Recent Decisions

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true where the instrument contains specification as to the payment for repairs. As was stated in *Rothschild v. Weinthal*:

The established rule is that where real estate, or the income from real estate, is devised to trustees to pay over the income therefrom to a person for life, such person is entitled only to the net income, after payment of taxes, repairs, and the expense of administering the trust, unless the will contains a provision to the contrary.

A statement that the “entire rents and profits” were to be paid to the life tenant has, however, been held not to mean that the principal of the trust was to bear the cost of repairs.

From what has been said, it is obvious that much of the controversy regarding the problem of repairs could be avoided by careful draftsmanship. While it is obviously impossible for the draftsman to predict every situation that might arise, it is advisable for him to anticipate the necessity of major maintenance expenses when preparing trust instruments that involve life interests in developed property. If avoidance of litigation is of prime concern, vesting of the trustee with the power to determine such questions would probably be more advisable, since his word would be final unless a clear abuse of the power were shown. This delegation of power to the trustee can, moreover, be limited by specific provisions concerning certain repairs according to the wishes of the settlor or testator.

E. L. Twohey

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**RECENT DECISIONS**

**UNFAIR COMPETITION—USE OF TRADE NAME OR TRADE MARK FOR PURPOSE OF COMPETITION.—** *Triangle Publications, Inc., v. Rohrich et al.*, 167 F. (2d) 969 (C.C.A. 2nd 1948). It is generally well settled in the law of unfair use of trade name that one merchant shall not divert customers from another by representing what he sells as originating from the second. At first, there was considerable controversy whether a merchant’s business reputation, indicated by his trade mark, could extend beyond such goods as he sold. During recent years, however,

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32 191 Ind. 85, 131 N.E. 917, 132 N.E. 687 (1921).
33 Guthrie v. Wheeler, 51 Conn. 207 (1884).
34 A possible aid in the interpretation of trust instruments of this nature could be supplied by a presumption statute. Such a statute could establish certain rules of construction applicable to problems not covered or anticipated in the original instrument. However, statutory presumptions like all presumptions will yield to the clearly expressed intention of the settlor.
it has been recognized that a merchant may have a sufficient economic interest in the use of his mark outside of his particular field of activity as to justify the intervention by a court. And so it has become unlawful for any merchant to appropriate and use the trade name of another, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two. The following case serves to make one wonder, today, as to how far the courts may extend the reach of this unfair competition trade name doctrine.

Plaintiff, Triangle Publications, Inc., had published since Sept. 1944 a girls' magazine entitled "Seventeen." Such title was their registered trade mark. In February, 1945, defendants adopted "Miss Seventeen Foundations Co." as a partnership name under which to make and sell girdles. "Miss Seventeen" was their registered trade mark for said girdles. Plaintiff alleged that defendants' use of name "Seventeen" was unlawful and prayed that they should be enjoined for infringement of trade mark and unfair competition.

The district court found the defendants not "guilty of statutory trade mark infringement," since infringement under the statute involves the use of a trade mark upon "merchandise of substantially the same descriptive properties as those set forth in such registration." 33 Stat. 728 (1905), as amended, 15 U.S.C., § 96 (1946). It must be conceded that magazines and girdles are hardly to be considered as goods of substantially the same descriptive properties. It was decided, however, that defendants were guilty of "unfair competition and unfair trading entitling plaintiff to relief." Accordingly, a judgment was granted permanently enjoining any continued use by the defendants of the word "seventeen" or the numeral "17" and granting damages.

Defendants' subsequent appeal presented the circuit court with the following problem: granted that the two articles bearing the same trade mark of "Seventeen" were not goods of the same descriptive properties as would make defendants guilty of statutory trade mark infringement, was "Seventeen," as the title of plaintiff's magazine (1) a trade mark which was arbitrary and fanciful and not merely descriptive of the magazine or its subject matter, or (2) had it acquired such a secondary meaning, as to entitle plaintiff protection of his reputation against use of that name by others (even upon such non-competing goods as defendants' girdles), if others' goods were likely to be thought to originate with plaintiff's trade name?

In concluding that the answer lay in affirming the district court's decree, the circuit court relied heavily upon an eighth circuit decision in Hanson et al. v. Triangle Publications, 163 F. (2d) 74 (C.C.A. 8th 1947). Therein the court upheld an injunction granted to the same company that is the plaintiff in the instant case, enjoining Hanson and another, manufacturers of dresses for teenage girls, labeled "Seventeen for the Junior Teens," from using the word "Seventeen" in the manufacture, sale, and distribution of such dresses. The court based its decree upon unfair competition, rather than trade mark infringement, because although plaintiff's trade mark was found to be fanciful and arbitrary, it nevertheless could not be said that defendant had used such name on merchandise of substantially the same descriptive properties. The fact that the same name was used on non-similar goods was held not of itself sufficient to deny plaintiff relief, since there was the further consideration that plaintiff had made its magazine, through use as an advertising medium, serve as "a commercial blesser and oblique brander of merchandise for identifying the products of its advertiser's in the market." The court further said:

Such promotive use of the name of the magazine would seem not to be directly within the scope of plaintiff's registration and to constitute rather an extension of the trade-mark into a field of outside or secondary meaning. Such a secondary meaning, however, also is entitled to protec-
tion from unfair competition, and this ground of itself would require affirmance of the injunction here, even though there has been no technical infringement of the statutory registration . . . there can be unfair competition although the businesses involved are not directly competitive. Under present general law, the use of another's mark or name, even in a non-competitive field, where the object of the user is to trade on the other's reputation and good will, or where that necessarily will be the result, will constitute unfair competition.

In citing this closely analogous case, the circuit court in the instant case made it clear that admittedly plaintiff is not the manufacturer of girdles. However, the very fact that the plaintiff's magazine had a secondary meaning, said the court, by virtue of its use as an advertising medium for girls' wearing apparel, serving thereby to "commercially bless" such goods; made defendants' use of the word "Seventeen" as a vehicle for identifying and selling girdles, necessarily competitive with plaintiff's use thereof for the same purpose. This use would create confusion in the minds of the purchasers as to sponsorship.

An investigation of the following cases would appear to sustain the judge's contention: *Yale Electric Corporation v. Robertson*, 26 F. (2d) 972, 974 (C.C.A. 2nd 1928) involving locks and flashlights, which held that unless the defendant's use is so far apart from that made by the owner to ensure against any erroneous linking of the two, such use would be unlawful. *L. E. Waterman Co. v. Gordon*, 72 F. (2d) 272 (C.C.A. 2nd 1934), wherein plaintiff, making pens under name "Waterman," sought to enjoin defendant from using that word upon razor blades:

It is now well settled in this country that a trade mark protects the owner against not only its use upon the articles to which he has applied it, but upon such other goods as might naturally be supposed to come from him. . . . There is indeed a limit; the goods on which the supposed infringer puts the mark may be too remote from any that the owner would be likely to make or sell. . . . But . . . when the infringement is so wanton, there is no need to look nicely at the plaintiff's proofs in this regard.

*Standard Brands v. Smidler*, 151 F. (2d) 34 (C.C.A. 2nd 1945), concerning symbol "V-8" on plaintiff's vegetable juice cocktail and defendant's dry vitamins:

What has been said respecting infringement applied as well to the cause of action for unfair competition, which is but a somewhat broader phase of the same wrong. The gist of this action is the likelihood that the goods of the defendant will be passed off as those of the plaintiff.


... it is the "unfairness" of defendant's conduct rather than the existence of "competition" between plaintiff and defendant which forms the basis for the intervention of a court of equity.

The principle laid down in the foregoing decisions was held to be applicable to the situation of probable confusion as to sponsorship found by the court to exist in the instant case. In either case, the alleged wrong of the defendant is the risk he imposes upon the plaintiff that his merchandise might be associated by the public with those of the defendant. Of course, once that it has been determined that plaintiff had a right to the protection of its trade name, it is immaterial whether such association is based on identifying defendant's goods with the plaintiff or to a sponsorship of the latter.

At first blush, it would appear that the court had adequately resolved the whole problem. But although the principle laid down in the foregoing decisions
is correct, it is doubtful whether it was correctly applied by the instant court which declared that the name "Seventeen" as used upon defendants' girdles came within the ambit of plaintiff's "secondary meaning." Further, as the dissenting opinion of Judge Frank indicates, the decision is at variance with the decision of the sixth circuit, and also "with the rationale of recent decisions of this court (thus leaving the subject in confusion in this circuit.)"

