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Note and Comment

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NOTE AND COMMENT

INDUCING BREACH OF AGREEMENT BY EMPLOYEES NOT TO JOIN A LABOR UNION, IN ORDER TO COMPEL UNIONIZATION OF PLAINTIFF'S BUSINESS.—In *Hitchman Coal & Coke Company* v. *John Mitchell*, et al., (Dec. 10, 1917), 38 Sup. Ct. 65, the novel question was presented to the Supreme Court of the United States, as to whether or not members of a labor Union could be enjoined from conspiring to persuade, and persuading, without violence or show of violence, plaintiff's employees, not members of the Union,—and who were working for plaintiff not for a specified time, but under an agreement not to continue in plaintiff's employment if they joined the Union, this agreement being fully known to defendants,—secretly to agree to join the Union and continue working for plaintiff until enough had agreed to join, so that a strike could be called, and plaintiff be thereby forced to unionize its business of mining coal.

The majority of the court held that a permanent injunction should issue, Mr. Justice PITNEY, delivering the opinion, Mr. Justice BRANDEIS, delivering a dissenting opinion, in which Mr. Justice HOLMES, and Mr. Justice CLARKE, concurred.

In 1907, plaintiff was the owner of 5000 acres of coal land in West Virginia, and employed 200 or 300 men in mining about 300,000 tons of coal annually. At that time all the mines in Ohio, Indiana, and Illinois, were operated as 'union-closed-shop' mines, i. e., no one could hold a job about them without being a member of the United Mine Workers of America. All the mines in West Virginia, except a very few, were 'non-union-open-shop' mines, while those in Pennsylvania were partly 'open,' and partly 'closed' mines.

Plaintiff had opened their West Virginia mines in 1902, and operated them as "non-union," until April 1903, when, "under threats from the Union officials," that another mine owned by plaintiff in Ohio, already unionized, would be closed down by a strike "if the men at the West Virginia mine were not allowed to organize," they consented to the unionization of the latter.

For the next three years strikes followed because of difficulties with the plaintiffs as to scales of wages, and also between the Union and plaintiff's competitors, for which plaintiff was in no way responsible. The result was that the mining business in West Virginia was greatly disorganized during this period, to the loss both of the plaintiff, and the workmen, and plaintiff's mines stood idle from April to June, 1906.

In June, 1906, a self-appointed committee of the former employees of plaintiff, came to plaintiff to inquire upon what terms they could return to work, and were informed they could come back but not as members of the United Mine Workers of America; that plaintiff would not recognize that Union; that contracts would be made with individual workmen only; that the mines would be run non-union; that if any one wanted to join the union he could do so, but if he did, he could not remain in the employ of the company; that if he worked for plaintiff, he would have to work as a non-union man. Each employee was told this, and agreed to it before he was employed. The employment was not for a specified time. Operations were resumed, upon these conditions, June 12, 1906, and carried on with entire satisfaction to all parties for more than a year.

About July 1, 1907, three of the defendants, G., Z., and W., called on plaintiff's general manager to submit "a proposition for the unionization of the mine;" the manager refused to consider this, but at the request of these defendants laid it before plaintiff's board of directors, who rejected it. At some of the interviews plaintiff's manager told these defendants the terms upon which the men were employed.

In September, 1907, another defendant, H., was sent by the Union to organize all the mines in the district where plaintiff's mines were located; H. had distinct and timely notice that the contract between plaintiff and its employees expressly provided that the latter, if they joined the Union, should not remain in plaintiff's employment.

H. remained more than a month in the vicinity, interviewing as many of plaintiff's employees as possible, resorting to deception and abuse, holding public meetings, at which he abused plaintiff's superintendent, and intimating that wages paid by plaintiff would probably be reduced unless the mines were unionized. He kept secret the names of those who had agreed to join

the Union, but said that "after he got the majority he would organize the place," and that "they had sixty men signed up," about enough to "crack off," and "were going to shut down the mine as soon as he got a few more."

