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Recent Decisions

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forced is to abrogate this provision of the statute, or to amend it by substituting therefor the French rule, namely that the law of the nationality is to govern."

Thus is the law in the United States in regard to the application of *renvoi* whenever a situation arises where *renvoi* might figure as a problem. The *Tallmadge* case is the pilot that guides the courts of all the states to steer clear of *renvoi.*

There are exceptions, of course. The Restatement of the Law of Conflict of Laws sums up the matter this way. "Except as stated in section 8, when there is a difference in the Conflict of Laws of two states whose laws are involved in a problem, the rule of Conflict of Laws of the forum is applied; (a) in all cases where as a preliminary of legal ideas, these are determined by the forum according to its law; (b) where in making the choice of law to govern a certain situation the law of another state is to be applied, since the only Conflict of Laws used in the determination of the case is the Conflict of Laws of the forum, the foreign law to be applied is the law applicable to the matter in hand and not the Conflict of Laws of the foreign state." In section 8 are set out the exceptions: "(1) All questions of title to land are decided in accordance with the law of the state where the land is, including the Conflict of Laws rules of that state. (2) All questions concerning the validity of a decree of divorce are decided in accordance with the law of the domicile of the parties, including the Conflict of Laws rules of that state." [8]

J. Barrett Guthrie.

RECENT DECISIONS

CERTIFICATES OF CONVENIENCE AND NECESSITY. *South Mississippi Airways v. Chicago and Southern Airlines,* 26 So. (2d) 455 (1946).—Certificates of public convenience and necessity for the operation of airlines were granted to three companies by the Public Service Commission of Mississippi. The protestants appealed to a circuit court which vacated the order because the commission was without authority to grant the certificates sought.

Therefore, two of the applicants brought this action and attempted to show that the state legislature had in fact included airlines as subject to a "common carrier" status. The appellees argued that the words "other common carriers" appear usually in conjunction with the word "railroad" in order to make it unnecessary to repeat the other common carriers by name. It was noted, too, that the legislature did not specifically name airlines in this category in the Public Service Commission Act of 1938 (Code 1942, Section 7688 *et seq.*). Moreover, the same code required that every person navigating any aircraft within the state, and carrying a passenger, must have a certificate of authorization from the proper Federal agency of the

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[8] Corpus Juris Secundum, Vol. 15.

Department of Commerce as well as a pilot's license from that same body. This it was said indicated further that the legislature was willing to leave control of aircraft to the Federal government.

Applicants, however, believed that airlines are common carriers by implication. For example, it was said in a New York case, *Anderson v. Fidelity and Casualty Co.*, 228 N. Y. 475, 127 N. E. 584, 9 A. L. R. 1544 (1920) that,

> Today, as is practically conceded by counsel for both parties in the instant case, the term "common carrier" should be applied to the "jitney bus", and tomorrow, in a proper case, it may well be that it may be applied to that most recent device for eliminating the fetters of distance, the aeroplane.

That court could see no good reason why there could not be common carriers by airplane. In a later case in that state it was held that a state may prescribe air traffic regulations for intra-state operations. *People v. Katz*, 140 Misc. 46, 249 N. Y. S. 719 (1931).

These statements were relied on by applicants solely for their possible persuasive effects on the court. Their effect was nil. Furthermore, before applying for certificates of public convenience and necessity the applicants had obtained a written opinion from the office of the Attorney General which upheld their view. This, too, was an assertion of interpretation which carried no weight as far as the court was concerned. Nor was the court able to find support for the appellants' contention that the terms "highway" and "motor vehicle" as used in the Act of 1938 were applicable to support their case.

While it is true that an airplane may be considered to be a vehicle and subject to state control as a "common carrier," the definition of "highway" in the Motor Carrier Regulatory Act was limited to roads on the ground and not to air routes. This precluded a construction of the Public Service Commission's power consistent with the arguments of appellants.

