NOTES AND COMMENTS

CONSTITUTIONAL LAW

THE ASSOCIATED PRESS CASE

Defendant, a cooperative association consisting of the publishers of over 1200 newspapers,[1] set up a system of by-laws with respect to the admission of new members. Non-competing applicants could be elected to membership by the Board of Directors without payment of money or the imposition of terms; but competing applicants could be elected over the objection of competing members only upon: (a) payment to the Association of 10% of the total amount of the regular assessments received by it from old members in the same competitive field for the period from Oct. 1, 1900 to the first day of the month preceeding the date of applicant's election, (b) relinquishment of any exclusive rights applicant might have to any news or news picture services, and, upon request of a member competitor, furnishing it to the competitor on the same terms as available to applicant, (c) a majority vote of the regular members voting.

Other by-laws required members to promptly furnish the Association all the news of their respective districts and prohibited the selling or furnishing of spontaneous news to any other agency or publisher. They also prohibited members from making available to non-members, in advance of publication, any news furnished by The Associated Press.

The United States filed a bill for injunction charging a violation of the Sherman Anti-Trust Act[2] in that the acts of the Association constituted (1) a combination and conspiracy in restraint of interstate[3] trade in news, and (2) an attempt to monopolize. Over defendant's objection, the District Court entered a summary decree enjoining the enforcement of the by-laws relating to admission of competing applicants, but without prejudice to the right of adoption of by-laws legally restricting admission.[4] Held: *affirmed.* The by-laws with respect to admission of competing applicants were invalid as restricting members' admission in violation of the Act. The by-laws forbidding members' communication of spontaneous news to non-members, though not invalid in themselves, were invalid as part of an unlawful combination while those unlawfully restricting membership were in force. *Associated Press et al. v. United States,* —— U. S. ——, 65 Sup. Ct. 1416 (1945).

1. The membership included 81% of the morning papers in the country and 59% of the evening papers. Through these members the news gathered by AP reached 96% of the morning circulation and 77% of the evening circulation.
2. 26 Stat. 209 (1890), 15 U. S. C. A. §§1-7 (1941).
3. Associated Press v. National Labor Relations Board, 301 U. S. 103 (1937) is precedent that AP is in interstate commerce.
4. 52 F. Supp. 362 (1945).

Since the rule of strict construction[5] of the Sherman Act gave way to the reincarnation of the common law "rule of reason"[6] what the court will declare illegal has been often difficult to predict. The application of the Act to certain kinds of combinations is clear. A combination which fixes prices, either directly or indirectly, is illegal *per se*;[7] and this is true irrespective of the business necessity of price-fixing. A combination which effectively excludes, or tries to exclude, outsiders from the business entirely is unlawful.[8] Nor is an attempt to extend the scope of a lawful monopoly[9] permitted.[10] A combination which uses illegal means in order to effect purposes in themselves lawful is condemned activity.[11] Although these instances of violation are settled, they are by no means exclusive.[12] For ever present is the necessity of weighing the advantages resulting from the combination against the interest of the public.[13]

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5. United States v. Joint Traffic Association, 171 U. S. 505 (1898); United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1897).
6. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911); United States v. American Tobacco Co., 221 U. S. 106 (1911).
7. United States v. Socony Vacuum Oil Co., 310 U. S. 150 (1940). This case reaffirms the doctrine of United States v. Trenton Potteries Co., 273 U. S. 392 (1927) which had previously been modified by the holdings of Sugar Institute Inc. v. United States, 297 U. S. 553 (1936) and Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933). The latter two cases had applied the "rule of reason" to combinations indirectly fixing prices.
8. American Medical Association v. United States, 317 U. S. 519 (1943); Fashion Originators Guild of America, Inc. et al. v. Federal Trade Commission, 312 U. S. 457 (1941).
9. A lawful monopoly is one granted by the sovereign, e.g. a patent or a copyright.
10. Ethyl Gasoline Corp. v. United States, 309 U. S. 436 (1940); Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20 (1912).
11. Bedford Cut Stone Co. v. Journeymen Stone Cutters Association, 274 U. S. 37 (1927); Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921); Loewe v. Lawler, 208 U. S. 274 (1908).
12. Weston, "The Application Of The Sherman Act To 'Integrated' And 'Loose' Industrial Combinations" (1940) 7 Law and Contemp. Prob. 42, 60. "Although certain types of activity have been found to be within the statutory prohibitions, and there is now a cluster of legal doctrine around some of these types of activity, neither these typical situations nor the legal rules annonnced in determining them are exclusive. The scope of the law's application remains essentially fluid. And ample opportunity exists to extend the law's reach into regions where its presence has not yet been detected."
13. Paramount Famous Lasky Corporation et al. v. United States, 282 U. S. 30 (1930); United States v. First National Pictures, Inc., 282 U. S. 44 (1930); Anderson v. Shipowners Association, 272 U. S. 359 (1926). In these cases, although the combinations did not try to fix prices, or altogether to exclude outsiders from the industry, but only to impose conditions upon their freedom of action, the court found that the benefit to the combination was outweighted by the injury to the public, and the combinations were outlawed. See Apex Hosiery Co. v. Leader, 310 U. S. 469, 500 (1940).