At another non-union mine in the same vicinity, not belonging to plaintiff, the same defendant, H., had been laboring with the employees, and about the middle of October, had succeeded in shutting it down.

October 24, 1907, plaintiff brought its bill for an injunction against the defendants alleging that they have unlawfully formed themselves into a conspiracy the purpose of which is "to cause your orator's mine to be shut down, its plant to remain idle, its contracts to be broken and unfulfilled, until your orator shall submit to the demand of the Union" to unionize its plant, and thereafter to employ only Union men.

A final decree granting a perpetual injunction was made in 1913 by the District Court, (202 Fed. 512); this was reversed by the Circuit Court of Appeals in 1914 (214 Fed. 685); afterwards an appeal was allowed, but dismissed by the Supreme Court, although a writ of *certiorari* was granted (241 U. S. 644). Upon final hearing the decree of the Circuit Court of Appeals was reversed, and the decree of the District Court modified, and affirmed as modified.

Mr. Justice PITNEY'S opinion is based upon propositions which may be summarized:

As to plaintiff's rights: (1) Plaintiff is as free to make non-membership in a union a condition of employment, as the working man is free to join the union. This is part of the constitutional right of personal liberty and private property, not to be taken away even by legislation, except under the paramount police power. (2) Plaintiff is entitled to be protected in the status created by the agreement,—even if it was terminable at the will of either party, for that does not make it at the will of others, and by the weight of authority the unjustified interference of third parties is actionable although the employment is at will.

(3) Plaintiff is entitled to the continued good will of its employees, and the value of the relation is in the reasonable probability that by treating its employees fairly it will be able to retain them, and to secure others as needed.

(4) The right of action for persuading an employee to leave his employer is universally recognized, and rests upon fundamental principles of general application, and not upon the English Statute of Laborers.

As to defendants' justification: (1) No question of the rights of employees is involved. Even if they have a right to strike, defendants have no right to instigate a strike, since they are not the agents of the employees.

(2) While defendants and other workmen have a right to form unions, and invite other workingmen to join, generally, the right is not absolute, but must be exercised with a reasonable regard to the conflicting rights of others. That a defendant wants the services is not a justification for enticing an employee.

(3) Defendants' efforts were not *bona fide* to enlarge the membership of the Union, but to organize the mine as a means to compel the owners to change their method of operation.

(4) The means employed by defendants were *unlawful*, even though peaceable, since it was a combination to procure concerted breaches of known contracts, intentionally and maliciously designed to inflict unnecessary damage on plaintiff by a strike, making it difficult if not impossible for plaintiff to run its mine non-union, as it had a right to do.

(5) This is not a case of defendants withholding from an employer an economic need,—a supply of labor,—until he assents to be governed by the Union regulations, for defendants have no supply of labor, needed by plaintiff, for the supply of non-union labor was ample in the district.

(6) Defendants are not justified by competition, for they are not competitors of the plaintiff, and if they were, their method would be unfair, and subject to injunction, just as it would be for a competing trader to induce his rival's clerks to desert him at a critical time in order to cripple his business.

The District Court held the United Mine Workers of America and its branches, an unlawful organization under the laws of West Virginia and under the Federal Anti-Trust Act; also that the injunction should apply to three defendants not served with summons, and to the officers, not parties to the suit, but who had succeeded in office some of the original defendants, and also all present and future members of the Union without naming them. These were held to be erroneous.

The most important parts of Mr. Justice BRANDEIS' dissenting opinion relate to (1) Unionizing plaintiff's mine; (2) Attempt to induce employees to violate their contracts; and (3) Persuading employees to leave plaintiff's employment.

As to (1) a distinction, based upon the testimony is drawn between "unionizing the mine," and "unionizing the employees;" the latter is only inducing the employees to join the Union; the former is inducing the employer to enter into a collective agreement with the Union (a) to employ only members of the Union; (b) to negotiate only with its officers as to wages, hours, etc.; (c) to treat only with the Union's representatives in settling disputes arising from the employment.

