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Recent Cases

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RECENT CASES

CONSTITUTIONAL LAW — CONSTITUTIONALITY OF GROUP LIBEL STATUTE

The defendant caused defamatory leaflets to be published and distributed portraying criminality and unchastity, *inter alia,* of the Negro race and urging segregation. He was convicted under an Illinois criminal libel statute[1] forbidding any publication which portrays depravity or lack of virtue of a class of citizens of any race, color or creed. Defendant appealed on the grounds that the statute was violative of the liberty of speech and press guaranteed by the Due Process Clause of the Fourteenth Amendment, and was too vague, under restrictions implicit in the same clause. *Held* (5-4),[2] the statute is constitutional. Libellous utterances are not protected by the guarantee of free speech in the Constitution, and the construction which the Illinois court has given this statute disposes of the contention that it is too vague. *Beauharnais v. Illinois,* 343 U.S. 250, 72 Sup. Ct. 725 (1952).

Criminal libel prosecutions by which the state sought to prevent breaches of the peace[3] were not unknown at common law.[4] Today, however, criminal libel is largely governed by statute.[5] Although these laws are directed at individuals, group libel prosecutions under them have been upheld if an identifiable group or class has been defamed.[6]

1. ILL. ANN. STAT. c. 38, § 471 (1935).

2. Mr. Justice Frankfurter gave the opinion; Justices Black, Douglas, Reed and Jackson dissented in separate opinions.

3. Kennerly v. Hennessay, 68 Fla. 138, 66 So. 729 (1914); Provident Savings Life Assurance Society v. Johnson, 113 Ky. 84, 72 S.W. 754 (1903); Commonwealth v. Blanding, 20 Mass. 304, 15 Am. Dec. 214 (1825); Commonwealth v. Clap, 4 Mass. 163, 3 Am. Dec. 212 (1808); Minnesota v. Hoskins, 60 Minn. 68, 62 N.W. 270 (1895); New Hampshire v. Burnham, 9 N.H. 34 (1837); New York v. Stockes, 24 N.Y. Supp. 727 (Gen. Sess. 1893). See also Note, 19 A.L.R. 1473 (1922). At common law truth was no defense to libel. See Note, 19 A.L.R. 1473, 1477 (1922).

4. Regina v. Newman, 118 Eng. Rep. 437 (Q.B. 1852); Rex v. Grant, 110 Eng. Rep. 1092, 9 Eng. Rul. Cas. 186 (K.B. 1834); Rex v. Harvey and Chapman, 107 Eng. Rep. 379 (K.B. 1823); Rex v. Burks, 101 Eng. Rep. 825 (K.B. 1796); Rex v. Bickerton, 93 Eng. Rep. 659 (K.B. 1721); Anonymous, 88 Eng. Rep. 921 (K.B. 1706); Case of Scandalous Libels, 77 Eng. Rep. 250 (1605).

5. Note, 19 A.L.R. 1482 (1922). The statutes make either truth alone or truth coupled with good motives and for justifiable ends a defense. Note, 19 A.L.R. 1483, 1505 (1922). Statutory criminal libel has strayed from the common law purpose of preventing breaches of the peace by adopting the civil definition of libel and thereby emphasizing the injury to the individual libeled instead. Note 19 A.L.R. 1476 (1922).

6. The case upon which the prosecutions have been based seems to be Rex v. Osborn, 94 Eng. Rep. 406, 425 (K.B. 1732), wherein a conviction for libel against the whole community of Jews was upheld. Other cases involve defamation of the Knights of Columbus: California v. Turner, 28 Cal. App. 766, 154 Pac. 34 (1915); California v. Gordon, 63 Cal. App. 627, 219 Pac. 486 (1923); Alumbaugh v. Georgia, 39 Ga. App. 559, 147 S.E. 714 (1929); Crane v. Oklahoma, 14 Okla. Crim. 30, 166 Pac. 1110, 19 A.L.R. 1455 (1917). Still others involve a defamation of various groups: Illinois v. Spielman, 318 Ill. 482, 149 N.E. 466 (1925); Kansas v. Brady, 44 Kan. 435, 24 Pac. 948 (1890); Tracy v. Kentucky, 87 Ky. 651, 9 S.W. 822 (1888); Minnesota v. Cramer, 193 Minn. 344,

Restriction on criminal group libel have appeared in statutory form in eight states[7] for the purpose of reducing tension between social groups.[8] The enforcement of these statutes has been generally ineffective,[9] but this is neither determinative of their constitutionality nor of their desirability.

The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech. . . ." This prohibition is enforced against the states through the Due Process Clause of the Fourteenth Amendment.[10] "Within the category of protected speech are utterances designed to persuade people to adopt an opinion or policy concerning matters of public interest."[11] However, there are certain classes of speech which are not protected. Among these are lewd, obscene and

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258 N.W. 525 (1935); Palmer v. City of Concord, 48 N.H. 211, 97 Am. Dec. 605 (1868); Jones v. Texas, 38 Tex. Crim. App. 664, 43 S.W. 78 (1897); Noble v. Texas, 38 Tex. Crim. App. 368, 43 S.W. 80 (1897); Rex v. Williams, 106 Eng. Rep. 1308 (K.B. 1822); Rex v. Jenour, 87 Eng. Rep. 1318 (K.B. 1740). See also Note, 97 A.L.R. 281 (1935). More recently there have been cases restricting the use of criminal libel statutes in group libel prosecutions. See Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D.D.C. 1948); Latimer v. Chicago Daily News, 330 Ill. App. 295, 71 N.E.2d 553 (1947); Noral v. Hearst Publications, 40 Cal. App.2d 348, 104 P.2d 860 (1940).

7. CALIFORNIA EDUCATION CODE § 8271-72 (1944); CONN. REV. GEN. STAT. § 8376 (1949); IND. ANN. STAT. §§ 10-904, 10-914 (Supp. 1951); MASS. ANN. LAWS c. 272, § 98 (Supp. 1951); NEV. COMP. LAWS ANN. § 10110 (Hillyear 1929); N.J. STAT. ANN. tit. 2, c. 157 B, §§ 1-8 (1937); N.M. STAT. ANN. § 41-2725-7 (1941); W. VA. CODE ANN. § 6109 (1949). The California statute only forbids teachers and textbooks from reflecting upon citizens "because of their race, color, or creed," violation of which may involve dismissal. The Connecticut statute applies only to advertisements. The Massachusetts and Indiana statutes are directed at racial and religious hatred. The Nevada statute defines criminal libel so broadly that it could probably be the basis for a group libel prosecution. The New Jersey statute has broad libel provisions, but its constitutionality has been placed in serious doubt. See New Jersey v. Klapprott, 127 N.J.L. 395, 22 A.2d 877 (Sup. Ct. 1941). The New Mexico statute is limited to fraternal or religious orders. The West Virginia statute is limited to pictures and theater performances which injuriously reflect upon any person or class of persons as to arouse prejudice or ire against that person or class. See Note, 61 YALE L.J. 252, 255-56, n.15, 16, 17, 18, 19 (1952).

8. Beauharnais v. Illinois, 343 U.S. 250, 72 Sup. Ct. 725, 731, 732, 733, 96 L. Ed. 620 (1952); Note, 47 COL. L. REV. 595, 596 (1947).

9. Of the statutes mentioned in note 7 *supra*, Indiana, Massachusetts, Nevada and New Mexico show no successful prosecutions. The California, Connecticut and West Virginia statutes are designed only to combat certain types of group libel and, therefore, merit little consideration as anti-hate legislation. The New Jersey statute's effectiveness and constitutionality have been put in serious doubt by New Jersey v. Klapprott, 127 N.J.L. 395, 22 A.2d 877 (Sup. Ct. 1941).

10. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 Sup. Ct. 777, 96 L. Ed. 687 (1952); Schneider v. Irvington, 308 U.S. 147, 60 Sup. Ct. 146, 84 L. Ed. 155 (1939); Lovell v. Griffin, 303 U.S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949 (1938); DeJonge v. Oregon, 299 U.S. 353, 57 Sup. Ct. 255, 81 L. Ed. 278 (1937); Grosjean v. American Press Co., 297 U.S. 233, 56 Sup. Ct. 444, 80 L. Ed. 660 (1936); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357 (1931); Stromberg v. California, 283 U.S. 359, 51 Sup. Ct. 532, 75 L. Ed. 1117(1931); Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925).

11. Note, 47 COL. L. REV. 595, 604 (1947). *See* Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 293, 61 Sup. Ct. 552, 85 L. Ed. 836 (1941); Cantwell v. Connecticut, 310 U.S. 296, 310, 60 Sup. Ct. 909, 84 L. Ed. 1213 (1940); Thornhill v. Alabama, 310 U.S. 88, 95, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940).

profane language; insulting or fighting words; and libellous utterances.[12] Lewd, obscene and profane language is in a class *sui generis* because the very utterance offends long established moral and religious standards.[13] The use of libellous statements and insulting language has been made criminal partly because it is conducive to a breach of the peace,[14] but statutes governing criminal libel emphasize the fact that such statements constitute a personal injury to a particular individual's reputation or his sensibilities.[15] The constitutionality of other communications depends upon whether or not they give rise to a "clear and present danger" of a substantive evil which the legislature has a right to prevent.[16] If the breach-of-the-peace basis had been the only reason for making it a crime to utter libellous matter or insulting words, the "clear and present danger" test should be applied here too.[17]

Group libel is different from libel of the individual.[18] There is no particular person injured by the utterance.[19] Thus the statutes are designed only to prevent breaches of the peace;[20] therefore, the "clear and present danger" test, formulated in 1919 and widely applied until recently,[21] should apply.

During recent years, in cases involving statutes restricting freedom of speech, the burden of showing constitutionality has rested upon

12. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572, 62 Sup. Ct. 769, 86 L. Ed. 1031 (1942); Cantwell v. State of Connecticut, 310 U.S. 296, 309, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940).

13. For an able argument that the "clear and present danger" test should apply here see: Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability*, 48 MICH. L. REV. 811, 833 (1950). See also 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 56 (1947).

14. 33 AM. JUR. 299, *Libel and Slander* § 320 (1941).

15. Note, 19 A.L.R. 1522 (1922).

16. West Virginia Board of Education v. Barnette, 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943); Taylor v. Mississippi, 319 U.S. 583, 63 Sup. Ct. 1200, 87 L. Ed. 1600 (1943); Herndon v. Lowry, 301 U.S. 242, 57 Sup. Ct. 732, 81 L. Ed. 1066 (1937); Schenck v. United States, 249 U.S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470 (1919); Antieau, *The Rule of Clear and Present Danger: Its Origin and Application*, 13 U. OF DETROIT L.J. 198 (1950); Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability*, 48 MICH. L. REV. 811 (1950); Richardson, *Freedom of Expression and the Function of the Courts*, 65 HARV. L. REV. 1 (1951). To what extent "clear and present danger" was weakened by Dennis v. United States, 341 U.S. 494, 71 Sup. Ct. 857, 95 L. Ed. 1137 (1951), see Antieau, *Dennis v. United States — Precedent, Principle or Perversion*, 5 VAND. L. REV. 141 (1952).

17. Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 61 Sup. Ct. 552, 85 L. Ed. 836, (1941); Cantwell v. Connecticut, 310 U.S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940); Thornhill v. Alabama, 310 U.S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093, (1940). See also Note, 61 YALE L.J. 252, 258 (1952).

18. This is the first peacetime conviction under a group libel law to be upheld up by an appellate court. Note, 61 YALE L.J. 252, 256 (1952).

19. Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COL. L. REV. 728, 730 (1942).

