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Recent Cases

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RECENT CASES

CONFLICT OF LAWS—TORTS—CHOICE OF LAW REQUIRED BY FEDERAL TORT CLAIMS ACT

Plaintiff, representative of a passenger killed in an airplane crash over the District of Columbia, sued the United States under the Federal Tort Claims Act, alleging that the negligence of a government control tower operator in Virginia was a concurring cause of the accident. The act states that the liability of the United States shall be governed by the law of the place "where the act or omission occurred."[1] The trial court found the control tower operator negligent and rendered a judgment for $150,000, applying the statute of the District of Columbia, which places no limit on the amount of recovery for wrongful death.[2] On appeal, *held,* affirmed in part and modified in part (2-1). The Virginia statute,[3] limiting recovery to $15,000, must be applied since the negligence occurred in Virginia. *United States v. Union Trust Co.,* 221 F.2d 62 (D.C. Cir. 1955).[4]

In the field of torts the generally accepted conflict of laws disregards the law of the place where the negligent act was committed and, instead, applies the law of the place where the injury was sustained.[5] This rule was applied in *Alabama Great Southern R.R. v. Carroll*[6] when the defendant's employee, while in Alabama, negligently failed to discover a weak link connecting two railroad cars and injury resulted to plaintiff in Mississippi. Plaintiff, also an employee of defendant, was denied recovery because of the fellow-servant rule extant in Mississippi, although recovery would have been allowed in Alabama under a statutory modification of this rule. In *Cameron v. Vandergriff,*[7] plaintiff was allowed to recover under the laws of

1. Federal Tort Claims Act, 28 U.S.C.A. § 1346(b) (1946).
2. D.C. CODE ANN. § 16-201 (1951).
3. VA. CODE § 8-636 (1950).
4. A major portion of the court's opinion was devoted to the application of "discretionary function" as defined in Dalehite v. United States, 346 U.S. 15 (1953). Excluded from the operation of the Federal Tort Claims Act is any claim based "upon the exercise . . . or failure to exercise or perform a discretionary function . . . on the part of . . . an employee of the Government. . . ." The court was unanimous in holding that a government control tower operator's duties were not discretionary. 28 U.S.C.A. § 2680 (1946).
5. Hermann v. Port Blakely Mill Co., 69 Fed. 646 (N.D. Cal. 1895); Leonard v. Decker, 22 Fed. 741 (S.D.N.Y. 1884); Darks v. Scudder-Gale Grocer Co., 146 Mo. App. 246, 130 S.W. 430 (1910); Mike v. Lian, 322 Pa. 353, 185 Atl. 775 (1936); GOODRICH, CONFLICT OF LAWS § 93 (3d ed. 1949); STUMBERG, CONFLICT OF LAWS 187 (2d ed. 1951). *But see* Lindstrom v. International Nav. Co., 117 Fed. 170 (E.D.N.Y. 1902), *rev'd on other grounds,* 123 Fed. 475 (2d Cir. 1903), *cert. denied,* 193 U.S. 699 (1904); Caldwell v. Gore, 175 La. 501, 143 So. 387 (1932).
6. 97 Ala. 126, 11 So. 803 (1892).
7. 53 Ark. 381, 13 S.W. 1092 (1890).

Arkansas for injuries sustained there although the negligent act occurred in Indian Territory.

Notwithstanding the general rule, the majority of the court in the instant case felt compelled to construe the Tort Claims Act strictly. Although the rationale was not expressed, it might have been reasoned that liability should not be extended beyond that intended by Congress.[8] However, this theory would seem to have questionable application here, since a more liberal interpretation would not have broadened liability under the act, but would merely have increased the amount of recovery. The dissenting judge did not think the language of the act required such a strict construction, nor did he think Congress intended to disregard the traditional conflict of laws rule. He would expand the word "act" to include not only a voluntary contraction of muscles, but its consequences; in this case, the crash of the plane in the District of Columbia. Language in at least two cases supports such an expansion. In *Connecticut Valley Lumber Co. v. Maine Central R.R.*,[9] the court, in applying the law of the place of the injury, said, "[T]he locality of the act is deemed at common law to be the same as that of the damage." In *Lacey v. L. W. Wiggins Airways, Inc.*,[10] the negligent act occurred on land and injury resulted when the interstate's plane crashed more than a marine league from shore in Massachusetts Bay. The court, retaining jurisdiction under the Death on the High Seas Act,[11] thought of the negligent "act" as continuing and being consummated by the death of the intestate. The drafters of the *Restatement of Torts*, however, excluded from the word "act" even the most direct and immediate consequences.[12]

There is apparently no legislative history concerning this section of the Tort Claims Act, and the instant case appears to be the first decided in which the negligence of a government employee occurred in one state and the injury to plaintiff in another. The absence of any discussion by Congress prior to the passage of the act, has prompted one writer to conclude that the words "act or omission" were accidentally employed.[13] This conclusion seems reasonable, in view of the fact

8. See, *e.g.*, Bryan v. United States, 99 F.2d 549 (10th Cir. 1938); 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6301 (3d ed., Horack 1943).

9. 78 N.H. 553, 103 Atl. 263 (1918) (defendant railroad started a fire in Canada that burned plaintiff's bridge spanning Hall stream, the international dividing line at that point; in determining liability for the part of the bridge located in New Hampshire, the court applied the law of that state, disregarding the law of the place where the act occurred.).

10. 95 F. Supp. 916 (E.D.N.Y. 1951).

11. This act gave district courts of the United States jurisdiction over suits to recover damage "whenever the death of a person shall be caused by wrongful act, neglect, or default *occurring* on the high seas beyond a marine league from the shore of any state. . . ." 41 STAT. 537 (1920), 46 U.S.C.A. § 761 (1944). (Emphasis added.).

12. RESTATEMENT, TORTS § 2 (1934).

13. Leflar, *Choice of Law: Torts: Current Trends*, 6 VAND. L. REV. 447, 448 (1953). See also Gottlieb, *State Law Versus a Federal Common Law of Torts*, 7 VAND. L. REV. 206, 207 (1954).

that Congress was primarily concerned with removing the immunity of the Sovereign, and perhaps did not intend to anticipate the problems of conflict of laws which might arise.[14] It is unfortunate that these particular words were used; had the statute read "according to the law of the place where the *tort* occurred," the court undoubtedly would have applied the law of the place of the injury.[15] The place-of-the-act rule may be difficult to apply in cases in which there is continuing negligence, the original act occurring in State *A* followed by failure to discover and correct in State *B* or *C*. The place-of-the-injury rule has been generally followed because of its easy application and essential fairness.[16] In the absence of discussion by Congress, it seems doubtful that a change in the usual tort conflict of laws rule was intended, especially where Congress expressed the desire that the liability of the United States be likened to that of a private person.[17]

CONSTITUTIONAL LAW—EQUAL PROTECTION—EXEMPTION OF VETERANS FROM PAYMENT OF HUNTING AND FISHING FEES

A non-veteran sought to have an Indiana statute[1] exempting veterans from payment of hunting and fishing fees declared unconstitutional on the ground that the exemption violated the equal protection clauses of the state and federal constitutions. The Indiana Supreme Court reversed a judgment of the circuit court upholding the statute[2] and defendants petitioned for rehearing. *Held* (3-2), the exemption violates the equal protection clause of the Indiana constitution;[3] the

14. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation,* 35 GEO. L.J. 1, 2 (1946).

15. "The *locus delecti* or place of wrong, is the place where the last event necessary to make the actor liable for an alleged tort occurs." GOODRICH, CONFLICT OF LAWS § 93 (3d ed. 1949); RESTATEMENT, CONFLICT OF LAWS § 377 (1934); see also STUMBERG, CONFLICT OF LAWS 187 (2d ed. 1951).

16. Goodrich, *Yielding Place to New: Rest versus Motion in the Conflict of Laws,* 50 COLUM. L. REV. 881, 893 (1950). But see Rheinstein, *The Place of Wrong: A Study in the Method of Case Law,* 19 TUL. L. REV. 4 (1944); Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement,* 36 MINN. L. REV. 1 (1951). The place-of-harm rule was developed to be applied to cases involving injury to person or property and difficulty will be encountered in applying the rule to cases involving injury to intangible rights, *e.g.,* widely published defamatory statements.

17. "The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. § 1346(b) (1953).

1. IND. ANN. STAT. § 11-1424 (Burns Cum. Supp. 1942).

2. Hanley v. State, 123 N.E.2d 452 (Ind. 1954).

3. IND. CONST. art. I, § 23. "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

subject matter of the game and fish act provides no reasonable basis for an exemption of veterans as a class. *Hanley v. State*, 126 N.E.2d 879 (Ind. 1955).

Not all legislative discrimination is prohibited by constitutional guaranties of equal protection.[4] A legislature may establish a class and accord it special treatment if the classification is reasonable and not arbitrary.[5] However, the fact that the class defined corresponds to some natural grouping, or is composed of those who seem to belong together, is not enough;[6] the definition must be based on a substantial difference in the position of members of the class relating to the purpose of the legislation and to the advancement of the public welfare.[7] Finally, all persons similarly situated with respect to the announced legislative purpose must be included.[8]

Statutes relating to veterans usually are designed to grant the group certain privileges or immunities, and it is well settled that former military service may be used as a basis for special legislative

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4. "[N]either the (fourteenth) amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people. . . ." Barbier v. Connolly, 113 U.S. 27, 31 (1885).

5. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Tigner v. Texas, 310 U.S. 141, 147 (1940).

6. The test for reasonableness has been stated as follows:
"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematically nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitary." Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78, 79 (1911).

7. Essentially the same test for reasonableness of classification is used in both the state and federal courts. Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928); Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927); Armour & Co. v. North Dakota, 240 U.S. 510 (1916); Barrett v. Indiana, 229 U.S. 26 (1913); Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911); Watson v. Maryland, 218 U.S. 173 (1910); Southern Ry. v. Greene, 216 U.S. 400 (1909); Minneapolis & St. L. Ry. v. Beckwith, 129 U.S. 26 (1889); Harper v. Galloway, 58 Fla. 255, 51 So. 226 (1910); Marallis v. Chicago, 349 Ill. 422, 182 N.E. 394 (1932); Motley v. State Bd. of Barber Examiners ,228 N.C. 337, 45 S.E.2d 550 (1947); State v. Shedroi, 75 Vt. 277, 54 Atl. 1081 (1903); State *ex rel.* Bacich v. Huse, 187 Wash. 75, 59 P.2d 1101 (1936).

