CRIMINAL LAW—INDETERMINATE SENTENCE—DUE PROCESS

Petitioner brought an action for a writ of habeas corpus asking release from prison where he was allegedly being illegally restrained. The original conviction occurred in the Court of Common Pleas of Cuyahoga County. The petitioner pleaded not guilty to the indictment, but he later changed his plea to guilty upon being told by the court that the sentence would be for only one year. The sentence by the court was for one year as had been previously promised. In the case at bar, the convicted petitioner claimed that he had been held over the period of sentence. The state defended on the ground that every sentence under Ohio Revised Code section 5145.01 is a general one unless it falls within one of the exceptions. Counsel for the petitioner then argued that if the state's defense was valid, the petitioner had been deprived of due process of law because he relied upon the representation of the trial court and changed his plea from not guilty to guilty. *Held*, petitioner remanded to custody. R.C. 5145.01—if a sentence rendered happened to be for a definite term, it is not void but to be treated as a general one. In the absence of coercion in entering a plea of guilty, it is done voluntarily and is not a deprival of due process under Article 1, Section 16 of the Ohio Constitution. *In re Smith*, 162 Ohio St. 58, 120 N.E. 2d 736 (1954).

An indeterminate sentence in criminal law is one which involves fixing a minimum and a maximum term at the time of sentencing rather than a single period of years. The parole system and indeterminate sentences are usually thought of as complimentary phases of correctional treatment. The indispensible preliminary to an intelligent appraisal of the nature and workings of indeterminate sentence laws is an understanding of what the aim of penal treatment ought to be. Indeterminate sentence law in connection with parole permits the period of time necessary to accomplish such a physical, emotional, and mental rehabilitation that the parolee's renewed freedom will no longer endanger the welfare of society.

There are two general types of indeterminate sentence laws, both of which must be controlled by statute. (1) States in which statutory sentences are controlling; for example, Ohio. Ohio Rev. Code §5145.01. Here it is mandatory upon the court to give the accused the exact sentence set out in the convicting statute. No discretion is given to either the judge or jury. (2) States where the statutory range governs the fixing of the sentence, either by the court or by the jury; for example, Vermont. Vt. Stat. (1947), sec. 7932. The effect of the latter is to make it discretionary to set any maximum or minimum within the limits set out by statute. A sentence for a term less than the minimum prescribed by statute is erroneous. *Morris v. Clark*, 156 Ga. 489, 119 S.E. 303 (1923). This latter type of sentence has been criticized because it is possible for the sentencing authority to set maximum and minimum terms substantially equal in duration, thus minimizing the operational area of the parole

system. There is a conflict in authority as to the validity of such a sentence. In *Jones v. State*, 23 Ala. App. 384, 125 So. 898 (1930), such a sentence was held to be invalid as being against the legislative intent, but in *State v. Davisson*, 28 N.M. 653, 217 Pac. 240, *cert. denied* 267 U.S. 574 (1924), a like sentence was upheld.

Under the Ohio type of statute, conceding the sentence is general and not void, the only time at which the petitioner may say his debt to the state is satisfied as of right is at the expiration of the maximum period. *Ex parte Tischler*, 127 Ohio St. 404, 188 N.E. 730 (1933). The prisoner, therefore, has a remedial right only if and when he is held over the maximum term. *People v. Lumbley*, 8 Cal. 2d 752, 68 P. 2d 354 (1937). The minimum sentence is merely a period at which, as a matter of discretion and not right, the prisoner may be released to conclude his sentence outside of confinement under supervision. *Clarke v. State*, 23 Ariz. 470, 204 Pac. 1032 (1922).

Upon the above principle, the case at bar follows *Ex parte Thorpe*, 66 Ohio App. 128, 32 N.E. 2d 571 (1941). However, in the principal case an additional question was raised by the facts leading up to the conviction. That is, assuming the sentence is general, it may still be unconstitutional as applied in this situation, as a denial of procedural due process of law. A decision of a state supreme court construing state penal statutes in such wise as to impose a heavier sentence than would be possible under the construction advanced by the accused is not reviewable in the United States Supreme Court as a denial of due process of law. *Herbert et al. v. Louisiana*, 272 U.S. 312 (1926). The theory therefore, for a due process violation, must be based on the trial court's representation concerning the one year sentence, and the reliance by the petitioner to his detriment. The cause of action in the present case did not arise until parole was refused. In *Ex parte Farrar*, 74 Okla. Crim. 390, 126 P. 2d 545 (1942), it was held that where an accused was induced to plead guilty by representations on the part of the assistant county attorney and the trial judge that the accused was eligible for a suspended sentence, whereas in fact, on account of a prior conviction, he was not eligible for a suspended sentence, judgment revoking suspension of sentence on that account was void and the accused was held to be imprisoned without due process of law and entitled to a writ of habeas corpus. The Oklahoma court held that the plea of guilty entered by the petitioner was induced by promises which could not lawfully be carried into execution, and a plea of guilty thus obtained was contrary to the spirit of the Bill of Rights of the Constitution.

The Ohio Supreme Court said the petitioner was not *compelled* to enter a plea of guilty, but according to the Oklahoma case, compulsion is not necessary. The petitioner must only prove that he was induced by promises to plead guilty to establish a good case of deprivation of due process of law. The question thus arises whether Ohio recognizes

confessions induced by promises in any situation. Why did not the Ohio Supreme Court follow the precedent set out in cases where the inducements and confessions were made prior to the trial? Confessions, to be received as evidence in a criminal case, must appear to be free and voluntary. A confession induced by hope or fear excited in the mind by representations or threats of anyone is not to be considered voluntary. *State v. Strong*, 12 Ohio Dec. 701 (1902). Ohio does not follow the English doctrine which restricts the operation of inducements solely to those made by one in authority, but follow the rule, that if confessions are induced by any one in the general public, they are inadmissible as evidence. *Bram v. U.S.*, 168 U.S. 532 (1897). However, in *Spears v. State*, 2 Ohio St. 583 (1825), it was held that if the confession is induced by one in authority, there is a presumption of inadmissibility, but if made by anyone else, it is mere evidence of inadmissibility. The *Spears* case, *supra*, went on to say that confessions or disclosures made under *any promise* or *encouragement* of any hope or fear are inadmissible. The court also announced that the knowledge of the prisoner as to the groundlessness of the promise is highly irrelevant. The United States Supreme Court has never passed upon the problem of induced promises to plead guilty either prior to or at the trial. However, in the above cases, it is evident that Ohio courts recognize induced promises to plead guilty prior to indictment, so why did not they extend the doctrine to facts as alleged in the principal case? As theoretical matter, it seems as though an inducement made by the court, as in the principal case, should be of greater force and expected to be relied upon to a greater degree then an inducement covered by the *Spears* case. Either the Ohio courts should follow their theory of induced confessions by promise in toto, or they should discard it altogether.

Since the petitioner alleged in his petition that there was a violation of due process only under the Ohio Constitution, and not the federal, the instant case is not reviewable either by certiorari or appeal by the United States Supreme Court; however, if the Fourteenth Amendment of the Federal Constitution had been pleaded in the alternative, jurisdiction may have been gained in the case at bar. If the alternative remedy had been pleaded, perhaps the Supreme Court would follow the theory set out in *Clemons v. U.S.*, 137 F. 2d 302 (4th Cir. 1943). In that case, the Assistant U.S. District Attorney gave the defendant definite assurance that he would not be prosecuted for a felony but only for a misdemeanor, but the judge sentenced him under the provisions of a felony statute. The court said that the defendant and his counsel relied on the representation of the District Attorney; that without such assurance they might have used greater diligence in preparation for trial and might have employed equally different tactics during the course of the trial itself; and that since they could not be sure just what would have been the course of events, there was a denial of due process.

Since the Ohio Supreme Court is the final forum to which a state

due process question may be taken, its judgment under the Ohio Constitution is final. Had counsel for the petitioner pleaded the "due process" clause of the Fourteenth Amendment to the Federal Constitution, reversal might have been gained in the United States Supreme Court on the theory of the *Clemons* case, *supra*. As far as the application of the indeterminate sentence law to the facts, it is undoubtedly correct; however, the question of due process may have been decided otherwise, if we look to cases from other jurisdictions or to the Ohio theory of confessions induced by promises prior to the time that the case comes before a court.

Martin S. Bogarad

EASEMENTS—COMMON DRIVEWAY—USED BY TWO OWNERS FOR MORE THAN 21 YEARS—PRESCRIPTIVE RIGHTS ACQUIRED

Plaintiffs and defendants owned adjoining improved properties on the south side of West Maple Street in North Canton, Ohio, plaintiffs' property being the easterly [of the two] and defendants' the westerly of the two properties. In 1924 or 1925, pursuant to an oral agreement between the then owners, a joint drive complete with aprons was constructed leading to the garages in the rear of the lots, each owner paying one-half the cost of construction. The original owners used the drive until 1948, in which year both properties changed ownership. Difficulties over the use of the driveway then arose and on July 26, 1951, the plaintiffs, Shanks, commenced an action against the defendants, Floom, asking for an injunction restraining defendants from using the drive and that plaintiffs' title be quieted against any claim of the defendants. The common pleas court denied the injunction. The court of appeals quieted title of plaintiffs as to the west line of their property and held that both properties were subject to an easement for driveway purposes by reason of more than 21 years of adverse use. *Held*, the majority opinion of the supreme court affirmed the judgment of the court of appeals. *Shanks v. Floom*, 162 Ohio St. 479, 124 N.E. 2d 416 (1955).

Whether the use of the driveway was permissive only and thus not ripening into an easement or was a use under a claim of right which would ripen into an easement by prescription was before the supreme court for the first time. The court held, "the nature and permanence of the improvement, that it was constructed of concrete, and that it was constructed on what the owners considered to be the boundary line between their properties, are more consistent with a claim of right on the part of each owner than with a day-to-day permissive use." The court quoted with approval from two cases in which the facts were identical with the facts in the instant case. In the first case, *Rubinstein v. Turk*, 29 Ohio Law Abs. 653 (1939), the court of appeals said, "the possession and use by each

owner was under a claim of right and therefore adverse. This adverse possession continued for more than 21 years and therefore ripened into a prescriptive right." In the other case, *Johnson v. Whelan*, 171 Okla. 243, 42 P. 2d 882, 92 ALR 1096 (1935), the Supreme Court of Oklahoma held as follows: "While the mere permissive use of a way over the land of another will not ripen into an easement, yet one who joins his adjacent landowner in the construction of a paved private way over and along the medial line, has given such adjacent owner more than a mere license. Each owner, by the use of the driveway, is continuously asserting an adverse right in the portion of the way on the other's lot. And from such use for 15 years the law raises a presumption of the grant of an easement." In Ohio, this adverse use must, of course, be for 21 years.

The minority opinion in the principal case contended that there was nothing hostile nor adverse in the creation of the driveway or in its subsequent use. There was merely created a revocable parol license. Attention was called to certain Michigan and Illinois cases referred to in the majority opinion. In *Wilkinson v. Hutzel*, 142 Mich. 674, 106 N.W. 207 (1906), the court stated, "An acquiescence for a long period of years between adjoining owners in such mutual user of a way would not create title in and to the land of the other in either party for the reason that there is nothing hostile or adverse in such user." Again in *Banach v. Lawera*, 330 Mich. 436, 47 N.W. 2d 679 (1951), the court said, "a prescriptive easement with respect to a joint driveway does not arise out of mutual use of the driveway until mutuality ends and adverse use commences and continues for the period essential to the fastening of such right. If use of a joint driveway was permissive at inception, such permissive character will continue of the same nature, and no adverse use can arise until there is a distinct and positive assertion of a right hostile to the owner and brought home to him." The Illinois court in *Lang v. Dupuis*, 382 Ill. 101, 46 N.E. 2d 21 (1943), stated, "where adjoining owners constructed a driveway on a lot line under an oral agreement and without stating how long the driveway should be used as such, and owners and their successors used the driveway for more than 20 years the first owner's successor obtained no easement by perscription on the portion of the driveway on the lot of the second owner's successor, and had merely a revocable license to use the driveway."

The minority opinion also cites the case of *Pennsylvania Rd. Co. v. Donovan*, 111 Ohio St. 341, 145 N.E. 479 (1924) which held, "an easement by prescription may be acquired by open, notorious, continuous, adverse use for a period of 21 years. Such use never ripens into a prescriptive right unless the use is adverse and not merely permissive." It must be noted on this point that the defendant conceded "that if their use of the driveway, and that of their predecessors in title, pursuant to this agreement, was permissive only such use under the law of Ohio could not ripen into an easement."

The writer believes that the *bete noire* of these cases is the interpretation placed on the word, *hostile*, which in its commonly accepted definition, means having or showing ill-will, inimical or unfriendly. It was well said in *Kimball v. Anderson*, 125 Ohio St. 241, 181 N.E. 17 (1932), "to establish hostility it is not necessary to show that there was a heated controversy or a manifestation of ill will, or that the claimant was in any sense an enemy of the servient estate; . . . it is sufficient if the use is inconsistent with the rights of the title owner and not subordinate or subservient thereto." The court further says "that hostile use is sometimes described as possession and use under a claim of right."

It is to be noted that the court of appeals in the instant case, affirmed by the supreme court, quieted plaintiffs' title as to the west line of their property, but held that both properties were subject to an easement for driveway purposes. This is entirely consonant with the authorities and underlines the distinction between title by adverse possession and title to an easement by prescription: that to establish title by adverse possession, the use of the land by the claimant must be exclusive; to acquire an easement by prescription as in the instant case, the use need not be and indeed was not exclusive. Both plaintiffs and defendants used all of the driveway. However, defendants' use of the driveway was open, continuous and adverse for a period of 21 years or more, consequently the defendants prevailed.

The weight of authority is in agreement with *Johnson v. Whelan*, *supra*, and, supports the majority opinion in the instant case, in their holdings that a parol agreement, though void under the statute of frauds, will, if followed by use for the period of prescription, establish a prescriptive right to an easement.

John F. McCarthy

LABOR LAW: STATES' RIGHTS AND FEDERAL SUPERCEDURE —JURISDICTION OVER STRANGER PICKETING

Petitioner, a Pennsylvania corporation doing a portion of its interstate business in Ohio, sought an injunction in an Ohio Common Pleas Court to enjoin a labor union from picketing the company's Ohio place of business. The corporation's employees were not affiliated with any labor group. The Court of Common Pleas granted the relief sought upon a finding that the union's picket practice violated state law in that it sought to coerce an employer to influence his employees regarding their choice of a bargaining agent. The Supreme Court of Ohio, affirming an Ohio Court of Appeals, *held* the state courts to be without jurisdiction of the subject matter since, under federal supremacy doctrine, exclusive jurisdiction was thought to be vested exclusively with the NLRB. *Grimes and Hauer, Inc. v. Pollock*, 163 Ohio St. 372,—N.E.—2d (1955).

State power in labor disputes involving stranger picketing has long

been hedged with qualifications. A comparatively early case declared a state powerless to enjoin picketing solely on the ground that the participants were strangers to the employment relation. *American Federation of Labor v. Swing*, 312 U.S. 321 (1941). States did, for a time however, enjoy rather extensive jurisdictional perogative in the field—it being correctly assumed that if a union's activities were neither protected nor prohibited by the National Labor Relations Act, a local forum might be had. *Brown-Saltman Co. v. Furniture Workers Local 576*, 26 L.R.R.M. 2552 (Cal. Super. Ct. 1950); *State ex rel Tidewater Shaver Barge Lines v. Dobson*, 195 Ore.533, 245 P. 2d 903 (1952). Stranger picketing not having been mentioned, eo nomine, in the federal legislation, the states displayed little reticence in exercising control. Where violence threatened on the picket line or where an employer sought damages for property destruction, local jurists acted without a discernible qualm. *Hearn Department Stores, Inc. v. Livingston*, 282 App. Div. 480, 125 N.Y.S. 2d 187 (1953); *Lodge Manufacturing Co. v. Gilbert*, 195 Tenn. 403, 260 S.W. 2d 154 (1953); *Benton v. Painters Local No. 333*, 263 P. 2d 854 (Cal. App. 1953). Their right so to do was clearly recognized by *Allen-Bradley Local No. 111 v. Wisconsin Labor Board*, 315 U.S. 740 (1942).

Nor did state courts exhibit measurable compunction where labor was thought to have contravened state economic policy. Coercive union attempts to circumvent state anti-trust policy were designated locally controllable. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490 (1949). And the states went further to assume injunction power where labor allegedly sought to coerce employers to bring influence to bear upon their employees in organization disputes. *Chic Maid Hat Manufacturing Co. v. Korba*, 32 L.R.R.M. 2105 (N.Y.. App. Div. 4th Dept. 1953); *Goodwins, Inc. v. Hagedorn*, 303 N.Y. 300, 101 N.E. 2d 697 (1951); *Union News Co. v. Davis*, 201 Misc. 1062, 108 N.Y.S. 2d 554 (1951); *Kincaid-Webber Motor Co. v. Quinn*, 362 Mo. 375, 241 S.W. 2d 886 (1951). On facts equivalent to the instant case the issuance of an injunction was held authorized by Ohio law in *Richman Brothers Co. v. Clothing Workers of America*, 116 N.E. 2d 60 (Ohio C.P. 1953).

Supplying the ultimate requisite judicial sanction for such jurisdictional base, the Supreme Court in *Building Service Employees v. Gazzam*, 339 U.S. 532 (1950), indicated that state standards of "unlawful" union picketing could be applied in situations like the *Richman* dispute, *supra*. At least one post-*Gazzam* state adjudication resulted in an injunction against abusive picketing notwithstanding that the dispute was then pending before the NLRB. *Huff Truck Lines v. Drivers, Chauffeurs, Warehousemen and Helpers Local No. 270*, 30 L.R.R.M. 2571 ((La. Par. Ct. 1952). Implicit in decisions like *Huff, supra*, was the notion that union practices at variance with local policy ought not to remain ungoverned in the absence of affirmative federal action.

But the high Court limited the area for application of state policy in *Garner v. Teamsters, Chauffeurs, and Helpers Local No. 276,* 346 U.S. 485 (1953), wherein the rule was enunciated that local courts are impotent to enjoin coercive stranger picketing if it falls within the reach of the National Labor Relations Act. From an examination of the text, it would seem manifest that the jurisdiction of the NLRB pre-empts and excludes all others for the sake of national uniformity. Thus the Court by approaching the problem from a jurisdictional vantage point largely obliterated the state's right victory as posited in the *Gazzam* opinion, *supra.* Whether this result stems from a determination that such picketing is protected under federal law or, conversely, from a characterization of the picketing as prohibited, is not abundantly clear. The distinction is not here relevant, however, since a finding of either would be dispositive of the case. *Amalgamated Association of Street Railway Employees v. Wisconsin Labor Board,* 340 U.S. 383 (1951); *Hill v. Florida,* 325 U.S. 538 (1945).

Post-*Garner* state and federal opinions have, with few exceptions, acquiesced in the Supreme Court policy, even abnegating power where neither party has sought NLRB relief. *Browning v. King Co.,* 34 N.J. Super. 13, 111 A. 2d 415 (1954); *Bert Manufacturing Co. v. Local 810,* 136 N.Y.S. 2d 805 (1954); *Lock Joint Pipe Co. v. Anderson,* 127 F. Supp. 692 (1955); *Richman Brothers v. Clothing Workers,* 36 L.R.R.M. 2320 (Ohio C.P. 1955); *Copper Transport Co. v. Stufflebeam,* 36 L.R.R.M. 2433 (Mo. 1955). The instant case fits concisely into this category. Taken in conjunction with the *Garner* rationale, these cases elicit at least three provocative queries: 1. Is a state tribunal to be ousted of jurisdiction although the NLRB has previously declined jurisdiction of the particular litigation? 2. If a state court chooses to ignore the *Garner* doctrine what remedies are available to the parties? 3. And what of the violence and damage-action situations?

Answering these questions in reverse order, we find the Court has made abundantly clear the proposition that damages may yet be had, via state judicial process, from an overly exhuberant union. *United Construction Workers v. Laburnum,* 347 U.S. 656 (1954). As to violence cases, post-*Garner* decisions have continued to assert local and federal jurisdiction, nor can any reason be perceived why this should not be so. *Irving Subway and Grating Co. v. Silverman,* 117 F. Supp. 671 (1953); *Perez v. Trifiletti,* 74 So. 2d 100 (Fla. 1954), *cert. denied* 348 U.S. 926; *Douglas Public Service Corp. v. Gaspard,* 225 La. 972, 74 So. 2d 182 (1954); *Wisconsin Employment Relations Board v. Automobile Workers,* 36 L.R.R.M. 2109 (Wisc. 1955); *Driver's Union v. Jax Beer Co.,* 36 L.R.R.M. 2188 (Tex. Civ. App. 1955); *McQuay, Inc. v. Automobile Workers,* 36 L.R.R.M. 2446 (Minn. 1955).

In regard to question 2 *supra,* where no violence is imminent and the case falls within the purview of the *Garner* rule but a hyper-provincial tribunal chooses to ignore its lack of jurisdiction the litigants can, of

course, traverse the traditional appeal route to the highest court in the land. But can they obtain a federal court injunction pende lite? *In Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511 (1955), the Court answered this question in the negative by sustaining a Federal District Court's disinclination to enjoin an Ohio court where the *Garner* doctrine was clearly applicable. The court noted what has never been questioned: Federal courts are here as barren of subject matter jurisdiction as any state court—hence the rule is inapplicable which states that federal judges may, in conjunction with exercise of their own jurisdiction, enjoin their judicial counterparts on the state level. See *Capital Service, Inc. v. NLRB*, 347 U. S. 501 (1954). The Court held in the *Richman* case that relief could be had only at the behest of the NLRB but sought to assuage the losers by hinting that the employer's original action in seeking the state injunction might of itself be an unfair labor practice. *In the Matter of W. T. Carter and Brother*, 90 N.L.R.B. 2020 (1950).

The problem of state judicial power where the NLRB has declined jurisdiction of a particular dispute, as raised in question 1. *supra*, is more difficult of solution. One may argue with some force that state power ought, theoretically, to be denied despite a prior refusal of the Board to assert its power. The argument would be something like this: Once stranger picketing ceases to be conceived of as outside the pale of the National Labor Relations Act it must, of logical necessity, be categorized as either protected or prohibited. As such it can only be dealt with by the NLRB. Therefore inaction by the Board is not pertinent to the jurisdiction problem. The chief difficulty with such a solution is that a recent Federal District Court decision rejects it. In *N.L.R.B. v. Swift and Co.*, 36 L.R.R.M. 2087 (U.S. Dist. Ct. East. Dist. Mo. 1955) the Board was denied an injunction against state action in a case involving peaceful stranger picketing. The reason given for the refusal was the validity of state jurisdiction which was thought to obtain since the Board had previously refused to hear the employer's complaint. This decision assumes two things: 1. The Board's refusal to act indicates a neutral position. 2. In the absence of Federal action the states must be permitted to assert their power. In answer to the first contention it would seem patent that the Board's attempt to enjoin state action shows that it's original refusal to entertain the employer's grievance constituted a tacit sanction of the union's activity. Even were this not true, unformity of result is not obtained by permitting state action in the absence of NLRB activity. The rationale of the *Garner* case was uniformity of result; if the Board wishes to sanction stranger picketing then state courts ought to be compelled to step aside. It is submitted that the *Swift* opinion is out of harmony with Supreme Court policy and ought not be permitted to stand.

Indeed, the Court has already denied, on *Garner* theory, state jurisdiction under similar circumstances in the related field of strike

policy. *Weber v. Anheuser Busch, Inc.*, 348 U.S. 468 (1955). There the NLRB declining to classify a strike as an unfair labor practice under section 8 (b) (4) (D) of the Taft Hartley Act, accordingly dismissed the action; the Supreme Court struck down a subsequent state injunction since, said the high court, the NLRB *might have found the* union activity either protected or prohibited under another section of the act. (emphasis supplied) Such a disposition is tantamount to holding that if in fact a litigant's practices fall within the confines of the federal act, the state has no jurisdiction; action or inaction by the NLRB is therefore irrelevant.

This much, then, would appear true: Where the issue is stranger picketing of an interstate business and the essence of the complaint appears to be union conduct amounting to an unfair labor practice, sole and exclusive jurisdiction over the subject matter rests with the NLRB. To this we need add but one caveat *viz:* States may still proscribe violence and property damage. Such a national policy may be thought, by some states' rights advocates, to be unsatisfactory; but this is not the first instance in which parochial policy has been superseded in the name of interstate considerations.

William Franklin Sherman

PUNITIVE DAMAGES—FRAUD IN THE SALE OF REAL ESTATE

Plaintiff when examining defendant's house and property with a view to purchase inquired as to water supply. Defendant assured him of an abundant supply of water. After plaintiff occupied the house for approximately thirty days, he found the well did not have sufficient capacity and had to drill another well. There was some evidence that defendant previously had trouble with the water supply and wished to sell the house because of that difficulty. The issue of compensatory and punitive damages for fraud was submitted to the jury and a general verdict was returned for plaintiff. On appeal, *held* affirmed. The jury may award punitive damages in a tort action based upon sale of real property where the sale was induced by fraud which was motivated by "actual malice." *Waters v. Novak*, 94 Ohio App. 347, 115 N.E. 2d 420 (1953).

The principle that only actual damages are allowed for breach of contract unless the law provides for the award of punitive damages was relied upon by the dissenting judge in the principal case. *Refrigeration and Air Conditioning Institute v. Rine*, 80 Ohio App. 317, 75 N.E. 2d 473 (1946). The dissenting judge felt that even though the plaintiff's petition sounded in tort, the operative facts sounded in contract, and Ohio has held that there can be no allowance of punitive damages in an action brought for breach of contract. *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922). The *Ketcham* case was based upon contract and a malicious breach alleged. The court there said, "This malice does not

change the action from one ex contractu to one ex delicto." This follows the general rule that although the facts may reveal a tortious act, if the action proceeds on a contract theory, no punitive damages are allowable. *North v. Johnson*, 58 Minn. 242, 59 N.W. 1012 (1894); 17 C. J., *Damages* §272.

However, in the principal case, the plaintiff's cause of action did not arise out of the deed, but out of the fraud between the parties before the deed was executed. *Taylor v. Leith*, 26 Ohio St. 428 (1875). The plaintiff could not have shown the vendor's material misrepresentation to vary the terms of the written contract or deed, but only to show that it induced the plaintiff to enter into the contract. *Drew v. Christopher Construction Co.*, 140 Ohio St. 1, 41 N.E. 2d 1018 (1942). A tort action has thus been permitted against the seller of merchandise and punitive damages allowed where the sale was induced by fraud. *Saberton v. Greenwald*, 146 Ohio St. 414, 66 N.E. 2d 224 (1946). Thus the rule has evolved in Ohio that punitive damages may be recovered for a tort committed in connection with, but independently of, the breach of contract. *Saberton v. Greenwald, supra; Armstrong v. Feldhaus, Sr.*, 87 Ohio App. 75, 93 N.E. 2d 776 (1950).

Other jurisdictions have expressed the rule similarly that punitive damages may be recovered in a tort action even though the tort incidentally involves a breach of contract. *Haigler v. Donnelly*, 18 Cal. 2d 674, 117 P. 2d 331 (1941). For example, turning back the speedometer on a secondhand car before selling it was held to be fraud for which punitive damages may be awarded. *Jones v. West Side Buick Auto Co.*, 231 Mo. App. 187, 93 S.W. 2d 1083 (1936). Some jurisdictions have stated the rule even more broadly so that punitive damages may be recovered for breach of contract where the breach is attended by such gross negligence or willful wrong as to amount to a tort, *D. L. Fair Lumber Co. v. Weems*, 196 Miss. 201, 16 So. 2d 770 (1944); noted 151 A.L.R. 631 (1944); or where a fraudulent act accompanies the breach, *Davis & Clanton v. C. I. T. Corp.*, 190 S.C. 151, 2 S.E. 2d 382 (1939); *Prince v. State Mutual Life Insurance Co.*, 77 S.C. 187 55 S.E. 766 (1907).

The principal case does not relax the existing rule in Ohio that "bare fraud" without actual malice is insufficient for punitive damages, *Cable v. Bowlus*, 21 O.C.C. 53, 11 O.C.D. 526, aff'd without opinion 69 Ohio St. 563, 70 N.E. 1115 (1903); 13 O. Jur., *Damages* §139. The principal case does, however, add to the existing law the idea that punitive damages can be awarded for fraudulent sale of real property when the action proceeds in tort. The case offers a warning, also. It points up the fact that a petition should be drawn clearly to sound in tort if punitive damages are to be requested; otherwise, the court may say breach of contract and only compensatory damages are possible.

William F. McKee

RIGHT OF PRESS TO BE PRESENT DURING CRIMINAL TRIAL

On February 11, 1955 respondent, Judge of the Common Pleas Court, Cuyahoga County was conducting the trial of State v. Baker et al., on an indictment of pandering. Before cross-examination of a state's witness, counsel for the accused requested that his client's right to a public trial be waived during the remainder of the witness' testimony because counsel would "better be able to compel the witness to tell the truth" if she could be examined in private. Respondent then excluded the general public, including newsmen employed by the relators, from the courtroom during the remainder of this witness' testimony. Within this interval only the parties directly concerned with the case remained. A record of this testimony was made available to the public as soon as possible.

Relators, several Cleveland newspaper publishers, immediately sought a writ of prohibition in the court of appeals to forbid respondent's future exclusion of any of relators' reporters as well as the general public from the Cuyahoga County criminal court and to strike from the record the order issued by respondent on February 11. *Held.* Granted that the guarantee of a public trial is for the accused's benefit, such right does not guarantee the accused a private trial as against the public whose interests are equally involved in the judicious administration of the law. Writ allowed. *E. W. Scripps Co. et al. v. Parker Fulton,* 97 Ohio App. 125 N.E. 2nd 896 (1955).

Not only is this a case of first impression in Ohio, it is also the second reported decision on this subject in the United States. The first, *United Press Associations et al. v. Francis L. Valente* 308 N. Y. 71 123 N.E. 2nd 777, decided only two months before *Scripps Co. v. Fulton, supra* reached a result contra to the Ohio case. The cases cannot be distinguished on the facts or on the status of the two states. True there are factual differences in the cases but actually these differences would seem to present a much stronger argument for the press' position in *U.P. Associations v. Valente supra* than in *Scripps v. Fulton supra.* In the former case, the judge excluded the public and press from the trial on his own motion on the ground that public decency compelled his action. The accused not only did not waive his right to a public trial but later secured a reversal of his first trial because of the sweeping exclusion. *People v. Jelke,* 308 N.Y. 56, 123 N.E. 2d 769 (1955). Further the record of the Jelke trial was never available to the public or press. However, the New York Court denied the press associations' application to restrain Valente from enforcing his order on the ground that this action did not deprive the press of any right of which they could complain.

There are differences also in the statutory bases of the public trial guarantee in New York and Ohio. Article I section 16 of the Ohio Constitution provides that "all courts shall be open" and Article I sec-

tion 10 grants the accused the right of public trial. In New York there is no constitutional protection but public trial is granted the accused by N. Y. CODE CRIM. PROC. §8 and N. Y. CIVIL RIGHTS LAW §12 while the more broadly worded judiciary law section 4 declares that with certain exceptions—divorce upon adultery, seduction etc.—"the sittings of every court within this state shall be public and every citizen may freely attend the same." Ohio law contains no exceptions such as those found in New York; hence if *U.P. Associations v. Valente supra* had been predicated on these exceptions, as it might possibly have been, *see* concurring opinion Desmond J., reconciliation of the two cases would be much easier. But the majority opinion in *U.P. Associations v. Valente, supra* expressly disavows reliance on the exception clause of section 4.

If the contradictory results of the two cases cannot be ascribed to factual or statutory differences, neither can they be explained by diverging views on the scope of the 1st Amendment. The New York court was unanimous in excluding any application of freedom of speech or press to their case and the majority in *Scripps v. Fulton, supra* uses much the same language. To understand these two cases then it is necessary to look beyond facts, statutes or constitutions and to examine the varying concepts of the scope of the public trial guarantee, first as they concern the right of the accused and then as they concern the right if any, of the public, 156 A.L.R. 257, 14 Am. Juris §139-143.

There are a number of reasons for the long standing disagreement of the courts as to the meaning of the guarantee. The fact that the origin of the protection is obscure is partially responsible. See, *The Accused's Right To a Public Trial* 49 COLUM. L. REV. 111 (1949), Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381 (1932). Then too, although the supreme court has held the due process clause of the 14th Amendment to include the right of public trial for the accused, *In Re Oliver*, 333 U.S. 257 (1947), it has not yet had an opportunity to give an analysis of the exact extent of the guarantee. The state courts therefore are primarily concerned with the interpretation of their own constitutions and statutes. And, although all states except two make some provision for the guarantee within their laws, by implication or otherwise, the bare language of the provisions is of little help in resolving the argument.

Happily, however, there are a few areas where all courts agree. A public trial for the accused does not mean that the courtroom must always be open to all who wish to attend. The general public need only be admitted up to the limited capacity of the courtroom. *Commonwealth v. Trinkle*, 294 Pa. 564, 124 A&L 191 (1924); *State v. Hensley* 75 Ohio St. 255, 263, 79 N.E. 462,463 (1906); 3 WIGMORE, EVIDENCE §1835 (2d ed. 1923). To keep order a judge may exclude unruly spectators, *People v. Hartman*, 103 Cal. 242, 37 Pac. 153 (1894). (If there is a threat of rescue of the accused, ticketed admission to the courtroom is permissible. *Pierpont v. State*, 49 Ohio App. 77, 195 N.E. 264 (1934),

petition in error dismissed 128 Ohio St. 572, 192 N.E. 740 (1934).) In obscene cases the court is generally free to exclude the young, *State v. Hensley, supra.* See COOLEY, CONSTITUTIONAL LIMITATIONS, 380 (5th ed.). Some states even have statutes expressly allowing such exclusion. See 44 COLUM. L. REV. 112. Where a child witness is unable to testify clearly before an audience, the court may temporarily exclude the spectators. *Hogan v. State,* 191 Ark. 437, 86 S.W. 2nd 931 (1935).

On the other hand, most courts agree that a public trial for the accused means the presence of someone other than court officers, parties, counsel, witnesses, jurors and friends. *People v. Hartman,* supra, *People* v. *Jelke, supra.* The conflict between the courts arises in deciding how many spectators must be present and how they are to be selected. Those courts more scrupulous in protecting the accused's right define "public" trial broadly as one in which the courtroom is to be kept open with all classes of spectators admitted. *State v. Hensley,* supra. If the accused is not given this kind of trial, these courts regard his right as violated even though no prejudice may be shown, *Fields v. State,* 4 N.P. (N.S.) 401, 17 O.D. 16 (1906) and may even decide his right has not be waived although he failed to object to the exclusion in the court below. *State v. Hensley, supra.*

Other courts are less vigorous in interpreting the accused's right. To them a "public" trial is simply one which is not secret and the requirement is satisfied when specified classes of spectators are admitted, although the general public is excluded. *Robertson v. State,* 64 Fla. 437, 60 So. 118 (1912), *People v. Hall,* 51 App. Div. 75, 64 N.Y.S. 433. (1900) For reversal the accused must show actual prejudice by the exclusion. *State v. Nyphus,* 19 N.D. 326, 12 N.W. 71 (1909) and the right may be waived by failure to make timely objection. *State v. Smith,* 90 Utah 482, 62 P. 2nd 110 (1936). People v. Miller, 258 N.Y. 54, 177 N.E. 306 (1931). Moreover in many of these states stautes expressly allow the judge to bar spectators in certain types of salacious cases. N.Y. JUDICIARY LAW §4.

Of course, individual decisions will always be influenced by the reasons for the exclusion, its duration and the extent of the exclusion. However, an analysis of existing cases would seem to place the courts of Ohio among those more scrupulous and the courts of New York among those less concerned with the guarantee, although much of the language of *People v. Jelke, supra* may reflect a trend toward a broader interpretation.

Those courts which place more value on the right of the accused are also more prone to recognize a corresponding right in the public to be admitted. *People v. Hartman, supra.* In contrast, jurisdictions which give the accused's right less importance deny the public any interest beyond that which can be safeguarded by the accused. *Moore v. State* 151 Ga. 648, 108 S.E. 47 (1921). Ironically one result of this recognition of a right in the public is to decrease the actual potentcy of the accused's

protection as he may only waive his own and not the public's right. The guarantee becomes affirmative only.

Although much language can be found affirming the right of the public to be present, *State v. Keeler*, 52 Mont. 255, 156 Pac. 1080 (1916), *State v. Hansley*, *supra*, *Colletti v. State*, 12 Ohio App. 104 (1919), suits by spectators have been understandably rare. *State v. Copp*, 15 N.H. 212 (1844)—expulsion of spectator justified on ground of his being unruly, *Williamson v. Lucy*, 29 At. 943, (1893)—spectator not allowed damages against the excluding justice. And until the two cases under discussion, the press, if excluded, has also remained silent. Ordinarily, of course, the press has not been excluded except for personal misconduct. 6 TEMP. L. Q. 391 (1949), supra. Even in jurisdictions taking a less vigorous view of the public trial guarantee exclusion of the press has only occurred incidental to exclusion of all spectators and no specific mention of the press has been made. *Robertson v. State*, 64 Fla. 437, 60 So. 118 (1912). *But cf. People v. Hall*, *supra*. Moreover, some jurisdictions have argued further that the presence of the press should be especially favored as tending to make the trial more public than the presence of idle spectators. *Keddington v. State*, 19 Ariz. 457, 172 Pac. 273 (1918). Although opinions differ as to the merits of permitting the press to "stand-in" for the public, certainly no court before *U.P. Associations v. Valente*, *supra* has gone so far as to affirmatively exclude the press. See CROSS, THE PEOPLE'S RIGHT TO KNOW, 155-79 (1953), 35 MICH. L. REV. 476 (1937). Until *U.P. Associations v. Valente*, *supra*, however, the courts had not been looking at the right of the press to be present but only at the right of the accused to have the press present. When the question asked is the public's right to be present, the basic split between the courts as to the scope of the public trial guarantee inevitably produces different answers.

Although the New York court in *People v. Jelke*, *supra* has taken a long step away from the narrowed view of the right of the accused in *People v. Hall*, it still cannot bring itself to recognize a similar right in the public. However the vigorous dissent of Froessel, J. and the concurring opinion of Desmond, J. may hint at a future about face in New York. But Ohio with its more exacting approach to the public trial guarantee has now clearly recognized that the public, albeit the press, has as important a stake in the public trial as the accused.

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