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# ABSTRACTS

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## ABSTRACTS

*Mary Jane Plumer*

APPEAL AND ERROR—PARTIES CANNOT BY STIPULATION AUTHORIZE COURT TO DETERMINE QUESTIONS OF FACT IN ANY OTHER MANNER THAN THAT PRESCRIBED BY STATUTE—Plaintiff sued defendant company for personal injuries resulting from slipping on a banana peel on the floor of defendant's motor bus. The action was tried by a judge of the superior court without a jury and upon an "agreed statement of facts" submitted as evidence and from which it was stipulated that the judge could draw inferences of fact. The plaintiff requested a ruling that the evidence, which consisted solely of the "agreed statement," warranted a finding for the plaintiff and the ruling was denied. No bill of exceptions was filed and the correctness of the ruling was argued in this court upon a report by the judge. The report stated that the parties stipulated that this court might also draw inferences of fact from the statement. *Held*, report dismissed. If this statement was not a case stated, it had only the effect of other evidence from which the superior court could draw inferences of fact; this court could review those inferences but only to the extent of seeing that they were not unwarranted as a matter of law. If the statement was a case stated, the General Laws provide that this court, as well as other courts, is empowered to draw inferences of fact from the case stated unless the parties withhold the power.[1] The right to report a case depends entirely on another provision of the General Laws which specifies that there must be a "finding of facts by the court" or an "agreement as to all the material facts."[2] Since the judge did not find the crucial facts of negligence or due care here, but ruled that no question of fact was open on the subject, the case cannot come within the first classification. It cannot come within the second as that would describe a case stated. The parties negatived any intention of presenting a case stated by avoiding the use of the term and submitting the statement "as evidence" rather than as a definitive statement of the facts. In a case stated the power to find facts by inference is conferred on the court by statute and neither the parties nor the judge can enlarge this statutory power by stipulation. *Scaccia v. Boston Elevated Ry. Co.*, (Mass. 1944) 56 N.E. (2d) 465.

BAILMENT—BURDEN OF PROOF OF NEGLIGENCE IN ACTION BY BAILOR AGAINST BAILEE FOR DAMAGE TO GOODS—Plaintiff is an insurance company which has succeeded to the right of Joseph Bova against defendant parking lot proprietor on account of damage done to Bova's car after it had been left in defendant's parking lot and stolen therefrom. Plaintiff contended that it had made out a prima facie case by showing delivery of the automobile to defendant, his acceptance as bailee, and his failure to return it on demand. Defendant contended that he had met this case by a showing that the car had been stolen, and the burden of proceeding with the evidence as well as the burden of proof was then on the plaintiff to show that the defendant was negligent in protecting the property against theft which resulted proximately in plaintiff's damage. The court below granted defendant's motion for judgment on the pleadings. *Held*,

[1] Mass. Gen. Laws (1932) c. 231, § 126.

[2] Mass. Gen. Laws (1932) c. 231, § 111.

reversed. "The fact . . . that the pleadings do not put in issue the defendant's claim that the automobile which had been bailed with the defendant had been stolen, does not, without further explanation on the part of the defendant, tending to show that he was without negligence, counterbalance the presumption of negligence on his part created by his failure and inability to return the automobile to the bailor upon demand. The court should have put the defendant on his proof and to render judgment for the defendant at this stage of the proceeding was reversible error." [1] The court said further that since the bailee is the only one who knows the facts concerning the loss or destruction of the property, and the means he had used to protect it, the burden is also upon him to persuade the jury that he was without negligence in the premises. *Agricultural Ins. Co. v. Constantino*, (Ohio App. 1943) 56 N.E. (2d) 687.[2]

BANKRUPTCY—REORGANIZATION UNDER SECTION 77B—SUBORDINATION OF PARENT'S CLAIM ON SUBSIDIARY'S NOTES TO CLAIM OF BONDHOLDERS AGAINST PROCEEDS OF SALE OF STOCK IN SUBSIDIARY—This is a proceeding arising out of the reorganization of Inland Light & Power Corporation and Commonwealth Power & Light Company under section 77B of the Bankruptcy Act.[1] Inland was the owner of all the stock in the Michigan Public Service Company and had pledged it with Central Hanover Bank, appellant here, as security for an issue of Inland bonds, the bank being trustee for the bondholders. Inland was also the owner of demand notes upon Michigan. The district court ordered that the notes be cancelled, and the stock sold, the proceeds to be held for future disposition. On petition by the trustee of Commonwealth, an unsecured creditor of Inland, the court entered a rule to show cause why the demand notes should not be paid first out of this sum. The chancery master, to whom the case was referred, concluded that Inland had sold its bonds on the strength of its having pledged Michigan stock as security, that it therefore owed a fiduciary duty to the bondholders not to exercise its control over Michigan in its own interest and to the exclusion of the interest of the bondholders; that this fiduciary duty had been breached and because of the breach, the claim of Inland on the notes must be subordinated to the claim of the bondholders. The district court adopted the findings of the master and decreed accordingly. This appeal is taken by the trustee of Commonwealth, the parent company of Inland, and other unsecured creditors and the trustee for holders of debenture bonds who claim that the court had no jurisdiction to adjudicate a claim of Inland on the notes, since it was not administering the assets of Michigan; that the facts do not support the claimed breach of fiduciary duty; and that the doctrine of equitable subordination does not apply to a controversy between different groups of the parents' creditors, but only to claims asserted by the parent against public security holders; that Inland debenture holders never having managed or controlled either Inland

[1] Principal case at 693.