20. That the reason for passing the statute herein involved was the prevention of race riots. 343 U.S. at 257-62.

21. See Antieau, *Dennis v. United States — Precedent, Principle or Perversion*, 5 VAND. L. REV. 141 (1952), for the extent to which the *Dennis* case weakened "clear and present danger." See also Schenck v. United States, 249 U.S. 27, 39 Sup. Ct. 247, 63 L. Ed. 470 (1919).

those supporting the legislation.[22] They must prove a "grave and immediate danger to interests which the state may lawfully protect"[23] since the presumption in favor of legislation is balanced by the preferred place of free speech in our society.[24] In marked contrast to this attitude is the judicial self-restraint with which the Court has approached economic legislation.[25] The presumption in those cases is that the law is constitutional.[26]

Mr. Justice Frankfurter has consistently contended that the Court should approach legislation encroaching on personal liberties with the same attitude with which it approaches economic legislation.[27] By this later view, if the legislature has a "rational basis" for its restriction of free speech, the law is constitutional.[28] The instant case suggests a change in the attitude of the Court in accord with the views of Mr. Justice Frankfurter.[29]

The dangers inherent in the new attitude are amply illustrated by this case. Legislation of this type has an inevitable tendency to close channels of communication through fear of breach of its provisions.[30] The statute blocks the path of its own repeal by limiting discussion on the very subject in question.[31] This is the reason experimentation with restrictions on free speech should not be tolerated. Furthermore, the statute may be used against those minorities it was designed to protect.[32] The Court has consistently held that if the interpretation

22. For a full discussion of this development see United States v. Carolene Products, 304 U.S. 144, 152 n.4, 58 Sup. Ct. 778, 82 L. Ed. 1234 (1938); Antieau, *Judicial Delimitation of the First Amendment Freedoms,* 34 MARQ. L. REV. 57, 58, 74 (1950).

23. Antieau, *supra* note 22, at 75.

24. *But see:* National Maritime Union v. Herzog, 78 F. Supp. 146, 168 (D.D.C. 1948), *aff'd,* 68 Sup. Ct. 1520; Thomas v. Collins, 323 U.S. 516, 530, 65 Sup. Ct. 315, 89 L. Ed. 430 (1945); Lusky, *Minority Rights and the Public Interest,* 52 YALE L.J. 1, 19 (1942); Barnett, *Mr. Justice Black and the Supreme Court,* 8 U. OF CHI. L. REV. 20, 27 (1940).

25. Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421, 72 Sup. Ct. 405, 96 L. Ed. 343 (1952); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703 (1937); Nebbia v. New York, 291 U.S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934).

26. See Note, 36 COL. L. REV. 283 (1936). For a full discussion of the doctrine of "presumption of constitutionality" see Note, 31 COL. L. REV. 1136 (1931).

27. For a discussion of his theory see Pennekamp v. Florida, 328 U.S. 331, 352-53, 66 Sup. Ct. 1029, 90 L. Ed. 1295 (1946) (concurring opinion); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 663, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943) (dissent); Bridges v. California, 314 U.S. 252, 295-96, 62 Sup. Ct. 190, 86 L. Ed. 192 (1941) (dissent); Antieau, *Dennis v. United States — Precedent, Principle or Perversion,* 5 VAND. L. REV. 141, 142 (1952); Antieau, *Judicial Delimitation of the First Amendment Freedoms,* 34 MARQ. L. REV. 57, 77 (1950).

28. See 343 U.S. at 257-262. See also Frank, *The United States Supreme Court:* 1951-52, 20 U. OF CHI. L. REV. 1, 27 (1952).

29. Frank, *supra* note 26, at 27.

30. *Id.* at 28. See also Richardson, *Freedom of Expression and the Function of the Courts,* 65 HARV. L. REV. 1, 50 (1951).

31. See note 28 *supra.*

32. Tanenhaus, *Group Libel,* 35 CORNELL L.Q. 261, 279 (1950). The same group libel law used to convict Beauharnais was used to harass the Jehovah's

of that portion of a statute upon which conviction is based is so broad as to permit the punishment of utterances within the protection of the guarantee of free speech, the conviction must be set aside.[33] The statutory language as here construed is broad enough to include protected speech with utterances deemed by the majority to be unprotected; yet the conviction was upheld.[34] A further extension of this rule would seem to be undesirable.

FEDERAL EMPLOYERS LIABILITY ACT — LIABILITY FOR EMPLOYMENT OF MAN WITH VIOLENT TENDENCIES

Plaintiff, defendant's foreman, was assaulted by another employee who was on duty but without the scope of his employment, and sues the employer here under the Federal Employers Libility Act[1] for negligence in employing a man with known violent tendencies. Suit was dismissed in the lower court and affirmed on appeal to the intermediate court. *Held,* reversed and remanded. The complaint states a cause of action for negligence in employing a man with such a disposition. *Tatham v. Wabash R.R.,* 107 N.E.2d 735 (Ill. 1952).

Under common law a master owed a duty to his servants to employ capable fellow servants. He was liable for injuries resulting from his negligence in doing so, whether or not the servant was engaged in furtherance of the master's work, if the master knew or should have known that the servant was not capable.[2] This was particularly true where the master hired a servant who he knew or should have known had violent tendencies.[3] The ground for liability was not *respondeat superior,* but negligence of the master in hiring the servant.[4]

Under the Federal Employers Liability Act the employer generally has not been held for injuries sustained by one employee at the hand of another outside the scope of his employment, even where the employee's vicious disposition was known or should have been known to

Witnesses. Bevins v. Prindable, 39 F. Supp. 708, 713 (E.D. Ill. 1941), *aff'd,* 314 U.S. 573 (1941).

33. Mr. Justice Reed dissenting, 343 U.S. at 280-281.

34. Mr. Justice Black dissenting, 343 U.S. at 269-272.

1. 53 STAT. 1404 (1939), 45 U.S.C.A. 51 (1943).

2. MECHEM, AGENCY § 403 (4th ed. 1952); PROSSER, TORTS § 67 (1941); RESTATEMENT, TORTS § 317, comment *c* (1934).

3. Norfolk and Western Ry. v. Hoover, 79 Md. 253, 29 Atl. 994 (1894); Gilman v. Eastern Railroad Corp., 92 Mass. 233 (1865); Hilts v. Chicago & G.T. Ry., 55 Mich. 437, 21 N.W. 878 (1885); see Lamb v. Littman, 128 N.C. 631, 38 S.E. 911 (1901).

4. "And we think there could be no difference whether the injury result from negligence in doing the master's work, or from an assault made by a dangerous, drunken, and desperate employe, if his reputation was such that the master might reasonably have foreseen such consequences." Missouri, K. & T. Ry. of Texas v. Day, 104 Tex. 237, 136 S.W. 435, 440 (1911).

the master.[5] Though under obligation to furnish safe equipment and safe working places,[6] the employer has been under no obligation to furnish stable working companions.

The instant case apparently represents a deviation from the previous rule toward applicability of the Federal Employers Liability Act to common law negligence of the master in employing dangerous fellow servants. Previously the courts have overlooked this ground of liability in an effort to hold on the basis of *respondeat superior,* rather than distinctly indicate that there was no ground of liability in the master's negligent employment. *Davis v. Green,*[7] is the leading case on the subject, and the court in the instant case felt bound by its decision unless it was possible to distinguish it. Though the *Davis* case has been interpreted[8] as disallowing recovery for the negligent selection of employees by the master, it does not, however, rule out the possibility of recovery; instead it holds that the employee in the case was not within the scope of his employment when he committed the wrongful act, and that thence the employer is not liable on the theory of *respondeat superior.* Another case[9] held there was no duty to protect two servants from each other; in this action, however, there was no showing of general vicious nature, but merely ill feeling between two people.

The instant case seemingly extends the applicability of the Federal Employers Liability Act to the common law duty of the master to employ fit servants. From previous cases there would seem to be no ground of denial of the right to recovery, and the present case represents a desirable extension.

FEDERAL JURISDICTION — DIVERSITY JURISDICTION AND THE MULTI-STATE CORPORATION

Plaintiff, a citizen of Massachusetts, brought a tort action for negligence against the Boston & Maine Railroad in the United States District Court for the District of Massachusetts. The plaintiff alleged diversity of citizenship based upon the fact that the defendant was incorporated in New York. The defendant challenged the diversity jurisdiction of the court on the ground that in addition to being incorporated in New York it was also incorporated in Massachusetts. The trial court dismissed for lack of jurisdiction. *Held,* affirmed. When a multi-state

5. Roebuck v. Atchison, T. & S.F. Ry., 99 Kan. 544, 162 Pac. 1153 (1917); cf. Davis v. Green, 260 U.S. 349, 352, 43 Sup. Ct. 123, 67 L. Ed. 299 (1922).

6. "That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent had a duty to make reasonable provision against it." Lillie v. Thompson, 332 U.S. 459, 462, 68 Sup. Ct. 140, 92 L. Ed. 73 (1947).

7. Davis v. Green, 260 U.S. 349, 43 Sup. Ct. 123, 67 L. Ed. 299 (1922).

8. See note 9 *infra.*

9. Atlantic Coast Line R.R. v. Southwell, 275 U.S. 64, 48 Sup. Ct. 25, 72 L. Ed. 157 (1927).

corporation is sued in one of the states in which it is incorporated, it is, for jurisdictional purposes, treated as a citizen of that state. Consequently, there is no diversity of citizenship between a corporation incorporated in the forum state and a citizen of the forum state. *Seavey v. Boston & Maine R.R.*, 197 F.2d 485 (1st Cir. 1952).

Because there is a conclusive presumption that all of the shareholders of a corporation are citizens of the incorporating state,[1] a corporation is treated, for jurisdictional purposes[2] in the federal courts, as a citizen of the incorporating state.[3] A corporation holding charters in more than one state is generally treated as a citizen of each state in which it is incorporated.[4] Therefore, when an action is brought against the corporation in a state in which it is incorporated by a citizen of that state, the question of the citizenship of the corporation for jurisdictional purposes is raised. All of the cases seem to agree that when the plaintiff is not a citizen of the forum state and the action is brought in a state of incorporation, there is diversity of citizenship even though the corporation holds a charter in the state of the plaintiff's citizenship.[5] However, when, as in the instant case, the plaintiff is a citizen of the forum state and the multi-state corporation is incorporated in that state, there

1. *See* Bank of the United States v. Deveaux, 5 Cranch 61, 67, 3 L. Ed. 38 (U.S. 1809) (that a corporation is not a citizen but that the characters of the members of the corporation may be examined for purposes of jurisdiction); Marshall v. Baltimore & Ohio R.R., 16 How. 314, 329, 14 L. Ed. 953 (U.S. 1853) (that there is a conclusive presumption that the members of the corporation are citizens of the incorporating state); Chicago & Northwestern Ry. v. Whitton, 13 Wall. 270, 283, 20 L. Ed. 571 (U.S. 1871) (that a corporation is considered a citizen for purposes of federal jurisdiction). See BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 44-45 (5th ed. 1949); McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 853 & 1090 & 1225 (1943); Note, 28 MICH. L. REV. 436 (1930). See also, 28 FED. R. CIV. P. Form 2 n.4.

2. *See* Paul v. Virginia, 8 Wall. 168, 177, 19 L. Ed. 357 (U.S. 1868) (that corporations are not citizens within the privileges and immunities clause of the Constitution).

3. Patch v. Wabash R.R., 207 U.S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204 (1907) (removal sought on grounds of diversity disallowed); Southern Ry. v. Allison, 190 U.S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078 (1902) (removal allowed because re-incorporation in the forum state had been under compulsion of state law); Louisville, N. A. & C. Ry. v. Louisville Trust Co., 174 U.S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081 (1899); Kansas Pacific Ry. v. Atchison, T. & S.F.R.R., 112 U.S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794 (1884); Thomas v. South Butte Mining Co., 230 Fed. 968 (9th Cir. 1916); Everett Ry., Light & Power Co. v. United States, 236 Fed. 806, 807 (W.D. Wash. 1916).

4. "In any suit in which the defendant is engaged in the courts of Pennsylvania, whether state or federal, it is deemed to be a citizen of Pennsylvania. In any suit in which the defendant corporation is engaged in the state of New York it is deemed to be a citizen of New York." Lucas v. New York Central R.R., 88 F. Supp. 536, 537 (S.D.N.Y. 1950). See Town of Bethel v. Atlantic Coast Line R.R., 81 F.2d 60, 64 (4th Cir. 1936), *cert. denied*, 298 U.S. 682 (1936); 2 MORAWETZ, THE LAW OF PRIVATE CORPORATIONS § 999 (2d ed. 1886); Notes, 4 COL. L. REV. 63 (1904), 28 MICH. L. REV. 436 (1930).

