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RECENT CASES

AUTOMOBILES—OWNER'S LIABILITY STATUTES—APPLICATION TO THE MASTER-SERVANT RELATIONSHIP

Plaintiffs were the driver and passengers in an automobile which collided with a truck owned by defendant and being negligently driven by its employee. The employee had defendant's permission to drive the truck, but he was not acting within the scope of his employment at the time of the accident. The Michigan Owner's Liability Statute provides that the owner of a motor vehicle is liable for any injury resulting from the negligent operation of the vehicle with the owner's permission. On the basis of the statute, the trial court entered judgment for the plaintiff and defendant appealed. *Held,* affirmed. The owner's liability statute applies not only where the relationship between owner and driver is that of bailor and bailee, but also where the relationship is that of master and servant. *Moore v. Palmer,* 86 N.W.2d 585 (Mich. 1957).

Prior to the enactment of the owner's liability statutes, the employer-owner's liability for the negligence of the employee-driver was usually based on the principles of master and servant—*i.e.,* the owner was liable only if the servant was acting within the scope of his employment.[1] Thus, automobile owners were immune from liability when the relationship between the owner and the driver was that of bailor and bailee, and many innocent third parties were left to recover from the ofttime financially irresponsible drivers.[2] In order to protect the public from such a result, many states have now enacted statutes which attach liability to the owner who has permitted another person to use his motor vehicle.[3] The constitutionality of these statutes is predicated on the valid exercise of the police power of the state in

1. The common law doctrine holding the master liable for the negligent acts of his employees, acting within the scope of their employment, began to develop in the late seventeenth century. Michael v. Alestree, 2 Levinz 172 (K.B. 1676). The rule persists to the modern day of the automobile and has been applied to a master whose servant operated his motor vehicle. Field v. Evans, 262 Mass. 345, 159 N.E. 751 (1928).

2. The purpose of the owner's liability statute is to make the owner of the automobile bear the loss, rather than the innocent third party. Kernan v. Webb, 50 R.I. 394, 148 Atl. 186 (1929).

3. "The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such vehicle. . . . The owner shall not be liable, however, unless said motor vehicle is being driven with his or her express or implied consent or knowledge. . . ." MICH. STAT. ANN. § 9.2101 (1952). See also CAL. VEHICLE CODE ANN. § 402 (DEERING SUPP. 1957); IOWA CODE ANN. § 321.493 (Supp. 1957); MINN. STAT. ANN. § 170.54 (1946); N.Y. VEHICLE & TRAFFIC LAW § 59; R.I. GEN. LAWS ANN. § 31-31-3 (1956).

regulating the use of motor vehicles.[4] Jurisdictions having a statute similar to that in Michigan have held the owner liable upon a mere showing that the driver was operating the vehicle with the owner's permission.[5] Other jurisdictions have a statute which raises a rebuttable presumption that the driver was acting in the owner's behalf, thus placing upon the owner the burden of showing that the driver was not acting within the scope of employment.[6] Jurisdictions not having a statute bearing on the owner's liability hold that permissive use of an automobile does not of itself furnish any basis for liability on the part of the owner.[7]

Some jurisdictions having an owner's liability statute similar to that in Michigan have extended the application of the statute to the master-servant relationship.[8] The court takes cognizance of the fact that prior to the instant case the problem of when to apply the owner's liability statute was in a state of confusion in Michigan.[9] In this decision the court endeavors to clear the area of doubt by saying that the statute does not expressly exclude the master-servant relationship from statutory application. The court reasoned that the statute was intended to apply to all owners without exception, and reached the conclusion that it is no defense for the employer to show that the driver was acting without the scope of his employment, if it is proved that the driver had the employer's consent to operate the vehicle.

The avowed purpose of the owner's liability statutes is the protection of the public.[10] At common law the employer was liable for all the negligent acts of his employees acting within the scope of their employment. The bailor, however, was immune from liability for injuries caused by his negligent bailee. To remedy the latter situation the owner's liability statutes were passed. The court in the instant

4. Stapleton v. Independent Brewing Co., 198 Mich. 170, 164 N.W. 520 (1917); Atkins v. Hertz Drivurself Stations, Inc., 261 N.Y. 352, 185 N.E. 408 (1933).

5. Montagna v. Brown, 31 Cal. 2d 642, 88 P.2d 745 (1939); Robinson v. Bruce Rent-a-Ford Co., 205 Iowa 261, 215 N.W. 724 (1927); Ballman v. Brinker, 211 Minn. 322, 1 N.W.2d 365 (1942); Grant v. Knepper, 245 N.Y. 158, 156 N.E. 650, 652, (1927); Guerin v. Mongeon, 49 R.I. 414, 143 Atl. 674 (1928). *But see* Stuart v. Pilgrim, 247 Iowa 709, 74 N.W.2d 212 (1956), in which the Iowa court refused to impute the negligence of the permissive driver to the owner so as to preclude the owner from recovery for damages to his vehicle. The case is discussed in 5 DRAKE L. REV. 127 (1956).

6. MASS. ANN. LAW, c. 231, § 85A; TENN. CODE ANN. § 59-1037 (1956). See Fitiles v. Umlah, 322 Mass. 325, 77 N.E.2d 212 (1948); Emert v. Wilkerson, 7 Tenn. App. 269 (1928).

7. Downes v. Norrell, 261 Ala. 430, 74 So. 2d 593 (1954); Graham v. Shilling, 133 Colo. 5, 291 P.2d 396 (1955); Mutual Cas. Co. v. Indemnity Ins. Co. of North America, 186 Va. 204, 42 S.E.2d 298 (1947).

8. Grant v. Knepper, 245 N.Y. 158, 164, 156 N.E. 650, 652 (1927); Guerin v. Mongeon, 49 R.I. 414, 143 Atl. 674, 675 (1928).

9. See Gray v. Sawatzki, 272 Mich. 140, 261 N.W. 276 (1935), in which the court used the scope of employment test.

10. "The purpose and effect of this statute is to protect the public. . . ." Steinle v. Beckwith, 198 Minn. 424, 270 N.W. 139, 141 (1936). See also Kernan v. Webb, 50 R.I. 394, 148 Atl. 186 (1929).

case does not limit the application of the statute to the bailor-bailee situations, but uses it to extend the common law liability of the master for the negligent acts of his servants, acting within or without the scope of employment. The result seems undesirable. The employer, in order to continue in business[11] must keep his vehicles on the road, and by having the statute applied to employers, he cannot protect himself, except by extensive insurance coverage, from liability arising from the negligent acts of his employees, acting without the scope of their employment. It is suggested that the owner's liability statutes should not be used by the courts to abrogate the well established common law doctrines applicable to an employer and his employees, unless the statutes are amended by the legislatures to abolish the distinction between the master-servant and the bailor-bailee relationships.

BANKRUPTCY—DISCHARGE—FAILURE OF CREDITOR TO INFORM BANKRUPTCY COURT OF BANKRUPT'S FRAUD IN PROCURING LOAN

Following the bankrupt's discharge a creditor brought suit in a state court to collect on a debt which had been listed on the bankruptcy schedule. The creditor asserted that his claim was not barred by the discharge because of fraud and deceit in obtaining the loan upon which his claim was based.[1] Had the bankruptcy court known of this fraud, it presumably would have denied the discharge.[2] While having notice of the bankruptcy proceedings, the creditor chose not to take part therein. The bankrupt, by ancillary petition in the bankruptcy court, sought an injunction against the creditor's action. The referee enjoined the creditor, but on petition for review his decision

11. It has been suggested that the liability for the negligence of employees should be considered as one of the risks of business. This writer suggests that the employer is sufficiently burdened under the deep pocket doctrine, that he should not be forced to assume any further burdens.

1. "Debts not affected by a discharge.
"(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (2) are liabilities for obtaining money or property by false pretenses or false representations . . . ." 30 STAT. 544 (1898), as amended, 11 U.S.C. § 35 (1952).
2. "Discharges, When granted.
. . . .
"(c) The court shall grant the discharge unless satisfied that the bankrupt has . . . (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition . . . ." 30 STAT. 544 (1898), as amended, 11 U.S.C. § 32 (1952).

was reversed by the district court. On appeal, *held,* affirmed. The Bankruptcy Act[3] does not impose a duty upon creditors to advise the bankruptcy court of information which would preclude a discharge, and a creditor is thus not estopped to deny that his claim was discharged, even though he deliberately fails to inform the bankruptcy court that the loan upon which his claim is based was fraudulently procured by the bankrupt. *White v. Public Loan Co.,* 247 F.2d 601 (8th Cir. 1957).

The bankruptcy court, as a court of equity,[4] has the power to grant any appropriate and necessary injunctive relief in furtherance or aid of its jurisdiction or decrees.[5] The power and authority of the bankruptcy court does not end with the discharge but may be invoked by the bankrupt to secure the benefit of his discharge.[6] However, under the doctrine of *Local Loan Co. v. Hunt,*[7] the bankruptcy court will exercise this jurisdiction to pass upon the dischargeability of a particular debt only under exceptional circumstances. Normally, when a creditor seeks to enforce his claim in a state court, the debtor must then plead the discharge as a defense in that court.[8]

The bankruptcy court will grant a discharge of the bankrupt's debts, unless it can be shown that the bankrupt was guilty of certain specified conduct,[9] such as having fraudulently procured a loan,[10] which will prevent his discharge. Generally speaking, a discharge in bankruptcy releases the bankrupt from all of his provable debts.[11] There are, however, some classes of obligations, such as alimony due or to become due, which by their nature, apart from extrinsic circumstances, are not dischargeable.[12] Furthermore, extrinsic circumstances

3. 30 STAT. 544 (1898), as amended, 11 U.S.C. §§ 1-1255 (1952).

4. "Courts of bankruptcy . . . are invested 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.' Consequently this Court has held that for many purposes 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.' . . . By virtue of § 2 [of the Bankruptcy Act] a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the Act, it applies the principles and rules of equity jurisprudence." Pepper v. Litton, 308 U.S. 295, 303-04 (1939). "[C]ourts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity." Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934).

5. Pepper v. Litton, 308 U.S. 295 (1939); Local Loan Co. v. Hunt, 292 U.S. 234 (1934).

6. Local Loan Co. v. Hunt, 292 U.S. 234 (1934).

7. *Ibid.*

8. 6 AM. JUR., *Bankruptcy* § 313 (1950).

9. 30 STAT. 544 (1898), as amended, 11 U.S.C. § 32 (1952).

10. 11 U.S.C. § 32 (c) (1952).

11. 11 U.S.C. § 35 (1952).

12. *Ibid.* In California State Board of Equalization v. Coast Radio Products, 228 F.2d 520 (9th Cir. 1955), it was held that the Board could rely on the nondischargeable nature of its claim against the bankrupt and had no duty to file a claim in the bankruptcy proceedings even though the assets were sufficient to have paid the claim. This case was not mentioned or referred to in the opinion in the instant case.

surrounding a particular claim may result in removal of that claim from the operation of the discharge. Thus, fraud in the procurement of a loan will prevent the discharge of the particular claim based upon that loan.[13] In *In re Walton*,[14] a case essentially like the one at hand, the creditor concealed the fact that the bankrupt had fraudulently procured the credit. This fraud, if known to the bankruptcy court, presumably would have been grounds for denying a discharge to the bankrupt. After the bankruptcy proceedings the creditor sought to enforce his claim against the bankrupt, asserting that, because of the fraud, his claim was not within the operation of the discharge. He was held estopped to deny that his claim was discharged.

The referee's decision to grant the injunction in the instant case was based on the *Walton* case holding.[15] The district court judge reversed solely on the ground that the *Walton* holding was erroneous.[16] Although the court of appeals indicated that the result of the *Walton* case might be desirable, it nevertheless affirmed the holding of the district court, as it could find no express or implied duty imposed on a creditor by the Bankruptcy Act to inform the bankruptcy court of facts which would preclude a discharge of the bankrupt. In addition the court said that a contrary decision would deprive the creditor of the benefit of a valid right to claim the exemption granted under the Bankruptcy Act.[17] Inasmuch as the issue of special circumstances which would give the bankruptcy court jurisdiction to pass on the dischargeability of creditors' claims had not been raised below, the court of appeals expressed no opinion on this feature of the case. The judgment was affirmed without prejudice to the right of the bankrupt to file an amended complaint alleging such special and unusual circumstances as might exist which could be sufficient to entitle the bankruptcy court to assert ancillary jurisdiction and determine the dischargeability of the debt, if the bankrupt so desired.

An analysis of the cases would seem to indicate that courts have been more zealous in protecting creditors than in carrying out the purpose of the Bankruptcy Act, which was to allow unfortunate debtors a chance at a fresh start. Naturally there will be cases where debtors will take advantage of creditors, but the converse of this can also

13. See note 1 *supra*.

14. 51 F. Supp. 857 (W.D. Mo. 1943).

15. 247 F.2d at 602.

16. *Id.* at 603. Two authorities in the bankruptcy field have commented on the *Walton* case as follows: "The decision so holding treats the creditor as estopped by his bad faith in not opposing discharge, as well as relying on the so-called 'unusual circumstances' of his asserting inapplicability of the discharge, and it would seem that the estoppel theory is the better basis for the holding." 8 REMINGTON, BANKRUPTCY § 3262 (6th ed. 1955). "This decision has absolutely no statutory basis to support it and must be regarded as erroneous." 1 COLLIER, BANKRUPTCY § 14.07 n.4 (1956).