The underpinning, so to speak, of the instant court's decision was that the name "Seventeen" was not descriptive but fanciful. (It is well known, that where a trade name is merely descriptive, there is a much heavier burden upon one claiming exclusive use.) After reviewing the history of plaintiff's adoption of that name, Judge Frank contended that the name was unmistakably descriptive. To sustain his contention he adduced: (a) plaintiff's own testimony that they chose the name "Seventeen" because it meant "youth" to the general public, before plaintiff even used that word; (b) plaintiff itself was convinced of the well-established symbolical meaning of the word by the fact that it requested Booth Tarkington, author of the well-known novel, "Seventeen," for his "blessing," saying that it "would like to call the magazine 'Seventeen' because this would represent the mean age group to which the magazine would appeal; ..." This indicates that the plaintiff wanted the magazine to convey this same meaning and none other to the public; (c) plaintiffs, also, were not the first to use such name—previously "Seventeen" was widely used and advertised for use upon certain cosmetics to symbolize youth. This last is a telling point, for despite the earlier extensive use of said symbol, the plaintiff claims that any such product may not be so labeled without its approval lest otherwise customers be erroneously misled. But see Restatement, Torts § 717 (1934), comment g.

On the weight of these facts the dissenting Judge insisted that defendants should not be enjoined, unless through plaintiff's own prior efforts it had established a "secondary meaning" of its trade name which included commodities such as girdles; for "it is well settled that without creating a 'secondary meaning' one who first uses a descriptive name acquires no monopoly in the use of that name."

Up to now, the "secondary meaning" doctrine has been limited to cases where the defendant sells a particular good which is similar to, and actually or potentially competitive with, the particular goods of the plaintiff. In the instant case, since plaintiff's "secondary meaning" refers only to a magazine, and defendants do not sell a magazine, but an article of wearing apparel, one is forced to conclude with the dissenting Judge that on the face of the matter it is difficult to see where confusion might arise.

Naturally, this conclusion as to the manifest improbability of confusion based on the mere face of the matter would be valueless if there were a finding, supported by evidence, that there had been actual confusion or clear evidence that it was likely. It is on precisely this point that the facts of Hanson et al. v. Triangle Publications, supra, are at severe variance with the instant case. In that case it is mentioned that the trial court made a plain, express finding of fact that "persons in the fashion and apparel business had in fact (emphasis supplied) been confused into believing that there was some relation between defendants' dresses and plaintiff's magazine."

The present court itself had said in Best & Co., Inc. v. Miller, 167 F. (2d) 374 (C. C. A. 2nd 1948):

While not conclusive, it is not without significance in determining the likelihood of deception of the public by the use of the defendant's trade name that no actual confusion has ever resulted . . .

Judge Frank concluded that since in the trial court of the instant case there was no finding that the "descriptive, non-fanciful," name "Seventeen", as used upon
an article of wearing apparel, had created an actual belief in the minds of the consuming public that it was made by or had the editorial approval of the plaintiff, the trial judge's finding as to what was likely can only be considered as nothing more than conjecture. Hence, he asserted that "we can guess as well as the trial judge", since the instant court was not bound by such a finding. See U. S. v. U. S. Gypsum Co., ....U. S...., 68 S. Ct. 525 (1948); Best & Co., Inc. v. Miller, supra.

The dissenting judge's colleagues had stressed the trial judge's statement that the defendants took the same name as plaintiff "because they saw some advantage to it, brought to their attention by plaintiff's use of it." (But in this regard it is noteworthy that defendants had chosen and used this name after plaintiff had published his magazine for only five months.) However, Judge Frank believed that his colleagues, in doing so, had misapplied a correct doctrine:

(a) It has been held that, in a case relating to competitive articles, where there is room for a reasonable belief that confusion of buyers might occur (i. e., where that fact on the face of things is within the realm of the plausible), then evidence that defendants knowingly selected plaintiff's trade-name, with the deliberate intention of benefiting by plaintiff's public exploitation of it, is enough to prove that confusion is likely.

(b) But such rulings have never been made—in truth they have been rejected—when, as here, the probability of confusion of source is so slight as to be virtually incredible.

Hence, Judge Frank concluded that the Supreme Court of the United States should review this decision on the grounds that in this same circuit the instant court had denied relief in a similar case, stating that "a plaintiff must make out an unusually strong case when his trade-name relates to a business and not to any particular product."

Since the present-day rationale of trade name protection is such actual or probable confusion of source that will injure or threaten injury to plaintiff's good will, it would seem only fair that a plaintiff seeking such protection should at all times be compelled to prove that defendant's merchandise is so inferior that, if that merchandise in any way deceives the public into associating it with the plaintiff, injury to plaintiff's good reputation would follow. As the instant case illustrates, no limitation of that nature has yet been imposed upon the courts.

The old "limitation" on the trade name doctrine, which makes the courts decline to let the supposed borrower feel its restraining hand when he puts another's mark on goods which are very remote from any that the owner would be likely to make or sell, is not enough. The instant case dramatically indicates that the time has long since arrived when trade name unfair competition law is in need of another limitation—one which would require the courts to look more critically to plaintiff's proof of "misled buyers", "confusion of sponsorship", and "injured reputation", and in the absence thereof, in all fairness to give the defendant the benefit of the doubt.

Walter B. Bieschke

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Monopolies—The Moving Picture Anti-Trust Cases.—United States v. Paramount Pictures, Inc., et al., 333 U. S. ...., 68 S. Ct. 915, (1948). This case involves a consideration by the Supreme Court of The United States of the guilt of a vast segment of the nation-wide movie industry of a district court conviction of restraining and monopolizing interstate trade in the distribution and exhibition of
films. Not only were the violations of the Sherman Act by the largest moving picture film distributors of the country in issue, but a more difficult problem, that of what to do about the violations, was presented to the Supreme Court for its consideration.

From a reading of the majority opinion in this case written by Mr. Justice Douglas, it is apparent that the Court had little difficulty in upholding the district court's finding of many Sherman Act violations then existent in the routine procedures necessary eventually to bring films from the producer's stage to the local cinema. Mr. Justice Frankfurter, dissenting in this case, agreed completely with the majority that the district court should be affirmed in its findings of Sherman Act violations but could not agree with the majority's view as to what should or should not be done about these violations.

At the outset, it seems well to point out that Government charges of restraining and monopolizing trade in the production of films were unconvincing to the District court and were dropped completely by the Government in this appeal. It was in the delivery of the film from the producer to the local movie house, the distribution and exhibition field, that an illegal but exceedingly powerful non-competitive empire had been erected by the defendants contrary to Sections One and Two of the Sherman Act. 26 STAT. 209 (1890), as amended, 15 U. S. C. §§ 1, 2 (1946).

As a result of the consideration of a vast amount of evidence, both written and oral, the United States District Court for the Southern District of New York found that the five major national distributors of films and many other distributors and nation-wide exhibitors (movie house heads) of films had been boldly guilty of conspiracies to restrain and monopolize trade in movie films. United States v. Paramount Pictures, Inc., et al., 66 F. Supp. 323 (S. D. N. Y. 1946) and a statement of facts and conclusions of law for this same case, 70 F. Supp. 53 (S. D. N. Y. 1947). Because those distributors had a practical monopoly on the distribution of all good films necessary to the existence of any theater, they had a strangle hold on the movie industry. These distributor-defendants had acted in concert to reduce movie distribution to a collective rather than a competitive enterprise. By agreements among themselves and with nation wide theaters dependent upon them, they were able veritably to dictate the terms upon which a movie would be licensed for public showings.

A film is never sold to a movie house. The right to exhibit under copyright is licensed. Through concerted action these defendants incorporated, in all their licensing agreements with the exhibitors, covenants which fixed minimum prices for the showing of movies all over the country, an obvious restraint of trade.

It was found that in many instances the distributors had incorporated in their licenses agreements not to license the same picture to another exhibitor for a length of time beyond that which was necessary to protect the initial licensee in the profitable showing of his film. Clearance agreements not to re-license a film within a certain time in a competitive area, if reasonable, were upheld by the district court and the Supreme Court as valid. But if the length of time was beyond the scope and motive of protection of the initial licensee, they were unreasonable restraints of trade and violative of the public interest in the viewing of a film.

It was found that exhibitor-defendants as well as distributors were guilty of Sherman Act violations, not only in being parties to the above designated conspiracies in restraint and monopolization of trade but also by operating their theaters on a collective basis by pooling agreements and joint ownership, thus removing competition from this field. This nullification of competition in the exhibition field received severe reproof from the Supreme Court: "Clearer restraints of trade are difficult to imagine." To add to this collective alliance the distributors had financial and managerial interests in movie house chains and other exhibitors through-
out the nation, bringing about complete destruction even of the possibility of successful independent competitive film showing in America. All of these findings were upheld by the Supreme Court.

