

# CASE NOTES

## EMINENT DOMAIN—DAMAGES—ENHANCED VALUE IN LAND CONDEMNATION

Petitioner's land was taken in a condemnation proceeding, and on the trial of the issue of damages the court charged the jury that in computing the amount that they could consider any enhancement in the value of the property which resulted from the projected use by the condemnor for highway purposes. The Court of Appeals of Georgia held that this was a correct statement of the law under *Hard v. Housing Authority of the City of Atlanta*<sup>1</sup> and cases cited therein, but that because of a recent amendment to the Code of Georgia approved March 10, 1966, the case must be reversed.<sup>2</sup> That amendment provided:

In fixing and determining adequate compensation to be paid for property actually taken, consideration shall not be given to any increase or decrease in the value of property actually taken resulting from the improvements, or the anticipation thereof, in connection with which the right of eminent domain is being exercised.<sup>3</sup>

On appeal the Supreme Court of Georgia held that this portion of the Act was unconstitutional and reversed.<sup>4</sup>

The Constitution requires that upon condemnation a landowner be paid "just and adequate compensation,"<sup>5</sup> and according to the court only the judiciary can determine what is just and adequate compensation.<sup>6</sup> The legislature through the passage of this Act tried to overrule the established decisional law of the state.<sup>7</sup> In the eyes of the court this is clearly beyond the powers of the General Assembly and violative of art. I, sec. I, par. 23 of the Constitution of Georgia calling for the separation of the legislative, judicial, and executive branches.<sup>8</sup>

The overwhelming majority view in the United States is that the land owner is entitled to the value at the time of taking without consideration of any enhancement caused by the project. Most courts deny outright any enhancement in computing damages,<sup>9</sup> while a few have recognized that

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1. 219 Ga. 74, 132 S.E.2d 25 (1963).

2. *State Highway Dept. v. Calhoun*, 114 Ga. App. 501, 151 S.E.2d 806 (1966).

3. GA. LAWS, 1966 pp. 320, 327. GA. CODE ANN. §36-1117.

4. *Calhoun v. State Highway Dept.* \_\_\_ Ga. \_\_\_ (1967).

5. GEORGIA CONST., Art. I, Sec. III, par. 1, GA. CODE ANN. §2-301 (1960).

6. *Supra* n. 4.

7. *Hard v. Housing Authority*, 219 Ga. 74, 132 S.E.2d 25 (1963); *Central Ga. Power Co. v. Mays*, 137 Ga. 120, 72 S.E. 900 (1911); *Gate City Terminal Co. v. Thrower*, 136 Ga. 436, 71 S.E. 903 (1911).

8. *Supra* n. 4.

9. *United States v. Miller*, 317 U.S. 369 (1943); *Housing Authority v. Title Guarantee Loan and Trust Co.*, 243 Ala. 157, 8 So.2d 835 (1942); *Bonaparte v. Baltimore*, 131 Md. 80, 101 A. 594 (1917).

the owner can recover any enhancement which occurred before a definite determination that the land in question would be taken, but at a time when there was a reasonable certainty that the improvement would be somewhere in the neighborhood.<sup>10</sup> The logic behind this view is more palatable than that followed by the Georgia court. The land adjacent to the project might very well benefit from the improvement because of the increased possibilities of use to which it may be put. However, the land taken for the project can no longer be put to any use by the owner, nor can he enjoy any benefits from it. Thus any increase in its value is due solely to speculation as to what the condemnor might be willing to pay and not to any increased use. Also the state should not be compelled to pay for an increase in value which it has itself created by construction of the project.

What, then, could a lawyer for the state do to convince the Supreme Court that enhanced value should not be allowed in making the award? It is conceded that only the supreme court can decide this question, and the legislature cannot pass laws overruling the Court's interpretation of the constitution.<sup>11</sup> Perhaps the court could be persuaded to change its view, but this is rather unlikely even though there appears to be some conflict between the two appellate courts of this state on this question.<sup>12</sup> The decisions relied on by the supreme court all say that the view they are upholding is the correct law in Georgia and in support cite many cases without ever giving any convincing reasons for their position. The idea seems to be that this has been the law for so long that it just cannot be wrong. In the *Hard* case the court even went so far as to lift a quote from *Green v. Coast Line R.R.*,<sup>13</sup> a case concerning foreclosure of a mortgage, saying:

Every direct authority known to us is against us; nevertheless, we are right and these are all wrong, as time and further judicial study of the subject will manifest.<sup>14</sup>

However, since 1895 when *Green* was decided the majority view has been and continues to be that enhanced value shall not be allowed. This is not to say that Georgia is in the wrong just because it has adopted and holds fast to the minority view, but that reason and logic lie on the side of the

10. *Shoemaker v. United States*, 147 U.S. 282 (1893); *Kerr v. South Park*, 117 U.S. 369 (1885); *United States v. Goodloe*, 204 Ala. 484, 86 So. 546 (1920).

11. *Thompson v. Talmadge*, 201 Ga. 867, 872, 41 S.E.2d 883, 890 (1947): "The Constitution vests all legislative power in the General Assembly. Art. 3, sec. 1, par. 1. It vests all judicial power in the courts. Art. 6, sec. 1, par. 1. It commands that these powers remain forever separate and distinct. Art. 1, sec. 1, par. 23. This court in *McCutcheon v. State*, 199 Ga. 685 (35 S.E.2d, 144), citing in the opinion a number of older decisions supporting its ruling, held that construing the Constitution and the statutes is the function of the judiciary, and that the General Assembly has no power to make such construction. By this was meant that determining the meaning of the Constitution, which is binding upon everyone, was the exclusive function of the courts in the adjudication of cases properly brought before them for decision."

12. In both the *Hard* and *Calhoun* cases the Court of Appeals has been reversed and the enhanced value view upheld by the Supreme Court.

13. 97 Ga. 15, 24 S.E. 814 (1895).

14. *Id.* at 35, 36.

majority, and the courts would do well to explore this question further in the future rather than say this is the law because it has always been this way.

W. W. PLOWDEN, JR.

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## CRIMINAL LAW—APPOINTMENT OF COUNSEL FOR INDIGENTS—ATTORNEY TO SERVE OR BE HELD IN CONTEMPT

Attorney Weiner was appointed by the Superior Court of Fulton County to defend an indigent who had been indicted on a felony charge. A plea in abatement was filed for the defendant alleging that personal financial straits made it impossible for the appointed counsel to adequately represent him or to provide the financial support needed to adequately research and prepare the case. At the same time an action was filed by the attorney in his own name alleging improper taking of property interest on several grounds. Both petitions were dismissed on general demurrer, appealed to the Supreme Court of Georgia, and transferred to the Court of Appeals.<sup>1</sup>

Careful distinction should be made between the question of whether an attorney appointed to defend an indigent defendant can demand compensation and the questions of whether he can be forced to serve and whether such service will be deemed to protect the constitutional rights of the defendant where the appointed counsel cannot afford to financially support the case. This case seems to be one where complex procedure and somewhat less than precise legal analysis have produced a result that is not the same as the holding. This decision clearly resulted in the appointed attorney being forced to serve in the best way he could without once considering the legality of such a result or incorporating it into the holding. The decision openly disposed of any concern about the constitutional rights of the defendant by pointing out that the case came to the Court of Appeals by transfer from the Supreme Court so that this important question was taken as a premise and no attempt was made to justify this position.<sup>2</sup>

The court proports to agree with the United States Supreme Court that a court may issue a valid order compelling a lawyer to represent an indigent and cites a decision which involves neither court appointed counsel nor indigent defendant.<sup>3</sup> This case never approaches the question of appointed counsel closer than to include as appendix Title II of the *Civil Rights Act of 1964*<sup>4</sup> which provides for appointment of counsel for indigent

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1. *Weiner v. Fulton Co.*, 113 Ga. App. 343, 148 S.E.2d 143 (1966).

2. *Id.* at 347, 148 S.E.2d at 147 (1966).

3. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

4. *Civil Rights Act of 1964*, Title II, 78 Stat. 241 (1964), 42 U.S.C. 1971 (1964).

claimants and which interestingly enough also provides for reasonable attorney's fees.

Statutes respecting appointment of attorneys for poor persons are strictly construed as in derogation of common law.<sup>5</sup> Georgia has no statute requiring appointment of counsel, but our courts have construed the provision guaranteeing each accused the privilege and benefit of counsel to authorize and to make mandatory the appointment of counsel. Failure to appoint counsel is deemed a violation of the accused's constitutional right to counsel.<sup>6</sup> This holding made it mandatory that counsel be appointed; it did not make it mandatory that the attorney appointed serve. The burden was placed squarely upon the court. There are numerous cases making it clear that where it appears during the course of the proceedings that his rights will otherwise be substantially impaired or denied, an indigent defendant is entitled to have assigned counsel discharged or replaced.<sup>7</sup> There appears no reason why this condition could not be found to exist at the time of appointment where for some valid reason the appointed counsel is unable to serve.

While there are jurisdictions that place the attorney under no obligation to offer gratuitous service for indigent defendants in criminal cases,<sup>8</sup> Georgia is clearly in the majority when it regards such service as a professional obligation.<sup>9</sup> The gap between a professional or ethical obligation and a legal obligation is filled indirectly by finding that the state has a duty to provide counsel for indigents<sup>10</sup> and that the legislature, with whom such power rests,<sup>11</sup> has not provided funds to pay such counsel. Cases abound which hold that the government has no liability to pay counsel appointed to satisfy the constitutional guaranty of counsel.<sup>12</sup> The instant decision cites some twenty-one cases in as many jurisdictions supporting this general concept. It seems that since the constitution requires the services of an attorney and neither the indigent defendant nor the courts can pay him that he is deemed to have some legal duty to serve without compensation. This is a little like saying that since poor people are hungry and the great society demands they be fed in spite of the shortage of funds in the treasuries of the great society and of the poor people, that the grocery owner has an

5. *People ex rel. King v. McNeil*, 10 N.Y.2d 749, 210 N.Y.S.2d 118 (1961).

6. *Bibb Co. v. Hancock*, 211 Ga. 429, 436, 86 S.E.2d 511, 517 (1955).

7. *United States v. Plattner*, 330 F.2d 271 (2d Cir. 1964); *United States v. Gutterman*, 147 F.2d 540 (2d Cir. 1945); *State ex rel. White v. Hilgeman*, 218 Ind. 572, 34 N.E.2d 129 (1941); *State v. Smith*, 43 N.J. 67, 212 A.2d 669 (1964).

8. *Hyatt v. Hamilton Co.*, 121 Iowa 292, 96 N.W. 855 (1903); *Cane Co. v. Smith*, 13 Wis. 585 (1832).

9. *Elam v. Johnson*, 48 Ga. 348, 350 (1873).

10. U. S. CONST. amend. VI; GA. CONST. Art I, §1, par. 5.

11. *Case v. Shawnee Co.*, 4 Kan. 511 (1853); *Dismukes v. Noxubee Co.*, 58 Miss. 612 (1881); *Wayne Co. v. Wallar*, 90 Pa. 99 (1865); *Rucknbrod v. Mullins*, 102 Utah 548, 133 P.2d 325 (1943).

12. *Dolan v. United States*, 351 F.2d 671 (5th Cir. 1965); *State v. Rush*, 87 N.J. Super. 49, 207 A.2d 724 (N.J. 1965); *Scott v. State*, 392 S.W.2d 681 (Tenn. 1965); *Pardee v. Salt Lake Co.*, 39 Utah 482, 118 P. 122 (1911).

obligation to dispense free food.<sup>13</sup> The concurring opinion in this case expresses great concern lest the noble legal profession be considered in the same way as a trade or craft. An 1879 opinion repudiated the concept of compensation for appointed defense counsel with the admonition that it would be better to let such cases rest on human sympathy and a just sense of professional obligation. This opinion continued with the prophecy that "no poverty-stricken prisoner is ever likely to suffer for want of necessary professional or pecuniary aid."<sup>14</sup>

This court was on certain ground when it held that any funds to be paid appointed defense counsel must be appropriated by the legislature. It fell on the side of the overwhelming majority when it held that appointed counsel has no claim for compensation. The support for this position is somewhat less sturdy and seems to rest largely on a confusion of professional obligations with legal duties, which confusion is very evident in the *Elam v. Johnson* case<sup>15</sup> upon which the instant court obviously relied. Neither this court nor any other court encountered in this study has produced a strong legal defense for this admitted taking of private property for public use without any compensation. The justification offered is an implied contract arising out of admission to the bar.<sup>16</sup> This supposed contract seems uncertain in so many of its terms as to cast grave doubt upon its existence.

When this court entered the even more difficult area of its right to demand that the appointed attorney serve, it began to write in an incredible manner. The bogus reference to *Heart of Atlanta Motel, Inc. v. United States*<sup>17</sup> as holding that a court may issue a valid order compelling a lawyer to serve has already been pointed out. There is not one other attempt to support this position with authority. There is much support of the indigent's right to counsel cited and equal strength shown for the power of the court to appoint this counsel. However, when it comes to the question of whether the court can force the appointed counsel to serve even in the face of severe financial hardship and demonstrated inability to prepare the case the court relies on language such as "We incline to the proposition that lawyers undertake certain professional obligations. . ."<sup>18</sup> It is doubtful that the parties in this case realized that their legal rights and duties would be decided by what a court was inclined to believe about professional obligations! The court also "inclined to believe" that a lawyer, "except in unusual circumstances," has no right and will make no effort to refuse a case which he is requested to take. Since the holding was that this lawyer had no right to refuse this case it seems that dire financial

13. *Bibb Co. v. Hancock*, 211 Ga. 429, 437, 86 S.E.2d 511, 518 (1955).

14. *Wayne Co. v. Waller*, 90 Pa. 99 (1876).

15. 48 Ga. 348 (1873).

16. *United States v. Dillon*, 346 F.2d 633, 636, 638 (9th Cir. 1965).

17. *Supra* n. 3.

18. *Supra* n. 1 at 347, 148 S.E.2d at 147.

straits such that the attorney is unable to support a case must not be considered as unusual circumstances, a point worthy of note by many prospective law students. Having thus been "inclined" to assume the authority for this taking it was a refreshing note the court struck when it took judicial notice that the present session of the legislature was giving earnest attention to possible ways of meeting due process standard without undue hardship on the profession. It is to be hoped that this body legislates better than the court.

GENE H. KENDALL

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## TORTS—INNKEEPERS LIABILITY—DUTY TO AN INFANT GUEST

Plaintiff brought an action for damages as next friend of his infant daughter who was six years and ten months of age at the time of the injury. While registered in defendant's motel, the infant walked through a clear glass panel separating the motel room from the outside patio. Recovery was allowed for injuries resulting from the defendant's negligence in failing to warn the infant guest of the hidden danger in the floor to ceiling glass panel, or to place markings on the glass to warn the child, or to construct guards around the panel.<sup>1</sup>

While an innkeeper is no longer an insurer of the safety of his guests,<sup>2</sup> as he was at common law,<sup>3</sup> even to his infant guests, he is under an affirmative duty to protect his guests from unreasonable risks of physical harm,<sup>4</sup> to use ordinary care to furnish the guests with safe accommodations,<sup>5</sup> and to warn guests of hidden dangers on the premises.<sup>6</sup> This duty of an innkeeper to his guests is greater to an infant and the innkeeper is bound to consider whether his premises, although safe enough for an adult, present any reasonably avoidable danger to his infant guests.<sup>7</sup>

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1. *Waugh v. Duke Corp.*, 248 F. Supp. 626 (M.D.N.C. 1966).

2. *Clancy v. Barker*, 131 Fed. 161, 69 L.R.A. 653 (8th Cir. 1904); *Goldin v. Lipkind*, 49 So.2d 539, 27 A.L.R.2d 816 (Fla. 1950); *Richmond v. Wilkinson*, 73 Ga. App. 36, 36 S.E.2d 536 (1945); *Bell v. Daugherty*, 199 Iowa 413, 200 N.W. 708, 37 A.L.R. 154 (1924).

3. *Hulett v. Swift*, 33 N.Y. 571 (1865); *Epp v. Bowman-Biltmore Hotel Corp.*, 171 Misc. 338 12 N.Y.S.2d 384 (N.Y.C. Mun. Ct. 1939).

4. *Sarne v. Hoffman*, 110 Ga. App. 164, 138 S.E.2d 96 (1964); *Hollman v. Henry Grady Hotel Co.*, 42 Ga. App. 347, 156 S.E. 275 (1930); *Patrick v. Springs*, 145 N.C. 270, 70 S.E. 395 (1911); 29 AM. JUR. *Innkeepers* §57 (1960); RESTATEMENT, TORTS, §314A (1965); see PROSSER, TORTS 402 (3d ed. 1964).

5. *Hotel Dempsey Co. v. Teel*, 128 F.2d 615 (1959); *Newton v. Candace, Inc.*, 94 Ga. App. 385, 94 S.E.2d 739 (1956).

6. *Hillinghorst v. Heart of Atlanta Motel, Inc.*, 104 Ga. App. 731, 122 S.E.2d 751 (1961); *Barnes v. Hotel O. Henry Corp.*, 229 N.C. 730, 51 S.E.2d 180 (1949); 29 AM. JUR. *Innkeepers* §67 (1960).

7. *Baker v. Dallas Hotel Co.*, 73 F.2d 825 (5th Cir. 1934); *Jacksonville v. Stokes*, 74 So.2d 278 (Fla. 1954); *Crosswhite v. Shelby Operating Corp.*, 182 Va. 713, 30 S.E.2d 673, 53 A.L.R. 573 (1944); 29 AM. JUR. *Innkeepers* §58 (1960).