17. See note 1 *supra*.

occur, as in the instant case.[18] In this case the creditor withheld information which would have precluded a discharge of the bankrupt. This action in effect allowed him to obtain a preferred position as to other creditors against later acquired property of the debtor. Thus by his own questionable conduct he stands to benefit at the expense of other creditors whose claims are barred by the discharge. Inasmuch as this case represents the current status of the law and this court could find nothing in the statute to prevent the result reached here, perhaps legislation would be in order to remedy the situation.[19]

BILLS AND NOTES—DEMAND INSTRUMENTS—TIME WHEN STATUTE OF LIMITATIONS BEGINS TO RUN

Plaintiff—executrix brought an action against defendant to recover judgment on a promisory note made by defendant payable to the deceased. The note provided in part: "Demand after date we . . . promise to pay . . . with interest at 4 percent per annum from date payable semi-annually."[1] It further provided that failure to pay any interest installment within ten days after due date would cause the entire note to become due and collectable at once. The statutory period of limitations for negotiable instruments was ten years. Since the action was commenced more than ten years after execution of the note, defendant pleaded the statute of limitations and moved to dismiss. Although plaintiff contended that the statute did not begin to run on this particular note until actual demand for payment had been made, the trial court dismissed the action. On appeal, *held,* affirmed. Even though a demand note provides for payment of interest and acceleration of the due date of the instrument upon default in payment of interest, its character as a demand instrument is not changed and the statute of limitations begins to run against such demand paper from the date of execution. *Stebens v. Wilkinson,* 87 N.W.2d 16 (Iowa 1957).

Under the Uniform Negotiable Instruments Act,[2] section seven, an instrument in which no time for payment is expressed is payable upon

18. A practice has grown up among certain type creditors where the debtor is required to answer questions in writing, the full import of which he may fail to comprehend, in a loan application and then if the debtor later becomes insolvent, his answers are claimed to be fraud. Thus the creditor is in effect insuring himself against the effects of a later discharge in bankruptcy barring his claim. See 1 HANNA & MACLACHLAN, CREDITORS' RIGHTS 365 (4th ed. 1949).

19. See Smedley, *Bankruptcy Courts as Forums for Determining the Dischargeability of Debts,* 39 MINN. L. REV. 651 (1955).

1. Stebens v. Wilson, 87 N.W.2d 16 (Iowa 1957).

2. This act has been adopted in all American jurisdictions. 5 U.L.A., *Negotiable Instruments* xv-xlvi (1943).

demand,[3] unless the circumstances show a different intention.[4] No particular words such as "on demand" are necessary to make an instrument payable upon demand.[5] It is well settled that the statute of limitations begins to run against ordinary demand paper from the date of its execution, and not from the date of demand.[6] The majority of American jurisdictions hold that the fact that a demand instrument also calls for the payment of interest does not change the time from which the statute begins to run.[7] Further, the fact that a note indicates no time of payment but is expressed to be payable with interest annually does not prevent it from being payable upon demand.[8] These positions seem to be based upon the theory that, as a demand note is immediately payable when made, and as the statute runs from the date that payment is due, the statute therefore runs from the date of execution.[9] Some American jurisdictions, however, feeling that this is an unrealistic approach, have adopted the rule that a provision for the payment of interest takes a demand note out of the general rule and that the statute does not begin to run until actual demand is made.[10] These courts feel that this view is more realistic and more cognizant of actual business practices because a provision to pay interest is one circumstance tending to show that it was the intent of the parties that the note was not to become due immediately.[11]

In the instant case the court held that the note sued on was clearly a demand note, although the words "demand after date" were used instead of "on demand after date." Further, it was held that the provisions for payment of interest and for "acceleration" upon default of interest payments did not affect the demand character of the note. Applying the orthodox majority rules, the court concluded that the

3. MacKey v. Dobrucki, 116 Conn. 666, 166 Atl. 393 (1933); Carmen v. Higginson, 245 Mass. 511, 140 N.E. 246 (1923); Coleman v. Page's Estate, 202 S.C. 486, 25 S.E.2d 559 (1943).

4. Glass v. Adoue & Lobit, 39 Tex. Civ. App. 21, 86 S.W. 798 (1905).

5. Kraft v. Thomas, 123 Ind. 513, 24 N.E. 346 (1890) ("when called for"); O'Neil v. Magner, 81 Cal. 631, 22 Pac. 876 (1889) ("on demand after date"); Love v. Perry, 19 Ga. App. 86, 90 S.E. 978 (1916) ("after date"). 10 C.J.S., *Bills and Notes* § 247(a) (1938).

6. Clark v. Gibbs, 69 F.2d 364 (5th Cir. 1934); Kraft v. Thomas, 123 Ind. 513, 24 N.E. 346 (1890); BRITTON, BILLS AND NOTES § 161 (1943); Annot., 44 A.L.R. 397 (1926).

7. Jones v. Nichole, 82 Cal. 32, 22 Pac. 878 (1889); House v. Peacock, 84 Conn. 54, 78 Atl. 723 (1911); Annot., 44 A.L.R. 397, 399 (1926).

8. Roberts v. Snow, 27 Neb. 425, 43 N.W. 241 (1889); Jillson v. Hill, 70 Mass. (4 Gray) 316 (1855) (interest within six months).

9. See note 7 *supra*.

10. Shapleigh Hardware Co. v. Spiro, 141 Miss. 38, 106 So. 209 (1925); Boyd v. Buchanan, 176 Mo. App. 56, 162 S.W. 1075 (1914); Baxter v. Beckwith, 25 Colo. App. 322, 137 Pac. 901 (1913); *cf.* Sullivan v. Ellis, 219 Fed. 694 (8th Cir. 1915); Blick v. Cockins, 131 Md. 625, 102 Atl. 1022 (1917).

11. Farmers and Merchants Nat'l Bank v. Cole, 184 Okla. 337, 87 P.2d 149 (1939).

statute of limitations began to run from the date of execution of the instrument and plaintiff's claim was thus barred.[12]

If it is assumed that the orthodox majority rules should be followed, the decision in the instant case is not open to question. However, as is pointed out by the dissent,[13] as a practical matter the maker and payee of a note do not expect it to be paid immediately; otherwise there would be small reason for making the note. The dissenting judge felt that the provisions for periodic interest (payable semi-annually) and acceleration in default of interest were sufficient manifestations to support a finding that the parties did not intend immediate payment. Thus the instrument would be brought within the minority rule that if a note, although payable upon demand, fairly shows within the four corners of the instrument that the parties intended that it become due only upon actual demand, the statute of limitations does not commence to run from the date of the execution of the note but from the date of actual demand.[14] It would seem that, viewed in the light of present day business practices and transactions, this view is the more realistic although admittedly it is not as exact and certain in application as is the majority rule. There is the further possibility that the court erred in its analysis of the note and that, because of the provision for semi-annual payment of interest, it was in fact not a demand note at all but a six month time note. Although this interpretation of the instrument is possible, the court seemed to give it little attention, as the word "demand" appeared in the instrument itself.

BILLS AND NOTES—HOLDER IN DUE COURSE—GIVING A CHECK IN EXCHANGE FOR ANOTHER NEGOTIABLE INSTRUMENT IS NOT THE GIVING OF VALUE WHEN THE CHECK TURNS OUT TO BE WORTHLESS

Plaintiff-corporation, payee of a cashier's check, seeks recovery from drawee-bank, which stopped payment on the check. Payment

12. The court excluded oral evidence tending to show that the parties actually did not intend immediate payment, under the rule that parol evidence is not admissible to vary the terms of a written instrument in the absence of allegations of fraud, accident or mistake. See Furleigh v. Dawson, 245 Iowa 359, 62 N.W.2d 174 (1954). If the rule that the statute begins to run on all demand paper from the date of execution is accepted, the only question is whether or not the note is in fact demand paper, and the instant court correctly excluded the offered testimony. However, if the minority rule that the governing consideration is the intent of the parties is followed, note the possibility of admitting this evidence to clear up a patent ambiguity evidenced by inconsistent provisions in the note—*e.g.*, "demand" and "interest payable semi-annually."

13. Instant case, 87 N.W.2d at 20.

14. Shapleigh Hardware Co. v. Spiro, 141 Miss. 38, 106 So. 209 (1925).

was stopped because the consideration given by plaintiff had failed. In exchange for the cashier's check plaintiff had given a check which it received from its agent. This latter check was returned unpaid to defendant because of insufficient funds in the agent's personal checking account. Plaintiff contended, however, that its giving of the agent's check to defendant constituted value and that plaintiff is a holder in due course of the cashier's check. On plaintiff's appeal from an adverse judgment, *held,* affirmed. A holder of a negotiable instrument in exchange for which he has given a check which proves to be worthless has not given value for the other instrument and thus cannot be a holder in due course. *Dakota Transfer & Storage Co. v. Merchants Nat'l Bank & Trust Co.,* 86 N.W.2d 639 (N.D. 1957).

Failure of consideration is a personal defense, good against one who is not a holder in due course.[1] Section 52 of the Negotiable Instrument Law, in setting forth the requirements of a holder in due course, specifies among other things the giving of "value."[2] In section 25 of the Negotiable Instruments Law "value" is defined as "any consideration sufficient to support a simple contract." Relying on this definition, most courts hold that one who gives a negotiable instrument executed by himself or a third party in exchange for another instrument has given value,[3] and subsequently acquired knowledge of infirmities in the instrument which he received does not affect his status as a holder in due course.[4] A few courts qualify this rule, however, by requiring that before a holder in such exchange can be said to have given value the instrument which he transferred must have passed into the hands of a holder in due course.[5] The theory of these courts seems to be that before a holder of a negotiable instrument can be said to be a holder in due course, he must show that that which he gave as value

1. NEGOTIABLE INSTRUMENTS LAW § 28: "Absence or failure of consideration is matter of defense as against any person not a holder in due course. . . ."

2. NEGOTIABLE INSTRUMENTS LAW § 52: "A holder in due course is a holder who has taken the instrument under the following conditions:

". . . .

"3. That he took in good faith and *for value*. . . ." (Emphasis added.)

3. Matlock v. Scheuerman, 51 Ore. 49, 93 Pac. 823, 827 (1908): "Where . . . there is an exchange of commercial paper, each instrument forms a sufficient consideration for the other . . . and each is an independent obligation not conditional on the payment of the other."

Miller v. Marks, 46 Utah 257, 148 Pac. 412, 417 (1914): "The rule . . . is quite well settled that an exchange of commercial paper, notes, checks, or bills is a sufficient consideration, each for the other. . . . Upon such an exchange the particular transaction between the parties is consummated, and is not executory merely; each party becoming a holder for a valuable consideration."

See also Montgomery Garage Co. v. Manufacturers' Liability Ins. Co., 94 N.J.L. 152, 109 Atl. 296 (1920); BRITTON, BILLS AND NOTES § 98 (1943).

4. Montgomery Garage Co. v. Manufacturers' Liability Ins. Co., 94 N.J.L. 152, 109 Atl. 296 (1920); Miller v. Marks, 46 Utah 257, 148 Pac. 412 (1914); Pennoyer v. Dubois State Bank, 35 Wyo. 319, 249 Pac. 795 (1926); BRITTON, BILLS AND NOTES § 98 (1943).

5. See, *e.g.,* Cartier v. Morrison, 232 Mich. 352, 205 N.W. 108 (1952), disapproved in 24 MICH. L. REV. 714 (1926).

is now a binding obligation upon him.[6] The basis of this theory is a possible implication from section 54 of the Negotiable Instruments Law, which provides that one who has not paid the full amount agreed to be paid is only a holder in due course as to the amount paid prior to receiving knowledge of some infirmity in the instrument he holds. The implication is that a mere promise to pay does not constitute value under this section, in contrast to section 25.[7] Thus, a transferee who acquires knowledge of any infirmity in the instrument he holds prior to payment or transfer to a holder in due course of the instrument which he gave in exchange is precluded from being a holder in due course, except as to any amount already paid.[8]

The instant court is apparently adopting the minority view[9] concerning the exchange of negotiable instruments as the giving of value. It does not so state, but the opinion gives the impression that if the bank had negotiated the check received from plaintiff to an innocent third party, a holder in due course, the result would be different.[10] This controversy is, however, between the original parties, and according to the court, this is determinative.[11] Since the plaintiff indorsed to the bank a check which eventually proved to be worthless, the court concludes that the plaintiff did not give value so as to become a holder in due course according to the requirements of section 52 of the Negotiable Instruments Law.[12] Since he is not a holder in due course, plaintiff is vulnerable to the defense of failure of consideration.[13]

6. Cartier v. Morrison, *supra* note 5. The court in Pennoyer v. Dubois State Bank, 35 Wyo. 319, 249 Pac. 795, 798-99 (1926) in rejecting this position, states it as follows: "But there is authority for holding that the plaintiff, to avoid the effect of section 54, and to sustain the burden of proving that it was a holder in due course, was required to prove that the certificates of deposit had been negotiated and that the plaintiff had either paid or become liable to pay them to some one other than the payee."

