

Glasser's second ground of appeal—that he had not been tried by an impartial jury—would require a reversal, if the allegations could be sustained by proof that the jurors were biased.³⁰ Membership in the league would not of itself be a ground for disqualification unless the league were actively interested in the litigation.³¹ It was not improper for the league to submit a list of prospective jurors,³² although it is improper to delegate the final choice to it, no matter how high-minded its motives.³³ However, the disqualification of jurors on ground of bias is peculiarly a matter for the trial court,³⁴ and reviewing courts are sparing in the use of their powers to set aside its decision.³⁵ Glasser based his affidavit on an article written by one of the women of the panel from which the jury was selected.³⁶ The trial court considered his petition and was convinced that the defendants were not prejudiced by the composition of the jury; and the circuit court of appeals held that the trial court had not abused its discretion.³⁷ Clearly, the jury should be a body truly representative of the community;³⁸ but this doctrine grew out of, and primarily relates to, the exclusion of persons from the jury lists on account of racial discrimination.³⁹ It may be questioned whether its application in the instant case is entirely consistent with its history and traditional usage.

Copyrights—Assignability of Right of Renewal—[Federal].—In 1912, Graff, a lyricist, assigned to the plaintiff music publishers the copyright to his lyric, "When Irish Eyes Are Smiling," pursuant to a general royalty agreement under which Graff was

³⁰ *Cooley*, Constitutional Limitations 678 (8th ed. 1927); *Wood v. United States*, 83 F. (2d) 587, 589 (App. D.C. 1936).

³¹ *Remus v. United States*, 291 Fed. 501 (1923), cert. den. 263 U.S. 717 (1924) (membership in Anti-Saloon League in case involving violation of National Prohibition Act); *Noonan v. Saline County Coal Co.*, 173 Ill. App. 541 (1912) (membership in United Mine Workers in case between member of union and his employer); *Musick v. People*, 40 Ill. 268 (1866) (membership in society for detection and prosecution of horse thieves in prosecution for stealing a horse). See 31 A.L.R. 411 (1924).

³² *Walker v. United States*, 93 F. (2d) 383 (C.C.A. 8th 1937).

³³ *United States v. Murphy*, 224 Fed. 554 (D.C.N.Y. 1915). Thus, the clerk may not exclude names otherwise qualified, merely because they do not appear in the list submitted by the league. Cf. *United States v. Ballard*, 35 F. Supp. 105 (Cal. 1940).

³⁴ *Crawford v. United States*, 212 U.S. 183, 196 (1909); *Union Electric Light & Power Co. v. Snyder Estate*, 65 F. (2d) 297 (C.C.A. 8th 1933).

³⁵ *Reynolds v. United States*, 98 U.S. 145, 157 (1878); *Frank v. United States*, 59 F. (2d) 670, 675 (C.C.A. 9th 1932).

³⁶ *Women and the Law*, 26 A.B.A.J. 354 (1940). The writer states: "With one exception, the women were all members of the League of Women Voters, who had been recommended by that organization at the invitation of the court." In the same article it is said: "All the information we had, had been given us by members of the Bar Association and distinguished judges."

³⁷ *United States v. Glasser*, 116 F. (2d) 690, 705 (C.C.A. 7th 1940).

³⁸ *Smith v. Texas*, 311 U.S. 128, 130 (1940).

³⁹ *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879); *Martin v. Texas*, 200 U.S. 316, 319 (1906); *Chambers v. Florida*, 309 U.S. 227, 228 (1940).

working. The Copyright Act of 1909¹ gives an author the right to renew his copyright for another twenty-eight year period, providing he is living one year before the expiration of the original period. If the author dies, the renewal right accrues to his widow or children.² In 1917, Graff, financially desperate, released his royalties and assigned his expectancy of the renewal rights in the song in question and in sixty-nine other songs written under the general agreement to the plaintiff for a consideration of \$1600. In connection with the assignment Graff also executed an "irrevocable power of attorney" to exercise the renewal right. Graff testified that at the time of the assignment the songs were earning royalties of \$5000 yearly. In 1939 Graff applied for a renewal, which he assigned to the defendant. Plaintiff brought an action for damages for copyright infringement and for an interlocutory decree restraining the defendant from publishing the song *pendente lite*. The decree was granted,³ and the defendant appealed on the ground that the assignment of the renewal rights violated the policy of the Copyright Act. *Held*, Frank, J., dissenting, in the absence of express statutory restraint, the common law policy in favor of alienability prevails, and the assignment is valid. *Witmark & Sons v. Fred Fisher Music Co.*⁴

