Washington and Lee Law Review

Volume 19 | Issue 2 Article 2

Fall 9-1-1962

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Washington and Lee Law Review

Member of the Southern Law Review Conference

Volume XIX Fall 1962 Number 2

EQUAL ACCESS TO JUSTICE. THE CHALLENGE AND THE OPPORTUNITY*

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I

The Challenge

Some eighty-five years ago, in the year 1877, John Randolph Tucker urged the graduating law class of the University of Maryland:

> "To prepare, by solemn consecration, to advance the right and destroy the wrong; to promote justice and defeat inequity; to defend the oppressed and assail the oppressor; to protect freedom and oppose tyranny; to uphold the institutional liberties of our people and to guard them against all usurpation; * * *"

My text is drawn from those noble words of the great teacher and leader of the bar in whose memory these lectures are given.

The specific problem which I venture to discuss is how best to assure competent legal advice and representation for the millions among us—and there are millions—who need the services of a lawyer but cannot pay his reasonable charges. The importance of filling this need is obvious to lawyers, for we know full well that our services are essential to assure equal opportunity for a just result. This is true in matters which never reach a court but involve legal questions, as well as of proceedings in court.

Lawyers cannot guarantee that justice will be attained in a particular instance, but the skills and industry of lawyers can assure to their clients equal access to justice. As Justice Jackson once said, legal

*These are the fourteenth annual John Randolph Tucker Lectures, delivered at the School of Law, Washington and Lee University, on May 4-5, 1962. A few editional changes have been made in adapting the lectures for publication.

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"rights are worth, when they are threatened, just what some lawyer makes them worth."[1]

In a society which becomes more complex and sophisticated each day, the need for legal advice and representation becomes ever greater. In the simpler days of our forebears legal problems arose less frequently and they were easier of solution. The average lawyer was able to and in fact did handle legal matters for the neighbor who could pay little, if anything, for his services. This is true today in many places, particularly in rural areas; but in the more populous cities and counties, for a variety of reasons, many who need legal advice or representation, in civil and criminal matters, are not able to enlist the unpaid services of a lawyer.

This is not because lawyers are less public spirited today; there are few indeed who do not in practice serve needy clients and even strangers without fee or at a token rate; but the great mass of those who need the help of lawyers in the more populous areas do not know lawyers as friends and neighbors. It is natural that they should hesitate to wait on a strange lawyer, hat in hand, and ask for free representation. Moreover, lawyers have obligations to their families and regular clients and there is a limit to the amount of free time they can give.

In civil matters, a survey conducted some years ago by the National Legal Aid and Defender Association among legal aid offices, showed that a national average of at least 7 persons out of every 1,000 need a lawyer's help each year but cannot afford, or think they cannot afford, to hire a lawyer.[2] The percentage will, of course, vary from state to state, from city to city, but it is probably higher today. In criminal matters, the national average is approximately one-half of all those accused of a criminal act.[3]

The leaders of our profession have long been alive to the difficult problems involved. Entrusted by the people with a monopoly to practice law, the profession recognizes that hand in hand with this exclusive license goes the obligation to provide the services that only licensed lawyers can lawfully render, to all those who need these services, whether or not they can be paid for.

We have attempted to meet our professional obligation to indigent persons on a collective basis, through the so-called Legal Aid Movement which began some eighty-five years ago in this coun-

[1]Jackson, The County Seat Lawyer, 36 ABAJ 497 (1950).
[2]Brownell, Legal Aid in the United States 79 (1951).
[3]Equal Justice For The Accused 80 (1959).

try. The central idea is to supply legal advice and representation for the poor through a community law office manned by lawyers who are employed by the organization or volunteer their services. The size of the office and staff and the method of operation will of course vary with the requirements of the community served. Generally, offices offering advice and representation in civil matters are known as Legal Aid offices and those supplying legal services in criminal matters, as Defender offices.

There are now 224 Legal Aid offices and 98 Defender services in this country. Together they handle over 500,000 cases a year, at a cost to the American people—mostly through Community Chest, United Fund and tax funds—of nearly $5,000,000 a year. About two-thirds of these community law offices have been opened within the past fifteen years, largely through the efforts of the organized bar, at national, state and local levels, with the expert assistance of the National Legal Aid and Defender Association.

Despite the substantial progress already made we are very far indeed from meeting the actual need. On the civil side, there are still nine central cities in this country of 100,000 or more population which are without any organized Legal Aid facilities whatsoever. Some twenty cities of 75,000 to 100,000 population have no Legal Aid service. The existing Legal Aid facilities in twenty-four cities of 100,000 or more population do not meet even the *minimum* requirements established by the American Bar Association and the National Legal Aid and Defender Association.[4] All too few of the existing Legal Aid offices are actually covering the requirements of their own localities. Many are hampered by poorly paid and inadequate staff; others are badly directed by disinterested or inactive boards of directors.

On the criminal side, as Judge Prettyman has emphasized, the need for competent defense counsel who will be available in court when and as they are required is very great indeed.[5] The Uniform Crime Reports issued by the Federal Bureau of Investigation show that city and rural law enforcement agencies reported a rate of 3,640 arrests per 100,000 persons for all criminal offenses during 1960 (a total of 3,959,559). City arrest rates were almost three times higher

[4]1961 Annual Report of the Standing Committee on Legal Aid Work of the American Bar Association 2-6.

[5]Prettyman, The Problem of the Indigent (John Randolph Tucker Lectures, 1961), 18 Wash. & Lee L. Rev. 202 (1961).

than rural rates.[6] Yet there are now some thirty-one counties of 400,000 population or more where no Defender office or other organized service exists.[7] In the federal courts, with few exceptions, there is no organized service.

Moreover, the trend of judicial decisions, both federal and state, indicates that the need for defense counsel in criminal cases is likely to increase sharply in the future.[8] The rule of *Betts v. Brady*[9] is obviously being whittled away. The probabilities are that in the not too distant future state courts, like the federal courts, will be powerless to try a defendant on a criminal charge unless counsel is provided or there is an intelligent and understanding rejection of the offer of counsel.[10] As recently stated by Justice Black in his concurring opinion in *Carnley v. Cochran*:[11]

> "Twenty years' experience in the state and federal courts with the *Betts v. Brady* rule has demonstrated its basic failure as a constitutional guide. Indeed, it has served not to guide but to confuse the courts as to when a person prosecuted by a State for crime is entitled to a lawyer. Little more could be expected, however, of a standard which imposes upon courts nothing more than the perplexing responsibility of appointing lawyers for an accused when a trial judge believes that a failure to do so would be 'shocking to the universal sense of justice.' To be sure, in recent years this Court has been fairly consistent in assuring indigent defendants the right to counsel. As the years have gone on we have been compelled even under the *Betts* rule to reverse more and more state convictions either for new trial or for hearing to determine whether counsel had been erroneously denied—a result that in my judgment is due to a growing recognition of the fact that our Bill of Rights is correct in assuming that no layman should be compelled to defend himself in a criminal prosecution."

A society which boasts of "Equal Justice For All" should not be *forced* by the courts or statute to do what is necessary to make the promise a reality. Such steps should be taken voluntarily—even eagerly. There may be difference of opinion as to whether counsel must be provided as a constitutional requirement, but most lawyers would agree that equality of justice is not likely to be achieved in serious criminal

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[6]Department of Justice, Federal Bureau of Investigation, Crime in the United States—Uniform Crime Reports—1960, 16, 89-103 (1961).

[7]1961 Report of ABA Committee, op. cit. supra note 4, at 4.

[8]Prettyman, op. cit. supra note 5; See Beaney, The Right to Counsel in American Courts (1955).

[9]316 U.S. 455 (1942).

[10]Johnson v. Zerbst, 304 U.S. 458 (1937); Fed. R. Crim. Pa. 44.

[11]369 U.S. 506, 518 (1962).

prosecutions unless the defendant is provided with a competent attorney.

No greater challenge faces our profession today than this: millions of our people will need lawyers in the years ahead but cannot pay for the service they must have to be assured of equal access to justice. These services will be needed in and out of court—in civil and criminal matters—as legal advice, negotiation in legal matters and representation in court.

Organized facilities are unavailable in many places and they are inadequate, in varying degrees, in most cities and counties where they now exist. Individual practitioners cannot be expected to provide the services needed; such a burden would be unfair to all concerned and is impractical except in rural areas and the smaller towns and counties. This is a community problem not unlike that involved in providing medical and surgical services for the poor. Community law offices must be provided, just as we accept and support community hospitals and medical clinics.

There is no need to draw a picture of the great dangers to our way of life which can flow from denial of this fundamental right of every citizen. "Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with; but injustice makes us want to pull things down."[12] This wise observation by the Legal Aid pioneer, Reginald Heber Smith, was put even more bluntly by Judge Learned Hand when he said: "If we are to keep our democracy, there must be one commandment: 'THOU SHALL NOT RATION JUSTICE'."[13]

But the distressing fact is that justice *is* being rationed because of the unavailability in many instances and in many places of legal services for those who cannot pay. When this occurs, as the immediate past president of the American Bar Association, Whitney North Seymour, observed just a year ago: "poverty and not the judge, may be deciding the case."[14]

The responsibility is yours and mine. As Judge Prettyman put it, speaking of the criminal side:

> "[T]he organized bar has the responsibility—not just *a* responsibility but *the* responsibility—for a solution to the basic problem and all the underlying subsidiary problems respecting the representation of indigents in criminal cases in this coun-

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[12]Brownell, op. cit. supra note 2, xiii.

[13]Speech before 75th Anniversary Dinner of The Legal Aid Society of New York (1951).

[14]1961 Report of ABA Committee, op. cit. supra note 4, at 7.

> try; * * * It is a big job, a personal one, a challenging one, worthy of the power and the character of the American bar. The organized bar ought to design the solution, direct it, supply it, and man it."[15]

I have attempted to sketch the outlines of a challenge which our profession must face and meet with understanding, intelligence and courage. The problems raised are continuing ones and they can only be evaluated through frequent reexamination of local conditions by the bar.

If large segments of our bar continue to bury their heads in the sands of complacency with the status quo, the public will have every right to take the torch from our hands. The primary responsibility is ours; it goes hand in hand with the exclusive license to practice law. Society rightly looks to our profession for solutions to these professional problems. It is indeed fortunate that we still have the opportunity to put our own house in order.

II

The Opportunity

The encouraging fact is that we know how to solve the great problem of providing legal counsel for the poor—in both civil and criminal matters—in cities large and small. Over the past fifteen years the Legal Aid and Defender movement has established with certainty that at very reasonable cost it is possible to establish community law offices which have the manpower and competence to handle the needs of most indigent persons in the community for legal advice and representation in civil and criminal matters.

Fifty years ago fewer than 50,000 persons were served by Legal Aid offices, and less than $90,000 was spent in providing this service. There was no Legal Aid Committee of the American Bar Association nor of any state or local bar association. Not until 1921 did the organized bar bestir itself—but the movement could have had no better sponsors at the bar than Charles Evans Hughes, Elihu Root and Reginald Heber Smith.

Beginning in 1946, under the leadership of Harrison Tweed and Emery A. Brownell, and the continual prodding of Reginald Heber Smith, the movement took on a new and dramatic impetus. The American Bar Association, in partnership with the National Legal

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[15]Prettyman, op. cit. supra note 5, at 218.

Aid and Defender Association, undertook to provide promotional leadership at the national level. With funds supplied by the bar, by industry and labor, and the Ford Foundation, a national campaign to establish new Legal Aid and Defender offices, and to strengthen existing services, was under way.

Today—a bare fifteen years later—224 Legal Aid offices and 98 Defender services, three times as many as in 1945, handle over 500,000 cases a year. The rejuvenated National Legal Aid and Defender Association has assumed its rightful stature and is affiliated with the American Bar Association. An interesting statistic is that from 1949 through 1959 Legal Aid and Defender offices handled nearly half as many cases (3,740,144) as were handled in the preceding 71 years.[16]

On the civil side, over 130 Legal Aid offices with a paid staff of attorneys are now rendering service in 126 cities having a combined population of approximately 63,500,000 people. In 77 other cities there are Legal Aid offices operating with volunteer legal staffs serving a combined population of 16,500,000 people. Volunteer panels of lawyers are available to over 23,000,000 people in 128 other communities, large and small, throughout the country.[17]

The most dramatic fact is the rate of growth in the last decade. In the three decades 1920 to 1950 the rate for both Legal Aid and Defender facilities had been roughly 40 per cent for each ten-year period. From 1950 to 1960, however, the rate was over 250 per cent.[18]

If we can maintain this momentum in providing new facilities and if we can at the same time strengthen the inadequate facilities which now exist, it is entirely possible to meet the challenge in a relatively short period of time.

Experience throughout the country has shown that in organizing a new Legal Aid office it is generally desirable to establish it as a separate entity. The most practical form is that of a charitable corporation which will be eligible for tax-exempt gifts and will maintain continuity of service and uniform records. A board of directors of some fifteen leading members of the community has been found to be effective and efficient. It is desirable to have representation from civic and business interests and the social service field but the bar should retain control.

Irrespective of the form of organization selected there are certain fundamentals which are basic to successful operation and effective

[16]Brownell, Supplement to Legal Aid in the United States 46 (1961).
[17]Id. at 10.
[18]Ibid.

service. These are: (1) a definite place, accessible to the persons who need the service, convenient to courts and social service agencies, and well publicized; (2) a definite time—regular office hours which fit the convenience of working people who cannot afford time away from jobs; (3) a definite person, if possible—because it is customary and natural for clients to repose confidence in a particular lawyer; (4) a supervisory group—one which assures sound legal policies and represents the best interests of the community.

Most Legal Aid Societies in cities which have a Community Chest or United Fund receive their support from this source. Some are financed jointly by the municipality and Community Chest. The Legal Aid office should be considered as a legal clinic for the poor, to be integrated into the community pattern of social services in much the same way as health and welfare services. There is no more reason for lawyers to be the sole support of the legal clinic than for doctors to finance the hospital and medical clinics.

The legal problems of poor people fall generally into well defined channels: debt claims, family problems, installment contracts, landlord and tenant cases, and the like. Such matters can be handled far more efficiently in the community law office than if spread around among individual lawyers. Greater efficiency is possible because of the similarity of cases and the expert knowledge of the Legal Aid lawyer as to how they can best be handled. The Legal Aid lawyer's knowledge of community resources usually exceeds that of the private practitioner. The effect of efficiency and special knowledge is shown by the fact that the costs of a case range from $7 to just over $11 on the average.[19]

Good legal counsel is often just as urgent a need for families without means as medical care. The typical Legal Aid Society provides this expert counsel for people who cannot pay a lawyer and when necessary takes over the defense or the prosecution of their cases without charge.

These simple acts of justice—petty as they may seem in individual cases—add up to many dollars saved for people who need the money desperately; they keep families together and renew their faith in American justice; they enable people to retain their self-respect, understand their rights and so become better citizens.

Legal Aid and Defender offices do not compete with the private lawyer in the slightest degree. On the contrary, they relieve the bar of a substantial burden and through the referral of ineligible cases to

[19]Ibid.

practicing lawyers through a Lawyer Referral Service or bar association, actually build new business for lawyers.

It should be emphasized that the mere existence of Legal Aid and Defender offices in a particular city does not mean that the needs of that community are being served. It most cities the services provided are probably incomplete in some degree. In too many places the service is totally inadequate. Our objective of equal access to justice will not be achieved until each local agency is organized and financed and administered so as to provide full service to the community.

It is important that each community periodically undertake an inventory of its full needs and of the organization's accomplishments in meeting those needs. Such a study should involve representatives of the organization's governing board, the judiciary, the bar association and community welfare planning groups. Typical questions to be considered in these studies are:

(1) Should the territory covered by the present Legal Aid service be enlarged?

(2) Are eligibility standards and other intake policies fair and equitable to the bar and the community?

(3) Is the present staff sufficient in number and quality to give adequate and competent and courteous service to all eligible applicants?

(4) If services are not provided in criminal cases what steps should be taken to set up a Defender service. Should service in criminal cases be financed privately or by public funds or by both?

(5) Is the present office located in a central place so that it may be conveniently reached by clients?

(6) Are decent salaries and working conditions provided for professional and clerical employees?

(7) Are ineligible applicants referred to lawyers through the lawyer referral service or a panel supplied by the bar association?

(8) In what respects could relations be improved with the bar association, the Community Chest and other welfare agencies and the public generally?

On the criminal side the development of organized Defender services has been disappointingly slow. Nevertheless, twice as many indigent persons have the services of a Defender office today as was the case a decade ago. Most Defender services are operated as a public office, entirely through tax support. There are, however, excellent voluntary services which receive financial support from private sources.

For many years there has been active and often heated debate as to whether a public or private defender system is preferable. The position of the organized bar is that the method used should be in accord with local needs and wishes.[20] We are concerned with the substance—not the form. Whatever method is used, it should give representation at least equal in quality and independence to that available to paying clients in the community.

An interesting variant, and one believed to be promising for the future, is the privately incorporated Defender service, with a Board of Directors composed of community leaders, but deriving its financial support partly from private sources and partly from the municipality. In this way the Defender himself is under the supervision of the Board of Directors of a private organization and is not subject to political or judicial direction in the performance of his duties.

Experience has shown that in the more populous cities and counties the Defender office is far superior to the haphazard assignment of counsel on an *ad hoc* basis.[21] The organized service is better because *experienced attorneys are available in court when and as they are needed.* Representation is given at less cost and the private bar is relieved of the burden of handling assigned cases. This is not to suggest that the assignment system does not work well in some places. But an organized service is far better in the larger cities and counties.

In February 1960 the House of Delegates of the American Bar Association adopted a set of standards for Defender services. These standards, which are applicable to all forms of service, bear repeating:

> "The Defender System of every state should:
>
> "1. Provide counsel for every indigent person unable to employ counsel who faces the possibility of the deprivation of his liberty or other serious criminal sanctions;

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[20]The position of the American Bar Association has been settled since 1940, when the House of Delegates approved the following statement by its Committee on Legal Aid Work: "In connection with Legal Aid in the Criminal Courts, the Committee wishes to end any uncertainties that may have existed as to the position of the American Bar Association in connection with the relative merits of public and private Defenders. The position of the American Bar Association is that the method and instrumentality of securing adequate representation of poor defendants in Criminal Courts is a local question for determination in the light of local conditions, needs and wishes. The concern of the Association is to secure proper representation of poor defendants in the Criminal Courts as broadly and as promptly as possible without preference or partiality as to method or instrumentality."

[21]Brownell, Supplement, op. cit. supra note 16, at 54.

"2. Afford representation which is experienced, competent and zealous;

"3. Provide the investigatory and other facilities necessary for a complete defense;

"4. Come into operation at a sufficiently early stage of the proceedings so as to fully advise and protect the defendant;

"5. Assure undivided loyalty by defense counsel to the client;

"6. Include the taking of appeals and the prosecuting of other remedies, before or after conviction, considered by the defending counsel to be in the interest of justice;

"7. Maintain in each county in which the volume of criminal cases requiring assignment of counsel is such as to justify the employment of at least one full-time lawyer to handle the work effectively, a Defender office, either as a public office or as a quasi-public or private organization;

"8. Enlist community participation and responsibility and encourage the continuing cooperation of the organized bar."[22]

Some have asked whether the Legal Aid movement is a step towards "socialization" of the profession. On the contrary, the movement represents the thoughtful effort of the organized bar to preserve the independence of the profession. If we can properly implement these plans—and do so with dispatch—the threat to our independence will be greatly reduced. Fortunately, the choice is still ours—to provide, with comparatively little cost and effort, community law offices which serve to assure equality before the law and, at the same time, to preserve the moral and political strength of our heritage.

How can new Legal Aid and Defender services be established? Not by the American Bar Association and its partner in this effort, the National Legal Aid and Defender Association. Nor can existing facilities be strengthened through national efforts alone. Interest and leadership within the organized bar at state and local levels is a basic requirement. Local bar leaders are needed to organize and inspire other leaders of the community to survey local requirements and then to take appropriate steps to establish and finance a community law office suitable for the particular community or to strengthen or expand an existing office. Time and again one or two local lawyers have been able to do this with the expert assistance of representatives of the American Bar Association and the National Legal Aid and Defender Association. No worthier cause can enlist the heart and talent of a member of the bar. Legal Aid is the lawyer's "Red Cross."

By way of summary, I will close with bits of wisdom from three

[22]Brownell, Supplement, op. cit. supra note 16, at 54.

great leaders of our profession. My first quotation is taken from the Commencement Address by Elihu Root before the graduating class at Yale Law School just 58 years ago. Said Senator Root:

> "He is a poor-spirited fellow who conceives that he has no duty but to his clients and sets before himself no object but personal success. To be a lawyer working for fees is not to be any the less a citizen whose unbought service is due to his community and his country with his best and constant effort. And the lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the law. In the cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men, present and to come. If he fail in loyalty to this cause; if he have not the earnestness and sincerity which come from a strong desire to maintain the reign of law; his voice will ring false in the courts and will fail to carry conviction to judicial minds."

My second quotation is from a great jurist who was also the first Chairman of the Standing Committee on Legal Aid Work of the American Bar Association, Charles Evans Hughes:

> "Whatever else lawyers may accomplish in public affairs, it is their privilege and obligation to assure a competent administration of justice to the needy so that no man shall suffer in the enforcement of his legal rights for want of a skilled protector, able, fearless, and incorruptible."[23]

And lastly, from Harrison Tweed, Chairman of the American Law Institute and long a leader in legal aid work:

> "Legal Aid needs help from every one but most of all it seeks the passionate interest of younger men. They belong to to-day and to tomorrow, not to yesterday. They see what is required in the true perspective and with almost complete unanimity, whereas in the older generation only a fringing few visualized the need and worked its realization. The generation which is coming to the bar recognizes that many of the things which in the past were given as benevolences are, in reality, rights to which men are entitled and which they must have in full measure if our system of government is to demonstrate its superiority. That generation will see to it that the services of lawyers are available to all who need them."[24]

Let us move forward together, young and old alike—lawyers all—in this great crusade to make America's dream come true. Let us do so while the choice of remedy is still open to our profession.

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[23]Hughes, "Legal Aid Societies, Their function and Necessity," 43rd Annual Report of the American Bar Association 234 (1920).

[24]Brownell, op. cit. supra note 2, at xx.

PRORATA RECOVERY BY SHAREHOLDERS ON CORPORATE CAUSES OF ACTION AS A MEANS OF ACHIEVING CORPORATE JUSTICE

By EDWARD J. GRENIER, JR.*†

Ordinarily the entire recovery in a shareholder derivative suit goes to the corporation. On occasion, however, in order to straighten out the affairs of some closely held corporations, courts have decreed direct recovery to shareholders in proportion to the number of shares held by each. In 1955, in the landmark case of *Perlman v. Feldmann*,[1] direct prorata recovery was decreed for the first time in a case involving a publicly held corporation. This significant extension of the prorata remedy opens the way to its use as a practical alternative to a corporate recovery in a great variety of derivative suits. It also, however, is likely to raise a host of problems not previously faced by the courts in dealing with closely held corporations. This article will examine some of the problems and implications, largely unexplored in *Perlman*, arising out of the extension of this remedy to publicly held corporations. Chief among the problems seems to be working out procedural rules which will assure reasonable protection to the potentially conflicting interests of the several groups that make up the large modern corporation. Some of the major implications arising from the *Perlman* decision might relate to the very nature of the corporation and the derivative suit.

I. DEVELOPMENT OF PRORATA RECOVERY

Originally, in the United States the shareholder's suit, although on behalf of his corporation, was not based upon a strict concept of the corporate entity.[2] The plaintiff brought the action as representative of all the shareholders, except any that might be defendants, even

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†The author wishes to express his thanks to Professor David R. Herwitz of the Harvard Law School, who first led him to a consideration of this subject.

[1]219 F.2d 173 (2d Cir.), cert. denied, 349 U.S. 952 (1955), 68 Harv. L. Rev. 1274, on remand, 154 F. Supp. 436 (D. Conn. 1957), 71 Harv. L. Rev. 1559 (1958), 160 F. Supp. 310 (D. Conn. 1958) (final order). This case is extensively discussed in Hill, The Sale of Controlling Shares, 70 Harv. L. Rev. 986 (1957).

[2]See Prunty, The Shareholders' Derivative Suit: Notes on Its Derivation, 32 N.Y.U.L. Rev. 980, 989 (1957).

though the recovery inured to the corporation. When such actions were brought against parties outside the corporation, courts began stressing the fact that the cause of action belonged to the corporation as a separate entity, and that the plaintiff was suing primarily as representative of this entity.[3] In this way the derivative suit came to be rationalized on a theory of strict separation of the corporation from its shareholders.[4] However, in order to prevent abuse, the equity courts imposed certain requirements as to standing that had to be met to entitle a shareholder to bring suit.[5] Even with these procedural safeguards designed to prevents abuses, in certain situations a corporate recovery led to either inconvenience or injustice. Therefore, some courts abandoning rigid formalism, granted recovery directly to the plaintiff-shareholders and other shareholders found entitled to damages in proportion to the number of shares held by each.

A. *Distinguished From Individual or Class Actions.*

A prorata recovery of damages on a corporate cause of action must be distinguished from recoveries on causes of action owned by shareholders in their own right, and enforceable in either individual or class suits.[6] A suit by or on behalf of one of several classes of shareholders is not based on a corporate cause of action, and therefore a recovery therein is not "prorata" as the term is used herein.[7] It may be difficult, on occasion, though to distinguish between the two types of suits. Over a strong dissent, one court has held that a suit to compel declaration of a dividend is derivative in nature.[8] On the other hand, a shareholder has been permitted to bring an individual suit, in his own name, against insiders for misappropriation of corporate

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[3]Id. at 990-92.

[4]See 4 Pomeroy, Equity Jurisprudence §§ 1089, 1091, 1095 (5th ed. 1941).

[5]For example, the contemporaneous-ownership rule. Fed. R. Civ. P 23(b)(1), Hawes v. Oakland, 104 U.S. 450 (1882).

[6]See, e.g., Stevens, Private Corporations § 167, at 784, 796 (2d ed. 1949). But see Comment, 46 Ill. L. Rev. 937 (1952) (advocates nonderivative shareholders' action for diminution in the value of their shares, reserving to the corporation an action for the loss of assets). This recommendation, however, seems to ignore the possibility of the shareholders benefiting twice. Compare General Rubber Co. v. Benedict, 215 N.Y. 18, 109 N.E. 96 (1915).

[7]See, e.g., Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947). When used alone, "pro rata" hereinafter means prorata recovery.

[8]Gordon v. Elliman, 306 N.Y. 456, 119 N.E. 331 (1954) (4-3 decision); cf. Shanik v. Empire Power Corp., 58 N.Y.S.2d 176 (Sup. Ct. 1945), aff'd mem., 270 App. Div. 925, 62 N.Y.S.2d 760, aff'd mem., 296 N.Y. 664, 69 N.E.2d 818 (1946) (derivative suit with prorata recovery).

assets—the classical derivative-suit situation.[9] Even if prorata recovery would be appropriate in this latter situation, the nature of the suit may be crucial if the plaintiff is unable to meet the procedural prerequisites for bringing a derivative suit.[10] Generally, however, courts have maintained the distinction between recovery by the shareholder in his own right and recovery in a derivative suit of his prorata share of damages payable to the corporation.[11]

B. *Typical Situations in Which Prorata Recovery Has Been Decreed.*

Prorata recovery on a corporate cause of action has been decreed: (1) to provide a convenient method for ultimate distribution when the corporation is in liquidation or when its assets have been sold; (2) to protect shareholders from dissipation of a corporate recovery because of foreseeable future mismanagement by the defendants, who will remain in control of corporate affairs; (3) to limit recovery to "innocent" shareholders; and (4) to provide a remedy against those who sell corporate control for an excessive consideration.[12]

The liquidation situation presents no difficulties of theory or policy. In the other situations, however, the corporation is a going concern, and prorata recovery in substance effects a distribution of some corporate assets to certain shareholders.[13]

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[9]Equitable Trust Co. v. Columbia Nat'l Bank, 145 S.C. 91, 142 S.E. 811 (1928) (action at law based on conversion of plaintiff's shares through taking of corporate assets). The court appeared influenced in reaching its decision by the fact that all parties below regarded the suit as properly an action at law; thus the defendants should not now be permitted to change position. Id. at 133, 142 S.E. at 824.

[10]E.g., Fed. R. Civ. P 23(b)(1); N.Y. Gen. Corp. Law § 61-b (security-for-expenses provision applicable to derivative suits).

[11]See Dill v. Johnson, 72 Okla. 149, 179 Pac. 608 (1919); Note, 40 Calif. L. Rev. 127, 131 n.40 (1952). But see Tierney v. United Pocahontas Coal Co., 85 W Va. 545, 102 S.E. 249 (1920) (some blurring of this distinction).

[12]See Stevens, Private Corporations § 167, at 793-96 (2d ed. 1949); Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 946 (1958) (hereinafter cited Developments—Multiparty Litigation); Note, 69 Harv. L. Rev. 1314 (1956); Note, 2 U. Chi. L. Rev. 317 (1935); 23 Minn. L. Rev. 973, 974 (1939). For the remainder of this article, these situations will be called, respectively the liquidation situation; the foreseeable-mismanagement situation; the innocent-shareholder situation; and the sale-of-control situation. These labels may give more of an appearance of clarity than the cases warrant. There is considerable overlapping, and they are intended to describe typical situations rather than to be rigid categorizations. The term "innocent" herein refers to shareholders who are free not merely from actual participation in the wrongful acts, but also from acquiesence, laches, etc. Unless otherwise indicated, it is assumed, as is usual in derivative suits, that the individual defendants are officers or directors of the corporation.

[13]The corporate cause of action is in a real sense a corporate asset, even though it may not be shown on the balance sheet. This asset will cease to exist

1. *Corporation in liquidation.*

Prorata recovery simply provides a procedural short cut in the process of distribution of the corporate assets and is granted by the courts on the ground of convenience, provided corporate liabilities have been discharged.[14]

2. *Foreseeable mismanagement.*

When future gross mismanagement on the part of the defendants can be readily predicted on the basis of past performance,[15] prorata recovery should be readily available, provided it is clear that the plaintiffs will not be adequately protected by a corporate recovery. Otherwise, a future derivative suit may be required because of an unlawful dissipation of of this corporate recovery. Perhaps the only exception to the granting of pro rata in such cases should be when the recoverable funds are needed by the corporation to meet current liabilities. It is arguable, of course, that if the record of past mismanagement is so glaring as to require prorata recovery on that basis alone, the long-term interests of the corporation may be better served by granting a corporate recovery and appointing a receiver.[16] Where a closely held corporation is involved a court-decreed dissolution would perhaps be the best solution.[17]

3. *Limitation of recovery to "innocent" shareholders.*

Situations in which prorata recovery is decreed in order to limit recovery to "innocent" shareholders[18] present more difficult ques-

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after the suit in which prorata recovery is decreed, and the corporation will not receive any of the proceeds as a substitute for this asset. Furthermore, the balance sheet may show assets which have been misappropriated and are the subject of the action, thus emphasizing the fact that the cause of action is a corporate asset, a substitute for the misappropriated assets. Therefore, it is realistic to consider prorata recovery as an effective distribution of a corporate asset.

[14]See, e.g., Sale v. Ambler, 335 Pa. 165, 6 A.2d 519 (1939); Alexander v. Quality Leather Goods Corp., 150 Misc. 577, 269 N.Y. Supp. 499 (Sup. Ct. 1934).

[15]See, e.g., Backus v. Finkelstein, 23 F.2d 357 (D. Minn. 1927); Fougeray v. Cord, 50 N.J. Eq. 185, 24 Atl. 499 (Ch. 1892), rev'd in part sub nom. Laurel Springs Land Co. v. Fougeray, 50 N.J. Eq. 756, 26 Atl. 886 (Ct. Err. & App.) (lower court's decree eliminated plaintiff as a shareholder in the corporation; upper court gave him right to a reasonable dividend); cf. Eaton v. Robinson, 19 R.I. 146, 31 Atl. 1058 (1895) (per curiam) (serious prior mismanagement; prorata recovery granted in order to obviate necessity of second suit to compel declaration of a dividend).

[16]See Note, 69 Harv. L. Rev. 1314, 1315 (1956). See generally Baker & Cary, Cases and Materials on Corporations 706-07 (3d ed. 1958).

[17]See Note, 71 Harv. L. Rev. 1498, 1511-14 (1958).

[18]E.g., Young v. Columbia Oil Co., 110 W. Va. 364, 158 S.E. 678 (1931) (ratifiers and shareholders with notice of the operations for the directors' benefit barred);

tions of policy. Unlike the liquidation and foreseeable-mismanagement situations, in which the only basic issue is whether or not a corporate recovery should be decreed,[19] there is the additional complication that the wrongdoers may be permitted to retain funds proportionate to the shares held by persons who, although innocent of actual wrongdoing, either tacitly acquiesced in or expressly approved the acts of the defendants. Perhaps when the defendants are directors guilty of flagrant and wilful breaches of fiduciary duty toward the corporation, full payment of the corporate damages should be exacted.[20] Even though such recovery may include a punitive element,

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Brown v. DeYoung, 167 Ill. 549, 47 N.E. 863 (1897) (per curiam on opinion below) (participator in wrong and acquiescer barred); Harris v. Rogers, 190 App. Div. 208, 179 N.Y. Supp. 799 (1919) (shareholders who gave releases barred; some of plaintiff's shares "tainted" and thus barred, but affirmance based upon plaintiff's execution of judgment). The Illinois court later expressly declined to follow the rule of the Brown case and granted corporate recovery. Voorhees v. Mason, 245 Ill. 256, 91 N.E. 1056 (1910). In Harris v. Pearsall, 116 Misc. 366, 190 N.Y. Supp. 61 (Sup. Ct. 1921), appeal dismissed on stipulation, 202 App. Div. 785, 194 N.Y. Supp. 942 (1922), the same plaintiff as in the Rogers case was permitted to bring a later derivative suit against the then present directors, successors to those involved in the first suit, for failing to sue the former directors.

[19]This is not meant to indicate that the problems arising in the innocent-shareholder situation could not also arise in the two situations discussed above, if some shareholders were found to have acquiesced in the wrongful acts. However, the above situations inherently and necessarily raise only the problem of corporate versus prorata recovery, whereas the innocent-shareholder situation necessarily raises the issues discussed in the text. Solely for the purpose of analysis, each of the situations is assumed to exist in its purest form. Thus, in the foreseeable-mismanagement situation, the only shareholders who would be eliminated from sharing in the recovery are the individual defendants themselves. Of course, these hypothetical situations will rarely be found in pure form in actual cases.

[20]Cf. Leech, Transactions in Corporate Control, 104 U. Pa. L. Rev. 725, 823-26 (1956) who, speaking of sale-of-control cases, suggests a derivative suit with full corporate recovery is preferable since recovery is "prophylactic" However, the contention that corporate recovery should be granted because pro rata acts as a pro tanto ratification of nonratifiable fraud, Keenan v. Eshleman, 23 Del. Ch. 234, 252, 2 A.2d 904, 912 (Sup. Ct. 1938), 23 Minn. L. Rev. 937 (1939), Annot., 120 A.L.R. 238 (1939), seems highly formalistic. The acquiescing shareholders are not accepting the fraud in the name of the corporation, but are merely forfeiting their right to participate in any recovery.

In these cases, it seems that the breach of fiduciary duty involved is not enough to show continual past gross mismanagement so as to give a basis for predicting future mismanagement. Compare McCourt v. Singers-Bigger, 145 Fed. 103 (8th Cir. 1906) (corporate recovery; no prolonged history of serious and constant mismanagement). If, however, the breach is flagrant and willful and the defendants' past conduct over a significant period justifies prorata recovery on the ground of foreseeable mismanagement, perhaps the defendants should be required to pay all shareholders other than themselves, including acquiescers or would-be ratifiers, thus approximating a corporate recovery.

it could be justified as providing a deterrent against such breaches of fiduciary duty.

In less serious situations only prorata recovery may be justifiable even though the defendants violated a fiduciary duty. When the liability of directors arises from negligence, from serious and extensive misjudgments, or from authorization of now completed ultra vires acts, it may be argued that they should not be required to account to acquiescing shareholders. In these latter situations it is more likely that the corporate funds paid out are in the hands of third parties so that damages payable by the directors would not come from such funds. Indeed, the directors may have derived no economic benefit at all from the transactions.[21] Even in some situations in which the directors obtained corporate funds through a flagrant breach of fiduciary duty, prorata recovery may be appropriate, because the shareholders' acquiescence, under the circumstances, is equivalent to a compromise agreement with the defendants.[22] In such instances, the strong policy of the law in favor of settlements without litigation seems to swing the balance in favor of the defendants. Furthermore, the acquiescers merely receive the results of their bargain when recovery is denied to them.

4. *Sale of control in violation of a fiduciary duty.*

The use of prorata recovery as a means of providing a remedy against those who sell corporate control for an excessive consideration presents difficulties similar to those of the innocent-shareholder situation. The primary emphasis in the cases is on holding the purchasers of control to their contract with the defendant sellers and thus denying any recovery to them.[23] Of course, in addition, there may be other shareholders against whom the seller-defendants have personal defences, as in the innocent-shareholder situation. Here, however, a noncontrolling shareholder should not be found to have acquiesced in the sale of control unless he had full knowledge of the material

[21]Cf. Harris v. Pearsall, 116 Misc. 366, 190 N.Y. Supp. 61 (Sup. Ct. 1921), appeal dismissed on stipulation, 202 App. Div. 785, 194 N.Y. Supp. 942 (1922). This factor should not be sufficient to cause a prorata, rather than a corporate, recovery; however, it should be considered when the defendants' conduct is not outrageous, even though it involves some sort of breach of fiduciary duty.

[22]See Chounis v. Laing, 125 W Va. 275, 23 S.E. 628 (1942) (however, no finding of intent to defraud).

[23]See Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), cert. denied, 349 U. S. 952 (1955). But see Leech, supra note 20, at 823-26.

facts. Mere failure to object within a reasonable time after the sale should not be considered acquiescence, since sellers of control frequently attempt to conceal such transactions from the noncontrolling shareholders.[24] Shareholders with full knowledge, who have failed to act for a long period, should be barred from recovery, for their acquiescence must certainly be conscious. In some cases, it may even be in the nature of a contractual compromise of liability.

Of course, the use of prorata recovery presupposes that a corporate cause of action exists. Such a cause exists if some corporate "opportunity" or "asset" has been appropriated by the defendants for their own benefit.[25] However, in many cases the only real injury seems to be to the noncontrolling shareholders, who either were not permitted to participate in the sale or were induced to sell at a price lower than that received by the controlling shareholders. In logic, it seems that in such situations an individual or representative action by such noncontrolling shareholders in their own right should be permitted.[26] Such an action avoids the conceptual difficulty of permitting persons no longer shareholders to receive a portion of damages due to the corporation.[27] The ultimate result of such an individual action should be the same as that of a derivative suit with prorata recovery, for in either case an accounting for any excess "premium" will be required since liability is based upon a breach of fiduciary duty.[28]

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[24]See, e.g., Commonwealth Title Ins. & Trust Co. v. Seltzer, 227 Pa. 410, 76 Atl. 77 (1910).

[25]See, e.g., Perlman v. Feldmann, 219 F.2d 173 (2d Cir.) cert. denied, 349 U.S. 952 (1955).

[26]See, e.g. Sautter v. Fulmer, 258 N.Y. 107, 179 N.E. 310 (1932). But see American Trust Co. v. California W States Life Ins. Co., 15 Cal. 2d 42, 66, 98 P.2d 497 (1940) (injury to the corporation). If injury both to the corporation and to former shareholders is shown, probably both a derivative suit and an individual action by the former shareholders should be permitted. But care should be taken not to decree the equivalent of a double recovery against the defendants (compare note 6, supra), except possibly in the very limited situation described in note 71, infra, if it is found that the wrong to the corporation injured both a former and present shareholder.

[27]But cf. Watson v. Button, 235 F.2d 235 (9th Cir. 1956), 35 N.C.L. Rev. 279 (1957) (in nonderivative suit former shareholder in two-man corporation allowed to recover prorata share of corporate damages).

[28]Compare Perlman v. Feldmann, 154 F. Supp. 436 (D. Conn. 1957) (prorata recovery), with Sautter v. Fulmer, 258 N.Y. 107, 179 N.E. 310 (1932) (nonderivative suit). However, the measure of damages might be different if the action is based upon deceit. See Baker & Cary, op. cit. supra note 16, at 596. Furthermore, it is assumed in the text that no damages against the sellers for actual looting by the purchasers, see Insuranshares v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940), will be recoverable.

C. *Possible Use of Prorata Recovery to Bar "Subsequent" Shareholders From Sharing in Damages Recoverable by the Corporation.*

Although in many jurisdictions a shareholder does not have standing to bring a derivative suit unless he was a shareholder at the time of the wrong,[29] no court has decreed prorata recovery solely because some of the shareholders at the time of suit were subsequent shareholders. The purpose of the rule on standing to sue is to prevent speculation in litigation and to reduce the likelihood of strike suits;[30] it is not based on a feeling that it is unfair to permit subsequent shareholders to benefit from a recovery.

It has been held, however, in the leading case of *Home Fire Ins. Co. v. Barber* and in two other cases,[31] that the corporation itself is barred from recovery when all the present shareholders are subsequent shareholders. In that situation, then, it is not possible, in jurisdictions adhering to the *Home Fire Ins. Co.* rule, to bring a derivative suit either because subsequent shareholders have no standing to sue or because the plaintiff in a derivative suit cannot assert greater rights than those of his corporation.[32] On the other hand, the presence of just one contemporaneous shareholder, perhaps the holder of only one share in a large publicly-held corporation, can lead to the dramatically opposite result of a full corporate recovery. In such an extreme situation, it seems more

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[29]E.g., Fed. R. Civ. P 23(b)(1); N.Y. Gen. Corp. Law § 61. A shareholder who would qualify under these statutes will be referred to as a contemporaneous shareholder. One who would not qualify will be called a subsequent shareholder.

[30]See Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 951-52, 967 (1958).

[31]Park Terrace, Inc. v. Burge, 249 N.C. 308, 106 S.E.2d 478 (1959), 37 N.C.L. Rev. 320 (1959); Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N.W. 1024 (1903); Capitol Wine & Spirit Corp. v. Pokrass, 277 App. Div. 184, 98 N.Y.S.2d 291 (1950), aff'd per curiam, 302 N.Y. 734, 98 N.E.2d 704 (1951). In the Home Fire Ins. Co. case the court specifically noted that the present shareholders had paid a fair consideration for their stock and were thus not injured by the prior mismanagement. Home Fire Ins. Co. v. Barber, supra at 657, 663, 93 N.W. at 1029, 1031. The court in Pokrass relied upon the lack of standing in the jurisdiction of a subsequent shareholder to bring a suit on behalf of the corporation. The fairness argument of the Home Fire Ins. Co. case was relied upon in the concurring opinion. Capitol Wine & Spirit Corp. v. Pokrass, supra at 189-90, 98 N.Y.S.2d at 296-97.

[32]See Glenn, The Stockholder's Suit—Corporate and Individual Grievances, 33 Yale L.J. 580, 588 (1924). But see Di Tomasso v. Loverro, 250 App. Div. 206, 293 N.Y. Supp. 912, aff'd per curiam, 276 N.Y. 551, 12 N.E.2d 570 (1937) (corporation barred because in pari delicto as party to contract in restraint of competition, but shareholder allowed to recover from directors prorata share of corporate damages on the contract). The Di Tomasso rule would not apply, however, when the bar against the corporation arises only because of the unfairness of allowing the shareholders to benefit from a recovery.

logical and reasonable to decree prorata recovery, and so allow recovery only to the single contemporaneous shareholder.[33]

Certain factors, however, may point toward the desirability of a corporate recovery, even when *all* the present shareholders are subsequent shareholders. If the loss of corporate assets remains concealed until shortly before the suit, the substantial injury really falls upon the present shareholders, whether contemporaneous or subsequent. It is likely that former shareholders sold out at prices higher than those obtainable if the wrong had been known. If the suit is against directors or officers, there is no policy reason for releasing them from liability if their wrong has caused a present injury to present shareholders. If the suit is against persons never within the corporation (for example, persons who allegedly violated a contract with the corporation), the failure of a prior management to bring suit should not bar an action regardless of when the breach was discovered and the status of present shareholders. The rule of *Home Fire Ins. Co. v. Barber*[34] seems inapplicable, since outsiders should be bound by their undertaking and not be permitted to look behind the corporate entity.

The *Home Fire Ins. Co.* rule and its extension, through the use of prorata recovery,[35] to the situation where substantially all the shareholders are subsequent may not be fully operative unless there is but a single class of common shareholders. It is arguable that bondholders[36] and preferred shareholders, whether "contemporaneous" or

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[33]See May v. Midwest Ref. Co., 121 F.2d 431 (1st Cir.) cert. denied, 314 U.S. 668 (1941).

[34]67 Neb. 644, 93 N.W. 1024 (1903). This case involved breaches of fiduciary duty by directors and officers of a closely-held corporation. The court itself noted that, since the "corporation is not asserting or endeavoring to protect a title to property, it can only maintain a suit in equity as the representative of its stockholders...." Id. at 664, 93 N.W at 1031-32.

[35]The same prorata recovery can be obtained even if the corporation itself brings the suit under a new management. See Matthews v. Headley Chocolate Co., 130 Md. 523, 100 Atl. 645 (1917).

[36]The ordinary trade creditor should not be afforded any special rights so long as he still may enforce his primary cause of action against the corporation. Upon insolvency in the equity sense, it seems that such a creditor should be able to prevent any direct prorata recovery by the shareholders. See text after note 55 and at notes 56-57, infra; Stevens, Private Corporations §§ 167, 168, at 797, 799 (2d ed. 1949). Similarly, the rule of the Home Fire Ins. Co. case itself should be inapplicable, since in the insolvency situation a corporate recovery is really for the benefit of creditors, and not the subsequent shareholders. But see Capitol Wine & Spirit Corp. v. Pokrass, 277 App. Div. 184, 98 N.Y.S.2d 291 (1950), aff'd per curiam, 302 N.Y. 734, 98 N.E.2d 704 (1951) (amended complaint alleging that suit is solely for benefit of creditors—government's for unpaid taxes—not permitted; but no indication of insolvency). It seems that a creditor's knowledge of the wrong when he extended the credit should be immaterial. Cf. Easton Nat'l Bank v. American Brick & Tile Co., 70 N.J. Eq. 732, 64 Atl. 917 (Ct. Err. & App. 1906).

"subsequent," as those terms are used in this article, are always entitled to a corporate recovery, at least to the extent necessary to restore impaired capital.[37] They might even be entitled to a corporate recovery over and above this amount so as to provide sufficient working capital to prevent another impairment of capital as a result of current operations.

Bondholders especially have strong ground for demanding a corporate recovery. They are senior to all other interests, and they cannot enforce their rights until their bonds are mature. Bondholders as a group should have the continuing right to some corporate recovery when capital has been impaired even if all the bonds changed hands between the occurrence of the wrong and the time of suit. This argument possesses less force when extended to preferred shareholders, even if they have a liquidation preference, for they are corporate risk-takers and entitled to maintain derivative suits to redress corporate wrongs.[38] Nevertheless, they do seem entitled to a "cushion" argument similar to that of the bondholders.

Even when the capital of the corporation consists entirely of a single class of common stock and the suit is against corporate insiders, prorata recovery may be inappropriate if only a comparatively small number of the shareholders are subsequent. Logically, the same rules governing the availability of prorata recovery should apply whether a shareholder brings a derivative suit or new management brings a corporate suit.[39] A rigid rule requiring prorata recovery in such situations would result in the diversion of a considerable amount of assets away from the corporate treasuries. Such a rule would work exceptionally great mischief in publicly held corporations with actively traded stock; in such corporations some shareholders are almost always bound to be "subsequent." Furthermore, the great majority of the shareholders, especially in publicly held corporations, would probably prefer to have such assets remain in the corporation in order to produce long-term growth and profitability. Of course, the amounts received in such a prorata distribution could be reinvested, but this may not be practicable if each shareholder receives

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[37]Cf. Matthews v. Headley Chocolate Co., 130 Md. 523, 100 Atl. 645 (1917). The court mentioned specifically that there was no showing that the corporation needed the recovery in order to pay creditors, that the capital was impaired, or that there would be any injury to the preferred shareholders if pro rata were decreed.