Generally courts have allowed recovery to infant guests for a showing of even slight negligence on the part of the innkeeper. In *Baker v. Dallas Hotel Co.*<sup>8</sup> and in *Crosswhite v. Shelby Operating Co.*<sup>9</sup> recovery was allowed when infants fell from a window in their hotel, due to insecurely fastened window screens. An innkeeper was held liable for injuries to an eight months old guest who came in contact with a hot radiator pipe when the innkeeper failed to provide a requested baby bed.<sup>10</sup> An eight year old child recovered as a business invitee when she walked through a clear glass window in a model home.<sup>11</sup> Adults have generally been denied recovery under similar circumstances.<sup>12</sup> A sixteen year old boy was denied recovery when he walked through a window next to a door he had entered just prior to the accident.<sup>13</sup> The Georgia Court of Appeals denied recovery to a business invitee on the grounds that he was an adult and knew of the danger of the glass panel.<sup>14</sup> Courts have uniformly held that glass windows and doors are reasonably safe constructions<sup>15</sup> and an injury involving a glass panel does not raise a presumption of negligence on the part of the innkeeper.<sup>16</sup> In contrast to this weight of authority the Texas Supreme Court recently ruled that a motel owner was liable for injuries received by an adult guest when he walked through a clear glass window from the outside of the motel at night, reasoning that the clear glass was not an open and obvious danger at night.<sup>17</sup>

In the principal case the court also denied the defendant the defense of contributory negligence. Under the Illinois rule,<sup>18</sup> which the court in the instant case follows, it is conclusively presumed that an infant under seven years of age is incapable of contributory negligence.

Courts are holding with increasing frequency that innkeepers are liable for even slight negligence to infant guests because of the inability of an infant to recognize dangers that are obvious to adults. There has not been a case of similar facts decided in Georgia; however, the Georgia statutory protection given business invitees requiring ordinary care by the invitor,<sup>19</sup>

8. *Ibid.* (Plaintiff here was a two year old infant).

9. *Supra* n. 7. (Plaintiff here was a three year old infant).

10. *Seelbach v. Cadick*, 405 S.W.2d 745 (Ky. App. 1966).

11. *McCain v. Bankers Life & Cas. Co.*, 110 So.2d 718, 68 A.L.R.2d 1194 (Fla. App. 1959).

12. *Rosenburg v. Hartman*, 313 Mass. 54, 46 N.E.2d 406 (1943); *Acme Laundry Co. v. Ford*, 284 S.W.2d 745 (Tex. Civ. App. 1955); *Snyder v. Ginn*, 202 Va. 8, 116 S.E.2d 31 (1960).

13. *A. C. Burton Co. v. Stasny*, 223 S.W.2d 310 (Tex. Civ. App. 1949).

14. *Brand v. Pope*, 103 Ga. App. 489, 119 S.E.2d 723 (1961).

15. *Rosenburg v. Hartman*, *supra* n. 12; *Crawford v. Given Bros.*, 318 S.W.2d 123 (Tex. Civ. App. 1958).

16. *Bullard v. Rolader*, 152 Ga. 369, 110 S.E. 16 (1921); *Fulton Ice & Coal Co. v. Pece*, 29 Ga. App. 507, 116 S.E. 57 (1923).

17. *Scott v. Lieman*, 404 S.W.2d 288 (Tex. 1966).

18. *Red Top Cab Co. v. Cochran*, 100 Ga. App. 707, 112 S.E.2d 229 (1959); *Chicago City Ry. Co. v. Tuocy*, 196 Ill. 410, 63 N.E. 997, 58 L.R.A. 270 (1902); *Walston v. Green*, 247 N.C. 693, 192 S.E.2d 124 (1958); Note, *Contributory Negligence of Children*, 18 S.C.L. REV. 648 (1966).

19. GA. CODE ANN. §105-401 (Supp. 1966); *Sarno v. Hoffman*, *supra* n. 4; *A. C. Day v. Piedmont Hotel, Inc.*, 96 Ga. App. 215, 99 S.E.2d 513 (1957). Hotel guests are considered business invitees.

as opposed to licensees who are protected only from wilful and wanton injury;<sup>20</sup> the Georgia courts' imposition of a more strict duty of care toward infants;<sup>21</sup> and the use of the Illinois rule for contributory negligence<sup>22</sup> give every indication that the Georgia courts would follow the rule of the court in the instant case.

EDWARD J. HARRELL

## ADMINISTRATIVE LAW—AGENCY DISCRETION— ENJOINING OF S.E.C. PUBLICITY

The defendant Commissioners of the Securities and Exchange Commission in conjunction with a stop-order hearing immediately issued a press release reciting in detail charges against Shasta Minerals and Chemical Co. and K. L. Stoker, Shasta president. In a second proceeding against Keystone Securities Corporation, Shasta underwriter, to revoke its dealer-broker registration, a news release summarized charges including those against Shasta and Stoker. Both proceedings ended in negotiated settlements. In a third proceeding against a director of Silver King Mines, Inc., the news release included upon request a copy of the application containing allegations against Stoker and companies unrelated to the subpoena hearing. The District Court held, absolute discretion as to publicity is not granted the SEC and its arbitrary, capricious, and unreasonable action is enjoinable as a denial of due process of law absent prior adjudication and when used as a pressuring device or as a general enforcement policy.<sup>1</sup>

This case is on the fringe of the large area of agency actions not resulting in a final order or other reviewable actions, beyond the safeguards of a hearing, and generally beyond judicial review. There are extensive examples of such agency powers.<sup>2</sup> The court appears to grant judicial review in the form of an injunction against the agency's arbitrary and capricious exercise of its discretion. Conceding the arbitrariness of this release of publicity, the problem remains whether this action is reviewable.

The general presumption is for reviewability of agency actions. Section 10 of the Administrative Procedure Act states:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . . (e) It (*the reviewing court*) shall . . . hold unlawful and set aside any agency

20. GA. CODE ANN. §105-402 (1962 Rev.); *Handibee v. McCarthy*, 114 Ga. App. 541, 151 S.E.2d 905 (1967); *Cook v. Southern R. R. Co.*, 53 Ga. App. 723, 187 S.E. 274 (1936).

21. *Drum v. Shirey*, 106 Ga. App. 699, 128 S.E.2d 92 (1962).

22. *Red Top Cab Co. v. Cochran*, *supra* n. 18.

1. *Silver King Mines, Inc. v. Cohen*, 261 F. Supp. 666 (D. Utah 1966).

2. 1 DAVIS, ADMINISTRATIVE LAW §4 (1958); see e.g., *Dyer v. S.E.C.*, 291 F.2d 774 (8th Cir. 1961); *Hearst Radio, Inc. v. F.C.C.*, 167 F.2d 225 (D.C. Cir. 1948); *Fahey v. Mallonee*, 332 U.S. 245 (1947).

action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion. . . .<sup>3</sup>

The Supreme Court has construed this statute to exclude from judicial review those actions of an agency by law committed to its discretion.<sup>4</sup> Louis L. Jaffe states, "the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion."<sup>5</sup> However in a later case the Court held where this discretion is committed by law even arbitrary or capricious action is not reviewable.<sup>6</sup>

The release of publicity appears to be committed by law to the SEC's discretion.<sup>7</sup> It was held in *Schmidt v. U.S.*<sup>8</sup> that publication of information about pending investigation and later publication of the results of the investigation were within the SEC's discretion. The following comment by Louis Loss, viewing the effect of *Barr v. Matteo*<sup>9</sup> and *Howard v. Lyons*<sup>10</sup> on the use of publicity by the SEC, reflects the general idea that publicity, though discretionary, is a duty of the Commission:

"It is now quite clear from two cases decided by the Supreme Court in 1959 that executive officers have an 'absolute privilege' for defamatory statements issued in the course of their official duties."<sup>11</sup>

There are cases of review involving the issuance of publicity by the SEC, but they are appeals from final orders alleging prejudice in the subsequent proceedings.<sup>12</sup> They are not judicial actions based solely upon the issuance of publicity. In declining to review the Interstate Commerce Commission's refusal to suspend a railroad rate,<sup>13</sup> the court refused to review an agency action that did not result in a final order or other reviewable form of action under the Administrative Procedure Act. This situation did not create grounds for review as the court seems to find in the instant case. The court also emphasizes the use of publicity for the purpose of pressuring those involved with the Commission and as a general enforcement policy. Yet "the use of publicity by the Commission to effectuate compliance with its policies is well known."<sup>14</sup>

Due to the broad Congressional commitment of public protection to the SEC, its use of publicity would seem beyond the scope of judicial review.

THOMAS J. RATCLIFFE, JR.

3. ADMINISTRATIVE PROCEDURE ACT §10, 60 Stat. 243 (1946), 5 U.S.C. §1009 (1952).

4. *Schilling v. Rogers*, 363 U.S. 666 (1960); *Panama Canal Co. v. Grace Line*, 356 U.S. 309 (1958).

5. Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 769, at 793-94 (1958).

6. *Arrow Transp. Co. v. Southern R.R.*, 372 U.S. 658 (1963).

7. SECURITIES EXCHANGE ACT of 1934, 48 Stat. 881 (1934), 15 U.S.C. §78u(a) (1952). The Commission is authorized in its discretion, to publish information concerning such violation. . . .

8. 198 F.2d 32 (7th Cir. 1952), cert. denied 344 U.S. 896 (1952).

9. 360 U.S. 564 (1959).

10. 360 U.S. 593 (1959).

11. 3 LOSS, SECURITIES REGULATION, 1933, §12C, (2d ed. 1961).

12. *N. Sims Organ & Co. v. S.E.C.*, 293 F.2d 79 (2d Cir. 1961); *Gilligan, Will & Co. v. S.E.C.*, 267 F.2d 461 (2d Cir. 1959).

13. *Luckenbach S.S. Co. v. U.S.*, 179 F. Supp. 605 (D. Del. 1959).

14. 45 VA. L. REV. 1053, at 1054 (1959).

## ADMINISTRATIVE LAW—RIGHT TO HEARING— SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Appellant bank and others sued the Comptroller of the Currency and the West Side National Bank to enjoin the operation of the newly chartered West Side National Bank and to compel the Comptroller of the Currency to grant a formal adversary hearing before finally passing upon the bank's charter application. The trial court denied relief,<sup>1</sup> and on appeal the appellant contended that it was entitled to a formal hearing with an opportunity to interrogate and cross examine the applicants and present evidence in opposition; and further, that a record should be made so that a judicial review as per section 10 (e)<sup>2</sup> of the Administrative Procedure Act could be accorded. The Comptroller of the Currency contended that neither appellant nor any competitor banks have standing to challenge the chartering of a new national bank; that the chartering of a new national bank is discretionary and is not subject to judicial review; and, that he may pass upon charter applications informally, without a formal adversary hearing. The U.S. Court of Appeals Eighth Circuit, in *Webster Groves Trust Co. v. Saxon*,<sup>3</sup> affirmed the trial court, holding that neither the National Banking Act,<sup>4</sup> the Administrative Procedure Act,<sup>5</sup> nor procedural due process require the Comptroller of the Currency to hold a formal hearing at which commercial banks can present objections relative to issuance of a new national bank charter. The court also held that such action by the Comptroller is not subject to review by trial de novo, but that if he acts in excess or abuse of his legal authority, acts arbitrarily or capriciously, abuses his discretion, unlawfully discriminates in violation of the Constitution, to this extent his actions are subject to judicial review, with the burden of proof resting on the party seeking the review.

The precise extent of the discretionary authority vested in the Comptroller of the Currency relative to the chartering of new national banks and to the issuance of authorizations for branch banking has been the subject of a fairly substantial amount of recent litigation.<sup>6</sup> The present case is one of first impression in the federal appellate courts on the issues of whether the Comptroller of the Currency is processing an application for a new national bank charter is required to hold a formal adversary hearing upon the request of a competitor bank, and whether such action by the

1. *Webster Groves Trust Co. v. Saxon*, 249 F. Supp. 557 (E.D. Mo. 1965).

2. Administrative Procedure Act, §10 (e), 5 U.S.C. §1009 (e) (1964).

3. 370 F.2d 381 (8th Cir. 1966).

4. National Banking Act, 12 U.S.C. §§21-36 (1945).

5. Administrative Procedure Act, §§5, 10, 5 U.S.C. §§1004, 1009 (1964).

6. Some of the more pertinent are *First Nat. Bank of Smithfield, N. C. v. Saxon*, 352 F.2d 267 (4th Cir. 1965); *Camden Trust Co. v. Gidney*, 301 F.2d 521 (D.C. Cir. 1962), cert. denied 369 U.S. 886 (1962); *Community Nat. Bank of Pontiac v. Saxon*, 310 F.2d 224 (6th Cir. 1962); *Warren Bank v. Saxon*, 263 F. Supp. 34 (E.D. Mich. 1966); *American Bank and Trust Co. v. Saxon*, 248 F. Supp. 324 (W.D. Mich. 1965).

Comptroller is subject to judicial review by trial de novo. Several cases have held that the Comptroller's actions concerning the issuance or authority for "branch" banking are subject to review by trial de novo to the extent that he acts in excess or abuse of his discretionary authority, though he is not required to hold a formal adversary hearing.<sup>7</sup> It should be pointed out, however, as is done by the court in the *Webster Groves Trust Co.* case,<sup>8</sup> that the Comptroller derives his authority to issue certification of "branch" banking, and his authority to issue charters for new national banks, from separate statutory provisions.<sup>9</sup> None of the provisions require the Comptroller to make an adjudication on the record. Both provisions appear to vest authority in the Comptroller to make a determination on the merits in accordance with law at his discretion, but the provision concerning branch banking contains a much more lengthy and complex set of specific statutory requirements which must be complied with before such discretion may be exercised. Thus the apparent trend of the decisions toward allowing a somewhat more extensive judicial inquiry into the Comptroller's actions relative to the issuance of "branch" banking authority, as opposed to the issuance of new bank charters, would appear to be generally in conformity with the needs of judicial review imposed by the statutes.

*Warren Bank v. Saxon*,<sup>10</sup> a district court case decided approximately a month before the *Webster Groves Trust Co.* case, appears to be somewhat in conflict with the *Webster Groves Trust Co.* case in that the court there held that though the Comptroller of the Currency is vested with a large amount of discretion in his determinations regarding the issuance of a new national bank charter, nevertheless upon a proper showing a review de novo could be had.

The holding in the *Webster Groves Trust Co.* case that there is no requirement that the Comptroller hold a formal hearing pursuant to the issuance of a new national bank charter, but that his actions regarding such are subject to a limited judicial review,<sup>11</sup> appears to be proper. As pointed out by the court, section 5 of the Administrative Procedure Act<sup>12</sup> imposes no requirement of an adversary hearing before an agency, but only specifies the procedure to be followed when a hearing is required by some other statute. There is clearly no requirement in the National Banking Act,<sup>13</sup> the source of the Comptroller's powers, of a hearing on an application for a national bank charter. It is also fairly apparent that the Comptroller is vested with discretionary authority as to the policy considerations in-

7. *First Nat. Bank of Smithfield, N. C. v. Saxon*, 352 F.2d 367 (4th Cir. 1965); *Community Nat. Bank of Pontiac v. Saxon*, 310 F.2d 244 (6th Cir. 1962); *Nat. Bank of Detroit v. Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1956).

8. *Supra* n. 3 at 385, 386.

9. Authority to issue new national bank charters is found in 12 U.S.C. §§26, 27 (1945). Authority to issue authorization for branch banking is found in 12 U.S.C. §36 (1945).

10. *Warren Bank v. Saxon*, *supra* n. 6.

11. *Supra* n. 3.

12. Administrative Procedure Act, §5, 5 U.S.C. §1004 (1964).

13. National Banking Act, 12 U.S.C. §§ 26, 27 (1945).

volved in the granting of such charters. At the same time there are no statutes precluding judicial review of such action,<sup>14</sup> nor does such agency action by the Comptroller appear to be absolutely "committed" to agency discretion to the extent that it is completely unreviewable.<sup>15</sup>

The only real difficulty with the decision in the *Webster Groves Trust Co.* case lies in the apparent inconsistency between the holdings that while the Comptroller of the Currency is not required to hold a formal hearing, and that his action is not subject to review by trial de novo, nevertheless if he acts "in excess of his statutory grant of power, acts arbitrarily or capriciously, abuses his discretion, or unlawfully discriminates in violation of the Constitution, he is certainly subject to restraint by the courts."<sup>16</sup> The court went on to hold that "if the Comptroller acts in excess or abuse of his legal authority, to this extent his actions are subject to judicial review, with the burden of proof resting on the party seeking the review."<sup>17</sup> It is difficult to see how, except in the most extreme or blatant cases, the court may determine that the Comptroller has acted arbitrarily or capriciously, or abused his discretion, when there is neither a requirement for any sort of hearing or record thereof at the agency level, nor any allowance of a review by trial de novo in the court. It would appear that the only conclusion which may be drawn as to the practical effect of the holding on this point is that while the court is properly leaving to the Comptroller of the Currency those determinations which are committed by statute solely to his discretion, the court is refusing to abdicate its duty to give a limited judicial review to the determinations of the Comptroller in those cases which present obvious and substantial evidence of an abuse of power.

CHARLES B. PEKOR, JR.

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## ATTORNEY AND CLIENT—UNAUTHORIZED PRACTICE OF LAW—TITLE INSURANCE COMPANIES NOT ENJOINED

Plaintiff title insurance company was engaged in certain activities concerning its title insurance business which defendant bar association alleged was the unauthorized practice of law.<sup>1</sup> On an action for declaratory judgment in which the defendant cross-claimed for an injunction against the

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14. Administrative Procedure Act, §10, 5 U.S.C. §1009 (1964).

15. See, Administrative Procedure Act, §10, 5 U.S.C. §1009 (1964), DAVIS, ADMINISTRATIVE LAW TREATISE, §2.16 (1958), *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964).

16. *Supra* n. 3 at 387.

17. *Supra* n. 3 at 388.

