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NOTES

THE ESTABLISHMENT OF THE UNIVERSITY OF CHICAGO LAW REVIEW

The issue of this, the first number of the University of Chicago Law Review, marks another step in the growth of the school. The Review will have a double purpose harmonious with the character and aims of the school itself. The Law School has in general two points of view: that of a school of national scope with interests as broad as the whole field of the law, and that of a school situated in the city of Chicago and consequently having a very direct and vital interest in the legal problems of the city and state in which it is. Both these points of view and these interests will be manifest in the various departments of the Review.

The main divisions of the magazine will constitute a carefully considered adaptation of the arrangements generally prevailing in law reviews. The leading articles will be by outstanding members of law school faculties and of the bench and bar. The range of topics discussed will, it is hoped, be broad. They will always be of general interest; many of them will also be of particular local interest.

The prominence given to the department of Legislation and Administration is but a proper recognition of the growing importance of these divisions of our legal systems. This department will treat in these fields both general problems and specific measures, actual and proposed.

The Comment department will be a medium for the publication of a wide variety of shorter articles by teachers, members of the bar, and students, in recognition of a need for which little provision has hitherto been made.

The sections devoted to case discussions will deal in varying fashions with the more important current decisions as they appear. This detailed analysis of particular recent cases with a careful consideration of the relation between the individual case and the body of related decisions will, it is believed, prove to be for the practicing lawyer one of the most valuable parts of the Review.

The Book Review department will provide impartial, adequate reviews of the more important legal publications as they appear.

The Review is primarily and essentially a product of the student body. It, of course, has and will continue to have the whole-hearted endorsement and assistance of the Faculty, but the responsibility of the Review and the credit for it will belong to the students of the Law School.

After a careful consideration of all the factors involved, it has been decided to begin publication of the magazine on a quarterly basis. The value of a professional publication of any sort is not in its quantity but in its quality. The issuance of the magazine on a quarterly basis will permit a careful editing of material and a thoroughness in preparation and in details of publication that will enable the Review to make definite contributions in the field of legal literature.

HARRY A. BIGELOW, *Dean*

THE UNIVERSITY OF CHICAGO LAW SCHOOL

POWER OF FEDERAL APPELLATE COURT TO REVIEW RULING ON MOTION FOR NEW TRIAL

In the latest case¹ dealing with the power of a Federal Appellate court to review the action of the trial court in overruling a motion for a new trial, the Supreme Court was apparently unable to escape the "dead hand" of the common law, though the rule invoked may work grave injustices under our judicial organization for which it was never designed.

¹ Fairmount Glass Works v. Cub Fork Coal Co., 53 Sup. Ct. 252 (1933).

The facts involved were these:

The plaintiff brought a suit in the United States District Court for the breach of a contract to buy a large amount of coal. The jury returned a verdict in favor of the plaintiff for one dollar damages. The trial court overruled plaintiff's motion for a new trial and entered judgment on the verdict. On appeal, the Circuit Court of Appeals found that under the most favorable view of the evidence for the defendant the plaintiff was entitled to recover at least \$18,250, if it was entitled to recover at all. It treated the verdict for the plaintiff as settling its right to recover and remanded the case for a trial of the amount of damages only. On certiorari the Supreme Court, Mr. Justice Stone and Mr. Justice Cardozo dissenting, reversed the judgment of the Court of Appeals on the ground that the ruling of the trial court in refusing to set aside the verdict was not reviewable.

There is nothing new in the general rule that the refusal of a new trial by a federal court is not ordinarily the subject of exception and appellate review. From a very early period the English courts, sitting in banc, exercised the power to grant new trials for misconduct of the jury.²

As long as the doctrine prevailed that a jury might properly decide on their own knowledge, it was impossible to obtain a new trial because a verdict was against the evidence or not supported by the evidence.³

For a false verdict the writ of attaint was the exclusive remedy.⁴

In 1655 a new trial was granted for excessive damages on the assumption that the jury must have been prejudiced.⁵

In 1683 a new trial was apparently granted because the jury found "contrary to the direction of the court."⁶

By the middle of the seventeen hundreds the power of the court in banc to grant new trials for all sorts of errors and mistakes on the part of the jury was firmly established.⁷

² Anon. 14 H. VII, 1 (3) (1499) (motion for a venire de novo sustained because the jury ate and drank during their deliberations).

Metcalf v. Dean, Cro. Eliz. 189 (1590) (venire de novo awarded because the jury examined a witness privately).

Apparently at this time the distinction taken in *Witham v. Lewis*, 1 Wilson 48 (1744), that an application for a venire de novo was based on error on the face of the record and a motion for a new trial on extrinsic matters, had not been recognized.

³ Slade's Case, Style, 138 (1648).

⁴ Slade's Case, *supra*; Bushell's Case, Vaughan, 135 (1670).

⁵ Wood v. Gunston, Style, 466 (1655). This appears to be the earliest reported case of a new trial without some specific act of misconduct on the part of the jury. The statement in the opinion that "It is frequent in our books for the court to take notice of *miscarriages* of juries, and to grant new trials upon them" probably refers to the misconduct cases.

⁶ Kaines v. Knightly, Skinner, 54 (1683).

⁷ Woodford v. Eades, 1 Strange 425 (1721); Berks v. Mason, Sayer, 456 (1756); Bright v. Eynon, 1 Burr. 390 (1757); in this latter case, Lord Mansfield observed: "Trials by jury, in civil cases, could not now subsist without a power somewhere to grant new trials."

From a very early period new trials were granted for errors⁸ of law on the part of the trial judge, but there was no occasion for appellate review of a refusal of a new trial on such grounds, because the party always had an adequate remedy by exception to the original ruling at the trial.

Obviously a motion for a new trial was the exclusive method of calling attention to misconduct or mistake on the part of the jury, since rulings by the judge were the only subjects of exception. But under the English practice there was little, if any, need for appellate review of the refusal of a new trial on these grounds, because the application was heard by a bench of four judges who were quite as competent to handle the matter as any reviewing court. In fact a very small percentage of the English cases ever were carried to an appellate court at all. This seems to indicate that the work of the court in banc was in the main satisfactory⁹ to the legal profession and their clients.

When the Judiciary Act of 1789 was adopted by Congress there were no English precedents for appellate review of an order refusing a new trial, and it was accordingly held that such orders were not reviewable, for which holding a long line of cases is cited in an exhaustive note to the opinion. It should be noted that the Congressional scheme for something in the nature of a court in banc soon failed in practice, with the result that in the federal courts, as in nearly all of the state courts, a motion for a new trial is passed on by a single judge, and hence the litigant has no remedy for his errors in this particular unless the Circuit Court of Appeals has some power of review.

Doubtless, legislation would be necessary to give the Circuit Court of Appeals the same power of appellate review that is today exercised by most of the state appellate courts.

Under the implied adoption of the common law by the Judiciary Act, where the question is one of fact, such as the ordinary question of excessive or inadequate damages, depending on different views of the evidence, the decision of the trial judge doubtless is conclusive.

But the Supreme Court has recognized that the trial judge does not have an absolutely free hand in dealing with a motion for a new trial. He may not exclude competent evidence bearing on a question raised by the motion, and his action in this regard is reviewable.¹⁰ When a state supreme court, dealing with a case under the Federal Employers' Liability Act, found that a verdict was excessive because of prejudice on the part of the jury, but allowed a remittitur instead of a new trial, the Supreme Court found no difficulty in reviewing this ac-

⁸ *Reg. v. Corporation of Helston*, 10 Mod. 202 (1714), and innumerable later cases where new trials were granted for misdirection, errors in rulings on evidence, *etc.*

⁹ At a much later date the common law Procedure Act (1854) provided for appellate review of rulings on motions for new trials not involving matters of discretion. Under the Judicature Act and the present rules of court the English Court of Appeals seems to have the powers of a trial court in dealing with new trials, and its decisions are reviewable by the House of Lords. *Jones v. Spencer*, 77 L.T.R. 536 (1898).

¹⁰ *Mattox v. United States*, 146 U.S. 140 (1892).

tion, and reversing it as an error of law.¹¹ It may be taken, then, that the district court may commit errors of law in refusing a new trial, and of necessity the Court of Appeals must have the power to determine whether such an error has been committed. It was urged in this case that it was such an error to refuse to set aside a verdict for nominal damages where the evidence conclusively established substantial damages, but the majority opinion takes the position that the trial judge was not bound to treat the verdict for nominal damages as settling the right to recover, because the jury *may* have returned that verdict in order to saddle the costs on the defendant, without really finding the issues for the plaintiff. It is, of course, possible that the jury may have indulged in that misconduct, but it is a startling doctrine that the discretion of the single judge authorizes him to bind a party on the basis of a mere speculative possibility. Besides, there is nothing to indicate that the trial judge acted on such a theory.

There is a well known doctrine, applied in a number of tort cases cited in the opinion, that a court may properly refuse to grant the plaintiff a new trial for inadequate damages where under the evidence it was fairly clear that the plaintiff was not entitled to recover at all.¹² The case at bar apparently does not present that situation.

The opinion states:

"The plaintiffs were not entitled to a directed verdict; the evidence was voluminous; and on some issues at least conflicting. The instructions left the contested issues of liability to the jury. The verdict may have represented a finding for the defendant on those issues."

It is to be regretted that the majority opinion should strain the doctrine of discretion to limit the power of appellate review, when the absence of a court in banc has deprived the litigant of an important common law safeguard.

E. W. HINTON*

¹¹ *M. & St. P. Ry. Co. v. Moquin*, 283 U.S. 520 (1930). In a note appended to the opinion in the principal case the following reference to the Moquin case appears: "Compare *Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin*, 283 U.S. 520, 51 Sup. Ct. 501, 75 L. Ed. 1243, in which the *trial court*, expressing the opinion that the verdict was excessive because of passion and prejudice, nevertheless refused, on the filing of a remittitur, to grant a new trial." This appears to be a mistake. An examination of the printed record in the Moquin case fails to disclose any such opinion by the trial court. So far as the record shows, the defendant's original motion for judgment or for a new trial was overruled without an opinion. On appeal from this order the *Supreme Court* of Minnesota found that the verdict was excessive because of passion, *etc.*, but affirmed on condition of a remittitur by the plaintiff. When the case was remanded to the trial court, plaintiff filed a consent to a remittitur, and judgment was entered in accordance with the *mandate* for the reduced amount.

¹² *Johnson v. Franklin*, 112 Conn. 228, 152 Atl. 64 (1930).

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THE NATURE OF THE DEFENSE OF ENTRAPMENT

The case of *Sorrells v. United States*¹ is the most recent of a growing line of decisions in which the Supreme Court has found occasion to define the legal consequences—with respect to prosecution for federal crimes—of the use of methods by federal law-enforcement officers which are unlawful or contrary to sound morals. Sorrells was indicted for violation of the National Prohibition Act.² He entered a plea of not guilty and upon his trial relied upon the defense of entrapment. The evidence showed that one Martin, a prohibition agent, while posing as a tourist, called at the home of the defendant. During their conversation it was discovered that both were war veterans and had served as members of the same Division. Martin twice requested the defendant to procure him some liquor, but defendant stated he had none. After some further exchange of war reminiscences, Martin again renewed his request, whereupon defendant left his house and returned shortly with some liquor which he sold to Martin. Martin admitted that he persuaded the defendant to secure the liquor with the purpose of prosecuting him for procuring and selling. Defendant introduced evidence of good character at the trial, and the government in rebuttal introduced testimony that the defendant had the general reputation of a rum runner.

The trial court denied a motion for a directed verdict for the defendant, and also refused to submit the issue of entrapment to the jury, ruling that “as a matter of law” there was no entrapment. Defendant was found guilty and sentenced to imprisonment, which judgment was affirmed by the Circuit Court of Appeals for the Fourth Circuit.³ The Supreme Court granted a writ of certiorari limited to the question whether the evidence was sufficient to go to the jury upon the issue of entrapment.⁴ *Held*, judgment reversed. The trial court erred in holding that as a matter of law there was no entrapment. The issue should have been left to the jury. Mr. Justice Roberts, with whom concurred Mr. Justice Brandeis and Mr. Justice Stone, agreed in result but argued that the Supreme Court ought to remand with instructions to the court below to quash the indictment and discharge the defendant. Mr. Justice McReynolds alone favored the affirmance of the judgment.

The instant case is interesting chiefly for the difference of opinion which developed between the judges as to the legal effect of proof of entrapment. The availability of entrapment as a defense or as a bar to prosecution in the federal courts had not been squarely passed upon by the Supreme Court,⁵ but in a con-

¹ 53 Sup. Ct. 210 (1932).

² 41 Stat. 305 (1919), 27 U.S.C. § 1 (1926), as amended, 46 Stat. 1036 (1931), 27 U.S.C. Supp. VI § 91 (1933).

³ 57 F. (2d) 973 (1932).

⁴ 53 Sup. Ct. 19 (1932).

⁵ See *Casey v. United States*, 276 U.S. 413, 48 Sup. Ct. 373 (1928), where the Supreme Court touched upon the question but found it unnecessary upon the facts presented to decide it. A dissenting opinion by Mr. Justice Brandeis foreshadowed the position adopted in the principal case in Mr. Justice Roberts' concurring opinion.

siderable number of cases in the lower courts, involving for the most part alleged violations of the narcotic and liquor laws and with facts substantially similar to those of the present case, the defense had in one form or another been sustained.⁶ In the state courts there had been more difference of view.⁷ It seems sufficiently clear that Martin's activities herein went further than those of an under-cover operative creating a favorable occasion for the defendant to offer to sell liquor, if such were his business or natural inclination. By his own testimony and that of others present at the time, it is apparent that the criminal intent or design originated in his mind, and that, if he had left defendant to his own devices, the latter would not have committed any violation of the statute. It is probable that there will be little disposition to question the desirability of the result that the Supreme Court reached in the case, for sound policy seems to demand that the courts should within the proper limits of the judicial power discourage those forms of official conduct which are calculated to create crime and disrespect for law rather than to promote its proper enforcement.

In this, all of the judges, save possibly Mr. Justice McReynolds, are agreed. Their difference is as to the theory and method by which the result shall be reached. Mr. Chief Justice Hughes, speaking for five members of the Court, argues that entrapment is a defense under the general issue because a sale of liquor induced by methods amounting to an entrapment is not a crime within the purview of the Prohibition Act. While it is true that the general language of the Act is broad enough to comprehend such a case, the Court ought not to at-

⁶ *Woo Wai v. United States*, 223 Fed. 412 (C.C.A. 9th 1915); *Butts v. United States*, 273 Fed. 35 (C.C.A. 8th 1921); *Lucadamo v. United States*, 280 Fed. 653 (C.C.A. 2d 1922) (semble); *Zucker v. United States*, 288 Fed. 12 (C.C.A. 3rd 1923) (semble); *Cermak v. United States*, 4 F. (2d) 99 (C.C.A. 6th 1925); *Capuano v. United States*, 9 F. (2d) 41 (C.C.A. 1st 1925); *Gargano v. United States*, 24 F. (2d) 625 (C.C.A. 5th 1928); *O'Brien v. United States*, 51 F. (2d) 674 (C.C.A. 7th 1931). The Circuit Court of Appeals of the Fourth Circuit in deciding the principal case expressly declined to follow the rule laid down in an earlier case in accord with the decisions in the other circuits. See *Newman v. United States*, 299 Fed. 128, 131 (1924).

⁷ An exhaustive annotation to the case of *Butts v. United States*, *supra* note 7, in 18 A.L.R. 146 collects both the federal and state decisions on entrapment. The leading case in a state court refusing to follow the doctrine of entrapment where the element of want of consent was not an essential constituent in the crime is *People v. Mills*, 178 N.Y. 274, 70 N.E. 786, 67 L.R.A. 131 (1904).

The opinion of Mr. Chief Justice Hughes properly distinguishes the principal case from three other types of cases where entrapment has been held a defense because it in some way negatives the existence of some element necessary by definition to the existence of crime. In cases of the first type the trap negated the existence of knowledge that the person to whom liquor was sold was an Indian. *United States v. Healy*, 202 Fed. 349 (D.C. 1913); *Voves v. United States*, 249 Fed. 191 (C.C.A. 1918). In the second group the entrapment negated the want of consent which was an essential element of the crime. *Connor v. People*, 18 Colo. 373, 33 Pac. 159 (1893) (larceny); *Williams v. Georgia*, 55 Ga. 391 (1875) (larceny); *State v. Adams*, 115 N.C. 775, 20 S.E. 722 (1894) (larceny). In the third class are cases where physical conditions essential to an offense are absent if there be a trap, such as the element of breaking in burglary. *Regina v. Johnson*, Car. & Mar. 218 (1841) (burglary); *Love v. People*, 160 Ill. 501, 43 N.E. 710 (1896) (burglary); *People v. McCord*, 76 Mich. 200, 42 N.W. 1106 (1889) (burglary).

tribute to Congress an intent to accomplish a result contrary to what seems to be the sound policy unless specific and unequivocal language leaves no room for a different interpretation. There is no such language here. It is a recognized function of courts so to construe statutes, penal and otherwise, as to avoid absurd consequences or flagrant injustice. The Chief Justice intimates that cases might arise where because of the enormity of the defendant's act an otherwise applicable statute would not receive this restrictive interpretation. His opinion also asserts that the defense of entrapment does not consist simply in the fact that the particular act was committed at the instance of federal officials, but that evidence of predisposition and criminal design of the defendant is admissible for the purpose of showing that his act was not altogether the product of creative official activity.

The majority treats as a misconception the view that the defense is in the nature of a plea in bar, involving not a denial of guilt but rather an assertion that the defendant is entitled to go free whether he be innocent or guilty. Instead it operates to show that defendant was not guilty of the sort of conduct which is made criminal by the statute. The Chief Justice asserts, though without citation of authority, that this view accords with the practice followed by the lower federal courts.

Mr. Justice Roberts regards as unwarranted this reliance upon statutory construction and insists that the applicable principle is that "the courts must be closed to the trial of a crime instigated by the government's own agents." He regards the doctrine of entrapment in criminal law as an analogue to the rule applied by courts in civil proceedings by virtue of which judicial aid is refused "to the perpetration and consummation of illegal schemes" and the use of legal processes for the consummation of wrongs is denied. He regards as involving an irrelevant balancing of equities between government and the accused the doctrine approved by the majority under which the defendant's previous course of conduct or bad reputation is permitted to be proved, asserting that the government has no equity, and under any sound policy will be denied all advantage whenever the offense is instigated by its own official. The implication seems to be that there will be no such estoppel of the government where its agent's conduct amounts to something less than instigation or inducement. His opinion asserts that the view of the minority renders unnecessary any distinction based upon the seriousness of the crime. He insists that, since the issue of entrapment has no connection with guilt or innocence, it may be raised at any point in the proceeding, even by writ of habeas corpus;⁸ also that it is the duty of the court at any stage of the case, if proof of entrapment appears, to quash the indictment and set the defendant at liberty.

If the decision of this controversy is made to turn solely upon the moral aspects of the whole matter, Mr. Justice Roberts' analysis would seem entirely convincing. It is difficult to see what bearing the instigation of defendant's act by Martin has upon his guilt or innocence, if those terms are used in the ethical

⁸ *United States ex. rel. Hassel v. Mathues*, (D.C.) 22 F. (2d) 979 (1927).

sense. Such instigation becomes legally material only when the instigator is a government officer. Since the defendant was ignorant of Martin's true character, it can scarcely be maintained that such character had any effect upon the moral quality of his act. In this respect, the present case differs materially from that situation where a court imports the requirement of scienter by construction into a penal statute in order to save a defendant who is morally innocent.⁹ But guilt or innocence in a legal sense depends upon whether or not defendant's conduct falls within the legal definition of a crime, and the above considerations do not militate decisively against the propriety of reading an exception covering cases of entrapment into a statute.

The position of the learned justice is not itself free from difficulties. Like the Chief Justice he asserts with doubtful justification that the practice in the lower courts is in accord with his views.¹⁰ His opinion seems highly unsatisfactory in its treatment of *Ex parte United States*,¹¹ which is cited as supporting his position, though interestingly enough it is also cited by the Chief Justice as a supporting authority. If the case is in point at all, its tendency seems to the writer contra to Mr. Justice Roberts' view. The assertion that the minority position has the merit of avoiding the necessity of any distinction based upon the gravity of the crime with which a defendant is charged seems a highly questionable one. The same considerations of policy which would cause the majority to refrain from reading entrapment into a penal statute as a defense would in all probabil-

⁹ There are a number of instances in which courts have avoided a literal interpretation of a penal statute by importing common law defenses into it by construction. See 1 Bishop, *Criminal Law* (9th ed. 1923), § 291b. The leading case is *Regina v. Tolson*, 23 Q.B.D. 168 (1889).

¹⁰ As a matter of fact little attention has been given in the cases in the lower courts to the issue which gives rise to the disagreement between the judges here. Mr. Justice Roberts is able to cite cases where proof of entrapment resulted in dismissal of prosecution and liberation of the defendant before verdict. But in the bulk of the cases the trial court has left the matter to the jury under instructions permitting an acquittal.

¹¹ 242 U.S. 27, 37 Sup. Ct. 72 (1916). In this case the Supreme Court decided, perhaps unfortunately, that the federal courts did not possess inherent power to suspend indefinitely the execution of a sentence imposed following a plea of guilty to an indictment charging a federal crime upon considerations extraneous to the legality of the conviction. Mr. Chief Justice Hughes relies on this case to support his argument that the Court is without power to interfere with the prosecution in an entrapment case if the defendant has in fact violated the federal statute, merely because of views as to policy which the Court entertains. (See p. 215). Mr. Justice Roberts argues that the power to construe which the majority rely upon here should equally apply to enable the penalties prescribed by federal criminal law to be modified, but that the decision in the above case settles that this may not be done.

The weakness in Mr. Justice Robert's argument is that the analogies the majority rely upon in their process of construction herein had no application to the situation in *Ex parte United States*, once it had been decided that the federal judicial power did not *per se* include the power to suspend which was there exercised. The case on its facts does not necessarily exclude the position taken by Mr. Justice Roberts and his colleagues, but that position is difficult to reconcile with much of the reasoning of Chief Justice White's opinion. See 37 Sup. Ct. at p. 78.

ity cause a court which had adopted the minority view to restrict its definition of entrapment in such manner as to exclude a plea in bar or a motion to quash.¹²

It is possible that the policy underlying the entrapment doctrine will be better effectuated by a rule which leaves the question to the court. Perhaps juries will be prone to be influenced unduly by the popularity or unpopularity of the statute with the violation of which a defendant is charged if it is left to them to pass upon the defense. As against this rather speculative merit, the minority view faces the criticism that its rationale involves the assumption of a new constitutional doctrine. Once it is admitted that the statute was violated by Mr. Sorrells, then it follows from the position adopted that Congress is without power to bring a defendant who has been entrapped into a violation of an otherwise valid penal statute to the bar of justice. Conceivably that is a defensible position, but it seems a rather inconsistent one to be taken by judges who have in other cases properly insisted that courts should go to any reasonable extreme to avoid deciding an issue of the constitutional power of Congress. If there were no reason other than this, it would seem that the majority of the Court were justified in disposing of the present case by construction of the statute.

The question may well be raised, however, as to what constitutional basis there would be for the implication of this new limitation. It is true that the Supreme Court has refused to permit the use of evidence in criminal prosecutions, provided a timely objection is made, where it has been obtained by methods which violate the express constitutional guaranties against unlawful search and seizure.¹³ But it must be remembered that the Court, though by a bare majority, refused to extend this protection by analogy to a case where the methods used, while clearly unlawful, were not regarded as violating these constitutional prohibitions.¹⁴ The instant case seems in one aspect weaker than the wire-tapping case, since it is difficult to see within what constitutional prohibition entrapment might be held to fall by analogy. Possibly it might be argued that an attempt by Congress to control this matter in a manner contrary to the Supreme Court's own view of sound policy would be a legislative invasion of the field of judicial power. But even under a constitutional system such as ours where the content of constitutional doctrine is so largely dependent upon the views of the judges as to policy, sound discretion would seem to suggest that such a position should not be taken, if it is to be taken at all, until such time as necessity requires.

ARTHUR H. KENT*

¹² It seems unlikely that the doctrine of entrapment could be availed of under either view if the crime with which defendant is charged were atrocious in character or threatened the safety or vital interests of the government. It is significant that the great majority of the federal cases have involved liquor and narcotic violations.

¹³ *Weeks v. United States*, 232 U.S. 383, 34 Sup. Ct. 341 (1914); *Agnello v. United States*, 269 U.S. 20, 46 Sup. Ct. 4 (1925).

¹⁴ *Olmstead v. United States*, 277 U.S. 438, 48 Sup. Ct. 564 (1928).

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THE NECESSITY OF MOTION BEFORE TRIAL TO SUPPRESS
EVIDENCE OBTAINED BY ILLEGAL SEARCH
AND SEIZURE

The two cases, *Bock v. City of Cincinnati* and *Tapp v. Same*,¹ recently considered together by the Court of Appeals of Ohio, Hamilton County, stir interest in the question of the admissibility of evidence obtained by illegal search and seizure.

Two views upon the question are now somewhat crystallized; each has commanded analysis and criticism by eminent jurists on the bench and off.² A large majority of the courts in this country have held that evidence otherwise competent is admissible notwithstanding the unlawful method by which it has been obtained.³ On the other hand, a respectable minority, headed by the United States Supreme Court, have taken the view that full effect can be given to the constitutional guaranties against unreasonable search and seizure and self incrimination only by making such evidence inadmissible against the accused party.⁴ The Illinois Supreme Court has aligned itself with the latter group.⁵

However, those courts which follow the minority rule have split on the question as to whether, as a matter of procedure, a defendant must make a motion prior to the trial for the return of, or to suppress, the evidence obtained by the illegal search and seizure. Two views are evident in the decisions.

One line of authority adheres to the rule that this is simply a question of competency of the evidence and, as in cases of other such evidential questions, it is proper to make an objection to evidence at the time it is sought to be introduced at the trial.⁶ Some of the courts taking this view regard it as the only proper

¹ 183 N.E. 119 (1932).

² 4 Wigmore, Evidence (2nd ed. 1923), 626, §§2183-4; Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 386 (1921); Chafee, The Progress of the Law, 35 Harv. L. Rev. 673, 694 (1922); Atkinson, Unreasonable Searches and Seizures, 25 Col. L. Rev. 11 (1925); Harno, Evidence Obtained By Unlawful Searches and Seizures, 19 Ill. L. Rev. 303 (1925); Knox, Self Incrimination, 74 Univ. Pa. L. Rev. 139 (1925).

³ *People v. Adams*, 176 N.Y. 351, 68 N.E. 636 (1903), aff. in 192 U.S. 585, 24 Sup. Ct. 372 (1904); *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926) and cases cited therein.

⁴ Amendments IV and V, U.S. Constitution; and see corresponding sections in state constitutions; *Boyd v. United States*, 116 U.S. 616, 6 Sup. Ct. 524 (1886); *Weeks v. United States*, 232 U.S. 383, 34 Sup. Ct. 341 (1914); *Gouled v. United States* 255 U.S. 298, 41 Sup. Ct. 261 (1921); *Agnello v. United States*, 269 U.S. 20, 46 Sup. Ct. 4 (1925); *Grau v. United States*, 278 U.S. 124, 53 Sup. Ct. 38 (1932). No attempt is made to cite the authorities in full.

⁵ *People v. Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923); *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924).

⁶ *United States v. Wong Quong Wong*, 94 Fed. 832 (1899); *State v. Sheridan*, 121 Iowa 164, 94 N.W. 730 (1903); *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (1920); *Blum v. State*, 94 Md. 375, 51 Atl. 26 (1902); *Holmes v. State*, 146 Miss. 351, 111 So. 860 (1927); *Walker v. State*, 239 Pac. 191 (Okla. Crim. App. 1925); *State v. Slamon*, 73 Vt. 212, 50 Atl. 1097 (1901); *State v. Wills*, 91 W.Va. 659, 114 S.E. 261, 24 A. L. R. 1398 (1922); and see *Holmes v. United States*, 275 Fed. 49 (1921); Chafee, The Progress of the Law, 35 Harv. L. Rev. 673 (1922).

method which may be used to raise the issue,⁷ whereas most of them hold that it is proper to make an objection at the time of the trial, or to make a motion before the trial for the return of, or to suppress, the evidence wrongfully obtained. The general attitude is, that while this may be a collateral issue, and some delay may be caused in settling it, yet it is no more a collateral issue and would cause no greater delay than would the raising and settling of an objection to evidence for any other reason.⁸ There would seem to be much merit in this rule. As for the accused man, it insures him against losing his immunity from being faced with this type of evidence, in those cases where he was unaware that it was going to be used until the trial, and so had no earlier chance to protest its use. As for the prosecution, it may be contended that it should be prepared to defend against any attack upon its evidence, and so it is not an injustice to allow the objection to be made at the trial; and, as for the court, it would save the trial judge the useless formality of conducting a prior inquiry to determine the competency of testimony that may never be offered at the trial.⁹

Another group of courts uphold the practice that, in order to take advantage of the constitutional guaranties, the defendant must make a timely motion, at least before the trial has begun, for the return of, or to suppress the use of, the illegally obtained evidence.¹⁰ If he does this, then the court should decide the matter at that time, but if it does not then decide the question, it may be raised upon objection, when the evidence is offered at the trial. This rule is commonly regarded as the orthodox corollary of the original minority rule of the United States Supreme Court. The practice was first attempted in 1908 in a federal district court¹¹ as a means to circumvent the position of the United States Supreme Court in affirming *Adams v. People*.¹² Such a motion before trial was successful

⁷ *Holmes v. State*, 146 Miss. 351, 111 So. 860 (1927).

⁸ See *Youman v. Commonwealth*, 189 Ky. 152, 169, 224 S.W. 860, 867 (1920).

⁹ See *Holmes v. State*, 146 Miss. 351, 358, 111 So. 860, 861 (1927).

¹⁰ *Weeks v. United States*, 232 U.S. 383, 34 Sup. Ct. 341 (1914); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 Sup. Ct. 182 (1920); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 Sup. Ct. 153 (1931); *Farmer v. United States*, 223 Fed. 903 (1915); *Rice v. United States*, 251 Fed. 778 (1918); *Macknight v. United States*, 263 Fed. 832 (1920); *Youngblood v. United States*, 266 Fed. 795 (1920); *United States v. Rykowski*, 267 Fed. 866 (1920); *Wiggins v. United States*, 272 Fed. 41 (1921); *United States v. O'Dowd*, 273 Fed. 600 (1921); *Brink v. United States*, 60 F. (2d) 231 (1932); *United States v. Notto*, 61 F. (2d) 781 (1932); *People v. Marxhausen*, 204 Mich. 559, 171 N.W. 557 (1919); *People v. Miller*, 217 Mich. 635, 187 N.W. 366 (1922); *Commonwealth v. Valsalka*, 37 Atl. 405 (Pa. 1897); *State v. Hennessy*, 114 Wash. 351, 195 Pac. 211 (1921); *State v. Dersiy*, 121 Wash. 700, 209 Pac. 837 (1922); *State v. Funk*, 17 P. (2d) 11 (Wash. 1932); but see *People v. Bass*, 235 Mich. 588, 209 N.W. 927 (1926).

¹¹ *United States v. Wilson*, 163 Fed. 338 (1908).

¹² 176 N.Y. 351, 68 N.E. 636 (1903), aff. in 192 U.S. 585, 24 Sup. Ct. 372 (1904). In the *Adams* case the court had permitted evidence obtained by illegal search and seizure to be used on the trial over the objections of the defendant, giving as one reason that to allow the objection would raise a collateral issue. The new practice escaped that difficulty by trying the matter *before* the trial on the merits.

in a later case;¹³ and in 1914, the practice was made authoritative by the decision in *Weeks v. United States*.¹⁴

To this rule of practice the courts, under the leadership of the United States Supreme Court, have since made certain qualifications.¹⁵ The nature of these qualifications as well as the extent to which they have gone leads to an inquiry as to the true justification for the requirement of a motion before trial. The reason for the requirement is not disclosed in the cases dealing with this problem. The true reason would seem to be this: if no objection is voiced until the offer of the evidence at the trial, the prosecution is not usually aware that the method of obtaining the evidence is going to be called into question, and hence is rarely prepared to defend it. This is especially true when we consider the way the district attorney's business is conducted, the trials very often being handled by officers quite remote from those who executed the arrest and the seizure of the evidence, and who are often entirely unfamiliar with the detailed manner by which the evidence was obtained. It might be contended, however, that this is the fault of the prosecutor's office and it should not concern the court; if the prosecutor chooses to come into court not fully prepared to meet such contingencies, that is his misfortune and not the defendant's. The courts, however, do not look at it in this way, but having an eye on the practical problems of law enforcement, they are somewhat more favorable to the state than exact justice would require, and will not permit the prosecution to be thus surprised. On the other hand, were the prosecution to be allowed time to prepare its defense of the evidence, it would entail prolonged interruption of the trial. This interruption might be of considerable length, for in these cases very often there is a question of whether or not there was probable cause for an arrest, upon which depends the legality of the search and seizure.

That the above suggestions are the real reasons for the rule is verified somewhat by an observation of the nature of the rule and the two recognized exceptions. The rule allows objections to be taken at the trial if a prior motion before trial has been made. The prosecution has then received a warning that certain evidence will probably be protested and has had an opportunity to prepare for such an objection. The court can require a quick hearing of the arguments without injustice to the State and without a long delay of the trial.

Again, we see this policy silently operating in the cases which are held to be within the qualifications of the rule. These are chiefly two. The first qualification is illustrated by *Gouled v. United States*¹⁶ in which the defendant, arrested and

¹³ *United States v. Mills*, 185 Fed. 318 (1911).

¹⁴ 232 U.S. 383, 34 Sup. Ct. 341 (1914).

¹⁵ See *Gouled v. United States*, 255 U.S. 298, 41 Sup. Ct. 261 (1921); *Amos v. United States*, 255 U.S. 313, 41 Sup. Ct. 266 (1921); *Agnello v. United States*, 269 U.S. 20, 46 Sup. Ct. 47 (1925); *State v. Warfield*, 184 Wis. 56, 198 N.W. 854 (1924); and see *People v. Bass*, 235 Mich. 588, 209 N.W. 927 (1926) and strong dissent therein.

¹⁶ *Supra*, note 15.

jailed, is unaware until the trial that evidence has been taken from his premises and is to be used against him. In this situation neither side has had a chance to be prepared; but the defendant has as the basis for his objection, a constitutional right, whereas against him is only a rule of convenience. Balancing these factors, the courts decide that in such cases the delay in the trial is warranted.

The second qualification is recognized in those cases where the unlawful seizure of the evidence is not disputed, but is admitted or patent at the time of the offer in evidence at the trial.¹⁷ Obviously in such cases it would do the state no good to have time to prepare itself upon this point; it is not unfair, therefore, to have a ruling upon the matter at the trial; and it is not inexpedient, for the court can decide the question speedily.

These qualifications seem, then, to confirm the idea that the real reason for the rule, and one with some merit, lies in the combined policy of not allowing the prosecution to be unduly prejudiced by a surprise attack, or in the alternative, of not allowing overlong delays in the trials of cases.¹⁸

In the instant cases, the Ohio Court of Appeals apparently would create another qualification to the rule. Officers had taken certain evidence from the persons and premises of the defendants, without search warrants or probable cause to believe the defendants were violating the law. The appellate court held that the searches and arrests were unlawful and the evidence so obtained should have been excluded upon the defendants' objections at the trials. It was urged on the court that no motion to suppress was made before the trial in either case. The authority in favor of such requirement was conceded, and the qualification in the *Gould* case¹⁹ was referred to. Then the court lays down what, it is submitted, might ground a third qualification to the already rifled motion-before-trial rule.²⁰

What the Ohio Court is suggesting is this: in the haste and confusion of police court examination, the defendant, through lack of advice and ignorance of his legal rights, or through mere inadvertency, may fail to request a return or suppression of ill-gotten evidence; this being true, it would be unfair to de-

¹⁷ Thus in *Amos v. United States*, 255 U.S. 313, 41 Sup. Ct. 266 (1921), the government witness testified on cross-examination that there had been no warrant for the arrest or search.

¹⁸ The influence of these rather recent decisions creating qualifications will, no doubt, be very important in the future considerations of the problem. Justice Cardozo, speaking as a member of the New York Court of Appeals, in *People v. Defore*, 242 N.Y. 413, 150 N.E. 505 (1926), states that "the procedural condition of a preliminary motion has been substantially abandoned, or if enforced at all, is an exceptional requirement."

¹⁹ *Supra*, note 15.

²⁰ 183 N.E. 119, 122 (1932). The Court says: "We think, however, in the interest of an orderly administration of justice that a motion to suppress should be made before trial upon the merits, and the matter should not be raised as a collateral issue upon the trial. It is a matter of common knowledge, however, that the daily dockets of police courts are heavy, and that matters are presented therein rapidly and without the deliberation incident to trials in the upper court. For this reason, the consideration of such collateral matter with the case upon its merits, while not approved, may be excused."

prive him of his constitutional immunity from the use of this evidence against him; the balance of policy lies on his side rather than in favor of the rule of practice.

The language of the court is not very strong; moreover, the circumstances presented a strong case for the application of the rule which requires a motion before trial. Far from being undisputed or admitted, the illegality of the search and seizure in the case is debatable, depending on whether the court feels that probable cause existed for the arrest and search. To decide this fairly would require delay in the trial to permit each side to marshal its facts and arguments. If the motion before trial rule is to be retained at all, these Ohio cases would seem to call for its application.

It is to be noted, that even if the result of these cases were accepted as proper practice, it would not affect the great bulk of cases in which the problem of illegal searches and seizures arises; the instant cases arose in police court, whereas the chief source of questions of this nature is felony cases which are tried in the felony and circuit courts. The confusion and haste of the police court does not exist there and a defendant can find no such excuse, as the Ohio court found for him, to excuse his failure to file a timely motion to suppress such evidence.

Finally, we might regard the cases as other illustrations of a general distaste for the motion-before-trial rule. This general attitude might be, in some degree, a result of the fact that the question has lately arisen most often in prohibition law violation cases; perhaps the courts were less disposed in such cases to insist on the prosecution being safe from surprise attacks.

In any event, if the true tendency of the decisions be to delimit the rule into ineffectiveness by a growing number of exceptions, it might be better to adopt a simple, uniform rule which allows the objection to be made on the trial in all cases.

JOHN N. FEGAN

THE CONSTITUTIONALITY OF THE ILLINOIS INCOME TAX LAW OF 1932

The recent case of *Bachrach v. Nelson*¹ has made it impossible under the present provisions of the Constitution of Illinois to enjoy the advantages of the typical graduated income tax as a source of state revenue. The Illinois Constitution states that the General Assembly shall tax property in proportion to its value, authorizes a tax on certain designated businesses or occupations and on persons or corporations owning or using franchises or privileges, and provides that other objects or subjects can be taxed in such manner as may be consistent with principles of taxation fixed in the Constitution.² The Illinois legislature enacted a law imposing a graduated tax upon residents of the state on entire net income, upon nonresidents with respect to net income from sources within the state,

¹ 182 N. E. 909 (Ill. 1932).

² Const., art. 9, §§ 1, 2.

and upon fiduciaries or beneficiaries of estates or trusts respecting such estate or trust incomes. A nonresident who pays a tax in another state on income derived from sources in Illinois could credit such payment on his Illinois tax provided the other state allows a similar reciprocal right to nonresidents of that state. Nonresidents of Illinois were subjected to an additional penalty to which residents were not subjected, to wit, that any failure, willful or otherwise, to file a complete return would result in the nonresident's forfeiting the right to certain deductions.³ The Supreme Court of Illinois in the main case held the income tax unconstitutional since under the Illinois Constitution the legislature could impose only occupation, franchise, or privilege taxes, and property taxes based on value; that a tax on income is a tax on property and as such is invalid since not levied in proportion to value; and that certain of the provisions with regard to nonresidents are violative of the Constitution of the United States.

Sustaining its conclusion that under the Illinois Constitution the General Assembly can impose only property taxes based on value, in addition to occupation, franchise, and privilege taxes, the court reasons historically. An earlier Constitution made general property taxation by value the exclusive method of apportioning the tax burden.⁴ The present Constitution is a virtual re-enactment of this section.⁵ The "principles of taxation fixed in this constitution" are interpreted as the general property tax, in accordance with which all taxes must be imposed except those on businesses, occupations, franchises, or privileges. And while the legislature may tax other objects or persons, such taxes must be levied by the same *ad valorem* principle.⁶

If carried to its logical conclusion, this decision would mean that it is the duty of the Illinois legislature to tax income as property under the Constitution, and that the tax on income would have to be according to value. Such a tax would be a perversion of the taxing power, since an income of a certain amount would have to be regarded as the same amount of cash in hand, which it is not, and there would be no graduated feature so that the tax could be imposed upon ability to pay.

When, as at the present time, the state government is in need of new sources of revenue it would seem that the court would hesitate before declaring unconstitutional an income tax when there are authorities by which the tax could be sustained. The legislature must decide the policy as to levying and apportioning taxes and the courts have no concern with such policy except to see that constitutional limitations are observed.⁷ At least one court under a constitution similar to that of Illinois has refused to regard the legislature as restricted by it.⁸

³ Laws 1931-32, 1st Sp. Sess. 91.

⁵ Const. 1870, art. 9, § 1.

⁴ Const. 1848, art. 9, § 2.

⁶ Const., art. 9, § 2.

⁷ *Green v. Frazier*, 253 U.S. 233 (1920); *Blunt v. U.S.*, 255 Fed. 332 (1918).

⁸ *Stanley v. Gates*, 179 Ark. 886, 19 S.W. (2d) 1000 (1929). A constitution providing for taxation of property according to value and then providing that certain occupations and privileges could be taxed does not prohibit imposition of an income tax under the doctrine of *expressio unius est exclusio alterius*.

However, the Illinois Constitution declares that the General Assembly shall provide revenue by levying property taxes by valuation, and the court seizes upon this as excluding all other forms of taxes not expressly permitted by the Constitution.⁹ A constitutional declaration that all property shall be taxed in proportion to its value is mandatory.¹⁰ Under the present Constitution of Illinois the legislature can impose an income tax only if it is regarded as a tax on property, and the tax as such is invalid since levied on the basis of graduation instead of valuation as required by the Constitution. Where the Constitution of Illinois was not involved, the Supreme Court of Illinois has not regarded an income tax as a tax upon the particular property or business from which such income is derived.¹¹

There is a decided split of authority as to whether or not an income tax is a tax on property. In the principal case the Illinois court takes its stand with those jurisdictions recognizing income as property within constitutional provisions respecting taxation.¹² Such a tax is within a constitutional provision limiting the tax rate to a certain percentage of the value of the taxable property within the state,¹³ and a tax on incomes derived from property must conform to a constitutional requirement that property taxes be proportional.¹⁴ A tax imposed upon incomes of individuals and partnerships is held by the same jurisdiction to be a tax on property and not an excise tax.¹⁵

Numerous other courts decide that an income tax is not a tax on property so as to come within a constitutional requirement that all property taxes be laid according to value.¹⁶ An income tax is an excise, not a property tax.¹⁷ One

⁹ Const., art. 9, § 1.

¹⁰ *San Pedro R. Co. v. Los Angeles*, 180 Cal. 18, 179 Pac. 393 (1919).

¹¹ Provisions in a lease requiring the lessee to pay, when due, all taxes, of every kind, levied upon the real estate demised or upon any improvements thereon, or upon any interest of the lessor in or under the lease, do not require the lessee to pay the Federal income tax of the lessor on the rentals received under the lease. *Young v. Illinois Athletic Club*, 310 Ill. 75, 141 N.E. 369 (1923).

¹² *State v. Pinder*, 30 Del. 416, 108 Atl. 43 (1919); *Opinion of the Justices*, 266 Mass. 583, 165 N.E. 900 (1929).

¹³ *Eliasberg Bros. Mercantile Co. v. Grimes*, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300 (1920).

¹⁴ *Opinion of the Justices*, 220 Mass. 613, 108 N.E. 570 (1915).

¹⁵ *Eaton, C. & P. Co. v. Commonwealth*, 237 Mass. 523, 130 N.E. 99 (1921).

¹⁶ *Stanley v. Gates*, 179 Ark. 886, 19 S.W. (2d) 1000 (1929); *Waring v. Savannah*, 60 Ga. 93 (1878); *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930); *Glasgow v. Rowse*, 43 Mo. 479 (1869); *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S.W. 196 (1918) (which the Supreme Court of Illinois cited in support of the principal case).

¹⁷ *Sims v. Ahrens*, 167 Ark. 557, 271 S.W. 720 (1925); *Diefendorf v. Gallet*, 10 P. (2d) 307 (Idaho 1932); A Miss. statute provided for a tax on all annual incomes, with certain exceptions. Pl., state revenue agent, sued to recover from def. corporation an income tax. Def. contended tax was one on property and void because the property was not assessed in proportion to value as required by state constitution. *Held*, it was an excise and not a property tax, and hence pl. should recover. *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4, 25 A.L.R. 748 (1921); *Opinion of the Justices*, 77 N.H. 611, 93 Atl. 311 (1915); "While there is some au-

court's approach to the problem is that an income tax is a tax, not on property, but against the recipient of the income.¹⁸ The textwriters apparently would not favor the principal case but would agree with the courts which hold that an income tax is not a tax on property.¹⁹

Another classification would be on the basis of two Supreme Court cases. Income derived from real and personal property is itself property and so an income tax is a tax on property insofar as it taxes the income from property; a tax on income derived from trades, professions, or vocations is a tax not upon property but upon activity and is an excise tax.²⁰ Under this classification that portion of the tax levied upon income from occupations would not have to conform to the constitutional requirement of levy according to the value of the property, but since it would not be a property tax, it could not be upheld under the Constitution as interpreted by the court in *Bachrach v. Nelson*. And even if permitted under the Constitution of Illinois the result would be undesirable since the excise would place upon incomes from occupations alone a burden which the legislature intended to be borne as well by income from property, and which would not be subject to tax because it was not levied on a basis of valuation. It is submitted that the true holding of the Pollock case was that a tax upon income from property was such a direct tax as was required to be apportioned under the provisions of the Federal Constitution existing at the time of the case, and that the doctrine of the case should be strictly confined. Logically, a tax upon income from property is not the same as a tax upon property itself, since a tax on property is imposed whether or not the property produces income, and a tax on income from property is imposed only if the property produces income.

States are subject to the equal protection clause in exercising taxing power;²¹ the requirement being that the state refrain from arbitrary classification in exerting the taxing power.²² It follows that a graduated income tax is not contrary to the equal protection clause.²³ A state may impose a tax on the incomes of nonresidents arising from any business or occupation carried on within the state without violation of due process.²⁴ If such a tax does not give nonresidents

thority to the contrary, the view more generally taken is that an income tax is not a tax on property, but is more nearly within the category of excise taxes." 61 C.J., *Income Taxes*, 1559, §§ 2306, *et seq.*

¹⁸ *Norris v. Cary*, 238 N.W. 415 (Wis. 1931).

¹⁹ Black, *Income and Other Federal Taxes* (4th ed. 1919), § 2; Cooley, *Taxation* (4th ed. 1924), 3477, §§ 1743-1751.

²⁰ *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895); *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1 (1916).

²¹ *Ohio Oil Co. v. Conway*, 281 U.S. 146 (1930).

²² *Quaker City Cab Co. v. Commonwealth of Pa.*, 277 U.S. 389 (1928); 28 Col. L. Rev. 972 (1928); 27 Mich. L. Rev. 800 (1929).

²³ Const., U.S., Amend. 14; *State v. Frear*, 148 Wis. 456, 134 N.W. 673 (1912), writ of error dismissed, 231 U.S. 616 (1913).

²⁴ Const., U.S., Amend. 14; *Shaffer v. Carter*, 252 U.S. 37 (1920); 20 Col. L. Rev. 457 (1920); 18 Mich. L. Rev. 547 (1920).

the benefit of exemptions given residents of the state, it is void as abridging the privileges and immunities of citizens of the United States, and it is not remedied by allowing the nonresident to deduct from his tax a tax paid on such income in the state of his residence, if such state allows a like deduction by nonresidents within its borders; a state cannot barter away the rights of its citizens to the enjoyment of the privileges and immunities clause, and discrimination cannot be corrected by retaliation.²⁵

JOHN N. HUGHES

ANNULMENT OF MARRIAGE FOR FRAUDULENT MISREPRESENTATION

The question whether a fraudulent misrepresentation as to fortune is ground for annulment of marriage was presented in New York in the recent case of *Shonfeld v. Shonfeld*.¹ Reversing the Appellate Division, the Court of Appeals, by a divided bench (4 to 3), decided that it was error to hold as a matter of law that the misrepresentation could not be material.

The court, speaking through Crouch, J., based its decision on the New York statute,² declaring that "Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential," as interpreted in *Di Lorenzo v. Di Lorenzo*.³ As the fraud which will invalidate a marriage has never been precisely defined, the court is left free to meet each case as it arises. It need not necessarily concern what are commonly called the "essentials" of the marriage relation, but will be sufficient if it is material to the giving of consent, in the sense that if the misrepresentation had not been made, the consent would not have been given.

The misrepresentation was not a mere exaggeration or misstatement of her means or prospects, which might or might not be an incentive to marriage. It was a definite statement of an existing fact without which, as the defendant clearly understood, no marriage was presently practicable.^{3a}

A vigorous dissenting opinion was written by Crane, J., in which the construction of the statute given in the *Di Lorenzo* case, upon which the court relied, was critically assailed as dictum. A marriage is something more than a mere civil contract; it results in a status, to which legal rights and liabilities attach in which the state has an interest. Fraud which will invalidate such a

²⁵ Const., U.S., art. 4, § 2; *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920); 20 Col. L. Rev. 457 (1920); 18 Mich. L. Rev. 547 (1920); 29 Yale L. Jour. 799 (1920).

¹ 260 N.Y. 477, 184 N.E. 60 (1933), reversing 258 N.Y. S. 338.

² C. 14, § 10 of the New York Cons. Laws (Domestic Relations Law).

³ 174 N.Y. 467, 67 N.E. 63, 63 L.R.A. 92 (1903). See also comments in 1 Corn. L. Quar. 48 (1916) and 6 Corn L. Quar. 199, 401 (1921).

^{3a} *Shonfeld v. Shonfeld*, 260 N. Y. 477, 184 N.E. 60, 62 (1933).

relation must be serious and important and must be of such a nature as to mislead a reasonably prudent person. But

the marriage in this case was a mere matter of bargain and sale. The woman bought the man for \$6,000, and because she failed to have the money the man seeks to have the marriage annulled. . . . Sufficient for this case to say that the mere statement of the woman that she had \$6,000 was not sufficient to deceive a reasonably prudent and careful man, and under the circumstances stated here is not of sufficient importance to the marriage contract to move a court of equity to annul it.^{3b}

It has been very generally stated in the reports and textbooks that the fraud which will invalidate a marriage contract must touch some of the so-called "essentials" of the marriage relation. A mere misrepresentation as to some of the "incidentals" of the relation is stated to be insufficient. Such "incidentals" have been stated to include fortune, rank, character, and health.⁴ As to fortune and rank the decisions probably bear out the statement.⁵ But there has been a growing tendency to relax the general rule as to character and health, especially where the complainant was young and inexperienced and the fraudulent misrepresentation or concealment has been particularly gross and would result in a shocking mismating, as where the defendant was a notorious criminal.⁶ An Alabama court decreed an annulment for fraudulent representations as to name,

^{3b} *Shonfeld v. Shonfeld*, 260 N. Y. 477, 184 N.E. 60, 62, 65 (1933).

⁴ See *Madden, Domestic Relations* (1931), 15; *Bishop, Marriage and Divorce* (1892), § 459; *Eversley, Domestic Relations* (1926), 29; 18 R.C.L. 414; 38 C. J. 1302. Note *Wakefield v. Mackay*, 1 Phill. Ecc. 134, 1 Hagg. Consist. 394, where Lord Stowell said, "A man who means to act upon such representations (character, fortune, or health) should verify them by his own inquiries. The law presumes that he uses due caution in a matter in which his happiness for life is so materially involved, and makes no provision for the relief of a blind credulity however it may have been produced."

⁵ *Mayer v. Mayer*, 207 Cal. 685, 279 Pac. 783 (1929); *Marshall v. Marshall*, 212 Cal. 736, 300 Pac. 816, 75 A.L.R. 661 (1931); *Williams v. Williams*, 32 Del. 39, 118 Atl. 638 (1922); *Wier v. Still*, 31 Iowa 107 (1870); *Chipman v. Johnston*, 237 Mass. 502, 130 N.E. 65, 14 A.L.R. 119 (1921), discussed in 19 Mich. L. Rev. 881-82; *Heath v. Heath*, 159 Atl. 418 (N.H. 1931), disapproving liberal dicta in *Gatto v. Gatto*, 79 N.H. 177, 106 Atl. 493 (1919); *Woodward v. Heichelbech*, 97 N.J. Eq. 253, 128 Atl. 169 (1925); *Jakar v. Jakar*, 113 S.C. 295, 102 S.E. 337 (1919), although the defendant was admittedly a "villain of the deepest dye"; and probably *Klein v. Wolfsohn*, 1 Abb. N. Cas. 134 (N.Y. 1876). Contra, *Robert v. Robert*, 150 N.Y.S. 366 (1914); and *Raia v. Raia*, 214 Ala. 391, 108 So. 11 (1926), where the complainant was very young and allegedly feeble-minded. For dicta in accordance with the general rule as to fortune and rank, see *Lyon v. Lyon*, 230 Ill. 366, 82 N.E. 850 (1907); *Bielby v. Bielby*, 333 Ill. 478, 165 N.E. 235 (1929); *Brown v. Scott*, 140 Md. 258, 117 Atl. 144, 22 A.L.R. 810 (1922); *Keyes v. Keyes*, 26 N.Y.S. 910 (1893); *Fish v. Fish*, 39 N.Y.S. 537 (1896); *Glean v. Glean*, 75 N.Y.S. 622 (1902); *Bahrenburg v. Bahrenburg*, 150 N.Y.S. 589 (1914); *Minner v. Minner*, 238 N.Y. 529, 144 N.E. 781 (1924); *Lapides v. Lapides*, 254 N.Y. 73, 171 N.E. 911 (1930); *Maynard v. Hill*, 125 U.S. 190 (1888). For dicta as to sufficiency of such fraud, see *Gatto v. Gatto*, 79 N.H. 177, 106 Atl. 493 (1919), where the court very caustically assails the argument of public policy; disapproved in *Heath v. Heath*, 159 Atl. 418 (N.H. 1932); *Cox v. Cox*, 110 Atl. 924 (N.J.Eq. 1919); *Caruso v. Caruso*, 104 N.J.Eq. 588, 146 Atl. 649 (1929).

⁶ *Brown v. Scott*, 140 Md. 258, 117 Atl. 144, 22 A.L.R. 810 (1922).

character, and financial ability, where the complainant was very young and allegedly feeble-minded.⁷

But even in the absence of such special circumstances, some courts have decreed an annulment where there has been gross misrepresentation as to character.⁸ A New York court held a misrepresentation as to honesty sufficient.⁹ Facts suggesting the existence of a conspiracy to defraud an old man (the complainant) of his property by marriage were held sufficient by the Michigan Supreme Court.¹⁰ And annulments have recently been granted in New York for the false representation of the defendant that he loved the complainant and had money where his purpose in getting married was to evade the immigration laws,¹¹ and for a misrepresentation as to citizenship where it resulted in the expatriation of the complainant.¹²

The early New York cases, supported by several recent decisions and numerous dicta, were generally to the effect that marriage is something more than a contract; it is a status.¹³

But the conception of marriage as predominantly contractual was developed in 1903 when the New York Court of Appeals decided *Di Lorenzo v. Di Lorenzo*.¹⁴

It is upon the authority of this case that the Shonfeld case is decided, as well as many of the other New York cases to be considered. It is the argument of the dissenting justices that this statement in the *Di Lorenzo* case is dictum and therefore not binding on the New York Court of Appeals. But is it? It is submitted that the fraud in the *Di Lorenzo* case (representation to the complainant that the child shown him by the defendant was theirs when in fact the

⁷ *Raia v. Raia*, 214 Ala. 391, 108 So. 11 (1926).

⁸ *Dooley v. Dooley*, 93 N.J.Eq. 22, 115 Atl. 136 (1921); contra, *Wier v. Still*, 31 Iowa 107 (1870).

⁹ *Sheridan v. Sheridan*, 186 N.Y.S. 470 (1921).

¹⁰ *Gillett v. Gillett*, 78 Mich. 184, 43 N.W. 1101 (1889) (a very incomplete report).

¹¹ *Rubman v. Rubman*, 251 N.Y.S. 474 (1931) (excellent survey of cases).

¹² *Truiano v. Truiano*, 201 N.Y.S. 573 (1923), discussed in 24 Col. L. Rev. 433, 8 Minn. L. Rev. 341, and 33 Yale L. Jour. 793 (1924).

¹³ *Fish v. Fish*, 39 N.Y.S. 537 (1896); *Svenson v. Svenson*, 178 N.Y. 54, 70 N.E. 120 (1904); *Schaeffer v. Schaeffer*, 144 N.Y.S. 774 (1913); *Miner v. Miner*, 238 N.Y. 529, 144 N.E. 781 (1924); and see *Lapides v. Lapides*, 254 N.Y. 73, 171 N.E. 911 (1930) for approval of this "status" theory of marriage.

¹⁴ 174 N.Y. 467, 67 N.E. 63, 63 L.R.A. 92 (1903) where the court said

While, then, it is true that marriage contracts are based upon consideration peculiar to themselves and that public policy is concerned with the regulation of the family relation, nevertheless, our law considers the marriage in no other light than as a civil contract. . . . There is no valid reason for excepting marriage contracts from the general rule (of contracts). . . . If the plaintiff proves to the satisfaction of the court that through a misrepresentation of some fact, which was an essential element in the giving of his consent to the contract of marriage and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage.

It is to be observed that the New York courts have not carried the contractual concept of marriage to its logical extreme of permitting the parties mutually to rescind or abandon the contract.

defendant had given birth to no child at all) would not be sufficient ground for the annulment of the marriage in most jurisdictions. That fraud did not go to any of the so-called "essentials" of the marriage. But it was a material inducement (i.e., saving the honor of the defendant, legitimating the child, etc.) to the complainant's consenting to the marriage. It may be that the construction of the statute given by the Court of Appeals in that case was questionable, as the court has repeatedly admitted, since and lastly in the Shonfeld case, that the statute was merely declaratory of the existing law; and it would seem that such a fraud would be insufficient before.¹⁵ But in deciding the Di Lorenzo case as it did it was necessary for the Court of Appeals to make such a broad statement as to the contractual nature of marriage. And it has been repeatedly followed in New York.¹⁶

The cases cited by Judge Crouch in his opinion do fully bear out his conclusion that the fraud need not necessarily go to the essentials of the marriage.¹⁷ And in 1914 the Appellate Division of the New York Supreme Court decreed an annulment where the complainant was induced to marry the defendant by his misrepresentation that they would put their money together and buy a hotel, and it appeared that the defendant had never any intention of carrying out his declared intention.¹⁸

It is thus seen that the decision in the Shonfeld case is not at all revolutionary in New York, that substantially identical facts were held ground for annulment almost two decades ago, that it is a logical result of the principles announced in

¹⁵ *Klein v. Wolfsohn*, 1 Abb. N. Cas. 134 (1876). Note the construction given to similar statutes as merely declaratory in *Lewis v. Lewis*, 44 Minn. 124 (1891); *Willeys v. Willeys*, 76 Neb. 228 (1906); *Thorne v. Farrar*, 57 Wash. 441 (1910); *Wells v. Talham*, 180 Wis. 654, 194 N.W. 36, 33 A.L.R. 827 (1923).

¹⁶ See *Domschke v. Domschke*, 122 N.Y.S. 892 (1910); *Robert v. Robert*, 150 N.Y.S. 366 (1914); *Griffin v. Griffin*, 204 N.Y.S. 131, aff'd in 205 N.Y.S. 926 (1924); *Rutstein v. Rutstein*, 222 N.Y.S. 688 (1927); *Beard v. Beard*, 238 N.Y. 599, 144 N.E. 908 (1924), aff'g. 201 N.Y.S. 886 (1924). See further the cases cited in Crouch, *Annulment of Marriage for Fraud in New York*, 6 Corn. L. Quar. 401 (1921). Judge Crouch says, at p. 405,

It wiped out any limitation of the field of materiality which, for considerations of public policy, had been confined to facts going to the essence of the marriage relation. It applied to the marriage contract the rule applicable to all other contracts that the misrepresentation of any material fact, including consent, justifies rescission. . . . Public policy does not enter into the matter. . . . The court, deliberately as it seems, excluded its consideration. At the very outset of its opinion it stamped as error the holding of the Appellate Division that considerations of public policy took the marriage relation so far out of the domain of ordinary contracts as not to warrant annulment. While it recognized that public policy is concerned with the regulation of the family relation, "Nevertheless," it said, "our law considers marriage in no other light than as a civil contract"; and hence that there was no valid reason for excepting the marriage contract from the general rule. When the cases in this and other states holding the older doctrine were pressed to the attention of the court, it put them aside without attempt at explanation or differentiation and, relying upon the plain provisions of our statute and the established rules applicable to contracts generally, laid down the rule quoted above.

¹⁷ *Domschke v. Domschke*, 122 N.Y.S. 892 (1910); contra *Glean v. Glean*, 75 N.Y.S. 622 (1902).

¹⁸ *Robert v. Robert*, 150 N.Y.S. 366 (1914).

the DiLorenzo case, and that it is probably in line with the changed social attitudes toward marriage.¹⁹

A factor of undoubted significance in the development of this liberal attitude of the New York courts toward annulment is the restriction of absolute divorce to only one ground, namely, adultery.²⁰

With this decision, the New York Court of Appeals seems to have definitely accepted the logical result of the DiLorenzo case; and there seems to be considerable reason and justification for the decision, in view of the statutory situation. But it can well be doubted whether the courts of other jurisdictions will follow, unless they should become convinced that there is less "public policy" in denying relief where the domestic difficulties have already been aired in court than in granting it at the request of the parties, where divorce is difficult or undesirable.

CLIFFORD J. HYNNING

THE CONSTITUTIONALITY OF THE DECLARATORY JUDGMENT

Proponents of the declaratory judgment as a necessary procedural reform¹ may well be heartened by a recent decision² handed down by the United States Supreme Court. After a steady march of approval through numerous state courts,³ the constitutionality of the declaratory judgment as a "case" or "controversy" received a set back at the hands of our highest tribunal in a number

¹⁹ See Ogburn, *The Changing Family*, 23 *Pub. Am. Sociological Soc.*, 124-133 (1928), reprinted in Reuter and Runner, *The Family* (1931), 150-156. Also see *Recent Social Trends* (1933), 661-708. Vanneman, *Annulment of Marriage for Fraud*, 9 *Minn. L. Rev.* 497, says, at page 517,

The mores of the day are not the same as of a hundred years ago. People look upon the marriage relation differently. This point is evident at every point in the marriage relation. It is submitted that a judicious application of the liberal view of the New York courts is in harmony with present day social attitudes, and that the law cannot hope to modify social concepts but will eventually itself be modified thereby as the present trend rather definitely shows.

²⁰ See *Wells v. Talham*, 180 *Wis.* 654, 194 *N.W.* 36, 33 *A.L.R.* 827 (1923), suggesting this explanation.

¹ Borchard, *The Constitutionality of Declaratory Judgments*, 31 *Col. L. Rev.* 561 (1931), *The Declaratory Judgment—A Needed Procedural Reform*, 28 *Yale L. Jour.* 1, 105 (1918), *The Declaratory Judgment in the United States*, 37 *W.Va. L. Rev.* 127 (1931), *Judicial Relief for Peril and Insecurity*, 45 *Harv. L. Rev.* 793 (1932); Cooper, *Locking the Stable Door Before The Horse Is Stolen*, 16 *Ill. L. Rev.* 436 (1921); Dodd, *Progress of Preventive Justice*, 6 *Am. Bar Ass'n. Jour.* 151 (1920); Rice, *The Constitutionality of the Declaratory Judgment*, 28 *W. Va. L. Rev.* 1 (1921); Sunderland, *Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 *Mich. L. Rev.* 69 (1917).

² *Nashville, Chattanooga and St. Louis Railway v. Ray C. Wallace*, *Comptroller of the Treasury of Tennessee, etc.*, 53 *Sup. Ct.* 345 (1933).

³ For a complete tabulation of states and decisions therein, see Borchard, *The Constitutionality of Declaratory Judgments*, 31 *Col. L. Rev.* 561, notes 3 and 4 (1931).

of dicta⁴ several years ago. After a full reconsideration of the problem, a unanimous court has apparently changed its point of view, and the constitutionality of this procedural device is now established.

The case arose under the following circumstances: A Tennessee statute provided for an excise tax on gasoline from each seller, storer or distributor of gasoline for the privilege of doing a gasoline business in Tennessee. The appellant railroad which purchased all of its gasoline outside of the state, brought the gasoline into Tennessee and stored it in private tanks for immediate use. A large percentage of the gasoline taxed was withdrawn and used outside of the state. Practically all of the gasoline was used in one form or another in operation of the railroad's transportation system. The appellant brought an action under the Tennessee Uniform Act on Declaratory Judgments against the taxing authorities to procure a judgment declaring that it was not in the business of storing or distributing gasoline and that the tax was a burden on interstate commerce. The Tennessee courts ruled against the appellants. An appeal was then taken to the United States Supreme Court. In setting the case down for a hearing, the latter court invited the attention of counsel to the question whether a "case" or "controversy" was presented, in view of the proceedings in the state court which were brought for a declaratory judgment. *Held*, that the levy did not burden interstate commerce and the United States Supreme Court had jurisdiction of the appeal.

The importance of the decision lies in the court's pronouncement as to the validity of the declaratory judgment. This is doubly interesting. Not only is the present position of the court contrary to that previously announced,⁵ but a

⁴ *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 47 Sup. Ct. 282 (1927); *Willing v. Chicago Auditorium Co.*, 277 U.S. 274, 48 Sup. Ct. 507 (1927); *Warehouse Co. v. Tobacco Growers*, 276 U.S. 71, 48 Sup. Ct. 291 (1927).

⁵ *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 47 Sup. Ct. 282 (1927). Ky. enacted a state co-operative statute. Certain Ky. warehousemen brought actions under the Ky. Declaratory Judgments Act for a declaration that this act was unconstitutional. The Ky. court rendered a declaratory judgment holding the Warehouse Act constitutional. Nonresident warehousemen thereupon brought an action in the federal district court under the Federal Conformity Act, 17 Stat. 196 (1872), 28 U.S.C. § 724 (1926), for a declaration that the act was unconstitutional. The court held that the proceedings were improper under the Conformity Act, and further that the court had no jurisdiction to decide a case brought under a state declaratory judgment statute as not constituting a "case" or "controversy." See Note, 36 Yale L. Jour. 845 (1927).

Willing v. Chicago Auditorium Co., 277 U.S. 274, 48 Sup. Ct. 507 (1927). The association brought a suit in the state court in the nature of a bill to remove a cloud on title. This was removed to the federal district court on grounds of diversity of citizenship. The Circuit Court of Appeals, Seventh Circuit, reversed the dismissal of the suit for want of equity jurisdiction. The Supreme Court reversed the Circuit Court of Appeals, holding that the case was not one within the equity jurisdiction of the court and that what the plaintiff sought was a declaratory judgment. This relief was declared to be beyond the power of the Federal Courts since it did not present a "case" or "controversy." See notes on above cases in 25 Mich. L. Rev. 529 (1927); 100 Cent. L. Jour. 95 (1927); 13 Va. L. Rev. 644 (1927); 36 Yale L. Jour. 845 (1927); 23 Ill. L. Rev. 595 (1929); 38 Yale L. Jour. 104 (1928).

unanimous court went out of its way to give the problem complete consideration. The mere holding that the court had appellate jurisdiction to review the final judgment of a state court involving a federal question would have relieved the court from the necessity of overruling its previous dicta.⁶ It is difficult to imagine what motivated the court's previous hostility.⁷ That the court went out of its way to deal body blows to the constitutionality of the declaratory judgment in earlier cases is clear.⁸ This tardy adoption by the United States Supreme Court of a view long accepted by the state courts is probably the result of a complete and clear analysis of the declaratory judgment.⁹

From the thread that runs through a number of decisions we may gather what

⁶ It was argued by Messrs. Borchard and Clark who filed a brief as "*amici curiae*" that a decision by the Supreme Court that the judgment of the Supreme Court of Tennessee is not subject to appeal, would have the effect of rendering doubtful if not of nullifying an established procedure of a state court. Such control of state court procedure should not be assumed by the Supreme Court except under an overriding federal law. Or if the appeal is refused, the judgment may be binding on all concerned. "Thus a state court would make a judgment against a federal right which would remain unchallenged." It follows that the issue set at rest by *Martin v. Hunter's Lessees*, 1 Wheat. 304 (1816), that a state court cannot interpose its judgment against that of the United States Supreme Court on a question of federal right (there of title under a treaty with a foreign country), may be revived. P. 17 of brief.

⁷ A note in 45 Harv. L. Rev. 1089 (1932) seeks to justify the court's earlier stand on the grounds that: (1) Issues presented in the federal courts lack the essentials of a "case" or "controversy;" (2) Since the Supreme Court deals with constitutional questions and statutory construction and because under declaratory judgment procedure such questions are apt to be presented without an adequate record of the facts and with insufficient practical experience of the actual operation of the statute; (3) It is inadvisable to require federal courts to determine in advance the legal consequences of certain acts.

See answer in a Note, 41 Yale L. Jour. 1195 (1932), wherein the author contends that the above rationalization has "the disadvantage of proceeding on assumptions as to declaratory judgments which have but little relation to the facts."

⁸ The Grannis case, *supra* note 4, could have been decided merely on the fact that the state declaratory judgment statute was not such a procedural matter as to come within the Conformity Act. See 40 Harv. L. Rev. 903 (1927).

In the Willing case, *supra* note 4, Mr. Justice Stone said,

I concur in the result. It suffices to say that the suit is plainly not one within the equity jurisdiction conferred by secs. 24 and 28 of the judicial code. But it is unnecessary, and I am therefore not prepared to go further and say anything in support of the view that Congress may not constitutionally confer on the federal courts jurisdiction to render declaratory judgments in cases where that form of judgment would be an appropriate remedy, or that this court is without constitutional power to review such judgments of state courts when they involve a federal question.

The commentators support the view taken by Mr. Justice Stone. Grinnel, 13 Mass. L. Quar. 50 (1928); Langmaid, 23 Ill. L. Rev. 595 (1924); 41 Harv. L. Rev. 232 (1928); 43 Harv. L. Rev. 1290 (1930); 38 Yale L. Jour. 104 (1928).

⁹ That the Supreme Court appears to attribute to the Liberty Warehouse cases as well as to the Willing Case, a variety of meanings, none of which has any proper relation to the declaratory judgment, would seem to follow from the fact that the court will not render advisory opinions, or decide moot cases, or pass on conclusions of an administrative body. Obviously, it is not a proper exercise of judicial power for a court to render advisory opinions and the action for a declaratory judgment cannot be employed to such an end. Borchard, 31 Col. L. Rev. 561, 594 (1931). See cases cited therein.

essentials are necessary to constitute a "case" or "controversy" as required under Article 3 Section 2 of the Federal Constitution.¹⁰ There must be adverse parties;¹¹ the judgment rendered must be conclusive and binding;¹² the issue must be specific¹³—not moot;¹⁴ and substantial legal interests must be involved.¹⁵ In his clever handling¹⁶ of the Grannis and Willing decisions in the main case one feels that Mr. Justice Stone had his tongue in his cheek. These cases, like the instant one, probably contained all the operative requirements the courts had previously announced as prerequisite to a "case" or "controversy." One is led to conclude that after a cursory study of the declaratory judgment procedure in the earlier cases, the court confused such a judgment with a moot case.¹⁷ A careful reading of all these cases will convince one that they contained live is-

¹⁰ Art. 3, § 2 provides that: "The judicial power shall extend to all cases, in Law and Equity, arising under the constitution, the Laws of the United States (and) to controversies between two or more states."

¹¹ *South Spring Gold Mining Co. v. Amador Midion Gold Mining Co.*, 145 U.S. 300, 12 Sup. Ct. 921 (1891); *Muskra v. United States*, 219 U.S. 346, 31 Sup. Ct. 250 (1910).

¹² *Gordon v. United States*, 117 U.S. 697 (1885); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 47 Sup. Ct. 284 (1926).

¹³ *New Jersey v. Sargent, Atty. Gen., et al.*, 269 U.S. 328, 46 Sup. Ct. 122 (1925).

¹⁴ *Barker Painting Co. v. Local No. 734, Brotherhood of Painters, Decorators, and Paperhangers of America et al.*, 281 U.S. 462, 50 Sup. Ct. 356 (1929).

¹⁵ *Fairchild v. Hughes*, 258 U.S. 126, 42 Sup. Ct. 274 (1921); *Texas v. Interstate Commerce Commission*, 258 U.S. 158, 42 Sup. Ct. 261 (1922); *Massachusetts v. Mellon*, 262 U.S. 447, 43 Sup. Ct. 597 (1922); *New Jersey v. Sargent*, 269 U.S. 328, 46 Sup. Ct. 122 (1925).

¹⁶ ". . . or a decision advising what the law would be on an uncertain or hypothetical state of facts, *as was thought to be the case* [italics ours] in *Liberty Warehouse Co. etc.*"

¹⁷ "Herein lies the distinction between declaratory judgments and moot cases or advisory opinions. The declaratory judgment is a final one, forever binding on the parties on the issues presented; the decision of a moot case is mere dictum, as no rights are effected thereby; while an advisory opinion is but an expression of law as applied to certain facts not necessarily in dispute and can have no binding effect on any future litigation between interested parties." *Anway v. Grand Rapids Ry. Co.*, 211 Mich. 592, 179 N.W. 350 (1920).

Borchard and Clark, *op. cit.*, *supra*, note 6, present the following collection of cases to indicate the prerequisites of a declaratory judgment in the state courts:

The declaratory judgment involves and implies an actual controversy. *Hess v. Country Club Park*, 213 Cal. 613, 296 Pac. 300 (1931); *Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930); *Karihers Petition (no. 1)*, 284 Pa. 455, 131 Atl. 265 (1925). Cases have been dismissed for lack of justiciable controversy, either because of want of necessary legal interest in the issue upon the part of the plaintiff or defendant, *Garden City News v. Hurst*, 129 Kan. 365, 282 Pac. 720 (1929); *Perry v. City of Elizabethton*, 160 Tenn. 102, 22 S.W. (2d) 359 (1929); or because the parties were not adverse in interest, *Crawford v. Favour*, 34 Ariz. 13, 267 Pac. 412 (1928); *Reese v. Adamson*, 297 Pa. 13, 146 Atl. 262 (1929); or because the facts were not sufficiently ripe for judicial decision, in which event the judgment would merely have been an advisory opinion, *Lisbon Village Dist. v. Town of Lisbon*, 85 N.H. 173, 155 Atl. 252 (1931); *In re Freeholders of Hudson County*, 105 N.J.L. 57, 143 Atl. 536 (1928); or because in the court's discretionary view, there was an absence of certain parties deemed necessary to the suit, *Coke v. Shanks*, 209 Ky. 723, 273 S.W. 552 (1925); *Cummings v. Shipp*, 156 Tenn. 595, 3 S.W. (2d) 1062 (1928); or because the court's judgment would not have finally settled the issue, *Additional Law Judge*, 53rd Jud. Dist., 10 D. and C. 577 (Pa. 1927); or because the court was not in a position to make its judgment effective, *State ex rel. Baird v. Board of Commissioners of Wyandotte County*, 117 Kan. 151, 230 Pac. 531 (1924).

sues between adverse parties, and involved substantial legal interests properly subject to a binding judgment.

"The distinctive characteristic of the declaratory judgment is that the declaration stands by itself; that is to say, no executory process follows as of course."¹⁸ That execution is not an essential feature of the judicial process is recognized by the Supreme Court in two recent cases.¹⁹ Mr. Justice Stone, in saying in the main case that as long as the controversy is justiciable the form of procedure is immaterial, makes theory conform to actuality. Instances are innumerable wherein the Supreme Court has handed down "binding declarations of right" without further relief. These decisions²⁰ range from the settling of boundary disputes between the states down through the review of judgments of the Court of Claims, bills to remove a cloud on and to quiet title, naturalization proceedings, the construction of wills, the giving of directions to trustees, judgments declaring marriages void, and litigation to determine the location of a county seat. Further, the court has often construed or interpreted statutes and ordinances or administrative action under them.²¹ It is true that usually an injunction against the enforcement of such statutes was asked along with the declaration of unconstitutionality. But an injunction is not really necessary;—once an act is declared unconstitutional, the authorities will not enforce it. In the instant case, the court well realizes that the mere fact that no injunction is prayed for does not render the controversy less justiciable.²²

Thus, we have a definite declaration by the court that the mere fact that an action results in a declaratory judgment will not render it unconstitutional *per se*. Rather, in determining whether a "case" or "controversy" is presented, the court will look at substance instead of form. It is to be hoped that this clean-cut decision will be sufficient to cause favorable action by the United States Senate on the proposed Federal Declaratory Judgment Act.²³

A. A. RIBICOFF

¹⁸ Kariher's Petition (no. 1), 284 Pa. 455, 131 Atl. 265 (1925).

¹⁹ "While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. . . . Nor is it essential that only established and generally recognized forms of remedy should be invoked." *Fidelity Nat. Bank v. Swope*, 274 U.S. 123, 47 Sup. Ct. 511 (1926); *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U.S. 716, 49 Sup. Ct. 499 (1928).

²⁰ For a complete collection of cases see Borchard, *ibid.*, 31 Col. L. Rev. 561, 596, note 106.

²¹ *Ibid.*, 586, note 69 (examples).

²² For a discussion of justiciability as applied to these cases, *ibid.*, 610 *et seq.*

²³ A federal declaratory judgment act was passed by the House of Representatives on Jan. 25, 1928. H.R. Rep. 5623, 70th Cong. 1st sess.; see 69 Cong. Rec. 1680, 2025, 2032 (1925). Hearings were held by a subcommittee of the Senate Committee on Judiciary on April 27 and May 18, 1928. The opinion in the *Willing Case* was handed down on May 21, 1928. The bill, evidently, was "killed" in committee due to this decision. See sub-committee of Senate Committee on Judiciary, 70th Cong. 1st Sess., Hearings on H.R. No. 5623 (1928). A new declara-

LIABILITY OF AN INNOCENT PRINCIPAL FOR MISREPRESENTATIONS OF A REAL ESTATE AGENT

Substantially the same problem has arisen in four cases within the past five years.

In *Light v. Chandler Improvement Co.*¹ *A* (agent), a real estate broker with whom the land was listed to find a purchaser, fraudulently misrepresented the fertility of the soil. *P* (principal) without knowledge of the agent's misrepresentations signed a contract of sale and took a mortgage as part of the purchase price. When *P* sought to foreclose the mortgage, *T* (third person) claimed recoupment for fraud. *Held*, no recoupment.

In *Lemarb v. Power*² *P* authorized *A*³ to find a purchaser for a plot of land with a store building upon it. *A* fraudulently misrepresented to *T* (1) that the store was entirely upon the plot, (2) that the Standard Oil Co. was seeking a ten-year lease of the corner of the lot. In fact, the store extended slightly into the public way and *T* was forced to pay sixty-one dollars to rectify this error. The Standard Oil Co. had not offered to lease the property. Upon discovery of the deception *T* brought this action for fraudulent misrepresentation against *P* who was innocent. *Held*, *T* could recover damages for the misrepresentation about the location of the store, but not for that concerning the fictitious lease.

In *Friedman v. New York Telephone Co.*⁴ *A* had written authority to find a purchaser for property. He falsely represented to *T* that the heating and plumbing system in the building was good. *T* brought an action for damages against *P* who was innocent. *Held*, *T* could not recover.

In *Taylor v. Wilson*⁵ *A* without *P*'s knowledge falsely represented that the premises in question had a good cesspool on them, "a mighty good one." *T* sued *P* for fraudulent misrepresentation. *Held*, *T* could recover, one judge dissenting. The two opinions differ on a question of fact which neither seems to consider important, yet which, it is submitted, is the controlling factor, both in

tory judgment bill was introduced into the House of Representatives and debated upon, June 27, 1932. H.R. 4624, 72nd Cong., 1st Sess. See 75 Cong. Rec. 726 (1932). This bill was passed on December 19, 1932. H.R. Rep. 4624, 72nd Cong., 2nd Sess.; see 76 Cong. Rec. 726 (1932). On December 20, 1932, it was referred to the Senate Committee on Judiciary. 76 Cong. Rec. 753 (1932).

It may be of interest to compare the procedural device embodied in 180, Judicial Code (284 U.S.C. 287). This seems to provide for a declaratory judgment as to those persons indebted to the United States. See Frankfurter and Katz, Cases on Federal Jurisdiction and Procedure, 93.

¹ 33 Ariz. 101, 261 Pac. 969, 57 A.L.R. 107 (note) (1928).

² 151 Wash. 273, 275 Pac. 561 (1929).

³ The representations were made by a sub-agent, but since this does not affect the result the simpler notation is followed.

⁴ 256 N.Y. 392, 176 N.E. 543 (1931); reversing 246 N.Y.S. 741, 231 App. Div. 830 (1930).

⁵ 183 N.E. 541 (Ohio App. 1932).

this case and in the three previous cases. The majority opinion speaks of the agent as having authority to complete a contract,⁶ whereas the dissenting judge specifically states that the agent had authority only to find a purchaser.⁷

This case illustrates the primary cause of the apparent confusion of the cases—a failure to isolate the agency problem from other questions involved:

1) Failure to distinguish the question of what constitutes fraud in a particular jurisdiction from the agency problem is the factor which causes the most difficulty. Whether a certain misrepresentation is fraudulent or not may depend on whether the court follows *Derry v. Peek*⁸ or *Matteson v. Rice*,⁹ but this does not determine whether *P* is to be held for such misrepresentations if made by his agent. The substantive law of torts does not as an original matter determine the question of vicarious liability. To illustrate with an example from a field of physical torts in which the conflict is more sharply defined than in that of fraud: suppose that *A* while driving a truck for *P* negligently stops so close to *T* that *T* suffers from nervous shock. *T* sues *P*. If the state in which the action is brought does not allow recovery for fright, the issue is settled before any problem of agency arises. That this distinction between the *scope* of the liability for a tort and vicarious liability has not been so obvious in the fraud cases is due to the anomalous character of the common law idea of fraud, partaking as it does of both contract and tort characteristics. The same anomaly helps to explain the lag in the growth of the scope of liability for fraud, as compared with that of physical torts.

2) The second contributing cause of the haze which hides the agency problem is the question of procedure. Many courts and lawyers do not appreciate the difference between an affirmative action for fraudulent misrepresentation and a defensive plea of fraud or a bill in equity to rescind because of fraud.¹⁰ Essen-

⁶ "We are of the opinion that the agents of defendants had implied authority to do more than just find a buyer and make the representations about the cesspool described in the petition. Defendants admit that their agents negotiated the transaction between the plaintiff and the defendants. In other words they do not claim that said agents were employed merely to find a buyer or to bring the parties together." Lemert, J., *supra*, note 5, at 542.

⁷ "To my notion it is a matter of common knowledge that a real estate agent's authority is limited, in that it ends when he has procured a purchaser willing, able, and ready to enter into a contract of purchase. It is also the common understanding that the vendor usually reserves to himself the power to conclude the sale. This was what followed in this case." Sherick, P. J., dissenting, *supra*, note 5, at 543.

⁸ 14 App. Cases 337, 58 L.J.Ch. 864, 61 L.T. 265 (1889).

⁹ 116 Wis. 328 (1903). The various views on what constitutes fraud are not strictly within the scope of this article. See Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 Harv. L. Rev. 733 (1929); Carpenter, *Responsibility for Misrepresentation*, 24 Ill. L. Rev. 749 (1930); Williston, *Liability for Honest Misrepresentation*, 24 Harv. L. Rev. 415 (1916). See also articles cited therein.

¹⁰ Thus in *Light v. Chandler Improvement Co.*, *supra* note 1, in which *T* (defendant) claimed recoupment for fraud of *A*, *P* (plaintiff) cited *Mayo v. Wahlgreen*, 9 Colo. App. 506,

tially this is a question of substantive law, though masquerading under the form of procedure. Some states which do not allow an affirmative action for deceit against an innocent principal will permit the agent's deceit to form the basis for an equitable action for rescission or a defensive recoupment.¹¹ In others an innocent misrepresentation by the agent is sufficient ground for a proceeding for rescission,¹² while in a third group even fraudulent misrepresentations by the agent are not a sufficient basis for rescission as against an innocent principal.¹³

Having disposed of these preliminary inquiries, we can focus our attention upon the comparatively simple agency problem which divides itself into (a) the question of general and special agents, and (b) the "apparent" authority or "scope of authority."

The distinction between a general and special agent is still an active principle in our law¹⁴ though it is gradually breaking down.¹⁵ None of the principal cases discussed here, for example, consider it as an independent factor. The general view on the question can be expressed in the words of *Haskell v. Starbird*,¹⁶ "There is no distinction in the matter of responsibility, for the fraud of an agent authorized to do business generally, and of an agent employed to conduct a single transaction, if, in either case, he is acting in the business for which he was employed by the principal, and had full authority to complete the transaction." In other words the doctrine of ostensible or apparent authority applies alike to general and special agents, and if the power of the latter to bind the principal is more limited than that of the former it is only because a third party acting as a reasonable man would not be justified in ascribing to him such broad powers as a person entrusted with more duties would be likely to have.

As far as agency law is involved, therefore, our determination of the four principal cases depends on the answer to a single question. What representations concerning land could a third person reasonably believe an agent had au-

50 Pac. 40 (1897) and *Freyer v. McCord*, 165 Pa. 539, 30 Atl. 1024 (1895) which were affirmative actions for deceit. And in *Taylor v. Wilson*, *supra* note 4, the dissent cited *Light v. Chandler* which represents a defensive use of fraud.

¹¹ *Supra*, note 1; *Martin v. Ince*, 148 S.W. 1178 (Tex. 1912); *McNeile v. Cridland*, 168 Pa. 16, 31 Atl. 939 (1895); 57 A.L.R. 107, 115; *Cook, Rescission for Innocent Misrepresentation*, 27 Yale L. Jour. 929 (1918); 28 *ibid.* 178.

¹² *Ebbs v. St. Louis Union Trust Co.*, 153 S.E. 858 (N.C. 1930).

¹³ *Luff v. Nevirs*, 106 N.J.Eq. 386, 150 Atl. 834 (1930). Cf. *N.Y. Life Ins. Co. v. Marotta*, 57 F. (2d) 1038 (C.C.A. 3rd 1932) which distinguishes the defense of fraud in law from that in equity.

¹⁴ *Blackwell v. Ketcham*, 53 Ind. 184 (1876); *Hatch v. Taylor*, 10 N.H. 538, 541 (1840); *Waldron v. Cutley*, 105 N.J.Eq. 586, 144 Atl. 447 (1929); *Bowles v. Rice*, 107 Va. 51 (1907).

¹⁵ *Watts v. Howard*, 70 Minn. 122 (1897); *Haskell v. Starbird*, 152 Mass. 117, 119 (1890); 1 *Mechem, Agency* (2d ed. 1914), 39, par. 61 ff, 520, par. 737.

¹⁶ *Supra*, note 15.

thority to make, if such agent's duties consisted of finding a purchaser and showing him the land, the contract itself being made by the third person and principal personally? In view of the general custom in America of listing real estate with numerous brokers at the same time, without giving authority to complete a contract,¹⁷ the decisions in the principal cases seem sound in holding that such agent's power is quite limited. His apparent authority does not extend to making representations concerning the character and quality of the real estate. His principal is bound only by unauthorized misrepresentations concerning the location and quantity of the land.¹⁸ This is clearly illustrated in both of these aspects in *Lemarb v. Power*, *supra*, where the court allowed recovery for the misrepresentation concerning the quantity of the land, but refused to permit damages for the false statements about the Standard Oil lease. *Friedman v. New York Telephone Co.*, *supra*, also clearly falls within this principle, the agent having misrepresented the character of the plumbing. Applying the same principle to the agency problem in *Light v. Chandler Improvement Co.*, *supra*, the principal would not be liable in an affirmative action for fraud, since the agent's misrepresentation concerned the quality of the land (fertility). But since the fraud was pleaded as a defense, we apply our analysis of the procedural problem and decide as the court did in that case, that fraud can be so pleaded. It is necessary, however, that the party seeking recoupment bring to the attention of *P* the fraud of the agent, and offer to rescind. This was not done in *Light v. Chandler Improvement Co.* so the court found for the plaintiff.

It should now be apparent why the importance of a simple question of fact was stressed as the controlling point in the case of *Taylor v. Wilson*, *supra*. If, as the majority supposed, the agent had authority not only to find a purchaser but also to close the deal, it would be reasonable to suppose that he had more authority than a broker whose power was limited to finding a purchaser. Consequently his apparent authority would include the making of representations concerning the quality and character of the property.¹⁹ Assuming the majority opinion is correct in its statement of the facts, therefore, all four principal cases are consistent.

To sum up and collate the rules presented we can state the liability of an inno-

¹⁷ See excellent discussion of this point in *Light v. Chandler Imp. Co.*, *supra*, note 1.

¹⁸ Location of land: *Brennen v. Kent*, 206 Ala. 561, 90 So. 790 (1921) (to set aside conveyance); *Ballard v. Lyons*, 114 Minn. 264, 131 N.W. 320, 38 L.R.A. (N.S.) 301 (1911) (to recover money paid on a contract); *Green v. Worman*, 83 Mo. App. 568 (1900) (fraud); *Firebaugh v. Bentley*, 65 Ore. 170, 130 Pac. 1129 (1913) (rescission); 57 A.L.R. 107, 117.

Quantity of the land: *Griswold v. Gebbie*, 126 Pa. 353, 17 Atl. 673, 12 Am. St. Rep. 878 (1889); *Farris v. Gilder*, 115 S.W. 645 (Tex. 1908) (to recover value); *Mason v. Crosby*, 1 Woodb. & M. 342, Fed. Cas. No. 9234 (1846); 57 A.L.R. 107, 117.

¹⁹ "The proper application of this rule [that *P* is liable for the misrepresentations of *A* within his apparent authority] may depend on questions of fact and may vary with the circumstances of each case. Thus it may appear that a real estate broker was also an agent to sell and convey." Pound, J., in *Friedman v. N.Y. Telephone Co.*, *supra*, note 4.

cent principal for fraudulent misrepresentations of his agent concerning land as follows:

1. In an affirmative action of deceit by *T* against *P*.

a) If *A* is merely authorized to find a purchaser, he has power to bind *P* only by representations concerning the location and quantity of the land, and not for those concerning character or quality of the land.

b) If *A* has authority to complete a contract, he can bind *P* by representations concerning quality and character.

2. But although *A* whose authority is limited to finding a purchaser has no apparent authority to make representations concerning the character of the land, *T* can rescind or recoup in such a case if he notifies *P* of the fraud and offers to rescind.

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