Further, the Supreme Court affirmed the district court's findings that formula deals, master agreements and franchises which gave to one licensee or an interlocking few licensees complete control over the showing of all good films in large geographical areas were restraints of trade and monopolistic practices. These specific charges were also considered in two other cases decided by the Supreme Court on the same day. *United States v. Griffith*, 333 U.S. 68 S.Ct. 941 (1948) and *Schine Chain Theatres, Inc., v. United States*, 333 U.S. 68 S.Ct. 947 (1948). In these cases monopolistic domination of the exhibition field by the defendants, Griffith and Schine, in their particular geographical area was found to exist. These two cases were local attempts to correct a segment of the nation-wide empire of corruption and the destruction of such local monopolies evidences the determination of the Supreme Court completely to destroy the nation-wide monopoly now in existence.

In the principal case it was also found that distributors were licensing films only on the contingency that other films were also accepted (block-booking); that in some cases double features were mandatory if licenses to films were to be obtained; that films were licensed before they were viewed by the licensee and that discrimination existed against certain unfavored licensees.

With all the foregoing instances of corruption apparent to the Supreme Court, it faced the difficult problem of what to do about them. The district court, in its decree, enjoined the many aforesaid illegal practices, but to enjoin an industry which exhibited such a propensity for unlawful activities was obviously little protection for the public against recurring similar violations to say nothing of new, future illegal adventures. However, powerful control of the industry remained and the tendency to exercise this power in an unlawful manner was already proved. To defeat the possibility of recurring violations the district court decreed that a procedure be installed whereby all films should be offered for licensing by the distributors to the exhibitors devoid of illegal covenants and in such a manner that each, whether he be a favored member of a chain or an independent exhibitor, would have an opportunity to bid competitively for the right to license. The film should then be granted to the highest responsible bidder. To facilitate compliance with the competitive bidding decree, the district court *recommended*—not an order, but a recommendation—that arbitration boards be set up to insure compliance with the bidding standards issued by the court. Rejecting this method of remedy chosen by the district court, Mr. Justice Douglas said, "... the provisions for competitive bidding in these cases promises little in the way of relief against the real evils of the conspiracy. They implicate the judiciary heavily in the details of business management if supervision is to be effective." By this alteration of the district court's decision, the remedial decree's central arch of correction was removed, necessitating a remanding of the case to the district court for further curative action. Herein was the point of departure from the majority for Mr. Justice Frankfurter. In his opinion, the discretionary power of the district court in its choice of remedies could not be shown to be grossly unsatisfactory and, not being arbitrary or capricious, he felt it should stand. He would have then upheld the competitive bidding decree with but one minor exception and affirm the district court's decision.

Mr. Justice Douglas, in remanding this case to the district court, issued no positive pattern for the lower court to follow in devising a proper remedy for the movie distributor-exhibitors' violations. Yet, the underlying current of his opinion concerning problems which should be reconsidered by the district court in the reframing of its decree flows in only one direction and reveals the Supreme Court's notion of the proper method of correction: The divestiture of the distributor and
exhibitor interests between each other and among themselves. It was this exact remedy which the Supreme Court directed to be incorporated in the decrees settling the Griffith and Schine cases. It was this remedy which the Supreme Court directed to cure the exhibitor chain monopoly situation revealed in United States v. Crescent Amusement Co., 323 U. S. 173, 65 S. Ct. 254, 89 L. Ed. 160 (1944), another conviction on a local scale of the evils aimed at on a national scale in the principal case. In the Crescent case Mr. Justice Douglas said that "proclivity in the past to use that (chain) affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future." The Crescent, Griffith and Schine cases were cited in the instant case by Mr. Justice Douglas to exemplify remedies which have been used to correct the same corruption present in the case under discussion. Is it not probable, then, that only such complete divestiture of monopolistic interests tending to restrain trade is the only adequate remedy in the eyes of the Supreme Court? A decree of such nation-wide divestiture may well be ordered by the district court at the conclusion of its consideration of this remanded case.

Thomas Broden

BILLS AND NOTES—CONTRACTS RELEASING BANK FROM LIABILITY FOR PAYMENT OF CHECK IN SPITE OF THE STOP PAYMENT ORDER.—Speroff v. First Central Trust Company, ...Ohio St....., 79 N. E. (2d) 119 (1948). In this case it was held that a stipulation purporting to release the bank from liability for negligence in the observance of the stop payment order is without consideration and void as against public policy.

The facts are as follows: Action by the plaintiff against the defendant bank to recover the amount of a check which the plaintiff had drawn on the defendant, but which the plaintiff later notified the defendant not to pay. However, the defendant later, through inadvertence or oversight, paid the check, and debited the plaintiff's account. The defendant admitted the drawing of the check and the notice not to pay, but as a defense alleged that the plaintiff had signed a statement agreeing not to hold the defendant liable if it should pay the check through inadvertency or oversight.

The question in the case was whether the releasing of the bank from liability for paying as a result of inadvertence or accident in spite of the stop payment order, constitutes a valid contract, which is not void as against public policy. It was held that the purported release was void for want of consideration and as being against public policy. The court said:

The defendant bank was aware that a check is simply an order which may be countermanded and payment forbidden by the drawer any time before it is actually cashed or accepted and that an order to stop payment may be oral or in writing so long as it conveys to the bank a definite instruction to that effect. Under the reciprocal rights and obligations inherent in the relationship existing between a bank and its depositors, it was the duty of the defendant not to pay the check after receiving such an order from the plaintiff depositor. Hence, when the plaintiff was asked to sign a statement or release to the effect that the bank would not be held responsible if it should pay the check through inadvertency, or oversight; this was something new—an element that concededly had not previously existed in their relationship. What benefit or consideration was received by the plaintiff as the promisor and what detriment was suffered by the defendant bank as promisee as a result of the new statement or re-
lease? Clearly there was no compliance with either of these fundamental requirements as to a consideration. On the contrary the plaintiff promisor thereby received no benefit but suffered a detriment, and the promisee suffered no detriment but received a benefit.

In *John H. Mahon Co. v. Huntington National Bank of Columbus*, 62 Ohio App. 261, 23 N. E. (2d) 638 (1939), the only previous Ohio case directly on point, the court held that a stipulation in a stop payment notice relieving the bank of liability in paying of a check because of inadvertence or oversight is a contract binding upon the drawer. Although the court in the *Speroff* case failed to take cognizance of the *Mahon* case, it overruled the latter on this point *sub silentio*.

In *Hiroshima v. Bank of Italy*, 78 Cal. App. 362, 248 Pac. 947 (1926), it was held that a stipulation in a stop payment notice of a check to a bank, which releases the bank from all liabilities in case of negligence or oversight in paying the check, is void because it lacks consideration and is against public policy. Anything that tends to injure the public and is against the public good is against public policy. Such an agreement, which relieves the bank of all liability or responsibility, is against public policy because it tends to injure the general public.


I find that the bank could not release itself from all forms of negligence, as this is against public policy, and further I do not believe that there is a consideration for such release, as the drawer of an uncertified check can revoke his order for the payment of the same at any time before it is paid or certified by the bank, and it has no right to pay the funds of the drawer after such notice. The bank had no right to exact a release for itself for all forms of negligence, as a condition precedent to its acceptance of such stop order, because it was an act it already legally bound to perform.

In a Massachusetts case, *Tremont Trust Co. v. Burack*, 235 Mass. 398, 126 N. E. 782 (1920), in which the opposite conclusion was reached, Pierce, J., asked:

Is it illegal for a bank to contract against the negligence of its employees in failing to stop the payment of a check after receiving an order to stop its payment? It is manifest the quoted words were intended to exonerate the bank from the kind of negligence shown by the record, and we are unable to see anything illegal, or anything opposed to public policy, in a stipulation or agreement which relieves a bank so circumstanced from the results of the mere inattention, carelessness, oversightedness, or mistakes of its employees.

The determination of whether a contract is against public policy is a question for the courts to declare, because it is a question of law. In making this determination the courts will take into consideration all the circumstances relative to the case. The court also will take cognizance of the fact that one should not be restricted in his freedom to contract. It would be to the benefit of the public good to keep the freedom to contract unrestricted. The agreement between the parties should not be held void unless it is contrary to what the constitution, judiciary, and the legislature have declared to be public policy or it clearly injures the public good. *Hodnich v. Fidelity Trust Co.*, 96 Ind. App. 342, 183 N. E. 488 (1932).