[2] On the question of burden of proof in an action for damage to bailed goods see: 22 N.C. L. REV. 252 (1944); 30 KY. L. J. 325 (1942); 25 MARQ. L. REV. 221 (1941); 7 OHIO ST. L. J. 250 (1941); where subject of bailment is destroyed or damaged by fire, see 9 A.L.R. 559 (1920), 71 A.L.R. 767 (1931), 151 A.L.R. 716 (1944); in actions for injury to or loss of boat during bailment, see 11 A.L.R. 690 (1921).

[1] 11 U.S.C. (1940) § 207.

or Michigan, they owed no fiduciary duty and could not have breached it. *Held*, affirmed. The notes in question were an asset of an estate being reorganized by a court of equity, "having ample powers for the exigencies of varying situations." The fact that Michigan was under complete control and domination of Inland; that it was insufficiently capitalized; that proper provision was not made for the subsidiary's extensive rehabilitation and expansion program; and that on Inland's demand Michigan declared dividends and paid them with money borrowed on open account from Inland, together amount to a breach of fiduciary duty. The third contention made by the trustee for the debenture holders is not tenable, the appellees' contention not being supported by the cases cited by them.[2] *In re Commonwealth Light & Power Co.*, (C.C.A. 7th, 1944) 141 F. (2d) 734.[3]

CORPORATIONS—RIGHT OF STOCKHOLDERS OF RECORD TO VOTE WITHOUT DIRECTION FROM BENEFICIAL OWNERS—Plaintiffs, stockholders of record in defendant corporation, petitioned to determine the validity of an alleged election of the individual defendants as directors of defendant corporation, basing their action upon the general corporation law which provides that the chancellor may determine the validity of any election of any director upon the application of any stockholder.[1] Whether or not defendant electors were elected depended upon the validity of the action of tellers in rejecting a large number of votes cast on proxies given by holders of record who were New York brokerage houses. It was contended that no mere record holder could vote stock without the direction of the real owner. The General Corporation Laws provide that each stockholder shall have one vote for each share of stock having voting power registered in his name [2] and give to the directors the power to fix the date for the purposes of determining what stockholders may vote.[3] Those who gave the proxies on which were cast the votes disallowed were holders of record on the day so fixed. *Held*, on a motion to dismiss the complaint, motion denied and decree for defendants. The rules of the New York stock exchange notwithstanding, it is the rule of this state that in the absence of special circumstances a mere record holder of stock may vote it without direction from the beneficial owner. *McLain v. Lanova Corporation*, (Del. Ch. 1944) 39 A. (2d) 209.

DESCENT AND DISTRIBUTION—DEVOLUTION OF PROPERTY OF ONE MURDERED BY SOLE HEIR WHEN STATUTE PROVIDES THAT HEIR WHO MURDERS ANCESTOR SHALL NOT INHERIT—Claude Norton, grandson of deceased, Mary Norton, in a proceeding against him and others by deceased's administratrix to

[2] The cases cited were Consolidated Rock Products Co. v. Du Bois, 312 U.S. 510, 61 S. Ct. 675 (1941) and Prudence Realization Corp. v. Geist, 316 U.S. 89, 62 S. Ct. 978 (1942).

[3] A petition for certiorari filed by trustee for Inland was dismissed on motion of counsel for petitioner. Bachrach, Trustee in Bankruptcy v. Central Hanover Bank and Trust Co., Trustee, 322 U.S. 766 (1944).

[1] Del. Rev. Code (1935) § 2063.

[2] Del. Rev. Code (1935) § 2049.

[3] Del. Rev. Code (1935) § 2049.

determine the heirs and distributees of the estate, filed a cross-petition and cross-complaint claiming the entire estate. From an order sustaining two of three demurrers to the cross-petition and cross-complaint, and adjudging that cross-complainant is not an heir and not entitled to inherit or receive any part of the estate, Claude Norton appeals. His claim is based upon the allegations that his father was the only child of Mary Norton, and that he Clarence Norton murdered her and under the Oregon statute is for that reason prohibited from inheriting or receiving any portion of the estate; that he Claude Norton is the only child of deceased's son and the only living lineal descendant with the exception of his father. *Held*, affirmed. The statute disqualifying the son because of his matricide did not create a new heir. The statute [2] prescribes that the property of decedent shall descend to decedent's children and to the issue of any deceased child by right of representation. The son may not inherit because of his alleged act of slaying the decedent; the grandson may not inherit because his father is still living. By way of dicta the court said that decedent's sister who survived her could not inherit because by the statute a surviving sister may not succeed to intestate property unless the intestate leaves no lineal descendant, nor father, nor mother. *In re Norton's Estate*, (Ore. 1944) 151 P. (2d) 719.[4]

EVIDENCE—PROOF OF POWER OF ATTORNEY EXECUTED IN FOREIGN JURISDICTION—On a motion to dismiss defendant's appeal from the allowance of a will on the ground that the acting attorney and agent for the named defendant had no authority to take the appeal or to execute the appeal bond, there was introduced into evidence a power of attorney broad enough to authorize the actions questioned, purportedly signed by defendant who was then in Ireland and authenticated by the signature and seal of a notary public in Ireland. The paper was sent air mail and bore an Irish stamp and postmark, and was accompanied by a letter from defendant's counsel in Ireland, replying to a previous communication sent to defendant by his American attorney. Plaintiff contended that the power of attorney could not be found to be authenticated in the absence of proof of defendant's handwriting and of proof that the purported notary public was in fact the holder of that office. The motion was denied subject to exceptions. *Held*, affirmed. An officially sealed certificate of a foreign notary is prime facie evidence of the due execution of the paper, without proof of defendant's handwriting. The court will take judicial notice of the fact that it is common practice to accept the signature and authority of a foreign notary public without proof. The evidence of delivery by defendant is the postmark which raises the inference that it was affixed at the place mentioned, the letter accompanying the power of attorney, in answer to the American attorney's letter, and the fact that the dates of mailing and receiving indicate that the mail took its ordinary course. *Whelton v. Daly*, (N.H. 1944) 37 A. (2d) 1.[1]

[1] Ore. Comp. Laws Ann. (1940) § 16-203.

