANDER—LIABILITY OF PHYSICIAN FOR PUBLICATION OF FACT OF PATIENT'S VENEREAL DISEASE.—*Shoemaker v. Friedberg* . . . Cal. . . ., 183 P. (2d) 318 (1947). —Under what circumstances a physician may, without liability, publish the fact of his patient's venereal disease to third persons is a question which arises most frequently in defamation actions. Here his position as to privilege or liability is least well defined, owing to the anachronisms and confusion which exist in that branch of the law. Decisions like that in the instant case do not relieve the murkiness surrounding the subject of defamation, although the result reached seemed fair under the particular facts.

The defendant physician, on a house call, told the plaintiff, his patient, within hearing of plaintiff's mother, plaintiff's landlady, and a neighbor, that plaintiff was suffering from venereal disease. The statement was based on well-founded belief. Plaintiff had already told her mother and the landlady that defendant had notified her by letter of defendant's conclusions based on an examination, that plaintiff had the disease. The landlady had opened the conversation by speaking to defendant about the letter, and plaintiff made no effort to check the conversation, though knowing of the neighbor's presence. Defendant was ignorant of the neighbor's presence. Plaintiff sued for slander.

The court cited subdivision 3 of section 47 of the California Civil Code:

> In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information, [privilege exists].

No malice was found to exist on the part of the defendant, and in such a communication as is described in subdivision 3 of section 47 of the code "malice is not to be inferred from the communication or publication." CALIFORNIA CIVIL CODE § 48. The words, "to a person interested therein" cannot, of course, have reference to the plaintiff, since publication to the plaintiff is not at issue in defamation since it is publication to third persons concerning the plaintiff which gives rise to complaint. Such third persons in the instant case could be only the land-

lady, the mother, or the neighbor. Did the defendant physician come within the privilege? If so, it would be because he came under one of the three categories of privileged publisher set forth in the statute.

The court seemed unwilling to base its decision on classifying defendant as to the first type, "one who is also interested," although it said that as to the subject matter of the letter, defendant was interested, and later made reference to the case of *New York and Porto Rico S. S. Co. v. Garcia,* 16 F(2d) 734 (1926). In that case a physician employed by the defendant steamship company told the plaintiff in the presence of casual bystanders that the plaintiff had venereal disease. The plaintiff was not a patient of the physician, and the latter's statement was made in response to the plaintiff's inquiry as to why she should not be allowed to sail aboard the defendant's ship. The physician had been reliably informed as to plaintiff's condition through the United States Public Health Service. Although the court alluded to a possible "interest" on the part of the physician, the decision was undoubtedly based upon a regard for the duty of the physician, under the circumstances, to speak as a defensive measure.

Inconclusive, then, on the question of whether or not the defendant was described in the first category of privileged publishers under the statute, the court turned to the second category and here seems to have misread the statute. The court sought to establish a qualified privilege by noting that plaintiff's mother and landlady ". . . stood in such relation to plaintiff, and were persons interested in her, as to afford a reasonable ground for supposing that the communication made by defendant . . . was innocent," and thus qualifiedly privileged. But a careful reading of the statute discloses something wholly different. It says ". . . a communication . . . *by* one who stands in such relation . . ." (italics added). The statute, to give an illustration, means this: A, a family physician, has the privilege of telling B, C's parent, that C has venereal disease. B is clearly interested. A, as family physician, stands in such relation to B as to afford a reasonable ground for supposing that his motive in speaking of C's disease is innocent. This does not parallel the case at hand. The question, under the statute, was not as to whether the mother and landlady stood in "such relationship" to plaintiff, but whether the defendant stood in "such relationship" to the mother and the landlady. It might be argued that he did, and indeed at common law otherwise defamatory publications were permitted where they were in the real interest of others and there was a legal or moral duty upon the publisher to speak. The court might have found that the defendant had such a duty in this case. Though it is true that his words were addressed to plaintiff, it was not unlikely that the defendant intended both the landlady and the mother to heed them. But the court wholly ignored this basis on which to rest its judgment, though making reference to *Simonsen v. Swenson,* 104 Neb. 224, 177 N. W. 831, 9 A. L. R. 1250 (1920), wherein a physician disclosed information imparted by a patient to the plaintiff's landlord, in order to prevent the spread of disease, and it was held that the physician was not liable for the disclosure. This case, however, was not a defamation case at all, but an action for damages for breach of a confidential relationship.

The court next turned to the possibility of plaintiff's privilege under the third category of the statute, namely, one "who is requested by the person interested." As has been seen, this "person interested" must be either the mother, the landlady, or the neighbor. Did any of these request the publication by defendant? As far as the statute is concerned, that would now be the proper question, and not whether the plaintiff requested the publication. The court, however, neglected to examine the question of request by the mother, landlady or neighbor as interested persons. Instead, and with no reference to the fact that it was now going beyond the limits of the statute and into a traditional common law privilege—the court

said ". . . plaintiff at no time made any objection to the conversation nor did she attempt to stop [the landlady] in the evident intent to invite the defendant to discuss . . ." the plaintiff's supposed venereal disease.

> This silence of plaintiff is significant and would support the inference, if drawn, that [the landlady] was speaking for the plaintiff, at least with her tacit consent or approval, and with the intent of causing the defendant to discuss the contents of the letter, and to disclose the disease from which he believed plaintiff was suffering. This might be construed as an implied consent of the patient to the disclosure of the disease by the doctor.

It will be noted that the California statute does not include consent of plaintiff among the situations giving rise to privilege. Consent of the plaintiff created an absolute privilege at the common law; and where a statute, such as that cited in the case at hand, specifies in non-exclusive terms that privilege will arise under certain circumstances, it does not abrogate privileges recognized at common law which arose out of other circumstances. The court was correct in saying that plaintiff's conduct might have been construed as implied consent. It should have gone on to state definitely that out of such consent there could arise an absolute privilege.

As to the recipients: the court concluded (and, as noted, upon a seemingly erroneous reading of the statute) that defendant's statements were privileged as to the landlady and the mother. Actually, defendant's statements were privileged as to them, if at all, (1) because of defendant's relationship to the mother and to the landlady, or (2) because his oral statement was not news as to them. As has been seen, the first reason is subject to some doubt. The second reason raises two questions: (a) whether, after there has been publication *by* A's *letter* to C to the effect that B has venereal disease, a right of action for defamation arises in B upon a subsequent *oral* publication (i. e., publication in a new form) by A to C to the same effect; (b) whether, since injury to feelings is an element of damages in any action for defamation, a new cause of action ought not to arise upon each subsequent publication to the same person. Even though the repeated matter has ceased to be news as to him and the plaintiff's reputation is not actually further damaged, might not the law give a remedy to the plaintiff for mental suffering which he might incur under the repetition? The parallel situation in tort law would be any occasion on which a person is intentionally subjected to repeated injury to his feelings.

There remained, then, to consider the neighbor as a recipient. As to this, the court said:

> Consideration must be had of the bearing on the case of the statement by the defendant made in the hearing of [the neighbor] whom the evidence fails to disclose bore any close relationship to plaintiff or defendant so that those statements would be privileged as to [the neighbor].

But under the California statute the relationship of the neighbor to the plaintiff would be immaterial. As before stated, the statute gives the privilege where "such relationship" exists between defendant and (here) the neighbor. At common law, of course, even this privilege would not here exist unless the communication were clearly in the interest of the neighbor, which was admittedly not the case. After teetering momentarily upon this quite untenable limb, the court then moved—and more logically—to consider the neighbor as a casual bystander. The question to be raised here would be, of course, whether defendant's publication was excessive so as to destroy whatever qualified privilege he might have. (Query: Did the

defendant, either by virtue of the statute or by virtue of the common law doctrine as to consent, have an *absolute* privilege? If so, why be concerned with the question of destruction of privilege?) The test as to excess would seem to be whether the method of publication adopted were a proper and reasonable one. The court did not see fit to employ this test, but rather said: "It appears that [the neighbor] was merely a casual bystander who overheard the remarks of defendant without any connivance on [defendant's] part." The court also cited *Fahr v. Hayes,* 50 N. J. L. 275, 13 Atl. 261 (1888): "The presence of bystanders at that meeting was a mere casual incident, not in any sense sought for by the defendant, and for which therefore he should not be held responsible." But the fact that defendant did not connive for, or seek for the overhearer's presence is obviously not conclusive as to excess.

It seems remarkable that nowhere in this case is reference made to the absolute defense of truth in a civil action. The California statute makes no mention of this defense. The court speaks of defendant's acting upon reasonable belief, but only so as to show that he acted without malice.

This case is significant in two ways. First, accepting our defamation laws as they are, it shows the need for courts to follow them with care and to be clear and explicit in revealing through decisions the guides which these laws provide under particular sets of facts. The court here, although incidentally achieving a fair result under the facts given, in getting to its result, laid down some rules and spoke some dicta which do not seem correct. Litigants in future physician-patient defamation cases in California cannot turn to the decision for guidance, without finding the following difficulties therein:

1) Inconclusiveness as to whether, under similar circumstances, a physician is an interested party as to his patient, and therefore privileged.

2) The incorrect proposition that close relationship between the plaintiff and a third party creates a privilege in the publisher as to that third party.

3) The apparent confusing of rules relating to actions for slander and actions for physicians's breach of a patient's confidence.

4) The apparent confusion by the court of the question of "request" under the statute and the common law privilege arising from the plaintiff's consent.

5) Omission of the court, under the facts, to examine the question of abuse of privilege through excessive publication and the failure to apply correct tests as to excess.

6) (Possibly) The omission of the court to discuss truth as a defense.

William B. Ball

RIGHT OF PRIVACY—DISSEMINATION OF ROGUE'S GALLERY PHOTOGRAPHS AND FINGERPRINTS OF INDICTED PERSONS BEFORE TRIAL.—*McGovern v. Van Riper et al., O'Brien et al v. McGovern, Jenkins et al v. Same, Anzer et al. v. Same,* 140 N. J. Eq. 341, 54 A. (2d) 469 (1947). Law enforcement officers may not only take photographs and fingerprints of indicted persons, but may disseminate such photographs and fingerprints to other law enforcement agencies, before trial or conviction of the indicted persons. A statute authorizing this procedure is a valid exercise of the state's police powers and is not an unwarranted invasion of the right of privacy. Such was the holding in the instant case.

This was a consolidation for final hearing of bills of complaint brought by the various complainants to restrain the defendants, law enforcement officers, from taking and disseminating fingerprints and photographs of the complainants, who were under indictments of a county grand jury, but had not yet been tried or convicted.

William McGovern, acting in his capacity as county sheriff, arrested Jenkins, O'Brien, Anzer and others after their indictment. McGovern, as the arresting officer, was authorized by a state statute, R. S. 53:1-15 *et seq.*, N. J. S. A., to take and to send to the state bureau of investigation the photographs and fingerprints of the indicted persons at the time of their arraignment. Jenkins and the others then brought suit to enjoin McGovern from so doing, contending that the authorizing statute violated the right of privacy as alleged to be protected by the state and federal constitutions. Orders to show cause were issued, with *ad interim* restraint.

Meanwhile, McGovern was indicted by the county grand jury for failure to fingerprint and photograph certain indicted persons after they had pleaded to the indictments against them. He in turn brought suit to enjoin the taking and disseminating of his photograph and fingerprints unless and until he was convicted. The court refused to restrain the taking of such records, but held that that part of the statute which required their distribution before conviction violated the state constitution and was not a valid exercise of the state's police power. *McGovern v. Van Riper et al.*, 137 N. J. Eq. 24, 43 A. (2d) 514 (1945). McGovern appealed from the first part of the decision, but the appellate court affirmed it in *McGovern, Sheriff, v. Van Riper, Attorney General, et al.*, 137 N. J. Eq. 548, 45 A. (2d) 842 (1946). Although there was no appeal taken by the defendants as to the restraint against disseminating the records in question, the court took occasion to state that the authorizing statute did not violate constitutional rights.

This square contradiction of the lower court's opinion illustrates the difficulties involved in dealing with the hazy boundaries of the right of privacy. Since it was first discussed as a separate right, by Brandeis in 1890, 4 HARV. L. REV. 193, the right of privacy has been much discussed and defined. A representative definition is that given in the leading case of *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S. E. 68 (1905). It was there called ". . . the right of a person to be secure from invasion by the public into matters of a private nature."

It was early determined that taking photographs and measurements of prisoners for police records was not an invasion of the right of privacy. *Downs v. Swann*, 111 Md. 53, 73 A. 653 (1909). But the same case held that such records were not to be disseminated, and a later case granted an injunction against the circulation of police identification records in advance of conviction. *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905). This was one of the cases relied on by the chancery court in *McGovern v. Van Riper*. Such were the general rules prevailing in the majority of cases involving police identification files when Vice Chancellor Kays made his decision in the present case dismissing all the bills of complaints and ruling that dissemination before trial and conviction is not an invasion of the right of privacy.

In support of this decision, the court first met the lower court's objection in the *McGovern* case, that the right of privacy is a natural right and therefore unchangeable, by quoting *Pine v. Opzewski*, 112 N. J. L. 429, 170 Atl. 825, 830:

> Changing conditions necessarily impose a greater demand upon . . . the police power, for such reasonable supervision and regulation as may be essential for the common welfare. Acceptance of restrictions upon the so-called natural rights of every individual . . . is the first and most imperative obligation entering into what we call the social compact.