5. Muller v. Dows, 94 U.S. 444, 24 L. Ed. 207 (1877); Chicago & Northwestern Ry. v. Whitton, 13 Wall. 270, 20 L. Ed. 571 (U.S. 1871); Muller v. Boston & M. R.R., 9 F. Supp. 802 (D. N.H. 1935); Union Trust Co. v. Rochester & P.R.R., 29 Fed. 609 (W.D. Pa. 1886). Cf. Goodwin v. N.Y., N.H. & Hartford R.R., 124 Fed. 358 (C.C. Mass. 1903).

is disagreement upon the question of diversity of citizenship.[6]

In *Gavin v. Hudson & Manhattan R.R.*,[7] where the situation was identical to the instant case, an opposite result was reached. The plaintiff, a citizen of New Jersey, brought his action in the New Jersey federal court alleging that there was diversity of citizenship because the defendant was incorporated in New York. Notwithstanding the fact that the defendant was also incorporated in New Jersey, the court ruled there was diversity jurisdiction. The effect of the holding seems to be that the court not only recognized the existence of the New Jersey corporate-citizen in New Jersey, but also recognized the existence of the New York corporate-citizen in New Jersey; and with a co-existence of citizenships it allowed the plaintiff to choose which corporate-citizen he desired to sue.[8] The court in deciding this case took the pragmatic approach that, since the citizen of New Jersey could go into New York and sue the defendant in federal court and a citizen of New York could come into New Jersey and sue the defendant in federal court, it would be senseless to prohibit the citizen of New Jeresy from suing the defendant in the federal court in New Jersey. However, the court does not say how service of process was had on the New York corporate-citizen in New Jersey.[9]

The conflicting results of the *Gavin* case and the instant case seem to stem from the same basic premise — that a multi-state corporation is a distinct entity in each state in which it is incorporated, and though it is in actuality but one corporation, it is in legal concept several corporations.[10] The instant case proceeds upon the theory that a body

6. *See* Gavin v. Hudson & Manhattan R.R., 185 F.2d 104, 107 n.11 (3d Cir. 1950), and the instant case, 197 F.2d at 489.

7. 185 F.2d 104 (3d Cir. 1950). This case has been severely criticized. See 3 ALA. L. REV. 397 (1951), 15 ALBANY L. REV. 240 (1951), 1 CATHOLIC U.L. REV. 156 (1951), 14 GA. B.J. 374 (1952), 64 HARV. L. REV. 1009 (1951), 22 MISS. L.J. 244 (1951).

8. "Plaintiffs declared against this railroad as a New York corporation. It certainly is a New York corporation. Does the fact that it is also a New Jersey corporation defeat federal jurisdiction in a suit in New Jersey by a New Jersey citizen?" Gavin v. Hudson & Manhattan R.R., 185 F.2d 104, 107 (3d Cir. 1950).

9. When the *Gavin* case was before the district court the opinion of that court pointed out that the corporate entity in question was a result of the consolidation of separate entities, that upon the consolidation the original corporations were dissolved and that under the laws of the two states, contemplating united action in allowing the consolidation, the new corporation could not exist in only one state but by its unique character was a creature of both states. The only possible defendant being the new consolidated corporation made up of citizens of New York and New Jersey, service was made upon the new consolidated corporation. Gavin v. Hudson & Manhattan R.R., 90 F. Supp. 172 (D. N.J. 1950). Upon review, this decision was reversed without mention of the problem of service of process. Gavin v. Hudson & Manhattan R.R., 185 F.2d 104 (3d Cir. 1950).

10. In the *Gavin* case the rule from RESTATEMENT, CONFLICT OF LAWS § 207 (1934), that suits "by or against an association incorporated in two or more states may be brought by or against the association as a corporation of any of the incorporating states" was found to be applicable. Gavin v. Hudson & Manhattan R.R., 185 F.2d 104, 107 (3d Cir. 1950). In the instant case the corporation was held to be so fully domesticated in each state of its incorporation that

incorporated in the forum state is a creature of the laws of that state and is to be treated as *solely* domesticated therein for purposes of diversity jurisdiction.[11]

The court acknowledges that it is dealing with a pyramid of legal fictions and is but seeking a rule to apprise litigants of the accessability of federal courts.[12] The court favorably recognizes[13] that the result of the instant case will, if anything, tend to constrict rather than expand the scope of diversity jurisdiction.[14] The instant case hints at a bold, but expedient, step which might be considered by the Supreme Court to narrowly restrict diversity jurisdiction.[15] If a multi-state corporation were considered in whatever state it is found as being made up of corporate-citizens of each state in which the corporation holds a charter, an action against the corporation would be an action against all of the corporate-citizens jointly. Under this approach there would never be diversity of citizenship when the adversary of the corporation was a citizen of any state in which the corporation was incorporated.[16] In this way a large part of the diversity cases which are now flooding the federal courts with questions of state law would be channeled into the state courts.[17]

FEDERAL JURISDICTION — ERIE RAILROAD DOCTRINE EXTENDED TO STATE-CREATED RIGHTS ARISING UNDER SPECIAL FEDERAL QUESTION JURISDICTION

In 1942 a Virginia corporation was reorganized under the Bankruptcy Act.[1] Plaintiffs were substituted as trustees of the reorganized corporation and in 1945 sued defendants, the majority stockholder and directors, in the New York federal court to recover assets allegedly misappropriated. Jurisdiction was based on the Bankruptcy Act.

it was not amendable to a suit under diversity jurisdiction where the plaintiff is a citizen of that same state. 197 F.2d at 488.

11. 197 F.2d at 488. *See* Memphis & Charleston R.R. v. Alabama, 107 U.S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518 (1882); Ohio & Mississippi R.R. v. Wheeler, 1 Black 286, 17 L. Ed. 130 (U.S. 1861).

12. 197 F. 2d at 487.

13. Diversity jurisdiction has long been under fire of criticism. For a history of the development of diversity jurisdiction see FRANKFURTHER AND LANDIS, THE BUSINESS OF THE SUPREME COURT 90 (1st ed. 1928). Also see Friendly, *Historic Basis of Diversity Jurisdiction,* 41 HARV. L. REV. 483 (1928).

14. 197 F.2d at 489.

15. *Ibid.*

16. See Frankfurther, *Distribution of Judicial Power Between the United States and State Courts,* 13 CORNELL L.Q. 499 (1928), for an extensive treatment of the evils arising under the present application of diversity jurisdiction. In this article the author points out that corporate litigation is the key to the problem. *Id.* at 523.

17. This device for constricting the scope of diversity jurisdiction was suggested in 64 HARV. L. REV. 1009 (1951).

1. 30 STAT. 544 *et seq.* (1898), 11 U.S.C.A. § 1 *et. seq.* (1927).

Though the cause of action was created by New York law and the state limitation statute was applied, the federal court held it was free to apply its federal equitable rule in construing the state limitations statute. From the judgment below the defendant appealed. *Held,* reversed with directions to dismiss the complaint. The federal court must apply the substantive law of the state to a state-created cause of action though jurisdiction of the court is based upon a federal statute. *Austrian v. Williams,* 198 F.2d 697 (2d Cir. 1952).

The theory of an independent, transcendent body of substantive common law was fully developed by the federal courts in *Swift v. Tyson*[2] and as extended by succeeding cases,[3] continued as an established part of American law for almost a century. This theory was reversed in 1938 by *Erie Railroad v. Tompkins,*[4] which held that in "diversity cases" the federal court must apply the substantive common law of the state. The underlying theory was that a litigant should have the same rights in the federal court as in the state courts.[5] The doctrine has been held to apply in equity as well as in law if the action is a state-created right in a diversity case.[6] However, the *Erie* doctrine was restricted to "substantive" as distinguished from "procedural" law, and federal courts were left to follow their own rules in procedural matters.[7] Seeking to give this distinction a definite, workable meaning,

2. 16 Pet. 1, 10 L. Ed. 865 (U.S. 1842).

3. Leading cases applying the doctrine are collected in Black & White Taxicab and Transfer Co. v. Brown & Yellow Taxicab and Transfer Co., 276 U.S. 518, 530, 48 Sup. Ct. 404, 407, 72 L. Ed. 681, 57 A.L.R. 426 (1928). See Boseman v. Connecticut General Life Insurance Co., 301 U.S. 196, 57 Sup. Ct. 686, 81 L. Ed. 1036, 110 A.L.R. 732 (1937); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228 (1910) (with Justice Holmes writing a vigorous dissent attacking the entire doctrine); Watson v. Tarpley, 18 How. 517, 15 L. Ed. 509 (U.S. 1856); Rowan v. Runnels, 5 How. 134, 12 L. Ed. 85 (U.S. 1846); Lane v. Vick, 3 How. 464, 11 L. Ed. 681 (U.S. 1844).

4. 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938). See also Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins,* 55 YALE L.J. 265 (1946); Notes, N.Y.U.L.Q. REV. 144 (1938), 24 VA. L. REV. 895 (1938).

5. Garrett v. Moore-McCormack Co., 317 U.S. 239, 245, 63 Sup. Ct. 246, 250, 87 L. Ed. 239 (1942). See also 44 COL. L. REV. 915 (1944). The objective of *Erie* is full protection for the substantive rights intended to be afforded litigants by the jurisdiction in which the right itself originated. 43 COL. L. REV. 837, 861 (1943).

6. Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 58 Sup. Ct. 860, 82 L. Ed. 1290 (1938); New York Life Ins. Co. v. Jackson, 304 U.S. 261, 58 Sup. Ct. 871, 82 L. Ed. 1329 (1938). This doctrine was later confirmed in Guaranty Trust Co. v. York, 326 U.S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231 (1945). *But cf.* Holmberg v. Armbrecht, 327 U.S. 392, 66 Sup. Ct. 582, 90 L. Ed. 743 162 A.L.R. 719 (1946); Prudence Realization Corp. v. Geist, 316 U.S. 89, 95, 62 Sup. Ct. 978, 982, 86 L. Ed. 1293 (1942). "Federal courts in many cases have applied the state statute of limitations in enforcing in equity a right arising under a Federal statute." Note, 162 A.L.R. 719, 726 (1946). However, where federal courts are enforcing a federally-created right in equity, the desired principal of uniformity is best served by following federal equity rules. 46 COL. L. REV. 676 (1946).

7. Sampson v. Channell, 110 F.2d 754, 128 A.L.R. 394 (1st Cir. 1940), *cert. denied,* 310 U.S. 650, noted in 27 VA. L. REV. 120 (1940); Cities Service Co. v. Dunlap, 308 U.S. 208, 60 Sup. Ct. 201, 84 L. Ed. 196 (1939).

the Supreme Court, through Mr. Justice Frankfurter,[8] has taken the view that the theory of the *Erie* case required uniformity of result where the federal court sits as another court of the forum, irrespective of the court in which the suit was brought and that mere jurisdictional characterization of a matter as "procedural" or "substantive" should not interfere with this theory. The *Erie* doctrine throughout its development has been applied to diversity cases but the Supreme Court has not flatly so limited its application nor has it been expressly extended.[9]

Where jurisdiction has been based on a federal statute creating a legal cause of action and no federal statute of limitation has been applicable, the federal courts have generally felt bound by the applicable state statute of limitations.[10] Apparently this is an expansion of the basic doctrine in the *Erie* case to apply to a federally created cause of action where jurisdiction is based on federal question. However, when a federally created cause of action is solely enforcable in equity, the Supreme Court has held that a state statute of limitations does not bar the action.[11]

Whether the federal courts should extend the *Erie* doctrine to an equity suit involving state-created rights where the jurisdiction of the

8. Guaranty Trust Co. v. York, 326 U.S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231 (1945). Under the theory of this case, if a matter significantly affects the outcome of the litigation then it is defined as "substantive." This gives "substantive" a very broad and indefinite meaning. The *York* decision is in keeping with a number of cases stemming from the *Erie* case, *e.g.*, Palmer v. Hoffman, 318 U.S. 109, 63 Sup. Ct. 477, 87 L. Ed. 645, 114 A.L.R. 719 (1943); Klaxon Co. v. Stentor Co., 313 U.S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941). The *York* case has been acclaimed as the logical and necessary result of the *Erie* doctrine. See, *e.g.*, 21 N.Y.L.Q. REV. 145 (1946); 31 VA. L. REV. 948 (1945).