7. BRANNAN, NEGOTIABLE INSTRUMENTS LAW 721-22 (7th ed., Beutel 1948) comments on section 54 as follows: "The words 'before he has paid the full amount agreed to be paid therefor' read by themselves are susceptible to two meanings: (1) before the transferee has given the ultimate cash for the instrument or (2) before he has completed the transaction involved.

"If the first interpretation be adopted then giving credit by banks, giving negotiable instruments, and other promises to pay in the future, would not constitute value and the holder would be a holder in due course only in so far as he had liquidated his obligation before notice of the infirmity. This is the position which had been taken by many courts before the act and some since; but it is submitted that it is contrary to the spirit of the act and the specific purpose of secs. 25, 26 and 27, which clearly adopt the business point of view that a credit transaction may be complete payment."

8. *Ibid.*

9. See Cartier v. Morrison, 232 Mich. 352, 205 N.W. 108 (1925), 24 MICH. L. REV. 714 (1926); BRITTON, BILLS AND NOTES § 98 (1943).

10. "The rights of innocent holders for value without notice are not involved in this case." Instant case, 86 N.W.2d at 644.

11. "The controversy here is between the original parties. The plaintiff has lost no rights that it had before the issuance of the cashier's check." *Id.* at 644.

12. See note 2 *supra.*

13. See note 1 *supra.*

The plaintiff obviously gave value under what appears to be the better view of the effect of the exchange of negotiable instruments.[14] When he negotiated the check to the bank he became secondarily liable as an indorser of the instrument, further transfer being unnecessary.[15] The facts of this case also give rise to another point of law which, it is submitted, could quite appropriately have been considered by the court. Since the plaintiff received the check from its agent, who knew it was worthless, the question arises whether the agent's knowledge should be imputed to the plaintiff.[16] Such imputation, if made, could prevent plaintiff's being a holder in due course by reason of bad faith. A possible basis for not imputing the agent's knowledge is the application of the rule that knowledge will not be imputed where the agent was acting adversely to his principal. Here the agent acted adversely in squandering his principal's money, for which arrearage the bad check was given in an attempt to rectify the situation.[17] The question under this fact situation then turns on whether or not the plaintiff-principal, who is seeking to retain the benefit of its agent's adverse act, changed its position prior to learning that the agent's act was adverse to its interest as principal.[18] If it did change its position, knowledge will not be imputed, and the plaintiff will not be

14. See BRITTON, BILLS AND NOTES § 98 (1943).

15. NEGOTIABLE INSTRUMENTS LAW § 66: "[H]e [indorser] engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

16. As a general proposition an agent's knowledge, in the course of employment and material to the business, is imputed to his principal. See *e.g.*, Reardon v. Mutual Life Ins. Co., 138 Conn. 510, 86 A.2d 570 (1952); RESTATEMENT, AGENCY § 272 (1933); TIFFANY, AGENCY § 108 (2d ed., Powell 1924). This rule is based on the presumption that the agent will disclose his knowledge to his principal. For a criticism of this rule as fiction see MECHEM, OUTLINES OF AGENCY 90-91 n.22 (4th ed. 1952). An exception to this rule arises, however, when the agent's acts are adverse to his principal's interests. MECHEM, OUTLINES OF AGENCY 90-91 n.22 (4th ed. 1952); RESTATEMENT, AGENCY § 280 (1933); TIFFANY, AGENCY § 110 (2d ed. Powell 1924). In such cases knowledge will not be imputed. See Bank v. McDonald, 107 Ark. 232, 154 S.W. 512 (1913); Mutual Assur. Co. v. Norwich Sav. Soc., 128 Conn. 510, 24 A.2d 477 (1942).

17. RESTATEMENT, AGENCY § 282, comment *f* (1933): "The rule applies although the agent in obtaining the benefit for the principal is doing so to return to the principal something of which he has wrongfully deprived him, or is reimbursing him for property wrongfully taken from him."

18. RESTATEMENT, AGENCY § 282(2)(c) (1933): "The principal is affected by the knowledge of an agent although acting adversely to the principal if, before he has changed his position the principal knowingly retains a benefit received through the act of the agent which otherwise he would not have received."

Comment *f* at 629-30: "If the principal receives a benefit as the result of the conduct of an agent, he cannot keep the benefit and escape responsibility for the means by which it has been acquired, unless he takes as a bona fide purchaser . . . or unless there is otherwise a change *in conditions*." The italicized portion has been changed to *in his position* in RESTATEMENT 2d, AGENCY § 282, comment *h* at 14 (Tent. Draft No. 5, 1957).

precluded from holding in due course on this account.[19] If there was a change of position by plaintiff, it was its act in becoming secondarily liable on the check which it negotiated to the bank. However, if this did not constitute a change of position on the plaintiff's part, knowledge will be imputed, thereby preventing plaintiff's being a holder in due course.[20] Another point, touched by the court, but not employed as a basis for decision, is whether a payee can be a holder in due course.[21] The court alludes to the idea that a payee cannot be a holder in due course, which position, if taken, would have excluded the necessity for any consideration of the giving of value. In apparent contradiction, however, the opinion also conveys the idea that the only bar to the plaintiff's being a holder in due course is the fact that it did not give value, as required by section 52 of the Negotiable Instruments Law.[22] Regrettably, in the final analysis it appears that the instant decision is not in accord with the better reasoning concerning the giving of value and is unclear concerning whether a payee can be a holder in due course.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—USE OF PERJURED TESTIMONY AND SUPPRESSION OF MATERIAL EVIDENCE FAVORABLE TO ACCUSED IN STATE CRIMINAL PROCEEDINGS

Petitioner, after trial and conviction in a state court for the murder of his wife, sought a writ of habeas corpus from the state court, asserting that the state held him in confinement without according him due process of law, in violation of the fourteenth amendment of the Constitution of the United States. His contentions were, in substance, that the sole basis of his conviction was perjured testimony, which was knowingly used by the prosecuting authorities and also that these authorities suppressed evidence which would have, apart from impeaching the testimony given against him, corroborated his

19. Maryland Cas. Co. v. Tulsa Industrial Loan & Inv. Co., 83 F.2d 14 (10th Cir. 1936).

20. Maryland Cas. Co. v. Tulsa Industrial Loan & Inv. Co., *supra* note 19. Although the court here found a change in position, it pointed out that: "If before his position has been changed, the principal learns the facts and knowingly retains a benefit obtained through the acts of the agent which he would not have received otherwise, he cannot escape responsibility." *Id.* at 17.

21. See Note, 30, So. CALIF. L. REV. 109 (1956) for a discussion of this problem.

22. "Clearly the plaintiff did not qualify under the provisions of Subd. 3 of Section 41-0502, NDRC 1943 [NEGOTIABLE INSTRUMENTS LAW § 52(3)] . . . because the plaintiff had not parted with anything of value." Instant case, 86 N.W.2d at 644.

claim that the act was committed in a fit of passion.[1] The trial court refused to issue the writ, and the state appellate court affirmed. On certiorari from the United States Supreme Court,[2] *held,* reversed. Due process of law is denied in a state criminal proceeding when the conviction is based upon testimony known by the prosecution to be perjured and the prosecution suppressed material evidence which would have disclosed the perjury and tended to establish a defense. *Alcorta v. Texas,* 355 U.S. 28 (1957).

Although the limitations placed upon criminal procedures in the federal courts under the Bill of Rights, including the due process clause of the fifth amendment, do not extend to the state courts,[3] the due process clause of the fourteenth amendment restricts the freedom possessed by the states in the making and enforcement of their criminal laws.[4] The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in doing so it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[5] To preserve the fundamental concepts of a fair hearing the Supreme Court will vacate a conviction in cases where the state has hurried the accused to conviction under mob domination,[6] deprived the accused of the aid of counsel,[7] tried the accused before a biased judge,[8] or contrived a conviction based upon confessions obtained from the accused by violence.[9]

The doctrine that the knowing use of perjured testimony and the knowing suppression of evidence amounts to a denial of due process as guaranteed by the fourteenth amendment is relatively new. It was first considered in the case of *Mooney v. Holohan*[10] in which the Court stated, though in dictum, that a criminal conviction procured by state prosecuting authorities by the knowing use of perjured

1. Petitioner relied on a Texas statute treating killing under influence of sudden passion arising from adequate cause, as murder without malice. A witness for the state gave testimony inconsistent with petitioner's claim that he had come upon his wife, whom he had already suspected of marital infidelity, kissing such witness in a parked automobile. After the trial, the witness admitted he had had sexual intercourse with petitioner's wife on many occasions, which fact was known by the prosecutor during the trial.

2. The procedure involved in the instant case was a review of a final decision of the Texas Court of Criminal Appeals. The Texas court had refused to issue a state writ of habeas corpus. Federal habeas corpus was not involved.

3. Rochin v. California, 342 U.S. 165 (1952).

4. Brown v. Mississippi, 297 U.S. 278 (1936).

5. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (opinion by Justice Cardozo).

6. Moore v. Dempsey, 261 U.S. 86 (1923).

7. Powell v. Alabama, 287 U.S. 45 (1932). *But see* Soulia v. O'Brien, 94 F. Supp. 764 (D. Mass. 1950) (mistakes of counsel in and of themselves are not enough for habeas corpus).

8. Tumey v. Ohio, 273 U.S. 510 (1927).

9. Brown v. Mississippi, 297 U.S. 278 (1936).

10. 294 U.S. 103 (1935) (dictum).

testimony was a denial of due process of law in violation of the fourteenth amendment. The dictum of *Mooney* was adopted in *Pyle v. Kansas*,[11] a case in which prosecuting officials coerced and threatened witnesses, with the result that evidence was suppressed and perjured. Although stressing that each case depends upon its own facts, recent federal[12] and state[13] decisions indicate a willingness to adopt the rule if the circumstances warrant its application. It has been applied in cases of suppression where the prosecutor has failed to call witnesses,[14] failed to produce real evidence or exhibits,[15] or merely disregarded keenly pertinent evidence.[16] The evidence suppressed must be material,[17] that is, it must be of such nature that had it been disclosed, the judge or jury would have been likely to consider it in reaching a conclusion.[18] In the case of perjured testimony, as is true of suppression of evidence, the courts require that such testimony must be knowingly used before due process is violated,[19] but the materiality of the perjured testimony does not seem to be controlling,[20] however, a mere allegation of the use of perjured testimony without any specification as to what the false testimony was is not sufficient to prove that perjured testimony was knowingly used.[21]

In the instant case the Court carefully applied the standards developed for vacating a conviction based upon suppressed and perjured

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11. 317 U.S. 213 (1942).

12. Bales v. Lainson, 244 F.2d 495 (8th Cir. 1957); Lister v. McLeod, 240 F.2d 16 (10th Cir. 1957); United States v. Jackson, 153 F. Supp. 781 (N.D. N.Y. 1957).

13. State v. Mayo, 95 So.2d 424 (Fla. 1957); Height v. Director, Patuxent Institution, 209 Md. 645, 120 A.2d 911 (1956); Missouri v. Eaton, 280 S.W.2d 63 (Mo. 1955).

14. United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955); United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952) (evidence suppressed was not relevant to issue of whether petitioner was guilty or not guilty but was relevant to the penalty to be imposed on the petitioner).

15. United States *ex rel.* Montgomery v. Ragan, 86 F. Supp. 382 (N.D. Ill. 1949) (prosecuting authorities suppressed evidence of a doctor's examination which would have proved that crime of rape had not been committed).

16. United States v. Rutkin, 212 F.2d 641 (3d Cir. 1954).

17. United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 765 (3d Cir. 1955) ("vital evidence, material to the issues of guilt or penalty."); Morton v. United States, 147 F.2d 28 (1945).

18. Soulia v. O'Brien, 94 F. Supp. 764 (D. Mass. 1950). If the evidence would have been merely cumulative, vague or confusing, the prosecutor has violated no duty in not disclosing. See, *e.g.*, Jordon v. Bondy, 114 F.2d 599 (D.C. Cir. 1940); Cummings v. United States, 15 F.2d 168 (9th Cir. 1926); *Ex parte* Mooney, 10 Cal. 2d 1, 73 P.2d 554 (1937).

19. Hysler v. Florida, 315 U.S. 411 (1942).

20. "A lie is a lie, no matter what its subject, and, if it is in anyway relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." People v. Savvides, 1 N.Y.2d 554, 136 N.E.2d 853, 854 (1956).

21. Lister v. McLeod, 240 F.2d 16 (10th Cir. 1957). See Wild v. Oklahoma, 187 F.2d 409 (10th Cir. 1951) (where allegation was merely one of perjury by a witness with no suggestion that it was knowingly used by prosecuting officials).

evidence. Adhering to the rule of *Mooney v. Holohan*[22] and *Pyle v. Kansas*,[23] the Court holds that the petitioner was not accorded due process of law. In *Mooney* and *Pyle* the Court was faced with a situation in which the prosecutor obtained perjured testimony or concealed the existence of evidence from the defense by affirmative action.[24] The present holding would extend the *Mooney* doctrine to situations in which the prosecutor obtained a conviction through negative acts. Here the prosecutor did not coerce, threaten or otherwise procure a witness to testify falsely but merely remained silent when he knew that a states' witness was giving false testimony. He did, however, encourage the witness not to volunteer information which would materially aid the defendant. The likelihood of prejudice in this situation is obvious. It is reasonable to assume that the prosecutor who elicited this testimony knew that had the facts been truthfully portrayed to the jury, a different decision might have been reached.