The court then cited three New Jersey cases which had been used as authority for the taking of photographs and fingerprints in the *McGovern* case. The first case of *Bartletta v. McFeeley,* 107 N. J. Eq. 141, 152 Atl. 17 (1930), affirmed 109 N. J. Eq. 241, 156 Atl. 658 (1931), arose before the statute in question, and mentioned as justification for dissemination the fact that it made it possible for police to discover whether the suspect was a second offender. The second case of *Bartletta v. McFeeley,* 113 N. J. Eq. 67, 166 Atl. 144 (1933), arose after enactment of the statute. Bartletta sought to have his record removed from the various rogues galleries to which it had been sent after his arrest. No indictment had then been found against him, but the court denied that it had authority to force return of forwarded records, and that there had been any impropriety in forwarding them. *Fernicola v. Keenan,* 136 N. J. Eq. 9, 39 A. (2d) 851 (1944), refused relief in similar circumstances on the grounds that the fingerprinting was necessary "for the benefit of society" and that possible future use justified the retention of the records by the various police forces. Coupling these opinions with the view of the appellate court in the *McGovern* case, the court held the statute to be within the police power of the state, to facilitate detection and punishment of crime.

The court further pointed out that indictment makes a private life a matter of public interest, thus removing it from the realm of the right of privacy to the extent demanded by the public interest. This is much the same as saying that a person may waive his right of privacy by becoming involved in a situation where the right is overcome by other considerations. It extends the rule that one convicted of crime forfeits his right of privacy to the extent required for society's protection, as stated in *Hodgmann v. Olsen,* 86 Wash. 615, 150 Pac. 1122, L.. R. A 1916A 739 (1915), to the case of one indicted, without regard to whether trial or conviction ever result.

A further justification that might be noted is that the alleged invasion of privacy is slight indeed, since the police files are not public. An Indiana case has held that the taking and filing of fingerprints upon arrest for misdemeanor is not an indignity, and constitutes no interference with privacy. *State ex rel. Mavity v. Tyndall,* .... Ind. ...., 66 N. E. (2d) 755 (1946). Here, perhaps, the "reasonable man" has grown calloused to essentially protective interference, so that he no longer considers it an infringement of his privacy. The same case held that whether or not a citizen acquitted of a misdemeanor might compel surrender or destruction of his identification records should be decided according to the balance in each case between the right of privacy and the public interest. The New Jersey decision seems based on sounder principle so far as equal treatment of all is concerned, and also in regard to protection of the public, since today's innocent victim may be tomorrow's offender, in which case existing records may aid in his apprehension.

John F. Bodle

CONSTITUTIONAL LAW—POWER OF A STATE TO REGULATE FOREIGN COMMERCE.—*Bob-Lo Excursion Company v. Michigan,* .... U. S. ...., 68 S. Ct. 358 (1948). Appellant, a Michigan corporation, operates excursion steamers from Detroit to a small island in Canadian waters known as "Bob-Lo", which it owns and upon which it conducts an amusement park. The steamers travel directly from Detroit to "Bob-Lo" on a one-day, round trip, pleasure excursion. Appellant maintained a policy of excluding colored people and upon excluding a certain colored girl, named Ray, the appellant was prosecuted and convicted in a criminal action in the Recorder's Court for violation of the Michigan Civil Rights Act, MICH. COMP.

LAWS (Supp. 1940) §§ 17115-146 to 17115-148, in the discrimination practiced against Miss Ray. The Supreme Court of Michigan decided that the company was a public conveyance and affirmed the decision of the Recorder's Court, 317 Mich. 686, 27 N. W. (2d) 139 (1947).

The narrow question presented to the Supreme Court of the United States was: does the Commerce Clause, of the Federal Constitution exclude the State of Michigan from applying its Civil Rights Act?

In the opinion of the Court, delivered by Mr. Justice Rutledge, the foreign commerce aspect of the excursion is made certain by reference to *Lord v. Goodall Steamship Co.*, 102 U. S. 541, 26 L. Ed. 224 (1880), in which it was decided that a ship traveling between two ports of the same state was foreign commerce and subject to federal control. When a ship sails the sea lanes with ships of foreign nations its character as foreign commerce is determined notwithstanding the fact that it does not trade with them or enter into a foreign port. Once a ship sails in company with foreign ships it is in foreign commerce and subject to the regulatory powers delegated to Congress.

Granting that this is foreign commerce, there is a special local interest apart from the federal interest in matters of immigration and navigation. The only established means of transportation to the island is on appellant's steamers, which begin and end their voyage in Detroit without touching the Canadian mainland. There are no established means of transportation from "Bob-Lo" to the Canadian mainland and vice versa. ". . . the island is economically and socially, though not politically, an amusement adjunct of the City of Detroit."

The local interest of a state is not precluded from protection solely by reason of the fact that it affects foreign commerce. The power granted by the Constitution to regulate foreign commerce is not exclusive. In *Cooley v. Board of Wardens*. 12 How. 299, 13 L. Ed. 996 (1851), the criterion is expounded. "Foreign commerce . . . includes various subjects, upon some of which there should be a uniform rule and upon others different rules in different localities. The power is exclusive in Congress in the former but not in the latter." The delegation of power to the Federal Government concerning foreign commerce did not absolutely curtail state action. States may legislate by virtue of their reserve police power, even though foreign commerce is affected, when the interest is primarily local and the legislation is reasonable. The recent decision of *Morgan v. Virginia*, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1318 (1945), noted in 22 NOTRE DAME LAWYER 133, recognizes the states' right to legislate in matters of predominately local interest which influence interstate commerce, if the legislation is not burdensome on such commerce. This should certainly be applicable to foreign commerce of a similar character.

Thus, the application of the Michigan Civil Rights Act to foreign commerce was affirmed by reason of the special local interest of Michigan upon the peculiar set of facts. The principle, said the Court relied on is as old as the Constitution, 1 STAT. 54, but the result from application to these facts is an innovation.

The dissent of Mr. Justice Jackson, joined in by Mr. Justice Vinson, asserts that the sphere of the states' power does not expand or contract because of the policy embodied in the legislation. Once commerce is deemed foreign the power of the states is excluded. The decision of the court is criticised for distinguishing degrees of foreignness without establishing a standard by which subsequent cases on the same point may be decided.

In a separate concurring opinion written by Mr. Justice Douglas and concurred in by Mr. Justice Black, a more fundamental principle is seen to be controlling. The need and reason for federal control of foreign commerce is uni-

formity of regulation; if uniformity is achieved the state action is valid. In the instant case the Michigan Civil Rights Act is in accord with federal policy and decision. *Mitchell v. United States,* 313 U. S. 80, 61 S. Ct. 873, 85 L. Ed. 1201 (1940). In *Missouri Pacific R. Co. v. Larabee Flour Mills Co.,* 211 U. S. 612, 29 S. Ct. 168, 53 L. Ed. 352, (1908), the states' power to require common carriers to perform their common law duty of rendering equal service to all is upheld even though it may affect interstate commerce. Uniformity is also indicated by *Mitchell v. United States,* supra, in which the Negroes' right to travel on a public carrier is stated to be a "fundamental right which is guaranteed against state action by the Fourteenth Amendment."

Perhaps, when the time is propitious, the court will discern that the right to travel on a public conveyance is fundamental and that both the state and federal government have a duty to protect the right, *per se,* foreign commerce notwithstanding.

Wm. J. Braunlich, Jr.

COMMUNITY PROPERTY—CONSTITUTIONALITY OF THE PENNSYLVANIA COMMUNITY PROPERTY ACT.—*Willcox v. Penn. Mutual Life Insurance Company,* .... Pa. ...., 55 A. (2d) 521 (1947). On July 7, 1947, by legislative enactment, Pennsylvania became the thirteenth community property state. The Act, effective September 1, 1947, was avowedly aimed at reducing federal income taxes. 96 U. OF PA. L. REV. 20, at 21 note 10 (1947). Several months later, in a friendly lawsuit to contest the validity of the Act, the entire enactment was declared unconstitutional as a deprivation of property under the due process clause of the Fourteenth Amendment of the Federal Constitution and a provision in the Declaration of Rights of the Constitution of Pennsylvania.

Mark Willcox, Jr., the plaintiff, was the assignee of all the rights under a policy of insurance issued in 1934 to one Shippen Lewis. At the time of issuance, Lewis was married to Mary F. W. Lewis and the marriage was still in effect when this action was brought. On October 1, 1947, prior to the assignment of the policy, Lewis paid the annual premium in advance. The money for payment was derived from three sources: (1) A part had been obtained by Lewis on September 30, 1947, as life tenant of a trust created many years earlier under the will of his grandfather; (2) another portion was paid by endorsing to the company a check which he had received on September 30, 1947, as a dividend on stock of the American Brake Shoe Company owned by him since 1943; and (3) the balance was paid in cash which he had owned prior to September 1, 1947. After the assignment plaintiff Willcox applied to the insurance company for the issuance of a paid-up policy based on the cash surrender value of the assigned policy and for a loan of $500. Admittedly, if the assignment was valid, planitiff was entitled to have these requests granted, but the insurance company refused to comply unless Mrs. Lewis, the wife of the insured, would agree. It was the company's position that since it had been notified that part of the premium payment apparently consisted of community property of Mr. Lewis and his wife, the latter had a legal interest in the value of the policy which limited the right of the husband, Mr. Lewis, to assign it without her consent. The relief prayed was a mandatory injunction directing the company to issue the paid-up policy and to grant the loan.

The Pennsylvania Supreme Court resolved the issues to be: 1. Whether, under the provisions of the Pennsylvania Community Property Act, two of the portions used to pay the annual premium on Mr. Lewis's policy were community property

in which a one-half interest belonged to his wife, namely, the portion derived from a dividend received by him after the effective date of the act but on stock owned by him prior thereto and the portion received by him after the effective date of the act as life tenant under a previously created trust. 2. If decided that the above did constitute community property under the statute, then whether the Pennsylvania Community Property Law is a valid legislative act.

In deciding that the above portions were community property, the court studied pertinent sections of the Pennsylvania act:

> Sections 1 and 2 of the Community Property Law state that the separate property of the husband and wife respectively shall consist of all property owned by him or her before marriage or before the effective date of the act, whichever is later, and that acquired afterwards by gift, devise or descent. Section 3 provided that all property, acquired by either the husband or wife during marriage and after the effective date of the act, except that which is the separate property of either, shall be deemed the community or common property of the husband and wife; in other words, everything which is not separate property under sections 1 and 2 is community property under section 3. The question then arises whether, under the first two sections, "all property of the husband (wife) . . . owned . . . by him (her) before marriage" does or does not include the income from such property accruing after the marriage. The answer to the question would seem to be indicated by section 4 of the act which provides that the wife shall have the management, control and disposition of her separate property and also of "that portion of the common or community property, consisting of her earnings, all rents, interests, dividends and other income from her separate property and all other common or community property, the title to which stands in her name." From this it would appear that the legislature intended that not only the wife's earnings but "all rents, interest, dividends and other income from her separate property" should constitute a portion of the common or community property, an inference strengthened by the phrase, "all . . . other common or community property, the title to which stands in her name." Of course, whatever is true in this respect of the wife's income from her separate property must apply similarly to the income of the husband from his separate property. *It therefore seems reasonably conclusive that income accruing to either spouse during the marriage and after the effective date of the act and arising out of property owned by such spouse prior to the marriage or to such date, becomes community property of which one-half belongs to each.* (emphasis supplied).

Having interpreted the statute to mean that the proceeds of separate property were community property, the court, in making a determination of the heretofore mentioned second issue, ruled the act unconstitutional as a deprivation of property without due process. Denying that the legislature has constitutional power to effect an involuntary transfer of property in the case of marriages existing before the effective date of the act, the court cited *Ervine's Appeal,* 16 Pa. 256, 263, 264, 55 Am. Dec. 499 (1851), where it was said that

> If the legislature possessed an irresponsible power over every man's private estate . . . all inducement to acquisition, to industry, and economy would be removed. . . . If the government is interdicted from taking private property even for public use without just compensation, how can the legislature take it from one man and dispose of it as they think fit. The great principle is (1) that a man's property is his own, and that he shall

> enjoy it according to his pleasure (injuring no other man) until it is proved in a due process of law that it is not his, but belongs to another.

Admitting the above principle, defendant argued that it is applicable to an act of the assembly which takes property from one stranger and gives it to another, but that it is not applicable to an act which takes from the husband and gives to the wife or vice versa. In denying that there is such a distinction, the Pennsylvania court said:

> While the legislature may have the power to alter and control the rights of curtesy and dower, since such rights *arise wholly out of the marriage relation itself* (Melizet's Appeal, 17 Pa. 449, 55 Am. Dec. 573; ....) it cannot transfer from one spouse to the other a property right *which existed before and entirely independently of the marriage.* Elder v. Elder, 256 Pa. 139, 100 A. 581.

The principle was laid down by Mr. Justice Harlan in *Baker's Executors v. Kilgore,* 145 U. S. 487, 491, 12 S. Ct. 943, 944, 36 L. Ed. 786 (1892):

> . . . the relation of husband and wife is . . . formed subject to the power of state to control and regulate both the relation and the property rights directly connected with it, by such legislation as does not violate those fundamental principles which have been established for the protection of private and personal rights against illegal interference.

In accordance with the Statutory Construction Act of May 28, 1937, P. L. 1019, § 55, 46 P. S. § 555, the court could have ruled the remainder of the act valid if the legislative intendment could have been accomplished. But inasmuch as the governor of Pennsylvania, in approving the bill, had made the statement that "the purpose of the recent legislation is primarily to effect savings on federal income tax" 96 U. OF PA. L. REV. 20 at 21 note 10 (1947), the court concluded that the entire act must fail because the purpose might be defeated on occasion.

As an alternative reason for declaring the Act invalid the court pointed out that

> Where a statute is so vague, indefinite and uncertain that the courts are unable to determine, with any reasonable degree of certainty, what the legislature intended or is so incomplete or conflicting and inconsistent in its provisions that it cannot be executed it will be declared inoperative. *Miller v. Belmont Packing and Rubber Co.,* 268 Pa. 51, 63, 110 A. 802, 806, (1920).