9. *Compare* Guaranty Trust Co. v. York, 326 U.S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079 (1945), a diversity case accepting the *Erie* doctrine, and Holmberg v. Armbrecht, 327 U.S. 392, 66 Sup. Ct. 582, 90 L. Ed. 743 (1946), a federal question case rejecting the *Erie* doctrine, neither of which expressly limits *Erie* to diversity jurisdiction; *with*, D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 466, 62 Sup. Ct. 676, 683, 86 L. Ed. 477 (1942) (Jackson, concurring opinion), stating that "The Court has not extended the doctrine of Erie v. Tompkins beyond diversity cases," and Austrian v. Williams, 198 F.2d 697, 702 (2d Cir. 1952) (Clark, dissenting opinion). See Dobie and Ladd, FEDERAL JURISDICTION AND PROCEDURE, 463, 467 n.40 (2d ed. 1950); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 265 (1946); 38 VA. L. REV. 680 (1952).

10. See Holmberg v. Armbrecht, 327 U.S. 592, 395, 66 Sup. Ct. 582, 584, 90 L. Ed. 743 (1946); Moore v. Illinois Cent. Ry., 312 U.S. 630, 634, 61 Sup. Ct. 754, 85 L. Ed. 1089, 1092 (1941); Rawlings v. Ray, 312 U.S. 96, 61 Supt. Ct. 473, 85 L. Ed. 605 (1941); Foundry & Pipe Works v. Atlanta, 293 U.S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241 (1906). See also cases collected in Note, 162, A.L.R. 724 (1946).

11. Holmberg v. Armbrecht, 327 U.S. 392, 66 Sup. Ct. 582, 90 L. Ed. 743, 162 A.L.R. 719 (1946). In the instant case, the lower court relied heavily upon this decision but the majority of the circuit court distinguishes the two because *Holmberg* turns on a federally-created right and *Austrian* on a state-created right, with Congress merely creating the forum under its Article I powers. *But cf.*, Prudence Realization Corp. v. Geist, 316 U.S. 89, 95, 62 Sup. Ct. 978, 982, 86 L. Ed. 1293 (1942), in which it is said that a court of bankruptcy is a court of equity and it is for this court to define and apply federal law with regard, however, for rights acquired under rules of state law.

courts is based upon a federal statute is the issue in the instant case. Without question, the jurisdiction of the federal court here is created by the Bankruptcy Act[12] which expressly provides that the state limitation statute shall be a bar to claims upon which the trustee can sue.[13] The majority and the trial court agree that the substantive rights under which the trustee sues are state-created rights with the Bankruptcy Act merely determining the forum.[14] The dissent contends that this equitable right of accounting against a defaulting fiduciary is an asset of the corporation which belongs to New York no more than any other state.[15]

With the dissent agreeing in principle, the lower court holds that, although a right of action is wholly state-created, since the jurisdiction is not based on diversity of citizenship, the action does not come within the *Erie* doctrine and the federal courts are free to adopt their own view of equitable laches.[16] In reversing the lower court, the majority holds that "the clear mandate to apply the state limitation statute" in the Bankruptcy Act "includes its applications in the manner established by the New York courts."[17]

Thus, the court has extended the *Erie* doctrine to include special federal question jurisdiction when such federal statute merely creates another forum for suit on a state-created right. Because of this basic similarity between diversity jurisdiction and this action, it does not seem reasonable to try to limit the doctrine of the *Erie* case to diversity jurisdiction alone. It would appear more logical to allow the *Erie* doctrine to apply where a nonfederal issue is the basis of the jurisdiction; the application of the doctrine could better be limited to the cause of action in which the "objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be

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12. *See* Austrian v. Williams, 198 F.2d 697, 699 (2d Cir. 1952); *id.* at 702 (dissenting opinion); Austrian v. Williams, 103 F. Supp. 64, 111 (S.D.N.Y. 1952) (lower court).

13. 52 STAT. 849 (1938), 11 U.S.C.A. § 29(e) (Supp. 1952): "A receiver or trustee may . . . institute proceedings in behalf of the estate upon any claim against which the period of limitations fixed by . . . State law had not expired at the time of the filing of the petition in bankruptcy."

14. Austrian v. Williams, 198 F.2d 697, 699 (2d Cir. 1952) (majority); Austrian v. Williams, 103 F. Supp. 64, 111 (S.D.N.Y. 1952) (lower court). This is a decisive distinction. See National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 598 n.23, 69 Sup. Ct. 1173, 1180, 93 L. Ed. 1556 (1949), and cases cited therein; Puerto Rico v. Russell & Co. 288 U.S. 476, 483, 53 Sup. Ct. 447, 449, 77 L. Ed. 903, (1933) (". . . nature of the right to be established is decisive —not the source of the authority to establish it."). As respects limitations in suits prosecuted by trustee in bankruptcy, distinction is made between those founded strictly on the Bankruptcy Title and those based on rights existing under a state statute. See Silverman v. Christian, 123 N.J. Eq. 506, 198 Atl. 832 (1938).

15. Austrian v. Williams, 198 F.2d 697, 702 (dissenting opinion).

16. Austrian v. Williams, 103 F. Supp. 64, 110-17 (lower court); Austrian v. Williams 198 F.2d 697, 702-03 (dissenting opinion).

17. Austrian v. Williams, 198 F.2d 697, 701 (majority opinion).

afforded them by the jurisdiction in which the right itself originates."[18] This holding seems consistent with the growing tendency in the federal system to attain uniformity where the cause of action is state-created.[19] Congress has made the state substantive law applicable to these state-created rights, and, in order to protect the litigant's rights as originated and adjudicated by state law, the only uniformity required under this part of the federal statute is in the administration of the Bankruptcy Act.

Although the results of the instant case seem inequitable, it is the interpretation of the New York statute by the New York courts which is the source of this condition.[20] As a general rule the state limitation statutes are consistent with the federal equity doctrine in that the statute is tolled while the fraud is concealed from the one who is defrauded.[21]

LABOR LAW — PICKETING — INJUNCTION AGAINST BREACH OF BARGAINING AGREEMENT

Employer and its employees' union had entered into a contract, terminable sixty days after written notice. Prior to termination, the union demanded a wage increase, notifying the employer in writing of its desire to amend the agreement. Eight months later, during negotiations, the employees established picket lines. The employer filed a suit for a temporary restraining order enjoining the picketing. The petition was denied, and the petitioner appealed. *Held,* (4-3), injunction

18. Garrett v. Moore-McCormack Co., 317 U.S. 239, 245, 63 Sup. Ct. 246, 250, 87 L. Ed. 239 (1942).

19. See notes 5 and 6 *supra.*

20. N.Y. CIV. PRAC. ACT. § 11, provides that the only matters which toll the limitation period are those "specifically prescribed" in the statute itself; which exceptions do not include "domination" or "control" of a corporation by a majority stockholder. Zwerdling v. Bent, 291 N.Y. 654, 51 N.E.2d 933 (1943), is quoted by the courts in instant case as being New York state authority that the claims herein would have been barred before the date of adjudication. *But cf.* Laird v. United Shipyards Inc., 163 F.2d 12 (2d Cir. 1947), *cert. denied,* 332 U.S. 848 (1947), in which the Second Circuit held that fraud involving an intention to deceive must be pleaded and proved to establish a cause of action on which the New York limitations statute does not begin to run until discovery of the fraud. This indicates that the plaintiff might have prevailed if he had affirmatively plead, and shown proof of, an intention on the part of the defendant to deceive or defraud. See Mannaberg v. Kausner, 294 N.Y. 859, 62 N.E.2d 487 (1945) (applying statute of limitations only from time of discovery of the fraud when fraud is properly alleged); Reno v. Bull, 226 N.Y. 546, 124 N.E. 144 (1919) (plaintiff must plead and prove fraud).

21. See Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636 (U.S. 1875), in which, according to the federal equity rule, the bar of the statute does not begin to run until the fraud is discovered where the party injured by fraud remains in ignorance of it without fault. In Michelsen v. Penney, 135 F. 2d 409 (2d Cir. 1943) it was held that a limitation statute is tolled while a corporation continues under the domination of the wrongdoers. The equitable rule of the *Glover* case is read into every federal statute of limitation. Holmberg v. Armbrecht, 327 U.S. 392, 66 Sup. Ct. 582, 90 L. Ed. 743 (1946). A vast majority of the state statutes and decisions are in line with this federal equity rule.

granted. The required formal written notice of termination not having been given, the agreement was in force. The picketing was in breach of the agreement and therefore was unlawful. *Lion Oil Co. v. Marsh,* 249 S.W.2d 569 (Ark. 1952).

Between 1940 and 1952 peaceful picketing has undergone a transition in its position as constitutionally protected free speech;[1] now it may be enjoined when contrary to the public policy of a state.[2] Recent cases indicate that the Supreme Court would henceforth allow the states wide latitude in the regulation of labor affairs,[3] and accompanying this policy has been an increased use of the injunction in labor controversies. Since injunction is an equitable remedy, however, its use in labor cases is still governed by traditional, fundamental principles of equity.[4] The complainant must show that unlawful acts have been threatened and will be committed unless restrained,[5] that the injury will be substantial and irreparable, that there is no adequate remedy at law,[6] that denial of relief to the complainant will result in greater injury to him than granting relief to the defendant,[7] and that he has "clean hands."[8] Even then the granting of an injunction is not absolute but rests in the sound discretion of the trial court,[9] but with recogni-

1. "Peaceful picketing is the workingman's means of communication." Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 293, 61 Sup. Ct. 552, 85 L. Ed. 836 (1941); Thornhill v. Alabama, 310 U.S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940); Senn v. Tile Layers Protective Union, Local No. 5, 301 U.S. 468, 57 Sup. Ct. 857, 81 L. Ed. 1229 (1937); Cox, *Strikes, Picketing and the Constitution,* 4 VAND. L. REV. 574 (1951).

2. Hughes v. Superior Court of California, 339 U.S. 460, 70 Sup. Ct. 718, 94 L. Ed. 985 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 Sup. Ct. 684, 93 L. Ed. 834 (1949) (inducing violation of statute); Self v. Taylor, 217 Ark. 953, 235 S.W.2d 45 (1950) (indirect violation of statute). See also 3 VAND. L. REV. 313 (1950).

3. "[T]he state's power to govern in this field is paramount. . . ." Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 504, 69 Sup. Ct. 684, 93 L. Ed. 834 (1949). The problem is "to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.'" International Brotherhood of Teamsters Union, Local 309 v. Hanke, 339 U. S. 470, 474, 70 Sup. Ct. 773, 94 L. Ed. 995 (1950). "What public policy [the state] should adopt in furthering desirable industrial relations is for it to say so long as rights guaranteed by the Constitution are respected." Hotel & Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 315 U.S. 437, 442, 62 Sup. Ct. 706, 708, 86 L. Ed. 946 (1942). See also Hughes v. Superior Court, 339 U.S. 460, 70 Sup. Ct. 718, 94 L. Ed. 985 (1950); Cole v. State, 338 U.S. 345, 70 Sup. Ct. 172, 94 L. Ed. 155 (1949) (upholding injunction against picketing in violation of state "freedom to work" statute); 3 VAND. L. REV. 313 (1950).