1. *Georgia Bar Ass'n v. Lawyers Title Ins. Co.*, 222 Ga. 657, 151 S.E.2d 718 (1966). The report indicates, although in a rather brief fashion, the activities which the title company would not be allowed to do. Basically, the title company was not prohibited from any of its previous activities except advertising that it could perform legal services and charging a fee for the preparation of papers by its attorneys incidental to issuing title insurance.

plaintiff, the trial court entered an order declaring that none of the activities complained of were unauthorized practice except the plaintiff's so-called "walk-in" business.<sup>2</sup> In a decision with one dissent the Supreme Court of Georgia affirmed the lower court ruling.<sup>3</sup>

It has been stated that it is difficult, if not impossible, to precisely define the practice of law.<sup>4</sup> Generally, the courts hold it is not limited to practice before a court of justice, but includes legal advice, and the preparation of legal instruments, whether or not such matters are pending before a court.<sup>5</sup> More than incompetent individuals are excluded from practice; the exclusion extends to lay persons or organizations who practice indirectly through competent attorneys.<sup>6</sup>

Interestingly, in the principal case the Chief Justice of the Supreme Court of Georgia states in his concurring opinion that the activities of the title company in question were "not matters carried on before the courts" and are therefore "outside the courts' authority to control."<sup>7</sup> Clearly, this view is not the generally accepted rule. The almost universal rule seems to be that the practice of law is not confined to the courtroom and covers all matters where a legal right is involved.<sup>8</sup>

The legislatures of all the states have enacted statutes relating to unauthorized practice.<sup>9</sup> Generally, the statutes do not precisely define what constitutes the practice of law, leaving this role in the regulation of legal practice to the judiciary; the courts have inherent power to control admissions to the bar, prescribe qualifications for applicants, and to disbar or discipline attorneys.<sup>10</sup> It is commonly said that while the legislature may pass statutes in aid of the judiciary, it has no power to exclude the judiciary from its constitutional power to regulate and define the practice of law.<sup>11</sup>

Upon examination of some of the more noteworthy cases concerning this problem within the past decade we find that a New Jersey court has

2. The "walk-in" business occurs only in the Atlanta, Georgia, area where the title company maintains a title plant and can determine for itself the risk involved in insuring a title to land in the Atlanta area without consulting an independent attorney.
3. *Georgia Bar Ass'n v. Lawyers Title Ins. Co.*, *supra* n. 1. It is noteworthy that this litigation was brought against and a cross-action filed by the Georgia Bar Association, a voluntary bar association, and not the recently established unified bar, the State Bar of Georgia. See GA. CODE ANN. ch. 9-7 (Supp. 1966).
4. *Creditors' Serv. Corp. v. Cummings*, 57 R.I. 291, 190 Atl. 2, 9 (1937); *Rhode Island Bar Ass'n v. Auto. Serv. Ass'n*, 55 R.I. 122, 179 Atl. 139, 140 (1935).
5. *Eley v. Miller*, 7 Ind. App. 529, 34 N.E. 836, 837 (1893); *In re Duncan*, 83 S.C. 186, 65 S.E. 210, 211 (1909).
6. *Wayne v. Murphey-Favre & Co.*, 56 Idaho 788, 59 P.2d 721, 723 (1936). See A.B.A. CANNONS OF PROFESSIONAL ETHICS NOS. 6, 35, 47.
7. *Georgia Bar Ass'n v. Lawyers Title Ins. Co.*, *supra* n. 1 at 660, 151 S.E.2d at 723.
8. *Supra* n. 5.
9. See HICKS & KATZ, UNAUTHORIZED PRACTICE OF LAW 15-61 (1934); 34 ST. JOHN'S L. R. 354 n. 4 (1960).
10. *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954); *In re Opinion of the Justices*, 279 Mass. 607, 180 N.E. 725 (1932).
11. *State ex rel Wright v. Barlow*, 131 Neb. 294, 268 N.W. 95 (1936); *Grievance Comm. v. Dean*, 190 S.W.2d 126 (Tex. Civ. App. 1945).

held that a title company's function should be limited to insuring, searching, and abstracting titles.<sup>12</sup> When the defendant gave legal opinions in clearing objections to titles and imposed a charge which greatly exceeded the actual cost of abstract and search, it was deemed to be practicing law illegally. In the course of the opinion, the court approved *Beaih Abstract & Guar. Co. v. Bar Ass'n of Arkansas*<sup>13</sup> which held that title examination and curative work when done for another by a title insurance organization constituted the unauthorized practice of law.

In a much noted Arizona case<sup>14</sup> concerning a question similar to that of the principal case, the court felt strongly that the "monopoly"<sup>15</sup> that would result from its granting to lawyers the exclusive right to perform the challenged activities was designed for the protection of the public<sup>16</sup> rather than to aid attorneys financially.<sup>17</sup>

The Georgia Supreme Court in *Boyken v. Hopkins*,<sup>18</sup> ruled that the practice of law is not confined to practice in the courts but includes the preparation of pleadings and other papers incident to any action or special proceeding in any court or other judicial body, conveyancing, the preparation of all legal instruments of all kinds whereby a legal right is secured, the rendering of opinions as to the validity or invalidity of the title to real estate or personal property, or the giving of legal advice in any action taken for others in any manner connected with the law. This decision was based on a statute enacted in 1915 and apparently follows the general rule. However, the legislature in 1931 changed the law and enacted a statute which, after defining the practice of law, contains a proviso, reading "nor shall any person, firm, or corporation be prohibited from drawing any legal instrument for another person, firm, or corporation, providing it is done without fee and solely at the solicitation and request and under the direction of the person, firm, or corporation desiring to execute such instrument."<sup>19</sup> Although the preamble to the act states that the law was passed, not for the purpose of protecting the legal profession but to assure protection to the public, the act fails in its purpose for it makes it possible for

12. *New Jersey State Bar Ass'n v. No. New Jersey Mortgage Ass'n*, 32 N.J. 430, 161 A.2d 257 (1960).

13. 230 Ark. 494, 326 S.W.2d 900 (1959).

14. *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961); Note, 1962 DUKE L. J. 595.

15. "The problem of unauthorized practice of law is a problem of using the process of the law to define and protect a monopoly." Llewellyn, *The Bar's Troubles, and Poultices—And Cures?*, 5 LAW & CONTEMP. PROB. 104 (1938).

16. The public policy behind the prohibition against practice of law by laymen is that "... upon matters affecting one's legal rights, one must have assurance of competence and integrity and must enjoy freedom of full disclosure, with complete confidence in the undivided allegiance of one's counselor in the definition and assertion of the rights in question." *Beach Abstract & Guar. Co. v. Bar Ass'n of Arkansas*, *supra* n. 13.

17. The duty of the "court is not to protect the Bar from competition but to protect the public from being advised or represented in legal matters by incompetent or unreliable persons." *Hulse v. Criger*, 336 Mo. 26, 37, 247 SW.2d 855, 857 (1952).

18. 174 Ga. 511, 162 S.E. 767 (1931).

19. GA. CODE ANN. §9-401 (1936).

anyone to draft legal documents provided there is no charge; every ounce of protection that the act claims to give is destroyed by the proviso.<sup>20</sup>

It is this statute<sup>21</sup> that was the primary question in the principal case.<sup>22</sup> The Bar Association argued that it was unconstitutional as violative of the separation of powers clause of the Georgia Constitution;<sup>23</sup> however, the court rejected this contention. In a bit of rhetoric the court stated that although the judiciary cannot be circumscribed in the regulation of the practice of law, the legislature may "aid the judiciary" in the performance of these duties. Thus, it appears that Georgia has gone the furthest of any state in allowing the legislative branch to place precise definitions on the practice of law.

Among the solutions which have been suggested to solve the problem of unauthorized practice, the following are representative:

- (1) Raising the standards of practicing attorneys to even more capable service and a lesser emphasis on traditional attorney prerogative and, through such revitalized skill and dedication, deter harmful commercial influence.<sup>24</sup>
- (2) Public relations activities initiated by the bar which would contribute to client education on the role of the attorney.<sup>25</sup>
- (3) Better public relations and cooperation between the title companies and the bar association.<sup>26</sup>
- (4) Re-evaluation of the area of activities by the bar and the courts to determine what services are needed or desired by the public.<sup>27</sup>
- (5) More emphasis in law schools on the ethical problems raised when attorneys accept employment with large corporate organizations.<sup>28</sup>
- (6) Creation of a bar related title insurance organization.<sup>29</sup>

JERRY D. SANDERS

## CONFLICT OF LAWS—ADMIRALTY—POINTS OF CONTACT TO DETERMINE CHOICE OF LAW

Plaintiff, a foreign seaman, was injured in an American port aboard a foreign registered vessel owned by a foreign corporation the majority

20. See 2 GA. B. J. 63 (1940).

21. *Supra* n. 19.

22. Georgia Bar Ass'n v. Lawyers Title Ins. Co., *supra* n. 1.

23. GA. CONST. art. VI, §1, para. 1 (1945).

24. Perry, *Unauthorized Practice of Law by Realtors and Title Insurance Companies*, 36 TEMP. L. Q. 334, 344 (1963).

25. *Ibid.*

26. This element seemed to have been entirely lacking in the principal case.

27. 72 HARV. L. R. 1334 (1959).

28. The Committee of Professional Ethics and Grievances of the American Bar Association in an opinion stated: "There never could have arisen in this country any widespread lay practice of the law without the assistance (and we may say the suggestion and inventive genius) of intelligent, but highly unprofessional lawyers. It may fairly be said now that no lawyer can urge unfamiliarity either with the ethical or legal inproprieties of such misconduct. It must cease or be stopped by the activities of the organized profession. Drastic action should hereafter be taken against any lawyer participating therein." See 26 UNAUTHORIZED PRACTICE NEWS 196 (Fall 1960).

29. This suggestion is aimed at the principal problem and seems to have worked well in Florida. See 3 GA. ST. B.J. 173 (1966).

stockholder of which was a foreign citizen who had resided in the United States since 1945 and who controlled the operations of the vessel from the United States. The plaintiff attempted to bring his cause of action within the Jones Act,<sup>1</sup> but the trial court held, and the appellate court affirmed, that there were not sufficient contacts between the United States and the vessel to outweigh the rule which gives cardinal importance to the flag of the vessel.<sup>2</sup>

The contracts on which the court in the principal case relied are expressed in *Lauritzen v. Larsen*.<sup>3</sup> These contacts which alone, or in combination, govern the choice of laws concerning maritime torts under the Jones Act are: (1) place of the wrongful act (2) place of contract (3) inaccessibility of foreign forum (4) law of the forum (5) law of the flag (6) allegiance or domicile of the injured (7) allegiance of the defendant shipowner.

The contact which the courts have had the most difficulty in applying is the allegiance of the defendant shipowner. The Supreme Court in the *Lauritzen* case stated:

Until recent times the factor was not a frequent occasion of conflict, for the nationality of the ship was that of the owners. But it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them.<sup>4</sup>

Confronted with foreign registration and ownership by a foreign corporation just how far will the courts go in pressing beyond these formalities, if they be mere formalities, to apply the Jones Act when the suit is brought by a foreign seaman.

Since the *Lauritzen*<sup>5</sup> case the United States District Court of the Southern District of New York has held the Jones Act applicable to foreign registered vessels when the injury to the foreign seaman took place on the high seas and when it was shown that the defendant foreign shipowner was a foreign corporation which was owned and controlled by American interests.<sup>6</sup> During the same period of time the identical court has declined to apply the Jones Act when the injury to the foreign seaman occurred on the high seas and when only ownership and no control by American interests of the inter-

1. Jones Act §41 Stat. 1007 (1920), 46 U.S.C. §688 (1958).

2. *Tsakonites v. Transpacific Carrier's Corp.*, 368 F.2d 426 (2d Cir. 1966).

3. 345 U.S. 571 (1953).

4. *Supra* n. 2 at 588.

5. *Supra* n. 2.

6. *Pavlou v. Ocean Traders Marine Corp.*, 211 F.Supp. 320 (S.D.N.Y. 1962); *Rodriguez v. Solar Shipping Ltd.*, 169 F.Supp. 79 (S.D.N.Y. 1958); *Bobolakis v. Compania Panamena*, 168 F.Supp. 235 (S.D.N.Y. 1958); *Zielinski v. Empresa Hondurena de Vapores*, 113 F. Supp. 93 (S.D.N.Y. 1953).

mediary foreign corporation was shown.<sup>7</sup> Even when the injury occurred in the territorial waters of the United States the Southern District Court of New York does not seem inclined to apply the Jones Act unless it can be shown that American interests both own and control the foreign corporation which owns the foreign registered vessel thereby making it possible for American interests to control the vessel from the United States.<sup>8</sup>

The Federal District Court of Maryland held that where the injury to the foreign seaman occurred aboard a foreign registered vessel they would not apply the Jones Act unless more than beneficial ownership by American interests of the foreign corporation owning the vessel could be shown.<sup>9</sup> A Pennsylvania District Court considered the same question some two years later and held they would apply the Jones Act if the plaintiff foreign seaman could show that the two foreign corporations which owned the vessel were ultimately owned and controlled by American interests.<sup>10</sup> Probably the farthest any court has gone in holding the Jones Act applicable when the injury was to a foreign seaman on a foreign registered vessel owned by a foreign corporation was in *Southern Cross S.S. Co. v. Firipis*.<sup>11</sup> In this case American interests owned only 20% of the stock of the foreign corporation but this was shown to be the controlling interest. Furthermore, the injury occurred within the territorial waters of the United States and this factor probably influenced the court to some degree in reaching their decision.

It is difficult to discern any definite trend on this particular question. The District Court of Maryland probably best summed up what could be said about any trend when it had the question before it of whether mere beneficial ownership by American interests of the stock of the foreign corporation owning the foreign registered vessel was sufficient for them to apply the Jones Act when the injury was to a foreign seaman. They said, after reviewing the New York District Court cases on this point that they they did not feel themselves bound by precedent and that "the finding of American allegiance of the shipowners, arrived at by piercing the veil of corporate ownership, is nothing more than a fortuitous circumstance."<sup>12</sup> They held that the Jones Act should not be applied when nothing more than ownership by American interests is shown.

If there is any trend on this question it is in the direction of the courts becoming more hesitant in disregarding the flag of the vessel.<sup>13</sup> In a recent

7. *Moutzouris v. Nat'l Shipping and Trading Co.*, 194 F. Supp. 468 (S.D.N.Y. 1961); *Mproumeriotis v. Seacrest Shipping Co.*, 149 F. Supp. 265 (S.D.N.Y. 1957); *Argyros v. Polar Compania de Navegacion Ltd.*, 146 F. Supp. 624 (S.D.N.Y. 1956).

8. *Bartholomew v. Universe Tankships Inc.*, 263 F.2d 437 (2d Cir.) cert. denied 359 U.S. 1000 (1959); *Voyiatzis v. Nat'l Shipping and Trading Co.*, 199 F. Supp. 920 (S.D.N.Y. 1961).

9. *Mpampouros v. Auromar*, 203 F. Supp. 944 (D.C.Md. 1962).

10. *Lascartos v. S./T Olympic Flame*, 227 F. Supp. 161 (E. D. Penn. 1964).

11. 285 F.2d. 651 (4th Cir. 1960), cert. denied, 365 U.S. 869 (1961).

12. *Supra* n. 9 at 949.

13. *Tjonam v. A/S Glittre*, 340 F.2d 290, 292 (2d Cir.), cert. denied, 381 U.S. 925 (1965).

Supreme Court case<sup>14</sup> the Court, although not concerned with the particular problem of whether to apply the Jones Act, but in dealing with a similar problem of whether to apply American law in the case of a foreign registered and owned vessel, ownership of which ultimately was in American interests, reemphasized the importance of giving great weight to the flag of the vessel.

From the principal case<sup>15</sup> and an earlier one<sup>16</sup> it is evident that the beneficial ownership and control of the foreign corporation must be by American interests and not simply by foreign citizens living in this country. The courts seem to be extremely hesitant in holding the Jones Act applicable unless it is clear that the foreign registration and ownership by a foreign corporation is a sham designed to allow the American owner to circumvent some of the more stringent laws of the United States. I believe this is the correct approach for, as was pointed out in *Mpampourous v. Auomar*,<sup>17</sup> "unquestionably the Jones Act is remedial legislation for the benefit of the seaman and primary emphasis should be placed on this aspect rather than its penal effect on shipowners". Therefore, if the injured seaman is a citizen and domiciled in a foreign country the remedial effect of the Jones Act will not be furthered by the courts lightly disregarding the flag of the vessel and its foreign corporate ownership.

GEORGE T. WILLIAMS

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### CONFLICT OF LAWS—GROUPING OF CONTACTS RULE—WEIGHING SIGNIFICANT CONTACTS

In an appeal from an award given in a wrongful death action, the Second Circuit Court of Appeals held that the District Court erred in applying a Massachusetts wrongful death statute limiting recovery to \$15,000, when the decedent was a New York domiciliary, killed in a Massachusetts airline crash, and that for choice of law purposes under the prevailing New York conflict of laws rule, the most significant contact was the domicile of principle beneficiaries at the time of death, rather than one acquired subsequent to the death of the decedent. The court specifically made the time of death, the point at which the relevant domicile of the beneficiaries would be considered to determine the appropriate law to be applied.<sup>1</sup>

The decedent had purchased the ticket in New York for the fatal flight to Nantucket Is., Mass. (where the crash occurred). He left in New York a widow and two minor children and two adult children by a previous marriage residing in California. Approximately one month after his death, the widow and minor children moved to Maryland. The plaintiff in this

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14. *McCulloh v. Sociedad Nacional de Marineros de Brazil*, 372 U.S. 10 (1963).

15. *Supra* n. 1.

16. *Cruz v. Harkna*, 122 F. Supp. 288 (S.D.N.Y. 1954).

17. *Supra* n. 9 at 949.

1. *Gore v. Northeast Airlines, Inc.*, 373 F.2d 717 (2d Cir. 1967).

action is the executor of the decedent's will, which was being administered in New York, and the defendant airline although doing business in New York, was incorporated in Massachusetts. In disposing of the case, the District Court held<sup>2</sup> that the change of domicile by the principle beneficiaries to Maryland divested New York of any substantial governmental interest in the amount of damages to be awarded, and as such precluded the application of New York's unlimited wrongful death statute. Since Maryland had acquired the dominant interest in the welfare of the beneficiaries, and its conflict of laws rule was the traditional *lex loci delicti* rule, the court held that Maryland would apply the Massachusetts wrongful death limitation to the action.<sup>3</sup>

Since jurisdiction in the case was based on diversity of citizenship, the courts were bound to apply the law of the state in which they sit,<sup>4</sup> including the conflict of laws rule of the state.<sup>5</sup> The circuit court was therefore bound to ascribe the same significance to the change of domicile, as would the New York courts; such significance being derived from an analysis of (1) the prevailing public policy of New York against restricted recoveries for wrongful death,<sup>6</sup> and (2) the prevailing conflict of laws rule.<sup>7</sup>

The Constitution of New York provides that "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subjected to any statutory limitation."<sup>8</sup> This article was adopted in 1896 and remains today as a general indicator of the policy of unlimited damages. It is also apparent that the New York policy is directed at the protection of the citizens who use common carriers, rather than being primarily for the dependents. The purpose of such a policy is to induce common carriers to operate safely and to deter negligent operation, for fear of such unlimited recoveries.<sup>9</sup> Indeed, wrongful death statutes have been analogized to contracts of accident insurance payable to the survivors.<sup>10</sup> Viewed in the light of these declarations,

2. *Gore v. Northeast Airlines, Inc.*, 222 F. Supp. 50 (S.D. N.Y. 1963), Note, 17 VAND. L. REV. 1314 (1964). See *Tramontana v. S. A. Empresa De Viacao Area Rio Grandese*, 350 F.2d 468, 475 (D.C. Cir. 1965) and Weintraub, *Revolution in the Choice of Law for Torts*, 51 A.B.A.J. 441, 443 (1965).