8. Davis v. Teague, 220 Ala. 309, 125 So. 51 (1929), *appeal dismissed*, 281 U.S. 695 (1930) (for lack of federal question). See Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

favor.[9] The instant case is the first concerned with exemption of veterans from payment of hunting and fishing license fees, but many courts have considered the validity of exemption from payment of occupational license fees, particularly peddlers' licenses.[10] There has been disagreement with respect to exemptions applicable only to disabled and indigent veterans,[11] but exemption of all veterans, without reference to disability or indigence, has been declared unconstitutional by every court[12] except the Supreme Court of New Jersey.[13] The majority applied the rule that the classification must bear some relation to the subject matter of the license acts in order to be reasonable,[14] and found that there is no relation between the business of a peddler, as defined by the statute under consideration, and former military service.[15]

The purpose of fish and game laws has been established by cases involving the question of discrimination in the granting of hunting and fishing licenses. It is settled that a state may preserve the rights to wild life within the state for its own citizens, to the exclusion of

9. United States v. Hall, 98 U.S. 343 (1878); People *ex rel.* Jendrick v. Allman, 396 Ill. 35, 71 N.E.2d 44 (1947); Marallis v. Chicago, 349 Ill. 422, 182 N.E. 394 (1932); Farley v. Watt, 165 Okla. 6, 23 P.2d 687 (1933); Tennessee Title Co. v. First Federal Savings and Loan Ass'n, 185 Tenn. 145, 203 S.W.2d 697 (1947); Larson v. City of Shelton, 37 Wash. 2d 481, 224 P.2d 1067 (1950). *Contra,* State v. Shedroi, 75 Vt. 277, 54 Atl. 1081 (1903).

10. See, Annot., 83 A.L.R. 1231 (1933).

11. Exemption upheld in Macon v. Samples, 167 Ga. 150, 145 S.E. 57 (1928); State v. Montgomery, 92 Me. 433, 43 Atl. 13 (1899); Farley v. Watt, 165 Okla. 6, 23 P.2d 687 (1933). *Contra,* Edelmann v. Fort Smith, 194 Ark. 100, 105 S.W.2d 528 (1937); *Ex parte* Jones, 38 Tex. Crim. 482, 43 S.W. 513 (1897).

12. Ratta v. Healy, 1 F. Supp. 669 (D.N.H. 1932), *aff'd,* 67 F.2d 554 (1st Cir.), *dismissed per curiam,* 389 U.S. 701 (1933), *rev'd on jurisdictional grounds,* 292 U.S. 263 (1934); Marallis v. Chicago, 349 Ill. 422, 182 N.E. 394 (1932); State v. Garbroski, 111 Iowa 496, 82 N.W. 959 (1900); Commonwealth v. Hana, 195 Mass. 262, 81 N.E. 149 (1907); City of Laurens v. Anderson, 75 S.C. 62, 55 S.E. 136 (1906); State v. Shedroi, 75 Vt. 277, 54 Atl. 1081 (1903); Larson v. City of Shelton, 37 Wash. 2d 481, 224 P.2d 1067 (1950); State v. Whitcom, 122 Wis. 110, 99 N.W. 468 (1904). See also, McLendon v. State, 179 Ala. 54, 60 So. 392 (1912), *answer to certified question conformed to in* 6 Ala. App. 19, 60 So. 406 (1912) (an exemption of veterans from certain professional license payments not in violation of the bill of rights of the state constitution, but is in conflict with the fourteenth amendment of the United States Constitution); *In re* Humphrey, 178 Minn. 331, 227 N.W. 179 (1929) (*held,* that exemption of veterans from state bar examinations violated requirements of permissive classification). *But cf.,* Motley v. State Bd. of Barber Examiners, 228 N.C. 337, 45 S.E.2d 550 (1947) (upheld exemption of veterans who barbered for three years in the service from barber examinations and fees).

13. Strauss v. Borough of Bradley Beach, 117 N.J.L. 45, 186 Atl. 691 (Sup. Ct. 1936), *aff'd,* 118 N.J.L. 561, 194 Atl. 160 (1937).

14. "Events long since past, and neither present conditions nor a difference in situation between the honorably discharged soldiers and the other members of the community or state are therefore the basis of the legislative classification." Marallis v. Chicago, 348 Ill. 422, 182 N.E. 394, 398 (1932).

15. "The classification attempted by this statute is based on no apparent necessity, or difference in conditions of circumstances that have any relation whatsoever to the employment in which the veterans of the Civil War is authorized to engage without paying license." State v. Garbroski, 111 Iowa 496, 82 N.W. 959, 960 (1900).

nonresidents and aliens.[16] However, legislatures have not been allowed to discriminate among the residents of a state.[17] Distinctions between eligible voters and nonvoters,[18] the citizens of different counties,[19] and persons of different ages have been found violative of state constitutional guaranties of equal protection.[20] The courts have agreed that the purpose of license and conservation acts is the protection of game and fish, that these classifications are contrary to the purpose of the acts, and, therefore, arbitrary and unreasonable.[21]

Both lines of authority seem to support the decision in the instant case. The statute in question was distinguished from those which grant a bonus or other consideration to veterans. The court found that the statue was designed to provide funds for the propagation of game and fish, and based its decision on the absence of any relation between the purpose of the act and former military service. "There is no substantial distinction between the present conditions and circumstances of veterans in the attempted classification here in question and those of other citizens of Indiana in relation to the protection and conservation of fish and game."[22] Thus the decision does not threaten existing veterans' legislation which falls within the reasonable classification test.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—PROCEDURE FOR REMOVAL OF JUDGE AN INTERFERENCE WITH JUDICIAL PROCESSES

While a criminal action against petitioner was pending on a motion to dismiss the indictment, the district attorney filed an application for change of judge. An Oregon statute[1] provided that no judge may proceed with an action in which such an application is filed. Upon the refusal of the judge to proceed, petitioner brought an original mandamus proceeding in the Oregon Supreme Court, alleging that the

16. LaCoste v. Louisiana, 263 U.S. 545 (1924); Truax v. Raich, 239 U.S. 33 (1915); Patsone v. Pennsylvania, 232 U.S. 138 (1914); Geer v. Connecticut, 161 U.S. 519 (1896); State *ex rel.* Spence v. Bryan, 87 Fla. 56, 99 So. 327 (1924). *But see,* Toomer v. Witsell, 334 U.S. 385 (1948); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Missouri v. Holland, 252 U.S. 416 (1920).

17. State v. Johnson, 172 Ark. 866, 291 S.W. 89 (1927); State *ex rel.* Spence v. Bryan, 87 Fla. 56, 99 So. 327 (1924); Buntin v. Crowder, 173 Tenn. 386, 118 S.W.2d 221 (1927); State *ex rel.* Bacich v. Huse, 187 Wash. 75, 59 P.2d 1101 (1936).

18. State v. Johnson, 172 Ark. 866, 291 S.W. 89 (1927).

19. State *ex rel.* Spence v. Bryan, 87 Fla. 56, 99 So. 327 (1924); State v. Higgins, 51 S.C. 51, 8 S.E. 15 (1897); Buntin v. Crowder, 173 Tenn. 388, 118 S.W.2d 221 (1938).

20. State *ex rel.* Emerson v. Erickson, 159 Minn. 287, 198 N.W. 1000 (1924)

21. See note 17 *supra.*

22. Instant case at 883.

1. ORE. COMP. LAWS ANN. §§ 1-501, 502 (Supp. 1947).

statute was unconstitutional. *Held,* a mandatory writ commanding the judge to proceed must issue; the statute violates the principle of separation of powers by allowing the disqualification of a judge without a statement of facts showing bias or prejudice. *State v. Vandenberg,* 280 P.2d 344 (Ore. 1955).

A procedure by which a judge may be disqualified for bias or prejudice is provided by statute in nearly every state and in the federal rules of procedure.[2] The procedure most frequently employed requires that an affidavit be filed setting forth facts to show that a fair trial cannot be had under the presiding judge. Some statutes limit the allegations to specific situations;[3] others do not define those facts upon which a reasonable belief in bias or prejudice can exist.[4] The federal courts[5] and the majority of the state courts[6] have held that the judge may rule upon the legal sufficiency of the affidavit but may not inquire into the validity of the facts alleged. However, some statutes expressly permit a denial by the judge followed by a hearing and determination of the alleged bias or prejudice.[7]

The instant case illustrates the limitation on legislative power to allow disqualification. The court found that a statute which allows uncontrolled ability to remove a judge places a burden on the courts amounting to legislative interference with the exercise of judicial functions, forbidden by the principle of separation of powers.[8] The statute was compared with an earlier Oregon statute[9] which required that bias or prejudice be established by an affidavit containing a statement that the affidavit was filed in good faith and not for the purpose of delay. That statute had been considered by the court and found

2. The grounds upon which a judge could be disqualified at common law have been the subject of disagreement. Blackstone denied that any such grounds existed. 3 BLACKSTONE, COMMENTARIES* 361. *Contra,* Turner v. Commonwealth, 59 Ky. 619 (1859) (common law allowed disqualification of judge related to one of the litigants); Woodmen of the World v. Alford, 206 Ala. 18, 89 So. 528 (1920) (any interest, the probable and natural tendency of which is to create bias in the mind of the judge, could be grounds for disqualification).

3. IND. ANN. STAT. § 9-1303 (Burns 1933); TENN. CODE ANN. § 17-201 (1956); WYO. COMP. STAT. ANN. § 3-1901 (1945).

4. 28 U.S.C.A. § 144 (1949).

5. See Berger v. United States, 255 U.S. 22 (1920); Refior v. Lansing Drop Forge Co., 124 F.2d 440 (6th Cir.), *cert. denied,* 316 U.S. 671 (1942); Mitchell v. United States, 126 F.2d 550 (10th Cir.), *cert. denied,* 316 U.S. 702 (1942), *rehearing denied,* 324 U.S. 887 (1945).

6. See State *ex rel.* Brown v. Dewell, 131 Fla. 566, 179 So. 695 (1938); Davis v. Irwin, 65 Idaho 77, 139 P.2d 474 (1943); Branham v. Caudill, 264 Ky. 263, 94 S.W.2d 674 (1936).

7. CAL. CODE CIV. PROC. § 170 (Deering 1953); see Bass v. Minich, 194 Ark. 589, 109 S.W.2d 139 (1937); Omohundro v. State, 172 Tenn. 48, 109 S.W.2d 1159 (1937).

8. See Austin v. Lambert, 11 Cal. 2d 73, 77 P.2d 849 (1938); Krug v. Superior Court, 11 Cal. 2d 733, 77 P.2d 854 (1938) (similar statute held unconstitutional on same ground).

9. ORE. COMP. LAWS ANN. §§ 1-501, 502 (Supp. 1943).

constitutional.[10] The court pointed out that, although it was possible for a judge to be disqualified for a cause other than bias or prejudice under the former system, that result could be attained only by abuse of the system, while its accomplishment was the manifest purpose of the statute in question.

If the constitutionality of a disqualification procedure is to be determined by the burden put upon the courts, it would seem that the distinction drawn by the court in the instant case is untenable. Certainly a procedure designed to allow removal of a judge at the whim of the parties unduly interferes with judicial processes; yet a statute which purports to limit disqualification may be so easily abused that substantially the same burden is created. The requirement of an affidavit of bias or prejudice, the truthfulness of which cannot be questioned, does not seem sufficient assurance that the procedure will not be used as a dilatory tactic.[11] Adequate protection of the parties, on the other hand, requires that a procedure for disqualification be readily available. Perhaps the best solution is illustrated by the California statute,[12] which provides that questions of bias or prejudice shall be heard and determined by some other judge agreed upon by the parties.