Each of these is legal. To obtain them, any or all, men may strive or strike; and if a Union may strike to obtain them, why not to secure an agreement to provide for them? There is no coercion in the legal sense, where a Union merely endeavors to induce employees to join a Union, with the intention thereafter to order a strike, unless the employer consents to unionize his shop. He is free to accept the agreement or disadvantage as he chooses. If it is coercion to threaten to strike unless plaintiff consents to a *closed union-shop*, it is also coercion to threaten not to give employment unless the applicant will consent to a *closed non-union shop*. Either has the equal right to withhold such an economic need from the other; in a legal sense an agreement entered into, under such circumstances, is voluntarily entered into.

As to (2), there is evidence of an attempt to induce plaintiff's employees to *agree* to join the Union; but none whatever of any attempt to induce them to violate their contract. Until an employee actually joined the Union, he

was not, under the contract, called upon to leave plaintiff's employ; there was no breach of contract until he both joined *and* failed to withdraw. If it was intended to secure agreements to join when a large number had consented to do so, and then join together, and strike, unless plaintiff consented to unionize his mine,—this would clearly be permissible under the contract.

As to (3), to induce third persons to leave an employment, or not to enter it, if done maliciously and without justifiable cause is actionable although such persons are free to exercise their own will. The contract here added nothing to plaintiff's right in this connection, since it was terminable at will. Persuasion, merely as a means is lawful, if, and only if, for a justifiable cause; here this was to strengthen the Union, and the individual's bargaining power by collective bargaining, so the workmen's condition would be improved. It should not be doubted that to induce workmen to leave or not to enter employment to advance such purpose, is justifiable when they are not bound by contract to remain in such employment.

At the same time a decision was rendered in *Eagle Glass & Manufacturing Co.* v. *Thomas W. Rowe, et al.*, 38 Sup. Ct. 80, involving the same situation, Mr. Justice PITNEY pronouncing the opinion of the majority of the Court, and the same justices dissenting as in the *Hitchman* case. In this *Glass* case, the Circuit Court of Appeals, had said: "There is nothing in the contract which requires such employees to work for any fixed or definite period. If any of them should decide to join [the Union] the plaintiff could not recover damages for the breach of the same. * * * The only penalty is that they cannot secure further employment from the plaintiff. * * * Such being the case it would be unreasonable to hold the Union liable in damages to the plaintiff because they had used lawful methods to induce the non-union miners to become members of their organization. We fail to see how this contract can be taken as a basis for restraining the defendants from using lawful methods for inducing the parties to the contract to join the organization."

Mr. Justice PITNEY says: "This reasoning, essential to the decision reached, is erroneous for several reasons: (stated in the Hitchman case) (a) because plaintiff was entitled by law to be protected from interference with the good will of its employees, although they were at liberty to quit the employment at pleasure; (b) because the case involved no question of the rights of employers, and their right to quit gave to defendants no right to instigate a strike; and (c) because the methods pursued by the defendants were not lawful methods." These are substantially the same as (3) above, under Plaintiff's rights, and (1) and (4) under Defendant's justification.

It is only in (4) above, that "procuring concerted breaches of known contracts," is relied on as one of the elements of unlawfulness. Mr. Justice BRANDEIS, (2) above, says there is no evidence "whatever of any attempt to induce them to violate their contracts."

The majority opinion seems to consider that "agreeing to join" the Union, and still continuing to work for the plaintiff, until the employee should actually be taken into the Union, and becoming thereby subject to its jurisdiction, was a substantial breach of the contract of employment, and if this

was induced by the defendant with knowledge, it was unlawful. Mr. Justice BRANDEIS on the other hand held that only by continuing to work for the plaintiff after the employee had actually been taken into the Union would be a breach of the contract. He seemed to admit that inducing the employer to do that would be technically unlawful, but does not state very clearly that such would be the case, or that it would be important if it were the case. In short "procuring a breach of contract" does not seem to have had much to do with either the majority or the minority opinion.