There is nothing inconsistent with previous decisions in this ruling. The Mississippi court was not prepared to make a judicial law in a case in which the legislature alone has jurisdiction. Nor was the judiciary ready to set aside *stare decisis*. It had been held twenty years earlier that "The Railroad Commission has no implied power." *Illinois Cent. R. Co. et al. v. Mississippi R. Commission et al.*, 143 Miss. 805, 109 So. 868 (1926). This, moreover, is not a local opinion as is demonstrated by the citations listed by appellees. Where a statute confers specific powers on a tribunal, board or commission with limited powers, such as Public Service Commissions, its powers are limited to those specifically mentioned in the statute. *Bamberger Electric Co. v. Public Utilities Commission*, 59 Utah 351, 204 P. 314 (1922); *People ex. rel. Public Service Interstate Transportation Co., Inc. v. Public Service Commission et al.*, 262 N. Y. 39, 186 N. E. 195 (1933); *Union Pacific R. Co. v. Public Service Commission*, 103 Utah 186, 134 P. (2d) 469 (1943).

A Public Service Commission is an administrative creature of the legislature and its powers, specifically enumerated in statutes, may not be implied.

Evidently the law-making body of Mississippi has decided, as is seen in its statutes, that there is no present necessity for the creation of a monopoly in this newest form of transportation. The court did well to resist the temptation to anticipate future social policy and "imply" the "meaning" of the legislature accordingly.

Charles T. Dunn.

ARTIFICIAL MARKET AND FAIR PRICE. *Cudahy Packing Co. v. United States,* 155 F. (2d) 905. June 4, 1946.—This was an action by Cudahy Brothers against the United States to recover compensation allegedly due for requisitioned beef carcasses. There was a judgment in favor of the United States. The plaintiff appealed and the United States Circuit Court of Appeals affirmed the decision.

The plaintiff was engaged in the slaughtering of cattle, hogs, and sheep, and in the preparation and sale, at wholesale, of fresh beef and other meat products. On June 16, 1943, the President of the United States, acting through his authorized agent, requisitioned at plaintiff's plant, seventy-five beef carcasses and a Director of the Office of Food Distribution Administration determined the fair and just compensation for the carcasses taken was $9,409.09, but plaintiff refused to accept that amount. Thereupon defendant, pursuant to the Statute, U. S. C. A. Section 721 (1941), paid plaintiff fifty percent or $4,702.05 of the $9,409.09, and the plaintiff, claiming that the value of the carcasses was $12,191.49, brought this action to recover what it claimed was fair and just compensation for requisitioned carcasses. The aforementioned statute reads: "If, upon any requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 percent of such amount and shall be entitled to sue the United States in any district court of the United States . . . for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property."

The Court found that prior to June 16, 1943, the Office of Price Administration had fixed a ceiling price for beef carcasses, and that when the carcasses were taken, there was an established market at Cudahy, Wisconsin, and that the market value of the carcasses was $9,404.09. The plaintiff's argument is that "fair value and just compensation" presupposes the existence of a free market; that in our case, no free market prevailed; and that in such a situation, resort should be had to indices of value other than an artificially created market.

The Court agreed that just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined, *Olson v. United States,* 292 U. S. 246 (1933), and where there is a market price prevailing at the time and place of taking, that price is just compensation. *United States v. New River Collieries Co.,* 262 U. S. 341 (1922).

Judge Kerner in his opinion pointed out the distinction between the consequences of a seizure and the consequences of the imposition of lawful war-time restriction on price and the law is well settled that the imposition of use and price is a proper exercise of sovereign war powers and that the resulting market conditions are lawful. *Yakus v. United States,* 321 U. S. 414 (1943). The principles enunciated in the cases cited impel to the conclusion that the market price at which the property is actually bought and sold at the time of the taking is the measure of just compensation and that the causes which control or affect the market at the time are immaterial.

Edward J. Flattery.