Based upon considerations of ethical and moral principals the decision in the instant case appears sound. As stated in the American Bar Association canons of ethics, the prosecutor's primary duty is not to convict, but to see that justice is done, and credible evidence that might tend to prove the accused's innocence should not be suppressed.[25] Unfortunately this basic premise of fair trial is often sacrificed for the sake of conviction. With the exception of New York,[26] it is difficult to find state decisions which adhere to the rule with any degree of consistency, and reluctance to invade the province of the states[27] has restricted Supreme Court interference. The fraud practiced on the court by suppression and use of perjured evidence appears to be as destructive as mob violence. In relation to the guarantee of due process, such a trial may result in a greater deprivation of rights than a conviction based upon no evidence at all. A conviction based upon no evidence at all could be reversed on examination of the record by a reviewing court. The error in the instant case would rarely come to light.

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22. 294 U.S. 103 (1935).

23. 317 U.S. 213 (1942).

24. The prosecuting officials threatened and coerced the witnesses thereby concealing evidence from the defense. Mooney v. Holohan, 294 U.S. 103, 106-07 (1935); Pyle v. Kansas, 317 U.S. 213, 216 (1942).

25. A.B.A. Canons of Ethics, Canon 5. See also *A Code of Trial Conduct: Promulgated by the College of Trial Lawyers*, 43 A.B.A.J. 223 (1957).

26. People v. Savvides, 1 N.Y.2d 554, 136 N.E.2d 853 (1956); People v. Riley, 83 N.Y.S.2d 281 (County Ct. 1948).

27. Ashe v. United States *ex rel.* Valotta, 270 U.S. 424 (1926); Frank v. Mangum, 237 U.S. 309 (1915); Felts v. Murphy, 201 U.S. 123 (1906); Maxwell v. Dow, 176 U.S. 581 (1900); Hurtado v. California, 110 U.S. 516 (1884); Dunn v. Lyons, 23 F.2d 14 (5th Cir. 1927), *cert. denied*, 276 U.S. 622 (1928).

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—EXECUTORY INTEREST CONDITIONED UPON RACIAL RESTRICTION ON USE OF LAND

Plaintiffs, Negro property owners, brought an action to quiet title and for a declaratory judgment, asserting that their predecessor in title had entered into a racially restrictive covenant with other owners of a certain tract of land, including plaintiffs' lot, which placed a cloud on the title. The covenant was an agreement that no owner would sell or lease the property to any colored person and was enforceable by automatic forfeiture to the nonviolating owners who recorded notice of their claim.[1] Defendants contended that the covenant created an executory interest[2] in the land, which vested in the defendants automatically upon the happening of the specified event and thus did not involve state action. The lower court held that enforcement of the restrictive covenant would be a violation of the equal protection clause of the fourteenth amendment and therefore removed the enforceability of the covenant as a cloud upon the title. *Held,* affirmed. Covenants not to sell to members of a particular race do not change their character whether denominated "executory interests" or "future interests," and no rights, duties or obligations can be based thereon, as they are a violation of the equal protection of the laws guaranteed by the fourteenth amendment. *Capitol Federal Sav. and Loan Ass'n v. Smith,* 316 P.2d 252 (Colo. 1957).

Racial restrictions upon the sale or use of land were generally upheld as valid and enforceable[3] until the Supreme Court, in *Shelley v.*

1. The covenant further provided against occupancy by any colored person, and in addition to the forfeiture clause provided for an action for damages against any person who violated the restriction, and for enforcement of rights of nonviolating owners by actions for specific performance, abatement, ejectment, or by injunction. The covenant was dated May 9, 1942 and was to have effect until Jan. 1, 1990. Capitol Federal Sav. and Loan Ass'n v. Smith, 316 P.2d 252, 254 (Colo. 1957).

2. An executory interest is the possibility or prospect of an estate, which exists by reason of the limitation of a freehold estate subject to a condition precedent, and which cannot be regarded as a contingent remainder. 2 TIFFANY, REAL PROPERTY §§ 363-67 (3d ed. 1939). It is distinguished by these characteristics: on the happening of a condition or event, an estate vests in the holder of the executory interest; it must vest in some person other than the creator of the interest; with the exception of the executory interest after the determinable fee and the fee simple conditional, it vests in derogation of a vested freehold estate; on the happening of the condition or event, it may become a present interest automatically, no entry or election being necessary. 1 SIMES, FUTURE INTERESTS § 149 (1936). It is subject to the rule against perpetuities. TIFFANY, *op. cit. supra,* §§ 391-401. For a full discussion of executory interests, see 19 AM. JUR., *Estates* §§ 95-134 (1939).

3. See Annot., 3 A.L.R.2d 466, 474 (1949). Some courts had held that a restriction restraining the sale of land to a particular race was an unlawful restraint on alienation; while others, including Colorado, held that restrictions as to sale were not invalid. There was general agreement that restrictions as to use and occupancy did not constitute unlawful restraints on alienation. *Id.* at 489, 491 and cases cited.

Kraemer,[4] held that a judicial decree granting specific enforcement of a private agreement restricting the use of land to a single race is state action violative of the equal protection clause. State action was defined as positive action which could fairly be attributable to any agency, branch or level of government of the state.[5] Later decisions expanded the state action concept to include the awarding of damages for a breach of a racially restrictive covenant,[6] and the operation of a school, for white boys only, by a board acting as a trustee of private funds, where the board was appointed under a state statute and functioned as an agency of the City of Philadelphia.[7] The decision in the *Shelley* case and subsequent cases made the effectiveness of such covenants depend on voluntary compliance with their terms by the contracting parties; it was not held to be unlawful to make agreements involving racial restrictions, nor to secure compliance with their provisions, unless the method of enforcement constitutes state action in violation of the Federal Constitution.[8]

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4. 334 U.S. 1 (1948), 2 VAND. L. REV. 119. In Hurd v. Hodge, 334 U.S. 24 (1948), a similar decision was rendered as to the District of Columbia, on the grounds of federal public policy. These decisions attracted great interest and much comment. See Ming, *The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203 (1949).

5. 334 U.S. at 14. "State action, as that phrase is understood for purposes of the fourteenth amendment, refers to exertions of state power in all forms." *Id.* at 20. ". . . State authority in the shape of laws, customs, or judicial or executive proceedings" is subject to review under the fourteenth amendment. Civil Rights Cases, 109 U.S. 3, 17 (1883). For a complete history and a study of the requirements of state action under the fourteenth amendment, see 1 RACE REL. L. REP. 613 (1956).

6. Barrows v. Jackson, 112 Cal. App. 2d 534, 247 P.2d 99 (1952), *aff'd*, 346 U.S. 249 (1953).

7. Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957). One Girard left a fund to the city of Philadelphia in trust for the education of "poor white male orphans." The college was established and was operated by a Board of City Trusts, appointed under a Pennsylvania statute. The Supreme Court held that the board was an agency of the state and consequently was forbidden by the fourteenth amendment from operating, even as a trustee of private funds, a school excluding Negroes because of race. In subsequent action in the case, the Philadelphia Orphan's Court directed the removal of the board as trustee effective upon the appointment of a substitute trustee by the court. *In re* Estate of Stephen Girard, Orphan's Court, No. 10. Philadelphia County, Pa., July Term, 1885, Sept. 11, 1957, *aff'd*, 138 A.2d 844 (Pa. 1958).

8. So long as the purposes of the agreements are effectuated by voluntary compliance with their terms, there is no state action and the provisions of the fourteenth amendment have not been violated. The fourteenth amendment "erects no shield against merely private conduct, however discriminatory. . . ." Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Barrows v. Jackson, 112 Cal. App. 2d 534, 247 P.2d 99 (1952), *aff'd*, 346 U.S. 249 (1953). In Claremont Improvement Club, Inc. v. Buckingham, 89 Cal. App. 2d 32, 200 P.2d 47 (1948), declaratory relief to establish the validity of a racially restrictive covenant was refused because such covenants are not unconstitutional insofar as voluntary adherence to their terms is concerned, but are merely unenforceable by the state judicial process. It would seem, however, that although voluntary adherence to the terms of a racially restrictive covenant does not violate the Constitution, under the decision in *Shelley* that it is an agreement to which the law attaches no legal or equitable obligations, the covenant loses its effectiveness; for "[i]t is perfectly true that the covenants take life from

Subsequently, the *Shelley* case was distinguished by the North Carolina court in *Charlotte Park and Recreation Comm'n v. Barringer*,[9] which involved a racial restriction in the form of a determinable fee. The court held that the determinable fee, which, upon the happening of a specified event, terminates by its own limitation and automatically reverts to the grantor, operates without judicial enforcement by the state courts, and is therefore valid since it involves no state action. The instant case raises the similar problem of the automatic vesting of an estate in the holder of an executory interest. The court, relying on *Shelley v. Kraemer*, held that this was a racial restriction violative of the fourteenth amendment. The court simply stated that "high sounding phrases or outmoded common law terms cannot alter the effect of the agreement. . . ."[10] Although state action had to be found in order to bring the case within the prohibition of the fourteenth amendment, the court does not make it clear how state action is involved in this situation. In dispensing with the automatic forfeiture question, the court apparently takes the position that for it to recognize any racial restriction as binding, no matter what its form, would be unconstitutional.

It is unfortunate that in the instant case the court did not see fit to discuss more fully the reasoning behind its decision. Assuming that the language created a valid executory interest,[11] the court was

court enforcement and that without it the discrimination they implement would wholly fail." Comment, 45 MICH. L. REV. 733, 741 (1947). "In holding that a covenant is valid and yet unenforceable, the court overlooked the case of *Von Hoffman v. City of Quincy*, (4 Wallace 535) [18 L. Ed. 403 (1866)] holding that a right without a remedy is as if it were not; that the inability to enforce a contract leaves nothing but an abstract right of no practical value and renders the protection of the Constitution a shadow and a delusion." Askew, *Restrictive Covenant Cases*, 12 GA. B. J. 277, 283 (1948).

9. 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied sub nom.*, Leeper v. Charlotte Park and Recreation Comm'n, 350 U.S. 983 (1956), 9 VAND L. REV. 561. The case was an action for declaratory judgment, involving a deed which contained, in addition to the restriction and reversion provision, a condition precedent to the reversion that the grantor should pay $3500 to the grantee. This condition was required to be met before the land should revert to the grantor. A determinable fee, in fact, terminates and reverts automatically. However, the court characterized the restriction, not as a covenant, but as a determinable fee, saying, "The operation of this reversion provision is not by any judicial enforcement by the State Courts of North Carolina, and *Shelley v. Kraemer* . . . has no application." *Id.* at 123. This problem was anticipated in 2 VAND. L. REV. 119, 122 (1948). See also Annot., 3 A.L.R.2d 466, 473-74 (1949), commenting that a limitation upon the estate granted may accomplish purposes otherwise unobtainable. For a discussion of the determinable fee, see 1 TIFFANY, REAL PROPERTY § 220 (3d ed. 1939).

10. Instant case, 316 P.2d at 255

11. If the executory interest is invalid for other than constitutional reasons, there is no problem. If the covenant did, in fact, create a valid executory interest. it might have been held invalid as a violation of the rule against perpetuities. A future interest is invalid unless it is certain that it must vest within the period of perpetuities; probability of vesting, however great, is not enough. The period involved in the instant case was 48 years. See note 1 *supra*. For a discussion of the rule and its application, see Leach, *Perpetuities In a Nutshell*, 51 HARV. L. REV. 638, 642 (1938).

squarely confronted with the problem of state action. In striking down the racial restriction the court made no clear analysis of this problem. Extending the state action concept to the instant case seems to require a holding that the state acts in taking recognition of an accomplished fact, the automatic vesting of title, made possible by the operation of a common law device for creating interests in land. In this regard, it is settled that state enforcement of a common law practice is state action, just as is enforcement of legislation embodying the practice.[12] Since land may be transferred only by grace of the state, by means which the state has provided, it could be said that judicial approval of a common law method of conveyancing is state control of private action, which is, in fact, state action. Failure to prevent the vesting of title in the holder of the executory interest in this situation could be termed "state sanction" or "passive" state action.[13] Carrying the state action doctrine a step further, it has been suggested that the decision in *Shelley v. Kraemer* raises the question of whether or not the enforcement of all private acts of discrimination is within the fourteenth amendment, since they ultimately depend upon state action.[14] Whether the court in the instant case employed any such reasoning is impossible to tell. The decision does little to resolve the question of the validity of such devices used to effectuate a racial restriction. However, in the light of the decisions of the Supreme Court of the United States in the restrictive covenant[15] and school segregation cases,[16] and the policy enunciated therein, their validity seems rather dubious at best.

CRIMINAL LAW—FORMER JEOPARDY—RETRIAL ON GREATER OFFENSE AFTER CONVICTION OF LESSER OFFENSE IS REVERSED ON APPEAL

Defendant was tried on counts of arson and of causing death by arson, which constitutes murder in the first degree. The court in-

12. Bridges v. California, 314 U.S. 252 (1941); AFL v. Swing, 312 U.S. 321 (1941).

13. 9 VAND. L. REV. 561 (1956). It is not a novel idea that state inaction is to be regarded as state action. Hyman, *Segregation And The Fourteenth Amendment*, 4 VAND. L. REV. 555, 569 (1951); *cf.* Terry v. Adams, 345 U.S. 461 (1953); Catlette v. United States, 152 F.2d 902, 907 (4th Cir. 1943). For a discussion of state action as including state inaction, see 1 RACE REL. L. REP. 613, 631 (1956).