CONSTITUTIONAL LAW—STATE POLICE POWER—RESTRICTION OF COMPETITION AMONG EMPLOYMENT AGENCIES

Acting under authority of the Wisconsin code,[1] the Industrial Commission of Milwaukee rejected plaintiff's application for a license to operate an employment agency on the ground that the community was adequately served by existing agencies. The circuit court affirmed the commission's decision and plaintiff appealed, urging that the code provision violated the due process clause of the Constitution.[2] *Held* (4-3) affirmed. The statute is a valid exercise of the police power reserved to the states. *Graebner v. Industrial Comm'n*, 269 Wis. 252, 68 N.W.2d 714 (1955).

10. See U'Ren v. Bagley, 118 Ore. 77, 245 Pac. 1074 (1926).
11. In one state it has been held that a statute providing for disqualification without a hearing and determination of alleged bias as prejudice is an unconstitutional deprivation of judicial power. Diehl v. Crump, 720 Okla. 108, 179 Pac. 4 (1919).
12. CAL. CODE CIV. PROC. § 170 (Deering 1953).

1. [T]he industrial commission shall have . . . authority . . . to refuse to issue such license . . . [if] it is found . . . that the number of employment agents . . . is sufficient to supply the needs of employers and employees." WIS. STAT. § 105.13 (1949).
2. U.S. CONST. amend. XIV, § 1.

Power to protect a public interest through regulation of private businesses is clearly within the powers reserved to the states, subject only to the limitations of the fourteenth amendment.[3] Early Supreme Court decisions developed the doctrine that state regulation for any purpose is permissible only if "the business is affected with a public interest."[4] Dissatisfaction with the rigidity of this criterion[5] brought about its repudiation in 1934, when the Court, relying heavily upon the dissenting opinion of Mr. Justice Brandeis in *New State Ice Co. v. Liebmann*,[6] held that regulation is permissible when a business, for adequate reason, is subject to control for the public good.[7] Two standards, suggested by Mr. Justice Brandeis, apparently are now major considerations in determining the scope of a state's power to regulate private businesses.[8] First, does the regulation have a real and substantial relation to the public interest sought to be protected and yet not exceed it, and, second, is the regulation neither arbitrary nor unreasonable in view of the public good enhanced?[9] These criteria, while applicable to governmental control of private businesses in general, also limit regulation which restricts the right to engage in a particular business.[10] Such regulation has been upheld, however, when applied to a variety of businesses: historically, public carriers and utilities;[11] more recently, slaughter-houses,[12] private banks,[13] cotton gins,[14] laundries and dry-cleaners,[15] funeral homes,[16] plumbing,[17] and many others.[18]

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3. See U.S. CONST. ANN. 982 (Corwin ed. 1952).
4. Munn v. Illinois, 94 U.S. 113 (1876); Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923). See 22 TEMP. L.Q. 338 (1948). For origin and development of this phrase, see Hamilton, *Affectation with a Public Interest*, 39 YALE L.J. 1089 (1930); McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930).
5. Ribnik v. McBride, 277 U.S. 350, 359 (1928) (dissenting opinion of Justice Stone); Tyson & Bros. v. Banton, 273 U.S. 418 (1927).
6. 285 U.S. 262 (1932).
7. Nebbia v. New York, 291 U.S. 502 (1934). See also Olsen v. Nebraska *ex rel.* Western Reference, 313 U.S. 236 (1941).
8. The limitations imposed by the due process clause require that "regulation shall not be unreasonable, arbitrary or capricious; and that the means of regulation selected shall have a real or substantial relation to the object sought to be obtained." 285 U.S. at 302.
9. Restating these questions in another way, it might be asked (1) is this business subject to this type of regulation at all and (2) is the price of the regulation reasonable considering the degree of public interest enhanced?
10. Replogle v. Little Rock, 166 Ark. 617, 267 S.W. 353 (1925); People *ex rel.* Durham Realty Co. v. La Fetra, 230 N.Y. 429, 130 N.E. 601 (1921).
11. New State Ice Co. v. Liebmann, 285 U.S. 262, 282, 283 (1932).
12. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).
13. Engel v. O'Malley, 219 U.S. 128 (1911).
14. Frost v. Corporation Comm'n, 278 U.S. 515 (1928); Hohman v. State, 122 Okla. 45, 250 Pac. 514 (1926).
15. State v. Lawrence, 213 N.C. 674, 197 S.E. 586 (1938). *Contra*, State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940); cf. Moore v. Sutton, 185 Va. 481, 39 S.E.2d 348 (1946) (similar statute concerning photographers invalid). See also Hanft and Hamrick, *Haphazard Regimentation Under Licensing Statutes*, 17 N.C.L. REV. 1, 16, 17 (1939).

The discouraging of fraudulent practices and usurious rates has long been deemed sufficient to justify state regulation of employment agencies.[19] Thus the trade has been subjected to licensing on the basis of good moral character,[20] and, more recently, to supervision of rates,[21] but not to regulation which amounts to virtual prohibition.[22] Prior to the instant case, only one court had considered legislation authorizing the denial of a license to a qualified applicant on the ground that the public interest is better served by limiting the field to those presently engaged in the business. The regulation was held invalid.[23] The Wisconsin court, despite a strong dissent which fears "trends [leading] to a controlled economy,"[24] evades discussion of the basic issues, explaining that "we are bound by our precedents."[25]

Among the precedents relied upon by the court were decisions which upheld legislation giving the mayor power to revoke a permit for a public exhibition "whenever he shall consider it necessary and expedient for the good order of the city so to do,"[26] and legislation empowering the municipal council, in its discretion, to issue or withhold a license from a prospective junk dealer.[27] The dissenting justices felt that no case cited by the majority justified denying a qualified applicant the right to carry on a common calling simply because the field was amply supplied, and that the public interest in an employment agency, while sufficient to support restrictions limiting entry according to standards of conduct and fitness, did not require restriction designed to eliminate the undesirable aspects of competition in the field.[28]

Mr. Justice Brandeis' consideration that regulation must be no more than is necessary to protect a public interest would lend weight to the dissent, inasmuch as the public interest in employment agencies primarily is in the prevention of fraudulent practices rather than in the prevention of undesirable economic conditions similar to those which justify regulation of public carriers and utilities. However,

16. State Bd. of Funeral Directors v. Cooksey, 148 Fla. 271, 4 So. 2d 253 (1941).
17. Roach v. City of Durham, 204 N.C. 587, 169 S.E. 149 (1933). *But see* People v. Brown, 407 Ill. 565, 95 N.E.2d 888 (1951).
18. See cases collected in 11 AM. JUR., *Const. Law* §§ 286, 336 (1937). See also Silverman, Bennett, and Lechiter, *Control by Licensing Over Entry Into the Market*, 8 LAW & CONTEMP. PROB. 234 (1941).
19. Brazee v. Michigan, 241 U.S. 340 (1916); Price v. People, 193 Ill. 114, 61 N.E. 844 (1901).
20. *Ibid.* See also 11 AM. JUR., *Const. Law* §§ 286, 336 (1937).
21. Olsen v. Nebraska *ex rel.* Western Reference, 313 U.S. 236 (1941).
22. Adams v. Tanner, 244 U.S. 590 (1917).
23. Engberg v. Debel, 194 Minn. 394, 260 N.W. 626 (1935).
24. Instant case at 718.
25. *Id.* at 716.
26. State *ex rel.* Bluemond Amusement Park, Inc. v. Mayor, 207 Wis. 199, 240 N.W. 847, 849 (1932).
27. Lerner v. City of Delavan, 203 Wis. 32, 233 N.W. 608 (1930).
28. Instant case at 718, 719.

it has been argued that restriction of competition among employment agencies bears an intimate relation to the protection of the public from fraudulent practices,[29] and that, even if the regulation exceeds the danger, the court may not examine the wisdom behind the causes of legislation, but only the effects.[30]

Determination of the constitutionality of legislation regulating private businesses is generally left to the states.[31] As a matter of policy, the Supreme Court will allow the state's decision to stand unless the regulation is clearly arbitrary and unreasonable. Therefore, despite the fact that two courts have reached opposite conclusions, the Supreme Court might not resolve the question in the instant case one way or another. Recently the Court emphasized its "hands off" policy, saying, "the people must resort to the polls, not to the courts" for protection against this type of legislation.[32]

CONTEMPT OF COURT—SUMMARY PUNISHMENT OF DIRECT CONTEMPT—ATTORNEY'S ABSENCE FROM COURT

Petitioner, sole counsel for a defendant in a felony case, was late returning to the trial after a noon recess. He had been tardy in attending the same court on several previous occasions, once during this trial. Upon the court's order to show cause why he should not be punished for contempt, petitioner replied that he had taken a nap during the recess and accidentally overslept. The court declined to believe this excuse and found petitioner guilty of contempt. Petitioner sought annulment of the order of contempt on the ground that the contempt, if any, was not committed in the presence of the court and could be punished only after a proper hearing. *Held* (4-3), affirmed. An attorney's absence from court is within the presence and knowledge of the court; therefore, if the attorney presents no valid excuse, he may be punished summarily for direct contempt. *Lyons v. Superior Court*, 278 P.2d 681 (Cal. 1955).

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29. Engberg v. Debel, 194 Minn. 394, 260 N.W. 626, 628 (1935) (dissenting opinion of Chief Justice Devaney).

30. The court is not "a superlegislature to weigh the wisdom of legislation. . . ." Day Brite Lighting Co. v. Missouri, 342 U.S. 421, 423 (1952).

31. Differences of opinion as to the wisdom, need, or appropriateness of the legislation "suggest a choice which should be left to the states." Olsen v. Nebraska *ex rel.* Western Reference, 313 U.S. 236, 246 (1941); Day Brite Lighting Co. v. Missouri, 342 U.S. 421 (1952); Breard v. Alexandria, 341 U.S. 622 (1951). See also CONSTITUTION OF THE UNITED STATES, ANNOTATED (Corwin ed. 1952); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

32. Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

Contempt committed within the presence of the court is classified as direct,[1] while that committed outside the presence of the court is classified as indirect.[2] The significance of the distinction lies in the difference in method of punishment. In the case of a direct contempt, the facts are known to the court and the contempt can be punished summarily;[3] in the case of an indirect contempt, an affidavit, notice, and hearing usually are required before sentence can be imposed.[4] The proper definition of the phrase "within the presence of the court" has been the subject of disagreement. Some courts have held that "any act which is calculated to impede, embarrass, or obstruct the court in the administration of justice is contempt committed in the presence of the court.[5] Other courts have held that only those acts done within the court's "ocular view, or range of vision" are committed within the presence of the court.[6]

Failure of an attorney to attend court at the time appointed for trial of a criminal case in which he is counsel of record may constitute contempt if the attorney has no valid excuse.[7] Other courts which have considered the problem of classifying the contempt have adopted the view advocated by the dissenting justices in the instant case: that the absence, if a contempt, is indirect, punishable only after notice and hearing.[8] By ruling that the attorney's absence in the instant case was a direct contempt, the trial court in effect decided that a hearing was unnecessary to determine the validity of the attorney's excuse; yet the reasons for his absence occurred away from the court and out of its sight and hearing. Of course, prior instances of tardiness known to the court may indicate that an attorney's excuse for being late on a particular occasion is fabricated, but a judge can-

1. Clark v. United States, 289 U.S. 1 (1932); Blodgett v. Superior Court, 210 Cal. 1, 290 Pac. 293 (1930); Cooper v. People, 13 Colo. 337, 22 Pac. 790 (1889); *Ex parte* Earman, 85 Fla. 297, 95 So. 755 (1923); *Ex parte* Ratliff, 117 Tex. 325, 3 S.W.2d 406 (1928).