3. This reference to the law of Maryland and Massachusetts has been termed "... a sort of renvoi which bristles with complexity and uncertainty. . . ." See Leflar, *Conflict of Laws*, 1964 ANNUAL SURVEY OF AMERICAN LAW 88 (1964).

4. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

5. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

6. *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962), cert. denied, 372 U.S. 912 (1963); *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902 (1962); *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 211 N.Y.S.2d 133 (1961).

7. *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463 (1965); *Long v. Pan American World Airways, Inc.*, 16 N.Y.2d 337, 266 N.Y.S.2d 513 (1965); *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963).

8. NEW YORK CONST., art. I, §16 (1938).

9. See *Oldfield v. New York & Harlem R.R.*, 14 N.Y. 310 (1856); cf. *Western Union Tel. Co. v. Cochran*, 277 App. Div. 625 (3d Dept.), 102 N.Y.S.2d 65, aff'd, 302 N.Y. 545 (1951); *Johnston v. Fargo*, 184 N.Y. 379 (1906).

10. *Currie, The Constitution and the Transitory Cause of Action*, 73 HARV. L. REV. 36, 47 (1959).

it is apparent that the policy is for the protection of the traveling citizen, rather than being created solely for the benefit of the dependents.<sup>11</sup>

As to when the rights of the beneficiaries accrue,<sup>12</sup> New York courts have been equally explicit. In *Meekin v. Brooklyn Heights R.R.*<sup>13</sup> the court said, "This is a right of property which becomes vested as of the moment of death and can be converted into money through a statutory action brought for their benefit by the personal representatives, who are simply trustees for the purpose."<sup>14</sup> Once vested, the rights of beneficiaries to damages are not mitigated by statutes passed after the death of the decedent,<sup>15</sup> remarriage of the next of kin<sup>16</sup> or receipt of insurance<sup>17</sup> covering the decedent. So it is apparent that for the purpose of these policy considerations, the relevant reference point in time is the time of death of the decedent, in determining what the rights of recovery are.

In 1963, New York adopted the "Restatement Rule"<sup>18</sup> or "grouping of contacts rule" in the landmark decision of *Babcock v. Jackson*<sup>19</sup> and the circuit court recognized this as the prevailing rule. Although among the states this is the minority rule,<sup>20</sup> it has much vocal support from commentators and advocates of the RESTATEMENT OF CONFLICTS, SECOND.<sup>21</sup> The essence of the rule is that in choice of laws situations, the law of the state with the most significant relationship to the occurrence (here tort) and the parties, should govern the disposition of the action. The determination is made by considering the competing interests of the various states involved in the tort, and weighing these "contacts"; the result being the application of the law of the state most interested in the transaction. In this case, New York, Massachusetts, Maryland and California are the competing states. The lower court, held that Maryland had acquired the dominant interest in the disposition of the case, so its conflict of laws rule would be applied, which necessitated the application of the Massachusetts limitation.<sup>22</sup>

The circuit court felt constrained to hold that in light of these strong policy considerations of the forum and because the rights of the benefi-

11. In the New York Decedent Estate Law, §133, those who will benefit from the wrongful death action are the "next of kin," who may or may not be dependents. Also the argument that reduction of pauperism was the purpose of the statute has been rejected in *Tanas v. Municipal Gas Co.*, 88 App. Div. 251, 84 N.Y.S. 1053, 1059 (1903).

12. *Supra* n. 11.

13. 164 N.Y. 145, 58 N.E. 50 (1900).

14. *Supra* n. 13 at 149.

15. *Matter of Weaver*, 195 Misc. 405 (Surr. Ct. Kings Co. 1949).

16. *Lees v. New York Consol. R.R.*, 109 Misc. 608 (Kings Co. 1919).

17. RESTATEMENT, TORTS §925, comment (h) at 643 (1939); 25 C.J.S. *Damages* §99 (2) (1966).

18. RESTATEMENT (SECOND), CONFLICT OF LAWS §379, 379 (a) (Tent. Draft No. 9, 1964).

19. *Supra* n. 7.

20. 15A C.J.S. *Conflict of Laws* §8 (4), 12 (2) (1967). Georgia still adheres to the traditional *lex loci delicti* rule. See 5 ENCYC. OF GA. LAWS, *Conflict of Laws*, §34 (1962).

21. For a collection and analysis of authorities, see *Griffith v. United Airlines Inc.*, 416 Pa. 1, 203 A.2d 796, 802 (1964).

22. *Gore v. Northeast Airlines, Inc.*, *supra* n. 2.

aries vested at the time the cause of action arose, for choice of law purposes, the subsequently acquired domicile was one contact to be considered (in favor of Maryland), but that the "relevant" domicile for choice of law purposes was New York. So under the prevailing choice of law rule, New York retained the dominant contact and was not deprived of its governmental interest because of the change and domicile.

It is submitted that because this "reference point in time" is deeply rooted in New York policy considerations, it will have limited applicability to the general conflict of laws field. The case shows that this determination must be prefaced by an analysis of (1) the state's treatment of rights of survivors to damages and (2) a weighing of these rights in relation to the prevailing conflict of laws rule. Also, though the court did not give a general treatment of domicile as a contact, there is no doubt that the court was influenced by the "qualitative" test for weighing the relevant contacts of competing states, as applied in *Dym v. Gordon*.<sup>23</sup> The RESTATEMENT, SECOND recognizes that for choice of law purposes, the relevancy of domicile changes in relation to the "... nature of the interest affected."<sup>24</sup> So the "reference time" established in this case should not be construed as establishing a particular time when the contacts under the RESTATEMENT rule are frozen, rather the case recognizes the "qualitative" test<sup>25</sup> which New York would apply to the respective domiciles and assesses the weight that a New York court would give to the "new" domicile. For this reason the writer believes that the holding evidences a logical application of prevalent forum policies, to the question of relative weights of contacts used in applying New York's conflicts of laws rule.

D. L. RAMPEY, JR.

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## CONSTITUTIONAL LAW—FREEDOM OF ASSEMBLY

A sixty-five year old citizen of the United States refused to answer a question on her Medicare application which made inquiry as to whether or not she was, or ever had been, a member of any organization required to register under the Internal Security Act of 1950.<sup>1</sup> Plaintiff seeks an injunction to prevent the government from making such inquiry on the basis that it is a violation of her constitutional right as provided in the first amendment.<sup>2</sup> The court granted plaintiff's prayer for a permanent injunction.<sup>3</sup>

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23. *Dym v. Gordon*, *supra* n. 7.

24. RESTATEMENT (SECOND), CONFLICT OF LAWS, §379(2), comment (b) at 6 (Tent. Draft No. 9, 1964). See generally, Weintraub, *An Inquiry Into the Utility of "Domicile" as a Concept in Conflicts Analysis*, 63 MICH. L. REV. 961 (1965).

25. *Dym v. Gordon*, *supra* n. 7.

1. 64 Stat. 987 (1950).

2. U.S. CONST. amend. I, cl. 3.

3. *Reed v. Gardner*, 261 F. Supp. 87 (C.D. Calif. 1966).

The United States Supreme Court, in *Barenblatt v. United States*,<sup>4</sup> held that Congress could investigate persons and interrogate witnesses as to whether or not they were members of the communist party. However, this case applied only in reference to a threat to overthrow the United States government. This, of course, represents the extreme situation and individual rights would give way to the immediate need for governmental security. As *State v. Levitt*<sup>5</sup> recognized, "[f]ree speech and assembly must yield in some instances to the more important right of self-preservation of a government against its overthrow by violence."<sup>6</sup> This would justify the observation that

. . . no right, constitutional, fundamental or otherwise, is absolute and unlimited in this society of ours—not even life and personal liberty—if we are to live with our neighbors. . . . Absolute and unlimited freedom in a society is only the reverse side of the coin of anarchy. No government of law and order would be possible under the doctrine of unlimited freedoms.<sup>7</sup>

Since the first amendment prevents the enforcement of laws abridging the right to peaceably assemble, the constitutional aspect of the medicare application is automatically brought into question. Even though the Constitution does not confer the right of assembly, it does guarantee its free exercise.<sup>8</sup> Therefore, if there is no threat of immediate overthrow of the United States, the government should be restrained from infringing upon the individual rights as protected by the United States Constitution.<sup>9</sup>

When a close question is involved relating to first amendment rights and their being a bar to government interrogations, resolution of the issue should always involve the balancing of the competing private and public interests which are at stake in the individual case.<sup>10</sup>

Even though most Americans would probably resist any advantage which our country might afford to the communists, if the members of that group come under the protection of the United States Constitution, they are and should be entitled to the same freedoms as non-communists who are protected by the Constitution.<sup>11</sup> In as much as the communists are attempting to undermine and destroy the very government which affords the freedoms they always claim and assert, there is a strong belief in some quarters that they should be denied the protection of these freedoms.<sup>12</sup>

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4. 360 U.S. 109 (1959).

5. 203 N.E.2d 821 (S. Ct. Ind. 1965).

6. *Id.* at 823.

7. *Id.* at 824.

8. 16 AM. JUR. CONSTITUTIONAL LAW §354 (1964). See also, 14 P.2d 667 (S. Ct. Wyo. 1932).

9. *Dennis v. United States*, 341 U.S. 494, (1951); *Yates v. United States*, 354 U.S. 298 (1957).

10. *Supra* n. 4.

11. *Ibid.* This provision is "the right of the people" and not merely the right of non-communists. See *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 379 U.S. 693 (1964).

12. See, *Communist Party of the United States of America v. Subversive Activities Control Board*, 367 U.S. 1 (1961).

To deprive even the communists of these fundamental freedoms, in the absence of emergency, would be to open the door ever so slightly to illegal encroachment upon the constitutional rights of others or other associations and when the winds of public opinion or for any other reason, even convenience, blow strong enough the restraining door of the Constitution would be blown ajar and persons of all circumstance would be threatened in their free exercise of their constitutional rights and the great freedoms imbued in the American Constitution would be reduced to ruin. A citizen's constitutional right, regardless of whether or not he is a communist, cannot be infringed because even a majority of all of the people choose that it be.<sup>13</sup>

It can be readily seen *a fortiori* that the reverse of this is true. When we extend the constitutional cloak of protection to those who are undesirable or thought to be undesirable, even though dangerous, then we, at the same instance, strengthen our constitutional rights and are more secure in our democratic society.

In the principal case, there was no evidence of an immediate attempt to overthrow the government. Therefore, the court was justified in holding that the plaintiff being forced to answer the question was a violation of her constitutional rights under the first amendment. It is this writer's conclusion that only in the most immediate, extreme or dangerous situations should a person's right to peaceably assemble be curtailed.

CHARLES L. DUNLAP

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## CONSTITUTIONAL LAW—INCORPORATION PROCESS—SIXTH AND FOURTEENTH AMENDMENTS

At the trial of defendant in a North Carolina state court on charges of criminal trespass, a nolle prosequi with leave was entered. The effect of this action was to permit defendant to go wherever he wanted, but the proceedings against him were not permanently terminated, the indictment was not discharged, and the statute of limitations was tolled indefinitely.<sup>1</sup> The North Carolina Supreme Court affirmed the action of the trial court,<sup>2</sup> but the United States Supreme Court reversed, holding that the fourteenth amendment makes the sixth amendment guarantee of a speedy trial applicable to actions in state courts and that the state court action in this case was a violation of that guarantee.<sup>3</sup>

As early as 1875 the Supreme Court faced the problem of whether the guarantees of the Bill of Rights were incorporated into the fourteenth

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13. *Supra* n. 1.

1. *Klopfer v. North Carolina*, 387 U.S. 988 (1967).

2. 226 N.C. 349, 149 S.E.2d 909 (1966).

3. *Supra* n. 1.

amendment due process clause.<sup>4</sup> In rejecting this idea the Court held that the seventh amendment guarantee of a jury trial in suits at common law did not apply to the states since it was not a "privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge."<sup>5</sup> Since that time the Court has held that the states cannot deny to any person the guarantees of the first amendment,<sup>6</sup> the fourth amendment,<sup>7</sup> the fifth amendment just compensation clause,<sup>8</sup> the fifth amendment privilege against self-incrimination,<sup>9</sup> the eighth amendment prohibition of cruel and unusual punishment,<sup>10</sup> the sixth amendment right to assistance of counsel,<sup>11</sup> and the sixth amendment right to confrontation of witnesses.<sup>12</sup>

Whether the states are precluded from denying these guarantees because the Bill of Rights was "incorporated" into the fourteenth amendment due process clause or because they are "consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions"<sup>13</sup> is an issue which has long plagued the Court. In *Twining v. New Jersey* the Court said that ". . . it is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. . . . If this is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law."<sup>14</sup> However, in *Klopfer v. North Carolina*, although it did not use the term "incorporate," the Court certainly implied a process of incorporation when it said that the state action "clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the *Sixth Amendment* of the Constitution of the United States."<sup>15</sup>

Although it might seem that this distinction is purely academic, this writer agrees with Justice Harlan in his concurring opinion in *Pointer v. Texas*<sup>16</sup> that the distinction is an important one. Under the "fundamental concept of due process" theory the states are allowed some freedom in choosing the methods by which the requirements of fundamental fairness are to be met. Under the "incorporation" theory, however, state procedures must meet all the requirements for the securing of these liberties in the federal judicial system, regardless of whether a particular require-

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4. *Walker v. Sauvinet*, 92 U.S. 90 (1875).

5. *Supra* n. 4 at 92.

6. *Gitlow v. New York*, 268 U.S. 652 (1925); *DeJonge v. Oregon*, 299 U.S. 353 (1957).

7. *Mapp v. Ohio*, 367 U.S. 643 (1961); noted, *MERCER L. REV.* 275 (1961).

8. *Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226 (1897).

9. *Malloy v. Hogan*, 378 U.S. 1 (1964).

10. *Robinson v. California*, 370 U.S. 660 (1962).

11. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

12. *Pointer v. Texas*, 380 U.S. 400 (1965).

13. *Buchalter v. New York*, 319 U.S. 427 at 429 (1943).

14. 211 U.S. 78 at 99 (1908).

15. *Supra* n. 1 at 993. (Emphasis added).

16. *Supra* n. 12 at 408.

ment is necessarily fundamental to the liberty which is to be protected. This is an encroachment upon the rights of the states to administer their own judicial systems, and only the Supreme Court can remedy it. This writer doubts that it will do so.

THOMAS C. SANDERS

## CONSTITUTIONAL LAW—PROPERTY RIGHTS— OUTDOOR ADVERTISING RESTRICTIONS

An equitable action was brought by a property owner and a lessee of his property against the Georgia State Highway Department<sup>1</sup> to enjoin the agents of this department from removing certain outdoor signs and billboards located on petitioner's property adjoining an Interstate Highway. In their attempt to remove these signs and billboards, respondents were acting in accordance with section 13 paragraph C of the 'Georgia Outdoor Advertising Control Act'<sup>2</sup> which was "enacted to effectuate the participation of the State of Georgia in the program established under the provisions of Title 23, United States Code, section 131,"<sup>3</sup> said title dealing with state participation<sup>4</sup> in the control of outdoor advertising along the Interstate Highway System.

In affirming the decision of the Superior Court of Fulton County, the Supreme Court of Georgia recognized the right of a landowner to advertise on his land, or to lease advertising rights as a legitimate and inherent property right, and any restriction of this right is a "taking" of his property for which he must be justly compensated. Therefore, the court declared this 1964 Act<sup>5</sup> unconstitutional in that it violates the provisions of the fifth<sup>6</sup> and fourteenth<sup>7</sup> amendments to the United States Constitution as well as the provisions set forth in article I, section 3, paragraph 1 of the Constitution of the State of Georgia<sup>8</sup> in that this Act<sup>9</sup> was an attempt, by the state, to "exercise its power of eminent domain without provision for the payment of just and adequate compensation."<sup>10</sup>

Congress has also recognized this right of a property owner to advertise on his property, or to lease this right, as a fundamental and basic property right and the restriction or regulation of such right as a "taking" of a

1. *State Hwy. Dept. v. Branch*, 222 Ga. 770, 152 S.E.2d 372 (1966).

2. GA. LAWS, 1964, p. 128; GA. CODE ANN. §95-20A (Supp. 1966).

3. *Id.* at 128, sec. 1, par. b.

4. 23 U.S.C. §131 (b) (1966).

5. *Supra* n. 2.

6. U. S. CONST. amend. V. ". . . [N] or shall private property be taken for public use, without just compensation."

7. U. S. CONST. amend. XIV. ". . . [N] or shall any state deprive any person of life, liberty, or property, without due process," and adequate compensation being first paid."

8. "[P]rivate property shall not be taken, or damaged, for public purposes, without just

9. *Supra* n. 2.

10. *Supra* n. 1 at 770, 152 S.E.2d at 373 (1966).

property interest by amending the federal statute<sup>11</sup>—in conformity to which the Georgia Act<sup>12</sup> was passed—so as to cause said statute<sup>13</sup> to provide that just compensation be paid for the removal of advertisements forbidden by this Act<sup>14</sup> and further provided for the federal government to pay seventy-five percent of such cost.<sup>15</sup>

It is therefore evident, by the decision in the principal case,<sup>16</sup> that the Georgia courts do not adhere to the theory that control and regulation of outdoor advertising alongside interstate highways constitutes a valid exercise of the police power of the state, in that such control is deemed necessary to protect the health, safety, and welfare of the general public. Whether or not there is a positive relationship between billboards appearing on a straight stretch of highway and highway safety, where the signs do not block the driver's view, is a debatable question on which there is a major difference in expert opinion.<sup>17</sup> In *Crawford v. City of Topeka*,<sup>18</sup> an early case dealing with billboard restrictions, the court discussed the question of the use of police power regarding billboard regulations as follows:

All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public, but a limitation without reason or necessity cannot be enforced. In what way can the erection of a safe structure for advertising purposes, near the front of a lot endanger public safety any more than a like structure for some other lawful purpose? . . . Although the police power is a broad one, it is not without limitations, and a secure structure, which is not an infringement upon the public safety, and is not a nuisance, cannot be made one by legislative fiat, and then prohibited.<sup>19</sup>

In accordance with the holding in the principal case,<sup>20</sup> the Georgia General Assembly in its 1967 session repealed the 1964 Act<sup>21</sup> and passed House Bill Number 474 which gives the Georgia State Highway Department the authority to exercise the power of eminent domain<sup>22</sup> and provides that just compensation be paid for the removal of advertising devices.<sup>23</sup>

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11. Federal-Aid Highway Act of 1958, 23 U.S.C. §101 (1966).