INJUNCTION—CONSTITUTIONAL LAW MONOPOLIES—CONTRACT. *Hughes Tool Co. v. Motion Picture Ass'n of America, Inc.,* 66 Fed. Supp. 9, Oct. 14, 1946.—"The Outlaw" has aroused, in the past months, a great amount of publicity in which the main struggle has been between Howard Hughes, the now famous multi-millionaire, and the defendant, which defendant represents a movement in this country to induce Hollywood film producers to produce entertainment of less scandalous nature.

Plaintiff seeks an injunction *pendente lite,* restraining defendant from revoking, or taking any steps looking to, the revocation of the seal of approval granted by defendant on May 23, 1941, to plaintiff's motion picture "The Outlaw," and from combining or conspiring with or among its members to prevent or impair plaintiff's distribution and exhibition of such picture.

Defendant received notice, by Judge Leibell, restraining the said defendant and its officers and agent from (1) revoking or taking any steps looking to the revocation of that seal of approval, and (2) taking any action in respect to the advertising used by plaintiff in connection with the exhibition of the motion picture, "The Outlaw."

The defendant, a voluntary membership corporation, is composed of the majority of producing and distributing companies of the United States, and has a close and effective working relationship with about 95% of the producing, distributing and exhibiting companies in the motion picture industry. Under its constitution and by-laws, there has been created a system of censorship to certain codes established by a Productive Code Administration and an Advertising Code Administration, both organizations within defendant corporation. All films produced by its members are required to be submitted to the PCA and ACA for their respective approval before the films receive the defendant's seal of approval. The advertising of these films must also be approved by the ACA.

"The Outlaw" was produced by the plaintiff in 1941. This film plus the advertising was submitted to the PCA and ACA, respectively, for approval. After much correspondence between plaintiff and defendant as to some changes to be made, the defendant corporation granted its seal of approval with the condition that certain changes be made in the films as well as in its advertising. The plaintiff claims damages in the sum of $1,000,000 because of the rejection of the advertising by the defendant.

In its second claim, the plaintiff alleged that the defendant and its members entered into an agreement and conspiracy to hinder and suppress competition in the interstate sale, distribution and showing of motion picture films, and to create a monopoly in said industry by reason of the economic control centered in the seal. That such practice violates the First Amendment of the Constitution of the United States as well as the Sherman Anti-Trust Act, 15 U. S. C. A., Sec. 1-7, 15 note. In conclusion, the plaintiff seeks damages in the sum of $5,000,000.

It was shown at the trial that the defendant approved 187 stills of the picture out of 202; twenty-six newspaper advertisements were approved, while twenty were rejected. The rejected ones were in the nature of ink drawings, in which the breasts of the star were emphasized and exposed. Others were rejected because they showed a man and woman together in hay in a compromising horizontal position.

Late in April, 1946, it is alleged by the defendant, and not denied, a sky-writing airplane wrote the words, "The Outlaw" in the sky over Pasadena, and then made two enormous circles with a dot in the middle of each.

In its ruling, the court expressed its approval of the defendant's work and purpose of its organization. The court rejected plaintiff's contention that the defendant showed known discrimination on its part against the plaintiff. The fact that the defendant approved a portion of the advertisement of "The Outlaw" indicated the defendant to be willing to cooperate with the plaintiff.

As to the violation of the First Amendment, the court found the plaintiff not to be restrained from his right to practice free speech. Defendant's disapproval of plaintiff's advertisement was no such violation. The court held that the defendant does not seek to invade the plaintiff's right of free speech and press; but seeks only to deny plaintiff's right to do whatever he sees fit under the defendant's seal of approval. The granting of the "seal" is strictly up to the defendant.

The court reasoned that, if the seal contract can be said to be illegal because of the alleged violation of the Sherman Anti-Trust Act, plaintiff cannot in the same breath enforce it and attack it. Both parties, in this cause of action, are in *pari delicto,* and in such cases, the court will not lend its aid to either party.

The court further noted that some of the defendant's members, who distribute motion pictures, have agreed that they will not "release, distribute or promote the release or distribution or in any way, directly or indirectly, make available for release or distribution any motion picture which has not theretofore been approved," is not a violation of the Act. That the defendant has a moral obligation to the public and if there is any restraint by the defendant in this case, it is a reasonable one.