[2] Id. at § 16-101.

[3] Principal case at 722.

[4] On murder of ancestor by heir as affecting intestate succession see 51 A.L.R. 1096 (1927).

[1] See annotation on authorship or authenticity of written or printed matter as inferable without extrinsic proof. 131 A.L.R. 301 (1941).

EVIDENCE—WHETHER REVERSIBLE ERROR NOT TO PERMIT DEFENDANT TO INSPECT STATEMENT OF PRINCIPAL WITNESS MADE BEFORE INDICTMENT FILED TO IMPEACH WITNESS—Defendant was convicted of transporting a woman in interstate commerce for purposes of prostitution on the testimony of a professional prostitute.[1] Before the indictment was filed this witness had made a statement to a federal investigating officer which completely exculpated the accused. During the cross-examination counsel for defendant demanded the privilege of inspecting this paper with a view to cross-examining her on it and presumably to impeach her. The judge read it but refused to allow the accused to see it. Defendant appealed, raising this, among other points, as error. *Held*, reversed and new trial ordered. This statement must have been suppressed on the ground that it was a privileged communication, because, being inconsistent with defendant's testimony on the stand, it would otherwise have been competent evidence to contradict it. However, when as in this case, the one possessing the privilege brings to light the transaction to which the communication relates, he may no longer suppress the communication itself. Since the accused could not ask the witness if she had made the statement and so prepare the way to offer it in evidence, the refusal of his demand for inspection of it was error. This is the first time that this question has been directly presented to a federal court. It is not analagous to refusals to allow inspection of papers used to refresh the recollection of a witness [2] or those used in preparation for a witness's examination.[3] The competence of the document here was apparent without inspection. There are authorities to uphold our view [4] and, although there are authorities the other way, "justice so plainly points in one way that we cannot hesitate to choose as we have indicated." [5] *United States v. Krubewitch*, (C.C.A. 2d, 1944) 145 F. (2d) 76.[6]

FEDERAL COURTS—REMOVAL OF CAUSES—IS A SUIT UNDER THE FAIR LABOR STANDARDS ACT REMOVABLE?—The plaintiff brought suit under the Fair Labor Standards Act [1] against the defendant company in a state court to recover overtime compensation, liquidated damages, reasonable attorney fees and costs. The defendant removed the proceeding to the federal district court on the grounds that, under the federal removal statute,[2] the action arose under the laws of the United States and that the suit, having arisen under a law regulating commerce,[3] was one of which the federal district courts were given original jurisdiction. On plaintiff's motion to remand, *held*, denied. There is authority for holding that suits under the Fair Labor Standards Act are suits arising out of a

[1] 18 U.S.C. (1940) § 88, id. at §§ 398, 399.

[2] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811 (1940).

[3] Lennon v. United States, (C.C.A. 8th, 1927) 20 F. (2d) 490.

[4] People v. Walsh, 262 N.Y. 140, 186 N.E. 422 (1933); State v. Hayes, 127 Conn. 543, 18 A. (2d) 895 (1941).

[5] Principal case at 79.

[6] See annotation on right of accused to inspection or disclosure of evidence in possession of prosecution, 52 A.L.R. 207 (1928).

[1] 29 U.S.C. (1940) § 201 et seq.

[2] 28 U.S.C. (1940) § 71.

[3] 28 U.S.C. (1940) § 41.

law regulating commerce.[4] Since these suits are considered as arising under federal law for the purpose of conferring original jurisdiction, they should also be so considered for the purpose of removal. Although the authorities are conflicting, to hold otherwise would impliedly repeal the provisions of the removal statute as to suits arising under the Fair Labor Standards Act. Had Congress wished to withdraw this privilege, it would have done so explicitly as it did in the Employers' Liability Act.[5] "The intention to deprive a litigant of the right to remove a case, otherwise removable, cannot be presumed, but must be evidenced by the use of appropriate language." [6] The provision of the Fair Labor Standards Act that an action may be "maintained" in any court of competent jurisdiction [7] means that an action may be commenced in such court; but it cannot have been intended to mean that any action once instituted must be "held" there. *Sonnesyn v. Federal Cartridge Co.*, (D.C. Minn. 1944) 54 F. Supp. 29.[8]