And since the Pennsylvania Act in one provision proclaimed, in effect, that all property acquired after marriage, not classified as separate property, would vest an undivided one-half interest in each spouse, Pa. Laws (1947) No. 550, §§ 1, 2, 3, 4; *Pa. Leg. Serv.* (Purdon 1947) p. 1499 and since the Act in other sections provided, in effect, that the husband (wife) could exercise complete control over the property and that his (her) creditors could reach that portion of it in his (her) name Pa. Laws (1947) No. 550, §§ 4, 7; Pa. Leg. Serv. (Purdon 1947) p. 1500 and because another Pennsylvania statute prevented the wife from suing the husband for illegal use of the community property, 48 PA. ANN. STAT. (Purdon 1930) § 111 it was the court's position that the

> Community Property Law is not only vague, indefinite and uncertain but so incomplete, conflicting and inconsistent in its provisions that it is incapable either of rational interpretation or of judicial enforcement and consequently under the principle previously referred to it must be held to be inoperative and void.

The decision serves as warning to any state considering community property legislation. Provisions for division of income from separate property and provisions with regard to the management and control of the community property should be carefully weighed and specificially written to prevent vagueness and inconsistency. What the effect of the decision will be on the other existing community property states is difficult to determine. The Oklahoma Act after which the Pennsylvania Act was patterned, 96 U. OF PA. L. REV. 20 and the Nebraska Act, which was also patterned after the Oklahoma Act, NEB. LAWS (1947) c. 156, might well be tested on constitutional grounds. Idaho, Louisiana and Texas are other community property states having statutes which might be interpreted to mean a deprivation of property without due process. 1 De Funiak, PRINCIPLES OF COMMUNITY PROPERTY, §§ 71, 77 (1943) (In the other community property states express statutory enactments prevent such an effect by providing that fruits and profits of separate property of a spouse shall also be the separate property of the spouse). 1 De Funiak, PRINCIPLES OF COMMUNITY PROPERTY, § 71, (1943).

In conclusion it is interesting to note that the invalidating of the Pennsylvania Act may have come at a very strategic time. As has been mentioned, the avowed purpose of the Pennsylvania statute was to effect savings on federal income tax. Tax legislation now before Congress, if it becomes law, will give to the nation the substantial tax advantage which has been enjoyed by the community property states. KNUTSON TAX BILL, H.R. 4790. If that happens, community property states will, of course, be on equal footing with all other states in the payment of federal income tax but the same community property laws will still be in effect and despite the tax savings they offer they are not always popular. They frequently lead to confusion on property rights, especially in the states that recently have piled community property laws on top of existing property laws. It is possible that the recent Pennsylvania decision will be the first link in a chain reaction among the community property states. The *causa proxima* would be enactment of the Knutson tax bill.

James A. Cassidy

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—DISCRIMINATION.—*Patton v. State of Mississippi*, ... U. S. ...., 68 S. Ct. 184 (1948). The defendant Patton, a Negro, was indicted by an all-white grand jury for the murder of a white man. The defendant filed a motion to quash on the grounds that he had been denied equal protection of the law as guaranteed by the Fourteenth Amendment to the Federal Constitution. The defendant proved that no Negro had served on either grand or trial juries for some thirty years in that county. The Mississippi Supreme Court denied his motion. The defendant appealed to the Supreme Court of the United States which reversed the decision and granted the motion. The holding was that the fact that no Negroes had served on the juries for such a long period of time would raise a presumption of discrimination which the state must overcome to defeat the defendant's motion. The state presented no evidence in the appeal to prove lack of discrimination.

As early as 1879, in *Strauder v. State of West Virginia*, 100 U. S. 303, 10 Otto 303, 25 L. Ed. 664 (1879), it was recognized that the purpose of the Fourteenth Amendment was to give to Negroes the usual civil rights granted to other citizens. This was held to include the right not to be discriminated against in the drawing of juries.

The majority of southern states draw their juries from the lists of voters in the county. Such a procedure does not violate the letter of the Fourteenth Amend-

ment, but voting requirements are set up, such as the poll tax, and the requirement of being able to read and interpret the state constitution. These voting regulations are aimed at excluding the Negro from voting and until recently indirectly affected his right to serve on juries. Since he was not a voter, and was not on the jury lists, exclusion from jury service was not on the basis of color. More recently, with the advance in education and economic status of the Negroes, more have been able to qualify as voters and have been placed on the jury lists. This situation has served to make the problem of racial discrimination against Negro defendants a serious one, although even today the proportion of qualified Negro jurors is extremely small as compared to qualified whites.

The proportion of Negro voters to white is about one in four hundred. Therefore, until recently, when an objection concerning racial discrimination has been brought before them, Southern courts have pointed out that it would be impossible to put one-four hundreths of a Negro on a jury. Thus, by looking at each particular case, the court could avoid looking at a long continued practice over a period of years. This was held error by the United States Supreme Court in this case.

Southern cases uniformly hold that while discrimination against a Negro in the calling of a jury would violate the Federal Constitution, the Negro defendant must prove the discrimination was solely because of color. A showing of the fact that no Negroes had served for a long period of time did not raise such a presumption. In the case at hand, the Court held that a showing that Negroes were qualified as jurors and had not been called for a long period of time would establish a presumption that discrimination had in fact been practiced. The state must then show that such was not the case; that racial discrimination had not in fact been practiced. This ruling stands squarely in accord with *Hill v. State of Texas,* 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559 (1942). It in effect recognized that not only laws but administration of the laws may violate a constitutional right.

It must be pointed out that the decision does not assure a Negro defendant that any Negro will be on the jury that tries him. It does demand that the qualified Negro on the jury lists be called the same as any other citizen.

In the light of the facts the decision seems reasonable. Surely such a showing of all white juries over a long period of time should raise a presumption of discrimination and the state in turn has the opportunity to disprove such a presumption. It seems, however, that the state would be in a better position to disprove the discrimination than would the defendant in attempting to prove discrimination. Whether the decision will effect the system of justice in the South remains to be seen. It is conceivable that new higher qualifications may be legislated for jury members which will not appear discriminatory on their face but will exclude the Negro from the jury in fact. For the present, the Court's holding, in affirming its prior stand on the problem, is a step forward in our system of justice and in the enforcement of the constitutional rights of all citizens.

The trend in the state courts is favorable in upholding the *Hill* and *Patton* cases. In *Dixon v. State* .... Ind. ...., 67 N. E. (2d) 138, (1946), the court pointed out that state courts are sworn to uphold the Federal Constitution. The court ruled with the Supreme Court and reversed a verdict because of racial discrimination. In a very recent case the Mississippi Supreme Court bowed to the *Patton* decision and reversed the stand it had taken in an earlier case on similar facts.

John J. Cauley

DAMAGES—NECESSITY FOR ASCERTAINMENT OF AMOUNT WITHIN REASONABLE APPROXIMATION IN TORT ACTIONS.—*Telluride Power Co. v. Williams,* 164 F. (2d) 685 (C. C. A. 10th, 1947). The opinion in this case contains the following statement:

> Recovery of damages cannot be had where there is a substantial uncertainty as to whether a tort was committed, *or where the tort was of such nature as to preclude the ascertainment of the amount of the damages within a reasonable approximation.* (italics added).

This rule, although it worked a good result in the instant case, is not of universal application. There are a number of actionable wrongs where the courts will presume compensatory damages.

> It is difficult to discover any money loss necessarily resulting from an assault without physical contact; an obstruction of the right to vote; expulsion from car without physical contact or injury; malicious prosecution . . . the seduction of a daughter; . . . alienation of a wife's affections . . . Yet courts find no difficulty in entertaining such actions and awarding compensatory damages. *Koerber v. Patek,* 123 Wis. 453, 102 N. W. 40 (1905).

An outstanding example of the recovery of substantial damages without the proof of pecuniary loss and where the court will presume damages, is recovery by one having the custody of a dead body when that body has been wrongfully mutilated. *Larson v. Chase,* 47 Minn. 307, 50 N. W. 238 (1891). A Utah court refused to find $1150 in damages excessive for the moving, without notice, of plaintiff's son from one cemetery plot to another. They held that since ". . . there is no accurate standard by which the injury can be measured . . . the jury must necessarily be permitted to exercise a wide discretion." *Thirkfield v. Mt. View Cemetery Assn.,* 12 Utah 76, 41 P. 564 (1895). In the case of an unauthorized autopsy damages were incapable of exact measurement and were left to the "sound judgment of the jury." *Palmquist v. Standard Acc. Ins. Co.,* 3 Fed. Sup. 358 (S. D. Cal. 1933). Substantial damages are allowable for ". . . injury to the feeling and for mental suffering resulting from such unlawful act, even though no pecuniary damage be alleged or proved." *Beller v. City of New York,* 58 N. Y. S. (2d) 112 (1945).

It is well settled in libel cases, that where the words published are libelous *per se,* general damages are recoverable and the plaintiff is not required to prove any specific injury. *Oklahoma Pub. Co. v. Givens,* 67 F. (2d) 62 (C. C. A. 10th, 1933). The law presumes general damages to be the natural and proximate consequence of such publication and does not require evidential proof of special damages. The amount of recovery is left in the hands of the jury and they may consider injured feelings, reputation, the character of the parties and the imputation itself. *Fenstermaker v. Tribune Pub. Co.,* 13 Utah 532, 45 P. 1097 (1896). The courts have recognized the same general rule in actions for slander. In such cases, as in libel, some slanderous words are *per se* actionable and the complaining party is entitled to substantial damages without proof of special damages. The law assumes that injury will flow from such words as a matter of course. *Kendell v. Lively,* 94 Colo. 483, 31 P. (2d) 343 (1934); *West Texas Utilities Co. v. Wills,* .... Tex. ...., 164 S. W. (2d) 405 (1942). Actionable slander where no proof of damage is required has been divided into four classes: that which imputes crimes or loathsome disease, that which affects the occupation of the plaintiff, and, more recently, that which imputes unchastity to a woman. The latter class has been in part due to modern statutes. Prosser, LAW OF TORTS (1941), Section 92, pages 798-9.

Malicious prosecution is another of the more common types of tort actions in which substantial damages may be recovered though pecuniary loss cannot be proved. In such a case, the loss may be "humiliation" or "mortification," the "injury to reputation" or "emotional distress." Courts generally presume such results to flow from the defendant's wrongful conduct and are "recognized as elements of damages under a general plea of damages . . . ." *Barnes v. Culver,* 192 Ky. 10, 232 S. W. 39 (1921). In *Drakos v. Jones,* 189 Okla. 593, 118 P. (2d) 388 (1941) the judge drew a comparison between this type of action and defamation, stating, ". . . . the plaintiff may recover for injuries such as mental or emotional distress and injury to reputation which necessarily result from such wrongful acts without specific proof that same have resulted in such harm." This view is also taken in *Foster v. Chicago, B. & Q. R. Co.,* 321 Mo. 1202, 14 S. W. (2d) 561 (1928); and in *Hayes v. Ketron,* 223 Ky. 119, 3 S. W. (2d) 172 (1928).

Such is the case in various actions having their basis in domestic relations. Criminal conversation is the invasion of a legal right based on the marriage contract. Damages may be recovered following such a disruption for the "loss of consortship" or "humiliation and disgrace" or "anguish of mind." None of which would seem to be "susceptible to exact admeasurement" but may be, nevertheless, the basis for recovery. *Browning v. Jones,* 52 Ill. App. 597 (1893). The same, generally, is true of alienation of affections. "The gist of the action is loss of consortium . . ." It may be maintained where there is no "loss of service or . . . pecuniary damage whatever . . ." and even if the husband continues to live with his wife. *Woodhouse v. Woodhouse et ux.,* 99 Vt. 91, 130 Atl. 758 (1925).

The foregoing illustrates the fact that there need not always be an ascertainment of damages within a reasonable approximation. Indeed, the cases point out that substantial recovery is often allowed where there is no practical basis whatsoever from which a jury may maintain damages.

F. J. Coufal

SCHOOLS AND COLLEGES—RACIAL DISCRIMINATION.—*Sipuel v. Board of Regents of University of Oklahoma et al.,* .... U. S. ...., 68 S. Ct. 299 (1948). On January 14, 1946, Ada Louis Sipuel, a Negro, concededly qualified to receive the professional legal education offered by the state, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the State of Oklahoma. Petitioner's application for admission was denied, solely because of her color.

Petitioner then made application for a writ of mandamus in the District Court of Cleveland County, Oklahoma. The writ of mandamus was refused, and the Supreme Court of the State of Oklahoma affirmed the judgment of the district court.

The case was then brought to the United States Supreme Court on writ of certiorari to the Supreme Court of the State of Oklahoma. The Supreme Court held that the petitioner is entitled to secure legal education offered by the state institution. This privilege had been denied her up to this time, although many white applicants had been afforded legal education. Since this is in conflict with the equal protection clause of the Fourteenth Amendment the Supreme Court ordered the Board of Regents of the University of Oklahoma to provide legal education to the petitioner as soon as it does for applicants of any other group.

In compliance with this mandate the Supreme Court of Oklahoma rendered an opinion of January 17, 1948, which said:

> Said Board of Regents is hereby directed, under the authority conferred upon it by the provisions of Art. 13-A, Constitution of the State of Oklahoma, and Title 70 O. S. 1941, Secs. 1976, 1979, to afford to plaintiff, and all others similiarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups are afforded such opportunity, in conformity with the equal protection clause of the Fourteenth Amendment of the Federal Constitution and with the provisions of the Constitution and Statutes of this state requiring segregation of the races in the schools of this state. Art. 13, Sec. 3, Constitution of Oklahoma; 70 O. S. 1941, Secs. 451-457. *Sipuel v. Board of Regents* .... Okla. ...., ... P.. ...., 16 L. W. 4167.