The principal case is the first to present the issue whether a right to renew a copyright under the Copyright Act of 1909 is assignable.⁵ The statute does not, in express terms, seem to forbid an assignment, stating merely, "the author . . . if still living, or the widow, widower, or children of the author, if the author be not living, . . . shall be entitled to a renewal and extension of the copyright . . . for a further term of twenty-eight years when application for such renewal and extension shall have been made . . . within one year prior to the original term of copyright."⁶ The problem before the court, therefore, was one of statutory interpretation. None of the usual extrinsic aids to interpretation sufficed to induce a unanimous decision by the court, however. The legislative history of the act, studied in isolation, is ambiguous;⁷ the opinion of legal text-writers is divided;⁸ the fact that subsequent proposed amendments to the act mentioned the possibility of an author's assigning the renewal was used by both

¹ 35 Stat. 1075 (1909), 17 U.S.C.A. §§ 1-63 (1927).

² 35 Stat. 1080 (1909), amended by 54 Stat. 51 (1940), 17 U.S.C.A. § 23 (Supp. 1941).

³ *Witmark & Sons v. Fred Fisher Music Co.*, 38 F. Supp. 72 (N.Y. 1941), noted in 55 Harv. L. Rev. 139 (1942).

⁴ 125 F. (2d) 949 (C.C.A. 2d 1942).

⁵ This case has been followed, albeit reluctantly. *Selwyn & Co. v. Veiller*, 43 F. Supp. 491 (N.Y. 1942). See *Tobani v. Carl Fischer, Inc.*, 98 F. (2d) 57, 60 (C.C.A. 2d 1938), cert. den. 305 U.S. 650 (1938). But see *Silverman v. Sunrise Picture Corp.*, 273 Fed. 909 (C.C.A. 2d 1921), modified on other grounds, 290 Fed. 804 (C.C.A. 2d 1923), cert. den. 262 U.S. 758 (1923).

⁶ 35 Stat. 1080 (1909), amended by 54 Stat. 51 (1940), 17 U.S.C.A. § 23 (Supp. 1941).

⁷ See H.R. Rep. No. 2220, 60th Cong., 2d Sess. (1909). The House Report was adopted by the Senate Committee on Patents as its own. S. Rep. No. 1108, 60th Cong., 2d Sess. (1909).

⁸ The following definitely state that the renewal right is assignable: *Drone*, *Law of Property* 326, 332 (1879); *MacGillivray*, *The Law of Copyright* 267 (1902); *Curtis*, *The Law of Copyright* 253 (1847); *Copyright Renewal*, 10 *Air Law Rev.* 198, 199 (1939). The following tend to hedge on the issue: *Weil*, *Copyright Law* 367 (1917); 2 *Ladas*, *International Protection of Literary and Artistic Property* 773 (1938); *Frohlich and Schwartz*, *The Law of Motion Pictures* 549 (1918). *Amdur*, *Copyright Law and Practice* 532-38, 540-41 (1936), seems to contend that the right is not assignable.

sides.⁹ In view of the ambiguity of the statute, both majority and minority felt compelled to construe it in the light of general policy considerations.

The majority, in the instant case, were impressed with the history of the legal struggle against restraints upon the alienation of real property and the line of decisions which finally upheld the assignability of choses in action. From this history they concluded that public policy was so markedly in favor of a man's being able to translate his property rights into money that nothing so drastic as a restraint upon this power should be read into a statute in the absence of express terms to that effect.¹⁰ Assuming the majority's position to be sound, it is still difficult to fit the author's right of renewal into the framework of common law property and contract rights. It has long been held that all rights accruing to authors under the copyright acts are merely statutory and should be distinguished from "common law" rights of property in literary works.¹¹ Statutes which have created such rights have qualified them so variously that it is difficult to analogize them to any of the recognized common law rights. For example, upon the death of the author before the original term has run, the right to the renewal does not accrue to the benefit of his estate, but only to those specifically referred to in the statute. Nor do purported assignments on the part of the author serve to cut off the statutory beneficiaries.¹² Furthermore, although it might be said that the right of renewal resembles a contingent remainder, this view has not been accepted by the courts.¹³ However, even if the analogy to contingent remainders were pursued, the common law has always regarded the alienation of contingent interests with extreme disfavor,¹⁴ obviously because of the element of uncertainty and speculation involved in their evaluation.

⁹ H.R. 6990, 71st Cong., 2d Sess.; H.R. 10434, 69th Cong., 1st Sess.; H.R. 11948, 72d Cong., 1st Sess.; H.R. 926, 76th Cong., 1st Sess. The majority thought that these bills indicated that Congress thought that such an assignment was possible. *Witmark & Sons v. Fred Fisher Music Co.*, 125 F. (2d) 949, 953 (C.C.A. 2d 1942). Frank, J., was of opinion that these bills indicated that the draftsmen believed that such legislation was needed to validate such an assignment. *Ibid.*, at 959.

¹⁰ Frank, J., admitted that *at one time* there had been such a strong policy in favor of the general freedom of contract, but he insisted that such a policy was never exclusively dominant, and that it represented the culmination of the doctrines of classical *laissez-faire*, which both courts and legislatures had long since rejected. He berated the majority for being in the grip of "that 'old Adam'—Adam Smith." *Witmark & Sons v. Fred Fisher Music Co.*, 125 F. (2d) 949, 962-68 (C.C.A. 2d 1942).

¹¹ *Wheaton v. Peters*, 8 Pet. (U.S.) 591 (1834); *Drone*, *op. cit. supra* note 8, at 100. Thus *Paige v. Banks*, 13 Wall. (U.S.) 608 (1871), cited by the majority in the principal case, can be distinguished because in that case it appears that the author assigned the "common law" property in the work before publication to the publisher, who took out the copyright in his own name and was then held entitled to the renewal.

¹² *Silverman v. Sunrise Picture Corp.*, 273 Fed. 909, 912 (C.C.A. 2d 1921), modified on other grounds, 290 Fed. 804 (C.C.A. 2d 1923), cert. den. 262 U.S. 758 (1923). The fact that in certain instances an executor will have a right which the author never had has not bothered the courts. *Fox Film Corp. v. Knowles*, 261 U.S. 326, 329 (1923).

¹³ A renewal is an independent statutory grant rather than any kind of extension of the original copyright. *Southern Music Co. v. Bibo-Lang, Inc.*, 10 F. Supp. 975 (N.Y. 1935); see *Shapiro, Bernstein & Co. v. Bryan*, 27 F. Supp. 11, 13 (N.Y. 1939).

¹⁴ 2 *Tiffany*, *Real Property* § 341 (3d ed. 1939). These interests have been made assignable in some cases by statute—but not by judicial decision. *Ibid.*

Thus it would appear that there is no reason to construe the copyright act strictly, as being in derogation of rights existing at common law, or as being subject to general rules of common law policy.¹⁵ In fact, it would seem that the constitutional and legislative background of the copyright acts demonstrates that the policy behind them was inconsistent with common law traditions. A copyright was originally a royal grant; it appears to have been used by the king to curry favor with the stationers' guilds and to control the press.¹⁶ Alleged abuses of the Crown's power to grant copyrights and other monopolies gave the common law courts occasion to seize upon the rising opposition to these abuses and to forge it into an enduring public policy.¹⁷ In 1624 by act of Parliament the king was shorn of his powers to grant monopolies.¹⁸ This policy may have been prompted primarily by Parliament's desire to wrest power from the king and to vest it in itself. Under the influence of the writings of the classical economists, however, the policy became one of the main tenets of the theory of laissez-faire, and has been so applied by the courts.¹⁹

Nevertheless, copyright legislation has been enacted in direct contravention to the anti-monopoly policy. It was felt that an overriding policy existed in favor of protecting and encouraging authors, even if the only way this could be accomplished was through the granting of a qualified monopoly. In England the Copyright Act of 1709²⁰ was passed, giving a limited period of monopoly to the holder of a copyright under the statute, with the proviso that when the period was over the work was to become the property of the general public. In the colonies, the statutes resembled those of the mother country,²¹ although in some colonial statutes the monopoly feature was qualified even further by the provision that the copyright should last only so long as the copyright holder provided an adequate supply of the copyrighted material at reasonable prices.²² The policy in favor of authors found its way into the Constitution in the patents and copyrights clause: "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."²³ This is the only clause in the entire Con-

¹⁵ In *Powell v. Head*, 12 Ch.D. 686, 688 (1879), it was argued that the part owner of a play could grant a license for its production without the consent of the other owners because, at common law, one tenant in common of a chattel has a right to use the chattel as he pleases. Jessel, M.R., rejected this argument, saying: "I am not at all inclined to extend the antiquated and barbarous doctrines, which have been set aside partly by the Legislature and partly by the Courts of Equity, to new rights created by statute, and which are of a character wholly different from the rights of property to which these ancient doctrines apply." Cf. *Holmes, J.*, dissenting, in *Truax v. Corrigan*, 257 U.S. 312, 342 (1921).

¹⁶ 6 Holdsworth, *History of English Law*, 360-79 (2d ed. 1937).

¹⁷ *Ibid.*; Hamilton, *Patents and Free Enterprise*, TNEC Monograph No. 31, at 14 (1941).

¹⁸ Hamilton, *op. cit. supra* note 17, at 15-18.

¹⁹ Thus an agreement not to compete, coupled with the sale of a business, will not be enforced where it would tend to create a monopoly. 5 Williston, *Contracts* § 1641, at 4600 (rev. ed. 1937).

²⁰ 8 Anne, c. 19 (1709).

²¹ Hamilton, *op. cit. supra* note 17, at 18-22.

²² *Ibid.*, at 22.

²³ U.S. Const. art. 1, § 8 (8). That this limitation on the power should be constantly kept in mind in construing copyright and patent statutes has been brought out by the renewed vi-

stitution which is directed toward the benefit of a special class of individuals. It would seem that a policy looking toward the protection of authors which was compelling enough not only to receive constitutional recognition, but also to override a deep-seated common law policy against monopolies of any kind, is also of sufficient force to override a relatively weaker common law policy in favor of assignability, especially where the right in question has no relation to the common law.

Viewed in this light, certain aspects of the legislative history of the copyright acts take on more significance.²⁴ For instance, the following passage is found in the committee report on the Copyright Act of 1909: "It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life and fifty years was suggested. Your committee, after full consideration, decided that it was distinctly to the advantage of the *author* to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the *exclusive right of the author* to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right."²⁵ In the opinion of the Attorney General, the renewal right under this statute could be applied for only in the name of the author.²⁶ Hence it would seem that Congress, in drafting copyright legislation, was not attempting to enable a publisher, by having the author sign another form,²⁷ to acquire a long-term monopoly in contravention of common law policy, and in contravention also of a constitutional policy which looked only toward the protection of authors.

The policy of the copyright acts interpreted in the light of the constitutional background would seem to dovetail nicely with modern ideas of social policy. Older ideas of freedom of contract have been seriously restricted by statute in the interest of certain segments of the public. "Yellow-dog contracts" have been outlawed;²⁸ assignments of wages have been forbidden or stringently regulated;²⁹ members of the general public have been forced to contribute to provisions for their old age under the Social Security Act.³⁰ Freedom of contract has likewise met with judicial qualification, especially

tality given the clause in several recent decisions of the Supreme Court. *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U.S. 84 (1941); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488 (1942), noted in 9 *Univ. Chi. L. Rev.* 518 (1942); *United States v. Univis Lens Co.*, 62 S.Ct. 1088 (1942).

²⁴ Dissenting opinion of Frank, J., in *Witmark & Sons v. Fred Fisher Music Co.*, 125 F. (2d) 949, 957-58 (C.C.A. 2d 1942).

²⁵ H.R. Rep. No. 2220, op. cit. supra note 7 (italics added).

²⁶ 28 Ops. Atty. Gen. 162 (1910).

²⁷ The majority of the court in the principal case felt that the power of attorney was entitled to respect because it was the historical bridge whereby assignments not recognized at law were actually enforced. Frank, J., compared the effect of the majority's decision on the Copyright Act of 1909 with the manner in which the English courts treated the Statute of Uses—"adding three words to a conveyance." *Witmark & Sons v. Fred Fisher Music Co.*, 125 F. (2d) 949, 959 (C.C.A. 2d 1942).

²⁸ 1 *Teller, Labor Disputes and Collective Bargaining* § 48 (1940).

²⁹ *Fortas, Wage Assignments in Chicago*, 42 *Yale L. J.* 526 (1933).

³⁰ 49 Stat. 620 (1935), amended by 53 Stat. 1360 (1939), 42 U.S.C.A. § 301 (Supp. 1941).

where the parties have been in disparate positions. Perhaps the oldest manifestation of this tendency was the manner in which the chancellor looked behind an apparent conveyance of real property to declare a mortgage and give an equity of redemption.³¹ Among the most recent manifestations are rulings to the effect that a person included within the provisions of a workmen's compensation act cannot validly contract himself out of the statute,³² and that a person working under a wages and hours statute cannot effectively release his statutory claims against his employer.³³ Equity especially has exhibited this tendency, particularly in respect to the assignment of mere expectancies. While in some jurisdictions such assignments have been enforced,³⁴ equity always looks to the transaction itself with extreme suspicion for several reasons: 1) the assignor of an expectancy was generally in desperate circumstances at the time of the assignment;³⁵ 2) he was generally greatly inferior in business experience;³⁶ 3) the difficulty in assessing the value of the expectancy usually results in a totally inadequate consideration.³⁷

Since analogous considerations are applicable in the instant case, it would seem that the least equity could do is to refuse to enforce the assignment, leaving the parties to damages at law. This would probably lead to a settlement. However, in view of the gambling nature of the contract, the unequal position of the author, the general inadequacy of consideration and the constitutional policy involved, the only straightforward answer to the situation would be to declare assignments like that in the principal case invalid.

Federal Courts—Removal Jurisdiction of Suits “Arising under” Federal Statute—Fair Labor Standards Act—[Federal].—Plaintiff brought suit in a state court to recover unpaid minimum and overtime wages, and damages, under the Fair Labor Standards Act,¹ which provides that such a suit “may be maintained in any court of competent jurisdiction.”² Defendant removed to the federal district court on the ground that the suit arose under a law regulating commerce, to which the requirement

³¹ 5 Tiffany, *Real Property* § 1379 (3d ed. 1939). Cf. Tefft, *The Myth of Strict Foreclosure*, 4 *Univ. Chi. L. Rev.* 575 (1937).

³² *Wass v. Bracker Construction Co.*, 185 *Minn.* 70, 240 *N.W.* 464 (1931).

³³ *Fleming v. Warshawsky & Co.*, 123 *F.* (2d) 622, 626 (C.C.A. 7th 1941); *United States ex rel. Johnson v. Morley Construction Co.*, 98 *F.* (2d) 781, 789 (C.C.A. 2d 1938); *Travis v. Ray*, 41 *F. Supp.* 6, 8 (Ky. 1941); *Hutchinson v. William C. Barry, Inc.*, 5 *Wage and Hour Rep.* 389 (D.C. Mass. 1942).

³⁴ *In re Lind*, [1915] 2 *Ch. Div.* 345. *Contra: Gannon v. Graham*, 211 *Iowa* 516, 231 *N.W.* 675 (1930). See *McClure v. Raben*, 125 *Ind.* 139, 25 *N.E.* 179 (1890); *Donough v. Garland*, 269 *Ill.* 565, 109 *N.E.* 1015 (1915).

³⁵ 3 *Pomeroy, Equity Jurisprudence* § 953 (Symons ed. 1941).

³⁶ *Ames v. Ames*, 46 *Ind. App.* 597, 91 *N.E.* 509 (1910); 2 *Chafee and Simpson, Cases on Equity* 1173-93, 1185 n. 5 (1934).

³⁷ *Marks v. Gates*, 154 *Fed.* 481 (C.C.A. 9th 1907).

¹ 52 *Stat.* 1062, 1063 (1938), as amended, 29 *U.S.C.A.* §§ 206, 207 (Supp. 1941).

² 52 *Stat.* 1069 (1938), 29 *U.S.C.A.* § 216 (Supp. 1941).