FEDERAL COURTS—WHETHER COMPLAINT MUST BE AMENDED TO FORM ISSUE BETWEEN PLAINTIFF AND A THIRD-PARTY BROUGHT IN BY DEFENDANT UNDER NEW FEDERAL RULES—Plaintiff brought an action for the wrongful death of her husband against the defendant water company. The American Oil Company was brought in by the water company as a third-party defendant, the complaint of the water company alleging that the oil company was alone and solely liable for damages caused plaintiff. A motion by the plaintiff to amend her complaint in order to charge the oil company with liability was denied. The oil company made a motion to dismiss third-party proceedings, contending there was no one on the record who could recover from it. *Held*, motion denied. Rule 14 (a) of the Federal Rules of Civil Procedure states that: "The plaintiff *may* amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant." [1] There is nothing in the section to indicate that plaintiff *must* amend his complaint to include the third-party. When the liability of third-party defendant to plaintiff is direct, the third-party complaint itself presents an issue between those two parties "and makes them opposing parties without amendment in respect to plaintiff's original claim." [2] Rules 12 and 13 provide that, if the third-party complaint alleges facts showing third party's direct liability to plaintiff, the third-party "*shall*" make his defenses or counter-claims. At this point in the present suit the plaintiff and third-party were at issue and no amendment was necessary or

[4] The Court cites, among other cases, Robertson v. Argus Hosiery Mills, (C.C.A. 6th, 1941) 121 F. (2d) 285; Campbell v. Superior Decalcomania Co., (D.C. Tex. 1940) 31 F. Supp. 663; Missel v. Overnight Motor Transp. Co., (D.C. Md. 1941) 36 F. Supp. 980.

[5] 45 U.S.C. (1940) § 56.

[6] Principal case at 33.

[7] 29 U.S.C. (1940) § 216.

[8] See "Removal of Employee Suits under the Fair Labor Standards Act," 36 ILL. L. REV. 787 (1942); "Employee Suits under FLSA Not Removable despite Original Jurisdiction in Federal Court," 55 HARV. L. REV. 541 (1942).

[1] 28 U.S.C. (1940) following § 723c. (Italics supplied.)

[2] Principal case at 104.

required. *Lommer v. Scranton-Spring Brook Water Service Co.* (American Oil Co., Third-Party Defendant), (D.C. Pa. 1944) 4 Fed. Rules Dec. 104.[3]

FEDERAL COURTS—WHETHER STATE STATUTE BARRING RECOVERY OF DEFICIENCY JUDGMENTS IS LIMITATION ON JURISDICTION OF FEDERAL COURT—Plaintiff, a resident of Virginia, brought suit in a North Carolina court against a resident of that state to recover a deficiency judgment on notes given to secure a mortgage on Virginia land and payable there. A North Carolina law provides that holders of notes given to secure the purchase price of real property "shall not be entitled to a deficiency judgment on account" thereof.[1] The North Carolina Supreme Court overruled the decision of the lower state court allowing recovery, held that the statute placed a limitation on the jurisdiction of the state courts and denied the plaintiff the right to recover. The plaintiff then commenced an action on the same claim in the federal district court. *Held*, judgment for plaintiff. The jurisdiction of this court, which has been conferred on it by federal law,[2] cannot be abridged by any state statute. *Stephenson v. Grand Trunk Western Ry. Co.*[3] held that the Illinois legislature, by passing a statute forbidding suit in that state to recover damages for death by wrongful act occurring outside the state, could not prevent the federal courts in Illinois from entertaining suit for such a death occurring in Michigan. When the court in the *Stephenson* case was confronted with the rule of *Erie Railroad v. Tompkins*,[4] that "the law to be applied in any case is the law of the state," it observed that the rule excepted matters governed by federal law. Also that court stated that if Congress or the federal courts have no power over the state when it acts through its legislature or its courts, then the state legislature can have no similar power over federal courts. The holding in the *Erie Railroad* case must be confined to matters of substance, and not of jurisdiction. *Bullington v. Angel*, (D.C. N.C. 1944) 56 F. Supp. 372.[5]

HABEAS CORPUS—MAY A FEDERAL PRISONER BROUGHT INTO A DISTRICT TO TESTIFY APPLY TO THE FEDERAL COURT OF THAT DISTRICT FOR RELEASE ON HABEAS CORPUS?—This is a petition for habeas corpus to secure for petitioner a release from further confinement under a sentence imposed by this court for bank robbery. The ground on which release is sought is that the statute

[3] See generally Holtzoff, "Some Problems under Federal Third-Party Practice," 3 LA. L. REV. 408 (1941).

[1] N.C. Laws, 1933, c. 36.

[2] Federal district courts are given original jurisdiction in civil suits where the matter in controversy exceeds the value of $3000 and is between citizens of different states. 28 U.S.C. (1940) § 41 (1).

[3] (C.C.A. 7th, 1940) 110 F. (2d) 401.

[4] 304 U.S. 64 at 68, 58 S. Ct. 817 (1938).

[5] See annotation on duty of federal courts to follow state statutes as regards obligations arising in other states, 132 A.L.R. 470 (1941). See generally "After Erie Railroad v. Tompkins: Some Problems in 'Substance' and 'Procedure'," 38 COL. L. REV. 1472 (1938); Tunks, "Categorization and Federalism: 'Substance' and 'Procedure' after Erie Railroad v. Tompkins," 34 ILL. L. REV. 271 (1939).

on which the indictment was based was unconstitutional. Although originally sentenced by this court, petitioner was committed to confinement elsewhere and is back in the district under a writ of habeas corpus ad testificandum. The United States attorney contends that the question is not properly before the court since by statute applicable to habeas corpus proceedings in the federal court district judges are limited in jurisdiction to cases arising "within their respective jurisdictions." [1] The prisoner being confined in this district by virtue of a writ of habeas corpus ad testificandum and not under the original sentence, is for the purpose of this case not confined within the district. The petitioner contends, however, that even though the petition be not procedurally sound, under 28 U.S.C. § 461 [2] the petition should be considered an application to this court which imposed the sentence to reconsider the case and release the prisoner. *Held*, writ discharged and prisoner remanded to the custody of respondent. A federal district court has no jurisdiction of the habeas corpus proceeding by a prisoner serving sentence in another district who is present within the district only by virtue of a habeas corpus ad testificandum, even though he was originally sentenced within the district. But even if the petition be regarded as an application to the court which imposed the sentence to reconsider the original case, when, as here, the term in which sentence was rendered has long expired, the court is without power on a petition for habeas corpus to modify or change the sentence on the ground that it was void. *Sanders v. Brady*, (D.C. Md. 1944) 57 F. Supp. 87.