On January 22, 1948, the District Court of Cleveland County of Oklahoma declared that unless the Oklahoma State Regents for Higher Education established a law school which would afford a legal education substantially equal to that provided for white students, the petitioner would have to be admitted to the University of Oklahoma. Until such a law school is provided, any person who makes timely and proper application to enroll must be accepted and remain on the same scholastic basis as other students. Should the Board of Regents for Higher Education refuse to admit a Negro applicant concededly qualified to receive legal training, they cannot enroll or admit any other applicant. Consequently, under this mandate Negroes and whites who are qualified to enter the law school at the University of Oklahoma must be admitted together, otherwise the exclusion of any applicant will mean exclusion of all applicants.

This mandate is all right as far as it goes, but why limit the exclusion to applicants? If anyone is receiving legal training, while at the same time others are being denied it, is this not unlawful discrimination and contrary to the equal protection clause of the Fourteenth Amendment? If an applicant is denied the right to receive legal training to which he or she is entitled, then in order to abide by the Constitution of the United States no one else has the right to legal education, be he an applicant or advanced student. Therefore, if a state denies the right of legal education to a qualified applicant because of his race, it thereby forfeits the right to maintain a state law school.

After the issuance of the mandates by the State Supreme Court and District Court of Cleveland County, the petitioner moved to file a petition to the United States Supreme Court for a writ of mandamus to compel compliance with the mandate issued in *Sipuel v. Board of Regents,* .... U. S. ...., 68 S. Ct. 299 (1948).

Motion for leave to file petition for writ of mandamus was denied. It was held that by ordering Oklahoma State Regents to admit a qualified Negro applicant to the University of Oklahoma Law School where she may remain until a separate law school is established and ready to function, the Oklahoma County Court did not depart from the United States Supreme Court's mandate in *Sipuel v. Board of Regents of University of Oklahoma,* .... U. S....., 68 S. Ct. 299 (1948). See *Sipuel v. Hurst,* 16 L. W. 4167.

The issue in this case was not whether the Board of Regents was able to satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes, but rather the failure to provide equal legal training facilities as soon as it does for white students. The "separate but equal" theory of education has long been upheld as to its validity under the Fourteenth Amendment of the United States Constitution. *State of Missouri ex rel. Gaines v. Canada,* 395 U. S. 337, 344, 59 S. Ct.. 232, 83 L. Ed. 208 (1938); *Plessy v. Ferguson,* 163 U. S. 537, 544, 258, 16 S. Ct. 1138, 41 L. Ed. 256 (1896); *McCabe v. Atchi-*

son, T. & S. F. Ry. Co., 235 U. S. 151, 160, 35 S. Ct. 69, 59 L. Ed. 169, 173 (1914); *Gong Lum v. Rice,* 275 U. S. 78, 85, 86, 48 S. Ct. 91, 72 L. Ed. 172, 176, 177 (1927).

However, the question arises, can a Negro student receive as good a legal training in a school that is established overnight as in one that has been long established and well-known? Is it within the spirit of the United States Supreme Court's mandate in *Sipuel v. Board of Regents of Oklahoma* to have equality by legal fiction in establishing such a law school rather than equality in fact by admitting Negro students to the University of Oklahoma? Mr. Justice Rutledge in his dissenting opinion answers in the negative to these questions. He states that "no separate law school could be established elsewhere overnight capable of giving petitioner a legal education equal to that afforded by the state's long established and well-known state university law school." *Sipuel v. Hurst,* 16 L. W. 4167 (1948). Also worthy of note is Mr. Justice Murphy's opinion that a hearing be had in order to determine whether the action of the Oklahoma courts subsequent to the issuance of the United States Supreme Court's mandate in *Sipuel v. Board of Regents of University of Oklahoma,* .... U. S. ...., 68 S. Ct. 299 (1948) constitutes an evasion of that mandate.

On paper the "separate but equal" theory is workable and held constitutional; however it is a legal fallacy when put into actual practice. 23 NOTRE DAME LAWYER, 220. This segregation is found in seventeen southern states and the District of Columbia. Whether the test be by expenditure per pupil, teachers' salaries, the number of pupils per teacher, transportation of students, adequacy of school buildings and educational equipment, length of school term, extent of curriculum, there is a marked difference in quality between the opportunities afforded the white children as compared to those afforded Negro children. The present case is but a confirmation of the fictional legal equality existing under the "separate but equal" theory, and the absence of equality in fact.

Louis F. Di Giovanni

FEDERAL FOOD, DRUG, AND COSMETIC ACT—MISBRANDING OF A DRUG.—*United States v. Sullivan,* .... U. S. ...., 68 S. Ct. 331, 1948).—A retail druggist in Columbus, Georgia, was charged with certain acts which resulted in sulfathiazole being misbranded while held for sale after shipment in interstate commerce. The drug in question had been shipped in interstate commerce from Chicago, Illinois, to a consignee at Atlanta, Georgia. The drug was in tablet form and the druggist bought a bottle of 1,000 tablets, which bottle was properly labeled as required by section 502 (f) (1) and (2) of the Federal Food, Drug, and Cosmetic Act, 52 STAT. 1040 (1938), 21 U. S. C. § 352 (1940). On two occasions the druggist removed twelve tablets from the properly labeled bottle, placed them in boxes labeled "sulfathiazole" and sold them to customers. The boxes sold did not contain the adequate directions for use or warning of dangers, as required by statute.

This case came to the Supreme Court on a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. The latter court thought that the act of the druggist may be called misbranding in the broadest possible sense of the Act's language. However, it was the opinion of the Court that this interpretation was too broad and that the Act applied only to the first sale by the importer after interstate shipment.

The Court in finding the druggist guilty has interpreted section 301 (k) of the Federal Food, Drug, and Cosmetic Act of 1938, 52 STAT. 1040 (1938), 21 U. S. C. § 301 (1940), which prohibits

> (k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded.

From this interpretation there is imposed a duty on the one who sells to the consumer. This duty is to provide that a drug having passed in interstate commerce shall be labeled to include adequate directions for use and such adequate warnings against a use dangerous to health, or against unsafe dosage, as are necessary for the protection of users. Thus Congress, in using the power to regulate commerce among the several states as provided by Article I, Section 8, of the Constition of the United States, has passed an act to protect the consumer; and to guarantee this protection, it has imposed the possibility of criminal liability on the one who sells directly to the consumer.

The decision in the instant case follows a trend of legal interpretation looking to protection of the consumer which goes back to cases decided under the Pure Food Act of 1906, 34 STAT. 768 (1906), repealed by 52 STAT. 1040 (1938), 21 U. S. C. §§ 1-5 (1940), and continues to the present. In *Hipolite Egg Co. v. United* States, 220 U. S. 45, 31 S. Ct. 364, 55 L. Ed. 364 (1911) the Court held as constitutional the confiscation of misbranded articles which had passed in interstate commerce and were still in the original packages in the hands of the importers. That articles having moved in interstate commerce shall be and remain branded under the Federal regulations until they reach the consumers was decided in *McDermott v. Wisconsin,* 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 754 (1913). This case held that the provisions of the Federal Pure Food Act superseded the Wisconsin law relating to the labeling of food articles if such articles had passed in interstate commerce. That the purpose of the act was to secure the purity of food and drugs and to inform the purchasers of what they were buying was decided in *United States v. Antikamnia Chemical Co.,* 231 U. S. 654, 34 S. Ct. 222, 58 L. Ed. 419 (1914). Again emphasis was placed on the protection to the consumer in *United States v. Lexington Mill Co.,* 232 U. S. 399, 34 S. Ct. 377, 58 L. Ed. 658 (1914) and in *United States v. Schider,* 246 U. S. 519, 38 S. Ct. 369, 62 L. Ed. 863 (1918). These cases held that the legislation was intended to make it possible for the consumer to know that an article purchased was what it purported to be. The constitutionality of making unlawful the sale of one article under a misleading label was upheld in *Seven Cases v. United States,* 239 U. S. 510, 36 S. Ct. 190, 60 L. Ed. 411 (1916) and in *Weeks v. United States,* 245 U. S 618, 38 S. Ct. 219, 62 L. Ed. 513 (1918). The prevention of injury to public health was brought out in *United States v. Ninety-Five Barrels, More or Less, Apple Cider Vinegar,* 263 U. S. 695, 44 S. Ct. 529, 68 L. Ed. 1094 (1923) as being the primary purpose of the Food and Drug Act. The relationship of Congress to public health was stated in *United States v. Darby,* 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941) by holding that:

> Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed upon interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare.

Section 301 of the Federal Food, Drug, and Cosmetic Act of 1938 was held constitutional in *United States v. Commercial Creamery Co.,* 43 Fed. Supp. 714 (E. D. Wash. 1942) as an exercise of the authority of Congress to prevent the facilities of commerce from being used to transport impure and adulterated food to the people who consume them. The necessity for a broad construction of the Act was

stated in *United States v. Research Laboratories, Inc.*, 317 U. S. 656, 63 S. Ct. 54, 87 L. Ed. 528 (1942). This case held that the Act was designed to prevent injury to public health. The liability of the agents of a corporation in shipping misbranded or adulterated drugs in interstate commerce was upheld as part of the extended practical construction by the Court in *United States v. Datterwiech*, 320 U. S. 277, 64 S. Ct. 134, 88 L. Ed. 35 (1943). Liberal construction and protection of the public are the basis for the decision in *United States v. Seven Jugs, etc., of Dr. Salsbury's Rakos*, 53 Fed. Supp. 746 (Dist. Ct. D. Minn. 1944). In *United States v. Two Bags, Each Containing 110 Pounds, Poppy Seeds*, 147 F. (2d) 123. (C.C.A. Ohio 1945) the court held that the purpose of the Act was to inform purchasers of what they are buying, and the provisions must be construed to effect that purpose.

The summation of the above trend of interpretations is very effectively stated in the words of the Court in *United States v. Walsh*, 331 U. S. 432, 434, 67 S. Ct. 1283, 91 L. Ed. 1175 (1947):

> The commerce clause of the Constitution is not to be interpreted so as to deny to Congress the power to make effective its regulations of interstate commerce. Where that effectiveness depends upon a regulation or prohibition attaching regardless of whether the particular transaction in issue is interstate or intrastate in character, a transaction that concerns a business generally engaged in interstate commerce, Congress may act.

The dissent of Mr. Justice Frankfurter does not deny that the intent of Congress was to protect the ultimate consumer. However, it is his contention that section 301 (k) refers to not only drugs but also to food and cosmetics. On the test showing the impractibility of the corner grocer's being required to label each little bag of food that has passed in interstate commerce in the bulk and the selling of which necessarily requires placing part of the bulk in a different container, the Justice infers that Congress did not intend that the druggist be required to do this labeling with a drug. This contention strikes at the vital issue in the case. To uphold the decision of the court it is necessary to say that "the doing of any other act" of section 301 (k) applies not to food, drugs and devices, and cosmetics taken together but rather to the individual categories of food, drugs and devices, and cosmetics and the misbranding of each of the categories contained in the separate and differing sections of the Act (§§ 403, 502, 602) on misbranded food, misbranded drugs and devices, and misbranded cosmetics. But here a criminal liability is imposed. The right "to be informed of the nature and cause of the accusation" stated in the United States Constitution Amendment VI, was held in *United States v. Potter*, 56 Fed. 83 (C. C., D. Mass. 1892) and in *Paraiso v. United States*, 207 U. S. 368, 28 S. Ct. 127, 52 L. Ed. 249 (1907) to mean that the elements of a crime must be in some way declared by the legislative power, and cannot be constructed by the courts from any supposed intention of the legislature which the statute fails to state. The dissent holds that the Act is far from clear and that the elements of the present crime are constructions of the court and not a declaration by the legislative power. The words of Justice Frankfurter are:

> If it takes nine pages to determine the scope of a statute, its meaning can hardly be so clear that he who runs may read, or that even he who reads may read. Generalities regarding the effect to be given to the "clear meaning" of a statute do not make the meaning of a particular statute "clear." . . . If differentiations are to be made in the enforcement of the Act and in the meaning which the ordinary person is to derive from the Act, such differentiations are interpolations of construction. They are not expressions by Congress.

The Act makes provisions for an Administrator who is authorized to make exceptions in cases where compliance with the provisions is not necessary for the protection of the public health. The House Committee on Interstate and Foreign Commerce reported (H.R. 2139, 75th Cong. 3d Sess., 3) on section 301 (k) as follows:

> In order to extend the protection of consumers contemplated by the law to the full extent constitutionally possible, paragraph (k) has been inserted prohibiting the changing of labels so as to misbrand articles held for sale after interstate shipment.

In addition section 352 (f) provides that a drug shall be deemed to be misbranded:

> . . . Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: Provided, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Administrator shall promulgate regulations exempting such drug or device from such requirement.

From the actual and separate categories of food, drugs or device, and cosmetics the intent of Congress to refer to each of these categories separately has been shown and the differentiations made in the interpretation of section 301 (k) are warranted.

Legislation providing for the protection of the ultimate consumer must necessarily be extensive in scope. In this Act the phrase "the doing of any other act" of section 301 (k) is large enough to include all possible offenders. Here the offense is a possible injury to public health. Legislation of this type can be limited only by the final definition of what constitutes public health.

George B. Kashmer

CO-OPERATIVES—EXTENT OF POWERS OF AGRICULTURAL PURCHASING CO-OPERATIVES.—*State* ex rel. *Arn., Attorney General, v. Consumers Co-op., Ass'n. et al.*, 163 Kan. 324, 183 Pac. 423 (2d) (1947). Litigation questioning the powers and activities of agricultural co-operatives has been before the courts on numerous occasions. Heretofore, those organizations concerned have been, in most instances, agricultural marketing co-operatives, and they have been able to maintain successfully the validity of their granted powers in the majority of cases. 35 AM. JUR. 154. In the present case, however, the defendant CCA was an agricultural purchasing, or consumer, association. This was a quo warranto action, in which a revocation of the CCA's charter was sought on the ground that it was exceeding its lawful powers. The court tells us that this case was the culmination of agitation in the last two sessions of the Kansas legislature, based principally on the complaint that co-operatives such as the CCA were engaged in active competition with private business. The usual tax question, however, is not involved in the present case.