In *Gaita v. Windsor Bank*, 251 N. Y. 152, 167 N. E. 203 (1929), the court said:

The common-law liability of a bank in regard to a specific transaction may be limited provided the limitation has the assent of the depositor. In such a situation the clearly expressed intention of the parties will prevail and the rule of "freedom of contract" will be enforced.
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If a drawer desires to hold a bank to its common-law liability and impose upon it the absolute duty of stopping payment of a check, the notice served on the bank should be positive and unqualified. Then, if the bank does not desire to assume the liability imposed by such a notice, it may cancel the depositor. On the other hand, if the drawer serves a qualified or limited notice, the obligation of the bank is thereby limited, and it will not be liable to the drawer if the check is inadvertently paid.

In spite of these decisions which run contra to the principal case, it seems well to note that the principle of "freedom of contract" should not be extended to such a degree that it tends to injure the public or is against the public good. Any contract or writing, purporting to relieve the defendant of all liability or responsibility, is against public policy because such contract tends to injure the public and is against the public good. Thus, a bank cannot be relieved of its liability regardless of any such agreement that it makes.

John C. Castelli

CONSTITUTIONAL LAW—ALIENS—EQUAL PROTECTION OF THE LAWS DESPITE INELIGIBILITY FOR CITIZENSHIP.—Torao Takahashi v. Fish and Game Commission et al. .... U. S. ...., 68 S. Ct. 1138 (1948). This is a suit brought contesting the constitutionality of a statute of the State of California, denying a commercial fisherman's license to an alien Japanese, ineligible for United States citizenship. The Superior Court of California ruled the statute unconstitutional, but this decision was reversed in the supreme court of that state, where it was held constitutional. Certiorari was granted in the Supreme Court of the United States upon the ground that the lower court had relied on federal grounds for its decision.

The petitioner, Torao Takahashi, was born in Japan and came to this country in 1907. Federal laws, based on distinction of "color and race" have permitted Japanese and certain other non-white racial groups to enter and reside in this country, 43 Stat. 159 (1924), as amended, 8 U. S. C. § 211 (1946). Takahashi held a commercial fisherman's license, properly issued by the State of California, from 1915 until the outbreak of war in 1942. At that time all such licenses held by Japanese were revoked and these persons, being regarded as enemy aliens, were interned by military order. In 1943 during this period of evacuation, the state legislature passed an amendment to the California Fish and Game Code prohibiting issuance of a license to any "alien Japanese". In 1945 this was further amended by striking the 1943 provision as to "alien Japanese" for fear it might be declared unconstitutional and inserting instead a provision denying issuance of such license to "any person ineligible to citizenship", which classification included, of course, alien Japanese. CAL. STAT., Fish and Game Code § 427 (1947).

In 1945, after being released from military internment, the petitioner made application for a reissuance of his commercial license and was refused. He asked for a writ of mandamus ordering the State of California to issue him a license permitting him to fish either within or outside of the international three mile limit.

The respondents based the validity of the statute upon three major points. First, that the statute is primarily a fish conservation measure; second, that since the Federal Government may choose immigrants in part on the basis of race and color classifications, so a state may adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living; and third, that the State of California has a "special public interest" to protect.
The petitioner, Takahashi, maintained that the statute is merely an outgrowth of the racial antagonism rampant on the west coast, especially toward persons of Japanese ancestry.

The court began its consideration of the case by first stating a summary of the principles laid down in *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). In that case the State of Arizona enacted a law requiring all employers of more than five persons to hire no less than eighty (80) per cent electors, or native born citizens of the United States, but permitting them to retain a maximum of twenty per cent alien employees. The court here said that lawful entry, under federal law, into the United States by an alien gave him a federal privilege to enter in and abide in any state in the Union, and thereafter under the Fourteenth Amendment to enjoy the equal protection of the laws of the state in which he abode; that this privilege to enter in and abide in any state carried with it the "right to work for a living in the common occupations of the community". If this were otherwise that Amendment would be a mere "barren form of words". As to the reasonableness of the restrictions placed by this statute, their conflict with the federal power to control immigration, which is a vested power, would nullify them.

In a very methodical manner, the Court then proceeded to consider the arguments advanced by the respondents as to the statute's constitutionality. It was conceded that the State of California does have the right to enact measures necessary for the conservation of fish and game, but that is not to say that they may choose as to which of the inhabitants of the state, lawfully residing therein, are to enjoy these facilities. Even through the use of such power as this, that is, to abolish in toto the right to fish by everyone, to say that they may then discriminate as to which persons of the state may then make use of these resources, is *non-sequitur*.

The Court likewise saw no merit in the second point presented by the respondents: that the state has a right to choose which of its inhabitants may participate in certain occupations, based upon the Federal Government's power to select immigrants on the basis of race and color in part. The power to regulate and control all matters pertaining to immigration was transferred to the Federal Government by the States in the Constitution of the United States. In a constitutional question involving a conflict on a like point between a federal and state law, the federal law shall prevail, *McCulloch v. State of Maryland*, 4 Wheaton 316, 4 L. Ed. 579 (1819).

The Court disposed of respondents' final contention that it was their duty to protect a "special public interest" in state fish by holding that no state could allow certain members of a community to earn a livelihood by exploitation of the "interest" without allowing others to do so. In *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896), the Court sustained a law that, in order to restrict the use of game to people of the state, prohibited the out-of-state transportation of game killed within the state. Clearly this is a conservation measure restricting the use of the game to inhabitants of the state for their enjoyment. On the other hand, where Louisiana declared that the state owned all the shrimp within the state, but permitted ultimate sale and shipment of shrimp for consumption outside the state's boundaries, Louisiana was denied the power under the commerce clause to require the local processing of shrimp taken from Louisiana marshes as a prerequisite to out-of-state transportation, *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 117 (1928). Looking at this case, the Court could see not only a restriction upon interstate commerce in violation of the Commerce clause of the Constitution, but a measure forcing processing of the shrimp within Louisiana prior to its out-of-state transportation. This was obviously unreasonable.
Practically every state in the Union has statutes in effect today similar to the one here in question. For an excellent discussion of these statutes, see Konvitz, *The Alien and the Asiatic in American Law* (1946). In his work, Mr. Konvitz clearly outlines the many directions in which laws of this type lead. The State of California has in effect today statutes prohibiting ineligible aliens from participating in eight different occupations, and four into which even a declarant may not enter. Illinois lists twenty-six similar fields, New York twenty-seven and New Jersey twenty-one from which aliens are excluded. Thus far courts have upheld many of these statutes and they will continue to stand until the principles of the instant case are brought to bear upon them. A statute similar in effect to these was declared unconstitutional in the case of *Oyama v. California*, 332 U. S. 633, 68 S. Ct. 269, 92 L. Ed. 257 (1948), noted in 23 Notre Dame Lawyer 409 (1948), which dealt with the right of an alien to hold land in trust as guardian for a minor.

Many of these cases base their validity upon the theory of state ownership of the interest being protected. This basis, however, is rather vacillatory legally; see Mr. Justice Holmes' comment in *Missouri v. Holland*, 252 U. S. 416, 434, 40 S.Ct. 382, 384, 64 L. Ed. 641, 648 (1920), that "To put the claim of the State upon title is to lean upon a slender reed". Another theory, and perhaps the stronger one, is to put it upon the duty of the state to protect the public welfare from peril. In *Miller v. Niagara Falls*, 207 App. Div. 798, 202 N. Y. Supp. 549 (1924), the court upheld a statute prohibiting the issuance of a license to an alien to sell soft drinks. Oregon held a like statute unconstitutional in *George v. Portland*, 114 Ore. 418, 235 P. 681 (1925).

If laws such as these are necessary to protect the public welfare, they should be reasonable and rational, not arbitrary and discriminatory. If these trades and professions, such as bus driving, plumbing, medicine, the law, etc., are to be taken out of the class of a righteous calling, and placed within the realm of "privileged vocations", we should be careful to see that they are not the means to another end for politically chosen groups. Would it not be possible, that if they are to be set out as privileged positions, that they might be used to exclude certain national groups such as Jews, Negroes, Catholics or even carried to the absurdity of a blue-eyed boy? Laws such as these are absurd, and should be treated by the courts as such. The Fourteenth Amendment of the Constitution does not state that equal protection of the laws should be afforded to citizens only, but to all persons, and that an alien is certainly a person was early established in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

It will be of double interest and significance to the reader to note that the amendment in question, to Section 990 of the Fish and Game Code, was proposed by a legislative committee devoted to Japanese resettlement problems, not by a committee concerned with the conservation of fish.