LABOR LAW—EFFECT GIVEN TO ADMINISTRATIVE DECISION UNDER THE FAIR LABOR STANDARDS ACT—The plaintiffs here were employed as fire guards in the defendant's plant and worked during the day at regular hours for weekly salaries. Under an oral agreement plaintiffs stayed in the fire hall on defendant's premises several nights each week and, for each alarm answered, were paid an agreed amount in addition to their fixed compensation. No other tasks were imposed on them during this time, they were provided with comfortable quarters, they could spend their time in sleep or amusement, and fire alarms were rare. Plaintiffs brought suit in the district court under the Fair Labor Standards Act [1] to recover overtime compensation for the time spent waiting for calls, and that court, on the assumption that time thus spent could not be considered work, rendered judgment wholly denying the claim. The circuit court affirmed. On certiorari, *held*, reversed. It is the duty of the court to decide whether, under the act, such time is working time where the parties have not contemplated the problem raised by the statute. Since there is no principle of law in the statute or under court decisions on this issue of fact, the understanding of the district court was erroneous. "Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged." [2] Although Congress has placed on the courts the responsibility of deciding whether particu-

[1] 28 U.S.C. (1940) § 452.

[2] 28 U.S.C. (1940) § 461 provides: "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

[1] 29 U.S.C. (1940) § 201 et seq.

[2] Principal case at 163.

lar cases fall within or without the act,[3] it also created the office of administrator and conferred on him various duties, among them the bringing of injunctions to restrain violations of the act. In carrying out this duty he has gained experience in ascertaining working time in employments that involve periods of inactivity. He has set up certain standards as a guide in these situations. In a brief amicus curiae to this court he concludes "that the general tests which he suggested point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time." [4] While the administrator's findings are not conclusive even in cases with which they directly deal and there is no statutory provision as to what, if any, deference should be paid to the administrator's conclusions, "we consider that the rulings, interpretations and opinions of the administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." [5] *Skidmore v. Swift and Co.*, (U.S. 1944) 65 S. Ct. 161.[6]

LABOR LAW—MAY UNION WHICH HAS OBTAINED A MONOPOLY BY AGREEMENTS WITH NON-UNION ELEMENTS BE ENJOINED FROM BOYCOTTING RIVAL'S PRODUCTS?—Plaintiffs are manufacturers of electrical equipment whose plants are located outside of New York City. Defendant is a local union operating in that city whose membership includes almost every one within the city who works on or produces electrical equipment. By refusing to work on disfavored goods, peaceful persuasion, picketing and blacklisting, defendant obtained closed shop agreements with local manufacturing and contracting concerns and finally persuaded such concerns to enter into agreements with it by means of which the goods of plaintiffs have been completely excluded from the New York City area. The result of the monopoly thus obtained is that the members of defendant union enjoy high wages and short hours, the manufacturers and contractors make large profits and the public suffers by paying a higher price for electrical equipment in the metropolitan area than elsewhere. The plaintiffs sued in the federal district court and that court enjoined the activities of defendant tending to boycott plaintiff's products from the New York area, declaring them to be a conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act.[1] *Held*, reversed. *United States v. Hutcheson* [2] made it clear that the Sherman, Clayton and La Guardia Acts should be interpreted together and that section 20 of the Clayton Act [3] exempts from the operation of the Sherman Act permissible union activities in any labor dispute within the defi-

[3] Kirschbaum Co. v. Walling, 316 U.S. 517 at 523, 62 S. Ct. 1116 (1942).

[4] Principal case at 164.

[5] Ibid.

[6] The opinion in Armour and Co. v. Wantock, (U.S. 1944) 65 S. Ct. 165 comes to the same conclusion on essentially similar facts.

See generally Robert L. Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis," 58 HARV. L. REV. 70 (1944).

[1] 15 U.S.C. (1940) § 1 et seq.

[2] 312 U.S. 219, 61 S. Ct. 463 (1941).

[3] 29 U.S.C. (1940) § 52.

nition of that term in the Norris La Guardia Act.[4] The *Hutcheson* case and other more recent cases [5] have conceded labor unions broad powers to refuse to work and to employ peaceful persuasion. That the union here conspired with non-union elements and imposed injuries on third persons in attaining its objectives adds complexities to the problem; but a "labor dispute" within the statutory definition is involved and the defendant's purpose in all its activities was clearly to benefit union members.[6] It is clear that the union members may refuse to work on plaintiff's products and, by this weapon alone, enforce their boycott on those products. In this respect the injunction of the lower court is contrary to the statute. Justice Frankfurter said in the *Hutcheson* case that "so long as a union acts in its self-interest and does not combine with non-labor groups" the court will not pass upon the wisdom of the union's objectives. If the converse of this statement is to be accepted as true, then it does not mean that all combinations with non-labor groups are illicit, but rather that, when there is such a combination *and* the union is no longer acting in its own self-interest, whether such combination is illicit, will have to be determined by whether the activity complained of is one which promotes legitimate union objectives. "On this basis it would follow that here the activities which cannot be forbidden Local 3 acting by itself are not to be interdicted because other groups join with them to the same end." [7] *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, (C.C.A. 2d, 1944) 145 F. (2d) 215.[8]