2. Snow v. Hawkes, 183 N.C. 365, 111 S.E. 621 (1922); State v. Jones, 111 Ore. 295, 226 Pac. 433 (1924); *Ex parte* Duncan, 78 Tex. Crim. 447, 182 S.W. 313, (1916); *Ex parte* Ratliff, 117 Tex. 325, 3 S.W.2d 406 (1928) (dictum).

3. *Ex parte* Pugh, 30 Ariz. 129, 245 Pac. 273 (1926); *Ex parte* Lake, 65 Cal. App. 420, 224 Pac. 126 (1924); People v. Sherwin, 334 Ill. 609, 166 N.E. 513 (1929); *In re* Solberg, 51 S.D. 246, 213 N.W. 9 (1927).

4. Craddock v. Oliver, 23 Ala. App. 183, 123 So. 87 (1929); *Ex parte* Coulter, 160 Ark. 550, 255 S.W. 15 (1923); Gorham v. New Haven, 82 Conn. 153, 72 Atl. 1012 (1909); State v. Shumaker, 200 Ind. 623, 163 N.E. 272 (1928); Muffly v. State, 129 Neb. 334, 261 N.W. 560 (1935). The California statute is characteristic of those existing in other states. It provides for summary punishment when the contempt is direct, and for affidavit, notice, and hearing when the contempt is indirect. CAL. CODE CIV. PROC. § 1211 (Deering 1953).

5. See Weldon v. State, 150 Ark. 407, 234 S.W. 466 (1921); People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528 (1872).

6. See State v. Root, 5 N.D. 487, 67 N.W. 590 (1896).

7. See *In re* McHugh, 152 Mich. 505, 116 N.W. 459 (1908); *Ex parte* Mackay, 140 Cal. App. 400, 35 P.2d 385 (1934); *cf.* Sellers v. Whaley, 84 Ga. App. 715, 67 S.E.2d 241 (1951).

8. Klein v. United States, 151 F.2d 286 (D.C. Cir. 1945); *Ex parte* Clark, 208 Mo. 121, 106 S.W. 990 (1907); *Ex parte* Hill, 122 Tex. 80, 52 S.W.2d 367 (1932); State v. Winthrop, 148 Wash. 526, 269 Pac. 793 (1928); instant case at 685-88.

not resolve an issue of fact solely on the basis of his personal knowledge.[9]

Summary punishment for contempt is predicated on the idea that a court must act quickly to prevent conduct which offends the authority of the court and hinders the judicial process.[10] The court in the instant case was faced with the problem of determining whether such quick action should be taken when an attorney is late to court, realizing that the power to adjudicate a direct contempt is "necessarily of an arbitrary nature, and should be used with great prudence and caution."[11] If a hearing were required, the tardy attorney could introduce evidence to show any justification he might have for being late, and the court would be given a more accurate picture of the circumstances.

CORPORATIONS—INSPECTION OF BOOKS AND RECORDS—RIGHT OF FORMER DIRECTOR

A director, who was not a stockholder, petitioned[1] for an order compelling the corporation to permit him to inspect its books and records, alleging mismanagement and misappropriation of corporate funds. Also in dispute were certain legal fees petitioner claimed were due him from the corporation. After a ruling of the court in petitioner's favor, a stockholders' meeting was held and he was removed from office. The court considered this new matter on an order to show cause, but, on the basis of the pleadings and affidavits only, granted petitioner's request for inspection notwithstanding that he no longer was a director. On appeal by the corporation, petitioner contended that he might have exposed himself to personal liability for what transpired during his term of office, and to that extent was entitled to an inspection. *Held,* reversed and remitted. A discharged director has no absolute right to inspect the corporate books, but he may have a qualified right to inspect books covering a period of his directorship if a showing is made by appropriate evidence that such inspection is necessary to protect the former director's personal responsibility interest as well as the interest of the stockholders.[2] *Cohen v. Cocoline Products, Inc.,* 309 N.Y. 119, 127 N.E.2d 906 (1955).

9. Shafer v. City of Eau Claire, 105 Wis. 239, 81 N.W. 409 (1900); 9 WIGMORE EVIDENCE § 2569 (3d. ed. 1940); Annot., 113 A.L.R. 258 (1938).
10. See DANGEL, CONTEMPT § 446 (1939).
11. People *ex rel.* Field v. Turner, 1 Cal. 152, 153 (1850) (dictum).

1. N.Y. CIV. PRAC. ACT § 1283 (a proceeding in the nature of mandamus).
2. In reversing, the majority held that granting petitioner's request on the basis of the pleadings only was effectively granting an absolute right, because triable issues of fact were raised which could only have been resolved after a hearing. Instant case at 908. Three dissenting justices reasoned that since petitioner was neither a director nor a stockholder, he had no rights at all to the inspection. *Id.* at 909.

A director stands in a fiduciary relation to the corporation and must keep informed of its affairs in order to perform his duties intelligently. For this reason the courts have universally recognized his common-law right to inspect the corporate books and records.[3] Although the remedy by which this right may be enforced is discretionary and largely controlled by equitable principles,[4] some courts have held that the right is absolute and the director's motives are not subject to question.[5] Other courts have expressed the view that his action can be defeated by a showing of purposes hostile or inimical to the corporation.[6] The New York courts early laid down the rule of absolute right,[7] and have held that where a wrongful purpose is established the corporation's remedy is to remove the director from office.[8] This unconditional statement of the right of a director in office has served as the basis for a corollary that no right to an inspection can exist when he is out of office, regardless of his motives.[9]

The rigidity of the rule and of its supposed corollary has caused the right of inspection to be the subject of conflicting decisions in New York.[10] In *Application of Hafter*,[11] a recently removed director was denied inspection on the ground that the right existed only while he possessed the status of a director. This case was cited as controlling in four subsequent decisions where the question of motive was not

3. BALLANTINE, CORPORATIONS § 165 (rev. ed. 1946); 5 FLETCHER, PRIVATE CORPORATIONS § 2235 (perm. ed. rev. repl. 1952); STEVENS, PRIVATE CORPORATIONS § 109 (2d ed. 1949).

4. 34 AM. JUR., *Mandamus* § 33 (1941).

5. Wilkins v. M. Ascher Silk Corp., 207 App. Div. 168, 201 N.Y. Supp. 739 (1st Dep't 1923), *aff'd mem.*, 237 N.Y. 574, 143 N.E. 748 (1924) (absolute right irrespective of his motive); People *ex rel.* Leach v. Central Fish Co., 117 App. Div. 77, 101 N.Y. Supp. 1108 (1st Dep't 1907) (all petitioner need show is that he is a director, that he has demanded inspection and that his demand has been refused); Drake v. Newton Amusement Corp., 123 N.J.L. 560, 9 A.2d 636 (1939); Machen v. Machen & Mayer Elec. Mfg. Co., 237 Pa. 212, 85 Atl. 100 (1912); State *ex rel.* Aultman v. Ice, 75 W. Va. 476, 84 S.E. 181 (1915). *But see* Strassburger v. Philadelphia Record Co., 335 Pa. 485, 6 A.2d 922, 924 (1939) (the court intimated that Pennsylvania may not still adhere to this rule).

6. State *ex rel.* Paschall v. Scott, 41 Wash. 2d 71, 247 P.2d 543 (1952), 51 MICH L. REV. 747, 101 U. PA. L. REV. 555 (1953); Hemingway v. Hemingway, 58 Conn. 443, 19 Atl. 766 (1890); Stone v. Kellogg, 165 Ill. 192, 46 N.E. 222, 227 (1896) (dictum).

7. People *ex rel.* Muir v. Throop, 12 Wend. 183 (N.Y. 1834).

8. "If the hostility assumes such a shape and goes to such an extent as to justify his removal from the office the law has provided a method by which that end can be accomplished, but, so long as he remains a director, he cannot be denied the rights appertaining to the office." People *ex rel.* Leach v. Central Fish Co., 117 App. Div. 77, 101 N.Y. Supp. 1108, 1110 (1st Dep't 1907).

9. Instant case at 909. This was the theory of the dissent.

10. This conflict has resulted where the director is incumbent—*compare* Davis v. Keilsohn Offset Co., 273 App. Div. 695, 79 N.Y.S.2d 540 (1st Dep't 1948), *with* Melup v. Rubber Corp. of America, 181 Misc. 826, 43 N.Y.S.2d 444 (Sup. Ct. 1943)—as well as where the director has been removed—*compare* Application of Minskoff, 192 Misc. 559, 80 N.Y.S.2d 863 (Sup. Ct. 1948), *with* Application of LaVin, 37 N.Y.S.2d 161 (Sup. Ct. 1942).

11. 67 N.Y.S.2d 745 (Sup. Ct.) *aff'd*, 270 App. Div. 995, 62 N.Y.S.2d 861 (1st Dep't 1946), *aff'd mem. sub nom.* Hafter v. Eagle Fish Co., 296 N.Y. 808, 71 N.E.2d 774 (1947).

considered.[12] Prior to the *Hafter* case, inspection by former directors was allowed "where the removal was sudden"[13] or was done to "flout the determination of [the court]."[14] The possibility of personal liability was considered in *Halperin v. Air King Products Co.*[15] and inspection granted, but the court's emphasis on the applicant's stockholdings distinguishes that decision from the instant case. In other jurisdictions where removal from office has been pleaded in defense to directors' suits for inspection, any question of their being a right of inspection by virtue of the office of director was dismissed as being moot.[16] However, the evidence in each of these cases showed motives hostile to the corporation, and the courts seemed to prefer reaching an equitable result on the point of the applicant's no longer holding the requisite office, rather than the exercise of a discretion to deny inspection where it is sought for an improper purpose.