14. Hyman, *supra* note 13, at 565. The analysis is persued to its ultimate conclusion in Hale, *Force and the State: A Comparison of "Political" and "Economic" compulsion*, 35 COLUM. L. REV. 149 (1935), and Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946).

15. See note 4 *supra*.

16. Brown v. Board of Education, 347 U.S. 483 (1954).

structed the jury that under the first count defendant could be found guilty of arson, and that under the second count the defendant could be found guilty of first or second degree murder. The court treated second degree murder as included within the instruction on murder in the first degree. From a verdict of guilty of arson and second degree murder[1] the defendant appealed and the judgment was reversed. In a second trial he was found guilty of first degree murder, despite his asserted defense of former jeopardy. On certiorari from the judgment of the court of appeals affirming the second conviction, *held,* reversed. A verdict of guilty of murder in the second degree, under an indictment for murder in the first degree, amounts to an acquittal of the charge of murder in the first degree; and any second trial for first degree murder violates the accused's constitutional right not to be twice put in jeopardy for the same offense. *Green v. United States,* 355 U.S. 184 (1957).

The Federal Constitution[2] and many state constitutions[3] guarantee that once a defendant has been acquitted of a crime he shall be free from the possibility of conviction of the same offense by a second trier of fact. The reason generally given for this principle is that the individual has limited resources and the state should not be allowed to try the individual repeatedly, thus undesirably increasing the chances of conviction.[4] When the defendant is charged with an offense, is convicted of a lesser included offense, appeals from the conviction and a new trial is granted, the question is whether the defendant can only be retried for the same offense of which he was convicted or whether he may also be retried for the greated offense of which he was acquitted. Approximately half of the states that have considered the question

1. The dissenting opinion in the instant case states that the finding of arson and second degree murder made "him [Green] guilty of all the elements necessary to convict him of the first degree felony murder with which he was charged. . . ." Green v. United States, 355 U.S. 184, 215 (1957). It would seem that the two convictions do not necessarily result in first degree murder, death caused by arson, because in the initial trial the jury apparently believed that arson was not the cause of death but that defendant had caused the death by other means sufficient to convict defendant of murder in the second degree.

2. U.S. CONST. amend. V.

3. See, *e.g.,* DEL. CONST. art. I, § 8; FLA. CONST. Decl. of Rights § 12 (1944); ILL. CONST. art. II, § 10.

4. 355 U.S. at 187. Generally a state cannot appeal from an acquittal or to impose a more severe penalty: State v. Dulaney, 87 Ark. 17, 112 S.W. 158 (1908); Commonwealth v. Fenwick, 177 Ky. 685, 198 S.W. 32 (1917). And where a verdict of guilty is returned against the defendant, he appeals, and the intermediate state appellate court reverses for defendant, the state cannot appeal to the higher appellate court. State v. B'Gos, 175 Ga. 627, 165 S.E. 566 (1932). The federal government generally cannot appeal. United States v. Weissman, 266 U.S. 377 (1924); United States *ex. rel.* West Va. Pittsburgh Coal Co. v. Bittner, 11 F.2d 93 (4th Cir. 1926). For instances where a state can appeal—generally at the stage of proceedings before trial—see 2 AM. JUR., *Appeal and Error* § 227 (1936).

have held that the defendant cannot be retried for the greater offense,[5] while the others hold that the retrial can include the greater offense of which the defendant was formerly acquitted.[6] In reviewing these decisions on state offenses the Supreme Court has held[7] that the retrial for the greater offense is not a violation of the due process clause of the fourteenth amendment.

In *Trono v. United States*,[8] a case originating in the local courts of the Philippine Islands, the defendants were indicted for murder but were convicted of the lesser offense of assault. They appealed to the Philippine Supreme Court, which, in accordance with local practice, entered a judgment of guilty of murder without remanding the case for retrial. The United States Supreme Court affirmed,[9] holding that the defendants, by appealing, waived[10] their immunity from double jeopardy. The Court's reasoning was that if the defendants sought complete acquittal they assumed the risk of being found guilty of the greater offense originally charged.

The instant case involved a federal criminal prosecution originating in a federal district court. In this situation, at least one lower federal court had previously held that the retrial could not include the greater offense of which the defendant had originally been acquitted.[11] In the majority of the lower federal courts, however, the *Trono* case has been used as authority for the proposition that the retrial can include the greater offense.[12] The instant case definitely establishes that this previous interpretation of the *Trono* case is not to be followed[13] and that when one is convicted in a federal court of a lesser included offense and appeals, any new trial cannot consider greater offenses of which he was acquitted.[14] The majority opinion in the instant case distinguishes *Trono* and treats the case as one of first impression, while

5. Examples of this group are: People v. Gilmore, 4 Cal. 376 (1854); Simmons v. State, 156 Fla. 353, 22 So. 2d 802 (1945) (dictum). The dissenting opinion in the *Green* case lists seventeen states in this group. 355 U.S. at 217.

6. Hoskins v. Commonwealth, 152 Ky. 805, 154 S.W. 919 (1913) (dictum); State v. Stallings, 334 Mo. 1, 64 S.W.2d 643 (1933). In these jurisdictions note the inapplicability of the rationale of Simmons v. State, *supra* note 5. The *Green* case lists nineteen states in this group. 355 U.S. at 216.

7. Brantley v. Georgia, 217 U.S. 284 (1910). The Georgia constitution expressly allowed a second trial for the same offense if the defendant appealed.

8. 199 U.S. 521 (1905).

9. *Id.* at 535.

10. *Id.* at 533.

11. United States v. Owens, 2 Alaska 480 (1905), decided four months prior to the *Trono* case.

12. Green v. United States, 236 F.2d 708, 710 (D.C. Cir. 1956), *rev'd*, 355 U.S. 184 (1957); Salta v. United States, 44 F.2d 752 (1st Cir. 1930); United States v. Gonzales, 206 Fed. 239 (W.D. Wash. 1913). Actually the exact question was not before the Court in *Trono* because there was no retrial. An upper Philippine court simply set aside a conviction of a lesser included offense and held the defendant guilty of "homicide." 199 U.S. at 522.

13. 355 U.S. at 197.

14. 355 U.S. at 198.

the dissenters state that the decision overrules *Trono*.[15] For the position of the majority it can be said that *Trono* and related cases[16] dealt with prosecution in a local court under local law, which makes those cases analogous to state prosecution for a state offense. For the view of the dissenting justices it can well be argued that the *Trono* type cases are not similar to state prosecutions and that the lower federal courts have not treated them as such but have used the *Trono* rationale in federal prosecutions.[17]

Some note should be made of the fact that lower federal courts have been following a position that has probably committed many to harsher sentences on second trials, and if the Supreme Court is just now iterating a principle it long thought settled, then there are many who would think the proclamation belated. In the final analysis, however, the important question is whether the present decision is desirable and not whether the Supreme Court is overruling prior opinions or deciding a case of first impression that is distinguishable from cases that it has considered before. A compromise would be to restrain the retrial to the lesser offense unless the error invalidates acquittal of the greater offense. This would protect the individual from the greater strength of the state and still allow retrial where the acquittal of the greater offense was erroneous.

EVIDENCE—SEARCHES AND SEIZURES—ADMISSIBILITY IN FEDERAL COURTS OF EVIDENCE OBTAINED THROUGH WIRETAPPING BY STATE OFFICIALS

New York police, having obtained authority in accordance with New York law to tap the wires of a telephone used by the defendant,[1]

15. 355 U.S. at 213.

16. See Carbonell v. People, 27 F.2d 253 (1st Cir. 1928), where defendant was indicted for murder, found guilty of manslaughter, and appealed. After reversal defendant was indicted for murder and found guilty of manslaughter for a second time. The court declared it could "assume without deciding" that the trial for murder could have prejudiced the defense, but in view of *Trono* the error was immaterial.

17. See cases cited *supra* note 12. And the Court in deciding *Trono* treated *Trono* as a case arising in a lower federal court of the continental United States. A most striking example is the intermediate appellate court in the instant case where the court was considering the defendant's appeal from conviction of second degree murder:
"In seeking a new trial . . . the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance." Green v. United States, 218 F.2d 856, 859. (D.C. Cir. 1955). And see Stroud v. United States, 251 U.S. 15 (1919), where a prosecution was begun in a federal court and then appealed by the defendant. The Supreme Court allowed a retrial that resulted in a jury verdict death penalty after a prior jury verdict without death penalty.

1. N.Y. CONST. art. I, § 12; N.Y. CODE CRIM. PROC. § 813-a.

overheard a conversation which led them to believe that the defendant was engaged in transporting narcotics. Acting on this information, they stopped a car in which eleven five-gallon cans of alcohol were found. The defendant was turned over to federal authorities and was convicted of illegal possession and transportation of alcohol without federal tax stamps.[2] The conviction, which was based almost entirely on the testimony of the New York police, was affirmed by the court of appeals. On certiorari from the United States Supreme Court, *held,* reversed. Under section 605 of the Communications Act of 1934[3] evidence obtained from wiretapping by state officials, even though in accordance with state law, is not admissible in a federal court. *Benanti v. United States,* 355 U.S. 96 (1957).

Evidence gathered by federal officers through an unreasonable search and seizure in violation of the fourth amendment is inadmissible in federal court.[4] Such evidence is excluded only when obtained by federal officers or by others in cooperation with them,[5] or by state officers for a federal purpose.[6] This evidence is not barred when acquired by a private party[7] or by state officers acting independently of the federal government.[8]

In *Olmstead v. United States*[9] the Supreme Court held that evidence obtained by wiretapping was not evidence obtained by unreasonable search and seizure so as to be inadmissible in federal courts under the fourth amendment. Thus, there was no barrier to the admission of wiretap evidence until the enactment of section 605 of the Com-

2. INT. REV. CODE OF 1954, § 5008(b) (1), 5642.

3. 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1952).

4. Weeks v. United States, 232 U.S. 383 (1914).

5. Byars v. United States, 273 U.S. 28 (1927); Lowery v. United States, 128 F.2d 477 (8th Cir. 1942).

6. Gambino v. United States, 275 U.S. 310 (1927). New York police, acting in behalf of the federal government, made an unlawful search of the defendant's car. Intoxicating liquor was found in the violation of the National Prohibition Act. The Supreme Court held that admission of this evidence violated the fourth and fifth amendments.

7. Burdeau v. McDowell, 256 U.S. 465 (1921).

8. Serio v. United States, 203 F.2d 576 (5th Cir. 1953); Jaroshuk v. United States, 201 F.2d 52 (9th Cir. 1953). Nor does fourth amendment exclusion apply in state court prosecutions. Wolf v. Colorado, 338 U.S. 25 (1949). In this case the Supreme Court affirmed a conviction where the evidence was obtained through an unconstitutional search and seizure by state officials. The Court held that the due process clause of the fourteenth amendment did not require exclusion of the evidence. However, it should be noted in this connection that the Court will reject the use of such evidence where it is obtained in such a manner as to shock the conscience of the Court. Rochin v. Califorina, 342 U.S. 165 (1952).

9. 277 U.S. 438 (1928). The defendant here contended that this evidence procured by federal officers through wiretapping, was inadmissible in federal court. The Supreme Court with Brandeis, Holmes, Cardozo and Stone dissenting held wiretapping was not a search and seizure because there was no entry on the premises of the defendant.

munications Act of 1934.[10] In *Nardone v. United States*[11] the Supreme Court held that section 605 required exclusion of federally gathered wiretap evidence in federal courts. The Court stated that the plain words of the statute forbade anyone, unless authorized by the sender, to intercept a telephone message.[12] It also pointed out that the statute made it equally clear that no person should divulge or publish the message or its contents to any person.[13] The Court subsequently held that evidence procured indirectly through information gained by wiretapping is likewise inadmissible in federal court.[14]

In *Schwartz v. Texas*[15] the Supreme Court held that wiretap evidence gathered by state officials is admissible in state courts. The instant case is the first to determine whether wiretap evidence obtained by state officials independently of federal officials is admissible in federal court. The Court held that, following the interpretation placed on section 605 of the Communications Act by the *Nardone* case, evidence obtained in violation of that statute was inadmissible in federal court whether secured by federal officers or state officers and stated that distinctions designed to defeat the meaning of the statute would not be tolerated. The government, referring to *Schwartz v. Texas* and cases dealing with unreasonable search and seizure, urged that the evidence was admissible because the wiretap occured without the knowledge or participation of federal officers. The Supreme Court concluded that the *Schwartz* case was not in point because it involved a state rule of evidence in a state proceeding. As an alternative argument to uphold the conviction the government argued that no violation of section 605 had taken place because the wiretap was done by state officials in accordance with state law.[16] The government's contention was that section 605 should not be interpreted to prevent a state from authorizing such methods in furtherance of its police functions. The Supreme Court rejected this argument, holding that

10. 48 STAT. 1103 (1934), 47 U.S.C. 605 (1952). "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ."

11. 302 U.S. 379 (1937).

12. *Id.* at 382.