In holding the statute unconstitutional, Mr. Justice Murphy, in his concurring opinion, severely censures those who would attempt to legalize discrimination through indirect methods. The words of the amendment appeared innocent in referring to "persons ineligible for citizenship", but they could not deny that Japanese were the only ineligible persons making use of these fishing licenses in great numbers. He refers to it as an act drawn against a background of economic and racial tensions, having no relation whatever to any constitutionally cognizable interest of California.

A decision such as that handed down in the instant case will not, of course, serve as a panacea to cover all constitutional wrongs, but perhaps it will serve as somewhat of a tocsin to any legislative body contemplating such action through the use of subterfuge. The latent becomes the patent through judicial determination of the real intent behind the law.

*Edward G. Coleman.*
TORTS—GUEST STATUTE—STRICT INTERPRETATION.—Eshelman v. Wilson, ....Ohio App., 80 N.E. (2d) 803 (1948). This is an action for personal injuries brought by Lillian I. Eshelman against Eleanor P. Wilson. These injuries were suffered by the plaintiff when she was struck by the defendant's automobile. From a judgment for the plaintiff the defendant appeals. The judgment was affirmed.

The essential facts are that the plaintiff and the defendant together with other women were preparing to return home after attending a social gathering. All were the defendant's guests. She had furnished transportation to the function and was to furnish it for the return trip. The defendant took her place back of the wheel, another guest to her right, and the plaintiff to the extreme right of the seat. The defendant could not find her keys and during the search for them the plaintiff alighted from the car. The defendant soon found the keys and commenced to operate the car. The gears were in reverse and the brake was not released. When the defendant stepped on the starter the car moved backward for a short distance and stopped. In its movement it struck and injured the plaintiff.

The question raised on this appeal is whether or not at the time of the plaintiff's injury she was a guest of the defendant. The answer to this question depends upon the construction of the Ohio Guest Statute, PAGE'S OHIO GEN. CODE §§ 6308-6 (1937).

The owner... responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to .... a guest while being transported without payment therefor in or upon said motor vehicle, resulting from the operation thereof, unless such injuries ... are caused by the wilful or wanton misconduct of such operator, .... of said motor vehicle.

The trial judge held, and it was contended here by the appellee, that inasmuch as the plaintiff, at the time that she was injured, was not in or upon the motor vehicle of the defendant, she was not a guest of the defendant. The defendant-appellant claimed that the section of the code should not be limited to the requirement that the person transported be in or upon the motor vehicle in which he is riding.

There is no material factual dispute in the record; the judgment rests entirely upon the proper construction of the guest statute. The court of appeals upheld the lower court's decision and in effect said that not to do so would require the elimination from the statute of the words "in or upon said motor vehicle."

Admittedly there were no cases in relation to the question in point in Ohio. Massachusetts, which has no statutory guest law, but which has evolved a like principle from the common law, supports the claim of the defendant that one may be a guest of the operator of an automobile while in the venture of the transportation although not in or upon the motor vehicle. In Bragdon v. Dinsmore, 312 Mass. 628, 45 N.E. (2d) 833, 146 A.L.R. 680 (1942), plaintiff was struck by the defendant's car after she had alighted from it. It was held that the plaintiff's relationship as defendant's guest had not ceased at the time of the accident. And in Ruel v. Langelier, 299 Mass. 240, 12 N.E. (2d) 735 (1938), it was said that:

The degree of automobile owner's duty to guest does not depend on the latter's physical position or whether she was in or outside the automobile when injured, but on whether the owner's act, claimed to be negligent, was performed in course of carrying out the gratuitous undertaking assumed.

A fortiori, it would seem that if Massachusetts had had a statute such as Ohio's, limiting a "guest" in negligence cases to one who is being transported...
without payment therefor in or upon said motor vehicle, it would have reached a different rule.

The appellee was supported directly or inferentially by: Miller v. Fairley, 141 Ohio St. 327, 48 N.E. (2d) 217 (1943); Prager v. Isreal, 15 Cal. (2d) 89, 98 P. (2d) 729 (1940); Harrison v. Gamatero, 52 Cal. App. (2d) 178, 125 P. (2d) 904 (1942); Smith et ux. v. Pope, 53 Cal. App. (2d) 43, 127 P. (2d) 292 (1942).

In the Smith case the defendant's foot slipped from the clutch pedal of the automobile which was in gear. The car jerked forward injuring the plaintiff who was preparing to enter it. It was held that the guest statute did not apply to the plaintiff since he was merely preparing to enter the car.

Statutory law clearly restricts the immunity of a gratuitous driver. That is, the guest must be in or upon said motor vehicle to enable the driver to plead immunity under the guest statute where wilful and wanton negligence is absent. However, as shown by the Massachusett's decision in Bragdon v. Dinsmore, 312 Mass. 628, 45 N.E. (2d) 833, 146 A.L.R. 680 (1942), this restriction is not in accord with the principle evolved from the common law which extends immunity to the driver as long as the relationship of host and guest is present. Certainly this is the more natural administration of justice. To punish an individual for such a gratuitous undertaking where there is no wilful or gross negligence has little justification since the rider voluntarily assumes his status as guest, and should not be heard to complain of a risk undertaken on his own volition.

Louis F. DiGiovanni

DEFAMATION—BROADCASTER'S LIABILITY BASED ON DUE CARE.—Kelly v. Hoffman, et al., 137 N. J. L. ...., 61 A. (2d) 143 (1948). This is an appeal from an order made by the lower court striking out the third count of the complaint pursuant to motion made by defendant, The Trent Broadcasting Company, upon the ground that it stated no cause of action. Reversed. The substantive question before the court was disposed of as follows. The radio broadcasting company leased its facilities; the lessee hired a news commentator, not an employee of the radio broadcasting company, who during the broadcast issued defamatory statements which were carried to the radio listeners by its facilities. Held, that the radio broadcasting company was not liable for the defamatory statement during the broadcast by such person if it could not have been prevented by the exercise of reasonable care.

Justice Bruling stated in the majority opinion, "... the case is one of first impression. ... The pertinent cases are relatively few and the law is still and obviously in the process of crystallization." Such a situation has brought forth the two views regarding acts of publishing defamatory statements. The first is that of the so-called absolute liability as adopted in Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), where Wood read the alleged defamatory remarks from a script during the broadcast on the eve of an election. The jury had absolved the radio station. On appeal, the court reversed on the ground that the instructions to the jury as to the definition of libel per se, and that due care was to have been taken into account, were erroneous. It held that radio defamation was libel rather than slander, and that liability was absolute. It did so on two grounds: (1) the existence of a written script, available to the station, and from which Wood read; and (2) the great harm that might result from radio defamation. Justice Wachenfeld, dissenting in the instant case, appears to be in accord with this theory of liability when he states, "... the liability should be abso-
lute, regardless of fault.” The second view regarding acts of publishing defamatory statements, basing the liability on the grounds of negligence, is represented in *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A. (2d) 302 (1939), where, in the course of a sponsored broadcast, the featured comedian, Al Jolson, interpolated a remark not in the prepared script, and referred to the plaintiff as, “a rotten hotel.” The court reviewed the aspects of both libel and slander and concluded that radio defamation conformed to neither, although it included certain features of both. It should be treated as a new and independent form of action. The court held the radio station not liable for the interjected remark, where it appeared that it had exercised due care. Further illustrating the unsettled state of the law on this subject, Volume Three of *Restatement of the Law of Torts*, §577, at page 196, contains the following *Caveat*:

The Institute expresses no opinion as to whether the proprietors of a radio broadcasting station are relieved from liability for a defamatory broadcast by a person not in their employ if they could not have prevented the publication by the exercise of reasonable care, or whether, as an original publisher, they are liable irrespective of the precaution taken to prevent the defamatory publication.

At this point it is interesting to note the interpretative rule laid down by the Federal Communications Commission in *Port Huron Broadcasting Co.*, Docket No. 6987, No. BE-R-967, June 28, 1948, where the Commission, in its opinion interpreting the Federal Communications Act, 48 Stat. 1088 (1934), 47 U.S.C. 315 (1946), which provides that a licensed radio station that permits any legally qualified candidate to use its facilities, shall have no power of censorship over the material broadcast by such candidate, said,

... the prohibition contained therein against censorship in connection with political broadcasts appears clearly an occupation of the field by Federal authority, which under the law, would relieve the licensee of responsibility for any libelous matter broadcast in case of a speech coming within section 315, irrespective of the provision of state law.

Justice Burling pointed out that the instant case does not fall within this section, for the speaker was not a legally qualified political candidate, nor such person embodied within the meaning of the Federal Communications Act.

On August 5, 1948, a Special House Investigating Committee began an investigation of the Federal Communications Commission's ruling in the *Port Huron* case. The Special House Committee determined that the Commission in the *Port Huron* case had “invaded the field of legislation and had indulged in quasi-judicial legislation on the subject which Congress clearly decided was outside the Communications Act.” Such action was condemned. At the conclusion of the hearings, Mr. Wayne Coy, Chairman of the Federal Communications Commission, assured Chairman Forest Harness that no broadcaster's license would be revoked if he continued to forbid libelous statements in political broadcasts. Obviously Chairman Coy was attempting to appease the wrath of the House Committee over the aforementioned *Port Huron* ruling. However, what effect does Chairman Coy's statement have on the interpretative rule laid down in the *Port Huron* hearing?

Justice Burling's majority opinion and Justice Wachenfeld's minority opinion in the instant case both indicate that the problem is one which should be a subject of legislative enactment. It is a question of social and economic importance. It is, therefore, one of public policy, and as such should be resolved by the legislature rather than by spurious analogy between the publication by newspaper and the publication by radio.
RECENT DECISIONS

In connection with advisability of legislative enactment, it should be noted that the only legislation now pending before Congress is the White bill, (S-1333), § 14, containing a provision forbidding censorship, but exempting broadcasters from liability for anything broadcast in discussion of political or controversial issues.

Kelly v. Hoffman et al. has definitely fortified the view advocating that the liability of radio broadcasting companies be based on negligence by electing to decide the case upon the broad duty of the defendant as a disseminator, in contrast to the absolute liability of a publisher. In the absence of any legislation, this appears to be a sound, practical solution to the problem.

To contend that the radio broadcasting companies should be held to the same absolute liability as the publishers of printed matter shows disregard and lack of appreciation of the basic difference between the two forms of publication. Once the printed material of a newspaper or similar publication is fixed, the same will remain unchanged, thus affording a publisher the opportunity of being fully aware of the matter to be disseminated to the reading public. The position of the radio broadcasting companies is, on the contrary, much different. Painstaking censorship of scripts prepared for broadcasting can be instantly made of no avail by the will of the speaker who may, for a split second, deviate from the text of the prepared script to inject defamatory material into the program. The rapidity by which this defamatory interpolation can be accomplished virtually strips the stations of any means of preventing it.

Therefore, to impose the burden of absolute liability on the radio broadcasting companies is against public policy. To require due care on the part of the broadcasting companies is more in accord with the ideals of reasonableness and justice to which the law strives to adhere.

John L. Globensky

CONSTITUTIONAL LAW—FULL FAITH AND CREDIT—THE EFFECT OF AN EX PARTE DIVORCE ON A PRIOR SUPPORT DECREES—Estin v. Estin, ....U.S., 68 S.Ct. 1213 (1948). The Full Faith and Credit Clause of the Constitution does not require that an ex parte divorce obtained by substituted service on the nonresident defendant be given the same effect in relation to incidents of marriage which are in personam in nature as would be required had personal jurisdiction of the defendant been obtained. Thus it was held that New York could constitutionally refuse to allow an ex parte Nevada divorce to vacate a prior support decree granted in New York, even though the jurisdiction of Nevada had previously been recognized, provided the decree was given the same effect a similar New York decree would have had.

Petitioner left his wife, the respondent, in 1942. In 1943, she received a decree of separation and an award of permanent alimony in a New York action in which he appeared. In 1944, petitioner left New York and moved to Nevada, where in May, 1945, he received a decree of absolute divorce on substituted service of the respondent, who remained a resident of New York and did not appear. Petitioner ceased payments on the prior decree of separation after the filing of the Nevada decree, and it was upon suit in New York for a supplementary judgment for the arrears that this action arose. A denial of the husband's motion to strike out the alimony provisions of the support decree was ultimately affirmed by the Court of Appeals of New York, and he brought certiorari to the Supreme Court.
This case must first be distinguished from both the situation where the court granting the divorce has jurisdiction over both members of the marriage relationship, *Yarborough v. Yarborough*, 290 U.S. 202, 54 S.Ct. 181, 78 L.Ed. 269 (1933); *Davis v. Davis*, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26 (1938); *Sherrer v. Sherrer*, 333 U.S. 687 (1948); *Coe v. Coe*, 333 U.S. 68, 68 S.Ct. 1094 (1948), and the situation where the court attempting to grant the decree has jurisdiction over neither. *Bell v. Bell*, 181 U.S. 175, 21 S.Ct. 551, 45 L.Ed. 804 (1901). This action concerns, instead, an *ex parte* decree of the type considered in *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942), 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945). That case, in overruling *Haddock v. Haddock*, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867 (1906), held that a divorce granted through substituted service by a state having jurisdiction over one of the parties was entitled to full faith and credit and could only be attacked on the ground that the state granting the divorce did not have jurisdiction over either party. Accordingly, petitioner argued that since New York had found that Nevada had jurisdiction to grant the decree, *Estin v. Estin*, 63 N.Y.S. (2d) 476 (1946), the holding of the New York Court of Appeals that this support decree survived petitioner's divorce was not in line with that court's previous decisions and thus denied the Nevada judgment the full faith and credit which the Constitution demands. The Court answered in part with the reminder that since the highest court of New York had held that, under New York law, this support decree survived the Nevada divorce, the Court was limited to a determination of whether this action conformed to the Constitution, and not whether it conformed to that court's earlier decisions.

The first argument entertained by the Court, that New York had an interest in the welfare of the respondent sufficient to justify ignoring an otherwise valid judgment of a sister state, does not appear to have been relied upon in arriving at the decision. Although, as the Court stated, such instances "have been few and far between", the Court made no attempt to create such an exception, but said instead that "... the question is whether Nevada could under any circumstances adjudicate rights of respondent under the New York judgment when she was not personally served or did not appear in the proceeding."

The question as the Court has framed it does not, however, represent a completely accurate statement of the issue. The Nevada decree was silent on the subject of alimony, and the opinion makes no mention of any attempt to show that the question of respondent's support was raised in the Nevada action. As Mr. Justice Frankfurter observes in his dissent, the question is whether New York has formulated a rule regarding the survival of support decrees after an *ex parte* divorce decree which discriminates against judgments of sister states. To answer this question, it is necessary to make a closer examination of the decision of the New York Court of Appeals. *Estin v. Estin*, 296 N.Y. 308, 73 N.E. (2d) 113 (1947).

In order to prove that New York had discriminated against foreign *ex parte* decrees it would be necessary to show that, when confronted with a domestic decree, New York could arrive at a different result without overruling the holding of this decision. While the opinion is admittedly not too clear, it does not appear that this would be possible. In classing this case with those where no jurisdiction over the defendant had been acquired, the court cited two cases in which valid *ex parte* divorce decrees obtained by substituted service were held not to supersede prior support decrees. *Miller v. Miller*, 200 Iowa 193, 206 N.W. 262 (1925); *Wagster v. Wagster*, 193 Ark. 902, 103 S.W. (2d) 638 (1937). Although the first case is weakened somewhat by the fact that the Full Faith and Credit Clause, as then interpreted by the Supreme Court, did not require the recognition of this foreign *ex parte* decree, the second case was based upon a domestic decree.
acquired after the defendant had abandoned his domicile in the state of the forum. Moreover, it seems improbable that a contrary decision could be reconciled with the number of New York decisions which hold that a domestic divorce decree obtained without personal jurisdiction of the defendant cannot create an obligation to pay alimony or affect other in personam incidents of the marriage relation. Rigney v. Rigney, 127 N. Y. 408, 28 N.E. 405 (1891); Baylies v. Baylies, 196 App. Div. 677, 188 N.Y.S. 147 (1921); Robinson v. Robinson, 254 App. Div. 696, 3 N.Y.S. (2d) 882 (1938). In view of these decisions, it would be difficult to conclude that New York meant to limit the rule which is formulated to foreign ex parte decrees.

A question not directly presented here, but germane to the problem, is that of the validity of a contrary state rule under the Due Process Clause. In other words, the question is one of the constitutionality of a state rule providing that a support decree shall not survive divorce regardless of the fact that the divorce was granted by a state not having jurisdiction over the defendant. The difficulty arises from the fact that an action to dissolve the status of the parties is an in rem proceeding, while actions concerning alimony and other personal incidents of the marriage are actions in personam, and thus presumably within the due process requirements set forth in Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1878). In that case, an adjudication of the rights of a nonresident creditor without his being personally served, and without his voluntary submission to the jurisdiction of the court was held to be a nullity. As has been previously noted, an attempt to adjudicate the question of alimony in an ex parte divorce action was held not binding on the nonresident defendant who did not appear. Baylies v. Baylies, 196 App. Div. 677, 188 N. Y. S. 147 (1921). There seems to be no reason why the extinguishment of a valid judgment for alimony by an ex parte divorce decree should occupy any other position. The case of Esenwein v. Pennsylvania, 325 U. S. 279, 65 S. Ct. 1118, 89 L. Ed. 1608 (1945), while presenting a similar fact situation, was not decisive of the issue, since the Court was able to dispose of that case on the question of the right of the courts of Pennsylvania to litigate the fact of the domicile of the plaintiff. In concurring, Mr. Justice Douglas and Mr. Justice Rutledge were quick to point out, however, that full faith and credit need not be given to the in personam effects of ex parte foreign decrees.

While even a holding to that effect would not directly dispose of the due process question involved in domestic ex parte decrees, the dicta expressed indicates the general tenor of the Court on the subject.

The blessings of uniformity which the Court envisioned as flowing from its decision in Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942), are proving themselves not to be entirely unmixed. This decision represents another of many steps which must be taken before the Court's understanding of the precise effect of that holding can be determined. It is probable that future developments will be concerned more with questions of due process than those of full faith and credit.

John H. O'Hara

**Contracts—Sale of Automobile—Dealer's Option to Repurchase.**—Larson Buick Co., Inc. v. Mosca et al., 79 N. Y. S. (2d) 654 (1948). Here a temporary injunction was granted to prevent further transfer of a new automobile after purchaser Philip Mosca resold it to a used car dealer. At the time of purchase, Mosca signed an agreement giving the new car dealer, Larson Buick Co., option to repurchase the car should be desire to dispose of it within six months. The facts
show that Mosca assured the seller that the car was for his own use, yet at the same time he was accompanied by a used car buyer to whom the car was sold the following day. For this breach of contract a temporary injunction was asked, and the court held that action for damage here would not be an adequate remedy and that in view of the fraud committed, the injunction should be granted to prevent further transfer pending trial. After the granting of the injunction a settlement was made by the parties out of court.

To be certain that new automobiles are sold to legitimate buyers and not resold at a premium, many dealers are requiring their customers to sign similar contracts. A Georgia case, Schuler v. Dearing Chevrolet Co., ...Ga. App. (2d)...., 46 S. E. (2d) 611 (1948), held that a contract, in which the seller gives the buyer as consideration the sale of a new automobile and the sum of one dollar; and the buyer in turn agrees to give the seller first privilege of repurchasing said automobile at original price should the buyer decide for any reason to sell within six months, is not void for either indefiniteness, uncertainty, or lack of mutuality—that any sale disregarding dealer's option to repurchase is a breach of contract.

In the Georgia case the dealer asked only for special damages, stating that though he could have made a substantial profit, he would not have sold the car above list (thus eliminating general damages). The court sustained the defendant's contention that the petition sets forth no cause of action since it plainly disclosed on its face that the plaintiff has not been damaged. Even nominal damages were not allowed, since the court ruled that nominal damages could not be recovered in a suit failing to allege general damages and not asking for nominal damages.

A comparison of the New York and Georgia cases discloses the advantage of an injunction when it can be obtained. Unfortunately dealers usually do not have knowledge of the trades until several months after they are consummated. It has been suggested that reasonable liquidated damages should be written into the contract. If reasonable, they might be allowed, especially since it is difficult properly to determine just how much a dealer is damaged when the loss of good will and damage to his reputation is considered.

Liquidated damages were allowed in the District of Columbia, when a municipal court ruled as valid a repurchase contract that permitted the dealer to repurchase the car at ten per cent less than the original sale price or, in event of a breach of the option, to be entitled to liquidated damages in the amount of ten per cent of the original sale price. The court stated that this was not an unenforceable penalty clause but constituted reasonable damages computed in advance. Quinn, J., said: "If ever there was a flagrant case this is it. The original purchaser had no idea of keeping the car for his own use." Francis and Parsons, Inc. v. Allen, Mun. Ct. D. C., July 12, 1948. See comment, 34 A. B. A. J. 829 (Sept. 1948).

In general, repurchase contracts are a matter for each city or community. Many dealers will not require an option because of strong customer protests. Also, in some ...as dealers themselves have been guilty of exploiting the automobile shortage and therefore cannot equitably impose restraints on their customers. Fortunately, most dealers are honest and want to see their quota distributed properly. In the final analysis the local courts will determine the validity of repurchase contracts. Some will find these contracts to be a form of coercion to which the buyer is forced to agree to obtain a new automobile. Others will take judicial notice of the social and economic conditions that make it imperative that the short supply of new automobiles goes to worthy and legitimate buyers and will hold the restraints to be reasonable.

L. G. Sculthorp

The issue presented in this case required the court to determine the meaning of the term "gross proceeds" under a sales tax law taxing the privilege of retail sales upon the basis of gross proceeds. The court held that by "gross proceeds" were meant the sum of money, if any, received by the seller, together with the value of the property likewise received, such value to be determined in a manner designed to bring about a fair and reasonable result.

The case arose as an original proceeding in mandamus brought by plaintiffs to compel defendant tax commissioner of Michigan to rescind certain regulations of the commission fixing gross proceeds subject to sales tax on sales of new automobiles accompanied by trade-ins as the "book" or actual wholesale value of the automobile traded in, not the trade-in value as set by the parties at the time of sale.

Plaintiff automobile dealers admitted that they were setting the value of trade-ins far below the actual worth of the used cars. In effect, they were raising the price of the new cars many hundreds of dollars above list. This was and is a general practice of some new automobile dealers. In March, 1948, the tax commission amended the regulations applicable to the dealers so that thereafter the value of the gross proceeds of the sale would include the actual and not the allowed value of the automobile traded in.

As defined in the sales tax act as amended, Mich. Stat. Ann. § 7.521g (Callaghan, Supp. 1947), the term gross proceeds means:

...The amount received in money, credits, property, or other money's in consideration of sales at retail within this state, without any deduction on account of the cost of the property sold, the cost of materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses. Credits or refunds for returned goods may be deducted.

Defendant's amendment to the pertinent regulation (No. 4) left the regulation reading, in part,

...The total amount of the sale means the amount received in money, credits, property, or other money's worth. When credits, property, or money's worth becomes all or part of the consideration then the dollar value of such credits, property, or other money's worth must be determined and made part of seller's records. The trade-in value of a motor vehicle shall, for sales tax purposes and until further amendment or revision of this rule, be not less than its wholesale dollar value at time of trade as shown in the current issue of "Car and Truck Appraisals," published by the American Auto Appraisal, 194 Grove, Detroit 3, Michigan, and designated by the federal reserve board for corresponding appraisal purposes in Michigan and other states.

This regulation applied specifically to automobile dealers, and was later again amended so that any "similar equally reliable used-car guide" could be used to arrive at the value of such trade-ins.

Plaintiffs argued that the regulation, as amended, altered the rule of the statute. Defendant contended that the amendment was a mere clarification of the statutory rule, in the light of obvious practices in the automobile market, where deliberate under valuation of trade-ins was common. The court sustained defendants' contention upon the ground that effect must be given to the clear and unambiguous words of the statute, and that the regulation, as amended, was a mere declaration of the statutory meaning. Said the court,
Giving the language used by the legislature its ordinary meaning, the conclusion follows that the amount due the state of each taxable transaction of the character in question must be determined on the basis of what the seller has received in money, property, or other things of value, by way of consideration for the sale. Had it been intended to permit the payment of the tax on the basis of cash received and the credit of property taken in part-payment at an agreed amount arrived at without any attempt at a fair valuation, we think appropriate language to indicate such intent would have been used. The duty of the court is to apply the statute as enacted. It must be borne in mind that in the instant case we are not dealing with transactions in which the parties to a sale undertake by some reasonable method to arrive at the fair value of the property received by the seller, or with instances in which a subsequent sale of the articles traded in discloses that the amount allowed was either greater or less than the actual selling value at the time of the resale. Rather we are concerned with transactions involving the intentional undervaluation of the used property that the purchaser delivers in part payment... It is our conclusion that the term “gross proceeds” as the legislature has defined it, must be construed to mean the sum of money, if any, received by the seller, together with the value of the property likewise received, such value to be determined in a manner designed to bring about a fair and reasonable result. (Italics supplied).

The court cited decisions of foreign courts construing analogous statutes which supported the court’s interpretation: Combined Metals Reduction Co. v. State Tax Commissioner, ...Utah..., 176 P. (2d) 614 (1947); State ex rel Sioux Falls Motor Co. v. Welsh, 65 S.D. 68, 270 N.W. 852 (1936); Warshawsky & Co. v. Department of Finance, 377 Ill. 165, 36 N.E. (2d) 233 (1941). These cases were, as the court said, “somewhat analogous” and were not on “all fours” with the instant case, the exact point of which seems one of first impression.

The court rejected plaintiffs’ contention that previous rulings of the board had been adverse to defendant’s regulation in this case. But the contention would have at all events been immaterial, since courts are not bound to follow administrative interpretations. Here the court cited, inter alia, City of Wyandotte v. State Board of Tax Administration, 278 Mich. 47, 270 N. W. 211 (1936) and Rudolph Wurlitzer Co. v. State Board of Tax Administration, 281 Mich. 558, 275 N. W. 248 (1937). Further, observed the court, the interpretation contended for on the part of plaintiffs would result in discrimination in cases where the sale was consummated in cash only, as distinguished from those cases where some of the value received was taken in property. The legislature could not have intended such an anomaly and the Board could not previously have so interpreted it.

As authority for its contention for the valuation of the property upon the basis of the arbitrary value set by the seller or “agreed upon” by the parties, plaintiffs cited the case of Montgomery Ward & Co. v. Fry, 277 Mich. 260, 269 N. W. 166 at 170 (Count 5) (1936). The court there held that, where property is taken in on a trade-in for a certain sum, the seller afterwards losing money on the resale of the article, the seller nevertheless was taxable on the value of the article set at the trade-in and not at the resale. The court in the instant case distinguished the Ward case upon its facts, stating that the decision there was applicable only to the facts then before the court. While the court there had said,

The gross proceeds of a sale constitutes the price fixed at the sale, paid in money in part and second-hand articles accepted at an arbitrary figure by the seller. The loss, if any, in such transactions, as well as the profit, if any, is that of the plaintiff without any share therein by the state,
the decision there seemed to the court in the *Pore* case to have been based upon grounds of estoppel; that is, plaintiff there was estopped from saying it had not received the consideration it had actually received.

The court gave great weight to the fact that in the *Ward* case there was no contention that the parties did not attempt to reach a fair valuation. This point seems the pivot of the entire case. Without the arbitrary, opportunistic valuation on the part of the automobile dealers, a valuation approaching extortion from the buyer, the ruling of the State Tax Board would not have been necessary; there was, in the court's words, "no occasion therefor" previous to the past two or three years. Note again *supra*, where the court said,

... in the instant case we are not dealing with transactions in which a subsequent sale of the articles traded in discloses that the amount allowed was either greater or less than the actual selling value at the time of resale, (but) with transactions involving the intentional undervaluation of the used property that the purchaser delivers in part payment.

The court was clearly displeased with the conduct of the automobile dealers, and rightly declined to give them the benefit of any liberal construction of the statute as contended for by them. If, perhaps, a case were to arise in which a reputable dealer had incurred a great loss because of a sudden fall of the market, the *Ward* case might be reexamined in the light of that condition and the case distinguished from the *Ward* case on the facts. There seems, however, no immediate danger of a downward plunge of the automobile market, although there are some indications of a general revision downward. (A consultation of the want-ad sections of Detroit newspapers during October, 1948, will show a general nervousness on the part of used-car dealers who have optimistically overstocked. Little sign of a break in the new car market has yet appeared.) In no case, said the court here, could the *Ward* case be construed to cover the instant facts. If any such construction were urged, said the court, any language in the *Ward* case giving such a contention color must be considered dictum.

Plaintiffs raised several other contentions, one of which was that the amendments to the ruling should not be made retroactive. This contention the court also dismissed, holding that the statute, not the Board, fixed plaintiffs' liability and that the amendment, changing no rules but merely interpreting them correctly, was actually recognizing a liability already present. Rules which previously existed unrecognized may be taken advantage of at any time, and estoppel cannot be invoked against the Tax Board. *Obert v. Evatt, Tax Commissioner et al.*, 144 Ohio St. 492, 59 N. E. (2d) 931 (1945); *E. C. Olsen Co. v. State Tax Commission*, 109 Utah 563, 168 P. (2d) 324 (1946).

In a concurring opinion, Justice Boyles dissented to the extent that he felt that the *Ward* decision should be explicitly overruled as it affected the point at issue, saying, at page 199, "This is not a one way statute, and it should operate for as well as against the taxpayer when circumstances warrant." The narrow interpretation given to the *Ward* case by the majority, as has been pointed out above, would seem to allow room for such an interpretation in a taxpayer's favor should it be warranted by the facts in a given case, without an express overruling, which, as will be seen in the discussion of the dissent, might present very interesting and perhaps embarrassing problems in statutory construction.

Justice Dethmers, dissenting, advanced the interesting opinion that the majority here in effect overruled the *Ward* case. This, said he, the court was not free to do because the legislature had twice re-enacted the statute after the *Ward* decision had interpreted the rule in the manner contended for by plaintiffs. Upon familiar principles of statutory construction, the court here was bound by the decision and any change therein was a matter for the legislature. Justice Dethmers said, *inter alia*,

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The controlling question in the instant case, as it was in the Montgomery Ward case, is, what does the term "gross proceeds" mean in cases where the consideration paid for a new article is part money and part trade-in. Persuasive, indeed, is Mr. Justice Carr's reasoning in support of his conclusion that the term "gross proceeds" as defined in the original 1933 enactment, means purchase money paid, together with the market value of the trade-in, rather than the arbitrary allowance as a credit for the trade-in. However, in the Montgomery Ward case this court construed the term contrariwise. Are we at liberty now to overrule this case?

This rhetorical question the dissent answered in the negative. Citing several cases upholding the principle of legislative construction that, where a statute is re-enacted which has previously received a judicial construction by the court of last resort, such construction becomes a part of the re-enactment. Heald v. District of Columbia, 254 U. S. 20, 41 S. Ct. 42, 65 L. Ed. 106 (1920); McEvoy v. City of Sault Ste. Marie (syl. 6) 136 Mich. 172, 98 N. W. 1006 (1904); Guitt v. Foss, 230 Mich. 8, 203 N. W. 151, (1925). To the effect that the construction is obligatory on the courts: Magnus v. McClelland, 93 Va. 786, 22 S. E. 364 (1895); Merchant's National Bank of Mobile v. Hubbard, 222 Ala. 518, 133 So. 723, at 731. (1931). That the rule includes even dicta: 50 Am. Jur. Statutes § 142. This last point of Justice Dethmer's seems illogical, despite its apparent general adoption.

It does not seem that the above discussion by the dissent is applicable to the case. The majority clearly pointed out that the Ward case was distinguishable on its facts from the case at bar. Further, no dicta were in terms disavowed; the court merely said that

...if the language quoted from the opinion is construed as applicable to a situation of the character presented in the case at bar, it must to that extent be regarded as dictum. As indicated, however, it should not be interpreted as going beyond the scope of the matters before the court for adjudication. The decision cannot be given the force and effect for which plaintiffs contend.

Nothing more was said.

Even, however, if the court had expressly overruled the holding of the Ward case or had expressly disregarded as dictum the language before quoted, it might have found comfort in the case of Giroud v. The United States, 328 U. S. 61, 66 S. Ct. 448, 73 L. Ed. 889 (1946). There the entire principle of the weight given to re-enactment was re-examined, and, in the face of re-enactment following three adverse holdings by the Supreme Court, the Court nevertheless overruled the holdings, saying, "It is at best treacherous to find in the Congressional silence alone the adoption of a controlling rule of law."

Space prevents the further discussion of the absorbing problem raised by the dissent, but, in the opinion of the writer, it is but academic in relation to the Pore case, since the court cleverly avoided clashing with the re-enactment rule.

Upon the whole, the decision reflects what might perhaps seem to some a rather tenuous construction and an agile distinction. However, it must be remembered that the court was presented with an abnormal situation in which unscrupulous individuals were taking advantage both of their clients and of the state. While the court could not help the clients, it could and did help the state. It must be considered that the dealers involved had been in effect demanding bribes to sell automobiles. The use of the undervalued trade-in is a gross exhibition of cynical materialism, which the courts should not protect more than is absolutely necessary. It is not too much to ask that the state receive its tax from the actual value of