4. See 31 AM. JUR., *Labor* § 320 (1940).

5. Interborough Rapid Transit Co. v. Lavin, 247 N.Y. 65, 159 N.E. 863 (1928).

6. Schlesinger v. Quinto, 201 App. Div. 487, 194 N.Y. Supp. 401 (1st Dep't 1922).

7. *Ibid.*

8. David Adler & Sons v. Maglio, 200 Wis. 153, 228 N.W. 123 (1929).

9. Western Maryland Dairy v. Chenowith, 180 Md. 236, 23 A.2d 660 (1942); McDonald v. Brewery & Beverage Drivers, Helpers and Warehousemen, Local Union No. 792, 215 Minn. 274, 9 N.W.2d 770 (1943). See also 28 AM. JUR., *Injunctions* § 14 (1940).

tion that injunction is an extraordinary remedy, to be used sparingly,[10] only in cases reasonably free from doubt,[11] with reference to the special circumstances of each case.[12] Within these limits, the trial court may exercise judicial discretion, not to be disturbed on appeal unless it has been abused.[13]

The propriety of injunctive relief for the enforcement of collective bargaining agreements has been disputed.[14] However, the stability resultant from enforcement of these agreements has induced most courts to agree that injunction is a proper remedy, whether at the instance of the employer or union.[15] Anti-injunction statutes have prohibited the granting of injunctions in cases growing out of "labor disputes" except in a specified manner.[16] Even where such statutes are in force, there is doubt as to the applicability of the prohibitions to suits involving labor agreements.[17] Some courts hold that only an interpretation of a contract is involved,[18] and distinguish between injunctive

10. *See* Schlesinger v. Quinto, 201 App. Div. 487, 194 N.Y. Supp. 401, 411 (1st Dep't 1922) (dissenting opinion): "Injunctions which give all that would follow a trial of the issues should be granted only in cases of real necessity. . . ."

11. *Ibid.*

12. See McDonald v. Brewery & Beverage Drivers, Helpers and Warehousemen, Local Union No. 792, 215 Minn. 274, 9 N.W.2d 770, 772 (1943): ". . . such relief was too harsh for a court of equity to grant under the circumstances."

13. See 28 AM. JUR., *Injunctions* § 328 (1940).

14. Generally, as to injunction against breach of contract, see 28 AM. JUR., *Injunctions* § 82 (1940); as to remedies available for breach of a collective bargaining agreement, see Gregory, *The Collective Bargaining Agreement: Its Nature and Scope,* 1949 WASH. U.L.Q. 3; Note, 156 A.L.R. 652 (1945). See also Wilson v. Airline Coal Co., 215 Iowa 855, 246 N.W. 753 (1933), holding that there is a want of mutuality in collective bargaining agreements making them unenforceful in equity; Lundoff-Bicknell Co. v. Smith, 24 Ohio App. 294, 156 N.E. 243 (1927) (agreement unenforceable because for personal services). *Contra:* Murphy v. Ralph, 165 Misc. 335, 299 N.Y. Supp. 270 (Sup. Ct. 1937) (agreements enforceable in equity). *Compare* Schwartz v. Driscoll, 217 Mich. 384, 186 N.W. 522 (1922) (remedy at law is adequate), *with* Schlesinger v. Quinto, 201 App. Div. 487, 194 N.Y. Supp. 401 (1st Dep't 1922) (damages at law inadequate).

15. Commercial Telegraphers' Union, A.F.L. v. Western Union Telegraph Co., 53 F. Supp. 90, 96, (D.D.C. 1943); Suttin v. Unity Button Works, 144 Misc. 784, 258 N.Y. Supp. 863 (Sup. Ct. 1932). *Contra:* Western Maryland Dairy v. Chenowith, 180 Md. 236, 23 A.2d 660, 663 (1942), "If equity could not restrain an attempted breach of agreement . . . the system of collective bargaining would be demoralized. . . ."; *accord,* Montaldo v. Hires Bottling Co., 59 Cal. App.2d 642, 139 P.2d 666 (1943) (where a statute provided for injunctive relief against breach of a collective bargaining agreement); Grassi Contracting Co. v. Bennett, 174 App. Div. 244, 160 N.Y. Supp. 279 (1st Dep't 1916). *But see* Mosshamer v. Wabash Ry. Co., 221 Mich. 407, 191 N.W. 210, 211 (1922) ("[A]court of equity may not by . . . injunction thus interfere with the running of the employer's business."); A. R. Barnes & Co. v. Berry, 156 Fed. 72 (S.D. Ohio 1907), *rev'd,* 157 Fed. 883 (S.D. Ohio 1908); *aff'd on other grounds,* 169 Fed. 225 (6th Cir. 1909).

16. Norris La Guardia Act, 47 STAT. 70, 29 U.S.C.A. § 101 (1932); N.Y. CIV. PRAC. ACT § 876(a) (1946). See, Associated Flour Haulers & Warehousemen v. Sullivan, 168 Misc. 315, 5 N.Y.S.2d 982 (Sup. Ct. 1938).

17. See Notes, 137 A.L.R. 867 (1942), 149 A.L.R. 464 (1944).

18. Associated Flour Haulers & Warehousemen v. Sullivan, 168 Misc. 315, 5 N.Y.S.2d 982 (Sup. Ct. 1938); Ralston v. Cunningham, 143 Pa. Super. 412, 18 A.2d 108 (1941).

relief and specific performance.[19] However, most cases do hold that a "labor dispute" is involved and that the prohibitions in the various acts apply.[20]

In the instant case the court held that peaceful picketing constituted a breach of an agreement, that such a breach is unlawful and may be enjoined, and that the right of free speech had been bargained away.

The three dissenting justices, in two opinions,[21] indicated several other possible approaches to the problems. They doubted that picketing was a breach at all since this was not a contract of employment but one setting conditions for work. There was no provision in the agreement indicating that the right to picket had been bargained away. They added that if the picketing was considered a breach, it would be compensable in damages, and while it may have been "wrongful" it was not enjoinable as being "unlawful."[22] The dissenters noted also that the sixty day provision was intended only to supply the cooling-off period required by the Taft-Hartley Law, and the union was free to strike after such period. Furthermore, the granting of an injunction is within the discretion of the trial court, and the chancellor did not abuse his discretion, since the right to relief was extremely doubtful.

It is surprising that in the light of all these factors, the Supreme Court of Arkansas should have considered that the employer was entitled, as a matter of right, to an injunction against his employees. This court's attitude indicates an even more widespread use of the injunction weapon in labor controversies in the future.

LANDLORD AND TENANT — EXCULPATORY AGREEMENT — EFFECT ON RIGHT OF SUBROGATION OF LANDLORD'S INSURER

Defendant-lessee rented a warehouse as a tenant from month to month from plaintiff. A modification of the lease agreement was made between the landlord and the tenant which provided that, in exchange for the tenant paying an increased rent, the owner would keep the premises insured; that the tenant would be exempt from all liability, including liability for negligence, if the premises were destroyed by fire from any cause; and that in case of destruction by fire the owner would hold only the insurance company for the loss. The exemption

19. Sanford v. Boston Edison Co., 316 Mass. 631, 56 N.E.2d 1 (1944). *But cf.* Scafidi v. Debnar, 22 N.Y.S.2d 390 (Sup. Ct. 1940).

20. Wilson Employees' Representation Plan v. Wilson & Co., 53 F. Supp. 23 (S.D. Cal. 1943). See National Labor Relations Act, 49 STAT. 450, 29 U.S.C.A. § 152(9) (1947), 29 U.S.C.A. §§ 151 *et. seq.* (1935). *But cf.* Labor-Management Relations Act, 61 STAT. 156, 29 U.S.C.A. § 185 (1947).

21. McFaddin, J., 249 S.W.2d at 574; George Rose Smith, J., joined by Millwee, J., *id.* at 576.

22. Western Maryland Dairy v. Chenowith, 180 Md. 236, 23 A.2d 660 (1942), (breach of a contract is unlawful). *Contra:* Lundoff-Bicknell v. Smith, 24 Ohio App. 294, 156 N.E. 243 (1927); 66 C.J., *Unlawful* 35 (1934).

of the lessee from liability for negligence was made subsequent to the issuance of the insurance policy and without notice to the insurance company. Lessee's servants negligently started a fire which destroyed the building. Lessor recovered the loss from the insurance company and at the demand of the insurer sued the lessee under the subrogation clause in the insurance policy. Does the exemption from liability for negligence, provided for in the lease agreement, defeat the rights of the insurance company in a subrogation action? The lower court answered in the affirmative. *Held,* affirmed. The contract relieving the lessee of the liability for negligence is a good defense to an action by the insurance company. *Kansas City Stock Yards Co. v. A. Reich & Sons, Inc.,* 250 S.W.2d 692 (Mo. 1952).

Between landlord and tenant there is an implied covenant on the part of the tenant that he will redeliver possession of the premises upon the expiration of the lease in the same general condition as the property was when he took possession,[1] ordinary wear and tear excepted.[2] A tenant may be liable in a contract action for breach of such a covenant. Likewise he may be liable in a tort action both for acts of waste[3] and acts of negligence[4] which cause any material or substantial injury to the premises.[5]

How are these different theories of liability affected by (1) a general contract of exemption from liability; and (2) a specific contract of exemption from liability? The great majority of cases allow the common law liability of the landlord or the tenant to be nullified by contracts exempting them from liability, whether those contracts be general or specific.[6] However, there is a minority view which holds that

1. United States v. Bostick, 94 U.S. 53, 24 L. Ed. 65 (1876); United States v. Jordan, 186 F.2d 803 (6th Cir. 1951); Lane v. Spurgeon, 100 Cal. App.2d 460, 223 P.2d 889 (1950); Verlinden v. Godberson, 238 Iowa 161, 25 N.W.2d 347 (1947); Koerkel v. Coburn, 6 So.2d 249 (La. App. 1942); Cincinnati Oakland Motor Co. v. Meyer, 37 Ohio App. 90, 174 N.E. 154 (1930); 32 AM. JUR., *Landlord & Tenant* §§ 201, 802 (1941); 4 THOMPSON, REAL PROPERTY 1614 (3d ed. 1940); 2 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 161 (1947).

2. Gaff Estate Co. v. Grote, 22 Ohio App. 44, 153 N.E. 919, 106 A.L.R. 1369 (1926); *see* Tirrell v. Osburn, 55 A.2d 725, 727 (D.C. Ct. App. 1947); Case v. Guise, 288 Ill. App. 609, 6 N.E.2d 469, 471 (1937). See also Notes, 20 A.L.R.2d 1341 (1951), 45 A.L.R. 70 (1926); 32 AM. JUR., *Landlord & Tenant* § 201 (1941); 51 C.J.S., *Landlord & Tenant* §414 (1947).

3. Delano v. Smith, 206 Mass 365, 92 N.E. 500, 30 L.R.A. (N.S.) 474 (1910); Winans v. Valentine, 152 Ore. 462, 54 P.2d 106 (1936); Davenport v. Magoon, 13 Ore. 3, 4 Pac. 299 (1884); *see* Bandlow v. Thieme, 53 Wis. 57, 9 N.W. 920, 921 (1881); 1 AMERICAN LAW OF PROPERTY § 3.39 (1952); 1 TIFFANY, LANDLORD & TENANT § 109 (3d ed. 1939); TIFFANY, REAL PROPERTY §§ 639-51 (3d ed. 1939); 1 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY §§ 46-49 (1947).

4. Roselip v. Raisch, 73 Cal. App.2d 125, 166 P.2d 340 (1946). *But see* Rountree v. Thompson, 226 N.C. 553, 39 S.E.2d 523, 524 (1946); Arkansas Fuel Oil Co. v. Connellee, 39 S.W.2d 99, 101 (Tex. Civ. App. 1931).

5. "The plaintiff may have his choice of actions, in contract for breach of the promise or in tort for the violation of the legal duty." PROSSER, TORTS 204 (1941). See also 4 THOMPSON, REAL PROPERTY § 1613 (3d ed. 1940).

6. General Mills, Inc. v. Goldman, 184 F.2d 359 (8th Cir. 1950), *cert. denied,* 340 U.S. 947 (1951), noted in 35 MINN. L. REV. 603 (1951), 12 U. OF PA. L. REV. 452 (1951); Cobb v. Gulf Refining Co., Inc., 284 Ky. 523, 145 S.W.2d 96 (1940);

a party may not contract away liability for his own negligence.[7] In upholding such contracts the majority justify their conclusions on the basis of freedom of contract guaranteed by state and federal constitutions,[8] and upon the ground that such contracts are private instruments which do not affect the public.[9] Even the majority rule is subject to the qualification that where the parties fail to refer expressly to negligence in their contract, such omission shows that the parties intended not to include an exemption from negligence.[10] However, by the use of specific exemption contracts, setting out the field of nonliability in concise language, the parties may expressly exempt the tenant from liability for negligence.