13. *Ibid.*

14. Nardone v. United States, 308 U.S. 338 (1939). This second *Nardone* case held that where unlawful wiretapping is involved not only are the communications excluded but also the information gained as a result of the wiretap is excluded. See Bernstein, *The Fruit of the Poisonous Tree*, 37 ILL. L. REV. 99 (1942). The Court has determined that this protection applies to intrastate as well as interstate messages. Weiss v. United States, 308 U.S. 321, 329 (1939).

15. 344 U.S. 199 (1952). It is significant to note that after this decision Texas amended its statute so as to make inadmissible evidence obtained in violation of the laws of the United States. TEX. CODE CRIM. PROC. ANN. art. 727a (Supp. 1957).

16. See note 1 *supra*.

the Communications Act was comprehensive in nature, its policy being to protect those interests set out in section 605, and that if Congress had intended to make exceptions to the statute it would have done so.

The decision in the instant case expands the area which is within the exclusionary protection of section 605. While the fourth amendment is a prohibition upon federal officials in their investigatory activities, the prohibition of section 605 of the Communications Act is not expressly limited to federal government activity. The instant case indicates that the Supreme Court will not interpret the act, by analogy to the prohibition on unreasonable search and seizure, as simply a limitation on the acts of federal officials. Rather, the instant case seems to establish section 605 as a broad exclusionary rule forbidding the use of any wiretap evidence in federal courts. The result reached in the instant case appears correct, for the statute contains a specific prohibition against divulgence by anyone not authorized by the sender. There will no doubt be many who consider this decision a severe blow to law enforcement. The theme of their argument is that the right to tap wires is necessary to combat organized crime.[17] While this may be true, the answer lies in legislative modification of section 605 by Congress. It is significant to note that the act stands unchanged despite the clamor for reform from various law enforcement agencies.

EVIDENCE—WITNESSES—CROSS-EXAMINATION OF HANDWRITING EXPERT WITH SPECIMENS NOT ALREADY IN EVIDENCE

Defendant was convicted of forging the owner's name to a certificate of automobile title. The only evidence that defendant was the forger was the testimony of a handwriting expert who examined specimens of the defendant's and the owner's handwritings.[1] Upon appeal defendant maintained that the lower court materially hampered his cross-examination of this witness by refusing to allow him to confront the expert with specimens of the owner's handwriting[2] which had not

17. For this point of view see Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195 (1954); Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792 (1954).

1. The owner of the car was defendant's wife, from whom he had been separated for about six months. The certificate in question assigned title to one John Bowman, but no one by that name could be found at the address listed. On the same day of the supposed transfer the wife disappeared and was not seen or heard from again.

2. Apparently the authenticity of the proposed testing specimens was not in doubt.

previously been introduced into evidence.[3] *Held,* reversed. Refusal to allow cross-examination of a handwriting expert by confrontation with specimens of handwriting not previously introduced in evidence, without determining whether the test could be concluded expeditiously and without undue confusion is a prejudicial curtailment of the right of cross-examination. *New Jersey v. Bulna,* 46 N.J. Super. 313, 134 A.2d 738 (App. Div. 1957).

Evidence of the authorship of an instrument by a comparison of handwriting has long been resisted by the courts.[4] At common law, neither the layman nor the expert could testify from a comparison of handwriting specimens.[5] Today it is no longer a prerequisite that the witness have previous familiarity with the author's handwriting, and both the expert and the trier of fact can compare handwriting styles.[6] The great controversy centers on what specimens should be allowed to be compared with the disputed writing.[7] Since a question of the authorship of the offered specimens can arise, objections of unfairness, undue consumption of time and confusion of issues have led many states to limit comparison to specimens which are "genuine," *i.e.,* those written by the person whose handwriting is in issue—or to specimens which are already in evidence.[8] Furthermore, comparison is normally limited to those specimens which are conceded to be "genuine,"[9] or, in most states, those found by the trial judge to be "genuine" on preliminary hearing.[10] Since these same problems arise where new specimens are offered for the purpose of cross-examination of the expert, most courts have placed similar limitations on the use of the specimens for this purpose.[11] However, other courts have found

3. The trial court refused to hear any explanation of the defendant's purpose for submitting the specimens. In this appeal, however, it is stated that defendant's counsel offered the specimens twice; once for the purpose of testing the witness's opinion as to the identity of the writer thereof with the writer of the disputed assignment of certificate, and once to test his opinion as to whether two such specimens were written by the same person. New Jersey v. Bulna, 46 N.J. Super. 313, 134 A.2d 738, 742 (App. Div. 1957).

4. See 7 WIGMORE, EVIDENCE §§ 1991-94 (3d ed. 1940).

5. *Ibid.* See also, MORGAN, BASIC PROBLEMS OF EVIDENCE 203 (1957). It was not until the Common Law Procedure Acts in 1854 that such a comparison was allowed in England. See Note, *Authentication of Disputed Writings by Comparison: The Expert Witness,* 104 U. PA. L. REV. 664 (1956).

6. This has been done generally by statutes. See, *e.g.,* CAL. CODE CIV. PROC. § 1944 (Deering 1953); IOWA CODE ANN. § 622.25 (1950). However, in a few cases comparison has been allowed without the aid of a statute. See State v. Hastings, 53 N.H. 452, 461 (1873); State v. Ward, 39 Vt. 223, 233 (1867).

7. MORGAN, BASIC PROBLEMS OF EVIDENCE 203 (1957).

8. Note 6 *supra.* See also, 7 WIGMORE, EVIDENCE § 2016 (3d ed. 1940).

9. State v. Debner, 205 Iowa 25, 215 N.W. 721 (1927); Morrison v. Porter, 35 Minn. 425, 29 N.W. 54 (1886).

10. Omohundro v. State, 172 Tenn. 48, 109 S.W.2d 1159 (1937), 15 TENN. L. REV. 251 (1938); State v. Thompson, 80 Me. 194, 13 Atl. 892 (1888). For an excellent discussion of the reasons for this additional limitation see University of Illinois v. Spalding, 71 N.H. 163, 51 Atl. 731 (1901).

11. McArthur v. Citizens Bank, 223 Fed. 1004 (4th Cir. 1915) (requiring specimens offered to be compared to be admitted or proven genuine); Rose v.

that these objections may not be sufficient to outweigh the benefit to be derived from the tests.[12]

The instant court recognizes that the trial court does have discretion to refuse the use of specimens of handwriting offered for cross-examination if the benefits to be derived from such a test are outweighted by dangers such as undue consumption of time and confusion of issues. However, the court holds that the trial court cannot refuse to allow the specimens solely on the ground that they are not already in evidence.[13] Since the conviction here depended heavily on the testimony of the expert, the disallowance of the cross-examination without any attempt to see whether the test could be concluded expeditiously and without undue confusion was especially prejudicial. The court further points out that restricting the defendant to the use of those documents already employed during his direct examination destroyed the very efficacy of the test since the expert was already aware of their origin.[14]

The willingness of some courts, including the court in the instant case, to relax the rigid limitations on the use of handwriting specimens on cross-examination appears to be attributable to two important factors. The first of these is the recognition that modern courts no longer consider the opinion testimony of handwriting experts as a low order of evidence.[15] The second is the great potentiality of such tests for discovery of the unqualified or "pseudo" expert who tends to lean the way his client wishes to go.[16] A question with which the instant court was not faced is whether courts are justified in limiting the testing on cross-examination solely to specimens written by the person whose handwriting is in issue. If the theory behind admitting any writings not otherwise in the case is that the expert has had plenty of time to study the characteristics of the handwriting of the parties involved, and should be able to recognize those same characteristics in the new specimens submitted, it is arguable that this same reasoning could

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First Nat'l Bank, 91 Mo. 399, 3 S.W. 876 (1887) (requiring specimens already to be in evidence). See Annot., 128 A.L.R. 1329, 1337 (1940).

12. Hoag v. Wright, 174 N.Y. 36, 66 N.E. 579 (1903).

13. 134 A.2d at 743.

14. *Ibid.*

15. For a long period of time it was felt that the opinion of the handwriting expert was inferior to the ordinary person who had seen the party write, even though only once, or had corresponded with him. This was perhaps due to the fact that witnesses were accepted as experts who knew little or nothing about scientific analysis. With modern research techniques the expert's opinion is much more reliable than the layman's. For a demonstration that the characteristics of each specimen can be clearly shown by use of proper scientific methods, see OSBORN, QUESTIONED DOCUMENTS (2d ed. 1929). For a criticism of the opinion of lay witnesses based on memory, see Inbau, *Lay Witness Identification of Handwriting*, 34 ILL. L. REV. 433 (1939).

16. For a recognition that there are entirely too many of this type of expert, see Swett, *How to Select and When To Employ A Handwriting Expert*, 14 ALA. LAW. 142, 143 (1953).

be applied regardless of whether the specimens are "genuine" or not. Of course, after the new specimen is introduced, if the opposing party doubts its authorship and the other is put to his proof, the dangers of undue consumption of time and confusion of issues may again arise.[17] No set rule should be adopted. It should be left within the trial judge's discretion to determine whether the purposes for which the samples are offered are of sufficient merit to outweigh the dangers involved.[18]

FAIR TRADE LAWS—ROBINSON PATMAN ACT—CIVIL ACTION FOR TREBLE DAMAGES FOR SELLING AT UNREASONABLY LOW PRICES

In a civil action in a United States District Court, treble damages and injunctive relief were sought, under sections 4 and 16 of the Clayton Act,[1] for injuries allegedly suffered by reason of the respondent's sales at unreasonably low prices in violation of section 3 of the Robinson-Patman Act.[2] The complaint was dismissed on the ground that private remedies afforded by sections 4 and 16 of the Clayton Act are not available to redress of violation of section 3 of the Robinson-Patman Act. The court of appeals affirmed the order of dis-

17. Since the court can limit the number of new specimens to be introduced, these dangers can be avoided to some extent.

18. This is apparently the view taken by Professor McCormick. "It seems that any one who claims to be an expert should be subject to a testing of his claim on cross-examination by presenting him with true and fabricated writings and asking him to distinguish. Since in fairness he may properly request time for examination and testing, the judge should have a discretion to say whether under the circumstances the test is worth the time it will take." MCCORMICK, EVIDENCE 367 (1954).
"It is better to take a little time to see whether the opinion of the witness is worth anything, rather than to hazard life, liberty, or property upon an opinion that is worth nothing." Hoag v. Wright, 174 N.Y. 36, 66 N.E. 579, 581 (1903).

1. 38 STAT. 731, 737 (1914), 15 U.S.C. §§ 15, 26 (1952). Section 4 of the Clayton Act provides: "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."
Section 16 of the Clayton Act grants a private cause of action for injunctive relief against "threatened loss or violation of the antitrust laws."

2. 49 STAT. 1528 (1936), 15 U.S.C. § 13a (1952). Section 3 of the Robinson-Patman Act provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell . . . goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
"Any person violating any of the provisions of this section shall, upon conviction threof, be fined not more than $5,000 or imprisoned not more than one year, or both."

missal,[3] and certiorari was granted by the Supreme Court.[4] *Held,* affirmed. Congress did not, by amendment, make section 3 of the Robinson-Patman Act a part of the Clayton Act, nor is section 3 of the Robinson-Patman Act an antitrust law as embraced in section 1 of the Clayton Act;[5] therefore, a practice which is forbidden solely by section 3 of the Robinson-Patman Act, namely, to sell "at unreasonably low prices for the purpose of destroying competition," is not subject to civil redress under sections 4 and 16 of the Clayton Act. *Nashville Milk Co. v. Carnation Co.,* 355 U.S. 373 (1958).

The Robinson-Patman Act was the product of two distinct bills introduced in Congress at about the same time for the purpose of maintaining the plane of business competition best suited for a healthy economy by deterring price discrimination and its effects.[6] Because of the similarity of purposes, the two bills were combined,[7] notwithstanding the fact that the respective methods used to effectuate those purposes were civil in the one bill and criminal in the other.[8] Section 1 of the Robinson-Patman Act expressly amended the Clayton Act, and thus the civil remedies available for a violation of the Clayton Act became applicable to it. Section 3 of the Robinson-Patman Act was criminal in nature. The question immediately arose whether section 3 was also an amendment to the Clayton Act, thereby affording civil redress for a violation of it under sections 4 and 16 of the Clayton Act, or whether its enforcement was left exclusively to criminal sanctions.[9] There was very little civil litigation based on section 3 for several

3. 238 F.2d 86 (7th Cir. 1956).

4. To resolve a conflict between the principal case and Vance v. Safeway Stores, Inc., 239 F.2d 144 (10th Cir. 1956).

5. 38 STAT. 730 (1914), 15 U.S.C. § 12 (1952). Section 1 of the Clayton Act provides: "That 'antitrust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety. . . . "

6. The Borah-Van Nuys bill, S. 4171, 74th Cong., 2d Sess. (1936), a close copy of the Canadian Price Discrimination Act, Canada Stat. 25 & 26 GEO. V, c. 56, § 9 (1935), was introduced for the purpose of subjecting discriminatory business practices to penal consequences. It was subsequently added without alteration to the Patman bill. H.R. 8442, 74th Cong., 2d Sess. (1936).

The Robinson-Patman bill was introduced as an amendment to the Clayton Act for the purpose of abolishing blanket immunities for quality discounts. See *Hearings Before the House Judiciary Committee on Bills to Amend the Clayton Act,* 74th Cong., 1st Sess. 214, 248, 257-58 (1935).

