2-1-1949

Recent Decisions

John C. Castelli
Edward G. Coleman
Arthur B. Curran
John L. Globensky

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr
Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndlr/vol24/iss2/7

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
principle of "separation of powers", it certainly is not so because of its antiquity, as has been noted previously. If any defense is to be made, it must be that this power is somehow essential to the exercise of the judicial function. Experience seems to prove the contrary. The federal courts, as well as some state courts, have for quite a few years been divested of the power to punish indirect contempts by publication, and there is as yet no evidence of any disruption of judicial processes.

It is, of course, not difficult to imagine a situation where the power of contemnor could be so great as to actually influence a court in its decision of a pending case, but it can then be asked: How effective is the exercise of the contempt power in removing this pressure? If a judge is not possessed of sufficient fortitude to defy the pressure of adverse criticism, how is the exercise of a power which is certain to bring him more adverse criticism, particularly in the voting booth, going to alleviate the situation?

John H. O'Hara.

RECENT DECISIONS

Divorce—Failure to Meet Residence Requirement Cannot Be Attacked in Collateral Action.—Schillerstrom v. Schillerstrom, .... N.D. ...., 32 N.W. (2d) 106 (1948). The issue presented in this case was whether or not the trial court in North Dakota had jurisdiction to hear and determine this action for divorce when the plaintiff had not met North Dakota's residence requirements: "A divorce must not be granted, unless the plaintiff in good faith has been a resident of the state for twelve months next preceding the commencement of the action." North Dakota Revised Code § 14-0517 (1943).

Plaintiff was a native of North Dakota, and had lived in Mercer County until she went to Fargo to attend school. She was in Fargo when she married the defendant, a native and resident of Moorhead, Minnesota. Through the marriage, plaintiff assumed by operation of law the domicil of her husband. After the marriage, she continued to attend school in Fargo, later working there. The couple did not immediately set up permanent living quarters, but lived in rooms, moving from time to time. Later they established permanent residence in Fargo, while defendant continued to work in Moorhead, which adjoins Fargo. Marital difficulties arose and they separated, plaintiff returning to her parents' home in Mercer County, North Dakota. After a short reconciliation, during which a child was born, the parties again separated and this action for divorce was instituted by plaintiff.

The district (trial) court granted the divorce, but later (under a new judge, the trial judge having died in the meantime) sustained a motion to vacate the judgment. The trial court based this ruling on the ground "that jurisdiction had not been acquired over the subject matter for the reason that the plaintiff had not been domiciled within this State 'for twelve months next preceding the commencement of the action' as required by Section 14-0517 . . ." The plaintiff below appealed to the supreme court from the ruling on the motion to vacate. The supreme court here reversed the ruling, thus reinstating the original judgment.
granting a divorce. The supreme court held that the statutory requirement of duration of residence ("length of residence" and "length of domicil" were used synonymously by the statute; this confusion will be discussed below) did not impose a restriction on the court to "hear and determine" an action for divorce, but merely limits the authority of the court to "grant" a divorce. Since a motion to vacate judgment on the grounds of no jurisdiction is a collateral attack, it is not a proper method of appealing the question of length of residence, and, since here the statutory time for appeal had elapsed, the judgment of the trial court must stand. It appeared that the plaintiff had not actually resided in North Dakota for the statutory period.

The jurisdiction to hear and determine an action is conferred on the district court by § 103 of the North Dakota Constitution, reading: "The district court shall have original jurisdiction, except as otherwise provided in this constitution, for all causes both at law and equity and such appellate jurisdiction as may be conferred by law." This provision clearly includes actions for divorce.

After first having determined that plaintiff here had established her "domicil" in North Dakota as a matter of fact, prior to the commencement of the divorce action, by physical residence there and intent to reside there, the court discussed the general principles upon which it rested its decision. Domicil, said the court, is a jurisdictional fact under the full faith and credit clause, and extraterritorial effect will be given only if a divorce decree is based upon domicil. Domicil is, indeed, a federal restriction on the state courts. Andrews v. Andrews, 188 U.S. 14, 23 S.Ct. 237, 47 L.Ed. 366 (1903). Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945). But the added requirement of length or duration of residence, where actual domicil exists, is not such a jurisdictional fact unless the state of the forum so makes it. With this requirement, whatever it be, the full faith and credit clause is not concerned. By jurisdictional in this sense is meant the power to hear and determine the case. Consequently, finding facts as to duration of residence comes within the scope of the state constitutional authority given to the court, and, if the finding is erroneous, the error does not go to the power to hear and determine the action. The error is one of exercise of jurisdiction only, and the judgment is not subject to collateral attack. There must be a proper appeal of the case in order to obtain a reversal of the first judgment.

Therefore, when the plaintiff had established domicil, the court obtained jurisdiction to hear and determine the action brought by her for divorce. The question of domicil was one of fact—actual residence plus the intent to reside in North Dakota. This the plaintiff had. The power to hear the case devolved upon the court from the constitutional provision quoted above. The particular length of time required by North Dakota as necessary residence prior to bringing a divorce action was irrelevant to the court's power to hear and determine the case, affecting alone the power to grant a divorce. The faulty finding of fact to the effect that plaintiff had been a resident of the state for twelve months next preceding the action was an error in the exercise of its jurisdiction and not in excess of it. Plaintiff's comings and goings to and from North Dakota should have barred her from receiving a divorce, since she apparently did not reside in the state "for twelve months next preceding the action", but they had no effect upon the court's power to hear the action, once her domicil, indicated by her presence and state of mind, was proved as a fact. Plaintiff regarded North Dakota as home throughout her wanderings. Therefore, North Dakota courts could hear her case.

A difficulty in reading this case was that, throughout the discussion of "domicil and length of residence" by the court, the two terms were used interchangeably. The confusion was a product not of the judge but of the statute.
which spoke of length of domicil as synonymous with length of residence. The judge followed the statute and used the two terms interchangeably. He had previously made the distinctions quite clear, however, by an excellent discussion of the actual meanings of the two terms. This clarity was somewhat befogged later, when the judge sometimes used the terms correctly, not in the equivalent sense of the statute, without indicating that he was doing so.

A proper interpretation of the two terms is, however, of the utmost importance in clarifying the legal issues involved. For when it is once understood that domicil, as a matter of fact, depends upon residence only in an evidentiary sense, so that length of residence is merely additional proof of domicil, the holding and reasoning of the court at once become easily appreciated. Further, considerable confusion can be caused from an indiscriminate mingling of the two meanings of “residence”—one, as evidentiary of domicil, and two, in its strict statutory sense in reference to divorce actions. In this latter sense, residence for the purposes of divorce is not acquired until the statutory period has been met, although the plaintiff may have been an inhabitant of the state for several months.

The respondent relied upon two incorrect interpretations of the meaning of domicil, urging that residence for the statutory period was a jurisdictional requirement in the sense that it was necessary for the court to hear and determine the case. The respondent cited Smith v. Smith, 7 N.D. 404, 75 N.W. 783 (1898) which seemed to hold, and said,

The statement requiring residence, which means domicil (sic) for a period of 90 days, as preliminary to starting an action for a divorce, is jurisdictional to the subject matter. Until this preliminary proof is made, the trial court obtains no authority to move in the action.