The foundation for the anxieties of private businessmen can readily be seen by a look at the octopean activities of the CCA. This organization conceded that it was:

> . . . engaged in international trade, including the shipping of petroleum products overseas to the extent that during 1946 approximately three million gallons of motor oil were shipped to some ten different countries; that it has entered into exchange agreements with all major and independent oil companies in connection with the transportation of oil and gasoline; that it owns and operates oil refineries at Coffeyville, Kan., Phillipsburg, Kan., and Scotts Bluff, Nebr., where it has a total annual production of more than 130 million gallons of refined fuels and can handle approximately six million barrels of crude oil a year, in addition to a one-third interest in a refinery at McPherson; it owns and operates canning plants, lumber mills, soybean plants, paint factories and printing plants; is engaged in manufacturing and owns and operates retail service stations and food stores; buys, owns and holds extensive oil and gas leases and royalties and oil producing properties and drills, operates and produces some 450 or more oil wells with annual oil runs of near one and three-fourths million barrels; owns and operates a system of oil pipelines and publishes a biweekly paper; operates auditing management services and operates insurance agencies.

The CCA claimed to be operating properly under Kansas G. S. 1935, Chapter 17, Article 16, the Cooperative Marketing Act. Looking into the act the court found among its announced purposes that associations organized under the act may engage

> . . . in any activity in connection with . . . the manufacturing, selling, or supply to its members of machinery, equipment, or supplies; . . . Nothing in this act shall authorize such association to engage in the banking business. Kansas G. S. 1935 17-1604.

As to the powers granted by the Act the court saw that the cooperative associations could, among other things,

> . . . engage in any activity in connection with . . . the purchase, hiring, or use by its members of supplies, machinery or equipment; or in the financing of any such activities; . . . Kansas G. S. 1935 17-1605 (a)

with the additional power:

> To do each and everything necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the subjects therein (herein) enumerated; or conducive to or expedient for the interest or benefit of the association . . . Kansas G. S. 17-1605 (g).

The plaintiff, in his brief appealed to the preamble to the Act, Kansas G. S. 1935 17-1601, which made mention only of marketing co-operatives, in an attempt to obtain a narrow construction of the act, but this proposition was disregarded by the court for the reason that,

> . . . if there is a broader proposition expressed in the act than is suggested in the preamble, the body or enacting part of the law will prevail over the preamble. 50 AM. JUR. 297.

Another rule of construction relied upon by the court was that co-operative marketing acts should be liberally construed, so as to uphold the purposes of the legislation. However, it should be noted that none of the cases cited in support of this rule involved co-operatives of the purchasing type.

Interpreting the applicable statutes in the light of the above-mentioned rules the court was logically led to the decision that the CCA had the lawful power

to own and operate oil wells and pipe lines, which acts, in the opinion of the court, had precipitated the present action.

In addition the court ruled that the CCA did not violate the statutes by having among the common stockholders some 218 co-operative societies organized under Kansas G. S. 1935, Chapter 17, Article 15, and 732 co-operative associations organized under the laws of other states and six European countries.

The State Corporation Commission had been joined as a defendant in order to obtain the ruling of the court on various instruments issued by the CCA. In this regard, the most important decision of the court was that the issuance of Deferred Patronage Refund Certificates did not constitute a sale of securities.

It would seem that the court (perhaps without full realization) put its finger upon the heart of the whole problem of agricultural co-operatives today when it said:

> The fact that this question has arisen demonstrates the truth of the doctrine that once a step is taken in a certain economic direction the end lies along a path which perhaps was not contemplated at the outset when the step was first taken.

Many ramifications of co-operatives are apparent today which undoubtedly were not foreseen by those legislators responsible for the co-operative legislation, the motivation for which was a desire to raise the substandard income level of the farmers by strengthening them in their bargaining with other business interests. There is almost no limit to the powers which agricultural co-operatives may assume under the Kansas statutes and comparable legislation elsewhere when interpreted in the manner of the court in the present case. If such powers are carried to their fullest logical application, then we shall have a community within a community, with an entirely self-sufficient agricultural population existing amid the interdependent capitalism of the remainder of the population. For, indeed, the other segments of the population have shown but comparatively little inclination toward co-operatives. As an indication of this trend we see that one-sixth of all farm supplies purchased in America are handled by consumer, or purchasing, co-operatives. *Commerce and Industry Ass'n Report, Tax Liability of Co-operatives* 7 (1946). Instead of the harmony envisioned by the co-operativists in a system wherein all groups are co-operatively organized, we shall see the discord resulting from a division of the country into pro-agriculture and anti-agriculture camps. Already this is evidenced by the great agitation on both sides concerning the taxing of co-operatives. Also we see that many false co-operatives have been able to masquerade as such for the purpose of enjoying the great benefits thereby derived.

The time for haphazard legislation concerning co-operatives is past. We must decide what we want and order our laws to that end. If the decision should be to limit the growing power of the agricultural co-operatives, then it must be done with a realization of the proved needs for certain services of these organizations. The legislation of Virginia on co-operatives, as it is reviewed and interpreted in *Rockingham Co-Op Farm v. City of Harrisonburg*, 171 Va. 339, 198 S. E. 908 (1938), exemplifies how to limit co-operatives in a precise and unambiguous manner.

Robert D. Londergan.

COURTS—CRIMINAL LAW—DUE PROCESS.—*Marino v. Ragen*, ...U. S....., 68 S. Ct. 240, 92 L. Ed. 203 (1947). Petitioner, Tony Marino, was convicted on a charge of murder in 1925. At the time he was eighteen years of age, unable to read, write, or understand the English language and ignorant of American trial court procedure. Having been advised by his interpreters, one of whom was the arresting officer, of the meaning and effect of a plea of guilty to the charge, Marino waived a jury trial and pleaded guilty. He was sentenced to life imprisonment. It later appeared, however, that counsel was not appointed to represent him nor was the waiver in fact signed by him or a plea of guilty entered at the trial. These facts were conceded by respondent.

After an interval of twenty-two years he sought a writ of habeas corpus alleging that his conviction was the result of a denial of his right under the Federal Constitution. The Circuit Court of Winnebago County, after hearing, quashed the writ. A writ of certiorari was then filed with the Supreme Court of the United States, properly addressed to the same Circuit Court; this in conformity with Illinois practice and procedure. The Attorney General of Illinois confessed error and consented to the reversal of the judgment of the Circuit Court. He contended that habeas corpus was the appropriate action to bring in Illinois because the facts were known to the court at the time, although they were not a matter of record at the original trial. As the question of whether or not habeas corpus is the correct remedy is a matter to be decided by the state, the Supreme Court of the United States accepted the confession of the Illinois Attorney General and concluded that petitioner was denied the due process of law which the Fourteenth Amendment requires. Permission was granted to proceed in *forma pauperis*. The petition for a writ of certiorari was granted and the judgment vacated and remanded to the Circuit Court.

Mr. Justice Rutledge delivered the opinion of the Supreme Court and in his analysis severely criticized the Illinois procedural system with regard to post-conviction cases. During the past three terms a flood of petitions filed in *forma pauperis* have besieged the Court. One-third to over one-half of these petitions came from Illinois. A defect in the procedural system of that state is clearly indicated by these figures. Adhering consistently to the practice of not entertaining these petitions, for the reason that the appropriate state remedy had not been undertaken or that the petitioner had not exhausted his state remedies, only two of the 322 petitions filed in the 1946 term were granted. Experience has tended to prove that the only relief offered is the state's confession of error which is entirely inadequate.

The United States Supreme Court's previous practice of issuing writs of habeas corpus is clearly defined in Ex parte *Abernathy*, 320 U. S. 219, 64 S. Ct. 13, 88 L. Ed. 3 (1943).

> The jurisdiction conferred on the Supreme Court of the United States by 28 U. S. C. A. sections 377, 451, to issue writ of habeas corpus in aid of its appellate jurisdiction, is discretionary and will not, save in exceptional circumstances, be exercised in cases where an adequate remedy may be had in a lower federal court, or, if the relief sought is from the judgment of a state court, where the petitioner has not exhausted his remedies in the state courts.

As a general rule the state is allowed a free rein in these circumstances and the Federal Supreme Court will only intervene when it becomes apparent that the state affords no remedy or because in the particular case the remedy afforded proves in practice unavailable or seriously inadequate. Ex parte *Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572 (1944).

In the almost parallel case of *Woods v. Nierstheimer,* 328 U. S. 211, 66 S. Ct. 996, 90 L. Ed. 1177 (1946), habeas corpus was denied because of an Illinois state rule limiting the use of this writ to instances of lack of jurisdiction or of subsequent developments entitling the petitioner to his release. Although the present petition does not challenge the circuit court's jurisdiction over the subject matter, the Attorney General contends that it is now the appropriate remedy. Both of these decisions were handed down within the space of seven months. *Coram nobis* was thought to be the adequate and exclusively appropriate remedy in the previous instance, but this was restricted by the fact that the five year period of limitation had been exhausted. The Supreme Court did not probe deeply into the question of whether or not there was an adequate remedy but dismissed the petition with the suggestion that the state and not the federal courts should provide remedies.

A writ of error *coram nobis* is an appropriate remedy in criminal cases as well as civil and will lie to set aside a conviction obtained by duress or fraud, or where by some excusable mistake or ignorance of the accused, or without negligence on his part, he has been deprived of a defense which he could have used at his trial, and which, if known by the court, would have prevented conviction. The error of fact must not have been known to the court at the time judgment was rendered nor appear on the face of the record. *People v. Green,* 355 Ill. 468, 189 N. E. 500 (1934). This poses the question of the outcome if the clerk of the court made a routine entry on the record that petitioner had waived his rights. Without much doubt this routine entry would be evidence enough to prohibit the use of a writ of *coram nobis.*

The narrow scope of a writ of error in Illinois is typified in *Carter v. Illinois,* 329 U. S. 173, 67 S. Ct 216, 91 L. Ed. 157 (1946). On the common law record of the Illinois court the Federal Supreme Court held that there was no showing of a denial of due process under the Fourteenth Amendment. That record was not disputed and since review was limited to what was written thereon, no other alternative could be reached. The perception of the inadequacy of this procedure is also significant.

In the Illinois situations the difficulty does not appear to arise from the lack of procedural courses but rather from too many confusing paths. Solutions such as habeas corpus, *coram nobis,* and writ of error are not definitely defined by Illinois and, as far can be deduced from the cases presented, the adequacy of the procedure is left to the discretion of the Attorney General. Accordingly, if habeas corpus does not challenge jurisdiction, or the statute of limitations hinders the use of *coram nobis* or a writ of error; what is the adequate remedy provided?

The Supreme Court's confusion is exemplified by Mr. Justice Rutledge's conclusion in his opinion.

> It is that the Illinois procedural labyrinth is made up entirely of blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one.

Distinctions between the various avenues of satisfaction are so minute that the average person can not possibly be cognizant of the best path. It therefore becomes imperative that either the state correct its present procedural maze or that the federal courts offer a better opportunity in the future to safeguard the constitutional privileges of these petitioners.

James W. Oberfell

WAR POWERS—LANDLORD AND TENANT—CONSTITUTIONALITY OF HOUSING AND RENT ACT OF 1947.—*Creedon v. Miller*, ... U. S. ...., 16 L. W. 4165 (1948). In accordance with Section 349(a) of the act on judicial procedure passed August 24, 1937 and reported in 50 STAT. 752, 28 U. S. C. § 349 (1937), which provides that in any suit to which the United States or any of its employees is a party, an appeal may be taken directly to the Supreme Court "within thirty days after the entry of a final or interlocutory judgment," and which also provides that such an appeal will be heard by the Court "at the earliest possible time and shall take precedence over all other matters not of a like character," this case came before the Supreme Court upon direct appeal from the District Court for the Northern District of Ohio in which it was held that Title II of the Housing and Rent Act of 1947, 61 STAT. 193, 50 U. S. C. A. APP. § 1881 (Supp. 1947), is unconstitutional. As reported in 74 Fed. Supp. 546 (1947), the lower court, among other things, considered the Act a governmental attempt to regulate local rents in peacetime, as lacking uniformity in application, and as constituting a delegation of legislative power.

In reversing the decision of the district court, Mr. Justice Douglas, who delivered the opinion of the Court, relied heavily upon similar cases in which the Emergency Price Control Act of 1942, 56 STAT. 25, 50 U. S. C. A. APP. § 1881 (Supp. 1947), was upheld against similar objections, as well as various federal and state rent control legislation passed during the emergency created by World War I. But of the various cases cited, particular attention was given to *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 40 S. Ct. 106, 64 L. Ed. 194 (1919), to *Ruppert v. Caffey*, 251 U. S. 264, 40 S. Ct. 141, 64 L. Ed. 261 (1920), and to *Bowles v. Willingham*, 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944). The first upheld the validity of the War Time Prohibition Act, 40 STAT. 1045 (1918); the second, the validity of the National Prohibition Act (popularly referred to as the Volstead Act), 41 STAT. 305, 27 U. S. C. A. § 1 (1919); and the third, the validity of the Emergency Price Control Act of 1942, 56 STAT. 25, 50 U. S. C. A. APP. § 1881 (Supp. 1947). The principles and holding of the first two cases are in fact so closely parallel to the instant case as to lead Mr. Justice Frankfurter to concur in the Court's opinion simply on the ground that this merely presents a new situation and set of facts for the very same principles to be applied.