7. The Borah-Van Nuys bill became § 3 of the Robinson-Patman Act. 49 STAT. 1528 (1936), 15 U.S.C. § 13a (1952).

8. Section 1 of the Robinson-Patman Act, 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1952), expressly amends § 2 of the Clayton Act, 38 STAT. 730 (1914), 15 U.S.C. § 13 (1952), and is therefore an "antitrust law" as defined in § 1 of the Clayton Act, 38 STAT. 730 (1914), 15 U.S.C. § 12 (1952), for which civil remedies for injuries resulting from its violation are permitted by §§ 4 and 16 of the Clayton Act. 38 STAT. 731, 737 (1914), 15 U.S.C. §§ 15 and 26 (1952).

9. For the view that civil actions are possible for a violation of § 3, see 80 CONG. REC. 9420, 9421, 9903 (1936). *Contra,* 80 CONG. REC. 9419, 9421 (1936); H.R. REP. No. 2951, 74th Cong., 2d Sess. 8 (1936).

years,[10] and it was not until the Supreme Court indicated that a civil action would lie for a violation of this section that such civil litigation substantially increased.[11] Subsequently, in the leading case of *Balian Ice Cream Co. v. Arden Farms Co.*,[12] a federal district court expressly held that the Congressional purpose of the Robinson-Patman Act was to create an instrument of antitrust enforcement. The lower federal courts, relying largely on the *Balian* case, have been in general agreement that section 3 of the Robinson-Patman Act was an amendment to the Clayton Act and that civil remedies for its violation were provided by sections 4 and 16 of the Clayton Act.[13]

The decision of the majority in the instant case is a clear reversal of the position held by the lower federal courts and of the view indicated by the Supreme Court's own dicta that a private remedy is available under the Clayton Act for a violation of section 3 of the Robinson-Patman Act.[14] By employing basic rules of statutory in-

10. The reason apparently being that most legal and business communities considered that § 3 provided only criminal sanctions. Gordon, *Robinson-Patman Anti-Discrimination Act: The Meaning of Sections 1 and 3*, 22 A.B.A.J. 593, 649 (1936); Hamilton & Loevinger, *The Second Attack On Price Discrimination: The Robinson-Patman Act*. 22 WASH. U.L.Q. 153. 182 (1936); Notes, 50 HARV. L. REV. 106, 121, 122 (1937); 85 U. PA. L. REV. 306, 312 (1937).

11. The first case to allow civil redress under § 3 was decided in 1942. Atlantic Brick Co. v. O'Neal, 44 F. Supp. 39 (E.D. Tex. 1942). The action was not based solely on the Robinson-Patman Act, but the court indicated that one may invoke the provisions of § 3 of that act in a private action "if he can allege and prove injury proximately caused by such violations."

The Supreme Court indicated by dicta that such an action would lie. Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 750 (1947). See also Moore v. Mead's Fine Bread Co., 348 U.S. 115, 117 (1954): *accord*, Spencer v. Sun Oil Co., 94 F. Supp. 408 (D. Conn. 1950); Gordon, Wolf, Cowen Co. v. Independent Halvah & Candies, Inc., 9 F.R.D. 700 (S.D.N.Y. 1949). See also, Moore v. Mead Service Co., 184 F.2d 338 (10th Cir. 1950); Atlantic Co. v. Citizens Ice & Coal Storage Co., 178 F.2d 453 (5th Cir. 1949); A. J. Goodman & Son v. United Lacquer Mfg. Corp., 81 F. Supp. 890 (D. Mass. 1949). *Contra*. National Used Car Market Report, Inc. v. National Auto Dealers Ass'n, 108 F. Supp. 692 (D.D.C. 1951).

12. 94 Supp. 796 (S.D. Cal. 1950). In construing the Robinson-Patman Act in its entirety to be an amendment to the Clayton Act, it was said, "Whether an act is amendatory of existing law is determined not by title alone, or by declarations in the new act that *it purports to amend* existing law. On the contrary, it is determined by an examination and comparison of its provisions with existing law. If its aim is to clarify or correct uncertainties which arose from the enforcement of the existing law, or to reach situations which were not covered by the original statute, the act is amendatory, *even though in its wording* it does not purport to amend the language of the prior act. Whatever supplements existing legislation, in order to achieve more successfully the societal object sought to be obtained *may be said to amend it.*" *Id.* at 798.

13. Because of the vagueness of the phrase "unreasonably low prices" of § 3, some question has been raised concerning the constitutionality of section 3 as a criminal statute. See Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co., 131 F.2d. 419, 422 (8th Cir. 1942); F. & A. Ice Cream Co. v. Arden Farms Co., 98 F. Supp. 180 (S.D. Cal. 1951); United States v. Bowman Dairy Co., 89 F. Supp. 112, 114 (N.D. Ill. 1949). See also, Waldes Kohinoor, Inc. v. Stabile, 140 F. Supp. 916, 919 (S.D.N.Y. 1956); Hershel California Fruit Products Co. v. Hunt Foods, Inc., 119 F. Supp. 603 (N.D. Cal. 1954); Myers v. Shell Oil Co., 96 F. Supp. 670, 674 (S.D. Cal. 1951); Comment, 55 MICH. L. REV. 845, 848 (1957); 49 NW. U.L. REV. 285, 292 (1954).

14. See notes 11, 12 and 13, *supra*.

terpretation, the Supreme Court held that the first section of the Robinson-Patman Act, and only the first section, is amendatory of the Clayton Act;[15] that sections 2, 3 and 4 of the Robinson-Patman Act are separate and distinct provisions standing on their own footing and carrying their own sanctions;[16] and that a violator of section 3 must be prosecuted under the provisions of that section exclusively, and specifically not under any provisions of the Clayton Act.[17] In spite of the overlapping provisions of section 3 of the Robinson-Patman Act and section 2 of the Clayton Act,[18] it was determined that the Robinson-Patman Act is not ambiguous on its face in regard to its dual purpose;[19] that the title of the act clearly supports this interpretation;[20] and that the legislative history of the act lends further support to this view.[21]

In consideration of the chaotic legislative history of section 3 and of the diametrically opposing results of the numerous judicial attempts to interpret it on the basis of its history,[22] an analysis of the decision of the Supreme Court in the instant case must necessarily look to the four corners of the statute alone. The purpose of this statute is to avoid harmful economic effects from unfair business competition, and hence to protect the public in general. Its sanctions are expressly criminal. Therefore, the only source from which a civil remedy may spring must be from its own provisions in conjunction with general law, and not from a similarity between its language and another distinct statute which does allow civil remedies. The Court here was

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15. See note 8 *supra.*

16. 355 U.S. at 376. Section 2 applies the amending provisions of § 1 to litigation commenced under the former provisions of § 2 of the Clayton Act. 49 STAT. 1527 (1936), 15 U.S.C. § 21a (1952).

Section 4 applies to certain practices of cooperative associations. 49 STAT. 1528 (1936), 15 U.S.C. § 13b. (1952).

17. "Further, § 3 contains only penal sanctions for violation of its provisions; in the absence of a clear expression of Congressional intent to the contrary, these sanctions should under familiar principals be considered exclusive, rather than supplemented by civil sanctions of a distinct statute." Instant case, 355 U.S. at 377. See also, D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165 (1915).

18. There is a partial overlap between the price discrimination clauses of § 3 of the Robinson-Patman Act, 49 STAT. 1528 (1936), 15 U.S.C. § 13a (1952), and § 2 of the Clayton Act, as amended, 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1952).

19. The first section of the Robinson-Patman Act reads: "That section 2 of the (Clayton Act) . . . is amended to read as follows: . . ." This entire section is set forth in quotation marks and no other section his either the same introductory phrase or the quotation marks. 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1952).

20. The title of the Robinson-Patman Act reads:

"An Act

"To amend section 2 of [Clayton Act] . . . *and for other purposes.*" 49 STAT. 1526 (1936). (Emphasis added.)

21. See 80 CONG. REC. 9419, 9421 (1936); H.R. REP. No. 2951, 74th Cong., 2d Sess. 8 (1936).

22. See note 9 *supra.*

not dealing with the question of whether a civil action for single damages is afforded by this section, but has limited itself exclusively to the determination that, in the absence of clear language to the contrary, it could find no legislative intent that the civil remedies of the Clayton Act are applicable to a violation of section 3 of the Robinson-Patman Act. Therefore, the mere fact that the enforcement agencies of the government have seldom used the section, and that there is some question concerning its constitutional validity as a criminal statute,[23] does not empower the court to supplement it with a remedy from another distinct statute where there is no clear manifestation of legislative intent. If this decision renders section 3 ineffective as either a criminal or civil statute, then it is a result that only the legislature can remedy.

PARTNERSHIP—CREDITORS' RIGHTS—LIABILITY OF A PARTNER FRAUDULENTLY INDUCED TO ENTER INTO THE PARTNERSHIP AGREEMENT

Appellant was induced to enter into a partnership agreement[1] by the fraudulent representations of the other partners.[2] He was inactive and the reputation of the partnership was due in no way to his connection with it since the creditors were unaware that he was a partner.[3] On petition for involuntary bankruptcy by partnership creditors,[4] the partnership and all partners except appellant[5] were declared bankrupt. The appellant, contesting the referee's finding of his personal liability for firm debts under the Colorado Uniform

23. See note 13 *supra*.

1. The referee specifically found that the appellant was induced to become a partner by the fraudulent representations of two of the four Smiths, who with the appellant made up the partnership of T. C. Smith & Son.

2. Van Andel was a partner from April 21, 1955, to July 9, 1955, when the partnership was dissolved by mutual consent without an accounting or winding up.

3. The referee found that: "'[A]s to the petitioning creditors, when their debts were contracted, John J. Van Andel was unknown to them as a partner and was so far unknown and inactive in the affairs of the partnership that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.'" Van Andel v. Smith, 248 F.2d 915, 919 (10th Cir. 1957).

4. The petitioning creditors said that their debts were contracted as follows:
(1) Hallack and Howard, between August 29, and October 31, 1955.
(2) George Wafer, between March 12, and July 12, 1955.
(3) W. D. Woodside Company, between April 1, and December 1, 1955.
All these creditors were found to have been doing business with the partnership before April 21, 1955.

5. The referee found that Van Andel was solvent as an individual, and that as to him personally there were not three petitioning creditors as required.

Partnership Act,[6] contended that the adjudication of bankruptcy was erroneous as the presence of fraud voided the partnership *ab initio* thus relieving him of any liability.[7] *Held,* affirmed. A partner who is induced to enter into an existing partnership through fraud of the other partners is liable to creditors for debts incurred while he is a partner, even though the defrauded partner was inactive and unknown to the creditors. *Van Andel v. Smith,* 248 F.2d 915 (10th Cir. 1957).

The members of an ordinary partnership are jointly liable for the partnership debts.[8] Their's is an unlimited liability, regardless of any agreements among themselves.[9] When a judgment is obtained against the partnership and all its members for a firm debt, execution thereon can be levied either on the partnership assets or upon the property or any partner.[10] Upon bankruptcy, partnership liabilities are first met out of partnership assets, and only when these prove insufficient are the personal assets of the several partners distributed.[11]

There is a division of opinion in the few decisions mentioning the point as to whether a partnership is void *ab initio*[12] or voidable[13] when one partner is induced by fraud to enter into the partnership agree-

6. COLO. REV. STAT. ANN. § 104-1-39 (1953). This section, which adopts UNIFORM PARTNERSHIP ACT § 39, provides:

"Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled:

"(1) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

"(2) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

"(3) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership."

7. The court rejected appellant's contention that the adjudication was erroneous in that there were not three creditors as required by the Bankruptcy Act because one of the debts was incurred after the dissolution of the partnership.

8. See Hall v. Lanning, 91 U.S. 160 (1875); Kent v. National Supply Co., 36 S.W.2d 811 (Tex. Civ. App. 1931). UNIFORM PARTNERSHIP ACT § 15 codifies the common-law liability of partners as to the contractual obligations of the partnership, making the partners jointly liable for obligations incurred in the ordinary course of business. The Uniform Act creates the tenancy in partnership by § 25 thereof. This is a unique form of ownership that supersedes the common-law theory of a joint tenancy.

9. See Weaver v. Oliver, 40 S.W.2d 984 (Tex. Civ. App. 1931);1 BARRETT & SEAGO, PARTNERS AND PARTNERSHIPS c. 3, § 8.2 (1956).

10. Webb v. Gregory, 108 S.W.478 (Tex. Civ. App. 1908). Where a partner pays more than his pro rata share of the partnership debts, he is entitled to contribution from a co-partner. Goldring v. Chudacoff, 15 Cal. App. 2d 741, 60 P.2d 135 (1936).

11. See 52 STAT. 845 (1938), 11 U.S.C. § 23(g) (1952); COLLIER, BANKRUPTCY § 5.26 (14th ed. 1940).

12. Oteri v. Scalzo, 145 U.S. 578 (1892); Long v. Newlin, 144 Cal. App. 2d 509, 301 P.2d 271 (1956); 68 C.J.S., *Partnership* § 13b (1950).