LABOR LAW—WHETHER COMPANY, HAVING ENTERED INTO CLOSED SHOP AGREEMENT WITH COMPANY-DOMINATED UNION, MAY DISCHARGE EMPLOYEES EXCLUDED FROM MEMBERSHIP IN SUCH UNION—The C. I. O. threatened to organize the employees of petitioner company which, in order to frustrate such plans, sponsored the formation of a rival union, the Independent. Disputes arose between the two groups and, in an effort to settle these, the two unions and the company signed a settlement agreement which was approved by the N.L.R.B. and pursuant to which a consent election was held. Independent won the election and was certified by the board as bargaining representative. The company then signed a closed shop agreement with the winning union, knowing that it intended to refuse membership to those employees formerly associated with the C.I.O. The company discharged the employees who were refused membership. The board found that these actions constituted unfair labor practices and ordered the company to reinstate the discharged employees with

[4] 29 U.S.C. (1940) § 113.

[5] See note 6 infra.

[6] In reaching this conclusion the court cited as controlling cases, United States v. International Hod Carriers, 313 U.S. 539, 61 S. Ct. 839 (1941), affirming United States v. Carrozzo, (D.C. Ill. 1941) 37 F. Supp. 191, and United States v. American Federation of Musicians, 318 U.S. 741, 63 S. Ct. 665 (1943), affirming dismissal in (D.C. Ill. 1942) 47 F. Supp. 304. The lower court in the principal case had reached its conclusion on the ground that a "labor dispute" was not involved.

[7] Principal case at 225.

[8] See 28 VA. L. REV. 554 (1942) and 5 UNIV. DET. L. J. 132 (1941) for case notes on the decision reached by the federal district court, (D.C. N.Y. 1941) 41 F. Supp. 727, in the principal case.

back pay. The circuit court of appeals ordered enforcement of the order and the case is here on certiorari. *Held,* affirmed, the court dividing five to four. Section 8 (3) of the National Labor Relations Act [1] does not permit such a closed shop contract between a company and a labor union that it has "established, maintained, or assisted." The Independent is such a union and its establishment was an unfair labor practice. The settlement agreement that the board approved was a measure to prevent the discharge of employees because of their union affiliations. This agreement implied that all employees would be allowed membership in the union that won the election. When petitioner, knowing the intention of Independent to exclude those employees formerly associated with the C.I.O. signed the contract for a closed shop and subsequently discharged those excluded from membership, it indulged in another unfair labor practice. The board has consistently looked behind settlement agreements where there has been a subsequent unfair labor practice. Petitioner's argument that, since section 8 (3) of the act permits union shop agreements and since it has no control over admission to union membership, it must abide by the contract even though it knew of the union's discriminatory purpose, is unsound. A company may not deprive an employee of his employment because of his prior association with any union and "to permit it to do so by indirection, through the medium of a 'union' of its own creation, would be to sanction a readily-contrived mechanism for evasion of the act." [2] *Dissent.* The company was bound to enter into the closed shop agreement, even after it knew of the Independent's exclusionary attitude toward certain employees, because both unions had entered into the election agreement on the understanding that whichever one won would obtain a closed shop. After the Independent won, the board before certifying it, might have made conditions as to the terms to be imposed on the defeated union. It is not up to the company to impose such terms. It had dealt with the union's duly certified bargaining agent as it was required by law to do and was merely acting as the instrument of the union in discharging the employees who had been refused membership. *Wallace Corporation v. National Labor Relations Board,* (U.S. 1944) 65 S. Ct. 238.[3]

LABOR LAW—WHETHER EMPLOYER IS GUILTY OF UNFAIR LABOR PRACTICE UNDER N.L.R.A. BY DISCHARGE OF AND FAILURE TO REEMPLOY "WILDCAT" STRIKERS—Certain employees of defendant company, aggrieved because a meeting to discuss wage problems could not be arranged between their union's bargaining agent and the defendant's representative, staged a "wildcat" strike. These employees mistakenly believed that the illness of the company's representative, which prevented the meeting from taking place, was feigned. The strikers constituted about one-fourth of all the employees of the defendant. They were discharged and for some time the defendant refused to reemploy them although they were eventually reinstated. In a complaint to the National Labor Relations Board this discharge and failure to reemploy was alleged, among other

[1] 29 U.S.C. (1940) § 158 (3).

[2] Principal case at 242.