[38]See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 321 (1936) (voting preferred); cf. Shanik v. Empire Power Corp., 58 N.Y.S.2d 176 (Sup. Ct. 1945), aff'd mem., 270 App. Div. 925, 62 N.Y.S.2d 760, aff'd mem., 296 N.Y. 664, 69 N.E.2d 818 (1946) (nonvoting participating stock).

[39]See note 35 supra.

but a small amount, and it may be inconvenient if a charter amendment is required for the issuance of any new shares necessary for such reinvestment.[40]

If the *Home Fire Ins. Co.* rule is extended in the breach-of-fiduciary-duty case to the situation in which substantially all the shareholders are subsequent, and rejected when substantially all the shareholders are contemporaneous, there will remain difficult problems of application in intermediate situations when the factors mentioned above as strongly pointing toward a corporate recovery are lacking. It is arguable that if no creditors or senior security-holders are prejudiced, prorata recovery should be decreed whenever it is clear that the wrongful acts could have damaged only the contemporaneous shareholders. A showing that the subsequent shareholders purchased at a price depressed because of the wrongs is some evidence of this, although it is difficult to devise a reliable method for isolating the impact of the wrong on the price of the shares. The defendants should have the burden of proving clearly that all the elements justifying prorata recovery, including the clear financial solvency of the corporation, are present. At some point the number of subsequent shareholders would be sufficiently large so that the burden be shifted to those who oppose pro rata to show that the wrong actually injured subsequent shareholders or that the financial condition of the corporation requires a corporate recovery. This type of adjustment in the burden of proof should provide a reasonably workable method for achieving desirable corporate-law results. Subject to all the foregoing conditions, therefore, in some circumstances a decree awarding prorata recovery solely because of the presence of subsequent shareholders in the corporation would be justifiable.

II. Right To Request, Object To, and Share in Prorata Recovery

A. *Standing to Request and Object.*

There is no objection to allowing either party to request prorata recovery in the liquidation situation, since the primary reason for the request is to afford greater convenience,[41] but in the foreseeable-

[40]Furthermore, registration of a new issue of shares with the SEC might be required under the Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. §§ 77a-77aa (1958), as amended, 15 U.S.C. § 77b (Supp. II, 1961).

[41]Compare Sale v. Ambler, 335 Pa. 165, 6 A.2d 519 (1939) (requested by the plaintiff), with Shanik v. Empire Power Corp., 58 N.Y.S.2d 176 (Sup. Ct. 1945), aff'd mem., 270 App. Div. 925, 62 N.Y.S.2d 760, aff'd mem., 296 N.Y. 664, 69 N.E.2d 818 (1946) (requested by the defendant).

mismanagement situation only the plaintiffs or intervening plaintiffs should be permitted to make this request. Even though prorata recovery appears to diminish the amount of damages recoverable from the defendants, in most instances the defendants are large shareholders as well as managers and thus derive proportionate benefit from any corporate recovery.[42] Of course, this need not be the case; especially in a large publicly-held corporation these manager-defendants may own no shares at all, so that the full amount of damages will be recoverable regardless of the type of recovery. In any event, it is unlikely that a court will accept an argument by the defendants in a foreseeable-mismanagement situation that prorata recovery should be decreed because "our past terrible record shows we are likely to mismanage in the future." Furthermore, prorata recovery in this situation is granted because of the possibility of future losses from mismanagement, rather than because of any right in the defendants to limit the recovery on the basis of defenses against some of the plaintiff group.

The decreeing of prorata recovery because recovery should be limited to innocent or contemporaneous shareholders depends entirely upon personal defenses against some shareholders, so that only the defendants should be permitted to request pro rata.[43] Furthermore, no policy interest is served by allowing some shareholder-plaintiffs to allege that other shareholders should be barred from recovery.

Similar considerations apply in the sale-of-control situation. If the action is conceived of as a corporate cause of action, only the defendants should be able to request prorata recovery. Of course, some of these suits may be in the nature of individual causes of action possessed by the noncontrolling shareholders.[44]

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[42]See, e.g., Backus v. Finkelstein, 23 F.2d 357 (D. Minn. 1927); Henry G. Davis & Co. v. Gemmell, 73 Md. 530, 21 Atl. 712 (1891). As noted in footnote 19, supra, in the "pure" foreseeable-mismanagement situation, the only shares barred from participation in the recovery are those held by the individual defendants themselves.

[43]See, e.g., Joyce v. Congdon, 114 Wash. 239, 195 Pac. 29 (1921); Brown v. DeYoung, 167 Ill. 549, 47 N.E. 863 (1897) (per curiam on opinion of court below). But see Note, 2 U. Chi. L. Rev. 317, 322 n.28 (1935) (interpreting a comment made by one court).

[44]Such suits might be considered "spurious" class suits under Federal Rule 23(a)(3), and thus not binding on absentees, since each shareholder would possess his own separate cause of action. See Moore, Federal Practice par. 23.10, at 3442-50 (2d ed. 1948). However, in this type of suit there seem to be no reasons of policy for refusing to permit the common questions arising from the sale to be determined once and for all in the class suit, provided the test of adequacy of representation is met, with each member of the class then permitted to come in and prove his claim. See Chafee, Some Problems of Equity 280-88 (1950); Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 936-39 (1958).

Shareholder-plaintiffs should have standing to object to prorata recovery requested by a defendant, whereas it would be incongruous to honor such an objection by a defendant.[45] Some might agrue that the plaintiffs should have no standing to object, since they will benefit as much if the recovery goes directly to them rather than to the corporation. However, even apart from other considerations,[46] a dollar in the hands of the shareholder is not the same as a dollar in the corporate treasury. The latter possesses a certain dynamism, the possibility of producing more dollars in profits. The plaintiffs may well, therefore, as investors prefer a corporate recovery, especially if the recovery forms a substantial part of corporate assets.[47] Furthermore, plaintiffs should be permitted to ask for a corporate recovery in order to benefit shareholders not parties, since the representative character of the suit becomes even more apparent once prorata recovery has been requested.

The plaintiffs, though, are not likely to represent adequately the interests of all the absent shareholders. They have no standing to refute the defendants' allegations of personal defenses against some of the absentees, the basis of the defendants' request for pro rata. Moreover, they may be quite content with prorata recovery, possibly because they have no interest in a long-term investment[48] or because they would recover a sizeable sum of money which would then be available for more profitable investment elsewhere. Consequently the personal interests of the plaintiffs may be antagonistic to the

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[45]This incongruity was pointed out in Perlman v. Feldmann, 219 F.2d 173, 178 (2d Cir.), cert denied, 349 U.S. 952 (1955). Of course, a defendant may use incongruous arguments, even those pointing to increased liability, in order to ward off the evil day for payment of any damages—hardly a position that would appeal to a court of equity. See Weeks v. Bareco Oil Co., 125 F.2d 84, 90 (7th Cir. 1941).

In the liquidation situation, there is no point in permitting anyone to argue for a corporate recovery, for presumably the court will insure that the rights of creditors are upheld before allowing shareholders to receive any of the fund after a prorata recovery is decreed.

[46]For example some courts have denied recovery of attorney's fees to the plaintiffs because the recovery does not benefit the corporation. See, e.g., Joyce v. Congdon, 114 Wash. 239, 195 Pac. 29 (1921). However, these cases did not involve a group of shareholders eligible to share in the recovery large enough to be considered a class. In at least one case, ibid., the recovery for the plaintiff "class" was so small that an attorney's fee could not have been taken out of it; thus any such fee would have required an additional recovery from the defendants. However, if a large enough group of shareholders is involved, the suit should be treated like any other class suit, with the fees being taken from the fund recovered. See Perlman v. Feldmann, 160 F. Supp. 310 (D. Conn. 1958); Note, 69 Harv. L. Rev. 1314, 1319 (1956).

[47]See Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 947 (1958).

[48]See ibid.

interests of many of the absentees. A fortiori, the plaintiffs may fail to represent adequately the interests of others, such as bondholders, with interests in the corporation.

B. *Notification to Persons or Classes not Before the Court.*

In view of these possibilities, notification should be given to absent shareholders of the pendency of the action and the possibility that prorata recovery will be decreed.[49] When the plaintiffs do not adequately represent all interests any attempt to bind inadequately represented absentees on the issue of whether prorata recovery should be decreed may violate due process.[50] Such notification, with an invitation to intervene, should satisfy due process,[51] for it affords an

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[49]See Note, 69 Harv. L. Rev. 1314, 1316 (1956). But see Chounis v. Laing, 125 W Va. 275, 23 S.E. 628 (1942) (notice not necessary because shareholders can intervene after the decree and still recover); Bailey v. Jacobs, 325 Pa. 187, 189 Atl. 320 (1937) (court holds failure of shareholders to join in suit is assent to defendants' acts or waiver of rights). Both of these cases overlook the considerations in favor of pre-decree notice.

[50]Cf. Hansberry v. Lee, 311 U.S. 32 (1940). Representation may not be adequate unless the claims and defenses of absentees are actually litigated. See Note, 46 Colum. L. Rev. 818, 831 (1946); cf. Note, 67 Harv. L. Rev. 1059, 1065 (1954). It has been stated that the adequacy of representation and the question of whether to permit the suit to be maintained as a class suit is or should be within the trial court's discretion. See Wheaton, Representative Suits Involving Numerous Litigants, 19 Cornell L.Q. 399, 433 (1934); Editorial Note, 2 How. L.J. 111, 127 (1956) (by implication); Comment, 25 Texas L. Rev. 64, 70 (1946). But see Weeks v. Bareco Oil Co., 125 F.2d 84, 93 (7th Cir. 1941) (dictum) (if facts are undisputed appellate court can exercise its own judgment). Of course, the trial court's determination is subjecct to review for abuse of discretion. For suggested tests of whether the representation is adequate, see Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 938 (1958); Note, 6 Stan. L. Rev. 120, 141-42 (1953).

[51]See Chafee, op. cit. supra note 44, at 231 (though should not grant binding effect to all class suits on basis of notice alone, id. at 276-77); Keeffe, Levy & Donovan, Lee Defeats Ben Hur, 33 Cornell L.Q. 327, 345-49 (1948) (notice alone should make class suit binding on absentees); Note, 46 Colum. L. Rev. 818 (1946) (if notification is given, all class suits should have collateral estoppel effects against absentees). But see Note, 7 Okla. L. Rev. 472 (1954) (advocates some notice, but it is not decisive of due process).

In the pro rata situation, notice should be sufficient, since, even if no absentees enter the suit, their rights will receive some sort of rough representation, provided some arguments are made both for and against pro rata. Notification will give the absentees a greater opportunity to enter and have their arguments presented more sharply. Even if the absentees form sub-classes, notice should suffice, for there will probably be only a few arguments available to each group; these can be gotten before the court if only a few out of each group come in. The same reasoning seems applicable to such special groups as bondholders and preferred shareholders, both of whom may present only narrowly confined arguments, as indicated in the text. In any event, on the issue of whether to grant pro rata, the pro rata situation may be differentiated from other types of class suits from the point of view of most of the

adequate opportunity to be heard. Stockholders' lists will facilitate this notification,[52] although these lists may not be fully adequate to insure notice to all interested parties, for example when prorata recovery may be decreed to former shareholders.[53] If this is a possibility, in fairness, such former shareholders should be notified and offered the opportunity to argue for prorata recovery. The best available type of notification should be used, with publication used only when identity or whereabouts are unknown.[54] Failure to notify a former-shareholder group may not be as serious as failure to notify present shareholders, some of whom might wish to argue for a corporate recovery, since, by hypothesis, the defendants will present arguments for pro rata,[55] and so former shareholders will receive at least rough representation by the defendants.

Certain groups other than shareholders and former shareholders should receive notification. In the liquidation situation, of course all types of creditors should be notified after the decree, but there is not much point in permitting them to argue for a corporate recovery before the decree; thus, they do not need to receive the notice here under consideration. In the remaining pro rata situations, ordinary trade creditors probably should not be given standing to object to prorata recovery, unless they are unable to realize on the primary obligation of the corporation; insolvency in the equity sense should be sufficient basis for giving standing to these creditors. Of course, it is unlikely that either party to the litigation will present evidence of such insolvency. Even so, no elaborate system to give

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absent shareholders: The difference between a direct prorata recovery and a corporate recovery does not seem as crucial as retaining or losing a cause of action, as in the usual class-suit situation. Even shareholders who might be in a group barred by pro rata may be better off than absentees in other class-suit situations, since they will be able to contend individually after the decree that they should be within the claimant group, whereas in other class suits once the class loses no member gets a second chance. Therefore, it seems that notice should suffice to bind absentees to the court's determination to grant pro rata, even if such notice without more would not be sufficient in other class suits.

[52]See Perlman v. Feldmann, 160 F. Supp. 310 (D. Conn. 1958).

[53]See text at notes 68-72, infra.

[54]Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[55]In the foreseeable-mismanagement situation, it is true that the plaintiffs would present the argument for prorata recovery, but only the defendants could argue for barring subsequent shareholders from participation in the recovery. If the defendants so argue, the former shareholders would most likely receive notice after the decree to come in and claim, if appropriate. See text at notes 85-86 infra. If only the plaintiffs argue for prorata in this situation, the subsequent-shareholder issue would not arise; therefore, as a matter of sound judicial administration, it seems that if former shareholders want to obtain part of the recovery, they should be left to whatever right to intervene that they might have.

notice to such creditors is necessary, since hidden insolvency does not occur frequently, and courts are likely to protect creditors when insolvency is known or suspected.[56] Perhaps it would be desirable to give a general notice by publication of the suit and the possibility of prorata recovery.[57] If a creditor does appear before the decree is rendered, he should be permitted to argue for a corporate recovery solely on the ground of insolvency.

Bondholders seem to be in a stronger position to object to prorata recovery, since they have no present right of action against the corporation. They should be permitted to demand elimination of any impairment of capital.[58] If the jurisdiction permits "nimble dividends" to be paid from the net profits of the current or recent accounting period,[59] the question may arise whether such a statute destroys the bondholders' standing to object to a prorata recovery.[60] It might be argued that the statutory term "net profits" should be construed to mean profits arising from the operations of the business; thus a recovery in the suit would not be "net profits." Even if this term is broad enough to encompass recoveries in litigation, however, such

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[56]See, e.g., Matthews v. Headley Chocolate Co., 130 Md. 523, 190 Atl. 645 (1917) (court mentions that there was no allegation that the money was needed for creditors); Alexander v. Quality Leather Goods Corp., 150 Misc. 577, 269 N.Y. Supp. 499 (Sup. Ct. 1934) (corporation dissolved; court mentions that creditors have been paid).

[57]Cf. Johnson v. Waters, 111 U.S. 640 (1884) (notification to creditors by newspaper after decree in creditors' bill); Berger, "Disregarding the Corporation Entity" for Stockholders' Benefit, 55 Colum. L. Rev. 808, 823 (1955).

[58]See text at notes 36-37, supra. Normally there could not be a fresh impairment of capital through prorata recovery, since the asset involved, the cause of action, is not likely to appear on the balance sheet. Moreover, if the corporate assets involved in the suit still appear on the balance sheet even though no longer possessed by the corporation, pro rata still would do no more than to confirm an existing impairment.

[59]E.g., Cal. Corp. Code § 1500(b); Del. Code Ann. tit. 8, § 170(a)(2) (1953). See generally Dodd & Baker, Cases and Materials on Corporations 1157-63 (2d ed. 1951).

[60]Such recovery has been characterized as a "forced" payment of a dividend. See Miller v. Crown Perfumery Co., 125 App. Div. 881, 110 N.Y. Supp. 806 (1908); Note, 69 Harv. L. Rev. 1314, 1315-16 (1956). This statement seems to envision prorata recovery as if the funds go first to the corporation, usually contrary to actual fact. However, the contention appears to have much force if the corporate cause of action is shown on the balance sheet, or if the misappropriated assets are still shown thereon. It has force in any event if the term "dividend" is not taken in a technical sense. See note 13 supra. Perhaps the dividend statute would not literally apply to pro rata unless the cause of action were shown on the balance sheet, and perhaps not even then because of the absence of corporate action. However, the party requesting pro rata might attempt to argue by analogy from the statute so as to defeat the objections of the bondholders—probably without too great a chance for success in view of the bondholders' contract with the corporation.

a statute may refer only to dividends paid through normal corporate action, and not to distributions, possibly analogous to dividends, ordered by a court. Therefore, it seems that such a statute should not affect the standing of the bondholders to object. As in the case when equity insolvency is present, it is unlikely that either side in the suit will offer evidence of an impairment of capital.[61] Consequently, bondholders should receive some sort of personal notice.[62]

Similar arguments relating to an impairment of capital are available to preferred shareholders. They have an analogous "cushion" argument, especially when they have a liquidation preference. In addition, their standing to object to prorata recovery for the common shareholders should be absolutely clear when there are arrearages on cumulative preferred dividends. Any such recovery to the common without providing for the payment of such arrearages violates the contract among the shareholders *inter sese*. Even the holder of noncumulative preferred without a liquidation preference should have standing to object to prorata recovery in order to insure that assets will be available in the future to pay his noncumulative dividend and to give him something on liquidation. This last argument is especially cogent if a preferred shareholder is permitted to share in a prorata recovery only to the extent that he is entitled to dividends under his contract with the corporation. Alternatively, provided no senior security is prejudiced, perhaps the preferred shareholders should receive so much of the prorata recovery as will return to them capital proportionate to the amount by which the common is impaired. However, this compounds the evil of a capital impairment and may undermine the notion of a capital measuring rod. Permitting the preferred to argue for a corporate recovery seems preferable. In a sale-of-control case, it might be argued that a holder of nonvoting preferred should have no standing to oppose pro rata since he has no voice in control. This argument has force if used to prevent such a holder from joining in a nonderivative class suit by noncontrolling shareholders, seeking an individual recovery. However, the use of the derivative suit in this situation presupposes the existence of some corporate asset or

[61]This is true, unless, of course, impairment of capital is involved in the actual litigation.

[62]Since a hidden capital impairment seems not likely to occur frequently, perhaps notice by mail should be sent to only a fraction of the bondholders, with the remainder being notified through publication, if that would be less expensive.

In the foreseeable-mismanagement situation, it seems that courts should be very sympathetic to the bondholders' request for a receivership to protect whatever corporate recovery they manage to obtain.

opportunity as the basis of the suit,[63] and so a preferred shareholder should have the same standing he has in any other pro rata situation, and should receive individual notice.

Even though all these notifications appear desirable, the cost of providing them, even by ordinary mail, may be high, especially in a large publicly-held corporation. The allocation of this cost might well have a practical effect on the type of remedy sought. In the first instance, it would seem that the cost of such notice should be borne by the party requesting prorata recovery, since it is his request that produces the need for the notice.[64] However, since the purpose of the notice is to give absentees the opportunity of arguing for a corporate recovery, it may be argued that the corporation should bear the expense of notice.[65] Actually, though, the notice is not given for the benefit of the corporation, but rather for the benefit of absentees who may be interested in a corporate recovery. On the other hand, since the parties to the suit and the persons receiving notice represent virtually the totality of interests in the corporation, perhaps at least some part of the burden should be borne by the corporation.[66]

When the defendants request pro rata, perhaps the cost of notice should be divided equally between them and the corporation. The defendants should bear some of the burden because they made the original demand for pro rata and stand to benefit from decreased damages; yet, at least some of the expense should fall upon those

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[63]See Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), cert. denied, 349 U.S. 952 (1955).

[64]Cf. Note, 67 Harv. L. Rev. 1059, 1065 (1954) (in class suits, burden should always be on the plaintiff); Note, 6 Stan. L. Rev. 120, 136 (1953). But cf. Gordon, The Common Question Class Suit Under the Federal Rules and in Illinois, 42 Ill. L. Rev. 518, 529 (1947); Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 938 (1958) (might in some circumstances in class suits shift burden to the defendants).

[65]Cf. id. at 938 n.462 (corporation bears expense of notice in ordinary derivative suit). Cases which deny to the plaintiffs their attorneys' fees because the recovery does not go to the corporation, e.g., Joyce v. Congdon, 114 Wash. 239, 195 Pac. 29 (1921), may not be in point here, since the primary import of the notice is to enable persons not otherwise before the court to present arguments for a corporate recovery.

[66]Even though all interests in the corporation may be affected to some extent because of corporate payment of such expenses, the burden of such costs appears to fall most heavily on the common shareholders, for bond interest and preferred dividends must be satisfied prior to payment of dividends on the common. However, senior interests could be burdened considerably if the corporation is in difficult financial circumstances. In any event, bondholders and preferred shareholders should bear a lesser part of the burden, since they are likely to gain less from a corporate recovery than the junior interests and may oppose prorata recovery on only limited grounds and to a limited extent.

who will benefit from the notice. Even though not exact, this division of the expenses will approximate the desired result and will be easy to administer. When the plaintiffs seek pro rata in the foreseeable-mismanagement situation, the corporation should bear the entire expense. Both sides to the litigation are likely to derive benefit from prorata recovery—albeit for differing reasons. Since the defendants are frequently substantial shareholders, allocating the entire burden to the corporation will be equitable, yet easy to administer.[67] In the liquidation situation, notice prior to the decree seems unnecessary; but if any is required, the cost should be taken out of the fund before the court, since the decreeing of pro rata is a matter of convenience and is merely a short cut to the ultimate result of a corporate recovery. In any event, in all these situations the court should be empowered to allocate this expense according to the equities in the individual case.

C. *Right to Share in a Prorata Recovery*

Prima facie, the plaintiffs and all other common shareholders not barred because of personal defenses of the defendants against them should be entitled to share in a prorata recovery. However, at least two questions concerning the common shareholders must be answered: (1) Assuming that prorata recovery is decreed on some ground other than mere presence of subsequent shareholders, should subsequent shareholders be barred from recovery? (2) Even if subsequent shareholders are not barred as a group, should some former shareholders be substituted for some present subsequent shareholders?

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[67]In this situation, if the defendants own no shares, they will not benefit from any reduced liability (unless they too can claim prorata recovery on another ground). By charging the corporation with the entire cost, the burden will fall predominantly upon the real beneficiaries of the recovery—the common shareholders represented by the plaintiffs—although indirectly. When the defendants do own shares, they would share in this indirect burden, but they receive the benefit of not being forced to pay some of the damages. This is a real advantage, especially if the financial condition of the corporation is not very strong, even though they would have a proportionate interest in what they restore to the corporation if a corporate recovery were decreed.

When it is the defendants who request pro rata, it does not seem inequitable to charge one half of the expense to them even if they are substantial shareholders in the corporation. The bulk of the burden will thus fall upon the defendants, but they have the most to gain through pro rata. It is true that this arrangement would not place any of the burden upon former shareholders. However, the defendants may benefit from the arguments for pro rata offered by such persons and may need them in order to prove that the impact of the wrongful acts fell solely upon the former holders. This will benefit the defendants if they can thus bar some present shareholders and still cut out some of the former holders through various personal defenses.

Since pro rata is decreed anyway, there is no need to consider the subsequent shareholders as a group, and thus the analysis used to determine whether pro rata should be decreed solely because of the presence of subsequent shareholders[68] is inappropriate. Any number can be excluded without inconvenience, and therefore each shareholder's case should be examined on its merits.

Because of the wrongful acts, some of the present shareholders may have purchased at a lower price than they would otherwise have paid. If so, it may be argued that a former contemporaneous shareholder, who sold without knowledge of the wrong, should share in the recovery rather than his purchaser.[69] This can be rationalized on the ground that, if permitted to recover, the subsequent shareholder will be unjustly enriched at the expense of the innocent, unknowing, contemporaneous shareholder. Such a substitution should not depend upon the subsequent shareholder's knowledge of the wrong,[70] but the case for substitution is even stronger if the subsequent shareholder had knowledge of the wrong while his seller did not. The right to substitution becomes more doubtful if both purchaser and seller had knowledge of the wrong at the time of sale. It is possible that, even though the purchase price was lower than it would have been had there been no wrong, part of the consideration was for the possibility that the corporation might some day recover for the wrong. If so, it seems that the former shareholder should be excluded. Of course, it may be impossible to determine whether any of the consideration was so allocated. The court must then weigh the equities between the parties. If it is found that the former shareholder was fully aware of his personal loss because of the wrong and that he sold because he did not want to risk further loss, it seems more equitable not to allow him to be substituted for the present subsequent

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[68]See part I C., supra.

[69]Cf. Watson v. Button, 235 F.2d 235 (9th Cir. 1956) (factor of lack of knowledge stressed in nonderivative suit by former shareholder to recover his proportionate share of corporate damages).

[70]The result of any given case should not differ solely because the shareholder at the time of the suit is removed by several mesne conveyances from the holder of the shares at the time of the wrong. Unless otherwise indicated, the "subsequent shareholder" referred to in the text is the actual purchaser from the contemporaneous shareholder. Except as indicated, a later subsequent purchaser stands in the shoes of his predecessor. For a discussion of this problem, see Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 948-49 (1958).

Even if pro rata is decreed solely because of the presence of subsequent shareholders, the question of whether the contemporaneous shareholders should be substituted for any or all of the present subsequent holders must be considered on an individual basis. Moreover, it is possible that some of the subsequent shareholders might recover, even though their group as a whole is prima facie barred.

shareholder. If the court finds that the former shareholder, although he knew of the wrong, was not fully aware of its effect upon him, perhaps the equities point toward a recovery for him. Similarly, if the seller had full knowledge of the wrong, but the subsequent-shareholder-purchaser had no knowledge, the subsequent shareholder may prevail over him; but less than full knowledge on the part of the seller may lead to the opposite result. In any event, if the defendants can show that recovery by the subsequent shareholder would involve a windfall and that the former shareholder waived his rights or relinquished them to his purchaser, the defendants should not be required to pay either claimant. The defendants should be liable to the present shareholder only to the extent that the wrongful act injured him.

If the subsequent shareholder paid a consideration to the contemporaneous shareholder equal to what would have been paid had there been no wrong, it seems that the subsequent shareholder should recover.[71] A recovery by the former shareholder would unjustly enrich him, whereas denial of all recovery whatsoever would seem to enrich the defendants unjustly; for, by paying a full consideration, the subsequent shareholder has taken upon himself the impact of the defendants' wrong against the corporation. In all these variations of this situation, very difficult problems of valuation are likely to be presented to the court.[72] Yet, this approach seems more likely to

[71]Compare text following note 33 and at note 34, supra. If the present shareholder is one removed by several mesne conveyances from the contemporaneous shareholder, an attempt should be made to determine whether he paid a full consideration, as described in the text. If so, this should be determinative rather than the consideration paid by the original subsequent shareholder. Perhaps the most difficult case would arise when the present subsequent shareholder has paid a full consideration, but the former contemporaneous shareholder received a price depressed because of the wrong, the real gain thus going to some intermediate subsequent shareholder. In this case, the court should strive to protect the present shareholder, for example, by placing a greater burden upon the contemporaneous shareholder to show that he did not fully understand the impact of the wrongful acts upon him and did not merely want to avoid further risk of loss. If the equities are perfectly balanced, however, perhaps the defendants should be compelled to recompense both for their loss, since the wrongful acts have in fact injured both. This is likely to occur so infrequently that it does not seem unfair to impose this burden upon the defendants. However, the defendants might be given a defense against the present shareholder, although liable to the contemporaneous holder, if they can prove that the price paid by the present holder depended solely upon independent market factors operating after the wrong was known or could have been known by buyers and sellers.

[72]Courts, though, have solved difficult valuation problems. See, e.g., Perlman v. Feldmann, 154 F. Supp. 436 (D. Conn. 1957).

achieve substantial justice than a blanket rule of excluding or including subsequent shareholders.

Trade creditors of the corporation should have no right to share in any prorata recovery, but if the corporation is insolvent in the equity sense, they should be able to prevent such recovery until they are paid.[73] Although bondholders may be able to prevent prorata recovery until an impairment of capital is corrected, it does not seem that they would be entitled to any of the principal on the bonds under the bond indenture until maturity. However, they should be permitted to collect arrearages in interest payments before any payments are made to the shareholders. Preferred shareholders may be in a somewhat different position; they are equity holders and risk-takers. But since they are entitled to receive only limited dividends, whether cumulative or not, they should share in a prorata recovery only to the extent of such dividends, payable at the time of suit but not yet paid, and should not be entitled to any return of capital.[74]

III. Procedure After the Decree

If a closely-held corporation is involved in the suit, no substantial mechanical difficulties should arise after prorata recovery is decreed. Normally only a single class of common shares exists, and all the shareholders either are parties or can be easily joined.[75] In such cases, courts have had no difficulty in making the distribution of damages, usually through a master.[76] No unfamiliar problems are presented.

As previously noted, *Perlman v. Feldmann*[77] was the first pro rata case involving a corporation whose shares were widely held. The

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[73]See text at notes 56-57, supra. For a fuller discussion of the rights of bondholders, see text at notes 58-62, supra.

[74]See text at and around note 63, supra. This right would extend to any dividends not paid at the time of decree and arguably might include dividends for the entire current year, even though not yet payable, if it appears that they might not otherwise be paid. In the liquidation situation, these shareholders should receive out of the fund collected only what they are entitled to by contract on liquidation; of course, all senior security interests and trade creditors must first be satisfied out of the fund if they are not otherwise paid.

[75]See, e.g., Spaulding v. North Milwaukee Town Site Co., 106 Wis. 481, 81 N.W 1064 (1900).

[76]See, e.g., Backus v. Finkelstein, 23 F.2d 357 (D. Minn. 1927). In Eaton v. Robinson, 19 R.I. 146, 31 Atl. 1058 (1895) (per curiam), the court avoided problems of distribution by awarding judgment only to those shareholders before the court. However, this would force the remaining shareholders to commence future actions, with possible statute-of-limitations difficulty.

[77]219 F.2d 173 (2d Cir.), cert denied, 349 U.S. 952 (1955). This case, apparently, did not present any of the problems arising from the existence of bondholders, preferred shareholders, or ordinary creditors.

final order merely provided for the clerk to send notice to all stockholders appearing on a list submitted to the court, apparently without an examination of the status of those holders.[78] Thus, the problem of effecting the distribution remained simple.

When the distribution is more complex, it may be possible to include in the notice given prior to the decree[79] a statement of when to present claims after the decree. However, the exact date of the decree will be very difficult to estimate, especially if many persons appear to contest the granting of prorata recovery. Therefore, a second notice—after the decree—will probably be needed. Since a pro rata case after the decree is not different from an ordinary class suit, the normal class-suit rule placing the burden of giving notice upon the plaintiffs, with the costs being taken from the fund recovered, should be followed.[80] Unlike notice before the decree, when the primary issue is whether or not to grant pro rata, the corporation as a whole is not involved; this notice after decree is entirely for the benefit of those who might claim a share in the recovery.

The actual machinery for effecting distribution could be the same as that worked out for use in an ordinary class suit:[81] (1) The court enters an interlocutory order or decree for the plaintiffs of record and all similarly situated who come in prior to a specified deadline. (2) A master is appointed, to whom the defendants are compelled to give whatever names and addresses of absentees they have in their possession. This is important if former shareholders are to participate in the recovery, for the defendants may be able to provide records giving their identity. Of course, the defendants will be compelled to turn over the current stockholder lists, if in their possession and if they have not done so for the purpose of prior notification. (3) The plaintiffs' attorney or the master submits the forms for proof of claims with explanatory material to the judge for approval and then mails them to the absentees. (4) The absentees are required to file their claims

[78]160 F. Supp. 310, 311 (D. Conn. 1958). The court did not raise the problem of the existence of subsequent shareholders, although in fact almost all the shares were held by one subsequent shareholder at the time of the decree. Jennings, Trading in Corporate Control, 44 Calif. L. Review. 1, 3 n.12 (1956).

[79]See part II B., supra.

[80]See Perlman v. Feldmann, 160 F. Supp. 310, 312 (D. Conn. 1958); Wheaton, supra note 50, at 438-39, 440 (the class-suit rule).

[81]See Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 693-94 (1941). The main outlines of the authors' proposal are presented in the text. The authors regard this procedure as the "maximum complexity" permissible for class suits. Id. at 694. See also Backus v. Finkelstein, 23 F.2d 357, 366 (D. Minn. 1927).

within a prescribed period. The defendants are permitted to file objections raising personal defenses, but not the common questions settled in the main suit. (5) The master hears objections and determines the individual damages. (6) Upon submission of the master's report, the court hears objections and then renders a final decree ordering the defendants to pay. The court reserves jurisdiction until the end of the distribution.

The use of this machinery presents no great difficulty when the extent of the damages recoverable from the defendants depends entirely upon the number of present shareholders who prove their claims, only the liability per share having been determined during the suit. The defendants should have the burden of proving personal defenses against the claimants, who are merely required to establish their identity as shareholders. In most instances, the defendants should be able to prove acquiescence readily enough through the records of shareholders' meetings; it seems that once such records are introduced, the claimants should have the burden of going forward to show that their apparent acquiescence was not real. The defendants, however, should have the ultimate burden of persuasion since they stand to benefit from a reduced recovery.[82]

More difficulty will be encountered if former contemporaneous and present subsequent shareholders compete for the recovery. In order to prevent a double recovery (by both the former and present shareholders), it may be necessary for the court to ascertain the total amount of damages that could possibly be recovered from the defendants.[83] The court might then merely pay out the fund on a first-come-first-served basis. This haphazard system, however, would hardly carry out the equitable purposes of prorata recovery. It has been suggested that a presumption against recovery by the subsequent shareholders should be established until they show that they are entitled to the recovery in a proceeding of which the former shareholders have notice.[84] However, since it will usually be predictable that some former shareholders will be entitled to recover,[85] and this can be indicated in the interlocutory decree, the general post-decree

[82]But see Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 948 (1958). The result should be the same in the foreseeable-mismanagement situation: All the shareholders other than the defendants would recover directly from the defendants unless they prove personal defense against some.

[83]Compare Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), cert. denied, 349 U.S. 952 (1955), on remand, 154 F. Supp. 436 (D. Conn. 1957). However, in one situation a double recovery might be desirable. See note 71 supra.

[84]Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 949 (1958).

[85]This is especially true in the sale-of-control cases.

notification to all possible claimants should suffice. If the identity of some of the former shareholders is unknown, presumably because of sales on stock exchanges, notice by publication could be used; such a notice would identify the period during which the shareholders could be considered "contemporaneous." Of course, every effort should be made to trace a chain of title back from a present shareholder to a contemporaneous holder. If, however, the original post-decree notice by publication presents the only means of finding the contemporaneous holder, that notice should specify the date by which such a holder must come forward.[86] After that date, the court should determine the equities as between the remaining present subsequent shareholders and the defendants;[87] if it is determined that these shareholders suffered no injury from the defendants' acts, the defendants' liability would be reduced *pro tanto.*

IV Some Effects of Granting Prorata Recovery

The preceding discussion has focused upon some of the implications arising from the possibility of a prorata recovery. Now some inquiry must be made into the nature of the suit once pro rata is decreed. Does the suit remain essentially derivative in character, or does it become some type of class action? If the latter, at least in situations in which the plaintiffs can request pro rata initially, should the plaintiffs be excused from complying with the procedural requirements for derivative suits?[88] The first question may be somewhat misleading, for the ordinary derivative suit is certainly a type of representative suit.[89] Nevertheless, at least for the purpose of notification to absentees and distribution of the recovery, the suit seems to be treated

[86]See Wheaton, supra note 50, at 439. If the contemporaneous holder does come forward, the defendants should be allowed at that time to argue against recovery by either claimant, provided they do not rely on defenses already decided against them in the main suit.

[87]If prorata recovery is decreed solely because of the presence of subsequent shareholders, this question would have been settled during the main suit, unless some, but not all, such shareholders can prove that they were the ones harmed by the wrongful acts. See text at notes 68-72, supra.

[88]This may be especially crucial in states which require security for costs from certain plaintiffs in derivative suits. E.g., N.Y. Gen. Corp. Law § 61-b. See Goldstein v. Weisman, 185 F. Supp. 242, 250-51 (S.D.N.Y. 1960) (problem hinted at, but not faced).

[89]See Prunty, The Shareholders' Derivative Suit; Notes on Its Derivation, 32 N.Y.U.L. Rev. 980, 989 (1957); Glenn, The Stockholder's Suit—Corporate and Individual Grievances, 33 Yale L. J. 580, 583 (1924) (but it is primarily derivative, id. at 584). But see McLaughlin, The Mystery of the Representative Suit, 26 Geo. L.J. 878, 901-04 (1938); Note, Shareholder Derivative Suits; Are They Class Actions?, 42 Iowa L. Rev. 568 (1957).

the same as other kinds of class suits.[90] On the other hand, even when the plaintiffs are entitled to request prorata recovery in their complaint, the action must still be viewed as brought in the right of the corporation, and not in the right of individuals.[91] It seems, therefore, that the plaintiffs should be required to comply with the requirements for bringing a derivative suit.[92] Otherwise, plaintiffs could avoid these requirements simply by requesting direct prorata recovery. Of course, it could be argued that if the plaintiffs failed to obtain pro rata under such a complaint, they should simply be thrown out of court; thus the action might be viewed as nonderivative. However, this would be a poor method of judicial administration. It would be preferable to dispose of the corporate cause of action completely once it is brought before the court, especially in view of the possibility that the plaintiffs may be the only shareholders who desire a prorata recovery.

Since the derivative suit with a prorata recovery, though initially treated as an ordinary derivative suit, is best treated after decree in the same manner as nonderivative class suits, there is good reason to view this as a sui generis type of action.[93] Because the prorata remedy reaches more equitable results in certain cases,[94] categorization into any rigid form after the decree is undesirable; in particular, rigid categorization according to the types of class suits provided in Federal Rule 23(a) should be avoided. Thus, if a closely-held corporation is involved, there is no need to apply any kind of class-suit concept to the action after prorata recovery has been decreed.[95] Furthermore, even though in the ordinary derivative suit a single shareholder who prosecutes the suit with proper competence and vigor[96] quite adequately repre-

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[90]See Kalven & Rosenfield, supra note 81, at 692 n.26.

[91]See Stevens, Private Corporaitons § 167, at 784, 796 (2d ed. 1949); Note, 40 Calif. L. Rev. 127, 131 n.40 (1952). But see Berger, "Disregarding the Corporate Entity" for Stockholders' Benefit, 55 Colum. L. Rev. 808 (1955); Comment, 46 Ill. L. Rev. 937 (1952).

[92]See Note, 40 Calif. L. Rev. 127, 131 (1952); cf. Berger, supra note 91, at 823 (some procedural safeguards in derivative suits should be applied to the individual class suit proposed therein).

[93]Compare Pentland v. Dravo Corp., 152 F.2d 851, 854 (3d Cir. 1945); Rahl, The Class Action Device and Employee Suits Under the Fair Labor Standards Act, 37 Ill. L. Rev. 119, 134 (1942) (FLSA class suits are a sui generis type of action).

[94]See, e.g., May v. Midwest Ref. Co., 121 F.2d 431 (1st Cir.), cert. denied, 314 U.S. 668 (1941) (large long-settled interests in former corporate assets protected through use of pro rata).

[95]In fact, it may be improper to do so. Cf. Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 937 (1958) (size of class).

[96]See Everett v. Phillips, 288 N.Y. 227, 233, 43 N.E.2d 18, 20 (1942) (by implication).

sents the interests of all the shareholders, the court should make a fresh analysis of the plaintiff's ability to represent the possibly many divergent interests in the corporation concerning the very issue of whether pro rata should be decreed.[97]

For the purpose of the statute of limitations the normal derivative-suit rule should apply;[98] then a claimant is not barred because the statute had run on the corporate cause of action prior to the time when he individually submitted his claim.[99] The opposite rule would permit the defendants to escape liability to many, if not all, claimants simply because the court declared prorata recovery at or near the expiration of the period of limitations. The policy against stale claims certainly would not require this windfall to the defendants, since the commencement of the suit informs them of the possibility of these claims, and indeed of the possibility of the larger liability of a corporate recovery.

The res judicata effects flowing from the pro rata suit must similarly be worked out apart from a preconceived mold. Issues relating to the merits of the claim against the defendants should follow the normal rules of res judicata in derivative suits; that is, absentees should be bound on issues relating to the merits whether or not actually litigated and regardless of the notice sent to them.[100] However, only those to whom notice is sent should be bound by the court's determination to grant prorata recovery.[101] If the court rejects pro

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[97]For a discussion of these possibly divergent interests, see part II B., supra. Thus among those who would ultimately oppose the defendants on the merits there may hardly be a single homogeneous class represented by the plaintiffs. Cf. Comment, 25 Texas L. Rev. 64, 70-73 (1946) (discussion of problem of sub-classes).

[98]See generally Baker & Cary, Cases and Materials on Corporations 683-86 (3d ed. 1958) (no statutes distinguished between derivative suits and suits by the corporation, though the former raise special problems); Note, Statute of Limitations and Shareholders' Derivative Actions, 56 Colum. L. Rev. 106 (1956).

[99]This same rule is advocated for all class suits: The statute is tolled once suit is brought, and each class member can share in the recovery even though the statute would bar his separate individual suit. See Keeffe, Levy & Donovan, supra note 51, at 339-42; Gordon, supra note 64 at 531 n.79 (advocates tolling even if suit is later dismissed or compromised).

There might be such a bar if the pro rata suit were viewed as resulting ultimately in a kind of "spurious" class action like the suit under federal rule 23(a)(3). See Chafee, Some Problems of Equity 267-68, 283 (1950). But see Moore, Federal Practice par. 23.12, at 3476 (2d ed. 1948).

[100]See Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 956 (1958); Note, 34 Colum. L. Rev. 118, 136-37 (1934). However, notice is required in some jurisdictions when the suit is compromised or dismissed. See, e.g., Fed. R. Civ. P 23(c).

[101]See note 51 supra; cf. First Nat'l Bank v. Edwards, 134 S.C. 348, 132 S.E. 824 (1926). Notice by publication should be sufficient to bind unknown persons. See Keeffe, Levy & Donovan, supra note 51, at 347-48 (alternative suggestion to jurisdic-

rata, this determination should bind the absentees whether or not notice has been sent, for the primary purpose of this notice is to enable those who oppose the pro rata remedy to argue for a corporate recovery; thus when a corporate recovery is decreed, the ordinary derivative-suit rules should apply.[102] On the issue of damages no

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tion by notice alone that the court might take jurisdiction in rem, the res being the class claim, id. at 348 n.53); cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (quasi in rem suit). But see Letter from George W. Pepper to Arthur J. Keeffe, 33 Cornell L.Q. 349, 350 (1948) (may need more individualized notice). In the pro rata situation, the only group likely to contain many unknown persons is that of former shareholders, who cannot be harmed by the court's granting prorata recovery, since, without a prorata recovery, they could not share at all in the recovery; furthermore, they will be given the best available post-decree notice. Therefore, binding such persons to a grant of pro rata through notice by publication does not appear prejudicial or unfair.

It is difficult to conceive of a workable remedy for a shareholder who is entitled to individual notice, but does not receive it, and is thus not bound by the decision to grant prorata, rather than corporate, recovery. Perhaps he could seek to enjoin the distribution to the shareholders if it has not yet occurred until he is heard on the question whether to grant prorata recovery; however, this situation is unlikely to occur because such a shareholder is not likely to receive post-decree notice either. Perhaps he could bring a later derivative suit against all who received part of the recovery and against the former defendants for the balance due the corporation on the original cause of action. If the number who received the recovery is large, the suit might be maintained as a class suit against a defendant class. Even if this solution might be accepted as workable—which seems doubtful, a rule of law permitting the question of whether to grant prorata recovery to be relitigated by a single shareholder seems dubious. The corporation itself, which was a party to the original suit, might be held bound by the determination not to grant a corporate recovery. In any event, it does not seem that such a shareholder should be permitted to make any kind of a collateral attack on the judgment in the original suit, whether such attack be made in the same state where the original judgment was rendered or in some other state. However, in order to give some teeth to the notice requirement, perhaps the prorata decree itself should provide for reopening within a given time (e.g., one year) by a shareholder who was entitled to individual notice, but did not receive it. This would not only give effect to the notice requirement, but would provide a definite date for the final termination of the litigation. The foregoing analysis applies with equal force to any other type of individual, such as a bondholder, who might be held entitled to receive individualized notice.

[102]This question of binding effect could arise only if the court failed to give the pre-decree notice that should normally be available if pro rata is requested. Some courts, though, might prefer to avoid the bother of notice if they determine that the case for pro rata is very weak.

Normally it would seem that a corporate recovery would not harm any of the absentees. However, it is true that some absentees might want to argue for pro rata on the ground of foreseeable mismanagement. If the plaintiffs fail to argue properly for pro rata, the proper remedy appears to be intervention on the ground of lack of adequacy of representation. Cf. Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 955 (1958). Furthermore, a corporate recovery prima facie protects all the interests in the corporation. On the other hand, if pro rata is decreed and some of the absentees are barred from recovery, these absentees suffer an

problem should arise: if pro rata is decreed, the pre-decree notice should be sufficient to bind all the absentees; if pro rata is not decreed, the ordinary derivative-suit rule that all are bound regardless of notice may be applied.

The question remains whether nonresident absentees, even if they receive proper notice, can constitutionally be bound by a state-court determination whether or not to grant prorata recovery. In the ordinary derivative suit, this problem has never arisen, probably because of the requirement of actually bringing the corporation itself into the suit. However, on the issue of whether to grant pro rata, the usefulness of relying upon the corporate entity vanishes, and divergent interests within the corporation must be considered separately. If the issue of pro rata is raised but a corporate recovery is decreed, the ordinary derivative-suit procedure should be followed. If pro rata is decreed, it may be argued that, even if in some class-action situations state courts could not constitutionally bind nonresident absentees, the state court should be able to bind all here, provided proper notice is given, since it initially acquired plenary jurisdiction over the corporate cause of action. This argument may fail, however, since there is nothing to bar a nonresident from commencing his own deriva-

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immediate and irrevocable loss. Therefore, the need for pre-decree notice is far greater when pro rata is ultimately decreed.

It is true that former shareholders might want to argue for prorata, since this is their only way to benefit from the recovery, unless they are restored to the status of present shareholders, for example, though rescission of a sale, see, e.g., Goodliffe v. Colonial Corp., 107 Utah 488, 155 P.2d 177 (1945) (plaintiffs in derivative suit permitted to reestablish selves as shareholders of record). The former shareholders might seem more in need of notice that a corporate recovery is to be granted than do the present shareholders who wish to argue that the case presents a foreseeable mismanagement situation. Nevertheless, they do not seem to have standing to raise the defendants' personal defenses against some present shareholders, even if they might compete with some of the present shareholders after a pro rata decree; and the foreseeable-mismanagement argument is clearly not open to them. Therefore, they should be entitled to pre-decree notice only in the sale-of-control situation and possibly in the subsequent-shareholder situation. In the latter situation, notice might not be essential since the defendants will most likely make the same arguments for pro rata as those available to the former shareholders. However, testimony from some of the former shareholders might be necessary in order to establish the defendants' contention that the injury was done only to the former shareholders, although notice given for this purpose to only some of these former holders should not be determinative of the binding effect of the court's determination upon these absentees. In any event, the former shareholders might have some recourse through ordinary intervention. For discussion of the need for notice to these former holders in order to bind them when pro rata is ultimately granted, see text at notes 53-55, supra.

tive suit in another jurisdiction prior to the decree in the first suit.[103] Moreover, to contend that a court has acquired "[illegible]ry jurisdiction" is to beg the question of whether the court has the power to bind the absentees once conflicts of interest because of pro rata become possible. In any event, even though there may be some doubt, indications seem to be that state courts can bind nonresident absentees in ordinary class suits,[104] and thus should have the same power here.

