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Recent Cases

ADMINISTRATIVE LAW—HEALTH INSPECTIONS WITHOUT A SEARCH WARRANT

*Frank v. Maryland*¹

Gentry, an inspector of the Baltimore City Health Department, in response to a complaint began an inspection one afternoon to locate the source of some rats. Gentry knocked on Frank's door, and receiving no answer, conducted an inspection of the contiguous area and found about one-half ton of "rodent feces mixed with straw and trash". Frank then appeared and inquired as to Gentry's presence and purpose. He was told the reason for the inspection and was asked to permit an interior inspection but refused to give his consent. Gentry did not have a warrant at that time nor did he have one the next afternoon when he returned to the Frank residence. He received no answer to his knock and after conducting another outside inspection he swore out a warrant for Frank's arrest. This warrant alleged a violation of section 120 of article 12 of the Baltimore City Code.² Frank was found guilty and fined twenty dollars. On appeal to the Criminal Court of Baltimore he was again found guilty in a de novo proceeding. Certiorari was denied by the Maryland Court of Appeals. On appeal to the United States Supreme Court, *held*, affirmed, in a five-four decision. Mr. Justice Frankfurter writing for the majority found that the ordinance cited above did not deny Frank due process of law.

It is the law of this nation that the restriction of the fourth amendment against unreasonable searches and seizures is applicable to the states through the fourteenth amendment in that it is "implicit in the concept of ordered society."³ Therefore, a study of the background and *raison d'être* of the fourth amendment should help in an analysis of the application of the unreasonable search and seizure doctrine under the fourteenth amendment.

1. 359 U.S. 360 (1959) (four justices dissented and one concurred).

2. *Id.* at 361. "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, . . . he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars."

3. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). The court in that case also stated: "The security of one's privacy against intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore . . . enforceable against the States through the Due Process Clause." See also *Palko v. Conn.*, 302 U.S. 319 (1937).

Just prior to the American revolution there were in use, in England, warrants which were general with regard to the person to be apprehended or goods to be seized.⁴ In response to such a warrant the case of *Entick v. Carrington*⁵ arose and these warrants were declared illegal, Lord Camden saying that otherwise all secret enclosures would be subject to search and inspection "whenever the secretary of state shall think fit. . ."⁶ A first cousin of the general warrant was the Writ of Assistance used in the American colonies to enforce the Act of Trade upon American shipping.⁷ James Otis represented American shipping in its attempt to get these writs declared illegal, and at least one contemporary believed that Otis' able attack against them planted the germ of independence in the minds of American colonists.⁸ The gist of his argument is summarized in the following statement. "It is a power, that places the liberty of man in the hands of every petty officer."⁹ It seems reasonable to say that these general warrants and Writs of Assistance played an important role in the formation and adoption of the fourth amendment of the United States Constitution.¹⁰

Most of the cases concerning unreasonable search and seizure involve criminal prosecutions.¹¹ The evidence obtained in an unreasonable search, if used in a criminal trial would violate the fifth amendment's guarantee against self incrimination. This helps explain the emphasis given by Mr. Justice Frankfurter in the *Frank* case to the fact that "no evidence for criminal prosecution is sought to be seized."¹² Concerning this so called relationship between the fourth and fifth amendments it has been stated that the searches and seizures condemned by the fourth amendment are:

almost always made for the purpose of compelling a man to give evidence against himself . . . and compelling a man . . . 'to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment.¹³

Others feel that the fourth amendment is not dependent upon the fifth amendment for meaning and purpose.¹⁴ While the general warrants of England were used primarily to combat seditious libel, a crime, the objectives of the Writs of Assistance were more civil in nature, the collection of custom fees.

4. 3 MAY, CONSTITUTIONAL HISTORY OF ENGLAND 1 (1896).

5. 19 Howell's State Trials 1030 (1765).

6. *Id.* at 1063.

7. TUDOR, THE LIFE OF JAMES OTIS 52 (1823).

8. *Id.* at 61.

9. 2 ADAMS, WORKS OF JOHN ADAMS 524 (1850).

10. 2 STORY, COMMENTARIES ON THE CONSTITUTION § 1902, at 679 (3d ed. 1858)..

11. *Harris v. United States*, 331 U.S. 145, 155 (1947) (dissenting opinion) (all cases decided under Fourth Amendment from 1914 to 1938 involved a crime, payment of a penalty, or a forfeiture).

12. 359 U.S. at 366.

13. *Shapiro v. United States*, 335 U.S. 618, 632 (1948).

14. 8 WIGMORE, EVIDENCE § 2264 (3d ed. 1940).

The first case going to the United States Supreme Court concerning the constitutionality of an ordinance providing for health inspection without a search warrant was *District of Columbia v. Little*.¹⁵ The factual situation was very similar to the one in the *Frank* case. The Court did not decide the constitutionality of the ordinance in the case, holding that the refusal of Little to unlock the door was not the type of "interference" prohibited by the ordinance. The Municipal Court of Appeals for the District of Columbia had earlier held in *Little v. District of Columbia*¹⁶ that the ordinance violated the Fourth Amendment, reasoning that a health inspector could not inspect, when challenged, without a search warrant.¹⁷

*Givner v. Maryland*¹⁸ is an example of a holding contrary to the *Little* case. There Givner refused to permit an inspection authorized by the same Baltimore ordinance involved in the *Frank* case. The Maryland court held that this ordinance did not violate article 26 of the Maryland constitution, which is similar to the fourth amendment of the United States Constitution, and that here the liberty of the individual must yield to public demand for health and safety.¹⁹

The problem in this area is to balance the right of an individual to privacy of the home against the right of the public to be protected from diseases arising from unsanitary conditions. Certainly a state could not affirmatively authorize an unlawful search without violating the due process clause of the fourteenth amendment,²⁰ but a state or city can authorize health inspections under their police power if the inspection is not an unreasonable search.²¹ Or as stated by the United States Supreme Court, a prohibition against unreasonable searches does not prohibit reasonable searches.²² What is a reasonable search cannot be determined by an abstract formula; rather the determination must be made from a weighing of the facts and circumstances of each case.²³

A search warrant is not always a condition precedent to a reasonable search,²⁴ but as stated in *Agnello v. United States*:²⁵

15. 339 U.S. 1, 4-5 (1949). The ordinance provided in part that "any person violating . . . these regulations, or interfering with or preventing any inspection authorized thereby, shall be deemed guilty of a misdemeanor, and shall, upon conviction . . . be punished by a fine of not less than \$5 nor more than \$45."

16. 62 A.2d 874 (Munic. Ct. App. D.C. 1948).

17. *Id.* at 876.

18. 210 Md. 484, 124 A.2d 764 (1956).

19. *Id.* at 504, 124 A.2d at 775.

20. *Wolf v. Colorado*, *supra* note 3.

21. *Givner v. Maryland*, 210 Md. 484, 124 A.2d 764 (1956).

22. *United States v. Rabinowitz*, 339 U.S. 56 (1950).

23. *Ibid.*

24. *Hubbel v. Higgins*, 148 Iowa 36, 126 N.W. 914 (1910) (inspection of hotels); *Keiper v. City of Louisville*, 152 Ky. 691, 154 S.W. 18 (1913) (inspection of restaurants).

25. 268 U.S. 20 (1925).

While the question has never been decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein.²⁶

When faced with the problem, the Supreme Court in the *Frank* case did find that the facts and circumstances of the case were such that where the ordinance authorized an inspection only during daylight hours and did not permit a forceful entry, it did not authorize such a search as would have been prohibited by the fourth amendment and, therefore, it did not violate the due process clause of the fourteenth amendment.

It should be noted again at this point that this was a five-four decision, and in addition that Mr. Justice Whittaker concurred only in the result.²⁷ He felt that the request to inspect at midday, solely to determine if the house were rat infested, and the procedure subsequently employed, i.e., the imposition of the fine, "did not amount to enforcement of, an unreasonable search within the meaning of the Fourth and Fourteenth Amendments. . . ."²⁸ Therefore an inspection or administrative procedure that is more strict or far-reaching than in the *Frank* case might not be approved by Mr. Justice Whittaker.

The dissent was based upon the premise that the fourth amendment, in theory, prohibits this type of inspection and administrative procedure. Mr. Justice Douglas stated that the fourth amendment, applied to the states through the fourteenth amendment, had "heretofore been thought to protect privacy when civil litigation, as well as criminal prosecutions, was in the offing."²⁹

It was pointed out in the majority opinion that this Baltimore ordinance had been in existence since 1801 and that thousands of inspections had been made under it. This fact coupled with the necessity of using this type of inspection to effectively control disease in a municipal area seems to point up the reasonableness of this holding. But it does indicate a further encroachment upon individual privacy. It may be that such an encroachment is necessary as the trend continues toward more urban living, but in view of the fact that the vast majority of home owners will voluntarily permit this type of inspection, it does not seem that it would be an undue burden to require the issuance of a search warrant by a magistrate when an owner or tenant refuses entry, rather than imposing an automatic fine for denying entry to the health inspector.