[3] See generally "Effect of a Closed-shop Contract on Employer Practices otherwise Unfair under the NLRA," 56 HARV. L. REV. 613 (1943). See 28 VA. L. REV. 1007 (1942) for case note involving somewhat similar fact situation.

charges, as an unfair labor practice under section 8 (1) of the National Labor Relations Act.[1] The board sustained this charge and issued an order directing the company to compensate the striking employees for time lost prior to their reinstatement. *Held,* petition denied. Whether this was an unfair labor practice within section 8 (1) of the act depends on whether the striking employees were engaged in "concerted activities, for the purpose of collective bargaining or other mutual aid or protection" within the meaning of section 7 of the act. They were not so engaged but were a minority group attempting to interfere with collective bargaining by the authorized agent of all the employees. It is destructive to industrial harmony for small groups to ignore the bargaining agency thus set up and to try to take matters into their own hands and contrary to the purpose of the act.[2] "Not only did the company agree to bargain only with the union, but the employees agreed to bargain only through the union. Those who engaged in the 'wildcat' strike violated this agreement."[3] There is nothing in the statute which protects from discharge those employees who strike in violation of its provisions. *National Labor Relations Board v. Draper Corporation,* (C.C.A. 4th, 1944) 145 F. (2d) 199.[4]

MALICIOUS PROSECUTION—EXTENT TO WHICH CLIENT MUST DISCLOSE FACTS TO COUNSEL TO SECURE PROTECTION—In an action of tort for malicious prosecution for violation of a Massachusetts statute,[1] arising out of a campaign in which plaintiff and defendant were candidates for election to the board of selectmen of the town of Barre, it appeared that criminal proceedings had been instituted and continued to final conclusion by defendant under the advice of competent counsel; and that plaintiff had finally been adjudged not guilty and discharged on the ground that by a later provision of the statute under which he was prosecuted, its provisions were limited to public elections in towns whose population exceeds ten thousand, while Barre had a population of only thirty-eight hundred. The evidence showed that defendant knew the population of Barre but did not disclose it to his attorney, and the question raised is whether failure to disclose this fact to the attorney denies him the protection against an action for malicious protection accorded one who has acted upon advice of counsel given upon a case truly stated. The lower court gave judgment for plaintiff and defendant excepted to some of its rulings. *Held,* that defendant's failure to state to counsel the population of Barre would not necessarily be a fatal omission if the defendant as a reasonable man should not have known that such fact was material. The rule is that "he who relies on the protection of legal advice must have given all the facts he knew and reasonably ought to have deemed material,

[1] 29 U.S.C. (1940) § 158 et seq.

[2] 29 U.S.C. (1940) § 159 states that such representatives shall be "the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment."

[3] Principal case at 204.

[4] Sullivan, "Discharge of 'Wildcat' Strikers: Discrimination," 29 CORN. L. Q. 550 (1944).

[1] Mass. Gen. Laws (Ter. Ed. 1932) c. 55, § 39.

but only such facts."[2] The judgment was reversed and case remanded. *Higgins v. Pratt*, (Mass. 1944) 56 N.E. (2d) 595.

PRICE CONTROL ACT—WHETHER PENALTIES UNDER THE ACT ARE CUMULATIVE—In June 1942, plaintiff rented a house for a higher rental than the landlord had been receiving in March 1 of that year. Defendants, executors of the will of the original landlord, were advised in May 1943 that this was a violation of price ceiling regulations and remitted to plaintiff the excess rental payments. Plaintiff sued under section 205 (e) of the Price Control Act, which provides that a renter who has been overcharged "may bring an action either for $50.00 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is greater,"[1] claiming $50.00 for each of the ten months during which excess rentals were paid or $500. *Held*, plaintiff may recover only $50 of excess. The language of the statute, which is not entirely clear on this point, should be strictly construed because the landlord is not relieved of liability by reason of his good faith.[2] A rental contract is one continuous transaction even though the rent is paid monthly so the tenant should not be able to multiply the remedy by the number of months involved.[3] Although it has been held that a tenant may recover for several overcharges, this was in a case where the tenant sued for treble the amount of overcharges.[4] A liberal construction of the statute might penalize an innocent violator and unjustly enrich a tenant who sat back and did nothing for many months until the damages reached a sizeable amount. *Everly v. Zepp*, (D.C. Pa. 1944) 57 F. Supp. 303.[5]

TAXATION—CONSTITUTIONALITY OF STATE TAXATION OF OPEN ACCOUNTS DUE FROM UNITED STATES—Petitioners, partners in the contracting and construction business, brought this action in a Georgia state court to enjoin the assessment by state tax officials under a Georgia statute of a sum owed to petitioner by the United States Government on two construction contracts. The statute under which the amount was sought to be assessed subjected to taxation "money due on open account."[1] It was claimed by petitioner that the open account here was an instrumentality of the United States and therefore immune from state or county taxation. The Supreme Court of Georgia overruled the trial court's dismissal of respondent's general demurrer. On certiorari, *held*, affirmed. The proposed tax on the open account claim against the United States is not a tax upon its power to raise money or to carry on military and civil operations, under *McCulloch v. Maryland*.[2] The account does not represent a credit instrumental-

[2] Principal case at 600.

[1] 56 Stat. L. 23 (1942), 50 U.S.C. (Supp. 1943) App. § 925 (e).
[2] Ward v. Bochino, 181 Misc. 355, 46 N.Y.S. (2d) 54 (1944).
[3] Id.
[4] Kerr v. Congel, 181 Misc. 461, 46 N.Y.S. (2d) 932 (1944).
[5] On the Price Control Act in general, see annotations in 142 A.L.R. 1521 (1943), 143 id. 1533, 144 id. 1517, 145 id. 1484; Sprecher, "Price Control in the Courts," 44 COL. L. REV. 34 (1944) and comment concerning recent amendments by the same author in 43 MICH. L. REV. 188 (1944).