V. Some Problems in the Federal Courts

A. *Application of the Rule of Erie R.R. v. Tompkins.*[105]

In cases in which the corporate cause of action is based upon a state-created right, the question arises whether a federal court that has jurisdiction solely because of diversity of citizenship must follow state law in determining whether to grant prorata recovery. First, let us assume that the highest court of the state in which the federal district court is sitting has held squarely that prorata recovery will not be granted in the type of case before the federal court.[106] It may be argued that the pro rata device is simply one remedy available to a federal court of equity,[107] and that the federal court is free to grant an equitable remedy even though the state court would not.[108] Thus when the case involves a choice among different remedies—corporate recovery versus prorata recovery—rather than the question of the availability of any remedy at all, it might be contended that the fed-

[103]Cf. Winkelman v. General Motors Corp., 39 F. Supp. 826 (S.D.N.Y. 1940) (several suits commenced in federal and state courts within the same state); Wheaton, Representative Suits Involving Numerous Litigants, 19 Cornell L.Q. 399, 426 (1934.) Wheaton would not permit separate suits by members of the class during the pendency of the class suit. Id. at 438. A similar suggestion has been made concerning derivative suits. See McLaughlin, supra note 89, at 903. However, there may be some difficulty in preventing a nonresident from beginning another suit in another jurisdiction, a point not discussed by either author.

[104]See Hansberry v. Lee, 311 U.S. 32, 43 (1940) (dictum); Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 940 (1958); Note, 67 Harv. L. Rev. 1059, 1067-68 (1954).

[105]304 U.S. 64 (1938).

[106]Such a situation might occur in Delaware. See Keenan v. Eshleman, 23 Del. Ch. 234, 2 A.2d 904 (Sup. Ct. 1938).

[107]Cf. Spaulding v. North Milwaukee Town Site Co., 106 Wis. 481, 496, 81 N.W. 1064, 1069 (1900) (dictum) (granting of prorata recovery involves an equitable power of the court). Even though pro rata is a type of remedy, it does not follow that it must be classified as "procedural" for the purpose of the Erie doctrine. Cf. Sampson v. Channell, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940).

[108]See Guffey v. Smith, 237 U.S. 101 (1915); cf. Pusey & Jones Co. v. Hanssen, 261 U.S. 491 (1923).

eral court should be able to mold its remedy independently.[109] However, it seems that the granting of prorata recovery is not based upon remedial standards, that is, upon a determination of how best to carry out the policy of the underlying liability-determining law Rather, except in some liquidation situations, the desirability of prorata recovery depends upon prelitigation conduct. In other words, the decision is not as to the desirability of one remedy or another in a given factual situation,[110] but rather a determination of whether to transfer the substantive right to the recovery from the corporation to some of its shareholders upon finding certain facts to exist.[111] Furthermore, even if prorata recovery is considered merely one type of remedy available to a court of equity, its unavailability in the state court may be grounded upon a strongly felt state policy,[112] which should be honored in the federal court.[113] Moreover, the state legal rule regarding prorata recovery directs the outcome of the litigation and should therefore bind the federal court.[114]

This same analysis should lead the federal court to attempt to follow state law when the state decisions have refused prorata recovery in some situations, but are silent concerning the situation before the federal court. Conversely, if in a situation similar to that before the federal court, a state court would grant prorata recovery, it seems that the federal court should be obliged to do the same. This is not a situation in which the federal court would merely close its doors to the plaintiffs, remitting them to the state court.[115] Rather, the federal court has assumed jurisdiction over the controversy and therefore

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[109]See Hart & Wechsler, The Federal Courts and the Federal System 652 (1953). The unavailability of any remedy in the state courts, however, closes the doors of the federal courts sitting in the state in diversity cases. See Angel v. Bullington, 330 U.S. 183 (1947).

[110]See Guffey v. Smith, 237 U.S. 101 (1915).

[111]See Note, 69 Harv. L. Rev. 1314, 1317 (1956).

[112]See Keenan v. Eshleman, 23 Del. Ch. 234, 2 A.2d 904 (Sup. Ct. 1938).

[113]Cf. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535-36 (1958) (some indication that in some areas the strength of the state policy may determine whether the federal court must follow the state under Erie).

[114]Cf. Guaranty Trust Co. v. York, 326 U.S. 99 (1945). It is not clear what law was followed in the Perlman case. See Perlman v. Feldmann, 219 F.2d 173, 178 (2d Cir.), cert. denied, 349 U.S. 952 (1955). In May v. Midwest Ref. Co., 121 F.2d 431 (1st Cir.), cert. denied, 314 U.S. 668 (1941), in denying the equitable relief requested and substituting a prorata recovery, the court did refer to the law of the state of incorporation, but it is not clear that this law was determinative.

[115]For indications that such door-closing may be permissible, see Hart & Wechsler, op. cit. supra note 109, at 658; Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 964-65 (1958).

should be required to follow the state rules regulating liability.[116] However, if prorata recovery is urged in a liquidation situation solely as a matter of convenience, the federal court should be free to mold the remedy, provided no person shares in the recovery who would not share if the suit were brought in the state court.[117] When the courts of the state have been completely silent, the federal court must attempt to work out its results in accordance with whatever relevant state law it can find.[118]

If the derivative suit could not have been brought in the state court because of the inability to obtain service upon a nonresident corporation,[119] it might be argued that the federal court should not be limited by the state's rules concerning prorata recovery. This argument might prevail if this were a question of whether a particular type of multiparty litigation should be permitted in the federal court when the device is unavailable in the state courts.[120] In this situation, however, the derivative suit device itself is available in the state courts. Furthermore, since the issue of whether to grant pro rata should be determined by state rules governing the underlying liability, the inability to bring the action in the courts of the state in which the federal court is sitting, solely because of service-of-process problems, does not render the *Erie* doctrine inapplicable.[121]

A similar argument for federal independence in granting prorata recovery might be made when the federal court obtains jurisdiction of a state-created claim solely through the doctrine of pendent jurisdiction.[122] However, even though jurisdiction is not based upon diver-

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[116]Cf. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) (rationale that state security-for-costs statute creates a new liability).

[117]Cf. Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 996-98 (1958).

[118]See generally Hart & Weschler, op. cit. supra note 109, at 628-29.

[119]If venue is laid in the federal courts under 28 U.S.C. § 1401 (1958), extraterritorial service over the corporation in whose behalf the suit is brought may be obtained under 28 U.S.C. § 1695 (1958). See Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 963 (1958).

[120]See id. at 997-98. But cf. Griffin v. McCoach, 313 U.S. 498 (1941).

[121]It is possible that the substantive law of a state other than that of the forum should be applied, since venue may be laid under 28 U.S.C. § 1401 (1958) only because the real defendants reside in the forum; the forum may have had no connection with the alleged wrongful acts. It is arguable that in this situation the federal court should ascertain the proper state law through an independent application of conflict-of-law rules. Cf. Hart & Weschler, op. cit. supra note 109, at 633-36. However, Griffin v. McCoach, supra note 120, may require the federal court to apply the conflicts rule of the forum. If this is true, the federal court would be obliged to apply the law of the forum state if that state regards the rules governing prorata recovery as "procedural." Cf. Sampson v. Channell, 110 F.2d 751 (1st Cir.), cert. denied, 310 U.S. 650 (1940).

[122]See Hurn v. Oursler, 289 U.S. 238 (1933).

sity of citizenship, *Erie* requires the application of state substantive law in deciding the state-created right, for state law here operates independently and of its own force, and not merely through adoption by federal law.[123] Therefore, the right of the federal court to make an independent determination of the prorata issue, once the federal claim has dropped out of the case leaving only the state claim for decision, must be denied on the same reasoning as that applied in the situation in which the suit could not have been brought in the state court. However, if the federal claim is determined upon a trial, it seems that federally developed rules on pro rata should govern even though the state claim is incidentally adjudicated.

B. *Federal Jurisdiction.*

Since the derivative suit with prorata recovery should be considered sui generis, with some elements governed by the rules of the ordinary derivative suit and others by the rules of ordinary nonderivative class suits,[124] some question may arise as to the power of the federal court sitting in a diversity-of-citizenship suit to permit nondiverse shareholders to enter the suit to share in a prorata recovery. It seems, though, that once the federal court has obtained jurisdiction over the derivative suit, it should retain jurisdiction until the final relief is granted.[125] However, since the granting of pro rata involves more than the mere fashioning of a remedy, it might be argued that, for the purpose of federal diversity jurisdiction, the entire suit must be governed by ordinary class-suit rules. Even so, diversity between the original parties of record should be sufficient even though non-diverse class members enter later; this idea of minimal diversity will probably be accepted.[126]

More difficult is the question of jurisdictional amount—especially

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[123]See Hart & Weschler, op. cit. supra note 109, at 697. If the plaintiff brings a derivative suit based on a state-created cause of action, but can obtain federal-question jurisdiction because he must rely on federal law in order to prove his case, see Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), it still seems that the federal court should be obliged to follow the state rule on pro rata, since the primary duty involved in the case is determined by state law. When, however, the cause of action is based upon federal law, the federal courts should be free to develop their own rules governing prorata recovery.

[124]See text at notes 93-102, supra.

[125]Cf. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (bill ancillary to earlier bill maintainable without diversity).

[126]See Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 933 (1958). Professor Moore indicates that nondiverse members of a class can intervene in a spurious class suit after the commencement of the action. 3 Moore, Federal Practice par. 23.10, at 3443 (2d ed. 1948).

in view of the recent increase in the requirement.[127] While it is true that a federal court does not lose jurisdiction of an action simply because the plaintiff fails to recover the jurisdictional amount,[128] it might be argued that the decreeing of prorata recovery changes the suit into a new type of action for which an independent showing of jurisdiction is required.[129] If this argument is sound, not only might an aggregate prorata recovery in excess of $10,000 be required, but possibly each claimant might be required to claim this amount. In other words, solely for the purpose of deciding whether the monetary requirement has been satisfied, the court may have to determine whether the suit has become a "true," "hybrid," or "spurious" class action under Federal Rule 23(a). Only if the suit is considered a "true" class action could the various claims be aggregated.[130] It is arguable that the shareholders comprising the plaintiff class share a "common" right in the recovery within the meaning of Rule 23(a)(1) relating to true class actions.[131] However, when the defendants may have personal defenses against some of the claimants and when the total amount of the recovery will depend upon the number of shareholders who qualify to share in the recovery, the rights of the claimants should be viewed as "several," thus rendering the suit "hybrid" or "spurious"—probably the latter, although the matter of classification is often extremely difficult.[132] Even so, in such class suits only the individual claims of the original parties of record need meet the jurisdictional amount.[133] Thus small claimants would not be barred from intervening, or participating without intervention,[134] although there is some indication that in spurious class suits absentees can come in only through intervention.[135]

In order to avoid this tangle, the federal court should look only to the amount claimed by the plaintiff in the complaint, subject to

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[127]28 U.S.C. §§ 1331, 1332 (1958).

[128]See Hart and Wechsler, op cit. supra note 109, at 994-95.

[129]See Developments—Multiparty Litigation, 71 Harv. L. Rev. 874, 960 (1958).

[130]See id. at 933; Moore, Federal Practice par. 23.13, at 3477-78 (2d ed. 1948).

[131]Cf. Smith v. Swormstedt, 16 How. 57 (U.S.) 288 (1853) (suit concerning disposition of a pre-existing fund).

[132]See Chafee, op. cit. supra note 99, at 251-56.

[133]See, e.g., Ames v. Mengel Co., 190 F.2d 344 (2d Cir. 1951); Moore, Federal Practice par. 23.10, at 3443 (2d ed. 1948).

[134]See Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 712-13 (1941) (advocates participation after the decree, apparently differing from formal intervention).

[135]See Oppenheimer v. F. J. Young & Co., 144 F.2d 387, 390 (1944) (by implication); Rahl, supra note 93, at 126, 130 (by implication). Such intervention must probably be before the decree. See Chafee, op. cit. supra note 99, at 285.

whatever criteria apply in other actions.[136] Thus the possible corporate recovery would be determinative.[137] However, when the plaintiff properly requests prorata recovery in the complaint, the actual prorata share demanded should control. This approach seems justified, since the whole purpose of the action is to dispose of the corporate cause of action once and for all, whatever the kind of recovery ultimately granted. The federal courts could use this sensible approach by viewing the action as sui generis and not necessarily within any category of Rule 23(a). Alternatively, if it is felt that, apart from specific statutory authority,[138] Rule 23 occupies the entire field of class-suit-type actions in the federal courts, the same result can be reached by relying on the categorization of the derivative suit as a true class suit within Rule 23(a)(1). Thus, when the plaintiff properly requests prorata recovery in his complaint, the court could treat the suit as a derivative suit for the proportion of the corporate claim demanded by the plaintiff.[139]

VI. Conclusion

The availability of prorata recovery may cast some light upon the nature of the derivative suit, and even of the corporation itself. The prorata remedy does not seem to fit in with any rigid concept of the corporation as an entity distinct from its shareholders, nor with a corresponding conception of the derivative suit.[140] If the corporation possesses a legal personality completely distinct from its shareholders, logically it seems that the status of its shareholders, often the basis for pro rata, should be irrelevant. The slight divergence from the rigid entity approach introduced by the contemporaneous-ownership rule in derivative suits does not appear to preclude the use of the entity theory because the recovery is for the corporation. However, direct

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[136]See generally Hart & Wechsler, op. cit. supra note 109, at 994-95.

[137]See Koster v. (American) Lumbermens Mut. Cas. Co., 330 U.S. 518, 523-24 (1947) (dictum).

[138]E.g., Fair Labor Standards Act § 16 (b), 52 Stat. 1069, as amended, 29 U.S.C. § 216(b); Rahl, supra note 93, at 132, 134 (class suit here a sui generis action).

[139]Cf. Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A., 343 U.S. 156 (1952) (rationale that the corporation should state a corporate claim on behalf of intervening nonenemy shareholders for the proportion of the assets due to such intervenors). This case is discussed extensively in Berger, "Disregarding the Corporate Entity" for Stockholders' Benefit, 55 Colum. L. Rev. 808 (1955).

[140]See 4 Pomeroy, Equity Jurisprudence §§ 1089, 1091, 1094, 1095 (5th ed. 1941) for a presentation of the entity theory of the corporation and derivative suit. The pro rata problem is apparently ignored. Professor Stevens points out that the prorata cases should lead to a "reassessment of the merit of the inherited concepts of corporateness." Stevens, Private Corporations § 167, at 789 (2d ed. 1949).

recovery by the shareholders through prorata recovery can result only from a disregard of the corporate entity.[141] Therefore, rather than attempting to justify the use of pro rata merely on the ground that a court of equity should be able to mold this remedy because of the necessity of an exceptional case,[142] it would seem preferable to fit it in with some general theory of the nature of the corporation and the derivative suit. Thus the corporation should be considered an association of persons "united for a common purpose and permitted by law to use a common name."[143] The shareholders thus possess a dual legal personality—individual and corporate.[144] The plaintiff shareholder in a derivative suit acts in the latter capacity, the derivative suit being a convenient procedural device designed to avoid a multiplicity of suits by shareholders and to insure that the rights of creditors are safeguarded.[145] Under this view of the corporation and the derivative suit, prorata recovery may be used whenever a more equitable result can be reached by doing so, provided that the supervening rights of creditors are protected.

This equitable device, though, should not be used too freely, since a corporate recovery generally tends to insure that all the interests in the corporation are protected.[146] Furthermore, when the corporation is a going concern, the management of the corporate funds should generally remain in the hands of the corporate managers—the persons appointed by the shareholders to manage their investment.[147] However, prorata recovery should be used to protect the investment of innocent shareholders, as in the foreseeable-mismanagement situation, and to bar shareholders against whom defendants clearly have equitable defenses.

If pro rata is so used, the objection that it tends to encourage fraud[148] seems weak. If the defendants practice fraud or concealment

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[141]See Berger, supra note 139. See also Berle, The Theory of Enterprise Entity, 47 Colum. L. Rev. 343 (1947) (courts will disregard corporate entities to look to the real enterprise in order to reach realistic results).

[142]See May v. Midwest Ref. Co., 121 F.2d 431 (1st Cir.) cert. denied, 314 U.S. 668 (1941); Ballantine, Corporations § 143, at 336 (rev. ed. 1946).

[143]Berle, supra note 141, at 352.

[144]See Stevens, Private Corporations §§ 8, 9 (2d ed. 1949).

[145]See Smith v. Hurd, 53 Mass. (12 Met.) 371 (1847) (these practical reasons urged as well as those based upon a strict view of the corporate entity).

[146]In the liquidation situation, pro rata would afford the same protection. In the sale-of-control situation especially, pro rata may be the only way to protect the interests of a large group, the former shareholders.

[147]Cf. Glenn, The Stockholders' Suit—Corporate and Individual Grievances, 33 Yale L.J. 580, 587-88 (1924).

[148]Keenan v. Eshleman, 23 Del. Ch. 234, 253, 2 A.2d 904, 912 (Sup. Ct. 1938).

in order to obtain the shareholder acquiescences relied upon for pro rata a court of equity could hold that the acquiescences were ineffective because not all the facts were known, and thus award a corporate recovery.[149] In the foreseeable-mismanagment situation, it would be highly unrealistic to suppose that the defendants would feel utterly free to mismanage in a grand manner, expecting the plaintiffs to request pro rata in later litigation; there is always the risk that a corporate recovery and a receiver might be demanded. In the sale-of-control situation, it is true that the defendant sellers do keep part of the unlawful "premium" when pro rata is decreed. Thus there is force to the argument that there is some incentive to practice fraud or concealment because of the availability of pro rata; perhaps the suggestion that a full "prophylactic" corporate recovery should be had against the sellers has some merit.[150] However, the rights of former shareholders must be protected, probably through some kind of direct recovery. If prorata recovery is to be allowed solely because of the presence of subsequent shareholders, the defendants may tend to take risks, especially in a corporation with actively traded stock. However, it seems that they could not rely on the availability of pro rata, since many factors might lead to a corporate recovery.[151]

On balance, prorata recovery, under certain circumstances, provides a useful and desirable method for redressing wrongs to the corporation. Through it, the derivative suit is likely to become a far more refined instrument for achieving corporate justice.

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[149]Cf. Holland v. Presley, 168 Misc. 942, 6 N.Y.S.2d 743 (Sup. Ct. 1938), rev'd on other grounds, 255 App. Div. 667, 8 N.Y.S.2d 804, aff'd mem., 280 N.Y. 835, 21 N.E.2d 884 (1939).

[150]See Leech, Transactions in Corporate Control, 104 U. Pa. L. Rev. 725, 823-26 (1956).

[151]See text at notes 34-40, supra.

STATE CRIMINAL CONFESSION CASES: SUBSEQUENT DEVELOPMENTS IN CASES REVERSED BY U S. SUPREME COURT AND SOME CURRENT PROBLEMS*

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In the past quarter century the U. S. Supreme Court has reviewed thirty-one cases, not counting denials of petitions for certiorari, involving state convictions allegedly based on the use of involuntary confessions in violation of the due process clause of the fourteenth amendment. The Court reversed twenty-two convictions and affirmed nine.[1] This article will describe the subsequent developments in the twenty-two cases reversed by the Supreme Court and consider some current problems in state criminal prosecutions involving confessions.

When the Supreme Court in 1936 for the first time in *Brown v. Mississippi*[2] reversed a state criminal conviction on the ground that the due process clause of the fourteenth amendment had been violated by the admission of an involuntary confession into evidence, it may well have been influenced by the then recently issued *Wickersham Report,* in which it had been said that "the third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread."[3] Explicit note was taken of this report in *Chambers v. Florida,* decided four years later.[4]

The *Wickersham Report* provided the authoritative showing that a need existed in the 1930's to eliminate the third degree in law enforcement, a need which the U. S. Supreme Court undertook to meet by reviewing state confession cases, and, where appropriate, reversing

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*The first part of this article was published in 19 Wash. & Lee L. Rev. 35 (1962) under the title, Twenty-five Years of State Criminal Confession Cases in the U.S. Supreme Court.

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[1]Ritz, Twenty-five Years of State Criminal Confession Cases in the U.S. Supreme Court, 19 Wash. & Lee L. Rev. 35, 35-36 (1962). This survey covers cases through the 1960 Term. The Supreme Court reviewed one state confession case during the 1961 Term, reversing a Colorado conviction of murder. Gallegos v. Colorado, 370 U.S. 49 (1962).

[2]297 U.S. 278 (1936).

[3]National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 4 (1931).

[4]309 U.S. 227, 238 n.11 and 240 n.15 (1940).

state convictions. It is less easy to justify the *continued* reliance on the *Wickersham Report* as the principal, virtually the sole, empirical evidence demonstrating that the third degree is still used in law enforcement so that there is a continuing need for Supreme Court review of state criminal convictions allegedly based on the use of coerced confessions.[5]

The United States Civil Rights Commission[6] relies heavily on the *Wickersham Report* for its finding that the third degree is an evil in the United States in 1961,[7] and beyond this single 1931 report the Commission points to little in the way of unimpeachable evidence of present widespread use of the third degree. About the only data the Commission educes are two convictions under the Civil Rights Act[8] of police chiefs for violating the civil rights of accused persons by obtaining confessions by the use of physical violence;[9] a hearsay statement by the Alabama Advisory Committee to the Civil Rights Commission that "police in their area allegedly have been known to make use of force and intimidation in order to extort confessions from prisoners";[10] and self-serving complaints made by inmates of New Jersey prisons in interviews with an investigator.[11] Although the Civil Rights Commission found no evidence of racial discrimination in the use of the third degree to obtain confessions,[12] on the basis of this sketchy evidence the Commission concluded, "Police brutality—the unnecessary use of violence to enfore the mores of segregation, to punish, and to coerce confessions—is a serious problem in the United States."[13]

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[5]E.g., Culombe v. Connecticut, 367 U.S. 568, 571 n.2 and 579 n.17 (1962).

[6]1961 United States Civil Rights Commission Report No. 5, Justice.

[7]Id. at 16.

[8]18 U.S.C. § 242 (1958).

[9]Pool v. United States, 260 F.2d 57, 59-63 (9th Cir. 1958). The report of this case indicates that after being coerced by physical violence into confessing, the accused persons pleaded guilty in the state court to the burglaries charged against them, and they were sentenced to confinement for from one to fifteen years, sentences afterwards commuted to ten months. United States v. Lowery, Crim. No. 13,235 (S.D. Tex. Feb. 19, 1958), Report of the Attorney General of the United States for the Fiscal Year Ended June 30, 1958, at 177.

Williams v. United States, 341 U.S. 97 (1951), also involved a conviction under the Civil Rights Act for brutality in obtaining confessions. However, the defendant was a special policeman hired by a lumber company to ascertain the identity of theives, a somewhat different situation from that in which duly organized law enforcement agencies use the third degree to obtain confessions.

[10]Justice, supra note 6, at 17 n.68.

[11]Trebach, Defendants and Defenders, discussed in Justice, supra note 6, at 18.

[12]Justice, supra note 6, 16-18.

[13]Id. at 28. Literally, this definition of police brutality sanctions the use of violence if *necessary* to obtain a confession.

Physical torture was involved in *Brown v. Mississippi*, the first coerced confession case. Since 1936 when that case was decided, there have been *no* others reaching the Supreme Court in which the Court has found as a fact that physical violence had been used,[14] although the question is raised in the state courts with a fair degree of frequency.[15] This fact may give rise to quite different inferences.

It could be argued that the Supreme Court decision in *Brown v. Mississippi* was extraordinarily effective, and that state courts taking it to heart have faithfully applied the decision so that convictions based on confessions obtained by physical violence are being reversed at the state level, without any reaching the Supreme Court.

On the other hand, it is also possible that *Brown v. Mississippi* was something of a freak, a unique case of physical violence that slipped through the state judicial screen. Prior to the *Brown* decision, Mississippi had reversed convictions based on confessions obtained by physical violence.[16] Other states were following the same rule.[17]

It is also possible that law enforcement officials, forewarned by the *Brown* decision, have developed techniques that are more or less effective in concealing the use of physical violence to obtain confessions. It is always possible to claim that the evidences of physical violence were present when the accused was taken into custody or that they are the result of the defendant's own actions in seeking to escape from custody.[18] In any event, under the self-imposed "uncontradicted facts" rule being followed by the U.S. Supreme Court, the police can, by testifying falsely and denying the use of physical violence, sterilize the de-

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[14]Justice, supra note 6, at 17 and n.66, says: "It is noteworthy that, with two exceptions, all Supreme Court confession cases since 1942 have involved psychological coercion alone." It is not clear why the Commission uses the date 1942, rather than 1936 when *Brown* was decided, as a starting point. The two exceptions cited are Rochin v. California, 342 U.S. 165 (1952), and Reck v. Pate, 367 U.S. 433 (1961). Rochin involved the use of a stomach pump to recover narcotics swallowed by the defendant, but no involuntary verbal confession, and so the case is not in point. In Reck v. Pate there was a claim of physical violence, but the opinion of the Supreme Court was expressly based on the premise "that the officers did not inflict deliberate physical abuse or injury upon Reck during the period they held him in their custody." 367 U.S. at 440.

[15]Supplements to the annotation, Confession by one who has been subjected to or threatened with physical suffering, 24 A.L.R. 703 (1923). The A.L.R. Blue Book of Supplemental Decisions, 1946-1952 (Permanent Vol. 2, 1952) lists 47 state cases; the 1952-1958 supplement (Permanent Vol. 3, 1958) lists 27 cases; the 1962 supplement lists 11 cases.

[16]White v. Mississippi, 129 Miss. 182, 91 So. 903 (1922).

[17]The cases are collected in Annot., 24 A.L.R. 703 (1923).

[18]E.g., Pool v. United States, supra note 9.

fendant's claim so that it will not be open to review in that court.[19] The haunting feeling remains, though, that in spite of disclaimers and the uncontradicted facts rule, disputed claims, particularly of physical violence, do influence the Court's judgment, on the basis of the old adage that where there is smoke there is fire.[20] Otherwise, why does the Court recite the details of the defendant's allegations, which are disputed by the state, and so presumably not considered by the Supreme Court?[21]

Still another possibility is that the astute prosecutor, who has other sufficient evidence to convict, withholds the dubious confession, lest it bring about an automatic reversal without regard to the guilt of the accused.[22]

The cases the Supreme Court reversed on the ground that involuntary confessions had been used in obtaining convictions came from thirteen states. In order of number of cases, they were: Alabama, four; New York and Texas, three each; Connecticut and Pennsylvania, two each; and Arkansas, Florida, Indiana, Mississippi, Ohio, South Carolina, and Tennessee, one each. The cases in which the state judgments of conviction were affirmed came from seven states. They were: California, three; and Arizona, Nebraska, New Jersey, New York, Oklahoma, and Utah, one each.

Obviously, there is no pattern. The largest number of cases came from Alabama and New York, with four each, and yet it can hardly be maintained that New York is following higher standards in criminal law enforcement simply because only three of the New York convictions in comparison with all four of those from Alabama were reversed. Nor do the three California affirmances, all by divided courts, prove that California is following higher standards than Texas with three reversals. The thirty-one states that have never had a state conviction reviewed on the ground that an involuntary confession was

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[19]This rule and its effect is discussed in Ritz, supra note 1, beginning at 51. For another criticism of the rule see Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases, 14 Stan. L. Rev. 328, 339-41 (1962).

[20]This also is the conclusion reached by the writer of the article cited in note 19 supra, 14 Stan. L. Rev. at 351.

[21]E.g., in Reck v. Pate, 367 U.S. 433 (1961), the Court said: "As the district judge further noted, the record 'carries an unexpressed import of police brutality...' Reck testified at length to beatings inflicted upon him on each of the four days he was in police custody before he confessed. His testimony was corroborated. The police, however, denied beating Reck, and, in view of this conflict in the evidence, we proceed upon the premise, as did the District Court, that the officers did not inflict deliberate physical abuse or injury upon Reck during the period they held him in their custody." Id. at 440.

[22]See text infra beginning after note 100.

admitted into evidence cannot smugly assert claims to higher standards in law enforcement than exist in the other nine states. Their time may come soon.[23]

The first confession case came from Mississippi in 1936, but since then the Supreme Court has not reviewed another case from that state. Connecticut never had a confession case reviewed by the Supreme Court until the 1960 Term, when two were reviewed and both convictions reversed. This hardly demonstrates that standards of law enforcement have declined in Connecticut in comparison with those in Mississippi, although Judge Clark of the Second Circuit so interprets the appearance of Connecticut cases on the Supreme Court calendar. In still another Connecticut case, in the federal courts on habeas corpus, Judge Clark said:

> "It is unfortunate that so many cases of illegally coerced confessions of a like nature are now appearing in this state, so generally renowned for its fair administration of the law; thus see Rogers v. Richmond ... Culombe v. Connecticut.... It would seem that legislation setting forth the constitutional rights of the accused would be helpful as directives to the police and prosecutors...."[24]

The conclusion seems inescapable that the pattern of states represented in confession cases reviewed by the Supreme Court bears no relationship to the standards of law enforcement being followed in individual states. "Chance" must be a factor of undeterminable weight. The state court opinion in the case reviewed by the Supreme Court is sometimes undistinguishable from the opinion in another case not reviewed. The Supreme Court of Errors of Connecticut wrote:

> "Here again, the question for the court to decide was whether this conduct induced the defendant to make an involuntary and hence untrue statement."[25]

It was told that "this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment."[26] Two months later the Supreme Court of Montana approved the following statement from an earlier decision of its own:

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[23]Colorado has now been added to the lists of states that have a conviction reversed in the U.S. Supreme Court on the ground that an involuntary confession was admitted into evidence. See note 1 supra.

[24]Reid v. Richmond, 295 F.2d 83, 91 n.1 (2d Cir. 1961), cert. denied (Douglas, J., dissenting), 368 U.S. 948 (1961).

[25]State v. Rogers, 143 Conn. 167, 174, 120 A.2d 409, 412 (1956).

[26]Rogers v. Richmond, 365 U.S. 534, 543-44 (1961).

> " 'The only fair test, if such it can be called, . . . is this: Was the inducement held out to the accused such as that there is any fair risk of a false confession? For the object of the rule is not to exclude a confession of the truth, but to avoid the possibility of a confession of guilt from one who is in fact innocent.' "[27]

In spite of the fact that the Montana test, in light of the *Rogers* opinion seems clearly wrong, when review was sought in the U.S. Supreme Court, Dryman's petition for certiorari was denied.[28]

Actually, there is no evidence of substance as to the effectiveness of federal review of state criminal convictions as a deterrent to the use of the third degree, other than that counsel of despair that every reversal of a criminal conviction represents a triumph of justice.[29] It cannot be established that federal review of state criminal proceedings has been helpful in eliminating the third degree, by holding over state officials the threat of reversals of convictions, or whether the federal action has been harmful, by promoting more sophisticated forms of the third degree, falsification of the facts, and particularly a lowering of the sense of local responsibility for the fair administration of criminal justice.

Subconsciously, most people probably feel that the third degree is used less frequently today than a quarter-century ago. The cause for the improvements, though, may well be found in a general raising of ethical and moral standards, rather than in forced improvements brought about by pressure from the federal judiciary.

When the Supreme Court reverses a criminal conviction on the ground that it was obtained in a proceeding in which a coerced confession was admitted into evidence, the case is remanded for further proceedings, which may mean, and usually does mean, a new trial on the same charge with the "coerced confession" excluded. It is useful to consider the results of these subsequent proceedings, which, for the most part, do not find their way into the law reports.

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[27]Dryman v. State, 361 P.2d 959, 961 (Mont. 1961). This opinion was handed down on May 12, 1961. Rogers v. Richmond was decided March 20, 1961, so the opinions in the case were available to the Supreme Court of Montana.

[28]Dryman v. Montana, 368 U.S. 990 (1962).

[29]All convictions based on coerced confessions will be rectified if all convictions are reversed, and so it follows as a matter of logic that the more convictions reversed the greater the chances are that no convictions based on coerced confessions will go unreversed. Since the federal judiciary never convicts of state crimes, but only releases, its activities can never initiate injustice, but only correct injustice, or at the worst, leave injustice uncorrected.

I. Subsequent Developments in Reversed Cases

Information on subsequent developments in cases reversed by the U.S. Supreme Court was collected in the following manner. Data for cases through 1942 had been collected by Boskey and Pickering from reported cases and newspaper accounts and published in a law review article in 1946.[30] For cases reversed after 1952, *Shepards* was checked for subsequently reported cases. A list of cases and a summary of the information so obtained was sent to the Attorney General of each state from which a case had come, with a request that the information so obtained be checked for accuracy, and that supplemental information be supplied on unreported proceedings. Most Attorney Generals generously responded to an initial letter, and all except one to a follow-up letter. While a few of the Attorney Generals were able to provide the information requested, most of them either referred the letter of inquiry to local officials or advised the writer to correspond with local officials. Consequently, some direct correspondence was carried on with local prosecuting officials and defense counsel.

The information so obtained shows the following subsequent developments in these twenty-two cases reversed by the U.S. Supreme Court: The defendants in exactly half of the cases were again convicted of the same or a lesser included offense, while the defendants in the other half were eventually released in one way or another.

After remand, the defendants in three cases were again tried and convicted of the same offenses and given the same punishment.[31] The proceedings in four cases resulted in convictions of the same offenses

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[30]Boskey & Pickering, Federal Restrictions on State Criminal Procedure, 13 U. Chi. L. Rev. 266 (1946).

[31]Vernon v. Alabama, 313 U.S. 547 (1941). Original conviction was for murder with the death sentence imposed. On retrial Vernon was again convicted and sentenced to death. The conviction was affirmed in Vernon v. State, 245 Ala. 633, 18 So. 2d 388 (1944). Apparently no further petition for certiorari was filed. In accordance with the judgment, Vernon was executed.

Watts v. Indiana, 338 U.S. 49 (1949). Original conviction was for murder in the first degree, with the death sentence imposed. On retrial Watts was again convicted and sentenced to death. The conviction was affirmed in Watts v. Indiana, 229 Ind. 80, 95 N.E.2d 570 (1950). Apparently no further petition for certiorari was filed. In accordance with the judgment Watts was executed.

Haley v. Ohio, 332 U.S. 596 (1948). Original conviction was of murder in the first degree with a life sentence imposed. On retrial Haley was again convicted and sentenced to life. The conviction was affirmed by the Court of Appeals and a motion to certify the record was dismissed by the Supreme Court of Ohio, 151 Ohio St. 80, 84 N.E.2d 217 (1949), cert. denied, 337 U.S. 945 (1949).

but with lesser punishments imposed.[32] Four resulted in convictions of lesser included offenses, and so with reduced punishments.[33]

Ten cases eventually terminated in the judicial release of the defendants while in one case, a rape proceeding, the defendant was killed during the second trial by the husband of the prosecutrix.[34] In one case the state supreme court on remand directed entry of judg-

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[32]Canty v. Alabama, 309 U.S. 629 (1940). Original conviction was of murder in first degree with the death sentence imposed. On retrial Canty was again convicted of murder in first degree, but with the sentence reduced from death to life imprisonment. This conviction was reversed because of prejudicial instructions. Canty v. State, 242 Ala. 589, 7 So. 2d 292 (1942). On retrial Canty was again convicted of murder in first degree and sentence fixed at life imprisonment. The conviction was affirmed, 244 Ala. 108, 11 So. 2d 844 (1943), cert. denied, 319 U.S. 746 (1943).

Payne v. Arkansas, 356 U.S. 560 (1958). Original conviction was of murder in first degree with the death sentence imposed. On retrial Payne was again convicted of murder in first degree and sentenced to death. The conviction was reversed in a four-to-three decision on the ground that a re-enactment of the crime "amounted to but a part of his coerced confession, and was also coerced and unlawfully obtained." Payne v. Arkansas, 231 Ark. 727, 332 S.W.2d 233, 235 (1960). Another trial resulted in a conviction of first degree murder and a life sentence, which conviction was not appealed.

Lomax v. Texas, 313 U.S. 544 (1941). Original conviction was of rape with the death sentence imposed. On retrial Lomax was again convicted of rape, but with the sentence reduced to life imprisonment. The conviction was affirmed, Lomax v. Texas, 146 Tex. Crim. 531, 176 S.W.2d 752 (1944). [This was the third trial in the Texas courts, the original conviction having been reversed because the trial judge had not submitted to the jury the question of whether Lomax's confession was voluntary. Lomax v. State, 136 Tex. Crim. 108, 124 S.W.2d 126 (1939)].

[33]Rogers v. Richmond, 365 U.S. 534 (1961). Original conviction of murder in first degree and death sentence imposed. On remand Rogers pleaded guilty to murder in the second degree and was sentenced to life imprisonmnt.

Culombe v. Connecticut, 367 U.S. 568 (1961). Original conviction of murder in first degree and death sentence imposed. On remand Culombe pleaded guilty to murder in the second degree and was sentenced to life imprisonment.

Brown v. Mississippi, 297 U.S. 278 (1936). Original conviction of murder and death sentence imposed. On remand, defendant pleaded nolo contendre to a charge of manslaughter and was sentenced to 7 1/2 years imprisonment with credit for the 2 1/2 years already served. Other defendants were sentenced to terms of 2 1/2 to 3 years, with similar credit for time served.

Spano v. New York, 360 U.S. 315 (1959). Original conviction of murder in first degree and death sentence imposed. During the course of a retrial Spano pleaded guilty to manslaughter in the first degree, and was sentenced to 10-20 years imprisonment.

[34]White v. Texas, 309 U.S. 631, on petition to rehear, 310 U.S. 530 (1940). The original conviction of rape, in which the death sentence had been imposed, was reversed by a state court. White v. State, 135 Tex. Crim. 210, 117 S.W.2d 450 (1938). On retrial there was another conviction of rape and the death sentence again imposed. This conviction was reversed by the U.S. Supreme Court. While a jury was being impaneled for a third trial, the defendant was killed in open court by the husband of the prosecutrix. The husband was later acquitted.

ment for the defendant.[35] The state nol-prossed further prosecutions in four cases.[36] In one case one defendant was placed in a mental institution during the course of the proceedings and the trial judge directed a verdict of acquittal as to the other defendants in what was the fifth trial of the case.[37] Two cases with the confessions excluded, resulted in jury acquittals.[38] Two cases resulted again in jury convictions, but the holdings of the state appellate courts in setting aside the convictions eventually required nol-prossing the convictions.[39]

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[35]Harris v. South Carolina, 338 U.S. 68 (1949). See text infra after note 68

[36]Fikes v. Alabama, 352 U.S. 191 (1957). See text infra after note 43.

Blackburn v. Alabama, 361 U.S. 199 (1961). Original conviction was of robbery, with sentence of 20 years imprisonment. Incident to the nol-prossing of the case, the Veterans Administration took custody of Blackburn and placed him in a veterans hospital.

Reck v. Pate, 367 U.S. 433 (1961). Original conviction in 1936 was of murder with a life sentence imposed. The other parties also convicted of the crime are still in the penitentiary and refuse to testify against Reck. Without the confession and without this testimony the state found it necessary to ask for the entry of a nolle prosequi.

Ward v. Texas, 316 U.S. 547 (1942). Original conviction was of murder without malice with a 3 year sentence imposed. Ward was first indicted at September Term 1939. The case was dismissed on October 22, 1942. The defendant very probably had been confined all or a large part of three years.

[37]Chambers v. Florida, 309 U.S. 227 (1940). The four defendants had originally been convicted of murder and the death sentence imposed in 1933. A multiplicity of the state court proceedings followed, culminating in the reversal by the U.S. Supreme Court on February 12, 1940. Meanwhile, Chambers had been transferred to the state hospital for the insane. The other three defendants were again tried, after various legal proceedings in the Florida courts. On March 9, 1942, the trial judge directed entry of judgments of acquittal.

[38]Malinski v. New York, 324 U.S. 401 (1945). Original conviction of murder in first degree with death sentence imposed. On retrial in June 1946 the jury returned a verdict of acquittal.

Ashcraft v. Tennessee, 322 U.S. 143 (1944), 327 U.S. 274 (1946). Ashcraft was twice convicted of murder and twice sentenced to life imprisonment. Both convictions were reversed by the U.S. Supreme Court on the ground that involuntary confessions had been admitted into evidence. A third trial resulted in a jury verdict of not guilty, both as to Ashcraft and his co-defendent, Ware.

[39]Leyra v. Denno, 347 U.S. 556 (1954). An original conviction of murder in the first degree with the death sentence imposed was reversed by the Court of Appeals of New York, People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951). On retrial Leyra was again convicted of first degree murder and sentenced to death. The conviction was affirmed by a four-to-two decision. People v. Leyra, 304 N.Y. 468, 108 N.E.2d 673 (1952), cert. denied (Black. J., and Douglas, J., dissenting), 345 U.S. 918 (1953). This conviction was reversed in the federal habeas corpus proceedings that followed. 347 U.S. 556 (1954). On his third trial, Leyra was again found guilty and sentenced to death, but this conviction was reversed by the Court of Appeals in a four-to-two decision. People v. Leyra, 1 N.Y.2d 199, 134 N.E.2d 475 (1956). As a result of this decision the indictment was dismissed.

Turner v. Pennsylvania, 338 U.S. 62 (1949). See text infra after note 56.

In the eleven cases in which convictions were again obtained in new trials after Supreme Court reversal, the principal tangible benefit to the defendants resulted from "delay." There was delay in the execution of the death sentence on the two defendants again convicted of the same crime and sentenced to death. Delay, operating somewhat differently, was also of significance in the eight cases in which the defendants were again convicted of the same offenses, with lesser punishments imposed, or convicted of lesser included offenses, carrying lesser punishments. The results in these cases confirmed the guilt of the defendants. Delay in bringing the cases to a final disposition was probably the most important factor that operated to secure the reductions in punishment. The Supreme Court reversal was of no apparent benefit to the one defendant who was again found guilty of the same crime and again sentenced to life imprisonment.

In several of the cases in which the defendants were not again convicted the benefits to the defendants involved are somewhat tangential or speculative. One defendant was killed before he could be tried again.[40] Another defendant was transferred to a mental institution and while he remains there cannot be tried again.[41] A third defendant's relatively short sentence militated against renewed prosecution.[42] One defendant, for quite extraordinary reasons, has not been able to obtain the benefits of the reversal; this is the defendant in *Fikes v. Alabama*.[43]

Fikes was charged with one rape and six burglaries. He confessed commission of all the crimes. He was tried for rape, convicted, and sentenced to 99 years imprisonment. He was then tried on another charge, for burglary with intent to commit rape, convicted, and sentenced to death. This latter conviction was reversed by the U.S. Supreme Court on the ground that his confession was involuntary. The state did not prosecute again, since without the confession there was not sufficient other evidence to sustain a conviction. The earlier conviction for rape was based, in part at least, on a similar "involuntary confession," and so this conviction can presumably be set aside whenever the question is properly raised in court. However, there is evidence other than the confession that might support another conviction of rape, the evidence being the testimony of the victim who identified the defendant as the perpetrator of the crime. The dilemma

[40] White v. Texas, note 34 supra.
[41] Blackburn v. Alabama, note 36 supra.
[42] Ward v. Texas, note 36 supra.
[43] 352 U.S. 191 (1957). Prettyman, Death and the Supreme Court 5-46 (1961).

posed for the defendant is that under Alabama law a retrial is on the whole charge and a second conviction with the death sentence imposed would not violate Alabama principles of double jeopardy. So far the defendant has not chosen to run this risk and remains confined in the penitentiary under an "unconstitutional" criminal judgment. Here again, time and delay may eventually operate to the benefit of the defendant. It is possible the victim will die so as to diminish the force of the other evidence available for another trial. Another distinct possibility is that the Supreme Court will extend the double jeopardy clause of the fifth amendment to the states, which clause as interpreted by the Court bars the imposition of greater punishment upon a second conviction.[44]

The subsequent developments in three cases reversed by the U.S. Supreme Court on June 27, 1949, are of particular interest because they encompassed a large range of possibilities. These three convictions, each of which carried the death penalty, came from different parts of the country: *Watts v. Indiana*,[45] *Turner v. Pennsylvania*, [46] and *Harris v. South Carolina*.[47]

The reversals in all three were by a Court whose members were so badly divided in their reasons that there were no majority opinions. Mr. Justice Frankfurter, who delivered the judgments of the Court, spoke only for himself and Justices Murphy and Rutledge.[48] He said the confessions were inadmissible, aside from any question of their reliability or untruthfulness, because obtained by proceedings that "offend the procedural standards of due process."[49] Mr. Justice Black thought all three confessions had been obtained by "inherently coercive" proceedings within the meaning of prior decisions.[50] Mr. Justice Douglas would have reversed because the confessions were obtained while the defendants were held by the police in illegal detention.[51] Chief Justice Vinson and Justices Reed and Burton would have affirmed all three convictions on the record in the state courts.[52] Mr. Justice Jackson, who was concerned primarily with the reliability of the confessions, thought the Watts conviction from Indiana should be reversed on the basis of "the State's admissions as to treatment

[44]Green v. United States, 355 U.S. 184 (1957).
[45]338 U.S. 49 (1949).
[46]338 U.S. 62 (1949).
[47]338 U.S. 68 (1949).
[48]338 U.S. at 49, 63, 68.
[49]Id. at 54.
[50]Id. at 55, 66, 71.
[51]Id. at 56, 66, 71.
[52]Id. at 55, 66, 71.

of Watts,"[53] while the convictions from Pennsylvania and South Carolina should be affirmed.

In light of subsequent developments in the three cases, these comments can be made: While Watts obtained the largest number of votes for reversal, six in all, he, of all three, was the defendant most certainly guilty. While Harris obtained fewer votes for a reversal, only five, of the three he was the one most likely innocent of the crime for which he had been convicted. On the basis of the record in the state courts, there is little doubt but that Turner, whose conviction was reversed by five votes, was actually guilty and escaped final conviction because of the Supreme Court rule relating to confessions.

For those who criticize any Supreme Court supervision of state criminal proceedings, the *Turner* case provides strong support. For those who commend such Supreme Court supervision, the *Harris* case provides support. For those who believe the rules established by the Supreme Court interfere with state admistration of criminal justice, the *Watts* case provides support. But when a comparison is made of *Watts* and *Turner,* some doubts must be expressed as to whether legal technicalities are not interfering with the equal administration of state criminal justice. And when a comparison is made of *Watts* and *Harris,* all should take pause. The comparison suggests that the states are not sufficiently careful in protecting the innocent from conviction, but it also suggests that the federal judicial supervision of state criminal proceedings is more attuned to dealing with unconstitutional convictions of the guilty than with barring constitutional convictions of the innocent.

Watts v. Indiana involved murder in connection with an attempted criminal assault. The judgment of conviction and sentence of death were originally affirmed by a unanimous state supreme court.[54] On remand, in a trial with the confession excluded, Watts was again convicted of the same crime and sentenced to death. This second conviction was affirmed by a unanimous court.[55] Watts was executed.[56]

Turner v. Pennsylvania involved a brutal double murder committed in 1945 during perpetration of a robbery. Turner, Johnson, and Lofton were charged with the crime. Turner and Johnson pleaded not guilty, but they were convicted and death sentences imposed. Lofton, the look-out, pleaded guilty and was sentenced to life imprisonment.

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[53]Id. at 57, 60.

[54]Watts v. State, 226 Ind. 655, 82 N.E.2d 846 (1948).

[55]Watts v. State, 229 Ind. 80, 95 N.E.2d 570 (1950).

[56]Letter from Patrick D. Sullivan, Deputy Attorney General of Indiana, August 31, 1961.

