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Decisions

DECISIONS

IN THE MATTER OF THE ARBITRATION BETWEEN JACOB RUPPERT *et. al.*, RESPONDENTS, AND INT'L. BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, A. F. OF L.—C. I. O., BREWERY WORKERS LOCAL UNIONS 1, 8, 124, 1059 AND 323, APPELLANTS' ARBITRATION AND AWARDS—POWERS OF ARBITRATOR—ARBITRATOR IN LABOR DISPUTE HELD TO HAVE INJUNCTION POWERS.—The New York Court of Appeals has held[1] that an arbitrator in a labor dispute possesses the power to include an injunction in his award.

Five separate brewery companies alleged that the unions and the workers were engaged in a "slowdown" contrary to the provisions of a general collective bargaining agreement in effect between the parties. The companies demanded appointment of an arbitrator by the American Arbitration Association and the scheduling of a hearing to be held within 24 hours. This "speedy arbitration" procedure, provided for in the collective bargaining agreement, was carried out. Two days later the arbitrator rendered his opinion and award. He found that there were slowdowns at the breweries in violation of the agreement, and he accordingly enjoined the local unions from continuing the slowdowns and directed them to take the steps necessary to stop the slowdowns. A special term order granted motion to confirm the award made by the arbitrator and denied the cross motion of the unions to vacate the arbitration award.[2] The appellate division unanimously modified the order,[3] but only as to purely formal matters, namely the title of the proceeding and designation of defendants. On the basis of this modification the unions appealed to the court of appeals as a matter of right.[4]

On the principal point involved the appellants contended that the arbitrator lacked authority to order an injunction against the unions. In ruling on this aspect of the case, the court rendered a novel decision in New York.

In holding that the arbitrator did not exceed his powers in including an injunction in his award, the court pointed out that the collective bargaining agreement did not directly affirm or deny such a power to the arbitrator but did authorize arbitration and further provided that the arbitrator's decision should be final and binding upon all parties to a given dispute. The evident intent of the parties was that there be speedy and immediately effective relief against strikes, lockouts and slowdowns. Under the circumstances nothing short of an injunction would have accomplished this intent, and as noted by the court's references to several authorities,[5] arbitrators have been licensed traditionally to direct such conduct of the parties as is necessary to the settlement of the matters in dispute. The primary question is one of the intent of the parties.[6] Although there were no earlier decisions of the court of appeals found in which an arbitration award containing an injunction was confirmed, the courts have frequently upheld awards which have commanded employers to rehire or retain employees, *i. e.* mandatory injunctions.[7]

[1] Jacob Ruppert et al. v. Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A. F. of L.—C. I. O. Brewery Workers Local Unions 1, 8, 124, 1059 and 323, 2 N. Y. 2d 833, 140 N. E. 2d 865 (1957).

[2] 2 Misc. 2d 744, 152 N. Y. S. 2d 327 (Sup. Ct. New York Co. 1956).

[3] 2 App. Div. 2d 670, 153 N. Y. S. 2d 553 (1st Dep't 1956).

[4] N. Y. CIV. PRAC. ACT § 588, (1B) (11).

[5] 6 WILLISTON, CONTRACTS § 1929 (rev. ed. New York 1938); C. J. *Aribtration and Award* § 310, n. 34 (1916); 6 C. J. S. *Arbitration and Award* § 80 (1937).

[6] Dodd v. Hakes, 114 N. Y. 260, 21 N. E. 398 (1889).

[7] Matter of William Devery (Daniels & Kennedy, Inc.), 292 N. Y. 596, 55 N. E.

The unions also argued that even if injunctions are not necessarily and always unlawful in arbitration awards, the injunction in this case was forbidden by section 876-a of the New York Civil Practice Act. This provision of the law relating to injunctions issued in labor disputes, like the federal Norris-LaGuardia Act,[8] reflects union resentment against the issuance of an injunction by a court or judge in a labor dispute except after the making of findings, which were not made in the instant case. On this argument the court concluded that the award was confirmed by special term and affirmed by the appellate division, and so in the broadest sense the courts ordered the injunction, even though it was not ordered in accordance with the statute. Once the court held that this particular employer-union agreement not only did not forbid but contemplated the inclusion of an injunction in such an award, no ground remained for invalidating the injunction. Arbitration is voluntary, and there is no reason why unions and employers should deny such powers to the special tribunals they themselves create.

Section 876-a, relating to injunction powers of courts and judges in labor disputes, and the section[9] authorizing arbitration of disputes are both in the New York Civil Practice Act. Each represents a separate public policy. The present decision affirming the award in the instant case harmonizes these two policies.

The New York Arbitration Law,[10] enacted in 1920, was the pioneer American statute designed to provide for the effective enforcement of arbitration agreements. There are specific provisions in this law which govern the grounds upon which the award of an arbitrator may be vacated by a court.[11] Such grounds are presented when the award of an arbitrator is "procured by corruption, fraud or other undue means"; when there was "evident partiality or corruption in the arbitrators"; when "the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy"; or "any other misbehavior by which the rights of the parties have been prejudiced"; or where "the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made." In the absence of the specified grounds upon which the court may vacate the award, the court must grant an order confirming it upon the motion of any party to the controversy, provided the procedural requirements of section 1461 of the Civil Practice Act, as to the filing or delivery of the award and time limit within which the motion must be made, are complied with.

Thus once the award is made, any party to the agreement may apply to the court for an order confirming, modifying, or vacating it, and the court, unless vacating or modifying the award on specific statutory grounds, must confirm it and enter judgment thereon. As was observed in *Marchant* v. *Mead-Morrison Mfg. Co.*:[12] "What transpire(s) as to the effect of the statutory procedure from the application to the state Supreme Court, and the entry of an order appointing an arbitrator, to and including the application for confirmation of the award made by the arbitrators, (is) a suit for the specific performance of the contract."

2d 370 (1944), *aff'd,* 266 App. Div. 213 (1st Dep't 1944); Matter of United Culinary Bar and Grill Employees (Schiffman), 299 N. Y. 577, 68 N. E. 2d 104 (1949).

[8] 61 Stat. 669 (1947), 9 U. S. C. A. §§ 1-14 (1953).

[9] N. Y. CIV. PRAC. ACT § 1448.

[10] N. Y. CIV. PRAC. ACT, Article 84. The Arbitration Law was repealed and this article of the Civil Practice Act amended to include the various provisions of the Arbitration Law by L. 1937, c. 341.

[11] *Id.* §§ 1462, 1462a, 1463.

[12] 29 F. 2d 40, 42 (2d Cir. 1928).

The constitutionality of the Arbitration Law was upheld,[13] soon after its enactment, against allegations that it violated the rights of trial by jury, that it abridged the constitutional jurisdiction of the courts, and that it impaired the obligation of contracts.

Arbitration, unlike procedure in the established courts, depends for its existence and for jurisdiction over parties and subject matter upon a contract existing between the parties, subject to limitation only by express provision of law.[14] The parties submitting to arbitration submit all issues of fact and law.[15] And the courts have held[16] and the statute requires[17] that these contracts of arbitration, whether of disputes in futuro or of existing controversies, should receive liberal construction with a view to accomplishing the purpose of the parties to effect a complete and final settlement of all existing controversies and to authorize the award made.

The holding of the court in the instant case thus clearly reflects and in a manner represents the logical summation of the law as it has been laid down by legislative enactment and in the cases on the subject over the past 35 years. Arbitration, authorized by statute, is contractual in its nature. The authority of the arbitrator stems from the agreement[18] between the parties. He has such jurisdiction as is given him by compact and conduct of the parties, limited only by express provisions of law.[19] He thus has such powers as are necessary to accomplish the intent of the parties as embodied in their agreement. If the intent of the parties under the agreement can only be effected by the inclusion of an injunction against one of the parties in the award, the arbitrator necessarily possesses the authority to so frame the award. By statutory provision[20] any party to the controversy may apply to the appropriate court for an order confirming (or modifying or vacating) the arbitrator's award, and the court must grant such an order unless the award is vacated, modified or corrected upon grounds specifically prescribed by the Civil Practice Act.[21] R. F. M.

CONSTITUTIONAL LAW—FEDERAL AGENT'S SEIZURE OF CONTRABAND IN OPEN VIEW FOLLOWING A LAWFUL ENTRY NOT A VIOLATION OF AMENDMENT IV OF THE UNITED STATES CONSTITUTION.—The United States District Court for the District of Columbia recently determined[1] that Federal police officers, who lawfully enter an accused's

[13] Matter of Berkovitz v. Arbib & Houlberg, 230 N. Y. 261, 130 N. E. 288 (1921).

[14] 3 AM. JUR. *Arbitration and Award* § 4 (1936); Fidelity & Dep. Co. of Md. v. Woltz, 234 App. Div. 823, 253 N. Y. Supp. 583 (4th Dep't 1931); I. Miller & Sons v. United Office and Professional Workers Local 16 C. I. O., 195 Misc. 20, 88 N. Y. S. 2d 573 (Sup. Ct. New York Co. 1949); Metro Plan v. Miscione, 257 App. Div. 652, 15 N. Y. S. 2d 35 (1st Dep't 1939).

[15] Samuel Adler, Inc. v. Local 584, Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, 282 App. Div. 142, 122 N. Y. S. 2d 8 (1st Dep't 1953).

[16] Palmer Plastics v. Rubin, 202 Misc. 184, 108 N. Y. S. 2d 514 (Sup. Ct. Kings Co. 1951).

[17] See note 9, *supra*.

[18] I. e., the "submission," see 3 AM. JUR. *Arbitration and Award* §§ 14, 37 (1936).

[19] Davis v. Rochester Can Co., 124 Misc. 123, 207 N. Y. Supp. 33 (Sup. Ct. Monroe Co. 1924), *rev'd other grounds*, 220 App. Div. 487, 221 N. Y. Supp. 666 (4th Dep't 1924) *aff'd*, 247 N. Y. 521, 161 N. E. 166 (1928).

[20] N. Y. CIV. PRAC. ACT § 1461.

[21] See note 11, *supra*.

[1] United States v. McDaniel, 154 F. Supp. 1 (D. D. C. 1957).

home without a search warrant, are not bound to close their eyes to that which is obvious and apparent but may seize a contraband article which is in open and patent view. This case involved the question of whether the acts of the officers in viewing that which was visible and manifest constituted an unreasonable search as prohibited by the federal constitution.[2] The decision distinguished this case from the situation where the entry by police officers is effected by improper means, but the case is generally in accord with the views of federal courts in other jurisdictions.

The defendant had been arrested on suspicion of murder. While being held at police headquarters, two officers went to his apartment without a search warrant[3] to interview two persons who lived in the premises. The police were voluntarily admitted by the occupants. Subsequently, one of the officers noticed a torn towel lying in open view in the room in which the interview was being conducted. Having received information that a torn towel was involved in the homicide the officers took possession of this article. The defendant moved to suppress such evidence as inadmissible on the ground that it was wrongfully obtained through illegal search and seizure.[4] The principle was invoked that a home may not be searched without a warrant except when incidental to an arrest that takes place on the premises.[5]

[2] U. S. CONST. amend. IV. "The right of the people to be secure in the person, home, papers and effects against unreasonable search and seizure shall not be violated, . . ." In this regard see; *IV Amendment, Federalism and Mr. Justice Frankfurter,* 8 SYRACUSE L. REV. 166 (1957). A discussion of the safeguards in the law of search and seizure is to be found in 52 NW. U. L. REV. 65 (1957).

[3] A search warrant is generally defined as an order in writing in the name of the sovereign signed by a magistrate and directed to a peace officer commanding him to search for personal property and bring it before the magistrate. Allen v. Hollbrook, 103 Utah 319, 135 P. 2d 242 (1943), *modified on other grounds,* 103 Utah 599, 139 P. 2d 233 (1944). The search warrant was not known to the early common law; Buckley v. Beaulieu, 104 Me. 56, 71 Atl. 70 (1908). The right to such warrant at first being seriously doubted; People *ex rel.* Robert Simpson Co. v. Kempner, 208 N. Y. 16, 101 N. E. 794 (1913). Its use was initially confined to searches for stolen goods; State v. Best, 8 N. J. Misc. 271, 150 Atl. 44 (1930). In recognition of its efficacy it became grafted into the law; Buckley v. Beaulieu, *supra.* Its legality has long been considered to be established on grounds of public necessity; People *ex rel.* Robert Simpson Co. v. Kempner, *supra.* However, courts and legislatures have carefully restricted and controlled its use; State v. Gutherie, 90 Me. 448, 38 Atl. 368 (1897).

[4] For a discussion of the question of defendant's standing to suppress evidence obtained by illegal seizure see: People v. Kitchens, 46 Cal. 2d 260, 294 P. 2d 17 (1956), commented upon in 2 VILL. L. REV. 231 (1956); and United States v. Jeffers, 342 U. S. 383, 72 S. Ct. 93, 96 L. Ed. 59 (1951). 8 WIGMORE, EVIDENCE § 2183 (3d ed. Boston 1940), notes that necessity does not require, and the spirit of the law does not condemn, the attempt to do justice incidentally and to enforce principles by indirect methods. For this reason it was long established that admissibility of evidence is not affected by the illegality of the means through which the evidence was obtained until the contrary rule was decided in Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). In New York illegally obtained evidence is admissible; People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926) and the state courts are not required to follow the federal rule that evidence illegally obtained is inadmissible; People v. La Combe, 170 Misc. 669, 9 N. Y. S. 2d 887 (N. Y. C. Magis. Ct. 1939).

[5] Papani v. United States, 84 F. 2d 160 (9th Cir. 1936); United States v. Lee, 83 F. 2d 195 (2d Cir. 1936). In United States v. Kaplan, 17 F. Supp. 920 (D. N. Y. 1936), *rev'd on other grounds,* 89 F. 2d 869 (2d Cir. 1937) the court held that a search without a warrant may be made of premises wherein a lawful arrest took place in order to find and seize things connected with the crime. Such a search must be confined to papers and property connected with the crime for which the arrest was made;

The district court denied defendant's motion to suppress the evidence holding that the seizure of the towel was not illegal. The court stated: "In determining matters under the IV Amendment we must bear in mind the basic principle that . . . it is only unreasonable searches that are proscribed . . . ." As a general rule, the interior of a home may not be searched without a search warrant, except in connection with and incidental to an arrest taking place on the premises. However, this rule is subject to the exception that "if, *without a search* [italics supplied] and without an unlawful entry into the premises, a contraband article . . . is seen in the premises, the police are not required to close their eyes . . . and walk out (leaving the article) . . . ." Since the entry of the officers was effected in a lawful manner for the purpose of interviewing prospective witnesses and not to effect a search for contraband its seizure was legal.[6]

The term "search" implies some exploratory investigation or a looking for a material thing. It includes the examination of a man's home with a view to discovery of some evidence of guilt to be used against him. While ordinary searching is a function of sight, it is held that the mere looking at that which is open and obvious to view is not a search. The observation of that which is apparent and manifest as contrasted to that which is hidden and concealed cannot be claimed to be the product of a search. This decision is generally in accord with the rule laid down by the federal appellate court of this district[7] and with the determinations of federal courts of other jurisdictions.[8]

In *McDonald* v. *United States*,[9] police agents without a search warrant entered into the accused's rooming house by climbing through the landlady's window. They proceeded along a public hallway to the accused's room and there by climbing onto a chair an officer peered over the transom into the room. In the room, the officer saw the accused and another engaged in "policy" operations. Commanding the accused to open the door, the officers then seized the "policy" number slips and other apparatus. The court granted the defendant's motion to suppress the contraband evidence and commented that while it was not a search to view that which was open and patent, the unlawful manner in which entry was made required the suppression.

In *Smith* v. *United States*,[10] federal prohibition agents while engaged in a raid upon an illegal "still" observed defendant's automobile in the area. One of the agents walked over to the vehicle and directed his flashlight into the open rear window where he saw bottles of illegal liquor. In denying the defendant's motion to suppress this evidence the court stated, ". . . [a] search warrant is not necessary when the object sought is visible, open and obvious to anyone within reasonable distance employing his eyes."

In *United States* v. *Strickland*,[11] federal agents without a warrant, acting upon

United States v. Kirschenblatt, 16 F. 2d 202 (2d Cir. 1926). Only those things directly used in perpetrating the crime can be taken; United States v. Poller, 43 F. 2d 911 (2d Cir. 1930). General exploratory searches whether under search warrant or in the guise of being incidental to a lawful arrest are unreasonable when they amount to a "fishing expedition"; United States v. 1013 Crates of Empty Old Smuggler Whiskey Bottles *et al.*, 52 F. 2d 49 (2d Cir. 1931).

[6] See note 1, *supra* at 2.

[7] McDonald v. United States, 166 F. 2d 57 (1947), *reversed on other grounds*, 335 U. S. 451, 69 S. Ct. 191, 93 L. Ed. 153 (1948).

[8] Smith v. United States, 2 F. 2d 715 (4th Cir. 1924); United States v. Strickland, 62 F. Supp. 468 (W. D. S. C. 1945).

[9] See note 7, *supra*.

[10] See note 8, *supra*.

[11] *Ibid.*

information, approached defendant's automobile wherein he and another were sitting. The agents directed their flashlights into the open front windows of the vehicle and saw counterfeit gasoline ration stamps lying upon the seat, partially concealed, between the occupants. The court denied defendant's motion to suppress the contraband evidence and held, "It is not a search to observe that which is open and patent."

The origin of the constitutional prohibition against unreasonable search and seizure is to be found in the abuse of the search warrant in England and its American colonies particularly through the use of the writ of assistance.[12] These abuses led to the IV Amendment to the United States Constitution which prohibited search and seizure and limited conditions under which a search warrant could issue. This amendment did not create the right of the individual to be free from unreasonable search and seizure but is merely declaratory of such right. The IV Amendment is a precautionary statement of the lack of federal power coupled with rigidly restricted permission to invade this right already existing. Chase suggests that this provision and the "due process" clause find their beginnings in earlier declarations of individual rights.[13]

The purpose of the IV Amendment is to protect the privacy of the individual. It is a guarantee against unreasonable invasion of that right and has been given a liberal interpretation in favor of the individual in order to prevent stealthy encroachment on the right secured thereby. The amendment operates solely as a restriction on the federal government and the activities of its agencies and does not restrict state governmental bodies.[14] It has been construed in light of what was an unreasonable search and seizure when such amendment was adopted. It is intended, however, to provide a wider protection than from the specific abuses which led to its adoption and is construed in a manner which will conserve the public interests as well as that of the individual in conformance with the privilege against compulsory self-incrimination. The amendment protects all persons regardless of their state or condition: the suspected, accused, and guilty are entitled to its protection as well as the innocent. The criminal law must be enforced without transgressing the individual's right to be free from unreasonable search and seizure, but the IV Amendment will be enforced even though persons guilty of crime thereby escape punishment. The protection afforded should not be impaired by a construction thought necessary to meet the changing demands of law enforcement. Before an accused can rely upon the protection of the IV Amendment his person, home or possessions must be searched in unreasonable manner by federal authorities. Without a search the accused can not complain of an

[12] The writ of assistance was an ancient writ issuing out of the Court of Exchequer to the sheriff commanding him to be in aid of the King's tenants by knight's service, or the King's collectors, debtors, or accountants to enforce payment of their dues in order to enable them to pay their obligations to the King. 1 MADOX, HIST. EXCH. 675; BLACK, LAW DICTIONARY (4th ed. St. Paul 1951).

[13] CHASE, BLACKSTONE § 128 (3d ed. New York 1877). ". . . by a variety of ancient statutes it is enacted that no man's goods shall be seized into the King's hands against the great charter (Magna Charta) . . . unless he be duly brought to answer and be forejudged by course of law." The Magna Charta provided, "no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or in any manner injured . . . unless by the lawful judgment of his peers or by the law of the land."

[14] Bell v. Hood, 71 F. Supp. 813 (S. D. Cal. 1947); United States v. Yee Doo, 41 F. Supp. 939 (D. C. Mass. 1941); United States *ex rel.* Holly v. Pennsylvania, 81 F. Supp. 861 (W. D. Pa. 1948), *aff'd*, 174 F. 2d 480 (3d Cir. 1949). In Black v. Impelliterri, 201 Misc. 371, 111 N. Y. S. 2d 402, *aff'd*, 281 App. Div. 671, 117 N. Y. S. 2d 686 (1st Dep't 1952), *appeal denied*, 305 N. Y. 724, 112 N. E. 2d 845 (1953) the court held that the protection of the IV Amendment of the United States Constitution imposes no limitation of power upon the state government.

illegal invasion of his right of privacy. A search as defined by the instant case entails a seeking out, or discovery of that which is concealed and not apparent to the eye.

Where a search has occurred it must then be determined whether such was an unreasonable invasion of privacy before the protection of the IV Amendment may be invoked. It must be remembered that all searches are not forbidden, but only those which are unreasonable. What constitutes a reasonable search and seizure is a judicial question determinable from a consideration of the purpose of the search, the presence of probable cause, the manner in which the search and seizure was made, the character of the article procured and the nature and importance of the crime suspected.[15]

This decision is a statement of case restriction of the federal rule against search and seizure without a warrant to the extent that lawful entry of a dwelling by police agents accompanied by seizure of contraband in open and apparent view is not an unreasonable search, and the evidence is admissible in federal courts. W. G. S.

CONSTITUTIONAL LAW—LABOR LAW—INJOINING OF PICKETING DESIGNED TO COERCE EMPLOYER, HELD, NOT A DEPRIVATION OF FREEDOM OF SPEECH UNDER THE FOURTEENTH AMENDMENT.—The United States Supreme Court, has held that a state, for the purpose of enforcing some public policy of its criminal or civil law, may constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.[1]

Defendant unions, after having failed in their efforts to induce some of the plaintiff's employees to join their union, picketed the entrance of the plaintiff's gravel pit which was on a rural highway in Wisconsin. This picketing was peaceful. Plaintiff, owner and operator of the gravel pit, sought an injunction to restrain this picketing. The trial court granted the injunction. The Supreme Court of Wisconsin at first reversed,[2] but upon reargument, withdrew its original opinion and affirmed the trial court on the theory that the union was unlawfully coercing the employer in interfering with its employees' right to join or refuse to join the defendant union.[3]

By statute, Wisconsin made it an unfair labor practice for an employee individually or in concert with others ". . . to coerce, intimidate or induce any employer to interfere with any of his employees in their enjoyment of their legal rights . . . or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative."[4] Another subsection of this statute made it an unfair labor practice for *any person* to do any act so pro-

[15] In United States v. Asendio, 171 F. 2d 122 (3d Cir. 1948) the court held that the reasonableness of a search is a judicial question for the court to determine. Such determination being dependent upon the circumstances involved; Mathews v. Correa, 135 F. 2d 534 (2d Cir. 1943). The purpose of the search was determinant upon the question of reasonableness in Zimmermann v. Wilson, 105 F. 2d 583 (3d Cir. 1939); whereas probable cause controlled in Moore v. State, 138 Miss. 116, 103 So. 483 (1925). The manner in which the search and seizure was made determined the outcome in Cleek v. State, 192 Tenn. 457, 241 S. W. 2d 529 (1951); with the character of the article seized of principal importance in State v. Ryan, 156 Minn. 186, 194 N. W. 396 (1923). In Neuslein v. District of Columbia, 115 F. 2d 690 (D. C. Cir. 1940) the nature and importance of the crime suspected was of vital concern in determining the reasonableness of a search.

[1] International Brotherhood of Teamsters v. Vogt, Inc., 354 U. S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347 (1957).

[2] 270 Wis. 315, 71 N. W. 2d 359 (1955).

[3] 270 Wis. 321a, 74 N. W. 2d 359 (1955).

[4] WIS. STAT. ANN. § 111.06 (2) (b) (1939).

hibited.[5] Among the rights so protected was the right to form and join labor unions or to refrain from forming or joining them.[6] Since an employer could not interfere with his employees' right to form or not to form a union as they chose, an employee or other person was forbidden by this statute from inducing an employer to perform such prohibited act. The purpose of the defendant in this case, the court found, was to induce the employer to coerce his employees into joining the defendant union. The Wisconsin Supreme Court found this to be an unlawful purpose, and one calling for the use of an injunction.

The United States Supreme Court affirmed the decision of the Wisconsin Supreme Court.[7] The court refuted the defendant's argument that the enjoining of this picketing was an infringement of free speech as protected by the *Due Process* Clause of the Fourteenth Amendment. The court held, in effect, that it was not an unreasonable restriction of free speech, as guaranteed by the Fourteenth Amendment, to enjoin picketing which was for the purpose of coercing an employer to exercise pressure upon his employees to join a specific labor union. The court indicated that if the picketing involved violence, the use of the injunction would have been obviously justified. The court went on to state that even where the picketing is peaceful, as was the situation here, there is no absolute immunity from all state regulations. There are, the court indicated, instances where peaceful picketing can be enjoined even though the action may restrict, to some extent, the right of free speech. On the other hand, the court made it clear that a state, through its legislatures or its courts, can not enact blanket prohibitions against picketing. Each case must be decided on its facts. Where the facts are undisputed, as they were in this case, it is always a question for the court as to whether the conduct of the pickets, though peaceful, was such that it should be enjoined.

The court recognized that picketing, though peaceful, may involve more than an innocent exercise of free speech. The purposes of the picketing must be taken into consideration; and where the purpose of the picketing is to compel an employer to abide by union rather than by state trade regulations, the purpose of picketing may be unlawful and subject to injunction, even though this picketing be peaceful.[8] It is clear that the instant decision recognizes the possibility, in accordance with given facts, that peaceful picketing can similarly involve economic, political and social expression. The result of the extension is clear; it affords the states the opportunity to regulate peaceful picketing, not on the basis of sheer whim, but upon a policy weighted by the facts of each case and investigation of the purposes involved.

Mr. Justice Douglas, joined by Chief Justice Warren and Mr. Justice Black, dissented on the ground that the state had no power to prohibit the union conduct involved. The dissent was of the opinion that picketing could be regulated or prohibited only to the extent that it forms an essential part of a course of conduct which a state can regulate or prohibit. They placed a greater emphasis on violence and its resultant effects rather than emphasizing that peaceful picketing in and of itself involves more than mere communication of ideas.

Both the majority and dissenting justices are in accord upon the proposition that lawful or proper labor purposes are a condition of peaceful picketing; their views differ on the question of what purposes are to be held lawful or proper, or unlawful or improper. The dissent argues that where there is no violence or disorder coupled

[5] *Id.* § 111.06 (3).

[6] *Id.* § 111.04.

[7] See note 1, *supra.*

[8] Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1948).

with the picketing, the principles of the *Thornhill* case,[9] a famous Supreme Court decision, would give the defendant First Amendment protection. The majority, basing its decision upon the trend of recent cases,[10] held that an injunction will be issued upon the finding of the court, regardless of the serenity of the picketing, that the union's conduct was against state policy and involved more than the communication of ideas.

An examination of the cases dealing with picketing indicates that there had been a trend toward limiting state action in labor picketing followed by a recent retreat from that position. The *Norris LaGuardia Act,*[11] limited the jurisdiction of the federal courts in regard to issuing injunctions in labor disputes. This act was followed by many similar state laws. At about the same time, the courts began to recognize, as one of the aims of picketing, an aspect of communication.[12]

Then came the famous *Thornhill* case.[13] In that case, the court was confronted with a situation where the defendant violated a state statute, making it a penal offense to picket or loiter without a just cause or legal excuse, or, to picket or loiter with the intent of influencing other persons. The effect of this statute was so broad that the offenses mentioned therein comprehended every method whereby the facts of a labor dispute might be publicized. Upon being found guilty of violating this statute, the defendant appealed to the United States Supreme Court on the sole ground that this all-encompassing statute was unconstitutional.

The court, in determining that the state statute, which in fact prohibited almost all picketing, was unconstitutional, stated that ". . . freedom of speech and of the press, secured by the First Amendment against abridgment by the United States, is secured to all persons by the Fourteenth Amendment against abridgment by the states."[14] The existence of a penal statute, the court stated, which did not specifically aim at the evils within the allowable sphere of state control, but rather was so general in nature that it encompassed virtually all other activities that in ordinary circumstances constitute an exercise of freedom of speech, resulted in continuous restraint of all freedom of discussion that might reasonably be regarded as within the purview of freedom of speech.

The *Thornhill* principle was later applied to hold unconstitutional an injunction against peaceful picketing based on a state's common law policy against picketing in the absence of a labor dispute between the employer and the employee.[15]

Within a brief period of time, the broad pronouncements, but not the specific holding, of the *Thornhill* case began to yield to the impacts of facts unforeseen. The court began to recognize that peaceful picketing was more than free speech and could not be immune from all state regulations.[16] With a growing reliance on the facts of each case, the court indicated an awareness that these cases involved not so much

[9] Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1939).

[10] Senn v. Tile Layers Protective Union, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1936); Bakery & Drivers & Helpers, I. B. T. v. Wohl, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1941); Hughes v. Superior Court of California, 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985 (1949); Pappas v. Stacey, 151 Me. 36, 116 A. 2d 497 (1955).

[11] NORRIS LAGUARDIA ACT, 47 STAT. 70 (1932), 29 U. S. C. § 101 (1952).

[12] See *supra* note 10, Senn v. Tile Layers Protective Union.

[13] See note 9, *supra.*

[14] *Id.* at 95; 60 S. Ct. at 737, 84 L. Ed. at 1098.

[15] A. F. of L. v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1940).

[16] I. B. T. v. Wohl, see *supra* note 10; Bakery & Drivers & Helpers; Carpenters & J. Union v. Ritters Cafe, 315 U. S. 722, 725-728, 62 S. Ct. 807, 86 L. Ed. 1143, 1146-48 (1941).

questions of free speech as a balance, struck by a state, between the purposes of the picketing and the interests of the state.

The decisive blow to the *Thornhill* doctrine came in the *Giboney* case,[17] where the court treated peaceful picketing not just as free speech, but looked to the integrated purpose and economic reasoning behind the picketing. As a result, the court enjoined the picketing which was in violation of Missouri law. A further extension of the *Giboney* doctrine came about in the *Hughes* case,[18] in which the court stated that the Fourteenth Amendment did not bar the use of an injunction to prohibit picketing where the purpose of such picketing was in violation of a state policy.

In the instant case, the court affirmed the growing trend permitting state courts to enjoin peaceful picketing which is in violation of their policy. The court, in its finding, stated that the conclusion reached by the state court, that the picketing was conducted for the purposes of coercing an employer, had a rational basis where such picketing was conducted upon a rural highway where a number of persons might pass and be influenced by the union's conduct. A. S. K.

CONSTITUTIONAL LAW—MUNICIPAL ORDINANCE PROHIBITING SOLICITATION OF MEMBERS FOR A LABOR UNION WITHOUT A LICENSE VIOLATES THE FIRST AMENDMENT AND IS UNCONSTITUTIONAL. In a recent decision, the Supreme Court of the United States reaffirmed the principle that a municipal ordinance which prohibits solicitation of members for an organization without a permit and license is violative of the First Amendment prohibition and is invalid as abridging freedom of speech, where the granting of such a license is discretionary upon city officials, and where definitive standards or controlling guides are absent.[1] The Court further held that it must itself determine whether a constitutional question has in fact been raised in a state court, and is not concluded by the negative view taken in the state court.[2]

Appellant was a salaried employee of the International Ladies Garment Workers Union who attempted to organize employees of a manufacturing company in violation of an ordinance of the City of Baxley, Georgia, which provided that:

"Section I. Before any person or persons . . . shall solicit membership for any . . . union . . . which requires from its members the payment of membership fees . . . , such person or persons shall make application in writing to Mayor and Council of the City of Baxley for the issuance of a permit to solicit members in such organization. . . ."
"Section VI. In the event that person making application is salaried employee . . . of the organization for which he desires to seek members . . . , he shall be issued a permit and license for soliciting such members upon the payment of $2,000.00 per year. Also $500.00 for each member obtained."
"Section VII. Any person . . . soliciting members . . . without first obtaining a permit and license therefor shall be punished as provided by Section 85 of Criminal Code of City of Baxley."[3]

The appellant made no effort to comply with the ordinance or obtain a permit thereunder. She was served with a summons and commanded to answer to the offense of "soliciting members for an organization without a permit and license." Before trial, appellant moved to abate the action, alleging that the ordinance was invalid on its

[17] See note 8, *supra*.
[18] See *supra* note 10, Hughes v. Superior Court of California.

[1] Staub v. City of Baxley, 355 U. S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958).
[2] *Id.* at 318, 78 S. Ct. at 280, 2 L. Ed. 2d at 305.
[3] *Id.* at 314, 78 S. Ct. at 278, 2 L. Ed. 2d at 303, where the ordinance is set forth in full in the margin of the opinion.

face by requiring, as conditions precedent for the exercise and enjoyment of First Amendment rights, the issuance of a license at the discretion of the Mayor and City Council and the payment of a license fee.[4] During a continuance at the trial court, appellant brought an action in the superior court of the county, seeking an injunction against enforcement of the ordinance and a declaration of its invalidity. The superior court found against petitioner and, on appeal, the state supreme court affirmed.[5] Appellant was thereafter convicted as charged, and successive appeals failed, the Georgia Court of Appeals holding that since "the attack was not made against any particular section of the ordinance as being void or unconstitutional, and . . . [since] the defendant has made no effort to comply with any section of the ordinance . . . it is not necessary to pass upon . . . the constitutionality of the ordinance. . . ."[6] The state supreme court denied certiorari, and the case came to the United States Supreme Court on appeal.

The puissant principle that the Court has re-enunciated here, that a municipality may not *unreasonably* abridge a constitutional right, is not in issue, since the dissent, in refusing to pass on the constitutionality of the ordinance, resisted jurisdiction strictly on procedural grounds, overtly concurring with the majority that *First National Bank* v. *Anderson*[7] is controlling where the Court is called upon to consider the substantive sufficiency of a claim of federal right. Indeed, those decisions in which no procedural defaults have occurred, but which stand simply for the proposition that municipal ordinances may not abridge constitutional guaranties unreasonably, are legion and incontrovertible.[8] They all embrace the rule that any ordinance which gives to an administrative official discretionary power to control in advance the right of a citizen to speak freely, to practice or preach his religion, to peaceably assemble, or to disseminate literature, is invalid as a prior restraint on the exercise of First Amendment rights, and a deprivation of liberty without *due process* of law as guaranteed by the Fourteenth Amendment.

The precise issue before the Court was appellee's contention that the decision of the court of appeals was based upon state procedural grounds and therefore rested upon an adequate non-federal basis. In rejecting this view, the Court, in effect, passed upon the *adequacy* of non-federal jurisdiction, and employed the substantive test laid down in *First National Bank* v. *Anderson,* wherein it was held that "[w]hether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law and, where a

[4] *Id.* at 335-38, 78 S. Ct. at 289-91, 2 L. Ed. 2d at 314-16, where portions of Petitioner's Plea in Abatement are included in the Appendix to the opinion.

[5] Staub v. Mayor, etc., of Baxley, 211 Ga. 1, 83 S. E. 2d 606 (1954), holding that, "If the ordinance is invalid, by reason of its unconstitutionality, or for other cause, such invalidity would be a complete defense to any prosecution that might be instituted for its violation."

[6] Staub v. City of Baxley, 94 Ga. App. 18, 24, 93 S. E. 2d 375, 378 (1956).

[7] 269 U. S. 341, 46 S. Ct. 135, 70 L. Ed. 295 (1925).

[8] Kunz v. People of State of New York, 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 280 (1950); Niemotko v. State of Maryland, 340 U. S. 268, 71 S. Ct. 325, 95 L. Ed. 267 (1950); Largent v. State of Texas, 318 U. S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (1942); Jones v. City of Opelika, 319 U. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290 (1942), adopting *per curiam* on rehearing the dissenting opinion in 316 U. S. 584, 62 S. Ct. 1231, 86 L. Ed. 1691 (1942); Schneider v. State of New Jersey, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939); Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1939); Hague v. C. I. O., 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1938); Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1937).

case coming from a state court presents that question, this court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken by the state court."[9] In *Schuylkill Trust Co.* v. *Commonwealth of Pennsylvania,*[10] the Court followed its earlier decision by holding that whether or not a constitutional question was put in issue, and the state court denied that it was, was itself a federal question, determinable by the Supreme Court only upon examination of the record. Shortly thereafter, the Court held that one may contest the validity of a municipal ordinance which is void on its face and under which he is prosecuted, without having sought a permit under it.[11] Five years ago, the Supreme Court of Georgia recognized that a constitutional attack on a statute was sufficient if for some reason the statute was invalid (as is here alleged) in every part.[12] The Georgia court was therein following a long line of its own decisions.[13]

The dissenting opinion avoided the question of constitutionality, narrowly confining the issue to the jurisdictional aspect. Mr. Justice Frankfurter asserted that an adequate non-federal basis was established in the state court proceeding, thereby precluding Supreme Court jurisdiction. In support of the dissenting opinion, a series of Georgia cases was offered, which did not properly raise constitutional questions for want of particularity in setting out the precise portion of the statute which abridged the claimed constitutional rights.[14] The persuasiveness of these decisions is not little, though an ultimate determination was not rendered on a federal level. At the Supreme Court level, however, great reliance was placed upon *Edelman* v. *People of State of California,*[15] which acknowledged the right of the state to determine its own procedural limitations upon the raising of constitutional questions, where no attempt to evade a constitutional guaranty is in evidence; but its efficacy was narrowed by the Court's statement that a writ of habeas corpus was still a remedy to which the defendant had recourse, and indeed, the Court recommended such action. Even here, two justices dissented on substantive grounds. In *Parker* v. *People of State of Illinois*[16] and *Nickel* v. *Cole,*[17] there were blatant and obvious procedural defaults on the part of the defendant which estopped him from raising the constitutional question. In neither of these cases was there any vague and uncertain reliance on *adequacy* of non-federal basis, no forensic circumlocutions concerning particularity or degree.

[9] See note 7, *supra* at 346, 46 S. Ct. at 137, 70 L. Ed. at 302.

[10] 296 U. S. 113, 56 S. Ct. 31, 80 L. Ed. 91 (1935).

[11] See *supra,* note 8, Lovell v. City of Griffin.

[12] Flynn v. State, 209 Ga. 519, 74 S. E. 2d 461 (1953).

[13] Atlantic Loan Co. v. Peterson, 181 Ga. 266, 182 S. E. 15 (1935); Miller v. Head, 186 Ga. 694, 198 S. E. 680 (1938); Stegall v. Southwest Georgia Regional Housing Authority, 197 Ga. 571, 30 S. E. 2d 196 (1944); Krasner v. Rutledge, 204 Ga. 380, 49 S. E. 2d 864 (1948).

[14] Rooks v. Tindall, 138 Ga. 863, 76 S. E. 378 (1912), allegations of unconstitutionality directed at sixteen sections of the Criminal Code; Crapp v. State, 148 Ga. 150, 95 S. E. 993 (1918), a single named "lengthy section" of a statute; Glover v. City of Rome, 173 Ga. 239, 160 S. E. 249 (1931), a single section of a city charter amendment; Wright v. Cannon, 185 Ga. 363, 195 S. E. 168 (1938), a named Act of the General Assembly; Richmond Concrete Products Co. v. Ward, 212 Ga. 773, 95 S. E. 2d 677 (1956), a five-section chapter of the Code.

[15] 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387 (1952).

[16] 333 U. S. 571, 68 S. Ct. 708, 92 L. Ed. 886 (1947).

[17] 256 U. S. 222, 225, 41 S. Ct. 467, 468, 65 L. Ed. 900 (1920), holding that: "[W]hen as here there can be no pretence that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong."

No one can doubt the validity of *Muskrat* v. *United States*,[18] where it was held that: "The right to declare a law unconstitutional, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted with constitutional authority. . . ." Presenting constitutional questions in the narrowest possible scope is a salutary precept of our law, and the disadvantage of keeping open doubtful questions which do not allow of construction is a price we must pay for federal system.[19] Against this strict construction of procedural aspect which vitally affects our substantive rights, courts have carefully weighed the substantive tenets themselves, the combined effect of the First and Fourteenth Amendments, working together. The question of constitutional law presented in the instant case involved both substantive and adjective issues. The Court was confronted with the conflict of interests between personal rights and public welfare, the clash between police power and constitutional guaranties; precisely, the dualism inherent in our federal system.[20]

Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society, within constitutional limits.[21] And though the Constitution does not impose any express limitation on the police power of the states, such power must be exercised with scrupulous regard for constitutionally guaranteed rights, and must finally be governed by the supremacy clause.[22] Theoretically, there is no conflict between the exercise of police powers and constitutional inhibitions, as the legitimate scope of one ends where the other begins.[23] However, the test used by the Court to determine the constitutionality of the police power employed by the municipality is to inquire whether the restrictions it imposes on rights secured to individuals by the Bill of Rights are *unreasonable,* and not whether it imposes any restrictions on such rights.[24] Whether *any* restriction on the Bill of Rights is unreasonable the Court has not inquired; neither does it express any sentiment one way or another by way of dicta.

The distinguishing feature between the majority and dissenting opinions is solely the *adequacy* of the non-federal basis with which the state court sets out its jurisdiction, and upon which Justice Frankfurter, in his dissent, arrives at his conclusion. The distinction appears to be one of degree, and not of kind. Yet the result would strike directly at the substantive guaranties of the Constitution. To state that a dilemma exists in respect of the jurisdictional aspect which confronts the Court when

[18] 219 U. S. 346, 361, 31 S. Ct. 250, 255, 55 L. Ed. 246 (1910).

[19] Liverpool, N. Y. & P. S. S. Co. v. Commissioners of Emigration, 113 U. S. 33, 39, 5 S. Ct. 352, 355, 28 L. Ed. 899 (1884), stating that the Court is bound "never to anticipate a question of constitutional law in advance of the necessity of deciding it"; and that it will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." See the concurring opinion of Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 346-48, 56 S. Ct. 466, 482-83, 80 L. Ed. 688, where he compends the rules and prior decisions for the Supreme Court's refusal to answer constitutional questions where some other means of adjudication may be had.

[20] See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, note on "Substance" and "Procedure" in the Enforcement of Federal Rights of Action in State Courts, 523-27 (New York 1953). See also Abernathy, *Assemblies in the Public Streets,* 5 SOUTH CAR. L. Q. 384 (1953).

[21] 16 C. J. S., *Constitutional Law* § 196 (1956).

[22] U. S. CONST., art. IV, cl. 2.

[23] 62 C. J. S., *Municipal Corporations* § 146 (1949).

[24] 11 AM. JUR., *Constitutional Law* § 302 (1937).

it seeks to avoid a constitutional question strictly on procedural grounds is merely to beg the question. Neither can the thoughtful dissent of Mr. Justice Frankfurter be dismissed on the basis of a quixotic turn of mind. This fragile and tenuous constitutional question must constantly be reevaluated and redetermined in terms of its own lubricity. Any imbalance leads to demagoguery. Until now, the Court has not chosen to speak definitively regarding the extent to which a state may legitimately exercise its police power, if such exercise conflicts with constitutional guaranties. Appertaining more precisely to the case under consideration, that is, whether a license fee which is *not* discriminatory or unreasonable may be extracted where a basic freedom is constrained, must likewise be left to conjecture and further judicial determination. D. G.

STATUTES—FEDERAL ALCOHOL REGULATION—FEDERAL ALCOHOL ADMINISTRATIVE ACT FORBIDS TIE-IN LIQUOR SALES.—The Supreme Court of the United States[1] has recently declared that "tie-in" liquor sales violate section 5 of the Federal Alcohol Administrative Act.[2]

In effect, section 5 prohibits wholesale distributors of distilled spirits from imposing purchase requirements on retailers to the exclusion in whole or in part of similar products offered for sale by other distributors. When a retailer is required to take a certain quota of such products, the result substantially restrains or prevents transactions in interstate or foreign commerce in those products.

During the period in which the alleged sales took place, Johnny Walker Scotch and Seagram's V. O. Whiskey were in short supply, while Seagram's Ancient Bottle Gin and 7-Crown whiskey were plentiful, although the latter two were relatively poor sellers. In order to increase sales of the latter, respondent liquor company compelled retailers to buy them if they wished to obtain the other two whiskies. The petitioner sought to suspend respondent's wholesale liquor permit for having made "quota" sales of alcoholic beverages in violation of sections 5a and 5b of the Act.[3] In suspending the permit for fifteen days, the commissioner held that the sales were "tie-in" sales within the purview of the Act. These adversely affected sales of competing brands and excluded in whole or in part distilled spirits offered for sale by other dealers in interstate commerce.

The Court of Appeals,[4] 5th Circuit, set the order aside. Its decision was based in part upon the fact that section 5a is captioned "Exclusive Outlet" and section 5b, "Tied House." Since the retailer in question was not a "tied house" or an "exclusive outlet," but rather, only the victim of these particular sales, doubts were raised concerning the meaning to be attributed to the statutory clauses. Further, the court favored a strict interpretation of the statute, holding it to be penal in nature, because violation of it might result in the forfeiture of respondent's permit to do business.

The Supreme Court granted certiorari[5] because a decision of the Court of Appeals in the 2nd circuit[6] was in conflict. In that case, the wholesale distributor procured from an importer a package deal involving scotch, in demand, and rum, which was plentiful but less salable. The wholesaler made scotch available to retailers only if

[1] Black v. Magnolia Liquor Company, Inc., 355 U. S. 24, 78 S. Ct. 106, 2 L. Ed. 2d 5 (1957).
[2] 49 Stat. 977, 27 U. S. C. 201 (1935).
[3] *Ibid.*
[4] 231 F. 2d 941 (5th Cir. 1956).
[5] 352 U. S. 877, 77 S. Ct. 99; 100 L. Ed. 1459 (1956).
[6] Distilled Brands Inc. v. Dunigan, 222 F. 2d 867 (2d Cir. 1955).

they purchased a specified amount of rum. As in the instant case, none of the retailers bought exclusively from the wholesaler. The commissioner found a violation of the aforesaid provisions,[7] and suspended the wholesaler's license for twenty days. This determination was affirmed by the Court of Appeals, which held that "tie-in" sales do constitute sufficient interference with competition so as to make Section 5 applicable. It was held to be a restraint on commerce inasmuch as the retailer was coerced into accepting a product which he would not have otherwise purchased. Other sellers of the "tied-in" products were therefore excluded from the market to that extent.[8] Respondent argued that it would be liable only if it prevented the retailers from buying any scotch or rum from other wholesalers, but not liable where it only reduced their purchases of other rums alone. The court, however, held that it was not necessary that there be complete exclusion from the market; partial interference would suffice. In reaching this conclusion, the court declined to limit the statutory language. Rather, it gave a broader interpretation in accordance with the construction frequently applied by the Revenue Department in its rulings.[9]

The Supreme Court,[10] in the instant case, reversed the decision of the Court of Appeals, 5th circuit, and upheld the commissioner. The "tie-in" sales condemned are contrary to statutory policy since the retailer is coerced into buying liquors he would not ordinarily buy at the time. Other sellers of the same products are, to that extent, excluded from the market that would exist should the demand arise. A wholesaler which compels a retailer to buy unwanted goods exacts a "quota" from the retailer and excludes sales by competing wholesalers in the statutory sense.

Tie-in agreements whereby the sale of one product is conditioned upon the purchase of another have been repeatedly condemned under the anti-trust laws.[11] Although the N. R. A. codes merely prohibited wholesalers from requiring retailers to handle their products exclusively, the provisions in the Act[12] added the phrase "to the exclusion in whole or in part" of products sold by others. Senate and House reports on the bill stated that the purpose was to prohibit practices tending to produce monopolistic control of retail outlets.

It is settled that a proceeding to suspend the privilege of engaging in a business because of noncompliance with applicable statutory standards is remedial rather than penal in nature.[13] The court, in refuting respondent's argument that the Act should be construed narrowly, applied a "fair meaning" rule,[14] in order to give effect to Congressional intention when it established the Act in question. Therefore, although the "tied-in" sales fell short of creating an "exclusive outlet" or a permanent "tied house," since this is remedial legislation, the language was given a more liberal interpretation. J. N. F.

[7] See note 2, *supra*.

[8] See note 6, *supra* at 869.

[9] COMM. INT. REV. ANN. REP., pp. 45-46 (1946); *ibid.*, at 49 (1947).

[10] See note 1, *supra* at 26, 78 S. Ct. at 108, 2 L. Ed. 2d at 7.

[11] Standard Oil v. United States, 337 U. S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949); United States v. Paramount, 334 U. S. 131, 68 S. Ct. 915, 92 L. Ed. 1261 (1948); Int'l. Salt v. United States, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947).

[12] See note 2, *supra*.

[13] Helvering v. Mitchell, 303 U. S. 391, 58 S. Ct. 630, 82 L. Ed. 917 (1938).

[14] See *supra* note 1. Black v. Magnolia Liquor Company, at 26, 78 S. Ct. at 109, 2 L. Ed. 2d at 8.

TORTS—NEGLIGENCE—STATE HOSPITAL HELD LIABLE FOR FAILURE TO WARN BUSINESS VISITOR OF DANGEROUS CONDITION EXISTING ON ITS PREMISES.—The Court of Claims has held that one visiting a patient at a state hospital is a business visitor to whom the state owes a duty of maintaining the premises in reasonably safe condition.[1]

The claimant, a passenger in an auto, was calling upon her brother, a patient at the hospital, which was owned, maintained and operated by the State of New York. The driver of the auto was directed by a patrolman, employed by the hospital, to park in an area across the street from the main entrance to the building where the patient was housed. As the claimant walked away from the car, she stepped into a hole and fell, fracturing her right arm and elbow.

The claim was predicated upon the negligence of the state in failing to keep the grounds in proper condition and its failure to warn the claimant of the holes and defects in the pavement. The state contended that the claimant was a "bare licensee" and was entitled to nothing more than a disclosure of the dangers known to the state and not obvious to the claimant, and further, that the claimant was guilty of contributory negligence in not seeing the hole.

The hole was located on a normal pedestrian route. It had been there for several weeks, a period of time reasonably long enough, in the court's opinion, for the state to have constructive, if not actual, notice thereof and within which to have repaired the hole or, at least, to have given warning of its presence to lawful users of the route. It should have been reasonably foreseeable, in the exercise of reasonable care, that there would be pedestrian traffic over the roadway at the point where the claimant fell. Accordingly, the state owed a duty of reasonable care to the claimant, a business visitor or invitee, and its failure to exercise that care was the sole proximate cause of the accident.

There are differences of opinion as to when a person is to be treated as a licensee, but, as a general rule, a person is a licensee, as that term is used in the law of negligence, where his entry or use of the premises is permitted, expressly or impliedly, by the owner or person in control thereof. He is not a trespasser, since a license implies permission or authority and is more than mere sufferance, but in general it does not imply an invitation. A licensee, therefore, occupies a position somewhere between that of a trespasser and that of a business visitor or invitee.[2]

The distinction between a licensee and an invitee is, at times, shadowy and indistinct.[3] This is so particularly between an implied license and an implied invitation.[4] An invitation is inferred where there is a common interest or mutual advantage and where the premises were intended or designed for such interest or advantage while a license is implied where the object is the mere pleasure, convenience or benefit of the person enjoying the privilege.[5]

In the instant case, the state contended that the plaintiff was a "bare licensee," that is, one who comes upon premises of another without invitation nor upon any business with the occupant of the premises.[6] Or one who enters the premises for purposes purely of his own or of a third person, which have no relation to the busi-

[1] Desmond v. State of New York, 4 Misc. 206, 158 N. Y. S. 2d 146 (N. Y. Ct. Cl. 1956).

[2] 65 C. J. S., *Negligence* § 32(a) (1950).

[3] Shoffner v. Pilkerton, 292 Ky. 1407, 166 S. W. 2d 870 (1942).

[4] Kruntorad v. Chicago, R. I. and P. Ry. Co., 111 Neb. 753, 197 N. W. 611, 612 (1924).

[5] *Ibid.*

[6] Cusick v. Adams, 115 N. Y. 55, 21 N. E. 673 (1889).

ness of the owner or occupant, and in which the latter has no interest, beneficial or otherwise.[7] The case hinges directly upon whether the claimant, visiting a patient at the hospital, was a business visitor (or invitee) or a licensee. All non-trespassing visitors upon lands of another, for the purpose of determining the relative duties of the occupant towards them, are classified either as licensees or business visitors.[8] The nature of the use to which one puts his land is often enough to express to the public his willingness or unwillingness to receive them.[9] Where a person is invited or permitted to enter or remain on land for a purpose directly or indirectly connected with business dealings with the occupant of land, he is a business visitor.[10] The entry of a business visitor may be for the convenience of others who are themselves upon the land for business purposes.[11] The presence of invitee may be caused by express or implied invitation.[12] Where state property was not intended for public or general travel, automobile occupants, losing their way and entering the property, were not invitees.[13] A truck driver, not employed by the state or engaged in any business with the state, was a licensee when he used a dirt road on state property intended for employees only.[14] A visitor to a patient in a hospital was a business visitor.[15] A possessor of land has no financial interest in the entry of a bare licensee.[16]

The court, in holding that the claimant was a business visitor, reasoned that there did exist an invitation by the hospital authorities, to be implied from the nature of the use of the land as a hospital, together with the required business purpose. Hospital authorities must expect that the patients, with whom there are direct business dealings, will entertain relatives and friends during certain permissible hours.

The state's immunity from liability for negligence of its agents, officers and employees in its charitable and other institutions has been waived.[17] The doctrine of respondeat superior applies.[18] The state, just as any other party, is responsible, in the operation and management of its schools, hospitals and other institutions, only for hazards reasonably to be foreseen and only for risks reasonably to be perceived.[19] The risk reasonably to be perceived defines the duty to be obeyed, and that test of duty and foreseeability has, in principle, been consistently applied by the courts in determining whether to impose liability upon the state.[20]

[7] See note 2, *supra* § 32(b).

[8] Johnstone v. State, 204 Misc. 239, 122 N. Y. S. 2d 734 (N. Y. Ct. Cl. 1952); Haefeli v. Woodrich Engineering Co., 255 N. Y. 442, 175 N. E. 123, 125 (1931).

[9] Restatement, Torts § 332, comment *b* (1934).

[10] *Id.* § 332.

[11] *Id.* § 332, comment *d.*

[12] See note 2, *supra* § 43(i).

[13] Tully v. State, 169 Misc. 796, 8 N. Y. S. 2d 622, 627 (N. Y. Ct. Cl. 1938).

[14] Hall v. State, 173 Misc. 903, 19 N. Y. S. 2d 20, 22 (N. Y. Ct. Cl. 1940).

[15] Greenfield v. Hospital Assn. of City of Schenectady, 258 App. Div. 352, 16 N. Y. S. 2d 729 (3d Dep't 1940); Johnson v. Staten Island Hospital, Inc., 271 N. Y. 519, 2 N. E. 2d 674 (1936); Schuchatowitz v. Leff, 225 App. Div. 574, 232 N. Y. Supp. 618 (1st Dep't 1929); Joachim v. State, 180 Misc. 963, 43 N. Y. S. 2d 167 (N. Y. Ct. Cl. 1943).

[16] Restatement, Torts § 343, comment *a* (1934).

[17] Flaherty v. State, 296 N. Y. 342, 346, 73 N. E. 2d 543 (1947); Scully v. State, 305 N. Y. 707, 112 N. E. 2d 782 (1957); N. Y. Ct. Cl. Act § 8.

[18] Liubowsky v. State, 260 App. Div. 416, 23 N. Y. S. 2d 633 (3d Dep't 1940).

[19] Williams v. State, 308 N. Y. 548, 557, 127 N. E. 2d 545 (1955); Flaherty v. State, 296 N. Y. 342, 73 N. E. 2d 543 (1947).

[20] Excelsior Ins. Co. of N. Y. v. State of New York, 296 N. Y. 40, 44, 69 N. E. 2d 553 (1946); Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99 (1928).

The occupant or possessor of land has a greater duty to a business visitor than to a licensee.[21] A licensee is entitled to expect nothing more than a disclosure of conditions which he will meet if he acts upon the license and enters, so far as those conditions are known to the giver of the privilege.[22] A possessor of land owes to a licensee no duty to prepare a safe place or to inspect land to discover possible or even probable dangers.[23] Toward a licensee, the sole duty of the occupant is to abstain from inflicting intentional or wanton or willful injury.[24] A mere licensee assumes all the risks of the premises and is entitled to protection only against active and affirmative negligence on the part of the occupant of the land.[25]

A business visitor is entitled to expect the occupant of the land to take reasonable care and to discover actual conditions and either to make them safe or to warn him.[26] Towards a business visitor, the plain duty of the owner of the land is to take such precautions, from time to time, as ordinary care and prudence would suggest are necessary for the safety of those who have occasion to use the premises for the purposes for which they had been appropriated, and for which, with his knowledge and permission, it was commonly used by the public.[27] An invitee has a right to assume that it was reasonably safe for his purposes.[28] The owners are bound to see that the premises are reasonably safe, and if they are not safe, and the owners should know of the dangerous conditions and negligently fail to inform themselves of such conditions, they are liable for any damages caused.[29] A visitor to a state hospital was an invitee and had right to assume that the hospital authorities had taken all reasonable precautions to make the place reasonably safe.[30]

[21] See note 16, *supra.*

[22] *Id.* at § 342, comment *c.*

[23] *Ibid.*

[24] Johnstone v. State, 204 Misc. 239, 122 N. Y. S. 2d 734 (N. Y. Ct. Cl. 1952); Rand v. Long Island R. Co., 197 Misc. 744, 95 N. Y. S. 2d 688 (Sup. Ct. Kings Co. 1950); Carbone v. Mackchil Realty Corp., 296 N. Y. 154, 71 N. E. 2d 447 (1948).

[25] Hall v. State, 173 Misc. 903, 19 N. Y. S. 2d 20 (N. Y. Ct. Cl. 1940).

[26] See note 16, *supra.*

[27] Valentine v. Pennsylvania R. Co., 131 F. Supp. 108, 110 (E. D. N. Y. 1938).

[28] Leahey v. State, 46 N. Y. S. 2d 310 (N. Y. Ct. Cl. 1944).

[29] Haefeli v. Woodrich Engineering Co., 225 N. Y. 442, 175 N. E. 123 (1931).

[30] Joachim v. State, 180 Misc. 963, 43 N. Y. S. 2d 167 (N. Y. Ct. Cl. 1943).