Though, in general, the insurer upon payment of loss is entitled to be subrogated *pro tanto* to any right of action which the insured may have against the wrongdoer,[11] the rights of the subrogee are ordinarily dependent upon the rights of the insured.[12] Thus, it would appear that

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Clarke v. Ames, 267 Mass. 44, 165 N.E. 696 (1929); Pettit Grain & Potato Co. v. Northern Pac. Ry., 227 Minn. 225, 34 N.W.2d 127 (1948); Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929); Lerner v. Heicklen, 89 Pa. Super. 234 (1926). See Note, 175 A.L.R. 83 (1948); RESTATEMENT, CONTRACTS 574 (1932); 6 WILLISTON, CONTRACTS § 1751C (1938); Note, *Exculpatory Clauses and Landlord's Liability for Negligence,* 15 TEMP. L.Q. 427 (1941).

7. Conn v. Manchester Amusement Co., 79 N.H. 450, 111 Atl. 339 (1920); Kean v. 34 West 34th St. Corp., 190 Misc. 914, 75 N.Y.S.2d 498 (Sup. Ct. 1947) (based on statute forbidding landlord from contracting away liability for negligence); *see* Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377, 379 (1941). See also 12 AM. JUR., *Contracts* § 183 (1938); 6 WILLISTON, CONTRACTS § 1751B (1938).

8. Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929); Cannon v. Bresch, 307 Pa. 31, 160 Atl. 595 (1932), 11 So. CALIF. L. REV. 296 (1938).

9. Inglis v. Garland, 19 Cal. App.2d 767, 64 P.2d 501 (1936); Jacob Siegel Co. v. Philadelphia Record Co., 348 Pa. 245, 35 A.2d 408 (1944).

10. Standard Ins. Co. of New York v. Ashland Oil & Refining Co., 186 F.2d 44 (10th Cir. 1950); Cairnes v. Hillman Drug. Co., 214 Ala. 545, 108 So. 362 (1926); Nashua Gummed & Coated Paper Co. v. Noyes Buick Co., 93 N.H. 348, 41 A.2d 920 (1945); Simmons v. Pagones, 66 S.D. 296, 282 N.W. 257 (1938); *see* Halliburton Oil Well Cementing Co. v. Paulk, 180 F.2d 79, 84 (5th Cir.), *cert. denied,* 340 U.S. 812 (1950); Fairfax Glass & Supply Co. v. Hadary, 151 F.2d 939, 940 (4th Cir. 1945); Perry v. Payne, 217 Pa. 252, 66 Atl. 553, 556 (1907); Potamkin and Plotka, *Indemnification Against Tort Liability — The "Hold Harmless" Clause — Its Interpretation and Effect Upon Insurance,* 92 U. OF PA. L. REV. 347 (1944). See also Note, 175 A.L.R. 29, 89 (1948).

11. Phoenix Insurance Co., v. Erie and Western Transportation Co., 117 U.S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873 (1886); Fidelity & Guaranty Fire Corp., Baltimore v. Silver Fleet Motor Express Inc., 242 Ala. 559, 7 So.2d 290 (1942); Globe & Rutgers Fire Ins. Co. v. Foil, 189 S.C. 91, 200 S.E. 97 (1938); Deming v. Merchants Cotton-Press & Storage Co., 90 Tenn. 306, 17 S.W. 89, 13 L.R.A. 518 (1891); Louisville & Nashville Ry. v. Manchester Mills, 88 Tenn. 653, 14 S.W. 314 (1890). See 29 AM. JUR., *Insurance* 1335 (1940); 6 APPLEMAN, INSURANCE LAW AND PRACTICE 4051 (1942); VANCE, INSURANCE 134 (3d ed. 1951); King, *Subrogation under Contracts Insuring Property,* 30 TEXAS L. REV. 62 (1951).

12. Wager v. Providence Insurance Co., 150 U.S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013 (1893); Phoenix Insurance Co. v. Erie and Western Transportation Co., 117 U.S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873 (1886); Globe & Rutgers Fire Ins. Co. v. Hines, 273 Fed. 774 (2d Cir. 1921); Rohn & Haas Co. v. Lessner, 168 Pa. Super. 242, 77 A.2d 675 (1951); *see* St. Louis, Iron Mountain and Southern Ry. v. Commercial Union Ins. Co., 139 U.S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154 (1891); Defense Supplies Corp. v. United States Lines Co., 148 F.2d 311, 312 (2d Cir.), *cert. denied,* 326 U.S. 746 (1945).

where the landlord has validly contracted away his rights against the tenant, the insurer will likewise be unable to recover.[13]

But since the landlord has thus destroyed the insurer's right of subrogation, will the insurer still be held liable on the policy? The cases are quite numerous in holding that an insurer is relieved of liability where the insured releases the wrongdoer *after* the loss.[14] One reason for this rule is that such a release before the insurer has paid the insured will destroy the insurer's right of subrogation.[15] Prior to the instant case there have been no reported decisions on the effect of an exemption contract entered into *before* the loss occurred.

An insurer occupies a position analogous to that of a surety, and it is well-settled by suretyship principles that an agreement altering the terms of the contract between the principal parties without the consent of the surety will discharge the surety.[16]

Where the insured destroys the insurer's right of subrogation before the loss, it seems just that the insurer should be relieved of his liability on the policy. The value of the insurer's right of subrogation is hard to estimate. Certainly the exercise of the right can bring pecuniary benefits to the insurer, but insurance companies often refuse to take advantage of the right of subrogation preferring to retain the good will of the community.

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13. See Alexander v. Young, 65 F.2d 752, 757 (10th Cir. 1933), where it is stated: "Since subrogation is limited to such rights as the creditor has at the time of payment by the surety, the surety is not subrogated to a right which originally existed in favor of the creditor, but which the latter released or discharged before payment by the surety."

14. Harter v. American Eagle Fire Ins. Co., 60 F.2d 245 (6th Cir. 1932); Universal Credit Co. v. Service Fire Ins. Co. of New York, 69 Ga. 357, 25 S.E.2d 526 (1943); Auto Owners' Protective Exc. v. Edwards, 82 Ind. App. 558, 136 N.E. 577 (1922); Farmer v. Union Ins. Co. of Indiana, 146 Miss. 600, 111 So. 584 (1927); Maryland Motor Car Ins. Co. v. Haggard, 168 S.W. 1011 (Tex. Civ. App. 1914); Sims v. Mutual Fire Insurance Co., 101 Wis. 586, 77 N.W. 908 (1899); *see* Weber v. United Hardware & Implement Mutuals Co., 75 N.D. 581, 31 N.W.2d 456, 459 (1948).

15. See Nelson v. Munch, 28 Minn. 314, 9 N.W. 863, 867 (1881), where the court said: "This right of subrogation implies an obligation on the part of the creditor to keep it unimpared, and if this duty is violated the loss must be borne by him who is in default. In short, the equity of a surety depends on the right of subrogation, and the consequent duty of the creditor to do no act by which the exercise of that right may be frustrated."

16. Edwards v. Goode, 228 Fed. 664 (5th Cir. 1916); Crossley v. Stanley, 112 Iowa 24, 83 N.W. 806 (1900); Zastrow v. Knight, 56 S.D. 554, 229 N.W. 925, 72 A.L.R. 379 (1930); Hermitage Nat. Bank v. Carpenter, 131 Tenn. 136, 174 S.W. 263 (1915); 50 AM. JUR., *Suretyship* § 48 (1944); ARANT, SURETYSHIP § 67 (1931); 1 BRANDT, SURETYSHIP AND GUARANTY §§ 416, 429, 430 (3d ed. 1905). For general discussion see Campbell, *Non-Consenual Suretyship*, 45 YALE L.J. 69 (1935).

MILITARY LAW — FAILURE TO INSTRUCT AS PREJUDICIAL ERROR

Defendant, while cleaning a rifle, unintentionally discharged it and killed another soldier. The defendant was charged with involuntary manslaughter in violation of Article 119 of the Uniform Code of Military Justice.[1] He pleaded not guilty but was found guilty of negligent homicide, in violation of Article 134 of the Code.[2] The law officer instructed the court as to the offense of involuntary manslaughter and as to what constituted culpable negligence, but with regard to lesser included offenses said only, "A table of lesser included offenses may be found, in regard to manslaughter on page 539 of the 1951 manual." *Held* (2-1), the failure to instruct on negligent homicide was prejudicial error. It was impossible to arrive at a proper verdict when not charged as to the elements and different lesser offenses. *United States v. Moreash* (No. 715), 27 Aug. 1952 (U.S.C.M.A.).

When there is no evidence tending to show the commission of a lesser offense, the majority rule in the American courts is that the accused is not entitled to a new trial for a failure to charge with respect to the lesser offense.[3] For example, one convicted of murder in the first degree cannot complain of a failure to charge as to the lesser degrees of homicide.[4] In the absence of evidence of any degree other than the one charged, it is proper to charge that the jury either find the defendant guilty as charged or not guilty,[5] since any other verdict would be a compromise.[6] The majority of courts hold that where the evidence required a conviction of higher offense, a conviction of the lower is

1. UCMJ art. 119, 50 U.S.C.A. § 713 (1951).
2. UCMJ art. 134, *id.* § 728.
3. 53 AM. JUR., *Trial* 591, n.8 (1945), and cases there cited. See also Notes, 21 A.L.R. 603 (1922), 27 A.L.R. 1097 (1923), 102 A.L.R. 1019 (1936).
4. Jefferson v. State, 196 Ark. 897, 120 S.W.2d 327 (1938); People v. King, 13 Cal.2d 521, 90 P.2d 291 (1939); Henderson v. State, 135 Fla. 548, 185 So. 625, 120 A.L.R. 742 (1939); Swain v. State, 214 Ind. 412, 15 N.E.2d 381 (1938); Birdsong v. Commonwealth, 289 Ky. 521, 159 S.W.2d 41 (1942); State v. Powell, 339 Mo. 80, 95 S.W.2d 1186 (1936); State v. Miller, 219 N.C. 514, 14 S.E.2d 522 (1941); State v. Rogers, 64 Ohio App. 39, 27 N.E.2d 791 (1938). *Contra*: State v. Hix, 58 Idaho 730, 78 P.2d 1003 (1938), holding that instruction requiring either conviction of murder in the first degree or acquittal was erroneous since the offense of murder in the first degree includes the lesser offenses of second degree murder and manslaughter. Pennsylvania and Tennessee have also consistently held that it is the prerogative of the jury to determine the degree of murder, and a failure to charge as to lesser degrees or an imperative instruction on the higher degree is erroneous. Commonwealth v. Turner, 367 Pa. 403, 80 A.2d 711 (1951); Commonwealth v. Lessner, 274 Pa. 108, 118 Atl. 24 (1922); Commonwealth v. Ferko, 269 Pa. 39, 112 Atl. 38 (1920); Commonwealth v. Fellows, 212 Pa. 297, 61 Atl. 922 (1905); Lane v. Commonwealth, 59 Pa. 371 (1868); Rhodes v. Commonwealth, 48 Pa. 396 (1864); Shipp v. State, 128 Tenn. 499, 161 S.W. 1017 (1913); Jones v. State, 128 Tenn. 493, 161 S.W. 1016 (1913). *See* Commonwealth v. McManus, 282 Pa. 25, 127 Atl. 316, 318 (1925). See also Notes, 21 A.L.R. 603 (1922), 102 A.L.R. 1019 (1936).
5. Notes, 21 A.L.R. 603 (1922), 102 A.L.R. 1019 (1936).
6. State v. Pruett, 27 N.M. 576, 203 Pac. 840 (1921); People v. Schultz, 267 Ill. 147, 107 N.E. 833 (1915). See 53 AM. JUR., *Trial* 592, n.9 (1945), and cases there cited.

error in favor of the defendant and he will not be heard to complain.[7] But where there is a conviction on the lesser offense and no evidence warrants the finding, it is reversible error if there is no evidence that the accused was guilty of the greater offense as charged.[8]

On the other hand, if there is any evidence tending to show the lesser offense, most jurisdictions say that it is the duty of the court to instruct as to the lower grades[9] and a refusal is prejudicial error.[10] A minority of courts, however, require the defendant to request instructions on the lower grades, and his failure to do so is his own neglect of which he will not be heard to complain.[11]

One state has held that, though an instruction on a lesser degree than is warranted by the evidence is error in defendant's favor, for which he cannot complain, the instruction on this lesser degree must be given properly or it is reversible error.[12] Most courts hold that such erroneous instruction on the lesser degree is cured by the jury's verdict of a higher degree[13] much as a verdict of the lesser cures an erroneous instruction on the higher degree.[14]

It would seem that the view taken by the majority opinion in the instant case is desirable. The defendant was charged with involuntary manslaughter and convicted of a proper lesser included offense,[15] but the law officer's instruction on lesser offenses was such that it amounted to no instruction whatever.

