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Recent Decisions

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RECENT DECISIONS

CONSTITUTIONAL LAW—CIVIL RIGHTS—INERENCE OF BAD MORAL CHARACTER FROM REFUSAL TO ANSWER QUESTIONS BEFORE STATE COMMITTEE OF BAR EXAMINERS.


Petitioner was refused certification to the State Bar of California by the State Committee of Bar Examiners on the grounds that he had failed to prove (1) that he was of good moral character and (2) that he did not advocate overthrow of the government by force. Although denying that he had ever advocated the overthrow of the government by force, petitioner refused to tell the committee whether he had ever been a member of the Communist party, contending that, by virtue of the first and fourteenth amendments, the committee had no right to probe further into his political associations. Despite the testimony of witnesses which tended to show the good moral character of the petitioner, the committee found that his failure to answer supported an inference that he was presently a member of the Communist party and therefore of bad moral character. The committee also found that petitioner obstructed the investigation by refusing to answer and thereby rendered an affirmative certification impossible. The Supreme Court of California, with three judges dissenting, affirmed the action of the committee. Certiorari having been granted, the Supreme Court of the United States, with three Justices dissenting, held that petitioner's refusal to answer per se could not support an inference of bad moral character, since it was in good faith. The Court also found, in reversing the decision as violative of the fourteenth amendment and remanding the case, that even if petitioner had been a member of the Communist party in 1941, as testimony tended to show, such could not provide a reasonable belief that he advocated the overthrow of the government in the face of his own denial, since the Communist party was a legal political party at that time. Konigsberg v. State Bar of California, 353 U.S. 252 (1957).2

The applicant's possession of good moral character is universally required for admission to the bar.3 California, in addition, requires that

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1. California Business and Professions Code, §§ 6060(c), 6064.1 (1937). Section 6060(c) requires that an applicant must have "good moral character" before he can be certified. Section 6064.1 provides that no person "...who advocates the overthrow of the government of the United States or of this State by force, violence, or other unconstitutional means, shall be certified to the Supreme Court for admission and a license to practice law."4


the applicant must not be an advocate of the overthrow of the government by force.\textsuperscript{4} Good moral character has been defined as at least common honesty,\textsuperscript{5} and including something more than mere good reputation.\textsuperscript{6} The scope of investigation into the moral character of an applicant is wider than merely ascertaining whether he has been guilty of a felony or misdemeanor.\textsuperscript{7} Equivocating in legal documents has been held as sufficient grounds for denying admission,\textsuperscript{8} as has obtaining goods by false pretenses.\textsuperscript{9} However, the mere fact that an applicant has been arrested but not convicted was held to be insufficient to demonstrate bad moral character.\textsuperscript{10}

In California as in all but two states, the burden of proving good moral character is on the applicant, as opposed to disbarment proceedings where the burden is on the accuser.\textsuperscript{11} Little evidence is usually required to sustain the burden of proof. Some states extend the applicant a presumption of good moral character.\textsuperscript{12} California in conformity with all other states has not made failure to answer any questions of the examiners a mandatory ground, ipso facto, for exclusion from the bar.\textsuperscript{13}

The instant case, as Schware \textit{v. Board of Bar Examiners of New Mexico},\textsuperscript{14} illustrates clearly that inquiry into an applicant's membership in the Communist party during its legal existence, is not of itself controlling in determining applicant's moral character or his present advocacy of overthrow of the government by force, nor may inferences of bad moral character or advocacy of forceful overthrow of the government be sustained from applicant's answer or failure to answer. While the majority of the Court in the instant case concluded that the examiners refused to certify petitioner because of inferences of bad moral character arising from his silence on questions about communist affiliations, the dissent of Mr. Justice Harlan, in interpreting the record, concluded that petitioner was denied certification because by failing to answer, he also failed to sustain the burden of proof. The latter interpretation seems to be borne out by the findings of the examiners.\textsuperscript{15} Though failure to answer examiners' questions in itself does not constitute a mandatory ground for denying certification, it should not follow that failure to answer certain pertinent questions could

\begin{itemize}
  \item[4.] See note 1, supra.
  \item[5.] People \textit{v. Macauley}, 230 Ill. 208, 82 N.E. 612 (1907).
  \item[6.] \textit{In re} Weinstein, 150 Or. 1, 42 P.2d 744 (1935).
  \item[7.] Spear \textit{v. State Bar of California}, 211 Cal. 183, 294 Pac. 697 (1930).
  \item[8.] Carver \textit{v. Clephane}, 137 F.2d 685 (D.C. Cir. 1943).
  \item[9.] \textit{In re} Dillingham, 188 N.C. 162, 124 S.E. 130 (1924).
  \item[10.] Schware \textit{v. Board of Bar Examiners of New Mexico}, 353 U.S. 232 (1957).
  \item[11.] Spear \textit{v. State Bar of California}, 211 Cal. 183, 294 Pac. 697 (1930); See \textit{in re} Wells, 174 Cal. 467, 163 Pac. 657 (1917).
  \item[12.] Petition \textit{of Morrison}, 45 S.D. 123, 186 N.W. 556 (1922).
  \item[14.] 353 U.S. 232 (1957).
  \item[15.] The pertinent part of the examiners' answer reads:
    "On or prior to the 17th day of May 1954 (the Full Committee) considered all of the evidence which had been introduced and determined that petitioner had not sustained the burden of proof that he was possessor of the good moral character required by the California Business and Professions Code, Sec. 6064.1 and that he had not complied with Sec. 6064.1 of said Code, so that his application must be denied . . . ."
\end{itemize}
not so obstruct the examiners' investigation that affirmative certification
would be impossible. In the instant case, the question of Communist
party affiliation is pertinent and could have been determining since the
examiners not only questioned petitioner about his membership in 1941,
but about his membership at the time of the hearing. Where an applicant
for the bar refused to answer questions about his present Communist
affiliations, it was held in In re Anastaplo that in determining applicant's
moral fitness, it was relevant to inquire into present Communist affiliations,
and that even if applicant answered in the negative, that would not preclude
the examiners from inquiring further into his political beliefs. The Court
in the instant case did not discuss the importance of petitioner's failing
to answer the inquiry into his present party membership, though he was
asked several times. Such silence, the Court found, was justified by his
good faith. The good faith of the petitioner, however it may work to
dispel inferences about his moral character and Communist affiliations,
cannot help petitioner sustain the burden of proof. The majority opinion
is to be preferred only if the majority interpretation of the record is proper.
Even then the instant case would do violence to the decision in Hammond
Packing Co. v. Arkansas. If the dissenting interpretation of the record
had been adopted, the Court would have been forced to decide the broad
questions concerning free speech which it so skillfully avoided. The
earlier statement of the Court that government's "interest in the character
of members of the bar sometimes admits of limitations upon rights set out
in the First Amendment" must be dealt with when these broad questions
are finally determined.

Peter P. Smith, III.

CONSTITUTIONAL LAW—Confrontation of Witnesses—
Admission of Evidence From Prior Hearing
Violative of Right of Confrontation.


Defendant Alan Tanser testified at the magistrate's hearing that George
Garis had solicited him to commit sodomy. Later at a grand jury hearing,

16. In re Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954), the court said: "His
petitioner's refusal to answer questions about his general fitness and good citizenship and justifies their refusal to issue a certificate."
opinion).
18. 3 Ill.2d 471, 121 N.E.2d 826 (1954).
19. 212 U.S. 322 (1908) holding that a state may treat a refusal to supply relevant
information as establishing facts against the refusing party even though he does
not have the burden of proof.
20. Throughout the hearings petitioner repeatedly objected to questions about his
beliefs and associations, asserting that such inquiries infringed rights guaranteed him
by the first and fourteenth amendments of the Federal Constitution.
Tanser denied such solicitation by Garis, and was indicted for "wilfully, falsely, knowingly and corruptly swearing . . . [before the] grand jury that George Garis had not solicited the said Alan Tanser to commit oral sodomy with him." Since Garis could not be found in the jurisdiction, a partial transcript of the magistrate's hearing which contained the testimony of Garis admitting the solicitation was introduced into evidence by the commonwealth over objection in order to prove that Tanser had committed perjury in his testimony before the grand jury. Without this transcript, the evidence was insufficient to convict Tanser. The superior court held that the transcript was admissible and sustained Tanser's conviction of perjury at the grand jury hearing. In reversing Tanser's conviction, the Supreme Court of Pennsylvania, with two judges dissenting, held that his constitutional right of confrontation of witnesses was violated by admitting said transcript. Commonwealth v. Russo, 388 Pa. 462, 131 A.2d 83 (1957).1

The policy of our trial system has been to regard the necessity of testing by cross-examination as a vital feature of the law. In the United States, almost all state constitutions have given a permanent sanction to the principle of confrontation.2 The Pennsylvania Constitution3 provides that the accused in a criminal prosecution has the right to meet the witnesses "face to face."4 Confrontation of witnesses and meeting the witnesses "face to face" means cross-examination in the presence of the accused.5 The law is well settled in Pennsylvania that evidence of testimony given at a previous hearing or trial is not admissible if the accused did not have the opportunity of confronting and cross-examining the witness who had given such testimony.6 Yet prior testimony, given voluntarily by one under oath, as well as prior declarations or admissions by him, is evidence against him on trial in a criminal proceeding.7 In the case of Commonwealth v. Doughty8 testimony of three defendants at a previous trial was admitted at a subsequent trial to prove a conspiracy and their participation in it. Although it is clearly hearsay evidence in such a case, it is admissible, for it is obvious that the party making the admission would not cross-examine himself. So too, the rule against admission of hearsay

2. 5 WIGMORE, EVIDENCE § 1397 n.2 (3d ed. 1940, Supp. 1955).
3. Pa. Const. art. 1, § 9: "In all criminal prosecutions the accused hath a right . . . to meet the witnesses face to face . . . ."
8. 139 Pa. 383, 21 Atl. 228 (1891).
The theory of the superior court and of the dissent in the present case that the constitutional provision of confrontation does not exclude evidence admissible by way of the vicarious admission exception to the hearsay rule is sound. Yet this exception has no application in the instant case. Wigmore in his work on evidence finds some "identity of interest" between the accused and the person who has testified necessary for considering the testimony of the witness as that of the accused. The testimony of Garis at his own hearing certainly cannot be considered a vicarious admission of Tanser who was witness against Garis, for there is no privity or identity of interest between them. The case of Becker v. Philadelphia, cited by the superior court, is not a precedent for the proposition that the abovesaid evidence is admissible in a criminal case; it, too, assumes the need for some legal relation in the form of some joint or common interest. The importance of this constitutional provision of confrontation in safeguarding against deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertions of a witness is readily seen. The decision of the supreme court in this case was made reluctantly; conclusive evidence was offered establishing the fact that Tanser had committed perjury. Even though the accused, who is obviously guilty, is acquitted, the decision is sound in that the court will not compromise this vital right of meeting one's accusers "face to face."

James W. Schwartz.

11. See note 9 supra.
13. 217 Pa. 344, 66 Atl. 564 (1907). (Plaintiff had accepted as her own admission testimony of a doctor who had appeared as a witness on her behalf to testify at a previous trial to the fact that she had sustained injuries.)
14. Zank v. West Penn Power Co., 169 Pa. Super. 164, 82 A.2d 554 (1951). (The court explained the principle cited in the Becker case as: "Testimony of third persons as witnesses in another case are [sic] admissible against a party if the latter is bound thereby because of agency, joint or common interest, or his having vouched for their credibility and impliedly asserted the fact by calling them as witnesses.")
CONSTITUTIONAL LAW—CONTEMPT BEFORE A CONGRESSIONAL SUBCOMMITTEE—PERTINENCY OF QUESTIONS.


Petitioner was convicted of contempt of Congress for refusing to answer questions of a subcommittee established by the Un-American Activities Committee of the United States House of Representatives to investigate communist infiltration in the labor field. The questions concerned persons whom the witness knew as Communist party members but who, to the best of his knowledge, had since removed themselves from the communist movement. The Supreme Court granted certiorari, and in reversing the conviction, *held*, with one Justice dissenting, that such questions asked by the subcommittee were not pertinent to the subject under inquiry and that petitioner was within his rights under the due process clause of the fifth amendment in refusing to testify. *Watkins v. United States*, 77 Sup. Ct. 1173 (1957).

The legislative branch of the national government has the power to conduct investigations and compel testimony. This power may be delegated to committees but is subject to certain limitations. The legislature may not expose an activity merely for the sake of exposure, investigate without reference to a legitimate legislative function, or encroach upon a function which is mainly judicial. Witnesses before congressional committees may refuse to answer questions, and they will not then be in contempt, if the committee exceeds its bounds by asking questions which are not pertinent to the subject under inquiry, or by inquiring into private affairs without a legitimate purpose. A contempt conviction based on the refusal of a witness to testify before the House Un-American Activities Committee has been affirmed although that committee produced little legislation within its proper field. Questions concerning membership in the Communist party are pertinent to a congressional investigation into

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subversive activities. The Un-American Activities Committee may request the names of parties producing communist publications and inquire into the records, personnel, and finances of the Communist party. Questions of the Un-American Activities Committee concerning persons who attended communist meetings at college were held to be pertinent to an investigation of subversion and un-American propaganda. However, a committee investigating crime in interstate commerce could not compel testimony concerning acquaintance with a certain party; nor could a committee investigating lobbying activities inquire into the names of those who purchased publications.

The majority of the Court finds fault with the enabling authority of the House Un-American Activities found in the Legislative Reorganization Act, and decides that the terms of the resolution referring to the topic of inquiry were so vague that the right of the witness to refuse to answer a question which was not pertinent was unreasonably compromised. The Court also found that the vagueness was not cured by the other references to the topic under inquiry. In the light of certain considerations the position taken by the majority seems incorrect. First, the Court attacks the resolution because of the vagueness of particular terms. In determining that the resolution lacked clarity, the Court fails to construe the resolution as a whole. In so doing, the well-known maxim expressed in McGrain v. Daugherty is rejected, and circumstances which might favor a valid construction of the resolution are ignored. In attacking the latitude given to the Committee, the majority fails to notice that other committees of both the House and Senate have been given

17. 60 STAT. 828 (1946).
18. The statement by the committee chairman at the outset of the hearing, the full committee's resolution authorizing creation of the subcommittee, and the hearings taken as a whole were considered. Watkins v. United States, 77 Sup. Ct. 1173, 1191 (1957). The title of the report of the hearings in Chicago, and the frame of the particular questions to Watkins were considered. Id. at 1192. The chairman's response when the petitioner objected on the grounds of pertinency was considered. Id. at 1193.
19. 273 U.S. 135, 178 (1927), where the Court quoted "We are bound to presume that the action of the legislative body was with a legitimate object, if it is capable of being so construed, and we have no right to assume that the contrary was intended."

True that the Court has held in the past that when the rights protected by the first amendment tend to be compromised by legislative action, the enactment should not enjoy the presumption of validity ordinarily extended. Thomas v. Collins, 323 U.S. 516, 530 (1944). Viewed in this light the majority's strict method of construing the resolution would be correct. However, because of the impracticality of drawing the resolution any less broad than it is drawn, the policy of extending the presumption of validity is more reasonable.
power in exceedingly broad terms. Such an interpretation, in effect, cripples the committee system as it now stands and fails to appreciate the problems with which legislative investigators must deal. Generally, investigating committees find that witnesses before them are less than co-operative, and that investigations cover such a wide field of information that some groundwork-questions must be asked before the scope of inquiry becomes clear. Thirdly, the majority position requires the committee to afford a witness that degree of clarity which the fifth amendment requires in criminal cases. This would place an insurmountable obstacle before the investigating body which would have to set down clear and concise facts which have not been determined before the committee has been informed of the true nature of the problem before it. In fact, the petitioner in the instant case most probably was more familiar with communism in the labor field because of his prior experience than the committee conducting the investigation. Fourthly, the majority is quick to infer that since one-fourth of the total number of persons to be identified by the petitioner was not connected with organized labor (which the government contended was the subject of inquiry), organized labor could not have been the subject of inquiry. The inference is made without considering why such persons were included. Mr. Justice Clark, in the dissenting opinion, asserts that such reasoning is a non-sequitur, and that quite the opposite conclusion follows. Finally, in view of the prior testimony of other witnesses the Court could countenance compelling Watkins to give that information which would either corroborate or contradict the prior testimony. Clearly these are pertinent questions, but then, in the view of this Court, this Court's attention should have turned to the pertinency of the questions asked the prior witnesses.

Leon A. Mankowski.

CONSTITUTIONAL LAW—Police Power of Municipality—Constitutionality of Curfew Ordinance.

Alves v. California (Cal. 1957).

Appellant, aged 21, was present in an automobile at a drive-in restaurant at 11:30 p.m. in the company of three young persons, one of whom was under 17 years of age. Appellant was charged with willfully aiding and abetting a minor to be in a public place at the hour of 11:30 p.m. in

22. Id. at 1176, 1177.
violation of a city curfew ordinance. The superior court denied his request for a writ of prohibition to prevent prosecution. On appeal, the district court, in interpreting the ordinance, defined the word "business" as pertaining to occupation notwithstanding the state’s contention that the words "legitimate business" should be construed to mean "legitimate activity", and held that the municipal ordinance constituted an unlawful invasion of personal rights and liberties and was therefore unconstitutional. *Alves v. California*, 306 P.2d 601 (Cal. 1957).

In interpreting statutes on the question of constitutionality, the courts will strive to find the statute valid and not oppressive or arbitrary. It is well established that if an enactment can be given any reasonable interpretation consistent with its validity, such interpretation should be adopted. However, under the doctrine of *noscitur a sociis*, the meaning of the general terms, "legitimate business", is confined to the meanings of the specific terms, "trade, profession or occupation", stated in a series of terms. Concurrent with the problem of interpretation is the reasonableness of the regulation in the light of the objects to be attained under the circumstances. The general rule is that a state may delegate a portion of its police power to municipalities, under which power the municipalities may enact ordinances to promote the peace, safety and general welfare of their inhabitants. In a proper case, however, the judiciary may review the ordinances so enacted to determine their constitutional validity. Although a municipality has a right to regulate the use of its streets, parks and public places, it may not do so to such an extent as to interfere with the personal liberty of the citizen as guaranteed to him by our constitutions and laws.

1. *Chico Municipal Code* § 648. The pertinent provisions are as follows:

   "Subdivision (a). It shall be unlawful for any minor under the age of seventeen years of age to be in or on any public street, park, square or public place between the hours of 10:00 o’clock P.M. and 5:00 A.M. of the following day, except when and where said minor is accompanied by a parent or legal guardian having custody of said minor, or where the presence of said minor in said place or places is connected with, and required by, some legitimate business, trade, profession or occupation in which said minor is engaged.

   Subdivision (b). Any person assisting, aiding, abetting or encouraging any minor under the age of seventeen years to violate the provisions of Subdivision (a) hereof shall be guilty of a misdemeanor; . . . ."

are few cases involving curfew ordinances from which it can be determined to what extent the courts will permit restrictions placed on personal liberty due to these ordinances. In a very early case, *Ex parte McCarver*,\(^{11}\) involving a curfew ordinance which prohibited the presence of a person under twenty-one years of age on the streets after the curfew hour unless seeking the services of a physician or accompanied by a parent or guardian, the ordinance was held to be a reasonable regulation of the personal liberty of the citizen. In a more recent case, *People v. Walton*,\(^ {12}\) involving an ordinance which permitted young citizens to be on the streets after the curfew hour so long as they were not “remaining or loitering”, the ordinance was upheld as a reasonable regulation. The curfew ordinance in the latter case is similar to those forbidding loitering which have been held to be constitutional.\(^ {13}\)

The ruling appears reasonable since the ordinance entails almost complete prohibition of juveniles’ presence for even normal activities outside of their homes. The ordinance in the instant case is almost as prohibitive as the ordinance\(^ {14}\) in *Ex parte McCarver*\(^ {15}\) and not nearly as liberal as the one in *People v. Walton*\(^ {16}\) which would permit such activities in the absence of “loitering”. In view of the doctrine of *noscitur a sociis*, the court was reasonable in adopting the narrower definition of the word “business”. This doctrine has been followed in defining “business” when coupled with a series of specific terms in tax statutes\(^ {17}\) and in workmen’s compensation acts.\(^ {18}\) The ruling in the instant case is significant since there are so few cases involving curfews. It will be a guide for the drafting of future curfew ordinances which are receiving attention as possible aid in combating juvenile crimes and mischief.

Robert L. Brabson.

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11. 39 Tex. Crim. 448, 46 S.W. 936 (1898), in which the Graham City Ordinance No. 30 was quoted as follows:

“Section 1. Any person under the age of twenty-one years who shall be found upon any of the streets or alleys of the city of Graham at night, and later than fifteen minutes after the ringing of the curfew bell as hereinafter provided, shall be guilty of a misdemeanor..."

Section 2. Be it further ordained that the foregoing section shall not apply to any person under the age of twenty-one years, who shall at the time of being so found upon the streets or alleys of said city be accompanied by his or her parent or guardian, or to any person or persons in search of the services of a physician, provided such person or persons at the time of being so found is actually executing such errand.”


14. See note 11 supra.

15. 39 Tex. Crim. 448, 46 S.W. 936 (1898).


The plaintiff and others, insurance brokers, brought suit to recover certain commissions claimed by them under an oral agreement entered into with the defendant. Defendant sought to escape liability under the New York Statute of Frauds.\footnote{1} The plaintiff Linn had gone to New York, and there had made an offer to defendant's agent Ehman, who deferred acceptance until he could secure authority from his home office. Linn returned to Philadelphia, and Ehman subsequently telephoned from New York and accepted the offer. At trial a compulsory non-suit was entered against plaintiff, and motion to remove was dismissed after argument before Common Pleas Court No. 7, Philadelphia County, en banc, which held, in this case of first impression, that because a contract entered into by telephone becomes effective at the place where the acceptance is spoken, under Pennsylvania conflict of laws, the agreement was terminable by the defendant under the New York Statute of Frauds, which requires a writing evidencing agreements which by their terms are not to be performed within one year. \footnote{2} Linn v. Employers Reinsurance Corp., 136 Legal Intelligencer No. 72, p. 1, col. 1 (C.P., Phila. March 6, 1957).

Except for contracts concerning land, the validity of a contract as affected by the Statute of Frauds is generally held to be a matter of substance to be determined by the law of the place of contracting, and not a matter relating to proof to be governed by the \textit{lex fori}.\footnote{3} It is settled law that a contract is considered to be made at the place where the last act necessary to make a binding agreement takes place.\footnote{4} What is the last act necessary to convert negotiation into contract is a question to be determined by the law of contracts rather than by any conflict of laws rule.\footnote{5} For example, where an agent enters into a contract for his principal, the situation is treated as if the principal were there personally, and the place of contracting is where the transaction between the agent and the third party is consummated.\footnote{6} A unilateral contract is formed when the requested act takes place, and the place of contracting is where that act

\begin{itemize}
\item \textbf{1. N.Y. Pers. Prop. Law § 31 (1).}
\item \textbf{2. Linn v. Employers Reinsurance Corp., 136 Legal Intelligencer No. 72, p. 1, col. 1 (C.P., Phila., March 6, 1957).}
\item \textbf{4. Victorson v. Albert M. Green Hosiery Mills, Inc., 202 F.2d 717 (3d Cir. 1953); \textit{In re Luce's Estate}, 54 York 119 (O.C., Fay. 1940); RESTATEMENT, CONTRACTS § 74 (1932).}
\item \textbf{6. Kamper v. Hunter Land Co., 146 Minn. 337, 178 N.W. 747 (1920).}
\end{itemize}
occurs.\(^7\) In contracts by correspondence, the act of placing the acceptance in the mail or delivering it for telegraphic transmission, if such means are authorized, completes the agreement,\(^8\) without regard to whether such acceptance ever reaches the offeror, unless the offeror otherwise limits the power of acceptance.\(^9\) The relatively few jurisdictions that have had to decide the place of contracting when the acceptance was given by telephone have unanimously held that the last act necessary for the formation of the contract is the utterance of acceptance into the telephone, and that therefore the place of contracting is the place where the acceptor speaks his acceptance.\(^10\)

The result reached by the instant case is in accord with all case authority and the Restatement of Conflict of Laws.\(^11\) Professor Williston, on the other hand, argues that the situation of concluding a contract via telephone is most closely analogous to that where the parties enter into an oral agreement in the presence of each other, and that in such a case the risk of being heard is placed upon the acceptor, the contract being formed when and where the offeror hears or ought to hear the acceptance.\(^12\) However, the well-settled rule as to an oral acceptance where the parties are face to face is that a contract is consummated upon the utterance of the acceptance unless the acceptor knows or has reason to know that the offeror does not hear or understand the words of acceptance.\(^13\) The Restatement of Contracts does not answer the question; the black letter is ambiguous and without comment, and when interpreted with other pertinent provisions can be construed to support either contention.\(^14\)

The cases which have decided the issue involved either a question of jurisdiction or the application of the Statute of Frauds; the question of risk of being heard or hearing was not presented, which may explain why the cases are singularly lacking in any discussion of the principles involved.\(^15\) But if not expressed, implicit in them is the analogy to the

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12. 1 Williston, Contracts §§ 82, 97 (rev. ed. 1936); Contra, Restatement, Conflict of Laws § 326, comment (d) (1934), which is dictum in Bank v. Sperry Flour Co., 141 Cal. 314, 74 Pac. 853 (1903).
rule in post and telegraphic acceptances, that their dispatching is the last act necessary for the formation of a contract. The logic of including the utterance of acceptance into the telephone with other means of accepting where the parties are at a distance, in which the law has found it expedient and politic to place the risk of being the last to be informed that a contract has been consummated upon the offeror, is irresistible, and these decisions will probably be followed "on the strength of this analogy." Nevertheless, it should be noted that the instant case serves to emphasize the artificiality of making the place of contracting a criterion for the choice of the applicable law in conflict of laws cases.

*John Thaddeus Grablewski.*

CORPORATIONS—Voting Trusts—Agreement Void for Failure to Comply With Statute.

_Abercrombie v. Davies_ (Del. Ch. 1957).

Defendants, who held a majority of shares in a Delaware corporation, entered into what purported to be a stock pooling agreement designating eight agents to whom were transferred voting control for a period of ten years. The stock was endorsed in blank and delivered to the agents for deposit in escrow with irrevocable proxies. The proxies were always to be exercised as a unit, as any seven agents should determine, and there were provisions for the choice of an arbitrator to resolve disagreements. The agents named were at the time the eight directors representing the six stockholders. There were provisions regulating the actions of the agents as directors. The agreement continued in effect for almost five years, when two of the parties were charged with violating it. Litigation was begun in California and resulted in a preliminary injunction. In the meantime, the minority stockholders instituted this suit in Delaware challenging the agreement's validity. The Court of Chancery of Delaware held the agreement invalid, in part, as it attempted to regulate director action, but severable and valid as a stock pooling agreement as it pertained to stockholder action. On appeal, the supreme court held what remained of the agreement to be a voting trust within the meaning of the voting trust statute and void for failure to comply with the statutory requirements. On remand, the lower court held the agreement void in its entirety and not merely unenforceable until compliance with the statute should be had. _Abercrombie v. Davies_, 131 A.2d 822 (Del. Ch. 1957).

The voting trust, a means for securing control of stockholder voting based on common law trust principles, came into use in the latter part of

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1. Del. Code Ann. tit. 8, § 218 (1953). (The requirements not met were that the shares be transferred on the corporation's books and that the agreement be filed in the corporation's principal office in Delaware.)
the nineteenth century as an alternative to the inadequacy of the proxy as a means of corporate control. It also provided a legalistic answer to the added disqualification of an irrevocable proxy, i.e., separation of voting rights from ownership, since a trustee is given legal title to the shares as well as the voting rights. Owing to their inception in a burgeoning capitalist economy when many corporate abuses were being exposed, voting trusts received much adverse criticism, and were often met by a hostile attitude in the courts. Since then many states, most of them since 1926, recognizing the usefulness and economic necessity of such a corporate control device, have enacted legislation authorizing the creation of voting trusts complying with statutory requirements. These statutes have sometimes been strictly interpreted by courts, and in this category, Delaware has held that the provisions of its voting trust statute are mandatory.

In *Hirschwald v. Erlebacher* the court enforced a voting trust agreement which failed for two years to meet certain statutory requirements and which contained no express provisions for such compliance. That decision at least paid lip-service to the strict compliance doctrine, for the issue was not whether the agreement must comply with the statute in order to be operative under law, but rather whether the parties were under an obligation among themselves to take those steps necessary to comply. The instant case rejects *Hirschwald* as authority for the proposition that as among the parties the agreement should always be merely unenforceable until compliance is carried out. The present agreement clearly manifests an intent that the parties to the agreement were under no obligation among themselves to comply if compliance was required by statute in order

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11. Abercrombie v. Davies, 130 A.2d 338 (Del. Ch. 1957). "If any stockholders' agreement providing for joint or concerted voting is so drawn as in effect to occupy the field reserved for statutory voting trusts, it is illegal, whatever mechanics may be devised to attain the result."


13. The same requirements as in question in the instant case. See note 1 supra.

14. Just prior to coming into court, the trustee who brought the suit filed a copy of the agreement per the statute. Enforcement acted to complete statutory compliance. The two year delay was held not to amount to laches or abandonment. The court...
to have any kind of an operative agreement.\textsuperscript{15} Thus the state of the law in Delaware appears to be that if the agreement is mute as to what should happen in case certain further steps are required by the voting trust statute, the agreement may be merely temporarily invalid and unenforceable among the parties because of the failure to meet statutory requirements, and yet ultimately enforceable among the parties because of an implied in fact agreement to comply with the statute as in \textit{Hirschwald}. On the other hand the agreement may be totally void among the parties because its terms and the conduct of the parties negative an implication of agreement to take those steps necessary to compliance, and because in its present form the agreement is not operative under law since it is out of compliance, as in the instant case. This is a sensible result, mindful of freedom of contract. The evidentiary and interpretive problems will be, however, frequently difficult. If the agreement is mute on the problem, and no implication of agreement to comply or not to comply is clear, a conflict of policies arises. It is suggested that the policy seeking to protect the bargain of the parties if reasonably possible should be coupled with a policy in favor of \textit{complying} voting trusts rather than allow a general policy disfavoring the existence of voting trusts to dominate.

\textit{John J. Cleary.}

**INSURANCE—Double Indemnity Clause—War Exclusion.**

\textit{Thomas v. Metropolitan Life Ins. Co. (Pa. 1957).}

The defendant company issued a life insurance policy on the life of Francis R. Thomas, Jr. naming the plaintiff in this action as beneficiary. The policy contained a provision for double indemnity if death was accidental but not the result of an act of war. The insured was killed in action by an enemy hand grenade in Korea on October 27, 1952. The defendant paid the face value of the policy upon proof of death but refused to pay double indemnity contending that the insured was killed as a result of an act of war. The Supreme Court of Pennsylvania in a per curiam opinion, with one dissent, held that the Korean conflict was embraced within the meaning of "an act of war." \textit{Thomas v. Metropolitan Life Ins. Co.,} 131 A.2d 600 (Pa. 1957).\textsuperscript{1}

The Korean conflict occasioned a periodically recurring problem in the interpretation of war exclusion clauses in life insurance policies. The so-called legal sense of the word "war" includes only a declared or solemn

\textsuperscript{15} Specific mechanics were provided to convert the agreement to a statutory voting trust when the parties should so agree.

\textsuperscript{1} Thomas v. Metropolitan Life Ins. Co., 131 A.2d 600 (Pa. 1957).
war, one engaged in upon authority of the nation's war making power, as contrasted to an undeclared or imperfect war. The problem is whether an undeclared war is included within the meaning of any particular war exclusion clause. In 1953, in the case of Beley v. Pennsylvania Mut. Life Ins. Co., the Pennsylvania Supreme Court held that the Korean conflict was not a war within the meaning of a double indemnity policy excepting death "during time of war." The court found the term "war" to be ambiguous and, using a cardinal principle of interpretation, construed the contract against the insurer which had supplied the ambiguous term. There is authority for this position prior and subsequent to Beley in other jurisdictions. In the instant case, the same court dealt with a war exclusion clause which excepted liability for a death that "shall not have occurred . . . as a result of an act of war." In considering the phrase "act of war" as a unit, the court found that it was not ambiguous, consistently meaning hostilities between nations, whether in declared or undeclared wars. Therefore the principle of interpreting the contract against the insurer was not applied in the instant case as it was in the Beley case. Considerable authority for the conclusion that undeclared wars are included in war exemption clauses may be found in other jurisdictions.

The question may be considered open in Pennsylvania since the instant case casts serious doubts on the underlying attitude of the court in the Beley case. The instant case shows a willingness on the part of the court to take judicial notice of the Korean conflict as being a "war" in common parlance. In the Beley case the court said that the existence or nonexistence of war

2. In the United States, this power is granted exclusively to Congress by U.S. CONST. art. I, § 8, cl. 11.
3. Bas v. Tingy Supreme Court 4 Dall 37 (1800) is an early case making this distinction.
5. Ibid.
6. Ibid.
was a political, not a judicial question. However the instant case indicates that the court could no longer close its judicial eyes to what everyone else called a war. In so doing they have substituted a very unpredictable standard for the formal congressional declaration of war in interpreting insurance contracts. It is now left to the court to determine, by a scale known only to itself, whether a particular clash of arms is a war within the meaning of a particular war exclusion clause. This problem need not arise in future policies since insurance contracts can, and should, be drafted so as to cover any clash of arms in a declared or undeclared war but as for the policies already issued, each case must be decided on its own particular facts.

Edward J. Carney, Jr.

LABOR LAW—LABOR MANAGEMENT RELATIONS ACT, 1947—SPECIFIC PERFORMANCE OF ARBITRATION AGREEMENTS UNDER SECTION 301 (a).

Textile Workers Union v. Lincoln Mills (U.S. 1957);
Goodall-Sanford, Inc. v. United Textile Workers, AFL (U.S. 1957);
General Electric Co. v. Local 205, United Electrical Workers (U.S. 1957).

The union in each of these companion cases had set forth in its contract with the employer a grievance procedure which ended with an agreement to arbitrate. The employer refused to accept arbitration and the union sought specific performance of this contract provision under section 301 (a) of the Taft-Hartley Act. In Textile Workers Union v. Lincoln Mills of

12. A strong argument could be made that Congress recognized the fact of war in Korea even though they did not choose to declare it, by its extension of the "G. I. Bill" to Korean veterans, and its appropriations in support of combat operations in that area.
13. It is suggested that once a court assumes that the term "war" means what the general public considers to be a war the problem arises as to how and where the line will be drawn. Under this interpretation, how would the court decide a truce line incident? When did Korea become a war? Would the deciding factor be when the first United States troops were ordered into the field or after a year of combat, or possibly after the newspapers began to refer to it as a war? This lack of a definite standard will make predictability extremely low in this area, to say the least.
14. Its search for a scale could lead a court to consider the particular circumstances surrounding the formation of an insurance contract in question. The insurer could then offer an argument based on actuarial figures. For example, the insurer manifests a clear intention not to cover military risks by the inclusion of a war exclusion clause in its contract. The insurer then bases the insured's premiums on the ordinary risks of the average person and to extend coverage to a war risk not intended to be covered by the parties on a technicality is to give a protection for which no premium has been paid.

1. Labor Management Relations Act, 1947 (Taft-Hartley Act), 61 STAT. 156, 29 U.S.C. § 185 (1957), which provides: "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."
the court of appeals interprets this section as merely jurisdictional and therefore no authority for granting the relief sought. The United States Court of Appeals for the Fifth Circuit in the latter two cases views the remedy of specific performance as not finding its needed statutory authority in section 301(a), but did find the necessary authority in the Arbitration Act. The Supreme Court, with Justice Frankfurter dissenting at length, held that section 301(a) not only gives district courts jurisdiction but also empowers these federal courts to formulate a body of federal common law dealing with collective bargaining agreements in which will be included the remedy of specific performance of executory agreements to arbitrate. Textile Workers Union v. Lincoln Mills, 77 Sup. Ct. 912 (1957); Goodall-Sanford, Inc. v. United Textile Workers, AFL, 77 Sup. Ct. 920 (1957); General Electric Co. v. Local 205, United Electrical Workers, 77 Sup. Ct. 921 (1957).

In common law executory agreements to arbitrate are not specifically enforceable. In order that the rule might be abrogated and specific performance of these agreements be obtained the United States Arbitration Act of 1925 was passed. In most instances this statute makes these executory agreements enforceable, however, section 1 of this Act has been interpreted as excluding all labor agreements. The other view holds that § 301(a) itself creates the remedy of specific performance, and thereby avoids the problems of the Arbitration Act entirely. In addition to the problems presented by this statute, there exists the problem of the severe limitation of the injunctive remedy in labor disputes by the Norris-LaGuardia Act. The Court in past decisions has held that the purpose of this Act would not be served if an injunction were prevented from issuing in a situation where such a remedy would best fulfill the overall policy of the Norris-LaGuardia Act. The Court followed that reasoning

2. 230 F.2d 81 (5th Cir. 1956).
8. 61 Stat. 669 (1947), 9 U.S.C. § 1 (1957), which provides: "...but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."
12. Syres v. Oil Workers Union, CIO, 350 U.S. 892 (1955); Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 222 (1949); Virginian Ry. v. System Federation, 300 U.S. 515 (1937). These cases did not concern § 301 (a), but the Court allowed injunctions to issue on the reasoning that where congressional policy is clear in favor of agreements to arbitrate there is no necessity to submit them to the requirements of § 7 of the Norris-LaGuardia Act. See Textile Workers Union v. Lincoln Mills of Alabama, 77 Sup. Ct. 912, 919 (1957).
here. 13 In these instant decisions the Court avoided the problems of the United States Arbitration Act by finding the necessary statutory authority in section 301(a) itself. 14

By virtue of these decisions the court has placed in the hands of the union a two-edged sword. It has armed the union with the once dreaded labor injunction, and at the same time made possible the union's bargaining itself out of the right to strike. The Court resolved the constitutional difficulties 15 by making the applicable law completely federal. 16 It has fulfilled two of its paramount judicial duties, that of giving predictability to the law and the other, that of applying a statute to a situation unanticipated by the legislators in a way consistent with the overall legislative intent. The Court fails to resolve the problem of the union bringing a suit under § 301(a) for a breach of individual contracts of employment. However, the decision does follow the trend of encouraging the arbitration of labor disputes and when this situation does arise there is a strong possibility that it will favor arbitration by the union and the employer rather than compel each member to bring an individual suit in his own name. The dissent interprets the legislative history of the Act as casting no light on the situation and proceeds to resolve nothing. 17

Edward J. McLaughlin

MALPRACTICE—STATUTE OF LIMITATIONS—
FRAUDULENT CONCEALMENT.


In a malpractice action the complaint alleged that the defendant surgeon left a portion of a surgical needle embedded in the plaintiff's back following an operation on September 15, 1932, and that the defendant negligently failed to remove the needle fragment, fraudulently concealing such fact. The defendant pleaded the statute of limitations. The lower court concluded as a matter of law that the plaintiff's action was barred by the two year statute of limitations. The plaintiff appealed, contending that fraudulent concealment tolled the statute of limitations in malpractice actions. The Supreme Court of South Dakota held, reversing and remanding, with two judges dissenting, that fraudulent concealment of a cause of action tolls the statute of limitations until the cause of action is dis-

14. Id. at 917.
15. Labor Management Relations Act, 1947 (Taft-Hartley Act), 61 Stat. 156, U.S.C. § 185 (1957), provides: "(a) Suits . . . may be brought in any district court . . . without regard to the citizenship of the parties." By this provision of the Act the requirement for diversity of citizenship is eliminated necessitating, for constitutional validity, that the controversy be one arising under the laws of the United States. Therefore, if Congress intended that state law govern, no federal substantive right would exist, and the suit would not be one arising under the laws of the United States.
16. Textile Workers Union v. Lincoln Mills, 77 Sup. Ct. 912, 918 (1957). "... We conclude that the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws."
17. Id. at 925.
covered or might have been discovered by the exercise of diligence. Also, where a trust or other confidential relationship exists between the parties, such as physician-patient, silence alone on the part of the one having the duty to disclose constitutes fraudulent concealment. *Hinkle v. Hargens*, 81 N.W.2d 888 (S.D. 1957).  

Ordinarily a cause of action for malpractice accrues and the limitation period applicable thereto commences to run at the time of the physician’s or dentist’s wrongful act or omission. A few courts hold that the limitation period begins to run at the termination of professional treatment. Where the person guilty of malpractice fraudulently conceals the fact so as to prevent the injured party from obtaining knowledge thereof, the statute of limitations does not begin to run until the cause of action is discovered or could have been discovered by the exercise of reasonable diligence on the part of the injured party. Statutes have been widely enacted by which the limitations period begins to run at the time the fraud is discovered. Courts have varied in their interpretations of the term fraudulent concealment. Many courts require that the physician have actual knowledge of the harm done. A complaint which averred that the physician either knew or should have known of the presence of a foreign substance in the patient’s body has been held not to be sufficient for fraudulent concealment. A Texas decision holds that in order that there be fraudulent concealment, the physician must have a fixed purpose to conceal the wrong from the patient. Some courts require an affirmative act on the part of the physician designed to prevent the discovery of the negligence for there to be fraudulent concealment. Other jurisdictions hold that due to the confidential relationship existing between the doctor and patient, a mere failure to disclose the harm will constitute fraudulent

5. *E.g. Ill. Rev. Stat. c. 83, § 23 (1930).* If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action and not afterwards. See also *Mo. Ann. Stat. § 516.120 (5) (Supp. 1955).*  
7. *Carter v. Harlan Hospital Ass’n*, 265 Ky. 452, 97 S.W.2d 9 (1936); *Albert v. Sherman*, 167 Tenn. 133, 67 S.W.2d 140 (1934); *contra*, *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934).  
concealment. This confidential relationship places on the physician a duty to disclose the harm to the patient.

Courts which require proof of an affirmative act to show fraudulent concealment have strictly construed the meaning of fraud. The main case however is indicative of a more sensible trend. These courts, liberally construing the meaning of fraud, take into consideration the physician-patient relationship. Rarely can an inexperienced patient ascertain sufficient facts to give rise to a cause of action. Also, the non-disclosure is treated as a breach of the trust placed in the physician by the patient. Where this trust relationship exists, the physician in almost complete possession of the facts should not escape liability by willfully concealing such facts, or by the non-disclosure of facts he knew or should have known. Thus, in the instant case, although the affirmative act required by some courts is not present, the court predicates liability on this non-disclosure and a more sensible result follows.

Edward H. Feege

NEGLIGENCE—DUTY OF CARE—INTERFERENCE WITH TESTAMENTARY EXPECTANCY INTEREST.

*Mickel v. Murphy* (Cal. 1957).

The plaintiff, sole beneficiary under the will of Henry Mickel, her husband, brought an action in tort for damages resulting to her from the unlawful practice of the law by the defendant. The defendant, in the words of the complaint, had advised, drawn, prepared, and notarized an instrument entitled “The Last Will and Testament of Henry Mickel”, but had neglected to advise the testator that a valid will required attestation of two witnesses. Because of the lack of attesting witnesses the will was null and void and Henry Mickel died intestate. It resulted that one-half of the estate passed to the mother of deceased. A demurrer to the complaint was sustained in the trial court and the plaintiff appealed. The District Court of Appeal for the Fourth District, California, affirmed, **holding**, that the complaint failed to state a cause of action because the defendant had acted only as scrivener of the will and not as an attorney; that no duty was owed to the plaintiff under the agreement to draw the will because the plaintiff had no vested interest or right in the property involved, in the absence of a valid will. *Mickel v. Murphy*, 305 P.2d 993 (Cal. App. 1957).1

1. *Hudson v. Moore*, 239 Ala. 162, 194 So. 147 (1940); *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934) (Leaving ball of gauze in appellant's abdominal cavity and failure to disclose this to appellant were held to be fraudulent concealment and continuing acts of negligence); *Breedlove v. Aiken*, 85 Ga. App. 719, 70 S.E.2d 85 (1952); *Tabor v. Clifton*, 63 Ga. App. 768, 10 S.E.2d 137 (1940); *Thompson v. Barnard*, 142 S.W.2d 238 (Tex. Civ. App. 1940).


The practice of law includes legal advice, counsel, and preparation of legal instruments and contracts by which legal rights are secured. An action in tort will not lie unless there is some legal duty owing by the defendant to the person allegedly injured. However, the common law imposes on anyone undertaking to perform a service for another, the duty to use ordinary care. If such a person fails to use care and injury results he will be held liable for such injury that was foreseeably caused by his violation of that duty. Of course the violation of the standard of care must cause injury to some protected interest of the plaintiff to create a cause of action. The interest of a beneficiary of a will is ambulatory and will not vest until the testator’s death, hence until that time it is merely a testamentary expectancy. Although the law of torts has extended protection in the form of damages for intentional interference with testamentary expectancies, the courts have not yet seen fit to extend protection to negligent interference with such prospective advantages, for the cases hold that malice or ill-will must be alleged and proved.

Issue might be taken with the holding of the court that the plaintiff did not allege facts showing that the defendant had acted other than as a scrivener, for it was definitely alleged that the defendant had advised the testator regarding the drawing of the will. This holding was influential in view of a more recent decision on the point. The court in the instant case apparently would not have found any liability in the defendant for his carelessness, even to the testator. The defendant had assumed a duty of care when he voluntarily took up the drawing of the will and the injury to the plaintiff’s interest was the type of injury most likely to result from the omission made by the defendant. But, the defendant had no duty to the plaintiff since her non-vested expectancy interest was not protected from negligent interference by third parties. If such an interest is sub-

10. Biakanja v. Irving, 310 P.2d 63 (Cal. App. 1957). In this case a notary public drew a will, notarized it but failed to have it witnessed as required. The will was invalid and the sole beneficiary under the invalid will sued for damages. It was held that the drawing of the will was the unlawful practice of law and therefore a violation of a statute prohibiting one from practicing law unless he is a member of the state bar; that this violation permitted the sole beneficiary of the invalid will to recover from the defendant the difference between the amount the beneficiary would have received under the will and the amount actually distributed to her according to the laws of intestate succession. Note that this allowance of recovery is contrary to the dicta of the instant case.
12. See note 9 supra.
stidial enough to be protected from intentional interference by third parties, why should not negligent interference which causes direct and foreseeable injury be protected against? The injury in either case is just as great, and the intent of the testator is clearly defeated by the negligent act. For these reasons protection should extend to testamentary expectancies against negligent interference by third parties.

William E. Mowatt.

**ZONING—LOT AREA RESTRICTIONS—CONSTITUTIONALITY OF ONE-ACRE REQUIREMENT.**


Bilbar Construction Co. purchased a fifty-acre tract of unimproved land in Easttown Township. The tract was located in an “A” residential district established by an Easttown Township zoning ordinance which provided that “A” districts should be a minimum of one acre with a minimum frontage of 150 feet. The tract bordered a road separating Easttown and Tredyffrin Townships. The land immediately across from the tract, which was located in Tredyffrin Township, had been developed into small residential properties in accordance with the Tredyffrin Township zoning ordinance with a minimum lot area of smaller proportions. Bilbar Construction Co. applied to the township zoning officer for a permit to construct a single-family dwelling on a lot of 21,000 square feet within the fifty-acre tract. The application was denied because the lot did not conform to minimum area requirements. This decision was affirmed by the Board of Adjustment of Easttown Township and the court of common pleas. On appeal, the Supreme Court of Pennsylvania reversed, *holding* that the ordinance was unconstitutional in its application to the appellants’ property because it was not reasonably and clearly necessary for the health, safety, or morals of that community or its inhabitants. *Bilbar Construction Co. v. Board of Adjustment*, 138 LEGAL INTELLIGENCER No. 8, p. 1, col. 3 (Pa. Sup. Ct. June 28, 1957).¹

The landowner’s right to devote property to legitimate use is subject to the superior claim of the public’s right of regulation under the state police power.² Zoning acts and the ordinances passed under them are a lawful exercise of this police power.³ But, zoning ordinances are constitutional only when they are based on the promotion of the health, safety, morals, or the public welfare of the inhabitants of the municipality and are not unjustly discriminatory, arbitrary, or unreasonable in their application to a particular piece of property.⁴ A lot area requirement is a type of zon-

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² Appeal of Perrin, 305 Pa. 42, 156 Atl. 305 (1931).
ing law which sets up a minimum area for lots in residential districts, usually accompanied by minimum frontage requirements. The validity of this type of regulation depends on whether in a particular case the requirements bear some relationship to the health and safety of the community.\(^5\) Lot area restrictions are often founded on aesthetic and economic values,\(^6\) but in most jurisdictions, zoning cannot be sustained merely on aesthetic grounds.\(^7\) Particularly, ordinances providing high minimum requirements, as in the instant case, are often declared to be an attempt to set up an exclusive section maintaining a low tax rate, and founded on a desire to promote the construction and maintenance of residences by people of the requisite financial ability.\(^8\) The establishment of such a residential neighborhood does not bear a sufficient relationship to the public health and safety to validate such an ordinance.\(^9\) However, some states have upheld similar zoning ordinances, some requiring areas larger than one-acre lots.\(^10\) Most of these courts recognize that a zoning law cannot be adopted to set up a barrier against the influx of thrifty and respectable citizens who desire to live in a district, nor for the purpose of protecting large estates already located in the district, but find validity in the ordinances by declaring that they are not founded on these grounds.\(^11\) Some courts, however, validate the ordinances strictly on aesthetic grounds, finding justification for them in the preservation of the character of the community, the maintenance of the value of the property therein and the dedication of the land throughout the township for its most appropriate use.\(^12\) The instant case is the first Pennsylvania decision reviewing a regulation of one-acre proportions.\(^13\)

The decision itself raises many unanswered questions. The case leaves the question of the validity of such lot area restrictions in general unanswered in Pennsylvania. Whether the case holds all lot area requirements of such proportions to be unreasonable and invalid or whether the unreasonableness of this requirement arises solely from the circumstances of the case, i.e., the proximity of a lower grade residential area just across

\(^7\) Appeal of Kerr, 294 Pa. 246, 144 Atl. 81 (1928); Appeal of Liggett, 291 Pa. 109, 139 Atl. 619 (1927).
\(^12\) E.g., Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952).
\(^13\) But a 20,000 square-foot lot requirement was sustained in Appeal of Volpe, 384 Pa. 374, 121 A.2d 97 (1956); a 7500 square-foot requirement was impliedly approved in Appeal of Elkins Park Improvement Association, 361 Pa. 322, 64 A.2d 783 (1949); and a minimum requirement of 4000 square feet was impliedly approved in Appeal of Brosnan, 330 Pa. 161, 198 Atl. 629 (1938).
the roadway, is not clear. Although dictum in the instant case \(^{14}\) definitely tends to indicate the former view, Justice Bell attempts to narrow the decision to the facts of the case in his closing words, declaring the ordinance unconstitutional "insofar as it applies to petitioners' property in this residential area." \(^{15}\) The decision may have put an end to "one-acre zoning" in Pennsylvania. It is suggested that this conclusion would be the better holding.

Donald G. Jewitt.

ZONING—Special Exception—Aesthetic Considerations in Denying a Proposed Use.

\textit{In re O'Hara's Appeal} (Pa. 1957).

Petitioner, owner of property situated in an "AA" residential district as defined by the applicable township zoning ordinance, applied to the board of adjustment requesting a special exception so that the property might be used for educational purposes as a regional diocesan high school. Pertinent parts of the ordinance provided that a building might be erected and a lot or premises may be used for educational purposes by and with the consent of the board of adjustment. \(^{1}\) The application was denied, and the board's decision was affirmed by the court of common pleas on the grounds of cost to the township, the availability of another site, the inadequacy of the present site, anticipated increase in traffic, and that the proposed use would destroy the residential character of the neighborhood and depreciate the value of nearby residences. On appeal, the Supreme Court of Pennsylvania reversed and held, \textit{inter alia}, \(^{2}\) that adverse effects on the character of the neighborhood are insufficient reasons for denying an exception, as not protecting the health, safety, morals or general welfare of the community. \textit{In re O'Hara's Appeal}, 389 Pa. 35, 131 A.2d 587 (1957). \(^{3}\)

In this case the proceeding was by application for special exception and not for a variance. An application for a special exception, as distinguished

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\(^{1}\) "A zoning ordinance in a residential district which makes it financially impossible for the vast majority of young married couples and for medium incomes to purchase or own a home in that district, is contrary to our Nation's ideals of liberty, private property and equality of opportunity. . . ." Bilbar Construction Co. v. Board of Adjustment, 138 Legal Intelligence No. 8, p. 6, col. 4 (Pa. Sup. Ct. June 28, 1957).


\(^{3}\) In re O'Hara's Appeal, 389 Pa. 35, 131 A.2d 587 (1957).

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2. The ordinance involved was not found to be unconstitutional on the grounds of an unlawful delegation of legislative authority to the board of adjustment because in applying the ordinance the board was held to the standard of minimum requirements for the promotion of health, safety, morals and general welfare of the township. The court also found that since the reasons of cost to the township, availability of another site and inadequacy of the present site had no relationship to the above standard of the ordinance, and that since there was not a high degree of probability that the anticipated increase in traffic would adversely affect the health, safety, morals or welfare of the township, a denial of the exception on these grounds was also unauthorized. In re O'Hara's Appeal, 389 Pa. 35, 131 A.2d 587 (1957).

The current trend of decisions elsewhere has been toward a recognition that aesthetic considerations may be among the several factors which determine whether or not a particular zoning ordinance is a proper exercise of the state’s police power. A regulation specifically expressing its aesthetic purposes has recently been upheld. In the present case the court did not rule directly that the state could not make aesthetic considerations the basis, or partly the basis, for its exercise of police power: it simply ruled that an administrative body, limited to act in the interest of community health, safety, morals and welfare could not so act. However, since the power delegated was in terms of the usual definition of the state’s reserved police power, it follows by necessary implication that the state could not make aesthetic considerations a basis. Though the emphasis of the past few years has indeed been in the direction of more powerful controls in the name of social planning, Pennsylvania either rejects the trend or has simply not caught up with it.

Vincent P. Haley.


7. Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954) (ordinance establishing minimum floor areas in certain districts held unconstitutional as not promoting health, safety, morals or general welfare of township).


9. State ex rel Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955), cert. denied, 350 U.S. 841 (1955) (ordinance required the building board to make a finding that "the exterior architectural appeal and function plan" of a proposed structure would not be so at variance with other structures in the neighborhood to cause "substantial depreciation in the property values of the neighborhood"). See Bernizer v. Parker, 348 U.S. 26 (1954).