In the instant case defendant's activities did not fit into any of the previously crystallized categories of conduct barred by the Act. Their legality was necessarily tested by balancing their utility against the interest of the public. The court stated no new doctrine in its conclusion that the public's interest was paramount since "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," it having long before stated that liberty of the press is a right of the public.[14] The weightier public interest found was therefore a legitimate one.

The decree in no sense declares the Associated Press a public calling[15] despite criticism te that effect.[16] The confusion is due to an unfortunate, though perhaps inevitable, use of language. For the phrase "affected with a public interest" has been applied as a test of a public calling, while the phrase "effect on the public" has been used as a test of reasonableness under the Sherman Act.[17] When the use of the terms are considered in their contexts, the "public calling" criticism becomes untenable. And the court legitimately "extended the law's reach into a region where its presence had not yet been detected."[18]

CONSTITUTIONAL LAW

RESTRAINTS ON ALIENATION

Plaintiff corporation, owner of a lake development, brought an action to recover the unpaid balance on an installment contract for the sale of land. Defendant alleged the contract was void and against public policy because by its terms the purchaser is restrained from

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14. See Grossjean v. American Press Co., 297 U. S. 234, 250 (1936). "The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information."

15. See Associated Press v. United States, 65 Sup. Ct. 1416, 1426 (1945) (Mr. Justice Douglas concurring). "The decree which we approve does not direct Associated Press to serve all applicants. It goes no further than to put a ban against competitors of its members in the same field or territory. —— If Associated Press, after the effects of that discrimination have been eliminated, freezes its membership at a given level, quite different problems would be presented."

16. See United States v. Associated Press, 52 F. Supp. 362, 375 (1945) (Judge Swan dissenting).

17. Small, "Anti-Trust Laws And Public Callings: The Associated Press Case" (1944) 23 N. C. L. Rev. 1. "In public calling cases, the finding of a business 'affected with a public interest' is an inflexible condition precedent to that type of regulation. It acts as a barrier beyond which the court cannot trespass. On the other hand, the 'effect on the public' as spoken of in anti-trust cases, is only a test, a method, or means to determine reasonableness and consequent validity. It is not a bar, but rather an economic weight to be measured with other elements, on the anti-trust balance scale in order to arrive at the ultimate reasonable or unreasonable nature inherent in the make-up of the combination."

18. Weston, supra note 12, at 60.

making a sale or permitting its use or occupancy by any person not a member of the Caucasian race; and, further, that such restraint on general alienation is illegal and void upon constitutional grounds forbidding discrimination. Held, for the plaintiff. The provision is not void as against public policy, nor within the constitutional prohibition against discrimination, nor an unlawful restraint on alienation.[1]

The United States Supreme Court in Buchanan v. Warley[2] held legislation restricting the right of a member of a particular race to live on certain land in violation of the Fourteenth Amendment. However, this prohibition has been construed as applying only to action by the state and not to individual action.[3] Yet in what seems to be the earliest American case in which the constitutional problem was considered, the court in holding a covenant void said that there was no real difference between legislative discrimination and discrimination founded on the common law of the state:

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce."[4]

This position has received scant attention in recent years. The courts have experienced no difficulty in finding that individual covenants and conditions against the purchase or occupancy of property by Negroes are outside the scope of the Fourteenth Amendment and therefore constitutionally unobjectionable.[5] This approach has obscured the real issue that so far as these agreements operate without state aid they are indeed purely the acts of individuals, but when the state through one of its instrumentalities, whether it be legislative, executive, judicial, or administrative, enforces such an agreement, state action has occurred.[6]

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1. Lion's Head Lake v. Brezezinski, —— N.J.L. ——, 43 A. 729 (1945). 729 (1945).
2. 245 U.S. 60, 81, 82 (1917); followed in Richmond v. Deans, 281 U.S. 704 (1930); Harmon v. Tyler, 273 U.S. 668 (1927).
3. Civil Rights Cases, 109 U.S. 3, 11 (1883); United States v. Cruikshank, 92 U.S. 542, 554 (1875).
4. Gandolfo v. Hartman, 49 Fed. 181, 182 (C.C.S.D. Cal. 1892) (In the latter half of its opinion, the court indicated that enforcement of the covenant would also violate the most-favored nation clause of a treaty between the United States and China and was contrary to public policy, as well.).
5. Corrigan v. Buckley, 271 U.S. 323, 330 (1926); Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596, 598 (1919); United Cooperative Realty Co. v. Hawkins, 269 Ky. 563, 565, 108 S.W. (2d) 507, 508 (1937); Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1932); Martin, "Segregation of Residences of Negroes" (1934) 32 Mich. L. Rev. 721; Bowman, "The Constitution and Common Law Restraints on Alienation" (1928) 8 B. U.L. Rev. 1.
6. McGovney, "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds is Unconstitutional" (1945) 33 Calif. L. Rev. 5; Kahen, "Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem" (1945) 12 U. of Chi. L. Rev. 198.

Numerous theories have been advanced to deny enforcement to restrictive covenants. When the purpose and the object of the restriction have been destroyed by a change of conditions within the restricted zone, the restriction ceases to be binding.[7] If the party seeking enforcement has himself violated the restriction, enforcement has been denied on the theory of estoppel or waiver.[8] In cases of Negro segregation by covenant or condition, the weight of authority invalidates a total restraint on alienation for an unlimited time to all except one or more races because of a public policy which favors the free marketability of land.[9] Covenants have been sustained where the restraints are to particular persons or classes of persons provided there is a reasonable time limitation, on the theory that such partial restraints have never come within the rule prohibiting restraints upon alienation, construing it to apply only to restraints for an unlimited time.[10] Several courts place great emphasis upon use and uphold restraints on use and occupation as to a limited class for a reasonable time and even in some cases for a period which is unlimited when they will not sanction similar restraints on sale or alienation.[11] The distinction is made on the ground that the rules against restraints on alienations were only intended to make conveyancing free and unrestrained, and had nothing to do with use and occupancy.[12] The chief criticism of the rule against alienation as construed in these cases is that it stresses the form of the restriction rather than its actual effect, which should be the determining factor.[13]

The holding in the instant case, however, is correct, since it involved an action to enforce payment and not to enforce the condition.[14]

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7. Pickel v. McCawley, 329 Mo. 166, 176, 44 S.W. (2d) 857, 861 (1931); Note (1940) 7 U. of Chi. L. Rev. 710.
8. McGovern v. Brown, 317 Ill. 73, 79, 80, 147 N.E. 664, 666 (1925) (building restriction violated by complainant himself); Schwartz v. Holycross, 83 Ind. App. 658, 665, 149 N.E. 699, 701 (1925) (acquiescence in violation of building restriction).
9. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596, 597 (1919); Porter v. Barret, 233 Mich. 373, 206 N.W. 532, 535, 536 (1925); White v. White, 108 W.Va. 128, 150 S.E. 531, 539 (1929). Contra: Chandler v. Zeigler, 88 Colo. 1, 291 Pac. 822, 824 (1930). See Gray, Restraints on Alienation (2d ed.) pp. 25-33.
10. Queensboro Land Co. v. Cozeaux, 136 La. 724, 67 So. 641, 643 (1915) (twenty-five years); Koehler v. Rowland, 275 Mo. 573, 584, 585, 205 S.W. 217, 220 (1918) (twenty-five years); see Gray, Restraints on Alienation (2d ed.) pp. 33-42.
11. Los Angeles Investment Co. v. Gray, 181 Cal. 680, 186 Pac 596, 597 (1929); Meade v. Dennistone, 173 Md. 302, 307, 196 Atl. 330, 335 (1938); Parmalee v. Morris, 218 Mich. 625, 632, 188 N.W. 330, 332 (1922).
12. See note 11 supra.
13. Martin, "Segregation of Residences of Negroes" (1934) 32 Mich. L. Rev. 721.
14. American Railway Express Co. v. Lindenberg, 260 U.S. 584, 590 (1923); Simpson et al. v. Fuller, 114 Ind. App. 583, 587, 51 N.E. (2d) 870, 872 (1943) (Where the illegal can be severed from the legal part of the contract, the bad part may be rejected and the good retained.).

CRIMINAL LAW

ANOTHER LARCENY-EMBEZZLEMENT CASE

Appellant, member of a maintenance crew working under a foreman, took several cans of Prestone from his employer. Appellant, as well as foreman, had a key to the building where the Prestone was kept. The chief engineer maintained control of the Prestone, and a requisition was required for the appellant to receive Prestone. Appellant admits he had no requisition for this abstraction, nor for his previous wrongful takings.[1] Appellant was bonded by employer for embezzlement, but was convicted of larceny. Appellant contends that his employment was such as to make his crime embezzlement rather than larceny. Held: affirmed. "We regard as immaterial the fact that he was bonded against embezzlement. It perhaps was a circumstance which the court might have taken into consideration in determining the relationship of the parties, but it was in no sense controlling." *Warren v. State* —— Ind. ——, 62 N.E. (2d) 624 (1945).

The above result is consistent with the common law.[2] However, all crimes in Indiana are statutory,[3] and the act to punish embezzlement[4] "was intended only to punish acts not before made criminal[5] . . . and . . . it cannot be held to embrace any taking which before would have been larceny."[6] The determinative question is whether "the property at the time of the conversion is rightfully in the control or possession of the wrongdoer, by virtue of his employment."[7] The fact that the employee had access to or control of the article by virtue of employment,

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1. Similar transactions may be shown to prove felonious intent, knowledge, and other similar states of mind. Anderson v. State, 218 Ind. 299, 32 N.E. (2d) 705 (1941); Hart v. State, 220 Ind. 469, 44 N.E. (2d) 346 (1942).
2. A servant in or about the house or stable does not have possession since the goods are truly under the master's control. Holmes, "The Common Law" (1881) p. 226.
3. "Crimes and misdemeanors shall be defined and punishment therefor fixed by statutes of this state and not otherwise." IND. STAT. ANN. (Burns, 1933) §9-2401.
   Although under this section all crimes are presumed to be defined and punishment fixed by statute, yet where a crime is not well defined by statute, the courts may look to the common law for a fuller definition thereof. Simpson v. State, 197 Ind. 77, 149 N.E. 53 (1925).
4. "Every . . . employee . . . who, having access to, control or possession of any money, article or thing of value, to the possession of which his employer is entitled, shall, while in such employment, take . . . or in any way whatever appropriate to his own use . . . shall be deemed guilty of embezzlement . . . ." IND STAT. ANN. (Burns, 1933) §10-1704.
5. In the legislation in New York the law of embezzlement has been uniformly treated as not supplementary to but as more or less amendatory of the law of larceny. The same may be said of the legislation of Alabama. Wharton, Criminal Law (12th ed. 1932) §1278.
6. Smith v. State, 28 Ind. 321, 324 (1867).
7. Wynegar v. State, 157 Ind. 577, 580, 62 N.E. 38, 39 (1901); United States v. Allen, 150 Fed. 152 (E. D. Ark. 1906).

without a special trust, does not constitute the requisite possession for embezzlement.[8]

In *Colip v. State*,[9] which was quoted with approval in the principal case, the court speaking of the embezzlement statute said, "Something more than mere physical access or opportunity of approach to the thing is required. There must be a relation of special trust in regard to the article appropriated . . . even where the servant has the care and oversight of property belonging to the master the felonious appropriation of it by the servant is larceny."[10] "The intent was to limit . . the (embezzlement) statute to cases in which such persons have, as an element of their employment a special trust concerning the money, article or thing . . . ."[11] This line of reasoning has been followed in other jurisdictions.[12] A servant authorized to dispose of goods "at his discretion" would have the requisite possession to make his misappropriation embezzlement,[13] only where the particular facts of the case pointed to the necessary "relation of special trust."[14]

Therefore, in the penumbral cases it would seem that the common law possession and custody distinction has made its presence felt through the medium of "special trust."

The suggestion that "Our embezzlement statute is much broader than the earlier statutes and under it an employee may be guilty of embezzlement when he merely has 'access to or control of' any . . thing of value . . . and it is not necessary that he have possession of the money or thing of value"[15] was dismissed as "dictum" in the principal case.

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8. Axtel v. State, 173 Ind. 711, 91 N.E. 354 (1910); Caldwell v. State, 193 Ind. 237, 137 N.E. 179 (1922); Currier v. State, 157 Ind. 114, 60 N.E. 1023 (1901), Vinnedge v. State, 167 Ind. 415, 79 N.E. 353 (1906); Davis v. State, 196 Ind. 213, 147 N.E. 766 (1925); State v. Winstandley, 155 Ind. 290, 58 N.E. 71 (1900); Schoenrock v. State, 193 Ind. 580, 141 N.E. 351 (1923) But cf. Gentry v. State, —— Ind. ——, 61 N.E. (2d) 641 (1945); State v. Wingo, 89 Ind. 204 (1883); Wynegar v. State, 157 Ind. 577, 62 N.E. 38 (1901).
9. 153 Ind. 584, 55 N.E. 739 (1899). Here a farmhand who had access to wheat in order to feed stock, took wheat from the granary and sold it, was convicted of larceny.
10. *Id.* at 586, 55 N.E. at 740.
11. Vinnedge v. State, 167 Ind. 415, 420, 79 N.E. 353, 355 (1906).
12. United States v. Strong, 27 Fed. Cas. No. 16,411 (C.C.D.C. 1821); Sweeney v. State, 25 Ala. App. 220, 143 So. 586 (1932); Roeder v. State, 39 Tex. Crim. Rep. 199, 45 S.W. 570 (1898); People v. Moore, 243 Ill. App. 378 (1927); Commonwealth v. Brandler, 81 Pa. Super. 585 (1923); Komito v. State, 90 Ohio St. 352, 107 N.E. 762 (1914).
13. Colip v. State, 153 Ind. 584, 587, 55 N.E. 739, 740 (1899), cited *supra* note 9.
14. Davis v. State, 196 Ind. 213, 223, 147 N.E. 766, 770 (1925); accord Marcus v. State, 26 Ind. 101 (1866).
15. Young v. State, 204 Ind. 331, 337, 183 N.E. 100, 102 (1932).

FEDERAL JURISDICTION

STATE RULES OF SUBSTANCE AND PROCEDURE

Plaintiff, a resident of Virginia, sued defendant, a resident of North Carolina, in a state court of North Carolina to recover a deficiency resulting from exercise of a power of sale contained in a deed of trust executed in Virginia on real estate situated in Virginia. A North Carolina statute provided: "In all sales of real property by mortgagees and/or trustees under powers of sale . . ., or where judgment or decree is given for foreclosure . . . the mortgagee or trustee or holder of notes secured by such a mortgage or deed of trust shall not be entitled to a deficiency judgment . . ."[1] Basing its decision on this statute the Supreme Court of North Carolina reversed a judgment for plaintiff and ordered the suit dismissed.[2] Thereupon, plaintiff instituted suit in a federal district court in the same state and recovered. On appeal to the Circuit Court of Appeals, affirmed. Angel v. Bullington, 150 F. (2d) 679 (C.C.A., 4th, 1945). Cert. granted.

The groundwork for this apparent departure from the doctrine of Erie B. Co. v. Tompkins[3] was laid by the Supreme Court of North Carolina when it interpreted the statute only to affect the jurisdiction of the state courts to render a deficiency judgment[4] and thereby to leave unhindered plaintiff's "substantive right." The Circuit Court of Appeals, bound by this construction, accordingly held that a state could not by statute deprive a federal court of jurisdiction.[5]

Had the North Carolina court interpreted the statute to express a public policy of the state or to affect substantive rights rather than remedial rights, it is quite possible that the federal courts would have followed the same course as the state court.[6] Thus in one case two triangular conflicts appear; one involving the contract clause,[7] the full faith and credit clause,[8] and the doctrine of public policy of a state; the second involving a conflict between federal jurisdiction, the public policy of a state, and the doctrine of Erie R. Co. v. Tompkins. Although the circuit court based its decision on the jurisdictional point only, it did at least recognize the latent possibilities in the statute involving the Federal Constitution.[9]

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1. N. C. Laws 1933, c. 36; N. C. Gen. Stat. c. 45 §36 (1943).
2. Bullington v. Angel, 220 N. C. 18, 16 S. E. (2d) 411 (1941).
3. 304 U. S. 64 (1938).
4. Bullington v. Angel, 220 N. C. 18, 20, 16 S. E. (2d) 411, 412 (1941).
5. Angel v. Bullington, supra, 680.
6. Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 175 U. S. 91 (1899); Transbel Inv. Co. v. Roth, 36 F. Supp. 396 (S. D. N. Y. 1940); May v. Mulligan, 36 F. Supp. 596 (W. D. Mich. 1939).
7. U. S. Const. Art. I, §10.
8. U. S. Const. Art. IV, §1.
9. "This raises the interesting questions whether the statute as thus interpreted runs afoul of the full faith and credit clause of . . . the Federal Constitution or the due process clause of §1 of the Fourteenth Amendment. We do not pass on these questions." Angel v. Bullington, supra, 681.

It has been a rule of law since 1840[10] that states cannot deprive federal courts of jurisdiction of any particular subject-matter when all the remaining conditions necessary for federal jurisdiction are present.[11] The most recent development of this rule was in *David Lupton & Sons v. Automobile Club of America*[12] where the plaintiff, barred from suing in state courts because of non-compliance with a state foreign corporation statute, was permitted to sue in the federal courts sitting in the same state.

A state need not enforce, however, a foreign contract or obligation when to do so would violate the expressed public policy of the forum on a matter not governed by federal law or the Constitution.[13] Federal Courts are likewise governed by the public policy of the state wherein they sit.[14] But to some extent the full faith and credit clause overrules the public policy of a state, even where the matter is not governed by federal law or the Constitution.[15] A state cannot by simply denying its courts jurisdiction, escape its duties under the full faith and credit clause.[16] The same argnment has been applied in holding a statute or decision expressing state policy violative of the due process clause of the Fourteenth Amendment.[17]

Lastly, although a state may prohibit its citizens from entering into certain types of agreements and may declare agreements unlawful when contravening a recognized public policy, a state may not restrict the obligations of a contract entered into and to be performed wholly without the state, except when it has a sufficient interest either in the subject matter or the parties to warrant his interference.[18]

The most apparent problems resulting from these rules are, first,

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10. Suydam v. Broadnax, 14 Pet. 67 (U. S. 1840).
11. This rule has been followed in a long line of decisions including Union Bank v. Vaiden, 18 How. 503 (U. S. 1855); Chicago & N. W. Ry. v. Whitton, 13 Wall. 270 (U. S. 1871).
12. 225 U. S. 489 (1912).
13. Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co. 175 U. S. 91 (1899); May v. Mulligan, 36 F. Supp. 596 (W. D. Mich. 1939).
14. Klaxon Co. v. Stentor Elec. Man. Co., 313 U. S. 487 (1941); Griffin v. McCoach, 313 U. S. 498 (1941); Transbel Inv. Co. v. Roth, 36 F. Supp. 396 (S. D. N. Y. 1940).
15. Broderick v. Rosner, 294 U. S. 629 (1935); Milwaukee County v. M. E. White, 296 U. S. 268 (1935).
16. Kenny v. Supreme Lodge, 252 U. S. 411, 415 (1920); Broderick v. Rosner 294 U.S. 629, 642 (1935).
17. Hartford Acc. & Ind. Co. v. Delta & Pine Land Co., 292 U. S. 143, 150 (1934).
18. Id. at 149. The interest of the forum was considered sufficient in Alaska Packers v. Industrial Acc. Comm., 294 U. S. 532 (1935) (interest in welfare of non-resident inhabitants who might become a charge on the state); Griffin v. McCoach, 313 U. S. 498 (1941) (The insured was a resident of the forum); but insufficient in Citizens Nat. Bk. v. Waugh, 78 F. (2d) 325, (C. C. A. 4th, 1935) (makers of notes were residents of forum but notes were made and were payable in another state); John Hancock Ins. Co. v. Yates, 299 U. S. 178 (1936) (only interest of forum was that suit was brought there and plaintiff had become a resident of forum after cause of action had been completed).

a conflict between the rule of federal jurisdiction and the doctrine of *Erie R. Co. v. Tompkins*, and, second, a conflict between the full faith and credit and contract clauses of the Federal Constitution and the public policy of a state.

A practical answer is needed to eliminate the unsatisfactory distinction between "substantive" and "remedial" rights. To say that only the remedial right is affected and the substantive right remains in existence to be enforced elsewhere affords no practical solution. It is certainly contrary to the spirit of *Erie R. Co. v. Tompkins*,[19] to hold that a federal court can render a judgment which the state court cannot, where the only basis of federal jurisdiction arises from diversity of citizenship and where the law applied is supposedly the law of the state.

The Supreme Court has recently disposed of a somewhat similar case, involving the applicability of a state statute of limitations in a federal court, by simply ignoring the distinction between remedial and substantive rights and holding that whatever one calls it, the federal court is bound by the state law.[20]

To solve the problem by saying that a state cannot deprive a federal court of jurisdiction involves a falsely implied assumption, since no attempt is being made to deprive a federal court of jurisdiction where a state court has jurisdiction.

The deeper problem of full faith and credit and public policy of a state cannot be disposed of so easily. Here the two lines of authority have been moving along with no *Erie R. Co. v. Tompkins* situation interposed. All that can be said is that each case is decided on its own facts.[21] The court after balancing full faith and credit and considerations of public policy[22] comes up with another case to support one

19. Note the now famous language of that case: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state . . . There is no federal general common law." Erie R. Co. v. Tompkins, supra 78. However, it appears that deviations are made from these principles where by applying the state law as interpreted by the state court to the facts of a particular case, the result would render the state law unconstitutional. See Griffin V. McCoach, 313 U. S. 498, 504, 506 (1941) (where the court determined the state law would not be unconstitutional).

20. Guaranty Trust Co. v. York, 323 U. S. ——, 65 Sup. Ct. 1464 (1945). "It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' . . . . In essence, the intent of that decision (Erie R. Co. v. Tompkins) was to insure that, in all cases where a federal court is exercising jurisdiction because of diversity of citizenship of the parties, the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of the litigation, as it would be if tried in a state court." (p. 1470). (Mr. Justice Rutledge and Mr. Justice Murphy dissented.)

21. Compare Bradford Electric Light Co. v. Clapper, 286 U. S. 145 (1932), with Alaska Packers v. Industrial Acc. Comm., 294 U. S. 532 (1935).

22. Note the following language in Alaska Packers v. Industrial Acc. Comm., 294 U. S. 532 (1935): ". . . there are some limitations upon the extent to which a state will be required by the full faith

of the two lines of reasoning. An attempt to rationalize the two lines so as to reach a general rule seems to be futile.

SALES

IMPLIED WARRANTY OF FITNESS

Plaintiff, after making examination as a texture, color, style and design, purchased a chenille lounging robe in defendant's department store. Undisputed testimony disclosed that on the third or fourth time the robe was worn, plaintiff waved or "fanned" a match after lighting a cigarette, the robe instantly caught fire, and plaintiff was badly burned. Plaintiff seeks damages, alleging breach of implied warranty. From a directed verdict for defendant, plaintiff appeals. *Held*: reversed. Lower court erred in failing to instruct the jury that, if the robe caught fire and burned as the witness testified, there was a breach of defendant's implied warranty of fitness.[1] Deffebach v. Lansburgh & Bro. (D.C. 1945), 150 F. (2d) 591.

Implied warranty in the sale of goods was unknown to the common law prior to the nineteenth century,[2] but in 1815 the need for legal recognition of such warranties was realized in sales in which the buyer had no opportunity to inspect his purchases.[3] During the years to follow the courts gradually enlarged their recognition of implied warranties until, prior to the adoption of the Uniform Sales Act, it had become well settled that manufacturers and producers impliedly

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and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy." (p. 546) ". . . the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, . . . but by appraising the governmental interests of each jurisdiction, and turning the scale of decisions according to their weight." (p. 547). "The interest of Alaska is not shown to be superior to that of California. No persuasive reason is shown for denying to California the right to enforce its own laws in its own courts, and in the circumstances the full faith and credit clause does not require that the statute of Alaska be given that effect." (p. 550).

1. District of Columbia Code, like §§15(1) and 15(3), Uniform Sales Act, provides that, "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment * * * *, there is an implied warranty that the goods shall be reasonably fit for such purpose. * * * * If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." 50 Stat. 33 (1937), D.C. Code (1940) tit. 28, §1115. Thirty-seven states, including Indiana, have adopted similar statutes. *Cf.* IND. STAT. ANN. (Burns 1933) §58-115. Restatement, "Uniform Revised Sales Act" (Proposed Final Draft, 1944) §§39 and 41(2)(a), and the English Sale of Goods Act, 1893, 56 & 57 Vict., c. 71, §14(1) contain similar provisions.
2. None but express warranties were recognized in the early decisions. Chandelor v. Lopus, Cro. Jac. 4 (1606-1607); Ames, "History of Assumpsit" (1888) 2 Harv. L. Rev. 1, 8.
3. Gardner v. Gray, 4 Campb. 144 (N.P. 1815); Williston, "Sales" (2d ed. 1924) §228.

warranted the fitness of their goods for particular purposes, provided the buyer had informed the manufacturer of the purpose for which the goods were to be used,[4] and provided the buyer relied upon the skill and judgment of the manufacturer.[5] Some jurisdictions refused to imply such a warranty to a dealer,[6] and required of him only fair dealing and good faith.[7] However, since the adoption of the Uniform Sales Act, the ordinary vendor has been placed in the same position as the manufacturer in jurisdictions which had previously made this distinction.[8]

Under the Uniform Sales Act, as was also true at Common law, the fundamental basis of liability under an implied warranty of fitness for a particular purpose is the buyer's justifiable reliance upon the seller's skill or judgment.[9] Where the buyer inspects the goods purchased,[10] or had an opportunity to adequately inspect them,[11] there is no implied warranty against defects which a reasonable inspection should have disclosed. However, where the buyer has examined goods,[12]

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4. Where an article is adopted to a single purpose, the mere fact of the sale may acquaint the seller with the buyer's intended use thereof. Kennan v. Cherry, 47 R.I. 125, 131, Atl. 309 (1925).
5. Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1883); Cleveland Linseed Oil Co. v. A. P. Buchanan & Sons, 120 Fed. 906 (C.C.A. 2d, 1903), and cases cited; Poland v. Miller et al., 95 Ind. 287 (1883); Robinson Machine Works v. Chandler, 56 Ind. 575 (1877); Merchants Nat. Bank of Massillon, Ohio v. Nees, 62 Ind. App. 290, 110 N.E. 73, 112 N.E. 904 (1916); Edwards Mfg. Co. v. Stoops, 54 Ind. App. 361, 102 N.E. 980 (1913).
6. Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88, 89 N.E. 723 (1909); Merriam Paper Co. v. N.Y. Market Gardener's Association, 58 Misc. 236, 108 N.Y. Supp. 1038 (Sup. Ct. 1908). See Cram v. Gas Engine Co., 75 Hun. 316, 26 N.Y. Supp. 1069, 1072 (Sup. Ct. 1894), in which it was said that authority goes no further than to hold manufacturers liable for implied warranties of fitness for a particular purpose.
7. Hurley-Mason Co. v. Stebbins, 79 Wash. 366, 140 Pac. 381 (1914).
8. Davenport Ladder Co. v. Edward Hines Lumber Co., 43 F. (2d) 63 (C.C.A. 8th, 1930); G. B. Shearer Co. v. Kakoulis, 144 N.Y. Supp. 1077 (Otsego County Ct. 1913); Wasserstrom v. Cohen, Frank & Co., 150 N.Y. Supp. 638, 640 (Sup. Ct. 1914), wherein the court said, "This amendment reverses the rule which formerly obtained in this state, which recognized implied warranties of fitness upon sales by manufacturers, but not against mere dealers, and brings our law into harmony with that prevailing in England and in many of the states in this country."
9. See 4 Williston, "Contracts" (Rev. ed. 1936) §988, p. 2721; Keenan v. Cherry & Webb, 47 R.I. 125, 130, 131 Atl. 309, 311 (1925).
10. Carleton v. Jenks, 80 Fed. 937 (C.C.A. 6th, 1897); Colchord Machinery Co. v. Loy-Wilson Foundry & Machine Co., 131 Mo. App. 540, 110 S.W. 630 (1908). *Cf.* IND. STAT. ANN. (Burns 1933) §58-115(3).
11. Williston, "Sales" (2d ed. 1924) §§232, 233 and 234.
12. It has been suggested that §15(3) of the Uniform Sales Act which provides that, "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed," does not apply where the buyer has not exercised an opportunity to examine. Williston, "Sales" (2d ed. 1924) §248; Vold, "Sales" (1931) §146. But see Weber Iron & Steel Co. v.

prior to purchase, which contain latent[13] defects, the modern trend of decisions is to enlarge the responsibility of the seller and to imply a warranty on his part from acts and circumstances, wherever they are relied upon by the buyer[14] and it is unnecessary to show the seller's knowledge of unfitness in action against him for breach of implied warranty of fitness.[15]

It is submitted that the instant case follows the general trend of recent decisions in finding seller's liability under breach of implied warranty of fitness.[16] However, it is believed that a jury instruction such as that prescribed by the court in the principal case to the effect that there was a breach of defendant's implied warranty of fitness "if the robe caught fire and burned as the witness testified"[17] is undesirable. Such instruction would preclude from the jury's consideration the following important question of fact upon which liability must be based: Did the buyer actually and justifiably rely upon the skill and judgment of the seller?[18]

Wright, 14 Tenn. App. 451 (1932) which holds §15(3) of the Uniform Sales Act applicable where the buyer had an opportunity to inspect goods, but did not do so.

13. See Miller & Co. v. Moore, Sims & Co., 83 Ga. 684, 692, 10 S.E. 360, 361 (1889).

14. See Davenport Ladder Co. v. Edward Hines Lumber Co., 43 F. (2d) 63, 67 (C.C.A. 8th, 1930); Bekkevoldt v. Potts, 173 Minn. 87, 216 N.W. 790 (1927), and cases discussed therein showing the extent to which courts have gone to find implied warranty of fitness even where the parties have included in a written contract the following provision: "No warranties have been made * * * * by the seller to the buyer unless expressly written hereon at the date of purchase."

15. Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E. (2d) 697 (1939).

16. *Cf.* Oil Well Supply Co. v. Watson, 168 Ind. 603, 80 N.E. 157 (1907); J. F. Darmody Co. v. Moss, 86 Ind. App. 426, 158 N.E. 489 (1927); Kurriss v. Conrad & Co., 312 Mass. 670, 46 N.E. (2d) 12 (1942); Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E. (2d) 697, 121 A.L.R. 460 (1939); Zirpola v. Adams Hat Stores, 122 N.J.L. 21, 4 A. (2d) 73 (1939). *Contra,* State ex rel. Jones Store Co. v. Shain, 630 Mo. Rep. 352, 179 S.W. (2d) 19 (1944), which holds that purchase of a woman's blouse from a retailer to be worn is not such a purchase for a particular purpose as to give rise to an implied warranty that the blouse will be free from latent defects which might cause serious injury to the buyer. In connection with this case, however, it may be noted that Missouri has not adopted the Uniform Sales Act.

17. Deffebach v. Lansburgh & Bro. 150 F. (2d) 591, 592 (1945).

18. Flynn v. Bedell Co., 242 Mass. 450, 136 N.E. 252, 27 A.L.R. 1504 (1922) in which it was held that whether a buyer, who examined a garment containing a latent defect, relied on the seller's skill and judgment that it was suitable for the purpose for which it was required, was properly a question for the jury. *Cf.* Keenan v. Cherry & Webb, 47 R.I. 125, 130, 131 Atl. 309, 311 (1925) in which the Uniform Sales Act is interpreted to treat reliance as a question of fact.