[1] Ga. Code (1933) § 92-101.
[2] 4 Wheat. (17 U.S.) 316 (1819).

ity; it is only an unsettled claim or demand made by a creditor. So long as nondiscriminatory, it does not substantially affect the power of the United States to secure credit for necessary military and civil construction projects. It is no more fatal than a tax on gross receipts received under contracts with the United States. It is not an exempt obligation under section 3701 of the Revised Statutes [3] providing that "all stocks, bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority," for that section applies only to written, interest-bearing obligations issued pursuant to Congressional authorization. *Smith v. Davis*, (U.S. 1944) 65 S. Ct. 157.[4]

TAXATION—DEDUCTIBILITY OF CAMPAIGN EXPENSES UNDER THE FEDERAL INCOME TAX LAW—Petitioner was appointed to fill an unexpired term as common pleas judge in a Pennsylvania county. Under the law of that state such judgeship is filled for a full term at the next election. In order to obtain the support of his party he, along with other party candidates, was assessed for the party's general campaign fund, an amount based on his prospective salary. He deducted this amount and also other customary campaign expenses from his income tax return as "reelection expense." The commissioner disallowed the item and he was sustained by the tax court and the circuit court of appeals. On writ of certiorari, *held*, affirmed. "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" are allowed as deductions under section 23 (a) (1) (A) of the Internal Revenue Code.[1] Since performing the functions of a judge is carrying on a trade or business under this code,[2] he could have deducted any expenses which related to the discharge of his duties in that office. "But his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years." [3] Neither do such expenses come under the amendment to the code entitled "non-trade or non-business expenses" and stating that, "In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income" [4] may be deducted. This amendment was passed for the specific purpose of allowing deductions from profitable transactions not covered by the statutory concept of "business income." [5] The difficulty is not that petitioner's expenditures relate

[3] 31 U.S.C. (1940) § 742.

[4] For a discussion of the scope of the doctrine of McCulloch v Maryland see "State Power to Tax Federal Institutions and Agencies," 28 VA. L. REV. 251 (1941). See also Martin Saxe, "Tax Immunity of Federal Agencies and Congressional Declarations," 21 TAXES 539 (1943). Ernest M. Brannon, "State Taxation of National Defense Activities," 20 TAXES 268 (1942). As applied to National banks see 59 A.L.R. 29 (1929), 81 A.L.R. 508 (1932), and 87 A.L.R. 846 (1933).

[1] 26 U.S.C. (Supp. 1943) § 23 (a) (1) (A).

[2] "Trade or business.—The term 'trade or business' includes the performance of the functions of a public office." 26 U.S.C. (1940) § 48 (d).

[3] Principal case at 97.

[4] 56 Stat. L. § 121, p. 798 at 819 (1942).

[5] In Higgins v. Commissioner of Internal Revenue, 312 U.S. 212, 61 S. Ct. 475

to non-business income and so were not covered before the amendment; the difficulty is that they were not incurred in "carrying on" his "business" of judging. That Congress could not have meant by this amendment to allow campaign expenses as a deduction is shown by legislative history, court decisions, and Treasury practice and regulations.[6] *Dissent*, the expenses came within the wording of the amendment as expenses incurred "for the production of income." Taxation on net, not on gross, income has been the underlying purpose of our tax laws. Congress could not have intended to restrict the application of this amendment to the facts of the *Higgins* case.[7] The tax court and the majority of this court relied on grounds of public policy in disallowing the deduction. "So long as campaign expenses spent by candidates are legitimate, ordinary and necessary, I am unwilling to assume that Congress intended by the 1942 Act to discriminate against the thousands of state officials subject to federal income taxes." [8] *McDonald v. Commissioner of Internal Revenue*, (U.S. 1944) 65 S. Ct. 96.

WORKMEN'S COMPENSATION — INJURY RESULTING FROM RECREATIONAL ACTIVITIES AS ARISING IN THE COURSE OF EMPLOYMENT — Certiorari to review a decision of the Industrial Commission awarding compensation to respondent for accidental injury sustained while playing soft ball in a public park. Respondent was an employee of relator, a partnership engaged in the dairy business. Relator encouraged its employees to form teams to play the teams of other dairies and businesses, and in the case of the soft ball team on which respondent played, it paid the entrance fee to the city park board, furnished uniforms and equipment, and gave a banquet at the end of the season for the participants. The games were played in the city parks under the rules and according to the schedules provided by the city park board; practices and games were held after working hours and participation was encouraged but not required. Relator contends here that an amendment to the statute providing that it is "not to cover workmen except while engaged in, on, or about the premises where their services are to be performed, or where their presence is a part of such service, at the time of the injury, and during the hours of service as such workmen," [1] excludes relator from compensation. The Industrial Commission found that Ewald Bros. deemed the contests of their employees an essential part of their business; hence, the injury to respondent arose out of and in the course of his employment. *Held*, the commission's findings are supported by the evidence; the writ is discharged. *Le Bar v. Ewald Bros. Dairy*, (Minn. 1944) 13 N. W. (2d) 729.[2]

(1941) the Court found that one who managed his own property was not in trade or business and so could not deduct expenses incurred in producing his gross income.

[6] Reed v. Commissioner, 13 B.T.A. 513 (1928), reversed on another ground (C.C.A. 3d, 1929) 34 F. (2d) 263, reversed under the name Lucas v. Reed, 281 U.S. 699, 50 S. Ct. 352 (1930); Treas. Reg. 103, § 19.23(a)-15; Treas. Reg. 103, § 23(o)-1.

[7] Mentioned supra note 5.

[8] Principal case at 102.

[1] Minn. Stat. (1941) §§ 176.01, Subd. 11, Mason Stat. (1927) § 432 (j).

[2] Case noted in 28 MINN. L. REV. 414 (1944). For collection of cases see 115 A. L. R. 993 (1938).