12. *Supra* n. 2.

13. *Supra* n. 11.

14. *Ibid.*

15. Highway Beautification Act of 1965, 23 U.S.C. §131 (g) (1966).

16. *Supra* n. 1.

17. See Biven & Cooper, *Recommendations Regarding Control of Outdoor Advertising Along the Interstate Highway System in Georgia*, 14 MER. L. REV. 308, 333 (1963).

18. 51 Kan. 756, 33 Pac. 476 (1893).

19. *Id.* at 757, 33 Pac. at 477 (1893).

20. *Supra* n. 1.

21. *Supra* n. 2.

22. House Bill No. 474 §9 (1967).

23. House Bill No. 474 §8 (d) (1967).

## CONSTITUTIONAL LAW—SEARCH AND SEIZURE PROVISIONS OF FOURTH AMENDMENT—ILLEGALLY OBTAINED EVIDENCE SHOULD BE EXCLUDED IN A CIVIL CASE

After plaintiff had been granted a divorce, defendant filed a motion for new trial on the ground of newly discovered evidence which consisted of letters illegally obtained by defendant from plaintiff's car. In overruling the motion for new trial, the court held that these letters were inadmissible under the search and seizure provisions of the fourth amendment of the United States Constitution.<sup>1</sup>

The court in the principal case based its decision on the reasoning of Justice Clark's opinion in the case of *Mapp v. Ohio*,<sup>2</sup> a criminal case, by emphasizing that the language employed therein apparently makes no distinction between a civil and criminal case. That is, the opinion states, without qualification, that evidence obtained in violation of the fourth amendment is inadmissible in a state court.<sup>3</sup> Thus, the significance of the holding in the instant case is the extension of the exclusionary rule, admittedly applicable to criminal cases, to a civil case.

Although the Supreme Court of the United States has not been confronted with the exact issue presented by the principal case, the Court decided an analogous issue in the case of *One 1958 Plymouth Sedan v. Pennsylvania*.<sup>4</sup> In that case, involving forfeiture proceedings, evidence illegally obtained by state officers was held inadmissible. Despite the fact that the Court referred to the forfeiture proceedings as quasi criminal in nature, the Court noted that it was a type of civil case.<sup>5</sup>

The only Georgia decision on this subject is contained in *Carson v. State*,<sup>6</sup> a case in which the state sought abatement of a public nuisance. Relying on the decisions in the *Mapp* and *Plymouth Sedan* cases as clearly establishing that evidence obtained through illegal searches and seizures should be excluded from a civil case, the court held inadmissible evidence obtained by illegal search warrants.<sup>7</sup> Virtually the same factual situation decided by the Georgia court was presented in an Alabama case,<sup>8</sup> which held the exclusionary rule of *Mapp* applicable to a civil case. The paucity of other state court decisions on this subject prevents the enunciation of a consensus regarding the admissibility of illegally obtained evidence in a civil case.

However, certain criteria can be suggested for an attorney arguing for the suppression of illegally obtained evidence in a civil case. Seemingly,

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1. *Williams v. Williams*, 8 Ohio Misc. 156, 221 N.E.2d 622 (1966).

2. 367 U.S. 643 (1961).

3. *Supra* n. 1 at 625.

4. 380 U.S. 693 (1965).

5. *Ibid.*

6. 221 Ga. 299, 144 S.E.2d 381 (1965).

7. *Id.* at 303.

8. *Carlisle v. State*, 276 Ala. 436, 163 So.2d 596 (1965).

his chances for a favorable ruling are enhanced if the proceeding embodies some criminal elements, such as penalties or charges of conduct which could be the subject of a criminal prosecution.<sup>9</sup> Another standard likely to be considered by the courts is whether government agents participated in the illegal search and seizure through which the evidence was obtained. Their presence would seem to strengthen the attorney's argument.<sup>10</sup>

Although the above two factors were missing in the principal case, it is submitted that the court's decision was sound because of the absence of any such limitations in the search and seizure provisions of the fourth amendment and in Justice Clark's opinion in the *Mapp* case.

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## CONSTITUTIONAL LAW—SIXTH AMENDMENT— CRIMINAL TAX PROSECUTION

Defendant in a criminal tax prosecution moved to suppress statements made during an interview with a special agent, on the ground that the failure to warn the defendant of his constitutional right to remain silent and to be represented by counsel was a violation of his sixth amendment rights as set forth in *Miranda v. Arizona*.<sup>1</sup> The U.S. District Court for the Northern District of Florida sustained the motion,<sup>2</sup> holding that:

. . . if this kind of warning is required Constitutionally for bank robbers, rapists, or arsonists, it seems to me that the taxpayer should have the same benefit, and I can see no possible way to distinguish in a criminal action that would subject one to possible confinement in an institution regardless of what the nature of the crime may be.<sup>3</sup>

The previous test of admissibility of evidence or statements obtained under similar circumstances had been the "voluntariness" test, as set forth in *United States v. Burdick*<sup>4</sup> and *United States v. Wheeler*.<sup>5</sup> The essence of this test is that:

. . . if a taxpayer freely consents to a tax examination of his records at the request of an internal revenue agent, as was done in this case, it is not to be concluded that his consent was enticed, induced, or rendered involuntary by the failure of the agent to

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9. Annot., 5 A.L.R. 3d 670, 673 (1965).

10. *Ibid.*

1. 384 U.S. 436 (1966).

2. *U.S. v. Kingry*, \_\_\_ F. Supp. \_\_\_, P-H 1967 Fed. Tax Serv. 19 Am. Fed. Tax R.2d 762 (D.C. Fla. 1967).

3. *Id.* at 765.

4. 214 F.2d 768 (3rd Cir. 1954).

5. 172 F. Supp. 278 (W. D. Pa. 1959); *aff'd* 275 F.2d 94 (3rd Cir. 1960).

divulge the purpose and the instructions of his superiors or to warn the taxpayer that he is suspected of criminality.<sup>6</sup>

The Court in *Miranda* held that "when an individual is taken into custody or deprived of his freedom in any way," he must be warned before any interrogation can be made that he has a right to remain silent and a right to have an attorney present, and that, if he cannot afford an attorney, one will be appointed for him if he so desires.<sup>7</sup> Though this holding has been widely applied in criminal trials, there is a split of authority as to its applicability in criminal tax prosecutions. Federal District Courts in Pennsylvania,<sup>8</sup> Wisconsin,<sup>9</sup> and California<sup>10</sup> have refused to apply the *Miranda* rules to criminal tax prosecutions. In one case, the court stated: "The language of *Miranda* makes it clear that there must be some form of detention, some type of in-custody situation before the proper constitutional warnings must be given."<sup>11</sup> The court in *United States v. Fiore*,<sup>12</sup> also a tax prosecution, expressly stated that: "We deem the holding in *Escobedo*, *Russo*, and *Miranda* inapplicable to investigations of this kind and find that 'voluntariness' remains the test of admissibility of evidence procured in these circumstances as held in the cases of *United States v. Burdick* and *United States v. Wheeler*."<sup>13</sup> However, in a similar case decided before *Miranda*, the Federal District Court of Arizona held that a suspect in a criminal tax investigation is entitled to be warned of his right to counsel at the time of a special agent's physical entry into the case.<sup>14</sup>

Before *Miranda*, the courts recognized the right to counsel in criminal tax prosecutions, but only to a limited extent. In *United States v. Venuto*,<sup>15</sup> the court held that by depriving the defendant in a criminal tax prosecution of the right to consult with his attorney during an 18 hour court recess, he was deprived of his sixth amendment right to have assistance of counsel. Where a defendant is not given a clear cut explanation of his right to counsel at the trial level, and he does not make a clear cut election, it has been held that his sixth amendment rights have been violated.<sup>16</sup> The courts would apply the sixth amendment right to counsel in a criminal tax prosecution only to insure the defendant adequate protection.<sup>17</sup>

6. *Id.* at 283. *Accord*, *Powers v. United States*, 223 U.S. 303 (1911); *Grant v. United States*, 282 F.2d 165 (2d Cir. 1960); *United States v. Wheeler*, *supra* n. 4; *United States v. Frank*, 245 F.2d 284 (3rd Cir. 1957); *Turner v. United States*, 222 F.2d 426 (4th Cir. 1955); *Voloutis v. United States*, 219 F.2d 782 (5th Cir. 1955); *Centrachio v. Garrity*, 198 F.2d 382 (1st Cir. 1952).

7. *Supra* n. 1 at 478-9.

8. *United States v. Fiore*, 258 F. Supp. 435 (W. D. Pa. 1966).

9. *Moon v. Brennan*, \_\_\_ F. Supp. \_\_\_, P-H 1967 Fed. Tax Serv. 19 Am. Fed. Tax R.2d 641 (E.D. Wis. 1966).

10. *United States v. Hill*, 260 F. Supp. 139 (S.D. Calif. 1966).

11. *Id.* at 142.

12. *Supra* n. 8.

13. *Id.* at 441. *Accord*, *Moon v. Brennan*, *supra* n. 9 at 642.

14. *United States v. Schoenburg*, \_\_\_ F. Supp. \_\_\_, P-H 1967 Fed. Tax Serv. 19 Am. Fed. Tax R.2d 347 (D.C. Ariz. 1966).

15. 182 F.2d 519 (3rd Cir. 1950).

16. *United States v. Curtiss*, 330 F.2d 278 (2d Cir. 1964).

17. *United States v. Koplin*, 227 F.2d 80 (7th Cir. 1955).

However, the pre-*Miranda* courts were unanimous in denying the right to constitutional warnings of the right to counsel and the right to remain silent at the investigatory level. Thus, voluntary disclosures obtained through fraudulent representations of the nature of the investigation have been held admissible.<sup>18</sup> It has also been held that by voluntarily turning books and records over to special agents, without being warned of his sixth amendment rights, a defendant waives his right to complain of illegality;<sup>19</sup> and that records turned over by a defendant after being read a demand letter stating that records must be made available to tax agents are admissible in a criminal tax prosecution.<sup>20</sup> In *Smith v. United States*<sup>21</sup> the defendant was questioned by a special agent after having been warned of his right to remain silent only. The court held that the sixth amendment right to counsel did not exist in such circumstances, stating that "The Sixth Amendment is specifically limited to 'criminal prosecutions.' . . . These investigations are of a fact-finding, non-adjudicative nature. . . . They are not judicial proceedings."<sup>22</sup>

The Supreme Court has yet to directly rule on this particular point. However, after the *Miranda* decision was handed down, the Court denied certiorari in *Kohatsu v. United States*.<sup>23</sup> The Ninth Circuit had upheld the conviction, distinguishing between crimes known to have been committed and those discovered in the course of a routine tax investigation, and stating that:

We find nothing in the Escobedo opinion or its 'philosophy' which would impose this duty [to warn a defendant of his right to remain silent] upon revenue agents during their investigation of a taxpayer's tax returns and statements. It is clear that all statements made and all documents delivered were voluntary acts of the appellant and were not induced by stealth, trickery or misrepresentation.<sup>24</sup>

It is interesting to note that Mr. Justice Douglas, who was part of the majority in *Miranda*, dissented from denial of certiorari in *Kohatsu*,<sup>25</sup> stating that he saw no conflict with *Miranda*, and would grant certiorari and affirm. This is perhaps an indication that the Supreme Court would not agree with the holding of the court in *United States v. Kingry*,<sup>26</sup> and that the *Miranda* rules should not be applied in criminal tax prosecutions.

NANCY POLATTY

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18. *Chieftain Pontiac Corp. v. Julian*, 209 F.2d 657 (1st Cir. 1954).

19. *Eggleton v. United States*, 227 F.2d 493 (6th Cir. 1955).

20. *Newman v. United States*, 277 F.2d 794 (5th Cir. 1960).

21. 250 F. Supp. 803 (D.C. N.J. 1966).

22. *Id.* at 806.

23. 384 U.S. 1011 (1966).

24. *Kohatsu v. United States*, 351 F.2d 898, 902 (9th Cir. 1965).

25. *Supra* n. 23.

26. *Supra* n. 2.

## CORPORATIONS—INSPECTION OF CORPORATE RECORDS—DISCRETION OF COURT IN DETERMINING PLACE OF INSPECTION

In a case of first impression in Louisiana, the Louisiana Court of Appeal affirmed the decision of the trial court and held that the court could require the president of a domestic corporation to deliver the corporate records to the office of a minority stockholder's attorney for photocopying.<sup>1</sup> A Louisiana statute required that the stockholder own the stock for a period of at least six months or hold at least five per cent of the total outstanding stock of the corporation.<sup>2</sup> It also required that the inspection be at a reasonable time and for a proper purpose but was silent as to the place of inspection. The court took note of the famous case of *G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*<sup>3</sup> which held that under ordinary circumstances, where there was no statutory designation of the place of the inspection, that it should take place where the records were kept. The court distinguished that case from the instant situation, and held that under extraordinary circumstances the court could require that the records be delivered to the office of the minority stockholder's attorney.

Statutes in other jurisdictions bear a marked similarity to the Louisiana statute. Stockholders under some statutes enjoy a qualified right of inspection, subject only to the requirement of ownership of a certain percentage of the outstanding shares of stock or ownership for a certain length of time, and to inspection at a reasonable time and for proper purpose.<sup>4</sup> Most other jurisdictions require only that the inspection take place at a reasonable time and for a proper purpose.<sup>5</sup> The latter type of statute is merely a codification of the common law.<sup>6</sup> About half of the states follow this common law rule.<sup>7</sup> Since Georgia has no statute on the subject,<sup>8</sup> it follows the common law rule.<sup>9</sup>

It is noteworthy that neither statutory law nor the common law mentions the place of inspection and there are no cases reported covering the subject. The ruling as to the place of inspection of corporate records by the Louisiana court seems sound. Thus it is the opinion of this writer that if the question arose either in Georgia, where the common law rule is in effect, or in any of the above statutory jurisdictions, the court could use its discretion in unusual circumstances to determine the place of inspection.

DAVID D. KLECKLEY

1. *Brandt Glass Co. v. The New Orleans Housing Mart*, 193 So.2d 321 (La. 1966).

2. LA. REV. STAT. tit. 12, §38 (1950).

3. 125 Ark. 65, 187 S.W. 1068 (1916).

4. Eg., WEST'S CAL. CODE ANN. §3003 (1963); ME. REV. STAT. Ch. 13, §373 (1964).

5. Eg., 15 PA. STAT. ANN. tit. 15, §2852-305 (1958).

6. *Doggett v. N. Am. Life Ins. Co.*, 396 Ill. 354, 71 N.E.2d 686 (1947).

7. NADLER, *GEORGIA CORPORATION LAW* 391 (1950).

8. *Ibid.*

9. See *G.G. & M. Co. v. Dixon*, 220 Ga. 329, 138 S.E.2d 662 (1964); *Winter v. So. Sec. Co.*, 155 Ga. 590, 118 S.E. 214 (1923).

## CRIMINAL LAW—PLEA OF INSANITY—DEFENDANT AS STATE'S WITNESS

The defendant was charged with the murder of his common law wife. At a special trial called to hear his plea of insanity, the state, over the objections of counsel, called the defendant as a witness, and he was adjudged sane by a special jury. On appeal, the Supreme Court of Georgia affirmed the lower court finding on the grounds that the special insanity trial was a civil proceeding, and thus according to Georgia law,<sup>1</sup> the defendant could be called by the plaintiff as a witness.<sup>2</sup> Since the GEORGIA CODE ANN. section dealing with the special trial states that the defendant would, upon being declared insane, be "delivered to the superintendent of the Milledgeville State Hospital,"<sup>3</sup> the court reasoned that this was not a criminal sanction, and therefore that the insanity proceeding was civil in nature.

In deciding what is a civil action and what is a criminal action, the courts have ruled in a variety of ways.<sup>4</sup> It has been stated generally that a civil action involves a proceeding ". . . by one person against another for the redress of a legal wrong or for the enforcement or *protection* of a private right or the redress or *prevention* of a private wrong."<sup>5</sup> A criminal action, on the other hand, has been described as ". . . an action by the sovereign<sup>6</sup> . . . against one charged with the commission of a criminal act for the enforcement of the *penalty* or *punishment* prescribed by law."<sup>7</sup> It has also been said that committing a person to an asylum is for the purpose of preventing him from harming himself or another, and is not punishment under the law.<sup>8</sup> It is thus apparent that a good argument can be made for the court's ruling that the insanity trial was a civil and not a criminal sanction.

It does not follow, however, that allowing the state to call the defendant as a witness in his own insanity trial, against his wishes, is as easily deduced. Georgia law permits the defendant to be cross examined by the plaintiff in civil cases.<sup>9</sup> But, the law also states that persons who do not have the use of reason and who do not understand the nature of an oath shall be incompetent witnesses.<sup>10</sup> In the decision of *Ray v. State*, the Geor-

1. GA. CODE ANN. §38-1801 (1954 Rev.).

2. *Bacon v. State*, 222 Ga. 151, 149 S.E.2d 111 (1966).

3. GA. CODE ANN. §27-1502 (1954 Rev.).

4. See generally 1 AM. JUR.2d *Actions* §44 (1962).

5. 1 AM. JUR.2d *Actions* §43 p. 576 (1962) [Emphasis added].

6. See *Harger v. Thomas*, 44 Pa. 128 (1862) for a discussion on the criminal nature of a proceeding being brought by an individual.

7. *Ex parte Tom Tong*, 108 U.S. 559 (1883); *State v. Harold*, 364 Mo. 1052, 271 S.W.2d 527 (1954) [Emphasis added].

