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Constitutional Law - Search and Seizure - Unreasonable Search and Seizure as Applied to the Person

CASE NOTES

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — UNREASONABLE SEARCH AND SEIZURE AS APPLIED TO THE PERSON. Two federal agents arranged to purchase two grains of heroin from the defendant. In pursuance of the plan, they furnished marked bills to a government informer who was to make the actual purchase. The defendant drove his automobile to an intersection to meet the informer. Police officers than came forward and attempted to make an arrest. A short struggle ensued, during which the defendant was seen to pass his hand over his mouth. Taken to a hospital the defendant was placed upon a table, strapped down, and forced to submit to having a stomach pump inserted down his throat. He was thus forced to emit into a cellophane wrapper contents which contained heroin. A supplemental search of his clothing disclosed the marked money in his pocket. On this set of facts, the search and seizure was *held* illegal as being unreasonable within the meaning of the Fourth Amendment although the officers had probable cause for making the arrest without a warrant. In accord with the Federal rule of admissibility, all such evidence so procured was excluded. *United States v. Willis*, 85 F. Supp. 745 (S.D.Cal., 1949).

The general rule that evidence is not rendered inadmissible simply because it has been unlawfully obtained was not disturbed until 1886 when the United States Supreme Court in *Boyd v. United States* [1] declared unconstitutional the admission of evidence obtained by an unreasonable search and seizure. The *Boyd* case remained unquestioned for twenty years, then in *Adams v. New York* [2] the Supreme Court virtually repudiated the view set down in the *Boyd* case. After another twenty years, the Court in *Weeks v. United States*,[3] reverted to the original doctrine of the *Boyd* case with the condition that the illegality of the search and seizure should be raised by a motion before trial for return of the thing seized. The procedure for excluding eveidence obtained by unlawful searches and seizures is now set forth in the Federal Rules of criminal procedure.[4]

Only one other instance in the reported cases can be found where evidence procured from the stomachs of the defendant was offered in a court of the United States. In that case, In re *Guzzardi*,[5] the court found that the federal officer had not participated in the search, but was called in after the evidence had been obtained, and also that the defendant had consented to the search.

To decide cases of this type it is necessary to make a detailed study in retrospect of cases decided, and to mold these precedents into a form that will be desirable henceforward. So it follows logically that views regarding cir-

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[1] 116 U.S. 616 (1886).

[2] 192 U.S. 585 (1904).

[3] 232 U.S. 383 (1914). Noteworthy articles on the subject of searches and seizures within the constitutional prohibition are: Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361 (1921); Grant, *The Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 So. Calif. L. Rev. 60 (1941); Wood, *The Scope of the Constitutional Immunity against Searches and Seizures*, 34 W. Va. L. Rev. 1 (1927).

[4] Fed. R. Crim. P., §41 (e) requires motion to suppress before trial unless defendant was unaware of opportunity, yet court may entertain motion during trial if it sees fit.

[5] 84 F. Supp. 294 (N.D.Tex. 1949). In the instant case of United States v. Wills the judge skipped over in a rather cursory manner the reason why the evidence there obtained was any more illegal than the forcing of the defendant to give fingerprints or the taking of the size of the defendant's shoes for comparison with those left at the scene of the crime.

cumstances like those here presented ultimately depend on the functions of the Fourth Amendment.[6] When the framers of the Constitution realized the need of restriction against unreasonable search and seizure, they had two forms to draw from, the Massachusetts plan, or the Virginia plan. Their choice was the Massachusetts view to guard against unreasonable searches and seizures within the United States Constitution. This is clear proof that they intended to give wide scope to this protection against police intrusion.[7]

The courts have time and time again, given effect to the principles of the Fourth Amendment and in so upholding these principles they have not taken a narrow view, but have given it a liberal construction and a wide scope. This is illustrated in the *Boyd* case. "It would seem that the right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures," would not be violated under ordinary construction of language, by compelling obedience to a subpoena. But the Supreme Court in a case where the issue arose held the evidence inadmissible simply because the information leading to the issue of the subpoena has been unlawfully secured.[8] Literally there is no "search" and "seizure" when a friendly visitor abstracts papers from an office, yet the Court held in *Gouled v. United States*[9] that evidence so obtained could not be used.

Despite the right of action the injured party may have against the offending person making the improper search or seizure, the better policy appears to be the exclusion of evidence wrongfully seized, *i.e.*, requiring only that the law enforcement officers themselves follow the law.[10]

JUDGMENTS — RES JUDICATA — DISMISSAL OF APPEAL AS MOOT. The office of Price Administration in 1944 brought suit against the defendant on two counts. Treble damages were demanded for a breach of Maximum Price Regulation No. 221 as amended and injunctive relief was asked to prevent further violations. Since the right to damages depended upon the right to injunction, by agreement the treble damage claim was held in abeyance until the final adjudication of the claim for injunction. There was a judgment for the defendant in the lower court and OPA appealed.[1] A new and separate action was filed one year later for treble damages for alleged continued violation of the price regulations. This action, by agreement, was continued pending the outcome of the appeal of the injunctive action. Subsequently, while the appeal was still pending, the President of the United States decontrolled the commodity. The appeal was dismissed on the ground that the question of injunctive relief had become moot.[2] Defendant then requested

[6] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." U.S.Const., Amend. IV.

[7] Harris v. United States, 331 U.S. 145, 162 (1947), Frankfurter, J., dissenting.

[8] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[9] 255 U.S. 298 (1921). See Rottschaefer, Constitutional Law 743-45 (1939) for further discussion of this case.

[10] The late Professor John H. Wigmore vigorously approved admission of improperly secured evidence. See Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922).

[1] Bowles v. Munsingwear, Inc., 63 F. Supp. 933 (D.Minn. 1945).

[2] Fleming v. Munsingwear, Inc., 162 F.2d 125 (8th Cir. 1947) (". . . there now being no law which would sustain the injunction sought by plaintiff, it seems clear that the case has become moot. . . . This court can concern itself only with actual controversies. . . . The appeal will therefore be dismissed.")

the dismissal of the two pending treble damage actions by the lower court on the ground that the judgment on the injunctive action barred further proceedings on the damage claims. This request was granted and OPA brought an appeal where it was *held* that the order of the lower court was proper and a dismissal of an appeal for mootness affirms the judgment of the lower court. *United States v. Munsingwear, Inc.*, 178 *F.2d* 204 (*8th Cir.* 1949).

As a general legal principle a dismissal of the appeal is an affirmance of the judgment of the lower court.[3] However, its application in the instant case appears questionable and is extremely contrary to the better view set out in the Restatement of Judgments, 69 (2): "Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action." The action for an injunction and the action for treble damages are two different causes of action.[4]

The basic error of the appellate court was the dismissal of the injunctive suit as moot. A moot question is one in which there is no actual case or controversy.[5] It is a fundamental rule that a question will not be regarded as moot despite matters which may have made it such in some respects, if there remain rights or liabilities of the litigants which may be adjudicated thereby.[6] If the question on the first appeal was moot, then, since no rights can be established under a moot question, it appears that the cause originally tried in the lower court had not been finally adjudicated.[7] If the appellate court had recognized that there were other rights to be determined, then obviously the judgment of the lower court would be no bar to a subsequent different and separate cause of action.

The court's reasoning in deciding the issue of treble damages sought by the OPA as being barred as a matter of res judicata is an improper application of such doctrine because a moot question determines no rights.[8] Because it determines no rights, the judgment of the lower court is of no effect.

The instant case is probably the result of a public post-war sentiment; the tenor of 1949 is definitely against sustaining wartime OPA penalties.

This case would probably not arise in North Dakota since the North Dakota Supreme Court has indicated that it will not dismiss an appeal for mootness if there are rights of the parties to be determined.[9]

MARRIAGE — PRESUMPTIONS AND BURDEN OF PROOF — PRESUMPTION OF VALIDITY OF SECOND MARRIAGE. Two women filed claims to a workmen's compensation award which was due a deceased workman, each claiming to be his widow. The testimony of the first claimant was to the effect that she

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[3] Burgess v. Poole, 45 Ark. 373 (1885); Tuttle v. Tuttle, 19 N. D. 748, 124 N.W. 429 (1909); *cf.* Clark v. Beadle County, 40 S.D. 597, 169 N.W. 23 (1918).

[4] Woodbury v. Porter, 158 F.2d 194 (8th Cir. 1946).

[5] Fleming v. Munsingwear, Inc., 162 F.2d 125 (8th Cir. 1947).

[6] State v. Stutsman, 24 N.D. 68, 139 N.W. 83 (1912); Clark v. Beadle County, 40 S.D. 597, 169 N.W. 23 (1918) (Appellate court should dismiss moot questions, "yet whenever the judgment if left unreversed will preclude the defeated party as to a fact vital to his rights. . . . There remains more than a moot question.")

[7] Gelpi. v. Tugwell, 123 F.2d 377 (1st Cir. 1941); Knowlton v. Inhabitants of Swampscott, 280 Mass. 69, 181 N.E. 849 (1932); Rawlings v. Claggett, 174 Miss. 845, 165 So. 620 (1936).

[8] Froemke v. Parker, 39 N.D. 628, 169 N.W. 80 (1918). ("If the matter had become a moot question, then a reversal of the judgment could not affect the rights of the parties.")

[9] State v. Stutsman, 24 N.D. 68, 139 N.W. 83 (1912).

married the deceased in 1923, and that there were nine children of this marriage. Two of these children were still minors. The first claimant also testified that she had never obtained a divorce or received notice that the deceased had done so. She had nevertheless remarried. The second claimant proved a marriage solemnized in 1941. On this set of facts the Supreme Court of Virginia *held* that the two minor children of the first marriage and the second wife were entitled to share in the award to the exclusion of the first wife. There is a presumption that a prior marriage continues until its dissolution is shown and also a presumption of tthe validity of a second marriage. Where two marriages of the same person are shown, the presumption of the validity of the second marriage overcomes the presumption of the dissolution is shown and also a presumption of the validity of a second marriage has the burden of producing evidence of its invalidity, since it will be presumed the first marriage was legally dissolved. *Parker v. American Lumber Co.*, 190 Va. 181, 56 S.E.2d 214 (1949).

Whether the presumptions of this case actually conflict presents a difficult question on which the text writers differ,[1] but courts invariably treat these presumptions as conflicting.[2] But with the exception of Iowa,[3] courts consistently hold that the presumption in favor of the validity of the second marriage (hereafter, presumption of validity) overthrows the presumption of continuance of the first[4] (hereafter, presumption of continuance) and the presumption of validity must therefore be met with evidence. As a basis four grounds are assigned: (1) That the prior marriage will be presumed to be invalid,[5] (2) That the prior marriage was dissolved by death,[6] (3) That one of the parties to the prior marriage obtained a divorce,[7] (4) That if the proof shows no divorce, it will be presumed that the other spouse had the marriage annulled.[8] As to what the attacking party must prove to invalidate the subsequent marriage, the courts are in irreconcilable conflict, but it is well established that proof of a prior marriage, presumption of its continuance, and uncorroborated testimony of the first wife are insufficient.[9] An extreme

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[1] That these presumptions cannot conflict, see 4 Wigmore, Evidence §2493 (3d ed. 1940); 4 Chamberlayne, The Modern Law of Evidence §§1224, 1225 (1913). *Contra:* 1 Jones, Commentaries on Evidence §357 (2d ed. 1926).

[2] *In re* Estate of Hughson, 173 Cal. 448, 160 Pac. 548 (1916); Hunter v. Hunter, 111 Cal. 261, 43 Pac. 756 (1896); Pittinger v. Pittinger, 28 Colo. 308, 64 Pac. 195 (1901); Roberts v. Roberts, 124 Fla. 116, 167 So. 808 (1936); Goodwin v. Goodwin, 113 Iowa 319, 85 N.W. 31 (1901).

[3] *In re* Colton's Estate, 129 Iowa 542, 105 N.W. 1008 (1906); Ellis v. Ellis, 58 Iowa 720, 13 N.W. 65 (1882). Isolated cases, subsequently ignored, in agreement: Lindsay v. Lindsay, 42 N.J. Eq. 150, 7 Atl. 666 (1887); Randlett v. Rice, 141 Mass. 385, 6 N.E. 238 (1886). Followed to slight extent, Williams v. Williams, 63 Wis. 58, 23 N.W. 110 (1885).

[4] Spears v. Spears, 178 Ark. 720, 12 S.W.2d 875 (1928); Hunter v. Hunter, *supra*, note 2; Winter v. Dibble, 251 Ill. 200, 95 N.E. 1093 (1911); Boulden v. McIntire, 119 Ind. 574, 21 NE. 445 (1889).

[5] Palmer v. Palmer, 162 N.Y. 130, 56 N.E. 501 (1900).

[6] Curry v. Curry, 122 S.W.2d 677 (Tex. Civ. App. 1938).

[7] *In re* Hughson's Estate, 173 Cal. 448, 160 Pac. 548 (1916); Winter v. Dibble, 251 Ill. 200, 95 N.E. 1093 (1911); Boulden v. McIntire, 119 Ind. 574, 21 N.E. 445 (1889); Veazie v. Staples, 308 Mass. 600, 33 N.E.2d 262 (1941).

[8] Lazarowicz v. Lazarowicz, 91 Misc. 116, 154 N.Y. Supp. 107 (1915).

[9] Mazzenga v. Rosso, 87 Cal. App.2d 790, 197 P.2d 770 (1948); Pittinger v. Pittinger, 28 Colo. 308, 64 Pac. 195 (1901); Wilson v. Allen, 108 Ga. 275, 33 S.E. 975 (1899) (Second wife was aggressor and was required to show the divorce she claimed existed); Holman v. Holman, 288 S.W. 413 (Tex. Civ. App. 1927).

application of the presumption of the validity of the second marriage [10] would tend to make it practically irrebuttable. Where there are children of the second marriage, the presumption of their legitimacy buttresses the presumption of validity.[11] However, this position is weakened by the statement that the children of a marriage dissolved because of a prior marriage will be adjudged the legitimate children of a party to the marriage who was in good faith.[12] A familiar canon of construction prevalent in decisions is that the "Law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy." [13] It has been held that the burden of proof borne by the attacking party requires proof even of a negative fact [14] where it is essential to the existence of a right.[15]

An early English case, often cited, held that, "*Semper praesumitur pro matrimonio* is a presumption of law that can be negatived only by disproving every reasonable possibility." [16] Another significant English case declared, "The presumption favoring the validity of the second marriage is not to be lightly repelled and not to be broken in upon or shaken by mere probability, but the evidence to repel it must be strong, distinct, satisfactory and conclusive." [17] Wide American approval has been given this doctrine,[18] but tribunals adopting this view are reluctant to state positively what proof is adequate. Proof of no divorce in any county of residence of either party was insufficient because one of them may have procured a divorce in a different county of one of the four states of residence.[19] Admission by an alleged bigamist that a prior marriage was subsisting when she entered the second was overcome by the presumption that her husband had divorced her in time to make the second marriage legal.[20] A divorce of record was excluded from evidence as it would negate the presumption of validity.[21] Iowa alone refuses to allow the presumption of validity to overthrow the presumption of continuation, stating that proof of no divorce in all counties of residence would rebut it.[22] The more moderate courts among those that give the presumption of validity a higher dignity, agree with Iowa as to adequacy of proof.[23] Where facts sustained the first wife's contention, it was held that if her

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[10] *In re* Salvin's Will, 106 Misc. 111, 184 N.Y. Supp. 897 (1919) (must aggressively exclude every indication or suggestion which may conceivably rescue second marriage). *Contra*: Hudspeth v. Hudspeth, 206 S.W.2d 863. (Tex. Civ. App. 1947). *See Judicial Presumptions Respecting Irregular Marriages*, 82 U. of Pa. L. Rev. 508 (1937).

[11] *In re* Biersack, 96 Misc. 161, 159 N.Y. Supp. 519 (1916) (but not confined to cases involving ligitimacy of offspring). *Contra:* Cole v. Cole, 153 Ill. 585, 38 N.E. 703 (1894) (presumption only arises due to presumption of innocence).

[12] *In re* Biersack, *supra*, note 11.

[13] Hynes v. McDermott, 91 N.Y. 451, 43 Am. Rep. 677 (1883).

[14] Patterson v. Gaines, 6 How. 550 (U.S. 1848).

[15] Boulden v. McIntire, 119 Ind. 574, 21 N.E. 445 (1889).

[16] Piers v. Piers, 9 Eng. Rep. 1118 (1949).

[17] Morris v. Davies, 7 Eng. Rep. 365 (1837).

[18] Holman v. Holman, 288 S.W. 413 (Tex. Civ. App. 1927).

[19] Spears v. Spears, 178 Ark. 720, 12 S.W.2d 875 (1928).

[20] Hunter v. Hunter, 111 Cal. 261, 43 Pac. 756 (1896); Lau v. Lau, 154 N.Y. Supp. 107 (1914).

[21] Barker v. Barker, 88 Misc. 300, 158 N.Y. Supp. 413 (1916) (marriages one month apart); *Cf.* Coal Run Coal Co. v. Jones, 127 Ill. 379, 8 N.E. 865 (1889) (first wife's testimony excluded on ground that showing no divorce would not show that second marriage was invalid).

[22] *In re* Colton's Estate, 129 Iowa 542, 105 N.W. 1008 (1906); Goodwin v. Goodwin, 113 Iowa 319, 85 N.W. 31 (1901); Ellis v. Ellis, 58 Iowa 720, 13 N.W. 65 (1882).

[23] *In re* Smith's Estate, 33 Cal.2d 279, 201 P.2d 539 (1949); Roberts v. Fowler, 124 Fla. 116, 167 So. 808 (1936); Cartwright v. McGown, 121 Ill. 388, 12 N.E. 737 (1887) (second marriage void and children of it declared illegitimate); Brokeshoulder v. Brokeshoulder, 84 Okla. 249, 204 Pac. 284 (1921).

husband had obtained a divorce, he would have had to do so fraudulently.[24] On the other hand, some courts have held that when an affirmative attempt is made to prove the validity of the second marriage, the presumption shifts to protect the first marriage.[25] This attitude seems to be consistent with the rule as to burden of proof. The presumption was not applied where a bigamist asserted the invalidity of his second marriage.[26] The presumption was rebutted and disproved when a divorce relied upon was shown never to have been granted.[27] A well reasoned and often cited case [28] held that the presumption of validity does not prevail when evidence is introduced, but that the whole case is then thrown open to be decided as a fact upon all the evidence, unfettered by any arbitrary rule. Another court warned that, "If a presumption of divorce is applied blindly, without due regard to the facts of the particular case, the divorce becomes a fiction, and the presumption becomes a conclusive presumption, *i.e.*, a rule of substantive law by which a bigamous marriage supplants a lawful one." [29] It has also been said that the jury may indulge the presumption, but that it cannot be sanctioned as a legal presumption.[30]

An anomaly appears between the civil law and the criminal law where neither the presumption of validity nor the presumption of death, divorce, or annulment upon which it is based is ever indulged in prosecutions for bigamy.[31] In cases where this particular conflict of presumptions arises, the party whose innocence is at stake is usually deceased, and the primary objective of the litigants is to acquire possession of the benefits arising from his death. A realistic consideration of the problem requires that a greater emphasis be placed upon the facts of each case with a displacement of unreasoned inferences which often places an ineluctable burden on a litigant.

PENAL STATUTES — CONSTRUCTION — LEGISLATIVE INTENT — EJUSDEM GENERIS. 18 U.S.C. §1462 (1948) declares: "Whoever knowingly deposits with any express company . . . for carriage . . . in interstate . . . commerce any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film,

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[24] Cole v. Cole, 153 Ill. 585, 38 N.W. 703 (1894); Ellis v. Ellis, 58 Iowa 720, 13 N.W. 65 (1882); Schmeizel v. Schmeizel, 184 Md. 584, 42 A.2d 106 (1945). Divorces from other states are sometimes refused recognition. Neely v. Tenn. G.&A.Ry., 145 Ga. 363, 89 S.E. 325 (1916) (presumption not raised in favor of railroad which had paid second wife earlier); Bell v. Little, 204 App. Div. 235, 197 N.Y. Supp. 674 (1922); *In re* Caltabellotta's Will, 183 App. Div. 753, 171 N.Y.Supp. 82 (1918) (distinguished between actions in rem, in personam, and for convenience).

[25] Wilson v. Allen, 108 Ga. 275, 33 S.E. 975 (1899); Clark v. Cassidy, 62 Ga. 408 (1879); *In re* Hamilton, 76 Hun. 200, 27 N.Y.Supp. 813 (1894). *Contra:* Coal Run Coal Co. v. Jones, 127 Ill. 379, 8 N.E. 865 (1889).

[26] Townsend v. Morgan, 63 A.2d 743 (Md. 1949); *In re* Sloan's Estate, 50 Wash. 86, 96 Pac. 684 (1908) (Presumption attaching to second marriage only overcomes presumption of marriage arising from cohabitation and reputation, and is not sufficiently strong to overcome proofs of prior marriage.)

[27] Woods v. Mutual Casualty Ins. Co., 141 S.W.2d 972 (Tex. Civ. App. 1940). As to degrees of proof required by different courts, see *In re* Smith's Estate, 33 Cal.2d 279, 201 P.2d 539 (1949); Cole v. Cole, 153 Ill. 585, 38 N.W. 703 (1894); Mitchell v. Frederick, 166 Md. 42, 170 Atl. 733 (1934); Colored Knights of Pythias v. Tucker, 92 Miss. 501, 35 So. 51 (1908); *In re* Aguirre's Estate, 57 Nev. 275, 65 P.2d 685 (1936).

[28] Turner v. Williams, 202 Mass. 500, 89 N.E. 110 (1909).

[29] Schmeizel v. Schmeizel, 184 Md. 584, 42 A.2d 106 (1945).

[30] Hammond v. Hammond, 43 Tex. Civ.App. 284, 94 S.W. 1067 (1906).

[31] People v. Lamarr, 20 Cal.2d. 345, 128 P.2d 678 (1942).

[32] As to classification of presumptions, see 44 Harv. L. Rev. pp. 931-32. As to presumptions generally, see Bohlen, *The Effect of Rebuttable Presumptions of Law and Burden of Proof*, 68 U of Pa.L. Rev. 307 (1920); McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L.Rev. 291 (1927).

paper, letter, writing, print, or other matter of indecent character . . . shall be fined . . . or imprisoned. . . ." Defendant deposited phonograph records, admittedly obscene, with an express company for carriage in interstate commerce. The District Court held this act to be a violation of the statute. The Circuit Court reversed,[1] believing the statute prohibited only matter *visibly* obscene. On writ of certiorari the Supreme Court *held*, with one justice taking no part and three dissenting, that the sending of obscene phonograph records in interstate commerce was an act prohibited by the statute. *U.S. v. Alpers*, 70 S. Ct. 352 (1950).

Strict construction of penal statutes in favor of the accused is a time-honored rule[2] founded on the tenderness of the law for the rights of individuals.[3] Early decisions of the Supreme Court indicate there are no common law offenses against the United States although that point was never directly decided.[4] It follows that one cannot be punished for crimes against the United States unless the act shown constitutes plainly and unmistakably an offense within the meaning of an act of Congress.[5] This rule of strict construction of penal statutes does not prevent a consideration of the legislative intent in enacting such statutes,[6] nor does the rule of ejusdem generis,[7] if a literal interpretation will defeat the obvious purpose of the legislature.[8] The fact that a particular thing does not exist at the time the law was enacted does not preclude the application of the law to it,[9] but such laws must not be extended by inference or implication.[10] The statute in question was first enacted February 8, 1897[11] and was soon thereafter held constitutional as a proper regulation of interstate commerce.[12] It was subsequently amended in 1905 and 1909[13] and thereafter its constitutionality was re-affirmed in a case which arose in North Dakota.[14] An amendment in 1920 enlarged the act to include the words "motion-picture film."[15] This indicates that obscene motion-picture films were not within the prohibitions of the act prior to the amendment, although the transmission of obscenity from motion pictures involves primarily the visual senses. *A fortiori* the statute does not include objects transmitting obscenity solely through auditory senses. It is not the general intent but the special intent of Congress manifested in the Act that

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[1] Alpers v. U.S., 175 F.2d 137 (9th Cir. 1949).
[2] U.S. v. Resnick, 299 U.S. 207 (1936); U.S. v. Wiltberger, 5 Wheat. 76, 95 (U.S. 1820).
[3] U.S. v. Wiltberger, *supra* note 2.
[4] U.S. v. Hudson, 7 Cranch 32 (U.S. 1812); U.S. v. Coolidge, 1 Wheat. 415 (U.S. 1816); U. S. v. Eaton, 144 U.S. 677 (1822); U.S. v. Worrall, 2 Dall. 384 (U.S. 1798).
[5] Fasulo v. U.S., 272 U.S. 620 (1926); Todd v. U.S., 158 U.S. 278, 282 (1895); Sarlls v. U.S., 152 U.S. 570 (1894); U.S. v. Chase, 135 U.S. 255 (1890).
[6] U.S. v. Hartwell, 6 Wall 385 (U.S. 1867); U.S. v. Corbett, 215 U.S. 233 (1909).
[7] General words following a designation of particular things or acts embrace only those acts or things of the same general nature as those specified. Gooch v. U.S., 297 U.S. 124 (1936); Crawford, Statutory Construction 327 (1940); Black's Law Dict. 645 (3d ed. 1933).
[8] U.S. v. Hartwell, *supra* note 2; U.S. v. Bitty, 208 U.S. 393 (1908); U.S. v. Mescall, 215 U.S. 26 (1909).
[9] Browder v. U.S. 312 U.S. 335, 339 (1941).
[10] Todd v. U.S., *supra* note 5; U.S. v. Harris, 177 U.S. 305 (1900).
[11] 29 Stat. 512 (1897).
[12] U.S. v. Popper, 98 F. 423 (N.D. Cal. 1899).
[13] 33 Stat. 705 (1905); 35 Stat. 1138 (1909).
[14] Clark v. U.S., 211 F. 916 (8th Cir. 1914).
[15] 41 Stat. 1060 (1920).

controls; [16] penal statutes should not be extended to things or acts not within its descriptive terms.[17]

To justify this court's decision the words "phonograph records" must be included within the meaning of the phrase "other matter of indecent character." But all the items specifically enumerated in the statute involve one's visual senses, while phonograph records involve the reproduction of sound transmitted to a person through his auditory senses. Clearly, a wide dissimilarity exists. The decision in the instant case seems to enlarge the application of legislative intent to include acts within the spirit though not within the letter of the law.[18]

TAXATION — FEDERAL INCOME TAX — EXEMPTIONS — EDUCATIONAL INSTITUTION OPERATING BUSINESS. New York University in seeking to invest its funds organized the taxpayer as a charitable corporation. Through a merger the University acquired the business of the C. F. Mueller Co., a well known manufacturer of macaroni products. The business was to be operated exclusively for the benefit of the Law School of New York University. Subsequently the Tax Commissioner assessed income tax on the profits of the Corporation for past years. The Corporation claimed income tax immunity under §101 (6) of the Internal Revenue Code,[1] arguing that they were exempt and that the test to be used was the destination of the income. It was shown that they did not act as a tax exempt corporation in that they paid social security taxes and deducted charitable contributions. The Tax Court in approving the Commissioner's action, said that Congress did not intend in §101 (6) to include in the exempt class a corporation organized and operated for educational purposes but having as its only activity the operation of a competitive commercial business for profit, even though the earnings go solely to the benefit of a separate corporation which itself would be exempt under §101 (6). The Tax Court indicated that the test in determining whether an institution is exempt under §101 (6) is to decide the source of the income rather than the destination of the income. *C. F. Mueller Company*, 14 T.C.111½ (1950).

This is a departure from past decisions concerning exemptions under §101 (6). However, the present interpretation is a logical one. The development

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[16] U.S. v. Harris, *supra* note 10.

[17] U.S. v. Resnick, *supra* note 2; U.S. v. Harris, *supra* note 10.

[18] Prior to the decision in the instant case case and after the decision in the court below, a bill was introduced in the House of Represenatives at the request of the Department of Justice to amend the statute so as to prohibit the transportation of obscene phonograph records in interstate commerce. H.R. 6622, 81st Cong., 2d. Sess. In requesting such amendment the Justice Department stated that whether the present law applied to phonograph records or not was questionable. The new measure would prohibit mailing of "every obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance." See 19 U.S.L. Week 2046 (U.S. July 25, 1950).

[1] Int. Rev. Code §101. *Exemptions from Tax on Corporations.* The following organizations shall be exempt from taxation under this chapter— . . . (6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary or, educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation. . . .

of the rule which allowed exemptions based upon the destination of the income [2] seems to have arisen because of two factors.

The first factor was the type of cases before the court. The earlier cases generally applied to charitable organizations which had income-raising activities on a business basis, but which were a very minor part of their overall activities.[3] In such a case the exemption was probably reasonable. This was extended in *Roche's Beach*, 96 F.2d (2d Cir. 1938), to include a separate corporation whose income was to go to charitable purposes, although it was engaged in competitive commercial business. This view was later restricted by refusing exemption to a corporation originally organized for profit, but which subsequently dedicated its earnings to exempt purposes.[4]

The second factor is the changing economic effects of taxation. In earlier years the effect of tax exemption on business operations was relatively unimportant, but, with increasingly high tax rates, a tax exempt business had a tremendous competitive advantage. It was to this that the Tax Court referred when they suggested that exempting Mueller from taxation was not advantageous to the public and actually could have a big disadvantage should Mueller decide to undersell his competitors and expand.

The need for remedial action in the present type of situation is apparent; such need has been met in the 1950 Revenue Act.[5] Should this case come up in North Dakota the Mueller case will probably be followed since our Code section is very similar to 101 (6).[6]

UNEMPLOYMENT COMPENSATION — SHOULD BENEFITS BE PAID WORKMEN ON STRIKE OR LOCKED OUT? The Sacramento Bakery Workers' Union sought changes in its master contract with the Bakers' Association. Though forewarned that a strike against one would be treated as a strike against all, the Union struck at the Butter Cream plant. Eight other bakers, Association members, retaliated with a lockout of all Union employees. The Insurance Appeals Board granted unemployment compensation to those locked-out employees and charged each employer's account with the payments made. The Association appealed, contending that §56 (a) of California's Unemployment Compensation Act excludes these claimants from benefits.[1] In a four to three decision, it was *held* that the volitional cause of the work stoppage rested with the Union, and hence these employees were not entitled to unemployment payments. *McKinley v. California Employment Stabilization Comm'n.* 209 P.2d 602 (Cal. 1949). The court reasoned that the strike at Butter Cream, like a boomerang, caused the general lockout.[2]

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[2] Roche's Beach, 96 F.2d 776 (2nd Cir. 1938) (exemption fund). See also Debs Memorial Radio Fund v. Comm., 148 F.2d 948 (2nd Cir. 1945); Edward Orton, Jr. Ceramic Foundation, 9 T.C. 533 (1947).

[3] Trinidad v. Sagrada Orden, 263 U.S. 578 (1924).

[4] Universal Oil Products Co. v. Campbell, 181 F.2d 451 (1950).

[5] Sec. 303, 1950 Revenue Act, which became law Sept. 23, 1950. This provision taxes the income of unrelated business activities of exempt organizations.

[6] §57-3809, N.D. Rev. Code. (1943). *Other Organizations Not Subject to Tax.* The following organizations shall be exempt from taxation under this chapter . . . (8) Corporations organized and operating exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inure to the benefit of any private stockholder or individual.

[1] "An individual is not eligible for benefits for unemployment . . . (a) If he left his work because of a trade dispute. . . ." Stat. 1945, ch. 1178, p. 2225, Deering's Gen. Laws, 1945 Pocket Supp., Act 8780d, sec. 56.

[2] *Id.* at 606.

All 48 states have some sort of provision excluding workmen jobless due to labor disputes.[3] Such unanimity results because the employer alone contributes to the unemployment funds in all but two states; [4] of course he should not be compelled to finance those who foment a labor dispute with him.[5] On the other hand, those involuntarily and innocently out of work should not be denied benefits, as the very purpose of the Unemployment Act is to ameliorate the consequences of involuntary unemployment.[6] It thus becomes the difficult task of administrative bureaus and the courts to determine who caused the work stoppage.

Most states [7] avoid the instant problem by refusing to distinguish between strikes and lockouts. The usual statute denies benefits if there is a "stoppage of work which exists because of a labor dispute." [8] These jurisdictions sacrifice justice for ease of administration.[9] An equally unjust but easy solution would be to compensate for all unemployment resulting from any type of labor dispute.[10]

California's unique phrasing ("if he left his work because of a trade dispute") implies in the word *left* that only a voluntary cessation of work will disqualify, and its courts have so held.[11] Thus California is committed to the *volitional cause* test and forsakes ease of administration in the commendable search for justice. The instant case and a prior similar one [12] vividly illustrate the complications involved.

Several commentators have sought to formulate rules of decision based upon who seeks to change the status quo.[13] In the application of these rules there has arisen the "employer-fault" concept wherein payments to employees are limited to cases where the employer is at fault.[14] The desire to skirt administrative difficulties has led a few writers to advocate repeal of all labor dispute disqualification clauses,[15] while another cogent analyst suggests

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[3] Fierst and Spector, *Unemployment Compensation in Labor Disputes*, 49 Yale L.J. 461 (1940); 33 Minn. L. Rev. 758, 763 (1949).

[4] Alabama and New Jersey. See Social Security Administration, Comparison of State Unemployment Insurance Laws as of October 1948, p. 13 (1948).

[5] Barnes v. Hall, 285 Ky. 160, 146 S.W.2d 929 (1940); Chrysler Corp. v. Smith, 297 Mich. 438, 298 N.W. 87 (1941).

[6] Steward Machine Co. v. Davis, 301 U.S. 548 (1938); Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal.2d 321, 328, 109 P.2d 935, 940 (1941).

[7] Including North Dakota. See N.D. Rev. Code §52-0602 (4) (1943).

[8] Fierst and Spector, *supra* note 3, at 462.

[9] 9 U. of Chi. L. Rev. 751, 756.

[10] *Id.* at 756.

[11] Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal.2d 321, 328, 109 P.2d 935, 940 (1941); Mattson Terminals v. California Employment Comm'n, 24 Cal.2d 695, 151 P.2d 202 (1944); W.R. Grace and Co. v. California Employment Comm'n, 24 Cal.2d 720, 151 P.2d 215 (1944).

[12] Bunny Waffle Shop v. California Employment Comm'n, 24 Cal.2d 735, 151 P.2d 224 (1944).

[13] Lesser, *Labor Disputes and Unemployment Compensation*, 55 Yale L.J. 167, 173 (1945); 33 Minn. L. Rev. 758, 767. These writers suggest that if the labor dispute was caused by employee-initiated action, benefits should be denied, while if employer-initiated action precipitates the dispute, benefits should be granted.

[14] See Letter of A. J. Altmeyer (chairman of the Social Security Board) to War Mobilization Director Byrnes, reprinted in 90 Cong. Rec. 6841 (1944) ("The function of disqualifications is shifting from limiting benefits to workers unemployed through no fault of their own to limiting payment to cases where the employer is at fault."); *Compare* Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942) *with* W.Va. Code Ann. §2366 (78) (1942).

[15] Schindler, *Collective Bargaining and Unemployment Insurance Legislation*, 38 Col. L.Rev. 858, 886 (1938); Fierst and Spector, *supra* note 3, at 489.

a compromise in which benefits are paid locked-out employees, but the amounts are not charged against the employer's account.[16]

None of these proposals entirely solve the basic three-headed problem: How (1) to pay unemployment benefits to the victims of a maladjusted economy (2) without aiding or penalizing either side in a labor dispute and (3) without burdening administrative bodies and the courts. Perhaps the solution lies in changing the source of unemployment funds from employer to employee contributions; then the employer cannot complain that his money is subsidizing those engaged in a dispute with him.[17] Payments could then be made to all labor dispute claimants, regardless of who caused the work stoppage. The purpose behind the unemployment acts (to aid the victims of a maladjusted economy) would be fulfilled, while the policy behind the labor dispute disqualifications (that the employer should not be compelled to finance those engaged in a controversy with him) would no longer be pertinent.

Under the present scheme of employer contributions for employee benefits, the labor dispute clauses will continue to plague any court seeking to do justice between labor and management.

WILLS — OLOGRAPHIC WILLS — VALIDITY OF WILL NOT SIGNED AT END. The decedent left an instrument contained in an envelope which bore, in her handwriting, the inscription, "Will of Ella McNair." The instrument consisted of three handwritten pages. At the top of the first page appeared the date, followed by the words, "I Ella McNair," in the exordium clause. A similar expression appeared on the third sheet. The back side of the third page proceeded to make further bequests and terminated at the middle of the page without signature or marks of any kind. The South Dakota Supreme Court *held* that the words "I Ella McNair" in the exordium clause and her name at the top of each page of the will constituted a signature within the meaning of the South Dakota Code which requires that every will, other than a nuncupative will, must be signed, and the will was accordingly admitted to probate. In re *McNair's Estate,* 38 N.W.2d 449 (S.D.1949).

The applicable South Dakota statutes [1] make no reference as to where the signature of a testator is to appear on the instrument. The only requirements for a valid olographic will are that the document must (1) be testamentary in character, (2) be written entirely in the hand of the testator, (3) be dated, and (4) signed by the hand of the testator himself. A failure in any one of these requirements nullifies the will.[2] Prior to the ruling in this case the South Dakota courts had applied the rule that the only evidence that would warrant the conclusion that an olographic will was a complete and executed document must have been found "in and on" the instrument itself. As a consequence it is not material where the name of the testator appears in a

[16] 33 Minn. L. Rev. 758 (1949).
[17] See 19 N.Y.U.L.Q. Rev. 294 (1942).

[1] The requisites of an olographic will are set forth in S.D. Code §56.0209 (1939): "An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form and may be made in or out of this state, and need not be witnessed." The same provision is found in N.D. Rev. Code §56-0304 (1943).

[2] Succession of Fitzhugh, 170 La. 122, 127 So. 386 (1930); Montague v. Street, 59 N.D. 618, 231 N. W. 728 (1930); *cf. In re* McKee (McKee v. Buck), 72 N.D. 86, 4 N.W.2d 652 (1942).

will of this character if it can be gathered from an inspection of the whole instrument that it is intended as a last will and testament and the statute is then satisfied.[3] So it was held in In re *McMahon's Estate*,[4] that an olographic will without a signature at the end thereof, or elsewhere, containing a phrase in the body of the will, "written, dated and signed by my own hand," was valid. The court stated that this was sufficient to constitute a signature inasmuch as the testatrix had declared that she had signed the document by her own hand and therefore there was an adoption of her signature in the execution of the will.

As to the question of admissibility of extrinsic evidence in cases of olographic wills without signatures other than in tthe exordium clauses, there is a division of opinion. The rule in some jurisdictions is that the intent of the testator is to be determined from the face of the instrument itself, and extrinsic evidence is not admissible on the issue of whether the testator's name appearing in the body of the instrument was intended as a signature.[5] The court in In re *Hurley's Estate*,[6] held that when the written name of the testator is in the exordium there must be something in the document or in the closing paragraph to indicate that the testator intended to adopt that signature as the executing signature of his will. It was also held in In re *Devlin's Estate*,[7] that the evidence of a name in the exordium clause only, is insufficient to prove execution where no inference can be drawn from the language itself that the testator signed the document or intended to adopt as his executing signature the name he had inserted in the exordium. In *Succession of Dyer*,[8] the court found such a document to be void as a will on the ground that provisions of a dispositive nature following the signature could have no effect. The underlying theory is that the placing of the signature at the end of the will is predicated upon the approval which the testator thereby gives to tthe testamentary disposition which proceeded it. The Virginia court, in construing a will similar to that involved in the instant case, has said that the testator's intention to adopt his name in the exordium clause as his signature must appear on the face of the will itself, and extrinsic evidence is not admissible to show such intention. This result is based on the theory that the mere placing of the testator's name in the exordium clause is an equivocal act and furnishes no ground for any inference that subsequent bequests are intended to be final.[9] Other jurisdictions admit extrinsic evidence in order to allow the acts and declarations of the testator to be shown for the purpose of determining whether he intended his name, as it appears in the body of the will, to be his signature. The signature authenticates and completes the document.[10]

It may be argued that the abrupt manner in which the will was terminated at the middle of the last page without signature indicated an incomplete

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[3] *In re* Brandow's Estate, 59 S.D. 364, 240 N.W. 323 (1932).
[4] 174 Cal. 423, 163 Pac. 669 (1917).
[5] *In re* Manchester's Estate, 174 Cal. 417, 163 Pac. 358 (1917).
[6] 178 Cal. 713, 174 Pac. 669 (1918).
[7] 198 Cal. 721, 247 Pac. 577 (1926).
[8] 155 La. 265, 99 So. 214 (1924).
[9] Warrick v. Warrick, 86 Va. 596, 10 S.E. 843 (1890).
[10] Peace v. Edwards, 170 N.C. 64, 86 S.E. 807 (1915).

will.[11] The dissent in the instant case took the position that the name was so placed at the top of the pages merely for the purpose of identification of the will and not for authentication or indicating its completeness. Nevertheless, the South Dakota court appears to be in agreement with the weight of the cases. The finding is supported by the fact that the will bore a date nineteen months prior to the testatrix's death which strongly suggests that the decedent recognized the document as her completed will. In the case of In re *Kenney's Estate,*[12] the court stated that the fact that sufficient space remained on the last page to include additional writing if decedent had intended any further declarations is also evidence of finality and completeness. Further, the testatrix took the instrument to the hospital with her. The court found that all the circumstances lead one to the conclusion that the decedent did consider the instrument to be a completed will.

WORKMEN'S COMPENSATION — CUSTOMARY ACTS AND ACTS BY CONSENT, DIRECTION, OR ACQUIESCENCE OF EMPLOYER — COMPENSATION FOR INJURIES. Claimant had been cleaning company tools in gasoline. While waiting for the drill to be brought out of the ground, he proceeded to clean the engine of his personal car. A spark from the starter ignited his clothing, causing severe burns for which he demanded compensation. The court found that the company customarily allowed workmen to tinker with their personal cars during spare time on the job; that such activity was incidental to the employment and contemplated thereby. It was *held* that claimant was entitled to compensation although the injury arose out of an act not strictly in furtherance of his employer's business. *Hillyard v. Lohmann-Johnson Drilling Company,* 168 Kan. 177, 211 P.2d 89 (1949).

In Kansas the injury must arise "in the course of" *and* "out of" the employment,[1] whereas in North Dakota the injury need only arise "in the course of" the employment,[2] and therefore the injury may be more easily proved compensable in North Dakota.[3]

Under the policy of liberal construction of the Workmen's Compensation laws [4] courts usually grant compensation for injuries suffered by an employee while performing an act for the mutual benefit of employer and employee even though the benefit to the employer is slight.[5] This is a liberalization of the old rule that denied compensation unless the employee was working either directly or indirectly for the employer.[6]

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[11] *In re* Bernard's Estate, 197 Cal. 36, 239 Pac. 404 (1925), stated that the abrupt termination of a will near the middle of the last page, without a signature, furnished a strong indication of the decedent's intent to do something more to make the document a completed will.

[12] 16 Cal. 50, 104 P.2d 782 (1940).

[1] Kan. Rev. Stat. §44-501 (1923).

[2] N.D. Rev. Code §65-0102 (1943).

[3] Kary v. North Dakota Workmen's Compensation Bureau, 67 N.D. 334, 272 N.W. 340, 341 (1937).

[4] Schwan v. Premack, 70 S.D. 371, 17 N.W.2d 911 (1945); Thoreson v. Schmahl, 222 Minn. 304, 24 N.W.2d 273 (1946).

[5] Wamhoff v. Wagner Electric Corp., 354 Mo. 711, 190 S.W.2d 915 (1945); Linderman v. Cownie Furs, 234 Iowa 708, 13 N.W.2d 677 (1944); Kennedy v. Thompson Lumber Co., 223 Minn. 277, 26 N.W.2d 459 (1947). *Contra:* Hammond v. Keim, 128 Neb. 310, 258 N.W. 478 (1935).

[6] Radtke Bros. v. Ind. Comm'n of Wisconsin, 174 Wis. 212, 183 N.W. 168 (1921); Bellman v. Northern Minn. Ore. Co., 167 Minn. 269, 208 N.W. 802 (1926); Mann v. Glastonbury Knitting Co., 90 Conn. 116, 96 Atl. 368 (1916); Brienen v. Wisconsin Public Service Co., 166 Wis. 24, 163 N.W. 182 (1917).

The North Dakota Supreme Court has stated [7] that, to impose liability, the work from which the injury arises must be something incident to and contemplated by the contract of employment. In determining whether a certain act is reasonably contemplated, the custom and usage of a particular employment should be considered.[8] But to impose employer liability based on custom, proof must be clear as to antiquity, duration, and universality of the custom.[9]

Custom has been shown to impose liability in "noon-hour" cases (those where injury arose during a noon off-duty period),[10] and the true rule to be derived from the cases is that the injury is compensable if it occurs while the employee is doing those reasonable things that his contract of employment expressly, impliedly, or by custom authorizes him to do.[11] The weight of authority is to the effect that where an injury arises out of a settled practice or condition known to the employer and there is a causal relation between the injury and the practice or condition, the injury is compensable.[12]

The instant case seems to be in direct accord with this modern broad view of liability.

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[7] Desautell v. Workmen's Compensation Bureau, 72 N.D. 35, 4 N.W.2d 581 (1942).

[8] Employer's Liability Assurance Corp. v. Industrial Accident Comm'n, 37 Cal. App.2d 567, 99 P.2d 1089 (1940).

[9] Davis v. North State Veneer Corp., 200 N.C. 263, 156 S.E. 859 (1931).

[10] Racine Rubber Co. v. Industrial Comm'n, 165 Wis. 600, 162 N.W. 664 (1917); Desautell v. Workmen's Compensation Bureau, 72 N.D. 35, 4 N.W.2d 581 (1942); *cf.* Morse v. Port Huron and D.R. Co., 251 Mich. 309, 232 N.W. 369 (1930); Chance v. Reliance Coal and Mining Co., 108 Kan. 121, 193 P. 889 (1920). *Contra:* Kary v. N.D. Workmen's Compensation Bureau, 67 N.D. 334, 272 N.W. 340 (1937); Pillen v. Workmen's Compensation Bureau, 60 N.D. 465, 235 N.W. 354 (1931).

[11] Employer's Liability Assurance Corp. v. Industrial Accident Comm'n, 37 Cal. App.2d 567, 573, 99 P.2d 1089, 1092 (1940); Desautell v. Workmen's Compensation Bureau, 72 N.D. 35, 4 N.W.2d 581 (1942).

[12] Re Ayers, 66 Ind. App. 458, 118 N.E. 386 (1918); American Steel Foundries v. Czapala, 112 Ind. App. 212, 44 N.E.2d 204 (1942); Wamhoff v. Wagner Electric Corp., 354 Mo. 711, 190 S.W.2d 915 (1945); *cf.* Vitas v. Grace Hospital Soc'y, 107 Conn. 512, 141 Atl. 649 (1928); Dunn v. University of Rochester, 266 N.Y. 362, 194 N.E. 856 (1935).