As was stated in the opinion of the majority, military courts are of the majority view that if there is any evidence of the lesser included offenses, it is the duty of the court to give suitable instructions as to these and a request is unnecessary. Under the new Code, the law officer serves in the capacity of judge and the court performs the function of the civilian jury. The dissent takes the position that the name of

7. Notes, 21 A.L.R. 603 (1922), 102 A.L.R. 1019 (1936).
8. *Ibid.*
9. 53 AM. JUR., *Trial* 590 (1945); Ann. Cas. 1916C 577.
10. *Ibid.*
11. See Note, 3 Ann. Cas. 139 (1906).
12. State v. Aitkens, 352 Mo. 746, 179 S.W.2d 84 (1944), where it was held that an erroneous instruction on excusable homicide was prejudicial notwithstanding the fact that the evidence might have preponderated in favor of the jury's verdict of second degree murder, since under the Missouri statutes if the accused be convicted of a lower grade of offense than that charged, even though the evidence shows him guilty of a higher degree, the verdict will stand, so that the accused was entitled to the possibile benefit of a correct instruction.
13. People v. Hashaway, 25 Cal.2d 842, 155 P.2d 101 (1945); State v. Zupkosky, 127 N.J.L. 218, 21 A.2d 771 (1941).
14. Bone v. State, 200 Ark. 592, 140 S.W.2d 140 (1940); Cook v. State, 56 Ga. App. 375, 192 S.E. 631 (1937); Goldsmith v. State, 54 Ga. App. 268, 187 S.E. 694 (1936).
15. See Guerra v. State, 105 Tex. Crim. App. 410, 288 S.W. 1084 (1926), where it was said that a conviction for negligent homicide may be had under an indictment charging murder, since such indictment will support a conviction of any lower grade of homicide or for aggravated or simple assualt but that appropriate instructions must be given on negligent homicide where the evidence raises the issue.

the offense of negligent homicide is self-explanatory and that, since there is sufficient evidence to support the verdict, it should not be disturbed. However, not even the simplest offense is self-explanatory and neither a jury nor a military tribunal should be presumed to be so well versed in the law as to know the elements of a crime.

MILITARY LAW — INFILTRATION OF COMMAND INFLUENCE AS GENERAL PREJUDICE

The defendant, a private in the army, was convicted by a general court-martial of involuntary manslaughter and assault with a dangerous weapon. At the trial the president of the court ruled on certain questions of law which should have been ruled on by the law member. An Army Board of Review set aside the conviction based on assault with a dangerous weapon, but approved the sentence imposed. Review was granted by the Court of Military Appeals to determine whether the record disclosed a prejudicial failure of the law member at the trial to perform the duties imposed on him by the law. *Held*, reversed. The failure of the law member to perform his duties allowed the trial to be controlled by an agency of command, thereby materially prejudicing the substantial rights of the accused. *United States v. Berry* (No. 69), 2 CMR 141 (U.S.C.M.A. 1952).

"Harmless error" statutes are designed to prevent appellate courts from reversing for mere technical error.[1] Several states and the Federal Government have enacted such legislation.[2] The determination of whether a particular case merits reversal or sustaining is still a matter of judicial judgment, guided to some extent by the policy of the statute.[3] However, the courts have been less inclined to sustain a conviction on the basis of harmless error where a constitutional principle or a specific command of Congress has been violated.[4]

1. Kotteakos v. United States, 328 U.S. 750, 759-60, 66 Sup. Ct. 1239, 90 L. Ed. 1557 (1946). For notable examples of hypertechnicality see State v. Campbell, 210 Mo. 202, 109 S.W. 706 (1908); State v. Warner, 220 Mo. 23, 119 S.W. 399 (1909), overruled by Missouri v. Adkins, 284 Mo. 680, 225 S.W. 981 (1920).

2. See A.L.I., CODE OF CRIMINAL PROCEDURE 1302-04 (1930). See also Sunderland, *The Problem of Appellate Review*, 5 TEXAS L. REV. 126, 146 (1926).

3. For an interesting conflict over what is reversible error see United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943); United States v. Liss, 137 F. 2d 995 (2d Cir. 1943); Keller v. Brooklyn Bus Corp., 128 F.2d 510 (2d Cir. 1942); *In re* Barnett, 124 F.2d 1005 (2d Cir. 1942), wherein Justice Hand and Justice Frank carry on a running battle. The modern trend of the Supreme Court seems to be in agreement with Justice Frank. See Kotteakos v. United States, 328 U.S. 750, 66 Sup. Ct. 1239, 90 L. Ed. 1557 (1946). These decisions say if the error probably affected the judgment to the detriment of the *accused*, the case should be reversed. See also, McCandless v. United States, 298 U.S. 342, 56 Sup. Ct. 764, 80 L. Ed. 1205 (1936) (civil case).

4. Watts v. Indiana, 338 U.S. 49, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949); Uveges v. Pennsylvania, 335 U.S. 437, 69 Sup. Ct. 184, 93 L. Ed. 127 (1948); *In re* Oliver, 333 U.S. 257, 68 Sup. Ct. 499, 92 L. Ed. 682 (1948); Williams v. North Carolina, 317 U.S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273

The Uniform Code of Military Justice contains a section providing that errors which do not materially prejudice the substantial rights of the accused are not grounds for reversal.[5] Prior to this case errors sufficient for reversal fell into two categories. The first was where the rights of the accused were injuriously affected in the proceedings below by what one Judge of the Court of Military Appeals has denominated *specific* prejudice.[6] Errors falling under this classification have been: stating three previous convictions without receiving supporting documents in evidence,[7] mistakes in stating the elements of the offense,[8] or the presence of the investigating officer at the trial as a member of the court-martial.[9] The second category involves standards or rights in the military accusatory system which form a pattern of "military due process." Although "the procedural protections contained in the Constitution are inapplicable as a matter of right in a proceeding before a military tribunal,"[10] still the denial of rights granted the accused under the Uniform Code of Military Justice which *parallel* constitutional rights of civilians may be a basis for reversal as a violation of "military due process."[11]

This case introduces a third category of error deemed sufficient for reversal. Though the term defies exact definition, *general* prejudice is said to be applied when there has been a departure from a principle so fundamental to military justice that to allow the conviction to stand without reversal would threaten to subvert future administration of justice.[12] This doctrine of general prejudice is supplementary to "military due process" and specific prejudice. Even if the appellant cannot show errors which specifically prejudiced his defense, he still has two strings to his bow. Reversal may be requested on the theory that rights granted him by the Uniform Code were denied, thereby depriving him of "military due process."[13] On the other hand, he may

(1942); Waley v. Johnston, 316 U. S. 101, 62 Sup. Ct. 964, 86 L. Ed. 1302 (1942); Stromberg v. California, 283 U.S. 359, 51 Sup. Ct. 532, 75 L. Ed. 1117, 73 A.L.R. 1484 (1931); Bram v. United States, 168 U.S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568 (1897). For an opinion that this is no hard and fast rule see Note, 20 GEO. WASH. L. REV. 489, 491 (1952).

5. Uniform Code of Military Justice, art. 59, 50 U.S.C.A. § 646(a) (1951). The section reads as follows: "A finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."

6. See United States v. Lee (No. 200), 2 CMR 118 (U.S.C.M.A. 1952), wherein Judge Brosman defines *specific* prejudice.

7. United States v. Zimmerman (No. 261), 2 CMR 66 (U.S.C.M.A. 1952).

8. United States v. Rhoden (No. 153), 2 CMR 99 (U.S.C.M.A. 1952).

9. United States v. Bound (No. 201), 2 CMR 130 (U.S.C.M.A. 1952).

10. Note, 27 N.Y.U.L.Q. REV. 163-64 (1952).

11. United States v. Clay (No. 49), 1 CMR 74 (U.S.C.M.A. 1951). See also Wurfel, *Military Due Process: What Is It?* 6 VAND. L. REV. 251 (1953). That the application of "military due process" is more rigid than its civilian counterpart, see Note, 20 GEO. WASH. L. REV. 489, 491 (1952).

12. United States v. Lee (No. 200), 2 CMR 118 (U.S.C.M.A. 1952); United States v. Berry (No. 69), 2 CMR 141 (U.S.C.M.A. 1952).

13. See note 11 *supra*.

contend that, although no rights specifically granted him in the Code were denied, a principle fundamental to military justice was violated, thereby giving rise to general prejudice.[14]

"Military due process," specific and general prejudice are merely convenient labels for the type of prejudice which requires reversal in a particular case.[15] But general prejudice is based on indwelling principles not specifically granted by the Code;[16] therefore, the court is faced with the difficult problem of deciding what is a fundamental principle.[17] In the instant case the failure of the law officer to rule on certain questions of law coupled with the president of the court's exercise of those duties resulted in an infiltration of the command influence. Since one of the basic purposes of the Uniform Code was to eliminate such influence as much as possible,[18] the presence of command influence at the trial was considered general prejudice. As to whether the concept of general prejudice will take on some definite meaning and serve a useful purpose, only future cases can tell.

TRUSTS — DISTRIBUTION OF STOCK DIVIDENDS BETWEEN LIFE TENANT AND REMAINDERMAN

By her will testatrix created a trust with complainant trust company as trustee. The principal asset of the trust was stock in an insurance company. In the years 1940, 1943 and 1947, the corporation declared and paid to complainant three stock dividends of 25%, 100% and 50% respectively. The trustee filed a bill against all of the testatrix's living issue seeking a declaration and construction of the will as to the proper distribution of these stock dividends. The will itself indicated no intention of the testatrix as to such distribution. The

14. See note 12 *supra.*

15. They should not be used as a substitute for analysis. Regardless of the class of prejudice each case must be decided on its own facts. In the instant case, 2 CMR at 147, Judge Brosman says, "We recognize, of course, that, on occasion through inadvertence or momentary indecision, a law member or law officer may fail to rule promptly on an issue before him. We have observed instances of this sort in which the president has stepped in to the breach and acted. Isolated and minor examples of this nature do not concern us greatly." For an opinion that reversals for lack of "military due process" are granted on too trivial grounds see Note, 20 GEO. WASH. L. REV. 490, 491 (1952).

16. See note 12 *supra.* That this decision is based upon violation of a principle not specifically granted, see United States v. Lee (No. 200), 2 CMR 118, 123 (U.S.C.M.A. 1952), wherein Judge Brosman said, "Such a compelling criterion we find within the sphere of this Court's effort in the sound content of opposition to command control of the military judicial process to be derived with assurance from all four corners of the Uniform Code of Military Justice." However, some confusion between "military due process" and *general* prejudice may arise by the court's statement in the same case to the effect that if a specific requirement of the manual which is overwhelmingly important is violated, it may constitute *general prejudice.*

17. This case holds that keeping a trial free of command influence is such a principle. United States v. Berry (No. 69), 2 CMR 141 (U.S.C.M.A. 1952).