The Smith case was subsequently affirmed on rehearing, the court seeming to hold a like conclusion.

In Graham v. Graham, 9 N.D. 88, 81 N.W. 44 (1899), the court apparently held that, because the petitioner had not been a resident of the state for 90 days prior to instituting the action, the court did not have jurisdiction to decide the case.

The instant case disposed of the contrary expressions in the above cases by an attempt to distinguish them on the ground that in those cases a trial de novo was sought, while here a collateral attack on the judgment was being made; therefore, the term jurisdiction in the Smith and Graham cases did not mean jurisdiction to hear and determine the case, but meant only that the court did not have the authority, termed jurisdiction, to grant the divorce. At any event, said the court, any expressions in those two cases which were contrary to the present holding were dicta. It is interesting to note that the court, proceeding carefully, discussed at length, with citations, its reasons for dismissing its previous dicta, and the reasons for disregarding dicta as a general principle where the dicta conflict with the present holding.

The court cited decisions from other jurisdictions which are in accord with the holding in the Schillerstrom case: Kern v. Field, 68 Minn. 317, 71 N.W. 393, 64 Am.St.Rep. 497 (1897), citing Thurston v. Thurston, 58 Minn. 279, 59 N.W. 1017 (1894); DeYoung v. DeYoung, 27 Cal. (2d) 521, 165 P. (2d) 457, 459 (1946); Aucutt v. Aucutt, 122 Tex. 518, 62 S.W. (2d) 77 (1933). The logic in these cases would seem to support the instant court’s interpretation as a correct one, although the view may not find universal accord.

While it is clear that the present case did not present a controversy involving separate sovereignties, so as directly to involve the full faith and credit clause, the holding seems to indicate that a sister state, in a collateral action, cannot question the jurisdiction of the state of the action over the res, where domicil has in fact been established, as shown by intent, regardless of whether or not
RECENT DECISIONS

the condition of length of residence has been met. Citing Davis v. Davis, 315 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26 (1938), the court said,

... in divorce actions, in so far as the full faith and credit clause is concerned, a decision of a state court upon the issue of domicil is res judicata if such issue has been litigated in an actual contest.

An interesting question is raised whether, in a case directly involving two separate sovereignties, the expressions in the instant case might be regarded as dicta. It is submitted that they would at least carry great force. This decision restates many of the principles laid down in the Williams case, and is a clarification of the law of North Dakota. While its actual binding effect, for purposes of future litigation, would seem to be only in a case where a domestic collateral attack is made on a similar judgment, its reasoning transcends the boundaries of North Dakota and domestic attacks, and should be taken into serious account in a case involving two sister states.

The opinion is a very complete discussion of the law on the subject. The treatment of the question of domicil and jurisdiction is particularly meritorious; indeed, the court, seeming to realize the importance of settling the issue, examined minutely each proposition presented to it and carefully annotated its conclusions. Such procedure is necessary in the decision of such murky questions of law as those presented in this case.

The American law of divorce has been so long in a great state of confusion that none profess to be able to see the road out. It is the belief of many that the only way out is a uniform divorce law. Naturally, such a solution must be long in coming, if it ever arrives at all. Until then, palliatives alone must prevent a further disintegration of the law of this subject. The instant opinion is an example of the responsibility felt by thoughtful courts toward the problem, and is at least a clarification of the law of one state. Of course, the correct way out is a realization of the true nature of matrimony. But this realization is still more impossible of attainment than the proposed uniform law. It is not a blanket acceptance of pragmatism to encourage courts to ameliorate the situation in so far as they can under existing concepts. On the contrary, even the most sanguine advocates of rigid divorce laws can do no better at the present than to encourage what seems to be the immediate end of legal effort, a further clarification and unification of existing law. One cannot reach the ultimate goal without removing the obstacles in the preliminary paths.

John C. Castelli

ADMINISTRATIVE LAW—JUDICIAL REVIEW OF ADMINISTRATIVE ACTION.—Unger v. United States, 79 F. Supp. 281 (E.D. Ill. 1948). This case came upon a petition for review of a decision of a government administrative agency, the Veterans Administration, asking for a declaratory judgment that the plaintiff was entitled to be granted insurance under the National Service Life Insurance Act of 1940, 54 Stat. 1008 (1940), as amended by the Insurance Act of 1946, 60 Stat. 781, 38 U.S.C. § 801 et seq. (1946).

The plaintiff, William H. Unger, after being honorably discharged from the army in 1941, re-enlisted in June, 1944, and was again honorably discharged in January, 1946. In April, 1946, he was observed to have several masses on his neck, which were diagnosed as "Hodgkins disease". Upon proper application Unger was granted a pension by the Veterans Administration for 60 per cent disability in July, 1947. Shortly thereafter he applied for $10,000 National
Service Life Insurance, paying the necessary premiums at that time, and in February, 1948, was notified that his application could not be accepted. The rejection was based upon a determination of the Veterans Administration, that for insurance purposes his disease had not been incurred in or aggravated by military service.

Thus the Administrator had found that for pension purposes the plaintiff had a service-connected disability, but that for insurance purposes, the disability was not service-connected.

The plaintiff based his contention upon an amendment to the National Service Life Insurance Act of 1940, which amendment, enacted in 1946 as § 802 (c) (2) states that:

Any individual who has had active service between October 8, 1940, and September 2, 1945, both dates inclusive, shall be granted such insurance upon application therefor in writing . . . and evidence satisfactory to the Administrator showing such person to be in good health at the time of such application. In any case in which application for life or disability insurance or for reinstatement of such insurance is made prior to January 1, 1950, the Administrator shall not deny, for the purposes of this section . . . that the applicant is in good health because of any disability or disabilities, less than total in degree, resulting from or aggravated by such active service. . . . 60 Stat. 781, 38 U.S.C. 802 (c) (2) (1946).

Prior to the enactment of this subparagraph in 1946, the Administrator was not permitted to issue policies of insurance to such disabled persons who did not at that time have then in effect such insurance. The addition of subparagraph (2) to paragraph (c) of § 802 clearly made it possible for him to do so.

Despite this amendment, the government contended that under the rules established by the courts governing administrative process, and the interpretation by those courts of relevant statutes, the plaintiff is not entitled to judicial review of this decision. They also state that under the Federal Declaratory Judgment Act, the government must first consent to such action.

With reference to the first point advanced by the defendant concerning the plaintiff's right to judicial review, the court pointed out that in 1946 the National Service Life Insurance Act of 1940 was amended by a revision of § 808 of this same chapter to read:

Except in the event of suit as provided in section 817 of this title, or other appropriate court proceedings, all decisions rendered by the Administrator under the provisions of this chapter, or regulations properly issued pursuant thereto, shall be final and conclusive on all questions of law or fact, and no other official of The United States except a judge or judges of United States Courts, shall have jurisdiction to review any such decisions. (Emphasis supplied.)