The facts in the case are as follows: On July 2, 1947, the day after the Housing and Rent Act went into effect, the defendants announced to their tenants that on August 1, the rentals in the suites of the defendants' apartments, located in the Cleveland Defense-Rental Area, would be increased by as much as 40% and 60%. They admitted that this was clearly in violation of Section 204(b) of the Act which provides that:

> . . . no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respects thereto on June 30, 1947.

The defendants, however, challenged the Act as unconstitutional because "it undertakes to fix and regulate local rentals and interferes with local affairs and rights not subject to congressional power." Under Section 206(b) of the Act, the Housing Expediter is authorized to apply for an order enjoining violations of Section 206(a). The plaintiff accordingly applied to the district court for an injunction to restrain the defendants. Section 206(a) reads: "It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rents for the use or occupancy of any controlled housing accommodations in excess

of the maximum rent prescribed under Section 204." A preliminary injunction was granted July 21, 1947 without contest but was later dissolved and the complaint dismissed. From this decision the plaintiff appealed.

The first objection raised in the district court as to the validity of the Act is based on a distinction the court attempted to draw between peace-in-fact and the official end of the war. The court held that, although the war might still not be over technically, the President's proclamation of December 31, 1946 declaring the cessation of hostilities of World War II, PROCLAMATION No. 2714, 12 F. R. 1, 50 U. S. C. A. APP. § 601 (Supp. 1947), did inaugurate peace-in-fact. As a consequence, the Act could not be construed as an exercise of war powers—especially, the court felt, since the statute does not state that Congress intended to act under them. In fact, in the view of the district court, Congress showed a contrary intention because it gave the Housing Expediter the power to end rent controls in any area where he sees fit without regard to the official termination of the war, and because it neither amended or extended the Emergency Price Control Act. This latter objection, however, does not seem a strong one in view of the fact that in Section 201(a) Congress states, as part of its declaration of policy, that "The Congress hereby reaffirms the declaration in the Price Control Extension Act of 1946 that unnecessary or unduly prolonged controls over rents would be inconsistent with the return to a peacetime economy and would tend to prevent the attainment of the goals therein declared." The answer to this attempt to determine whether or not a state of war still exists might lie in the dictum laid down in *United States v. Oglesby Grocery Co.*, 264 Fed. 691 (1920), that such determination is "political in character and is not within the scope of judicial function." This case was reversed on other grounds in 255 U. S. 108, 41 S. Ct. 306, 65 L. Ed. 535 (1921) but the same doctrine is affirmed in other cases, notably *Mather v. McStea*, 91 U. S. 7, 23 L. Ed. 188 (1875).

The answer given by Mr. Justice Douglas to this holding is that war powers include power to remedy evils arising from the war and power to support preservation of rights created by wartime legislation. This means war powers do rightfully continue until the emergency is ended. In addition to *Hamilton v. Kentucky Distilleries Co.*, and *Ruppert v. Caffey*, he also cites *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 67 S. Ct. 1129, 91 L. Ed. 991 (1947), and *Stewart v. Kahn (Stewart v. Bloom)*, 11 Wall. 493, 20 L .Ed. 176 (1871), in support of this contention. And what if Congress did not have this power? To this he says that Article I, Section 8, clause 18 of the Constitution would be "drastically limited in its application to the several war powers." And the results? "The results would be paralyzing. It would render Congress powerless to remedy conditions the creation of which necessarily followed from the mobilization of men and materials for the successful prosecution of the war. So to read the Constitution would be to make it self-defeating." But since the housing problem is expected to be serious for years to come, the difficulty arises as to the possible abuse of this power, even possibly to the extent of swallowing up other Congressional powers and Amendments IX and X of the Constitution as well. Of this he says, "There are no such implications in today's decision . . . Any power, of course can be abused. But we cannot assume that Congress is not alert to its constitutional responsibilities." Mr. Justice Jackson, in a very able concurring opinion, shows that he too recognizes the potential dangers of war powers, but none the less upholds their validity and gives effective answer to the contention of the district court that the war is really over.

In answer to the objection that the Housing Expediter is given too much discretionary power, Mr. Justice Douglas then points out that his power to remove

rent controls in areas no longer needing them is "far less extensive" than those given in *Bowles v. Willingham,* 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944), to the Price Administrator under the Emergency Price Control Act of 1942 where it was held that such discretion is no more fatal than in other situations where Congress has prescribed the general standard and has left to an administrative agency the determination of the precise situation to which the provisions of the Act will be applied. This indicates, as Mr. Justice Douglas next points out, that "the discretion must be kept within prescribed limits." Some idea as to these limits may be gathered from former cases. The *Bowles* case cites limitations imposed in the 1942 Act, the chief one being that "so far as practicable the Administrator in establishing any maximum rent should ascertain and give consideration to the rents prevailing for the accommodations or comparable ones, on April 1, 1941." *Yakus v. United States,* 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944), states that these limitations are sufficiently definite and precise to determine whether or not the Administrator has conformed to these standards.

Regardless of the objections raised, however, and its potential dangers, it appears settled that war powers such as rent control legislation will be with us for some time to come. The Court tends to this view, and earlier cases give it good authority. *Block v. Hirsh,* 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165 (1921), established the validity of rent control legislation passed during the World War I emergency in the District of Columbia, known as Act of October 22, 1919, 41 *Stat.* 297 (1919); *Brown Co. v. Feldman,* 256 U. S. 170, 41 S. Ct. 465, 65 L. Ed. 877 (1921) upheld the New York Housing Laws of 1920, New York by-laws cc. 942, 944, 947 (1920), as did *People ex rel Durham Realty Corp. v. La Fetra,* 257 U. S. 665, 42 S. Ct. 47, 66 L. Ed. 424 (1921); *Finn v. 415 Fifth Avenue,* 328 U. S. 838, 66 S. Ct. 1014, 90 L. Ed. 1614, 153 F. (2d) 501 (1946), upheld the New York Rent Control Law of March 28, 1945, MCK. UNCONSOL. § 8551 *et seq.* (Supp. 1947); and *Twentieth Century Association v. Waldman,* 326 U. S. 696, 66 S. Ct. 492, 90 L. Ed. 410, 162 A. L. R. 197, 294 N. Y. 571, 63 N. E. (2d) 177 (1945) upheld the Emergency Price Control Act of 1942, 56 STAT. 25, 50 U. S. C. A. APP. § 1881 (Supp. 1947).

Not only do these cases give us some insight into the legality of such legislation, but they also shed some light on the scope of such war powers. *Block v. Hirsch,* for example, reveals that such legislation is not invalid merely because landlords and tenants are deprived by it of a trial by jury or the rights to possession of the land. *People ex rel Durham Realty v. La Fetra* admits the validity of them even though the rights of private property are thereby curtailed and freedom of contract is abridged. Even *Chastleton v. Sinclair,* 264 U. S. 543, 44 S. Ct. 405, 68 L. Ed. 841 (1923), which seems to be one of the very few cases which could be construed as upholding the district court's position, tends to admit this scope of power during a period of hostilities.

The last point taken up by Mr. Justice Douglas is his answer to the objection that the present Act lacks uniformity in application because Section 202(a) exempts certain classes of housing accommodations and thus violates the Fifth Amendment of the Constitution. In answer to this, he cites the holding in *Brown v. Feldman,* 256 U. S. 170, 41 S. Ct. 465, 65 L. Ed. 877 (1921), that New York State was permitted to make like exemptions, though this had been similarly attacked as a violation of the Constitution, in that case of the Fourteenth Amendment. The *Bowles* case and *Barclay & Co. v. Edwards,* 267 U. S. 42, 45 S. Ct. 348, 69 L. Ed. 703 (1925), are cited in this connection also.

Prior to this decision by the Supreme Court, there had only been one case, fully reported, upholding the validity of the Housing & Rent Act of 1947; namely, *Stahl v. Finkelstein et al,* 73 N. Y. Supp. (2d) 679 (1947). In that case, a land-

lord sought to withdraw his housing accommodations from the rental market because at the rental he was obtaining, he was operating at a loss. Since this is not one of the statutory grounds for eviction, he alleged the act was therefore unconstitutional as working an unlawful confiscation of his property. It was held, however, that because the Act is a governmental exercise of police power in an emergency, it is not an unlawful taking of property, even though the landlord may be compelled thereunder to rent housing accommodations at a loss.

Due to the difference in the nature of the question raised, this case emphasized the question of police power, rather than war powers as the Supreme Court did in the instant case. It discussed the nature of police power in periods of emergency at length, as well as the justification for laws in such times. It also reaffirmed the principle laid down in *In Matter of Petition of Cheesebrough,* 87 N. Y. 232, 237 (1879), contained in the Latin phrase: *Salus populi suprema lex.* Three of the cases cited by the Supreme Court in the instant case are heavily relied upon in this New York City case: *Wilson v. Brown,* Em. App., 137 F. (2d) 348 (1943), *Block v. Hirsch,* and *Bowles v. Willingham.* In addition, there is a definite similarity between some of the arguments this court employs and those in the concurring opinion of Mr. Justice Jackson referred to earlier in the instant case.

Robert S. Olivier

SCHOOLS—SEGREGATION.—*Westminster School District of Orange County et al. v. Mendez et al.,* 161 F. (2d) 774, (C. C. A. 9th, 1947). For a number of years the school authorities of Orange County, California had been arbitrarily assigning all elementary school children of Mexican and Latin descent to separate schools. To enjoin this practice and to secure an equal protection of the California laws to these children this class action was initiated in the federal district court by the fathers of the children, as next friends.

In granting the relief prayed for the district court based its decision upon two distinct grounds: (1) that the Educational Code of California made provision only for the segregation of children of Indian, Chinese, Japanese or Mongolian parentage, thereby invoking the doctrine of *expressio unius est exclusio alterius;* and (2) that

> The equal protection of the laws pertaining to the public school system of California is not provided by furnishing in separate schools the same technical facilities, textbooks and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of ancestry. A paramount requisite in the American system of public education is social equality. It must be open to all children of unified school association regardless of lineage.

Mendez et al. v. Westminster School District of Orange County et al., 64 F. Supp. 544 (S. D. Calif., 1946).

Upon this appeal the Circuit Court of Appeals upheld the assumption of jurisdiction by the district court in holding that the school authorities were acting under color of California state law. The Supreme Court of the United States in the past has given cognizance to the fact that while education is a state matter, it is not so absolutely or exclusively, and whenever the management thereof clearly and unmistakably disregards rights secured by the Fourteenth Amendment the interference of federal authority will be justified. *Cumming v. Board of Education of Richmond County,* 175 U. S. 528, 20 S. Ct. 197, 44 L. Ed. 262 (1899). The

right to acquire an education is within the purview of the "due process" clause of the Fourteenth Amendment. *Meyer v. Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446 (1923). However, in affirming the decision the Circuit Court avoided consideration of the "equal but separate" theory and resolved the case on the narrower grounds of the California statute.

Strictly speaking, the case does not present the exact problem of race discrimination, and the court refused to consider the argument of the *amicus curiae* briefs asking for a reconsideration of the entire segregation doctrine. The earliest judicial recognition and direct sanction of the "equal but separate" theory as applied to schools is to be found in *Roberts v. City of Boston,* 5 Cush. (Mass) 198 (1849). In 1896 the Supreme Court of the United States in the case of *Plessy v. Ferguson,* 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), upheld the constitutionality of a Louisiana statute requiring separate accommodations for white and colored persons in coaches on railroads. In effect this decision held that such segregation did not necessarily imply the inferiority of either race to the other, and could do so only because the colored race chose to put that construction upon it. Although discussed therein by the court, this case did not directly rule that such segregation as then sanctioned would likewise extend to education. Insofar as the ruling pertains to interstate commerce it has been superseded by *Morgan v. Commonwealth of Virginia,* 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317 (1946), noted in 22 NOTRE DAME LAWYER 132. Dating from the *Plessy* case down to the present time the Supreme Court has, however, impliedly accepted the position that racial segregation in state-supported schools does not violate the Fourteenth Amendment.

In the light of past experiences and present circumstances the doctrine appears untenable. As was pointed out in the *amicus curiae* brief submitted by the National Association for the Advancement of Colored People in the present case, we have in recent years committed ourselves to an international policy of equal rights without regard to race or religion and have pledged ourselves to prevent any acts which may provoke discrimination and inequality among the various races and religions. Such provisions appear in the United Nations Charter, Article 55c, and again in the Act of Chapultepec signed with our Latin American neighbors in 1945. Both have been ratified as treaties by the Senate and are binding upon our federal government and upon the individual states. U. S. CONST. ARTICLE VI, § 2.

Aside from a consideration of these binding international agreements and the provisions of the Constitution, there are forces gathering in other fields which have long decried the "equal but separate" anomaly, and which may soon aid in sounding the death knell to *Jim Crow* in education. A recent exhaustive survey conducted by the President's Committee on Civil Rights, *To Secure These Rights,* pages 79-95, has recognized the long known fact that equality of facilities seldom if ever exists where segregation is followed, and any continuing assurance that it could exist is doubtful at best. See Note 23 NOTRE DAME LAWYER 220. After an examination of the segregation doctrine and its prejudicial social ramifications the Committee concluded:

> In any event we believe that not even the most mathematically precise equality of segregated institutions can properly be considered equality under the law. No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group.

Their recommendations to the President included the following for education:

> Enactment by the state legislatures of fair educational practice laws for public and private educational institutions, prohibiting discrimination in

> the admission and treatment of students based on race, color, creed, or national origin.

Invariably the Negroes and other minority groups have been denied an equal share of the tax-supported services and facilities under the "equal but separate" theory of equality. They are unquestionably recognized as citizens, yet they are branded with a mark of inferiority when association in the enjoyment of these rights is not permitted. As an abstraction it seems doubtful that the physical identity of facilities alone fulfills the true test of equality. Added thereto should be the similarity of values attached to the separate facilities by the members of society. It seems apparent that the past acquiesence in the doctrine of segregation is now due for a thorough judicial and legislative reconsideration if we are to maintain consonance between our avowed purposes and our present practices.

William V. Phelan

DIVORCE—ARMY COURT-MARTIAL AS CIVIL FELONY.—*Getz v. Getz*, ... Ill. App. ...., 75 N. E. (2d) 530 (1947). A conviction by general court-martial of desertion in time of war will not be construed to be a felony or other infamous crime under Illinois statute, ILL. REV. STAT. 1946, C. 40, par. 1 setting out conviction of felony or other infamous crime as grounds for divorce.

This was an action for divorce brought by Genevieve Junielle Getz against Carl Maurice Getz on the ground that he had been convicted of a felony. From a judgment dismissing the action the plaintiff appealed.

The defendant, while serving with the United States Army in Germany, deserted on or about November 9, 1944. By devious means he left that theater of war and returned to the United States and subsequently arrived at his home in Tower Hill, Illinois, in March, 1945. He had resided here with plaintiff until April 26, 1945, when he surrendered himself to military authorities. He was tried on the charge of violating the 58th Article of War, MANUAL FOR COURTS-MARTIAL, U. S. ARMY, 58 ART. OF WAR, App. 1, p. 218; U. S. C. A. Titale 10, § 1530, (1920) before a General Court-Martial and on conviction was sentenced to be shot to death with musketry. The sentence was later reduced to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for life; that period of confinement was later reduced to twenty-five years. The defendant is at present confined in a United States disciplinary barracks serving that sentence. The only question raised for decision was whether or not conviction by a general court-martial of desertion under the 58th Article of War is conviction of "felony or other infamous crime" as construed under the Illinois divorce act.

The Illinois statutes provide that where a married person, "has been convicted of felony or other infamous crime . . . it shall be lawful for the injured party to obtain a divorce," ILL. REV. STAT. 1945, c. 40, par. 1. This raises the question, what is a "felony or infamous crime" in Illinois? "A felony is an offense punishable with death or imprisonment in the penitentiary," ILL. REV. SAT., 1945, c. 38, ar. 585; and

> Every person convicted of the crime of murder, rape, kidnapping, willful and corrupt perjury or subordination of perjury, arson, burglary, robbery, sodomy, or other crime against nature, incest, forgery, counterfeiting, bigamy or larceny, if the punishment for said larceny is by imprisonment in the penitentiary, shall be deemed infamous . . .

ILL. REV. STAT. 1945, c. 38, par. 587.

Justice Scholfield, in delivering the opinion in *Lamkin et al v. The People,* 94 Ill. 501 (1880), said,

> It will be noted, a felony is an offense punishable,—that is, absolutely punishable, not that may or may not be "punishable with death or by imprisonment in the penitentiary," while the offense of which plaintiffs in error are indicted and convicted here shall be punishable by imprisonment in the penitentiary or by fine. Surely it is no more accurate, in view of this language, to say this offense is punishable by imprisonment in the penitentiary than to say it is punishable by fine, and it is impossible to say, under any rule of construction, that we are bound to lay more stress on the language fixing the punishment by confinement in the penitentiary than on that fixing the punishment by fine. On the contrary, the rule of construction applicable here is, unless it clearly appears this offense was intended to be denominated a felony, it shall be denominated a misdemeanor.

A felony, then, is a crime with a positive punishment and not an arbitrary term to be attached at the discretion of the court or jury. Where a crime is punishable by "imprisonment in the penitentiary or by fine," the alternate punishment, "or by fine," destroys the certainty of punishment by imprisonment and the crime is therefore not a felony. The construction of the term "felony" when applied to the Illinois statute defining "felony", ILL. REV. STAT. 1945. c. 38, par. 585, will make it exclusive of all crimes in which any alternative is given besides death or imprisonment.

The charge under which the military court convicted the defendant provides: "Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of War, suffer death or such other punishment as Court-martial may direct.", 58 ARTICLE OF WAR. As stated, this means that under this article of war, the defendant could be sentenced to death or imprisonment or in the alternative to fines, or other lesser military punishments. Conviction, then, on this charge would not constitute a felony under Illinois statutes as construed in the *Lamkin* case, and therefore would not furnish grounds for divorce under the Illinois divorce act.

Other reasons given by the Court why desertion from military service is not included under the term "felony," as used in the Illinois divorce act are,

> The crime of desertion from the army is exclusively a military offense cognizable only by the military courts, and when the desertion is from the United States Army the offense is exclusively against the United States, and the federal courts-martial have exclusive jurisdiction thereof.

6 C. J. S., Army and Navy 54. See also *Trask v. Payne,* 43 Barb., (N. Y.) 569 (1865); 6 C. J. S., Army and Navy, § 40, 6 C. J. S., Army and Navy, § 51. If we are to consider the Illinois statutes strictly this reason does not seem entirely sound. The statutes make no statement as to criminal jurisdictions in which felonies will be recognized in Illinois courts. It would seem logical then that any tribunal with authority to sentence a person to prison can convict a felony under the statute.

The judge also cited as authority, 6 C. J. S.: "A court-martial differs from a civil court in that pleading before a court-martial depends upon military usage," 6 C. J. S., Army and Navy, 56. Under Art. 11, § 9, Constitution of the State of Illinois, every man has a right to "public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The statute defining "felony" in Illinois neither says nor implies that conviction for a felony

must be had in a civil court or that a form of procedure differing from Illinois "trial by jury" would render any tribunal impotent to convict of felony. This cannot be the proper meaning of the statute.

The last reason advanced was that "It is not the policy of the law to favor divorce," *Decker v. Decker,* 193 Ill. 285, 61 N. E. 1108 (1901). See also *Floberg v. Floberg,* 358 Ill. 626, 193 N. E. 456 (1934), *Tripp v. Payne,* 339 Ill. 178, 171 N. E. 131 (1930). The logic of this reason cannot be contradicted. Marriage is the foundation of our society. It exists in our very nature and if we are to survive as a race, marriage must be preserved. The state has an interest as a party in every divorce case and this interest is to promote the general welfare. The general welfare can best be promoted by keeping divorce at a minimum. Marriage is treated today by the law as a pure civil contract and upon examination it will be found that there are about forty-seven different grounds entitling a breach of this contract. It has changed in recent years from a social and religious institution to a mere private concern. The results of this transformation can be seen in our growing criminal problems and in the increase of state dependent children. Marriage is not merely a civil contract. It is a relationship into which man enters according to his nature. It is a matter of free will whether he shall enter or not. Once there, however, he cannot of his own free will break these bonds purely for the satisfaction of worldly wants. He has entered a natural stage of his life designed by his Creator and he must of necessity follow this plan. Morally, then, marriage is not a contract which man can jump in and out of at will, and it deserves the greatest care on the part of the state in protecting it as the basic institution of our society.

The first reason advanced in this case is controlling. The others are not entirely conclusive and in some respects are faulty. The case is novel in Illinois. Though little has been done so far to control the divorce rate, the courts and the public are becoming more and more conscious of the speed with which our social system is disintegrating, and of the serious results which will surely follow if the present conditions continue. As this movement grows, the easy divorce will disappear. The case under discussion is the beginning in a long-needed reformation of the divorce laws and their interpretation. The recent war with the following hysteria will, in all probability, breed other litigation on these same points of law. This litigation will likely meet with the same disapproval of divorce, on social and moral grounds, that the court has shown in this case.

John G. Smith

IMPUTED NEGLIGENCE—PUBLIC EMPLOYEES—FIREMEN.—*Vogler v. Jones,* .... Okla. ...., 186 P. (2d) 315 (1947). A fireman's negligence in driving a city fire department truck is not imputable to a fire department lieutenant, who has charge of the truck and the right to control the driver.

This was an action for damages by a lieutenant of the Oklahoma City fire department against the owner of a civilian vehicle which smashed into the fire truck, causing injury to the lieutenant. There was evidence that the driver of the fire truck, as well as the driver of the civilian vehicle, had been negligent. The lieutenant admitted in testimony that he was in control of the fire truck, and that the driver was subject to his control and direction. The defense argued that the negligence of the driver of the fire truck should be imputed to the plaintiff, thus barring the plaintiff's recovery in the action.

In ruling, as a matter of law, that the negligence of the driver could not be imputed to a public employee who has charge of the vehicle and the right to control the driver, the court went a step further in limiting the scope of imputed negligence than any court in its jurisdiction had previously gone.

It has been fairly well settled for a number of years in similar cases where the plaintiff had no control or authority over the driver, and no reason to suspect the plaintiff of want of care, and where the plaintiff was injured by the combined negligence of the driver and a third person, that the negligence of the driver is not to be imputed to the plaintiff so as to prevent his recovery of damages. *McKernan v. Detroit Citizens' Street Railway Co.*, 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347 (1904); *Oklahoma Railway Co. v. Thomas*, 63 Okla. 219, 164 Pac. 120, L. R. A. 1917E 405 (1917). Judging from the emphasis which the courts have placed on the matter of "authority or control over the driver," it would have seemed, though it was never expressly decided, that this would be the point upon which these cases would turn, the point by which the courts would decide whether or not negligence was to be imputed. In the case of *Birmingham Railway & Electric Co. v. Baker*, 126 Ala. 135, 28 So. 87 (1900), it appeared that the negligence of the driver of a hose wagon *was* actually imputed to another fireman who was riding with him in the front seat, whose duty it was to watch for obstructions. However, on an appeal of this case, 132 Ala. 507, 31 So. 618 (1902), it became apparent that the plaintiff was not in fact riding on the seat with the driver at the time of the accident, and that the plaintiff had no control or authority over the driver of the wagon, so that the court refused to impute to the plaintiff the negligence of the driver.

Both the plaintiff and the defendant in the case of *Vogler v. Jones* relied on, and based their arguments on, the decision handed down in *Oklahoma Railway Co. v. Thomas*. In that case the court decided that where the plaintiff and another were riding upon the rear of a truck which was being driven at a high rate of speed to a fire, and the plaintiff had no voice in the selection of the driver, and no control of his actions or the speed of the truck, and that when, while riding thereon, a collision occurred between said truck and a street car, resulting in injuries to the plaintiff, the negligence, if any, of the driver of such truck could not be imputed to the plaintiff. The defendants in *Vogler v. Jones* apparently based their position on the presumption, arrived at from the wording of the decision in *Oklahoma Railway Co. v. Thomas*, as well as from the wording of decisions in earlier cases, that if the plaintiff did have charge of the vehicle and the right to control the driver, negligence would be imputed to him.

The decision in *Spellman v. Metropolitan Street Railway Co.*, 87 Kans. 415, 124 Pac. 363, Ann. Cas. 1913E 230 (1912) seems to have presaged the trend which culminated in the rule set forth in *Vogler v. Jones*. In the *Spellman* case the court remarked that a superior officer who was on a fire wagon at the time of an accident would not necessarily have the negligence of the driver imputed to him. It is evident that this decision did not go so far as the decision in *Vogler v. Jones* in not imputing negligence to an officer, in so far as it appeared that although the officer was a superior with respect to the other firemen on the vehicle, yet he did not attempt to exercise control over the driver.

Justice Bayless, in rendering the decision in *Vogler v. Jones*, adhered closely to the reasoning of Justice Cardozo in *Dowler v. Johnson*, 225 N. Y. 39, 121 N. E. 487, 3 A.L.R. 146 (1918). In the latter case, Justice Cardozo pointed out that where the relationship of master and servant does not exist, there can be no liability on the theory of *respondeat superior*. Thus in *Vogler v. Jones*, since there was no relationship of master and servant between the lieutenant and the driver, the negligence of the driver could under no circumstances be imputed to the

officer. However, Justice Cardozo went on to say that the theory of contributory negligence may operate in these cases, and this is essentially the position which Justice Bayless took in *Vogler v. Jones,* when he refused to allow the possibility of imputing negligence to a public employee, but instead submitted to the jury, as a question of fact, whether or not the plaintiff had been guilty of contributory negligence. If found in the affirmative this would effectively prevent recovery by the plaintiff for injuries for which he had himself been partially responsible by reason of his contributory negligence. The decision of the Oklahoma Supreme Court seems to have found the most reasonable theory for an equitable solution to the problem.

E. A. Steffen, Jr.

ALIENS—CONSTITUTIONAL LAW.—*Oyama v. State of California,* .... U. S. ...., 68 S. Ct. 269 (1948).—A direct attack upon the constitutionality of the California Alien Land Law was again thwarted by deciding the case on a minor clause in the Act, which clause was declared unconstitutional as applied to a minor citizen because it deprived him of the equal protection of California laws.

The facts were as follows: Kajiro Oyama, a Japanese alien, ineligible for American citzenship, furnished the consideration for a conveyance of land to his son, Fred Oyama, a minor citizen. The father then applied for and was granted guardianship of his son's land. The act in question, the Alien Land Law. Cal. Gen. Laws Act 261 (Deering 1944, 1945 Supp.), prohibits aliens ineligible for American citizenship to acquire, own, occupy, lease or transfer agricultural land. It also provides that any property acquired in violation of the statute shall escheat as of the date of acquisition, and that the same result shall follow any transfer made with "intent to prevent, evade or avoid" escheat. In addition, that intent is presumed, *prima facie,* whenever an ineligible alien pays the consideration for a transfer to a citizen or eligible alien.

Petitioners pressed three attacks on the Act as it had been applied in this case: first, that it denied Fred Oyama, the son, equal protection of the laws and of his privileges as an American citizen; second, that it denied Kajiro Oyama equal protection of the laws; and third, that it contravened the due process clause by sanctioning a taking of property after expiration of the applicable limitations period.