8. *Bailey v. State*, 210 Ga. 52, 77 S.E.2d 511 (1953); *Shea v. Gehan*, 70 Ga. App. 229, 28 S.E.2d 181 (1943); *People v. Lamb* 118 N.Y.S. 389 (Sup. Ct. Westchester Co., 1909). See *Sikes, Acquittal of Persons Accused of Crime by Reason of Insanity 1952 Law Enacted by General Assembly*, 16 GA. BAR J. 344 (1953). See also WEIHOTEN, MENTAL DISORDER AS A CRIMINAL DEFENSE, 450-451 (1954).

9. *Supra* n. 1.

10. GA. CODE ANN. §38-1607 (1954 Rev.).

gia Court of Appeals held that a person who, among other things, did not know what she was doing in court was incompetent as a witness.<sup>11</sup> Moreover, if a person claims to be insane as in the principal case and avers that he cannot "understand the nature and object of the proceedings against him and does not rightly comprehend his own condition in reference to such proceedings,"<sup>12</sup> how can that person be allowed to be cross examined on the very matter which he asserts he is unable to understand?

Perhaps the solution to this circular argument may be found in the trend of recognizing that individuals may be partially sane, and partially insane.<sup>13</sup> In *Cuesta v. Goldsmith*<sup>14</sup> and *Conoway v. State*,<sup>15</sup> witnesses who had actually been adjudged insane, but who could understand the oath obligation and correctly expounded what they had seen or heard were ruled as competent, although the courts held that the jury could weigh their testimony as it pleased. It is also the rule in many states, and apparently now in Georgia, that insanity allegations in the pleading may not bar the plaintiff from testifying if the court so directs.<sup>16</sup>

The court's logic in the principal case appears to be founded upon good general rules of law, although it seems somewhat of an extraordinary deduction. This writer believes, however, that in view of the fact that an insanity trial is so closely related to criminal litigation, it would better serve justice to allow the defendant the choice of testifying or not testifying. It is worth noting that the principal case was one of first impression in Georgia, and that this question has been litigated in a very few instances in other jurisdictions.<sup>17</sup>

GUS H. SMALL, JR.

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## FEDERAL TAXATION—DEDUCTIONS FOR EXPENSES INCURRED IN PURSUIT OF BUSINESS WHILE AWAY FROM HOME UNDER SECTION 162 (A)—REJECTION OF THE COMMISSIONER'S OVERNIGHT RULE

Plaintiff-taxpayer, a grocery salesman, was required by his employer to travel extensively. The taxpayer traveled a designated route each day calling on specified customers and although coverage of the route con-

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11. 32 Ga. App. 513, 124 S.E. 57 (1924).

12. *Supra* n. 2 at 153, 149 S.E.2d at 113 (1966).

13. *Holler v. Dickey*, 157 Kan. 335, 139 P.2d 846 (1943); *State v. Simes*, 12 Idaho 310, 85 P. 914 (1906). See generally 58 AM. JUR. *Witnesses* §119 p. 93 (1948).

14. 1 Ga. App. 48, 57 S.E. 983 (1907).

15. 171 Ga. 782, 156 S.E. 664 (1931).

16. *Supra* n. 13. This rule was specifically stated for damage actions rather than insanity trials.

17. For a look at statutes which provide the same procedure in civil insanity inquisitions as in criminal insanity trials, see WYO. COMP. STAT. §§10-904, 51-301 (1954).

sumed substantially a full day the taxpayer was able to return home each evening. The taxpayer's employer required the taxpayer to eat breakfast and lunch at customer's restaurants so that the employer could reach him by telephone if necessary. The expenses incurred by the taxpayer for these meals were reimbursed by the employer. The Commissioner disallowed the taxpayer's deduction for these expenses and assessed a deficiency against the taxpayer. On suit for refund in the District Court for the Eastern District of Tennessee, a verdict was rendered against the government for the full amount of the refund plus interest. On appeal, the United States Court of Appeals, Sixth Circuit affirmed,<sup>1</sup> holding that the amount of expense incurred was deductible as an expense incurred in pursuit of business "while away from home." Moreover, the court expressly refused to apply the Commissioner's overnight rule<sup>2</sup> as a test for determining the deductibility of expenses incurred while away from home in pursuit of business.

The Tax Court has supported the Commissioner's view in a number of cases.<sup>3</sup> However, in a recent case, *Bagley v. Comm.*,<sup>4</sup> the Tax Court reconsidered its position in prior decisions and allowed a deduction for expenses incurred on business trips which did not last overnight.<sup>5</sup> The Tax Court, while expressly refusing to apply the overnight rule, stated that in the future each case should be viewed on its own facts.<sup>6</sup>

The decision in the principal case is in line with recent decisions in other circuits rejecting the overnight rule.<sup>7</sup> In *Hanson v. Comm'r*,<sup>8</sup> a deduction for the cost of meals was allowed even though the taxpayer returned home on the same day. The court, while rejecting the overnight rule as a test for deductibility, expressly held that the Commissioner could not amend the statute by inserting the word "overnight."<sup>9</sup>

Thus, it is clear that in the future the Commissioner's overnight rule will find rare application, if any, in either the Tax Court or the Circuit

1. *Correll v. United States*, 369 F.2d 87 (6th Cir. 1966).

2. The overnight rule as promulgated by the Commissioner is that if the nature of the taxpayer's employment is such that when away from home, it is reasonable to need and obtain sleep in order to meet the exigencies of employment, then the expenses incurred are deductible. See, *Williams v. Patterson*, 286 F.2d 333 (5th Cir. 1961). The Commissioner has for many years applied the "overnight rule" as the test of deductibility of expenses incurred for meals on business trips. For a discussion of the development of the rule see 4A Mertens, *LAW OF FEDERAL TAXATION* 345 (1967 Supp.). However, the word "overnight" first appeared in the 1958 regulations, See Reg. 1.162-17 (B) (3) (ii), 1.162-17 (b) (4) and 1.162-17 (C) (2).

3. *Armstrong v. Comm'r*, 44 T.C. 208 (1965); *Smith v. Comm'r*, 33 T.C. 861 (1960); *Winn v. Comm'r*, 32 T.C. 176 (1959).

4. 46 T.C. 176 (1966).

5. This case was overruled by the United States Court of Appeals for the First Circuit stating: "We believe that fairness to the greatest number of people, and at the same time a practical administrative approach which will not permit every meal-purchasing taxpayer to take pot luck in the courts, is to accept the commissioner's sleep or rest rule." See *Comm'r v. Bagley*, 19 Am. Fed. Tax R.2d 924 (1967).

6. *Supra* n. 4.

7. *United States v. Morlean*, 356 F.2d 199, 208-210 (1965); *Williams v. Patterson*, 286 F.2d 333 (5th Cir. 1961); *Chandler v. Comm'r*, 226 F.2d 467 (1st Cir. 1966); *Scott v. Kelm*, 110 F. Supp. 819 (D.C. Minn. 1953).

8. 298 F.2d 391 (8th Cir. 1962).

9. *Ibid.*

Courts of Appeal. However, some circuits can be expected to apply the rule whenever possible.<sup>10</sup> Therefore, it would seem that this conflict must ultimately be decided by the Supreme Court. When this conflict is placed before the Court, a final rejection of the rule can be expected because a logical interpretation of the statute will not allow any other result. The theory of the INT. REV. CODE OF 1954, section 162 (A) is that an expense incurred in pursuit of business should be deductible as a business expense.<sup>11</sup> The Commissioner's overnight rule has no relation to the business necessity of meal expense. Rather, application of the rule establishes a time element as the test for deductibility.<sup>12</sup> A time element is certainly not relevant to the question of whether expenses are related to the taxpayer's business and should not be the basis for deductibility under the present statute.

JERRY B. SMITH

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## PATENT LAW—VALIDITY OF PATENT— DUTY OF DETERMINATION

The plaintiffs, holders of two patents, brought an action against the defendant for alleged infringement. The defendant contended that the patents were invalid; but the District Court, ruling that there was no infringement, said that it was not necessary therefore to decide the issues of invalidity.<sup>1</sup> The court recognized that the better practice is for the trial judge to rule upon a matter of validity. However, it was indicated in the statement of the case that the validity of the patents in question had been established in a prior litigation between the same parties. An interesting question for consideration presented by this case is whether a federal court, in a patent infringement action, having ruled that there is no infringement, should nevertheless consider the issue of validity where such issue is presented by the alleged infringer.

In every patent suit there are two possible issues with which the court may be confronted. One of these issues concerns the validity of the patent in question, and the other involves a determination of whether or not there has been an infringement.<sup>2</sup> The section 35-281 of the United States Code provides that a patentee shall have remedy by civil action for infringement of his patent. The burden, however, rests upon the patentee-plaintiff to show that the defendant has made, used, or sold the patented invention and,

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10. *Supra* n. 5.

11. *Supra* n. 1.

12. *Supra* n. 7.

1. *Howell Tire Co. v. Gordy Tire Co.*, 249 F.Supp. 301 (N.D. Ga. 1965).

2. *Franklin v. Masonite Corp.*, 132 F.2d 800 (2d Cir. 1942); *Aero Spark Plug Co. v. B. G. Corp.*, 130 F.2d 290 (2d Cir. 1942); *Irvin v. Buick Motor Co.*, 88 F.2d 947 (8th Cir. 1937); *Avery v. Ever Ready Label Corp.*, 104 F.Supp. 913 (D. N.J. 1952).

if the testimony is of equal weight, the defendant must prevail.<sup>3</sup> If the patent in question is valid, then the burden is upon the plaintiff to establish its claim of infringement.<sup>4</sup>

Section 35-282 of the United States Code provides that a patent shall be presumed valid and the burden of establishing invalidity of such patent shall rest upon the party asserting it. Thus, where the defendant in a patent infringement action attacks the validity of the patent, the burden of proving invalidity rests upon him.<sup>5</sup> The presumption of validity attends the grant of a patent and the burden of persuasion of invalidity is on the putative infringer.<sup>6</sup> The requirement of proof to sustain the burden of establishing invalidity of a patent is heavy, and it must be clear and convincing evidence.<sup>7</sup> The defendant must prove invalidity beyond a reasonable doubt,<sup>8</sup> and every reasonable doubt will be resolved against him.<sup>9</sup> The issuance of the patent is presumptive evidence of invention and patentability, and the presumption is so strong that in the event of a reasonable doubt as to patentability or invention that doubt must be resolved in favor of the validity of the patent.<sup>10</sup> The presumption must be given due weight, but it cannot be allowed to stand in the face of definitely contrary facts.<sup>11</sup> The presumption of validity is rebuttable and not conclusive.<sup>12</sup>

There has been a tendency among the lower federal courts in infringement suits to dispose of them where possible on the ground of non-infringement without going into the question of validity of the patent.<sup>13</sup> It has come to be recognized, however, that of the two questions, validity is of greater public importance; and the better practice for district courts in their disposition of patent suits is to inquire fully into the validity of the patent.<sup>14</sup> Although a patent is presumably valid, such presumption does not relieve the court of the duty of inquiring as to its validity in an action for infringement.<sup>15</sup> There is no requirement that the court must first pass

3. *Kalo Inoculant Co. v. Funk Bros. Seed Co.*, 161 F.2d 981 (7th Cir. 1947), *rev'd on other grounds*, 333 U.S. 127 (1948).
4. *United States Rubber Co. v. General Tire and Rubber Co.*, 128 F.2d 104 (6th Cir. 1942); *Aluminum Co. of America v. Thompson Prods.*, 122 F.2d 796 (6th Cir. 1941); *Automotive Parts Co. v. Wisconsin Axle Co.*, 81 F.2d 125 (6th Cir. 1935); *Hughes v. Salem Co-operative Co.*, 134 F.Supp. 572 (W.D. Mich. 1955); *Midland Steel Prods. Co. v. Clark Equipment Co.*, 75 F.Supp. 143 (W.D. Mich. 1947).
5. *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 151 F.2d 91 (9th Cir. 1945); *Merry Mfg. Co. v. Burns Tool Co.*, 206 F.Supp. 53 (N.D. Ga. 1962).
6. *Murray Co. v. Continental Gin Co.*, 264 F.2d 65 (5th Cir. 1959); *Guiberson Corp. v. Equip. Eng'rs*, 252 F.2d 431 (5th Cir. 1958).
7. *Harloro, Inc. v. Owens-Corning Fibreglas Corp.*, 266 F.2d 918 (D.C. Cir. 1959); *Pierce v. Aeronautical Communications Equip.*, 255 F.2d 458 (5th Cir. 1958).
8. *Fairchild v. Poe*, 259 F.2d 329 (5th Cir. 1958).
9. *Long v. Arkansas Foundry Co.*, 247 F.2d 366 (8th Cir. 1957); *Cameron Iron Works v. Stekoll*, 242 F.2d 17 (5th Cir. 1957).
10. *Park-In Theaters v. Rogers*, 130 F.2d 745 (9th Cir. 1942).
11. *Crosley Corp. v. Westinghouse Elec. & Mfg. Co.*, 152 F.2d 895 (3rd Cir. 1945).
12. *Patterson-Ballagh Corp. v. Moss*, 201 F.2d 403 (9th Cir. 1953); *Spring-Air Co. v. Ragains*, 96 F.Supp. 79 (W.D. Mich. 1951).
13. *Sinclair Co. v. Interchemical Corp.*, 325 U.S. 327 (1945).
14. *Avery v. Ever Ready Label Corp.* *supra* n. 2.
15. *Continental Farm Equip. Co. v. Love Tractor*, 199 F.2d 202 (8th Cir. 1952); *Comiskey Eng'r Co. v. Joseph Beugeleisen Co.*, 216 F.Supp. 483 (E.D. Mich. 1962).

on the issue of infringement and, if it decides that there is no infringement, must refuse to decide that the patent is invalid.<sup>16</sup> Indeed, since the public is affected, there is much to be said for a decision in such a case as to the invalidity of the alleged patent monopoly (either alone or in conjunction with a decision of non-infringement) whenever the issue of invalidity is before the court and the evidence warrants such a decision.<sup>17</sup> A decision as to invalidity will tend to discourage suits against others based on that patent; and mere threats of patent suits, due to the expense of defending such litigation, may often prevent lawful competition which will be in the public interest.<sup>18</sup> The language of the many cases involving patent infringements would definitely seem to indicate that, although there is no mandatory duty on the federal courts to consider validity of a patent where no infringement has been found, the better practice is to do so.

PAUL L. GALIS

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## TORTS—CONTRIBUTORY NEGLIGENCE— FAILURE TO USE SEATBELTS

The Circuit Court, Duval County, Florida, would not permit defendant automobile owner to offer evidence of guest passenger's failure to use seat belts as constituting a defense to gross negligence on part of the driver of defendant's automobile. The District Court of Appeal affirmed by stating that there has been no legislation in Florida concerning the mandatory use of seat belts and it is not within the province of the courts to legislate such matters.<sup>1</sup>

A guest passenger's failure to use seat belts as constituting contributory negligence may be based on either the common law theory or the legislative intent theory. The principal case was decided on the latter theory. Since there are no Florida statutes pertaining to seat belt regulations the court assumed that failure to use such was not a negligent act. If the common law doctrine had been applied a different result may have been reached. The well established rule in Florida is that the defense of contributory negligence is available in automobile guest passenger's cases.<sup>2</sup>

It is settled law in Florida that in order for plaintiff's negligence to bar a recovery, his act or acts of negligence must have contributed proximately to the injury.<sup>3</sup> The conduct of a defendant is the proximate cause of the

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16. *Cover v. Schwartz*, 133 F.2d 541 (2d Cir. 1943).

17. *Ibid.*

18. *Ibid.*

1. *Brown v. Kendrick*, 192 So.2d 49 (Fla. 1966).

2. *Richardson v. Sams*, 166 So.2d 468 (Fla. 1964); *Henley v. Carter*, 63 So.2d 192 (Fla. 1953); F.S.A. §320.59 (1958).

3. *Kidd v. Cox*, 40 So.2d 454 (Fla. 1949); *Shayne v. Sauders*, 129 Fla. 355, 176 So.2d 495 (Fla. 1937).

injury if his acts of negligence contributed proximately to his injury. The Florida Courts hold that a negligent act on the part of the plaintiff is not a proximate contributing cause of the injury unless the injury could have been avoided in the absence of that act of negligence.<sup>4</sup> If it can be proven that no injuries, or only minor injuries, would have been received by plaintiff if he had buckled his seat belt the issue then arises: Does a guest passenger's failure to buckle his seat belt constitute a negligent act which an ordinary, reasonable, prudent man would have committed?

As the usefulness of the seat belt is brought to the public eye through various types of safety programs and as a result of the recent state and federal legislation on the subject of seat belts, it may well be, or soon become, the duty of the objective, ordinary, reasonable, prudent man to fasten his seat belt. In *Sam v. Sams*<sup>5</sup> the Supreme Court of South Carolina held that the defendant should be allowed to prove, if he can, that the failure of the plaintiff to use a seat belt, under the facts and circumstances of the case, amounted to a failure to exercise such due care as a person of ordinary reason and prudence would have exercised under the same circumstances and that such a failure constituted a contributing proximate cause of plaintiff's injuries.

It is as well established in Georgia as in Florida that a guest passenger's contributory negligence can constitute a bar to any recovery for personal injuries he may receive from the defendant's gross negligence in the operation of a motor vehicle.<sup>6</sup> There are no Georgia cases directly in point but it should stand to reason that if one's failure to fasten his seat belt constitutes negligence, he should be held for contributory negligence in an action for personal injuries against a grossly negligent driver.

If a Georgia case arose in which the defendant alleged that plaintiff's failure to fasten his seat belt constituted contributory negligence the defense could be based on either of the above mentioned theories. The GA. CODE ANN. provides that "no new private passenger automobile shall be sold to the general public in this State unless said automobile shall be equipped with two sets of safety belts for the front seat thereof."<sup>7</sup> Defendant could contend that since Georgia has enacted a statute requiring seat belts in all new cars the legislature also intended that they be used while driving and a failure to do so constitutes contributory negligence.

Under the common law theory the defendant could contend that plaintiff's failure to use his seat belt constituted contributory negligence because the ordinary, reasonable man it is assumed, would act in accordance with public warnings received through various news media to "Buckle-Up for Safety." Under Georgia law if it can be determined that use of a seat belt

4. *Kulm v. Telford*, 115 So.2d 36 (Fla. 1959); *Bessett v. Hackett*, 66 So.2d 694 (Fla. 1953).

5. 148 So.2d 154 (Fla. 1966).