In recognizing a qualified right of inspection out of office, the court in the instant case has clarified the status of a discharged director, and, to a certain extent, equated his position with that of a stockholder. Because a stockholder has an ownership interest to safeguard, he is generally considered to have a right of inspection conditioned on the showing of a proper purpose.[17] The liability of a director for mismanagement during his term of office continues after his removal, and he may have this interest to protect.[18] The court here found the protection of this interest to be proper for inspection, and emphasized that such inspection could benefit the stockholders by disclosing dereliction on the part of other directors and officers. The possibility of injury to the corporation was left to the consideration of the trial court in the exercise of its discretion. If conflicting interests are shown, the problem could be met by appoint-

12. "Respondent was removed as a director of appellant corporation prior to the making of the order under review, albeit after the institution of this proceeding. Upon being relieved of his duty . . ., he no longer had the status which would entitle him absolutely to the examination." Overland v. LeRoy Foods, Inc., 279 App. Div. 876, 110 N.Y.S.2d 578, 579 (2d Dep't), *aff'd mem.*, 304 N.Y. 573, 107 N.E.2d 74 (1952); Hymes v. Riveredge Printers, Inc., 131 N.Y.S.2d 200 (Sup. Ct. 1954); Application of Minskoff, 192 Misc. 559, 80 N.Y.S.2d 863 (Sup. Ct. 1948); *accord*, Cravatts v. Klozo Fastener Corp., 205 Misc. 781, 133 N.Y.S.2d 235 (Sup. Ct. 1954).

13. People *ex rel.* Stauffer v. Bonwit Bros., 69 Misc. 70, 125 N.Y. Supp. 958, 959 (Sup. Ct. 1910).

14. Application of LaVin, 37 N.Y.S.2d 161, 162 (Sup. Ct. 1942).

15. 59 N.Y.S.2d 672 (Sup. Ct. 1945).

16. Dines v. Harris, 88 Colo. 22, 291 Pac. 1024 (1930); Leach v. Davy, 199 Mich. 378, 165 N.W. 927 (1917); Strassburger v. Philadelphia Record Co., 335 Pa. 485, 6 A.2d 922 (1939).

17. Guthrie v. Harkness, 199 U.S. 148 (1905); Durr v. Paragon Trading Corp., 270 N.Y. 464, 1 N.E.2d 967 (1936); BALLANTINE, CORPORATIONS § 159 (rev. ed. 1946); 5 FLETCHER, PRIVATE CORPORATIONS §§ 2213-2226 (perm. ed. rev. repl. 1952); Annot., 15 A.L.R.2d 11 (1951).

18. Medford Trust Co. v. McKnight, 292 Mass. 1, 197 N.E. 649, 663 (1935); Boyd v. Mutual Fire Ass'n, 116 Wis. 155, 90 N.W. 1086, 1093 (1902), *modified on rehearing*, 116 Wis. 155, 94 N.W. 171 (1903) (statute of limitations had run); 3 FLETCHER, PRIVATE CORPORATIONS § 996 (Perm. ed. rev. repl. 1947).

ing a neutral party to make the inspection.[19] It should be noted that the instant decision may have only academic value, as the exercise of the right outlined by the court seems doubtful. An offer of proof that inspection is necessary to protect the former director's personal responsibility interest could invite a stockholders' suit for mismanagement. On the other hand, if such a suit should be instituted, the appropriate books could be inspected under the New York discovery statute.[20]

CRIMINAL LAW—LOTTERIES—NECESSITY OF CONSIDERATION

Plaintiff, a newspaper, sought a declaratory judgment determining whether a proposed advertising program would violate a Connecticut statute which prohibited "lotteries."[1] A food store wished plaintiff to advertise a plan whereby persons entering the store would register their names, the names so registered to be placed in a box and prizes given to those persons whose names were withdrawn. There was no requirement that a person be present at the drawing in order to receive a prize, nor was a purchase at the store required for registration. Plaintiff argued that the absence of actual payment of consideration for participation and the absence of a requirement that the winner be present at the drawing placed the activity outside the scope of the statute. *Held,* payment of consideration is not essential, nor is the possibility of a public gathering; any scheme wherein chance is the predominant factor constitutes a "lottery" within the meaning of the statute. *Herald Publishing Co. v. Bill,* 111 A.2d 4 (Conn. 1955).

It is generally conceded that the term "lottery" has no technical legal significance other than the popular one.[2] Lottery was not a

19. News-Journal Corp. v. State *ex rel.* Gore, 136 Fla. 620, 187 So. 271 (1939). This form of relief was ordered where a stockholder was shown to have competing interests.

20. N.Y. CIV. PRAC. ACT §§ 324-27.

1. "LOTTERIES PROHIBITED. Any person who shall set up any lottery to raise and collect money or for the sale of any property or shall, by any kind of hazard, sell or dispose of any kind of property or set up a notification to induce people to bring and deposit property to be disposed of in any such manner or to risk their money or credit for the purpose of any such sale or disposition, shall be fined not more than one hundred dollars or imprisoned not more than one year." CONN. GEN. STAT. § 8667 (1949). The criminal liability of the plaintiff newspaper was determined by CONN. GEN. STAT. § 8876 (1949), which reads in part: "CONSPIRACY. Any person who shall combine, confederate or agree with another or others to accomplish any unlawful object by lawful means . . . shall be fined not more than five thousand dollars or imprisoned not more than fifteen years or both."

2. See, *e.g.,* Iris Amusement Corp. v. Kelly, 366 Ill. 256, 8 N.E.2d 648 (1937); State v. Coats, 158 Ore. 122, 74 P.2d 1102 (1938); State v. Lindsey, 110 Vt. 120, 2 A.2d 201 (1938); Society Theater v. City of Seattle, 118 Wash. 258, 203 Pac. 21 (1922).

common-law crime;[3] indeed, in the early history of the United States, lotteries were popular fund raising schemes of local governments.[4] However, its evils were recognized,[5] and by 1892 prohibitive legislation had been enacted in every state.[6] In the interpretation of these statutes the rule evolved that three elements are essential components of the forbidden activity: chance, prize, and consideration.[7] An effective weapon against actual gambling interests was provided but another problem arose when enterprising merchants adopted advertising or promotional plans containing some or all of these elements. Application of the statutes to these activities has been determined by judicial definition of the terms "prize," "chance," and "consideration" and the extent to which merchants could devise schemes satisfactorily devoid of the characteristics of gambling.

The courts have agreed that anything of value constitutes a prize;[8] and, although "skill" has been distinguished from "chance," any great degree of skill in a promotion scheme will necessarily decrease the number of participants, with consequent loss of advertising value.[9] As a result, consideration has been the factor most frequently sought to be avoided by promotion-minded merchants.[10] Absence of further legislative action[11] has left the definition of this element of a lottery

3. Stone v. Mississippi, 101 U.S. 814 (1879); State *ex rel.* Stafford v. Fox-Great Falls Theater Corp., 114 Mont. 52, 132 P.2d 689 (1942).

4. See Stone v. Mississippi, 101 U.S. 814 (1879). For a general discussion, see Treadway, *Lottery Laws in the United States; A Page from American Legal History,* 35 A.B.A.J. 385 (1949).

5. See Horner v. United States, 147 U.S. 449 (1893); Phalen v. Virginia, 49 U.S. (8 How.) 163 (1850); Rosewell v. Jones, 41 N.M. 258, 67 P.2d 286 (1937).

6. Louisiana was the last state in the Union to pass a statute outlawing lotteries. See Treadway, *supra* note 4.

7. See, *e.g.,* Affiliated Enterprises v. Rock-Ola Mfg. Corp., 23 F. Supp. 3 (N.D. Ill. 1937); Grimes v. State, 235 Ala. 192, 178 So. 73 (1937); Barker v. State, 56 Ga. App. 705, 193 S.E. 605 (1937); State v. Eames, 87 N.H. 477, 183 Atl. 590 (1936); City of Wink v. Griffith Amusement Co., 129 Tex. 40, 100 S.W.2d 695 (1936); Society Theater v. Seattle, 118 Wash. 258, 203 Pac. 21 (1922).

8. See, *e.g.,* Long v. State, 74 Md. 565, 22 Atl. 4 (1891) (food); Commonwealth v. Wright, 137 Mass. 250, 50 Am. Rep. 306 (1884) (small amount of money); Baedaro v. Caldwell, 156 Neb. 489, 56 N.W.2d 706 (1953) (free game on a pin ball machine); Carl Co. v. Lennon, 86 Misc. 255, 148 N.Y. Supp. 375 (Sup. Ct. 1914) (one dollar's worth of goods); Holloman v. State, 2 Tex. Crim. 610 (1877) (small piece of jewelry in a fifty-cent box of candy).

9. See Meyer, *Analysis of Business Lotteries and Promotions in Nebraska,* 34 NEB. L. REV. 447 (1955).

10. See, *e.g.,* State v. Dorau, 124 Conn. 160, 198 Atl. 573 (1938); State *ex rel.* Stafford v. Fox-Great Falls Theater Corp., 114 Mont. 52, 132 P.2d 689 (1942); State v. Eames, 87 N.H. 477, 183 Atl. 590 (1936).

11. Some twenty states have statutes which prohibit "gift enterprises." In the "gift enterprize" a chance in a drawing is given to purchasers of merchandise or other property. However, even in these states the rule remains that prize, chance, and consideration are essential elements of liability. The primary difference between "gift enterprise" and lottery is that the consideration passes in connection with the purchase of merchandise rather than the outright purchase of a lottery ticket. See, Long v. State, 74 Md. 565, 22 Atl. 4 (1891); Boon-Iseley Drug Co. v. Doughton, 189 N.C. 720, 128 S.E. 341 (1925); City of Rosewell v. Jones, 41 N.M. 258, 67 P.2d 286 (1937); for a collection of cases see Annot., 39 A.L.R. 1035 (1925).

to the courts. Some courts have adopted the view that there must be an actual payment of consideration; that mere incidental benefits flowing to the merchant through increased sales are not sufficient.[12] Other courts have followed the contractual theory of consideration, holding that if the participant did anything he was not legally bound to do, or refrained from doing anything he was legally free to do, there was consideration.[13] Still other courts have held that no consideration in any form is required if the combination of prize and chance alone produces a desire to "get something for nothing," for that result in itself is contrary to the public policy embodied in a lottery statute.[14] This is the view adopted by the court in the instant case.

An evaluation of these business promotion schemes in the light of public policy would seem to require a consideration of the interests involved and their relative value. On the one hand there is value to the promoter-merchant, reflected in increased sales, and the value to the community in increased advertising business, stimulation of community trade, and opportunity to share in the profits of the merchant.[15] On the other hand, there is the danger of "bigger and better" prizes rather than "bigger and better" products, increase of unfair trade practices between competing merchants,[16] and recurrence of the evils and excitement of public gambling.[17] Whether the detriment to the public interest outweighs the benefits to be derived would seem a matter for

12. Clark v. State, 80 So. 2d 308 (Ala. 1954); Yellow-Stone Kit v. State, 88 Ala. 196, 7 So. 338 (1890); People v. Cardas, 137 Cal. App. 788, 28 P.2d 99 (1933); Cross v. People, 18 Colo. 321, 32 Pac. 821 (1893); Equitable Loan & Security Co. v. Waring, 117 Ga. 599, 44 S.E. 320, 22 L.R.A. 93 (1903); State v. Hundling, 220 Iowa 1369, 264 N.W. 608 (1936); Commonwealth v. Malco-Memphis Theaters, 293 Ky. 531, 169 S.W.2d 596 (1934); State *ex rel.* District Att'y Gen. v. Crescent Amusement Co., 170 Tenn. 351, 95 S.W.2d 310 (1936).