Section 817, as amended in 1946 also, permits suit based on this chapter to be brought in the same manner provided for in §§ 445 and 551 as to converted life insurance. These provisions apply, however, only to a contract of insurance already in existence, not having lapsed or needing reinstatement at the time the suit is brought. Since the plaintiff in the instant case brings his suit upon an original application for a contract of insurance, the provisions of §§ 817, 445 and 551 would not have given him the right to judicial review. Before the amendment to § 808 the court would have been expressly precluded from entertaining jurisdiction in this case.

Prior to 1946, § 808 of Title 38 definitely precluded the right of an individual to judicial review of a decision based on this chapter, for it originally read:
Except in the event of suit as provided in section 817 of this title, all decisions rendered by the Administrator under the provisions of this chapter, or regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official of the United States shall have jurisdiction to review any such decisions.

In comparing this original section with the same section as amended (previously stated), it becomes obvious that by the addition of the terms, "or other appropriate court proceedings", "properly issued" and "except a judge or judges of the United States Courts" judicial review was not only permitted but advocated. In the only case to date decided on this point, *Zasove v. United States, ... U.S. ...*, 68 S.Ct. 1284 (1948), Mr. Chief Justice Vinson states that through the use of these tautological phrases it is clear that Congress intended more than a casual judicial scrutiny of decisions given under this statute. Although the facts of the *Zasove* case differed materially from those presented to us in the instant case, the question of judicial review there arose, and review was granted.

Turning to the next point advanced by the defendant as to the lack of consent of the government to a declaratory judgment action in this case, the court stated that the provisions of § 808 render inapplicable the non-consent clause of the Federal Declaratory Judgment Act as to this suit.

Having thus clearly demonstrated the right of the present plaintiff to judicial review of the administrative decision, the court further substantiates its position by pointing out a similar right the plaintiff would have had under the Administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C. 1009 (1946), to review of administrative process. Section 1009 begins:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Thus under this Act, unless the statute expressly or impliedly precludes it by leaving it to the discretion of the agency, judicial review is available.

It is interesting to note that the Administrative Procedure Act of 1946 became law just a few weeks prior to the enactment of the amendment to Section 808 of Title 38, U.S.C. If this amendment had not been enacted, the plaintiff would not have had the right to judicial review under the Administrative Act, since the statute as originally written did expressly preclude such review. Since, however, the amendment to § 808 indicated a vague congressional intent to give the right of review to the courts, resort to the Administrative Procedure Act was in this case unnecessary.

Thus we have here presented once again the highly important question of when judicial review of administrative process is to be permitted. By objective observation and integration of the various clauses of the insurance statute here being construed, the court has endeavored, and ably so, to arrive at the intent behind the law. The statute as originally written expressly precluded judicial review, but as rewritten by the insertion of certain phrases in the amendment, this preclusion of review, under the court's interpretation, was obviously eliminated. Due to the wide range of jurisdiction of many government agencies, statutes enabling them to exercise control over that jurisdiction must cover a wide range. Out of this attempt at all-covering legislation, we have seen arise quite often, not only irregularity and inconsistency of policy, but at times embarrassment and utter confusion in the various legal channels. The present case is an example of intelli-
gent judicial appraisal of what is essentially a functional problem: namely, the problem of how to achieve continuing effective government through the proper allocation of the judicial process and the administrative process. Here the court preferred "a solution to a slogan."

Despite its apparent antiquity, administrative law has become only recently a major concern of the Supreme Court. With the widening of the range of administration of government agencies, administrative law must of necessity extend its tenets to cover that range. This it can do only by judicial and legislative cognizance of the complexities of modern life requiring a considerable degree of government regulation, for even the most perfect law is not self-executing. Technological progress in our society will continue to present problems and situations similar to the one at hand, and courts must continue to meet them with a feeling of amelioration rather than distrust and suppression. Congress must of necessity legislate to meet changing conditions and the courts need not have a pragmatic sanction to interpret such legislation in the same light.

Edward G. Coleman

CONSTITUTIONAL LAW—NON-COMMUNIST AFFIDAVIT PROVISION OF THE TAFT-HARTLEY ACT.—Inland Steel Company v. National Labor Relations Board, ..., F. (2d) ..., (C.C.A. 7th 1948), 17 L.W. 2132 (U.S. Sept. 28, 1948). This case holds that § 9(h) of the Labor Management Relations Act of 1947, the Taft-Hartley Act, which requires union officers to file non-communist affidavits before their union may use the processes of the National Labor Relations Board, is not invalid as a violation of speech or political belief.

The facts of the instant case are that the petitioner (Inland Steel Company) appealed from an order of the National Labor Relations Board to the effect that upon compliance by the union with § 9(f), (g) and (h) of the Labor Management Relations Act, the company must bargain collectively with the union concerning a retirement and pension plan. The union (United Steel Workers of America) was permitted to intervene and join the Board in defense of the order but attacks that part of the order which makes compliance with § 9(h) of the Act a prerequisite before the company is required to bargain with the union. Subsections (f) and (g) of § 9 deal with the requirement that the union annually file a financial statement and organizational data. With these requirements the union complied and none are pertinent here but § 9(h) which the union contended is unconstitutional. The court unanimously affirmed the Board’s order that the company bargain with the union on the subject of a retirement and pension plan but split on the question of the validity of the controversial § 9(h). 61 Stat. 136 (1947), 29 U.S.C. 159 (Supp. 1948). The pertinent section provides that:

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under subsection (e)(1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of
the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or any illegal or unconstitutional methods. The provisions of Section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

Section 35 A of the Criminal Code provides that falsification of such affidavits is punishable by a fine of $10,000 or ten years in prison or both. 35 Stat. 1095 (1909), as amended, 18 U.S.C. § 85 (1946).

Justice Kerner, in the majority opinion, after recognizing that a law denying a person the right to earn a living because of race, religion or belief would be unconstitutional, Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093 (1947), goes on to say:

It is to be borne in mind that the Act was not passed because Congress disapproved of the views and beliefs of Communists, but because Congress recognized that the practices of persons who entertained the views presently to be discussed, might not use the powers and benefits conferred by the Act for the purposes intended by Congress . . .

Congress has the power to withhold benefits which it confers for the accomplishment of legitimate purposes within its constitutional power from those who, it has cause to believe, may utilize these beliefs for directly opposite purposes.

The majority pointed to National Maritime Union v. Herzog, 78 F. Supp. 146 (D.C.D.C. 1948), 16 L.W. 2501 (U.S. April 20, 1948) which decided this same question on April 13, 1948, that subsections (f), (g) and (h) of § 9 were constitutional; that Congress had the right to make these provisions precedent to the enjoyment of the statutorily created privileges of being the exclusive bargaining agent.

Important in the consideration of the present case is the fact that, apart from the National Labor Relations Act, no Union has the right to be exclusive bargaining Agent. That extraordinary privilege is extended by the statute and except for the Act, employers are not under compulsion to bargain collectively.