Frank P. Salierno.
Lawrence Turner.

CONSPIRACY. *Brooklyn National League Baseball Club, Incorporated v. Pasquel et al. District Court,* E. D. Missouri, 117 Fed. Supp. 117 (1946).—Charging the defendants with conspiracy to induce professional baseball players under contract to go to Mexico to play professional baseball, the Brooklyn National League Baseball Club brought action for a temporary injunction against the defendants Jorge Pasquel and Bernardo Pasquel individually as agents of the Mexican League and against Ray J. Gillespie.

Gillespie had been a sports writer for twenty-seven years, and at the time of this action was employed by the St. Louis Star Times. The Pasquels were engaged in promoting organized baseball in Mexico, and had called on Gillespie for services, including securing baseball equipment and hotel reservations and interviewing ball players and umpires. Of the ball players interviewed, only "Mickey" Owen was in organized baseball. The plaintiff alleged that it had Owen under contract when, in the spring of 1946, Owen was sent to Gillespie's office where he received a bonus for signing a contract to play ball in Mexico for the Pasquels. Gillespie signed for the Pasquels. Owen was interviewed and had a picture taken of himself and his bonus check, for publication by Gillespie. Before Gillespie signed the contract, Owen repeatedly assured him that he was not under contract to plaintiff.

Gillespie also figured in the approach made to one Reiser, a contract player of the plaintiff who was interviewed in New York by representatives of Pasquel who attempted to induce him to break his contract and advised him to contact Gillespie on arrival in St. Louis. Reiser never did contact Gillespie, who denied that he knew of Reiser having been referred to him, although he admitted making hotel reservations in St. Louis at this time for representatives of the Pasquels. Gillespie maintained that his interest in associating with Pasquel Brothers was their promise to him of exclusive stories on players signed. He denied being party to a conspiracy to induce players to violate contracts with organized baseball.

In dismissing the action as to the defendant Gillespie, the court stated that although Gillespie was undoubtedly the agent for Pasquel Brothers, his agency was not general, but was limited to specific purposes, and he received specific instructions for each of his acts. The court further maintained that: "The record is barren that he (Gillespie) ever knowingly contacted a player under contract or of facts which such knowledge could be imputed. . . . Although a conspiracy may be and usually is proven by circumstantial evidence . . . suspicion will not sustain a judgment."

The Court dismissed the action as to the Pasquel Brothers because of lack of jurisdiction. The plaintiff had based its claim to jurisdiction of the Court over the non-resident defendants, the Pasquel Brothers, on service on Gillespie, since service upon an agent is sufficient notice for his principal concerning an application for a

preliminary injunction. Since the action was dismissed against the resident defendant, the plaintiff found itself in the unhappy position of seeking a preliminary injunction against non-resident defendants, neither of whom had been served in the district or had entered their appearance. In dismissing the action against the Pasquel Brothers the Court stated, "The weight of authority supports the conclusion that the preliminary injunction here sought is an action in person and the defendants being non-residents and not served within the District and not having entered their appearance, their court is without jurisdiction to enter the order sought against them. As to such defendants the action will be dismissed without prejudice."

John M. Anderton.

WORKMEN'S COMPENSATION. *Reynolds Metal Co. v. Glass et al.,* 195 S. W. (2d) 280, ... Ky. ....., (June 14, 1946).—On June 7, 1944, one Emma Virginia Glass, an employee of appellant, Reynolds Metal Company, sustained a fatal accident. Both employer and employee had elected to operate under the provisions of the Workmen's Compensation Act (KRS 342.001 *et seq.*). With their father as next friend, the decedent's minor children, who were living in the home of and supported by the two parents at the time their mother sustained fatal injuries, made application to the compensation board for an award of appropriate compensation. The full board approved the finding of a referee that the surviving infant children were entitled to $12 per week for four hundred weeks. This appeal ensued.