Suppose the first day H undertook to unionize plaintiff's mine, he had induced all the employees *to join* the Union,—it would then have been their duty, under the contract, to quit working for plaintiff at once,—and the result would be as disastrous as if they had wrongfully struck,—but plaintiff certainly could not then have successfully complained, for that reason. On the other hand, if they had not quit, or if H had induced them not to quit as the contract called for, could the plaintiff sue them or H, or the Union for damage for breach of contract, or inducing breach thereof in not quitting? Perhaps, yes,—but certainly only for nominal damages; its remedy against employees would be discharge, and if it discharged one, and the others then quit, would it have an action against them? Certainly not.

The case would seem to stand then just as it would if there was no breach of contract,—and then, as conceded in both opinions, inducing plaintiffs to join the Union or 'going on a strike,' is actionable only if the means used or the purpose is otherwise *unlawful.* The majority opinion seems to go the whole length of holding that knowingly to persuade employees to join (or agree to join) the Union, with the purpose of thereafter being able to order them to strike, if the Union so determines, is an *unlawful* purpose and can be enjoined,—because it disturbs or tends to disturb the *status quo,* or the 'reasonable probability' that it will remain the same. This certainly goes a long way in curtailing the right and liberty of one person, or a group of persons, to persuade one another to enter into co-operation for their supposed mutual and otherwise lawful benefit.

Suppose that when G, L & W, asked plaintiff to unionize its mine, it had agreed to do so; this would have been the same sort of a breach of the contract by it, as the agreement to join the Union was by the employees in the case. Would the employees then have had an injunction against the plaintiff to prevent it from unionizing its mine, and discharging its employees, or being able thereafter to do so, if they did not join the Union, contrary to the agreement? We submit that to be consistent, the Court would have to hold so. For do not the employees have a right to the same *status quo,* or to a 'reasonable probability' that their employer will not, at the instance of some one else, unionize its mine, when it believes it would advance its interests to do so? It is doubtful if the court would so hold. And if it did, would not an employer complain that the court had seriously curtailed its constitutional rights of liberty and property by compelling it to operate its mines *'non-union'* when it wanted to have them *'union.'*

Are not the employees and the employers entitled to the 'equal protection', of the laws by an equal application thereof? They should be.

In recent years it seems to be conceded that the "right of association for collective bargaining", should be recognized and protected by the laws in a way similar to the protection extended to that 'exclusive right' included in the ownership and control of property; in fact that in no other practical way can those who have no property secure substantial economic equality with those who have property. If this is true should not the man's property in himself and the good will of his associates, be legally protected in the same way and to the same extent as the ownership of tangible property is? H. L. W.

WHO IS AN ALIEN ENEMY?—One Gustav Müller, a native German, resided in England on May 20th, 1915. He had never been naturalized. He owned a leasehold house in England, and on the date just mentioned he executed a power of attorney to one John White to sell this leasehold house and make proper conveyance of the same. Six days later he was permitted by the British Government to return to Germany, and he started the same day, May 26th. He was known to be in Germany on June 11th, but the date of his arrival was unknown. On June 2 the leasehold was sold to Tingley, but the latter, upon learning the facts here given respecting Müller refused to proceed with the contract of sale, and commenced an action for a declaration that the contract was illegal because at the time it was made the defendant, Müller, was an alien enemy. EVE, J., held that this fact had not been proved, and dismissed the action, and an appeal was taken to the Court of Appeal, *Tingley* v. *Müller*, [1917] L. R. 2 Ch. 144, and the decision of EVE, J., was sustained.

The case raises the broad question of who is an alien enemy, and six judges of the Court of Appeal wrote extensive opinions upon it. All the judges agreed that Müller's German nationality and allegiance did not make him an alien enemy. Five of them agreed that his departure from England for the purpose of returning to Germany did not make him an alien enemy, and that he should actually have reached Germany before the character of alien enemy attached to him. They differed as to the proof necessary to show his return. EVE, J., had held that evidence of his departure for Germany on May 26th did not prove his arrival in Germany by June 2, and two judges of the Court of Appeal, agreed. But the other three judges who thought such arrival was necessary to be shown, were of opinion that there was a presumption of fact that he arrived within seven days after leaving England.

SCRUTTON, L. J., thought that Müller became an alien enemy the moment he departed for Germany, on the ground that he thereupon lost his commercial or trade domicil in England and until he acquired another his national character reverted and this made him an alien enemy.

The term "alien enemy" is used with different meanings, depending on the principles or rules sought to be applied to the class so designated. Thus by United States Revised Statutes, Sec. 4067, relating to war, it is enacted that "all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, shall be liable to be apprehended, restrained, secured, and removed, as alien enemies."

This meaning is used in the Presidential Proclamations of April 6 and

November 16, 1917, regarding the conduct of alien enemies, within the United States. And it is the meaning employed in such cases as *Dorsey* v. *Brigham*, (1898) 177 Ill. 250, construing statues relating to naturalization.

But in connection with the regulations of trade with the enemy an entirely different meaning is given to the term. It was this meaning which was involved in *Tingley* v. *Müller*. The British Trading With the Enemy Act, 1914, (4-5 Geo. 5, ch. 87), does not define the term, but the Trading with the Enemy Proclamation, No. 2, of September 9, 1914, defined an "enemy" as any person of whatever nationality resident or carrying on business in the enemy country (*Tingley* v. *Müller*, p. 179, per SCRUTTON, L. J.). This is substantially the same definition as that given by our own Trading With the Enemy Act, of Oct. 6, 1917, which defines an enemy as a person residing in enemy territory or resident outside of the United States and doing business within enemy territory.

The term as employed in these acts has clearly taken on a meaning relevant to the purpose with which the acts were passed, namely, trade or commerce. Nationality has nothing to do with the matter, and domicil is not controlling. A German citizen residing in the United States, though domiciled in Germany, is not an alien enemy, while a neutral domiciled in a neutral country may be an alien enemy, if he is engaged in business within enemy territory. Even a citizen of the United States would be an alien enemy if voluntarily resident in a hostile country. DICEY ON PARTIES, p. 3. It is when one becomes a part of the business organization of the enemy, directly contributing by his trade or business to the welfare of the enemy, that he becomes an alien enemy under these Acts. The common law, which forbad trading with the enemy, as well as statutes regulating the matter, are "governed upon the public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State. Trading with a British subject or the subject of a neutral state carrying on business in the hostile territory is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy State, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies." Per Lord READING, in *Porter* v. *Freudenberg* [1915] 1 K. B. 866.

This is analogous to the view taken by the prize courts as to "enemy property." Thus in *The Benito Estenger* (1899), 176 U. S. 568, 571, the Supreme Court said that "property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character."

In the *Müller Case* there was nothing to show that the defendant had begun to carry on trade in Germany from any point outside of Germany, so that the establishment of commercial relations between him and the enemy could arise only through his re-establishment of residence in Germany. Hence not until he actually reached Germany could he be of any advantage to the enemy in the way of trade, and the views of the ma-

jority of the judges was in harmony with this commercial test of enemy character.

In *Daimler Co.* v. *Continental Tyre and Rubber Co.* [1916], 2 A. C. 307, the House of Lords was asked to go a step farther along the same line, and hold an English corporation to be an alien enemy because substantially all its shares were held by German subjects and its directors were all German subjects, three-fourths of them resident in Germany when war was declared. The Court of Appeal had held that it was not an alien enemy. In the House of Lords, Lord HALSBURY contended that it was an enemy, the corporation being substantially a mere partnership with a limited liability, all the partners presumably residing in enemy territory. He thought that "the unlawfulness of trading with the enemy could not be excused by the ingenuity of the means adopted." Lord ATKINSON thought an English Company might well be an alien enemy if in fact it could be shown that its real business activity was in enemy territory, but that the record was silent on that point. Lord SHAW dissented from both these positions, saying that since no dividends or assets could be paid to enemy shareholders, "and all trading with these shareholders * * being interpelled, there is no principle of law which would, in my humble opinion, justify the incongruity of dominating or regarding the Company itself as enemy either in character or in fact." Lord PARKER, with whom concurred Lords MERSEY and KINNEAR, took the position that enemy character could not be given to the company "merely because enemy shareholders may after the war become entitled to their proper share of the profits of trading," but he thought it might assume enemy character "if its agents or the persons in *de facto* control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under control of enemies." He refused to admit, however, that the character of individual shareholders could affect the character of the Company; and on this point Lord PARMOOR was in accord.

The problems here suggested are equally relevant to conditions in this country. Our own TRADING WITH THE ENEMY ACT, so far as corporations are concerned, does not include companies incorporated in the United States. However, the illegality of trading with the enemy was recognized at common law, and the statute does not abrogate or narrow the common law principles, but only makes special regulations and provides special penalties for certain classes of acts of this character. The war has brought up a large number of cases in England involving both the common law and statutory rules relating to alien enemies, and in the controversies which are sure to arise here over trading with the enemy, these English cases are likely to prove of great practical value to American lawyers. E. R. S.

WHEN IS A PREFERENTIAL TRANSFER "REQUIRED" TO BE RECORDED?—The BANKRUPTCY ACT of 1898 (as amended in 1903 and 1910), after defining a preference, provides in § 60b that preferences made under certain circumstances may be recovered from the preferred creditor if the latter had "rea-

sonable cause to believe" that a preference was to be effected "at the time of the transfer * * * or of the recording or registering of the transfer if by law recording or registering thereof is required," such time being within four months before bankruptcy. Bankrupcty courts have for years been vexed with the question: When is a transfer "required" to be recorded under this provision of the Act? Various suggestions as to the meaning of the Act were made by the various Circuit Courts of Appeals, but the question was finally authoritatively decided—in part, at least—in 1916 in the case of *Carey* v. *Donohue,* 240 U. S. 430. This case decided that a transfer was not "required" to be recorded under the provisions of § 60 unless the requirement was (to quote from the opinion in that case) "for the protection of creditors, —the persons interested in the bankrupt estate, and in whose behalf, or in whose place, the trustee is entitled to act." The decision in *Carey* v. *Donohue* was that an Ohio statute requiring the recording of deeds of land in order to make them effective *as against subsequent bona fide purchasers* was not such a requirement as was meant by § 60, and, of course, the decision is authoritative only on that point. The decision has therefore left open the question whether a statute requiring the recording of a transfer in order to make it effective as against *any creditor* is sufficient to satisfy the provision of the statute, or whether the recording act must require the record in order to make the transfer valid as against *the particular kind of creditor,* who is in the particular case, represented by the trustee in bankruptcy. The Supreme Court of the United States has just decided, in *Martin* v. *Commercial National Bank,* 38 Sup. Ct. —, that it is the latter requirement that must be made.

In a comment on *Carey* v. *Donohue* (14 MICH. L. REV. 578, 581) it was said that the language of the court in that case "seems to indicate pretty clearly that if the local law requires recording as against *any* of the classes of persons referred to in § 47a (2) there is a 'requirement' under § 60. Under § 47a (2) the trustee is given 'the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings' on property in the custody, or coming into the custody of the bankruptcy court; as to property not in such custody, he has the 'rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.' The Supreme Court* * * seems to indicate, without regard to any distinction as to the two classes of property referred to in § 47a (2), that if the local law requires recording as against any of the classes of creditors referred to in that section, recording is required under § 60." This interpretation of the decision in *Carey* v. *Donohue* was also made by the Circuit Court of Appeals for the Eighth Circuit in the case of *Bunch* v. *Maloney,* 233 Fed. 967, 147 C. C. A. (affirming *In re T. H. Bunch Commission Co.,* 225 Fed. 243), in which the court had under consideration an Arkansas statute which provided that unrecorded chattel mortgages were void as against subsequent purchasers and lien creditors. Referring to the decision in *Carey* v. *Donohue,* the Court said: "Two views may be taken of the construction given by *Carey* v. *Donohue* to the recording requirement clause of § 60b: First, that it is for the benefit of creditors generally, because their rights are the concern of bankruptcy proceedings, but

does not embrace those cases in which the requirement is in the interest of persons outside the purview of the BANKRUPTCY ACT. Second, that as to the creditors themselves the clause picks up and adopts all the substantive and procedural limitations of the construction of the statute prescribing the requirement; and if in local practice creditors of a particular class, like general creditors, could not invoke the failure to record, a corresponding disability rests upon the trustee in bankruptcy." After discussing the result sought to be attained by this section of the BANKRUPTCY ACT, namely, the striking down of all secret liens, the court decided that the trustee in bankruptcy might "invoke the remedy of § 60b regardless of the local construction of the statute making a procedural distinction between creditors with a lien and those without." So also in the case of *Hawkins* v. *Dannenberg Co.*, 234 Fed. 752, Judge LAMBDIN of the District Court for the Second District of Georgia, though compelled to a contrary decision by the authority of *Martin* v. *Commercial National Bank*, 228 Fed. 651, 143 C. C. A. 173, stated his opinion that under the decision in *Carey* v. *Donohue*, a provision of the Georgia statute making unrecorded mortgages void *as against lien creditors only* was nevertheless a "requirement" of recording under § 60 of the BANKRUPTCY ACT. This is the same Georgia statute that was under consideration by the Supreme Court in the principal case.

To the contrary, however, are the decision of the Circuit Court of Appeals for the Eighth Circuit in *Martin* v. *Bank, supra* (affirmed by the Supreme Court of the United States in the principal case) and the case of *Emerson-Brantingham Implement Co.* v. *Lawson*, 237 Fed. 877, decided by the District Court for the Southern District of Iowa, in a case raised under the Iowa act providing for a recording of conditional sale contracts, and holding that the trustee in bankruptcy acquired no rights as against previously recorded conditional sale contract because the latter was "required" to be recorded *only as against lien creditors.*

The question seems now to be finally settled in such a manner as to leave little room for doubt, but it is unfortunate that the Act has been so framed as to make possible the result which has now finally been attained. As is said by the court in *Bunch* v. *Maloney, supra,* in arguing against the construction now adopted by the Supreme Court, "It is difficult to perceive much result of consequence in the amendment of 1910 of § 60b. Though twice amended for further effectiveness, it would be doubtful that the section, so construed, would accomplish anything of practical value." And the cogency of this argument seems obvious. It is not the lien creditor that requires protection, but the general creditor, and it is to be regretted that the Supreme Court, in choosing between two possible courses open to it, has again, as in *Carey* v. *Donohue,* taken the path that gives least power to the trustee in bankruptcy, and most protection to the preferred creditor. E. H.

JOY-RIDING, SIMPLE AND COMPOUND.—The wrongful use of another's automobile, even though accompanied by a trespassory taking, cannot, if followed by a return to the owner or an abandonment, be easily brought within the

definition of larceny at common law or under the ordinary larceny statutes, because of the requirement of intent to deprive the owner permanently of his property. *Smith* v. *State*, 146 S. W. 547; *State* v. *Boggs* (Iowa, 1917), 164 N. W. 759; McCLAIN, CRIMINAL LAW, § 566. Of course, such intent, at the time of taking, might be found in spite of return or abandonment, though it is doubtful whether the bare circumstances stated above would constitute sufficient evidence of that intent to go to the jury. *Rex* v. *Phillips*, 2 East P. C. 662; *Brennon* v. *Com.*, 169 Ky. 815; *State* v. *Slingerland*, 19 Nev. 135; *State* v. *Davis*, 38 N. J. L. 176; *People* v. *Flynn*, 7 Utah 378. As a matter of law, intent to abandon at a distance, as distinguished from intent to return, has been held to be sufficient, on the principle that reckless indifference to harmful consequences is equivalent, in law as well as in ethics, to a direct purpose to produce such consequences. *State* v. *Davis*, *supra*. See also the other cases last above cited. *Reg.* v. *Prince*, 13 Cox C. C. 138, and *People* v. *Cummings*, 123 Cal. 269. And, if this position be granted, such abandonment after a trespassory taking would make a case of larceny, on the theory of continuing trespass, even though, at the time of taking, the intent had been to return the property. *Reg.* v. *Riley*, 6 Cox C. C. 88; *Weaver* v. *State*, 77 Ala. 26; *Com.* v. *White*, 11 Cush. 483; *State* v. *Coombs*, 55 Me. 477. Again, in any of these cases, a charge of larceny of the gasoline consumed might be sustained. By hypothesis, this gasoline has been taken by trespass and carried away, mixed perhaps with more not consumed, and its consumption sufficiently evidences an intent to deprive the owner thereof. A defense based on the theory that defendant never thought of the gasoline might be difficult to dispose of as a matter of law, but could hardly succeed on the issue of fact to the jury. A difficulty arises here as to the description of the property, but an indictment describing it as "gasoline in a quantity to the grand jurors unknown, of the value of twenty cents per gallon" would be sufficient. BISHOP CRIM. PRO., § 553. If a specific quantity were laid in the indictment, a variance in the proof would not, at least under the more liberal authorities, be fatal. *State* v. *Kreps*, 8 Ala. 951; *Com.* v. *Griffin*, 21 Pick. 523; *Hagerman* v. *State*, 54 N. J. L. 104 (semble); *State* v. *Martin*, 82 N. C. 672. These problems may be further complicated by the circumstances of the taking. If possession of the car was obtained by fraud, the taking could still be made out under the doctrine of larceny by trick. McCLAIN CRIM. LAW, §§ 559, 560. If the owner of the car had delivered possession to defendant as his servant, and he had abused the trust, the taking could be made out under the doctrine that in such a case the delivery vests a mere custody. Ib. § 556. If, on the other hand, the defendant was a bailee of the car, no larceny could be established. As to whether embezzlement could be made out, that would depend, of course, upon the phraseology of the statutes, but it is doubtful whether the broadest of the embezzlement statutes would be held to cover the case, the difficulty turning chiefly upon the construction of the words "fraudulently" and "convert." McCLAIN, §§ 640, 641; 87 Am. St. Rep. 19, note.

The foregoing theories are fairly comprehensive, yet, as they involve difficulties of proof as well as some propositions of law which might not be

accepted by a conservative court, there is ample justification for legislation dealing specifically with this sort of wrongdoing. Whether the current legislation can pass the ordeal of judicial construction, is not so clear. An Iowa statute provided that, "if any chauffeur or other person shall without the consent of the owner take, or cause to be taken, any automobile or motor vehicle, and operate or drive or cause the same to be operated or driven, he shall be imprisoned," etc. 1913 SUPP. TO CODE, § 4823. In the case of *State* v. *Boggs* (Oct. 20, 1917), 164 N. W. 759, which was a prosecution under this statute, defendant having obtained prosecutor's permission to use his automobile for 15 or 20 minutes, had driven it to a city eighty miles distant, where it was disabled and left in a garage. The state excepted to the refusal of the trial court to instruct that, "consent given by the owner of the car for a specific purpose or for a stated time, would not be consent to use the car for a different purpose, nor generally, nor for an unlimited time." The Supreme Court overruled the exception and volunteered the statement that, "The statute was not designed to punish one who obtains consent of the owner to take and operate his motor vehicle by misrepresentation or for a fraudulent purpose."

The future course of development can readily be forecast. A statute will be enacted covering the case of abuse of consent by excessive user, and another covering the case of consent procured by fraud. We shall then have a tripartite division of the offense of joy-riding, analogous to the division of larceny, embezzlement, and false pretenses. A few more statutes defining aggravated or compound joy-riding will complete the legal edifice, and further demonstrate the adaptability of the law to changing conditions. E. N. D.