CHARLES B. ERICKSON

26. *Id.* at 32.

27. 359 U.S. at 373 (1959) (concurring opinion).

28. *Id.* at 373-74.

CONFLICT OF LAWS—CONSTITUTIONALITY OF NON-RESIDENT
MOTORIST STATUTES AS TO PERSONAL REPRESENTATIVES

*State ex rel. Sullivan v. Cross*¹

The controversy arose out of an automobile accident on a Missouri highway resulting in the deaths of a Missouri resident and two Nebraska motorists. Plaintiff (the Missouri decedent's wife) sued the personal representatives of the non-resident motorists for the wrongful death of her husband in a Missouri circuit court. She proceeded under Missouri statutes which provide for jurisdiction over the foreign representative of a non-resident motorist by constructive service.² The defendants submitted a writ of prohibition to the Supreme Court of Missouri alleging that the circuit judge had no jurisdiction. They argued that the imposition of jurisdiction over a foreign representative violated procedural due process, that full faith and credit to foreign probate law and procedure was denied, and finally that assumption of jurisdiction over a foreign representative who has no power to act outside the state of his appointment violated due process. *Held*, writ denied. The court declared that procedural due process objections were met as the statute provided for notice and sufficient time to plead, that full faith and credit would not deter the Missouri court from giving a judgment since the enforceability of the judgment must be determined in a Nebraska probate court and not here, and that jurisdiction can be validly maintained because the notion of the limited territorial capacity of legal representatives must yield to the police power of a state in providing for its citizens' redress in its own courts against non-residents who inflict injuries upon them. The court relied heavily on *Brooks v. National Bank*³ which applied the Missouri statutes and predicted this result.

The constitutionality of the statutes regarding the non-resident motorist himself was upheld in *Hess v. Pawloski*.⁴ That decision rested on two grounds: (1) a state had power as a condition of the use of its highways to require the non-resident to appoint a state official as his agent on whom process could be served; (2) this power or jurisdiction was derived from the state's police power. However, attempts to extend jurisdiction to the non-resident's personal representative without explicit statutory authority were unsuccessful.⁵ The courts have held either that the agency between the non-resident motorist and the state officer was terminated by the former's death, or that they would not go so far unless the legislative intent were clearly present. In *Harris v. Bates*⁶ and *Crump v. Treadway*⁷ the Supreme Court of

1. 314 S.W.2d 889 (Mo. 1958) (en banc), 57 MICH. L. REV. 406 (1959).

2. §§ 506.200-.210, RSMo 1949, as amended, Mo. Laws 1955, at 310, § 1.

3. 251 F.2d 37 (8th Cir. 1958).

4. 274 U.S. 352 (1927).

5. *Hunt v. Tague*, 205 Md. 369, 109 A.2d 80 (1954); *In re Estate of Roche*, 16 N.J. 579, 109 A.2d 655 (1954); *Shelton v. Johnson*, 278 App. Div. 1012, 106 N.Y.S.2d 149 (1951); *Harris v. Owens*, 142 Ohio St. 379, 52 N.E.2d 522 (1943); Annot., 53 A.L.R.2d 1164 (1957).

6. 364 Mo. 1023, 270 S.W.2d 763 (1954).

7. 276 S.W.2d 226 (Mo. 1955).

Missouri held that a statute⁸ which purported to set up a local representative for the deceased non-resident for the purpose of defending an action against the deceased violated due process in that it failed to provide notice to the legal representative. The court also declared in these cases that subsection one of this statute (which provides that actions for personal injuries and death are not to abate because of the death of either party) should not, in the absence of legislative intent, be read in conjunction with the non-resident motorist statute. It was therefore held that this statute, without more, would not subject the legal representative of the non-resident motorist to the jurisdiction of Missouri courts.

A majority of the courts have upheld the statutory extension of jurisdiction to the personal representative as an exercise of the police power of the state in the interests of its citizens.⁹ Full faith and credit arguments are considered inapplicable. However, it is said that the claimant will have to take his chances with his judgment in the probate court of the non-resident's state and be subject to the general rules of the courts there. It is interesting to note that in several of these cases, the time limit for presenting claims against the estate of the non-resident motorist had expired. One case, *Knoop v. Anderson*,¹⁰ invalidated a similar statute declaring that jurisdiction cannot exist as to a *res* not within the territory of the state and upon an individual not empowered to act within it. However, the argument is somewhat turned around because it reasons from the principal premise that full faith and credit would not require enforcement of the judgment.

The majority decisions go far beyond the early exposition of the meaning of jurisdiction as found in *Pennoyer v. Neff*,¹¹ but justification is found in recent United States Supreme Court cases¹² which rule that jurisdiction is a pragmatic concept limited merely by the exigencies upon which the state police power is reasonably brought to bear. The argument in the *Knoop* case states that the representative is not subject to jurisdiction because of his traditional limitations, but this begs the real question as to whether jurisdiction can be validly asserted by the state under its police power.

There seems to be no compelling reason why the probate court's complete control over the estate of a non-resident motorist should not yield to foreign interference where such interference amounts merely to the establishment of the validity of an

8. § 537.020(3), RSMo 1949, as amended, Mo. Laws 1955, at 780, § 1.

9. *Brooks v. National Bank*, *supra* note 3; *Feinsinger v. Bard*, 195 F.2d 45 (7th Cir. 1952); *Oviatt v. Garretson*, 205 Ark. 792, 171 S.W.2d 287 (1943); *Plopa v. Du Pre*, 327 Mich. 660, 42 N.W.2d 777 (1950); *Tarczynski v. Chicago, M. St. P. & Pac. R.R.*, 261 Wis. 149, 52 N.W.2d 396 (1952); *Leighton v. Roper*, 300 N.Y. 434, 91 N.E.2d 876 (1950).

10. 71 F. Supp. 832 (N.D. Iowa 1947), 44 IOWA L. REV. 402 (1959).

11. 95 U.S. 714 (1878). It was held there that a state cannot, where the action is in personam, obtain jurisdiction over a non-resident by constructive service.

12. See generally *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Olberding v. Illinois Cent. R.R.*, 346 U.S. 388 (1953); *Alaska Packers Ass'n v. Industrial Union of Marine and Shipbuilding Workers of America*, 357 U.S. 217 (1958); *Essex v. Masci*, 289 U.S. 253 (1933).

asserted claim. As the cases point out, but do not assert as controlling,¹³ the probability is that liability insurance will sustain the estate against loss. Perhaps the plaintiff should be required to present his judgment allowing recovery within the time for filing claims against the decedent's estate. Apart from that limitation it is submitted that jurisdiction should be exercised. The judgment so obtained will perhaps have to be recognized anyhow (though possibly on a pro rata basis with other creditors, if any) in the foreign probate court under the United States Supreme Court decision in *Morris v. Jones*.¹⁴

HARRY D. PENER

CONFLICT OF LAWS—FULL FAITH AND CREDIT TO CUSTODY AWARDS—MISSOURI

*In re Rice*¹

Petitioner-father, respondent-mother, and child resided and were domiciled in Virginia. After marital difficulties arose, respondent brought the child to Missouri, where they have since resided. Petitioner was thereafter granted a divorce in Virginia, in which proceedings respondent personally appeared. Custody of the child was awarded to petitioner, although the child had not been present in Virginia after the commencement of the divorce action. Upon respondent's failure to surrender custody, this original proceeding in habeas corpus was brought, petitioner contending that the Virginia decree was entitled to full faith and credit as a judgment of a sister state. Respondent contended that the Virginia court lacked jurisdiction to award custody. *Held*, the Virginia decree was not binding insofar as it awarded custody. For an award of custody to be entitled to full faith and credit in Missouri, the jurisdiction of the rendering court must be based on domicile of the child within the state.²

By constitutional command, the judgments of each state shall be given full faith and credit by every other state.³ A judgment is to be given the same effect

13. *Brooks v. National Bank*, *supra* note 3, at 43; *State ex rel. Sullivan v. Cross*, *supra* note 1, at 895.

14. 329 U.S. 545 (1947). Here a Missouri judgment was recovered against an Illinois insurance association after the association had been put under the control of a liquidator. Under Illinois law the judgment would not have been a valid claim in the liquidation proceedings. The Supreme Court required the liquidator to admit the Missouri judgment as a claim against the association because of the command of full faith and credit. See *Holt, Extension of Non-Resident Motorist Statutes to Non-Resident Personal Representatives*, 101 U. PA. L. REV. 223 (1952).

1. 316 S.W.2d 329 (K.C. Ct. App. 1958), 45 VA. L. REV. 734 (1959).

2. Although the domicile of a minor is normally that of the father, when the father and mother separate and establish separate domiciles the child usually takes the domicile of the parent with whom it in fact lives. *Beckmann v. Beckmann*, 358 Mo. 1029, 218 S.W.2d 566 (1949) (en banc); § 452.150, RSMo 1949; Annot., 13 A.L.R.2d 306 (1950).

in the forum state that it would have in the rendering state.⁴ To be entitled to such respect, however, a judgment must have been based on valid jurisdiction⁵ and it must be final.⁶ The forum may inquire into the jurisdictional basis of the judgment sought to be enforced.⁷ If it is determined that the rendering court lacked sufficient jurisdiction, full faith and credit is not required.⁸

That the child custody cases are not easily reconciled with general principles is, however, apparent from the decisions rendered by the Supreme Court. In *New York ex rel. Halvey v. Halvey*,⁹ the Court held that modification of a custody decree by the enforcing court was not a denial of full faith and credit, where the rendering court could also have modified the decree. The Court reserved consideration of the effect of an ex parte custody award and, apparently, the very question of full faith and credit applicability.¹⁰ The ex parte question was answered in *May v. Anderson*,¹¹ the Court holding that an award by a court not having in personam jurisdiction over an absent mother was not entitled to full faith and credit. The Court denied importance to the location of the domicile of the child, and used language indicating that the case was decided on due process grounds.¹² The importance of the *May* case, if any, as establishing a national standard of jurisdiction for mandatory full faith and credit was apparently weakened by *Kovacs v. Brewer*,¹³ where, on facts not unlike those of the *Rice* case, the Court was again afforded an opportunity to clarify this area. The Court reserved the question of full faith and credit, stating that, since the court below had used "alternative grounds" for its decision, it was not required to decide the question.¹⁴ The Court may have, by implication, held that a custody award must be given full faith and

4. 28 U.S.C. 1738 (1952).

5. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

6. Cf. *Barber v. Barber*, 323 U.S. 77 (1944); *Sistare v. Sistare*, 218 U.S. 1 (1910); Comment, *The Finality of Judgments in the Conflict of Laws*, 41 COLUM. L. REV. 878 (1941).

7. *Williams v. North Carolina (II)*, 325 U.S. 226 (1945).

8. *Ibid.* It may well be that jurisdiction could be sufficient for a court, as a matter of discretion, to enforce a judgment without violating due process and yet not be sufficient for full faith and credit to be mandatory. Cf. *Crownover v. Crownover*, 58 N.M. 597, 610, 274 P.2d 127, 135 (1954).

9. 330 U.S. 610 (1947) (child removed by father from rendering state prior to ex parte decree).

10. *Id.* at 615-16.

11. 345 U.S. 528 (1953) (father and children domiciled in granting state, mother domiciled and children present in forum state).

12. *Id.* at 533-34. Cf. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948); Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959). *But see*, *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91, 121 (1953).

13. 356 U.S. 604 (1958) (mother, father and grandfather, who had actual custody by a prior decree, before the modifying court, child domiciled and present in the forum state).

14. On reading *Kovacs v. Brewer*, 245 N.C. 630, 97 S.E.2d 96 (1957), it would seem that the North Carolina court denied that full faith and credit was mandatory where the child was domiciled in the rendering state.

credit unless "changed circumstances" are shown.¹⁵ It would seem, however, that even if *May* did establish a national jurisdictional standard, in the absence of a definitive decision on the applicability of full faith and credit the state courts have a relative freedom of judicial decision in the custody area.

The majority of states, while professing to give full faith and credit to sister state custody awards, have developed several jurisdictional requirements.¹⁶ A number of states use domicile of the child as the sole jurisdictional fact.¹⁷ Others require the physical presence of the child in the rendering state,¹⁸ while still others require both parents before the rendering court.¹⁹ When the award sought to be enforced was not based on the jurisdictional standard recognized by the forum court, the award has been disregarded, purportedly on the theory that full faith and credit is not mandatory. A few courts will apparently enforce an award founded on any of the three bases, and recognize that several states may well have concurrent jurisdiction.²⁰ A minority of courts apparently flatly refuse full faith and credit to custody awards.²¹

The domicile basis of jurisdiction treats the problem simply as one of status and, therefore, subject to the control of the courts of the state where the child is domiciled. The Missouri courts have consistently followed this approach, whether determining their own jurisdiction²² or that of a sister state court whose decree is in issue.²³ Domicile is apparently the sole jurisdictional fact which will be recognized,²⁴ although the court in the *Rice* case placed some emphasis on physical location of the child.²⁵

The *Rice* decision rejected in personam jurisdiction over both parents as a sufficient basis of jurisdiction per se. Whether the court was unaware of, ignored, or felt not bound by the implications of the *May* case is not clear. The court may have felt that, even though the Virginia decree had been based on jurisdiction

15. *Kovacs v. Brewer*, *supra* note 13, at 611 (Frankfurter, J., dissenting). Custody decrees are almost universally subject to modification upon proof of changed circumstances indicating the advisability therefor. See, e.g., *Pearce v. Pearce*, 136 Ala. 188, 33 So. 883 (1903); RESTATEMENT, CONFLICT OF LAWS § 147, comment a, § 148 (1934).

16. See generally 1 EHRENZWEIG, CONFLICT OF LAWS 281-93 (1959). For a complete collection of cases, see Annots., 9 A.L.R.2d 434 (1950), 4 A.L.R.2d 7 (1949).

17. E.g., *Beckmann v. Beckmann*, *supra* note 2.

18. E.g., *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925).

19. E.g., *Anderson v. Anderson*, 74 W. Va. 124, 81 S.E. 706 (1914).

20. *Sampsell v. Superior Court*, 32 Cal. 2d 763, 197 P.2d 739 (1948); *Wallace v. Wallace*, 63 N.M. 414, 320 P.2d 1020 (1958); 10 HASTINGS L.J. 342 (1958).

21. E.g., *Bachman v. Mejias*, 1 N.Y.2d 575, 580, 136 N.E.2d 866, 868, 154 N.Y.S.2d 903, 906 (1956) ("The full faith and credit clause does not apply to custody decrees.")

22. *Beckmann v. Beckmann*, *supra* note 2; *State v. La Driere*, 273 S.W.2d 776 (St. L. Ct. App. 1954).

23. *Dawson v. Dawson*, 241 S.W.2d 725 (K.C. Ct. App. 1951).

24. *Beckmann v. Beckmann*, *supra* note 2; *State v. La Driere*, *supra* note 22; RESTATEMENT, CONFLICT OF LAWS §§ 117, 145-47 (1934).

25. 316 S.W.2d at 331. It is interesting to note that nowhere in the opinion is preference made to any of the Supreme Court decisions in this area.

sufficient to satisfy due process as per the *May* case, a stronger basis of jurisdiction was required for full faith and credit, and that, in view of the indecision in this area, it was free to follow the pre-*May* Missouri authorities. It is suggested that the Missouri courts will continue to reach this result until such time as the Supreme Court renders a definitive decision on the question.

Although each basis of jurisdiction has advantages and disadvantages, which one or what combination of them should be required before granting full faith and credit is a problem not lending itself to ready solution. And, as one court pointed out long ago, since a "change of circumstances" is so easily found, *quaere* whether full faith and credit to custody awards is of more than theoretical importance?²⁶ A national standard of jurisdiction would seem desirable in the interest of stability, however, particularly in preventing the parent who appeared in the prior proceeding from re-litigating merely by crossing state lines. The domicile requirement of Missouri and the majority of courts may be the most acceptable solution, although technical concepts of jurisdiction based on domicile seem somewhat removed from problems of child welfare.²⁷

ANDREW H. LA FORCE II

CONFLICT OF LAWS—MULTI-STATE DEFAMATION IN THE FEDERAL COURTS

*Barry v. Beacon Publications Corp.*¹

Jack Barry, a television entertainer, brought this action for libel in the United States Court for the Southern District of New York against a New York corporation, publisher of the magazine *Lowdown*. Jurisdiction was based on diversity of citizenship. Plaintiff alleged publication of the libelous material in New York, Illinois, Pennsylvania, and other states. Defendant contended that the New York single publication rule and one year statute of limitation should apply to bar the action, since it had been initiated more than one year after publication of the magazine. The court held that, because the action was based in part on publication in states which might not have a single publication rule or a one year statute of limitation, it would save plaintiff's rights by giving him leave to amend. The court noted that in such cases it was bound to apply New York conflict of laws rules, but it found no New York law applicable. On reargument, defendant brought to the court's attention the case of *Gregoire v. G. P. Putman's Sons*² (cited with approval by the federal courts in *Cassius v. Mortimer*³). It was contended that, as shown

26. *Morrill v. Morrill*, 83 Conn. 479, 492, 77 Atl. 1, 6 (1910).

27. *Stumberg, The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42, 62 (1940).

1. 169 F. Supp. 439 (S.D.N.Y. 1958).

2. 298 N.Y. 119, 81 N.E.2d 45 (1948).

3. *Barry v. Beacon Publications Corp.*, 195 F.2d 959 (2d Cir. 1958).

by this decision, New York would apply its internal law to actions brought in New York, even though those actions were predicated on publication in states which might follow the common law multiple publication rule or which might have longer statutes of limitation. The court did not believe that the *Gregoire* case stood for the proposition advanced by defendant, but, noting that the *Cassius* case gave it that interpretation, felt itself bound by the doctrine of stare decisis to dismiss the complaint.

*Erie R.R. v. Tompkins*⁴ decided that the federal courts must apply state law in diversity cases. Two reasons were given for this decision: (1) the Constitution prohibited the development of a federal common law; (2) the purpose of diversity jurisdiction, to prevent discrimination in state courts against non-citizens of that state, was being abused when such non-citizen could choose to have his case tried under a "general" federal law or a certain state's law, whichever was more favorable to him. However, the *Erie* case did not prescribe which state's law should be applied.⁵ In *Klaxon Co. v. Stentor Elec. Mfg. Co.*⁶ this choice of law problem was clarified. There defendant, a domiciliary of Delaware, was sued in the United States Court for the District of Delaware, by plaintiff, a domiciliary of New York, on a contract made and to be performed in New York. The issue was reduced to whether plaintiff should be allowed interest, under a New York statute, on his judgment from the date the action had been brought. It was held that the question must be decided in accordance with Delaware conflict of laws rules.⁷ By analogy the doctrine of *Klaxon* has been applied to tort actions;⁸ however, a few of the cases in the multi-state defamation area have ignored the *Klaxon* concept.⁹

In the *Barry* case the court recognized that the *Klaxon* case compelled it, in the first instance, to look to New York conflict of laws rules.

The court seemed to be bothered (as revealed by its hesitancy to accept defendant's interpretation of the *Gregoire* case) by the fact that New York rules might pre-emptively cut off, or permanently deny, the plaintiff's rights in other states if defendant could not be sued in another jurisdiction. However, this did not

4. 304 U.S. 64 (1938).

5. In the *Erie* case, *supra* note 4, suit was brought in New York on a tort which occurred in Pennsylvania. On remand, *Tompkins v. Erie R.R.*, 98 F.2d 49 (2d Cir. 1938), the court considered only Pennsylvania law, contrary to the holding of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

6. 313 U.S. 487 (1941).

7. In the *Klaxon* case the court did not seem to place its ruling directly on a constitutional basis; however, the opinion noted that if the federal courts were given a choice of which state's law to apply, in essence a federal "general" law of conflict of laws would be the result.

8. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952).

9. *Caldwell v. Crowell-Collier Publishing Co.*, 161 F.2d 333 (5th Cir. 1947), *cert. denied*, 332 U.S. 766 (1947); *Estill v. Hearst Publishing Co.*, 186 F.2d 1017 (7th Cir. 1951); *Sweeney v. Caller-Times Publishing Co.*, 41 F. Supp. 163 (S.D. Tex. 1941).

deter the court in *McGlue v. Weekly Publications, Inc.*¹⁰ from readily dismissing plaintiff's action, where it determined that the Massachusetts conflicts rule applied the single publication-one year statute of limitation test.

Where the *Klaxon* doctrine is in other instances recognized as controlling, widely divergent treatments of it can be found. In *Hartman v. Time, Inc.*¹¹ the Pennsylvania conflict of laws rules referred to the law of the place where the tort occurred. Publication of the libel had occurred on a national scale. It was held that the applicable law was the law of each state of publication. Though the *Hartman* case has been criticized¹² for employing a so-called "checkerboard jurisprudence,"¹³ it seems that the case merely followed *Klaxon* to its logical result. In *Mattox v. News Syndicate Co.*¹⁴ it was determined that New York followed the rule of *lex loci delicti*. Plaintiff was allegedly libeled in Virginia, her domicile, and other states by defendant, a New York newspaper. Judge Learned Hand reasoned that since it was an unworkable procedure to instruct the jury on the law of all places of publication and since plaintiff's reputation was principally established in her domicile, the trial court's decision to apply Virginia law was correct. Thus with some side-stepping of the problem created by *Klaxon*, the court applied the law of the place of plaintiff's primary reputation. In *Dale Sys. v. General Teleradio*,¹⁵ plaintiff was allegedly defamed throughout the eastern part of the United States by a radio broadcast originating in New York. It was determined under New York conflicts rules that the governing law was the law of the state where the last event necessary to make an actor liable took place. Somehow this proposition was equated with five possible rules suggested by Professor Ludwig to be used in multi-state publication situations.¹⁶ Upon finding that the facts of the case satisfied three of the rules and also to a considerable extent the other two, it was held that the New York internal law should govern. The parties in *Brayton v. Crowell-Collier Publishing Co.*¹⁷

10. 63 F. Supp. 744 (D. C. Mass. 1946).

11. 166 F.2d 127 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948).

12. Comment, 48 COLUM. L. REV. 932 (1948).

13. This phrase (which seemingly characterizes the result created by a strict application of the *Klaxon* doctrine) was originated by Wyzanski, J. in the case of *National Fruit Produce Co. v. Dwinell-Wright Co.*, 47 F. Supp. 499, 544 (D.C. Mass. 1942). Though the case involved multi-state unfair competition it is pertinent by analogy to the defamation area. The court there brushed aside the *Klaxon* problem by its interpretation of Massachusetts conflicts rules. The court felt that although Massachusetts generally followed the rule of *lex loci delicti*, it would not do so where the same tort occurred in several states. This discussion was suffixed with the statement: ". . . [U]ntil Massachusetts adopts a checker-board jurisprudence, the *Klaxon* case does not require this Court to do so."

14. 176 F.2d 897 (2d Cir. 1949), *cert. denied*, 338 U.S. 858 (1949).

15. 105 F. Supp. 745 (S.D.N.Y. 1952).

16. Ludwig, "Peace of Mind" in *48 Pieces v. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948). Professor Ludwig believes that the choice of law should be based on the dominant contacts of the tort. The forum, state of principal circulation, point of origination, place of last event, and domicile of the plaintiff, are offered as points of dominant contact.

assumed that New York internal law would govern. At the appellate level this assumption was not disturbed, even though it was held that *Klaxon* was applicable and that therefore, New York conflict of laws rules should have been used.

It should be noted that the *Klaxon* rule is not pertinent where suit is brought and the alleged tort occurs in the same jurisdiction. Plaintiff may divide the multi-state defamatory act into separate causes of action based upon publication in the different jurisdictions.¹⁸ Consequently, where plaintiff in a distinct cause of action alleges publication solely within the state in which the federal court is sitting, it has been held that the internal law of the forum is applicable.¹⁹

It is submitted that the apparent command of *Klaxon* is mainly responsible for the confusion relating to choice of law by federal courts in the multi-state defamation area. The *Klaxon* rule presents a dilemma. The courts can follow the command strictly and logically and reach the *Hartman* result; however, this interpretation subjects the defendant to fifty different libel laws and the jury to incomprehensible instructions. In short, the *Hartman* case, while it probably applies *Klaxon* correctly and may suffice as a cumbersome mechanical solution,²⁰ is not a good conflict of laws approach. On the other hand, the *Klaxon* command can be ignored, subtly or otherwise. This course of action allows the courts to evolve a federal or general law of conflict of laws which is directly contrary to the *Erie* principle. Dean Prosser advocates a return to the law before the *Erie* case.²¹ If the United States Supreme Court were to clarify the situation by choosing between the *Hartman* interpretation and the others, the Prosser solution would still deserve consideration,

18. The UNIFORM SINGLE PUBLICATION ACT, however would require the plaintiff in one cause of action to sue for all the damage suffered due to the publication in the different jurisdictions.

Sections 1 and 2 provide:

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine, or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

A judgment in any jurisdiction for or against the plaintiff upon the substantive merits or any action for damages founded upon a single publication or exhibition or utterance as described in Section 1 shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance.

The act has been adopted in Arizona, California, Idaho, New Mexico, North Dakota, and Pennsylvania.

19. *Hartman v. Time, Inc.*, 166 F.2d 127 (3d Cir. 1947), cert. denied, 334 U.S. 838 (1948); *Kelly v. Loew's, Inc.*, 76 F. Supp. 473 (D.C. Mass. 1948); *Wright v. R.K.O. Radio Pictures*, 55 F. Supp. 639 (D.C. Mass. 1944); *Curly v. Curtis Publishing Co.*, 48 F. Supp. 29 (D.C. Mass. 1942).

20. Although the UNIFORM SINGLE PUBLICATION ACT requires the cause of action to allege damages for publication in all jurisdictions, it does not instruct the forum as to what law it should use. It is therefore probable that the act also would compel the forum to consider the law of each jurisdiction in which publication occurred.

21. Prosser, *Interest of Publications*, 52 *Wash. L. Rev.* 858 (1952).

for it seems that the rationale of the *Erie* command is not pertinent where the federal courts must deal with a tort of national proportions.

It is further submitted that the *Klaxon* doctrine, as exemplified by the decision of the *Barry* case, effects an unconscionable result in the multi-state defamation field. Plaintiff, defamed nationally, may have his rights determined solely and permanently by the conflicts rule of the one jurisdiction in which the defendant can be sued. Only the fortunate plaintiff may be able to sue again in another jurisdiction which has a conflicts rule favorable to him.²² In any event, no superior law, i.e., *Klaxon*, should compel the federal courts to follow a jurisprudence whereby the substantial issues of a multi-state tortious act can only be settled by multiplicity of suits.

HARRY D. PENER

CONFLICT OF LAWS—REPOSSESSION IN MISSOURI UNDER CONDITIONAL SALE CONTRACT—VENDOR NOT REQUIRED TO MAKE REFUND

*Auffenberg Lincoln-Mercury, Inc. v. Wallace*¹

Defendant purchased a station wagon from plaintiff, and as security for the purchase price executed and delivered to plaintiff a conditional sale contract. The place of the contract, the situs of the station wagon, and the delivery of the station wagon to defendant were all in Illinois. The contract provided that the defendant was not to remove the automobile from Illinois without the consent of the plaintiff, but defendant did remove the automobile to Missouri. Upon defendant's default, plaintiff repossessed the automobile² and sued in a Missouri court for the unpaid portion of the purchase price. The trial court dismissed plaintiff's petition for failure to state a cause of action. On appeal, *held*, reversed.

The question on appeal was whether Missouri or Illinois law should govern. Under the law of Missouri plaintiff could not recover since Sec. 428.110, RSMo 1949, would require plaintiff to refund to defendant three-fourths of the amount de-

22. Unanimous adoption of the UNIFORM SINGLE PUBLICATION ACT would seem to bar the unsuccessful plaintiff from suing in other jurisdictions.

1. 318 S.W.2d 528 (St. L. Ct. App. 1958).

2. The only significant fact about which the parties were in dispute was whether the repossession of the automobile occurred in Missouri or Illinois. The plaintiff conceded that it was immaterial where repossession occurred, and the court assumed that repossession took place in Missouri. From the opinion it appears that the court felt this to be an insignificant factor.

Research disclosed no case where a court even discusses the issue of where

fendant had previously paid.³ Since Illinois recognized the validity of conditional sale contracts⁴ and since Illinois had no statute like section 428.110, under Illinois law plaintiff, having given sufficient credits, would be entitled to the balance due.

The general rule is that the validity and effect of a conditional sale contract are governed by the law of the state in which the contract was made and the property was then situated.⁵ This is also the law in Missouri.⁶ However, it has been held in Missouri⁷ and elsewhere⁸ that the parties to a contract may contract with reference to the law of a particular state if it is done in good faith and if the state selected has a real and substantial connection with the transaction or subject matter of the contract. Also, where parties to a conditional sale contract made in one state contemplate the removal of property to another state, they will be held to have contracted with reference to the law of the second state.⁹

The court in the principal case could discern no intention that the law of Missouri should govern or that the property would be removed to this state. The contract, delivery, and payments were all made in Illinois. And most important to the court, the conditional sale contract provided that the defendant was not to remove the automobile from Illinois without the written consent of the plaintiff. Therefore, the court reasoned that on principles of comity the contract should be enforced according to Illinois law unless to do so would contravene the public policy of Missouri.

It is well settled law that a forum state will not enforce a foreign contract that is contrary to its public policy.¹⁰ In *General Motors Acceptance Corp. v. Crawford*¹¹

3. The pertinent portion of the statute reads as follows:

Whenever such property is so sold [under a conditional sale contract] . . . it shall be unlawful for the vendor . . . to take possession of said property without tendering or refunding to the purchaser . . . the sum or sums of money so paid, after deducting therefrom a reasonable compensation for the use of such property, which shall in no case exceed twenty-five per cent of the amount so paid, anything in the contract to the contrary notwithstanding. . . .

4. *Sherer-Gillett Co. v. Long*, 318 Ill. 432, 149 N.E. 225 (1925).

5. *Annotts.*, 13 A.L.R.2d 1312 (1950), 148 A.L.R. 375 (1944), 87 A.L.R. 1308 (1933), 57 A.L.R. 535 (1928), 25 A.L.R. 1153 (1923). For a recent case so holding, see *Shanahan v. George B. Landers Constr. Co.*, 266 F.2d 400 (1st Cir. 1959).

6. *Lewis v. Willingham*, 274 S.W.2d 814 (Spr. Ct. App. 1955); *Lustig v. Montgomery*, 236 Mo. App. 374, 156 S.W.2d 782 (K.C. Ct. App. 1941); *Associates Inv. Co. v. Froelich*, 34 S.W.2d 987 (St. L. Ct. App. 1931); *Parker-Harris Co. v. Stephens*, 205 Mo. App. 373, 224 S.W. 1036 (Spr. Ct. App. 1920).

7. *Liebing v. Mutual Life Ins. Co. of New York*, 276 Mo. 118, 207 S.W. 230 (1918), *aff'd*, 259 U.S. 209 (1922).

8. 17 C.J.S. *Contracts* § 12(b) (1939).

9. *Boston Law Book Co. v. Hathorn*, 119 Vt. 416, 127 A.2d 120 (1956); *cf. Memphis Bank & Trust Co. v. West*, 260 S.W.2d 866 (St. L. Ct. App. 1953). *But cf., Shanahan v. George B. Landers Constr. Co.*, *supra* note 5; *Lustig v. Montgomery*, *supra* note 6.

10. 17 C.J.S. *Contracts* § 16(e) (1939).

11. 31 N.E.2d 689 (Ohio Ct. App. 1939).

an Ohio court held an Ohio statute¹² similar to section 428.110 applicable to a valid Kentucky conditional sale contract on the ground that "to hold that the Ohio statutory requirement, which is remedial, does not apply . . . would give greater rights to nonresidents than to our own citizens."¹³ The court in the principal case, however, held that since section 428.110 did not expressly apply to contracts made out of state it would not be given extraterritorial effect. Thus, the contract in question did not contravene the public policy of this state.

The principal case holds, in accord with the general rule, that the Missouri repossession statute will not apply to a conditioned sale contract when the contract was entered into in another state and the chattel was located there. It seems, however, that an exception is made to this rule when it can be affirmatively shown that the parties contracted with reference to the law of Missouri or contemplated removal of the chattel to Missouri.

TED M. HENSON, JR.

FEDERAL TAXATION—ARE PAYMENTS MADE TO ONE'S SPOUSE FOR RELEASE OF HER MARITAL INTEREST, COSTS OF ACQUISITION?

*Illinois Nat'l Bank v. United States*¹

The plaintiff, conservator of the estate of one Earl Davenport, the taxpayer, sought a refund of taxes paid on the gain from the sale of farm land on the ground that the District Director of Internal Revenue had erroneously disallowed a deduction of \$52,000. The amount had been paid to the taxpayer's wife pursuant to a postnuptial stipulation and settlement of property rights agreement. The spouse had filed suit for divorce, and the taxpayer, in an attempt to settle all property rights, alimony, maintenance and support, paid the amount in dispute in full settlement of all the spouse's right, title, and interest in the real estate of the taxpayer. The court in rendering judgment for the taxpayer disregarded the portions of the agreement pertaining to divorce and waiver of alimony and support money as being null and void, and held the amount involved to be a valid property rights settlement. The basis for the decision was that the value of the inchoate rights could not be computed by mortality tables under the applicable state law, and since they were valuable the taxpayer had

12. OHIO GEN. CODE § 8570 (1910), now OHIO REV. ANN. § 1319.14 (Baldwin 1959). The statute provided:

When property . . . is sold [under a conditional sale contract] . . . the person who sold . . . shall not take possession of such property without tendering or refunding to the purchaser . . . the money so paid after deducting therefrom a reasonable compensation for the use of such property, which in no case shall exceed fifty per cent of the amount paid, anything in the contract to the contrary notwithstanding . . .

13. 31 N.E.2d at 690.

1. 173 F. Supp. 475 (S.D. Ill. 1959).

to pay the amount demanded by the spouse in order to get the taxpayer's rights settled in the property.

The first case involving a factual situation similar to the *Illinois Nat'l Bank* case was *Frank v. Commissioner*.² In this case the release of the inchoate rights of the spouse was deemed to be a *quid pro quo* for the consideration paid her and therefore deductible from the sale proceeds in determining the taxable gain. The situation common to both the *Frank* and *Illinois Nat'l Bank* cases was the presence of conflict in the marital community giving rise to a presumption of an arm's length transaction.³

An estrangement of the marital community was not present in the *Frank J. Digan* case.⁴ In the *Digan* case the taxpayer was not allowed to add the amount paid as an addition to his cost, the court fearing a complete loss of revenue on the sale of such property. The court recognized that allowing the amount to be added to the basis of the property "would afford a widespread means of artificially shifting incidence of tax."⁵ The basis for the decision was that this was not a sale but a release of the marital interest. The court attempted to distinguish the *Frank* case on the grounds of differences in the property laws of the states wherein the property was located. Under more recent authority this would afford no basis for distinction.⁶

The second case contrary to the *Illinois Nat'l Bank* case is *George M. LeCroy*.⁷ The tax court adopted the same view that the state court had adopted in deciding the transaction for state income tax purposes.⁸ Under Arkansas law the wife has an inchoate dower interest in all land whereof her husband is seized during coverture. This was regarded as a contingent expectancy, and joinder in conveyance by the spouse was regarded not as an alienation but a release of a future contingent right. The state court concluded, and the tax court agreed, that the amounts paid to the wife were gifts and that there was no *quid pro quo*. No mention is made of difficulty in the marital community in either the state court or Tax Court decisions. This lends impetus to the consideration that the distinguishing factor between the *Frank* case and the *Digan* line of cases is the presence or absence of an element to give rise to a presumption of an arm's length transaction.

However, *O'Malley v. Yost*⁹ destroys the possibility of bridging the hiatus by

2. 51 F.2d 923 (3d Cir. 1931).

3. In the *Frank* case suit for divorce had been filed when the spouse refused to join in a conveyance unless paid \$40,000 for so doing. Pursuant thereto an agreement was entered into providing that the \$40,000 was to be placed in escrow and only delivered to the spouse in the event the divorce proceeding was decided in her favor.

4. 35 B.T.A. 256 (1937).

5. *Id.* at 257.

6. *O'Malley v. Yost*, 186 F.2d 603 (8th Cir. 1951). The court stated at 605: "The nature and character of the divorced wife's marital rights in the taxpayer's property are controlled by the laws of Nebraska, but the taxability of the compensation paid for the relinquishment of those rights is governed by the federal income tax act."

7. 15 T.C. 143 (1950).

8. *LeCroy v. Cook*, 211 Ark. 966, 204 S.W.2d 173 (1947).

9. 88 F. Supp. 626 (D. Neb. 1950), rev'd, 186 F.2d 603 (8th Cir. 1951), rehearing denied, 189 F.2d 351 (8th Cir. 1951).

using the serenity of the marital community as a gauge. In the *Yost* case the taxpayer and his wife, at the time of the transaction involved, were separated by a decree of separate maintenance. The wife refused to join in the conveyance unless she received one-half of the net proceeds of the sale. The district court held the amount so paid to her was a deductible expense in computing the cost of the sale.¹⁰ The court relied on the *Frank* case as persuasive authority for its position and distinguished the *Digan* case on the grounds that there was not present an estrangement of the marital community in the *Digan* case. On appeal by the government the court of appeals reversed the district court and denied the deduction as an expense on the ground that the payment had been to perfect title, thus intimating that it was a capital expenditure.¹¹ Seizing the opportunity to add the amount paid to the basis of the property the taxpayer filed for a rehearing. On rehearing the court disallowed the amount expended as a capitalized cost relying on precedent as in the *Digan* case.¹² The court using rather abstruse and specious reasoning stated, in reference to the then applicable regulations relating to capital expenditures:¹³

The expenditure in this case, being half of the sale price obtained by the husband from the sale of his property which he paid over to the wife because she demanded it as the condition for joining in her husband's deed, was not an 'expenditure for increasing the value' of the husband's property. The capital it represented had already entered into the tax computation made in full view of the existence of the inchoate interest of the wife in property owned by her husband resulting from marital relations never fully terminated.¹⁴

The court failed to establish what the result would be if the wife were paid for the release of her interest before the contract to sell was entered into, for then the expenditure could be "an expenditure for increasing the value" of the husband's property. The capital it represented would not have already entered into the tax computation. However, in view of the *Digan* line of cases it would appear the government is going to be adamant in disallowing such a cost in view of the fertile area that would be developed in which to evade payment of tax on the sale of appreciated property.

It is to be noted that under the present gift tax regulations the amount given to the spouse for release of her marital interest would be taxed as a gift.¹⁵ This would apparently be true whether the consideration flowed from the husband or the vendee after he had secured the husband's title.¹⁶ However, the fact that it is a gift

10. 88 F. Supp. 626 (D. Neb. 1950).

11. 186 F.2d 603 (8th Cir. 1951).

12. 189 F.2d 331 (8th Cir. 1951).

13. Substantially the same as Treas. Reg. § 1.263(a)-2 (1958).

14. 189 F.2d at 332.

15. Treas. Reg. § 25.2512-8 (1958). See Treas. Reg. § 25.2516-1 (1958) for treatment wherein a divorce is obtained within two years after entering into the agreement.

16. Since it is definitely stated there is no *quid pro quo* a gift will result regardless of the source of the property received.

under the gift tax law may not be controlling upon the courts in deciding the issue under the income tax law.¹⁷

It is submitted that if the *Illinois Nat'l Bank* case is sustained in the court of appeals it will be done so only on its own peculiar factual situation and the tendency to derogate from the *Frank* case will not be reversed. This will be true because of the following factors: (1) Precedent as in the *Digan*, *LeCroy*, and *Yost* cases; (2) the well founded fear of a loss of revenue; (3) the courts' reluctance to become ensnared in a hopeless labyrinth of distinguishing arm's length transactions from tax avoidance schemes; and (4) the recognition that regardless of the worth of marital interests under state law for federal income tax purposes they cannot be *quid pro quo*.

JACK E. EVANS

PUBLIC NUISANCE—INJUNCTION AGAINST UNLICENSED PRACTICE OF MEDICINE

State ex rel. Collet v. Scopel,¹

*State ex rel. Collet v. Errington*²

The prosecuting attorney of Jackson County, Missouri, instituted suits in equity to enjoin the unlicensed practice of medicine by the defendants who are naturopaths.³ The injunctions were sought on the ground that such practice is a public nuisance, dangerous to the public health and against the public policy of the state. The trial

17. *Farid-Es-Sultaneh v. Commissioner*, 160 F.2d 812 (2d Cir. 1947). Corporate stock was transferred to the taxpayer pursuant to an antenuptial contract in exchange for the taxpayer relinquishing her inchoate interest in the property of her affianced husband. The court held that there was a *quid pro quo* thereby permitting the taxpayer to acquire as her basis the fair market value of the stock. To reach this decision it was assumed the gift and income tax law were not *pari materia*. If this decision may be accepted as valid law today, the fact that the marital interest is not consideration under the gift tax law would not prevent it from being a *quid pro quo* under the income tax law.

1. 316 S.W.2d 515 (Mo. 1958).

2. 317 S.W.2d 326 (Mo. 1958) (en banc). Both cases are concerned with the same problem and will be referred to as the *Scopel-Errington* cases.

3. Naturopathy is "A system of physical culture and drugless treatment of disease by methods supposed to stimulate or assist nature." *State Board of Medical Registration & Examination v. Scherer*, 221 Ind. 92, 97, 46 N.E.2d 602, 604 (1943). *State v. Smith*, 233 Mo. 242, 135 S.W. 465 (1911) establishes the rule that to diagnose is to practice medicine. § 334.030, RSMo 1949 makes it a misdemeanor to practice medicine without a license. A penalty of 12 months in the county jail and a \$500 fine was imposed for unlicensed practice in *State v. Jones*, 237 Mo. App. 714, 164 S.W.2d 85 (S. Ct. App. 1942).

court dismissed the petitions in both cases. On appeal, *held*, reversed on the grounds that the defendants were incompetent to practice medicine and their extensive unlicensed practice was in fact a public nuisance.⁴ The Supreme Court of Missouri stated that mere unlicensed practice was not a nuisance *per se*, but here became a nuisance because the particular defendants' lack of ability and education endangered the health and welfare of the community.⁵

It is well established that equity will not enjoin the commission of a crime, but may enjoin an act in spite of its criminal nature, if the rights to be protected are recognized to be within equity's jurisdiction.⁶ An established ground for the exercise of equitable jurisdiction is the abatement of a public nuisance.⁷ However, at one time, courts refused to grant equitable relief to abate a public nuisance which did not threaten injury to property rights.⁸ This requirement has largely been done away with and it is generally recognized today that property rights need not necessarily be involved for the exercise of equitable jurisdiction.⁹ This conclusion has been reached by different approaches: (1) legislatures frequently have enacted statutes giving courts authority to issue injunctions in situations where property rights are not involved;¹⁰ (2) the courts have found property rights in many inconceivable

4. JOYCE, NUISANCE § 5 (1906). A public nuisance is an offense against the public order or economy of the state by unlawfully doing any act or by omitting to perform any duty which the common good, public decency, or morals, or the public right to life, health, and the use of property requires, and which at the same time interferes with the rights or property of the whole community or neighborhood, even though the extent may vary in its effect upon individuals.

5. The court, unimpressed by defendant Scopel's diplomas from various institutions, stated that diligent as he may have been in collecting diplomas, this did not indicate his competence to practice medicine.

6. *In re Debs*, 158 U.S. 564 (1895); *Dean v. Georgia ex rel. Anderson*, 151 Ga. 371, 106 S.E. 792 (1921); *New Orleans v. Liberty Shop*, 157 La. 26, 101 So. 798 (1924); 1 HIGH, INJUNCTIONS § 20a (4th ed. 1905).

7. *Commonwealth v. McGovern*, 116 Ky. 212, 231, 75 S.W. 261, 264 (1903) quoting STORY, EQUITABLE JURISPRUDENCE § 921 (5th ed. 1849). "In regard to public nuisances, the jurisdiction of Courts of Equity seems to be of very ancient date; and has been distinctly traced back to the reign of Queen Elizabeth." *People ex rel. Bennett v. Laman*, 277 N.Y. 368, 380, 14 N.E.2d 439, 444 (1938) quoting from Caldwell, *Injunctions Against Crime*, 26 ILL. L. REV. 259, 268 (1931). "It is apparent that the elasticity of the word 'nuisance' permits courts to stretch it to cover almost any situation which threatens injury to the interests of the public."

8. Chancellor Kent in *Attorney Gen. v. Utica Ins.*, 2 Johns. Ch. R. 370 (N.Y. 1817) applied this rule which was regarded as the law on this subject for many years. He said at 380 "[I]t is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for the Court of equity to interfere at all, and much less preliminarily, by injunction, to put down a public nuisance which did not violate the rights of property, but only contravened the general policy." *Accord*, *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S.W. 47 (1892).

9. *State ex rel. La Prade v. Smith*, 43 Ariz. 131, 29 P.2d 718 (1934); *Stead v. Fortner*, 255 Ill. 468, 99 N.E. 680 (1912); *Kentucky State Bd. of Dental Examiners v. Payne*, 213 Ky. 382, 281 S.W. 188 (1926); *Commonwealth v. McGovern*, *supra* note 7; *State ex rel. Crow v. Canty*, 207 Mo. 439, 105 S.W. 1078 (1907); *People ex rel. Bennett v. Laman*, *supra* note 7.

10. See collection of authorities in *State ex rel. Collet v. Scopel*, 316 S.W.2d 515 (Mo. 1958).

ways;¹¹ (3) the courts have rejected the old argument that property rights are required.¹² The scope of this Note will be confined to the development of the concept of public nuisance injunctions in Missouri.¹³

In 1883 and 1892 injunctive relief was denied the state in two related cases wherein the illegal sale of liquor was recognized to be a public nuisance. In the 1883 case, the St. Louis Court of Appeals denied relief on the ground that a recognized public nuisance would not be enjoined if it were also a crime because the defendant had a constitutional right to a jury trial.¹⁴ In the 1892 case, the Supreme Court of Missouri refused relief on the ground that a public nuisance must invade property rights before equity has jurisdiction to enjoin the act.¹⁵ Although these early cases have never been overruled, the court in the *Scopel-Errington* cases had no difficulty in avoiding these objections.¹⁶

In 1907, the Supreme Court of Missouri, in *State ex rel. Crow v. Canty*,¹⁷ employed a completely different approach which considerably altered the concept of public nuisance injunctions as laid down by the earlier cases. With little regard for these earlier Missouri cases, the court followed a leading Kentucky case, *Commonwealth v. McGovern*,¹⁸ holding that property rights need not be involved in an action to abate a public nuisance. That case enjoined the use of an arena for prizefights, but refused to enjoin the participating prizefighters on the ground that criminal prosecution would adequately prevent their participation.¹⁹ However, the Supreme Court of Missouri enjoined not only the use of an arena for bullfights, but also the individual bullfighters.²⁰ In taking this step, the court acknowledged that a person charged with a crime has a constitutional right to a jury trial, but reasoned that a person does not have a constitutional right to commit an act which is a public nuisance in addition to being a crime.

The *Scopel-Errington* cases are the first in which the Supreme Court of Missouri has relied upon the broad principles in *State ex rel. Crow v. Canty*, to enjoin the

11. *In re Debs*, *supra* note 6 (government had property interest in the mails); *North Bloomfield Gravel Min. Co. v. United States*, 88 Fed. 664 (9th Cir. 1898) (government had property interest in navigable rivers); *State ex rel. Wear v. Springfield Gas & Elec. Co.*, 204 S.W. 942 (Spr. Ct. App. 1918) (state had property interest in fish of the streams).

12. See cases cited note 9 *supra*.

13. See also the following discussions of the problem: Caldwell, *Injunctions Against Crime*, 26 ILL. L. REV. 259 (1931); Notes, 17 TEXAS L. REV. 219 (1939), 24 CORNELL L.Q. 118 (1938); 8 BROOKLYN L. REV. 100 (1939).

14. *State ex rel. Circuit Atty. v. Uhrig*, 14 Mo. App. 413 (St. L. Ct. App. 1883) (unlicensed dramshop).

15. *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S.W. 47 (1892) (illegal sale of beer on Sunday).

16. *State ex rel. Collet v. Scopel*, 316 S.W.2d at 522. The problem of property rights was not discussed. The court only casually mentioned that even if defendant might be criminally prosecuted, this would not stay the strong arm of equity.

17. 207 Mo. 439, 105 S.W. 1078 (1907).

18. 116 Ky. 212, 75 S.W. 261 (1903).

19. *Id.* at 217, 75 S.W. at 266.

20. *State ex rel. Crow v. Canty*, 207 Mo. 439, 105 S.W. 1078 (1907).

unlicensed practice of medicine. These principles are: (1) a public nuisance is an act dangerous to the public health and welfare; (2) a public nuisance may be enjoined in a suit brought on behalf of the state; (3) property rights need not be involved; (4) individuals may be enjoined from committing acts which are also crimes without denying them any constitutional rights. It should be borne in mind, however, that these principles are applicable only when the action is brought in behalf of the state, and the unlicensed practice is in fact a public nuisance.²¹ This is in line with the trend in other jurisdictions.²²

The *Scopel-Errington* cases merely repeat what was stated in *State ex rel. Crow v. Canty* fifty-one years before. Even though it seems that unlicensed practice *per se* cannot be enjoined, the decisions in the *Scopel-Errington* cases should result in a more effective application of the *Medical Practice Act*.²³

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TRADEMARKS—PROTECTION GIVEN TO TRADEMARK ACQUIRED UNDER SECONDARY MEANING DOCTRINE

*Anheuser-Busch, Inc. v. Bavarian Brewing Co.*¹

Plaintiff had the trademark, "Bavarian's," registered under the Lanham Act² for use on beer it manufactured. The mark had been used since 1938 in a local three-state trade area. Defendant, in 1955, began marketing beer under the mark "Busch Bavarian," not in present competition with the plaintiff in his distribution area, but threatening to sell it in the area in the future. Claiming ownership of the registered mark, "Bavarian's," and of a common law mark, "Bavarian," plaintiff charged that defendant's use of the word, "Bavarian," constituted unfair competition and infringement of its mark. The district court enjoined defendant from using the word, "Bavarian," in the plaintiff's three-state marketing area. On appeal, *held*,

21. A similar case failed primarily because the plaintiff was a private group and could not show a property loss. Plaintiff also failed to establish that defendant's unlicensed practice was dangerous enough to be a public nuisance. The court recognized the distinction between the state seeking the injunction and a private person or group as party plaintiff. *Missouri Veterinary Medical Ass'n v. Glisan*, 230 S.W.2d 169 (St. L. Ct. App. 1950).

22. *Burden v. Hoover*, 9 Ill. 2d 114, 137 N.E.2d 59 (1956); *Taylor v. Oklahoma ex rel. Rutherford*, 291 P.2d 1033 (Okla. 1955).

23. §§ 334.010-.150, RSMo 1949. These sections set forth certain requirements which must be met and satisfied by any person, not exempted, who undertakes the practice of medicine.

1. 264 F.2d 88 (6th Cir. 1959).

2. 15 U.S.C. § 1051-1127 (1952), as amended, 39 Stat. 427 (1946), as amended, 45 U.S.C. §§ 1051-1127 (1952), as amended, 68 Stat. 509 (1954).

affirmed. Plaintiff's mark had acquired a secondary meaning and was entitled to protection even though the word is descriptive and geographic. The injunction was properly limited to plaintiff's three-state trade area.

At common law certain words were considered incapable of becoming trademarks which would be protected by the courts. Included in this category were words which were merely descriptive of the goods to which the mark was attached, or which signified the geographical origin of that type of goods.³ The mark, "Bavarian," which was the subject of controversy in the principal case, could fall into either of these categories. However, when a word of this type developed a secondary meaning, an exception to this rule was recognized. Secondary meaning is said to arise when the mark has been used in such a manner that to the public mind it does not merely register in its descriptive or geographical sense, but is instantly associated with the manufacturer or marketer of the goods, rather than the goods themselves.⁴ A right to protected use of words of this type was developed in the English courts during the latter part of the nineteenth century.⁵ This doctrine was recognized by the Supreme Court of the United States shortly thereafter.⁶

A mark which has acquired a secondary meaning still belongs to the public in its primary descriptive sense.⁷ Thus the protection afforded by the common law against unauthorized use of these words appears to be based on the law of unfair competition. No monopoly was conferred, but protection was given against unfair use by a competitor seeking to "palm off" his products as those of the original user of the trademark.⁸ Others were permitted to use the word in its descriptive sense, provided it was not so used as to lead the public to believe that it was purchasing the goods of the original user who had established the secondary meaning.⁹ Therefore, in order to be entitled to relief, it became necessary to show that the imitator's use of the mark was to "palm off" his goods as those of the original proprietor,¹⁰ or that the second use of the mark was likely to cause confusion in the public mind.¹¹

This degree of protection may be contrasted to that generally given a valid statutory trademark, where an injunction, absolute in scope, will usually be rendered against any second use of the mark. The narrower protection afforded secondary meaning marks was only broad enough to prevent confusion and "palming off."¹² Most courts endeavored to limit protection to the possible trade area of the first

3. Canal Co. v. Clark, 80 U.S. (13 Wall.) 311 (1872).

4. Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938).

5. Reddaway v. Banham, [1896] A.C. 199; Wotherspoon v. Currie, [1872] L.R. 5 H.L. 508; Thompson v. Montgomery, [1891] 1 Ch. 35.

6. Elgin Nat'l Watch Co. v. Illinois Watch Case Co., 179 U.S. 665 (1901).

7. Hygrade Food Prods. Corp. v. H. D. Lee Mercantile Co., 46 F.2d 771 (10th Cir. 1931).

8. Sargent & Co. v. Welco Feed Mfg. Co., 195 F.2d 929 (8th Cir. 1952).

9. *Id.* at 934.

10. American Brewing Co. v. Bienville Brewery, 153 Fed. 615 (S.D. Ala. 1906).

11. New Yorker Hotel Corp. v. Pusateri, 87 F. Supp. 294 (W.D. Mo. 1949).

user,¹³ as was done in the principal case. If the common law were applied to the principal case, there would be difficulty in proving the "palming off" or likelihood of confusion, which are necessary elements, since at the time, there was no competition between the products in plaintiff's trade area.

Since secondary meaning exists only in the mind of the buying public, proof of its existence is necessary. Existence is a question of fact and the burden of proof will fall upon the party who is relying on it for validity of his trademark.¹⁴ The principal case is a good illustration. There were introduced (1) evidence of the length of time the mark had been in use, (2) evidence as to expenditures made in advertising the mark and (3) a public opinion survey made within the plaintiff's trade area which indicated that a majority of the members of the public interviewed associated "Bavarian" with beer manufactured by the plaintiff.¹⁵ These factors are generally considered to provide sufficient proof of the status of the mark in the mind of the public.¹⁶ It appears that the court regarded the public opinion survey as the most convincing evidence introduced.¹⁷

Although the law of trademarks has been dealt with by federal legislation off and on since 1870,¹⁸ the Lanham Act¹⁹ has supplanted all former acts and attempts to cover the entire field of federal statutory regulation of trademarks used in, or having effect on, interstate commerce.²⁰ The federal act was designed to create substantive rights from registration, which in turn should create an incentive to register.²¹

The act expressly provides for the registration of trademarks which, although not originally registrable, have attained a secondary meaning.²² In order to register such a mark, the applicant must present proof that he has enjoyed its exclusive

13. *Griesedieck W. Brewery Co. v. People's Brewery Co.*, 56 F. Supp. 600 (D. Minn. 1944), *aff'd*, 149 F.2d 1019 (8th Cir. 1945). The possible trade area includes not only the area where the product is sold, but also that area in which the product may reasonably be expected to be sold in the near future.

14. *Keller Prods. Inc. v. Rubber Linings Corp.*, 213 F.2d 382 (7th Cir. 1954); *King Pharr Canning Operations v. Pharr Canning Co.*, 85 F. Supp. 150 (W.D. Ark. 1949).

15. 264 F.2d at 91.

16. 52 AM. JUR. *Trademarks, Tradenames and Trade Practices* §§ 74-77 (1944).

17. 264 F.2d at 91.

18. The first federal trademark statute, Act of July 8, 1870, ch. 230, 16 Stat. 198, was declared unconstitutional in *The Trade Mark Cases*, 100 U.S. 82 (1879). The Act of March 3, 1881, ch. 138, 21 Stat. 502; Act of Aug. 5, 1882, ch. 393, 22 Stat. 298; Act of February 20, 1905, ch. 592, 33 Stat. 724, and the present act have been sustained on the basis of the commerce clause of the Constitution.

19. 60 Stat. 427 (1946), as amended, 15 U.S.C. §§ 1051-1127 (1952), as amended, 68 Stat. 509 (1954).

20. The common law protection of trademarks is still present for unregistered marks. Most states also have statutes which regulate trademarks used in intrastate commerce. *E.g.*, §§ 417.010-.360, RSMo 1949.

21. Robert, *Commentary on the Lanham Trade-Mark Act*, 15 U.S.C.A. comment to §§ 1051, at 268 (1948).

22. *Id.*

use for the five years immediately preceding the application for registration.²³ The official certificate, which is issued upon registration, is considered to be constructive notice and prima facie evidence of the registrant's ownership of the mark.²⁴ It appears that this statutory recognition may possibly have enlarged the protection available for a secondary meaning trademark, by simplifying the legal proof of its existence.²⁵ The court, in the principal case, agreed with this interpretation and accepted the certificate as sufficient proof of ownership.²⁶

The act also provides that any person who shall infringe or use a "copy, reproduction, or colorable imitation" of the registered mark with goods or services where such use is likely to cause confusion, mistake or deceive purchasers as to source of origin shall be liable in a civil action by the registrant.²⁷ The courts have generally interpreted the act as requiring only "a reasonable likelihood of confusion," and have not required proof of actual confusion. Thus, a similar mark might be permitted in connection with goods of different types or which are non-competitive.²⁸ This further indicates that "palming off" is regarded by the courts to be a necessary finding before protection will be granted to the secondary meaning trademark.²⁹ However, once this element is established, the owner of the registered trademark is entitled to injunctive relief sufficient to eliminate the confusion, and also, in proper cases, treble damages.³⁰

Injunctive relief is often awarded in the form of requiring the second user to unmistakably distinguish his product from that of the original user, either by changing the appearance of the goods, or by other proper means.³¹ If this is not sufficient to eliminate confusion, he may be ordered to desist from use of the

23. 60 Stat. 427, 51 U.S.C. § 1052(f) (1946).

24. Robert, *supra* note 21, at 280.

25. Although a registration under the Act of 1905 was considered to constitute prima facie evidence of ownership, the only practical effect was to shift the burden of proof. The registration did not constitute notice of any kind, and upon proof of bona fide adoption and use without knowledge of the registrant's use and registration, the statutory presumption could be overcome. The new act, by making registration conclusive evidence, has remedied this deficiency. Robert, *supra* note 21, at 279-80.

26. 264 F.2d at 90.

27. 60 Stat. 427, 15 U.S.C. § 1114 (1946).

28. Pure Oil Co. v. The Pep Boys—Manny, Moe & Jack, 128 F.2d 34 (D.C. Cir. 1942); Consolidated Cosmetics v. Neilson Chem. Co., 109 F. Supp. 300 (E.D. Mich. 1952).

29. Consolidated Cosmetics v. Neilson Chem. Co., *supra* note 28.

30. 60 Stat. 427, 15 U.S.C. § 1114(1b). Treble damages may be allowed where the infringement is willful.

31. In Shredded Wheat Co. v. Humphrey Cornell Co., 250 Fed. 960 (2d Cir. 1918), the court ordered the second manufacturer to mark his shredded wheat biscuits in such a manner that they could be readily distinguished from those made by the plaintiff. In Sunbeam Lighting Co. v. Sunbeam Corp., 183 F.2d 969 (9th Cir. 1950), *cert. denied*, 340 U.S. 920 (1951), the court permitted the second user to continue to use the name, but required him to change the style in writing of the mark so it could be readily distinguished from the mark used by the original

mark entirely,³² or to desist from using it within the area of possible competition with products produced or marketed by the original user.³³ An injunction absolute in scope is usually avoided unless it is the only possible way to prevent confusion and deception of the public.³⁴

In the principal case, adequate relief might have been given by issuing an order requiring the defendant to change the appearance of its mark or label so as to unmistakably distinguish it from that of the plaintiff. The facts of the case are silent as to whether a comparison of the labels was made for similarity in appearance. In view of the distinctive label used on Busch "Bavarian" beer, this would seem to offer adequate relief. Of course, this manner of relief would be impracticable in regard to beer sold by draft. In such case the injunction would have been necessary, but it could easily have been limited to draft beer only. However, it does appear that the relief granted the plaintiff can well be supported by the act and prior decisions.

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32. *Barton v. Rex-Oil Co.*, 29 F.2d 474 (3d Cir. 1928).

33. *Hiram Walker & Sons v. Penn-Maryland Corp.*, 79 F.2d 836, 839 (2d Cir.

1935); *Griesedieck W. Brewery Co. v. People's Brewery Co.*, *supra* note 13.

34. *Barton v. Rex-Oil Co.*, *supra* note 32.