Appellant contends that the "deceased employee" — though a parent — does not embrace both father and mother, but refers only to the parent who is primarily obligated to support them and with whom the wholly dependents were chiefly supported at the time of such parent's death, and with whom "such child or children (wholly dependents) are living or by whom actually supported at the time of the accident."

The judgment was for the appellee and the Court of Appeals held that a dependent's child's right to compensation is based on the employee status of the deceased parent, and the right is the same whether the employee is father or mother. The court says, too, that there is a conclusive statutory presumption that the children are wholly dependent and an age of less than sixteen years is the only condition of the right of such children to receive compensation.

Appellant further contended that other sections of the Kentucky Statutes have some bearing upon the proper interpretation of the compensation act, and cites as one of his examples, section 405.020, which says that "the father shall be primarily liable for the nurture and education of his minor children." However, the necessity for consideration of other statutes arises only when the statute under consideration and to be construed is, at least to some extent, ambiguous. In the instant case, the court said that the language of the controverted clause in the compensation statute was plain and unambiguous to the effect that children of a deceased parent with whom they are living "shall be presumed to be wholly dependent upon a deceased employee," who in this case was their mother with whom they were living and each of them were of the age making them such wholly dependents. The presumption of "wholly" dependent children in the described circumstances is conclusive and cannot be contradicted, and since the appellees are within the class of wholly dependents and occupy the status described in the statute, they are entitled to receive compensation provided by the Act due them as such dependents.

The suggestion that double compensation might result if the surviving parent died within the payment period (four hundred weeks) was made by appellant, who submitted that such was not the intention of the General Assembly. The court

found nothing in the entire compensation act remotely intimating the absence of such legislative intent. The *dictum* of the court impliedly asserts that such double allowance could be allowed in case of the death of both parents in the circumstances indicated. The compensation, which the dependents would receive concurrently for the death of both parents, would by no means be an extravagant allowance, and would be granted if such a situation were to arise.

George S. Stratigos.

AIR COMMERCE — FIFTH AMENDMENT — TAKING. *United States v. Causby et ux,* 66 Sup. Ct. Rep. 1062 (1946); 90 L. Ed. Adv. Ops. 971; 14 U. S. Law Week 4360.—On certiorari, a reversal and remanding for more specific findings, of a decision by the Court of Claims allowing $2,000 damages to the plaintiff.

Respondent's home is located near the municipal airport of Greensboro, N. C., from which there were frequent flights over his land by United States aircraft. These planes included bombers, transports and fighters which passed over the respondent's land at low altitudes, at frequent intervals, in taking off and landing. The noise of the engines, glare of the landing lights and proximity of the craft have made respondent's family fearful and nervous, caused them to lose sleep and have forced the abandonment of his poultry business because his chickens, upon being frightened, flew into the walls killing themselves.

On the basis of these facts the Court of Claims found a depreciation of respondent's property due to the easement "taken" by the United States. Value of the property destroyed and the easement taken was $2,000.

Mr. Justice Douglas delivered the opinion of the Court, noting at the beginning that this was a case of first impression.

The United States contends that by certain statutes, Air Commerce Act of 1926, 44 Stat. 568, 49 U. S. C., Sec. 171 *et seq.*, 49 U. S. C. A., Sec. 171 *et seq.*, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U. S. C., Sec. 401 *et seq.* 49 U. S. C. A., Sec. 401, it has "complete and exclusive national sovereignty in the airspace" over this country. Under these Acts every citizen is granted freedom of transit in air commerce "through the navigable air space of the United States." Navigable airspace is "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority." 49 U. S. C., Sec. 180, 49 U. S. C. A., Sec. 180. Consequently, it is argued, these flights within the minimum safe altitude prescribed are merely the exercise of that right. The United States claimed that "without any physical invasion of the property of the landowners there had been no taking of property" within the meaning of the Fifth Amendment to the Constitution.