The original 1946 conviction of Turner was affirmed by a unanimous Supreme Court of Pennsylvania.[57] After the U.S. Supreme Court reversed this conviction,[58] a series of four more trials followed, in each of which Turner was convicted of murder in the first degree. The jury imposed the death penalty in the first four of Turner's five convictions and life imprisonment in the fifth. The Supreme Court of Pennsylvania in a unanimous decision reversed the second conviction[59] and by a four-to-two vote reversed the third conviction.[60] The fourth conviction was set aside by the trial court and the fifth conviction reversed unanimously by the Supreme Court of Pennsylvania,[61] but with two judges dissenting from the majority's direction that the charge should be nol-prossed unless additional evidence could be presented at another trial. Lofton testified against Turner in his second and third trials, but refused to do so in the fourth and fifth trials. For refusing to testify, Lofton was found guilty of contempt by the trial court, but this conviction was reversed on appeal.[62] In accordance with the direction of the Supreme Court of Pennsylvania, the state entered a nolle prosequi on the charge against Turner and he was released.[63]

Johnson was also convicted of murder in the first degree and sentenced to death. This conviction was upheld by the Supreme Court of Pennsylvania in a four-to-one decision,[64] but reversed by the U.S. Supreme Court in a per curiam opinion on the authority of the *Turner* decision.[65] In a second trial, with Lofton testifying against him, Johnson was again convicted of murder in the first degree, but the jury reduced the punishment to life imprisonment.[66]

So in end result, after this series of trials: Lofton, who pleaded guilty remained in confinement. Johnson, who had been twice tried and convicted, remained in confinement. Turner, who was able to drag the proceedings through five trials, all of which resulted in convictions, four in the imposition of the death sentence,—won final judicial release. Justice Musmanno found in this result a rewarding

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[57]Commonwealth v. Turner, 358 Pa. 350, 58 A.2d 61 (1948).
[58]338 U.S. 62 (1949).
[59]Commonwealth v. Turner, 367 Pa. 403, 80 A.2d 708 (1951).
[60]Commonwealth v. Turner, 371 Pa. 417, 88 A.2d 915 (1952).
[61]Commonwealth v. Turner, 389 Pa. 239, 133 A.2d 187 (1957).
[62]Commonwealth v. Lofton, 389 Pa. 273, 133 A.2d 203 (1957).
[63]Letter from Arlen Specter, Assistant Attorney General, Philadelphia, Pa., October 27, 1961.
[64]Commonwealth v. Johnson, 365 Pa. 303, 74 A.2d 144 (1950).
[65]Johnson v. Pennsylvania, 340 U.S. 881 (1950).
[66]Letter, supra note 41.

end for "the search for the priceless jewel of truth,"[67] Justice Bell on the other hand, made this comment: "Lofton, 10 years after pleading guilty to these murders and after all these years in jail, now swears that he and Turner and Johnson never committed or had anything to do with these murders. How gullible can we be?"[68]

Harris v. South Carolina involved the brutal murder of a country storekeeper and his wife. The last words of the dying man were reportedly, "A big negro shot me and robbed me."[69] Harris, although of slight build, was convicted and sentenced to death. The Supreme Court of South Carolina affirmed by a three-to-two vote.[70] Both the trial court and the South Carolina Supreme Court majority recognized that the conviction could not be sustained without the use of the defendant's confession. The two dissenting judges would have reversed because they thought the only reasonable inference to be drawn from the undisputed facts was that the confession had not been freely and voluntarily made. On remand from the U.S. Supreme Court, the Supreme Court of South Carolina entered an order under date of September 20, 1949, directing that judgment should be entered for the defendant, who was then released.[71]

Before himself confessing, Harris had accused another person of the crime, but no prosecution was ever instituted against the person so accused. Still another person later confessed to a series of crimes, including the murders in the *Harris* case, and on his plea of guilty, he was convicted of these murders. Since the person who ultimately confessed did so to a number of crimes, the risk involved in confessing to the murders in the *Harris* case was less than total. This and other aspects of the case make it impossible to draw the certain conclusion from subsequent developments that the *Harris* case involved the conviction of an innocent man for a crime committed by someone else. It can be said with assurance, though, that the *Harris* case involved a defendant whom the state had not proved guilty beyond a reasonable doubt, and that subsequent developments in this case, more than those in any other, indicate that the accused was innocent.

These three cases, when compared and considered in relation to others, reveal several defects in the present administration of criminal justice: (1) Either guilty persons are being released by application

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[67]133 A.2d at 202.
[68]Id. n.3 at 202.
[69]338 U.S. at 69.
[70]State v. Harris, 212 S.C. 124, 46 S.E.2d 682 (1948).
[71]Letter from Hon. Daniel R. McLeod, Attorney General of South Carolina, September 12, 1961.

of the present rules regarding confessions, or the administration of criminal justice is so defective that innocent persons are being repeatedly convicted. (2) Long-delayed judicial reversals of convictions are interfering with the orderly administration of the executive function of parole and pardon. (3) As a result of these two defects, the criminal law is being applied unevenly to participants in the same crime, with the result that the more guilty may go unpunished while the less guilty suffer punishment. (4) The rights of innocent persons, other than the person who is immediately accused, are perhaps not being sufficiently considered and safeguarded.

Turner was convicted five times. Three different New York juries found Leyra guilty of first degree murder and as a result he was sentenced to death three times.[72] Eventually, though, the New York Court of Appeals in a four-to-two decision held that the conviction, without the confession, was not supported by the evidence and so the conviction was quashed and the defendant released.

In view of the repeated convictions by juries, initial affirmances by respected state appellate courts, and ultimate quashing of the convictions by divided courts, it seems impossible to treat the defendants in the *Turner* and *Leyra* cases as having been judicially declared to be "innocent" of the crimes with which they were charged. But if the final dismissals can be so treated, then the present administration of criminal justice is extremely defective. If five juries in Pennsylvania and three juries in New York can go so wrong as to convict innocent men repeatedly; if the Supreme Court of Pennsylvania and the Court of Appeals of New York can go so wrong as to affirm convictions of innocent men; and if a large minority of the members of the Supreme Court of the United States can go so wrong as to vote to affirm the convictions of innocent men, the administration of criminal justice is indeed in a sad state.

The conscience rests easier on the assumption that Turner and Leyra were guilty and escaped final conviction because of legal technicalities, rather than that these men were truly innocent and so the victims of massive and continued injustice.

Turner v. Pennsylvania involved a crime in which three accomplices were convicted. All or none were guilty. From the legal standpoint all participants in a crime, whether as perpetrator, aider and abettor, or accessory before the fact, are equally guilty, but some gradations in guilt are achieved through variations in the punish-

[72]Turner v. Pennsylvania, supra text after note 56; Leyra v. Denno, note 39 supra.

ment imposed. Using such gradations in punishment as a basis for determining relative guilt, the *Turner* case presents this situation: Lofton, the look-out, was the least guilty by definition and because he aided the state. He was never sentenced to death, but only to life imprisonment. Johnson was sentenced to death once, but on a second trial the punishment was reduced to life imprisonment, and so he must be considered the next most guilty. Turner was sentenced to death four times and to life once, and so must be considered the most guilty of the three. Yet in ultimate result it was Turner who obtained final judicial release while Johnson and Lofton were left in confinement.

Similarly, in *Reck v. Pate*[73] one participant in the crime won final release, since his accomplices refused to testify against him in another trial,[74] while the accomplices remain in prison.

The developments in another case, although not yet reviewed by the Supreme Court, demonstrate the current vagaries that result from long-delayed federal judicial review of state criminal proceedings, particularly in the arbitrary discriminations that may result. In 1932, in New York three men confessed to murder committed during armed robbery. All three were convicted of murder in the first degee and sentenced to life imprisonment. There they remained for twenty-three years. Then in 1955, the Court of Appeals for the Second Circuit ruled that Caminito's confession was involuntary.[75] In 1956, the Court of Appeals of New York, following this federal lead, made a similar ruling as regarded Bonino's confession,[76] and he too was released. For technical reasons, however, it was not until 1962 that the third person, Noia, was able to obtain a similar ruling on his confession, again from the Court of Appeals for the Second Circuit.[77] He has not yet obtained release, however, since the U.S. Supreme Court has granted certiorari in the case.[78] Was justice served when Turner was released and Lofton and Johnson held in confinement? Was justice served when Reck was released and his accomplices held in confinement? Is it just to hold Noia in prison seven and more years longer than Caminito?

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[73]See note 36 supra.

[74]Letter from Hon. Daniel P. Ward., State's Attorney of Cook County, Illinois, October 25, 1961.

[75]United States ex rel. Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955), reversing, 127 F. Supp. 689 (N.D.N.Y. 1955), cert. denied, 350 U.S. 896 (1955).

[76]People v. Bonino, 1 N.Y.2d 752, 135 N.E.2d 51 (1956).

[77]United States ex rel. Noia v. Fay, 300 F.2d 345 (2d Cir. 1962).

[78]Fay v. Noia, 369 U.S. 869 (1962).

Legal rules, or technicalities, can be found that will serve *to explain* these results.[79] They do not serve *to justify* these results either to the prisoners held in confinement or to a public interested in the fair and equal administration of criminal justice. This is not to argue that criminals should not be treated on an individual basis, or that it is not proper to keep one of several participants in a crime in confinement while others are released. However, it is to argue that the state parole authorities are the agencies of government charged by law with the responsibility for making such distinctions, and that appellate judges are not so charged. Where innocent men are held in confinement, every effort should be made to secure thir immediate release. But where guilty men are held in confinement, it is the executive branch of government that is charged by law and is in the best position to determine which prisoners have been rehabilitated and should be released and which ones should be held in confinement until their sentences are served.

Another aspect of the long-delayed judicial reversal is that it encourages a tongue-in-cheek approach to the serious matter of criminal law. The U.S. Supreme Court in 1961 in *Reck v. Pate* reversed a 1936 murder conviction and remanded the case to allow "the State a reasonable time in which to retry the petitioner."[80] Is such a remand to be taken seriously? What factors should the prosecuting officials consider in determining whether to retry the petitioner?

It is doubtful if a state can *fairly* prosecute for a crime committed a quarter of a century ago. But even if it can, is there any sense to a system that involves prosecutions of defendants twenty-five years after they have been placed in confinement, and who have been amenable to prosecution all that time? While the sixth amendment does not apply to the states, the principle of a "speedy" trial does have merit in any sound system of criminal law administration. Such remands after twenty-five years are hardly consistent with the principle.

If the prisoner is truly innocent in such a case, there has been a grave miscarriage of justice that is hardly remedied by simple release following twenty-five years of confinement. If the prosecuting authorities consider the prisoner to be guilty, in deciding whether to prosecute again, the state must consider all the factors that would be relevant to a determination of whether the prisoner should be released on parole. Twenty-five years of confinement cannot be ignored. The judiciary itself, when it orders such long-delayed releases, acts more in

[79]E.g., see note on the Second Circuit decision in 48 Va. L. Rev. 761 (1962).
[80]367 U.S. 433, 444 (1961).

the executive capacity of a thinly disguised super-board of paroles and pardons than in a judicial capacity.

In three of the cases reversed by the U.S. Supreme Court, the defendants finally won acquittals. In *Chambers v. Florida*,[81] the defendant had originally been convicted in 1933. After a multiplicity of legal proceedings, directed verdicts of acquittal in favor of the defendants were entered in 1942, after the defendant whose name the case bears had been transferred to a mental institution. Nine years is a long time. Ashcraft was twice convicted of murder, which convictions were twice affirmed by the Supreme Court of Tennessee, and twice reversed by the United States Supreme Court;[82] only thereafter did Ashcraft win a jury acquittal. Malinski's original conviction had been affirmed by the Court of Appeals of New York in a four-to-three decision, which conviction was reversed by the U.S. Supreme Court in a five-to-four decision.[83] Again it can only be said, that if these defendants were innocent, the judicial system came perilously close to working grave injustices. One can be happier with the present judicial system if one assumes that these defendants were guilty.

This leaves the *Harris* case, in which another man was eventually convicted of the crime for which Harris had been convicted and sentenced to death. Did the Supreme Court in this case save an innocent man from death? If it did, it is arguable that this one case alone would justify Supreme Court review of state criminal proceedings. However, the matter is not so simple. Suppose that Harris was in fact guilty, then the very reversal of his confession resulted in the conviction of an innocent man, whose conviction remains unreversed. How can it be known with certainty that the guilty person was the second man, who pleaded guilty to a series of crimes, and not Harris, who confessed, albeit involuntarily, to the crime?

The truth of the matter is that the *more certain the guilt* of the person convicted by use of an involuntary confession, the less harm can result from overturning the conviction. The release of the guilty though becomes a luxury that can be ill-afforded if it should result in the conviction of the innocent. If the law enforcement officials should

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[81]See note 37 supra.

[82]The case in the state courts is not reported. The first Supreme Court reversal was by a six-to-three vote, with Justices Jackson, Frankfurter, and Roberts dissenting. 322 U.S. 143 (1944). The second reversal was by a unanimous court, but with Frankfurter joining on the basis of the decision in the first case and Jackson not participating. 327 U.S. 274 (1946).

[83]Malinski v. New York, 324 U.S. 401 (1945), reversing 292 N.Y. 360, 55 N.E.2d 353 (1944).

assume that the judicial overturning of a conviction establishes the innocence of the person involved, they would be duty-bound to seek for another person as the perpetrator. It is possible, with the prime suspect judicially removed from further consideration, that the person so found will be innocent.

Suppose the second person accused in the *Harris* case had denied guilt, would the Harris "involuntary confession" have been admissible in evidence to prove Harris's guilt and so by necessary implication the innocence of the second defendant? Surely in this situation the *Rogers v. Richmond* rule that the admissibility into evidence of the confession must be determined "with complete disregard of whether or not [Harris] in fact spoke the truth"[84] does not apply.

Here a question may be asked that bears on larger considerations of ethics and morality: "May coercion be used to extort a confession from a guilty person in order to save an innocent person from conviction?" This could be the situation if the confession led to other evidence that demonstrated the truth of the confession. The question, even left unanswered, may serve to highlight a fundamental principle involved in the administration of the criminal law: The most certain way to protect the innocent is to find and convict the guilty.

II. A Survey of Current State Confession Cases

Evidence is not available to show the frequency with which the question of the voluntariness of a confession is raised in trial courts, or the number of confessions ruled involuntary as a matter of law by the trial judges. The frequency with which the question is raised in the state appellate courts shows that the matter is being considered in a large number of criminal trials.

In 1946, Professor McCormick reported the results of a survey he had made of the cases reported in the digest during the twenty-year period that had then elapsed since 1926.[85] He reported:

> "The digests for the twenty-year period 1926-1945 reveal 94 appeals in which the appellant claimed force or threats in securing a confession. The number of cases by years varies from 1 to 8. There was 1 in 1927, and there were 8 in each of the years 1930 and 1939, and surprisingly there were likewise 8 in the first half year of 1945. The number of these cases in which a reversal

[84] 365 U.S. at 544.

[85] McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Texas L. Rev. 239 (1946).

is granted varies from 1 to 4 annually and recent years have seen no lessening of reversals."[86]

In 1959, Professor Maguire reviewed the status of state law relating to involuntary confessions, particularly as it was being affected by the decisions of the U.S. Supreme Court.[87] More recently, Donald G. Targan has made a survey of the appellate court cases during the nine-year period from 1952 to 1960.[88] By Shepardizing the twenty-nine confession cases reviewed by the U.S. Supreme Court, Mr. Targan found ninety-two state cases in which the defendants alleged that their confessions had been obtained by physical or psychological coercion.[89] The present writer has scanned the advance sheets of all series of the National Reporter System for somewhat more than a year looking for confession cases relevant to this inquiry and has found more than eighty such cases.[90]

It is evident from the present survey that the number of cases in the state appellate court has greatly increased since Professor McCormick reported on the subject in 1946. It also seems clear that Mr. Targan's figure of ninety-two cases for a nine-year period considerably understates the actual number of cases, since his survey did not include any cases in which the state court did not cite a U.S. Supreme Court decision, there being a a considerable number of such cases. However, it is probable that Mr. Targan's figure does include most of the cases in which a truly serious question was presented as to whether the confession was involuntary. The increase in number of confession cases has not been paralleled by any similar increase in the number of reversals of convictions on the ground that involuntary confessions were used. Instead, the number of reversals each year during the past quarter century appears to have been fairly constant.

In the large majority of confession cases presented to state appellate courts in 1961-62, the courts appear to have had little doubt but

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[86]Id. at 244. In his survey, Professor McCormick used *"Criminal Law,* Key no. 522 (Confessions, Voluntary Character, Threats and Fear)."

[87]Maguire, Evidence of Guilt 107-66 (1959), an earlier version of which had been published as Maguire, 'Involuntary Confessions,' 31 Tul. L. Rev. 125 (1956).

[88]Comment, Justice Black—Inherent Coercion: An Analytical Study of the Standard for Determining the Voluntariness of a Confession, 10 Am. U.L. Rev. 53 (1961).

[89]Id. at 54.

[90]While no particular claim to complete coverage is made, it is believed that substantially all reported cases for 1961 and early 1962 were found, so that the cases covered give a reasonably complete picture of current litigation involving confessions.

that the confessions were voluntary.[91] In a substantial number of cases the defendant's contention of involuntariness of the confession is based on a claim that it was obtained after an illegal arrest, or during a period of illegal detention as by denial of counsel or failure to take before an examining magistrate.[92] Occasionally, of course, the mem-

[91]Hargett v. State, 357 S.W.2d 533 (Ark. 1962); People v. Monk, 56 Cal. 2d 288, 14 Cal. Rptr. 633, 363 P.2d 865 (1961); People v. Carter, 56 Cal. 2d 549, 15 Cal. Rptr. 645, 364 P.2d 477 (1961); People v. Fitzgerald, 56 Cal. 2d 855, 17 Cal. Rptr. 129, 366 P.2d 481 (1961); People v. Kaminsky, 22 Cal. Rptr. 191 (2d Dist. Ct. App. 1962);

Ciccarelli v. People, 364 P.2d 368 (Colo. 1961); Shuler v. State, 132 So. 2d 7 (Fla. 1961); Ebert v. State, 140 So. 2d 63 (2d Dist. Ct. App. Fla. 1962); People v. Sims, 21 Ill. 2d 425, 173 N.E.2d 494 (1961); People v. Seno, 23 Ill. 2d 206, 177 N.E.2d 843 (1961);

People v. Mosley, 23 Ill. 2d 211, 177 N.E.2d 851 (1961); People v. Jackson, 23 Ill. 2d 274, 178 N.E.2d 299 (1961); People v. Carter, 182 N.E.2d 197 (Ill. 1962); People v. Freeman, 182 N.E.2d 677 (Ill. 1962); State v. Jones, 113 N.W.2d 303 (Iowa 1962);

Andrews v. Hand, 372 P.2d 559 (Kans. 1962); State v. Collins, 242 La. 704, 138 So. 2d 546 (1962); State v. Scott, 141 So. 2d 389 (La. 1962); State v. Bueche, 142 So. 2d 381 (La. 1962); Doyon v. State, 181 A.2d 586 (Me. 1962);

Parker v. State, 225 Md. 288, 170 A.2d 210 (1961); Ralph v. State, 226 Md. 480, 174 A.2d 163 (1961), cert. denied (Douglas, J., dissenting), 369 U.S. 813 (1962); Hyde v. State, 228 Md. 209, 179 A.2d 421 (1962); Jones v. State, 182 A.2d 784 (Md. 1962); Commonwealth v. Pina, 174 N.E.2d 370 (Mass. 1961);

State v. Arradondo, 260 Minn. 512, 110 N.W.2d 469 (1961); Richardson v. State, 133 So. 2d 266 (Miss. 1961); State v. Ray, 354 S.W.2d 840 (Mo. 1962); Dryman v. State, 361 P.2d 959 (Mont. 1961); State v. Nelson, 362 P.2d 224 (Mont. 1961);

Bloeth v. New York, 9 N.Y.2d 211, 213 N.Y.S.2d 51, 173 N.E.2d 782 (1961), on motion to amend remittur, 9 N.Y.2d 823, 215 N.Y.S.2d 769, 175 N.E.2d 347 (1961), cert. denied (Douglas, J., dissenting), 368 U.S. 868 (1961); State v. Outing, 255 N.C. 468, 121 S.E.2d 847 (1961); Commonwealth v. Ross, 403 Pa. 358, 169 A.2d 780 (1961); State v. Young, 238 S.C. 115, 119 S.E.2d 504 (1961), cert. denied (Douglas, J., dissenting), 368 U.S. 868 (1961); State v. Worthy, 123 S.E.2d 835 (S.C. 1962);

Link v. State, 355 S.W.2d 713 (Tex. Crim. App. 1962); Porter v. State, 357 S.W.2d 401 (Tex. Crim. App. 1962); State v. Holman, 58 Wash. 2d 754, 364 P.2d 921 (1961).

Stories of police brutality are sometimes told, which, if true, leave little doubt of the involuntary character of the confession, but usually such stories are found to be untrue.

People v. Nischt, 23 Ill. 2d 284, 178 N.E.2d 378 (1961).; Johnson v. State, 336 S.W.2d 175 (Tex. Crim. App. 1960), cert. denied, 364 U.S. 927 (1960); Smith v. State, 350 Tex. Crim. App. 344 (1961), cert. denied, 368 U.S. 883 (1961).

In Johnson v. Ellis, 194 F. Supp. 258 (S.D. Tex. 1961), the federal district judge in a federal habeas corpus proceeding had this to say of the petitioner's story, "His tale of beatings, abuse, etc. struck this court as pure fabrication. Arranged against petitioner's incredible, unsupported story of coercion is a coherent, plausible narration of the events...." Id. at 263. The district judge's denial of the petition for habeas corpus was affirmed in 296 F.2d 325 (5th Cir. 1961), cert. denied (Douglas, J., dissenting), 369 U.S. 842 (1962).

[92]People v. Kendrick, 56 Cal. 2d 71, 14 Cal. Rptr. 13, 363 P.2d 13 (1961); People v. Garner, 15 Cal. Rptr. 620, 364 P.2d 452 (1961); Leach v. State, 132 So. 2d 329 (Fla. 1961), cert. denied (Douglas, J., dissenting), 368 U.S. 1005 (1962); Daw-

bers of the courts have been divided as to whether a particular confession was voluntary or involuntary.[93]

Most of the reversals of convictions in the state courts are made on the basis that some state rule relating to the admissibility of confessions has been violated.[94] Less frequently, in reversing, the state courts place the decision on the ground that the confession was obtained in violation of standards established by the U.S. Supreme Court.[95]

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son v. State, 139 So. 2d 408 (Fla. 1962); Young v. State, 140 So. 2d 97 (Fla. 1962);

State v. Evans, 372 P.2d 365 (Hawaii 1962); Parker v. Mississippi, 141 So. 2d 546 (Miss. 1962); People v. Lane, 10 N.Y.2d 347, 223 N.Y.S.2d 197, 179 N.E.2d 347 (1961); People v. Everett, 10 N.Y.2d 500, 225 N.Y.S.2d 193, 180 N.E.2d 556 (1962); People v. Doyle, 13 App. Div. 2d 605, 212 N.Y.S.2d 182 (3d Dep't 1961);

State v. Scarberry, 114 Ohio App. 85, 180 N.E.2d 631 (Ct. App., Scioto County, Ohio 1961); In re Dare, 370 P.2d 846 (Okla. Crim. App. 1962); Lopez v. State, 352 S.W.2d 106 (Tex. Crim App. 1961); Collins v. State, 352 S.W.2d 841 (Tex. Crim. App. 1962); Fernandez v. State, 353 S.W.2d 434 (Tex. Crim. App. 1962);

Marrufo v. State, 357 S.W.2d 761 (Tex. Crim. App. 1962); State v. Self, 366 P.2d 193 (Wash. 1961).

[93]People v. Roth, 11 N.Y.2d 80, 226 N.Y.S.2d 421, 181 N.E.2d 440 (1960) (conviction reversed because of admission of psychiatrist's report into evidence, but three of seven judges would also have reversed on ground that defendant's confession was involuntary); State v. Haynes, 58 Wash. 2d 716, 364 P.2d 935 (1961) (conviction affirmed by a 5-to-4 decision, four judges dissenting on the ground that the confession was involuntary); People v. Roberts, 364 Mich. 60, 110 N.W.2d 718 (1961) (the trial court's denial of a motion to quash was affirmed by an equally divided court, four judges taking the view that the proceedings should be quashed because of a failure to take the defendant, a juvenile, before a juvenile court as required by statute); Commonwealth v. Graham, 182 A.2d 727 (Pa. 1962) (conviction affirmed, one judge dissenting).

[94]People v. Trout, 54 Cal. 2d 576, 6 Cal. Rptr. 759, 354 P.2d 231 (1960) (implied threat that release from custody of wife of accused was dependent upon accused confessing); People v. Brommel, 56 Cal. 2d 629, 15 Cal. Rept. 909, 364 P. 2d 845 (1961) (officers told defendant that unless they got what they wanted, they would write "liar" on his statement and then he could expect no leniency from the court); People v. Rand, 21 Cal. Rptr. 89 (2d Dist. Ct. App. 1962) (threat to take wife to jail if accused did not confess); People v. Jackson, 23 Ill. 2d 263, 178 N.E.2d 310 (1961) (confession obtained during preliminary hearing); State v. Cross, 357 S.W.2d 125 (Mo. 1962) (trial court failed to instruct that jury must find confession to be true before they could consider it as evidence of guilt); State v. Tassiello, 75 N.J. Super. 1, 182 A.2d 129 (App. Div. 1962) (trial judge who admitted confession of one defendant and excluded that of another obtained under similar circumstances must have been mistaken as to the applicable law); People v. Howard, 15 App. Div. 2d 863, 224 N.Y.S.2d 886 (4th Dep't 1962) (police questioned defendant after his arraignment); Odis v. State, 345 S.W.2d 529 (Tex. Crim. App. 1961) (trial judge refused on request by the jury to define duress required to make a confession involuntary).

[95]Illinois has held that a confession obtained after the defendant had been detained in confinement for eight days is involuntary as a matter of law. People v. Price, 24 Ill. 2d 46, 179 N.E.2d 685 (1962). Arkansas has ruled that fifty-two hours of continuous questioning violates the "inherently coercive" Ashcraft rule. Binns v. State, 344 S.W.2d 841 (Ark. 1961).

Under the rules developed by the U.S. Supreme Court, the Court makes ultimate findings of fact that a confession was or was not involuntary, with the result that if ruled involuntary, the confession is excluded from further proceedings in the state court. Professor Maguire has commented that "the very minimum effect" of this procedure is "to remove this issue from state hands for decision in Washington."[96] State courts, on the other hand, are reversing and ordering new trials at which time further consideration may be given by the trial court to the character of the confession. The Supreme Court of Arkansas in *Binns v. State*[97] said that fifty-two hours of continuous questioning was inherently coercive as a matter of law, but nevertheless, while reversing the conviction, left the way open for the trial court to determine whether such extended questioning had in fact taken place.[98] The same procedure is being followed in Illinois[99] and New Jersey.[100]

In light of the U.S. Supreme Court's rule of automatic reversal, the well-advised prosecutor with substantial evidence of guilt, aside from the confession, will not introduce the confession into evidence. This may lead the accused himself to try to get the "coerced confession" into evidence or take advantage of it in some other way so as to secure the benefits of an automatic reversal. In the North Carolina case of *State v. Gaskill*[101] the defendant was convicted of rape and sentenced to life imprisonment. In his cross-examination of a police officer, the attorney for the defendant undertook to bring out that the state had obtained a confession, a tape recording of which was available and that it had been obtained by duress. The Supreme Court of North

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[96]Maguire, supra note 87, at 124.

[97]344 S.W.2d 841 (Ark. 1961).

[98]The point had not been argued by counsel for the defendant, which led one concurring judge to doubt whether the continuous questioning had in fact occurred, and so he thought the defendant was getting a "windfall reversal." One judge dissented, taking the view that the record did not show that this continuous questioning had taken place.

The procedure of the Binns case was followed in Kasinger v. State, 354 S.W.2d 718 (Ark. 1962).

[99]People v. Nemke, 23 Ill. 2d 591, 179 N.E.2d 825 (1962).

[100]State v. Fauntleroy, 36 N.J. 762, 177 A.2d 762 (1962).

[101]256 N.C. 652, 124 S.E.2d 873 (1962). In Doyon v. State, 181 A.2d 586 (Me. 1962), a confession was admitted into evidence, but a tape recording of the interrogation was excluded on motion of the defendant. In a petition for writ of error coram nobis the defendant based his claim almost entirely on the contents of the tape recording. In denying the petition, the Supreme Judicial Court of Maine said that coram nobis was not a device by which the petitioner could "reconsider his earlier decisions as to what evidence to offer on his own behalf and what evidence to seek to exclude from consideration by the jury." Id. at 587.

Carolina ruled against any argument based on the confession, saying, "A defendant cannot invalidate a trial by voluntarily introducing evidence which he might have excluded if that evidence had been offered by the State."[102] Similarly, Missouri has refused to permit a collateral attack, by way of habeas corpus, on a judgment of conviction following a plea of guilty, where the indictment by the grand jury was based on a "coerced confession."[103] A trial court in New York has ruled that even if a confession was coerced, its legal vitality disappears as an effective issue after the defendant, on the advice of counsel, pleads guilty.[104]

The Court of Appeals for the Second Circuit ruled in *United States ex rel. Reid v. Richmond*[105] that a state prisoner cannot claim a denial of due process in his conviction, when his counsel as a matter of strategy permitted introduction of an "involuntary" confession into evidence without objection. Speaking for the majority, Chief Judge Lumbard said, "We see no reason to require a state to try a criminal case on the theory that the state may not rely on concessions of counsel and the testimony of the defendant himself."[106] Circuit Judge Waterman, dissenting from a denial of a petition for rehearing, indicated that he was puzzled as to why defense counsel, a Public Defender, did not object to the introduction of the confessions "if only to save for appellate review the obvious constitutional questions."[107]

The fruit of the poisonous tree doctrine was recently extended by the Supreme Court of California to involuntary confessions. The court did so in *People v. Ditson*[108] without upsetting death-sentence convictions of a particularly brutal gangland murder. The trial court had excluded a confession as being involuntary, while at the same time declaring, "The mere exclusion of the confession to my mind does not exclude the evidence secured by the People as a result of it."[109] Testimony and photographs relating to the finding of the dismembered remains of the murder victim were claimed to be the fruits of the confession.

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[102]124 S.E.2d at 877.

[103]State v. Young, 351 S.W.2d 732 (Mo. 1961). The court assumed for purposes of decision that the confession had been "coerced", but expressed doubts as to whether this was a fact.

[104]People v. Williams, 225 N.Y.S.2d 333 (Ct. Gen. Sess., N.Y. County 1962).

[105]295 F.2d 83 (2d Cir. 1961), cert. denied, 368 U.S. 948 (1961).

[106]Id. at 90. But see People v. Rand, 21 Cal. Rptr. 89 (2d Dist. Ct. App. 1962), Files, J., dissented on ground that evidence presented to court was based on a stipulation entered into by defense counsel.

[107]295 F.2d at 91.

[108]20 Cal. Rptr. 165, 369 P.2d 714 (1962).

[109]369 P.2d at 716.

The evidence in the record, the Supreme Court of California thought, showed the confession to have been voluntary, and not involuntary as ruled by the trial court. The court found it surprising, therefore, that the State did not challenge the ruling below, strongly indicating that the State should do so in the future, since on a reversal and retrial a confession ruled voluntary by the Supreme Court would be admissible in evidence. The court also took note of legal and psychiatric authorities who have recognized a compulsion on the part of a perpetrator of a crime to confess, a phenomenon strikingly demonstrated in the *Ditson* case when, following conviction, the defendant who had confessed made a statement in writing to the trial judge in which he said that he had admitted what he had done "because I couldn't live with myself any more" and further, "The way I feel about getting caught, is like a Blessing from heaven."[110] In recognition of this aspect of human nature, the court reaffirmed a previous statement, "So long as the methods used comply with due process standards, it is in the public interest for the police to encourage confessions and admissions during interrogation."[111]

Nevertheless, the court continued to assume that the confession was involuntary and properly excluded from evidence, in order to examine the applicability of a fruit of the poisonous tree doctrine. After reviewing the United States Supreme Court decisions in the involuntary confession area, the court concluded that the doctrine of "the admissibility of the product or 'fruits' of an involuntary confession has been rejected by the Supreme Court of the United States and must be regarded as untenable."[112] Although no U.S. Supreme Court decision so holding was cited,[113] the court announced the following rule to be followed henceforth in California:

> "[T]he reason for the common law rule permitting the introduction of *real evidence* discovered by means of an involuntary confession—that such evidence tends to prove the 'trustworthiness' of the confession—must now be deemed constitu-

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[110]Id. at 724-25.

[111]Id. at 724.

[112]Id. at 725.

[113]The U.S. Supreme Court has never considered the question. Speaking with reference to the admission into evidence of a coerced confession, whose truthfulness has been established by corroborating evidence, Mr. Justice Frankfurter in his dissent in Stein v. New York said, "But if law officers learn that from now on they can coerce confessions without risk, since trial judges may admit such confessions provided only that, perhaps through the very process of extorting them, other evidence has been procured on which a conviction can be sustained, police in the future even more so than in the past will take the easy but ugly path of the third degree." 346 U.S. 156, 203 (1953).

> tionally indefensible, and hence that the rule itself must be abandoned. The inquiry should instead be directed to the issue of whether the introduction of the challenged evidence—the confession itself or its asserted product—in a criminal prosecution which culminated in a conviction denied the defendant, in the particular circumstances of that case, any essential element of a fair trial or due process of law."[114]

In the *Ditson* case, the California Supreme Court recognized "dangers inherent in the application" of a fruit of the poisonous tree rule, and admonished the trial courts to exercise great care to determine: (1) that the confession is in fact involuntary; and (2) "that the asserted 'fruits' of the confession thus found to be involuntary were *in fact* a product of that confession and would not have been otherwise discovered by the police from information already in their possession or independently acquired."[115] Two independently adequate bases were found to render the rule inapplicable to the facts of the *Ditson* case: (1) the defendant had not made timely object at the trial to the admission of the "fruits" and (2) there were no "fruits." The first basis is largely a makeweight of dubious value.[116] The second basis illustrates the difficulties inherent in the rule.

The California rule does not require the exclusion of all evidence obtained on the basis of checking out an involuntary confession. Only evidence that would not otherwise have been discovered by the police, either from information already in their possession or from independent sources, is to be excluded. In *Ditson*, as a result of the confession the dismembered body of the victim was discovered, but this evidence was held not to be the fruit of the confession, since every essential detail of the crime and the identity of its perpetrators were already known to the police, and the state was prepared to prosecute even though the body of the victim was never found.[117] Apparently also the implication of another person in the crime is not a fruit of the confession if the police already suspect his implication.[118]

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[114] 369 P.2d at 727.

[115] Id. at 730.

[116] Cf. State v. Smith, 37 N.J. 481, 181 A.2d 761 (1962), examining into legality of a search and seizure, even though no objection had been made to the admission of the evidence, "since the defense should not be charged with failing to anticipate Mapp." 181 A.2d at 765. Mapp v. Ohio, 367 U.S. 643 (1961), applied the rule of exclusion in the case in which the rule was announced.

[117] California has upheld a conviction of murder on wholly circumstantial evidence, no body having been found. People v. Scott, 176 Cal. App. 2d 458, 1 Cal. Rptr. 600, appeal dismissed (Douglas, J., dissenting), 364 U.S. 471 (1960).

[118] The confession implicated Gerald and Wynston Longbrake, but the court said this was not evidence but merely a "lead" in a process of investigation, since

The New York Court of Appeals, without any particular discussion of the point, impliedly rejected the fruit of the poisonous tree doctrine in *People v. Roth*.[119] In this murder case the defendant orally confessed and then pointed out the place where he had hidden a bloodstained rug and where the victim's coat could be found. The New York Court of Appeals indicated that even though the confession was held to be involuntary, "This does not mean that upon the retrial the People would be prevented from proving his identification of objects claimed to have constituted circumstantial evidence of his commission of the homicide."[120]

Professor Maguire[121] has pointed out that there is a close relationship between pretrial suppression of illegally-obtained evidence, and the exclusion of other evidence obtained by use of the illegal evidence.[122] While a majority of the Court of Appeals for the Second Circuit in the case of *In re Fried*[123] authorized pretrial suppression of involuntary confessions obtained in violation of an accused person's constitutional rights,[124] the decision has met with a "general lack of enthusiasm" in other federal courts,[125] and appears to have been rejected by all the state courts that have considered the matter.[126]

"the police already knew of the various members of the Longbrake family (some of whom had recently served time in prison) and of their possible connection with the crime." 369 P.2d at 730-31.

[119]11 N.Y.2d 80, 226 N.Y.S.2d 421, 181 N.E.2d 440 (1962).

[120]181 N.E.2d at 444. The court was divided on the question of whether the confession was involuntary. Only three of seven judges thought it was involuntary. The statement quoted is from the opinion of the court, prepared by one of the three judges who would have ruled the confession to be involuntary. All members of the court agreed on reversing the conviction on another point.

[121]Maguire, supra note 87.

[122]Id. at 147-48.

[123]161 F.2d 453 (2d Cir. 1947), cert. granted, 331 U.S. 804 (1947), writ dismissed on motion, 332 U.S. 807 (1947).

[124]Judge Frank wrote the opinion of the court and would have sanctioned pretrial suppression of any confession obtained illegally, whether in violation of constitutional rights or not; Judge Learned Hand agreed only to the extent of authorizing pretrial suppression of involuntary confessions obtained in violation of the accused's constitutional rights. Judge Augustus Hand would not have authorized pretrial suppression in either situation.

[125]Centracchio v. Garrity, 198 F.2d 382, 387-88 (1st Cir. 1952), cert. denied, 344 U.S. 866 (1952); Chieftain Pontiac Corp. v. Julian, 209 F.2d 657, 659 (1st Cir. 1954). One of the few cases, even in the federal courts, in which pretrial suppression of a confession has been ordered is United States v. Skeeters, 122 F. Supp. 52 (S.D. Cal. 1954.)

[126]Kokenes v. State, 213 Ind. 476, 13 N.E.2d 524, 526 (1938); McGee v. State, 230 Ind. 423, 104 N.E.2d 726, 728 (1952); State v. Cincenia, 6 N.J. 296, 78 A.2d 568, 571 (1951); People v. Nentarz, 142 Misc. 477, 254 N.Y.S. 574 (Sup. Ct. 1931); Application of Miller, 22 Misc. 2d 488, 193 N.Y.S.2d 377 (Sup. Ct. 1959); State v. Olivieri, 86 R.I. 211, 133 A.2d 767, 768 (1957); Dominguez v. State, 275 S.W.2d

It is too early to know the full effect that *Mapp v. Ohio*[127] will have on the present approach. It is significant, though, that the New York Court of Appeals in *People v. Rodriguez*[128] has held that a pretrial motion to suppress may be used to exclude from consideration a confession obtained as a product of an illegal search and seizure. In this case the accused contended that he had been induced to confess to certain killings by confrontation with a gun and other articles illegally obtained from his room. The court said:

> "In short, the exclusion rule covers not only the evidence illegally obtained but the product of the unlawful search as well.... And, obviously, it matters not that these 'fruits' happen to be confessions rather than some other type of evidence."[129]

The logic of Judge Learned Hand's comment in the case of *In re Fried* on the relationship between pretrial suppression of illegally-obtained evidence and illegally-obtained confessions seems unanswerable. Referring to the procedures followed where violations of the fourth amendment were involved, Judge Hand said:

> "Although, so far as I know, the same rule has not as yet been extended to confessions procured in violation of the Fifth Amendment, I feel too much the force of consistency not to take this added step.... Since I cannot see any rational basis here for distinguishing between the two Amendments when the situation is so nearly the same, I am content to accept this innovation."[130]

There appears to be no more rational basis for distinguishing between the fourth and fourteenth amendments than between the fourth and fifth.

Presumably, any person who coerces an accused into an involuntary confession in violation of his federal constitutional rights may be punished in an action brought under the Civil Rights Act,[131] but the effectiveness of such a proceeding is dubious. The rationale of the U.S. Supreme Court decisions in both the confession cases and in *Mapp v. Ohio* indicate that both a fruits of the poisonous tree doctrine and pretrial suppression of involuntary confessions are in the offing.

677, 678-79 (Tex. Crim. App. 1955); Walker v. State, 162 Tex. Crim. 408, 286 S.W.2d 144, 149 (1955); cert. denied, 350 U.S. 931 (1956).

[127] 367 U.S. 643 (1961).

[128] 11 N.Y.2d 279, 183 N.E.2d 651 (1962).

[129] 183 N.E.2d at 654.

[130] 161 F.2d at 465.

[131] See supra, notes 8 and 9.

In the confession cases, some version of the McNabb-Mallory rule, under which even voluntary confessions obtained during periods of illegal detention are excluded from evidence,[132] frequently urged upon the state courts.[133] The rule, however, has been rejected by the state judiciaries almost without exception,[134] although it finds some support among state judges.[135] The opinions of the United States Supreme Court in *Culombe v. Connecticut*[136] would indicate that the matter is the subject of frequent debate within the Court. At least two of the Justices are urging a broad right to counsel rule—"the right to consult a lawyer before talking with the police"—that would exclude many voluntary confessions obtained during periods of illegal detention.[137] If this viewpoint is once accepted, it would be but a short step to applying the full McNabb-Mallory rule[138] to the states.

III. Centralization of Police Administration

One important aspect of U.S. Supreme Court review of state criminal proceedings has apparently never been noted in the confession cases. This is the fact that the administration of state criminal justice, particularly when it is compared with the federal set-up, is highly decentralized. The federal-state judicial systems constitute a hierarchy, in which pronouncements at the top are made effective throughout the system. Similarly federal executive enforcement of criminal justice is centralized in the U.S. Department of Justice. This centralization has been carried so far that certain federal crimes cannot even be prosecuted without the "formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated."[139]

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[132]Maguire, supra note 87, at 155-66; Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1 (1958).

[133]See cases cited in note 92 supra.

[134]In Culombe v. Connecticut, Mr. Justice Frankfurter said that Michigan was the only state to follow the McNabb rule, citing People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960). 367 U.S. n.51 at 601. People v. Roberts, supra note 93, may cast some doubt on whether Michigan is following *McNabb* to the full extent.

[135]Besides the Michigan cases cited supra note 134 see Dawson v. State, 139 So. 2d 408 (Fla. 1962); People v. Lane, 10 N.Y.2d 347, 223 N.Y.S.2d 197, 179 N.E.2d 197 (1961); State v. Hayes, 58 Wash. 2d 716, 364 P.2d 935 (1961).

[136]367 U.S. 568 (1962).

[137]Mr. Justice Douglas, with whom Mr. Justice Black agrees, concurring. Id at 637.

[138]McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957).

[139]Fugitive Felon Act, 75 Stat. 795, 18 U.S.C.A. § 1073 (1961 Supp.).

The decentralization of criminal justice at the state level is particularly apparent when one seeks information on state law enforcement activities, such as subsequent developments in state confession cases reversed by the Supreme Court of the United States. To some extent not precisely defined, the States' Attorneys General have represented the states in these cases before the Supreme Court. The *United States Reports* indicate that in the twenty-two cases in which the convictions were reversed, the states were represented by the State Attorney General alone in nine cases, by the State Attorney General and other attorneys in seven cases, and by attorneys not identified as being associated with the State Attorney General in six cases. The survey made in this article shows that many State Attorney General Offices do not maintain records on what happens subsequent to remands from the Supreme Court. The Solicitor General for New York, for example, writes, "Criminal prosecutions in this State are handled by the County District Attorneys and not by the Attorney General. Consequently, this office has no record whatsoever of further proceedings in these cases."[140]

The Attorney General of the United States can adopt rules, which will carry out the directives of the federal judiciary as laid down in confession cases, and he may require federal law enforcement officials to obey such rules. State Attorney Generals do not have such great powers in relation to state and local enforcement officials.

The image of a soverign state being called to the bar of the U.S. Supreme Court to answer for its administration of criminal justice is largely an illusion. Formally, so far as the style of the case is concerned, it is the state that prosecutes for crime. In proceedings before appellate courts, state officials, in the name of the state, defend the criminal convictions so obtained. The state as such may be castigated for its techniques of law enforcement.

But law enforcement activities are carried out at a different level and by different persons. While of course the situation varies throughout the nation, generally there are no organized procedures by which federal constitutional rules, as enunciated by the U.S. Supreme Court, are made binding on local law enforcement officials. In fact, it is doubtful if there is very much in the way of organized procedures for even making the rules *known* to these officials.

A truly effective enforcement of federal constitutional rules requires a great deal more than supervision by the federal judiciary of

[140]Letter from Hon. Paxton Blair, Solicitor General of New York, August 25, 1961.

state criminal proceedings. There must be centralization of law enforcement activities, as well as judicial activities. This means there must be a transfer of authority from the localities to the states, so that the law enforcement activities of the states may be more easily subjected to directions from the federal government. To state the remedy also is to state the dangers inherent in the remedy. A centralized police system has great potentialities for good, but it also has great potentialities for evil.

A review of the state confession cases that have reached the U.S. Supreme Court in the last quarter century, particularly an analysis of the cases in which the Court reversed convictions, does not demonstrate that the present situation is one of which the states need to be ashamed. It would be a gross overstatement to say on the basis of this review, that the number of innocent persons who have been convicted by coerced confessions during the past quarter century equals the number of fingers on one hand. Considering human fallibility, this is hardly a bad record. Some lingering doubts must remain though as to whether this truly states the picture, and whether the cases that reach the U.S. Supreme Court have much to do with guilt or innocence.[141]

So far as protecting the innocent is concerned, a good case could be made, as a preferable alternative to the present techniques, for the complete abandonment of federal review of state confession cases and the adoption by the states of a rule that a criminal conviction will be reversed in an appellate court, unless two-thirds, or some such figure, of the reviewing judges vote to affirm. So far as a review of these confession cases shows, such a rule at the state level would more surely have protected the innocent, than the present system of reversals only by a majority even though the conviction is reviewed by a larger number of courts.

Herein must lie the basis for the major criticism that can be made of federal judicial review of state criminal cases involving convictions. The states, and particularly, the people in the local communities, are not interested solely in constitutional guarantees. They are also interested in protecting the innocent from unjust convictions. Federal judicial review emphasizes the prevention of the unconstitutional conviction of the guilty. An ideal system of criminal law administration gives first consideration to protecting the innocent.

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[141]See Prettyman, Death and the Supreme Court 298-300 (1961).

ALUMNI COMMENT

APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS*

RENO S. HARP, III†

The initial step after the indictment has been returned by the grand jury is an inquiry by the court as to whether each defendant is represented by counsel. Section 19.1-241 of the Code of Virginia requires that counsel be appointed to defend all indigents who are charged with a felony. During the past twelve months, I have appeared in thirty different courts in this State. Judges before whom I have argued cases have expressed their concern over the increasing number of defendants who assert that they are unable to employ counsel, and ask the court to provide them with a lawyer. In most of the circuits that I have visited over 50 per cent of the criminal cases are now handled by lawyers appointed by the court. This has caused a great deal of concern among the members of the judiciary. Some judges have made it a practice in every case where the defendant requests court-appointed counsel to inquire as to the defendant's financial condition. If it then appears to the court that the defendant is financially able to employ a lawyer, he is urged to do so by the court and, if the defendant is on bond, the case is continued to the next term of court.

The selection of the attorney to represent an indigent defendant is the next, and a very important, step. Many of the courts have adopted the policy of appointing two lawyers of considerable experience in all capital cases. This divides between two experienced heads the heavy burden of deciding on what course of action to take. In some circuits the court appoints two lawyers, an older and a younger lawyer, to handle a number of cases. The young lawyer does the leg work and the older lawyer is available to give advice and counsel. The fees allowed by the court are then divided between the attorneys.

Very few courts still follow the practice of indicting, appointing counsel, and trying a defendant all on the same day. This is a very dangerous practice. Although perfectly correct, this procedure, looks

*This paper is based on an address delivered at the Annual Meeting of the Judicial Conference of Virginia, May 11, 1962.

†Assistant Attorney General of Virginia.

somewhat unusual at a later date. Some of the courts have adopted a hard and fast rule that at least a week must elapse between the time counsel is appointed and the trial of the case, even if the plea to be entered is guilty.

At the time the defendant is arraigned, a question may arise as to whether or not he understands the nature of his plea. In the case of a youthful offender inquiry should always be made as to his age and previous education. Some of the courts have expressed the view that in all questionable cases, the defendant should be examined and a determination made as to his mental condition. Moreover, the court should explain to him his constitutional rights, that is to say, his right to plead not guilty and to be tried by a jury; his right to plead not guilty and to be tried by the court, with the consent of the court and the Commonwealth's Attorney; and if he pleads guilty that he will be tried by the court. This procedure should be followed in every case, and is most important when the defendant pleads guilty. Of course, inquiry should be made to ascertain that any guilty plea is made voluntarily and without any promises having been made to the defendant.

The next question that arises is the necessity of transcribing the evidence. Some of the courts have adopted a uniform practice of requiring a court reporter in all capital cases. This is by far the better practice. The availability of a transcript of the record protects the right of the Commonwealth and of the accused. Section 17-30.1 does not prescribe the particular means to be used in recording the evidence in a particular case. In the Third Judicial Circuit almost all criminal cases are recorded by means of a dictaphone dictating machine. The machines have been purchased by the respective boards of supervisors, and the cost of operation is small. This procedure is less expensive than employment of court reporters and works nearly as well. The Virginia Advisory Legislative Council made a study of the entire problem of court reporters in 1949, and it was determined at that time not to establish a court-reporter system. However, some sort of record of every criminal trial of any magnitude is needed, because more and more long-term prisoners are filing petitions for writs of habeas corpus.