13. See Central States Theater Corp. v. Patz, 11 F. Supp. 566 (S.D. Iowa 1935); Affiliated Enterprises v. Waller, 40 Del. 28, 5 A.2d 257 (1939); Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931); State *ex rel.* Regez v. Blumer, 236 Wis. 129, 294 N.W. 491 (1940). *But see* 18 VA. L. REV. 465 (1931).

14. See State *ex rel.* Hunter v. Omaha Motion Picture Exhibitors Ass'n, 139 Neb. 312, 297 N.W. 547 (1941).

15. In FCC v. American Broadcasting Co., 347 U.S. 284 (1954), the Court held that radio "give away" programs were not lotteries banned under 18 U.S.C.A. § 1304 (1950), which prohibits the broadcasting of lottery information. The Court reasoned that the "furthering of trade" and the "material benefits" to stations and advertisers from increased radio audience to be exposed to advertising was not sufficient consideration to constitute lottery.

16. It has been held that the use of punch boards, lottery, gaming devices, or gift devices as an inducement to purchase merchandise is an "unfair trade" practice within the meaning of the Federal Trade Commission Act. See, *e.g.*, Wolf v. FTC, 135 F.2d 564 (7th Cir. 1943). In such a case, however, the consideration for the chance is clear.

17. Those courts which have held the "business lottery promotion scheme" subject to the prohibition of lottery statutes seem convinced that it leads to the evils associated with gambling and is in fact worse, for it "enters the very hearthside." See, *e.g.*, Central States Theater Corp. v. Patz, 11 F. Supp. 566 (S.D. Iowa 1935); Affiliated Enterprises v. Waller, 40 Del. 28, 5 A.2d 257 (1939). *But see* Cross v. People, 18 Colo. 321, 32 Pac. 821 (1893), wherein the court, speaking of a business lottery promotion scheme, stated, "and the spirit of gambling is in no way cultivated or stimulated, which is the essential evil of lotteries, and which our statute is enacted to prevent."

the legislatures, which may forbid the activity by express omission of the requirement of consideration in the definition of "lottery," or by separate classification of the promotion scheme as a form of gambling.[18] The instant decision seems to be a judicial extension of antiquated legislation designed to cover an entirely different fact situation.[19] Loss of consideration by participants was a primary evil sought to be eliminated by the lottery statutes.[20] When a business promotion plan is deemed productive of other gambling evils, it would seem the better approach to await legislation condemning it as such, rather than to extend the scope of a lottery statute by eliminating the requirement of consideration.

DOMESTIC RELATIONS—ALIMONY—FIXED PAYMENTS TO WIFE UNTIL HER DEATH OR REMARRIAGE AS BASIS OF CLAIM AGAINST HUSBAND'S ESTATE

Plaintiff was granted a divorce from her husband, and a settlement agreement entered into by the parties was made part of the decree. The agreement provided that monthly payments of $325 were to be made to the plaintiff for the remainder of her life, or until she remarried. When the payments ceased on the husband's death, plaintiff filed a claim for them against his estate, based on the decree. The probate court denied the claim and the circuit court affirmed. On appeal, *held,* reversed. An agreement requiring monthly payments until the death or remarriage of the wife constitutes a settlement of alimony in gross which survives the death of the husband. *Kuckenbecker v. Estate of Kuckenbecker,* 4 Ill. App. 2d 314, 124 N.W.2d 52 (1955).

At common law absolute divorces were not granted, but alimony in the form of continuing payments was awarded to a wife as her

18. At least one court has based its refusal to extend a lottery statute to cover situations like the one at bar on the danger of usurping the power of the legislature. See State *ex rel.* Stafford v. Fox-Great Falls Theater Corp., 114 Mont. 52, 132 P.2d 689 (1942).

19. The Connecticut general lottery statute, note 1 *supra,* was passed in 1728, substantially revised in 1865, with only a few minor changes in 1930, into its present form. The court placed great emphasis on the fact that a prior Connecticut case, State v. Dorau, 124 Conn. 160, 198 Atl. 573 (1938), in which the court had held the statute applicable to a theater "bank night" lottery scheme, had not led to any new legislation. In fact a bill had been proposed in the Connecticut legislature seeking to allow "bank night" in the state and had failed to pass. See instant case at 9.

20. "[O]n the other [side there is] the sacrifice of the savings by the ignorant and credulous, and excitement, destructive of regular industry, often inducing insanity. It is to supress this species of lottery, we should remember, that the lottery statute was aimed." Rosewell v. Jones, 41 N.M. 258, 67 P.2d 286, 289 (1937) [quoting from 2 WHARTON, CRIMINAL LAW § 1778 (12th ed. 1932)].

means of support after a separation, the theory being that the husband still owed a duty to support his wife.[1] The great majority of American courts adopted the view that an award of alimony following an absolute divorce cannot be made in the absence of statute,[2] but the theory of an award of continuing payments has been considered the same: the duty of the husband to support his wife. For this reason the award may be terminated upon the remarriage of the wife or the death of the husband[3] and may be modified upon a change of circumstances.[4]

Alimony in gross is a lump sum award of the court made at the suggestion of one or both of the parties, if authorized by statute.[5] It can be made payable in a lump sum, or periodic installments.[6] The theory of such an award is that the granting of an absolute divorce causes the wife to lose her inchoate rights, and she should be compensated accordingly by the husband.[7] Most courts have held that, unlike an award requiring continuous payments in an undetermined amount, an award of alimony in gross creates a vested right which survives the remarriage of the wife[8] and the death of the husband,[9] and cannot be modified by the court.[10]

The difficulty of determining the kind and amount of alimony to be awarded is often avoided by incorporating in the divorce decree a contractual agreement between the parties providing for the dis-

1. Rayburn v. Rayburn, 300 Ky. 209, 187 S.W.2d 804 (1945); Culwell v. Culwell, 23 Tenn. App. 389, 133 S.W.2d 1009 (M.S. 1939); *accord,* Schneider v. Schneider, 286 Ill. App. 575, 4 N.E.2d 123 (1936).

2. Lyon v. Lyon, 318 Mass. 646, 63 N.E.2d 459 (1945); Walker v. Walker, 155 N.Y. 77, 49 N.E. 663 (1898); Brown v. Brown, 156 Tenn. 619, 4 S.W.2d 345 (1928). *Contra,* Wilson v. Wilson, 178 Va. 427, 17 S.E.2d 397 (1941). See MADDEN, DOMESTIC RELATIONS §§ 97-98 (1931); 2 VERNIER, AMERICAN FAMILY LAWS § 104 (1932).

3. *Accord,* Wilson v. Hinman, 182 N.Y. 408, 75 N.E. 236 (1905); Brandon v. Brandon, 175 Tenn. 463, 135 S.W.2d 929 (1940), 16 TENN. L. REV. 468; Murphy v. Shelton, 183 Wash. 180, 48 P.2d 247 (1935). *Contra,* Southard v. Southard, 262 Mass. 278, 159 N.E. 512 (1928), 37 YALE L.J. 994. But upon the wife's remarriage, the first husband must apply for termination of alimony. Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267 (1906); Mindlin v. Mindlin, 41 N.M. 155, 66 P.2d 260 (1937); Kirkbride v. Van Note, 275 N.Y. 244, 9 N.E.2d 852, 112 A.L.R. 243 (1937).

4. Aldrich v. Aldrich, 166 Mich. 248, 131 N.W. 542 (1911); Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066 (1920); Myers v. Myers, 62 Utah 90, 218 Pac. 123, 30 A.L.R. 74 (1923). In absence of statute see, Morgan v. Morgan, 211 Ala. 7, 99 So. 185 (1924).

5. See Roubicek v. Roubicek, 246 Ala. 442, 21 So. 2d 244 (1945); Turner v. Ewald, 290 Ky. 833, 162 S.W.2d 181 (1942); Jones v. Jones, 216 Ky. 810, 288 S. W. 737 (1926); Baird v. Baird, 311 Mass. 329, 41 N.E.2d 5 (1942); Rush v. Rush, 33 Tenn. App. 496, 232 S.W.2d 333 (W.S. 1949).

6. See De Roche v. De Roche, 12 N.D. 17, 94 N.W. 767 (1903); Winslow v. Winslow, 133 Tenn. 663, 182 S.W. 241 (1916).

7. MADDEN, DOMESTIC RELATIONS §§ 97-98 (1931); *accord,* Leutzinger v. McNeely, 216 Mo. App. 699, 273 S.W. 241 (1925).

8. Gilcrease v. Gilcrease, 186 Okla. 451, 98 P.2d 906, 127 A.L.R. 725 (1939).

9. Smith v. Rogers, 215 Ala. 581, 112 So. 190 (1927).

10. See Graham v. Graham, 135 Neb. 761, 284 N.W. 280 (1939); *cf.* Stefonick v. Stefonick, 118 Mont. 486, 167 P.2d 848 (1946) (refusal to award alimony in gross because it could not be modified).

position of their property, in the nature of a property settlement.[11] The disposition may be in the form of a lump sum payment or periodic payments by the husband, or a transfer of property between the parties.[12] Incorporation of such an agreement in a divorce decree encourages the parties to settle their differences as they see fit, subject to the approval of the court.[13] Most courts agree that a settlement agreement made part of a divorce decree does not lose its contractual nature and, therefore, cannot be modified.[14] However, many courts have held that when an agreement provides for both a lump sum settlement and periodic payments in an undetermined amount, the lump sum payment is the property settlement[15] and the periodic payments constitute alimony which is modifiable, and terminable upon the remarriage of the wife or the death of the husband.[16]

In interpreting the agreement in the instant case, the court relied on *Walters v. Walters*,[17] an earlier Illinois case in which an agreement to pay the wife $34,450 over a period of ten years was declared to be a property settlement which could not be modified by the court, and which survived the remarriage of the wife. The court in the instant case reached the conclusion that the payments in question constituted alimony in gross despite the fact that they were to continue until the wife's death or remarriage, an uncertain period of time, and could not have been installments of a fixed sum. The court assumed from the language of the agreement that the parties intended the payments to continue after the husband's death[18] and based its decision thereon without attempting to reconcile such an intention with the rule that an award of continuing alimony payments may be terminated on the death of the husband.[19] In giving effect to the intention, the court greatly broadened the meaning of alimony in gross. However, the result seems reasonable, if the parties are free to settle their respective rights as they see fit.[20]

11. Moore v. Crutchfield, 136 Va. 20, 116 S.E. 482 (1923); see Dickey v. Dickey, 154 Md. 675, 141 Atl. 387 (1928) (recognized settlement agreement as distinct from alimony).

