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CASE NOTES

ADMINISTRATIVE LAW-DUE PROCESS OF LAW-HEARING.—In a proceeding to deport an alien, the warrant on which he was arrested was not shown or read to him. He was not advised of his right to counsel until his examination was in progress, when it was adjourned to give him an opportunity to employ counsel. *Held,* the alien obtained a fair hearing although the warrant was not read to him if the charges were correctly stated to him. If the court is adjourned to give him an opportunity to employ counsel, which he declined to do, it does not render the hearing unfair. *Seif v. Nagle,* 14 F. (2d) 416.

There is a difference as to what is a fair hearing when the hearing is one in which the alien is seeking admission or if it is a hearing concerning the deportation of an alien. "Congress has the complete and absolute power over immigration", *Oceanic Navigation Co. v. Stranaham,* 214 U. S. 320. "An alien should be regarded as if he had been stopped and kept at the limit of our jurisdiction", *U. S. v. Ju Toy,* 198, U. S. 253. Since an alien is regarded as stopped at the entrance he is not within the jurisdiction of the United States and the "due process of law" clause of the United States Constitution does not apply to him. Congress may provide for any kind of hearing that it sees fit without violating the "due process" clause. After an alien has been admitted to the United States he is entitled to a fair hearing. "An alien, as well as a citizen, is protected by the prohibition of deprivation of life, liberty or property without due process and the equal protection of the law" *Whitfield v. Hanges, 222* Fed. 745. The case cited above states that all parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence is explanation or rebuttal. The above case is quoted with approval in the case of *Hays v. Sesto,* 12 F. (2d) 698. "Indispensable requisites of a fair hearing, are that the proceedings shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the trial to support it." Thus we see that an alien is entitled to a fair hearing in deportation proceedings.

WALTER O. BURK.

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BOUNDARIES-GOVERNMENT CORNERS-CONCLUSIVENESS.—In action for township's moving road over on land claimed by plaintiff by virtue of original corner stake, since obliterated, plaintiff introduced evidence showing that the obliterated stake marked the true corner of the government survey. The former owner of the plaintiff's land testified that he saw the survey mounds and stakes at the two corners of the land over 40 years ago, and that he established the road between the two mounds while the markings were still fresh. The defendant township showed by a resurvey that this was not the true corner. *Held,* that the original monument, if found or established, marks the

true corner, though a resurvey might indicate a different location. *Lawson v. Viola Tp.* 210 N. W. 979 (S. D. 1926).

A distinction is made between an "obliterated corner" and a "lost corner." An obliterated corner is one where no visible evidence remains of the work of the original surveyor in establishing it. A lost corner is one the position of which cannot be determined beyond reasonable doubt, or from original monuments, or reliable external evidence. *Fellows v. Willett,* 98 Okl. 248, 224, Pac. 298. A lost corner may be established by a new survey in which courses and distances shown on the plat and field notes furnish a guide. *Sommer v. Meyer,* 125 Minn. 258, 146 N. W. 1106;*Washington Rock Co. v. Young,* 29 Utah 108, 80 Pac. 382. But original corners, as established by the government surveyors, if they can be found, or the places where they were originally established, if they can be definitely determined, are conclusive on all persons owning or holding with reference thereto, *Barringer v. Davis,* 141 Iowa 419, 120 N. W. 65, without regard to whether they were located correctly or not, *Byrne v. McKeachie,* 34 S. D. 589, 149 N. W. 552; *Anderson v. Johanesen,* 155 Minn. 485, 193 N. W. 730; *Fellows v. Willett,* supra, and must remain the true corners or monuments by which to determine the boundaries. *Trinwith v. Smith,* 42 Or. 239, 70 Pac. 816. Thus, the point where a section post or quarter section post is placed on the ground, if satisfactorily established, is controling and conclusive though not according with courses and distances. *Lawler v. Rice County et al,* 147 Minn. 461, 180 N. W. 37; *Halley v. Harriman,* 106 Neb. 377, 183 N. W. 665. If the point or corner cannot be satisfactorily established, and it may be fixed with reasonable certainty by using the field notes of the government surveyor, such location will be adopted. *Weaver v. Howatt,* 171, Cal. 302, 152 Pac. 925. Where the monument is obliterated the court cannot presume, for instance, from the fences and trees alone, that the same were placed in accordance with the monuments. *Pine v. Reynolds,* 187 Iowa 379, 174 N. W. 257. The fact that the location will alter the shapes of the sections and the subdivisions thereby does not affect the conclusiveness of the survey. *Weaver v. Howatt,* supra.

LEONARD A. W. STEPHAN.

CONFLICT OF LAWS-DIVORCE-FULL FAITH AND CREDIT.—A and B, married parties, met in New York City and decided to marry each other upon securing divorces from their respective spouses. They repaired to Colorado for that purpose. Under the laws of Colorado, no person was entitled to a divorce unless such person had been a bona fide resident and citizen of the state for one year prior to the commencement of the divorce suit. A, after living in Colorado for one month, brought suit for divorce from her husband, who lived in England; notice being by publication only and he not appearing. The divorce was granted. B, after a residence of one year, filed suit against his wife who lived in New York. Service of notice was made by publication and the wife not appearing, his divorce was granted. A and B went to St. Louis, Mo., and were there married. This present suit for divorce is brought by A in the District of Columbia, B being the respondent. *Held,* that the divorces procured by the respective parties in Colorado, should not be and are not, recognized as valid divorces by the courts of the District of Columbia. *Friedenwald v. Friedenwald,* 16 Fed. (2d.) 509.

Where one spouse goes to a state other than that of the matrimonial domicile and there obtains a divorce under a residence simulated for that purpose, and not in good faith, the judgment is not binding upon the courts of the other states. *Andrews v. Andrews,* 188 U. S. 14. A decree of divorce from the bond of matrimony, obtained in the State of North Dakota, in which neither party is domiciled, upon service by publication and in another state, is entitled to no faith and credit in the latter state. *Streitwolf v. Streitwolf,* 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807. By the better view, the judgment or decree of a court of general jurisdiction in a sister state should not be held void on the ground that such court was deceived and misled as to the existence of jurisdictional facts and assumed to exercise jurisdiction when it had no right to do so, unless the evidence is of such satisfactory character as to exclude any other reasonable conclusion. *Knowlton v. Knowlton,* 155 Ill. 158, 39 N. E. 595. Where libellant is an actual resident of that state when the action is commenced, the judgment is valid, and stands on the same footing as any other judgment procured by false testimony. *Thurston v. Thurston,* 58 Minn. 279, 59 N. W. 1017. This view, if universally followed would be most conducive to harmony between the various state courts and very beneficial to the general public. As long as a judgment remains unimpeached in the state in which it was given, it should be accorded the full faith and credit that it is entitled to. This would obviate the anomalous situation of a man being single in one state and married in another; a law abiding citizen in one state and a bigamist in another. However, the modern trend of the courts seems to be the other way. A judgment of divorce granted in another state may be collaterally attacked by showing that the court which granted it was without jurisdiction even though jurisdictional facts are recited in the judgment. *Steinbroner v. Steinbroner,* 30 Cal. App. 673, 159 Pac. 235. It is generally held by the courts that residence in the state for the prescribed time before commencing an action for a divorce is jurisdictional. *Graham v. Graham,* 9 N. D. 88, 81 N. W. 44. It has been held that, if the party is actually a resident of the sister state at the time he commences the action, although he has not resided in that state as long as its laws require before commencing the action, the judgment is valid, although irregular, and hence is binding in a collateral suit. *Kern v. Field,* 68 Minn. 317, 71 N. W. 393. The word "residence" as used in divorce statutes should be construed as equivalent to "domicile". *Smith v. Smith,* 10 N. D. 219, 86 N. W. 721. No pretended residence nor temporary visits, nor actual bodily presence simply nor a sojourn here for business purposes, as an incident to further his plans for divorce, will suffice. He must have abandoned his home and must have actually established one here with the purpose of permanently retaining it. *Id.*

JUDSON MAYER.

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CONTRACTS-ALTERNATIVE PROVISIONS-IMPOSSIBILITY OF PERFORMANCE OF ONE PROVISION.—The Yankton Sioux Tribe of Indians, plaintiffs, ceded to the United States valuable lands, for which part consideration was congressional provision of speedy reference of disputed claims to other lands to the Supreme Court, with the alternative, in case of failure to speedily refer the claims as promised, of a waiver by the United States of all claims to the other land and a transfer of it in fee to the Indians. *Held,* reversing the decision

of the Court of Claims, that where promises are in the alternative, the fact that one of them is at the time, or subsequently becomes impossible of performance does not, at least without more, relieve the promisor from performing the other. *Yankton Sioux Tribe of Indians v. United States,* 47 Supreme Court Reporter 142 (1926).

It is a well known and generally accepted rule of law that where a contract provides that one of two alternatives shall be performed by the promisor, the fact that one alternative is, or becomes, impossible, does not excuse the promisor from performing that which remains possible. *Irvine v. Postal Tel. Cable Co.,* 26 Cal. App. 840, 173 Pac. 487. So it has been held that where adjacent land owners agreed each to construct and maintain certain portions of a drain, one of them was liable for failure to perform his part of the contract, although the work could not be done, because of the insufficiency of an outlet for the water where such outlet was on his land and could have been readily enlarged. *Britten v. Dunning,* 55 Mich. 158, 20 N. W. 883. So too, where no express or implied provision, as to the event of impossibility of performance can be found in the terms or circumstances of an agreement, it is a general rule of construction, founded on the absolute and unqualified terms of the promise, that the promisor remains responsible for damages, notwithstanding the supervening impossibility. *Switzer v. Pinconing Lumber Co.,* 59 Mich. 488, 26 N. W. 762. Ordinarily, impossibility of performance resulting from a contingency which might reasonably have been anticipated will not excuse performance of a contract as the contingency should have been provided for, *Mohaska County State Bank v. Brown,* 159 Iowa 577, 144 N. W. 459; and when an obligor, from inevitable accident or irressistable force, cannot perform one of two things, either of which at the time of his engagement he had the option to do, he is not relieved from the obligation to perform the other. *Jacquinet v. Boutron,* 19 La. Ann. 30. "This rule rests upon the substantial reason that, so long as the contract is capable of performance in any mode contemplated by the parties, its performance cannot be said to have become impossible." *Bath Tp. Board of Education v. Townsend.* 63 Ohio St. 514, 59, N. E. 223, 52 L. R. A. 868. But it is interesting to note that "if one of the alternative things becomes impossible by the act of God, or by the act or defaut of the obligee, or if by such conduct on his part as amounts to a clearer waiver of its benefits the obligor becomes excused from performing the others", *Smith v. Durell,* 16 N. H. 344, 41 Am. Dec. 732; and that "it is impossible to lay down any universal proposition either way, but that the principle to be applied in each case is that it must depend on the intention of the parties." *Barkworth v. Young,* 4 Drew. 1, 10, 62 English Reprints 1. It is important in considering the application of the rule to be certain that the contract in question is a true alternative contract and does not merely provide for a penalty or liquidated damages in case the performance intended as the real object of the contract is not rendered. 3 WILLISTON, CONTRACTS, sec. 1961, n. 9. In the instant case it seems that the contract with the Indians was a true alternative contract. So far as the writer could discover North Dakota has no cases in point.

BENJAMIN ASHKANAZE.

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EVIDENCE-ADMISSIBILITY OF MATTER OBTAINED THROUGH UNLAWFUL SEARCH AND SEIZURES.—An appeal was made from a judgment

of conviction for the unlawful possession of liquor, the grounds presented being that the warrant under which the search of the dwelling house of the defendant was made was not of proper form, thus, void, the evidence procured by such unlawful search being inadmissible. Even though the state conceded that the search warrant was void, *held,* the appeal disallowed. *State v. Fahn,* 52 N. D. 134, 205 N. W. 67.

In so holding, the Supreme Court of the State of North Dakota followed the rule adopted in the majority of the state courts, *State v. Lacy,* 212, N. W. 442 (N. D. 1927), but which is contrary to the Federal rule. The evidence admitted in this case was procured through a violation of CONSTITUTION OF THE STATE OF NORTH DAKOTA, SEC. 18, which provided that the rights of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall be guaranteed. The reasons for the rule as applied in the instant case are that even though the entry of the officer be unlawful, still, when the evidence of the violation of the law is before him, it would be an injustice to society not to use the evidence merely because of the illegal actions of the one man. Furthermore, the rules of evidence are not meant to be an indirect process of punishment, thus, to keep out the evidence procured through the illegal entrance of the officer would delay, interrupt, and confuse the court in disposing of the specific matter in hand; namely the punishment for the violation of the liquor laws. The decision in the instant case is fully supported by Dean Wigmore in 3 WIGMORE ON EVIDENCE, secs. 2175-2184. But the Federal rule is *contra.* It was first enunciated in the case of *Boyd v. the United States,* 116 U. S. 616, stating that evidence secured by a Federal officer without a proper warrant is inadmissible as being in violation of the Fourth Amendment to the Constitution of the United States. This rule is applied and restated by the United States Supreme Court in the case of *Byars v. United States,* decided January 3, 1927. In that case, upon a warrant issued by a judge of a state municipal court authorizing the search of the premises of the defendant for the unlawful possession of liquor, the local officer of the Des Moines, Iowa, Police Station invited a Federal agent, one Mr. Adams to accompany him on the search. Mr. Adams consented, and personally found in one of the rooms of the defendant a collection of counterfeit strip stamps of the kind used upon whiskey bottled in bond. The decision of the court ordered a return of the evidence to the defendant on the theory that, the evidence procured through the violation of the Fourth Amendment, its retention would amount to a recognition given by the court to the fruits of an action performed by a Federal officer in violation of the Constitution of the United States. The court makes it clear that the Federal rule guards watchfully against any stealthy encroachment upon the constitutional provisions providing for the security of person and property. See O. H. Thormodsgard, *The Agnello Case and the Seasonable Demand Rule,* 1 DAK. L. REV. 1 (1927).

JALMAR O. MUUS.

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NEGLIGENCE-LAST CLEAR CHANCE.—In an action to recover damages for personal injuries sustained by the driver of a truck in a collision with a railway train at a crossing, where it appeared that the view of one approaching the crossing for a distance of 600 feet was unobstructed, and was such as to enable one to see an approaching train

anywhere on the track within approximately 2000 feet of the crossing, and where the only obstruction of the driver's vision was afforded by the top over the seat of the truck and sloping side curtains, and where such driver approached the crossing without stopping or looking to ascertain the approach of a train, it was shown that the fireman on the train saw the truck approach the tracks, and gave such information to the engineer, that said engineer thereupon applied the brakes, but released them again when told that the truck had stopped. Engineer tried to stop train when 150 feet from crossing on fireman telling him that truck had been started again. This was, however, too late to avoid the injury. *Held,* that truck driver was guilty of contributory negligence which precludes recovery; and that under the facts and circumstances of the case, the Last Clear Chance doctrine would not apply. *State ex. rel. North Dakota Workmen's Compensation Board v. Great Northern Ry. Co.,* 209 N. W. 853 (N. Dak., 1926).

While the negligent act or omission of the person injured ordinarily defeats recovery, the rule is subject to the exception or qualification, that although such person has been guilty of negligence in exposing himself to danger, yet he may recover if the defendant, after knowing of such danger could have avoided the injury by the exercise of ordinary care and fails to do so. *Keefe v. Chicago and N. W. Ry. Co.,* 92 Iowa 182, 60 N. W. 503; *Dailey v. Burlington and M. Ry. Co.,* 58 Nebr. 396, 78 N. W. 722. The rule stated above is universally adopted where defendant knows, becomes aware of or discovers the peril of the person injured in time to avoid the injury. *Harlan v. St. Louis and N. Ry. Co.,* 65 Mo. 22. In some jurisdictions however, the principle upon which the doctrine of discovered peril is based, has no application in the absence of actual knowledge, on the part of the person causing the injury, of the peril of the person injured in time to prevent the injury by the use of means within his reach. *St. Louis Southwestern Ry. Co. v. Cochran,* 77 Ark. 398, 91 S. W. 747; *Arnold v. Ft. Dodge Ry. Co.,* (Iowa) 173 N. W. 252. In others, however, the doctrine has been extended to cases where the defendant might have discovered the peril by the exercise of reasonable care. *Louisville and N. Ry. Co. v. Hirey,* (Ky.) 29 S. W. 869; *Sites v. Knott,* 197 Mo. 684, 96 S. W. 206; *Guentha v. St. Louis Ry. Co.,* 108 Mo. 18, 18 S. W. 846. In some jurisdictions, this doctrine, as regards railroad companies, has been held to apply also where the accident occurs at a point where the railroad company has a reason to apprehend that persons may be on or near the tracks, and therefore where it might have discovered the injured party and by the exercise of ordinary care prevented the injury. *Blankenship v. Chesapeake and O. Ry Co.,* 94 Va. 449, 27 S. E. 20. By what appears to be the weight of authority the doctrine applies only where the defendant has actual knowledge of the injured party's peril, in time to avert the accident, by the exercise of ordinary care. 38 Cyc. 456; 29 Cyc. 530; 37 Cent. Dig. tit. Negligence, sec. 115; 20 R. C. L. sec. 116, Negligence; citing numerous cases involving the doctrine of last clear chance.

ALFRED G. TEXLEY.

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TORTS - MASTER AND SERVANT - DEVIATION BY SERVANT FROM ROUTE.—An electrical contractor sent his servant in a runabout on a long trip across the state, supplying him with a map and prescribing the route and major halts. Servant deviated from the prescribed

route the first day to make a private visit at a place 18 miles off the route. The visit completed, servant started back by a direct (but different) route to the place designated for the first night's halt. Darkness fell, and through fault the servant collided with a team and buggy, injuring the driver, who brought suit against the master for injuries. The case was tried to a jury below, but dismissed by the court on motion by the defense, on the ground, principally, that plaintiff had failed to establish liability in the master as a matter of law. On appeal, *held,* that the question whether servant's deviation from the prescribed route was such abandonment of the master's service as to exonerate the master from liability is one of fact for a jury, under proper instructions, and not one of law to be decided by the court. *Kohlman v. Hyland,* 210 N. W. 643 (N. D., 1926).

The court establishes the North Dakota general rule of evidence to be as follows: "In order to establish the liability of a master to a third person, to whom he owes no contractual duty, for the negligent act of his servant, the burden is on the plaintiff to prove, by a fair preponderance of the evidence, that the tort-feaser was a servant of the master working under his control, when the injury was sustained, and that the negligent act was done within the course of the employment." When a servant temporarily abandons his master's business and pursues an adventure of his own, the master is not liable for the tortious acts of the servant while so engaged on his private purposes. *Provo v. Conrad,* 130 Minn. 412, 153 N. W. 753, 2 MEECHAM ON AGENCY, sec. 1880. In the case of a servant driving his master's automobile on an enterprise assigned by, and along a route prescribed by, the master, a deviation from the prescribed route may be so clearly and incontrovertibly an abandonment of the master's business that the court must rule as a matter of law that the master is exonerated from liability for the tortious acts of the servant during the deviation. *Slater v. Advance Thresher Company,* 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598. On the other hand, the deviation may be so slight that reasonable men might well reach differing conclusions as to whether the master's business is to be considered as abandoned. *Dockweiler v. American Piano Company,* 94 Misc. Rep. 712, 160 N. Y. S. 270. There is, says the court in the main case, a certain indefinite "permissible zone of deviation"—"an area beyond and around the place within which the strict terms of the employment require the servant to remain, into which common experience with and observation of human nature suggest that he will, as inclination dictates, probably go." In accordance with the philosophy underlying the Master's Liability rule and the related Workmen's Compensation Acts, the burden of this risk should be borne by the master. The court cites *Eaken's Adm's. v. Anderson,* 169 Ky. 1, 183 S. W. 217, Ann. Cas. 1917D, 1003. See also SHERMAN AND REDFIELD ON NEGLIGENCE, (6th ed.) sec. 147. A troublesome question is one which arises in the main case, viz; When a servant has deviated to a considerable extent (18 miles) from the route of travel prescribed by the master, has accomplished his private object at the end of the deviation, and starts back to resume the prescribed route, assuming that the deviation amounts to a temporary abandonment of his master's business, when does he resume his master's business—when he starts back, or when he gets back, to the prescribed route? There is a marked variance in decisions

on this point. North Dakota has no rule. But see article 23 COLUMBIA LAW REVIEW 444, 716, on Frolic and Detour; *Riley v. Standard Oil Company,* 231 N. Y. 301, 132 N. E. 97, 22 A. L. R. 1382 holds that the servant has resumed the master's business when he starts back, even though he may choose a different route. HUDDY ON AUTOMOBILES, (7th ed.) sec. 753, states *contra,* as holds also *Dockweiler v. American Piano Company,* 94 Misc. Rep. 712, 160 N. Y. S. 270. For these reasons (1) that there is a certain "permissible" zone of deviation, as to the extent of which in any case reasonable men may differ; and (2) that there is a reasonable question as to whether the servant should be considered to have resumed the master's business when he started from the end of his deviation back in the general direction that his prescribed route takes, or not until he again reached the prescribed route - the court held in the main case that the question whether the servant's deviation from the prescribed route was a sufficient abandonment of the master's business to exonerate the master from liability should have been left as a question of fact to the jury, and not decided as a question of law by the court.

ARTHUR L. HAUGAN.

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TRUSTS - EXPRESS TRUST - DELIVERY FOR SAFE KEEPING.—This is an action to recover the proceeds of a promissory note alleged to have been delivered to plaintiff in such a way as to constitute an express trust. The note in question was given by D. Breneman and Emma Breneman to order of Hattie Stout for $1,090.00 and interest at seven per cent. Hattie Stout then delivered the note to F. A. Kelley for safe keeping with a provision that in the event of sickness or death he was to pay the necessary expenses and keep the proceeds without any probate court or legal proceedings. *Held,* that under the facts narrated it was not error for the court to find that no express trust had been created. *Kelley v. Norton,* 249 Pac. 608 (Kan., 1921).

Express trust implies the cooperation of three persons, the settlor who establishes the trust, a trustee or person who takes and holds the legal title of the trust property for the benefits of another, and the cestui que trust for whose benefit the trust is created. 39 Cyc. 35; Section 6274, COMPILED LAWS N. Dak. (1913). But, express trusts are created by stated intent of the settlor that they shall exist accompanied by necessary disposition of trust property. BOGERT ON TRUST, 43. Parol evidence is inadmissible to establish an express trust, *Harbour v. Harbour,* 146 S. W. 867 (Ark., 1912). However, parol evidence is admissible to make clear the details of the trust, the existence of which is in writing, *Fox v. Fox,* 95 N. E. 498 (Ill., 1911). In the present case when the trust was not sufficiently declared on its face it cannot be set up by extrinsic evidence to defeat the heirs at law or the next of kin, *Minot v. Attorney General,* 75 N. E. 149 (Mass., 1905). Words "received from Hattie Stout for safe keeping" would have been sufficient if it was the intention of the settlor to create a trust. See 16 L. R. A. (N. S.) 483. But words in a request, in their ordinary meaning, convey a mere request and do not convey a legal obligation of any kind either at law or in equity. *Hill v. Hill,* (1879) 1 Q. B. 271.

In the present case there was no separation of the legal from the equitable title; no trust can exist where the same person possesses

both. When the legal title, and the equitable title come together in the same person the equitable title is merged into the legal and the trust is terminated. *Doan v. Parrish of Ascension,* 103 Md. 662 (Md., 1915).

JOHN K. MACDONALD.

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