If the defendant pleads guilty, or not guilty, and is tried by the court without a jury, the use of the pre-sentence report, as provided for in Section 53-278.1, is of great assistance to the court in ascertaining the quantum of punishment to be imposed. Moreover, this report is part of the record of the court and usually contains a full summary of the crime or crimes committed by the defendant. More and more

courts in this State are using this very fine tool in determining the sentence to be imposed upon the defendant.

After the trial has been concluded, the next question which arises is the amount of the fee to be paid the attorney in court-appointed cases. Section 14-181 of the Code of Virginia (1950) provides that the court may allow a fee not to exceed $150 in cases where the crime may be punishable by death, or by confinement in the penitentiary for a period of more than ten years. If the crime is other than those mentioned before, the court may allow a fee not to exceed $50. The members of the bar and of the judiciary are aware of the fact that the amounts allowed by this statute are not sufficient to provide adequate compensation for the efforts of court-appointed attorneys in many cases.

The setting of the fee in any specific case is a difficult matter at best. There is a great difference in the fees allowed under identical situations in different courts. In one circuit a fee of $15 is allowed an attorney when he represents an indigent defendant who pleads guilty, while only one hundred miles away, the minimum fee allowed in another circuit under the same situation is $25. In 1960, $107,447 was paid court-appointed attorneys. In 1961, $156,965 was paid court-appointed attorneys. The total amounts involved are not small and are increasing each year.

In the order of appointing counsel the words "able and experienced attorney at law" could well be used. In the order allowing an attorney's fee the words "a fee of ——— dollars is allowed John Doe, attorney at law, who effectively and competently represented Richard Roe on a charge of murder" are useful.

The members of the judiciary receive many letters from inmates at the Virginia State Penitentiary. On some occasions these letters request that an attorney be appointed to aid the indigent in his appeal from his criminal conviction. Section 17-30.1 provides for the recording of the evidence and incidents of trial. It also provides that, in any felony case where the defendant is represented by an attorney appointed by the court, the court shall on motion of counsel for the defendant order that a copy of the transcript of the evidence be prepared in order that the indigent defendant may appeal. There is no specific provision of law which provides for the appointment of counsel to assist an indigent in his appeal of his criminal convicton. The Supreme Court of the United States has not ruled specifically on this point in regard to State cases. In the Federal system indigents are entitled to court-appointed counsel on appeal. The highest courts

of the states of Washington, Indiana, New York and Kansas have held that under the fourteenth amendment an indigent is entitled to court-appointed counsel on appeal. They have held that the refusal of a court to assign counsel upon request was a violation of the defendant's constitutional rights as guaranteed to him by the fourteenth amendment to the Constitution of the United States.

The test to be applied in these cases was expressed in the case of *Griffin v. Illinois*, 351 U.S. 12 (1956). The Supreme Court of the United States held that the denial of a transcript which was necessary to appeal a decision in a criminal case was a denial of a constitutional right.

The Supreme Court of the United States has laid great stress upon the point that indigents must be raised to the same level as those defendants who have the financial means to employ counsel. In 1895 the Supreme Court of Appeals of Virginia in *Barnes v. Commonwealth*, 92 Va. 794, 23 S.E. 784 (1895) recognized the fundamental right of an accused to have the assistance of counsel. Subsequent decisions of the Supreme Court of Appeals of Virginia and the statutes enacted by the General Assembly require the appointment of counsel in all felony cases. In the absence of a definitive decision of the Supreme Court of the United States, it would seem that the better practice would be for a trial court, upon request of an indigent defendant, to appoint counsel to assist the indigent in appealing his criminal conviction. Such action will have a far-reaching effect on the trial courts in this Commonwealth, but it is likely that in the not too distant future, the Supreme Court of the United States will require such appointments. This is a problem of considerable interest, for a convict is usually unable to appeal his own conviction.

In some cases, the attorneys appointed to represent an indigent defendant will, on their own motion, appeal a criminal conviction, thus insuring the equal protection of rights of accused persons regardless of their financial situation.

It is the duty of the legal profession to make sure that all persons charged with crimes are treated equally before the bars of justice in this State.

Washington and Lee Law Review

Member of the Southern Law Review Conference

Volume XIX | Fall 1962 | Number 2

Published twice a year by the School of Law, Washington and Lee University, Lexington Virginia. Subscription price, $3.00 per year, $1.75 per current issue, $2.00 per back issue. If a subscriber wishes his subscription discontinued at its expiration, notice to that effect should be given; otherwise it is assumed that a continuation is desired.

CASE COMMENTS

RETRACTION STATUTES: A CHANGE IN THE LAW OF LIBEL

Historically, the publication of a libel was actionable without pleading and proving any special damages.[1] Injury to the plaintiff's reputation was presumed, and so he could recover general damages. Three types of damages may be involved in a libel action: general, special, and punitive. The major elements of general damages are injury to reputation,[2] loss of business,[3] bodily injury and wounded feelings.[4] Special damages, on the other hand, can only be recovered when the injury is a direct pecuniary or material one.[5] Proof of special damage is extremely difficult, and American decisions sustaining such claims are few.[6] Finally, if the evidence shows that the defendant was wanton or malicious, punitive damages are recoverable in addition to damages given for compensation.[7] The theory of awarding punitive damages is that they are imposed on the defendant as a penalty. At common law, publication of a retraction would defeat a claim for punitive damages but served only to decrease the amount of general damages recoverable by the defamed party.[8]

The common law of libel has been often criticized,[9] particularly in the area of unintentional defamation where seemingly excessive damages have sometimes been recovered from responsible publishers. This dissatisfaction resulted in the sporadic enactment of statutes

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[1]Thorley v. Lord Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (1812). Mansfield stated in this case he that could see no valid reason for distinguishing slander from written defamation but was bound by a long established precedent.

[2]Craney v. Donovan, 92 Conn. 236, 102 Atl. 640 (1917).

[3]Williams Printing Co. v. Saunders, 113 Va. 156, 73 S.E. 472 (1912).

[4]Pion v. Caron, 237 Mass. 107, 129 N.E. 369 (1921).

[5]McCormick, Damages § 114 (1935).

[6]The courts generally require the defamed party to plead and prove the character of the acts which have caused the damage with a greater degree of definiteness than is normally required in pleading damages. McCormick, Damages § 115 (1935). The same conditions are required in England as well. "As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done." Ratcliff v. Evans, [1892] 2 Q.B. 524, 532 (C.A.).

[7]McCormick, Damages § 118 (1935).

[8]Meyerle v. Pioneer Pub. Co., 45 N.D. 568, 178 N.W. 792 (1920).

[9]See Note, 69 Harv. L. Rev. 875, 891 (1956).

limiting the recovery of general damages where the publisher of the libel has published or offered to publish a retraction.[10] Legislatures enacting such statutes consider retraction to be the same as exculpation and, therefore, this alleviates the need for general damages. Proponents of the retraction statutes contend that "exculpation in the eyes of the world is not accomplished by quiet entry of judgment on musty court rolls."[11] The strong desire to disseminate news rapidly in a world of nearly instantaneous communication will necessarily result in some unavoidable mistakes. Though there is no exact statistical information available, it is believed that responsible news media readily retract any false statements which are published. By providing for retraction in lieu of general damages, publishers are relieved of the danger of excessive verdicts and extortion by unscrupulous plaintiffs.

However, numerous writers are somewhat critical of the various retraction statutes.[12] They believe that retraction is never an entirely adequate remedy, for rarely does a retraction reach all who heard the defamation. Even though retraction often may be a sufficient remedy in the case of an inadvertent libel, there seems to be no justification for allowing publication of a retraction to relieve a malicious defendant.[13]

The Supreme Court of Oregon in *Holden v. Pioneer Broadcasting Co.*[14] applied a retraction statute[15] that radically changes the common law of libel. Under the Oregon statute the plaintiff may recover such special damages as he can prove to have suffered as a result of the defamatory statement, but general damages are not recoverable unless a correction or retraction was demanded and refused, or the plaintiff proves that the defendant actually intended to defame him.

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[10]For a comprehensive compilation of American retraction statutes see Leflar, Legal Remedies for Defamation, 6 Ark. L. Rev. 423, 436-40 (1952).

[11]Morris, Torts 294 (1953).

[12]See for instance Chafee, Possible New Remedies for Errors in the Press, 60 Harv. L. Rev. 1, 17 (1946); Morris, Inadvertent Newspaper Libel and Retraction, 32 Ill. L. Rev. 36 (1936); Note, 69 Harv. L. Rev. 875, 944 (1956).

[13]See 38 Calif. L. Rev. 951 (1950).

[14]356 P.2d 845 (Ore. 1961). The defendant's primary ground of attack was on the constitutionality of the Oregon statute. In *Holden* the Statute was upheld by a 4-3 decision. This constitutional attack has long been a serious deterrent to the adoption of strong retraction statutes. A statute eliminating the recovery of general damages by a defamed party runs the risk of depriving him of property without due process of law. This subject is developed at great length in Morris, Inadvertent Newspaper Libel and Retraction, 32 Ill. L. Rev. 36 (1937). In addition see 23 So. Cal. L. Rev. 89 (1949); 36 Ore. L. Rev. 70 (1956); 38 Calif. L. Rev. 951, 954 (1950).

[15]Ore. Rev. Stat. §§ 30.155-30.175 (1955).

In *Holden* the plaintiff sued to recover special, general and punitive damages for a libelous statement made by the defendants during a television broadcast. On motion of the defendants, the court struck the claims for general and punitive damages on the ground that the complaint did not allege that the defendants either intended to defame the plaintiff or refused to publish a retraction. In affirming, the Supreme Court said the Oregon statute requires "the plaintiff to plead and prove, as a condition precedent to recovery, defendants intent to defame or in the absence of such intent, the failure to retract upon demand."[16]

Though this decision represents a great change in the law of libel, it does not come without warning. As previously indicated, some state legislatures have sought to protect news media that retract defamatory releases from excessive verdicts. However, these efforts have been met with great hostility from the courts, for most of these retraction statutes have been held unconstitutional[17] or have been judicially construed so as to leave the common law virtually unchanged.[18] Retraction statutes may be divided into two categories: One group uses vague language that is susceptible of varying construction, while the other group expressly precludes the recovery of general damages.

A statute in the first group may read that the plaintiff shall recover only "actual damage" in the event of a retraction or an offer of the same. Most courts reviewing such a statute have construed "actual damage" to include both general and special damages.[19] Such a judicial construction leaves the common law unchanged, with the result, as Professor Morris says, that "the sum total of significant changes in the measure of damages when inadvertent libel has been retracted is zero."[20]

At least three states[21] have enacted statutes in the second group,

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[16]365 P.2d at 847.

[17]E.g., Hanson v. Krehbiel, 68 Kan. 670, 75 Pac. 1041 (1904); Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888).

[18]Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 N.E. 1018 (1908); Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

[19]Comer v. Age-Herald Pub. Co., 151 Ala. 613, 44 So. 673 (1907) (actual equals general damage); Ross v. Gore, 48 So. 2d 412 (Fla. 1950) (actual damages equal general damages);Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 N.E. 1018 (1908) (actual damages equal general damages); Meyerle v. Pioneer Pub. Co., 45 N.D. 568, 178 N.W. 792 (1920). In Neafie v. Hoboken Printing and Pub. Co., 75 N.J.L. 564, 68 Atl. 146 (1907), the statute was construed to exclude the recovery of punitive damages only.

[20]Morris, Inadvertent Newspaper Libel and Retraction, 32 Ill. L. Rev. 36, 42 (1932).

[21]The three states with more stringent retraction statutes which have been upheld in the face of constitutional attack are California, Minnesota, and Oregon.

expressly excluding general damages in the event of a retraction or an offer of retraction. These statutes do not admit of a judicial construction that permits the recovery of general damages. Although this latter group of statutes does preclude the recovery of general damages in the event of a retraction, there is a wide divergence of opinion as to how far this protection should carry.

Under the Minnesota statute general damages are not recoverable where there is a showing of good faith coupled with a full retraction by the defendant.[22] However, in *Allen v. Pioneer Press Co.*[23] this good faith requirement was construed to include freedom from negligence as well as freedom from an improper motive. Thus the scope of this statute has been limited by the judiciary so that there is little change from the common law.

The California statute[24] is at the other extreme from the Minnesota act. This statute, which was applied in *Werner v. Southern California Associated Newspapers*,[25] allows a retraction as a defense to recovery of general damages even in the case of a deliberate and malicious libel. By limiting the plaintiff's recovery to special damages for a malicious publication, the legislature seems to have granted a license to defame, tacitly encouraging sensationalism in the press.

The Oregon statute occupies the median position between the milder Minnesota statute and the more severe California legislation. The Oregon statute has many of the good features of the other two acts and yet omits the more objectionable aspects of each. It goes further in changing the common law of libel than does the Minnesota act, but it does not offer the more drastic protection to malicious publishers provided in the California statute.

Even at common law, proof of retraction generally precluded the recovery of punitive damages.[26] Consistent with this rule, most of the retraction statutes are interpreted as precluding the recovery of punitive damages. The Oregon retraction statute does not mention punitive damages and the court in *Holden* specifically declined to make a determination on that issue.[27] It only held that the allegations of the plaintiff's complaint were not sufficient to charge the defendants with an intent to defame.

Though the various retraction statutes have not met with great

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[22]Minn. Stat. Ann. § 548.06 (1947).
[23]40 Minn. 117, 41 N.W. 936 (1889).
[24]Cal. Civ. Code § 48(a).
[25]35 Cal. 2d 121, 216 P.2d 825 (1950).
[26]Prosser, Torts § 96 (1955).
[27]365 P.2d at 851.

judicial favor in the past, it is to be noted that the two most recent decisions involving retractions have sustained the more drastic type statutes. Perhaps this represents a new trend in the law of libel. If so, it is possible that the Oregon statute construed in *Holden* will become a model for other states. One of the better features of the Oregon act is that it allows a retraction to preclude recovery of general damages only for inadvertent libels. Although the Oregon statute requires the plaintiff to plead and prove malice or failure to retract upon demand, it would perhaps be desirable to establish a presumption against malice and to require the plaintiff to prove malice in fact. This would have the effect of taking the issue of good faith from a jury which might be oversolicitous of the plaintiff.

ANDREW W MCTHENIA, JR.

COHABITATION DURING PENDENCY OF A DIVORCE ACTION

When a court hearing an action for divorce learns that the parties have cohabited during pendency of such suit, the court is presented with an interesting question involving conflicting policies. Ordinarily the courts hold that voluntary cohabitation during the pendency of the suit bars the suit[1] and dismiss the action.[2] Some courts, though, have held that while the facts of such cohabitation should be brought to their attention, their jurisdiction to grant the divorce is not affected.[3] In accordance with the latter view it has been held that the original cause of action may be revived in the same action, after subsequent acts of aggression have taken place, by the filing of a supplemental petition.[4]

Recently, a Florida District Court of Appeals in *Seiferth v. Seiferth*[5] reached a different result concerning the effect of cohabitation of the parties during the pendency of a divorce action. A husband sued

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[1]Givens v. Givens, 304 S.W.2d 577 (Tex. Civ. App. 1957).

[2]Byrne v. Byrne, 93 N.J. Eq. 5, 114 Atl. 754 (Ch. 1921); Givens v. Givens, 304 S.W.2d 577 (Tex. Civ. App. 1957).

[3]Cabral v. Cabral, 323 Mass. 441, 82 N.E.2d 616 (1948); Tackaberry v. Tackaberry, 101 Mich. 102, 59 N.W. 400 (1894); Payne v. Payne, 157 Ore. 428, 72 P.2d 536 (1937).

[4]Huffine v. Huffine, 74 N.E.2d 764 (Ohio C.P 1947).

[5]132 So. 2d 471 (Fla. Ct. App. 1961).

for divorce on the ground of extreme cruelty.[6] The chancellor granted the divorce and the wife appealed contending that the court below should have dismissed the suit because the resumption of cohabitation during its pendency established condonation of the marital offense as a matter of law.[7] In affirming the decision below, the District Court of Appeals, in a divided opinion,[8] agreed with the finding of the chancellor that the defendant wife had not shown the element of forgiveness implicit in the defense of condonation.[9] One judge dissented, being of the opinion that the cohabitation in the marital home, which admittedly included several acts of sexual intercourse subsequent to the institution of the divorce proceedings, constituted condonation as a matter of law.[10]

The court in the *Seiferth* case, in its preoccupation with the legal sufficiency of the defense of condonation,[11] seemingly failed to con-

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[6]It has been held that either a husband or a wife may maintain an action for divorce based on cruelty. Levy v. Levy, 388 Ill. 179, 57 N.E.2d 366 (1944); Nall v. Nall, 287 Ky. 355, 153 S.W.2d 909 (1941); Persinger v. Persinger, 133 W Va. 312, 56 S.E.2d 110 (1949). The chief distinction made here is that a wife is ordinarily granted a divorce for cruelty on less provocation than a husband. Woolley v. Woolley, 113 Utah 391, 195 P.2d 743, 744 (1948).

[7]The appeal was actually taken from a refusal to dismiss upon the facts as set forth in the wife's amended answer. These are the facts as found by the special master upon re-referral of the cause to him by the chancellor: The defendant wife went to the plaintiff husband's place, the marital abode, for dinner. A violent argument developed, during the course of which the wife received a broken wrist. The plaintiff took his wife to the hospital and paid for her bill there. After the wife's release from the hospital she returned to the marital home, with her personal effects, and she shared the same bed with plaintiff. It was admitted by both parties that they had indulged in sexual intercourse. Seiferth v. Seiferth, 132 So. 2d 471, 473 (Fla. Ct. App. 1961).

[8]The decision was three to one.

[9]All courts require forgiveness, either implied or express, by the aggrieved spouse to constitute a valid defense of condonation. York v. York, 280 S.W.2d 553 (Ky. 1955); Ramsay v. Ramsay, 69 Nev. 176, 244 P.2d 381 (1952); Duff v. Duff, 126 N.E.2d 466 (Ohio Ct. App. 1954).

[10]132 So. 2d 471, 474 (Fla. Ct. App. 1961).

[11]Another problem which might have been behind this court's reluctance to accept condonation as a defense in this case is the distinction frequently applied by courts concerning condonation as a defense to a divorce based on the ground of cruelty as opposed to one based on the ground of adultery because of the different character of the offenses. Wolverton v. Wolverton, 163 Ind. 26, 71 N.E. 123 (1904); Brown v. Brown, 171 Kan. 249, 232 P.2d 603 (1951); Weber v. Weber, 195 Mo. App. 126, 189 S.W 577 (1916); Ramsay v. Ramsay, 69 Nev. 176, 244 P.2d 381 (1952); Fisher v. Fisher, 223 App. Div. 19, 227 N.Y. Supp. 345 (1st Dep't 1928); Wilson v. Wilson, 16 R.I. 122, 13 Atl. 102 (1888); Humphreys v. Humphreys, 39 Tenn. App. 99, 281 S.W.2d 270 (1954); Cudahy v. Cudahy, 217 Wis. 355, 258 N.W. 168 (1935).

There have been many cases holding that the resumption of marital relations constitutes condonation of cruelty. Obennoskey v. Obennoskey, 214 Ark. 358, 220

sider the "overwhelming weight of authority,"[12] which denies relief to the parties who cohabit during pendency of a suit for divorce.[13] This view is typically reflected by the words of a New York court:[14] "We think it is contrary to the policy of the law and incongruous to separate parties judicially who have not separated themselves."[15] The Virginia Supreme Court of Appeals in *Tarr v. Tarr*,[16] added its support to this view with these graphic words: "It would be shocking to the moral sense for a court of equity to grant a divorce to parties, who, during the pendency of the suit, litigated by day and copulated by night."[17]

While the authorities denying relief to parties who cohabit during the pendency of a divorce action are unanimous in their conclusion, they are also unanimous in refraining from enunciating the exact reasons behind their conclusion.[18] One can speculate as to the reasons.

Possibly a kind of the "clean hands" doctrine[19] is involved. This would not be an application of the doctrine in its usual sense, *i.e.*, denial of relief to a wrongdoer,[20] but rather a denial of relief to parties

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S.W.2d 610 (1949); Buck v. Buck, 205 Ark. 918, 171 S.W.2d 939 (1943); Johnson v. Johnson, 210 Ga. 795, 82 S.E.2d 831 (1954); Moore v. Moore, 362 Ill. 177, 199 N.E. 98 (1935); Babcock v. Babcock, 317 Mass. 772, 59 N.E.2d 471 (1944); Sewell, v. Sewell, 160 Neb. 173, 69 N.W.2d 549 (1955); Shinn v. Shinn, 148 Neb. 832, 29 N.W.2d 629 (1947); Lazarczyk v. Lazarczyk, 122 Misc. 536, 203 N.Y. Supp. 291 (Sup. Ct. 1924); Greer v. Greer, 178 Pa. Super. 643, 115 A.2d 794 (1955); Brooks v. Brooks, 200 Va. 530, 106 S.E.2d 611 (1959). But see Cox v. Cox, 343 S.W.2d 395 (Ky. 1961); Nixon v. Nixon, 329 Pa. 256, 198 Atl. 154 (1938); Hollister v. Hollister, 6 Pa. 449 (1847).

[12]"The overwhelming weight of authority is to the effect that when the parties to a suit for divorce have... resumed their marital relations, such action operates to end the litigation." Givens v. Givens, 304 S.W.2d 577, 580 (Tex. Civ. App. 1957).

[13]Holt v. Holt, 77 F.2d 538 (D.C. Cir. 1935); Baumgartner v. Baumgartner, 16 Ill. App. 2d 286, 148 N.E.2d 327 (1958); Wright v. Wright, 153 Neb. 18, 43 N.W.2d 424 (1950); Ross v. Ross, 4 Misc. 2d 399, 149 N.Y.S.2d 585 (Sup. Ct. 1956); Sommer v. Sommer, 285 App. Div. 809, 137 N.Y.S.2d 1 (1st Dep't 1955); McCarthy v. McCarthy, 199 Misc. 680, 103 N.Y.S.2d 808 (Dom. Rel. Ct. 1951); Berman v. Berman, 277 App. Div. 560, 101 N.Y.S.2d 206 (1st Dep't 1950); Tarr v. Tarr, 184 Va. 443, 35 S.E.2d 401 (1945).

[14]Berman v. Berman, 277 App. Div. 560, 101 N.Y.S.2d 206 (1st Dep't 1950).

[15]Id., 101 N.Y.S.2d at 207.

[16]184 Va. 443, 35 S.E.2d 401 (1945).

[17]184 Va. at 449, 35 S.E.2d at 404.

[18]Typical of the language of the courts in this respect is the language of the Supreme Court of Nebraska: "It is elementary that while a divorce is pending the parties must live separate and apart." Ellis v. Ellis, 115 Neb. 685, 214 N.W 300, 301 (1927).

[19]The doctrine that he who comes into equity must come with clean hands has been held applicable to divorce cases. Fritz v. Fritz, 179 Ore. 512, 174 P.2d 169, 174 (1946); Nelson, Divorce and Annulment § 1.03 (1945).

[20]Generally the clean hands principle is applied when the party seeking re-

who, through their actions out of court, show a lack of good faith in participating in the suit.[21] Professor Chafee in an exhaustive article criticizing the application of the clean hands doctrine to matrimonial litigation wrote: "It was an evil day when the first American judge to speak of clean hands had the bright idea of injecting the maxim into the very place where it would work its greatest mischief."[22] Perhaps he would not object to this application of the doctrine. The chief objection of Chafee and others to the use of a clean hands doctrine in divorce actions lies in the intolerable position in which the parties are left after its invocation.[23] This objection hardly applies where the parties show by their actions during the pendency of the suit that their position after denial of relief will not be intolerable.[24]

Another possible reason behind the conclusion of the majority view may be some idea of estoppel. Estoppel has been applied to divorce actions where lack of good faith has been shown.[25] It would not be an unwarranted extension to invoke an estoppel on the ground that the party is asking for judicial relief wholly inconsistent with his extrajudicial conduct.

The foregoing considerations point to the denial of relief where the parties have cohabited during the pendency of their suit for divorce. But a contrary result can be reached if the strong policy favoring reconciliation of the spouses[26] is considered controlling. It is arguable that this policy favoring reconciliation will best be served by allowing the parties to cohabit during the pendency of their divorce suit. They are then permitted to remain in the best possible

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lief is himself guilty of some wrongdoing in connection with the lawsuit. Rhine v. Terry, 111 Colo. 506, 143 P.2d 684, 685 (1943); Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613, 616 (1944); Hartman v. Cohn, 350 Pa. 41, 38 A.2d 22, 25 (1944).

[21]Lack of good faith has been described as one of the bases underlying the clean hands maxim. Vulcan Detinning Co. v. American Can Co., 72 N.J.Eq. 387, 67 Atl. 339, 341 (1907); Canfield v. Jack, 78 Okla. 127, 188 Pac. 1040 (1920).

[22]Chafee, Coming into Equity with Unclean Hands, 47 Mich L. Rev. 877, 1083 (1949).

[23]Id. at 1088.

[24]The parties in the Seiferth case have shown by their actions that living together is not an intolerable situation.

[25]Stafford v. Stafford, 163 Kan. 162, 181 P.2d 491 (1947); Bohmert v. Bohmert, 213 App. Div. 103, 210 N.Y. Supp. 1 (1st Dep't 1925); Deutsch v. Deutsch, 141 Pa. Super. 339, 14 A.2d 586 (1940).

[26]Many courts have enunciated this policy favoring reconciliation. DeBurgh v. DeBurgh, 39 Cal. 2d 858, 250 P.2d 598 (1952); Pilliner v. Pilliner, 64 Idaho 425, 133 P.2d 735 (1943); Diamond v. Diamond, 182 Md. 103, 32 A.2d 376 (1943); Iovino v. Iovino, 58 N.J. Super, 138, 155 A.2d 578 (App. Div. 1959); Brown v. Brown, 208 N.Y. Supp. 17 (Sup. Ct. 1924).

relationship to effect a reconciliation before they are legally separated.[27] While this view has been given scant consideration by the courts, it does seem to have some merit.

Cohabitation during the pendency of a divorce suit and the defense of condonation obviously raise different questions; and, therefore, they should be distinguished. The court in the *Seiferth* case failed to do so, and was led to a result contrary to the weight of authority. The court would have been on stronger ground if it had based the result on the policy favoring reconciliation of the spouses.

JAMES L. HOWE III

FINDERS' RIGHTS IN MISLAID PROPERTY

Legal controversies over the rights of contesting claimants to personalty discovered on premises not owned by the finder present particularly difficult problems. An excellent example is offered by the federal case of *Rofrano v. Duffy*,[1] which involved a tenant's action against his landlord for the recovery of $10,500 cash the tenant found upon the leased premises. The tenant discovered the money in a lunch box hidden behind paint cans on a shelf in the basement. He turned the money over to the landlord who represented that he was the owner. At the trial the landlord admitted that he was not the owner, but claimed that the money belonged to his deceased brother-in-law.

The trial court gave judgment for the tenant, and the landlord appealed. The federal court, applying New York law, affirmed the lower court's decision stating that either as a finder or as the occupant of the premises, the tenant was entitled to the money.[2] Alternative rationales were invoked. As one basis, the court said that under common law principles the tenant as the person in possession of the premises was entitled to custody of "mislaid" property as against anyone but the true owner. Futhermore, as a second basis of decision, the court pointed out that New York has by statute abolished the distinction between mislaid and lost property and awards both to the finder.

There is conflict over whether the custody of goods found on the

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[27]But see Szulc v. Szulc, 96 N.H. 190, 72 A.2d 500 (1950).

[1]291 F.2d 848 (2d Cir. 1961).
[2]Id. at 850.

premises of another should be given to the finder or to the owner of the premises.[3] A distinction is often drawn between mislaid and lost goods.[4] Mislaid goods are goods that are intentionally put aside and later forgotten.[5] Lost goods are those which casually and involuntarily pass out of the possession of the owner.[6] The element of intentional deposit, present with mislaid goods, is lacking in the case of lost goods.[7] The owner of the chattel is said to retain constructive possession of the property though custody may be in another on whose premises it has been left.[8]

The general view in the United States is that the finder of lost property should prevail as against the whole world except the true owner,[9] but the owner of the *locus in quo* should prevail over the finder of mislaid property.[10]

Since the circumstances under which the owner parts with possession are usually unknown, it is often difficult to decide whether the

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[3]Compare Pyle v. Springfield Marine Bank, 330 Ill. App. 1, 70 N.E.2d 257 (1946); Foster v. Fidelity Safe Deposit Co., 162 Mo. App. 165, 145 S.W. 139 (1912); Cohen v. Mfrs. Safe Deposit Co., 271 App. Div. 428, 65 N.Y.S.2d 791 (1st Dep't 1946); with In re Savarino, 1 F. Supp. 331 (S.D.N.Y. 1932); Vickery v. Hardin, 77 Ind. App. 558, 133 N.E. 922 (1922); Weeks v. Hackett, 104 Me. 264, 71 Atl. 858 (1908); Danielson v. Roberts, 44 Ore. 108, 74 Pac. 913 (1904). For a full discussion of this matter see Aigler, Rights of Finders, 21 Mich. L. Rev. 664 (1923); Moreland, Does the Place Where a Lost Article Is Found Determine the Rights of the Finder?, 15 Ky. L.J. 225 (1927). See also Walsh, Law of Property, 115 (2d ed. 1937).

[4]Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S.W 612 (1924); Foster v. Fidelity Safe Deposit Co., 264 Mo. 89, 174 S.W. 376 (1915); Hill v. Schrunk, 207 Ore. 71, 292 P.2d 141 (1956).

[5]Ibid.

[6]Automobile Ins. Co. v. Kirby, 25 Ala. App. 245, 144 So. 123 (1932); McDonald v. Ry. Express Agency, 89 Ga. App. 884, 81 S.E.2d 525 (1954); Foulke v. New York Consol. R.R., 228 N.Y. 269, 127 N.E. 237 (1920); Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 3 N.E.2d 661 (1935).

[7]Cohen v. Mfrs. Safe Deposit Co., 271 App. Div. 428, 65 N.Y.S.2d 791 (1st Dep't 1946); Jackson v. Steinberg, 186 Ore. 129, 200 P.2d 376 (1948); Schley v. Couch, 155 Tex. 195, 284 S.W.2d 333 (1955); Zech v. Accola, 253 Wis. 80, 33 N.W.2d 232 (1948).

[8]Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S.W. 612 (1924); J. G. McGrory Co. v. Hanley, 37 Ohio App. 461, 175 N.E. 232 (1930).

[9]In re Savarino, 1 F. Supp. 331 (S.DN..Y. 1932); McDonald v. Ry. Express Agency, 89 Ga. App. 884, 81 S.E.2d 525 (1954); State v. Mitchell, 150 Me. 396, 113 A.2d 618 (1955); Erickson v. Sinykin, 223 Minn. 232, 26 N.W.2d 172 (1947); Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 3 N.E.2d 661 (1935); Jackson v. Steinberg, 186 Ore. 129, 200 F.2d 376 (1948).

[10]Foster v. Fidelity Safe Deposit Co., 264 Mo. 89, 174 S.W. 376 (1915); Foulke v. New York Consol. R.R., 228 N.Y. 269, 127 N.E. 237 (1920); Jackson v. Steinberg, 186 Ore. 129, 200 P.2d 376 (1948); Flax v. Monticello Realty Co., 185 Va. 474, 39 S.E.2d 308 (1946). See 34 Am. Jur. Lost Property § 3 (1941); 36A C.J.S. Finding Lost Goods § 1 (1961).

goods are lost or merely misplaced.[11] Courts are often forced to base the classification upon the nature of the place where the goods are found.[12] If the place of finding is private, it is said that the owner of the premises has the intent to possess the place and whatever may be located there, but if the place where the goods are found is public, no such intent can be said to exist.[13]

Difficulties arise in determining whether the place of finding was private or public and distinctions are often attempted between quasi-private and quasi-public places of finding.[14]

In the *Rofrano* case, the Court of Appeals found that the money was mislaid rather than lost. "A lunch box containing $10,500 is 'mislaid' rather than 'lost' within the above definitions if found behind paint cans on a shelf six feet above the ground."[15] It is doubtful if there could be any serious question on this matter.

The classification of the property as "mislaid" adds little to the solution of disputes between landlords and tenants. If one starts with the premise that mislaid property should be placed in custody of the owner of the land, as against a finder,[16] the question arises as to whether landlord or tenant should be considered the owner. Rightful occupancy of the premises on which mislaid property is discovered could satisfy the "ownership" requirement and give the tenant the right to custody of the mislaid property. This appears to be the reasoning of the court in the principal case.

Cases involving landlords and tenants are rare.[17] However, analo-

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[11]How is one to tell whether a lady's handbag discovered on a streetcar seat has been casually dropped, or placed there and forgotten? Cf. Foulke v. New York Consol. R.R., 228 N.Y. 269, 127 N.E. 237 (1920). It seems undoubtedly true that the owner of goods may, by placing them on a table or bench in a bank, public conveyance, or shop, constitute the owner of such place bailee thereof, but this isn't always true.

[12]In the following cases the custody of the property was awarded to the owner of the premises on the ground that the place of finding was private. Pyle v. Springfield Marine Bank, 330 Ill. App. 1, 70 N.E.2d 257 (1946); Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S.W. 612 (1924); Hill v. Schrunk, 207 Ore. 71, 292 P.2d 141 (1956). However, in Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 3 N.E.2d 661 (1935) (found articles were awarded to the finder on the ground that the place was semi-public).

[13]Ibid.

[14]Compare Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 3 N.E.2d 661 (1935) with Pyle v. Springfield Marine Bank, 330 Ill. App. 1, 70 N.E.2d 257 (1946); Flax v. Monticello Realty Co., 185 Va. 474, 39 S.E.2d 308 (1946). See 36A C.J.S. Finding Lost Goods § 1 (1961).

[15]291 F.2d at 850.

[16]See note 10 supra.

[17]This writer has been unable to find a case presenting a fact situation similar to that involved in Rofrano v. Duffy. One explanation suggested for this is a lack

gous cases point to a result contra to *Rofrano v. Duffy*.[18] The English case of *Elwes v. Brigg Gas Co.*[19] was the first reported case to present a landlord-tenant dispute over discovered personalty. It held that the landlord was entitled to a two-thousand year old prehistoric boat uncovered by the tenant in making excavations. This principle was considered ten years later in *South Staffordshire Water Co. v. Sharman*.[20] The court approved the following statement of the applicable law:

> " 'The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the [owner] is not aware of the things' existence It is free to anyone who requires a specific intention as part of a de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession. . . .' "[21]

Up to the present time, this line of reasoning has generally been followed by American courts.[22] These courts often go so far as to hold that any personalty found in a private place is to be considered mislaid property rather than legally lost.[23] As such it is awarded to the owner of the premises as against a finder either on the basis of a quasi-bailment relationship[24] or by virtue of the doctrine of construc-

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of diligence on the part of tenant-finders in reporting discoveries of lost or mislaid property on the leased premises.

[18]Pyle v. Springfield Marine Bank, 330 Ill. App. 1, 70 N.E.2d 257 (1946); Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S.W. 612 (1924); Dolitsky v. Dollar Sav. Bank, 203 Misc. 262, 118 N.Y.S.2d 65 (N.Y. Munic. Ct. 1952) (money discovered lying on shelf adjacent to safe-deposit vault was held to be mislaid and custody was awarded to the owner of the premises).

[19]33 Ch. D. 562 (1886).

[20][1896] 2 Q.B. 44.

[21]Id. at 46-47. The quotation is from Pollock and Wright, Essay on Possession in the Common Law 41. The word "possessor" instead of "owner" is used in the original, but in context the word "possessor" is used to mean " owner," as distinguished from the "finder."

[22]Pyle v. Springfield Marine Bank, 330 Ill. App. 1, 70 N.E.2d 257 (1946); Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S.W. 612 (1924); Dolitsky v. Dollar Sav. Bank, 203 Misc. 262, 118 N.Y.S.2d 65 (N.Y. Munic. Ct. 1952); Hill v. Schrunk, 207 Ore. 71, 292 P.2d 141 (1956); Flax v. Monticello Realty Co., 185 Va. 474, 39 S.E.2d 308 (1946). See 34 Am. Jur. Lost Property § 3 (1941). This view is not accepted by all courts. For authority contra to the general rule see In re Savarino, 1 F. Supp. 331 (S.D.N.Y. 1932); Spagnuolo v. Bonnet, 16 N.J. 546, 109 A.2d 623 (1954).

[23]Hill v. Schrunk, 207 Ore. 71, 292 P.2d 141 (1956).

[24]Flax v. Monticello Realty Co., 185 Va. 474, 39 S.E.2d 308 (1946) (innkeeper held to be custodian as to mislaid and forgotten property).

tive possession.[25] If the position of the article indicates that it was voluntarily placed where discovered, the principle seems to be that the owner of the chattel has designated the owner of the place as bailee.[26] If the position of the chattel when discovered indicates that the owner parted with it involuntarily, the doctrine of constructive possession is used.[27]

New York has by statute abolished the distinction between lost and mislaid property.[28] Both *lost* and *mislaid* property are treated as *lost* property and awarded to the finder.[29] A finder is defined as the person who first takes possession of lost property.[30]

The New York statute contains elaborate procedural provisions for the protection of the original owner's rights.[31] The finder is required to notify the local authorities promptly, or turn the property over to the owner of the premises on which the personalty is found, who in turn has the responsibility of notifying local officials.[32] The chattel must be retained a stipulated length of time by the authorities and an effort made to locate the owner.[33] However, the statute also creates and protects the rights of honest finders.[34] The most distinctive feature is that title vests in the finder which is good as against the owner himself if the property is not claimed within the time period. This is in marked contrast to statutes in several other states which only require that the finder must be reimbursed for the expenses he necessarily incurs in caring for the chattel.[36] Under this type of statute, if the owner cannot be found, the chattel is sold and the proceeds retained by the municipality, except for whatever amount may be deducted for reimbursement of the finder.[37]

The New York statute contains at least one possible source of

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[25]Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S.W. 612 (1924) (where liberty bond was discovered by renter of safety vault box on the floor of a private room of safety vault department of a trust company, the company's right to custody was held superior to that of the finder on the basis of prior constructive possession).

[26]See note 24 supra.

[27]See note 25 supra.

[28]N.Y. Pers. Prop. Law §§ 251-58.

[29]Id. at § 251.

[30]Ibid.

[31]N.Y. Pers. Prop. Law §§ 251-58.

[32]Ibid.

[33]N.Y. Pers. Prop. Law § 251.

[34]Id. at § 254.

[35]N.Y. Pers. Prop. Law §§ 254, 257.

[36]Ala. Code tit. 47 §§ 155-60 (Recomp. 1958); Conn. Gen. Stat. §§ 50-1—50-14 (1958 Rev.); Vt. Stat. §§ 7632-7641 (1947); Wis. Stat. §§ 170.07-170.11 (1959).

[37]Ibid.

uncertainty and confusion in that a finder is defined merely as the one "who first takes possession." This leaves the old familiar problem of interpreting the term possession. The Court of Appeals in the *Rofrano* case impliedly construed possession as requiring a reduction to physical control[38] and so rejected the constructive possession doctrine.

One of the main purposes of the New York statute seems to be to promote the return of lost property by encouraging possible action by finders.[39] Indeed, protection of the owner's interest has always been the purported purpose of the courts in dealing with cases in this area.[40] Bearing this in mind, it is suggested that this would be defeated if the term "possession" was construed to require only a constructive control.

It is doubtful if the Second Circuit in the principal case correctly evaluated the precedents in saying that case law dictated a decision for the tenant. However, its decision is consistent with the purpose of the New York personal property statute. An award of the disputed property to the landlord on the basis of technical prior possession would result in a severe and undue limitation upon the statute's effectiveness. Certainly the temptation not to report a finding would be very great if the finder was aware that by doing so, he might lose his rights in the property found. The *Rofrano* decision should have the effect of encouraging honesty among finders.

JOHN W. JOHNSON

EFFECT OF HOLD OVER PROVISIONS ON VACANCIES IN OFFICE

In many jurisdictions, the incumbent in an elective public office is authorized to hold over after the expiration of the term, until his successor is duly qualified. When the successor fails to qualify, the question arises as to whether there is a vacancy in the office.

The question arose in *State ex rel. Foughty v. Friederich*.[1] At the

[38]291 F.2d 848, 850 (2d Cir. 1961).

[39]N.Y. Pers. Prop. Law §§ 251-58.

[40]Foster v. Fidelity Safe Deposit Co., 264 Mo. 89, 174 S.W. 376 (1915); Foulke v. New York Consol. R.R., 228 N.Y. 269, 127 N.E. 237 (1920); Jackson v. Steinberg, 186 Ore. 129, 200 P.2d 376 (1948); Flax v. Monticello Realty Co., 185 Va. 474, 39 S.E.2d 308 (1946). See Comment, 52 Harv. L. Rev. 1105 (1939).

[1]108 N.W.2d 681 (N.D. 1961).

1960 election, Heringer was elected a trial judge for a term to commence on the first Monday in January, 1961. The incumbent, Judge Benson, resigned before his term officially expired on January 2, 1961. Afterwards, on December 23, 1960, Heringer died. The governor appointed Friederich to fill the vacancy created by Judge Benson's resignation. The succeeding governor declared that a vacancy existed in the office because Judge-elect Heringer had failed to qualify, and he appointed Foughty to fill the vacancy. When Friederich refused to vacate the office upon request, Foughty filed an information in quo warranto challenging Friederich's claim to said office.

The Supreme Court of North Dakota upheld the trial court's denial of the writ, holding that the subsequent appointment of Foughty was invalid. The court reasoned that a vacancy in office does not result from the death of an elected official before the beginning of the new term where the term of the incumbent extends until a successor has qualified.[2] One judge dissented, taking the view that the hold over provision was designed in the public interest to prevent a vacancy in office and not to extend the tenure of an incumbent for his own benefit.[3]

The prevailing rule, as illustrated by the majority opinion is that the death of one elected to an office before he has qualified does not create a vacancy if the incumbent is authorized to hold over until his successor shall have qualified.[4] Therefore, the office is not to be deemed vacant so long as such office is filled by an incumbent who is legally qualified to perform the duties which appertain to it.[5]

The majority approach draws a distinction between vacancy created during the regular term and the expiration of a term of office. In the latter case, the incumbent is under an obligation to continue in office to discharge the duties until his successor has qualified, and this added period is a part of the rightful term of office[6] And accordingly, it is an established principle that a qualified successor is one who has been chosen by the same mode as the regular incum-

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[2]Id. at 682.

[3]Id. at 694.

[4]Pittman v. Ingram, 184 Ga. 255, 190 S.E. 794 (1937); Clark v. Wonnacott, 30 Idaho 98, 162 Pac. 1074 (1917); State ex rel. Freeman v. Carvey, 175 Iowa 344, 154 N.W 931 (1915); Smith v. Snell, 154 Kan. 197, 117 P.2d 567 (1941); Grinnell v. Bunker, 115 Me. 108, 98 Atl. 69 (1916); State ex rel. Boone County Atty. v. Willott, 103 Neb. 798, 174 N.W. 429 (1919); State ex rel. Hoyt v. Metcalfe, 80 Ohio St. 244, 88 N.E. 738 (1909); State ex rel. Hellier v. Vincent, 20 S.D. 90, 104 N.W 914 (1905). For cases of other jurisdictions see generally Annot., 74 A.L.R. 486 (1931).

[5]Pittman v. Ingram, 184 Ga. 255, 190 S.E. 794 (1937).

[6]Shackelford v. West, 138 Ga. 159, 74 S.E. 1079 (1912).

bent, absent a statute to the contrary.[7] Thus, if there is no vacancy to warrant an appointment, and there is no provision for a special election, the incumbent is entitled to hold over for another term.

Some jurisdictions follow a minority rule, as illustrated in the dissenting opinion of the principal case, under which the expiration of a term of office is synonymous with vacancy, even though the incumbent may hold over until his successor has qualified.[8] Therefore, the appointing power may fill the vacancy created by the expiration of a term of office, if no one has been elected to the office or if the official elected died prior to the beginning of his term.

The jurisdictions adhering to this approach generally emphasize that the hold over provision is not "designed or intended to extend the tenure of office by an incumbent for his own benefit beyond the specified term."[9] In declaring that a vacancy exists upon the expiration of a term of office, it is reasoned that a holdover provision is not a limitation upon the appointing power to fill vacancies in the offices.[10]

Under this approach a vacancy in office does not hinge upon the fact that there is an absence of a qualified person to administer the office.[11] The hold over provision is primarily aimed at preventing a hiatus in the office rather than prolonging the tenure of the incumbent.[12]

Another principle stressed by the jurisdictions following this minority approach is the construction of the state constitutions or the applicable statutes.[13] The Kentucky constitution provides that Justices of the Peace shall hold for three-year terms and "until their successors are elected and qualified."[14] Nevertheless, Olmstead v. Augustus[15]

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[7]Pittman v. Ingram, 184 Ga. 255, 190 S.E. 794 (1937).

[8]State ex rel. Covington v. Thompson, 142 Ala. 98, 38 So. 679 (1905); Adams v. Doyle, 139 Cal. 678, 73 Pac. 582 (1903); Gibbs v. People ex rel. Watts, 66 Colo. 414, 182 Pac. 894 (1919); People v. Pillman, 284 Ill. App. 287, 1 N.E.2d 788 (1936); People ex rel. Mitchell v. Sohmer, 209 N.Y. 151, 102 N.E. 593 (1913); State ex rel. Kenner v. Spears, 53 S.W. 247 (Tenn. Ct. Ch. App. 1899); Dobkins v. Reece, 17 S.W.2d 81 (Tex. Civ. App. 1929); State ex rel. Finch v. Washburn, 17 Wis. 678 (1864). For cases of other jurisdictions see generally Annot., 74 A.L.R. 486, 494 (1931).

[9]State ex rel. Sathre v. Moodie, 65 N.D. 340, 258 N.W 558 (1935). This case is distinguished in principal case but is not overruled.

[10]In re Advisory Opinion to the Governor, 65 Fla. 434, 62 So. 363 (1913).

[11]Alcorn ex rel. Hendrick v. Keating, 120 Conn. 427, 181 Atl. 340 (1935).

[12]Campbell v. Dotson, 111 Ky. 125, 63 S.W. 480 (1901).

[13]State ex rel. Sikes v. Williams, 222 Mo. 268, 121 S.W 64 (1909); People ex rel. Mitchell v. Sohmer, 209 N.Y. 151, 102 N.E. 593 (1913).

[14]Olmstead v. Augustus, 112 Ky. 365, 65 S.W 817, 818 (1901).

[15]112 Ky. 365, 65 S.W 817 (1901).

held there was a vacancy upon the expiration of the incumbent's term. The Court of Appeals of Kentucky felt construction of the constitution should be based "not only on an isolated expression, but on the whole instrument, and the plain purpose of the framers of the instrument must be effectuated."[16] The court said the framers of the constitution could not have intended for a person who was elected for one term of office to hold for a second term simply because his successor had died prior to qualifying. The prerequisite, as followed by the majority jurisdictions, that the successor is to be selected by the same mode as the incumbent has also been held not to be entirely conclusive as requiring actual qualification of a successor. Thus in *State ex rel. Robert v. Murphy*,[17] the Florida Supreme Court said this is only one factor "to be considered with such others as the law may present in forming a correct judgment as to the meaning of that law, whether organic or statutory."[18]

In a comparison of the majority and minority approaches, several distinguishing aspects are evident. The rationale in a majority of jurisdictions is that the people should be entitled to select the successors for elective offices.[19] If it is determined that a vacancy exists upon the expiration of the term of office, whenever the successor has not qualified, these jurisdictions feel there would be numerous occasions where the governor would be supplying such offices with incumbents and depriving the electorate of their right as provided under the state constitutions.[20] Such jurisdictions reason then, that allowing an incumbent to hold over for another term provides an adequate solution. However, the minority approach provides a more adequate protection for the electorate. It prevents an officer from holding over for a term to which he has neither been elected nor appointed.[21] The electorate has a manifest right to select successors,[22] and if under the circumstances they are unable to do so, then all jurisdictions provide some authority with the power of appointment. Allowing an incumbent to hold over for another term seems an undesirable result, which cannot be concealed by simply labeling the period of holding over as part of the fixed term. An incumbent may manipulate the election so as to secure the selection of a successor who would refuse

[16]Id. at 818.
[17]32 Fla. 138, 13 So. 705 (1893).
[18]State ex rel. Robert v. Murphy, 32 Fla. 138, 13 So. 705, 711 (1893).
[19]See State ex rel. Hoyt v. Metcalfe, 80 Ohio St. 244, 88 N.E. 738 (1909).
[20]Ibid.
[21]Campbell v. Dotson, 111 Ky. 125, 63 S.W 480 (1901).
[22]Ibid.

to qualify, or he might induce his successor to renounce the office before qualification.

The second distinguishable aspect between the two approaches is that of constitutional and legislative construction. The majority approach interprets literally the hold over provision of a state constitution or statute. It is interpreted as preventing the development of a vacancy, and of requiring the successor to be chosen by the same mode as the incumbent.[23] This prevents a governor whose appointments are subject to legislative confirmation from delaying appointments until the legislature has adjourned.[24] On the other hand the minority approach follows the intention of the framers of applicable constitutions and statutes.[25] The primary aim of a hold over provision is to insure the presence of a person qualified to perform the duties of the office during the short interval between the expiration of a term and the assumption of duties by the successor.[26] If the draftsmen had intended for an incumbent to hold over for another term upon the failure of his successor to qualify, a special provision would have been made.

Although the majority approach has several beneficial aspects, the minority view gives more protection to the integrity of elective offices and is more in accord with the spirit and purpose of the state constitutions or statutes on the subject.

JAY FREDERICK WILKS

LIABILITY OF LAND POSSESSOR TO SOCIAL GUEST

The division of negligence into degrees—slight, ordinary, gross—which was introduced into Anglo-American law in a 1704 bailment case,[1] has never received general judicial approval.[2] The concept,

[23]See Pitmann v. Ingram, 184 Ga. 255, 190 S.E. 794 (1937).
[24]E.g., Shackelford v. West, 138 Ga. 164, 74 S.E. 1079 (1912).
[25]See Olmstead v. Augustus, 112 Ky. 365, 65 S.W. 817 (1901).
[26]Hood v. Miller, 144 Okla. 288, 291 Pac. 504 (1930).

[1]The doctrine was borrowed from the Roman law by Chief Justice Holt in Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1704). See generally Green, The Three Degrees of Negligence, 8 Am. L. Rev. 649 (1874); Elliot, Degrees of Negligence, 6 So. Cal. L. Rev. 91 (1933).

[2]Steamboat New World v. King, 57 U.S. (16 How.) 260 (1853); Denver & R.G.R.R. v. Peterson, 30 Colo. 77, 69 Pac. 578 (1902); City of Lanark v. Dougherty, 153 Ill. 163, 38 N.E. 892 (1894); Denny v. Chicago, R.I. & P Ry., 150 Iowa 460, 130 N.W. 363 (1911); Raymond v. Portland R.R., 100 Me. 529, 62 Atl. 602 (1905);

however, has survived by statute in special situations.[3] Some twenty-nine states, by statute or court decision, apply the doctrine to limit the liability of a motor vehicle operator to a guest.[4] In these states the guest generally may not recover unless the driver was guilty of acts amounting to gross negligence or wilful misconduct.[5]

Smith v. Allen,[6] a recent decision from the Court of Appeals for the Fourth Circuit in a diversity action involving Virginia law expanded this doctrine to cover the host's liability to a social guest. Mrs. Smith was visiting her nephew, Mr. Allen, when she received leg injuries as a result of a fall caused by the collapse of a board in a pier which was maintained and controlled by Allen. There was evidence tending to show the board was rotten and that this fact was known or should have been known by Allen. Allen was told by his employee immediately prior to the accident of the defective condition of that part of the pier on which Mrs. Smith was injured. The trial court directed a verdict for the defendant, who had rested without introducing any evidence. The Court of Appeals reversed and remanded, holding that while the plaintiff could recover only upon a showing of gross negligence, there was sufficient evidence to go to the jury on this issue.

Since this was a case of novel impression under Virginia law,[7] the

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Prosser, Torts § 33 (2d ed. 1955). Most writers also have rejected the theory of degrees of negligence. Harper, Law of Torts § 74 (1933); Salmond, Law of Torts § 121 (10th ed. 1945); Elliott, Degrees of Negligence, 6 So. Cal. L. Rev. 91 (1933); Harper, Licensor-Licensee, Tweedledum-Tweedledee, 24 Conn. B. J. 123 (1951);

[3]These statutes generally apply the doctrine in situations involving bailment, criminal negligence and contributory negligence. See Cal. Civ. Code § 1846 (1931); Neb. Rev. Stat. §§ 25-1151 (1956); N.D. Comp. Laws §§ 7280-7283 (1913); S.D. Comp. Laws § 991 (1929); Wis. Stat. § 340.26 (1953). See note 4 infra.

[4]These states are: Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakato, Texas, Utah, Vermont, Virginia, Washington and Wyoming. For a comprehensive and detailed analysis as to what is required to impose liability in each of the above states see 27 Ins. Counsel J. 223 (1960).

[5]All of the states enumerated in note 4 supra require proof of gross negligence or willful misconduct or both to enable the guest to recover. 27 Ins. Counsel J. 223 (1960).

[6]297 F.2d 235 (4th Cir. 1961).

[7]Though Virginia has no cases dealing with the liability of a possessor of land to a social guest there are several Virginia cases dealing with the general class of licensees in the form of "tolerated intruders." Pettyjohn & Sons v. Basham, 126 Va. 72, 100 S.E. 813 (1919); Norfolk & W.R.R. v. DeBoard's Adm'r, 91 Va. 700, 22 S.E. 514 (1895); Nichols' Adm'r v. Washington, O. & W.R.R., 83 Va. 99, 5 S.E. 171 (1887). There are dicta in cases dealing with business invitees which suggests that the social guest might be given the status of an invitee. Richmond & M. Ry. v. Moore's Adm'r, 94 Va. 493, 27 S.E. 70 (1897); Rayless Chain Stores, Inc. v. DeJarnette, 163 Va. 938, 178 S.E. 34 (1935); see note 9 infra.

court looked elsewhere for authority. The court followed the Restatement nomenclature of classifying the social guest, Mrs. Smith, as a gratuitous licensee[8] rather than an invitee.[9] However, the court rejected the Restatement rule of the liability of possessors of land to gratuitous licensees which imposes liability on the host where he knows of a dangerous condition and fails to warn the guest or to use reasonable care to make the condition safe.[10] This rule, based primarily on ordinary negligence, was discarded in favor of the gross negligence rule. In reaching this result the court said:

> "[W]e cannot overlook the analogy between this situation and that of a guest passenger in the automobile of another."[11]

The Virginia guest statute, which codifies earlier Virginia decisions,[12] limits the liability to a guest of the owner or operator of a motor vehicle to situations involving gross negligence or wanton and wilful conduct.[13] Inherent in the Virginia statute and other "guest" statutes and judicial decisions which have adopted this rule is the premise that the recipient of gratuitous hospitality should be allowed to recover from his host only if the host was guilty of something more than ordinary negligence.[14] Thus, since the benefit runs only to the

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[8]A gratuitous licensee enters the land with the possessor's consent but not necessarily by his invitation. Only the consent distinguishes him from a trespasser. Restatement, Torts § 341 (1934); Prosser, Torts § 77 (2d ed. 1955).

[9]In order to qualify as an invitee the visitor must offer some potential pecuniary benefit to the host, or, at least, enter the premises under an invitation which expressly or impliedly represents that reasonable care has been exercised to make the premises safe. Restatement, Torts §§ 332, 343, comment a (1934); Prosser, Torts § 78 (2d ed. 1955).

[10]The rule provides that "a possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if he

(a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and

(b) invites or permits them to enter or remain upon the land, without exercising reasonable care (i) to make the condition safe, or (ii) to warn them of the condition and the risk involved therein." Restatement, Torts § 342 (1934).

[11]297 F.2d at 240.

[12]Jones v. Massie, 158 Va. 121, 163 S.E. 63 (1932); Boggs v. Plybon, 157 Va. 30, 160 S.E. 77 (1931). In 1938 Virginia passed a statute codifying the rule laid down in these decisions. Va. Code Ann. § 8-646.1 (1950). See note 13 infra.

[13]The statute stipulates that a guest may recover from the host driver only if injury was caused "from the gross negligence or willful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator." Va. Code Ann. § 8-646.1 (1950).

[14]Aragona v. Parrella, 325 Mass. 583, 91 N.E.2d 778 (1950); Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453 (1951); Solterer v. Kiss, 193 Va. 695, 70 S.E.2d 329

guest, the host's duty toward him should be correspondingly less than it would be in the ordinary situation.[15] Also some courts treat the problem as one involving assumption of the risk, pointing out that the guest should occupy a position equal to that of the host's family.[16] It appears that the basic philosophy is simply that one should not be quick to sue a friend for damages.

At first blush, the rationale appears equitable and just; but, is the host's hospitality worth absolving him from liability in all cases where he merely negligently injures the guest? Moreover, favors are returned so that the host may be in the process of returning a favor when the guest is injured. Is it fair, in any event, to classify the social guest invited partly for business purposes with the social guest invited for friendship only? It is hard to conceive of a situation in which the host does not receive or expect to receive some benefit from the presence of the guest, be it only his desire to accommodate a friend. In any event if the hospitality received by the injured guest is completely gratuitous such hospitality is unlikely to be of such magnitude as to justify excusing the host from all wrongdoing short of gross negligence. It is to some extent true that the social companion should not be quick to sue a good friend. But, in most cases in which suit is brought, the host will have insurance in which case the proceeding loses much of its adversary character and the basic reason for the gross negligence rule fails.[17]

This problem is further compounded by the difficulty experienced by the courts in applying and defining the standard of gross negligence.[18] At the root of this problem is the difficulty of formulating an objective standard by which the jury can determine, as a matter of fact, whether or not a defendant has been grossly negligent. Many courts,[19] including Virginia,[20] maintain that there is a difference in

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(1952); Roanoke Ry. & Elec. Co. v. Whitner, 173 Va. 253, 3 S.E.2d 169 (1939); Ferguson v. Virginia Tractor Co., 170 Va. 486, 197 S.E. 438 (1938).

[15]Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917); Jones v. Massie, 158 Va. 121, 163 S.E. 63 (1932); Boggs v. Plybon, 157 Va. 30, 160 S.E. 77 (1931). See note 14 supra.

[16]Comeau v. Comeau, 285 Mass. 578, 189 N.E. 588 (1934); Cosgrave v. Molstrom, 127 N.J.L. 505, 23 A.2d 288 (1941).

[17]See note 27 infra.

[18]Chicago, R.I. & P Ry. v. Hamler, 215 Ill. 525, 74 N.E. 705 (1905); John v. Northern Pac. Ry., 42 Mont. 18, 111 Pac. 632 (1910); McAdoo v. Richmond & D.R.R., 105 N.C. 140, 11 S.E. 316, (1890); Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 200 N.E. 483 (1936); Ketchmark v. Lindauer, 198 Va. 42, 92 S.E.2d 286 (1956); Prosser, Torts § 33 (2d ed. 1955); Elliott, Degrees of Negligence, 6 So. Cal. L. Rev. 91 (1933).

[19]Wilhite v. Webb, 253 Ala. 606, 46 So. 2d 414 (1950); Bedwell v. De Bolt, 221 Ind. 600, 50 N.E.2d 875 (1943); Titus v. Lonergan, 322 Mich. 112, 33 N.W.2d

kind between acts which are grossly negligent and those which are wilful and wanton. But the nature of this difference is not easily ascertainable and at least one writer has concluded that Virginia courts in particular have failed to grasp this distinction.[21] The only agreement the courts have reached in the area is that gross negligence is something greater than ordinary negligence,[22] which does little to dispel the aura of confusion surrounding the term. Nonetheless, the fact that the definition and application of the term "gross negligence" have been extremely difficult both for the courts and the juries is hardly to be doubted.[23] This is not to imply that standards of ordinary negligence are entirely certain and definite. But the additional division of an already indefinite standard can only result in increased confusion among courts and juries.

On the other hand, the Restatement rule,[24] has the merit of being relatively clear and precise. This rule, by virtue of its clarity and precision, is not likely to result in confusion in the minds of the jury, while an instruction on gross negligence, accompanied by a nebulous and uncertain standard, is likely to have the opposite result. For example, in the instant case, the jury could readily find that Allen knew or should have known of the condition and failed to warn Mrs. Smith. Under the Restatement rule this would settle the liability. However, under a gross negligence instruction, the jury would then have to decide if knowledge of the condition and failure to warn the guest amounted to gross negligence as defined by the court.

The Restatement theory of liability is substantially the standard of reasonable care in specific terms, though in all cases it exonerates the host from the duty of inspection. Since state courts are not bound by federal precedent dealing with state law, it would seem that it would be preferable for the Virginia court, when confronted

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685 (1948); Ressmeyer v. Jones, 210 Minn. 423, 298 N.W 709 (1941); Sorrell v. White, 103 Vt. 277, 153 Atl. 359 (1931).

[20]Ketchemark v. Lindauer, 198 Va. 42, 92 S.E.2d 286 (1956).

[21]Light, Annual Survey of Virginia Law, 42 Va. L. Rev. 1197 (1956).

[22]Steambolt New World v. King, 570 U.S. (16 How.) 260 (1853); Dickerson v. Connecticut Co., 98 Conn. 87, 118 Atl. 518 (1922); Thompson v. Ashba, 122 Ind. App. 58, 102 N.E.2d 519 (1951); Nadeau v. Fogg, 145 Me. 10, 70 A.2d 730 (1950); McLean v. Triboro Coach Co., 302 N.Y. 49, 96 N.E.2d 83 (1950). See also Prosser, Torts § 33 (2d ed. 1955).

[23]This fact has led the legal writers to condemn almost unanimously the doctrine of degrees of care. Eldridge, Modern Tort Problems § 10 (1941); Harper & James, Law of Torts § 16.13 (1956); Pollock, Torts 353 (14th ed. 1939); Prosser, Torts § 33 (2d ed. 1955); Salmond, Torts § 121 (10th ed. 1945).

[24]See note 10 supra.

with a case similar to *Smith v. Allen,* to adopt the Restatement rule on both practical and theoretical grounds. Though the gross negligence rule is firmly entrenched in Virginia law concerning guests in automobiles, the similarity between social guests in automobiles and those on land is not so striking as to demand a uniform rule. Many statutes, in fact, have different theories of liability to cover the two situations.[25] Moreover, consistency is not all important where the extension of a rule of law would tend to be unjust and impractical. Though Virginia has never passed on a case involving the problem presented in *Smith v. Allen,* such cases are appearing in the United States courts with increased frequency,[26] perhaps due to the spread of liability insurance to cover such situations.[27] If the present trend holds true the likelihood is that in the future Virginia courts also will be called upon to deal with this problem with frequency.

There has been an undercurrent of dissatisfaction with the rigid and arbitrary classifications concerning the social guest.[28] A recent New Jersey case set up reasonable care as the duty owed by the host to his guest.[29] Yet, essentially the social guest is still the invitee who is not an invitee,[30] even though such "business visitors" may offer no shade of pecuniary benefit to the host.[31] Perhaps the only way to do justice

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[25]For example Delaware, Florida, Ohio and Washington have "guest" statutes requiring the automobile guest to prove gross negligence or willful and wanton misconduct in order to impose liability on the host. Del. Code Ann. tit. 21, § 6101 (1953); Fla. Stat. § 320.59 (1956); Ohio Rev. Code § 4515.02 (Baldwin 1961); Wash. Rev. Code § 46.08.080 (1957). These same states have held that a possessor of land must use reasonable care to warn against or remove defects which he knows are likely to cause harm to his social guests. Maher v. Voss, 46 Del. 418, 84 A.2d 527 (1951); Goldberg v. Strauss, 55 Fla. 254, 45 So. 2d 883 (1950); Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453 (1951); McNamara v. Hall, 38 Wash. 2d 864, 233 P.2d 852 (1951).

[26]Compare the great number of recent cases in Annot., 25 A.L.R.2d 598 (1952), with the earlier lack of authority in annotations 12 A.L.R. 987 (1921), 92 A.L.R. 1005 (1934).

[27]Professor Harper suggests that their increased frequency is due to the spread of liability insurance. Harper & James, Law of Torts § 27.1 (1956). The great number of cases in Annot., 25 A.L.R.2d 598 (1952) between members of the same family suggests that these suits are not truly adversary.

[28]Laube v. Stevenson, a Discussion, 25 Conn. B.J. 123 (1951); McCleary, The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land, 1 Mo. L. Rev. 45 (1936).

[29]Cohen v. Kaminetsky, 36 N.J. 276, 176 A.2d 483 (1961).

[30]The term "invitee" seems to indicate that a social guest would fall squarely into this category. For a discussion of this anomaly see Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573 (1942).

[31]Those classified by the courts as invitees include many groups of visitors who do not confer discernible benefits upon the host. Guilford v. Yale Univ., 128 Conn. 449, 23 A.2d 917 (1942); Bunnell v. Waterbury Hospital, 103 Conn. 520,

to social guests as a group is to hold them entitled to reasonable care. This is not to emphasize particularly the desirability of decisions in favor of plaintiffs in tort cases, but rather to provide a more effective and practical means of enabling the courts to consider all relevant circumstances in each case. Hence it is urged that when confronted with this problem the Virginia courts adopt either the Restatement rule or the due care standard rather than extend the gross negligence theory of liability.

TIMOTHY G. IRELAND

BURDEN OF PROOF AS TO PERPETRATORS OF CRIMES

In criminal law, a difficult problem sometimes arises in those cases involving two persons when it is not clear whether one or both of them committed the crime. If the evidence shows that only one person could have committed the crime, the prosecution certainly must prove beyond a reasonable doubt which person is guilty.[1] If, however, it appears that the two persons co-operated in the crime, it would seem that the prosecution should not be required to prove beyond a reasonable doubt the exact part played by each.

The Supreme Court of North Carolina was recently confronted with this problem in *State v. Hargett*.[2] According to the state's evidence, Weingardner, Parrish and two other soldiers left Fort Bragg in Weingardner's car and drove to a nearby town. On reaching their destination, Weingardner remained at the home of a friend, while Parrish and others, later joined by Hargett, visited several food and liquor establishments. When Weingardner rejoined the group he was drunk and quarrelled with Parrish. Later, Parrish, Hargett and Weingardner left in Weingardner's automobile for the ostensible purpose of putting Weingardner on a bus for Fort Bragg. After twenty minutes, Parrish and Hargett returned, asserting that they had done so.[3] Three days afterward the body of Weingardner was

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131 Atl. 501 (1925); Schmidt v. George H. Hurd Realty Co., 170 Minn. 322, 212 N.W 903 (1927); Roper v. Commercial Fibre Co., 105 N.J.L. 10, 143 Atl. 741 (1928); Le Roux v. State, 307 N.Y. 397, 121 N.E.2d 386 (1954); Caldwell v. Village of Island Park, 304 N.Y. 268, 107 N.E.2d 441 (1952); Hise v. City of North Bend, 138 Ore. 150, 6 P.2d 30 (1931). See also Prosser, Torts § 78 (2d ed. 1955).

[1]Aylward v. State, 216 Ala. 218, 113 So. 22 (1927).

[2]255 N.C. 412, 121 S.E.2d 589 (1961).

[3]Later in the evening Hargett said that Weingardner was in his (Hargett's) car. In referring to this acknowledgement, the Supreme Court said that if Parrish

found in a ditch at the city dump. An autopsy showed the cause of death to have been drowning.

Hargett was indicted for murder. At his trial, Parrish testified that Hargett drove the car to the dump, and, after a brief altercation, shoved Weingardner into the ditch. This testimony was in direct conflict, however, with the statement made to the police by Hargett in which he said that Parrish was the one who hit the deceased and pushed him into the ditch. The jury returned a verdict that Hargett was guilty of manslaughter.

Hargett appealed, and the Supreme Court of North Carolina reversed on the ground that there was error in the instructions given to the jury. The lower court had given instructions embodying the prosecution's contention that even if Hargett was not guilty as a principal in the first degree, he might be guilty of aiding and abetting.[4] The instructions on the law of aiding and abetting were correct, but the Supreme Court thought there was no basis for a conviction as an aider and abettor,[5] stating that Hargett could be guilty only as a perpetrator. A new trial was ordered.

Although there was no affirmative testimony at the trial that the defendant was an aider and abettor, it can hardly be said that he was a disinterested bystander.[6] At the trial, Parrish accused Hargett of committing the crime, whereas, in an earlier statement Hargett had

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was the perpetrator the statement might be evidence of Hargett's guilt as an accessory after the fact, but was not sufficient to make him an aider and abettor.

[4]A principal in the first degree actually commits the crime with his own hands. State v. Allison, 200 N.C. 190, 156 S.E. 547 (1931). A principal in the second degree is not the perpetrator, but one who is present at the commission of the crime and either aids and abets, counsels, commands or encourages its commission. Spradlin v. Commonwealth, 195 Va. 523, 79 S.E. 2d 443 (1954). The distinction between the two is usually of little importance other than for descriptive purposes, since the degree of guilt for each is usually the same, State v. Holland, 211 N.C. 284, 189 S.E. 761 (1937). Only in those cases where some factor of mitigation or aggravation applies to one and not the other will the punishment vary as between the two. Red v. State, 39 Tex. Crim. App. 667, 47 S.W 1003 (1898).

[5]The Supreme Court felt that the evidence only showed that Hargett was at the dump with Parrish, and that he did not attempt to prevent the crime. Mere presence at the scene of the crime of a person who does not in any way participate in or encourage its commission does not make an aider and abettor. The court also stated that Hargett could not be considered an aider and abettor on the theory that he was bound to impede the commission of the felony or to recover the deceased from the ditch.

[6]Generally, a bystander is one who is present at the scene of the felony, but who does not act in concert with those who commit it. Hilmes v. Strobel, 59 Wis. 74, 17 N.W 539 (1883). To be guilty as an aider and abettor, the evidence must show, beyond a reasonable doubt, that he participated in the crime before or at the time of its occurrence. Drury v. Territory, 9 Okla. 398, 60 Pac. 101 (1900).

said that Parrish perpetrated the crime. Neither admitted that one perpetrated the crime with the other present aiding and abetting. However, it would not be inconsistent with either man's statement to find that one did aid and abet the other in the commission of the crime.

Furthermore, it was disclosed at the trial that both Parrish and Hargett were together for the greater part of the evening; that they told their friends they were going to the bus station to put Weingardner on a bus, when in fact they took him to the city dump; that Hargett drove Weingardner's car to the dump; that they were present at the scene of the crime; that neither interfered to prevent the crime, nor to recover Weingardner from the ditch; and that Hargett attempted to conceal the crime.[7] From these facts it would seem a jury might reasonably conclude that Hargett either perpetrated the crime or aided and abetted in its commission.[8]

Even though there was no concrete evidence of Hargett's aiding and abetting, it does not necessarily follow that an instruction relating to this degree of crime was wrong. In many jurisdictions,[9] the jury may convict the defendant of a lesser included offense even though the evidence shows the greater offense.[10] Once convicted, the defendant is not entitled to a new trial on the ground that the court erred in instructing on the less serious crime as to which there was no evidence.[11] The theory is that the accused is not prejudiced by an instruction that he can be convicted of a crime of a less serious nature than the one for which he should be convicted.[12]

Therefore, in *State v. Hargett,* if the punishment for aiding and

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[7]Although not disclosed at the trial, it may also be assumed that both were at the dump on their own accord, since neither testified otherwise.

[8]Notwithstanding that these facts, when considered separately, do not have much legal significance, yet when they are considered by the jury in connection with other circumstances, they indicate that one was the perpetrator of the crime and the other an aider and abettor.

[9]Some of these jurisdictions are: Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, and Wisconsin. For cases upholding this rule in the above jurisdictions see: Annot., 21 A.L.R. 603, 622 (1922); Annot., 27 A.L.R. 1097, 1100 (1923); Annot. 102 A.L.R. 1019, 1026 (1936).

[10]North Carolina holds that if the evidence warrants a conviction of a higher degree of homicide and does not warrant an acquittal, the jury can find the accused guilty of a lower degree. State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906); State v. Branch, 193 N.C. 621, 137 S.E. 801 (1927).

[11]State v. Bidwell, 150 Wash. 656, 274 Pac. 716 (1929).

[12]People v. Wolcott, 137 Cal. App. 355, 30 P.2d 601 (1934).

abetting was less than that for perpetrating the crime, the former would be a lesser included offense. Accordingly, an instruction on aiding and abetting, even though the evidence did not show such, would not be prejudicial error. There is no reason why this rule should not also apply if the penalty imposed on a perpetrator of a crime and one who aids and abets is of equal degree. Consequently, even if the giving of the aiding and abetting instruction was error, it hardly seems to have been prejudicial error.

A somewhat different approach could also be taken. In all criminal trials, the burden as to those facts which are material to the crime rests on the prosecution.[13] Evidence must be produced to overcome the presumption that the accused is innocent[14] and to establish his guilt beyond a reasonable doubt.[15] Thus, where the perpetrator of a single crime must be one of two persons, the evidence affording no reasonable inference that they acted in co-operation, the burden is upon the prosecution to prove one or the other of them guilty.[16] If there is a reasonable doubt as to which of the two perpetrated the crime, the doubt will operate so as to require an acquittal of both.[17]

State v. Hargett, however, can be distinguished from the above situation since the state had evidence tending to show that both participants were guilty. The difficulty was that the state did not have enough evidence to show the part that each played in the crime. But, when it can be inferred that both parties are guilty, is it necessary for the state to prove their respective roles in the crime?

The doctrine of the "non-shifting" burden of proof in criminal trials has become a firmly implanted principle of law due to the absence of affirmative pleadings by the defendant, and the general policy

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[13]State v. Helms, 181 N.C. 566, 107 S.E. 228 (1921); State v. Kline, 190 N.C. 177, 129 S.E. 417 (1925); State v. Walker, 193 N.C. 489, 137 S.E. 429 (1927). See 1 Wharton's Criminal Evidence § 16 (12th ed. 1955).

[14]The presumption of innocence cautions the jury to consider only the evidence, and that they should not make any surmises based on the present situation of the accused. 9 Wigmore, Evidence § 2511 (3d ed. 1940).

[15]If a juror has a reasonable doubt of the guilt of the accused he cannot vote for a conviction. State v. Ellis, 210 N.C. 166, 185 S.E. 663 (1936). In defining "reasonable doubt" Chief Justice Shaw of Massachusetts said: "It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge." Commonwealth v. Webster, 59 Mass (5 Cush.) 295 (1850).

[16]Aylward v. State, 216 Ala. 218, 113 So. 22 (1927).

[17]People v. Woody, 45 Cal. 289 (1873).

of caution in favor of accused persons.[18] Nevertheless, this rule has been relaxed in some jurisdictions which hold that the burden of producing evidence, in certain instances, may be upon the accused.[19] Thus, if the prosecution has established proof which would convince the jury of the defendant's guilt, the accused has been placed in a position where he should go forward with countervailing evidence.[20] Although the defendant is not required to do so,[21] his failure to present rebutting proof may be regarded as confirming the conclusion indicated by the evidence shown by the prosecution.[22] Hence, many jurisdictions, including North Carolina, place on the accused the burden to show certain facts in the nature of excuse or mitigation;[23] to prove that he acted in self-defense;[24] to rebut the presumption of malice arising from the use of a deadly weapon;[25] to establish intoxication at the time of the crime;[26] and to establish insanity.[27]

The defendant's duty to produce contervailing evidence has been interpreted to mean that the accused must support his cause by those facts peculiarly within his knowledge.[28] This rule might be extended

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[18]1 Greenleaf, A Treatise on the Law of Evidence § 81(b) (1899).

[19]Although the burden of producing evidence as to certain facts may be upon the defendant, the burden of ultimately convincing the jury, beyond a reasonable doubt remains upon the prosecution. See Cardozo's reasoning in Morrison v. California, 291 U.S. 82, 88 (1934).

[20]Lee v. State, 259 Ala. 455, 66 So. 2d 881 (1953).

[21]Hurston v. State, 235 Ala. 213, 178 So. 223 (1938); State v. Davis, 214 N.C. 787, 1 S.E.2d 104 (1939).

[22]The viewpoint is that once the prosecution has presented evidence which the accused could explain or deny, the accused's failure to testify raises a strong inference that he cannot truthfully explain or deny them. Vanderheiden v. State, 156 Neb. 735, 57 N.W.2d 761 (1953); State v. Anderson, 137 N.J.L. 6, 57 A.2d 665 (1948); State v. Levine, 117 Vt. 320, 91 A.2d 678 (1952).

[23]State v. Whitson, 111 N.C. 695, 16 S.E. 332 (1892); State v. Jones, 98 N.C. 651, 3 S.E. 507 (1887).

[24]State v. Barringer, 114 N.C. 840, 19 S.E. 275 (1894).

[25]Mealy v. Commonwealth, 135 Va. 585, 115 S. E. 528 (1923).

[26]State v. Corrivau, 93 Minn. 38, 100 N.W 638 (1904).

[27]People v. Allender, 117 Cal. 81, 48 Pac. 1014 (1897); Commonwealth v. Berchine, 168 Pa. 603, 32 Atl. 109 (1895).

[28]For example, in a case in which the defendant's whereabouts at the time of a crime is in question, the burden is on him to show where he was, as this knowledge is peculiarly within his power. White v. State, 31 Ind. 262 (1869). Many states have passed statutes making the proof of certain facts a prima facie showing of unascertained facts peculiarly within the knowledge of the accused. People v. Osaki, 209 Cal. 169, 286 Pac. 1025 (1930). Therefore, if the crime charged involves proof of a negative (i.e., that defendant did not have a license to carry a pistol) which is difficult to prove and is peculiarly within the knowledge of the defendant, proof of the doing of the prohibited act (i.e., carrying a pistol) makes out a prima facie case for the state and the burden is cast upon the accused to disprove the negative. McHenry v. State, 58 Ga. App. 410, 198 S.E. 818 (1938). In support of

to *State v. Hargett* in which the prosecution's evidence tends to show that Hargett co-operated in the crime. In most states, one involved in the joint commission of a crime is as guilty as the perpetrator of the act.[29] Since Hargett knew the identity of the actual perpetrator, the burden would shift to him to show that he was not the perpetrator. If he could not do this, it can be inferred that he was the one who pushed Weingardner into the ditch. This rule would not alter the state's burden of proof as to the accused's guilt, but would merely place upon Hargett the burden of producing evidence as to his part in the event.

In essence, once the prosecution produces evidence showing that the two persons co-operated in the crime, thereby making one as guilty as the other, it should not be required to convince the jury beyond a reasonable doubt of their respective functions in the act.

RICHARD K. WHITE, JR.

ATTACHMENT FOR A FOREIGN TORT

The Supreme Court of Pennsylvania is authorized by statute[1] to prescribe forms of action, writs and other rules of civil procedure for the courts of Pennsylvania. In order to carry out this function, the statute authorizes the court to suspend Acts of Assembly, provided neither the substantive laws nor the jurisdiction of the court is abridged, enlarged or modified. Under this authority, the Supreme

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this rule, Justice Holmes said: "It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the government." Casey v. United States, 276 U.S. 413, 418 (1928).

[29]The reasoning behind such a rule is expressed in Benge v. Commonwealth, 92 Ky. 1, 17 S.W 146 (1891): "This is for the reason that each is the agent and instrument of the other, and his act is the act of the other, and the act of each constitutes but one crime, and each is guilty of the act actually committed by the other. Such act is, in law, the act of each. Hence each is principal as to each act, although he did not actually perpetrate each act; but the act that the other perpetrated was his act, and he is principal as to it."

[1]Pa. Stat. Ann. tit. 17 § 61 (Supp. 1960) provides in part that: "the Supreme Court of Pennsylvania shall have the power to prescribe by general rule the forms of actions, process, writs, pleadings, and motions, and the practice and procedure in civil actions at law and in equity Provided, That such rules shall be consistent with the Constitution of this Commonwealth and shall neither abridge, enlarge nor modify the substantive rights of any litigant nor the jurisdiction of any of the said courts nor affect any statute of limitations."

Court adopted Rule 1252 which provides in part that a writ of foreign attachment may issue to attach property of a defendant upon *any* cause of action at law or in equity in which the relief sought includes a judgment or decree for the payment of money.[2]

Prior to the promulgation of Rule 1252, a 1937 Pennsylvania Act of Assembly[3] limited writs of foreign attachment to torts committed within the Commonwealth.[4] So the question arises as to whether the court has the power to suspend the Act of 1937 and thereby extend the availability of the writ to *any ex delicto* action irrespective of where the tort occurred. The problem turns upon whether or not such a change affects either the substantive rights of the parties or the jurisdiction of the court.

The question was squarely presented in the recent case of *Alpers v. New Jersey Bell Telephone Co.*[5] The plaintiff, a resident of Pennsylvania, was injured in an auto collision involving a vehicle owned by the defendant, a New Jersey corporation. The plaintiff attached property of the defendant in the possession of the Pennsylvania Bell Telephone Co.[6] The lower court dismissed the action and this was affirmed by the state supreme court. The majority held that foreign actions *ex delicto* were not within the scope of Rule 1252. The majority concluded that in view of the clear restriction of the writ of foreign attachment in actions *ex delicto* to torts committed within the Commonwealth, both by statutory and case law prior to the promulgation of Rule 1252, it was certainly not intended that Rule 1252 should change or alter in any manner a role so firmly established and so salutary in its effect. A dissenting judge took the view that Rule 1252 should be interpreted so as to permit the attachment subject to the application of the doctrine of *forum non conveniens.*[7]

Rule 1252 does not affect any fundamental change in the basic requirements for a proceeding by attachment.[8] Prior to obtaining a

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[2]Pa. Rules of Court 1252 (1960).

[3]Pa. Stat. Ann. tit. 12 P.S. § 2891 (1951).

[4]Originally the writ was limited to ex contractu actions; however, the writ was gradually extended to ex delicto actions. Numerous amendments were passed which eventually extended the writ of attachment to property within the Commonwealth owned by nonresidents for torts committed within the Commonwealth. A complete statutory history is provided in the opinion and footnotes of Alpers v. Jersey Bell Tel. Co., 403 Pa. 626, 170 A.2d 360 (1961).

[5]403 Pa. 626, 170 A.2d 360 (1961).

[6]In doing so the plaintiff relied upon Pa. Rules of Court 1252 (1960).

[7]See note 24 infra.

[8]The foreign attachment proceeding is firmly established in Pennsylvania. Fairchild Engine & Airplane Corp. v. Bellanca Corp., 391 Pa. 177, 137 A.2d 248 (1958); Falk & Co. v. South Texas Cotton Oil Co., 368 Pa. 199, 82 A.2d 27, 31

writ of foreign attachment, the plaintiff must show: (1) that the defendant is a nonresident (or foreign corporation) on whom personal service cannot be obtained, and (2) that tangible or intangible property belonging to the defendant is within the forum when the attachment is served upon the garnishee.[9] Upon meeting these requirements, the writ of foreign attachment will issue and a suit *quasi-in-rem*[10] will be formally instituted whereby the plaintiff may proceed against the property of the defendant, rather than against the defendant's person.

The question arises as to why the firmly established *quasi-in-rem* action, as commenced by writ of foreign attachment, should serve to change the substantive rights of parties[11] who seek recovery for a transitory cause of action.[12] Permitting the writ to issue for a transitory tort, irrespective of its origin, does not affect a change of substance, for the substantive law of the state wherein the cause of action arose will still control the liability imposed.[13]

It is equally difficult to understand what jurisdictional change would be made by Rule 1252. The word jurisdiction is undoubtedly difficult to define, since the term is used in two different general contexts: (1) jurisdiction over the person, and (2) jurisdiction over the subject matter. Jurisdiction over the subject matter is involved here since the action is one *quasi-in-rem*. Jurisdiction over the subject matter refers to the nature of the cause of action and the relief sought.

(1951); David E. Kennedy Co. v. Schleindl, 290 Pa. 38, 137 Atl. 815 (1227); Raymond v. Leishman, 243 Pa. 64, 89 Atl. 791, 793 (1914).

[9]Pa. Rules of Court 1252 (1960).

[10]A judgment in rem affects the interests of all persons in designated property. A judgment quasi-in-rem affects the interests of particular persons in designated property and is of two types: (1) where the plaintiff seeks to secure a pre-existing claim in the subject property and exclude all other claims by third persons, and (2) where the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him. Hanson v. Denckla, 357 U.S. 225, 246 (1958); Pennoyer v. Neff, 95 U.S. 714, 723 (1877); Fairchild Engine & Airplane Corp. v. Bellanca Corp., 391 Pa. 177, 137 A.2d 248, 250 (1958). Restatement, Judgments §§ 73, 74, 75, 76 (1942).

[11]For a similar case relating to the Federal Rules of Civil Procedure and effect of a federal rule on the substantive rights of parties see Sibbach v. Wilson & Co., 312 U.S. 1 (1940).

[12]Transitory actions are such personal actions as seek only the recovery of money or chattels whether the action is in tort or contract. The underlying theory is founded on the supposed violation of rights which in contemplation of law have no locality. Livingston v. Jefferson, 15 Fed. Cas. 660 (No. 8411) (C.C.D. Va. 1811); Solomon v. Atlantic Coast Line R.R., 187 Va. 240, 46 S.E.2d 369 (1948).

[13]Western Union v. Brown, 234 U.S. 542, 547 (1914); Smith v. Pennsylvania R.R., 304 Pa. 294, 156 Atl. 89 (1931); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918); Restatement, Conflict of Laws § 378 (1934).

This is conferred by sovereign authority which organizes the court, and is found in the general nature of the court's powers.[14] Certainly, it is within the nature of the court's power to render a judgment on a transitory cause of action for a personal injury.[15] As to the property itself, the tribunals of a state may subject property within its jurisdiction, although owned by nonresidents, to the payment of the demands of its own citizens without infringing upon the sovereignty of the state wherein the defendant resides.[16]

If permitted, the extension would not constitute a novel change. Other jurisdictions provide for writs of foreign attachment in actions *ex delicto* irrespective of where the cause of action arose;[17] however, the writ varies in its application depending upon the jurisdiction. New York courts are reluctant to entertain suits commenced by writ of foreign attachment when both parties are nonresidents of the state, but if the plaintiff is a resident[18] of New York then the suit will be entertained.[19] Illinois is more liberal in that a nonresident plaintiff may attach property of a nonresident defendant when such property is within the state.[20] Indiana also provides for a writ of foreign attachment for actions *ex delicto* irrespective of the parties' residence.[21]

Even though the court concluded that the rule authorized foreign attachments, the writ would not necessarily issue as a matter of right. In the recent case of *Plum v. Tampax Co.*,[22] the Pennsylvania Supreme Court adopted the discretionary doctrine of *forum non conveniens*.[23] Simply stated, the doctrine is that a court may refuse to accept a case even when the jurisdictional requirements are met, provided there is a more convenient forum. By applying this doctrine,[24] the courts

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[14]Cooper v. Reynolds, 77 U.S. 308, 316 (1870).

[15]See note 12 supra.

[16]Pennoyer v. Neff, 95 U.S. 714, 723 (1877); Weiner v. American Ins. Co., 224 Pa. 292, 73 Atl. 443 (1909); Restatement, Conflict of Laws § 106 (1934).

[17]N.Y. Civ. Prac. Act § 902 (1960); Ill. Ann. Stat. c. 11 § 11 (1951); Ind. Ann. Stat. § 3-501 (1946).

[18]Reese & Green, That Elusive Word, "Residence," 6 Vand. L. Rev. 561 (1953).

[19]Palmer v. The Gillette Co., 285 App. Div. 1156, 140 N.Y.S.2d 201 (2d Dep't 1955); Hoolahan v. United States Lines Co., 189 Misc. 168, 70 N.Y.S.2d 356 (Sup. Ct. 1947); see also Annot., 14 A.L.R.2d 405 (1948).

[20]Missouri Pac. R.R. v. Flannigan, 47 Ill. App. 322 (1893).

[21]Shedd v. Calumet Constr. Co., 270 Fed. 942 (7th Cir. 1921).

[22]339 Pa. 533, 160 A.2d 549 (1960).

[23]The applicability of the doctrine within the states was formally recognized by the Supreme Court in Broderick v. Rosner, 294 U.S. 629, 643 (1935). The doctrine was later recognized in the federal courts in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

[24]Pennsylvania has expressly approved the doctrine as stated in the Restatement, Conflict of Laws § 117(e) (Tent. Draft No. 4, 1957). See Plum v. Tampax Corp.,

can effectively control the use of the writ in actions to recover for foreign torts. At the same time, the plaintiff who asserts a good cause of action and seeks recovery by attachment would not be denied all access to the courts of Pennsylvania. It would seem that under the *Alpers* decision, a resident must either seek recovery *in personam*[25] within or without the Commonwealth since there is little chance the plaintiff can obtain personal service[26] upon the foreign defendant. The desirability of reducing burdensome litigation does not appear to warrant the harsh restriction that denies the fundamental *quasi-in-rem* action, especially when the same results may be more equitably achieved by a discretionary use of the doctrine of *forum non conveniens*.

The efficacy and desirability of the writ of foreign attachment as extended to foreign actions *ex delicto* has been well recognized and accepted in other jurisdictions.[27] It is submitted that a decision interpreting Rule 1252 so as to extend to foreign actions *ex delicto* would have been preferable. The application of the rule could then have been made to depend on the discretionary doctrine of *forum non conveniens*.

RICHARD L. ROSE

CONFLICT OF LAWS AND MINIMUM JURISDICTIONAL CONTACTS

Doing an act within a state or causing consequences therein are at the outer limits of a state's jurisdiction *in personam*[1] over nonresi-

339 Pa. 533, 160 A.2d 549 (1960). For the application of the doctrine in other jurisdictions see Barnett, The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380 (1947); Foster, Place of Trial in Civil Actions, 43 Harv. L. Rev. 1217 (1930); Blair, The Doctrine of Forum Non Conveniens in Anglo American Law, 29 Colum. L. Rev. 1 (1929).

[25]The distinction between an action in rem and an action in personam is that in an action in rem a valid judgment may be obtained so far as it affects the res without personal service of process, while in an action to recover a judgment in personam process must be personally served or there must be a personal or authorized appearance in the action." In re Blue's Estate, 67 Ohio App. 37, 32 N.E.2d 499, 507 (1939).

[26]Jurisdiction over the person of the defendant must be acquired before a valid judgment in personam can be obtained. Such jurisdiction is obtained by personally or constructively serving the defendant with notice of the pending suit. Pennoyer v. Neff, 95 U.S. 714 (1877).

[27]For the general provisions for writs of foreign attachment in several states, see note 17 supra.

[1]An action in personam is one in which "the technical object of the suit is

dents. In section 17 of the Illinois Civil Practice Act[2] the Illinois legislature has undertaken to go to the limits of the due process clause of the Constitution.[3] The constitutionality of the Illinois statute, specifically of section 17(1)(b) relating to the commission of a single tortious act as constituting the basis for *in personam* jurisdiction, was recently questioned in *Gray v. American Radiator & Sanitary Corp.*[4]

The specific problems presented by the *Gray* case were twofold: (1) statutory interpretation, more specifically, the meaning of the words "tortious act," and (2) the power of a state under federal constitutional law to subject to its courts, by process other than personal service within the state,[5] a nonresident[6] for a tortious act committed by the nonresident outside the territorial limits of the state, where the injury occurs within the state.

Titan Valve Manufacturing Company manufactured a safety valve outside Illinois.[7] American Radiator & Sanitary Corporation bought and installed the valve in a water heater which was sold to the plaintiff.[8] When the water heater was used in Illinois it exploded and caused injury to the plaintiff. The plaintiff sued both Titan and American Radiator for damages. The Illinois trial court dismissed the action against Titan, but the Supreme Court of Illinois reversed.

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to establish a claim against some particular person, with a judgment which generally in theory at least, binds his body...." Tyler v. Judges of Court of Registration, 175 Mass. 71, 55 N.E. 812, 814 (1900). See Goodrich, Conflict of Laws § 72 (2d ed. 1949).

[2]Ill. Rev. Stat. c. 110, § 17 (1959). The pertinent parts of paragraph 17 are as follows: "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State to any cause of action arising from the doing of any of said acts: .... (b) The commission of a tortious act within this State."

[3]See Pembleton v. Illinois Commercial Men's Ass'n, 289 Ill. 99, 124 N.E. 355, 359 (1919), dealing with the power of Illinois to give its courts jurisdiction in personam over a foreign corporation, in which the court stated that "the decisions in this State as to due process of law under the Fourteenth federal amendment must be controlled by the decisions of the federal courts rather than by the decisions of our own or other state courts."

[4]22 Ill. 2d 432, 176 N.E.2d 761 (1961).

[5]An action in tort is transitory and, if personal service can be obtained on the nonresident defendant anywhere in the state, the plaintiff can secure a personal judgment against him. See Roper v. Brooks, 201 La. 135, 9 So. 2d 485 (1942).

[6]The term "nonresident" as used in this comment in reference to the defendant, Titan, means that it was, at the time of the commencement of the action, a resident of another state.

[7]The court's syllabus to the case in the unofficial reporter states that the valve was manufactured in Ohio.

[8]The court's syllabus to the case in the unofficial reporter states that the

The defendant, Titan, contended that the words "commission of a tortious act" did not mean the same thing as "commission of a tort," and section 17 would not apply to one who commits a tort by an act done outside the state with consequences in the state.[9] The Supreme Court of Illinois held otherwise. Although a "tortious act" may mean something different from a tort,[10] the court interpreted the language of section 17 to include those cases where the negligent action alleged in the complaint does not occur in Illinois but only the injury occurs in Illinois.

In reaching its decision the Supreme Court of Illinois relied on *Nelson v. Miller*.[11] In the *Nelson* case, the defendant, a resident of Wisconsin, sent an employee into Illinois to deliver a stove. At the employee's request plaintiff assisted in unloading the stove. The employee negligently pushed the stove and injured the plaintiff. It was held that:

> "[T]he jurisdictional requirements... are met when the defendant... is the author of acts or omissions within the State, and when the complaint states a cause of action in tort arising from such conduct."[12]

The *Nelson* case holds that "tortious act" means an act alleged to be tortious. In the *Gray* case the Illinois court is extending this concept to include an injury in Illinois caused by an allegedly tortious act committed outside the jurisdiction.

This Illinois rule, in the light of developing precedents in this area, is believed to be constitutional under the due process clause of the fourteenth amendment.

The *International Shoe Co. v. Washington*[13] case announced a liberal rule that greatly expanded the traditional concepts of state jurisdiction over nonresidents. Justice Stone declared:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a

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valve was installed in the water heater in Pennsylvania and was sold to the consumer in Illinois.

[9]176 N.E.2d at 763.

[10]It can be argued that the words "tortious act" are not synonymous with the word "tort." "The former term, more restrictive than the latter, refers only to the act or conduct and does not include the consequence thereof." McMahon v. Boeing Airplane Co., 199 F. Supp. 908, 909 (N.D. Ill. 1961).

[11]11 Ill. 2d 378, 143 N.E.2d 673 (1957).

[12]Id. at 681.

[13]326 U.S. 310 (1945).

> judgment personally binding him.... But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[14]

Significantly, the only positive limitation placed on the assumption of jurisdiction over a nonresident defendant by the *International Shoe Co.* case is that due process "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has *no* contacts, ties, or relations."[15]

The defendant, Titan, in the *Gray* case argued that this minimum contact requirement had not been satisfied. The court, in rejecting Titan's contention, relied in part on the United States Supreme Court decision in *McGee v. International Life Ins. Co.*[16] In the *McGee* case the Court for the first time held that a single isolated act was sufficient to comply with the minimum contact test laid down in *International Shoe.* In *McGee* an insurance company, which solicited through the mails the purchase of an insurance policy and thereafter mailed the insured premium notices, was held subject to the jurisdiction of the state over causes of action arising from the policy.

A case which goes even beyond *McGee* is *Zacharakis v. Bunker Hill Mut. Ins. Co.*,[17] in which New York was held to have judicial jurisdiction over a Pennsylvania insurance company which, so far as it appears, had done no more than to mail a resident of New York a policy insuring hotel property in New Hampshire and had received in return a premium mailed from New York. This case was cited, apparently with approval, by the United States Supreme Court in the *McGee* case.[18]

The current attitude of the Supreme Court towards problems of allocating judicial jurisdiction among the states was clearly indicated in *Watson v. Employers Liab. Assurance Corp.*[19] The defendant issued a liability insurance policy to the manufacturer of a hair-waving product, an Illinois subsidiary of a Delaware corporation hav-

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[14]Id. at 316.
[15]Id. at 319. (Emphasis added.)
[16]355 U.S. 220 (1957).
[17]281 App. Div. 487, 120 N.Y.S.2d 418 (1st Dep't 1953).
[18]355 U.S. at 223.
[19]348 U.S. 66 (1954).

ing its headquarters in Massachusetts. The policy issued in Massachusetts or Illinois indemnified the insured against damages that might be suffered by users of the product. The plaintiff, a resident of Louisiana, was injured in using the product and instituted suit against the insurance company under the Louisiana direct action statute.[20] As the defendant insurance company was admitted to do business in Louisiana, it could be served with personal service and there was no issue as to jurisdiction over the person. However, the defendant denied liability because the policy contained a "no action" clause, which was valid under Massachusetts and Illinois law, prohibiting direct actions against the insurer until final determination of the insured's liability. The Supreme Court of the United States declared that Louisiana could apply its own law rather than the law of Massachusetts or Illinois and upheld the constitutionality of the statute.[21] The Court reasoned that the interests of the states where the contract was negotiated and delivered cannot outweigh the contracts and interests of Louisiana in taking care of persons injured in Louisiana. It should be noted that the Court analyzed the contacts for the purpose of solving a conflicts of laws problem (which state law to apply) rather than to determine whether or not the Louisiana court had personal jurisdiction over the defendant. Yet the two problems are similar in that they both concern the scope of the power of a court to render judgment. If the Supreme Court is willing to follow the weight of contacts in the one case it would seem to indicate that it should do so in the other.

It is commonly recognized that the law of the place where the injury occurs governs the right of action for a tort, no matter where the act or omission causing the injury takes place.[22] In the *Gray* case the place of injury was Illinois where the explosion occurred. The fact that Titan's conduct occurred outside of Illinois does not eliminate the law of Illinois as a matter of choice of law. It knew the valve might be sent into Illinois where the harm was done. This case is somewhat similar to that of shooting a firearm across the state line,[23] starting a

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[20]La. Rev. Stat. Ann. § 22:655 (1950), allows a direct action against the liability insurer without regard to a "no direct action" clause and without regard to the fact that the contract of insurance may have been made in another state, where it is binding.

[21]"What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there. In view of that interest, the direct action provisions here challenged do not violate due process." 348 U.S. at 73.

[22]The lex loci deliciti governs in actions of tort. Northern Pac. Ry. v. Babcock, 154 U.S. 190, 197 (1894); Jarrett v. Wabash Ry., 57 F.2d 669, 671 (2d Cir. 1932); Restatement, Conflict of Laws § 412 (1934).

[23]Dallas v. Whitney, 118 W. Va. 106, 188 S.E. 766 (1936).

fire which crosses the state line,[24] owning a a vicious dog which strays over the state line,[25] or shipping a negligently manufactured coffee urn across the state line.[26] By the rule of conflicts of laws, the defendant Titan's liability is measured by the domestic laws of Illinois[27] to the same extent as if it had acted within the state.

Since Illinois law would be applied in the *Gray* case as a matter of choice of law it seems plausible that Illinois courts should have jurisdiction to make this application. The fact that Illinois law is the law applicable in the *Gray* case in and of itself provides the necessary minimum contact to permit Illinois to exercise judicial jurisdiction under the due process clause of the fourteenth amendment.

MALCOLM LASSMAN

MINERAL LESSEE'S RIGHT TO STRIP MINE

There are two general methods of mining: underground or deep mining[1] and surface or strip mining.[2] The use of strip mining has always been limited by the thickness and character of the overlying strata. However, the development of modern earth-moving equipment and new mining techniques permit the application of strip mining to mineral deposits which could previously be mined only by the more conventional underground method. While strip mining may severely damage the surface, it does not necessarily render it entirely useless. Deep mining may or may not cause damage to the overlying surface, depending upon whether a sufficient amount of the mineral deposit is left in place to maintain adequate support.

The different effects that deep mining and strip mining have upon the surface are of great importance in determining the rights of the parties to a mineral lease that severs the surface ownership and mineral rights. These effects become even more significant if the lease agree-

[24]Otey v. Midland Valley Ry., 108 Kan. 755, 197 Pac. 203 (1921).
[25]Le Forest v. Tolman, 117 Mass. 109 (1875).
[26]Reed & Barton Corp. v. Maas, 73 F.2d 359 (1st Cir. 1934).
[27]See note 23 supra.

[1]Deep mining involves the sinking of shafts or the driving of slopes or drifts from the surface into the mineral deposit and the underground development of entries or galleries from which the mineral is removed for transportation to the surface.

[2]"Strip mining is done from the surface of the earth. In general, it is performed by stripping off the earth, known as overburden, which lies over the [mineral] and then removing the [mineral] so uncovered." Parsons v. Smith, 359 U.S. 215, 216 (1959).

ment was executed at a time when one of the mining methods either was unknown or was not generally accepted in the locality. The problem most often arises when the mineral lessee finds that, due to economic conditions or technological improvements, it will be more profitable to strip mine the mineral than to employ deep mining. The surface owner is then faced with the possibility that he will be deprived of the use and enjoyment of his land.

In a recent Pennsylvania case, *Heidt v. Aughenbaugh Coal Co.*,[3] the plaintiff sought to enjoin the mineral lessee from strip mining fire clay. The defendant coal company acquired mining rights under a 1915 mineral lease to its predecessor in title who had deep mined the fire clay between 1915 and 1926. The plaintiff obtained title to the surface through various devises and conveyances, each of which expressly excepted and reserved[4] the minerals and mining rights by reference[5] to the 1915 lease. When the plaintiff filed the complaint in 1960, he was using the surface for agricultural purposes[6] and had posted the land with "No Trespass" signs. The defendant entered upon the land and began its strip mining operation. The trial court entered judgment for the defendant and the Supreme Court of Pennsylvania affirmed. Although strip mining of fire clay may have been unknown[7] at the time the mineral lease was executed and although there may have been implications in the lease that deep mining was contemplated, a clause in the lease which provided the "right to mine to include all practical methods now in use, or which may hereafter be used ... and

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[3]406 Pa. 188, 176 A.2d 400 (1962).

[4]For the distinction between "exception" and "reservation," see Lauderbach-Zerby Co. v. Lewis, 283 Pa. 250, 129 Atl. 83 (1925).

[5]A description of the property transferred may be incorporated by reference to a prior conveyance. Bland v. Kentucky Coal Corp., 306 Ky. 1, 206 S.W.2d 62 (1947).

[6]Although the plaintiff complained that strip mining would prevent him from using the land for agricultural purposes, the surface in question was, "in the relatively near future," to be inundated by the construction of a federal dam. However, the court said that this fact was "in no sense controlling." 176 A.2d at 404.

[7]"Stripping with power shovels really began in 1877 near Pittsburg, Kansas." Sherwood, Development of Strip Mining, Mining Congress Journal 31 (Nov. 1945).

"The present era of stripping can be said to have begun in about 1910 with the successful introduction ... of large, full-revolving shovels in the midwestern United States." Koenig, Economics and Technique of Strip Coal Mining, Colorado School of Mines Quarterly 29 (April 1950).

Even though it is probable that mechanized stripping was not used to mine fire clay until after the lease was executed in 1915, "there is no rule of law which would preclude defendant, having the right to mine the [mineral], from using methods for that purpose made possible by modern machinery and inventions." Commonwealth v. Fisher, 364 Pa. 422, 72 A.2d 568, 570 (1950).

the right to strip the surface . . ." was sufficient to grant the mineral lessee the right to strip mine for fire clay.

The plaintiff argued that, with the exception of this one provision, virtually all the language in the lease implied that the parties intended the fire clay to be removed only by deep mining. However, the court said that the implications of deep mining were not strong enough to prevent the lessee from strip mining under the express covenants of the lease, and that to deny the lessee the right to strip mine would be to make a new contract.[8] The *Heidt* decision illustrates the most obvious basis for determining the mineral lessee's right to strip mine; *i.e.*, by an express agreement in the lease.

Another basis for establishing the mineral lessee's right to strip mine is by construing the entire lease to determine the intention[9] of the parties at the time the instrument was executed. When the language of a lease is contradictory, obscure or ambiguous, the most reasonable construction will be adopted.[10] Fairness, custom and usage are considered to determine what is reasonable.[11] Even though the original parties to the lease are not available, parol evidence may be introduced to explain ambiguous terms and to give meaning to expressions by showing the custom and usage at the time the instrument was executed.[12] If the instrument is susceptible of two or more equally reasonable constructions, it will be construed most strongly against the lessor.[13]

One provision, commonly found in mineral leases, deserves special consideration. This provision relates to the surface owner's absolute right to subjacent support.[14] Unless the surface owner has either ex-

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[8]"The law will not imply a different contract from that which the parties themselves made." Mount Carmel R.R. v. M. A. Hanna Co., 371 Pa. 232, 89 A.2d 508, 513 (1952).

[9]"[T]his intention must be deduced, not from specific provisions or fragmentary parts of the instrument, but from its entire context. . . ." Uinta Tunnel, Mining & Transp. Co. v. Ajax Gold Mining Co., 141 Fed. 563, 566 (8th Cir. 1905).

[10]Hempfield Township School Dist. v. Cavalier, 309 Pa. 460, 164 Atl. 602 (1932); Navarro Corp. v. School Dist. of Pittsburgh, 344 Pa. 429, 25 A.2d 808 (1942); Elliott-Lewis Corp. v. York-Shipley, Inc., 372 Pa. 346, 94 A.2d 47 (1953).

[11]Percy A. Brown & Co. v. Raub, 357 Pa. 271, 54 A.2d 35 (1947).

[12]"Evidence to explain ambiguity, establish a custom, or show the meaning of technical terms, and the like, is not regarded as an exception to the [parol evidence] rule, because it does not contradict or vary the written instrument. . . ." Thomas v. Scutt, 127 N.Y. 133, 27 N.E. 961, 963 (1891).

[13]Hunt v. Hunt, 119 Ky. 39, 82 S.W. 998 (1904); Eastham v. Church, 310 Ky. 93, 219 S.W.2d 406 (1949).

[14]Clinchfield Coal Corp. v. Compton, 148 Va. 437, 139 S.E. 308 (1927); Couch v. Clinchfield Coal Corp., 148 Va. 455, 139 S.E. 314 (1927).

pressly or impliedly waived his right to subjacent support,[15] the mineral lessee must carry on his underground mining so as not to disturb the overlying surface. However, a conveyance that expressly releases the mineral lessee from liability for damage to the surface is a waiver of the lessor's right to have his land supported.[16] It is also generally accepted that a grant of the right to mine *all* the mineral amounts to an implied waiver of the lessee's duty to maintain subjacent support.[17] *All* the mineral cannot be removed without causing damage to the surface. Some form of temporary support may be left in place of the mineral, or the nature of the overlying strata may be such that subsidence will not take place immediately, but ultimately the mining of all the mineral will necessarily result in some disturbance of the surface. By this rationale, the lessor who conveys the right to mine all the mineral will be deemed to have waived his right to subjacent support, and the mineral lessee is released from liability for damage to the surface resulting from underground mining.

The courts have not extended this reasoning to the point of holding that either an express or an implied waiver, standing alone, is enough to establish the mineral lessee's right to strip mine.[18] It seems that they have restrained from doing so by adopting a theory that the right to damage the surface is not the right to destroy the surface. Strip mining does not necessarily render the surface useless for its intended purpose.[19] Many states have reclamation statutes[20] which re-

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[15]"The modern decisions of both England and America recognize that the right of subjacent support may be waived either expressly or by necessary implication." Simmers v. Star Coal & Coke Co., 113 W. Va. 309, 311, 167 S.E. 737 (1933).

[16]Stelmack v. Glen Alden Coal Co., 339 Pa. 410, 14 A.2d 127 (1940); Continental Coal Co. v. Connellsville By-Product Co., 104 W. Va. 44, 138 S.E. 737 (1927).

[17]Kuhn v. Fairmont Coal Co., 179 Fed. 191 (4th Cir. 1910); Simmers v. Star Coal & Coke Co., 113 W. Va. 309, 167 S.E. 737 (1933)

[18]One exception is Commonwealth v. F. & W. Coal Co., 65 Dauph. 157 (Pa. C.P. 1953). The court held that an implied waiver of the right to subjacent support carried with it the right to conduct strip mining.

[19]"[I]t has been proven to the hilt that the [mineral] can be [strip] mined and that the land then can be put back into shape for satisfactory hay and pasture.... In fact, with proper handling, some land is even better after being turned over and plowed up." Brohard, Strip Revegetation, Coal Age 64, 65 (March 1962).

[20]The usual reclamation statute requires the strip mine operator to post bond at a specified rate per acre. If he fails to regrade and replant the stripped area within the designated period after completion of the mining, the bond is forfeited.

In Pennsylvania, the proceeds from forfeited bonds go into the "Bituminous Coal Open Pit Mining Reclamation Fund" for the purpose of reclaiming stripped lands in the same county where the liability was charged. Pa. Stat. Ann. tit. 52, § 1396.18 (1954).

In West Virginia, the forfeitures are deposited in the "Surface Mining Reclamation Fund" and are expended upon the particular land upon which the permit was issued. W. Va. Code Ann. § 2312(35d) (1961).

quire the mineral lessee to regrade and replant the stripped area, thus minimizing the damage. If the land is restored so that it serves a useful purpose, it can hardly be said that the surface has been destroyed. Furthermore, it is possible that deep mining of all the mineral will render the surface just as useless as strip mining does.[21] If both methods equally deprive the surface owner of the use and enjoyment of his land, it does not seem reasonable to deny the mineral lessee the right to choose the more practical method. It is therefore submitted that, when the land can be restored and used for its intended purpose or when either method would result in an equal amount of surface damage, either an express or an implied waiver of the mineral lessee's duty to maintain subjacent support should be sufficient to establish his right to strip mine.

Another provision in mineral leases which merits consideration is a grant of the right to *use* and *occupy* the surface. Here again, the courts have not interpreted such a provision to include the right to strip mine, by reasoning that the right to *use* and *occupy* the surface does not mean the right to destroy the surface.[22] This reasoning was upheld in *West Virginia-Pittsburgh Coal Co. v. Strong*.[23] A majority of the court denied the mineral lessee the right to strip mine even though the lease expressly granted the right to mine all the mineral and strip mining was the only method by which all the mineral could be removed.[24] The one dissenting Judge[25] felt that the court was disregarding an express provision of the lease and thereby depriving the lessee of a valuable contract right. Although it is conceded that a grant of the right to use and occupy the surface may not, in itself, be sufficient to establish the mineral lessee's right to strip mine, it should add considerable weight to this position. This is especially true if the surface is rugged mountainous country or barren wasteland.[26]

Every effort must be made to protect the surface owner's right to use and enjoy his land, but if he has conveyed away this right, he should not be protected at the expense of the mineral lessee. The

[21]Where deep mining is conducted without leaving proper subjacent support, subsidence of the surface may damage the land even more severely than strip mining.

[22]Barker v. Mintz, 73 Colo. 262, 215 Pac. 534 (1923).

[23]129 W. Va. 832, 42 S.E.2d 46 (1947).

[24]Where the overburden is relatively thin and consists of loose, unconsolidated material, strip mining may be the only method by which the mineral can be recovered.

[25]Fox, J., West Virginia Supreme Court of Appeals.

[26]Commonwealth v. Fisher, 364 Pa. 422, 72 A.2d 568 (1950); Commonwealth v. Fitzmartin, 376 Pa. 390, 102 A.2d 893 (1954).

courts have endeavored to decide each case upon its own merits. Nevertheless, in the absence of an express provision in the lease granting the right to strip mine, the mineral lessee has been faced with a most difficult task of providing his right to *destroy* the surface. By placing this burden upon the mineral lessee, he is denied a valuable contract right and is penalized for having failed to foresee the mining industry's unprecedented mechanization.

LEONARD SARGEANT III

DIRECTOR'S RIGHT TO INSPECT CORPORATE RECORDS

Normally a director in office has the right to examine the books and records of the corporation.[1] Whether this right may be denied or limited because the director's purposes are hostile to the corporation or because he acts in bad faith is a question that courts have not always answered consistently.

The recent Delaware case of *State ex rel. Farber v. Seiberling Rubber Co.*[2] deals with this problem. One of the directors of Seiberling Rubber Co., Eugene Farber, sought mandamus[3] to compel the officers of the corporation to provide him with a list of the stockholders or give him access to the corporate stock ledger. Seiberling answered that Farber's motive was improper; and if his petition was granted, such an inspection would be detrimental to the corporation. Farber moved to strike the answer[4] in its entirety, and the court was presented with the problem of whether or not a showing of improper motive on the part of a director is sufficient in law to deny him the right to inspect the corporate stock ledger.

The Superior Court of Delaware concluded that a director has a

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[1]People ex rel. Bartels v. Borgstede, 169 App. Div. 421, 155 N.Y.S. 322 (2d Dep't 1915). The court conceded that the right of a director to inspect and examine the corporation books is unquestioned. In some states the right is expressly granted by statute. See Cal. Corp. Code § 3004.

[2]168 A.2d 310 (Del. Super Ct. 1961).

[3]Traditionally the proper remedy used to enforce the inspection right is a writ of mandamus. The writ requires, as a matter of pleading, that a director needs only to show that he has demanded an inspection and that the demand has been refused. See 5 Fletcher, Corporations § 2251 (Rev. Vol. 1952), and cases cited therein.

[4]He contended that under Rule 12(f) of the Superior Court of Delaware, a defense is insufficient and subject to being struck when it is not a valid defense; or where it is not germane to the issues in the case; or where it is not responsive to the claims to which it is interposed. Del. Super. Ct. (Civ.) R. 12(f). See Fowler v. Munford, 48 Del. 282, 102 A.2d 535 (1954).

right to inspect the corporate books only so long as his purpose is not adverse to the interest of the corporation. If his motives are improper then the right to inspect ceases to exist. The court denied Farber's motion to strike on the ground that it admitted his improper motive, which constitutes a sufficient defense in law to deny him the right to inspect.

At common law both the director and the stockholder were accorded the right to inspect the books, records and documents of the corporation.[5] The right of the director has often been termed an absolute and unqualified right,[6] while the right of the stockholder has been qualified.[7] Although the inspection rights of a stockholder and a director have much in common, they are based upon different principles.

The right of a stockholder to inspect the books and records is an incident of stock ownership and the corresponding interest in the assets and business of the company.[8] This equitable ownership gives

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[5]See generally Annot., 15 A.L.R.2d 11 (1951); Annot., 174 A.L.R. 262 (1948); Annot., 80 A.L.R. 1502 (1932); Annot., 59 A.L.R. 1373 (1929); Annot., 22 A.L.R. 24 (1923).

[6]State ex rel. Watkins v. Cassell, 294 S.W.2d 647 (Mo. Ct. App. 1956); Drake v. Newton Amusement Corp., 123 N.J.L. 560, 9 A.2d 636 (Sup. Ct. 1939); Mitchell v. Rubber Reclaiming Co., 24 Atl. 407 (N.J. Ch. 1892); People ex rel. Muir v. Throop, 12 Wend. 183 (N.Y. 1834); Davis v. Keilsohn Offset Co., 273 App. Div. 695, 79 N.Y.S.2d 540 (1st Dep't 1948); State ex rel. Wilkens v. M. Ascher Silk Corp., 207 App. Div. 168, 201 N.Y.S. 739 (1st Dep't 1923), aff'd 237 N.Y. 574, 143 N.E. 748 (1924), rehearing denied 237 N.Y. 630, 143 N. E. 770 (1924); People ex rel. Leach v. Central Fish Co., 117 App. Div. 77, 101 N.Y.S. 1108 (1st Dep't 1907); Halperin v. Air King Prods. Co., 59 N.Y.S.2d 672 (Sup. Ct. 1946); Machen v. Machen & Mayer Elec. Mfg. Co., 237 Pa. 212, 85 Atl. 100 (1912); State ex rel. Aultman v. Ice, 75 W. Va. 476, 84 S.E. 181 (1915). See 5 Fletcher, Corporations § 2235 (Rev. Vol. 1952); Ballantine, Corporations § 165 (rev. ed. 1946); Annot., 15 A.L.R.2d 11, 76 (1951).

[7]State ex rel. Miller v. Loft, Inc., 34 Del. 538, 156 Atl. 170 (Super. Ct. 1931); News-Journal Corp. v. State ex rel. Gore, 136 Fla. 620, 187 So. 271 (1939), aff'd 1 So. 2d 559 (1941), aff'd per curiam 8 So. 2d 493 (1942); Albee v. Lamson & Hubbard Corp., 320 Mass. 421, 69 N.E.2d 811 (1946); In re Steinway, 159 N.Y. 250, 53 N.E. 1103 (1899); Tate v. Sonotone Corp., 272 App. Div. 103, 69 N.Y.S.2d 535 (1st Dep't 1947); see Miller v. Spanogle, 275 Ill. App. 335, 340 (1934) (dictum); Cravatts v. Klozo Fastner Corp., 205 Misc. 781, 133 N.Y.S.2d 235, 237 (Sup. Ct. 1954) (dictum). See Bartels and Flanagan, Inspection of Corporate Books and Records in New York by Stockholders and Directors, 38 Cornell L.Q. 289 (1953); Note, 18 La. L. Rev. 337 (1958); Note, 41 Va. L. Rev. 237 (1955).

[8]Guthrie v. Harkness, 199 U.S. 148 (1905), affirming 27 Utah 248, 75 Pac. 624 (1904); Hobbs v. Davis, 168 Cal. 556, 143 Pac. 733 (1914); State ex rel. Miller v. Loft, Inc., 34 Del. 538, 156 Atl. 170 (Super. Ct. 1931); State ex rel. De Juluecourt v. Pan American Co., 21 Del. 391, 61 Atl. 398 (Super Ct. 1904), aff'd mem. 63 Atl. 1118 (1906); Sawers v. American Phenolic Corp., 404 Ill. 440, 89 N.E. 2d 374 (1950); Wise v. H. M. Byllesby & Co., 285 Ill. App. 40, 1 N.E.2d 536 (1936); Klein v. Scranton Life Ins. Co., 137 Pa. Super 369, 11 A.2d 770 (1940); Kuhbach v. Irving Cut Glass Co., 220 Pa. 427, 69 Atl. 981 (1908). Cf., State ex rel. Dixon v. Missouri-Kansas Pipe

the shareholder the right to inspect for all "proper purposes"[9] necessary to protect his interests as a shareholder. On the other hand, a director stands in a fiduciary relation to the corporation and to its shareholders.[10] To perform properly the duties imposed by this dual relationship, a director must have a right to inspect the corporate books and records.[11] Moreover, the right of inspection is also essential in order for the director to protect himself from potential personal liability.[12] Consequently, it is apparent that a director inspects in order to perform his duties intelligently and prudently, while a stockholder inspects to protect his individual interests. Accordingly, a director generally has a wider and more extensive right of inspection.

Recognizing this distinction, it is evident that the "absolute" right of inspection enjoyed by a director, as opposed to the "qualified" right granted a stockholder, is based on the director's fiduciary function in supervising, managing and preserving the corporation.

The majority of courts, adhering to the doctrine prevailing in New York, have expressed the view that a director has an absolute and unqualified right of inspection and that his motives are immaterial.[13] The principle is stated in *State ex rel. Wilkins v. M. Ascher Silk Corp.*:[14]

Line Co., 42 Del. 423, 36 A.2d 29 (Super. Ct. 1944); State ex rel. Foster v. Standard Oil Co. of Kan., 41 Del. 172, 18 A.2d 235 (Super. Ct. 1941). See 5 Fletcher, Corporations §§ 2213-2226.4 (Rev. Vol. 1952). See also note 5 supra.

[9]See note 8 supra.

[10]"It is fundamental that directors stand in a fiduciary relation to the corporation and its shareholders, and that their primary duty is to deal fairly and justly." Yasik v. Watchtel, 25 Del. Ch. 247, 17 A.2d 309, 313 (1941); Drake v. Newton Amusement Corp., 123 N.J.L. 560, 9 A.2d 636 (Sup. Ct. 1939). Cf., Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941), cert. denied 316 U.S. 675 (1942) (director owed duty to minority shareholders on dissolution). See N.C. Gen. Stat. § 55-35 (Repl. Vol. 1960) (refers to directors fiduciary relation to the corporation and to its shareholders).

[11]People ex. rel. Bellman v. Standard Match Co., 208 App. Div. 4, 202 N.Y.S. 840 (2d Dep't 1924); People ex rel. Leach v. Central Fish Co., 117 App. Div. 77, 101 N.Y.S. 1108 (1st Dep't 1907); People ex rel. McInnes v. Columbia Paper Bag Co., 103 App. Div. 208, 92 N.Y.S. 1084 (1st Dep't 1905); Machen v. Machen & Mayer Elec. Mfg. Co., 237 Pa. 212, 85 Atl. 100 (1912); State ex rel. Keller v. Grymes, 65 W. Va. 451, 64 S.E. 728 (1909). See Annot., 15 A.L.R.2d 11, 41 (1951).

[12]"According to the weight of authority, it seems the directors of a corporation may be charged with negligence for a failure to inform themselves of matters shown by the books of the company, but there is respectable authority to the contrary." 3 Fletcher, Corporations § 1060 (Rev. Vol. 1947) and cases cited therein. See Ballantine, Corporations § 62 (rev. ed. 1946).

[13]See note 6 supra.

[14]207 App. Div. 168, 201 N.Y.S. 739 (1st Dep't 1923), aff'd 237 N.Y. 574, 143 N.E. 748 (1924), rehearing denied 237 N.Y. 630, 143 N.E. 770 (1924).

> "[S]o long as [he] remains a director, he is entitled to, and his duty is, to keep himself informed of the business of the corporation, irrespective of his motive; otherwise, the right of a director desiring to inspect will be dependent upon his being able to satisfy the other officers of the corporation that his motives were adequate."[15]

These jurisdictions indicate that removal from office is the appropriate remedy to use where a director's actions are hostile and inimical to the interests of the corporation.[16] Since a director's right to examine the corporate books is co-existent with his term of office, upon the expiration of that term or removal from office, he loses his right to inspect.[17]

A small minority of jurisdictions qualify the right, limiting it to inspection for "proper purposes."[18] In this form the rule closely approximates the right granted to stockholders at common law to inspect only for "proper purposes."

The rationale of the principal case and other jurisdictions qualifying the inspection right of a director is based on the reasons giving rise to the right of a director to inspect. It is inconsistent, the court says in the principal case, to say that "a director has an absolute right to inspect the records of a corporation so that he may better perform his obligations to protect the corporation, and in the next breath say this right is absolute and remains inviolate even though such exami-

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[15]201 N.Y.S. at 740. See Javits v. Investor's League, Inc., 92 N.Y.S.2d 267 (Sup. Ct. 1943).

[16]Davis v. Keilsohn Offset Co., 273 App. Div. 695, 79 N.Y.S.2d 540 (1st Dep't 1948); People ex rel. Leach v. Central Fish Co., 117 App. Div. 77, 101 N.Y.S. 1108 (1st Dep't 1907); Halperin v. Air King Prods. Co., 59 N.Y.S.2d 672 (Sup. Ct. 1946).

[17]Overland v. Le Roy Foods, Inc., 279 App. Div. 876, 110 N.Y.S.2d 578 (2d Dep't 1952) aff'd mem. 304 N.Y. 573, 107 N.E.2d 74 (1952) (director removed); Cravatts v. Klozo Fastner Corp., 205 Misc. 781, 133 N.Y.S.2d 235 (Sup. Ct. 1954) (director resigned); Hymes v. Riveredge Printers, Inc., 131 N.Y.S.2d 200 (Sup. Ct. 1954) (director removed). But see Cohen v. Cocaline Prods., 309 N.Y. 119, 127 N.E.2d 906 (1955) (director failing to be re-elected has a qualified right to inspect the books covering the period of his directorship); Application of La Vin, 37 N.Y.S.2d 161 (Sup. Ct. 1942) (ex-director entitled to examine the books up to the date of his removal from office).

Removal as a remedy presents practical difficulties and is not always effective. The remedy is criticized in Bartels & Flanagan, Inspection of Corporate Books and Records in New York by Stockholders and Directors, 38 Cornell L.Q. 289, 314 (1953).

[18]Hemingway v. Hemingway, 58 Conn. 443, 19 Atl. 766 (1890); State ex rel. Paschall v. Scott, 41 Wash. 2d 71, 247 P.2d 543 (1952). See Stone v. Kellogg, 165 Ill. 192, 46 N.E. 222 (1896) (dictum); Strassburger v. Philadelphia Record Co., 335 Pa. 485, 6 A.2d 922, 924 (1939) (dictum). See 5 Fletcher, Corporations § 2235, (Rev. Vol. 1952); 13 Am. Jur. Corporations § 1025 (1938). See also note 25 infra.

nation is conducted for an improper purpose hostile to the interests of the corporation."[19] Similar reasoning is used in *State ex rel. Paschall v. Scott*:[20]

> "[W]hen a director, driven by hostile and improper motives, seeks to examine corporate books and records, he cannot do so under a claim of duty. On the contrary, his purposes and action are entirely inconsistent with such duty. The basis of the right which a director has to examine corporate records—the performance of corporate duties—is then wholly lacking, and thus the right itself no longer exists."[21]

The minority rule seems to be founded upon sound reasoning. If a director cannot sustain the burden of showing that inspection is for a proper purpose and is not hostile or inimical to the interest of the corporation he should be denied the right to inspect. As asserted in *Davis v. Keilsohn Offset Co.*[22] in a concurring opinion:

> "[A] person ought not to receive the aid of a court order for an inspection of the books and records of a corporation as a director, if it be established that he has disqualified himself from continuing to act in that fiduciary capacity toward the corporation."[23]

Delaware, in adopting the minority rule, goes as far as any jurisdiction has in qualifying a director's right, and this may be indicative of a current trend. Apparently even the New York courts, as indicated in *Gresov v. Shattuck Denn Mining Corp.*,[24] have recognized that there

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[19] 168 A.2d 310, 312 (Del. Super. Ct. 1961).

[20] 41 Wash. 2d 71, 247 P.2d 543 (1952).

[21] 247 P.2d at 549.

[22] 273 App. Div. 695, 79 N.Y.S.2d 540 (1st Dep't 1948).

[23] 79 N.Y.S.2d at 542.

[24] 29 Misc.2d 324, 215 N.Y.S.2d 98 (Sup. Ct. 1961). In holding that a director of a foreign corporation doing business in New York "has an absolute, unqualified right to inspect its books and records," the court states, "Respondent's contention that this rule is inapplicable where inspection is sought for purposes inimical to the interest of the corporation is not questioned." The court held that an inspection sought for the apparent purpose of ousting present management is not considered to be an act of bad faith detrimental to the corporation. 215 N.Y.S.2d at 99.

In certain unusual circumstances the right has been restricted by the New York courts. Posen v. United Aircraft Prods. Co., 201 Misc. 260, 111 N.Y.S.2d 261 (Sup. Ct. 1952) (inspection denied where director engaged in national defense work did not have federal security clearance); People ex rel. Bellman v. Standard Match Co., 208 App. Div. 4, 202 N.Y.S. 840 (2d Dep't 1924) (former director of dissolved corporation denied the right to inspect). Cf., Javits v. Investor's League, Inc., 92 N.Y.S.2d 267 (Sup. Ct. 1949) (membership list denied).

See Melup v. Rubber Corp. of America, 181 Misc. 826, 43 N.Y.S.2d 444 (Sup. Ct. 1943) (while describing the right as absolute the court admitted there must be exceptions to it.) See also Ballantine, Corporations § 165 (rev. ed. 1946) (the view

may be cases where the right of inspection should be qualified.

In conclusion, the minority view appears to be more practical when the right to inspect is examined in light of the ever changing complexities of modern corporate structure and interlocking directorates. It reaches a fair and justified result by making it impossible for a hostile director to use his office as a means of carrying improper motives into execution, while preserving the right of inspection intact and unqualified where a director seeks inspection in good faith and in the proper performance of his duties.

ALLAN GETSON

ARBITRATION CLAUSES IN SEPARATION AGREEMENTS

While the use of arbitration only recently entered into the field of domestic relations, controversies regarding it are already appearing in the reported cases. The recent case of *Lasek v. Lasek*[1] upholds an arbitration clause in a separation agreement between husband and wife. The court granted a stay in proceedings at law brought by the wife for payments, in order to give effect to a clause requiring arbitration of "any dispute between the parties hereto with respect to the provisions of the agreement. . . ."[2] While arbitration in domestic relations is a relatively new concept, it seems to be quite well established in the state of New York.[3] The same is not true however in the majority of states, even thought this concept seems to be particularly applicable to such a litiguous matter as domestic relations.

In the *Lasek* case, the wife by bringing an action at law for the payments was attempting to avoid the arbitration clause. The court, however, held her bound by the clause, saying, "Having so chosen to arbitrate their differences, neither may avoid the choice on the ground that the other has failed to offer an excuse for the alleged breach."[4] The refusal of the husband to make the payments was arbitrable, for the court felt the clause was "sufficiently broad to encompass a dis-

is expressed that inspection should be denied "when necessary to prevent abuse by him or his representative").

[1]13 App. Div. 2d 242, 215 N.Y.2d 983 (1st Dep't 1961).
[2]215 N.Y.S.2d at 984.
[3]Id. at 985.
[4]Ibid.

pute arising from a simple refusal to comply with the separation agreement. . . ."[5]

The primary impediment to this practice in other states is the rule that a clause providing for the arbitration of future disputes is not enforceable.[6] The reasoning given for this rule is that such clauses oust the courts of jurisdiction,[7] or are void as against public policy.[8] States such as New York which allow a future dispute to be arbitrated say, "The arbitration clauses in the separation agreement provided a substitute for the usual legal forum, in which the parties might have their differences resolved, in relative privacy, by self-chosen judges."[9] These jurisdictions provide that arbitration clauses may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract."[10] This protects the rights of the parties where arbitration is involved, the same as where parties agree to settle a claim out of court. Since adequate protection for the parties is provided by the right to invalidate an unfair arbitration clause in a contract, and it is desirable to support methods of settling controversies amicably, provisions for settling future disputes by arbitration should be upheld.

There is little authority supporting the use of an arbitration clause in a separation agreement. Lindey on *Separation Agreements*,[11] cites only cases from New York as supporting this practice.[21] While this is a new concept, it seems the states which now allow arbitration of future disputes may adopt the practice.

The court states in the *Lasek* case, "Their right to agree upon arbitration of matters relating to marital support and maintenance under a subsisting separation agreement is not questioned, nor is it

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[5]Ibid.

[6]Hughes v. National Fuel Co., 121 W. Va. 392, 3 S.E.2d 621 (1939); Duval County v. Charleston Eng'r & Const. Co., 101 Fla. 341, 134 So. 509, 516 (1931); LaKube v. Cohen, 304 Mass. 156, 23 N.E.2d 144 (1939); Maryland Cas. Co. v. Mayfield, 225 Ala. 449, 143 So. 465, 467 (1932); Rentschler v. Missouri Pac. Ry., 126 Neb. 493, 253 N.W. 694, 700 (1934); Cocalis v. Nazlides, 308 Ill. 152, 139 N.E. 95 (1923).

[7]Corbin v. Adams, 76 Va. 58, 61 (1881); Merchants Grocery Co. v. Talladega Grocery Co., 217 Ala. 334, 116 So. 356, 359 (1928); W. H. Blodgett Co. v. Bebe Co., 190 Cal. 625, 214 Pac. 38 (1923); Johnson v. Brinkerhoff, 89 Utah 530, 57 P.2d 1132, 1139 (1936).

[8]Dunning v. Dunning, 114 Cal. App. 2d 110, 249 P.2d 609, 612 (Dist. Ct. App. 1952).

[9]215 N.Y.S.2d at 985.

[10]N.Y. Civ. Prac. Act § 1448 (1961); Manufacturers Chem. Co. v. Caswell, Strauss & Co., Inc., 259 App. Div. 321, 19 N.Y.S.2d 171, 173 (1st Dep't 1940).

[11]Lindey, Separation Agreements & Ante-Nuptial Contracts § 29 (1961).

[12]Id. at 368-74.

questionable."[13] The earlier case of *Braverman v. Braverman*[14] held the clause valid, but inapplicable because the dispute the husband sought to arbitrate was clearly not one the parties intended to encompass in the agreement. The *Braverman* case shows the attitude of the New York courts that arbitration is enforceable when the clear intent to do so is manifested. Approval of the practice of using arbitration clauses in separation agreements seems firmly established by the case usage in New York.

The New York statute is one in which future disputes are arbitrable.[15] The courts have interpreted this statute to enforce the choice to arbitrate, once the clear intent to do so is found.[16] As the court stated in *Marchant v. Mead-Morrison Mfg. Co.*:

> "Parties to a contract may agree, if they will that any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will give effect to their intention."[17]

This is the logical result of the clause to arbitrate. The parties have agreed freely to the arbitration clause, and there is no reason not to enforce their agreement.

There appears at present to be scant usage of arbitration in reference to marital disputes. For the states which now allow enforceable arbitration of future disputes by a statute similar to that of New York, the adoption of this concept should cause little difficulty. In states having less modern statutes[18] which deny the right to arbitrate a future dispute, there is an apparently simple method to authorize this concept without reference to statutory changes, which are always possible.[19]

The most effective and easiest method would be by court approval of the clause in a decree approving the agreement. Possibly this procedure has not been sufficiently considered by counsel. By incorporating the arbitration clause specifically, or the agreement generally, the court would be able to make arbitration binding on the parties. Since it is well established that incorporation of a separation

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[13] 215 N.Y.S.2d at 985.

[14] 9 Misc. 2d 661, 168 N.Y.S.2d 348 (Sup. Ct. 1957).

[15] N.Y. Civ. Prac. Act § 1448 (1961).

[16] Lehman v. Ostrovsky, 264 N.Y. 130, 190 N.E. 208 (1934).

[17] 252 N.Y. 284, 169 N.E. 386, 391 (1929).

[18] Va. Code Ann. § 8-503 (Repl. Vol. 1957); W. Va. Code Ann. § 5499 (1961); Tenn. Code Ann. § 23-506 (1956).

[19] An excellent guide for this change is provided by the proposed Uniform Statute on Arbitration of the Commissioners on Uniform State Laws. Handbook of the Commissioners on Uniform State Laws 162 (1955).

agreement into a court decree gives it the same force as the decree,[20] this rule would also apply when an arbitration clause is involved. Perhaps, incorporation by reference, or approval of the agreement containing the clause would be sufficient.

The use of arbitration in separation agreements is at present relatively untested because of the lack of instances in which it has been judicially noted. Much is written about the current congestion prevalent on court dockets. Courts themselves should relieve this congestion whenever possible.[21] Incorporation of the arbitration clause of a separation agreement into a court decree and subsequent enforcement thereof would aid in relieving this problem in the field of domestic relations. This practice might be applied also to resolve disputes arising when alimony payments need to be adjusted to meet changing circumstances. It is submitted that an arbitration clause in a separation agreement is a tailor-made technique for settling marital disputes in a private forum.

JOHN H. TATE, JR.

REMARKS ABOUT APPEAL AS PREJUDICIAL IN CRIMINAL CASES

Remarks in court in a criminal case regarding the right of a defendant to appeal raise the question of whether such remarks lessen the jury's sense of responsibility with resultant prejudice to the accused. This problem was dealt with in *State v. Clark*,[1] a recent rape case from Oregon in which the defendant was convicted and appealed. The trial court gave the following instruction to the jury:

> "If the defendant here is dissatisfied with the rulings of this court as to the law, he has the right of appeal to the Supreme Court and that Court can correct any mistakes which this court may make as to the law of the case. . . ."[2]

The Supreme Court of Oregon affirmed the conviction stating that

[20]Richards v. Richards, 85 Ga. App. 605, 69 S.E.2d 911, 913 (1952); Davis v. Davis, 229 Ind. 414, 99 N.E.2d 77 (1951).

[21]"Finally, any doubts as to the construction of the Act [arbitration] ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars." Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959).

[1]362 P.2d 335 (Ore. 1961).
[2]Ibid.

while the giving of the instruction was error, it was not prejudicial error so as to justify reversal. However, the court noted that the possibility of prejudicial error in certain situations was sufficiently great to warrant discontinuance of the practice of giving the instruction.[3]

Although the court did little to explain the decision, it did state that the challenged instruction was not made "with the intent to cause a jury to shirk its responsibility in deciding the facts, but rather with the intent to impress upon the jury its responsibility to accept the law as it comes from the court."[4] The court said that it is not every error that justifies reversal and pointed out that in view of the entire record there was no probability of prejudice in this case.[5]

Although remarks in court concerning a defendant's right of appeal are generally undesirable, there are two views in the United States as to whether the giving of such instructions constitutes reversible error. Under one view a conviction will not be reversed unless the appellate court finds there was the probability of prejudicial error,[6] while under the other view, the possibility of prejudicial error results in automatic reversal.[7].

Jurisdictions in accord with the principal case simply take the view that remarks concerning a defendant's future relief do not constitute substantial harm so as to warrant reversal.[8] The Oregon Supreme Court seems to couch its decision in terms of probability. That is, even if the instructions complained of had not been given, the jury probably would have found the defendant guilty.[9] California explains in a similar situation that "the jury in all probability would have rendered a verdict of guilty."[10]

Those jurisdictions which take the view that such instructions automatically constitute reversible error state that a jury should not con-

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[3]Id. at 336.

[4]Ibid.

[5]Ibid.

[6]Fiorella v. City of Birmingham, 35 Ala. App. 384, 48 So. 2d 761, 766 (1950); People v. Danford, 14 Cal. App. 442, 112 Pac. 474 (1910); State v. Satcher, 124 La. 1015, 50 So. 835 (1909); State v. Seaman, 10 N.J. Super. 439, 77 A.2d 284 (1950); State v. Leaks, 126 N.J.L. 115, 18 A.2d 33 (1941).

[7]Holt v. State, 2 Ga. App. 383, 58 S.E. 511 (1907); People v. Silverman, 252 App. Div. 149, 297 N.Y. Supp. 449 (2d Dep't 1937); People v. Santini, 221 App. Div. 139, 222 N.Y. Supp. 683 (1st Dep't 1937); People v. Sherwood, 271 N.Y. 427, 3 N.E.2d 581, 584 (1936). Cf., Coward v. Commonwealth, 164 Va. 639, 178 S.E. 797 (1935).

[8]State v. Seaman, supra note 6 at 286.

[9]362 P.2d at 336.

[10]People v. Cabaltero, 31 Cal. App. 2d 52, 87 P.2d 364, 369 (1939); People v. Stembridge, 99 Cal. App. 2d 15, 221 P.2d 212, 217 (1950).

sider such matters as appeal, because the knowledge of future review by other authorities may lead the jury to evade its responsibilities and compromise on the question of guilt. The possibility of lessening the seriousness of the jury's determination is based upon the theory that if the jury incorrectly convicts an innocent man, the mistake may still be corrected by a higher court.[11] This is the New York rule on the propriety of giving instructions similar to those in the principal case. In *People v. Silverman* the New York court held that prejudice arose from references to the defendant's right of appeal stating that "if the jury made a mistake the error might also be cured by an appeal."[12] The logic of such reasoning is not of recent origin. The early Georgia case of *Hodges v. State* noted that "the fact that a defendant, in a criminal case, may take up his case to the Supreme Court is no reason why he should not have meted out to him, by the Court and Jury, the full measure of his legal rights."[13]

The courts following the New York rule seem to couch their opinions in terms of "possibility" of prejudice to the accused. The test is whether the remarks "might have"[14] or possibly did influence the jury in the verdict returned as to its nature, character, degree, or amount. The significance of possible injury to a defendant is recognized in a Georgia statute that makes a mistrial mandatory if reference is made in court to subsequent relief open to the accused.[15]

In a similar although not identical situation, the prosecution's remarks to a jury regarding appeal have been held to constitute reversible error. Due to the nature of our adversary system this situation arises more frequently than that in the principal case, but the possible effect upon the jury seems indistinguishable. Analogous to the question raised in the principal case, there are two main views. Those jurisdictions that follow Oregon would say that such remarks are unnecessary and improper but not so prejudicial as to justify reversal.[16] Jurisdictions adhering to the New York rule would reverse and remand. In the New York case of *People v. Esposito* the prosecutor said, "I wish to call your attention to the fact that defendant can appeal from

[11]Kelly v. State, 210 Ind. 380, 3 N.E.2d 65 (1936); Davis v. State, 200 Ind. 88, 161 N.E. 375, 383 (1928).

[12]77 A.2d at 287.

[13]15 Ga. 117, 118 (1854).

[14]Pait v. State, 112 So. 2d 380, 386 (Fla. 1959); McCall v. State, 120 Fla. 707, 163 So. 38 (1935).

[15]Ga. Code Ann. § 27-2206 (Supp. 1961); Wilson v. State, 212 Ga. 157, 91 S.E.2d 16 (1956); McKuhen v. State, 120 Ga. App. 75, 115 S.E.2d 625 (Ct. App. 1960).

[16]Norris v. State, 16 Ala. App. 126, 75 So. 718 (1917); State v. Merryman, 78 Ariz. 73, 283 P.2d 239 (1955); People v. Nolan, 126 Cal. App. 623, 14 P.2d 880 (1932).

this decision of yours to the Court of Appeals, but the prosecution cannot."[17] The appellate court reversed the conviction. In another New York case, *People v. Johnson,* the court held that the jury has nothing to do with appeals and that the jurors have a sufficient task to perform in finding the truth and returning a verdict without regard to alternate consequences.[18]

However, in the area of remarks by prosecutors a distinction may be made from the situation presented in the principal case in that errors by counsel in making such remarks can sometimes be overcome by the court's admonishing the jury to disregard them.[19] On the other hand, some courts feel that withdrawal of the remarks by the court does not cure the error committed, and hold that the impression of such remarks on the minds of the jurors entitles the defendant to a new trial.[20]

Reviewing courts are frequently confronted with the determination of whether improper remarks made during the course of a trial are prejudicial or merely harmless. Occasionally, the conclusion is quite obvious. For example, the misreading of a defendant's Christian name in the charge is clearly incorrect, but not reversible error.[21] whereas the failure to instruct as to guilt beyond a reasonable doubt constitutes prejudice.[22] Unfortunately, not all errors are so easily classified. In some situations one judge may consider particular remarks prejudicial while another would consider them harmless.

When either court or counsel have made improper remarks about a criminal defendant's right to future relief, the New York rule requiring reversal is preferable because it insures to the accused an absolutely impartial trial.[23] The "possibility" of prejudice as a basis for remand seems more in keeping with other well-established protections provided for the criminally accused, such as the requirement of proof of guilt beyond a reasonable doubt, which is buttressed by the shielding presumption of innocence. The use of a "probability" test, as in the principal case, may result in a trial in which the reason-

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[17]224 N.Y. 370, 121 N.E. 344, 346 (1918). See also People v. Friedt, 280 App. Div. 836, 113 N.Y.S.2d 889 (2d Dep't 1952); People v. Teiper, 186 App. Div. 830, 175 N.Y. Supp. 197 (4th Dep't 1919).

[18]284 N.Y. 182, 30 N.E.2d 465 (1940).

[19]State v. Benjamin, 309 S.W.2d 602 (Mo. 1958); Gray v. State, 191 Tenn. 526, 235 S.W.2d 20 (1950).

[20]State v. Hawley, 229 N.C. 167, 48 S.E.2d 35, 36 (1948).

[21]State v. Gilliam, 351 S.W.2d 723 (Mo. 1961).

[22]Pollard v. State, 155 Tex. Crim. 488, 237 S.W.2d 301 (1951).

[23]People v. Johnson, supra note 18.

ing of the jurors is infected by unnecessary and detrimental impressions. It would be better if nothing was introduced into the trial that suggests to a jury that its verdict is inconclusive.[24]

PETER JOHN DAUK

DETERMINATION OF ACTUAL CASH VALUE FOR INSURANCE PURPOSES

The recent federal case of *Harper v. Penn Mut. Fire Ins. Co.*[1] deals with the problem of determining the actual cash value of a building under a policy of insurance covering damage by windstorm. The policy contained an 80 per cent co-insurance clause,[2] so that the insurer was interested in establishing a high actual cash value, so as to bring the co-insurance clause into operation, and the insured wanted to establish a lower value for the property. The insurer urged adoption of the theory of replacement cost less depreciation while the insured, in all probability, argued for the adoption of the broad evidence rule.

In the absence of a controlling Virginia decision, the court used the broad evidence rule to determine actual cash value. The broad evidence rule permits the introduction and consideration of any evidence

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[24]People v. Esposito, supra note 17.

[1]199 F. Supp. 663 (E.D. Va. 1961).

[2]The purpose of the co-insurance clause is to compel the insured to carry an amount of insurance at least equal to a specified percentage (usually 80%) of the value of the property by requiring him to bear part of any loss incurred if he fails to do so. For example, assume that an insured has a policy for $50,000, with an 80% co-insurance clause. The actual cash value of his property is $100,000, and he suffers a loss of $40,000. The amount of insurance required by the co-insurance clause is $80,000. Since the insured is only carrying five-eighths of the required amount, the insurer will be liable for only five-eighths of the $40,000 loss ($25,000) and the insured will have to bear the remainder of the loss ($15,000). See Pearl Assur. Co. v. Hartford Fire Ins. Co., 239 Ala. 515, 195 So. 747 (1940); Buse v. National Ben Franklin Ins. Co., 96 Misc. 229, 160 N.Y. Supp. 566 (Sup. Ct. 1916). The co-insurance provision, from its very nature, can only take effect where the loss is partial. Templeton v. Insurance Co. of North America, 201 S.W.2d 784 (Mo. Ct. App. 1947). Where, for example, the amount of insurance equals the specific percentage of the actual cash value of the property at the time of the loss or where the loss is total, the insured will recover in full, but not in excess of the amount of the policy. Hence, by the terms of the co-insurance clause, the liability of the insurer may vary with changes in the value of the property. For a discussion of the background and function of co-insurance, see Templeton v. Insurance Co. of North America, 201 S.W.2d 784 (Mo. Ct. App. 1947); Aldrich v. Great Am. Ins. Co., 195 App. Div. 174, 186 N.Y. Supp. 569 (1st Dep't 1921).

logically tending to the formation of a correct estimate of the value of the property at the time of the loss.[3]

Actual cash value is a term susceptible of various interpretations. The courts have said there is no single criterion applicable to all cases.[4] Generally, actual cash value depends on the nature of the property insured, its condition, and other circumstances existing at the time of the loss.[5] With respect to buildings, however, the courts have developed three general criteria or tests.[6] They are: (1) market value, (2) replacement or reproduction cost less depreciation, and (3) the so-called broad evidence rule.

One view is that actual cash value means the market value of the property at the time of the loss. The court in *Butler v. Aetna Ins. Co.*,[7] which involved the loss of a grain elevator, said that actual cash value means the market price of the property at the time of the loss "and where there is no established market the market price must be estimated at such amount as in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably given substantial weight in such bargaining."[8] The difficulty with this view[9] is that the value of a building is often dependent upon the marketability of the land on which the building is situated. If there is little market demand for the land, the building will also have a lower market value.[10] Buildings are not ordinarily bought and sold in the market separately from the land and so do not have a market value apart from the land, in the strict sense of the term.[11] For example, one might have an insured

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[3]Harper v. Penn Mut. Fire Ins. Co., 199 F. Supp. 663 (E.D. Va. 1961).

[4]See, e.g., Canadian Nat'l Fire Ins. Co. v. Colonsay Hotel, [1923] 3 D.L.R. 1001 (Can. Sup. Ct.). The trial court in this case had ruled that the test of actual cash value was replacement cost less depreciation. This was unanimously reversed on appeal, on three different grounds.

[5]Featherston v. Hartford Fire Ins. Co., 146 F. Supp. 535 (W.D. Ark. 1956); Castoldi v. Hartford County Mut. Fire Ins. Co., 21 Conn. Supp. 265, 154 A.2d 247 (Super. Ct. 1959); Newark Fire Ins. Co. v. Martineau, 26 Tenn. App. 261, 170 S.W.2d 927 (1943).

[6]Annot., 61 A.L.R.2d 711 (1958).

[7]64 N.D. 764, 256 N.W. 214 (1934).

[8]256 N.W. at 215.

[9]It would appear that in cases where there is no established market this test would result in substantially the same actual cash value as derived through the use of the so-called broad evidence rule.

[10]See, e.g., State Ins. Co. v. Taylor, 14 Colo. 499, 24 Pac. 333 (1890); Britven v. Occidental Ins. Co., 234 Iowa 682, 13 N.W.2d 791 (1944).

[11]Kingsley v. Spofford, 298 Mass. 469, 11 N.E.2d 487 (1937); McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902 (1928).

building of the value of $100,000 in an undesirable location. And if there was little demand for land in that location, the building might not be sold at all; yet, the building might still be worth $100,000 to the owner for business purposes. Hence, most courts reject market value as the sole test for determining actual cash value, but allow it to be considered along with other evidence.[12]

Another test adopted by a number of courts is replacement or reproduction cost less depreciation.[13] it would appear that in most cases the cost of a new building of the same material and dimensions as the one destroyed, less the amount the destroyed building has depreciated through use is readily ascertainable. By applying this test one can estimate with reasonable accuracy the actual cash value of a structure. The main objection to this test, however, is its inflexibility where a structure has become obsolete.[14] For example, in *McAnarney v. Newark Fire Ins. Co.*,[15] the insured owned a brewery which was no longer economically useful for producing malt because of the passage of the National Prohibition Act. The court rejected as the sole measure of damage the cost of reproduction less physical depreciation.[16] Clearly, in such a case, if the building could no longer be used for producing malt, its value to the owner would be considerably lessened and the exclusive use of the reproduction cost less physical depreciation may well result in the determination of an excessive total actual cash value.

The tendency on the part of a substantial number of courts has been to adopt what is termed the broad evidence rule.[17] The main fac-

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[12]State Ins. Co. v. Taylor, 14 Colo. 499, 24 Pac. 333 (1890); Castoldi v. Hartford County Mut. Fire Ins. Co., 21 Conn. Supp. 265, 154 A.2d 247 (Super. Ct. 1959); Smith v. Allemannia Fire Ins. Co., 219 Ill. App. 506 (1920); Britven v. Occidental Ins. Co., 234 Iowa 682, 13 N.W.2d 791 (1944); Kingsley v. Spofford, 298 Mass. 469, 11 N.E.2d 487 (1937); McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902 (1928); Third Nat'l Bank v. American Equitable Ins. Co., 27 Tenn. App. 249, 178 S.W.2d 915 (1943).

[13]Knuppel v. American Ins. Co., 269 F.2d 163 (7th Cir. 1959); Svea Fire & Life Ins. Co. v. State Sav. & Loan Ass'n, 19 F.2d 134 (8th Cir. 1927); Boise Ass'n of Credit Men v. United States Fire Ins. Co., 44 Idaho 249, 256 Pac. 523 (1927); Smith v. Allemannia Fire Ins. Co., 219 Ill. App. 506 (1920).

[14]See 37 Yale L.J. 827 (1928).

[15]247 N.Y. 176, 159 N.E. 902 (1928).

[16]159 N.E. at 904.

[17]Britven v. Occidental Ins. Co., 234 Iowa 682, 13 N.W.2d 791 (1944); Eshan Realty Corp. v. Stuyvesant Ins. Co., 25 Misc. 2d 828, 202 N.Y.S.2d 899 (Sup. Ct. 1960); Gervant v. New England Fire Ins. Co., 306 N.Y. 393, 118 N.E.2d 574 (1954); Sebring v. Fireman's Ins. Co., 227 App. Div. 103, 237 N.Y.S. 120 (4th Dep't 1929); McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902 (1928); Rochester Am. Ins. Co. v. Short, 207 Okla. 669, 252 P.2d 490 (1953); Citizens' Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co., 86 Vt. 267, 84 Atl. 970 (1912).

tors to be considered under this rule in determining actual cash value were pointed out in the leading case of *McAnarney v. Newark Fire Ins. Co.*[18] The court said:

> "Where insured buildings have been destroyed, the trier of fact may, and should, call to its aid, in order to effectuate complete indemnity, every fact and circumstance which would logically tend to the formation of a correct estimate of the loss. It may consider original cost and cost of reproduction; the opinions upon value given by qualified witnesses; the declarations against interest which may have been made by the assured; the gainful uses to which the buildings might have been put; as well as any other fact reasonably tending to throw light upon the subject."[19]

Factors such as rental values or income, expenses in connection with the operation of a building, and the valuation placed upon the building by public listers have been held admissible as bearing upon the question of actual cash value.[20] In the case of a destroyed dwelling house, the jury was sent to the neighborhood in which the residence was located with the instruction to view the entire neighborhood with regard to its character as a consideration affecting the value of the property.[21]

A modern application of the broad evidence rule is illustrated in the case of *Thorp v. American Aviation & Gen. Ins. Co.*,[22] in which the actual cash value of a motion picture theatre was in issue. The trial judge, in addition to instructing the jury to consider the factors set forth in the *McAnarney* case,[23] also advised the jury to consider that during the building's entire existence as a theater it had lost money in its operation, despite good management; that it was affected by a water condition which wet the theater and its contents; that there was no sewerage system in town; that the effective drawing power of the theater was limited to a three or four mile radius; that the average daily receipts for six weeks prior to the fire were less than $45.00; that some sixty-six theaters in the area had been closed down, abandoned, or converted to other uses in the period shortly before and subsequent to the date of the trial; that the theater had no air-conditioning; and that the increase in the distribution of television sets

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[18]247 N.Y. 176, 159 N.E. 902 (1928).

[19]159 N.E. at 905.

[20]Citizens' Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co., 86 Vt. 267, 84 Atl. 970 (1912).

[21]Rochester Am. Ins. Co. v. Short, 207 Okla. 669, 252 P.2d 490, 492 (1953).

[22]212 F.2d 821 (3d Cir. 1954).

[23]247 N.Y. 176, 159 N.E. 902 (1928).

had adversely affected the income of motion picture theaters at the time of the fire.[24] In other words, the broad evidence rule permits a wide latitude in the ascertainment of actual cash value. Depending on the circumstances the application of the rule may be favorable either to the insurer or the insured. For example, if in the above case the business climate and conditions surrounding the theater had been very good, the jury might have found a higher actual cash value.

It is submitted that the court in the principal case adopted the most equitable rule. However, since recovery under casualty insurance policies is predicated upon the actual cash value of the property at the time of the loss, it is important that both insurer and insured remain aware of the actual value of the structure. As was pointed out above, where the policy contains a co-insurance clause, the insurer may try to show that the actual cash value is great enough so as to make the insured a co-insurer. On the other hand, of course, the insured will want to introduce evidence tending to show a low actual cash value so as to avoid being a co-insurer. It is important, therefore, that both parties and especially the insured, be cognizant of the factors considered in such a determination. For the insured may wish to increase or reduce his insurance coverage in accordance with changes in the actual cash value. Hence, it is suggested that for the protection of the insured he should make a periodic review of the factors which go to make up the total value of the property.

NORRIS A. HARMON

TENANCY BY ENTIRETIES IN BANKRUPTCY PROCEEDINGS

The tenancy by the entireties has a long history at common law as an incident of the concept of the legal unity of husband and wife, it being a form of joint ownership that can only be vested in a husband and wife.[1] As a result of the abolition of the unity of spouses many jurisdictions have completely abolished this type of ownership, others have extensively modified it, while some retain the tenancy with most of its original characteristics.[2] The peculiar characteristic

[24]212 F.2d 821, 825-26 n.7 (3d Cir. 1954).

[1]Licker v. Gluskin, 265 Mass. 403, 164 N.E. 613 (1929); 2 Tiffany, Real Property § 431 (3d ed. 1939).

[2]For an excellent discussion of tenancy by the entireties and classification into groups see Phipps, Tenancy by Entireties, 25 Temp. L.Q. 24 (1951).

of a tenancy by the entireties is that each spouse has the possibility of becoming the sole owner of all the property by surviving the other. One spouse cannot defeat this right by a unilateral act; in other words, both must consent to any disposal of the property.[3] As a result of the limitation on alienation only joint creditors are able to reach the property in satisfaction of a debt.[4]

Virginia is one of the jurisdictions which still retains the tenancy by the entireties in its original common law form.[5] What appears to be a case of first impression in any state concerning one incident of the tenancy arose in a bankruptcy proceeding in Virginia in which a joint creditor sought to reopen a closed estate for consolidation with the subsequent bankruptcy proceeding of the other spouse. In the case of *In the Matter of Reid*,[6] a husband and wife owned property by the entireties. The husband upon filing a petition in bankruptcy was duly adjudicated a bankrupt, and on May 3, 1960, he was granted a discharge. The estate was closed on August 16, 1960. On October 18, 1960, his wife filed a petition in bankruptcy. A joint creditor, who had not participated in the earlier proceeding, moved to reopen the husband's estate for consolidation of the proceeding with that of his wife, so that property held by entireties could be reached. The

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[3]Ades v. Caplan, 132 Md. 66, 103 Atl. 94 (1918); McCubbin v. Stanford, 85 Md. 378, 37 Atl. 214 (1897); Licker v. Gluskin, 265 Mass., 403, 164 N.E. 613 (1929); Vasilion v. Vasilion, 192 Va. 735, 66 S.E.2d 599 (1951).

In Allen v. Parkey, 154 Va. 739, 149 S.E. 615 (1929) the court denied a partition of land held by the entireties because there is no separate interest in either tenant. The seisin is "per tout et non per my"

"[T]he survivor of the marriage, whether the husband or the wife, is entitled to the whole, which right cannot be defeated by a conveyance by the other to a stranger, as in the case of joint tenancy. " 2 Tiffany, Real Property § 430 at 218 (3d ed. (1939).

[4]Phillips v. Krakower, 46 F.2d 764 (4th Cir. 1931); In re Kearns, 8 F.2d 437 (4th Cir. 1925); Ades v. Caplan, 132 Md. 66, 103 Atl. 94 (1918); Frey v. McGaw, 127 Md. 23, 95 Atl. 960 (1915); Jordan v. Reynolds, 105 Md. 288, 66 Atl. 37 (1907); Johnson v. Leavitt, 188 N.C. 682, 125 S.E. 490 (1924); Martin v. Lewis, 187 N.C. 472, 122 S.E. 180 (1924).

If judgment is obtained by an individual creditor he has only a potential lien based on the contingent expectancy of that spouse surviving and the creditor cannot complain of a conveyance. Kerin v. Palumbo, 60 F.2d 480 (3d Cir. 1932); Wylie v. Zimmer, 98 F. Supp. 298 (E.D. Pa. 1951).

The creditor of the husband can levy and sell the property and the purchaser has a right to immediate possession, but this possession is subject to being defeated by the wife surviving. Licker v. Gluskin, 265 Mass. 403, 164 N.E. 613 (1929); Raptes v. Cheros, 259 Mass. 37, 155 N.E. 787 (1927).

[5]Phipps, Tenancy by Entireties, 25 Temp. L.Q. 24 (1951); Ritchie, Tenancies by the Entireties in Real Property with Particular Reference to the Law of Virginia, 28 Va. L. Rev. 608 (1941) contains a discussion of how to create tenancy by the entireties in Virginia and the applicable statutes.

[6]198 F. Supp. 689 (W.D. Va. 1961).

District Court granted the motion, basing its decision on an interpretation of Section 2(a)(8) of the Bankruptcy Act which provides for reopening an estate upon showing of good cause.[7] The bankrupt argued that the court should not exercise its discretion to reopen the estate because the petitioner was barred by laches, since he failed to seek a stay of discharge until a judgment against the joint debtors could be obtained in a state court. The court rejected this argument on the ground that laches was a good defense only when third persons would be injured by granting the relief sought,[8] and here there was no possibility of injury to third persons.

The purpose of a bankruptcy proceeding is twofold:[9] to relieve the debtor of a hopelessly indebted situation, and more importantly, to enable creditors to receive as much by way of payment as possible. In order to achieve these ends, title to property held by the bankrupt passes to the trustee[10] to be administered in the most advantageous way. However, the trustee receives title only to property which is capable of being transferred by the bankrupt at the time the petition is filed.[11] Since property held by entireties is incapable of being transferred by one of the spouses, it does not pass to the trustee.[12] Hence it is not available for the payment of the bankrupt's debts, and the individual bankrupt receives his discharge without losing his interest in property so held.

Several techniques have been used by the courts to enable joint creditors with good and valid claims, who would otherwise have their claims against the bankrupt extinguished if a discharge was granted, to reach property which did not pass to the trustee. In the leading case of *Lockwood v. Exchange Bank*[13] the creditor was the holder of the bankrupt's joint note which waived a homestead exemption. This property did not pass to the trustee under Section 70(a) of the Bankruptcy Act.[14] The creditor petitioned for a stay of discharge

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[7]Bankruptcy Act § 2(a)(8), 52 Stat. 843 (1938), 11 U.S.C. § 11(a)(8) (1958).

[8]Brust v. Irving Trust Co., 129 F. Supp. 462 (S.D.N.Y. 1955).

[9]Phillips v. Krakower, 46 F.2d 764, 765 (4th Cir. 1931).

[10]Bankruptcy Act § 70(a), 52 Stat. 879 (1938), 11 U.S.C. § 110(a) (1958).

[11]Everett v. Judson, 228 U.S. 474 (1913); Kerin v. Palumbo, 60 F.2d 480 (3d Cir. 1932); Dioguardi v. Gurran, 35 F.2d 431 (4th Cir. 1929); In re Kearns, 8 F.2d 437 (4th Cir. 1925); Wylie v. Zimmer, 98 F. Supp. 298 (E.D. Pa. 1951); Bankruptcy Act § 70(a)(5), 52 Stat. 879 (1938), U.S.C. § 110(a)(5) (1958).

[12]Kerin v. Palumbo, 60 F.2d 480 (3d Cir. 1932); Phillips v. Krakower, 46 F.2d 764 (4th Cir. 1931); Dioguardi v. Curran, 35 F.2d 431 (4th Cir. 1929); In re Kearns, 8 F.2d 437 (4th Cir. 1925); Wylie v. Zimmer, 98 F. Supp. 298 (E.D. Pa. 1951); Vonville v. Dexter, 118 Ind. App. 187, 76 N.E.2d 856 (1948).

[13]190 U.S. 294 (1903).

[14]Bankruptcy Act § 70(a), 52 Stat. 879 (1938), 11 U.S.C. § 110(a) (1958).

until judgment on the note could be obtained in a state court, and he could levy on the property. The court granted the stay because the creditor had a valid claim but since the property did not pass to the trustee in bankruptcy, his only remedy was in the state court. The court reasoned that to grant a discharge knowing that the creditor had a claim on this exempt property would be tantamount to legal fraud, for once the discharge was granted the debt would be barred.[15]

In *Phillips v. Krakower*,[16] which is heavily relied upon in the principal case, there was a petition filed seeking a stay of discharge until the holder of a joint note could obtain a judgment on it in a state court. The makers of the note owned property by the entireties, and one of the tenants was a bankrupt. Therefore, the only way the joint creditor could reach the property held by the entireties, title to which did not pass to the trustee, to satisfy his debt was to proceed in a state court. The court held that if the discharge was granted before the state court judgment was obtained the bankrupt's liability on the note would be extinguished, thus precluding the creditor from subjecting the property to payment during the bankrupt's lifetime because of the tenancy by the entirety. Therefore, the court reasoned that the stay should be granted in order to avoid this consequence.[17]

Essentially the same principles are involved in the principal case as in the *Lockwood* and *Krakower* cases. Although the creditor in *Reid* was not seeking a stay of discharge, the discharge already having been granted, he was seeking a decree to reopen the estate and to consolidate it with that of the wife's in her bankruptcy proceedings. Nevertheless, the cases are similar in that creditors would lose a valid claim if the relief sought is denied because in all three the property sought to be reached had not passed to the bankruptcy trustee for administration. In other words, in all three cases creditors were petitioning the bankruptcy court to use its broad equity powers to subject property, which has not passed to the trustee, to payment of a valid claim which would otherwise be lost.

Bankruptcy courts have always exercised broad equitable powers concerning the bankrupt's estate, but prior to 1938 an estate could be reopened only if it appeared that the estate had not been fully administered.[18] The Chandler Act broadened the power to reopen

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[15]190 U.S. at 300.

[16]46 F.2d 764 (4th Cir. 1931).

[17]Id. at 765, "We cannot conceive that any court would lend its aid to the accomplishment of a result [legal fraud] so shocking to the conscience."

[18]Kinder v. Scharff, 231 U.S. 517 (1913); In re Schreiber, 23 F.2d 428 (2d Cir. 1928); In re Chapman, 55 F.2d 965 (N.D.N.Y. 1930).

an estate by adding the last clause to Section 2(a)(8) by which an estate can be reopened "for cause shown."[19] Thus the powers of the court with relation to reopening estates were greatly increased, and now the reopening may be granted or refused in the discretion of the court, exercised on principles of equity.[20] However, this discretion should be exercised sparingly and only in unusual circumstances lest the bankrupt will never receive the assurance of a finally settled estate.

As pointed out by counsel for the bankrupt the creditor could have followed a procedure like that outlined in *Krakower* by moving for a stay of discharge until judgment could be obtained on the note and the property subjected to payment of the claim. The creditor could have also entered into the proceedings and received a dividend.[21] However, notwithstanding the failure to seek a stay or file a claim, the creditor should not be denied his request to reopen the estate under the circumstances shown in the *Reid* case. The husband's discharge included his obligation in the joint debt held by the petitioner, so that the only chance of satisfying the claim was dependent upon the wife's contingent right of sole ownership. This position was apparently at the creditor's choice.

When, however, the wife subsequently filed a petition in bankruptcy, as she did here, and is allowed to proceed to a discharge the creditor would be left holding a good claim without any remedy to satisfy it, and the bankrupts' still retaining all their property held by the entireties. To allow such a result, merely because the creditor failed to avail himself of a more expeditious method of obtaining satisfaction, would be tantamount to fraud upon the creditor.

Therefore, the court should exercise its discretion and allow the reopening of the first estate and then consolidate it with the one presently in bankruptcy. This was done by the District Court in the *Reid* case so as to enable a joint creditor holding a good claim to reach joint property. To have held otherwise would be tantamount to condoning fraudulent bankruptcy proceedings.

GARNET L. PATTERSON II

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[19]Bankruptcy Act § 2(a)(8), 52 Stat. 843 (1938), 11 U.S.C. § 11(a)(8) (1958).

[20]Grand Union Equip. Co. v. Lippner, 167 F.2d 958 (2d Cir. 1948); In re Stein, 111 F. Supp. 327 (S.D.N.Y. 1953); In re Ostermayer, 74 F. Supp. 803 (D.N.J. 1947); In re Krieg, 37 F. Supp. 559 (E.D. Pa. 1941).

[21]Ades v. Caplan, 132 Md. 66, 103 Atl. 94 (1918).

CITIZEN'S ARREST

The traditional requirement of a warrant to arrest for a breach of the peace not committed in the presence of the arresting party can occasionally hamper police officers in maintaining order. A patrolman often arrives upon the scene after an altercation has ended, but before order has been restored. The officer then cannot make an arrest until the proper warrant has been obtained. If he arrests without a warrant, the arrest may be annulled by the courts and the arresting officer sued for false arrest or false imprisonment. In an apparent effort to extend protection to officers who arrest for misdemeanors without a warrant, the highest court of New York, in the case of *People v. Foster*,[1] recently found an unusual type of citizen's arrest.

People v. Foster arose out of a New York City street-fight in which the defendant, a Negro girl, battled with a woman shopkeeper whose daughter allegedly had taunted her. After first blows had fallen, the defendant and two companions left the scene to summon one of their parents. When they returned, the shopkeeper, a Mrs. Salzberg, had retreated into the building and locked the door. Several dozen policemen arrived to find the defendant outside the shop loudly abusing Mrs. Salzberg before the many onlookers. The officers arrested the defendant upon the complaint of Mrs. Salzberg. The defendant was convicted of disorderly conduct and appealed to the New York Court of Appeals on the ground that the arrest without a warrant was illegal because the underlying assault for which the defendant was arrested had not been committed in the officer's presence.[2]

Speaking for three members of the court, Judge Desmond found that the underlying breach of the peace was still in progress when the officers arrived on the scene, and thus the arrest without a warrant was permissible and, secondly, that the shopkeeper had made a "citizen's arrest" of the defendant.[3]

The citizen's arrest was based on the theory that the police took

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[1] 10 N.Y.2d 99, 176 N.E.2d 397, 217 N.Y.S.2d 596 (1961).

[2] The court, in affirming the conviction, struggled to justify the arrest, with three of the judges basing the decision on two alternative grounds; a fourth member of the court concurring in the holding on one ground only, and the three remaining judges dissenting.

[3] The dissent's criticism of the first basis of the decision—that of a continuing breach of the peace—is that since the defendant left the scene between the initial altercation and the later disorder which was in progress when the police arrived, the original assault could not possibly be continuing. The majority opinion ignores the departure of the defendant, which would seem to make the first ground for the decision untenable.

the defendant into custody following an arrest by Mrs. Salzberg. This theory may prove to be a novel and extremely useful device for accomplishing arrests for misdemeanors without a warrant. The facts of *People v. Foster* do not suggest that Mrs. Salzberg intended to arrest the defendant. There is no indication that the shopkeeper mentioned an arrest or made any move to effect one, nor was the defendant conscious of having been arrested by Mrs. Salzberg. Indeed during the entire period when Mrs. Salzberg might have arrested defendant, a locked door separated the two women.

The two New York cases[4] cited in the principal case involved valid initial arrests carried out by private individuals in accordance with the settled requirements of a legitimate arrest, the police officers taking into custody individuals who had been previously arrested. But they do not support *People v. Foster*, in which the facts show that the defendant was arrested solely on the basis of an unsworn complaint, which under these circumstances is clearly illegal.

A proper citizen's arrest includes all the elements common to valid arrests in general, but civilians may lawfully apprehend criminals without a warrant only in well-defined circumstances. To constitute an arrest, there must be an intent to arrest, under real or pretended authority, accompanied by a seizure or detention which is so understood by the one arrested.[5] A private person making an arrest must always give notice of his intention,[6] unless the arrestee knows or ought to know under what authority the arrest is being made.[7] Unless there is statutory authority, neither an officer nor a private citizen may arrest for a misdemeanor unless it constitutes a breach of the peace committed in his presence.[8] A private person may arrest for a felony which has in fact been committed, provided he has reasonable grounds for believing the arrestee guilty of committing it.[9]

Many states have given statutory authority to officers[10] and to

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[4]People v. Ostrosky, 95 Misc. 104, 160 N.Y.S. 493 (Nassau County Ct. 1916); People ex rel. Gunn v. Webster, 75 Hun. 278, 26 N.Y.S. 1007 (5th Dep't 1894).

[5]Jenkins v. United States, 161 F.2d 99 (10th Cir. 1947); Melton v. State, 75 So. 2d 291 (Fla. 1954); State ex rel. Sadler v. District Court, 70 Mont. 378, 225 Pac. 1000 (1924); Lester v. Albers Super Market, Inc., 94 Ohio App. 313, 114 N.E.2d 529 (1952); Neapolitan v. United States Steel Corp., 149 N.E.2d 589 (Ohio Ct. of App. 1956).

[6]Brooks v. Commonwealth, 61 Pa. 352 (1869); ALI Code Crim. Proc. 249 (Official Draft 1930).

[7]Robinson v. State, 93 Ga. 77, 18 S.E. 1018 (1893); Croom v. State, 85 Ga. 718, 11 S.E. 1035 (1890).

[8]ALI Code Crim. Proc. 231-33 (Official Draft 1930).

[9]ALI Code Crim. Proc. 240-41 (Official Draft 1930).

[10]ALI Code Crim. Proc. 232 (Official Draft 1930); Warner, "Investigating the Law of Arrest," 26 A.B.A.J. 151, 152 (1940).

private[11] individuals to arrest for certain types of misdemeanors committed in their presence, although not amounting to a breach of the peace. But almost nowhere is an officer,[12] and never a private individual,[13] permitted to arrest for misdemeanors not committed in his presence, purely on the basis of suspicion or unsworn complaint.

Private individuals rarely exercise their authority to arrest. A survey of cases reaching the appellate courts in the last two decades discloses that, on an average, less than three cases a year have arisen involving citizen's arrests. These cases fall primarily into two categories; those involving government agents who find themselves in an "arrest" situation without a warrant and fall back on citizen's arrest to apprehend their man;[14] and those where retail store managers use citizen's arrest to detain suspected shoplifters.[15]

Only a handful of cases have arisen in recent years involving the traditional concept of an individual's arresting for a crime commit-

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[11]State ex rel. Sadler v. District Court, 70 Mont. 378, 255 Pac. 1000 (1924); ALI Code Crim. Proc. 238-39 (Official Draft 1930).

[12]A number of courts have held that statutes authorizing arrests without warrants for misdemeanors not committed in the presence of the arrester are unconstitutional as an unlawful search. See In re Kellam, 55 Kan. 700, 41 Pac. 960 (1895); Pinkerton v. Verberg, 78 Mich. 573, 44 N.W 579 (1889); Gunderson v. Struebing, 125 Wis. 173, 104 N.W. 149 (1905). But see Hanser v. Bieber, 271 Mo. 326, 197 S.W. 68 (1917).

[13]ALI Code Crim. Proc. 238. (Official Draft 1930).

[14]It should be noted that these arresters are trained in methods of arrest and their actions remain basically those of law enforcement officers. United States v. Burgos, 269 F.2d 763 (2d Cir. 1959) (federal customs officers arrested alien); Richardson v. United States, 217 F.2d 696 (8th Cir. 1954) (federal agents made arrests for narcotics violation); United States v. Coplon, 185 F.2d 629 (2d Cir. 1950) (federal agents made arrests for espionage); Dorsey v. United States, 174 F.2d 899 (5th Cir. 1949) (federal agents arrested holder of illegal sugar ration coupon); United States v. Lindenfeld, 142 F.2d 829 (2d Cir. 1944) (federal agents made arrests for narcotics violation); United States v. Hayden, 140 F. Supp. 429 (D. Md. 1956) (federal agents arrested operator of illegal still); United States v. Guller, 101 F Supp. 176 (E.D. Pa. 1951) (federal agents made arrests for narcotics violation); United States v. Chodak, 68 F. Supp. 455 (D. Md. 1946) (federal agents made arrests for violation of price ceilings); United States v. Strickland, 62 F. Supp. 468 (W.D.S.C. 1945) (federal agents arrested holder of illegal gas cupons); People v. Burgess, 170 Cal. App. 2d 36, 338 P.2d 524 (1959) (state investigators arrested a driver's license examiner); Smith v. Hubbard, 253 Minn. 215, 91 N.W.2d 756 (1958) (constable arrested a traffic offender); Commonwealth v. Duerr, 158 Pa. Super. 484, 45 A.2d 235 (1946) (state officers made arrests for auto theft).

[15]Montgomery Ward & Co. v. Freeman, 199 F.2d 720 (4th Cir. 1952); Sima v. Skaggs Payless Drug Center, Inc., 92 Idaho 387, 353 P.2d 1085 (1960); Jefferson Dry Goods Co. v. Stoess, 304 Ky. 73, 199 S.W.2d 994 (1947); Banks v. Town, Inc., 98 So. 2d 719 (La. App. 1957); Lester v. Albers Super Markets, Inc., 94 Ohio App. 313, 114 N.E.2d 529 (1952); Pilos v. First Nat'l Stores, Inc., 319 Mass. 475, 66 N.E.2d 576 (1946); Ira v. Columbia Food Co., 360 P.2d 622 (Ore. 1961); Martin v. Castner-Knott Dry Goods Co., 27 Tenn. App. 421, 181 S.W.2d 638 (1944).

ted in his presence and delivering the culprit to the authorities.[16] The crimes for which the arrests have been made have generally been varieties of breaches of the peace, with the arrester subduing the trouble-maker until the arrival of authorties. In some cases the person making the arrest was part of a posse organized in the classical manner to track down a thief.[17] Citizen posses are rare, however, having been replaced by more effective professional policemen. A plausible explanation of the scarcity of common law citizens' arrests would be the fact that few citizens are fully aware of their authority to arrest and fewer still are willing to risk the prosecution for false arrest which will likely result if the arrest is adjudged unwarranted.

The decline of arrests by private individuals should not be considered altogether undesirable. Except in rare instances official law enforcement agencies are capable of making necessary arrests without civilian aid. At the same time there seems to be no need to extend the law of arrest as it applies to police officers. Perhaps they should be given the power to arrest for any misdemeanor committed in their presence, whether or not it constitutes a breach of the peace. There seems to be no justification, however, for permitting an arrest for a misdemeanor not committed in the presence of the arresting officer, as was the case in *People v. Foster* Such an arrest invades "the sacred right of an individual to be protected from an arrest founded upon mere oral complaints where petty crimes of the misdemeanor type are involved. ."[18]

WILLIAM H. CLARK, JR.

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[16]Lima v. Lawler, 63 F. Supp. 446 (E.D. Va. 1945) (citizen's arrest of unruly sailor); Ogulin v. Jeffries, 121 Cal. App. 2d 211, 263 P.2d 75 (1953) (woman arrested man for attacking her); Thacker v. Commonwealth, 310 Ky. 702, 221 S.W.2d 682 (1949) (citizen's arrest of man shooting into bus, killing the driver); Commonwealth v. Lussier, 333 Mass. 83, 128 N.E.2d 569 (1955) (thief arrested by citizen as he ran from robbed liquor store); Bellinger v. State, 206 Misc. 575, 134 N.Y.S.2d 104 (1954) (hotel operator arrested trouble-maker in parking lot); Oklahoma Ry. Co. v. Sandford, 258 P.2d 604 (Okla. 1953) (bus driver arrested intoxicated motorist); Wingfield v. State, 81 Okla. Crim. 146, 160 P.2d 945 (1945) (citizen's arrest of prowler); Commonwealth ex rel. Garrison v. Burke, 378 Pa. 344, 106 A.2d 587 (1954) (citizen's arrest of burglar).

[17]State v. Parker, 355 Mo. 916, 199 S.W.2d 338 (1947).

[18]From Judge Frossel's dissent in People v. Foster, supra note 1 at 399.

EQUITABLE PROTECTION BY INJUNCTION FOR BUSINESS REPUTATION

Where individuals are harmed as the result of libelous publications the resort to a court of law for damages may be sufficient redress. However, in the case of the libel of a business, damages may not be adequate and restraining the publication by an injunction in equity may provide the only complete relief available.[1]

In the recent case of *Mayfair Farms, Inc. v. Socony Mobile Oil.*,[2] two plaintiffs, both restaurant operators, sought to enjoin the publication of defendant's motoring guidebook, a small part of which rated restaurants upon certain standards not set forth in the publication itself.[3] The basis of plaintiffs' complaint was that while the rating experts employed by defendant had information which warranted placing their restaurants in the highest category, the restaurants were nevertheless given inferior ratings.[4] The Superior Court of New Jersey denied a temporary injunction pending the hearing of the issues at law for three reasons: (1) the plaintiffs' rights to equitable relief were not clear as a matter of law,[5] (2) the ultimate error com-

[1]In most cases it is impossible to determine the extent of the damages arising from a business libel, therefore the remedy at law is speculative if not inadequate. See Toledo Computing Scale Co. v. Computing Scale Co., 142 Fed. 919, 922 (6th Cir. 1906) (dictum); Dehydro, Inc. v. Tretolite Co., 53 F.2d 273 (N.D. Okla. 1931); Kwass v. Kersey, 139 W. Va. 497, 81 S.E.2d 237 (1954) (dissenting opinion).

[2]172 A.2d 26 (N.J. Super. 1961). In the principal case the plaintiff cannot establish the cause of a falling off of its trade or the failure of its business to increase, except in cases where some tangible situation exists which is obviously the cause of business decline. On the other hand, the business volume of the plaintiffs' may increase, but how much greater the increase would have been had it not been for defendant's dissuasion is a matter of conjecture.

[3]Id. at 27. "The basis for the rating given to a particular restaurant is not explained in the guide...."

[4]The symbols used in the guide book are as follows:

"†—an unusually good value, relatively inexpensive
*—better than average
**—good
***—very good
****—excellent, worth a special effort to reach
*****—outstanding—one of the best in the country

Plaintiffs' restaurants, Mayfair Farms and Pal's Cabin, were given a good and better than average rating respectively." Id. at 27

[5]172 A.2d at 29. "New Jersey has for many years subscribed to the principle that an interlocutory injunction should not issue if a plaintiff's asserted rights are not clear as a matter of law." Citizens Coach Co. v. Camden Horse R.R., 29 N.J. Eq. 299 (Ct. Err. & App. 1878); General Elec. Co. v. Gem Vacuum Stores, Inc., 36 N.J. Super. 234, 115 A.2d 626 (App. Div. 1955); Noble Co. v. D. Van Nostrand Co., 63 N.J. Super. 534, 164 A.2d 834 (Ch. Div. 1960). Contra, Note, 40 Marq. L. Rev. 191 (1956) and cases cited therein.

plained of was that of ratings, a matter of judgment and opinion, and therefore not a justiciable issue,[6] and (3) the result of the injunction would be to deprive the public of the extensive material contained in the guidebook. Under New Jersey procedure the plaintiffs' allegations are taken as admitted for purposes of ruling on a motion to dismiss. Since certain allegations were sufficient to state a cause of action, the court overruled the defendant's motion to dismiss. This left the plaintiffs with only a remedy at law for damages for injury incurred by the publication.

Until recently, the use of an injunction to enjoin a business libel has been exercised only in exceptional cases.[7] However, the familiar language of an equity court that "equity has no jurisdiction to enjoin a libel"[8] is becoming "the power does exist and can be used in proper circumstances."[9] Where the power is recognized, the matter seems to be clearly one of discretion.

As a guide in the exercise of this discretion the Supreme Judicial Court of Massachusetts and one writer[10] have recognized and arrived at a triangular balance that recognizes the interests of the publisher of the alleged libel, the public, and the party seeking relief. In *Krebiozen Research Foundation v. Beacon Press, Inc.*,[11] the plaintiff was denied injunctive relief against publication of a book which criticized the effectiveness of plaintiff's drug as a cancer cure. The case is distinguishable from the principal case in that the objective appraisal of medicinals by the doctors based upon independent research is not akin to opinion ratings of restaurants. Furthermore, considera-

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[6]See Restatement, Torts § 627 (1938). The caveat to this section is noteworthy: "The Institute expresses no opinion as to whether one who holds himself out as able to give to intending purchasers ... information in regard to ... the quality of lands, chattels, or intangible things may be subject to liability for publishing to an intending purchaser ... an inaccurate opinion disparaging the other's property ... if he fails to exercise reasonable care ... or reasonable competence in forming his opinion ...."

[7]Factors bringing some cases within the exception are continuousness of the act, malice and inadequacy of the remedy at law. Cf., Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383 (1943) (display of plaintiff's car as a "White Elephant" enjoined); accord, Menard v. Houle, 298 Mass. 546, 11 N.E.2d 436 (1937).

[8]See, e.g., Francis v. Flinn, 118 U.S. 385 (1886); Kidd v. Horry, 28 Fed. 773 (C.C.E.D. Pa. 1886); Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873); Wolf v. Harris, 267 Mo. 405, 184 S.W. 1139 (1916); Marlin Fire Arms Co., v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902); Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690 (1931).

[9]172 A.2d at 30.

[10]See, Comment, 36 B.U.L. Rev. 644, 647 (1956). It is suggestetd that the principal case might well be the exceptional case that the writer depicted as "but a matter of conjecture."

[11]334 Mass. 86, 134 N.E.2d 1 (1956).

tions of health and safety were involved in the *Krebiozen* case so that the public interest in the discussion of cancer cures outweighed the plaintiff's interest in protection against an alleged libel.[12] This decision shows that a petitioner seeking to enjoin a libel must satisfy the court that his interest in being protected from irreparable injury outweighs the public interest in the publication.[13]

The exercise of discretion in deciding whether to enjoin a business libel presents a more difficult problem since the public interest in publication is not so strong. Therefore, an additional factor may be necessary to overcome the lack of precedent, and at the same time supplement the triangular balance as a guide in the exercise of this discretion.

It is submitted that a consideration of the gravity of the unfairness resulting if temporary injunctive relief is denied may be the additional factor necessary to prompt courts of equity to extend their jurisdiction to enjoin a business libel.

An analogy is to be found in the use of injunctions to enjoin unfair competition.[14] The development of this action to protect the business assets of reputation and good will shows that equity does enjoin business libels under a different equitable theory.[15] Because of the reluctance of equity to enjoin a libel as such, it has expanded the action of unfair competition.[16]

Originally equity would enjoin the passing off by the defendant

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[12]134 N.E.2d at 6. "In this case it is clear that the public interest in the discussion of the subject of cancer... [is] paramount." Accord, Willis v. O'Connell, 231 Fed. 1004 (S.D. Ala. 1916); Hoxsey Cancer Clinic v. Folsom, 155 F. Supp. 376 (D.D.C. 1957).

[13]See note 10 supra.

[14]"The law relating to unfair competition has a threefold object: First, to protect the honest trader in the business which fairly belongs to him; second, to punish the dishonest trader who is taking his competitor's business away by unfair means; and third, to protect the public from deception." Mitchell H. Mark Realty Corp. v. Major Amusement Co., 180 App. Div. 549, 168 N.Y.S. 244, 247 (1st Dep't 1917).

[15]Cf., Old Investors' & Traders Corp. v. Jenkins, 133 Misc. 213, 232 N.Y. Supp. 245 (Sup. Ct. 1928). See, Defuniak, Handbook of Modern Equity 116 (2d ed. 1956) where the author points out, "Some courts... have termed the wrong a "disparagement of property," or "disparagement of a business" and thus, by avoiding the terms "libel," "slander" or "defamation," have neatly evaded many difficulties presented by precedent as represented in the older cases." See Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640 (1916).

[16]Old Investors' & Traders Corp. v. Jenkins, 133 Misc. 213, 232 N.Y. Supp. 245 (Sup. Ct. 1928) (disparaging statement by competitor and publishers—both enjoined); Cf., Paramount Pictures, Inc. v. Leader Press, 106 F.2d 229 (10th Cir. 1939); Wolff, Unfair Competition by Truthful Disparagement, 47 Yale L.J. 1304, 1305 (1938).

of his goods as those of the plaintiff. This element of passing off was required.[17] This protection was subsequently extended to cases where the defendant did not appropriate plaintiff's good will for himself, but his action had the purpose or effect of aiding others in such appropriation.[18] In *Old Investors' & Trading Corp. v. Jenkins*,[19] the alleged disparagement, contained in a circular sent to plaintiff's customers, was enjoined despite the fact that the publisher was not a competitor. The court said: "While ... the court could not enjoin the mere publication of a libel, it could, provided the facts of the case warranted, issue an injunction against the defendant from mailing or otherwise sending to customers of the plaintiff false and misleading circulars of reading matter which would take away plaintiff's business by unfair means and deceive the public."[20]

This indicates that injunctive protection may be granted when the action is labeled unfair trade competition even though the plaintiff and defendant are not competing in the narrow sense. This is manifest in the language of some courts to the effect that "there is no fetish in the word competition. The invocation of equity rests more vitally upon the unfairness."[21]

In *Burke Transit Co. v. Queen City Coach Co.*,[22] the defendant, a transporttation corporation seeking to take over plaintiff's business, was alleged to have circulated false statements to the effect that plaintiff was unreliable, in failing financial condition and intending to go out of business. The defendant contended there was no right to restrain by injunction such slanderous statements affecting the plaintiff's business and that he had a remedy at law. The court disposed of this by saying:

> "But when it appears necessary for the protection of plaintiff's business or property rights, and it is alleged that the systematic circulation of false statements seriously affecting these rights will work irreparable and continuing injury, injunctive

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[17]Queen Mfg. Co. v. Isaac Grinsberg & Bros., 25 F.2d 284 (8th Cir. 1928) (passing off, injunction granted); Pulitzer Publishing Co. v. Houston Printing Co., 11 F.2d 834 (5th Cir. 1926) (no passing off, bill dismissed).

[18]Ralston Purina Co. v. Saniwax Paper Co., 26 F.2d 941 (W.D. Mich. 1928); Old Investors' & Traders Corp. v. Jenkins, 133 Misc. 213, 232 N.Y. Supp. 245 (Sup. Ct. 1928); Cf. Bass, Ratcliff & Gretton Ltd. v. Guggenheimer, 69 Fed. 271 (C.C.D. Md. 1895).

[19]133 Misc. 213, 232 N.Y. Supp. 245 (Sup. Ct. 1928).

[20]Id at 247.

[21]Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509, 512 (6th Cir. 1924); See Golenpaul v. Rosett, 174 Misc. 114, 115, 18 N.Y.S.2d 889, 891 (Sup. Ct. 1940).

[22]228 N.C. 768, 47 S.E.2d 297 (1948).

relief may be granted pending final determination of the action."[23]

In the principal case there was no threat by the defendant seeking to take over the plaintiff's businesses. However, there is little significance in distinguishing between a defendant who induces old customers not to carry out their contractual obligations, as in the *Burke* case, and the defendant who persuades new customers not to enter into contractual relations, as in the principal case. "One practice is as unfair as the other, and in both cases the growth and success of the plaintiff's business are seriously affected."[24]

Another factor to be considered is the purpose and effect of the publication sought to be enjoined. In *Mayfair Farms* the primary reason for denying the temporary injunction was the defendant's interest in immediate distribution of the publication as part of its summer advertising program.[25] Since the public interest involved is not so great as in the *Krebiozen* case, the argument for the granting of the temporary injunction in order to preserve the *status quo* is greater.[26]

In cases where the petitioner seeks to enjoin the publication of an alleged business libel, the exercise of discretion in the denial or issuance of a temporary injunction must be based upon sound principles of equity. As suggested in the *Krebiozen* case, even though the remedy at law is inadequate, the nature of the publication may be such that public interests must prevail over private. However, where the public interest is of less weight, equity may well issue a temporary injunction in order to preserve the *status quo* pending the hearing of the issues.

GERALD LEE KESTEN

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[23]47 S.E.2d at 299.

[24]Derenberg, Trade Mark Protection and Unfair Trading 143 (1936).

[25]The court states in the opinion: "It is obvious that a prompt decision as to an injunction is of great importance to the defendants who plan to launch at once, if not enjoined, a widespread campaign of advertising and selling, a campaign which will be timed for the commencement of the summer touring season." Query whether public or in fact private interest has outweighed the plaintiffs' interest in the preservation of the status quo pending the hearing upon the issues. 172 A.2d at 27.

[26]Mytinger & Casselberry, Inc. v. Numanna Laboratories, 215 F.2d 382 (7th Cir. 1954); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953); City of Newton v. Levis, 79 Fed. 715, 718 (8th Cir. 1897). An examination of these cases leads to the conclusion that the court in exercising discretion to issue or deny the temporary injunction should not be bound by the number or complexity of untried and unsettled questions of law, but rather the necessity (or lack of necessity) for preserving the status quo. See Milwaukee Elec. Ry. & Light Co. v. Bradley, 108 Wis. 467, 84 N.W. 870, 877 (1901) (temporary injunction granted to preserve status quo) "Not only does the discretionary power exist to protect a party against [irreparable injury]..., but the duty exists... to prevent such injury."

WASHINGTON AND LEE LAW REVIEW

Volume XIX

1962

SCHOOL OF LAW
WASHINGTON AND LEE UNIVERSITY
LEXINGTON, VIRGINIA

Printed in the United States

JOURNALISM LABORATORY PRESS
Washington and Lee University
Lexington, Virginia
Under the supervision of C. HAROLD LAUCK

LEADING ARTICLES

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The Editors gratefully acknowledge the contribution of Mr. C. Harold Lauck and his associates of the Journalism Press to the publication of this *Review*.

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