Mr. Justice Douglas proceeded to note the Common Law maxim of property rights — *Cujus est solum ejus est usque ad coelum,* 1 Coke, Institutes, 19 Ed. 1832, ch. 1, Sec. 1 (4a); 2 Blackstone, Commentaries, Lewis Ed. 1902, p. 18; 3 Kent, Commentaries, Gould Ed. 1896, p. 621, declaring "that doctrine has no place in the modern world." He explained that today the air is a public highway. It was conceded by the United States that if the respondent's property had been made untenable there would be a "taking" compensable under the Fifth Amendment. Here the land was not completely destroyed, Mr. Justice Douglas continued, but that is not controlling. "The use," he added, "of the airspace immediately above the land would limit the utility of the land and a diminution in its value." It was pointed out that the angle of glide does not operate to extend the minimum safe altitude declared by the C.A.A. and that therefore "the flights in question were not within the navigable airspace which Congress placed within the public domain." Although, it continued, airspace is a public highway, "if the landowner

is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere." However, all "airspace, apart from the immediate reaches above the land, is part of the public domain." Under South Carolina statutes, Mr. Justice Douglas points out, such interference with the right to enjoy property is illegal. In this case an easement was taken and it must be determined whether it is of a permanent or temporary nature in assessing damages. Therefore the judgment was reversed and the cause remanded to the Court of Claims for more specific findings of fact.

Mr. Justice Black dissented giving it as his opinion that there was no taking shown by the facts. He suggests rather that there might be a remedy in tort for the nuisance of the noise and lights incident to the flying. But, the opinion continues, "the concept of taking property as used in the Constitution has heretofore never been given so sweeping a meaning." By statute, 44 Stat. 568, 5 Stat. 973, it is provided that the United States of America is "to possess and exercise complete and exclusive national sovereignty in the air space (over) the United States." This statute is based on the assumption that the Commerce Clause of the Constitution gave Congress the plenary right to control navigable airspace and, it is argued, the Court ought not to limit this power. Mr. Justice Black declares that a distinction between "safe altitudes of flight" and "safe altitudes" for take-off and landing, both of which are regulated by C.A.A. is unwarranted. He continues, arguing that "Old concepts of private ownership of land should not be introduced into the field of air regulation." The dissenting opinion concludes that there should be a reversal on the grounds that there was no "taking" in the sense the word is used in the Constitution.

Mr. Justice Burton joined in the dissent.

As a case of first impression this decision is significant in that it interprets the phrase "nor shall private property be taken for public use without just compensation," in the Fifth Amendment, as applying to flights of government planes which appreciably depreciate the value of the realty over which they fly. It is established that such activity constitutes the taking of an easement over property, thus reasserting that a landowner has the right to all the airspace adjacent to his land which he might use either by physical occupation or as a prerequisite to enjoyment of that physically occupied.

John E. Cosgrove.

AGREEMENT NOT TO APPLY FOR RENT INCREASE HELD SUFFICIENT CONSIDERATION. *In re Dreir's Estate,* 62 N. Y. (2d) 722.—In this recent decision handed down by Surrogate Witmer, Surrogate's Court, Monroe County, New York, we find the opinion as to adequate consideration in this timely contractual problem firmly and soundly based on principles governing contracts.

The claimants are Harold W. Atwood and Edna, his wife, who were related to the decedent, Eliza B. Dreir, and lived in the adjoining part of a double house owned by her. The decedent died early in December and about a week later the heirs gathered for the reading of the will. The executors of the will discussed the question of maintenance of the house, and it was finally agreed that the heirs would not make an application to the rental division of the federal Office of Price Administration for an increased rental from the Atwoods if they would maintain, care, and prevent damage to the adjoining part of the building, which would be unoccupied during the winter months. A fire was to be kept in the furnace to prevent freezing of the pipes, and inspection was to be made from time to time. The relationship between the decedent and the Atwoods probably was the reason for the low rental that was paid, although at the time of the discussions neither

the claimant nor the other heirs knew if an increase would be granted. In the late spring the executors sold the house and the new owner made application to raise the claimant's rent, but the O.P.A. refused the increase. The claimants now contend that the agreement that they made in December with the executors was in reality without consideration and therefore they should be able to collect a judgment for services rendered on a *quantum meruit* basis.