13. Hynes v. Stewart & Owens, 49 Ky. (10 B. Mon.) 429 (1850); Perry v. Hale, 143 Mass. 540, 10 N.E. 174 (1887); Grossman v. Lewis, 226 Mass. 163, 115 N.E. 236 (1917).

ment. Dicta in these cases indicate that when the partnership is considered to have had existence until it is brought to an end by recission of otherwise, the defrauded partner is liable whether he held himself out as a partner or not.[14] On the other hand, if the partnership is considered void *ab initio* the indication is that the partner is liable only if he held himself out as a partner, that is, on an estoppel theory.[15] The present court construed section 39 of the Uniform Partnership Act to mean that a partnership induced by fraud is voidable rather than void *ab initio* as appellant contended. Section 39 states that, upon recission of a partnership contract for fraud or misrepresentation the defrauded partner is entitled to a lien on surplus partnership property, to stand as a creditor after liabilities to third parties have been satisfied, and to be indemnified by the defrauding parties against all debts and liabilities of the partnership.[16] Since these rights are created by section 39, the court inferred that the partnership entity must have come into existence and even though the partner was unknown and defrauded, he was liable for firm debts.[17]

A careful reading of section 39 leads to the conclusion that it states the rights of a defrauded partner and not his duties to the creditors of the partnership.[18] The cases that have been decided under this section of the act deal with relations between the partners themselves,[19] and

14. See note 13 *supra*. Normally, a dormant partner is liable for firm debts incurred while he was a member even though there was no representation that he was a partner; see Schwaegler Co. v. Marchesotti, 88 Cal. App. 2d 738, 199 P.2d 331 (1948); Dygert v. Hansen, 31 Wash. 2d 858, 199 P.2d 596 (1948).

15. Long v. Newlin, 144 Cal. App. 2d 509, 301 P.2d 271, 273 (1956) (dictum).

16. See note 6 *supra*.

17. The court construes § 39 to mean that a partnership is brought into existence even in the face of fraud and the defrauded partner is liable to creditors: "As we read it, the statute means that even though the partnership contract was procured by the fraud of one of the partners, nevertheless *the partnership entity is created* and until it is dissolved the defrauded partner is liable for debts of the partnership to third persons incurred during the life of the partnership. . . . While a defrauded partner may rescind for fraud, he remains liable to creditors who dealt with the partnership during its existence." 248 F.2d at 918. (Emphasis added.)

18. To support its construction that § 39 creates a liability to creditors on the part of the defrauded partner, the court cites two Massachusetts cases that are not concerned with the question of creditors rights; see 248 F.2d at 918 n. 7. Perry v. Hale, 143 Mass. 540, 10 N.E. 174 (1887), deals with an action by one defrauded stockholder against other shareholders for the price of stock in a "corporation" that had never been incorporated. The court held that there was no corporation and applied partnership law; the discussion of partners' liability to creditors is dictum. Grossman v. Lewis, 226 Mass. 163, 115 N.E. 236 (1917), concerns a suit between partners to end a partnership; no creditor was a party to the action. In the case at bar, the court distinguished the appellant's cases on the theory that they did not involve third parties; see 248 F.2d at 918. Logically the two cited cases should be distinguished on the same basis.

19. Long v. Newlin, 144 Cal. App. 2d 509, 301 P.2d 271 (1957); Gardner v. Shreve, 89 Cal. App. 2d 804, 202 P.2d 322 (1949); Adamo v. Nicholas, 13 Cal. App. 2d 261, 56 P.2d 985 (1936); Levin v. Hurwitz, 148 Md. 249, 129 Atl. 218 (1925); Brownback v. Nelson, 122 Mont. 525, 206 P.2d 1017 (1949); Alcorn v. Kohler, 203 Ore. 19, 277 P.2d 1009 (1954); Jefferies v. Jefferies, 387 Pa. 234, 127 A.2d 657 (1956).

not with partner-creditor relations. The statute makes no statement that the defrauded partner is under any obligation to pay partnership debts. Perhaps the court should have clarified its decision by examining the dicta in the partnership cases in its effort to support a theory of liability to third parties. The holding in this case is particularly harsh in light of the fact that this defrauded partner was unknown to the creditors. Such a result can be avoided by amending the Uniform Act to provide expressly that a person who is fraudulently induced to enter into a partnership agreement shall be liable for partnership debts only when he holds himself out to creditors as a partner.

WATERS AND WATERCOURSES—SUBTERRANEAN PERCOLATING WATERS—ACTION TO ENJOIN USE WHICH IMPAIRS ADJOINING LANDOWNER'S USE

The plaintiffs own and reside upon land which joins that owned by one of the defendants. This defendant has seven water wells upon his ten acre property. The water from these wells is used to supplement that drawn from other sources for use in the co-defendant's chicken processing plant. Plaintiffs allege that prior to the drilling and use of the seven wells by the defendant there was an abundant supply of water for domestic purposes in their own wells; that while defendant's wells are in production plaintiff's wells go dry; and that when defendant's wells are not in use water again returns to plaintiff's wells. Plaintiffs sue to enjoin the use of defendant's wells for providing the plant with water. On appeal from a decree in favor of defendants, *held,* reversed. Use of such large amounts of percolating water as to leave an adjoining landowners insufficient water for domestic purposes is "unreasonable" and will be enjoined. *Jones v. Oz-Ark-Val Poultry Co.,* 306 S.W.2d 111 (Ark. 1957).

All underground waters, except where otherwise provided by statute, are regarded in law as either flowing or percolating.[1] In the absence of proof to the contrary, a well will be presumed to be fed by percolating water.[2] Although there can be no ownership of percolating

1. Hathorn v. Dr. Strong's Saratoga Springs Sanitarium, 55 Misc. 445, 106 N.Y.S. 553 (Sup. Ct. 1907).

2. Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1936). The term "percolating waters" includes all waters which pass through the ground beneath the surface of the earth without a definite channel and are not shown to be supplied by a definite flowing stream; percolating waters are those which seep, ooze, filter and otherwise circulate through the subsurface strata. United Fuel Gas Co. v. Sawyers, 259 S.W.2d 466 (Ky. 1953); Pence v. Carney, 58 W. Va. 296, 52 S.E. 702 (1905).

water in the absolute sense, because of its wandering and migratory character,[3] the owner of land has a property right in percolating water beneath the surface of that land.[4] Ownership becomes absolute once the water is reduced to actual control and possession by the person claiming it.[5] In respect to the use of percolating waters by the owner of land from which it is drawn, several different rules are applied in the United States.[6] The English view, adopted in some American jurisdictions,[7] is that the land owner may drain off all water found under his land, and any resulting inconvenience to adjoining property falls within the description of *damnum absque injuria* and is not the basis of an action.[8] Thus a landowner may tap percolating water beneath his property even to the extent of lowering the water level on adjoining property.[9] However, this rule is limited in both England and the United States by the equitable doctrine which requires one to use his property, if at all possible, so as not to injure his neighbor's property.[10] In some states the English view, followed in early decisions,[11] has given way to the reasonable use rule, or the American rule,[12] which limits the use of percolating water to such amounts as may be necessary and reasonable for some beneficial purpose in connection with the land from which it is taken.[13] When the

3. Utah Copper Co. v. Stephen Hayes Estate, Inc., 83 Utah 545, 31 P.2d 624 (1934), *cert. denied,* 295 U.S. 742 (1935).

4. Rank v. Krug, 90 F. Supp. 773 (S.D. Cal. 1950); Gross v. MacCornack, 75 Ariz. 243, 255 P.2d 183 (1953).

5. Campbell v. Willard, 45 Ariz. 221, 42 P.2d 403 (1935); Utah Copper Co. v. Stephen Hayes Estate, Inc., 83 Utah 545, 31 P.2d 624 (1934), *cert. denied,* 295 U.S. 742 (1935).

6. The doctrine of prior appropriation is to be distinguished from those doctrines applicable to percolating water. Under this doctrine one who first diverts water from a stream and applies it to beneficial use has a prior right thereto, to the extent of his appropriation. Arizona v. California, 283 U.S. 423 (1931). It is generally held that this doctrine is applicable only to waters that are *publici juris* and is not applied to percolating waters. Howard v. Perrin, 200 U.S. 71 (1906); Annots., 109 A.L.R. 395, 408 (1937); 55 A.L.R. 1385, 1444 (1928).

7. See Annots., 109 A.L.R. 395, 397 (1937); 55 A.L.R. 1385, 1390 (1928).

8. Gallerani v. United States, 41 F. Supp. 293 (D. Mass. 1941).

9. Victor A. Harder Realty & Const. Co. v. City of New York, 64 N.Y.S.2d 310 (Sup. Ct. 1946).

10. "[F]or unavoidable damage to another's land, in the lawful use of one's own, no action can be maintained. . . . But the rule does not go beyond proper use and unavoidable damage. . . . 'Every man has the right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria.*'" Collins v. Chartiers Val. Gas Co., 131 Pa. 143, 18 Atl. 1012 (1890). From this it would appear that an action would lie if the damage were caused through negligence or malice. See also Rose v. Socony-Vacuum Corp., 54 R.I. 411, 173 Atl. 627 (1934).

11. Ocean Grove Camp-Meeting Ass'n v. Commissioners, 40 N.J. Eq. 447, 3 Atl. 168 (Ch. 1885).

12. P. Ballantine & Sons v. Public Serv. Corp., 86 N.J.L. 331, 91 Atl. 95 (1914). See also, Annots., 109 A.L.R. 395, 399 (1937); 55 A.L.R. 1385, 1398 (1928).

13. Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953); Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935).

use has no relation to the land—*e.g.*, a sale—it will be held to be unreasonable if it impairs or limits an adjoining landowner's supply of water.[14] This rule should be contrasted with the reasonable use rule generally applied to determine rights of riparian owners on surface streams. While the former generally looks only to the reasonableness of the use by the consumer in relation to his land, the latter looks to the rights of the consumer in relation to the rights of upper and lower riparian owners.[15] This is very similar to the correlative rights doctrine, applied to percolating waters in some American jurisdictions.[16] Under the correlative rights doctrine the rights of all landowners over a common saturated area are coequal or correlative and one cannot use more than his share, even for the benefit of his own land, where others' rights are injured by such use.[17]

The court in the instant case applied the riparian reasonable use rule to percolating waters. "As to water rights of riparian owners, this state has adopted the reasonable use rule. . . . We see no good reason why this same rule should not apply to a true subterranean stream or to subterranean percolating waters."[18] Whether or not any given use is reasonable depends upon the circumstances of the particular case. In this case the court, noting that plaintiffs' land had little value except for domestic purposes, held that it was unreasonable for defendants to use thousands of gallons of water each day for processing chickens if such use deprived plaintiffs of sufficient water for domestic needs. Since the rule applied by the court takes into consideration the resulting effect upon landowners who draw from a common source of supply, it would seem that the result reached

14. Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87 (1940).

15. United States v. Willow River Power Co., 324 U.S. 499 (1945); Colorado v. Kansas, 320 U.S. 383, (1943); Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171 (1896); City of Canton v. Shock, 66 Ohio St. 19, 63 N.E. 600 (1902). See also 56 AM. JUR., *Waters* § 274 (1947). It should be noted that the rights and liabilities in regard to running surface streams differ in several important respects from those in regard to percolating waters. The corpus of running water in a natural stream is not subject to private ownership as is the corpus of percolating water; but when percolating water escapes to another's property, the title of the former owner is gone. Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1933). Percolating water as distinguished from surface running water is a portion of the soil itself and belongs to the owner of the land. Gould v. Eaton, 111 Cal. 639, 44 Pac. 319 (1896). See also 56 AM. JUR., *Waters* § 111 (1947).

16. O'Leary v. Herbert, 5 Cal.2d 416, 55 P.2d 834 (1936); Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663 (1902); Cason v. Florida Power Co., 74 Fla. 1, 76 So. 535 (1917); Nashville, C. & St. L. Ry. v. Rickert, 19 Tenn. App. 446, 89 S.W.2d 889 (1935); Justesen v. Olsen, 86 Utah 158, 40 P.2d 802 (1935).

17. O'Leary v. Herbert, 5 Cal.2d 416, 55 P.2d 834 (1936). The phrases "reasonable use" and "correlative rights" are frequently used interchangeably with reference to percolating waters. Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953); Katz v. Walkinshaw, 141 Cal. 116, 74 Pac. 766 (1902); Annot., 55 A.L.R. 1385, 1399 (1928); *cf.* Erickson v. Crookston, Water Works Power and L. Co., 105 Minn. 182, 117 N.W. 435 (1908); Vanderwork v. Hewes, 15 N.M. 439, 110 Pac. 567 (1910).

18. 306 S.W.2d at 113.

is very similar to that which would be reached by application of the correlative rights rule.

Because of the widespread drought in many areas in recent years, questions concerning rights in available water are becoming more important. Indeed several states have enacted statutes applicable to questions that arise in this area.[19] The court in the instant case, having no statute upon which to rely, correctly realized that the test used should take into consideration the resulting effect upon the rights of others. It would also seem that there is no good reason for distinguishing between percolating water rights and riparian water rights if the test as applied to one reaches just and desirable results when applied to the other. This the court also recognized, and its decision would seem to simplify somewhat the law in this respect.

19. *E.g.* ARIZ. REV. STAT. ANN. §§ 45-141 to -154 (1954); CAL. WATER CODE ANN. (Deering 1944); TENN. CODE ANN. §§ 70-1801 to -1849 (Supp. 1957).