18. Note, 29 TEXAS L. REV. 651, 665 (1951).

chancellor decreed that the stock dividend should be distributed according to the Pennsylvania rule,[1] and since there was no impairment of trust corpus,[2] the stock should go in its entirety to the life beneficiaries. The remaindermen appealed. *Held,* affirmed. By either the Pennsylvania rule or the Kentucky rule, the life tenant is entitled to stock dividends from corporate earnings during the life estate; moreover, the early Tennessee decision rejecting the Massachusetts rule has become a rule of property and should be changed only by the legislature. *Nashville Trust Co. v. Tyne,* 250 S.W.2d 937 (Tenn. 1952).

In determining who is entitled to a dividend upon shares held in trust, as between the life tenant and remainderman, it is generally held that the manifestation of the settlor's intent in the trust instrument governs,[3] if not contrary to a statute or a rule of policy.[4] Where there is no expression of the settlor's intention, there is considerable inconsistency and confusion. The American courts have offered three principal solutions, the Kentucky, Massachusetts and Pennsylvania rules.[5]

The Kentucky rule is founded upon the theory that a dividend is a gain derived from the ownership of corporate stock.[6] Thus, under this rule, if the dividend is a distribution of earnings and is declared during the existence of the trust, it is income and belongs to the life tenant.[7] This is true whether the dividend is payable in cash or in stock, whether ordinary or extraordinary or whether declared from earnings accumulated before or after the creation of the trust. The Massachusetts rule is based upon a distinction between cash and stock dividends.[8] This rule awards to corpus all stock dividends and treats all

1. The Pennsylvania, Kentucky and Massachusetts rules are explained in the text, *infra.*

2. There was a formal stipulation by the parties that if the Pennsylvania rule was to be applied, all of the shares from the stock dividends held by trustee would go to the life beneficiaries. 250 S.W.2d at 939.

3. *See* Gibbons v. Mahon, 136 U.S. 549, 569, 10 Sup. Ct. 1057, 34 L. Ed. 525 (1890); *In re* Robinson's Trust, 218 Pa. 481, 67 Atl. 775, 777 (1907). See 2 SCOTT, TRUSTS § 236.15 (1939). *Cf.* 2 SCOTT, TRUSTS § 236.4 (1939), where the author suggests that evidence other than the instrument should be considered to determine what the settlor would have intended if he had considered the question.

4. *In re* Maris' Estate, 301 Pa. 20, 151 Atl. 577, 70 A.L.R. 1330 (1930); *see* Equitable Trust Co. of New York v. Prentice, 250 N.Y. 1, 164 N.E. 723, 724, 63 A.L.R. 263 (1928).

5. For a very comprehensive discussion of the three rules, see Note, 130 A.L.R 492 (1941).

6. "A stock dividend proper is the issue of new shares paid for by the transfer of a sum equal to their par value from the profit and loss account to that representing capital stock; and really a corporation has no right to declare a dividend, either in cash or stock, except from its earnings. . . ." Hite v. Hite, 93 Ky. 257, 20 S.W. 778, 780, 40 Am. St. Rep. 189 (1892).

7. Hite v. Hite, 93 Ky. 257, 20 S.W. 778, 40 Am. St. Rep. 189 (1892). See also Bireley's Adm'rs v. United Lutheran Church in America, 239 Ky. 82, 39 S.W.2d 203 (1931); Robinson v. Robinson's Ex'r, 221 Ky. 245, 298 S.W. 701 (1927); Cox v. Gaulbert's Trustee, 148 Ky. 407, 147 S.W. 25 (1912).

8. "A simple rule is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital." Minot v. Paine, 99 Mass. 101, 108, 96 Am. Dec., 705 (1868). See also Gibbons v. Mahon, 136 U.S. 549, 559, 10 Sup.

other dividends, whether in cash or property, as income.[9] Under the Pennsylvania rule,[10] it is not the form but the source of the dividend which determines its distribution. The first feature of this rule awards to the life tenant that portion of any extraordinary stock or cash dividend which came from corporate earnings since the creation of the trust, and the portion from accumulations prior thereto is awarded to trust corpus. However, this rule requires the trustee to maintain the book value of the corpus as it was at the date of the creation of the trust.[11]

Of the three rules, the Kentucky rule has been the least popular,[12] and has now been abandoned in Kentucky.[13] The weight of authority formerly was in favor of the Pennsylvania rule as to extraordinary cash[14] and extraordinary stock[15] dividends. Recently, however, the trend has been toward the Massachusetts rule,[16] with even Pennsyl-

Ct. 1057, 34 L. Ed. 525 (1890), where Gray, J., said: "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares; and the proportional interest of each shareholder remains the same. The only change is the evidence which represents that interest. . . ."

9. Old Colony Trust Co. v. Aymar, 317 Mass. 66, 56 N.E.2d 889 (1944); Creed v. McAleer, 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 (1931); Gray v. Hemenway, 212 Mass. 239, 98 N.E. 789 (1912).

10. Earp's Appeal, 28 Pa. 368 (1857).

11. "The effect of the rule is to give to the life tenant the income which has been earned since the trust came into being, but, at the same time, to preserve the value of the corpus as it was at the date of the death of the testator, or, to use a more convenient term, to preserve the intact value of the estate. This intact value includes the par value of the stock, plus any accumulations of income earned before the death of the testator. . . . From it must be subtracted capital losses." *In re* Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200, 203, 56 A.L.R. 1303 (1927). See also Baldwin v. Baldwin, 159 Md. 175, 150 Atl. 282 (1930); Waterhouse's Estate, 308 Pa. 422, 162 Atl. 295 (1932).

12. New York abandoned the Kentucky rule and adopted the Pennsylvania rule in *In re* Osborne, 209 N.Y. 450, 103 N.E. 723 (1913). By statute, however, stock dividends are now to be principal. N.Y. PERS. PROP. LAW § 17a. Delaware has seemingly rejected both the Pennsylvania and Massachusetts rules and appears to follow the Kentucky rule. Ortiz v. Fidelity-Philadelphia Trust Co., 18 Del. Ch. 439, 159 Atl. 376 (Sup. Ct. 1931); DuPont v. Peyton, 15 Del. Ch. 255, 136 Atl. 149 (Ch. 1927); Bryan v. Aikin, 10 Del. Ch. 446, 86 Atl. 674 (Sup. Ct. 1913).

13. KY. REV. STAT. § 386.020 (Supp. 1952) provides that all stock dividends in shares of the stock of the declaring corporation of the amount of 10% or more of the outstanding shares of that class are to be principal.

14. See Note, 24 A.L.R. 9 (1923), and cases cited therein. *E.g.*, *In re* Duffill's Estate, 180 Cal. 748, 183 Pac. 335 (1919); Lindau v. Community Fund, 188 Md. 474, 53 A.2d 409 (1947); Hagedorn v. Arens, 106 N.J. Eq. 377, 150 Atl. 4 (1930); State *ex rel.* Coykendal v. Karel 215 Wis. 505, 255 N.W. 132 (1934).

15. See Note, 24 A.L.R. 9 (1923), and cases cited therein. *E.g.*, *In re* Gartenlaub's Estate, 185 Cal. 375, 197 Pac. 90, 24 A.L.R. 1 (1921); Beattie v. Gedney, 99 N.J. Eq. 207, 132 Atl. 652 (1926); *In re* Dittmer's Estate, 197 Wis. 304, 222 N.W. 323 (1928).

16. UNIFORM PRINCIPAL AND INCOME ACT. § 5, 9A U.L.A. 232 (1951); RESTATEMENT, TRUSTS § 236 (Supp. 1948). See, *e.g.*, First National Bank of Tuscaloosa v. Hill, 241 Ala. 606, 4 So.2d 170 (1941); Burden v. Colorado National Bank, 116 Colo. 111, 179 P.2d 267 (1947); Burns v. Hines, 298 Ill. App. 563, 19 N.E.2d 382 (1939); Powell v. Madison Safe Deposit & Trust Co., 208 Ind. 432,

vania adopting it by statute.[17] The principal reason advanced for the preference of the Massachusetts rule is its simplicity as contrasted to the administrative difficulties of the Pennsylvania rule.[18]

In the instant case, where the settlor's intent was not revealed by the trust instrument,[19] the court, in considering which rule Tennessee would adopt, gave very little consideration to the relative merits of the three rules. Instead, it held that the Massachusetts rule had been definitely rejected in 1896 in *Pritchitt v. Nashville Trust Co.*;[20] and that it was unnecessary to adopt either the Pennsylvania or Kentucky rule, since, under either, the life tenant under the facts of this case would be entitled to receive all of the dividends.[21] The ambiguity in the language of the *Pritchitt* case remains,[22] and it continues to be uncertain whether extraordinary dividends, stock or cash, will be apportioned under the Pennsylvania rule or whether they will go to the life tenant under the Kentucky rule. The instant case is another indi-

196 N.E. 324, 101 A.L.R. 1368 (1935); Kirby v. Western Surety Co., 68 S.D. 612, 5 N.W.2d 405 (1942); 2 SCOTT, TRUSTS § 236.3 (1939).

17. In addition to Pennsylvania, other states wbich have adopted the Uniform Principal and Income Act are Alabama, Arizona, California, Connecticut, Florida, Illinois, Kansas, Louisiana, Maryland, North Carolina, Oklahoma, Oregon, Texas, Utah and Virginia. UNIFORM PRINCIPAL AND INCOME ACT, 9A U.L.A. 16 (Supp. 1951). The litigation as to which rule to follow has not been halted in all of the states adopting the act, however. The question still arises as to trusts created prior to the adoption or effective date of the particular statute. See, *e.g.*, Lindau v. Community Fund, 188 Md. 474, 53 A.2d 409 (1947).

18. "A trustee needs some plain principle to guide him; and the *cestuis que trust* ought not to be subjected to the expenses of going behind the action of the directors, and investigating the concerns of the corporation. . . ." Minot v. Paine, 99 Mass. 101, 108, 96 Am. Dec. 705 (1868). "Cash dividends are usually declared out of current income which has accumulated during the time the trust has been holding the stock. Stock dividends are often declared out of undistributed earnings and surplus which have been piling up some time and may have accrued before the trust held the stock. A rough and ready simple rule which will do substantial justice is to be preferred to a more complex rule which strives for ideal justice and causes much trouble and expense. Giving stock dividends to trust capital is of benefit to the life tenant as well as the remainderman, since the life tenant immediately begins to get income on such stock." BOGERT, TRUSTS 461 (3d ed. 1952).

19. 250 S.W.2d at 940.

20. 96 Tenn. 472, 36 S.W. 1064, 33 L.R.A. 856 (1896).

21. "We hold that this rejection of the Massachusetts rule, as it was announced by Judge Caldwell . . . and as it has remained the law of this State since 1896, has become a rule of property, which, under the doctrine of stare decisis, if it be altered, must be altered by the Legislature, and not by this Court. . . . Since all the stock dividends under consideration in the Pritchitt case, supra, were declared from net earnings or profits made after the death of the testator . . . it was unnecessary for a decision in the Pritchitt case, to choose between the Pennsylvania and the Kentucky rules. . . ." 250 S.W.2d at 939-40. The stipulation of the parties in the instant case, see note 1 *supra*, resulted in the dividends in question being considered as declared from net earnings since the creation of the trust, just as in the *Pritchitt* case above.

22. After rejecting the Massachusetts rule, the court in the *Pritchitt* case said: "The life tenant of corporate stock is entitled to the undiminished benefit of its net earnings in any and every contingency. . . . [I]n whatever form. If the dividends be paid in cash, he takes that; and if in stock, he takes that." Pritchitt v. Nashville Trust Co., 96 Tenn. 472, 478, 36 S.W. 1064, 1066, 33 L.R.A. 856 (1896). The remainder of the opinion likewise fails to clearly state whether it adopts the Kentucky or Pennsylvania rule.

cation of the reluctance of courts to change by judicial decision what they regard as a deeply rooted property rule. The decision suggests that the legislature might well consider the adoption of a statute providing for the disposition of dividends[23] as a number of states have done.[24]

23. See note 20 *supra.*
24. See note 16 *supra.* See also the New York statute, note 12 *supra,* and the Kentucky statute, note 13 *supra.*