The court in this case disallowed the Atwood's claim because there was indeed sufficient consideration given by the relinquishment of the right to at least apply for the increase in rental, even though neither party was certain of the decision that might be given by the O.P.A. The agreement was entered into on good faith and there was no evidence shown of deceit or fraud on the part of the executors. There have been various other cases, held to be binding, where a promise to forbear to bring action against another party has been held to be sufficient consideration.

To support their claim the Atwoods cite *Haussman v. Rowland,* 53 N. Y. S. (2d) 440 (1944). In this case the tenant's lease was extended on condition that the tenant would do certain painting or redecorating which, because of high prices, was in substance an increase in rent, and was illegal under O.P.A. regulations. Our case on the other hand was a legal consideration to refrain from applying to the O.P.A. and as such, violated none of their ceilings. This is a confusion on the claimant's part of illegal consideration and failure of consideration. The question of duress and improper coercion of a tenant was brought out by the claimants but once again their plea was defeated because they did not go against public policy. Only partial failure was held on the basis that a state law said that thirty day notice had to be given for rent increases and therefore no detriment would have occurred until February 1, 1945. This was ruled out as far as the main question is concerned, and in final summary the court took a line from an older case on the subject, *Harvey v. J. P. Morgan and Co.,* 2 N. Y. S. (2d) 520 (1937), "the slightest consideration is sufficient for the greatest undertaking."

Richard H. Keen.

ORDINANCES PROHIBITING TRAILERS.—Lower Merion Township, 46 Atl. (2d) 35, ... Pa. ..... (1946).—This was an action by the Lower Merion Township involving the validity of a building code ordinance, as it applies to house trailers.

In 1931, Lower Merion Township enacted a building code fixing certain minimum requirements relating to light, air, sanitation and safety of buildings thereafter erected. The buildings were classified according to use, among them dwellings. Penalities were provided for those who built, used or permitted to be used any non-conforming buildings including dwellings.

In 1940, the Township amended its building code, by adding Section 200, reading: "House trailer means any vehicle for living purposes within the township for an aggregate of more than thirty days in any period of one year, it shall be considered as a single family dwelling for all purposes of this ordinance."

This action, testing as it does the enforcement of a building code in these days of critical housing shortages, is quite important, and since this is one of first impression in Pennsylvania, it will undoubtedly be cited often to sustain or disprove positions of the relative parties in subsequent disputes.

The facts briefly are these: Since the enactment of the 1940 building code, Darwyn Gallup permitted house trailers to be placed on his ground and to be used and occupied as dwellings for several years without interruption. One trailer had been cited in particular. The wheels had been removed and the trailer had

been propped up on boxes with an enclosed foundation. Electric lights were strung from a main electric line, running water piped to each trailer, and all trailers used common toilet and shower facilities. Since this camp did not conform to the requirements of the building code in a great number of respects, including sanitation and windows, the township brought this action.

Gallup contends that a current housing shortage ought to make the ordinance void. However, Judge O'Reilly stated in the opinion ". . . With neither the wisdom of the ordinance nor the rationality of its enforcement have we anything to do. These have been confided by our constitution, not to the courts, but to the other two coordinate branches of the government."

For the disregard of the ordinance, Gallup was subjected to a penalty.

In closing it is interesting to note that the Oregon Supreme Court might not agree with this decision. On October 22, 1946. (according to Seattle Times of that date), the Oregon Supreme Court lashed at property owners' objecting to use of a city park for veterans' trailer houses at Eugene and refused to issue an injunction.

The unanimous opinion, written by Chief Justice Harry H. Belt, said: "It is difficult to reconcile the mental attitude of persons whose aesthetic senses are shocked by these unsightly trailer houses and yet make no objection to the use of the park as a cow pasture.

"We apprehend that these veterans and their families — including in many instances very young babies — will be as happy to vacate these trailer homes after the emergency ends as the plaintiffs will be to have them go."