The contention of petitioner that the law denied Fred Oyama the equal protection of the laws and his privileges as an American citizen was the only contention considered in the majority opinion and the court did not decide the other issues. The constitutionality of the whole Act, except the clause in question, was assumed by force of precedent established in the cases of: *Terrace v. Thompson,* 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923); *Porterfield v. Webb,* 263 U. S. 225, 44 S. Ct. 21, 68 L. Ed. 278 (1923); *Webb v. O'Brien,* 263 U. S. 225, 44 S. Ct. 112, 68 L. Ed. 318 (1923); and *Frick v. Webb,* 263 U. S. 326, 44 S. Ct. 115, 68 L. Ed. 323 (1923). These cases were all decided within a week of each other.

Ordinarily, under California law, where a parent pays for a conveyance to his child, there is a presumption that a gift was intended and there is no presumption that the minor takes the land in trust or for the benefit of his parent. *Gomez v. Cecena,* 15 Cal. (2d) 363, 101 P. (2d) 477 (1940).

In the majority opinion the court held that the section of the statute which put a *prima facie presumption of purpose to avoid escheat* on any conveyance of

farm lands, where the consideration was furnished by an ineligible alien, put an unjust burden of proof on the minor citizen son. This burden of proof was not common to sons of eligible aliens, nor to the sons of American citizens, and hence was held to violate the Fourteenth Amendment, by depriving Fred Oyama, the son, of the equal protection of California's laws and of his privileges as an American citizen.

In two concurring opinions, written respectively by Mr. Justice Black, in which Mr. Justice Douglas joined, and Mr. Justice Murphy, in which Mr. Justice Rutledge joined, the reasoning of the majority was upheld but these Justices preferred to rest their argument on the unconstitutionality of the whole Act.

Their chief argument against the validity of the Act appeared to be that the exclusive power over immigration and naturalization has been granted to the federal government by the Constitution. Assuming that Congress has the right to exclude aliens completely or require strict qualifications for their admittance, once they are within the country, Congress has guaranteed to them the equal protection of our laws and has impliedly authorized them to go into any state and live. No state should be allowed to erect obstacles designed to prevent the immigration of people whom Congress has authorized to come into and remain in the country.

Another argument, advanced by Mr. Justice Murphy, was to the effect that the "plenary power" of Congress is not uninhibited. That power is limited by the constitutional prohibition of racism.

The last argument goes beyond the Constitution and challenges the right of the states or of the federal government to make laws restricting the right of aliens to hold property. It was argued that this would be a violation of the United Nations Charter in which we pledged ourselves to cooperate with the United Nations to promote universal respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion. U. N. CHARTER Art. 55(c) and Art. 56.

In two dissenting opinions written respectively by Mr. Justice Reed, in which Mr. Justice Burton joined, and Mr. Justice Jackson, the reasoning of the majority opinion was criticized and rejected. In the first dissent, Mr. Justice Reed made no comment on the constitutionality of the Act as a whole, but assuming it was constitutional, by exercise of the police power, Section 9(a) was not discriminatory. Anyone, no matter what his racial origin may be, who, as a grantee, is a party to a sale of land, which the state attacks as being within the prescribed class must overcome the presumption of Section 9(a) to establish the legality of the transfer. This presumption operates with mechanical impartiality. In the language of Mr. Justice Reed:

> It is not a denial of equal protection for a state to classify transactions readily leading to law evasions differently from those without such a possibility. Such classification is permissable.

Mr. Justice Reed tests the Court's reasoning by applying it to a different set of facts. For purposes of illustration he put the following cases: (1) a solvent father purchases land from a third party and puts the title in his son; and (2) an insolvent father purchases land from a third party and puts the title in his son. In the second case, the creditors of the father can raise a *prima facie* presumption that the transfer was made with intent to defraud them of the satisfaction of their claims. The son of the solvent father is not burdened with such a presumption. By analogy, he contends, the inequality between the sons of eligible and ineligible landowners does not seem to differ.

In a brief analysis of the opinions it is seen that four Justices concurred in the majority opinion of Mr. Chief Justice Vinson declaring Section 9(a) of the Cali-

fornia Alien Land Law unconstitutional. Three Justices dissented from this opinion. The four concurring Justices and one dissenting Justice openly or impliedly declared that in their opinion the whole act was unconstitutional. Three Justices, including Mr. Chief Justice Vinson, made no comment on the constitutionality of the whole Act but bypassed that issue, assuming it was settled by prior decisions. The Justices who argue for the unconstitutionality of the whole Act would overrule the previous decisions of the Court holding these Alien Land Laws constitutional. *Terrace v. Thompson, Webb v. O'Brien,* supra.

The door is now open for another direct attack upon the constitutionality of the Alien Land Laws. The force, effect, and reasoning of the precedent cases of 1923, have been rudely shaken. Alien land laws in nine states of the Union are hanging in the balance. These states are California, Arizona, Idaho, Kansas, Louisiana, Montana, New Mexico, Oregon, and Utah. Slight limitations on aliens exist in seven other states. These too, may soon be invalidated.

The common law rule that aliens could not acquire real property by operation of law, but could take it by act of grantor, and hold it until office found, presupposes the right of the sovereign in escheat proceedings to deprive the alien of any land. California has narrowed down the common law rule so as to apply it only to ineligible aliens, and has further altered the common law by making it impossible for such an alien to hold land at all. It would seem that the common law rule was abrogated by the Fourteenth Amendment of the United States Constitution, but no court has so held. The alteration of the common law rule in California was held justified by the exercise of the police power. *Porterfield v. Webb, Webb v. O'Brien.*

Terrace v. Thompson is the leading case on the constitutionality of such a statute as is here embraced. The statute there concerned was a Washington statute but it was similar to the California statute in many respects. The Court, in that case, seems to have assumed that a state has the right to restrict aliens from holding or transferring land. *Hauenstein v. Lymham,* 100 U.S. 483, 25 L. Ed. 628 (1880) and *Blythe v. Hinkly,* 180 U. S. 333, 340, 21 S. Ct. 390, 45 L. Ed. 557 (1901), were cited as authority for that assumption. A review of these cases, however, confirms the supposition that no one has attacked the constitutionality of the common law rule. The Washington law applied to all aliens whether eligible for citizenship or not and, in respect to the former aliens, an exception was made to those who in good faith declared their intention to become citizens. It is difficult to see how the *Terrace* case controls the California law, since the California law discriminates even more closely. However, the succeeding cases of *Porterfield v. Webb, Webb v. O'Brien,* were decided on that precedent.

Hence it can be seen that by the existing law, the constitutionality of the common law rule is assumed *obiter dicta,* and the justification for the alteration of that law is found in the police power. The police power in all these cases is not adequately described or shown and it is a highly debatable proposition that there ever was sufficient grounds for invoking its use. Even if the grounds for invoking its use did exist at one time, the need for it has now ceased; Japanese aliens are no longer permitted to enter this country.

Another direct attack on the constitutionality of such legislation is now pending in the Supreme Court of the United States. In the case of *Torao Takahashi v. Fish & Game Commission et al,* .... Cal. (2d) ...., 185 P. (2d) 805 (1947), the California Supreme Court upheld the constitutionality of Section 990 of the Fish and Game Code of the State of California. By that section, ineligible aliens were refused the right to receive fishing licenses from the state. The petitioner had been refused a license and brought suit, alleging the unconstitutionality of the

statute in so far as it deprived him of the equal protection of the laws and due process. The Court held that it was not in violation of treaty rights because the 1911 treaty with Japan had been abrogated January 26, 1940. The Court also held that the statute was constitutional and not discriminatory. The Court cited the California Supreme Court decision of the *Oyama* case, 29 Cal. (2d) 164, 173 P. (2d) 794 (1947), and *Terrace v. Thompson,* and concluded by analogy that since the state had the right to deny ineligible aliens land, it also had the right to deny them fish, likewise state-owned. This case was appealed to the Supreme Court of the United States, and is now awaiting decision. *Torao Takahashi v. Fish & Game Commission et al,* 16 L. W. 3235, Docket No. 533.

This case might very well reverse the precedent cases of 1923, and with their falling, the Alien Land Laws as well as the Alien Fishing Laws will be declared unconstitutional. The result of this case may have far reaching effects.

One more argument may be brought up in the *Takahashi* case. The United Nations Charter is a treaty within the meaning of the Constitution, and the judges of every state are bound thereby. Discrimination against aliens violates the letter and spirit of that treaty, and should be declared void as in violation thereof.

Edward L. Twohey

GIFTS INTER VIVOS—CONSTRUCTIVE DELIVERY OF ROOSEVELT'S PAPERS TO THE UNITED STATES GOVERNMENT.—In re *Roosevelt's Will,* 73 N. Y. Supp. (2d) 821 (1947). In 1938 President Roosevelt prescribed a "Final Disposal" plan for the preservation of his papers for historical study and research. To this end the "Franklin D. Roosevelt Library, Inc." was formed, to build the library for the placing, maintenance, and preservation of such papers of historical interest as he might give or as might be given by others. This was effected when he approved a joint resolution of Congress to provide for the establishment and maintenance of the library. The dedication of the library was held on June 30, 1941, after Roosevelt had delivered papers and material of interest. After the Government took over the library he began sending material and papers to it, which were periodically reported in the ANNNUAL REPORTS OF THE ARCHIVIST OF THE UNITED STATES. Immediately after his death all papers in Washington were removed to the library, except those relating to the war, which have remained in the custody of the President of the United States. A memorandum by Roosevelt on July 16, 1943, addressed to the director of the library, requested that a committee of three persons (Samuel I. Rosenman, Harry L. Hopkins and Grace G. Tully or the survivors thereof) examine all his personal papers to determine those to be made public, those to be sealed for a specified time, and those never to be made public. The executors of his will petitioned the court to determine (1) whether Roosevelt, during his lifetime, had made a valid and effective gift of his papers, including those in his possession at the time of his death, to the United States Government for preservation in the library, and (2) the duties to be performed under the July, 1943 memorandum on the examination of his papers. The court held that the memorandum was not testamentary, did not revoke or modify the gift, and was an administrative problem for the government archivist and not a judicial question.

In New York, as in a number of other states, the essential elements of a valid gift *inter vivos* are: (1) a clear and unmistakable intention on the part of the donor to make a gift; (2) delivery of the thing given to the donee pursuant to donor's intention; and (3) the donee's acceptance of the gift. The court held that

there was an abundance of evidence to indicate that all requirements of a valid gift *inter vivos* were fulfilled by Roosevelt: the intention, by his writings, oral statements, and conduct; delivery, by the actual delivery of all papers during his lifetime and constructive delivery of all papers in his possession at the time of his death, since New York holds that informal instruments, such as memoranda and letters, are sufficient to pass title without delivery; and acceptance, which need not be immediate at the time of delivery, by the library's assertion of rights over the papers by reference in the annual reports of the archivist. The court said there was no evidence of revocation of the gift by Roosevelt's conduct, writings or oral statements. As no mention of the disposal of his papers was in his will the court inferred that Rooevelt believed he had already effectively disposed of them. It added, "A decedent's papers are not ordinarily regarded as assets of the estate."

There is no question about the papers actually delivered, but as to the constructive delivery of the papers in his possession at the time of his death the court's decision can be construed under the theory of gifts by an unsealed writing without delivery of the *res*. Under this theory the New York Supreme Court has held that personal property may be given by an unsealed instrument without delivery of the property. The leading case is In re *Cohn*, 187 App. Div. 392, 176 N. Y. Supp. 225 (1919), where the donor executed and delivered to his wife a memorandum stating that he gave her 500 shares of stock, which had recently been converted by one of his firms to personal assets, yet the stocks remained in the firm name and safety box. The court held that if a gift is established by the execution and delivery of an instrument there is no necessity for delivery, as symbolical delivery is valid where actual delivery is difficult. This doctrine is supported in *McGavic v. Cossum*, 72 App. Div. 35, 76 N. Y. Supp. 305 (1902) and *Hawkins v. Union Trust Co.*, 187 App. Div. 472, 175 N. Y. Supp. 694 (1919). The rule requiring delivery of the gift is relaxed where the gift is evidenced by writing. In re *Brown's Ex'r*, 130 Misc. Rep. 865, 226 N. Y. Supp. 1 (1927); In re *Brown's Will*, 252 N. Y. 366, 169 N. E. 612 (1930). Actual delivery is unnecessary where the donor's language clearly shows the intent to make the gift. In re *Sullivan's Estate*, 133 Misc. Rep. 758, 234 N. Y. Supp. 311 (1929). Delivery may be constructive or symbolical as well as actual and manual, but delivery must be actual if the thing is capable of delivery. *Allen v. Cowan*, 23 N. Y. 502 (1861). The majority of jurisdictions hold that a gift of personal property may be made by the delivery of an unsealed instrument, setting forth the donor's intent, without making delivery of the property. Unsealed writings are not recognized in a few of the states and in England. Of the use of unsealed instruments Professor Mechem has written:

> The reasoning of the cases, as far as there is any, seems dubious. Mention is seldom made of statutory changes in the law of seals, the courts thus wilfully failing to rely on the most plausible theoretical basis available to them. The theory of the writing as a constructive or symbolical delivery of the property, as already suggested, seems highly strained if the word delivery is to be construed in any exact sense.

Mechem, *Delivery in Gifts of Chattels*, (1927) 21 ILL. L. REV. 568, 585, 586.

The liberal construction of the New York court, though sufficient in that state, does not entirely agree with other authorities who contend: 1) to be effective the gift must be completed, executed and delivered during the lifetime of the donor, without his power of recall by transfer of the possession and legal title to the trustee or donee; Smith, H. E., PERSONAL PROPERTY, (2d Ed. 1908) 116, 117; *Neal et al., v. Neal et al.*, 194 Ark. 226, 106 S.W. (2d) 595 (1937); In re *Martin's Estate*, 219 Mo. App. 51, 266 S. W. 750 (1924); in *Clapper v. Frederick et al.* 199 Pa. 609, 613, 614, 49 Atl. 218, 219 (1901) it is said: