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Recent Cases

RECENT CASES

EVIDENCE—TESTIMONY OF A JUROR TO IMPEACH A VERDICT

State v. Kociolek is one of four recent New Jersey Supreme Court four to three decisions in which no dissenting opinion is reported.[1] The case, which permitted an affidavit of a juror as to the "occurrence of an event" to upset the verdict, presents a cogent summary of New Jersey law on the subject of the oversimplified "rule" that a juror may not impeach the verdict.[2]

Two weeks before the trial of the defendant for murder, the jury panel was in attendance in a court room where many defendants were being arraigned on criminal charges.[3] One of the men then arraigned, on an indictment for "robbery and assault with intent to kill", was Kociolek. The offense there charged was alleged to have occurred two days before the murder of one Edwards—the crime for which Kociolek was to be tried in the instant case. That indictment had "no connection whatever with the Edwards murder" and could not have been shown at the murder trial for the purpose of showing that the defendant, "being under indictment for allegedly committing another crime of a like nature, would be likely to commit the Edwards murder," or "even for the purpose of affecting defendant's credibility when he testified in his own behalf."[4]

Trial Judge Leonard was aware of the existence of the prior alleged offense and its publicity in connection with Kociolek's murder trial. Judge Leonard's charge to the jury repeatedly stated that the jury must determine the murder charge just from the facts presented at the trial: "You will be unjust in every aspect of the case if you do not determine it solely upon the facts and upon nothing else . . . ."[5] The supreme court remarked that "the trial judge here was especially vigilant to protect this defendant from that mishap."

Notwithstanding the judge's admonitions, the jury, after they had reached the verdict of guilty but before they were able to agree on the penalty to be imposed, recalled the indictment and plea entered by Kociolek two weeks before—although they incorrectly thought it had been for attrocious assault and battery. Four members who had been arguing for a life sentence then sided with the remainder of the jury and returned the verdict without a recommenda-

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[1] 20 N. J. 92, 118 A.2d 812 (1955); the other three cases being Buccheri v. Montgomery Ward & Co., 118 A.2d 21 (1955) (workmens' compensation—full faith and credit); Application of Reis, 119 A.2d 16 (N. J. 1955) (proceeding on petition for summary investigation into affairs of township); *In re* Blake's Will, 120 A.2d 745 (N. J. 1956) (will contest—presumptions).

[2] The court discusses the history of the rule since first set forth by Lord Mansfield in Vaise v. Delaval, 1 T.R. 11 (K.B. 1785) in which jurors' affidavits of a decision based upon chance were rejected.

[3] Evidently the practice of having the jury panel in the courtroom where criminal pleas were being entered had been adopted because of the lack of space in the courthouse. On oral argument the court directed the prosecutor to see that such practice is discontinued.

[4] State v. Kociolek, *supra,* 118 A.2d at 814.

[5] *Ibid.*

tion of life imprisonment—requiring a death sentence in New Jersey. Defense counsel presented a motion for a new trial based upon an affidavit of a juror as to the extraneous evidence which had been considered and its effect upon the verdict. The trial judge denied the motion on the ground that the affidavit was inadmissible.

On appeal to the supreme court the state argued that testimony of a juror could not be received to upset the verdict. It then became relevant to consider to what extent testimony of jurors had been admitted in New Jersey; the most complete statement in this field had been written by Mr. Justice Brennan while a judge of the superior court. *Palestroni v. Jacobs*[6] involved a civil action on a building contract. After retiring for their deliberations the jurors noticed the word "wainscot" in the contract, requested a dictionary from the court, and consulted it to ascertain the meaning of that word. Depositions were taken of the jurors as to whether or not they had consulted the dictionary and also whether the verdict had been influenced by the definition. As to the latter point it was "plain the depositions . . . . were wholly incompetent."[7] The jurors' testimony was permitted, however, to show the objective fact that the dictionary had been consulted. The court relied upon and discussed previous cases involving dictionaries.[8]

The *Palestroni* and *Kociolek* decisions raise serious doubts as to the value of old New Jersey cases holding jurors' testimony inadmissible to show that the verdict was reached by chance.[9] Where testimony has been rejected as involving the jurors' mental processes, however, no change is contemplated by the instant case. The reason for continuing exclusion in such cases is succinctly stated by the court:[10]

> "The better reasoned decisions support the exclusion of jurors' testimony as to their mental processes, not upon the discredited basis of the policies against self-stultification and avoidance of jury tampering, perjury or other fraudulent practices, but upon the sounder ground that, being personal to each juror, the working of the mind of any of them cannot be subjected to the test of other testimony, and therefore that such testimony should not be received to overthrow the verdict to which all assented."

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[6] 10 N.J. Super. 266, 77 A.2d 183 (1950).

[7] The same conclusion was reached in the instant case, 118 A.2d at 818, wherein the court stated: "The statements therein as to the actual effect of the consideration of the indictment upon the jurors' minds must, however, be rejected, and we have neither quoted such statements nor relied upon them in reaching our conclusion."

[8] *In re* Phelan, 126 N.J.L. 410, 19 A.2d 792 (1941) ("undue influence"); In re Collins Will, 18 N.J. Misc. 492, 15 A.2d 98 (1940) ("undue influence"); Long v. Payne, 198 App. Div. 667, 190 N.Y.S. 803 (1921) ("assume").

[9] Brewster v. Thompson, 1 N.J.L. 32 (Sup. Ct. 1790), Kennedy v. Kennedy, 18 N.J.L. 450 (Sup. Ct. 1842); in regard to these cases Mr. Justice Brennan refers to "implacably" applying the rule of exclusion.

[10] State v. Kociolek, *supra*, 118 A.2d at 814; for examples of such cases involving mental processes see Bragg v. King, 104 N.J.L. 4, 139 Atl. 884 (1928) (misunderstanding of court's charge); Marconi v. MacElliott, 8 N.J. Misc. 69, 148 Atl. 392 (1928) (misinterpretation of exhibit); *cf.* Lindauer v. Teeter, 41 N.J.L. 255 (1879).

In reaching its decision the supreme court did not rely alone upon New Jersey precedents, but quoted extensively from the opinion of Chief Justice Fuller of the United States Supreme Court in *Mattox v. United States*[11] and looked to other jurisdictions for modern statements on Lord Mansfield's old rule.[12] The role of the Uniform Rules of Evidence is also important because of the consideration of them by the state supreme court[13] and by committees of the legislature and the state bar association appointed to consider revision of the rules of evidence.[14] Mr. Justice Brennan cites Uniform Rules 41 and 44 with the comment that they are "consistent with the holding in the *Palestroni* case."[15]

The importance of the *Kociolek* decision does not lie in that it makes any particular inroads in the much discussed rule of exclusion, for the probability is that it merely extends the principles underlying the decisions in civil cases to the criminal field. The difficulty, however, is that one cannot be certain whether the decision indicates possible changes in existing law. To what extent may jurors' testimony be received in future cases? More important, what standard is to be applied in determining whether a particular affidavit concerns "overt acts"[16] or "mental processes"? Professor Wigmore has referred to this problem as "an arguable question"[17] and the existence of a four to three decision does not help the situation. Without a dissenting opinion to assist in explaining the closeness of the vote, it is difficult to know what slight change of facts might shift the balance of power. Because one must speculate on the reasons for the closeness of the decision the following factors are presented, with the suggestion that a change of any one might result in rejection of a juror's testimony in a future case.[18]

First, the state did not challenge the truth of the contents of the affidavit. The entire contention of the prosecutor was that the affidavit was inadmissible. On oral argument, in answer to a question from the court, the prosecutor admitted that if the affidavit was correct, the defendant had been prejudiced. Thus, in addition to what Mr. Justice Brennan denominates "prejudice inherent on

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11 146 U.S. 140 (1892).

12 See for example: State v. McCormick, 57 Kan. 440, 46 Pac. 777 (1896), where one juror had stated during deliberations that defendant had been convicted in former trial; Richards v. State, 36 Neb. 17, 53 N.W. 1027 (1893), during deliberations in rape case two jurors had stated that defendant had "ruined other girls" and should be convicted on general principles; and see 20 A.L.R. 1187; 67 A.L.R. 1523; 39 AM. JUR., *New Trial*, § 81 (1942).

13 See REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (May, 1955).

14 79 N.J.L.J. 97 (Legislative commission); 79 N.J.L.J. 36 (State Bar Association committee).

15 See REPORT, note 13 *supra*, at pp. 88, 89, 91-93.

16 State v. Kociolek, *supra*, 118 A.2d at 816, citing Perry v. Bailey, 12 Kan. 539, 544 (1874).

17 8 WIGMORE, EVIDENCE § 2353 (3rd ed. 1940): "Whether a given piece of conduct during retirement shall be classed as a formal and fatal irregularity (which may be proved) or as an erroneous ground of the verdict (which may not be proved) is often an arguable question . . . ; but that is very different from the question whether, conceding that it is a fatal irregularity, the juror alone is to be prohibited from proving it."

18 References to oral argument are made from notes taken by this author at the hearing, November 8, 1955, and he accepts responsibility for their accuracy.

the face of the matter," there was an admission of prejudice by the state. Will a different result be reached if the matter of prejudice is not admitted?

Second, the court states: "It should be remarked that in the instant case the event which set in motion the chain of events . . . . occurred outside the jury room . . .", and the presence of the jury panel in the courtroom when the defendant's plea was taken "was confirmed in depositions of court officers also filed in support of the motion for a new trial." In the *Palestroni*[19] case there was evidence, apart from jurors' testimony, that the dictionary had been delivered to the jury. It is submitted that both decisions, apart from dicta, leave undecided the question of a possible different result where the "condition or occurrence" takes place wholly within the jury room—notwithstanding the court's reference to proposed Uniform Rule 44.[20]

The third factor concerns another admission by the prosecutor which is not included in the reported opinion. The state asserted that the jury's discussion of the prior indictment was the operation of "mental processes" rather than an "objective event". The author of the majority opinion asked the prosecutor if the result would be any different if, instead of a remark by a juror calling attention to the prior indictment, the indictment itself (the actual sheet of paper with plea endorsed) had found its way to the jury room. The state conceded that the tangible document would be an "existing condition", thus permitting testimony by a juror to the fact that it was on the jury room table. In view of the fact that Kociolek was equally prejudiced whether a tangible indictment was on the table or its existence recalled verbally by a juror, it was a logical step for the court to allow the affidavit. Thus, in determining whether words of a juror are "objective" or "mental processes", it may be relevent to consider whether the words could have taken the form of a tangible document as the indictment in this case. Proponents of the rule of exclusion may well argue that admission of jurors' testimony as to what was said in the jury room should be limited to cases where the words represent a tangible document which itself, if present, would be admissible and prejudicial.

On the surface the problem of determining admissibility would seem to involve a balancing of conflicting policies: (1) excluding juror testimony in order to uphold the validity of verdicts and to make the verdict as uttered the final determination;[21] and (2) the policy of providing justice in each individual case. As a practical matter these two policies are brought into conflict in particular cases, especially where prejudice is patent and conceded. In theory,

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19 See note 6 *supra.*

20 State v. Kociolek, *supra,* 118 A.2d at 816, 818; and see Falknor, *Extrinsic Policies Affecting Admissibility,* 10 RUTG. L. REV. 574, 598, where Professor Falknor, writing for Rutgers' excellent *Symposium on the Uniform Rules of Evidence,* comments upon Rules 41 and 44 and concludes: "The Uniform Rules thus fall short of sanctioning the admissibility of jurors' testimony as to misconduct, either within or without the jury room; the question is to be resolved independently of the *Rules.*"

21 8 WIGMORE, EVIDENCE § 2353 (3rd ed. 1940).

however, it is not until the testimony has been determined to be admissible as within the concept of an "objective event" that the question of prejudice arises. Admissibility and prejudice are separate, distinct questions. Strict logic, therefore, shows that the two policies cannot conflict; the second cannot arise until the first has been determined. Nevertheless, it is apparent that the majority in the instant case pragmatically answered the second question before the first, and from the following excerpt it would appear that the existence of prejudice was used as a partial justification for receiving the affidavit:[22]

> ". . . but receiving their evidence as to the existence of the condition or the happening of the event, *particularly* when the consequences are governed according to whether capacity for adverse prejudice inheres in the condition or event itself supplies evidence which can be put to the test of other testimony (and thus sound policy is satisfied) and at the same time the evidence can serve to avert, as here, a *grave miscarriage of justice,* which it is certainly the *first duty of a court of conscience* to prevent if at all possible." (Emphasis added.)

It appears, therefore, that although there is a two-step process involved in determining admissibility and prejudice, the court felt that only by considering the steps simultaneously, or in inverse order, might it fulfill its "first duty". This is seen further in the court's reference to the fact that the prior indictment would have been inadmissible at the trial and "if such extraneous prejudicial matter was erroneously admitted in evidence at the trial," it would have caused the granting of a new trial. Thus the law "cannot tolerate the defeat of justice which would result from the indefensible exclusion of [a] juror's testimony as to the incident . . . ."[23] It is submitted that the fact that the indictment could not have been introduced at the trial does not affect the objective character of the juror's testimony and does not provide a standard for determining admissibility. The dictionary definition of "wainscot" in the *Palestroni* case could have been introduced at that trial; it was the fact that it had not been so introduced—and thus counsel had had no chance to rebut or explain the particular definition—that made prejudice inhere in the jury's consideration of the definition in closed session.[24] It would appear unfortunate that Mr. Justice Brennan introduced this consideration as additional justification for the decision. It would seem to say that the standard for determining admissibility would be prejudice, or the "defeat of justice", but such standard would open the judicial door to receipt of jurors' testimony in the unsound reasoning, misunderstanding of the charge, and misinterpretation of exhibit cases

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22 State v. Kociolek, *supra,* 118 A.2d at 816; it is surmised that the minority considered the questions in the logical order. Mr. Justice Wachenfeld, a dissenting member of the court, had asked the prosecutor how one may show that the extraneous matter was considered if not by the testimony of a juror. To the answer that in this case there was no other way, Justice Wachenfeld replied to the effect that the problem became difficult for a court of justice because prejudice was conceded.

23 State v. Kociolek, *supra,* 118 A.2d at 818.

24 See note 6 *supra.*

which also involve prejudice to a party.[25] When the decision is read as a whole, however, it seems apparent that "prejudice" is not offered as a test.

The difficulties which may be encountered in applying the decision in the *Kociolek* case to future fact situations point up the need for codification of the rules of evidence in New Jersey. In this respect it would seem important for the various committees studying such revision to note that the Uniform Rules of Evidence, while providing the "objective events" and "mental processes" distinctions, provide no standard for determining the difficult problem of classification.

It is submitted that the court has not opened the door to the proverbial "flood of litigation" and impeachment of jury verdicts, as may be feared by proponents of a strict rule of exclusion. Rather, the court has applied existing rules of permitting jurors' testimony as to objective events to the field of criminal law. The concept of a "court of conscience" would appear to be more compelling where a life is at stake than where there is a civil dispute and the jury seeks to define "wainscot".

HARMAN R. CLARK, JR.

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[25] See cases in note 10 *supra.*

TORTS—SLANDER PER SE—CHARGE OF COMMUNISM

In 1953 on the verdict of a jury, judgment was rendered adversely to the defendant, a school board director, Methodist, and prominent citizen of Myersdale. Plaintiff, a medical doctor of the Jewish faith and of foreign birth, was also a prominent citizen of Myersdale. Plaintiff complained that on three separate public occasions the defendant accused the plaintiff of being a communist. Plaintiff contended that according to a Pennsylvania statute the defendant's charges imputed a crime punishable by imprisonment and as such constituted slander per se. Defendant urged that the statute made only membership in the Communist Party a crime and that the Pennsylvania Supreme Court had set a precedent which said that to call a man a communist was not to defame him. The Pennsylvania Supreme Court, on the defendant's appeal, affirmed the judgment of the lower court for the plaintiff.[1]

The court disposed of the defendant's contentions by holding that to charge one with being a communist could be for no other purpose than to leave in the minds of people the impression that the accused was a member of the Communist Party.[2] Secondly, the Supreme Court of Pennsylvania never decided that it was not defamatory to call a person a communist. The court's statement to that effect had been merely obiter dicta,[3] made at a time when the public mind had not yet discerned that communism was the driving force behind Russian imperialism and terrorism.[4]

A brief summary of the judicial and legislative action which preceded the court's decision will be of help in understanding how the court was led to decide as it did in the principal case. In 1950 the court was undecided as to whether the charge of communism was defamatory. It held that words which implied that the plaintiff was sympathetic toward communism were not defamatory and by way of obiter dicta stated that to charge a man with being a communist or socialist was not defamatory.[5] In so doing the court reversed both the trial court and the Superior Court.[6] There was a dissenting opinion which was well supported by holdings which showed that courts in other jurisdictions were not in accord.[7] In 1949 a federal district court recognized that it

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1 Solosko v. Paxton, 119 A.2d 230 (Pa. 1956).

2 Americans for Democratic Action v. Meade, 72 Pa. D. & C. 306 (1950); Mencher v. Chesley, 297 N.Y. 94, 75 N.E. 2d 257 (1947).

3 McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 514, 72 A.2d 780, 784 (1950).

4 Although the court used this to distinguish the *Solosko* case from the *McAndrew* case, it is felt that sentiment in 1946 and the period thereafter was none too favorable toward Communism. See Americans for Democratic Action v. Meade, 72 Pa. D. & C. 306, 313 (1950).

5 McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 514, 72 A.2d 780, 784 (1950).

6 The opinion of the Superior Court is found in 165 Pa. Super. 276, 67 A.2d 730 (1949).

7 McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 519, 72 A.2d 780 (1950); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257, 259 (1947); Grant v. Reader's Digest Ass'n., Inc., 151 F.2d 733, 735 (2d Cir. 1945); Spanel v. Pegler, 160 F.2d 619, 621 (7th Cir. 1947). Also see Utah State Farm Bureau Federation v. National Farmers Union Service Corp., 198 F.2d 20 (10th Cir. 1952), 33 A.L.R. 2d 1186 (1952).

was slander per se to charge a government economist with being a communist.[8] At this time an Act of Congress made it a crime to knowingly or wilfully advocate the overthrow or destruction of the United States government by force or violence or to conspire to do so.[9] The United States Supreme Court on December 4, 1950, took judicial notice that the Communist Party advocated the violent overthrow of the United States government.[10] In light of these events it appears that the Pennsylvania Supreme Court ignored existing social norms[11] and judicial opinion to render a decision which had little validity. Acknowledging the serious nature of the charge of being a communist, in 1950 a Pennsylvania trial court held that the charge was capable of defamatory meaning.[12] The Pennsylvania Supreme Court in 1951 took judicial notice of the fact that communism as a political movement was dedicated to the overthrow of the United States government and the government of each state by force and violence.[13] On December 21, 1951, the Pennsylvania Legislature, after considering the dire threat of communism to democratic government, the recent tendency of courts to recognize that threat, and the general public sentiment against communism, passed an act which made membership in the Communist Party a felony, punishable by twenty years imprisonment or ten thousand dollars fine or both.[14] In 1952 the Pennsylvania Supreme Court shifted ground and recognized that the charge of being a communist was libelous per se but found for the defendant because the accusation was privileged.[15] When the court decided the principal case there was little doubt as to the general public distrust and hatred of communism or the consequences for any one who should be so unfortunate to be classified as a communist.

The Florida Supreme Court in 1953 found that the charge of communism could do such harm to one's reputation that it was held slander per se.[16] The Florida Statutes described the Communist Party as a conspiracy organized to overthrow democratic government. However, the statute did not make membership in the party a crime. It simply required a loyalty oath by public officials.[17] In spite of this, the court held that to call one a communist was synonymous with calling one a traitor and constituted slander per se.

Later in 1953 the Missouri Supreme Court found that it was slander per

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8 Remington v. Bentley, 88 F.Supp. 166 (S.D.N.Y. 1949).
9 Smith Act, 54 STAT. 671 (1948), 18 U.S.C. § 2385 (1952).
10 Dennis v. United States, 341 U.S. 494 (1950).
11 42 COLUM. L. REV. 1282. REISMAN, DEMOCRACY AND DEFAMATION 1304, indicates that as early as 1940 polls revealed that Communism was universally detested in the United States.
12 Americans for Democratic Action v. Meade, 72 Pa. D. & C. 306 (1950).
13 Milasinovich v. Serbian Progressive Club, Inc., 369 Pa. 26, 84 A.2d 571 (1951); Com. v. Truitt, 369 Pa. 72, 81, 91, 84 A.2d 571 (1951).
14 PA. STAT. ANN. tit. 18, § 3811 (Purdon 1955).
15 Matson v. Margiotti, 371 Pa. 188, (1952).
16 Joopanenko v. Gavagan, 67 So. 2d 434 (Fla. 1953).
17 Joopanenko v. Gavagan, 67 So. 2d 434, 438 (Fla. 1953).

se to accuse a person of being a communist even though the state had no statute making it a felony to be a member of the Party.[18]

The court held that the federal statutes made it a felony to advocate the overthrow of the United States government; and since the federal courts recognized that the Communist Party supported such doctrines, then Missouri would recognize that words charging or imputing the commission of a crime under the laws of another jurisdiction would be slander per se.[19]

The New York and Ohio courts were not as resourceful as those of Florida and Missouri. Both New York and Ohio recognized that the charge of communism submitted the accused to public hatred, ridicule and contempt by the great majority of American citizens; yet they held that without a statute making it a felony to be a member of the Communist Party, the accused had no remedy in slander unless he alleged special damages.[20]

The foregoing facts might make it appear that an appeal for the abolition of the differences between libel and slander would be the best way to deal with the problem. However, it is not felt that this would be valid.[21] Much more effective is the appeal that the legislature should take steps to deal with matters such as communism which stir up bitter public sentiment and are capable of creating lasting tensions in society. The legislatures by recognizing the threat of communism would give the courts a firm basis for punishing those who would use violence to destroy democracy and allow protection for those who would be accused falsely. In the case of New York and Ohio where the legislative machinery appears to be so ponderous that a force may threaten its very existence for no less than ten years and yet fail to move that body to action, then in that case the judiciary should take the initiative. On the issue of making the charge of communism slander per se, the courts were not without authority. Federal jurisdiction provided for this.[22] Labor leaders, whose work makes them appear a little left of the center, have suffered injustice because the courts could offer them no remedy for the communist smear which has been used against them quite frequently.[23] Thus, it would be well for other courts to note the example set by the Florida and Missouri courts. The Pennsylvania Supreme Court carried out the intention of the statute by imposing upon the defendant the serious nature of his charges. Here the court effectively discouraged

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18 Lightfoot v. Jennings, 254 S.W. 2d 596 (Mo. 1953).
19 Lightfoot v. Jennings, 254 S.W. 2d 596, 597 (Mo. 1953). See MO. REV. STAT. § 559.400 (1949).
20 Gross v. Mallamud, 200 Misc. 5, 108 N.Y.S. 2d 822 (1951); Weinstock v. Ladisky, 197 Misc. 859, 864, 98 N.Y.S. 2d 85, 91 (1950); Pecyk v. Semoncheck, 105 N.E. 2d 61 (Ohio 1952).
21 Ostrowe v. Lee, 256 N.Y. 36, 175 N.E. 505 (1931). Mr. Justice Cardozo shows a difference between libel and slander based on the permanent nature of libel.
22 Smith Act, 54 STAT. 671 (1948), 18 U.S.C. § 2385 (1952). See Dennis v. United States, 341 U.S. 494 (1950).
23 Pecyk v. Semoncheck, 105 N.E. 2d 61 (Ohio 1952); Keefe v. O'Brien, 203 Misc. 113, 116 N.Y.S. 2d 286 (1952); Krumholz v. Raffer, 195 Misc. 788, 91 N.Y.S. 2d 743 (1949).

the political ultraconservative and the crank from using the label of communism to plague the political liberal and the innocent.

Some would argue that the court's decision hampers free speech and prevents a searching out of those who would destroy democracy.[24] In fact the effect of the decision will be two fold. It will encourage our law enforcement agencies to do a more efficient job and deter self appointed inquisitors and witch hunters whose activity generally results in mob action and works to the detriment of democracy.

In deciding the principal case the court was careful not to open a breach for promiscuous law suits. Charging a person with being a communist was made slander per se within a narrow set of circumstances. In the *Solosko* case the defendant was not the town gossip nor a notorious blabber mouth. The defendant was a man of descretion, a prominent citizen, whose word was respected by many. The defendant made charges he could not support. These charges had the potential to do great harm to the plaintiff, a member of a minority group and born in a country dominated by the U.S.S.R.[25] The words used by the defendant were not the result of a fit of anger nor were they merely abusive. The defendant made a calculated attempt to use the communist label as a means to smear the plaintiff's good reputation in the town. In view of these circumstances it is felt that the Pennsylvania Supreme Court provided an excellent precedent for future cases and was well justified in finding for the plaintiff.

BLYTHE H. EVANS, JR.

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[24] Keefe v. O'Brien, *supra* note 22.
[25] Solosko v. Paxton, 119 A.2d 230 (Pa. 1956).