6. *Holland v. Boyett*, 93 Ga. App. 497, 92 S.E.2d 222 (1956).

7. GA. CODE ANN. §68-1801 (Supp. 1963).

would have partially reduced injuries actually received by plaintiff, his damages should be mitigated accordingly but his entire remedy should not be barred.<sup>8</sup>

WILLIAM S. PERRY

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## TRUSTS—PURCHASE MONEY RESULTING TRUSTS— EVIDENCE TO REBUT PRESUMPTION OF GIFT

The defendant purchased a thirty-five acre tract of land with his money and had the title placed in the plaintiff's name. He continued to manage, improve, and pay taxes thereon. Subsequently, his wife, the plaintiff, filed a divorce suit and was awarded the residence and the parcel upon which it was located free and clear of any encumbrances. The husband was held to own the remainder of the 35 acre tract which he had purchased and which included the residential parcel. The wife's motions for a directed verdict and for a judgment notwithstanding the verdict and for a new trial were denied; she appealed contending that there was no evidence which rebutted the presumption of a gift made to her by her husband of the entire tract of 35 acres. The husband, on the other hand, contends that it was not a donor-donee relationship that existed, but instead, it was a trustee-cestuique trust relationship with his wife holding as trustee for him. Held: Affirmed.<sup>1</sup>

It has long been held in Georgia that as between husband and wife, the payment of the purchase money by the husband and the taking of the title in the name of the wife suggests an intention on the part of the husband to make a gift to the wife.<sup>2</sup> This has been provided for by statute in Georgia.<sup>3</sup> It is also provided that this does not prevent a resulting trust.<sup>4</sup> Parol evidence about the nature of the transaction, the circumstances, the conduct of the parties are all properly admissible to rebut the presumption of a gift,<sup>5</sup> but such proof must be clear and convincing in order to rebut the gift presumption.<sup>6</sup> The main disagreement between the majority opinion and the dissenting opinion in this case was whether or not subsequent conduct of the parties could be used to rebut the gift presumption. Cases in Georgia and in other jurisdictions have held that subsequent conduct of the parties as to the property involved can be used as proof of an in-

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8. GA. CODE ANN. §105-603 (1956 Rev.)

1. Ashbaugh v. Ashbaugh, 222 Ga. 811, 152 S.E.2d 888 (1967).

2. Printup v. Patton, 91 Ga. 422, 18 S.E. 311 (1893).

3. GA. CODE ANN. §108-116 (1959).

4. *Ibid.*

5. Clark v. Griffon, 207 Ga. 255, 61 S.E.2d 128 (1950); Jackson v. Jackson, 150 Ga. 544, 104 S.E. 236 (1920).

6. Cain v. Varnadore, 171 Ga. 497, 498, 156 S.E. 216 (1930); Jackson v. Jackson, *supra* n. 5.

7. Gould v. Glass, 120 Ga. 50, 47 S.E. 505 (1904); Scanlon v. Scanlon, 6 Ill.2d 224, 127 N.E.2d 435 (1955); Elrod v. Cochran, 59 S.C. 467, 38 S.E. 122 (1901); Clary v. Spain, 119 Va. 58, 89 S.E. 130 (1916).

tention that existed at the time of the transaction.<sup>7</sup> So it would seem that the majority was correct in allowing the husband's testimony as to his and his wife's subsequent conduct regarding the property because there is no proof of any intention that existed at the time of the transaction. Since there is no proof of intention at that time, this subsequent conduct is not prevented from cutting down the gift presumption.<sup>8</sup> Here the husband introduced proof that he had spent his money not only on the purchase price but also for improvements and taxes subsequent to the taking of the title in his wife's name. Further, the husband showed that the wife had nothing to do with the management of the property except to sign papers put in front of her by him since the title was in her name. The husband did the work and paid the cash. Proof of this behavior is admissible, and it is sufficient to rebut the presumption of a gift of the tract from the husband to the wife.<sup>9</sup> Once the presumption is rebutted, the parties stand on the same footing as if they were strangers.<sup>10</sup> If they were strangers, there would be an implied trust with the donee-wife as trustee for the donor-husband.<sup>11</sup>

Therefore, the decision sets no new precedent but merely reaffirms existing Georgia law that has been declared sound not only by Georgia courts, but also by many other states that have similar presumptions in their law.

THOMAS L. KIRBO, III

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## TORTS—NEGLIGENCE—NATURAL GAS DISTRIBUTOR'S DUTY TO ODORIZE NATURAL GAS

The plaintiff and a fellow workman were engaged in connecting gas lines to appliances and as part of the job it was necessary to bleed the air out of the gas lines. The defendant gas distributor knew that workmen frequently relied on their sense of smell to detect escaping gas and it had been established custom of the gas distributor to mix an odorizing chemical with the gas. While the plaintiff was awaiting an odor indicating the appearance of gas, the building filled with unodorized gas and subsequently exploded causing injury to the plaintiff. The plaintiff asserted that the proximate cause of the explosion was the negligence of the defendant in failing to odorize the gas. The defendant in his demurrer stated that the complaint failed to allege any facts sufficient in law to show that the defendant breached a duty owing to the plaintiff. *Held*, a cause of action was stated. The practice of odorizing natural gas is encompassed within the

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8. *Williams v. Thomas*, 200 Ga. 767, 774, 38 S.E.2d 603 (1946).

9. *Gould v. Glass*, 120 Ga. 50, 47 S.E. 505 (1904).

10. *Thomas v. Thomas*, 79 N.J. Eq. 461, 81 Atl. 748 (1911)

11. GA. CODE ANN. §108-106 (1959).

duty of distributors to exercise reasonable care in the distribution of natural gas.<sup>1</sup>

In the instant case the Indiana court finds an analogy with the situation where a railroad maintains a flagman at a crossing although not required by statute to do so.<sup>2</sup> Even if at first there was no duty on the part of the gas distributor to odorize natural gas, the gas company could be held liable under the principle of affirmative conduct.<sup>3</sup> A person who is familiar with the custom of a railroad to close the gates of its crossing when a train is coming may rely upon the open gates as an indication that no train is coming and he may cross safely.<sup>4</sup> The Indiana court cites *Nelson v. Union Wire Rope Corp.*<sup>5</sup> also as authority that liability may arise from negligent performance of a voluntary undertaking. A number of other railroad cases hold likewise.<sup>6</sup>

Although the principal case was the first Indiana case holding that a distributor of natural gas is under a duty to odorize natural gas, other jurisdictions have ruled on the problem. The United States Court of Appeals, Fifth Circuit stated in *The City of Villa Rica v. Couch*:<sup>7</sup>

"Because of the dangers from the escape of natural gas and the fact that in its natural state it has no betraying odor, odorization before distribution to consumers is proper and indeed necessary."<sup>8</sup>

Similarly the Idaho court in *Doxstater v. Northwest Cities Gas Co.*<sup>9</sup> stated that where butane gas without an odor was not perceptible by smell the company furnishing the gas had a duty to supply an odorant. A court in Missouri has presented substantially the same holding with reference to propane gas being used in gas hot water heaters.<sup>10</sup>

It is difficult to comprehend the situation if gas distributors were not required in the exercise of due care to odorize natural gas. Relatively few people realize that in its natural state butane and propane are without odor. Consequently many persons could conceivably be in a deadly atmosphere, saturated with natural gas, and not be aware of its presence.

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1. *Roberts v. Ind. Gas and Water Co.*, 218 N.E.2d 556 (Ind. 1966), *aff'd on rehearing* 221 N.E.2d 693.

2. 221 N.E.2d at 695.

3. *Id.*

4. *Greenfield v. Terminal R. Ass'n of St. Louis*, 289 Ill. App. 147, 6 N.E.2d 888 (1937).

5. 31 Ill.2d 69, 199 N.E.2d 769 (1964).

6. *Will v. So. Pac. Co.*, 18 Cal2d 468, 116 P.2d 44 (1944); *Westaway v. Chicago St. P., M. & O. R. R.*, 56 Minn. 28, 57 N.W. 222 (1893); *Burns v. No. Chicago Rolling Mill Co.*, 65 Wisc. 312, 27 N.W. 43 (1886); see PROSSER, *LAW OF TORTS* §54 p. 342 (3d ed. 1964).

7. *City of Villa Rica v. Couch*, 281 F.2d 284 (5th Cir. 1960). (Odorization accomplished by using a device known as a "Peerless Odorizer" which mixes a sulfur based chemical known as "mercaptan" with an unodorized gas to produce an olfactory reaction).

8. *Id.*

9. 65 Idaho 814, 154 P.2d 498 (1944).

10. *Winkler v. Macon Gas Co.*, 361 Mo. 1017, 238 S.W.2d 386 (1951).

## TORTS—NEGLIGENCE—RES IPSA LOQUITUR

Plaintiff, paralyzed vocally and on the right side, was hospitalized for a heart condition. Upon his admission as a paying patient, the hospital was notified of his paralyzed condition and that he could not safely be left alone while smoking his pipe in bed. The nurses were instructed accordingly. The plaintiff received injuries as a result of a hospital bed fire and sought recovery through the application of the doctrine of *res ipsa loquitur*. The Superior Court rendered judgment for the plaintiff and the Court of Appeals of Georgia affirmed. The Supreme Court of Georgia reversed, holding that the evidence was insufficient to apply the doctrine of *res ipsa loquitur*.<sup>1</sup> Following the criterion established in *Miller v. Gerber Prods. Co.*<sup>2</sup> the court stated that plaintiff's claim was predicted upon a pyramiding of inferences: (1) that the pipe set the bed afire; (2) that a hospital attendant lit the pipe and left the plaintiff unattended while smoking it; and (3) that the pipe fell from his mouth as a result of his condition. Furthermore, the court regarded these inferences as too uncertain and speculative to raise a presumption of negligence on the part of the defendant-hospital.

The doctrine of *res ipsa loquitur* has as its basis GA. CODE ANN. section 38-123,<sup>3</sup> which provides that in arriving at a verdict, the jury, from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved. This statutory provision was further defined in the leading Georgia case on *res ipsa loquitur*, *Chenall v. Palmer Brick Co.*<sup>4</sup> In *Chenall*, the court laid down the criterion for the application of *res ipsa loquitur* stating that all the plaintiff should be required to do is to show that the defendant owned, operated, maintained, or controlled, and was responsible for, the management and maintainance of the thing doing the damage. They further stated, however, that the accident must be of a kind which, in the absence of proof of some external cause, does not ordinarily happen without negligence. The court in *Hotel Dempsey v. Teel*<sup>5</sup> applied this doctrine by permitting an inference of negligence against a defendant when it was shown that the offending instrument was wholly within his control; that neither the plaintiff nor anyone else had meddled with it; and that the occurrence was such as would not ordinarily happen without negligence. Although the above rules seem firmly set in the case law of Georgia, there is apparently no precise rule or standard by which the issue of the application vel non of *res ipsa loquitur* can be isolated and resolved. The specific

1. *Hosp. Authority of St. Mary's v. Eason*, 113 Ga. App. 401, 148 S.E.2d, 499 *rev'd*, 222 Ga. 536, 150 S.E.2d 812 (1966).

2. 207 Ga. 385, 62 S.E.2d 174 (1950). Anno., 52 A.L.R.2d 155 (1957).

3. See generally GA. CODE ANN. 38-123 (1954 Rev.).

4. 117 Ga. 106, 43 S.E. 443 (1903). See 9 WIGMORE, EVIDENCE §2509 (3d ed. 1940). See generally, 14 MER. L. REV. 427 (1962).

5. 128 F.2d 673 (5th Cir. 1943); *Blanton v. Great Atl. & Pac. Tea Co.*, 61 F.2d 427 (5th Cir. 1932); See *Green*, THE GA. LAW ON EVIDENCE, 39 (1957).

requirements for the factual application of the doctrine therefore remain essentially a matter of judicial guesswork. This unsettled status of the law—coupled with the narrowly limited area wherein the doctrine is applicable necessarily limits and curtails its proper use.<sup>6</sup>

Assuming that the courts of Georgia have very few guides, if any, to follow except the general ones briefly outlined above, still, this should not hinder their application of the law. It would seem that if the principle case involves *res ipsa loquitur* it would necessarily have to be decided in the light of previous cases involving similar circumstances. With this in mind the Georgia law relating to hospital liability in negligence cases must be examined briefly. In this respect, *Emory Univ. v. Shadburn* appears to have a direct bearing.<sup>7</sup> In that case it was recognized that a private hospital in which patients are placed for treatment by their physicians and which undertakes to care for the patients and supervise them is under a duty to exercise such reasonable care in looking after and protecting a patient as the patient's condition which is known to the hospital may require. This duty extends to the use of ordinary and reasonable care to protect the patient from any known or reasonably apprehended danger from himself which may be due to his condition.<sup>8</sup>

Generally, the mere occurrence of a fire with resultant injuries does not raise a presumption of negligence, and the doctrine of *res ipsa loquitur* is ordinarily held inapplicable, at least in other than exceptional instances.<sup>9</sup> However, the principle case is one in which *res ipsa loquitur* should have been applied. It was shown that the fire did occur, and that the defendant did have control of the pipe. Also, there was no evidence that anyone besides the defendant had been into the plaintiff's room before the fire occurred. It is from these facts that the defendant's negligence might be reasonably and logically inferred. Furthermore, there is the additional fact that the fire occurred in a hospital, which, at the time of the injury, was under a duty to protect the patient from foreseeable injuries which might result from his condition. This certainly gives support to the contention that this case is an exceptional instance, in which *res ipsa loquitur* can be applied to explain the occurrence of a fire.

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6. *Harrison v. Southeastern Fair Assoc.*, 104 Ga. App. 596, 122 S.E.2d 330 (1961).

7. 47 Ga. App. 643, 171 S.E. 192 (1932), *aff'd* 180 Ga. 595, 178 S.E. 436 (1935).

8. *Hosp. Authority of Hall Co. v. Adams*, 110 Ga. App. 848, 140 S.E.2d 139 (1964); *Starr v. Emory Univ.*, 93 Ga. App. 864, 93 S.E.2d 399 (1956); *Adams v. Ricks* 91 Ga. App. 494, 86 S.E.2d 329 (1955).

9. 65A C.J.S. *Negligence* §220.25 (1966).

## TORTS—NEGLIGENCE—STANDARD OF CARE FOR MINOR OPERATING MOTOR VEHICLE

Plaintiff, a minor aged fourteen, was operating a motor bike which collided with an automobile owned and operated by the defendant. Plaintiff and his father brought an action against the defendant in which the trial judge was requested to instruct the jury that the standard of care chargeable to a minor is that degree of care ordinarily exercised by one of the same age, discretion, knowledge, and experience under the same or similar circumstances. The trial judge refused the plaintiff's special request for instruction, and instructed the jury that a minor is chargeable with the same degree of care as an adult when engaged in the operation of a motor vehicle upon the public roads and highways. From a verdict and judgment for the defendant, plaintiffs appeal. *Held*, affirmed.<sup>1</sup>

The issue determined by the Supreme Court of Tennessee in the principal case was one of first impression in that state.<sup>2</sup> The majority's decision was founded upon public policy and based on an interpretation of the state licensing statute as setting out a uniform standard of care for all operators of motor vehicles on the public roads and highways.<sup>3</sup> In Justice Creson's dissenting opinion he points out that the licensing statute in question fails to mention the word "care" in any place.<sup>4</sup> The statute requires only that the applicant for a license shall demonstrate his ability to exercise ordinary and reasonable control in the operation of a motor vehicle.<sup>5</sup> A number of courts have held that statutes making no specific exception regarding minor operators were intended to require an adult standard of care.<sup>6</sup> A majority of the courts throughout the country, however, continue to make allowance for the immaturity of minor operators.<sup>7</sup> One of the most convincingly reasoned of these cases is that of *Charbonneau v. MacRury*<sup>8</sup> in which it was held that the standard for judging a minor operator's conduct should be that of the average conduct of persons of his age and experience. The standard applied in the *Charbonneau* case is essentially the same as that approved by the RESTATEMENT writers who interject intelligence as an additional determinant of the subjective standard.<sup>9</sup> Georgia follows this same general formula in determining the applicable degree of care with which to charge a minor under varying circumstances, but the Georgia courts have preferred to substitute capacity for either intelligence or experience on

1. *Powell v. Hartford Acc. and Indem. Co.* — Tenn. —, 398 S.W.2d 727 (1966).

2. *Id.* at —, 398 S.W.2d at 729.

3. *Id.* at —, 398 S.W.2d at 732.

4. *Id.* at —, 398 S.W.2d at 735.

5. TENN. CODE ANN. §59-707 (1956).

6. *Harrelson v. Whitehead*, 236 Ark. 310, 365 S.W.2d 886 (1963); *Betzold v. Erickson*, 35 Ill. App. 2d 203, 182 N.E.2d 342 (1962); *Wilson v. Shumate*, 296 S.W.2d 72 (Mo. 1965); *Karr v. McNeil*, 92 Ohio App. 458, 110 N.E.2d 714 (1952).

7. PROSSER, TORTS 159 (3d ed. 1964).

8. 84 N.H. 501, 153 A. 457 (1931); Annot., 73 A.L.R. 1266 (1931).

9. RESTATEMENT (SECOND), TORTS §283A (1965).

occasion.<sup>10</sup> In cases involving minor operators of motor scooters, motorcycles, and the like it is impossible to generalize in regard to the prevailing attitude of the courts throughout the nation on the question of the appropriate standard of care with which to charge such minor operators. Some courts hold the minor operator to the same standard of care as an adult.<sup>11</sup> Other courts follow the general rule of the majority and apply a subjective standard based on the minor's age, intelligence, and experience.<sup>12</sup> The Georgia courts hold that a minor operator of a motor scooter above the age of fourteen is presumptively chargeable with the same standard or degree of care for his own safety as an adult and the burden of rebutting this presumption lies upon the minor plaintiff through the introduction of evidence regarding his intelligence and capacity.<sup>13</sup>

In the principal case the minor operator was held to an adult standard of care based on the court's construction of the legislative intent embodied in the provisions of the state licensing act. It appears that no reference is made within the statute to an express standard of care for operators of motor vehicles on the roads and highways of the state whether minors or adults. The approach taken by many of the courts appears to be the sounder view, its appeal being found in the quality of subjectivity afforded by the use of such factors as age, intelligence, experience, or capacity as means for a jury to determine the appropriate degree of care with which an individual minor is chargeable under varying factual situations. The jury is fully qualified to make such subjective determinations of a minor's capacity to exercise care in regard to his own safety and that of others in varying situations based on these determinants. The talesmen are universally endowed with a bond of mutual knowledge and experience regarding the capacities attending the period of minority as they have passed through that same period of development and maturation themselves.

PETER J. RICE, JR.

## TORTS—RIGHT OF PRIVACY—NEW TEST FOR ELEMENTS OF THE TORT

The plaintiff, an "exotic dancer," alleged an invasion of privacy by defendants magazine publisher and private club for publication, without her knowledge or consent, of her photograph in an advertisement captioned by a stage name she had never used and billed as appearing at a club she had

10. *Heath v. Charleston & W. C. Ry.*, 218 Ga. 786, 130 S.E.2d 712 (1963); *Braswell v. Smith*, 27 Ga. 623, 110 S.E. 415 (1921); *Brewer v. Gittings*, 102 Ga. App. 367, 116 S.E.2d 500 (1960).

11. *Harrelson v. Whitehead* 236 Ark. 310, 365 S.W.2d 868 (1963); *Ryan v. C. & D. Motor Delivery Co.*, Ill. App.2d 18, 186 N.E.2d 156 (1962); *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 589 (1961).

12. *McCain v. Bankers Life & Cas. Co.*, 110 So.2d 718 (Fla. App. 1959), Annot., 68 A.L.R.2d 1194 (1959); *Ackerman v. Advance Petroleum Transp.*, 308 Mich. 96, 7 N.W.2d 235 (1942); *Bear v. Auguy*, 164 Neb. 756, 83 N.W.2d 559 (1957).

13. *Sheetz v. Welch*, 89 Ga. App. 749, 81 S.E.2d 319 (1954). See also GA. CODE ANN. §105-204 (1956).

never played. In fact there was another female dancing at the club under that name. The trial court found for plaintiff against both defendants. On appeal the Georgia Court of Appeals, *held*,<sup>1</sup> reversed in part, new trial granted in part. The evidence did not sustain a verdict for plaintiff under the test developed by this court.

The first reference to an independent and separate cause of action for an invasion of a right of privacy is generally conceded to be an article written in 1890 by Samuel D. Warren and Louis D. Brandeis.<sup>2</sup> But, judicial acceptance of the existence of this right as an independent right, did not come until 1905, when in *Pavesich v. New England Life Ins. Co.*,<sup>3</sup> the court said:

The punishment of one who had not committed any assault upon another . . . but who merely attracted public attention to the other evidences the fact that the ancient law recognized that a person had a legal right 'to be let alone,' so long as he was not interfering with the rights of other individuals or of the public. This idea has been carried into the common law . . . .<sup>4</sup>

Thus, Georgia became a leader in recognition of the right, and recent decisions have confirmed the existence of the right as a separate and independent cause of action.<sup>5</sup>

However, in the case sub judice, the court adopted as a starting point for deliberation, an analysis of cases by Dean Prosser which conclude that invasion of privacy is in reality a complex of four loosely related torts: (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) Public disclosure of embarrassing private facts about the plaintiff; (3) Publicity which places the plaintiff in a false light in the public eye; (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.<sup>6</sup> It thus appears that Georgia is repudiating the separate and independent right theory in their acceptance of Dean Prosser's four-torts-under-one-name approach.<sup>7</sup>

Under intrusion, Dean Prosser states that the interest protected is primarily a mental one.<sup>8</sup> However, in the general tort law, an action for in-

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1. *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496 (1966).

2. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

3. 122 Ga. 190, 50 S.E. 68 (1905). In *Robinson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), the existence of the right and the Warren and Brandeis article were rejected. Much of the *Pavesich* decision affirming the right was taken from the dissent by Judge Gray, 122 Ga. 190 at 213, 50 S.E. 68 at 78.

4. 122 Ga. 190 at 197, 50 S.E. 68 at 71.

5. *Colgate-Palmolive Co. v. Tullos*, 219 F.2d 617 (5th Cir. 1955); *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930); *Walker v. Whittle*, 83 Ga. App. 445, 64 S.E.2d 87 (1951); *Davis v. Gen. Fin. & Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950); *McDonald v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939); *Goodyear Tire & Rubber Co. v. Vandergeriff*, 52 Ga. App. 662, 184 S.E. 452 (1936).

6. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

7. *Supra* n. 5. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964).

8. *Supra* n. 6 at 392.

tionally inflicting emotional distress requires that the harm be attested by an "impact."<sup>9</sup> But in Georgia, special damages for invasion of privacy are not required.<sup>10</sup> In *Ford Motor Co. v. Williams*,<sup>11</sup> an action for invasion of the right of privacy was affirmed even though there was no one at home at the time of the invasion, making mental distress difficult to prove if such is the requirement. The court, in *Cabaniss v. Hipsley*,<sup>12</sup> cites three cases under the heading of intrusion that were previously recognized for affirming the separate and independent tort theory.<sup>13</sup> It seems then, that intrusion has not heretofore been an element of invasion of privacy.

Dean Prosser contends that disclosure and false light are in reality an extension of defamation into the field of publication, with the elimination of truth as a defense,<sup>14</sup> and that there must be publicity.<sup>15</sup> Dean Prosser concludes that, ultimately, it is a "mores" test determination—what the public will and will not tolerate.<sup>16</sup> By acceptance of Dean Prosser's analysis, the Georgia Court of Appeals apparently agrees that the right is an extension of defamation and that there must be publication of private facts. But the cases of *McDonald v. Coca-Cola Bottling Co.*,<sup>17</sup> and *Davis v. Gen. Fin. & Thrift Corp.*,<sup>18</sup> hold that publication is not necessary and repudiate specifically the contention that privacy is a branch of the law of defamation. The fallacy of the "mores" test is shown by contrasting *Melvin v. Reid*,<sup>19</sup> where a motion picture revealed a respected member of the community as a former prostitute, and resulted in a finding of invasion of privacy, with *Sidis v. F-R Publishing Corp.*,<sup>20</sup> where a former child prodigy's descent into obscurity was published in a not unsympathetic account in a national magazine, and no liability for invasion of privacy was found. Dean Prosser states that as to the *Melvin* case there was an invasion that the public would not tolerate, but as to the *Sidis* case there was nothing in the article that would be objectionable to a normal person.<sup>21</sup> The court in the case at hand stresses the fact that the plaintiff was not upset by the publication of this particular picture, but only by the use made of it in advertising another dancer. The court therefore concludes that plaintiff's privacy was not invaded. The error in this proposition is plain. The right being protected is the right not to be subjected to undesired publicity, not

9. PROSSER, LAW OF TORTS, §55 at 349 (3rd ed. 1964).

10. *Young v. W. & A.R. Co.*, 39 Ga. App. 761, 148 S.E. 44 (1929); see also, *supra* n. 7 at 972.

11. 108 Ga. App. 21, 132 S.E.2d 206 (1963), *rev'd on other grounds*, 219 Ga. 505, 134 S.E.2d 32 (1963).

12. *Supra* n. 1.

13. *Ford Motor Co. v. Williams*, *supra* n. 11; *Walker v. Whittle*, *McDonald v. Coca-Cola Bottling Co.*, *supra* n. 5.

14. *Supra* n. 6 at 398, 400.

15. *Id.* at 393.

16. *Id.* at 397, 400.

17. *Supra* n. 5.

18. *Supra* n. 5.

19. 112 Cal. App. 285, 297 Pac. 91 (1931).

20. 113 F.2d 806 (2d Cir. 1940), *affirming* 34 F.Supp. 19 (S.D.N.Y. 1938).

21. *Supra* n. 6 at 397.

just that which is unflattering.<sup>22</sup> The right of privacy exists not only “. . . to prevent inaccurate portrayals of private life, but to prevent its being depicted at all.”<sup>23</sup>

As for the necessity of a commercial appropriation deemed necessary by Dean Prosser<sup>24</sup> and the court here, Georgia repudiated this contention as early as 1939.<sup>25</sup>

In conclusion, it would appear that Georgia has either repudiated the separate and independent right of privacy theory, or has given an unfortunate impression of having done so. The right to be protected has nothing to do with intrusion, defamation or property interests, but concerns human dignity. “. . . [T]he invasion of the right of privacy is made actionable because it outrages a person's own feelings and sensibilities.”<sup>26</sup>

E. WAYNE WALLHAUSEN

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## TORTS—EFFECT OF PATIENT'S CONSENT TO MEDICAL TREATMENT—MUST BE INFORMED CONSENT

The plaintiff, paralyzed from the waist down due to an unsuccessful operative attempt to alleviate his condition of atrophy of the leg, brought suit for medical malpractice against the defendant surgeon alleging that the surgeon exceeded the scope of the plaintiff's consent to the operation. The Court of Common Pleas granted the defendant's motion for judgment *n.o.v.* and overruled the plaintiff's motion for a new trial. The Supreme Court of Pennsylvania reversed the lower court's ruling and reinstated the jury verdict awarding \$80,000 to the plaintiff. In so doing, the Pennsylvania court held that whether the defendant exceeded the scope of the plaintiff's consent was a question for the jury. The evidence supported the jury finding that the plaintiff's signed general consent to the operation was not a product of “informed consent,” since he was under the impression that there would be an exploratory laminectomy, the trouble located and examined, the incision closed, and he would then have the opportunity to decide on corrective surgery. The evidence further showed that the operation is considered major surgery and that there is a fifteen to twenty per cent risk of resultant paralysis. The surgeon could not specifically remember informing the plaintiff of this risk.<sup>1</sup>

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22. *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956).

23. *Supra* n. 2 at 218. *Accord*, *Yankwich, Trends in the Law Affecting Media of Communication*, 15 F.R.D. 291 at 322 (1954).

24. *Supra* n. 6 at 401.

25. *McDonald v. Coca-Cola Bottling Co.*, *supra* n. 5. *Accord*, Ludwig, “Peace of Mind” in *48 Pieces v. Uniform Right of Privacy*, 32 MINN. L. REV. 734 at 738 (1948).

26. *Yankwich*, *supra* n. 23.

1. *Gray v. Grunnagle*, 423 Pa. 144, 223 A.2d 663 (1966).

The cases involving the issue of consent to medical treatment are legion.<sup>2</sup> As Judge Cardozo so adroitly observed: ". . . [E]very human being of adult years and sound mind has a right to determine what shall be done with his body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."<sup>3</sup>

The general rule applicable in the surgical situation appears to be that to prevent the operation from being a tort, consent by the patient to the surgery is a prerequisite, unless an immediate emergency exists making it impracticable to obtain such consent and demanding immediate action to preserve the life or health of the patient.<sup>4</sup> Upon analysis, however, one may readily see salient exceptions to this general rule. There are certain circumstances which may prevent effective consent. Generally speaking, although consent may be expressly given, it may be vitiated by fraud,<sup>5</sup> coercion,<sup>6</sup> mistake,<sup>7</sup> or incapacity due to minority,<sup>8</sup> intoxication, or insanity.<sup>9</sup>

The plaintiff in the principal case<sup>10</sup> sought to and did invalidate his signed general consent on one further exception not listed above—the doctrine of "informed consent." Essentially, he contended that he was under the impression that the operation was solely exploratory and that he consented to it totally unaware that there was such a grave risk involved, thus removing his consent as a bar to recovery. Plaintiff's contention seems to be supported by the weight of authority.<sup>11</sup> For the sake of brevity, however, it seems sufficient to note that two cases particularly appear indicative of the modern trend of the courts regarding the doctrine of "informed consent."<sup>12</sup> In both the cases of *Natanson v. Kline*<sup>13</sup> and *Mitchell*

2. See generally, PROSSER, *TORTS* §18 at 105-107 (3d ed. 1964); 70 C.J.S. *Physicians and Surgeons* §48 (1951); McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 4 MINN. L. REV. 381 (1957); Morris, *Medical Malpractice—A Changing Picture*, INC. L. J. 319 (1959); Smith, *Antecedent Grounds of Liability in the Practice of Surgery*, 14 ROCKY MT. L. REV. 233 (1942); Note, 6 DUKE BAR J. 41 (1957); Note, 42 KY. L. J. 98 (1958).

3. *Schloendorff v. Soc'y of New York Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914).

4. See, *Kennedy v. Parrott*, 243 N.C. 355, 90 S.E.2d 754 (1956); *Jackovich v. Yocom*, 212 Iowa 914, 237 N.W. 444 (1931); *King v. Carney*, 85 Okla. 62, 204 Pac. 270 (1922). See general, 70 C.J.S. *Physicians and Surgeons* §48 (1951).

5. *Hobbs v. Kiser*, 236 Fed. 681 (8th Cir. 1916).

6. *Meek v. City of Loveland*, 85 Colo. 346, 276 Pac. 30 (1929).

7. *Samuelson v. Taylor*, 160 Wash. 369, 295 Pac. 113 (1931); *Hershey v. Peake*, 115 Kan. 562, 223 Pac. 1113 (1924).

8. *Tabor v. Scobee*, 254 S.W.2d 474 (Ky. 1953). But see, *Gulf and S.I.R. Co. v. Sullivan*, 155 Miss. 1, 119 So. 501 (1929).

9. *Farber v. Olkon*, 40 Cal.2d 503, 254 P.2d 620 (1953); *Pratt v. Davis*, 224 Ill. 300, 79 N.E. 562 (1906). For an illuminating discussion on factors invalidating consent see Powell, *Consent to Operative Procedures*, 21 Mo. L. REV. 189 (1961).

10. *Supra* n. 1.

11. For some recent decisions referring to "informed consent" see: *DiRoss v. Wein*, 261 N.Y.S.2d 623 24 A.D.2d 510 (1965); *Scott v. Wison*, 396 S.W.2d 532 (Tex. Civ. App. 1965); *Russell v. Harwick*, 166 So.2d 904 (Fla. App. 1964); *Bowers v. Talmadge*, 159 So.2d 888 (Fla. D.C. App. 1963).

12. *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093 (1960), *opinion clarified and defendant-appellant's motion for rehearing denied*, 187 Kan. 186, 354 P.2d 670 (1960); *Mitchell v. Robinson*, 334 S.W.2d 11 (Mo. 1960). In the *Natanson* case the court held that the risks inherent in her treatment by cobalt radiation and his failure to do so

*v. Robinson*<sup>14</sup> the courts dealt with the problem of the effectiveness of the plaintiff-patient's consent to medical treatment. In these illustrative cases the courts similarly concluded that the physician was under a duty to inform the patient of the inherent risks in the proposed treatments and that since there had been no such disclosure, the patient's consent was not "informed" and could not be used as a bar to recovery for injuries resulting from treatments.<sup>15</sup>

To say that the Georgia courts have not been confronted with this precise issue in many cases would be an understatement. However, indications arise from the materials available that the Georgia courts would favor the concept of "informed consent." In *Perry v. Hodgson*,<sup>16</sup> the court held that where the surgeon had gone beyond the limits of the consent given by the plaintiff, he could not relieve himself from liability for injury by showing skill in the unauthorized operation. Similarly, in *Keen v. Coleman*,<sup>17</sup> the Georgia court concluded that the defendant surgeon was not authorized to go beyond the agreement between the patient and himself and perform an unauthorized operation. Two federal cases further show this trend in Georgia law.<sup>18</sup> Particularly enlightening is the decision in *Rahn v. United States*.<sup>19</sup> Here, the United States District Court for the Southern District of Georgia determined that:

... It was the duty of the physician treating the plaintiff to act with the utmost good faith toward his patient, . . . and since he knew that the treatment adopted would probably be of no benefit, it was his duty to advise his patient of these facts and since he failed to do so, he was guilty of a breach of duty.

These decisions appear to show that Georgia adheres to the view that a physician will be held liable for injury resulting from surgery or treatment exceeding the scope of the patient's consent, and that for consent to be effective, it must be given with knowledge of the risks involved.

In conclusion, it should be pointed out that this writer does by no means advocate the use of this "informed consent" doctrine indiscriminately in all situations. Obviously the surgeon should not be allowed to wield the scalpel outside the permissible limits of the patient's consent. However, on the other hand, the surgeon's hands should not be tied with the thought that any deviation from the detailed plans of the operation would result

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prevented the patient's consent from barring her recovery. Similarly in the *Mitchell* case the court noted that the defendant doctors were under a duty to disclose to the patient the risks in the proposed insulin shock treatments. Since plaintiff had not been so advised, his consent could not have been informed and intelligent.

13. *Supra* n. 12.

14. *Supra* n. 12.

15. A section of the *Mitchell* case was overruled in *Aiken v. Clary*, 396 S.W.2d 668 (Mo. 1965). However *Mitchell* still points out the need for "informed consent."

16. 168 Ga. 678, 148 S.E. 659 (1929).

17. 67 Ga. App. 331, 20 S.E.2d 175 (1942).

18. *Rahn v. United States*, 22 F. Supp. 775 (S.D. Ga. 1963); *Wall v. Brim*, 138 F.2d 478 (5th Cir. 1943).

19. *Rahn v. United States*, *supra* n. 18.

in a lawsuit. This latter notion would tend only to strangle the medical profession. It seems that between these two extremes, there is the proverbial "twilight zone" wherein the circumstances of each case would be determinative. The best approach to the problem would appear to include four factors: (1) In the absence of an emergency, the doctor has a duty to inform the patient of all inherent risks in the proposed treatment or surgery; (2) the extent of this disclosure should be determined in full view of all the circumstances involved such as the seriousness of the treatment, the degree of possibility of the risks, the severity of the risks if any are involved, and the effect which the disclosure might have upon the patient if he is already emotionally unstable or overly apprehensive; (3) if it is determined that the doctor has a duty to inform and he does not do so, he should be liable for injury regardless of the skill with which the treatment is administered; and (4) whether the physician has breached his duty of disclosure or not should be evidenced by expert testimony<sup>20</sup> and generally left as a question of fact.

In the final analysis it should be emphasized that the essential point to bear in mind is that only with knowledge of the risks involved can the patient give an effective consent to medical treatment. An uninformed consent is as meaningless as one induced by fraud or misrepresentation.

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20. In Georgia the degree of care required of the doctor (including the duty of disclosure) is that used by the profession generally under similar circumstances. *Murphy v. Little*, 108 Ga. App. 360, 145 S.E.2d 760 (1965).

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got  
something  
to say . . .  
say it

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