Many of the veteran's houses in the 100-trailer unit are those of the students at the University of Oregon.

F. Gerard Feeney.

CONTEMPT — FREEDOM OF PRESS.—*Pennekamp v. Florida,* 66 Sup. Ct. 1029 (1946).—On Writ of Certiorari to the Supreme Court of Florida to review a judgment affirming a judgment of guilt in a contempt of court proceeding on a citation by the Circuit Court of Dade County. Reversed.

Pennekamp, individual petitioner and associate editor of the Miami Herald, together with the corporate petitioner who was the publisher of the paper were responsible for the publication of two editorials charged by the citation to be contemptuous of the Circuit Court and its judges in that they were unlawfully critical of the administration of criminal justice in certain cases then pending before the Court. After a finding of guilty the Supreme Court of the United States granted certiorari and reversed.

Mr. Justice Reed delivered the opinion of the court.

In reviewing the *Bridges v. California* case [1] he says importance must be given to the "clear and present danger rule" and goes on to say "The evil consequence of comment must be 'extremely serious and the degree of imminence extremely high before utterances can be punished.'" He states: "Reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption

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[1] 314 U. S. 252, 62 S. Ct. 190, 862, Ed. 192, 159 A. L. R. 1346 (1943).

of its processes." After examining the editorials in question and pointing out that while the cases were being heard at the time of publication and that the editorials did not portray the judges' attitudes, he emphasizes, however, that the Court must "weigh the right of free speech . . . against the danger of coercion and intimidation of courts in the factual situation presented by this record." He further states that the editorials could not be considered as constituting a "clear and present danger" to the administration of justice in Florida but were "only criticism of judicial action already taken . . ." Mr. Justice Reed states that publications such as the ones in question could not be considered as bringing influence upon judges and that the administration of justice has not been influenced.

Mr. Justice Frankfurter in delivering a concurring opinion stated, "A free press is not to be preferred to an independent judiciary nor an independent judiciary to a free press." He holds: "every time a situation like the present one comes here the precise problem before us is to determine whether the state court went beyond the allowable limits of judgment in holding that conduct which has been punished as a contempt was reasonably calculated to endanger a state's duty to administer impartial justice . . ."

Mr. Justice Murphy in concurring states that such publications must constitute a real threat to the administration of justice in order that they may be considered dangerous. "That situation is not even remotely present in this case."

Mr. Justice Rutledge in delivering a concurring opinion said that allowance must be granted to publications in reporting legal news. He states that "there is perhaps no area of news more inaccurately reported factually, on the whole, though with some notable exceptions, than legal news. Some part of this is due to carelessness . . . a small portion to bias . . . but a great deal . . . to ignorance which frequently is not at all blameworthy." His closing statement: "The statements in question are clearly fair comment in large part. Portions exceed that boundary. But the record does not disclose that they tended in any way to block or obstruct the functioning of the judicial process."

John C. Mowbray.

DIVERSITY OF CITIZENSHIP IN REFERENCE TO RESIDENTS OF THE DISTRICT OF COLUMBIA.—*Ostrow v. Samuel Brilliant Co.,* 66 Fed. Supp. 593 (1946).—This was an action for damages brought by the plaintiff, a resident of the District of Columbia, against the defendant, a Massachusetts corporation. No basis of jurisdiction, other than diversity of citizenship, was alleged in the complaint. The court raised the jurisdictional question of its own motion.

The question of the case was the constitutionality of an amendment to 28 U. S. C. A. No. 41, (1), which was effected in 1940. This amendment purported to read that the residents of the District of Columbia should be regarded as citizens of a foreign state wherever the question of diversity of citizenship arises as a basis of jurisdiction in the federal courts. Until 1933, there was prevalent opinion among the legal minds that Congress could not diversify jurisdiction so far as the constitutionality of the measure is concerned. This amendment was the culmination of the efforts fostered by the deviation from the opinion as mentioned above.

The principle marks the fifth attempt of the various federal courts to determine the constitutionality of this amendment; the box score thus far: