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RECENT DECISIONS

CONSTITUTIONAL LAW—ABSENCE OF CONVICTED DEFENDANT FROM HEARING TO SETTLE TRANSCRIPT OF TRIAL RECORD PRIOR TO APPEAL DOES NOT VIOLATE DUE PROCESS. — Chessman v. Teets, 239 F.2d 205 (9th Cir. 1956). In 1948, petitioner was convicted and sentenced to death. California law requires an automatic appeal to its Supreme Court of all trial judgments which result in a death sentence, Cal. Penal Code § 1239 (b) (West 1956), and the entire record of the trial must be prepared and certified as correct by the court reporter who stenographically recorded the trial proceedings. Cal. Rules On Appeal, Rules 33 (c) and 35 (b) (West 1955). The court reporter who had recorded the entire trial died while preparing the record for appeal, leaving 2,000 pages of shorthand notes to be transcribed and certified for use at the mandatory appeal. A substitute reporter was appointed to complete the transcription, and it was certified to be correct at a post-conviction hearing. Petitioner was not permitted to attend the hearing although permission was requested. After his conviction was affirmed, People v. Chessman, 38 Cal. 2d 166, 238 P.2d 1001 (1951), cert. denied, 343 U.S. 915 (1952), petitioner sought a writ of habeas corpus in the federal district court. The writ was denied and appeal was taken. Held, affirmed. Due process of law is not violated if the defendant in a criminal action is not permitted to be present at a hearing for settlement of the transcript because such hearing is part of the appeal procedure rather than of the trial.

Although it is a commonly accepted belief that a criminal defendant in a state court has the right to be present at all stages of his trial, the cases indicate that this right is subject to many limitations. Basically, due process requires that the defendant be present only if a fair hearing would be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97 (1934). This has been interpreted to mean that the defendant is entitled to hear everything that is heard by the jury, in order to adequately protect himself. United States v. Johnson, 129 F.2d 954, 958 (1942). Thus his presence is required where it bears a "reasonably substantial" relation to his opportunity to defend himself. Snyder v. Massachusetts, supra. Some divergencies appear in the application of this standard. While the defendant must be in court when the jurors are challenged, Hopt v. People, 110 U.S. 574, 579 (1883), it has been held that a juror may be discharged in the absence of the defendant, Howard v. Kentucky, 200 U.S. 164 (1906). Similarly, although the defendant has a right to be present while the jury receives evidence, United States v. Johnson, supra, it is not essential that the defendant actually hear the
evidence presented, *Felts v. Murphy*, 201 U.S. 123 (1906) (deafness), or be present when the verdict is rendered, *Frank v. Mangrum*, 237 U.S. 309, 343 (1915), nor is it necessary that the defendant be present when the jury views the scene of the crime, *Snyder v. Massachusetts*, supra. If a pure question of law is argued in the absence of both the defendant and the jury, the defendant is not prejudiced by his absence since his opportunity to defend himself is not affected. *United States v. Johnson*, supra.

In the absence of a statute to the contrary, a convicted defendant has no absolute right to take an appeal. *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937). If the state grants the right of appeal, it may set its own conditions, *McKane v. Durston*, 153 U.S. 684 (1894), subject however, to the requirements of due process of law, *Cole v. Arkansas*, 333 U.S. 196 (1948). Due process does not normally require the presence of the defendant, even in a capital case, during the hearing of his appeal, *Schwab v. Berggren*, 143 U.S. 442 (1892), but if at any stage of the judicial proceedings the presence of the defendant is necessary to insure a fair hearing, then his presence becomes a requisite, *Price v. Johnson*, 334 U.S. 266, 280 (1948). In the instant case the majority determined that the settlement proceedings were part of the appellate procedure and treated this as conclusive of the question. 239 F.2d at 218.

In two recent decisions where the defendants requested to be present at post-conviction hearings, the Supreme Court upheld the constitutionality of their exclusion on the grounds that the guilt or innocence of the defendants was not being determined at these hearings. *Solesbee v. Balkcom*, 339 U.S. 9 (1950); *Williams v. New York*, 337 U.S. 241 (1949). However, in neither case did the defendants claim prejudicial error at the trial which could affect their chances for release, and more importantly, though the defendants were not present, neither was the prosecution. The defendant in the instant case alleged prejudice at his trial, and since the record was plaintiff's only chance of showing prejudice on appeal, it appears that his guilt or innocence was being determined at these proceedings without his presence.

Although the majority in the instant case treated the hearing as part of the appellate process, it would be more logical and imminently more just to place it within the purview of the trial. The trial judge conducted the hearing; the trial prosecutor produced and questioned the witnesses; and the witnesses (excepting the substitute reporter) and others present at the trial testified from memory as to facts that had occurred at the trial — facts that were vital to defendant's contentions. The only person needed to complete the trial setting was the defendant himself.
Even treating the hearing as part of the appeal process, by the reasoning of the Price and Cole cases, supra, the particular factual situation surrounding this hearing demanded the defendant's presence in order to insure a full and fair hearing as required by the due process clause of the fourteenth amendment.

Daniel W. Hammer

CONSTITUTIONAL LAW—LOYALTY TEST OATHS—Illinois Loyalty Oath Statute Sustained in its Application to Teachers.—Pickus v. Board of Education, 138 N.E.2d 532 (Ill. 1956). In June, 1955, the Illinois Legislature enacted section 30 (b) of "An act in Relation to State Finance," ILL. ANN. STAT. c. 127, § 166 (b) (Smith-Hurd 1956 Supp.), which provides that no state employee, with certain non-pertinent exceptions, can receive compensation from legislative appropriations until he files an affidavit under oath stating that he is not knowingly a present member of, nor knowingly affiliated with, either the communist party or any other organization advocating the violent overthrow of the government. The plaintiffs were Chicago school teachers who continued to work after refusing to execute this affidavit. Plaintiffs' actions for declaratory judgment and injunctive relief against enforcement of the statute were dismissed. On direct appeal, the Supreme Court of Illinois held, in part, that the statute was constitutional and not in violation of either state or federal requirements of due process of law.


The primary position taken in opposition is that a test oath requirement violates rights guaranteed by the first and fourteenth amendments—collectively termed by those affected "academic freedom," "religious freedom" or "freedom of thought and conscience"—on the theory that such an oath limits absolute free-
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...
When the basic use and content of the oath have been established as constitutional, the issue narrows to the procedural effect of the statute. The immediate effect of refusing to file the affidavit in the instant case is to automatically withhold the employee's compensation from state funds, although the employee may continue to work without pay (as the plaintiffs did), and later may recover the back pay by execution of the affidavit.

Of course, the probable result of refusal to file is to force discontinuance of employment. This peculiar result was attacked on two grounds. The first was based on the claim that notice and hearing are essential in order to discharge an employee for loyalty reasons and that the automatic operation of this statute thus violates due process. Supporting this contention, reliance was placed upon Slowchower v. Board of Higher Education, 350 U.S. 551 (1956), which held that the summary dismissal of a college professor was without due process when he was automatically discharged for refusing to answer questions before a Senate investigating committee concerning his communist affiliation, and on the Adler and Garner cases, supra, in which provisions were made for hearings or review. However, in Slowchower a hearing was required because there was no substantial relationship between pleading the fifth amendment before an outside committee and disqualification from public employment. Moreover, in Adler, the hearings were found to be necessary as the only way to establish knowing membership in a subversive organization under the operation of the particular statute involved. Though hearings were given in Garner, supra, the main ground for discharge was the refusal to execute the oath and affidavit, rather than the results of any further inquiry. Similarly, in the instant case, the statute prescribed a standard of eligibility rather than imposing a penalty, so no hearing was necessary.

Petitioners also attacked the statute on the basis that the use of an oath under the circumstances was not a reasonable attempt to avert a substantial danger. The plaintiff contended that since this oath operates only to withhold pay without discharging non-signers, no danger is averted by the oath requirement; only an arbitrary limitation is set down, denying equal protection since the subversive, as well as the innocent objector, can continue to work. This argument is partially valid, but fails because by it the plaintiff is forced into the illogical position of contending that while discharge would be constitutional, a penalty falling short of discharge violates fundamental rights.

Guided by the recent Supreme Court decisions mentioned above, the instant court could safely hold that this statute was not an unreasonable attempt to eliminate communists from pub-
lic employment. Whether or not an oath requirement is effectual when it operates merely to withhold compensation is an issue which, like the larger question of whether loyalty oaths basically are wise or unwise, remains a question for the legislature and not for the courts to answer.

John E. Kennedy

Constitutional Law — Political Question — Legislature's Failure to Reapportion in Compliance With State Constitution Not Justiciable in Federal Courts. — Radford v. Gary, 145 F. Supp. 541 (W. D. Okla. 1956), aff'd per curiam, 352 U.S. 991 (1957). Plaintiff, a resident voter of Oklahoma, brought this action to compel the Oklahoma Legislature to make voting reapportionments as required by the state constitution. Plaintiff alleged that such failure to reapportion operated to deprive him of the equal protection of the laws guaranteed by the fourteenth amendment of the United States Constitution. In support of this contention, he alleged that the county wherein he resided and voted had approximately fifteen percent of the state population, with approximately two percent representation in the state senate and less than four percent in the state house of representatives. On a motion to dismiss, defendant conceded violation of constitutional rights, but contended that the question was of a political nature and therefore not justiciable. The motion was sustained.

It is well settled that the federal judiciary will not interfere in purely political controversies, i.e., those which are better answered by either the legislative or executive branch of the government. Luther v. Borden, 48 U.S. (7 How.) 1 (1849). The rationale behind this rule lies in the concept of the separation of powers among the three departments of the government. However, the manner by which the courts determine what questions are of a political nature has always been obscure, since the exact division of powers within the government is often a nebulous concept, incapable of clear-cut delineation. One authority believes that "the true basis of a political question is the lack of legal principles for the courts to apply in their consideration of cases involving certain types of subject matter, and the commitment of their final disposition to the political branches of the government." Field, The Doctrine of Political Questions in the Federal Courts, 8 MINN. L. REV. 485, 513 (1924). Another finds the ultimate answer in the
line drawn by the constitutional delegation. "The actual delegation as it has occurred has depended upon men's current beliefs as to what ought to be delegated, upon their political and social theories and their notions of expediency." Weston, Political Questions, 38 Harv. L. Rev. 296, 331 (1925). Neither theory clarifies the problem, but both indicate a consensus of opinion that judicial discretion is the deciding factor in determining which questions are of a political nature.

Most state courts regard reapportionment issues as justiciable. For a recent listing of authorities, see Tabor, The Gerrymandering of State and Federal Legislative Districts, 16 Md. L. Rev. 277, 284 (1956). However, state courts exercise great caution in using judicial sanctions to supplant legislative judgment. Only in instances of gross inequalities will an existing apportionment statute be held unconstitutional. Watts v. O'Connell, 247 S.W.2d 531 (Ky. 1952); Ragland v. Anderson, 125 Ky. 141, 100 S.W. 865 (1907). On the basis of separation of powers, state courts have refused to compel the legislature to reapportion even in the face of a specific mandate of the state constitution requiring reapportionment. Brewer v. Gray, 86 So. 2d 799, 803 (Fla. 1956) (dictum); State v. Zimmerman, 261 Wis. 398, 52 N.W.2d 903 (1952). The Oklahoma Supreme Court, in Romang v. Cordell, 206 Okla. 369, 243 P.2d 677 (1952), has acknowledged the unconstitutionality of the existing Oklahoma apportionment statute, but declined to furnish a remedy. Consequently, the plaintiff in the instant case had no remedy within the state and attempted to secure the protection of admitted constitutional rights by resort to the federal courts.

Precedent for the refusal of the federal court to intervene in the instant case was established in Colegrove v. Green, 328 U.S. 549 (1946), where the Supreme Court declined to invalidate on constitutional grounds an Illinois statute governing the apportionment of federal congressional districts in Illinois. Three justices denied relief, finding no justiciable issue — and at least determining that no jurisdiction should be exercised if not indeed holding that no jurisdiction existed — because there was a want of equity and the question was of a political nature. Three justices, dissenting, found precedent for both the existence of jurisdiction and its exercise. Mr. Justice Rutledge cast the deciding vote. He agreed that there might be a justiciable issue, but because there was a want of equity due to the "delicacy" of the federal-state issue, he determined that it should not be exercised. Thus, a majority denied equitable relief but a confusing line resulted as to justiciability of the issue. See Cook v. Fortson, 329 U.S. 675, 678 (1946).

The Colegrove case prevailed where the constitutionality of Georgia's county unit election system was assailed. The Court re-
A suit analogous to that of the instant case to compel a state general assembly to reapportion in compliance with the state constitution was dismissed for want of equity because it had been brought prematurely, the plaintiff having failed to exhaust his state remedies. *Remmey v. Smith*, 102 F. Supp. 708 (E.D. Pa. 1951), appeal dismissed, 342 U.S. 916 (1952). But as to the jurisdictional question, the court interpreted the *Colegrove* case as relating merely to the exercise of judicial power in the political area rather than to the existence of such power, and indicated that a suit based upon the fourteenth amendment could present "novel questions." 102 F. Supp. 708, 710, n. 11.

The dissent in the instant case relied heavily on *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii 1956), where the court denied a motion to dismiss upon finding that the Hawaiian territorial legislature had failed to reapportion in accordance with population changes. The court theorized that the majority in the *Colegrove* case had found a justiciable cause but had refused to exercise its equity power because of the delicacy of the state-federal relationship. Since Hawaii is a territory, the court concluded that it was not bound by the *Colegrove* case because a territory is not in any respect an independent sovereignty. However, overtones in the decision indicate that the result would have been the same even if Hawaii had been a state. The court felt that the impact of the recent Supreme Court decisions in the civil rights area has caused the delicacy of state-federal relations to bow to the necessity of recognition and enforcement of constitutionally protected rights.

The *Remmey* and *Dyer* cases may be indicative of dissatisfaction with the traditional view that a reapportionment issue is non-justiciable, at least where there is obvious unconstitutional discrimination. However, the *Colegrove* rule has prevailed in subsequent suits involving reapportionment. *Radford v. Gary*, supra; *Perry v. Folsom*, 144 F. Supp. 874 (N.D. Ala. 1956). Moreover, the memorandum affirmance of the instant case by the Supreme Court indicates that no departure from the traditional view may be anticipated despite the dissatisfaction. Such a stand, at least as in the instant case where there is ample evidence of geographical discrimination with no state remedy available, seems a regrettable counterpoint to recent free-swinging steps by the Supreme Court to end unconstitutional discrimination in other areas, *Brown v. Board of Education*, 347 U.S. 483 (1954), declaring
racial segregation in public schools unlawful; Terry v. Adams, 345 U.S. 461 (1953), eliminating discriminatory restrictions of the Negro vote in Texas.

In the event that a federal court assumes to adjudicate a case arising from a state legislature’s refusal to comply with the constitutional requirement of fair apportionment, there remains the problem of forcing adherence to its subsequent mandate. The federal system has long recognized its inability to coerce a state executive into performing his constitutional duty. Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860). Furthermore, presumably the legislature simply could ignore a writ of mandamus, an injunction, or a declaratory judgment. Rendering the present reapportionment statute unconstitutional may be a step in the right direction, but the Supreme Court evidently feels that judicial action would only increase the voter’s plight, since it might well result in at-large elections. See Colegrove v. Green, 328 U.S. 549, 555 (1946). Accordingly the Supreme Court maintains that the voter’s remedy lies in the hands of the electorate or “the fidelity of executive and legislative action.” Colegrove v. Green, supra at 556.

A possible solution to the dilemma would be to amend the state constitution by initiative, taking the apportionment power from the legislature and vesting it in a ministerial board “subject to the coercive power of the court.” Radford v. Gary, supra at 544. This would preclude the legislature from deciding a question so dear to its members’ permanent stay, a fact which seems to produce inaction. The impracticability of this solution, however, is self evident: it would entail motivating a lethargic populace, and doing so in the absence of political stimuli.

It is submitted that the federal judiciary will continue to treat the reapportionment question as one political in nature and refrain from judicial intervention, even where there is an admitted constitutional violation and the federal court is the only body which can grant relief. Judicial discretion will continue to prevent the courts from entering a “political thicket,” Colegrove v. Green, supra at 556, where no practical solution is to be found.

William J. Harte

court against the Consul General of Venezuela, residing in New York. Defendant appeared after service and moved for summary judgment. He claimed immunity from suit on two grounds: (1) by virtue of his status as consul general, and (2) on the further ground that the court lacked jurisdiction because he had been appointed alternate representative to the United Nations subsequent to the commencement of the action and therefore, had become amenable to suit only in the Supreme Court of the United States, as provided by 61 Stat. 762 (1947), 22 U.S.C. § 287 (1952). Held, because the evidence was insufficient to establish that the acts sued upon were performed within defendant's scope of authority as consul general, the court acquired jurisdiction which was not divested by defendant's subsequent appointment to the United Nations, but the action would be stayed so long as he possessed this privileged status.

The jurisdiction of the United States district courts over actions against consuls granted by 28 U.S.C. § 1351 (1952), will not be barred by claims of immunity on the part of consuls if the suit is based upon acts which are committed outside the scope of official duties. Lynders v. Lund, 32 F.2d 308 (N.D. Cal. 1929). Whether or not a particular person enjoys such status, however, is primarily a political question. A determination of the question by the State Department must be accepted by the courts, United States v. Coplon, 88 F. Supp. 915 (S.D.N.Y. 1950), but where the issue is raised as an affirmative defense in an action over which the court has jurisdiction and there is no executive ruling, the court may make its own determination. Trost v. Tompkins, 44 A.2d 226 (D.C. Munic. App. 1945).

When a court gains jurisdiction over the person of the defendant and subject matter, it is retained until a final judgment is rendered and cannot be divested by subsequent events. Earle v. De Besa, 109 Cal. App. 619, 293 Pac. 885 (1930); see also, People of Porto Rico v. Ramos, 232 U.S. 627 (1914). However, the concept of diplomatic immunity has long been recognized in the common law of nations as an effective bar to local jurisdiction. Aside from the treatise of 2 Grotius, War and Peace c. 18, § 9 (1682), this principle found its first tangible expression in 7 Anne c. 12 (1708). The United States, in accepting the doctrine in Rev. Stat. §§ 4063, 4064 (1875), 22 U.S.C. §§ 252-53 (1952), relies heavily on the English statute, and our courts have accepted Lord Campbell's classical exposition of its necessity as set out in Magdalena Steam Nav. Co. v. Martin, 2 El. & El. 94, 121 Eng. Rep. 10 (1859). See In re Baiz, 135 U.S. 403 (1890). By virtue of the Headquarters Agreement Between the United States and the United Nations § 15, 61 Stat. 762 (1947), 22 U.S.C. § 287 (1952),
the same privileges and immunities accorded diplomatic representatives to the United States were granted to permanent representatives of the United Nations.

The exemption of diplomatic officers from local jurisdiction is often referred to as extraterritoriality. Although misleading, the term metaphorically suggests the status of a sovereign in a state foreign to him, but more exactly, the status of his accredited representative who partakes of his sovereign's immunity. The true rationale of diplomatic immunity, however, is found in the practical considerations of statesmanship and not the subtleties of political theory. "Now the reason of the immunity has been shown to arise from the necessity of mutual intercourse . . . . Comity is the basis of much of International Law and custom is the very life of the common law of nations." Letter from Secretary of State to Secretary of Commerce and Labor, MS. DEPT. OF STATE, 288 DOMESTIC LETTERS 544 (1906). It is this voluntary recognition and enforcement of diplomatic immunity which maintains international reciprocity.

The instant case presents no opportunity for criticism of this principle nor a departure from it, but its peculiar factual situation may call into question the wisdom of the Headquarters Agreement, supra, wherein the United States generously accorded full diplomatic privileges and immunities to officials and permanent representatives of the United Nations. Significantly, the provisions of the United Nations Charter asked immunity only from suits arising from acts performed within the scope of official duties. See U. N. CHARTER art. 105, 59 STAT. 1053 (1945).

In Earle v. De Besa, supra, a California court, in a case similar to the instant one, having acquired jurisdiction over the defendant in a civil action, refused to dismiss the action although at the time of trial the defendant possessed the status of Vice-Consul of Peru, and as such was amenable to suit only in the federal courts under 36 STAT. 1160 (1911), now 28 U.S.C. § 1351 (1952). The court distinguished this situation from that in which the defendant possessed immune status prior to and during the commencement of the action, and found that the principles of international comity were not applicable. This thesis may find analogous support in Rev. Stat. §§ 4065, 4066 (1875), 22 U.S.C. § 254 (1952), which states that the immunity provisions are inapplicable to inhabitants of the United States who contracted debts before entering the service of an accredited ambassador thereby gaining immunity from civil suit. Although the instant case differs from the De Besa case in that the present action was stayed so long as the defendant retained his immune status, the court followed the De Besa rationale in upholding its jurisdiction, but
found that principles of international comity prohibited adjudication. However, the two cases are distinguishable, for in the De Besa case the subsequently acquired status of the defendant rendered him only partially immune from civil suit, while in the instant case the defendant was rendered completely immune.

It would be undesirable to suggest any further curtailment of the immunities granted, but it is in no way repugnant to an international consciousness to demand respect and subjection to local law which is not in direct opposition to these principles. Time and politics may have worked effectively against any change in the Headquarters Agreement, supra, but they do not stand in the way of interpretation of the principles of international comity.

The court's hesitation and solution in the instant case may be criticized as one following the only available avenue of decision and amounting to a mere nullity in effect: the defendant can leave the country before he loses his status, thereby leaving plaintiff with a worthless default judgment. In the practical interests of international comity it is better to resolve such problems through the diplomatic channels of state rather than the compulsory judicial process. However, when the courts of a nation are faced with such immediacy and fluctuation in international relations as are the courts of the United States, some degree of assurance must be given those entitled to adjudication of their disputes.

Patrick F. McCartan

Criminal Procedure — Appeal in Forma Pauperis — Trial Court's Denial Final in Absence of Bad Faith. — United States v. Johnson, 238 F.2d 565 (2d Cir. 1956), judgment vacated per curiam, 352 U.S. 565 (1957). Petitioner, convicted of a criminal offense in a United States district court, petitioned the court for leave to appeal in forma pauperis, seeking appointment of counsel and a free transcript of the trial record in order to appeal errors allegedly committed during the trial. The petition was rejected on the grounds that the appeal was frivolous and in bad faith. A similar petition subsequently was presented to and dismissed by the court of appeals. In the absence of proof that the action taken by the trial court was in bad faith and without warrant, district court denial of an appeal in forma pauperis is final and conclusive, under 28 U.S.C. § 1915 (a) (1952).
Appeal in forma pauperis is made available in the federal courts by 28 U.S.C. § 1915 (a) (1952), with the qualification that, "an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." An appeal in good faith is one in which there is a substantial question or one which has merit and is not frivolous. United States v. Durham, 130 F. Supp. 445 (D.D.C. 1955). An appeal in forma pauperis is not a right but a privilege, and it is not a violation of due process if denied. Clough v. Hunter, 191 F.2d 516 (10th Cir. 1951). If, however, it can be shown that the trial court's refusal of such an appeal was itself made in bad faith and without warrant, the appellate court will grant aid despite the trial court's certification that the petitioner's appeal is pursued in bad faith. Wells v. United States, 318 U.S. 257 (1943); Higgins v. Binns, 204 F.2d 327 (9th Cir. 1953).

In rejecting the petition in the instant case the court reasoned that it was within the power of Congress to authorize the trial judge to decide whether an appeal is substantial, and in the absence of proof that his determination was without basis or in bad faith his denial is final. The petitioner was not being punished because of his poverty, but rather he was being denied the assistance requested because he had been convicted by a court of proper jurisdiction, and the legislature had not seen fit to make further aid available to him. Other federal circuits confronted with this question have reached the same conclusion. In re Mitchell, 230 F.2d 729 (9th Cir. 1956); Bareij v. Ford Motor Co., 230 F.2d 729 (9th Cir. 1956); Bernstein v. United States, 195 F.2d 517 (4th Cir. 1952), cert. denied, 343 U.S. 980 (1952).

The court in the instant case distinguished Griffin v. Illinois, 351 U.S. 12 (1955), on the ground that the Supreme Court there was dealing with an appeal assumed to be meritorious, whereas the case at bar concerned an appeal deemed to be frivolous.

In dissent, Judge Frank, relying on the opinion of the Supreme Court in Bolling v. Sharpe, 347 U.S. 497 (1954), stated that the Griffin case does apply to the federal system through the Fifth Amendment; its prohibition of discrimination against the poor on appeal (once the opportunity to appeal has been extended) makes it applicable to the present problem with the result that the certification of the trial court should not be conclusive and that further aid should be extended.

In the Griffin case, petitioners convicted in the Illinois courts subsequently attempted to appeal pursuant to the Illinois statute, but a free transcript was not provided because no federal or state constitutional questions were involved. Being without financial means to obtain a transcript, petitioners were unable to adequate-
Recently appeal their conviction. The Supreme Court indicated that there was no meaningful distinction between the rights of the indigent when on trial and when on appeal, and held that due process and equal protection of the law required that there be no denial of the right to appeal because of lack of means to provide a transcript. State courts following this decision have waived the required appeal bond for an indigent, *Barber v. Gladden*, 298 P.2d 986 (Ore. 1956), and have granted aid to an indigent convicted of burglary where it previously had been available only to those sentenced to death or life imprisonment, *People v. Jackson*, 2 Misc.2d 521, 152 N.Y.S.2d 893 (County Ct. 1956). However, in *United States v. Sanders*, 142 F. Supp. 638 (D.Md. 1956), the court refused to apply the rule of the *Griffin* case to the case before it because, *inter alia*, it concerned rights under state rather than federal law.

The application of the prohibition of discrimination against indigent petitioners to the present case by Judge Frank, in dissent, brought into question the meaning and effect of 28 U.S.C. § 1915 (a) (1952). He noted that the courts previously had decided that the certification was not final when bad faith and action without warrant by the trial judge could be shown to an appellate court. However, the petitioner must show that the courts has abused its discretion, and it will often be impossible to do so without a transcript. If the defendant cannot afford the cost of a transcript, he may be denied the benefit of a review of his case where review otherwise would be available. Judge Frank stated that this result is a discrimination of the same type that the *Griffin* case prohibits. The dissent further contended that petitioner was entitled to appointment of counsel to aid in redrafting his petition to the appellate court, through a record obtained in the manner described in *Miller v. United States*, 317 U.S. 192 (1942), or by a transcript supplied by the court. The appellate court then could make an informed determination of the propriety of the trial court's certification of bad faith. Although this aid would increase the cost of judicial administration, in the opinion of Judge Frank the nature of our government requires assumption of this expense.

By virtue of the previous decisions holding aid in forma pauperis to be a privilege rather than a right, the conclusion of the majority is logically correct. However, the dissent has cogently pointed out that the majority interpretation of 28 U.S.C. § 1915 (a) (1952) involves the same discrimination against the petitioner already determined to violate the due process and equal protection provisions of the Fourteenth Amendment when arising in the state courts. Therefore, it is submitted that the decision that a
certification of bad faith is binding unless impeached cannot stand, unless due process for the federal courts is to mean something less than the due process required of the states.*

William D. Bailey, Jr.

*Subsequent to the completion of this writing, the Supreme Court of the United States vacated the judgment in a per curiam opinion, 352 U.S. 565 (1957), thus reaching the result the writer indicated would be proper.

Evidence—Admissibility of Oral Confessions Procured by Federal Officers Prior to Arraignment. — Rettig v. United States, 239 F.2d 916 (D.C. Cir. 1956). At 7:30 on a Sunday morning, shortly after she had reported to police that her husband had been stabbed to death, defendant was placed under arrest and taken to police headquarters. From the time of arrest until 8:30 that evening, defendant was intermittently questioned and given lie detector tests. She then was allowed to sleep until sometime between midnight and 3:00 A.M. Monday when she was awakened and again questioned for about an hour, during which time she allegedly made an oral confession admitting the crime. She was not presented before a committing magistrate until 11:45 Monday morning. Prior to this time, defendant was not advised of her right to counsel or instructed that anything she said could be used against her. She was indicted, tried and found guilty of second-degree murder. During the course of the trial, police testimony concerning the alleged confession was admitted into evidence over defendant’s objection that it was inadmissible under the McNabb rule of exclusion of confessions obtained during illegal detention. On appeal, the United States Court of Appeals, District of Columbia Circuit, sitting en banc, reversed and remanded the case on the ground that refusal to exclude the alleged confession was prejudicial error. The court was divided in its reasoning. Four judges held that illegal detention alone sufficed to render the confession inadmissible under the McNabb rule. Two of these four also found that the evidence showed that the confession was involuntary. Five judges held that the McNabb rule also required that the confession be induced by the illegal detention. Two of these five found such inducement, while the other three, dissenting, found neither inducement nor illegal detention. Federal court exclusion of criminal confessions obtained before timely arraignment is limited to cases where the confession was in some way induced by the illegal detention.
Prior to the decision of *McNabb v. United States*, 318 U.S. 332 (1943), the only test used to determine the admissibility of confessions was their voluntary or involuntary nature. *Purpura v. United States*, 262 Fed. 473 (4th Cir. 1919). Delay in arraignment was only one factor to be considered in the determination of the character of the confession. In the *McNabb* case, supra, the Supreme Court made this factor of delay the foundation of an additional rule of exclusion in the federal courts, grounded not upon constitutional requirements, but upon the power of the Supreme Court to supervise the administration of criminal procedure in the federal courts. In that case, the confessions of the defendants were found to have been made during a detention that violated the federal statutes [now replaced by Fed. R. Crim. P. 5 (a)] requiring prompt commitment without unnecessary delay, and having been induced by such illegal detention, the confessions were held inadmissible as evidence. *McNabb v. United States*, supra. However, it was not indicated whether or not inducement was a necessary requirement under the rule.

The resultant confusion was compounded in *Mitchell v. United States*, 322 U.S. 65 (1944), in which Mr. Justice Frankfurter, again speaking for the Court, stated, at 67: "Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the *McNabb* case which led us to rule that a conviction on such evidence could not stand." As a result of this broad dicta, some lower courts held that the *McNabb* rule added only the element of psychological pressure inducing the confession to the tests of physical coercion in determining the voluntary character of the confession. *Brinegar v. United States*, 165 F.2d 512 (10th Cir. 1947) aff'd, 338 U.S. 160 (1949).

In 1948, the Supreme Court again interpreted the *McNabb* rule, this time in the light of the *Mitchell* case. In *Upshaw v. United States*, 335 U.S. 410 (1948), the Court pointed out that: "The *Mitchell* case ... reaffirms the *McNabb* rule that a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological. ...'" 335 U.S. at 413. While this statement seems to rule out any requirement of inducement, other statements contained in the opinion tend to indicate that the decision was based upon the peculiar fact situation present. In the *Upshaw* case, the police admitted that the sole purpose of the illegal detention was to further question the
accused, the practical effect of which was to induce a confession. The Court also pointed out that in the McNabb case, the confessions were induced by the illegal detention. 335 U.S. at 412. Thus, the Supreme Court stated that illegal detention alone would exclude a confession, and in the same opinion referred to the fact that in both the McNabb and Upshaw cases, the confessions were induced by the detention. The resulting conflict in the lower federal courts, as is evidenced by the four separate opinions in the instant case, is a logical consequence of the Upshaw decision.

An attempt to embody in the Federal Rules of Criminal Procedure the rule that illegal detention alone is sufficient to exclude a confession obtained during the confinement did not succeed. Fed. R. Crim. P., Documentary History, Advisory Committee on Rules of Criminal Procedure, 13 (1943-1945). Similar legislative proposals and drafts were submitted to Congress but were defeated by widespread opposition. See 93 Cong. Rec. 1392 (1947). Due to the failure of these attempts and the confusing language in the Upshaw case, several circuit courts adopted the requirement that the illegal detention must induce the confession before it will be excluded. The Tenth Circuit in Pixley v. United States, 220 F.2d 912 (10th Cir. 1955), held that the McNabb rule strikes at confessions made while the accused is being unreasonably detained for the purpose of extracting evidence from him before arraignment, or confessions obtained with attending circumstances constituting physical or psychological coercion. Cf. Duncan v. United States, 197 F.2d 935 (5th Cir.), cert. denied, 344 U.S. 885 (1952). A series of cases beginning with certain dicta in Pierce v. United States, 197 F.2d 189 (D.C. Cir.), cert. denied, 344 U.S. 846 (1952), and including Tillotson v. United States, 231 F.2d 736 (D.C. Cir.), cert. denied, 351 U.S. 989 (1956), and Mallory v. United States, 236 F.2d 701 (D.C. Cir. 1956), cert. granted, 352 U.S. 877 (1956), indicated that inducement has been made a requirement in the District of Columbia Circuit.

However, decisions in the Second and Ninth Circuits have followed the literal language of the Upshaw case. In United States v. Walker, 176 F.2d 564, 567 (2d Cir. 1949), cert. denied, 342 U.S. 869 (1951), the court stated: "... we read Upshaw v. United States ... as holding that, although admissions may be in fact "voluntary," they are nevertheless incompetent, if they are obtained after the time has expired within which the accused should be arraigned, as provided by Rule 5 (a). ..." The same view was held in Symons v. United States, 178 F.2d 615 (9th Cir. 1949) (dictum), cert. denied, 339 U.S. 985 (1950).

In recent cases the Supreme Court has indicated that it favors the view that an illegal detention alone will be sufficient to render
a confession inadmissible. In *On Lee v. United States*, 343 U.S. 747, 754 (1952), the Court explained the McNabb rule, saying: "In *McNabb* ... we held that ... a confession made during [the illegal] detention would be excluded as evidence in federal courts even though not inadmissible on the ground of any otherwise involuntary character." Again in *Brown v. Allen*, 344 U.S. 443, 476 (1953), the Court explained: "Under the leadership of this Court a rule has been adopted for federal courts, that denies admission to confessions obtained before prompt arraignment notwithstanding their voluntary character. ... This experiment has been made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance."

Since it is the announced intention of the Supreme Court to "safe guard persons against compulsory questioning by law enforcement officers behind closed doors," *United States v. Minker*, 350 U.S. 179, 191 (1956), the opinions in the instant case requiring inducement are clearly out of line. The traditional respect which the Supreme Court always has had for the opinions of the District of Columbia Circuit necessarily should be outweighed by the fact that to require inducement destroys the *McNabb* rule and returns this field of criminal procedure to the status that existed prior to the *McNabb* case; namely, testing the admissibility of confessions by their voluntary or involuntary character. This is precisely the rule that the Supreme Court intended to change, and since it is a fair and equitable safeguard against police brutality and secret interrogation, it should be followed.

*Donald L. Very*

**Evidence—Impeachment of Witness—Use of Mechanically Recorded Prior Inconsistent Statement in Criminal Action.—** *Hutson v. State*, 296 S.W.2d (Tex. Crim. App. 1956). Arrested for drunken driving, defendant sought to establish at his trial, by testimony of the sheriff, that he was not drunk at the time of his arrest. The sheriff testified that defendant "acted more like he was doped than he did drunk." The state sought to impeach the witness by introducing a mechanically recorded statement made by the sheriff to the county attorney before the trial, where-in the witness stated he was "damn sure" defendant was drunk. This evidence was admitted by the court and the jury rendered a verdict of guilty. Defendant appealed, alleging, *inter alia*, error
in the admission of the recording. The Court of Criminal Appeals affirmed. A mechanical recording of a prior inconsistent statement of opinion by a witness may be admitted on cross-examination as evidence for the purpose of impeachment.

The courts have been unanimous in approving the admission of prior inconsistent statements of fact to impeach an opposing witness, subject to the requirement of materiality. See McCormick, Evidence § 34 (1954). The situation is otherwise where non-expert statements of opinion are involved. Early decisions reveal the traditional legal prejudice against conclusions drawn by a non-expert witness. State v. Nave, 283 Mo. 35, 222 S.W. 744 (1920); State v. Davidson, 9 S.D. 564, 70 N.W. 879 (1897); Drake v. State, 29 Tex. Crim. 265, 15 S.W. 725 (1890). In these cases, the courts refused to admit the prior utterance to impeach the witness because it embodied a conclusion: an opinion drawn by the witness from the facts.

The later cases exhibit a more analytical approach whereby the courts look beyond the facade of conclusion and consider the prior statement in the light of its impeachment function. Some specifically reject the prohibition against opinion. Bates v. State, 4 Ga.App. 486, 61 S.E. 888 (1908); Crawford v. Commonwealth, 235 Ky. 368, 31 S.W.2d 618 (1930); DeBose v State, 18 Okla. Crim. 549, 197 Pac. 176 (1921). Others merely set forth a blanket acceptance of prior inconsistent statements for impeachment purposes, ignoring the fact-opinion dichotomy. Massie v. Commonwealth, 177 Va. 883, 15 S.E.2d 30 (1941) (manslaughter-drunken driving); Zimberg v. United States, 142 F.2d 132 (1st Cir. 1944) (semble), cert. denied 326 U.S. 712 (1944). Throughout this area, as in the case of prior inconsistent statements of fact, there persists the requirement of materiality. Commonwealth v. Jackson, 281 S.W.2d 891 (Ky. 1955), reversed on other grounds, 296 S.W.2d 472 (Ky. 1956).

California, since 1872, has by statute provided: “A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony . . . .” CAL. CIV. PROC. CODE ANN. § 2052 (West 1955). By virtue of CAL. PEN. CODE ANN. § 1102 (West 1955), this section is made applicable to criminal proceedings. Recent cases have tended to construe this act as permitting the admission of prior inconsistent statements of opinion for impeachment purposes. People v. Brazil, 53 Cal.App. 2d 596, 128 P.2d 204 (1942) (semble); People v. Raven, 44 Cal. 2d 523, 282 P.2d 866, 867 (1955) (dictum).

New York has a statute of more recent date, 1937, which is comparable to the California Act. It provides:
In addition to impeachment in the manner now permitted by law, any party may introduce proof that a witness has made a prior statement inconsistent with his testimony, irrespective of the fact that the party has called the witness or made the witness his own, provided that such prior inconsistent statement was made in any writing by him subscribed or was made under oath. N.Y. Code Crim. Proc. § 8-a.

While the New York act readily lends itself to an interpretation admitting prior inconsistent statements of opinion, the New York Court of Appeals has rejected this interpretation. See People v. Cannizzaro, 1 N.Y.2d 167, 134 N.E.2d 206 (1956).

The Texas courts have long resisted the impetus of the trend toward admissibility of prior inconsistent statements of opinion. Drake v. State, supra; Sapp v. State, 80 Tex. Crim. 363, 190 S.W. 489 (1916); Shannon v. State, 118 Tex. Crim. 505, 35 S.W.2d 785 (1931); McCormick, Evidence § 35, n. 13 (1954). In the case of Flowers v. State, 150 Tex. Crim. 467, 202 S.W.2d 462 (1947), a departure from this long standing view seemingly is perceptible. The court therein permitted a witness to be impeached by a prior inconsistent statement concerning the question of drunkenness of the defendant. Moreover, the same issue of drunkenness was presented in the instant case; and, although the prior statements were classified as opinion, they were admitted without consideration of the rule against admitting prior inconsistent statements of opinion. 296 S.W.2d at 248. A statement relating to the condition of drunkenness necessarily would seem to be a conclusion. However, closer inspection indicates that perhaps all that may be involved is a short-hand expression of fact. While this question as yet remains untouched by the Texas courts, logic would favor the former interpretation.

The court in the instant case concerned itself primarily with the medium used to preserve the statement in question. The state here used a mechanical device to impeach the witness. Questions as to the use of mechanical devices have involved such controversial matters as lie-detecting and wire-tapping. Weiss v. United States. 308 U.S. 321 (1939) (wire-tapping); Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923) (lie-detecting); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947) (lie-detecting). Constitutional objections to the admission of the recorded testimony were raised but not considered by the majority on the motion for rehearing. However, these objections constitute the main thrust of the dissent, i.e., no opportunity for cross-examination; statement by a person not under oath; statement is hearsay; no opportunity to observe demeanor of the witness and no confrontation of the accused by the witness. 296 S.W.2d at 250. While these objections might be well taken in a case where the speaker
or the party spoken to was not present at the trial, they are unjustified in the case at bar, for here the speaker was present, under oath, and available for questioning. The objection of hearsay is inapplicable because of this availability for cross-examination. Furthermore, ample opportunity was afforded to observe the demeanor of the witness and to effect confrontation. Finally, these objections should fail because of the rule that prior inconsistent statements are not to be considered by the jury as substantive evidence, but pertain solely to impeachment of the witness. People v. Bishop, 270 App. Div. 133, 58 N.Y.S.2d 711 (2d Dept. 1945); Carroll v. State, 143 Tex. Crim. App. 269, 158 S.W.2d 553 (1942); 3 Wigmore, Evidence 1018 (3d ed. 1940).

In sum, assuming the prior inconsistent statement to be one of opinion, the principal case does not represent a substantive extension of the trend toward admitting prior inconsistent statements of opinion. It is merely an innovation in the means employed to accomplish impeachment of a witness. The means are reasonable and do not subject the parties to injustice. Indeed, mechanical recordings are more reliable than the fading human memory. To this should be added the caveat that the utilization of these devices must be cautious and wary, since recordings, whether wax, tape or wire, readily lend themselves to clandestine editing. Untampered with, they represent another step in the direction of a fairer trial. It must be concluded that the use of mechanical recordings to impeach a witness via a prior inconsistent statement is within the purview of the rationale advanced in favor of admitting such statements at all—the more complete ascertainment of the truth.

William C. Rindone, Jr.

Inkeepers—Duty to Guests—Liability for Servant's Tortious Conduct on Basis of Implied Contract.—Crawford v. Hotel Essex Boston Corp., 143 F. Supp. 172 (D. Mass. 1956). Plaintiff, a guest of the hotel operated by the defendant corporation, was questioned by the house detective concerning registration. After a heated exchange of words, the detective ordered plaintiff to wait while he checked on another guest. Plaintiff ignored the order and proceeded to his room. A few minutes later in an upstairs hallway, the detective reapproached plaintiff and, without making any effort to eject him from the hotel, struck him, causing severe injuries. The case was tried on a tort theory and the detective was found by the jury to have
acted within the scope of his employment. Verdict was rendered for the plaintiff. Defendant moved for judgment n.o.v. Held, motion denied. Although, as a matter of law, the detective may have acted outside the scope of his employment, the defendant is liable for consequential damages resulting from a breach of the contractual obligation of an innkeeper that his servants shall protect his guests from harm.

An innkeeper may be liable as a master for a servant’s tortious conduct. Relatively few cases have resulted in holding an innkeeper liable under respondeat superior for an attack on a guest by his servant, although this basis of liability is often mentioned. See, e.g., Cary v. Hotel Rueger, Inc., 195 Va. 980, 81 S.E.2d 421 (1954) (servant shoots guest). But cf. Emmick v. De Silva, 293 Fed. 17 (8th Cir. 1923) (imputation of unchastity). An innkeeper may be liable for his own negligence in employing the person who commits the assault. Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 661 (1904) (dictum); see Mechem, Agency § 403 (4th ed. 1952).

The decision in the instant case takes leave of tort theories; in the words of the court, “Strictly the suit sounds in contract, rather than in tort. . . .” 143 F. Supp. at 174. The same result would have obtained had the jury’s determination that the detective acted within the scope of his employment been allowed to stand. The opinion that a contractual right existed was based on Bryant v. Rich, 106 Mass. 180 (1870), aff’d sub nom., Vannevar v. Bryant, 88 U.S. (21 Wall.) 41 (1874) (removal denied), and Frewen v. Page, 238 Mass. 499, 131 N.E. 475 (1921). In Bryant v. Rich, supra, defendants were common carriers and the plaintiff was a passenger upon their steamboat. Plaintiff suffered a beating from defendants’ employees and brought his action in tort. The case was decided similarly to the instant case, the court holding that a contractual duty on the part of the common carrier wherein his servants shall not mistreat a guest had been breached. Liability of innkeepers on a contractual basis seems to have arisen from the common carrier cases. See, e.g., Frewen v. Page, supra at 477, citing Bryant v. Rich, supra. On the other hand, it has been pointed out that the duty of innkeepers with regard to the guest’s safety has never been as rigorous as that of common carriers. Clancy v. Barker, 131 Fed. 161, 165 (8th Cir. 1904); 2 Cooley, Torts 1343 (3d ed. 1906).

The opinion that a contractual duty does exist is not without support in other jurisdictions; yet the view taken by the principal case is not accepted by all courts which have considered the issue. Differences in opinion have been sharp. Compare Clancy v. Barker, 71 Neb. 83, 98 N.W. 440 (1904), aff’d on rehearing, 71
Until the beginning of this century, there seem to have been no cases holding the innkeeper liable for breach of a contract under facts similar to the instant case. The opinion of Clancy v. Barker states, 131 Fed. at 169:

> At that time [1904] no court had ever held, so far as our research and the authorities cited by counsel have disclosed the decisions, that the contract of an innkeeper was to insure the safety of the person of his guest against the negligent or willful acts of his servants without the scope of their employment.

A trend toward contract recovery is discernible; the principal case represents the most recent extension. See Clancy v Barker, 71 Neb. 83, 98 N.W. 440 (1904), aff'd on rehearing, 71 Neb. 91, 103 N.W. 446 (1905); DeWolf v. Ford, 193 N.Y. 397, 86 N.E. 527, 530 (1908); Frewen v. Page, supra (1921); Mayo Hotel Co. v. Danciger, supra (1935).

The opinions which discuss the contractual obligation are not always discriminating when defining the duty. The instant case itself is not clear on this point. A closing statement in the principal case mentions that, “The gravamen is the failure of the servants to protect the plaintiff from harm.” 143 F. Supp. at 174. Yet the court, on the same page, quotes Frewen v. Page, supra, for the statement that “... this right created an implied obligation that neither the innkeeper nor his servants will abuse or insult the guest. ...” It seems that the first statement sets forth an affirmative duty of protection, a breach of which is nonfeasance, whereas the latter merely states a negative duty to refrain from injuring a guest, a breach of which would be misfeasance. See Lehnen v. E. J. Hines & Co., 88 Kan. 58, 127 Pac. 612, 614 (1912) (dictum); Mayo Hotel Co. v. Danciger, 143 Okla. 196, 288 Pac. 309, 311 (1935) (semble). Another instance where the standard of duty is uncertain is found in the opinion by the Nebraska Supreme Court in Clancy v. Barker, supra (guest to be treated with due consideration for his comfort and safety). A duty of the negative type may be seen in De Wolf v. Ford, supra.

A logical difference in application, depending upon the nature of the duty imposed, may result in two ways: (1) under the affirmative standard, from one point of view there may be an extension of the effect that would be reached under the negative rule, for the hotel owner may be liable for failure of his servants to protect guests from injury at the hands of third persons as well as injury from the servants, (2) from another point of view, there
may be a narrowing of the effect that would be reached under the negative rule, for the hotel owner would not always be liable even for servant-inflicted injuries to guests—liability could only be imposed if the servant involved were one charged with the affirmative duty of protection, and if a servant not so charged should assault a guest there would be no liability since there would be no violation of any duty to protect. The absence of any case law positing the second point no doubt is due to the fact that the affirmative standard will not be found to exist in isolation from the negative rule, but rather to incorporate the more limited liability of the negative rule and then to proceed beyond it to further liability, namely that occasioned by the failure of a “protecting servant” to protect a guest from a third person. Therefore, only the first point of logical difference in application would seem to be of practical consequence.

Under that first point, it seems clear that the court in the instant case need not have gone so far as to say that an affirmative duty existed. Furthermore, the authority relied on by the court for this view is questionable; no case is cited which states so broad a duty except *Vannah v. Hart Private Hospital*, 228 Mass. 132, 117 N.E. 328, 329-30 (1917) (dictum), which is readily distinguishable.

The court in the instant case paid little attention to the nature of the duties of the servant who committed the assault. The last paragraph of the opinion states, 143 F. Supp. at 174: “I believe the Massachusetts law to be that if the guest of a hotel is assaulted by an employee, particularly by one whose duties include the preservation of order, he has at the least a contractual claim for consequential damages.” (Emphasis added.)

The nature of servant’s duties has been seen as material when the cause of action is in tort. *Rahmel v. Lehndorff*, 142 Cal. 681, 76 Pac. 659, 660 (1904). See also *Mechem, Agency* § 396 (a) (4th ed. 1952). It may be that any distinction as to the nature of the duties is unnecessary when a contractual duty of the negative type (duty to refrain from injuring guest) is imposed; but when an affirmative duty to protect is imposed, a distinction may be quite material. Would all servants, regardless of their usual duties, be bound to protect guests, at the peril of the innkeeper? This matter seems generally to have been ignored.

For logical clarity, in considering an innkeeper’s liability for servants’ wrongful conduct, a determination ought to be made as to which standard of contractual duty should apply, and, when called for, an inquiry should be made into the nature of the duties of the errant servant. Though the reasoning of the instant case is something less than precise, the end result could not be other
than that reached by the court, since the application of either standard—affirmative or negative—renders the hotel keeper absolutely liable for torts committed on his premises by his servants against his guests.

Eugene F. Waye