12. See North v. North, 339 Mo. 1226, 100 S.W.2d 582 (1936); *cf.* Colton v. Colton, 252 Ala. 442, 41 So. 2d 398 (1949).

13. Gross v. Gross, 154 Fla. 649, 18 So. 2d 538 (1944); Elliott v. Dunham, 191 Okla. 395, 130 P.2d 534 (1942).

14. Sullivan v. Sullivan, 215 Ala. 627, 111 So. 911 (1927); Turner v. Ewald, 290 Ky. 833, 162 S.W.2d 181 (1942); Dickey v. Dickey, 154 Md. 675, 141 Atl. 387 (1928).

15. Borton v. Borton, 230 Ala. 630, 162 So. 529 (1935).

16. Borton v. Borton, *supra* note 15; Doty v. Doty, 37 Tenn. App. 120, 260 S.W.2d 411 (W.S. 1952), 7 VAND. L. REV. 835, 840-41 (1954). *Contra,* Erwin v. Erwin, 179 Ark. 192, 14 S.W.2d 1100 (1929).

17. 409 Ill. 298, 99 N.E.2d 342 (1951).

18. The court in discussing the intent of the parties made only passing reference to a life insurance policy which the husband agreed to maintain. The policy was payable to the wife on the same terms as the monthly payments. Such a provision would seem to indicate an intention that the insurance proceeds would begin in lieu of the monthly payments after the husband's death. Instant case at 54.

19. See note 16 *supra.*

20. See Pryor v. Pryor, 88 Ark. 302, 114 S.W. 700 (1908); Brown v. Brown, 209 Mo. App. 416, 239 S.W. 1093 (1922).

DOMESTIC RELATIONS—DIVORCE AND ALIMONY—AWARD OF ALIMONY TO ADULTEROUS WIFE

When a wife sought divorce for extreme cruelty, the husband brought a cross action on grounds of adultery and cruelty. Both parties were found guilty of the offenses alleged. A California statute had been interpreted as a modification of the strict rule of recrimination;[1] accordingly, the trial court granted a divorce to both parties and awarded the wife alimony. The husband appealed on the ground that the trial court erred in failing to find that his cross action was in bar of the wife's suit, and in awarding the wife alimony. A district court of appeal affirmed (2-1),[2] and the husband appealed to the supreme court. *Held* (4-3), affirmed, and the opinion of the district court vacated. A wife's adultery is not an absolute bar to a decree of divorce and alimony when her husband is found guilty of marital fault. *Mueller v. Mueller*, 282 P.2d 869 (Cal. 1955).

Traditionally, the courts in this country have followed a strict rule of recrimination when both parties to a marriage show grounds for divorce.[3] The rule requires that a divorce be denied to both, regardless of the nature of the conduct of which each is guilty.[4] The basis of the rule seems to be the "clean hands" maxim,[5] although some courts indicate that relief is denied because both parties have breached the mutually dependent marriage covenants.[6] When a wife alone is guilty of marital fault and the husband is granted a divorce, an award of alimony to the wife is dependent upon statutory authority.[7] Most courts have adopted the view that they have no inherent power to award alimony after an absolute divorce, and in the absence of a statute authorizing an award of alimony to a wife against whom a divorce is decreed, have applied the common-law rule that a guilty wife is not entitled to alimony.[8]

1. CAL. CIV. CODE § 111 (Deering 1949); DeBurgh v. DeBurgh, 39 Cal. 2d 858, 250 P.2d 598 (1952).
2. Mueller v. Mueller, 276 P.2d 693 (Cal. App. 1954).
3. 17 AM. JUR., *Divorce and Separation* §§ 233, 235 (1938); 27 C.J.S., *Divorce* § 67 (1941). The rule has been known to the law since early Biblical times. See DEUTERONOMY XXII, 13-19.
4. 2 BISHOP, MARRIAGE AND DIVORCE 66 (6th ed. 1881).
5. Wolfe v. Wolfe, 120 W. Va. 389, 198 S.E. 209 (1938); 17 AM. JUR., *Divorce and Separation* § 233 (1938).
6. See Brazell v. Brazell, 54 Cal. App. 2d 458, 129 P.2d 117 (1942) (using both clean hands and contract theories).
7. See Nolen v. Nolen, 121 Fla. 130, 163 So. 401 (1935); Garner v. Garner, 182 Ore. 549, 189 P.2d 397 (1948); 2 BISHOP, MARRIAGE AND DIVORCE 406 (6th ed. 1881). *But see* Flaxman v. Flaxman, 177 Okla. 28, 57 P.2d 819 (1936); Alldredge v. Alldredge, 229 P.2d 681 (Utah 1951).
8. See Quarles v. Quarles, 179 F.2d 57 (D.C. Cir. 1949); Schneider v. Schneider, 286 Ill. App. 575, 4 N.E.2d 123 (1936); 2 VERNIER, AMERICAN FAMILY LAWS § 78 (1932). In some jurisdictions alimony may be awarded to a wife when the husband is granted the divorce. See Baker v. Baker, 271 Ky. 735, 113 S.W.2d 16 (1938); Kennedy v. Kennedy, 302 Mich. 491, 5 N.W.2d 438 (1942); Flaxman v. Flaxman, 177 Okla. 28, 57 P.2d 819 (1936); Warning v. Warning, 5 Wash. 2d 398, 105 P.2d 715 (1940).

In recent years, the traditional view has been rejected in many jurisdictions, by statute[9] and by judicial mandate.[10] Generally, those courts which have departed from strict recrimination have done so by adopting the rule of comparative rectitude, which provides a framework within which the rule of recrimination may be relaxed to the extent believed necessary to achieve the most equitable and most socially desirable result. The rule permits the trial court, when both parties are guilty of marital fault, in its discretion, nevertheless to grant a divorce to the less guilty party.[11] As a result, an award of alimony may be made to a less guilty wife.

The California statute provides that a wife may not receive alimony unless she is granted a divorce, and that a divorce must be denied "upon a showing by the defendant of any cause of action against the plaintiff, in bar of the plaintiff's cause of action."[12] In *DeBurgh v. DeBurgh*,[13] the California Supreme Court held that the statute does not require strict recrimination, but, instead, gives the trial court discretion in determining whether a defendant's cause of action is "in bar" of the plaintiff's suit. The discretion was said to rest not alone upon a comparison of the guilt of the parties, but upon a consideration of whether the good of society and of the parties requires that the marriage be terminated. The court's interpretation also allowed the trial court discretion to award alimony upon the granting of a double divorce.

The decision in the instant case illustrates the minor importance of comparative guilt in the application of the *DeBurgh* rule, and, in effect demonstrates the abrogation of recrimination in favor of socially desirable results. Although the court discussed the wife's adultery as a factor in determining whether she should be awarded alimony, the necessity of granting her a divorce in order to award her alimony required the court to find that the adultery was not a cause of action "in bar" of the wife's suit. Yet adultery has been considered the worst matrimonial offense.[14] The court's emphasis on the wife's ill health and impaired earning capacity indicated that these were the controlling considerations in affirming the award of alimony. If so, the determination of whether a husband's cause of action is "in bar" of a wife's suit will depend, not on the grounds he alleges, but on the acuteness of the wife's need—an anomalous result which should be cured by legislative action.

9. See 2 VERNIER, AMERICAN FAMILY LAWS § 78 (1932).
10. Pavletich v. Pavletich, 50 N.M. 224, 174 P.2d 826 (1946); Huff v. Huff, 178 Wash. 684, 35 P.2d 86 (1934).
11. See generally 17 AM. JUR., *Divorce and Separation* § 235 (1938); Annot., 63 A.L.R. 1132 (1929).
12. CAL. CIV. CODE § 139 (Deering Supp. 1955).
13. 39 Cal. 2d 858, 250 P.2d 598 (1952).
14. See 2 BISHOP, MARRIAGE AND DIVORCE 73 (6th ed. 1881); MADDEN, PERSONS AND DOMESTIC RELATIONS 305 (1931). Many statutes which modify recrimination specifically provide that the plaintiff's adultery is a good defense. See 2 VERNIER, AMERICAN FAMILY LAWS § 78 (1932).

TORTS—COMMON CARRIERS—LIABILITY TO PASSENGERS FOR TORTIOUS ACTS OF STRANGERS

Plaintiff, a passenger on defendant's electric trolley car, was struck by a piece of concrete intentionally thrown at the car by a young boy standing off the right of way. He brought suit to recover for his resulting injuries, alleging that they were caused by defendant's negligence in failing to foresee the danger and guard against it. Evidence was introduced to show that objects had been thrown at defendant's cars along the same segment of the trolly line at least sixteen times within the past four years, and that defendant had known of these occurrences. Defendant appealed from a verdict and judgment for the plaintiff on the ground that there was no evidence upon which a finding of negligence could be based. *Held,* affirmed. A common carrier may be required to protect its passengers from tortious acts of strangers which the carrier could reasonably anticipate from its knowledge that similar acts have frequently occurred. *Harpell v. Public Service Coordinated Transport,* 114 A.2d 295 (N.J. Super. 1955).

The courts have not agreed upon the terms to be used in describing to a jury the degree of care owned by a common carrier to its passengers,[1] but the differences lie primarily in a choice of words and do not ordinarily represent a conflict of views.[2] Whatever may be the language adopted, it is clear that the standard is high.[3] However, a common carrier is not an absolute insurer of the safety of its passengers.[4] Ordinarily, it is not bound to anticipate that a third party

1. HUTCHINSON, CARRIERS § 501 (1st ed. 1882); 2 MICHIE, CARRIERS 1718 (1915).

2. Coblentz v. Jaloff, 115 Ore. 656, 239 Pac. 825 (1925). See, *e.g.,* Minneapolis, St. P. & S. Ste. M. Ry. v. Galvin, 54 F.2d 202 (6th Cir. 1931) ("utmost"); Atchinson, T. & S. Fe R.R. v. Shean, 18 Colo. 368, 33 Pac. 108 (1893) ("extraordinary"); Shally v. New Orleans Pub. Serv. Bd., 159 La. App. 519, 105 So. 606 (1925) ("strictest"); Bennett v. Bartlett, 158 S.E. 712 (W.Va. 1931) ("highest").

3. See Terminal Taxicab Co. v. Kutz, 241 U.S. 252 (1916); Alabama Power Co. v. Maddox, 227 Ala. 628, 151 So. 575 (1933); Bezera v. Associated Oil Co., 117 Cal. App. 139, 3 P.2d 622 (1931); Briganti v. Connecticut Co., 119 Conn. 316, 175 Atl. 679 (1934); Peak v. Louisville & N.R.R., 221 Ky. 97, 297 S.W. 1107 (1927); Guinevan v. Checker Cab Co., 289 Mass. 295, 194 N.E. 100 (1935); Durfey v. Milligan, 265 Mich. 97, 251 N.W. 356 (1933); Wright v. Boston & M.R.R,. 83 N.H. 136, 139 Atl. 370 (1927); Ramsdell v. Frederick, 132 Ore. 161, 285 Pac. 219 (1930); Hughes v. Pittsburgh Transp. Co., 300 Pa. 474, 150 Atl. 153 (1930); Hogan v. Miller, 156 Va. 166, 157 S.E. 540 (1931); Scales v. Boynton Cab Co., 198 Wis. 293, 223 N.W. 836 (1929).

4. Atlantic Greyhound Corp. v. Lauritzen, 182 F.2d 540 (6th Cir. 1950); Livingston v. Seaboard Air Line Ry., 106 F. Supp. 886 (E.D.S.C. 1952); Waddell v. Crescent Motors, Inc., 260 Ala. 124, 69 So. 2d 414 (1953); Irwin v. Louisville & N.R.R., 161 Ala. 489, 50 So. 62 (1909); Miller v. Mills, 257 S.W.2d 520 (Ky. 1953); Louisville Ry. v. Logan, 306 Ky. 35, 206 S.W.2d 80 (1947); Schooler v. Louisville & I.R.R., 259 Ky. 80, 82 S.W.2d 221 (1935); Brown v. Gonzales, 77 So. 2d 887 (La. App. 1955); Baker v. Shreveport Ry., 68 So. 2d 228 (La. App. 1953); Fewings v. Mendenhall, 88 Minn. 336, 93 N.W. 127 (1903); Woas v. St. Louis Transit Co., 198 Mo. 664, 96 S.W. 1017 (1906); Rourke v. Hershock, 3 N.J. 422, 70 A.2d 489 (1950); Archer v. Pennsylvania R.R., 166 Pa. Super. 538, 72 A.2d 609 (1950); Bosworth v. Union Ry., 26 R.I. 309, 58 Atl. 982 (1904); Knoxville Cab Co. v. Miller, 176 Tenn. 88, 138 S.W.2d 428 (1940); Bennevendo v. Houston Transit Co., 238 S.W.2d 271, (Tex. Civ. App. 1951).

will intentionally interfere or meddle with the carrier or its operation.[5] A carrier is liable for the tortious act of a stranger resulting in injury to a passenger only when the carrier knew, or in the exercise of due care should have known, of the imminency of the tort and failed to use care to prevent its occurrence after a sufficient opportunity to do so.[6]

To show that a carrier should have anticipated the act of a stranger, plaintiffs have often submitted evidence of safety-history—that is, evidence of similar occurrences in the past. Generally, the courts have been prone to accept such evidence, although they have not agreed upon the weight to be accorded it.[7] In the instant case, evidence that the defendant knew of sixteen similar incidents in the past four years was said to justify a finding that the defendant had a duty to exercise care for the protection of its passengers. But in *Schooler v. Louisville & Interurban R.R.*,[8] the court found that no duty existed despite evidence that rocks and garbage had been thrown at the carrier nearly every night for the past three years. Once a duty has been established by safety-history evidence, it is important to recognize that such evidence is seldom conclusive as proof of a breach of that duty. Accidents often occur in safe places; anywhere that a large number of persons pass is likely to be a spot where several accidents have happened, regardless of the safe condition of the premises.[9] It is up to the judge to check the jury from formulating unsound general theories as to the weight of this statistical evidence on the issue of negligence.[10]

The determination of whether a breach of duty has been committeed involves an element of practicality; that is, a balancing of the magnitude of the risk and the utility of the risk. A carrier is not bound to employ every protective device which the ingenuity of man could provide. For example, a railroad should not be forced to use stone

5. 10 AM. JUR., *Carriers* § 1441 (1937).

6. Livingston v. Seaboard Air Line Ry., 106 F. Supp. 886 (E.D.S.C. 1952); Waddell v. Crescent Motors, Inc., 260 Ala. 124, 69 So. 2d 414 (1953); Miller v. Mills, 257 S.W.2d 520 (Ky. 1953); Louisville Ry. v. Logan, 306 Ky. 35, 206 S.W.2d 80 (1947); Schooler v. Louisville & I.R.R., 259 Ky. 80, 82 S.W.2d 221 (1935); Baker v. Shreveport Ry., 68 So. 2d 228 (La. App. 1953); Bennevendo v. Houston Transit Co., 238 S.W.2d 271 (Tex. Civ. App. 1951); Annot., 15 A.L.R. 887 (1921); 10 AM. JUR., *Carriers* § 1467 (1937). See also, Harper and Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 901 (1934).

7. Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205, 212 (1947).

8. 259 Ky. 80, 82 S.W.2d 221 (1935).

9. Griffith v. Denver, 55 Colo. 37, 132 Pac. 57 (1913); Gable v. Kansas City, 148 Mo. 470, 50 S.W. 84 (1899); Dubois v. Kingston, 102 N.Y. 219, 6 N.E. 273 (1886).

10. Stair v. Kane, 156 Fed. 100 (6th Cir. 1907); Chicago & N.W. Ry. v. Netolicky, 67 Fed. 665 (8th Cir. 1895); Martinez v. Planel, 36 Cal. 578 (1869); Long v. John Breuner Co., 36 Cal. App. 630, 172 Pac. 1132 (1918); Nave v. Flack, 90 Ind. 205, 46 Am. Rep. 205 (1883); Chesapeake & O.R.R. v. Meyers, 150 Ky. 841, 151 S.W. 19 (1912); Crocker v. McGregor, 76 Me. 282, 49 Am. Rep. 611 (1884); Commercial Club v. Epperson, 15 Tenn. App. 649 (1932); Cole v. North Danville Coop. Creamery, 103 Vt. 32, 151 Atl. 568 (1930).

crossties to eliminate the danger of decay inherent in wooden ones. In the instant case, the court in effect affirmed a finding that the risk of injury to passengers from thrown objects outweighed the expense of equipping the trolley cars with full-length window screens or safety-glass windows. Under similar circumstances, a number of courts might have reached a different conclusion.

TORTS—PROPERTY RIGHTS—DEPRIVATION OF ELECTIVE OFFICE IN LABOR UNION

Plaintiff brought suit against fellow members of a labor union to recover the salary of an elective union office and punitive damages. He alleged that in an election for the position, which he had held for seven years, he received the majority of the votes cast but was deprived of the office by defendants' alteration or erasure of the markings on the ballots. The trial court entered judgment for defendants for failure of the complaint to state a cause of action, and plaintiff appealed. *Held*, reversed. Wrongful deprivation of office in a labor union gives rise to a cause of action in tort for wrongful interference with a business or property right. *Longo v. Reilly*, 35 N.J. Super. 405, 114 A.2d 302 (App. Div. 1955).

Interference with a person's business or occupation is invasion of a property right and, therefore, a compensable tort. Liability was originally determined by the harshness of the means used by the defendant;[1] today it is found if the conduct was intentional and unprivileged.[2] Where a competitor has used ruthless business tactics,[3] or where a labor union has procured the discharge of the plaintiff from his employment,[4] the courts have reasoned that the defendant infringed upon the plaintiff's property right in his business or occupation.

Actions to recover for deprivation of elective office in government or in a voluntary association have not been placed in the category of

1. Huskie v. Griffin, 75 N.H. 345, 74 Atl. 595 (1909); Keeble v. Hickeringill, 11 East. 574, 103 Eng. Rep. 1127 (K.B. 1707); Temperton v. Russell, [1893] 1 Q.B. 715.

2. International News Serv. v. Associated Press, 248 U.S. 215 (1918); Katz v. Kapper, 7 Cal. App. 2d 1, 44 P.2d 1060 (1935); Skene v. Carayanis, 103 Conn. 708, 131 Atl. 497 (1926); Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909); Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 175 Atl. 62 (1934); Mogul S.S. Co. v. McGregor, [1892] A.C. 25.

3. See note 2 *supra*.

4. Kuzma v. Millinery Workers, Local 24, 27 N.J. Super. 579, 99 A.2d 833 (App. Div. 1953); Cook v. John H. Mathis Co., 1 N.J. Super. 335, 61 A.2d 585 (Ch. 1948); Lo Bianco v. Cushing, 117 N.J. Eq. 593, 177 Atl. 102 (1935), *aff'd*, 119 N.J. Eq. 377, 182 Atl. 874 (1936); Brennan v. United Hatters, Local 17, 73 N.J.L. 729, 65 Atl. 165 (1906).

interference with a business or occupation.[5] A "property right" analysis is often made, but liability in the majority of the cases has been determined by certainty of pecuniary loss. The court in *Talton v. Behncke*[6] rejected the counterclaim of the defendant, who had been recalled from a union office and granted a pension equal in amount to his former salary, on the ground that "the only loss he has suffered is his pleasure and satisfaction in being president of the union—a privilege not of a legal character."[7] In *Way v. Patton*,[8] the court stated that, when the defendant ruled that the elective office which plaintiff sought could not exist under the organization's constitution, "plaintiffs had no property rights whatever in the premises, as they had not yet been elected."[9] A candidate deprived of victory in a primary election is deemed to suffer no pecuniary loss when it cannot be shown that he would have won the general election.[10] The courts apparently refuse to recognize that a chance of financial gain unaccompanied by any risk of loss can have value,[11] and there seems no inclination to consider the chance a property right.

In the instant case, the requisite certainty of pecuniary loss was provided by the allegations that, but for defendants' conduct, plaintiff would have won the election. However, the court's statement that "office in a labor union is a property right [and] so is the right to be a candidate therefor"[12] seems contrary to the views expressed in *Way v. Patton*[13] and the majority of the election cases.[14] The court seemed inclined to classify the tort more particularly as an interference with plaintiff's business or occupation, a novel analysis which could be justified by the fact that the office had been plaintiff's sole means of livelihood for seven years.

5. Shields v. Booles, 238 Ky. 673, 38 S.W.2d 677 (1931); Valdez v. Gonzales, 50 N.M. 28, 176 P.2d 173 (1946); Schwartz v. Hefferman, 304 N.Y. 474, 109 N.E.2d 68 (1952); Frank v. Eaton, 225 App. Div. 149, 231 N.Y. Supp. 477 (3d Dep't 1928).
6. 199 F.2d 471 (7th Cir. 1952).
7. *Id.* at 474. *Contra,* Bianco v. Eisen, 190 Misc. 609, 75 N.Y.S.2d 914 (Sup. Ct. 1944).
8. 195 Ore. 36, 241 P.2d 895 (1952).
9. 241 P.2d at 903-04.
10. United States v. Randle, 39 F. Supp. 759 (W.D. La. 1941); Hill v. Carr, 186 Ill. App. 515 (1914); Larson v. Marsh, 144 Neb. 644, 14 N.W.2d 189 (1944).
11. McCORMICK, DAMAGES § 31 (1935); Note, 46 HARV. L. REV. 699 (1933).
12. Instant case at 306.
13. 195 Ore. 36, 241 P.2d 895 (1952).
14. Cases cited notes 5, 6, 10 *supra.*