In that case Justice Miller listed analogous cases which held conditions precedent valid or prerequisite to the enjoyment of a statutory privilege as long as the conditions were not "whimsical". Two of these cases are: Electric Bond and Share Co. v. Securities and Exchange Commission, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936 (1938), and Hawker v. New York, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898). In the former, the S.E.C. brought suit to enforce §§ 4(a) and 5 of the Public Utilities Holding Act of 1935, 49 Stat. 838 (1946), 15 U.S.C. § 79(d) and (e) (1946), which provide for registration of holding companies with the S.E.C. and prohibit the use of the mail and the instrumentalities of interstate commerce for those who fail to comply. This condition was upheld as valid by Chief Justice Hughes. Again in the latter case a New York statute prohibited the practice of medicine by one who had been convicted of a felony. This was held constitutional on the grounds that a sovereign may require good character as a condition to the practicing of a profession or a trade that is charged with public interest.

It is of interest to note that the Supreme Court, on June 21, 1948, affirmed without opinion the Herzog decision, 334 U.S. 854, 68 S.Ct. 1529, 92 L.Ed. 1479 (1948), in so far as (b) and (g) of § 9 were concerned but did not decide the validity of § 9 (h). Since our highest judicial oracle has not spoken on this section, we might say that the two lower court decisions in the Inland Steel case and the
Herszog case are only presumptive evidence of the validity of this disputed section, especially in view of the vigorous dissent in both cases.

The majority opinions in each case discussed the "clear and present danger" test; however, neither considered it controlling but rather used the condition precedent argument that was considered above. The former is the famous test of Mr. Justice Holmes set out in *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress had a right to prevent. It is a question of proximity and degree.

This might well be decisive, if and when the Supreme Court considers this question; that is, whether the threat to our national interest from Communist-dominated unions is sufficient to come within Mr. Justice Holmes' test. It must be remembered that at least four of the present Court are jealous guardians of the First Amendment and are wont to hold that the presumption of validity is against legislation that treads within the purview of this amendment. To wit: in *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1944), it is said:

For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press". It must be taken as a command of the broadest scope that explicit language, read in contacts of a liberty-loving society, will allow.

While it is true that in *Barsky v. United States*, 167 F. (2d) 241 (C.C.A. D.C. 1948), the Communist ideology was held a sufficient potential menace to justify congressional inquiry into that subject, yet investigation and legislation are distinct fields and the Court may well be more stringent in viewing the latter.

The Court could decide this question on the "bad tendency" doctrine established in *Gitlow v. New York*, 268 U.S. 625, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), which has never been expressly repudiated by the Supreme Court, and would permit a legislature to strike at "substantial" dangers to the state, whether imminent or remote. 48 Col. L. Rev. 258 (1949).

Justice Major, in his dissent, felt that this section was too uncertain to be enforceable. The term "officer" is not defined by the Act and the term "affiliated" with the Communist Party is perhaps too vague a criterion. As was said in *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939),

There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act.

It might well be that because of change in our national policy, the Labor Management Relations Act of 1947 will be amended or repealed. The issue in § 9(h), it appears, transcends party lines and is rather a question of national security versus constitutionally secured liberties—whether the danger to the former is sufficient to justify infringement of the latter.

For discussions of the non-Communist affidavits and the criminality of Communism per se, see notes, 23 *NOTRE DAME LAWYER* 238, 248, and 23 *NOTRE DAME LAWYER* 577.

Arthur B. Curran, Jr.
INToxicating LIQUORS—License Revocation Must Be Based on Promulgated Policies.—Khoury v. Board of Liquor Control of State, .... Ohio ..., 81 N.E. (2d) 634 (1948). The Ohio Court of Appeals has reversed a ruling of the Ohio State Liquor Board which revoked a permittee's license for sponsoring strip tease performances in his establishment. The charge of the Board was that the acts were lewd and indecent. In defense, the permittee contended that prior to the actual revocation of the license, he had no knowledge that he was violating any law or policy of the Board. The court of appeals held that it was not the intention of the legislature to allow the Board to enforce policies that were neither brought to the attention of the permittee nor were available as a matter of record.

The revocation of the license by the Board was based on Page's Ohio General Code §§ 6064-25 (1938).

The Board of Liquor Control may suspend or revoke any permit issued pursuant to the liquor control act for violation of any applicable restrictions of this act or any lawful rule or regulation of the Board or other sufficient cause . . . .

The Board contended that the strip tease performances were included within the words, "other sufficient cause", thereby relieving them of the requirement of the statute which makes it mandatory to publish or give notice to the permit holder of the rules, regulations and policies under which the act is to be administered. Page's Ohio General Code §§ 6064-5 (1938).

The question presented in the Khoury case resolves itself upon the consideration of two factors, first, the interpretation of the words, "other sufficient cause", and second, and most important, the court of appeals' reaction to the Board's operating under a policy which has not been communicated to or made available to the permittee.

The ejusdem generis rule of statutory interpretation is, that where particular words of description are followed by general terms, the general terms will be regarded as referring to things of a like class described by the particular terms. The basis for applying the ejusdem generis rule is that if the legislature had intended the general words to be used in an unrestricted sense, it would have made no mention of the particular classes.

Applying the rule of ejusdem generis to the words, "other sufficient cause", in the statute of the instant case, the particular words pertain to the applicable restrictions of the act, and the lawful rules, regulations and policies of the Board. These are available to the public. The reasonable conclusion appears to be that the words, "other sufficient cause", would mean some law or ordinance which had been promulgated by lawful authority. State laws and municipal ordinances would fall into this category.

This conclusion is supported by a recent case decided by the court of appeals. In Wittenberg v. Board of Liquor Control et al., .... Ohio ..., 80 N.E. (2d) 711 (1948), a permittee's license was revoked where he was operating, in connection with a night club, a hotel the rooms of which were being used for immoral purposes. The court sustained the Board's contention that such conduct was within the meaning of the words, "other sufficient cause". The use of rooms for immoral purposes was a violation of a state statute, thus unlawful under the laws of the State of Ohio. Page's Ohio General Code § 13031 (1938).

In the Khoury case the strip tease performances were not a violation of the state law or of a municipal ordinance of Cleveland. The evidence showed this type of entertainment to be carried on in various establishments throughout the city. No attempt had been made by law enforcement officers to prefer charges
against the operators, even after many investigations, in which permittee's premises were included.

The second reason for the court of appeal's overruling of the Liquor Control Board appears in the following excerpt of the court's opinion:

A permit holder who has invested heavily in his place of business and has built up good will, although he has no vested rights to retain a permit, is entitled to a policy from the Liquor Department upon which he can rely and it should at all times be fair to him.

One may call the motivating force of the court's decision justice, fair play, or any other comparable synonym. It indicates that the judiciary of the state will not permit politically infiltrated administrative agencies to forget or disregard the principle that the people of the United States are to be governed by laws and policies to which they have access. Further, it indicates that people will be free to act and carry on their businesses without fear of being put in jeopardy by the whims of the politicians who predominantly occupy the administrative posts.

In the instant case, the ruling of the Board might have appeared reasonable; certainly neither the court in its opinion nor the writer contend that strip teasing is a proper form of entertainment for the public. It is not contended that the Board could not issue regulations or make known a policy against this type of entertainment in night clubs whether lewd or not. Regardless of the pragmatic reasonableness of the Board's ruling, the principle upon which it is based is repugnant and cannot be condoned.

The Ohio court is on sound foundations in thus clearly establishing that it will not tolerate liquor license revocations based on policies which are neither brought to the attention of the permittee nor available as a matter of record.

John L. Globensky

CONSTITUTIONAL LAW—VOTING—THE RIGHT OF RESIDENTS OF LANDS UNDER FEDERAL CONTROL TO VOTE IN STATE ELECTIONS.—Arledge v. Mabry, ..., N.M. ..., 197 P. (2d) 884 (1948). This was a mandamus proceeding brought by a candidate for nomination in a Democratic primary election for the office of County Judge of Sandoval County, New Mexico, to compel the State Board of Canvassers to recanvass the returns in such a manner as to leave out the votes cast in, and by residents of Precinct No. Seventeen, which lies wholly within the Los Alamos Project of the United States Atomic Energy Commission. The alternative writ of mandamus granted by the lower court was made permanent.

Directly involved here is the question whether residents of an area under the control of the United States are residing within the state within the meaning of a provision of the state constitution which outlines the requirements for voters. The court answered this question affirmatively as to part and negatively as to the rest of the voters involved, depending upon the method used by the Federal Government in acquiring the land on which the voter lived.

The facts show that part of Precinct No. Seventeen was placed under federal control by condemnation in 1943. This proceeding was authorized by Congress pursuant to its power granted in Clause 17, § 8, Article 1, of the Constitution of the United States. The New Mexico statute consenting to this type of federal acquisition gives exclusive jurisdiction in and over any land "so acquired" to the United States for all purposes except the service of criminal and civil process of New Mexico courts. N. M. Stat. §§ 8-202, 8-203 (1941). Justice Sadler,
RECENT DECISIONS

who wrote the majority opinion, said that it was not a part of New Mexico, and the residents thereof are not qualified to vote in the state elections. His decision on this point seems to be well substantiated by the authority of all the cases reported in which the issue was involved. In 1811 the Supreme Judicial Court of Massachusetts held that the commonwealth could not take cognizance of criminal acts committed in the town of Springfield, which had been acquired by the Federal Government as an arsenal by the constitutional method. Commonwealth v. Clary, 8 Mass. 72 (1811).

The court discussed the problem of the present case in these words:

An objection occurred to the minds of some members of the court, that if the laws of the commonwealth have no force within this territory, the inhabitants thereof cannot exercise any civil or political privileges, under the laws of Massachusetts, within the town of Springfield. We are agreed that such consequence necessarily follows; . . .

This dictum was translated into authority by Opinion of the Justices, 42 Mass. 58, 1 Metc. 580 (1841) where the following words appear:

. . . we are of opinion, that where the general consent of the Commonwealth is given to the purchase of territory by the United States, for forts and dock yards, and where there is no other condition or reservation in the act granting such consent, but that of a concurrent jurisdiction of the State for the service of civil process, and criminal process against persons charged with crimes committed out of such territory . . . persons residing in such territory do not thereby acquire any elective franchise as inhabitants of the towns in which such territory is situated.

The point was determined in the same manner in Ohio, Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397 (1869); in New York, In re Town of Highlands, 22 N.Y.S. 137, 48 N.Y. St. Rep. 795 (1892); and in South Dakota, McMahon v. Polk, 10 S.D. 296, 73 N.W. 77, 47 L.R.A. 830 (1897).

The case of Fort Leavenworth Railway Co. v. Lowe, Sheriff, 27 Kan. 749 (1882), involving the question of the right of the state to tax railway property lying within a federal military reservation, was finally determined by the Supreme Court of the United States. Fort Leavenworth Railway Co. v. Lowe, 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264 (1885). It was held that a saving clause in the Kansas granting act was sufficient to empower the state to levy the tax in question. The opinion of the court, written by Justice Field, contains some interesting language. Referring to Opinion of the Justices, Sinks v. Reese, and other cases decided by state appellate courts, Justice Field said that they were . . . sufficient to support the proposition, which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be exercised over lands, within a state, purchased by the United States, with her consent, for the purposes designated, and that such consent, under the Constitution, operates to exclude all other legislative authority.

Two recent Kansas cases holding that the inhabitants of an area acquired from the state by constitutional method have no right to vote in state-sponsored elections are Herken v. Glynn, 151 Kan. 855, 101 P. (2d) 946 (1940) and State v. Corcoran, 155 Kan. 714, 128 P. (2d) 999 (1942).

As to the inhabitants of the remaining portion of Precinct No. Seventeen, the court held that they had legal residence in New Mexico because the land on which their homes were situated had not been acquired by the constitutional method, but were rather reserved from the public domain for military purposes, and later turned over to the Atomic Energy Commission. As to such lands the
New Mexico consent statute does not cede, nor does the United States claim, exclusive jurisdiction. 30 Stat. 36 (1897), 16 U.S.C. §480 (1946). The Federal Government occupies and uses such lands in a proprietary capacity only, and the area remains subject to the jurisdiction of the state, limited only by the free and effective use of the land for the purpose for which it was acquired. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091 (1930); *Six Companies v. De Vinney*, 2 F. Supp. 693 (1933). Justice Sadler concluded that the votes cast in the primary election by residents of this portion of the area within the precinct by electors otherwise qualified should have been received and counted, if legally cast.

The court then held that the votes were not legally cast because the voting places were on the territory acquired by the constitutional method, and the votes were therefore not cast in New Mexico as is required by the state constitution. The court said:

In legal effect, the case is not different from what it would have been if the polling places had been located and the balloting had occurred in Colorado or some other state.

The decision of this case seems to be in accord with the line of decisions in similar cases; indeed, the court could hardly have arrived at any other conclusion without departing entirely from rules long established. The case emphasizes a problem which will assume greater proportions if the Federal Government increases its territorial holdings within the states. The question is especially urgent in cases like the instant one, in which the state is given the right by Congress to exact taxes from the inhabitants of the area. The most obvious solution appears to be in the form of congressional enactment giving the elective franchise to citizens of areas acquired by condemnation or purchase within a state. This action could be dovetailed with similar provisions of the state granting statute and thus could be saved an important political right to an increasing number of Americans.

F. H. Hicks

---

**TORTS—LIGHT AS A NUISANCE.**—*Amphitheaters, Inc., v. Portland Meadows, a Corporation*, 47 Ore. 77, 198 P. (2d) 847 (1948). Plaintiff, owner of an outdoor drive-in theater, and defendant, owner of a race-track, built their respective businesses adjacent to one another in a sparsely settled area outside the city limits of Portland, Ore. The defendant installed powerful lights to illuminate his one mile oval track for night racing. Plaintiff's motion picture screen is 832 feet from the nearest of these lights and facing them. Plaintiff proved that the reflection from these lights is "spilled" onto its screen thereby almost obliterating the images thereon and that on at least one occasion it has felt required to refund the price of admission to its patrons. Plaintiff contended that such a casting of light upon its land is a trespass to real property or in the alternative a nuisance and asked damages.

In support of its theory of trespass the plaintiff cited *Swetland v. Curtiss Airports Corporation*, 55 F. (2d) 201, (C.C.A. 6th 1932), 83 A.L.R. 319; *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); and *Guith v. Consumers Power Co.*, 36 F. Supp. 21 (E.D.Mich. 1940). The court distinguished these cases on the ground that they all involved the flight of airplanes, reflecting the ancient maxim, *cujus est colum ejus est usque ad coelum*, "as modified by the rules of privilege set forth in the Restatement." The theory of trespass by rays of light could not stand on these cases.
On the contention of nuisance, the court ruled that the maxim *sic utere tuo ut alienum non laedas* was so general in its terms as to mean nothing at all. The court quoted Mr. Justice Holmes in 8 Harv. L. Rev. 3 (1894), as saying that it is “nothing but a benevolent yearning.” The cases cited by the plaintiff that held that light cast upon another’s land could constitute a nuisance all dealt with such light that would interfere with normal and ordinary use of residential property. And the test of whether a particular inconvenience would amount to a nuisance depends upon its effect on a normal person of ordinary habits and sensibilities. *Stoddard v. Snodgrass*, 117 Ore. 262, 241 Pac. 73 (1925). The court stated that “the fact that the plaintiff in this case is in love with darkness rather than light does not mean that light can be classed as a noxious or generally injurious instrumentality.” The maxim *lex non favet delictorum votis* was quoted with approval and applied.

The point on which the instant case turned was the sensitivity to light of the plaintiff’s business. As a conclusion to its arguments the court held that “a man cannot increase the liabilities of his neighbor by applying his own property to special and delicate uses, whether business or pleasure.” The sensitivity of the motion picture screen was so great that to hold the use to which the defendant put his land to constitute a nuisance would be placing too great a liability upon him. The judge delivering the opinion was careful to restrict the decision to the specific facts of the case before the court and held as a matter of law that there was no nuisance.

The court in deciding this case for the defendant has allowed one party to restrict the use of the other’s land without compensation. The plaintiff here was carrying on a lawful business in a lawful manner. The defendant in the pursuit of his business caused damage of great monetary value to the plaintiff. Under the ruling of this case such damage was *damnum absque injuria*. The court displayed its dislike of the notion that light could be a nuisance in its comment on *National Refining Co. v. Batte*, 135 Miss. 819, 100 So. 388 (1924) cited as supporting authority by the plaintiff. In that case the court held that the lights of automobiles using the defendant’s filling station, across the street from the plaintiff’s house, constituted a nuisance because under such conditions the plaintiffs could not sit on their porch in comfort. The court in the instant case said: “We doubt if the case would be followed in any state under conditions prevailing at the present time.” There has been no case directly in point with the *National Refining Co.* case since it was decided; however, the decision in that case had been neither criticized nor its soundness questioned until the present opinion criticized it.

The opinion of the instant case stated that this “case differs fundamentally from other cases, all typical cases of nuisance, in that light is not *noxious*, but is, in general, a *highly beneficial element.*” (Emphasis supplied.) The word “water” might be substituted for the word “light” in the foregoing quotation, for water, too, is a beneficial element, but it is very often the subject of nuisance. It would seem that because generally light is beneficial to man and his wants it does not follow naturally that such a beneficial element could not be turned into a nuisance. From the remarks quoted above it seems that under the jurisdiction of the Oregon Supreme Court the interference by light with one’s comfort must be severe indeed in order to constitute a nuisance.


> It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a
race, our sensibilities are becoming more refined, and that which formerly
did not offend cannot now be endured. That which the common law
did not condemn as a nuisance is now frequently outlawed as such by
the written law. This is not because the subject outlawed is of a different
nature, but because our sensibilities have become more refined and our
ideals more exacting.

True, the aesthetic sense of a person and the sensitivity of a motion picture
screen to light are not closely analogous but the language quoted tends to show
that in this case the court could have decided for the plaintiff on as valid grounds
as it did decide for the defendant. Both plaintiff and defendant commenced
operations almost concurrently; neither was of more social utility than the other.
This was not a prayer for an injunction to prohibit the use of the lights by the
defendant but a suit for damages. Had the result of the case been different, the
defendant could have continued using the lights and the plaintiff compensated
for the damage done to him by the plaintiff. The ends of justice would have
been better served by this method rather than by having the plaintiff's business
reduced to a negligible state while the defendant remained free to continue its
damage to its neighbor.

William G. Mahoney, Jr.

Evidence—Criminal Law—Self-Incrimination.—State v. Taylor, ... S.C. ...
49 S.E. (2d) 289 (1948). Appellant, a Negro about thirty years of age, was
convicted of rape and sentenced to death. The basis of this review was a
recognized duty on the part of the court so to examine the record where the
death penalty is involved to determine if there were any errors affecting the
substantial rights of the accused, even though they were not made the ground
of the appeal.

Appellant denied the crime. From the record it appeared that the following
testimony was admitted in evidence: The morning after the crime the appellant
was taken to jail where, together with four other Negro prisoners, he was re-
quired to line up with his back toward the prosecutrix and was required to
repeat certain words which the prosecutrix had previously stated were used by
the person who assaulted her. After this was done, the prosecutrix immediately
identified the accused as the person who assaulted her—this identification being
made almost solely on the sound of his voice repeating the required words. The
court reversed the judgment of the lower court and granted a new trial on the
grounds that the evidence presented was inadmissible as highly prejudicial.

In arriving at its decision, the court recognized the divergency of views on
the subject of self-incrimination. While pointing out that it is a fundamental
principle of American jurisprudence that no one be compelled to testify against
himself, it also conceded that the decisions of courts do not agree as to the
scope and extent of that privilege. It has been held that a court could not have
required a defendant, while on the stand, to try on a shoe. People v. Mead, 50
Mich. 228, 15 N.W. 95 (1883). It has also been held that to compel defendant
in a criminal trial to stand up for identification by a witness violates his con-
stitutional right against compulsory self-incrimination. Smith v. State, 247 Ala. 354,
24 So. (2d) 546 (1946). On the other hand it has been held that it did not
violate the defendant's constitutional privilege against self-incrimination to re-
quire him to stand up in court for identification. Appleby v. State, 221 Ind. 344,
48 N.E. (2d) 646 (1943). In line with this decision was State v. Jones, 188 Wash.
275, 62 P. (2d) 44 (1936), where it was held proper upon cross examination to sub-
mit to accused for pronunciation words which were similar in sound to the words he had pronounced at the police station.

It seems well settled that the constitutional privilege against self-incrimination is not so broad as to bring a compulsory physical examination of defendant within the scope of the doctrine, and the testimony of the physician as to what he has learned in the course of such examination is admissible as evidence. Along this line of thought is the admissibility of blood tests, pictures, and fingerprints as evidence. The instant case, however, concerns itself with a further refinement of the doctrine of self-incrimination than mere examinations of personal characteristics, for the accused was compelled, by exhibiting his voice in a required manner, to perform an affirmative act to aid the state in connecting him with the crime.

In considering this problem, the court cited a similar situation in which a defendant was called upon during the trial to stand up and repeat aloud certain words. The exception to this procedure was dismissed upon the grounds that the request was acceded to without any objection either by the defendant or his counsel. While stating that it was not the purpose of the court to pass upon the question until properly presented, the writer of the opinion observed:

To hold this was violation of the clause in Section 9 of the declaration of right which declares the accused "cannot be compelled to give evidence against himself" would in my judgment, be a strained construction of that instrument.

Johnson v. Commonwealth, 115 Pa. St. 369, 9 Atl. 78, 81 (1887). That part of the opinion bearing on the instant case, while only dicta, serves to emphasize the disagreement of the courts as to the extent to which the privilege may be extended, for the majority of opinion seems to be to the contrary.

To compel an accused to merely exhibit his personal characteristics, including his voice, and to compel him to exhibit them in a manner directly relating to the crime are two distinctly different acts and not merely a difference in degree. In the first instance the accused is not being required to be a witness against himself as he is merely being required to exhibit those characteristics which are peculiar to him and readily observable, independent of their relation to the crime; in the second case the accused is being compelled to be a witness against himself by testifying as to the association of these characteristics with the crime in question.

Thus in emphasis of the former point it has been held to be not improper to inspect appellant and to identify him from his appearance as well as his voice where the accused was merely required to converse with the witness in order for her to identify him. Beachem v. State, 144 Tex. Crim. R. 272, 162 S.W. (2d) 706 (1942).

As to the latter point, which concerns the principle involved in the present case, the court cited State v. Griffin, 129 S.C. 200, 124 S.E. 81, 35 A.L.R. 1227 (1924), as the controlling case. While not involving exactly the same factual situation it correctly states the problem involved, which according to the court was that, "The line of cleavage is whether the proposed evidence is the testimony of the defendant or evidence in itself, unaided by any statement of the defendant." There the question concerned the admissibility of the testimony of the sheriff to the effect that he compelled the defendant to place her foot in footprints in a potato patch at the scene of the crime and that she would not do it in the right way.

The court there made the distinction between the sheriff obtaining the shoe and comparing it with the track, and of forcing the defendant to place her foot
in the track. In the first instance the shoe and comparison of the shoe with
the track were not the testimony of the defendant, but of the sheriff and the
defendant was not bearing witness against herself as she was not necessary to
establish its authenticity, identity, or origin, which facts were established by
the testimony of the sheriff independent of the defendant. In answering the second
question the court said: "If the conformity had been perfect that fact would
have appeared from the enforced conduct of the defendant, clearly testimonial
compulsion."

In considering the decision of State v. Griffin as controlling in this decision,
the court in the present case said,

It is difficult to draw any distinction between compelling a defendant
to put his foot in a track at the scene of the crime in order to afford a
basis for comparison and requiring a defendant to repeat certain words
used at the scene of the crime in order to establish a basis for identity.
The court thus upheld the fundamental privilege against self-incrimination by
extending it to compulsory incriminating matter gained by word of mouth, and
correctly so.

John B. Palmer

TORTS—PROXIMATE CAUSE—AUTOMOBILES.—Galbraith v. Levin, Galbraith v.
Cohen, .... Mass. ...., 81 N.E. (2d) 560 (1948). These were two tort actions for
personal injuries arising out of the same fact situation, one action against the
owner of the automobile involved in the accident, the other against the car
owner's agent. The defendants had left the illegally registered automobile un-
attended, and with the keys over the sun visor, in violation of statute which
prohibited the leaving of automobiles unlocked and unattended. Mass. G. L.
(Ter. Ed.) c. 90, §§ 3, 9, 13 (1946). A short time after so leaving the car, it
was stolen, and the thief, operating the vehicle in a negligent manner, struck
and injured a pedestrian, who was the plaintiff in these actions. The main ques-
tion involved was whether the conduct of the defendants could be found to have
been the proximate cause of the plaintiff's injuries, or, on the other hand, whether
the conduct of the thief was a superseding intervening cause which the defendant
could not be expected to have reasonably foreseen or anticipated. The Massa-
chusetts court, in adopting the latter view and refusing to find liability for the
defendant's conduct, expressly overruled the case of Malloy v. Newman, 310
Mass. 269, 37 N.E. (2d) 1001 (1941), which involved essentially the same facts,
but in which an opposite result was reached. By so overruling the Malloy
case, the court at last cleared up the confusion existing in its own state decisions
respecting this point of law. This unfortunate situation had arisen out of the
previous cases concerning this problem of tort liability in which the Massachu-
setts courts had indulged in the game of picayunish "distinguishing" of cases
where, in truth, there was no essential basis for distinguishing them. By way
of illustration: The case of Slater v. T. C. Baker Co., 261 Mass. 424, 158 N.E.
778 (1927), first denied liability on the same general fact pattern, the only
salient fact difference being that the car was properly registered; the defendant
in that case, as in all the other cases considered herein, had violated a statute
forbidding leaving automobiles unattended and unlocked. In Sullivan v. Griffin,
318 Mass. 359, 61 N.E. (2d) 330 (1945), involving essentially the same facts,
the court followed the reasoning and the holding in the Slater case. Meanwhile,
in the Malloy case, which was decided after the Slater case but before the Sullivan
case, the court had found the defendant liable. In all of these similar fact pat-
terns, the mere point of compliance or non-compliance of the defendants with the vehicle registration statutes would not seem to be a substantial basis for distinguishing the cases, particularly since the original conduct of the defendants in all of these cases consisted of negligence arising out of the violation of the statute respecting the leaving of cars unattended and unlocked, aside from the point of vehicle registration.

It would seem that the most forceful objections to any cases in this same general category where the courts would find liability on the part of the defendants would arise upon application of the tort liability theory of proximate cause. In order for the plaintiffs to recover in these cases, it should be shown first of all that the defendant was negligent, and second, that the defendant's negligence was the proximate cause of the plaintiff's injury. See 158 A.L.R. 1374, 1375. It would not ordinarily be difficult to prove negligence in these cases, since violation of a statute would likely be held to be negligence per se or at least strong evidence of negligence. Satisfying the requirements of proximate cause in these cases would seem to present a more difficult problem. However, it is interesting at this juncture to note a recent Illinois case directly in point, Ostergard v. Frisch, 333 Ill. App. 359, 77 N.E. (2d) 537 (1948), in which it was held that the defendant-owner's conduct constituted negligence, and, further, was the proximate cause of the plaintiff's injury, rendering the defendant liable therefor. The court decided that the defendant had a duty to foresee the consequences of his negligence, and that if the defendant's conduct in violating the statute respecting the leaving of vehicles unattended and unlocked brought about the very harm which the statute was calculated to prevent, then the defendant's conduct was the legal cause of the harm. The Illinois case, as well as those cases from other jurisdictions which have followed the same rule, Ross v. Hartman, 139 F. (2d) 14, 158 A.L.R. 1370 (App. D. C. 1944), cert. denied, 321 U.S. 790, 64 S.Ct. 1080 (1944); cf. Magniore v. Laundry and Dry Cleaning Service, La. App., 150 So. 394 (1933), would seem to strain the theory of proximate cause and place too high a standard of reasonable foreseeability on the conduct of individuals. Ordinarily, the criminal act of a third person should preclude recovery against the defendant in these cases, even though the condition for the subsequent injury or damage to the plaintiff was caused by the negligence of the defendant. 38 Am. Jur., Negligence § 71 (1941). The criminal act of a third person is generally held to be a superseding cause, and becomes itself the proximate cause of the injury. RESTATEMENT, TORTS, § 448, comment (b) (1934). Thus it would seem that the better rule, which generally denies the liability of the negligent owner of the automobile or his agent, in these cases, has been adopted by the Massachusetts court, as well as by the courts of some few other jurisdictions in which this point of law has been considered. Castay v. Katz & Besthoff, La. App., 148 So. 76 (1933); Lotito v. Kyriacus, 74 N.Y.S. (2d) 599, 272 App. Div. 635 (1948).

E. A. Steffen, Jr.

WILLS—CONSTRUCTION—DYING WITHOUT ISSUE.—Stagg et al. v. Phenix et al., .... Ill., ...., 81 N.E. (2d) 565 (1948). This recent decision of the Illinois Supreme Court illustrates the cardinal rule of will construction that the intent of the testator as gathered from the unambiguous wording of the whole instrument will govern the court in the interpretation of that instrument.

The facts of the case are briefly as follows: In 1893, testators Jane A. and Daniel B. Phenix executed a joint will. The first clause of the will provided for a life estate in the survivor of the two testators. Jane A. Phenix died in 1906
and Daniel B. Phenix died in 1913. Two sons, Bardwell D. Phenix and William H. Phenix, devisees under the will, were the sole surviving heirs. The third clause of the will read as follows:

3. We give and devise to our son, Bardwell D. Phenix the following described real estate, (describing the real estate); Provided, that if the said Bardwell D. Phenix shall die without issue, leaving surviving him no child or children as his heir or heirs, then upon his death all the said described real estate devised to him shall go, and we give and devise the same, to the children of our son William H. Phenix then living, or that may be thereafter born.

The sixth clause had a similar provision as regarding one-half of the personalty. William H. Phenix died in 1940 and Bessie L. Stagg and Aura A. Timmons, both children of William H. Phenix, deceased, filed their bill for partition and for a construction of the above clauses. Bardwell D. Phenix, the appellant, was an old man who had been twice married and had no children. Bardwell contended that by the clause in question he received an absolute fee upon his survival of the life tenant and the limitation over was to take place only in the event that he predeceased the life tenant with no issue him surviving. The appellees on the other hand contended that Bardwell received a determinable fee and that they as the children of William Phenix were executory devisees. They further maintained that the ascertainment of the fulfillment of the condition should be determined as of the death of Bardwell.

Both contentions were based upon rules of construction as set out in Smith et al. v. Shephard et al., 370 Ill. 491, 19 N.E. (2d) 368 (1939), and Lachenmyer et al. v. Gehlback, 266 Ill. 11, 107 N.E. 202 (1914). The rules as set out in Smith v. Shephard, are as follows:

(1) Where, by will, an estate is devised to one person simpliciter, and in case of his death to another, the contingency of "his death" refers to the death of the devisee during the lifetime of the testator, and such devisee has an absolute estate in fee simple if he survives the testator.

(2) Where, by will, an estate is devised to one person, and in case of his death to another, if the contingency of "his death" is coupled with a condition such as "without issue," "without heirs," "without heirs of his body," "without husband or wife," or similar conditions, making the contingency upon which the estate vests, in itself uncertain, the devise over to the ultimate beneficiary takes effect upon the death of the first taker, under the circumstances indicated, at any time, whether before or after the death of the testator.

(3) There is another class of cases where the devise is not immediate but is of a future interest to take effect in possession upon a termination of an intervening particular estate. In such case, unless the will shows the testator intended to refer to a different date than the termination of the particular estate, the rule is that the gift over will take effect if the contingency happens at any time before the termination of the particular estate, and death without issue means death without issue before the termination of the particular estate.

Bardwell Phenix contended that his case fell within rule three as set out in the Shephard case and argued that since he had survived the life estate of the survivor he took an absolute fee and the condition was discharged. The appellees, on the other hand, suggested that the second rule was applicable and hence the condition could not be fulfilled until the death of Bardwell. The court disposed of the contention of the appellant by showing that the testators by another clause expressly provided that the gift over should not take effect until the death
of the survivor. The court further pointed out that even if the testator had not so directed, rule three would still not be applicable. There never was a life estate in the whole of the property devised since the joint will gave only a life estate to the survivor of those lands of which the other owned. The remainder of those lands the survivor owned in fee, but which lands passed at his death by reason of his earlier execution of the joint will. The court held that rule two of the Shephard case was not needed to arrive at a decision and hence reliance thereon was not necessary. In holding that Bardwell Phenix took a conditional fee subject to be divested at any time before or after the death of the testators the court considered several factors: The evident meaning of the language used, the fact that the testators contemplated Bardwell surviving them as indicated by their appointment of him as an executor, and thirdly, the fact that by the clause in question the testators designated the children of William Phenix that were then living, meaning those living at the death of Bardwell. Any child dying before Bardwell could not take under that clause, and as pointed out by the court, "it would be unreasonable to construe the intention of the testators to fix the time of death at an earlier date when the person to whom the gift over is to be made could not be determined."

The use of the term "conditional fee" is appropriate to describe the estate that Bardwell took. The failure of issue, him surviving, would operate as a condition subsequent and the executory devise over completed the divestiture as contemplated. It is not to be confused with the old conditional fee existing before the Statute De Donis. A treatment of this point is dealt with in Tiedman's Real Property, wherein it is stated:

Whenever a fee is so qualified, as to be made to determine, or liable to be defeated, at the happening of some contingent event or act, the fee is said to be base, qualified, or determinable. There are four classes of such fees, viz.: fee upon condition, fee upon limitation, a conditional limitation, and a fee conditional at common law. . . . TIEDMAN, REAL PROPERTY § 44 (2d ed. 1892).

Thus, it could be said that Bardwell took a conditional fee, or as stated in the quotation above, a fee upon condition.

At first glance it would appear unnecessary that the court should have gone into such a detailed discussion of the intent factor in view of the fact that by following rule two of the Shephard case the same ultimate conclusion could have been reached. The court, however, appeared intent upon correcting the error of the appellees' reasoning, though not their ultimate conclusion. The appellees relied on a rule of construction and sought to impress it upon the court as though it were a rule of law. Though, as in this case, it would not have been an injustice to have followed that rule, it would have opened the door to a looser interpretation of a testator's intent and in time could have abrogated the intent factor entirely.

E. L. Twokey